BURGUNDY, THE BIFURCATION OF JURISDICTION AND ITS FUTURE IMPLICATIONS

In the seminal Court of Appeal decision of *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381, Sundaresh Menon CJ departed from the traditional conception of jurisdiction as being monolithically rooted in presence, and recognised the notion of subject-matter jurisdiction. This essentially entails an examination into whether a non-resident is so closely connected to Singapore that a Singapore court is justified in regulating her extraterritorial conduct. This is a laudable development that coheres with the increasing outmodedness of Westphalian notions of sovereignty. This article suggests that, moving forward, subject-matter jurisdiction is relevant in two other contexts: as a true alternative to a plea of *forum non conveniens*, and as a check on the over-inclusive language of O 11 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), upon which *ex juris* service should only be allowed if the claim is closely enough connected to Singapore.

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I. Introduction

1 The Court of Appeal recently handed down the seminal decision of *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* ("*Burgundy*"),[1] and in doing so adjudicated on the question of whether leave is required to serve an examination of judgment debtor ("EJD") order out of jurisdiction on a non-party. On the surface, this called for the application of settled principles of statutory interpretation. However, things are not always as they seem; the court resolved the question in large part on the basis of subject-matter jurisdiction, which was hitherto a concept extant in English law that has never been referenced in local jurisprudence. The decision comprehensively settled the position for EJD orders, but leaves unanswered deeper jurisprudential issues which may determine how analogous issues are argued and decided in the future. This paper will not focus on the immediate issues raised by *Burgundy* which, in the

1 [2014] 3 SLR 381.

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author's view, were laudably and correctly decided, but on the larger implications for the direction of case law in Singapore.

2 The facts are deceptively simple. Burgundy Global Exploration Corporation ("Burgundy") entered into two separate but related contracts with Transocean Offshore International Ventures Limited ("Transocean"). Under the first contract, which was governed by an arbitration clause and included some exclusion clauses, Transocean agreed to supply a drilling rig and provide offshore drilling services to Burgundy. Under the second contract, which was governed by a non-exclusive jurisdiction clause in favour of the Singapore courts, Burgundy agreed to secure its payment obligations under the first contract by depositing moneys into an escrow account according to a stipulated timeline, failing which Transocean was entitled to terminate the first contract. Burgundy failed to make the first requisite payment, and Transocean exercised its right to terminate the first contract. Transocean commenced O 11[2] proceedings against Burgundy in the High Court for a breach of the second contract. Burgundy attempted to rely on the arbitration clause in the first contract to stay proceedings, but was unsuccessful in doing so. Transocean obtained summary judgment against Burgundy, and damages were assessed at US$105,536,922.

3 Transocean subsequently applied for and obtained EJD orders against the directors of Burgundy. Although the directors were resident in the Philippines, Transocean did not apply for leave to serve the EJD orders out of jurisdiction. Instead, Transocean obtained leave to effect substituted service by serving them on Burgundy's lawyers in Singapore. The directors applied to set aside the order for substituted service, but this was rejected by an assistant registrar. Burgundy appealed against the damages awarded while the directors cross-appealed against the assistant registrar's refusal to set aside the EJD orders. Both appeals were dismissed by the High Court; the parties then appealed to the Court of Appeal.

4 Burgundy's appeal to the Court of Appeal was successful. In brief, the second contract was meant to secure Burgundy's payment obligations, and was not to be conflated with Transocean's performance interest under the first contract. The latter could only be vindicated by an arbitral tribunal.

5 The Court of Appeal also allowed the directors' cross-appeal *apropos* the EJD orders. This is, of course, the subject matter of this article, and the reasoning of Sundaresh Menon CJ shall be summarised more fully:

2 Rules of Court (Cap 322, R 5, 2006 Rev Ed).

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(a) Jurisdiction is not a monolithic concept. There is a distinction between personal and subject-matter jurisdiction (citing *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* ("*Mackinnon*")[3] and *Masri v Consolidated Contractors International (UK) Ltd (No 4)* ("*Masri*")[4]);[5]

(b) Personal jurisdiction refers to the question of whether a person is amenable to the jurisdiction of the court in the sense of him being brought before the court. Subject matter jurisdiction refers to what a court is permitted to do in terms of regulating the extraterritorial conduct of someone over whom it has personal jurisdiction;[6]

(c) Where an EJD order is sought against a foreign officer of a company, the court's personal jurisdiction over the officer is in issue, and it is inevitable that the court has regard to whether this is the prelude to the impermissible exercise of exorbitant substantive jurisdiction;[7]

(d) Lord Mance's concerns in *Masri* must be understood in the context of England's Civil Procedure Rules ("CPR").[8] The CPR did not allow EJD orders to be served out of jurisdiction.[9] The Singapore Rules of Court,[10] in contrast, did allow EJD orders to be served out;[11]

(e) The caveat in O 11 r 8(1) of the Rules of Court, which stipulates that leave is not required where service of the originating process has already been granted, was not intended to extend to non-parties resident outside of Singapore. Concerns about extraterritoriality *vis-à-vis* the non-party would not have been considered at the originating process stage;[12]

3 [1986] Ch 482.
4 [2010] AC 90.
5 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [79]–[83].
6 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [80].
7 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [82].
8 The Civil Procedure Rules 1998 (SI 1998 No 3132) (UK).
9 *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] AC 90 at [37].
10 Cap 322, R 5, 2006 Rev Ed.
11 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [87].
12 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [105]–[106].

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(f) Thus, leave is required for EJD orders to be served out of jurisdiction on non-parties.[13] The fundamental question is whether the foreign officer is so closely connected to the substantive claim that the Singapore court is justified in taking jurisdiction over him. The mere fact of the officer possessing relevant information is insufficient.[14]

II. Genealogy of subject-matter jurisdiction

6 The jurisdiction of the English common law courts was originally regarded as an emanation of royal power. This is hardly surprising: the first common law court was the *curia regis* or *aula regis* established during the reign of King William I, which gradually and literally imposed the King's law across his territory and superseded the plethora of local jurisdictions.[15] The Peace of Westphalia, according to accepted canon, was the decisive geo-political event that laid the ground for the development of a system of authority based on the sovereignty of nation states.[16] Local elites, who were oftentimes Kings, started to exercise exclusive secular authority over their territories. The writ, which enabled a plaintiff to avail himself of the King's courts, was originally a command issued in the name of the King.[17]

7 Jurisdiction in the common law was thus synonymous with, and was perhaps better denoted as, amenability. A defendant was amenable to the common law courts because he was a subject of the realm.[18] This extends beyond residence or domicile: foreign visitors in a King's territory were also subject to the commands of the King. The high watermark for this conception of jurisdiction was *Carrick v Hancock*.[19] The plaintiff sought to enforce a Swedish judgment against the

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13 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [109].

14 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [112].

15 *Regina (Cart) v Upper Tribunal (Public Law Project intervening)* [2011] QB 120 at [44].

16 See, *eg*, Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty" (1999) 21(3) *International History Review* 569. A critique of the empirical accuracy of Westphalian theories of sovereignty is not within the purview of this paper. For an overview of the contrarian view, see James A Caporaso, "Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty" (2000) 2(2) *International Studies Review* 1.

17 S A de Smith, "The Prerogative Writs" (1951) 11 CLJ 40 at n 4.

18 During feudalistic times, the consensual and reciprocal relationship between a tenant and his lord or liege was always qualified by fidelity to the King – *salva fide debita domino regi*. See Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge University Press, 2000) at p 128.

19 (1895) 12 TLR 59. For the American equivalent, see *Pennoyer v Neff* 95 US 714 (1877).

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defendant. The Swedish action was started by a writ served on the defendant during a short visit to Sweden. Lord Russell of Killowen CJ observed that jurisdiction was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power, obedience to all its laws and to the lawful jurisdiction of its courts.[20] The service of the writ was foundational to the invocation of the court's jurisdiction precisely because it was a royal edict. Even in more recent times, Justice Holmes has said that "the foundation of jurisdiction is physical power".[21]

8 It is, of course, self-evident that states (with a few exceptions) are not discrete and closed units unto themselves with no contact with other states. Subjects trade and generally intermingle with subjects of other states, and this means that common law plaintiffs may find themselves unable to avail themselves of the courts if they are unable to physically serve a writ on a putative defendant while he is physically present in the forum.[22] In a more extreme case, a defendant ordinarily resident in the forum who flees to another state would be outside of the jurisdiction of the common law courts.[23] This was legislatively remedied by the Common Law Procedure Act 1852,[24] which allowed writs to be served on defendants not physically present in the jurisdiction if the cause of action arose within England, or if a contract made within England was breached.[25] These provisions are of course the precursors to modern legislation which permit *ex juris* service of originating processes. The significance of these provisions shall be examined in the ensuing section.

9 The Westphalian concept of sovereignty is today incomplete, both normatively and descriptively. In regard to the former, Nazi Germany regarded itself *qua* sovereign as being completely unbound by the rules of war, and committed unspeakable atrocities.[26] The Nuremberg Tribunal rejected the full implications of Westphalian sovereignty, and stressed that a court of law could penetrate the veil of the sovereign and convict persons who mere merely following the orders

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20 *Carrick v Hancock* (1895) 12 TLR 59 at 60.

21 *McDonald v Mabee* 243 US 90 (1915) at 91.

22 Thus resulting in injustice to local plaintiffs: G C Cheshire, *Private International Law* (Oxford University Press, 2nd Ed, 1938) at pp 110–111. But *cf Bourke v Lord MacDonald* (1781) 2 Dick 587, 21 ER 399, which seems to suggest that the service of a writ outside of the jurisdiction was regular; the case has since been rationalised in *Drummond v Drummond* [1866] LR 2 Ch 32 as one where the question did not actually arise.

23 This was actually complained about: see (1844) 27 *Legal Observer* 387.

24 c 76 (UK), ss XVIII and XIX.

25 Section XVIII (applicable to British subjects) and s XIX (applicable to non-British subjects).

26 Korovin Eugene, "The Second World War and International Law" (1946) 40 Am J Int'l L 742.

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of the sovereign.[27] In regard to the latter, globalisation, and the concomitant free flows of trade, capital and labour have eroded national boundaries and increased intra-national dependence.[28] The sovereignty of discrete nation states has, *de facto* and by necessity, been regulated and constrained by supra-national structures of both the regional (such as the European Union) and global (such as the World Trade Organisation) variety.

10 In parallel with (and perhaps in response to) the increasing obsoleteness of the Westphalian concept of sovereignty, the common law began qualifying its notion of jurisdiction. This was accomplished in two ways: indirectly via the doctrine of *forum non conveniens*, and directly via the requirement of subject-matter jurisdiction. The former shall be dealt with briefly. The seminal decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*[29] ("*Spiliada*") introduced the now familiar doctrine of *forum non conveniens*, whereby an action will be stayed if there is another available forum which is clearly or distinctly more appropriate.[30] This did not, in theory, have any relevance to the question of whether a court had validly assumed jurisdiction, but in practice entailed a validly-seized court declining to exercise its jurisdiction.

11 The second method of qualifying jurisdiction was the requirement of subject-matter jurisdiction. In *Mackinnon*, Hoffmann J (as he then was) held that jurisdiction is not monolithic; personal jurisdiction refers to who can be brought before the court, whereas subject-matter jurisdiction refers to the extent that the court can claim to regulate the extraterritorial conduct of those persons brought before the court.[31] *Masri* couched the requirement as entailing a substantial and bona fide connection between the subject matter and the source of the jurisdiction.[32]

12 Prior to *Burgundy*, Singapore adhered to the original common law position of conceiving of jurisdiction as a monolithic whole. As an aside, Singapore jurisprudence did follow the lead of *Spiliada*, and first applied *forum non conveniens* in the seminal decision of *Brinkerhoff*

27 *Judgment of the International Military Tribunal for the Trial of German Major War Criminals: September 30 and October 1, 1946*, Law Reports of Trials of War Criminals, vol VI (United Nations War Crimes Commission, 1948).
28 See, *eg*, Thomas L Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (Anchor Books, Reprint Ed, 2000).
29 [1987] AC 460.
30 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 475–478.
31 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 at 493.
32 *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] AC 90 at [18].

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Maritime Drilling Corp v PT Airfast Services Indonesia.[33] In *Burgundy*, the Court of Appeal departed from the original common law position, and drew a distinction between personal and subject-matter jurisdiction.[34]

III. Analysis of subject-matter jurisdiction

13 It is readily apparent that *Mackinnon* and *Masri* employed the requirement of subject-matter jurisdiction to curb the existence of jurisdiction. In *Mackinnon*, personal jurisdiction had become an academic issue because the plaintiff validly obtained and served an order for discovery on the London branch of Citibank; the order was discharged on the grounds of a lack of subject-matter jurisdiction. In *Masri*, the judgment creditor obtained and served an EJD order on a director habitually resident in Greece. While this could have been resolved on the basis of personal jurisdiction, the House of Lords set aside the order on the basis of subject-matter jurisdiction.

14 *Burgundy* examined the line of cases starting from *Mackinnon* and culminating in *Masri* and beyond, and ostensibly followed in their wake, at least where the notion of subject-matter jurisdiction is concerned. Both *Masri* and *Burgundy* concerned extraterritorial EJD orders, and their outcomes are superficially similar, in that the EJD orders in both were set aside. But, outside of the recognition of subject-matter jurisdiction, *Masri* and *Burgundy* are actually markedly different in their application of the same. The crucial difference in this regard is the statutory subtext: r 6.30(2) of the CPR was interpreted as not providing for any mechanism for the service of EJD orders outside of the jurisdiction,[35] whereas O 11 r 8(1) of the Singapore Rules of Court was interpreted as allowing EJD orders to be served outside of the jurisdiction with the leave of the court. *Masri*'s interpretation r 6.30(2) of the CPR thus fortified the court's conclusion that it did not, as an absolute rule, have the subject-matter jurisdiction to summon non-parties resident outside of the jurisdiction for an EJD.[36] *Burgundy* on the other hand did not take an absolute position: the mere fact that the target of the EJD was a non-party resident outside of the jurisdiction was insufficient to lead to the conclusion that the court did not have the requisite subject-matter jurisdiction. The enquiry was more nuanced: a Singapore court would have the requisite subject-matter jurisdiction if the non-party is so closely connected to the substantive claim that the court is justified in taking jurisdiction over him. Indeed, this was a

33 [1992] 2 SLR(R) 345.

34 See paras 5(a)–5(b) above.

35 *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] AC 90 at [27]–[38].

36 *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] AC 90 at [37].

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question to be asked at the leave stage, when a court is deciding whether to allow the EJD order to be served abroad.[37]

15 The use of subject-matter jurisdiction in this context is novel in two ways. First, subject-matter jurisdiction is considered on a case-by-case basis. Second, sufficiency of subject-matter jurisdiction determines the question of whether leave would be granted for an EJD order to be served outside of the jurisdiction.

16 The net effect of this is two-fold: first, subject-matter jurisdiction potentially justifies the assumption of jurisdiction; second, and more importantly, personal jurisdiction follows subject-matter jurisdiction. If the court holds that it has the requisite subject-matter jurisdiction, leave would be given for service out of jurisdiction – which *ex hypothesi* entails the assumption of personal jurisdiction. This in turn poses several questions which will potentially affect the outcomes of future cases.

A. *Personal jurisdiction has not been overtaken by subject-matter jurisdiction*

17 When used to deny the assumption of jurisdiction, subject-matter jurisdiction is cumulative; the presence or absence of personal jurisdiction is not relevant. But when used to justify the assumption of jurisdiction, subject-matter jurisdiction is disjunctive; the presence of subject-matter jurisdiction is also used to justify the existence of personal jurisdiction. Personal jurisdiction seems to be both over and under inclusive and, as a matter of brute fact, subject-matter jurisdiction seems to be the true determinant of whether a defendant needs to answer to the court.

18 This could be used to construct an argument that personal jurisdiction has been overtaken by subject-matter jurisdiction, and that "jurisdiction" properly so-called should no longer refer to personal jurisdiction.[38] This would be a tenable argument if jurisdiction were an entirely common law concept, but this no longer the case in Singapore. Section 16 of the Supreme Court of Judicature Act[39] statutorily enshrines the common law and expressly stipulates that the High Court shall have jurisdiction where the defendant is served with a writ of

37 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [112].

38 *Cf* Earl M Maltz, "Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction" (1988) 66 *Washington University Law Quarterly* 671.

39 Cap 322, 2007 Rev Ed.

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summons or any other originating process.[40] Thus, in Singapore at least, personal jurisdiction remains a relevant concept that must be logically distinguished from subject-matter jurisdiction. But this does not detract from the supplemental role that subject-matter jurisdiction plays in supplementing or blunting the rough edges of personal jurisdiction.

19 Quite apart from the statutory bar against conflation, there is value in retaining a distinction, not between personal and subject-matter jurisdiction *tout court* but between what von Mehren and Trautman term general and specific jurisdiction.[41] The former refers to jurisdiction based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected; the latter refers to affiliations between the forum and the underlying controversy which support the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate.[42] General jurisdiction must be retained because justice requires a certain and predictable place where a person can be reached by those having claims against him.[43] According to von Mehren and Trautman, the solution is to do away with the territorial-based conception of personal jurisdiction and instead base it on domicile or habitual residence. Expounding on this is, however, beyond the ambit of this paper.

B. *Lack of subject-matter jurisdiction as alternative to* **forum non conveniens**

20 The lack of subject-matter jurisdiction has hitherto been raised to set aside orders which regulate the extraterritorial conduct of persons resident abroad. But the lack of subject-matter jurisdiction can surely be raised in other contexts, and in particular as a true alternative to the plea of *forum non conveniens*. It has been opined that it is logically inconsistent for a defendant to seek to a stay on *forum non conveniens* grounds while protesting the existence of jurisdiction.[44] This logical inconsistency however presupposes a monolithic conception of jurisdiction.[45] A defendant could very well accept the existence of

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40 *Cf* Senior Courts Act 1981(c 54) (UK) s 19.

41 Arthur T von Mehren & Donald T Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966) 79 Harv L Rev 1121.

42 Arthur T von Mehren & Donald T Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966) 79 Harv L Rev 1121at 1136.

43 Arthur T von Mehren & Donald T Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966) 79 Harv L Rev 1121 at 1137.

44 *Halsbury's Laws of Singapore* vol 6(2) (Lexisnexis, 2013 Reissue) at para 75.012.

45 But *cf Republic of the Philippines v Maler Foundation* [2008] 2 SLR(R) 857 at [80] and *Williams & Glyn's Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438 at 442–443, where logical inconsistency was held to be no bar to

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personal jurisdiction, while objecting to the existence of subject-matter jurisdiction or, in the true alternative, pleading for a stay on *forum non conveniens* grounds.

21 It might be objected that subject-matter jurisdiction and *forum non conveniens* cover much the same ground. Subject matter jurisdiction is concerned with the extent to which extraterritorial conduct may be regulated by the court, and that enquiry looks into the strength of the connection between the subject matter of the proceedings and the forum. *Forum non conveniens* takes into account connecting factors not just encompassing convenience or expense, but also other factors like the governing law, residence, and place of business.[46] This is a fallacy on two counts.

22 While it is true that some factors are potentially relevant for both subject-matter jurisdiction and *forum non conveniens*, the two doctrines remain fundamentally and jurisprudentially distinct. This is because *forum non conveniens* entails a comparison between competing forums: the connecting factors are used to determine if there is another more appropriate forum, or if the local court is the most appropriate forum. Subject matter jurisdiction, on the other hand, is not concerned with comparisons; the enquiry is into whether a particular person is closely enough connected to the subject matter of the proceedings such that the court may assume jurisdiction over his extraterritorial conduct. A case with tenuous links to the forum would not be stayed under *forum non conveniens* if the defendant is unable to show that there is a more appropriate forum, but yet be dismissed for want of subject-matter jurisdiction precisely because of the tenuous links.

23 Secondly, and more importantly, a forum may be the most appropriate forum for proceedings at hand, but yet entail an extravagant and unjustified assumption of jurisdiction which subject-matter jurisdiction is precisely meant to prevent. This is ultimately because *forum non conveniens* takes into account factors which are not relevant in the subject-matter *calculus*. The fact patterns in *Masri* and *Burgundy* are excellent examples of this. In both cases, corporate judgment debtors did not pay up on their judgment debts and EJD orders were sought against the debtors' company directors. There was absolutely no doubt that England and Singapore, respectively, were the most appropriate forums for EJD proceedings; after all, the judgment debtors were avoiding judgment debts emanating from the local forum, the main actions were fought in the local forum, and the entire point of the EJD proceedings was to determine if there were assets available to satisfy the

advancing alternate arguments. Now also see *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500.

46 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478.

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unpaid judgment debts. But, the appropriateness of the local forum in and of itself could not justify compelling the appearance of a non-party, non-resident director.

C. **Ex juris** ***service ultimately premised on subject-matter jurisdiction***

24 As has already been established, *Burgundy* stands for the proposition that, where EJD orders are concerned, leave will be granted for *ex juris* service if the non-party is so closely connected to the substantive claim that the court is justified in taking jurisdiction over him.

25 The controlling provision is in this regard is O 11 r 8(1) of the Rules of Court, which applies to "any summons, notice or order issued, given or made in any proceedings". There is no reason for *Burgundy* to be read as only applying to EJD orders; the service of all other summonses, notices and orders should be subject to the same test. Quite apart from the plain language of O 11 r 8(1), *Burgundy* also makes clear that public interest analysis cannot be used to distinguish between laws with extraterritorial effect and those without.[47] Thus, EJD orders cannot be distinguished from other summonses, notices and orders on this basis. Indeed, even if the private-public distinction were to hold, the position is surely *a fortiori* for summonses, notices and orders with a public element; EJD proceedings entail what are essentially private disputes with no wider repercussions for the public.

26 This in turn poses the question of whether O 11 r 1 is also premised on subject-matter jurisdiction. It is at once apparent that the tests under O 11 r 8(1) and O 11 r 1 are different. The former is a test of close connection. The latter entails:

(a) a good arguable case that at least one of the heads of jurisdiction is satisfied;[48]

(b) a serious issue to be tried on the merits;[49]

(c) Singapore clearly being the most appropriate forum.[50]

27 Order 11 of the Singapore Rules of Court is based on O 11 of England's Rules of the Supreme Court, which can in turn be traced back to the Common Law Procedure Act 1852. The historical record suggests

47 *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 at [91].

48 *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 at [19].

49 *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 at [19].

50 *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [19].

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that the provisions allowing for service *ex juris* were actually predicated on subject-matter jurisdiction, although this was not immediately obvious at that time. *Comber v Leyland*[51] justified the contract limb of O XI r 1 on the following basis: the parties, having agreed that some part of the subject matter of the contract is to be executed within England, consent to the matter being litigated in England. In *In re Busfield, Whaley v Busfield*,[52] Chitty J explained the genesis of O XI: the rules in the order are founded on general principles of jurisprudence, and in the framing of those rules the whole subject was reconsidered, with attention drawn to the views entertained in particular by Germany. Germany is a civil law nation with general jurisdiction assumed on the basis of domicile;[53] Chitty J must have been referring to bases of specific jurisdiction, and these include the place of the branch, the place of location of property, the place of performance, and the place of commission of a tort.[54] Academics echoed the same view; Cowen opined that O XI r 1 reflects "jurisdiction based on the general consideration that the subject matter of the cases is sufficiently connected with the forum to warrant the assumption of jurisdiction."[55] Ehrenzweig stated that the English "courts were authorized by statute to acquire jurisdiction over persons outside the realm by service abroad in cases involving sufficient contacts".[56]

28 It might be objected that subject-matter jurisdiction was not *de jure* recognised in English law until the decision of *Mackinnon*; Hoffmann J (as he then was) in turn quoted extensively[57] from F A Mann's seminal article entitled "The Doctrine of Jurisdiction in International Law", which was only published in 1964.[58] This is misplaced in two respects.

29 First, the common law develops incrementally in nature; cases as the atomistic building blocks.[59] Principles are inductively derived from decided cases, and these are not controlling unless subsequent cases recognise them to be such and actually apply them to the facts at

51 [1898] AC 524 at 527.
52 (1886) 32 Ch D 123 at 124.
53 Christof von Dryander, "Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure" (1982) 16 Int'l Law 671 at 675.
54 Christof von Dryander, "Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure" (1982) 16 Int'l Law 671 at 675.
55 Zelman Cowen, "Transient Jurisdiction: A British View" (1960) 9 J Pub L 303 at 308.
56 Albert A Ehrenzweig, "The Transient Rule of Personal Jurisdiction: The "Power" Myth and *Forum Conveniens*" (1956) 65 Yale LJ 289 at 299.
57 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 at 493.
58 Francis A Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 *Recueil des cours* 146.
59 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [35].

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hand.[60] The *de jure* declaration of a principle is not, in any way, a necessary condition to the principle being implicitly applied by past cases. If this were not the case, some kinds of development in the common law would not be explicable – the most famous example being Lord Atkin's neighbour principle, which inductively rationalised disparate areas of tort law and is today heralded as the cornerstone of the unified tort of negligence.[61]

30 Second, subject-matter jurisprudence in fact does have a long vintage in England. Quite apart from the *Mackinnon* line of cases and the cases pertaining to *ex juris* service, subject-matter jurisdiction is also pertinent to the grant of injunctions. *Carron Iron Co v Maclaren*,[62] a House of Lords decision from 1855, concerned an anti-suit injunction. Carron Iron Co, a company incorporated in Scotland, sued the estate of Maclaren in Scotland, alleging that he was in possession of company property. Carron Iron Co had goods and agents for the sale of goods in England. The executors of Maclaren's estate successfully obtained an anti-suit injunction restraining Carron Iron Co from proceeding in their Scottish action. The House of Lords allowed the appeal and discharged the anti-suit injunction. Personal jurisdiction was not in issue because Carron Iron Co had submitted to the court's jurisdiction. Lord Cranworth's speech is particularly apposite. To him, the issue was whether the "connexion" with England made it fit for the Court to interfere to prevent Carron Iron Co from exercising their right of proceeding in their own country. Neither having property in England nor agents for the sale of goods in England was sufficient. The crucial aspect in this regard was that the court was dealing with the case of a "foreign corporation, seeking no assistance from the courts of this country". The holding that there was insufficient connection with England was another way of stating that the court lacked subject-matter jurisdiction – a rose by any other name would smell as sweet.

31 The provisions in O 11 r 1 allow *ex juris* service if some sort of subject-matter connection to Singapore can be shown. For some of these limbs, there is a perfect coincidence between subject-matter jurisdiction and the requirements stipulated therein. For instance, O 11 r 1(*g*) refers to the whole subject-matter being immovable property situate in Singapore. Order 11 r 1(*g*) is unproblematic because the requirement for subject-matter jurisdiction is *ipso jure* satisfied if the immovable property is situate in Singapore. Indeed, if a foreign court were to pronounce on the status of property situate in Singapore, this would constitute an extravagant assumption of jurisdiction. The

60 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [36].
61 *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 at [21]–[25].
62 (1855) 5 HLC 416.

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other limbs with a perfect coincidence are O 11 rr 1(*h*), (*i*), (*k*), (*m*) and (*n*).

32 There are, however, some limbs which are very wide in scope and ought to be qualified by subject-matter jurisdiction. Chief amongst these are O 11 r 1(*a*) (property in Singapore), O 11 r 1(*b*) (injunction) and O 11 r 1(*p*) (cause of action arising in Singapore). Taking O 11 r 1(*a*) as an example, it ought not to be sufficient to serve a writ *ex juris* simply because the putative defendant has property in Singapore. The subject matter of the suit must be analysed, and there must be sufficient connection between the subject matter of the claim and Singapore for leave to be granted. This would rule out actions where the claim is not related to the property; O 11 r 1(*a*) cannot be used to circumvent the other limbs in O 11 r 1. Put in another way, the presence of property within the territorial bounds of Singapore cannot justify the Singapore courts assuming unlimited jurisdiction over the extraterritorial conduct of a foreigner. Order 11 r 1(*b*) is similar, in that seeking an injunction pertaining to a putative defendant's conduct in Singapore does not entail the court trying an unrelated main claim to determine if the sought-after injunction should be granted.

33 Indeed, the requirement of subject-matter jurisdiction should also apply to limbs which, on their face, seem to pose no problems. That there is some connection to Singapore does not mean that there is sufficient connection. Take O 11 r 1(*d*)(i), which refers to a contract being made, or was made as a result of an essential step being taken, in Singapore. If two Americans meet at a business conference in Singapore and decide to contract for the delivery of goods in New York, with the contract being governed by New York law, it is difficult to see how the Singapore courts would have the requisite subject-matter jurisdiction in the event of a breach simply because the contract was made in Singapore.

34 All this runs into a variation of a problem already articulated, in that O 11 already requires the putative plaintiff to show that Singapore is clearly the most appropriate forum. But, even in the O 11 context, subject-matter jurisdiction and *forum conveniens* are distinct. Singapore may very well be the most appropriate forum to adjudicate on a tort claim because all the witnesses are resident in Singapore, but if the tort essentially implicates the extraterritorial conduct of a non-resident[63] with no effects in Singapore, the convenience of trying the case in Singapore cannot overcome the lack of subject-matter jurisdiction.

63 But satisfies O 11 r 1(*f*)(i) because a minor act or omission occurred in Singapore.

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IV. Conclusion

35 The recognition of the dichotomy between personal and subject-matter jurisdiction is a welcome development. The twin forces of globalisation and technological development are accelerating the shift away from Westphalian notions of sovereignty. Paralleling this, the courts have departed from the over-inclusive assumption of jurisdiction based on mere presence in two ways: *forum non conveniens*, which entails a court declining to exercise its jurisdiction, and subject-matter jurisdiction, which entails a court examining if it is justified in regulating the extraterritorial conduct of a foreigner.

36 This article argues that subject-matter jurisdiction is more pervasive and deeply-rooted in the law than has been commonly regarded. Nevertheless, there are insuperable obstacles, both in terms of authority and principle, to personal jurisdiction being overtaken by subject-matter jurisdiction. Moving forward, arguments touching on subject-matter jurisdiction are relevant in two ways: as a true alternative to a plea of *forum non conveniens*, with a non-resident defendant asserting that he is not closely enough connected to the forum for his extraterritorial conduct to be regulated; and as a check on the wide language of O 11, upon which *ex juris* service should only be allowed if the subject matter of the suit is closely enough connected to the forum.

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