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Case Note

EXPLORING A NEW FRONTIER IN SINGAPORE'S PRIVATE INTERNATIONAL LAW

IM Skaugen SE v MAN Diesel & Turbo SE
[2016] SGHCR 6

The establishment of the Singapore International Commercial Court ("SICC") marks a significant development in Singapore's private international law. This note leverages on the Singapore High Court decision of *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 to discuss two key issues raised by the SICC: the relationship between the Singapore High Court's and the SICC's jurisdictional rules, and the applicable test for the exercise of the SICC's jurisdiction. This note argues that the possibility of a transfer to the SICC should influence the High Court's exercise of its international jurisdiction, and that the SICC should not apply the common law jurisdictional approaches for the exercise of its international jurisdiction, but a unique test that recognises the competing policy objectives it has to balance.

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I. Introduction

1 The Singapore International Commercial Court ("SICC") was officially established as a division of the Singapore High Court[1] on 5 January 2015.[2] This heralded the accomplishment of an important lynchpin in Singapore's strategy to expand its legal services sector, profile Singapore law as the law of choice for international commercial disputes and cement Singapore as a leading destination for commercial dispute resolution.[3] Cases which are "international and commercial in

1 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18A.

2 "Establishment of the SICC" <http://www.sicc.gov.sg/About.aspx?id=21> (accessed May 2016).

3 *Report of the Singapore International Commercial Court Committee* (29 November 2013) at paras 1, 5 and 6. The Singapore International Commercial Court complements the work of the Singapore International Arbitration Centre and the Singapore International Mediation Centre to achieve these goals.

nature" fall within the jurisdiction of the SICC,[4] and cases may be transferred from the High Court to the SICC and *vice versa* under conditions specified in the Rules of Court.[5] To facilitate its objective of drawing international commercial cases to Singapore, several of the SICC's unique features are as follows: (a) the SICC is not bound to apply Singapore rules of evidence;[6] (b) it may allow questions of foreign law to be determined on submissions rather than proof;[7] (c) registered foreign lawyers can argue before the SICC;[8] and (d) the SICC bench comprises distinguished jurists from major jurisdictions around the world.[9]

2 Aside from representing a major step toward the fulfilment of Singapore's ambitions to be an internationally recognised dispute resolution hub, the advent of the SICC also marks a significant milestone in Singapore's private international law. It introduces a new body of jurisdictional rules into Singapore law and, as with any burgeoning area of law, several teething issues as to how the SICC rules should be interpreted and how these will interact with the existing rules remain to be elaborated. In view of the nascent stage of development of this area of law, the recent Singapore High Court decision of *IM Skaugen SE v MAN Diesel & Turbo SE*[10] ("*IM Skaugen*") is a frontrunner in the development of the law in this regard. In this case, the assistant registrar presiding over the case ably faced several of these issues head-on and proposed solutions to guide the law's development.

3 This note aims to use the judgment in *IM Skaugen* as a launching point to discuss and analyse two key issues in Singapore's private international law raised by the establishment of the SICC: the relationship between the High Court's and the SICC's jurisdictional rules, and the applicable test for the exercise of the SICC's jurisdiction. This note argues that the possibility of a transfer to the SICC should influence the Singapore High Court's application of the *Spiliada Maritime Corp v Cansulex Ltd*[11] ("*Spiliada*") calculus, although the High Court should continue to apply its own rules of international jurisdiction and not those of the SICC. This note also seeks to demonstrate that the common law approaches, that is, the English

4 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18D. The definitions of "international" and "commercial" for the purpose of this section can be found in O 110 rr 1(2)(*a*) and 1(2)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) respectively.

5 Cap 322, R 5, 2014 Rev Ed. Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18F; Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 12.

6 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18K.

7 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18L.

8 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18M.

9 "Judges" <http://www.sicc.gov.sg/Judges.aspx?id=30> (accessed May 2016).

10 [2016] SGHCR 6.

11 [1987] 1 AC 460.

Spiliada and the Australian *Voth v Manildra Flour Mills Pty Ltd*[12] ("*Voth*") tests, should not be adopted as the tests for the exercise of the SICC's jurisdiction pursuant to O 110 r 8 of the Singapore Rules of Court. Instead, the exercise of the SICC's international jurisdiction should be governed by a unique test that leans strongly towards the exercise of jurisdiction but has the flexibility to decline to exercise jurisdiction in exceptional circumstances in order to take into account the competing policy considerations it has to balance. As for the test governing a transfer of proceedings from the High Court to the SICC pursuant to O 110 r 12(4), above the requirement that the case in question be in substance international and commercial in nature, the court should balance the benefits of a transfer against the inconvenience and possible expense it may cause to the litigants. For avoidance of doubt, any reference to the High Court in this note refers to the High Court *excluding* the SICC.

II. *IM Skaugen*

4 In *IM Skaugen*, the plaintiffs were a group of companies providing marine transportation services in the oil and gas industry, with constituents incorporated in Norway and Singapore. The defendants were manufacturers of marine diesel engines, with constituents incorporated in Germany and Norway. The plaintiffs contracted with Chinese shipbuilders to build ships and opted to purchase ship engines from the defendants. During the course of negotiations between the plaintiffs and the defendants, the defendants made representations in a project planning manual regarding the rate of fuel consumption of the engines. Representations as to the rate of fuel consumption were also made in a technical agreement between the Chinese shipyard and the defendant. The shipbuilders purchased the engines from the defendants pursuant to this technical agreement. When the completed engines were put through factory acceptance tests, the results of the tests purported to show that the rates of fuel consumption were below the values previously represented to the plaintiffs. The defendants conceded that the factory acceptance tests may have been externally influenced in an improper manner to display incorrect rates of fuel consumption.

5 At the time of the Singapore High Court's judgment, the two sides were engaged in arbitration in Denmark and the International Chamber of Commerce ("ICC"), as well as litigation in Norway. Before the High Court, the plaintiffs pleaded that the representations made to them by the defendants during negotiations and the factory acceptance tests regarding the fuel consumption rates of their engines were false,

12 (1990) 171 CLR 538.

and that the plaintiffs were induced to rely upon, and did rely upon, these representations. The plaintiffs also alleged negligence and fraud. The defendants applied to set aside service of the writ out of jurisdiction and, alternatively, for a stay of proceedings on the ground that Singapore is not the natural forum. In the further alternative, the defendants argued that the proceedings should be stayed on case management grounds pending the outcome of other proceedings. In response, the plaintiffs argued, *inter alia*, that Singapore was the natural forum for the dispute and that the establishment of the SICC should feature in the natural forum calculus.

6 The assistant registrar eventually held for the defendants as Germany was found to be a more appropriate forum than Singapore. Accordingly, the writ for service out of jurisdiction was set aside.

III. Relationship between the High Court's and SICC's jurisdictional rules

7 In coming to his decision, the assistant registrar addressed the issue of whether the existing common law principles on the exercise of jurisdiction, as applied in the High Court, should be influenced by the possibility of transferring the case to the SICC.

8 The common law approach to the exercise of jurisdiction is well established and has been reaffirmed by the Court of Appeal on several occasions.[13] Essentially, the position in Singapore is aligned with the seminal English decision in *Spiliada*, where the House of Lords held that the overarching inquiry in determining whether the court should exercise its jurisdiction or grant a stay of proceedings involves a search for the most appropriate forum where "the case may be tried more suitably for the interests of all parties and the ends of justice".[14] The Court of Appeal, in reaffirming the applicable test in Singapore, emphasised that "it is important to see what the case is about, and connections which have no or little bearing on adjudication of the issues in dispute between the parties will carry little weight".[15]

13 *Zoom Communications Ltd v Broadcast Solutions Ltd* [2014] 4 SLR 500; *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391 at [38]–[44]; *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377; *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345.

14 *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 at 476C.

15 *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391 at [41]; *Halsbury's Laws of Singapore* (LexisNexis, 2013) at para 75.090.

9 As set out in *Halsbury's Laws of Singapore*[16] and affirmed by the Court of Appeal,[17] factors which the court will consider at the first stage of the *Spiliada* analysis include personal connections, connections to events and transactions, governing law, other proceedings and shape of the litigation. Should the defendant seeking a stay of proceedings succeed in proving that a foreign court is the more appropriate forum at this stage, the court will ordinarily grant a stay of proceedings, unless the plaintiff succeeds in showing that the case should nevertheless be heard in the forum due to the interests of justice. At this second stage of the *Spiliada* inquiry, factors that the court will consider include whether the foreign court will give effect to parties' choice of law, the presence of a time bar and whether there will be a denial of substantial justice if the case is stayed.[18]

10 Broadly, the same approach applies for cases of service out of jurisdiction, except that the procedural context is reversed. Where the plaintiff is seeking leave for service out of jurisdiction, the burden is on the plaintiff to prove that the forum is the most appropriate forum. Should the plaintiff fail to do so, he could argue that the interests of justice demand that the forum hear the case nonetheless. The defendant may apply to set aside service of the writ out of jurisdiction or to apply for a stay of proceedings, although in view of the differing allocation of the burden of proof, the more strategic option for the defendant would probably be the former.[19]

11 The introduction of the SICC as a specialist court within the Singapore judicial system raises the question of whether the possibility of a transfer to the SICC should influence the *Spiliada* test as it is applied in the High Court. On this issue, the assistant registrar held in the affirmative. He held that the existence of the SICC has a direct effect on the factors to be considered in the *Spiliada* test. For instance, the ability of foreign counsel to directly submit on foreign law in the SICC could have a bearing on the degree of inconvenience a party would experience in arguing points of foreign law.[20]

16 *Halsbury's Laws of Singapore* (LexisNexis, 2013) at paras 75.090–75.095.

17 *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391 at [42]. See also *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [15] and *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR(R) 711 at [10].

18 *Halsbury's Laws of Singapore* (LexisNexis, 2013) at paras 75.096–75.100; *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391 at [44].

19 The defendant can make both arguments in the alternative without being construed as having submitted to the jurisdiction of the forum. See *Zoom Communications Ltd v Broadcast Solutions Ltd* [2014] 4 SLR 500 at [32]–[33].

20 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [24].

12 The assistant registrar also opined that the High Court should take the SICC into account in the *Spiliada* test only if the case would subsequently be transferred to the SICC:[21]

> … lest the court take into account considerations that it ought not to have taken into account were it to transpire that proceedings would not or ought not to be transferred to the SICC.

To that end, he weighed against a cleanly demarcated approach under which the High Court would first decide whether it had international jurisdiction on its own private international law rules before considering whether the case could be transferred to the SICC as a matter of internal allocation of jurisdiction. In this vein, the assistant registrar suggested that it would be artificial to exclude the SICC from the *Spiliada* calculus as "technical intricacies should not determine the substantive content of the law where this would be contrary to common reason".[22]

13 It is suggested that the assistant registrar's conclusion is sound; the possibility of transfer to the SICC should rightly influence the application of the *Spiliada* test. The next section[23] details additional justifications for this conclusion. However, it is suggested that a conceptual separation between the questions of international jurisdiction and internal allocation of jurisdiction should be maintained for clarity and soundness in principle. This argument will be further elaborated in the following section.

A. Should the SICC be a factor in the Spiliada *calculus?*

14 There are several arguments that can be made for the possibility of a transfer to the SICC to influence the High Court's application of the *Spiliada* calculus to determine whether it (the High Court) should exercise its international jurisdiction to hear the merits of the matter.

15 First, as the assistant registrar pointed out, the factors considered in the *Spiliada* test will be affected by the existence of the SICC. As mentioned earlier, at the first stage of the *Spiliada* analysis, these factors include the governing law, other proceedings and the shape of the litigation. Should the SICC be included as part of this calculus, the SICC's international bench and ability to decide on foreign law based on submissions could erase any advantage the foreign forum may have for the application of foreign law in the natural forum analysis. Further, the existence of the SICC as a one-stop forum where foreign counsel can argue several different issues with different applicable

21 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [30].
22 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [30].
23 See paras 14–17 below.

foreign laws with considerably greater convenience and ease than in a conventional domestic court may also lean towards allowing the suit to proceed in Singapore in order to prevent fragmentation of litigation over numerous jurisdictions. Thus, to intentionally exclude the SICC from this calculus would affect the application of the *Spiliada* test in a manner that does not accurately reflect the characteristics of the legal system in Singapore.

16 Second, taking the SICC into account in the *Spiliada* test is consistent with the overarching policy intention driving the establishment of the SICC. The SICC is envisioned to become "the premium forum for court-based commercial dispute resolution both within and beyond Asia",[24] which will serve to enhance Singapore's status as "a leading forum for legal services and commercial dispute resolution".[25] The SICC is intended to "create a platform to catalyse the further growth of the legal services sector and the internationalisation of Singapore law".[26] Consequently, for the SICC to fulfil these policy objectives, the law should maximise the number of appropriate cases over which the SICC can assume jurisdiction, within reason. This policy consideration has been enshrined in statutory law. In the Choice of Court Agreements Act,[27] which is the enactment of the Hague Convention on Choice of Court Agreements 2005[28] in Singapore law, a contractual choice of the High Court is deemed to be a choice of the SICC as well, unless expressly provided for otherwise[29] – a move which would broaden the number of cases over which the SICC can exercise jurisdiction. The common law should also do its part to facilitate this policy objective. Taking into account the possibility of transfer to the SICC in the *Spiliada* test will serve this end as cases that may otherwise be heard in foreign forums could be transferred to the SICC instead, maximising the reach of the SICC.

17 Finally, the High Court has demonstrated an inclination towards taking into account the possibility of a transfer to the SICC in the *Spiliada* test. In *Accent Delight International Ltd v Bouvier, Yves Charles Edgar*[30] ("*Accent Delight*"), the High Court invited submissions from the parties as to the suitability of transferring the case to the SICC.

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24 *Report of the Singapore International Commercial Court Committee* (29 November 2013) at para 10.

25 *Report of the Singapore International Commercial Court Committee* (29 November 2013) at para 55.

26 *Report of the Singapore International Commercial Court Committee* (29 November 2013) at para 55.

27 Act 14 of 2016.

28 Hague Convention on Choice of Court Agreements (30 June 2005).

29 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 2(2).

30 [2016] 2 SLR 841.

The defendants argued, *inter alia*, that the possibility of transfer to the SICC should not feature in the *Spiliada* analysis. Although the judge did not specifically address this argument, she ultimately opined that the suit was eminently suitable for a transfer to the SICC in view of the strong international dimension of the case.[31] As the case before the judge was predominantly a question of whether the court should exercise its jurisdiction, thus invoking the *Spiliada* test, the High Court's consideration of the SICC at this stage evinces a preliminary willingness to take the SICC into account in the *Spiliada* test. Although this willingness in itself does not indicate that taking the SICC into account in the *Spiliada* test is the correct approach, it does serve as a signal that the courts are welcoming of this approach.

B. Should there be conceptual separation between international jurisdiction and internal allocation of jurisdiction?

18 As mentioned above, the assistant registrar was of the view that there should not be a strict separation between the questions of international jurisdiction and internal allocation of jurisdiction in the context of the SICC[32] in order to ensure that the High Court does not unduly take the SICC into account when the case is not suitable for transfer anyway. Notably, near the end of his judgment, the assistant registrar suggested that if the conditions are met for a transfer of a case from the High Court to the SICC, the High Court should apply the *SICC's* private international law rules (that is, the "not appropriate" test)[33] instead of its own private international law rules (that is, the *Spiliada* test) to determine whether the *High Court* itself has international jurisdiction.[34]

19 With respect, the suggestion that the SICC's private international law rules would apply in such a situation is conceptually problematic. There are two distinct jurisdictional issues in play here. The first is whether the High Court has the international jurisdiction to hear the case. The second is whether the High Court should transfer the proceedings to the SICC, which is a matter of internal allocation of jurisdiction. As argued above, it is suggested that the possibility of a transfer to the SICC should indeed influence the answer to the first question as a consideration under the *Spiliada* test. However, the assistant registrar's suggestion takes the effect of the SICC on the High Court's international jurisdiction one step too far by placing the

31 *Accent Delight International Ltd v Bouvier, Yves Charles Edgar* [2016] 2 SLR 841 at [116].
32 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [27]–[30].
33 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 8.
34 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [145].

question of internal allocation of jurisdiction prior to the question of whether the High Court should exercise international jurisdiction to hear the case in the first place. This cannot be right in principle. As Yeo Tiong Min SC pointed out in his Eighth Yong Pung How Professorship of Law Lecture:[35]

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

It is suggested that a conceptual distinction between international jurisdiction and internal allocation of jurisdiction can be maintained, while also ensuring that the High Court does not unduly take the SICC into account for cases which are eventually determined to be not amenable for transfer. A preferable legal framework would be for the High Court to continue applying its own private international law rules, that is, the *Spiliada* test. As part of the *Spiliada* analysis, the High Court should have regard to the SICC's private international law rules to determine whether the case is appropriate for transfer to the SICC. If it is, *and* if a holistic analysis of the *Spiliada* factors points towards Singapore as the natural forum, the High Court will first exercise jurisdiction over the case and then, if appropriate, subsequently order it to be transferred to the SICC. Crucially, this suggested framework of analysis remains situated *within* the domain of the High Court's own private international law rules. Thus, *conceptually*, the question of international jurisdiction remains prior to the question of internal allocation of jurisdiction, although in *practical effect*, the High Court will take into account the answer to the second question in its consideration of the first. Notwithstanding the similarities in practical consequence between the assistant registrar's suggestion and the framework described here, it is suggested that this framework is more conceptually sound and coheres better with fundamental principles of private international law.

20 As an aside, the assistant registrar cited the above paragraph from Yeo's lecture as an example of an argument against the consideration of the SICC in the *Spiliada* calculus.[36] With respect, it is clear from the context of his lecture that Yeo was not making such an

35 Yeo Tiong Min SC, "Staying Relevant: Exercise of Jurisdiction in the Age of the SICC" Eighth Yong Pung How Professorship of Law Lecture (13 May 2015) at para 41.

36 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [27].

argument in that paragraph – what he was cautioning against was the idea that the High Court should apply the SICC's private international law rules in cases involving a transfer to the SICC – the suggestion that the assistant registrar had put forth in his judgment.

C. Related issue – Should the SICC be a factor in the "strong cause" test?

21 Moving beyond the judgment in *IM Skaugen*, a related issue which arises for consideration is this: Where there is a choice of a foreign court, can the existence of the SICC also be a factor in the common law "strong cause" test[37] to allow the Singapore High Court to hear the case notwithstanding the choice of a foreign court?[38] In this context, the "strong cause" test applies where the parties' dispute features a choice of court clause. Under this approach, the court will be strongly inclined towards enforcing the agreement[39] and the party arguing for a breach must demonstrate strong reasons for the court to allow a breach of the agreement; that is, it is not reasonable or just that he should be held to the bargain.[40] Where the chosen forum is a foreign court, the SICC may feature in the "strong cause" test by reducing the difficulty and inconvenience of arguing foreign law in Singapore where there are exceptional circumstances militating against the dispute proceeding in the chosen foreign court, potentially neutralising the advantages of pursuing proceedings abroad. For the same reasons, where the chosen court is Singapore, the unique procedural features of the SICC may make it more challenging to argue that proceedings should be stayed in favour of a foreign court.[41]

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37 At the common law, where the parties have contractually chosen a court in which to bring their dispute, the party seeking to commence proceedings in a non-chosen court will only be able to do so if he can demonstrate "strong cause" amounting to exceptional circumstance for the court to hear the case. See *Halsbury's Laws of Singapore* (LexisNexis, 2013) at para 75.121.

38 The converse scenario where there is a choice of the Singapore courts will not be considered here, since it is unlikely that the existence of the Singapore International Commercial Court can be raised as an argument showing strong cause for the Singapore courts not to hear the case.

39 *The Hyundai Fortune* [2004] 4 SLR(R) 548 at [8].

40 *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977–1978] SLR(R) 112; *The Asian Plutus* [1990] 1 SLR(R) 504; *The Hyundai Fortune* [2004] 4 SLR(R) 548 at [7].

41 It is already rather difficult for "strong cause" to be made out in such situations, since it is unlikely that the forum will take kindly to the argument that proceedings in the forum amount to a breach of natural justice. This situation also raises the question of whether the High Court can transfer the case to the Singapore International Commercial Court if there is an exclusive choice of the High Court.

22 Logically, if the SICC can be considered in the *Spiliada* analysis, it should also be allowed to feature in the "strong cause" test. However, in the case of a choice of foreign court clause, a fundamental issue is whether the SICC would be able to assume jurisdiction at all. On its face, O 110 r 12(4) of the Rules of Court does not prevent the High Court from transferring cases to the SICC under such circumstances, that is, where there is a choice of foreign court. The High Court can technically order a transfer on its own motion even if one party contests the transfer.[42] However, such an order could be construed as an affront to the principle of party autonomy.[43] As such, although it may be conceptually possible for the existence of the SICC to influence the "strong cause" test to allow the Singapore courts to hear the case notwithstanding a choice of foreign court, it is suggested that the Singapore courts should be slow to invoke this discretion.

IV. Applicable test for exercise of the SICC's jurisdiction

23 The assistant registrar in *IM Skaugen* also discussed the applicable test for the exercise of the SICC's jurisdiction.

24 The exercise of the SICC's jurisdiction is governed by O 110 of the Rules of Court. Order 110 r 7 states that the SICC has jurisdiction to hear a case if the case is of an international and commercial nature, the parties have submitted to the SICC under a written jurisdiction agreement, and the parties do not seek relief connected to a prerogative order. Order 110 r 8 states that the SICC may decline to assume jurisdiction if it is "not appropriate" for the SICC to hear the case. The reference to "appropriateness" is repeated in O 110 r 12(4) in the context of a transfer of proceedings from the High Court to the SICC. One of the requirements for a case to be transferred is that the High Court must consider that the case is "more appropriate" to be heard in the SICC. For ease of reference, the relevant provisions are reproduced here in full:

> **Jurisdiction (O. 110, r. 7)**
>
> **7**.—(1) The Court has the jurisdiction to hear and try an action if —
>
> (*a*) the claims between the plaintiffs and the defendants named in the originating process when it was first filed are of an international and commercial nature;
>
> (*b*) each plaintiff and defendant named in the originating process when it was first filed has submitted to

42 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 12(4)(*b*)(ii).

43 Man Yip, "The Resolution of Disputes before the Singapore International Commercial Court" (2016) 65(2) ICLQ 439 at 446.

the Court's jurisdiction under a written jurisdiction agreement; and

(*c*) the parties do not seek any relief in the form of, or connected with, a prerogative order (including a Mandatory Order, a Prohibiting Order, a Quashing Order or an Order for Review of Detention).

Court may decline to assume jurisdiction (O. 110, r. 8)

8.—(1) Subject to paragraph (2), the Court may decline to assume jurisdiction in an action under Rule 7(1) if it is not appropriate for the action to be heard in the Court.

(2) The Court must not decline to assume jurisdiction in an action solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore, if there is a written jurisdiction agreement between the parties.

(3) In exercising its discretion under paragraph (1), the Court shall have regard to its international and commercial character.

Transfer of proceedings to or from Court (O. 110, r. 12)

12.—(4) A case may be transferred from the High Court to the Court only if the following requirements are met:

(*a*) the High Court considers that —

(i) the requirements in Rule 7(1)(*a*) and (*c*) are met; and

(ii) [*Deleted by S 756/2015 wef 01/01/2016*]

(iii) it is more appropriate for the case to be heard in the Court;

(*b*) either —

(i) a party has, with the consent of all other parties, applied for the transfer in accordance with Rule 13; or

(ii) the High Court, after hearing the parties, orders the transfer on its own motion.

25 The assistant registrar had the occasion to interpret these provisions. In his judgment, he held that O 110 r 12(4) was a test for the internal allocation of jurisdiction. Therefore, the reference to appropriateness in this context did not import the *Spiliada* test.[44] Instead, he held that the reference to appropriateness should be read together with the requirement in O 110 r 7 for a case to be international and commercial in nature before the SICC would assume jurisdiction,

44 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [111].

and should be interpreted to filter out cases which appear international and commercial on the surface but are not so in substance. As such, the assistant registrar held that a case would be deemed to be "more appropriate" for transfer to the SICC for the purposes of O 110 r 12(4) if the case is "in substance both international and commercial in nature".[45]

26 Near the end of his judgment, the assistant registrar also discussed the proper interpretation of O 110 r 8. He noted that O 110 r 8, in contrast to O 110 r 12(4), was a test for international jurisdiction. As for the substance of the test, he opined that the wording of O 110 r 8 suggested that the Australian "clearly inappropriate forum" test set out in *Voth* should apply as the SICC's test for international jurisdiction instead of the *Spiliada* test.[46] At present, even though the High Court's remarks in this regard were merely *obiter dicta*, the decision in *IM Skaugen* remains the only decision from the Singapore High Court on the principles governing the SICC's exercise of jurisdiction and thus serves as a useful starting point for a discussion of the applicable principles nonetheless.

A. Should common law tests be adopted for exercise of the SICC's jurisdiction?

27 With respect, it is suggested that neither the *Voth* nor the *Spiliada* test should apply in the context of O 110 r 8 of the Rules of Court.

28 First, both the *Voth* and *Spiliada* tests are heavily reliant on foreign connections. As pointed out by Yeo in his Eighth Yong Pung How Professorship of Law Lecture:[47]

> The difference between the two tests is whether one is looking to see whether the foreign connections indicate that there is a clearly more appropriate forum elsewhere, or they make the forum a clearly inappropriate one.

Given that O 110 r 8(2) expressly disavows sole reliance on foreign connections in deciding not to exercise jurisdiction, tests which by their nature incorporate a heavy reliance on foreign connections may not comport with the legislative intent for this rule. Although O 110 r 8(2) does allow foreign connections to be taken into account as long as they are not the sole consideration, the fact remains that the framework of

45 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [113].
46 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [145].
47 Yeo Tiong Min SC, "Staying Relevant: Exercise of Jurisdiction in the Age of the SICC" Eighth Yong Pung How Professorship of Law Lecture (13 May 2015) at para 32.

the rule suggests that foreign connections should not be a primary consideration in the SICC's decision as to whether to exercise jurisdiction, thus pointing away from the wholesale incorporation of the common law approaches.

29 Second, applying the common law approaches wholesale may also not comport with the broader policy intent behind the establishment of the SICC. As described earlier in this note, among other objectives, the creation of the SICC is intended to draw as many complex international commercial cases to Singapore as possible so as to enhance the development of Singapore law and promote growth in Singapore's legal services sector. In addition, the SICC's jurisdictional regime draws inspiration from the arbitral model.[48] These factors suggest that the SICC should be allowed to decline jurisdiction only on very narrow grounds.[49] The *Spiliada* approach is unlikely to be adequate for this purpose as it involves a holistic study of which forum is the most appropriate for the case to be heard in the interests of all parties and the ends of justice.[50] The *Voth* approach, even though it ostensibly sets a higher threshold for the forum to decline to hear a case, invokes similar considerations to the *Spiliada* test and is unlikely to differ much from the *Spiliada* test in terms of practical effect. As Mason CJ and Deane, Dawson, and Gaudron JJ opined in their joint judgment in *Voth* itself:[51]

> The 'clearly inappropriate forum' test is similar to and, for that reason, is likely to yield the same result as the 'more appropriate forum' test in the majority of cases. The difference between the two tests will be of critical significance only in those cases – probably rare – in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one.

The Singapore Court of Appeal has expressed its agreement with this assessment of *Voth*.[52] As such, it appears that neither the *Voth* nor the *Spiliada* approach provide the necessary stringency to facilitate the SICC's achievement of its policy objectives. This is not a surprising conclusion since the *Voth* and *Spiliada* tests were intended for usage by courts exercising general civil jurisdiction and thus had to be flexible enough to account for a variety of situations, achieve natural justice and

48 *Report of the Singapore International Commercial Court Committee* (29 November 2013) at paras 21(b) and 34; Man Yip, "The Resolution of Disputes before the Singapore International Commercial Court" (2016) 65(2) ICLQ 439 at 458.

49 Yeo Tiong Min SC, "Staying Relevant: Exercise of Jurisdiction in the Age of the SICC" Eighth Yong Pung How Professorship of Law Lecture (13 May 2015) at para 32.

50 *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 at 476C.

51 *Voth v Manildra Flour Mills Proprietary Ltd* (1990) 171 CLR 538 at 558.

52 *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391 at [47].

conform with international comity.[53] On the other hand, the SICC is a specialist court which has jurisdiction only in clearly defined situations. In view of the differing contextual backdrop of the SICC, its jurisdictional rules can be justifiably different from those of the High Court, for instance, by giving greater effect to party autonomy and the SICC's underlying policy imperatives.

30 Third, assuming that the *Voth* or *Spiliada* tests should be applied in the same context in which they are applied in the common law, there are few situations in which these tests would be applicable for the exercise of the SICC's jurisdiction anyway. For the SICC to exercise jurisdiction over an action, there must be a written agreement stating the parties' choice of the Singapore courts[54] or the SICC specifically.[55] The SICC can also exercise jurisdiction over an action if the case is transferred from the High Court, even if there is no choice of the SICC.[56] If there is a written agreement, then, assuming the SICC applies the parallel common law approach, the "strong cause" test should apply; that is, the court will hear the case unless the party arguing for a breach is able to show that it is not reasonable or just that he should be held to the bargain.[57] If the SICC exercises jurisdiction pursuant to a transfer from the High Court, the SICC will not reconsider whether it has or will exercise jurisdiction.[58] Therefore, with the foregoing in mind, there is only one conceivable situation in the context of O 110 r 8 where the *Spiliada* or *Voth* tests could be applied in a manner parallel with their usage in common law. This would be where the written jurisdiction agreement is a non-exclusive jurisdiction agreement. However, since jurisdiction agreements in favour of the SICC are deemed to be exclusive unless expressly provided for otherwise,[59] these scenarios are unlikely to be a frequent occurrence. Therefore, if one were to interpret

53 Yeo Tiong Min SC, "Staying Relevant: Exercise of Jurisdiction in the Age of the SICC" Eighth Yong Pung How Professorship of Law Lecture (13 May 2015) at paras 50–51.

54 In view of s 2(2) of the Choice of Court Agreements Act 2016 (Act 14 of 2016), which states that a choice of the Singapore courts is to be construed as including a choice of the Singapore International Commercial Court as well unless a contrary intention is shown.

55 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 7.

56 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 7(2)(*a*).

57 *The Asian Plutus* [1990] 1 SLR(R) 504; *The Hyundai Fortune* [2004] 4 SLR(R) 548 at [7].

58 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 12(5)(*a*). It may be argued that O 110 r 12(5)(*a*) forbids the Singapore International Commercial Court ("SICC") from reconsidering the existence of jurisdiction, but leaves the SICC free to consider whether it should exercise its jurisdiction. However, such an interpretation would frustrate the legislative purpose of this rule, which is ostensibly to prevent a repetition of the battle over jurisdiction in the SICC once it has been concluded in the High Court.

59 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18F.

the "not appropriate" test in O 110 r 8 as incorporating either the *Voth* or *Spiliada* tests, these tests would in most situations have to be applied in contexts where they would not be applied in the common law.

31 Should the applicable test be the common law "strong cause" test, then? The Report of the SICC Committee[60] suggests that the applicable test where there is a choice of the SICC and a stay is sought should be the "strong cause" test.[61] The argument for the "strong cause" test to be the applicable test is stronger than the arguments for the *Spiliada* or *Voth* tests in view of the test's strong inclination towards the SICC assuming jurisdiction. The "strong cause" test would thus cohere better with the overall policy undergirding the establishment of the SICC and give strong effect to the principle of party autonomy. However, the "strong cause" test takes into account factors largely similar to those considered in the *Spiliada* and *Voth* tests,[62] thus placing a heavy reliance on foreign connections as well. Therefore, to the extent that the *Spiliada* and *Voth* tests do not fit well with the tenor of O 110 r 8 for this reason, the same arguments apply to the "strong cause" test. Although the "strong cause" test may potentially be modified to suit the SICC's purposes, for example, by minimising reliance on foreign connections and emphasising the impact of the jurisdiction agreement,[63] it may be preferable for legal clarity to recognise that the SICC requires a distinct approach to the exercise of jurisdiction due to its unique purposes and rules, rather than attempting to shoehorn the SICC's approach into existing categories.

B. What should be the applicable approach for exercise of the SICC's jurisdiction?

32 What should be the applicable approach for the exercise of the SICC's jurisdiction, then? It is expected that the exact grounds for the SICC to decline to exercise jurisdiction under O 110 r 8 will become clearer as cases come to the SICC for decision, but some preliminary observations will be offered here. As a starting point, the grounds for the SICC to decline jurisdiction should be construed narrowly in order to

60 *Report of the Singapore International Commercial Court Committee* (29 November 2013).

61 *Report of the Singapore International Commercial Court Committee* (29 November 2013) at para 26.

62 *Halsbury's Laws of Singapore* (LexisNexis, 2013) at para 75.121.

63 It has been argued that the common law test may still be applicable for the Singapore International Commercial Court's ("SICC") exercise of jurisdiction under O 110 r 8 if one reads O 110 r 8(2) as merely placing so much weight on the choice of SICC agreement that foreign connections become irrelevant in the SICC's calculus: see Man Yip, "The Resolution of Disputes before the Singapore International Commercial Court" (2016) 65(2) ICLQ 439 at 457.

give effect to the SICC's policy objectives. One of the SICC's principal considerations in this regard should be whether the case is indeed international and commercial in nature, as provided in O 110 r 8(3).

33 The question is whether the courts, in determining "appropriateness" pursuant to O 110 r 8, should *solely* have regard to whether the case is both international and commercial in nature. It has been argued that it can be reasonably assumed that this is not the sole consideration under O 110 r 8 since it would be "unduly convoluted" for the requirement of "international and commercial nature" to be written in a separate paragraph from the test of "appropriateness" if the intention was indeed for the test to comprise solely of this requirement.[64] It is suggested that notwithstanding the broader policy objective of having very narrow grounds for the SICC to decline jurisdiction, it would be advantageous for the SICC to retain the discretion to stay proceedings in exceptional circumstances. Examples of exceptional circumstances that could justify the SICC declining to exercise jurisdiction are cases where there is a high risk of conflicting judgments from different jurisdictions,[65] or where the proceedings will turn on questions of the validity of foreign administrative action. Notably, having the discretion to decline to exercise jurisdiction on exceptional grounds is not inconsistent with the SICC's policy imperative of declining jurisdiction only on very narrow grounds; rather, it is an acknowledgement of the competing duties that the SICC has to balance, as both a national court and a responsible player in the global judicial landscape.[66]

34 As for the approach the High Court should take in determining whether to transfer proceedings to the SICC under O 110 r 12(4), in addition to the requirement that the case be "in substance both international and commercial in nature", it is suggested that the High Court should also consider whether a transfer of proceedings to the SICC will bring significant benefits to the judicial process and the litigants involved to justify the inconvenience and delay involved in effecting such a transfer. For example, it has been argued that the High Court should not transfer a case to the SICC where the proceedings

64 Man Yip, "The Resolution of Disputes before the Singapore International Commercial Court" (2016) 65(2) ICLQ 439 at 458.

65 See Man Yip, "The Resolution of Disputes before the Singapore International Commercial Court" (2016) 65(2) ICLQ 439 at 458 for an argument that the Singapore International Commercial Court should decline to exercise jurisdiction in such a situation.

66 Denise H Wong, "The Rise of the International Commercial Court: What Is It and Will It Work?" (2014) 33 CJQ 205 at 223–224.

have already reached a relatively advanced stage as this would cause "substantial delay to the resolution of the dispute".[67]

V. Conclusion

35 At present, the law in Singapore relating to the rules governing the SICC's jurisdiction is in a nascent stage of development. The judgment in *IM Skaugen* is a valuable and able effort to highlight and discuss some of the existing areas of ambiguity in the law. This note agrees with the assistant registrar's conclusion that the possibility of a transfer to the SICC should influence the High Court's application of the *Spiliada* approach as it decides whether to exercise international jurisdiction over an action. However, a strict conceptual separation between international jurisdiction and internal allocation of jurisdiction should be maintained. In addition, in contrast to the assistant registrar's suggestion, this note has argued that the SICC's test for the exercise of its international jurisdiction pursuant to O 110 r 8 should not be any of the common law approaches. Instead, the SICC should apply a unique test that inclines towards the exercise of jurisdiction but allows it to have the flexible discretion to decline to exercise jurisdiction in exceptional circumstances. As for the applicable approach under O 110 r 12(4), in addition to the requirement that a case be "in substance international and commercial in nature", the High Court should weigh the benefits of a transfer against the potential inconvenience and hassle that litigants may have to go through if a transfer is ordered. As future cases concerning the SICC's jurisdiction arrive for decision in the Singapore courts, it is hoped that the arguments presented in this note will be of value to the courts and legal practitioners alike.

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67 See Man Yip, "The Resolution of Disputes before the Singapore International Commercial Court" (2016) 65(2) ICLQ 439 at 462. However, as the Singapore International Commercial Court becomes increasingly entrenched as a leading forum for international commercial litigation, such situations may become less frequent as transfers would likely be effected earlier in the High Court proceedings.