Case Note

VOID CONTRACTS AND THE APPLICABILITY OF CHOICE OF LAW CLAUSES TO CONSEQUENTIAL RESTITUTIONARY CLAIMS

CIMB Bank Bhd v Dresdner Kleinwort Ltd
[2008] 4 SLR 543

This note examines the Singapore Court of Appeal's judgment in *CIMB Bank Bhd v Dresdner Kleinwort Ltd*, focusing specifically on what role, if any, should be played by a choice of law clause contained in a void contract in relation to the restitutionary aftermath of voidness.

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I. Introduction

1 In *CIMB Bank Bhd v Dresdner Kleinwort Ltd*,[1] the Singapore Court of Appeal had the opportunity to investigate what role should be played by a choice of law clause contained in a contract which is conceded to be void in relation to the restitutionary aftermath of the voidness. This issue will form the focal point of this note.

2 The case arose out of the sale of promissory notes by CIMB to Dresdner for approximately US$8.2m. The sale had been arranged, on CIMB's part, by one of its employees at its Inanam branch, George Chau. The contract between CIMB and Dresdner contained an English choice of law clause. It later transpired that the promissory notes had been issued in relation to a non-existent project, the whole thing being a fraud perpetrated by George Chau. Dresdner instituted an action for the return of the US$8.2m on the basis of unjust enrichment. CIMB then applied to have the action stayed on the basis of *forum non conveniens*,

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* The author would like to thank Professor Yeo Tiong Min for suggesting that this case should be looked at in the first place and also his helpful comments on an earlier draft. All errors remain the author's own.

1 [2008] 4 SLR 543.

arguing that England was the more appropriate forum.[2] In the course of applying the *Spiliada* test[3] on whether Singapore or some other forum was the more appropriate forum, the Court of Appeal had to consider what the applicable law of the unjust enrichment claim was, this being a factor indicating where the centre of gravity of the case lay.

3 The court was clear that one had to draw a distinction between a case where the parties agree that there is no agreement at all, such as in the present action, and a case where the parties disagree as to whether there is an agreement between them. In the latter situation, the court advocated the putative applicable law approach, *ie*, application of the law that would govern the contract if it were valid, to determine if the contract is valid. Although this is the generally adopted solution for the classic conflicts conundrum of which law determines if a contract is void,[4] there is room for a subtler approach to this issue.[5] However, given that Dresdner gave an undertaking that for the purposes of this action, it would not maintain that the agreement was valid, the opportunity to investigate alternative approaches did not arise. Instead, the central issue that the court faced was whether a choice of law clause contained in an admitted void contract could provide the applicable law of the unjust enrichment claim.

4 Before going into the specifics of the judgment, it must be pointed out that Dresdner's concession that there was no "agreement" is to be equated with a concession that there was no valid contract between the parties. The importance of this point will be apparent later.

II. The judgment

5 In order to determine what the applicable law of the unjust enrichment claim was, the court had to first determine what the choice

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2 Dresdner instituted the Singapore proceedings to make sure it was within the limitation period; it then promptly applied for a temporary stay whilst it awaited the outcome of German proceedings that had been brought against it by the ultimate purchasers of the dishonoured promissory notes. CIMB, on the other hand, requested a permanent stay of the Singapore action.

3 Test derived from *Spiliada Maritime Corp v Cansulex* [1987] AC 460.

4 *Eg*, Art 10(1) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); *Albeko Schumaschinen v The Kamborian Shoe Machine Co* (1961) 111 LJ 519.

5 See, for example, Adrian Briggs, "The Formation of International Contracts" [1990] LMCLQ 192; Jonathan Harris, "Does Choice of Law Make Any Sense?" (2004) 57 Current Legal Problems 305 at 316–324; Adeline Chong, "Choice of Law for Void Contracts and Their Restitutionary Aftermath: The Putative Governing Law of the Contract" in *Re-examining Contract and Unjust Enrichment* (Paula Giliker ed) (Martinus Nijhoff, 2007) at pp 155–170.

of law rule is for unjust enrichment. Here, the court applied r 230 of *Dicey, Morris and Collins* which sets out that:[6]

> (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
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> (2) The proper law of the obligation is (*semble*) determined as follows:
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> > (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
> >
> > (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*);
> >
> > (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

6 It was common ground that sub-r 2(b) was inapplicable given that the transaction did not involve any land. The issue was whether sub-r 2(a) or sub-r 2(c) provided the applicable law. CIMB argued that sub-r 2(a) applied and pointed towards English law because of the English choice of law clause, whereas Dresdner relied on sub-r 2(c) to maintain that Singapore law, being the law of the place of enrichment as Dresdner had remitted the money to CIMB Singapore, provided the proper law of the restitutionary obligation.

7 CIMB's argument that the English choice of law clause in the void contract should be given effect to govern the restitutionary consequences was thought by the court to be somewhat mischievous, given that CIMB had asserted that George Chau did not have the authority to enter into the agreement on its behalf and hence CIMB did not intend to enter into any contract. CIMB argued, however, that on Dresdner's part, there was such an intention. The court observed: "[T]he entire situation smacked of CIMB wanting to have its cake and eat it too."[7]

8 Central to the court's reasoning was the assessment of whether there had been a "meeting of minds" between the parties. So, if the parties had intended to enter into a contract, but some factor renders the contract ineffective or a failure, a choice of law clause contained in the ineffective or failed contract should be given effect to govern the

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6 *Dicey, Morris and Collins on the Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006).

7 [2008] 4 SLR 543 at [43]. Yet there is more merit to CIMB's argument than the court gave credit for, although it is suggested that CIMB did not quite make the correct argument; see Part III of this article.

consequential restitutionary obligation.[8] If there was no "meeting of minds" to enter into the contract at all and in effect there was no contract, then the choice of law clause has no further application.[9]

9 Furthermore, the court held that one needed to examine whether the factor which rendered the contract void also rendered the choice of law clause void.[10] The court noted that the defence of *non est factum* would strike down all the terms of a contract, including any express choice of law clause, whereas vitiating factors such as fraud, duress or common mistake as to the subject matter of the contract needed to be scrutinised further to see if they directly impugned any express choice of law clause. If the clause is not impugned, then there are grounds for contending that the law stipulated in the clause should govern the restitutionary consequences.

10 Applying these principles to the present case, the court held that there was no "meeting of minds" between the parties since it was common ground that there was no contract. Alternatively, the fraud perpetrated by George Chau infected the entire "agreement".[11] Thus, the English choice of law clause did not bind the parties. Sub-r 2(a) was inapplicable and the present action instead fell within sub-r 2(c). Given that Dresdner had transferred the money to CIMB Singapore and Singapore was also the place where CIMB allegedly changed its position by remitting the money to HSBC Hong Kong,[12] the court had no hesitation in holding that Singapore was the place of enrichment.[13] Hence, Singapore law was the applicable law of the unjust enrichment claim.[14]

11 Upon considering other additional factors, such as the possibility of related third party actions by CIMB and the availability of relevant witnesses, the court concluded that it was not established that

8 [2008] 4 SLR 543 at [41].
9 [2008] 4 SLR 543 at [50].
10 In relation to this, the court referred to the "infection" test propounded by Harris (Jonathan Harris, "Does Choice of Law Make Any Sense?" (2004) 57 Current Legal Problems 305), *ie*, one has to examine if the factor rendering the contract invalid "infects" the choice of law clause too.
11 [2008] 4 SLR 543 at [54].
12 CIMB Singapore transferred the money over to HSBC Hong Kong in favour of an unrelated third party company seemingly pursuant to fraudulent instructions issued by George Chau and another employee of CIMB.
13 [2008] 4 SLR 543 at [60].
14 Rather interestingly, the court noted ultimately that even if they had concluded that the applicable law of the unjust enrichment claim was English, rather than Singapore law, this would not have been a factor of much significance when applying the *forum non conveniens* test as the Singapore law on unjust enrichment was said to be similar, if not identical, to the English law on unjust enrichment. See [2008] 4 SLR 543 at [63].

England was the more appropriate forum for trial of the action. Accordingly, CIMB's application for a stay of the Singapore proceedings was denied.

III. Analysis

12 The court's exposition of the principles as to when an express choice of law clause could be said to survive contractual invalidity was careful and precise. The recognition that the important factor was whether there was a "meeting of minds" between the parties and needing to assess whether the grounds of the contractual failure directly impugned the choice of law clause demonstrated a clarity of judicial reasoning in this fraught area that should be applauded.

13 That said, it may be questioned whether the court accurately applied those principles to the case at hand. The court stressed several times that they were not dealing with a situation where there was a contract which the parties intended to enter into but which subsequently failed, but rather a situation where both parties acknowledged that there was no "agreement". This, to the court's mind, meant that there was no "meeting of minds", and therefore, the English choice of law clause did not bind both parties.[15]

14 With respect, the conclusion that Dresdner's concession that there was no contract between Dresdner and CIMB meant that there was no "meeting of minds" between the two parties was not an irresistible one. Even when Dresdner was informed by CIMB London that George Chau did not have the authority to enter into that particular transaction, Dresdner persisted in remitting the US$8.2m to CIMB Singapore.[16] Upon payment, CIMB London, despite all their earlier warnings to Dresdner about George Chau's lack of authority to enter into the transaction on their behalf, passed the promissory notes to Dresdner. It is untenable that either party did these actions on a whim. Dresdner's actions in remitting the money and CIMB's actions in handing the promissory notes over can be traced back to the void contract containing the English choice of law clause.

15 The point being made here is that the "agreement" was executed by both sides. Objectively construed, there is a strong argument that although there may have been no valid binding *contract* between the two parties, there was an "agreement", *ie*, there was a "meeting of minds" between Dresdner and CIMB that was sufficient at least to compel the

15 [2008] 4 SLR 543 at [56].
16 This was probably because of an oversight on Dresdner's part; see [2008] 4 SLR 543 at [28].

parties' actions. Therefore, the English choice of law clause should have been held to survive the acknowledgment that there was no contract and held to be the applicable law of the unjust enrichment claim.[17]

16 The alternative reason used, *ie*, that the vitiating factor was the fraud perpetrated by George Chau against both Dresdner and CIMB and this fraud "infected" the entire contract, including the English choice of law clause,[18] could also have merited further probing. Fraud, whether under English or Singapore domestic contract law,[19] merely renders a contract voidable, not void. If fraud were the vitiating factor, then there is actually a contract which did exist, but is now treated as if it never did exist upon avoidance.[20] Given that there was a contract prior to the moment of avoidance, this brings one back full circle to the point that there initially was a "meeting of minds" between the parties. In addition, the court should have, in accordance with the principles it had so clearly articulated, assessed independently whether the fraud directly impugned the choice of law clause itself.[21]

IV. Further points

17 The court's judgment raises certain issues associated with the survivability of choice of law clauses contained in void contracts that may benefit from some further exploration.

A. Meeting of minds

18 Notwithstanding its judgment on the facts of the case, it is unlikely that the court meant that only a valid contract would indicate that there has been a meeting of minds between the parties. The court had noted that the presence of vitiating factors such as fraud, duress or common mistake as to the subject matter of the contract would not necessarily mean that the parties did not have the intention to enter into a contract.[22] Therefore, although the court did not elaborate on what "meeting of minds" means, it is probably fair conjecture that the court

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17 Sub-r 2(a) covers claims arising from a void contract: *Dicey, Morris and Collins on the Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at para 34-020.

18 [2008] 4 SLR 543 at [54].

19 If one ignores the English choice of law clause, the objective proper law of the contract is probably either English or Singapore law.

20 Paraphrasing Yeo Tiong Min, *Choice of Law for Equitable Doctrines* (OUP, 2004) at para 9.22.

21 As the court noted, it would be "rare" for the fraud to have directly impacted on the victim's decision to agree to the choice of law clause itself: [2008] 4 SLR 543 at [46].

22 See especially [2008] 4 SLR 543 at [46]–[47].

meant stripping down a bargain to its bare essentials. In relation to this, most, if not all, legal systems would accept that there is a "meeting of minds" when there is an offer and a matching acceptance. Other elements, such as the common law requirement of consideration, are submitted to be extraneous to the enquiry as to whether there has been a "meeting of minds".

19 In most instances, the question of whether the parties' minds have met would be a purely factual one. However, sometimes, questions of law may arise. Issues such as whether silence constitutes acceptance, whether the defence of *non est factum* is made out, or whether a postal acceptance which goes awry constitutes valid acceptance, all involve questions of law. This then leads to the query: which law should determine whether there has been a "meeting of minds"?

20 As mentioned earlier, when the parties are in dispute as to whether a contract exists between them, the generally accepted approach is application of the putative governing law of the contract. This was approved by the court who noted that: "Such a rule makes good practical sense because otherwise it would mean that a mere allegation on the part of the defendant that there was fraud would suffice to neutralise the effect of the … choice of law clause in the agreement."[23] This argument works the other way round too. If an illiterate man concludes a contract thinking that he is signing a tenancy agreement when he is signing a contract of sale, it would be unfair on him to give effect to a choice of law clause cannily inserted into the contract by the other party for Ruritanian law, under which there is no defence of *non est factum*. There is a strong case for a more principled basis upon which to determine whether a contract is void rather than just simply applying the law stipulated in a choice of law clause in a disputed contract.[24] Similarly, it is submitted that the putative governing law of the contract should not govern the question of whether there has been a "meeting of minds" between the parties when one is determining whether an express choice of law clause in a void contract should be applied to the restitutionary consequences of voidness.

21 It is suggested that the law which is best suited to determine this issue is the *lex fori*. Admittedly, use of the *lex fori* has its own drawbacks. On the one hand, it can be considered to be parochial and may have little connection with the facts. On the other hand, if the parties have

23 [2008] 4 SLR 543 at [30].

24 See, for example, Adrian Briggs, "The Formation of International Contracts" [1990] LMCLQ 192; Jonathan Harris, "Does Choice of Law Make Any Sense?" (2004) 57 Current Legal Problems 305 at 316–324; Adeline Chong, "Choice of Law for Void Contracts and Their Restitutionary Aftermath: The Putative Governing Law of the Contract" in *Re-examining Contract and Unjust Enrichment* (Paula Giliker ed) (Martinus Nijhoff, 2007) at pp 155–170.

chosen to sue and submit in the forum, the parties agree to be subjected to the forum's choice of law rules. They then have little cause to complain if the choice of law rules of the *lex fori* dictate that the preliminary issue of whether the parties have had a "meeting of minds" is to be assessed by a stripped down version of the *lex fori*'s domestic contract law. Alternatively, if the court has exercised long arm jurisdiction on the basis of O 11 of the Rules of Court,[25] some sort of connection with Singapore is insisted upon so there is justification for applying Singaporean rules on whether there has been a "meeting of minds" between the parties. One should also note that Singapore law is not advocated to be the law which would apply to the substance of the restitutionary claim; it merely plays a preliminary role in determining what the applicable law of the restitutionary claim should be. Thus, if Singapore domestic contract law on offer and acceptance finds that there has been consensus between the parties, then any express choice of law clause in the void contract can be given effect and it is that law which will go on to govern the restitutionary claim. Applying this on the facts of *CIMB Bank Bhd v Dresdner Kleinwort Ltd*, it has been argued that a matching offer and acceptance can be derived from an objective overview of the parties' actions.

B. Illogicality

22 The second issue that crops up is this: if the contract is void, how can it have a governing law and how can that governing law be applied to the restitutionary consequences of voidness? One could possibly justify use of the putative governing law of the contract to determine whether the contract is valid, but when the voidness of the contract has already been established, it is sheer illogicality still to call upon this law.

23 There are nevertheless strong pragmatic reasons to justify applying the putative governing law of a contract to the restitutionary consequences. First, party expectations would probably be that any law which they choose to govern their contract would not only govern disputes arising out of the contract but also any consequences arising from the failure of the contract. It is unlikely that the parties intended one law to govern any contractual disputes and a different law to govern non-contractual disputes between them if those disputes arose out of the same transaction. Secondly, application of the putative governing law to the consequences of voidness will lead to a certain symmetry[26]

25 Cap 322, R 5, 2006 Rev Ed.

26 That said, it is not suggested that the law which strikes down a contract should invariably be applied to the consequences of voidness. *Eg*, if the contract is void because it is against forum public policy, the applicable law of the unjust enrichment claim is still suggested to be the putative governing law of the contract.

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because that same law would have determined the contract's voidness. This symmetry serves several functions. In addition to the advantages of practicality and convenience, the risk of inconsistency can be side-stepped. For example, the contract may be held to be void by the putative governing law of the contract, the law of country A, but the law of country B is instead applied to the restitutionary consequences. It might be though that according to the law of country B, the contract is valid and not void.

24 Thus, as the court explained:[27]

> One answer [to the criticism of illogicality] is that perhaps it is convenient and pragmatic to adopt that rule and, arguably, such an approach was probably in line with the expectations of the parties. This approach seems to be premised on the assumption that the choice of law clause can be regarded as separable from the contract itself. If the law applicable to a contract determines that it is void, it is not obviously desirable, or commercially sensible, for a different law then to be applied to determine the restitutionary consequences of this voidness.

25 Two further justifications can be added to what has been set out above. One is that any lingering problems of whether certain claims are contractual or restitutionary[28] would not pose a hurdle at the conflicts stage as the same law would be applicable no matter how the characterisation exercise is carried out. Another, and crucial, point is that the putative governing law of the contract will, more often than not, be the law of closest connection to the unjust enrichment claim. As Lord Penrose has observed:[29]

> … at the very least the attempt of parties to make a contract governed by or putatively governed by a chosen system of law or by a system selected on conventional conflict principles, remains a reality irrespective of whether or not they succeed in that attempt, and in particular remained a reality at the date of the performance tendered.

The *lex fori* merely plays the normal subsidiary role of stepping in only if the effect of applying the foreign governing law of the contract to the restitutionary aftermath offends forum public policy. See Adeline Chong, "Choice of Law for Void Contracts and Their Restitutionary Aftermath: The Putative Governing Law of the Contract" in *Re-examining Contract and Unjust Enrichment* (Paula Giliker ed) (Martinus Nijhoff, 2007) at pp 176–181.

27 [2008] 4 SLR 543 at [33].

28 *Eg*, the question mark over rescission; see Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd Ed, 2002) at pp 56–60.

29 *Baring Brothers v Cunninghame District Council* [1997] CLC 108 at 126. However, it should be noted that even though Lord Penrose recognised the significance of the parties' attempt to create a contract, he rejected the straightforward application of the putative proper law of the contract to govern the restitutionary claim in favour of a more flexible law of closest connection approach.

26 With reference to the facts of the case, the actions of Dresdner and CIMB in paying over the money and passing the promissory notes can only be explained on the basis that both parties (despite any protestations to the contrary) thought or acted as if there was some sort of legal relationship between them. Given that the assumed contract formed the basis for the parties' actions and is the reason why any enrichment occurred at all, the putative governing law of the contract should have been held to be the applicable law of the unjust enrichment claim.

C. The separability of the choice of law clause

27 The court briefly made reference to the idea that a choice of law clause is separable from the other terms of the contract in the passage reproduced above.[30] The idea of separability enables one to justify why a law stipulated in a choice of law clause could go on to govern the restitutionary consequences of contractual invalidity when the other contractual terms have been struck out.

28 The concept of the separability of the choice of law clause does not wholly cohere with the court's reasoning on whether there has been a "meeting of minds" between the parties. Under this strand of the court's analysis, one examines whether the parties had reached a "meeting of minds" on the contract as a whole, whereas if the idea of separability of the choice of law clause is to be fully embraced, one should examine if there has been a "meeting of minds" on the choice of law clause itself.

29 The idea of the separability of the choice of law clause has more relevance to the court's suggestion that one has to examine independently whether the vitiating factor directly impugns the choice of law clause. It is implicit that the court envisages a situation where the other terms of the contract may have fallen down, but the choice of law clause survives to govern the consequences of the failure of the contract. The court though provided little hint in its judgment as to whether the isolation of a choice of law clause in this manner is to be viewed as a legal or policy construct.

30 The answer to this is probably: both. One argument that could be made is that contracts do not exist in a legal vacuum. Important terms in a contract, such as "currency", "payment" and "damages", only have meaning when referred to a legal system. As Lord Diplock put it:[31]

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30 In para 24 of this article.
31 *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 at 65.

> [C]ontracts … are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable …

31 In this sense, a choice of law clause can be said to inhabit a higher jurisprudential plane compared to the other substantive terms of the contract, and thus, legally speaking, it is separable from the contract. Alternatively, one could argue, as Briggs does, that a choice of law clause, along with any jurisdiction clause and arbitration agreement, forms part of the parties' attempt to set up a dispute resolution mechanism.[32] This mechanism must be separable from the performance obligations of the contract otherwise it would be of no utility. In addition, the pragmatic reasons set out earlier[33] as to why the criticism of illogicality should not be a hurdle to giving effect to a choice of law clause contained in a void contract, *ie*, that this protects party expectations, prevents inconsistent outcomes, minimises characterisation problems and points towards the law of closest connection to the unjust enrichment claim, provide compelling justification to warrant treating a choice of law clause as being separable from the substantive provisions in a contract as a matter of policy.[34]

32 A related question is: what law determines whether the choice of law clause can be severed from the contract in which it is contained? Academic discussion on this issue favours the putative governing law of the contract determining whether the choice of law clause is separable from the contract and capable of surviving the invalidity of the contract.[35] Since it is best to minimise the role of the alternative, the *lex fori*, submitting the question of a choice of law clause's separability to the putative governing law of the contract seems to be a sensible solution.

V. Conclusion

33 Where void contracts are concerned, logically intractable problems abound. In *CIMB Bank Bhd v Dresdner Kleinwort Ltd*, the Singapore Court of Appeal showed that it was possible to approach the

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32 Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, 2008), especially ch 3.

33 See Part IV(B) of this article.

34 It should be noted that legal justifications stemming from drawing an analogy with arbitration and jurisdiction clauses (which are separable from the contract) are less persuasive given that the analogy is imperfect; arbitration and jurisdiction clauses are procedural in nature whereas choice of law clauses are substantive in nature.

35 Jonathan Harris, "Does Choice of Law Make Any Sense?" (2004) 57 Current Legal Problems 305 at 326.

issue of when a choice of law clause could be applied to the restitutionary consequences of voidness with a mixture of pragmatism and principle. The court did much to clarify and articulate the rules in this area, but it is submitted that, arguably, it ultimately did not apply those same principles wholeheartedly to the case at hand.