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WHEN CHOICE OF FORUM CLAUSES IN INTERNATIONAL COMMERCIAL CONTRACTS ARE CHALLENGED: KEY LESSONS FROM ASIAN JURISDICTIONS

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ABSTRACT

While Asia leads the world in cross-border trade and investments, no comparative study exists on the approaches of Asian courts to Choice-of-Forum clauses in international commercial contracts. This thesis fills this important gap by seeking to explore, identify, compare and explain the approaches of courts in Singapore, Hong Kong, Malaysia and the Philippines when Choice-of-Forum clauses in international commercial contracts are challenged. Employing a comparative law method, this thesis argues that the manner courts characterise Choice-of-Forum clauses, party autonomy, procedure, factors considered during enforcement, choice of law process, state and international interests are the factors which determine how courts decide cases and issues. The key lessons gathered in this thesis highlight the need for parties to consider the direct and indirect effects in drafting their Choice-of-Forum clauses, the need for courts to be predicable, reliable and coherent in their analysis, the importance of maintaining court discretion, the need for procedural and legislative reforms, and the existence of a conducive environment in Asia for strengthening laws on party autonomy and for the accession of Asian countries to the *Choice-of-Court Convention*.

DECLARATION

I declare that:

(i) the thesis comprises only my original work towards the Doctor of Philosophy;

(ii) due acknowledgment has been made in the text to all other materials used; and

(iii) this thesis has received dispensation from the University of Melbourne Research Higher Degrees Committee to go beyond the required word limit for a PhD thesis.

Lemuel D. Lopez

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To Carlos and Nena,
who taught me to dream big and work hard for my dreams

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A. Overview

While Asia leads the world in cross-border trade and investments,[1] no comparative study exists on the approaches of Asian courts to Choice-of-Forum clauses in international commercial contracts. This thesis fills this important gap by seeking to explore, identify, compare and explain the approaches of courts in Singapore, Hong Kong, Malaysia and the Philippines when Choice-of-Forum clauses in international commercial contracts are challenged. Employing a comparative law method, it argues that the manner courts characterise these clauses, party autonomy, procedure, factors considered during enforcement, choice of law process, state and international interests are the factors which determine how courts decide cases and issues. The key lessons gathered in this thesis highlight the need for parties to consider the direct and indirect effects in drafting their Choice-of-Forum clauses, the need for courts to be predicable, reliable and coherent

[1] See Roman Tomasic and Leon Wolff (eds), *Commercial Law in East Asia* (Ashgate, 2014) xiii.

in their analysis, the importance of maintaining court discretion, the need for procedural and legislative reforms, and the existence of a conducive environment in Asia for strengthening laws on party autonomy and for the accession of Asian countries to the *Choice-of-Court Convention*.

B. The Curious Case of International Commercial Contracts in Asia

The Twenty-first Century is claimed as the Asian Century.[1A] This means that Asia drives global economic growth, and shapes the composition of global economy, flow and volume of international trade and investments, nature of corporate transactions, type of business ventures and strategies, and even direction of technological developments and innovation.[2] Consequently, these developments in trade and investments are mirrored in the contracts entered by the parties engaged in it.

Nonetheless, despite Asia's leadership in the composition of trade, innovations and business strategies, the form and content of the contracts themselves continue to mirror those used in western countries, particularly by the Anglo-American companies.[3] These contracts are oftentimes 'drafted in a style that aims to create an exhaustive, and as precise as possible, regulation of underlying contractual relationship, thus attempting to render redundant any interference from external elements such as interpreter's discretion or the rules and principles of the governing law.'[4] This drafting style takes off from the common law models which draft contracts based on the principle of *caveat emptor*.[5] Under the common law system, parties are expected to be able to assess the relevant risks and to make provisions for them, and the final text of the contract is deemed to reflect this.[6] This common law style contract, however, may not sit well in other legal traditions. For example, while the civil law also respects and enforce the parties' will without evaluating the stipulations based on an ex-legal criterion, contracts are nonetheless evaluated based on a developed system of regulations applicable to the type which a particular contract may be categorised.[7] Thus, in the civil law tradition, civilian judges and lawyers are expected to read the

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[1A] Ibid.
[2] See William Scheela, *Venture Capital in Asia: Investing in Emerging Countries* (Business Expert Press, 2014) 17; Anil Gupta and Haiyan Wang, 'Building the Next-Generation Global Enterprise' in Anil Gupta, Toshiro Wakayama, and U. Srinivasa Rangan (eds), *Global Strategies for Emerging Asia* (Jossey-Bass, 2012) 3, 3; Niraj Dawar and Charan Bagga, 'Is Your Business Model Ready to Drill into the Core of the Diamond' in Anil Gupta, Toshiro Wakayama, and U Srinivasa Rangan (eds), *Global Strategies for Emerging Asia* (Jossey-Bass, 2012) 29, 36.
[3] See Giuditta Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press, 2014) 8.
[4] Ibid.
[5] Ibid 11.
[6] Ibid.
[7] Ibid 85.

contracts in the light of the numerous default provisions provided in the governing law for that type of contract.[8] Therefore, extensive provisions are not required in the contract.[9] In Asia, with legal systems ranging from civil law to common law to Islamic and socialist, and a lot of in-between and hybrids, there is therefore a formidable challenge to interpretation, performance and judicial enforcement of international commercial contracts, including those written in the common law style.

The common law drafting style of international commercial contracts, however, is just the tip of the iceberg. International commercial contracts in Asia may encounter a lot of problems during negotiations – incoherence of contractual provisions as often, these contracts are products of compromise,[10] problems associated with parties with unequal bargaining power,[11] language limitations,[12] different viewpoints on the significance of a contract,[13] possibility that the written agreement may not reflect the true intent of parties,[14] risk of having incomplete contracts,[15] imperfect information during negotiations,[16] among others. These problems, issues and challenges at the negotiations and documentation stage translate into a higher level of risk that the expectations of the parties may not be realised, the so-called transactions risk. No wonder then that the legal opinions issued to support the cross-border transactions in Asia may be generally more qualified. In Indonesia, for instance, aside from usual qualifications, legal opinions may often be qualified by a statement that there is no reliable central source of obtaining comprehensive sets of relevant laws and regulations.[17] Likewise, Thai legal opinions for project financing transactions are qualified by the silence of Thai law on the admissibility in evidence and enforceability of non-exclusive jurisdiction clauses stipulating foreign courts, waivers of objections to venue, and

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[8] Ibid 11, 85.
[9] Ibid 11.
[10] David Echenberg, 'Negotiating international contracts: does the process invite a review of standard contracts from the point of view of national legal requirements?' in Giuditta Cordero-Moss (ed), *Boilerplate, Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press, 2011) 11, 18.
[11] See Robert Hillman and Jeffrey Rachlinski, 'Standard-Form Contracting in the Electronic Age (2002) 77(2) *New York University Law Review* 429, 432-433.
[12] See Larry A. DiMatteo, *International Contracting: Law and Practice* (Kluwer Law International, 2013) 15.
[13] See Philip McConnaughay, 'Rethinking the Role of Law and Contracts in East-West Commercial Relationships' (2001) 41(2) *Virginia Journal of International Law* 427, 446.
[14] See Andrew Godwin, 'Obligations to Negotiate in Good Faith in Cross-Border Deals' (2013) 3 *Harvard Business Law Review Online* 92, 96.
[15] Frederick Lipman and Larry Dongxiao Qiu, *International Strategic Alliances Joint Ventures Between Asian and US Companies* (World Scientific, 2nd ed, 2014) 48; see also Godwin (n14) 96.
[16] Echenberg (n10) 15; see also Baker & McKenzie, *Asia Pacific Guide to Mergers & Acquisitions* (Baker &McKenzie, 2013) 94-95, 182-183, 270, 358, 363-364, 665.
[17] Allens, Linklaters, Widyawan & Partners, *Legal Guide to Investment in Indonesia* (Allens, Linklaters, Widyawan & Partners, 2014) 3.

judgment currency indemnities.[18] It appears that the qualifications in legal opinions reflect the deficiency and uncertainty in the legal infrastructure of Asian countries brought about by lack of laws and jurisprudence on specific legal issues. Similarly, credit-rating agencies may rate Asian companies involved in cross-border transactions lower than their Western counterparts.[19] In addition, accounting standards of emerging market firms are also seen to be of generally low quality, and thus are seen to be risker, and thus, receive lower credit ratings.[20] Western governments also recognise Asia's particular sensitivity to transaction risk.[21]

Because of the various problems inherent in Asian contracts, parties require a good mechanism to manage their risks. As this thesis will argue, risks may be managed better through the use of the Choice-of-Forum clause. The next section shall discuss how such clauses manage these risks.

C. Function and Purpose of Choice-of-Forum Clauses

Keyes has identified three particular interests which are relevant in determining a court's exercise of jurisdiction in international litigation – interests of parties, forum state, and foreign and international community.[22] Similarly, the importance of Choice-of-Forum clauses can be better appreciated if seen from these three key interests. For the parties, this is usually in the form of reduction of risks, gains in efficiency, and acquisition of certainty and predictability. For the forum state, this is usually the attraction of investments and trade. For the international community, the advancement of international commerce and trade through enhanced judicial cooperation and certainty in terms of jurisdictional outcomes are the primary motivation.

1. Parties' Interests

First, the parties' interest in Choice-of-Forum clauses has important commercial aspects. Fentiman provides a cogent analysis of how these clauses play this role. He notes that litigation

[18] Al Chandler, 'Thailand: Something Special,' *International Financial Law Review* (Web Page, 1 June 2011) <http://www.iflr.com/Article/2855518/Thailand-Something-special.html>.
[19] Giovanni Ferri and Li-Gang Liu, 'How Do Global Credit-Rating Agencies Rate Firms from Developing Countries?' ((2004) 2(3) *Asian Economic Papers* 30, 35.
[20] Kee-Hong Bae, Lynette Purda and Michael Welker, 'Credit rating initiation and accounting quality for emerging-market firms' (2013) 44(3) *Journal of International Business Studies* 216, 219.
[21] Justin Gleeson, 'An Australian Perspective on International Commercial Litigation: The Challenges and Opportunities,' (Conference Paper, International Litigation in the Asia Pacific, Wuhan University, China, 23-24 September 2013) 8-9.
[22] Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 178-225.

risk is the primary threat to a transaction because it is only in the course of litigation that the risks to which the transactions are prone will materialise.[23] Hence, where the litigation will occur in case a dispute arises is a key consideration in commercial transactions.[24] In effect, the Choice-of-Forum clause determines the efficacy of enforcing the other party's obligations and finding remedy for non-performance.[25] Moreover, it is an investment decision such that the objective is a good return on that investment; thus the direct concern is not winning or losing, but with the financial implications of either outcome.[26] Hence, where to litigate may go into the very financial valuation or consideration of the commercial transaction involved. The choice is also a means to crystallise the relative strengths and weaknesses of the parties, and therefore provides a framework for negotiating a settlement, which parties may consider in putting financial value to the transaction.[27]

As regards the legal aspects, Choice-of-Forum clauses define a whole range of legal and tactical issues – both substantive and procedural. First, fixing the forum appropriately guides the parties in drafting the contract. As the discussion below shows, forum law impacts a wide range of legal issues, and the parties cannot properly take these into account unless they fix the forum court through the Choice-of-Forum clause.[28] The Choice-of-Forum therefore gives parties greater predictability as to the legal impact of their contract.

Second, the Choice-of-Forum clause shapes the claimant's choices whether to claim, what to claim, and how to claim. Location of defendant's assets,[29] the value of these assets,[30] availability of effective enforcement mechanisms to seize and secure them,[31] costs of locating the assets,[32] court costs,[33] immunities available to the defendant,[34] etc. are important considerations of the claimant in pursuing a claim in a particular forum. Furthermore, what cause of action to file is defined by the forum court's conflict of law rules[35] particularly its rules on characterisation of the dispute (*eg,* is the dispute contractual, a tort or otherwise?),[36] jurisdictional rules (*ie*, subject matter

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[23] Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd ed, 2015) 5.
[24] Ibid 276.
[25] Ibid 276-7.
[26] Ibid 277.
[27] Ibid.
[28] Trevor Hartley, *Choice-of-Court Agreements under the European and International Instruments* (Oxford University Press, 2013) 4.
[29] See Fentiman (n23) 279.
[30] See Ibid 279.
[31] Ibid 283.
[32] See Ibid 279.
[33] Ibid 279.
[34] See, eg, Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 3rd ed, 2015) 80.
[35] Fentiman (n23) 279.
[36] Ibid; Peter Nygh, *Autonomy in International Contracts* (Clarendon Press, 1999) 88.

and personal jurisdiction rules), the kind of provisional remedies available (*ie*, the availability of a relief may be tied to the type of action filed),[37] the nature and amount of damages the court can award,[38] the extent of judicial discretion[39] (*eg,* the existence of grounds for dismissal under *forum non conveniens*[40] may depend on the cause of action), the defences available to the defendant,[41] the substantive outcome of the decision (*eg*, is a declaration of title sought?),[42] among others. Additionally, the cause of action may be shaped by the chosen court's rules on determining the validity or enforceability of the Choice-of-Forum clause, along with rules of interpretation, which goes into the scope or what actions to file. As regards how to pursue the claim (*ie*, the sequence or strategy employed), the chosen forum determines the entire procedural aspect of the case like how a claim is to be made including the contents of the pleading. This is because the laws of the forum court determine the procedure of any action filed.[43] As such, the chosen court determines the kind and extent of interlocutory relief and other remedies available for purposes of forcing the other party to negotiate and gain a tactical advantage during negotiations.[44] Likewise, the chosen court determines the discovery procedure available, which along with the interlocutory relief can also define the possibility of an out-of-court settlement.[45] Similarly, the rules of evidence of the chosen court determine the approach as to what documents or witnesses will be presented and how to present them during trial.[46] The possibility of third party proceedings is also a function of the rules of the chosen court.[47]

Third, important aspects of the Choice-of-Law clause may depend on the rules of the chosen forum. For one, even before applying the chosen law, the chosen court already has a large discretionary space to determine whether or not to proceed with the action filed through its inherent power to define and determine its own jurisdiction (*ie*, *kompetenz-kompetenz* principle). If this hurdle is accomplished, the characterisation of the dispute of the forum court, as shown above, may determine the application of the chosen law. This may depend on the rules of the chosen forum. Other aspects which are determined by the chosen forum include the parties' ability to

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[37] Fentiman (n23) 283.
[38] Ibid.
[39] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 198.
[40] Ronald Brand and Scott Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (Oxford University Press, 2007) 1.
[41] Fentiman (n23) 282.
[42] Ibid 282.
[43] Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) 5.
[44] See Fentiman (n23) 277.
[45] See Ibid 284.
[46] See Garnett (n43) 189.
[47] Fentiman (n23) 284.

designate the chosen law,[48] the existence[49] of the Choice-of-Law clause, and the evidence to be presented so as to prove the contents of the foreign law.[50] Whether or not to resort to *depeçage* (*ie*, splitting the case into issues which may then require different laws being applied)[51] or *renvoi* (*ie*, reference to the laws of a foreign jurisdiction pursuant to conflicts rule)[52] are also dependent on the forum court. In the absence of or unenforceability of the Choice-of-Law clause, the rules of the chosen forum determine what happens next.[53] The mandatory rules[54] and public policy[55] of the chosen forum can even trump the chosen law. Hence, to a large extent, how the Choice-of-Law clause will be applied depend on the choice-of-forum clause. Fentiman even strongly argues, 'success in a cross-border dispute….depends on the relevant rules for choice of law, the relative scope of the substantive law and the domestic law of the forum, and the forum rules for establishing the content of foreign law.'[56]

Fourth, the chosen court also determines important litigation issues like neutrality,[57] susceptibility to corruption,[58] predictability of results (*eg*, jurisdictions with not much experience in dealing with a particular type of dispute or issue imply greater unpredictability),[59] availability of technical expertise to deal with the issues,[60] and other case management issues (*eg*, number of cases in court dockets).[61] These are important factors defined by the Choice-of-Forum clause that the parties should take into account during trial or pursuing settlement.

2. State Interests

States also have strong interests in promoting Choice-of-Forum clauses. These clauses have become an integral part of attracting investments and trade and ensuring competitiveness in the global market, especially that they have become a common feature of international commercial

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[48] Nygh (n36) 86.
[49] Ibid 90.
[50] See Fentiman (n23) 668.
[51] Nygh (n36) 137.
[52] Ibid 86.
[53] Ibid 266.
[54] Ibid 199.
[55] See, eg, *Civil Code* (Philippines) art 1306; Nygh (n36) 233.
[56] Fentiman (n23) 283.
[57] Ibid 287.
[58] Trevor Hartley, *The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective* (Brill Nijhoff, 2006) 115.
[59] See, eg, Chandler (n18); Fentiman (n23) 285.
[60] See *The Bremen v Zapata Off-Shore Co,* 407 US 1, 12 (1972) ('The Bremen'); Hannah Buxbaum, 'Forum Selection in International Contract Litigation: The Role of Judicial Discretion' (2004) 12(2) *Willamette Journal of International and Dispute Resolution* 185, 195.
[61] See Fentiman (n23) 460; Buxbaum (n60) 190.

contracts.[62] In *Bremen v Zapata Off-Shore Co,* ('The Bremen') the United States Supreme Court, for instance, highlighted that 'the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.'[63] Furthermore, guaranteeing their enforceability reflects the country's general commitment to reliability of contracts. This commitment, in turn, may also improve the probability that judgments from the forum state will be enforced and recognised in another country to the extent that it would not be stricken down on public policy grounds because the forum state shares with the enforcing state the same values as regards contracts and Choice-of-Forum clauses. Moreover, for forum states and especially for dispute resolution centres, there is a strong incentive to implement the Choice-of-Forum clause so as to influence the development of the law as regards certain commercial issues.[64]

Furthermore, given the commercial nature of the transaction usually involved, and the presence of foreign parties, the state may also have commercial incentives in enforcing Choice-of-Forum clauses. This has been the view, for example, in the case of the Commercial Court in London where commercial litigation has been considered an important source of money for the United Kingdom.[65] The Commercial Court's attractiveness has not only ensured a steady flow of court fees but also generated a flourishing practice for the expert advisers, solicitors and barristers, and business for the hotel proprietors and travel firms.[66] In the United States, a survey conducted by the American Bar Association showed that over 98% of the respondents indicated that a convention on choice of court agreements would be useful for their practice.[67]

The enforcement of Choice-of-Forum clauses also addresses or at least provides a reliable framework for preventing forum shopping (*ie,* filing of actions in different forums to secure procedural advantage or harass the defendant[68]). As a result, if the state enforces the Choice-of-Forum clause, the state can address the issues arising from forum shopping like unfairness, adverse effect to local court resources, and undermining of foreign legal systems.[69]

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[62] Eg, Explanatory Memorandum to the Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements /*COM/2014/046 final - 2014/0021 (NLE), 3-4; Singapore Academy of Law, 'Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005' (Report, Singapore Academy of Law, March 2013) 2.
[63] *The Bremen* (n60) 13-4.
[64] See Singapore Academy of Law (n62) 2.
[65] Keyes (n22) 25.
[66] Ibid.
[67] American Bar Association, Recommendation Adopted by the House of Delegates August 7-8, 2006 (Survey, American Bar association, 2006) 2.
[68] See *Puyat v Zabarte* (2001) 353 SCRA 738, 751 ('Puyat').
[69] See Keyes (n22) 28-29.

3. Interests of the International Community

The advancement of international commerce and trade through enhanced judicial cooperation and certainty in terms of jurisdictional outcomes is the primary reason why the international community promotes Choice-of-Forum clauses.[70] The reliability of these clauses is seen as a key factor to economic growth especially in the context of facilitating global and intra-regional trade.[71] Being an aspect of party autonomy, as will be discussed in this thesis, its promotion is also aligned to the prevailing liberalist philosophy of promoting freedom and reliability of contracts. As a key to wealth creation, Choice-of-Forum clauses may be seen as channels of progress, and thus development and even global stability.

D. Aim of the Thesis and Research Questions

The goal of this thesis is to explore, identify, compare and explain the approaches of courts in Singapore, Hong Kong, Malaysia, and the Philippines when Choice-of-Forum clauses in international commercial contracts are challenged, *ie,* cases or actions are filed in their respective courts to enforce these clauses, to ask for certain forms of relief pursuant to these clauses, or to question their existence, validity and interpretation.

Specifically, this thesis seeks to answer the following research questions:

1. How do courts characterise Choice-of-Forum clauses?
2. What is the role of party autonomy in disputes involving Choice-of-Forum clauses?
3. What forms of relief and remedies are available to enforce Choice-of-Forum clauses?
4. What factors are considered by the court in granting relief pursuant to the Choice-of-Forum clauses?
5. How do courts determine the issues of existence, validity and interpretation of Choice-of-Forum clauses?
6. How do mandatory rules, public policy and other state and international interests affect the Choice-of-Forum clause analysis?

[70] Eg, *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entry into force 1 October 2015) preamble ('Choice-of-Court Convention'); American Bar Association (n67) 5.
[71] Yeo Tiong Min, 'International Litigation in Asia: Will the Hague Choice of Court Convention Make Any Difference' (Conference Paper, Japanese Society of International Law Annual Meeting, Shizuoka, 12-14 October 2013) 1 < http://www.jsil.jp/annual_documents/2013/1012224.pdf>.

7. What are the implications for the progressive development of the law of Choice-of-Forum clauses in Asia?

E. Outline of the Thesis

To achieve the aim of this study, each chapter of the thesis answers each of the questions outlined above. Chapter 2 discusses the role of characterisation of Choice-of-Forum clause issues as either a contractual or procedural matter in the Choice-of-Forum clause analysis. This chapter shows that the court's characterisation determines the legal tools available for the analysis. Chapter 3 probes into the role of party autonomy by showing that the two aspects of party autonomy – the freedom to determine the contents of the Choice-of-Forum clause and the freedom to control the flow of litigation – allow parties to lead and shape how courts approach Choice-of-Forum clause issues. Chapter 4 looks into the unique approaches to the enforcement of Choice-of-Forum clauses of each jurisdiction to show that even though Choice-of-Forum clauses are considered contracts, their enforcement still depends on the procedural rules of the forum court. Chapter 5 discusses the various factors courts consider in granting relief to emphasise the key role of court discretion in the Choice-of-Forum clause analysis. Chapter 6 looks at the relationship between the Choice-of-Forum clause and the law selected by the choice of law process. Notably, this chapter shows that other than the issue of existence which can be determined by forum law, the applicable law closely determines issues of validity and interpretation of Choice-of-Forum clauses. Chapter 7 highlights that the interests of the forum state, international community, as well as the interests of third-party states further limit the effects of Choice-of-Forum clauses. The key lessons gathered from the previous chapters are then collected in the concluding Chapter 8 which assesses the implications for the progressive development of the law of Choice-of-Forum clauses in Asia.

F. Rationale and Relevance

This thesis is significant because it fills an important gap in the literature on Choice-of-Forum clauses. While trade, foreign investments, and cross-border transactions are accelerating in Asia, it is unfortunate that literature is scarce, and there is even an absence of a comparative and comprehensive study of the approaches of the Asian courts on issues concerning Choice-of-Forum clauses. Much of the literature available only involves European jurisdictions and the United States, and whatever scarce materials which are available, oftentimes, these lack depth, comprehensiveness, and a more formal and academic analysis of the subject matter. Furthermore,

while distinguished representatives of major Asian countries participated in the negotiations on the *Choice-of-Court Convention*[72] (*eg,* Japan's Masato Dogauchi), and thus, possibly, an Asian perspective is already reflected in its language and its commentary, an analysis which includes unique Asian experiences which considers its public policy considerations, legal traditions and unique cultural approaches is yet to be fully articulated. This dearth in literature runs counter to the promotion of transparency, predictability, certainty and reliability of international commercial contracts in Asia.

Furthermore, this thesis addresses the very real need to articulate the scope and limitations of the principle of party autonomy, the legal and conceptual basis of Choice-of-Forum Clauses, especially since the same is already largely subscribed to in Asia. As such, this thesis hopes to provide a good practical guide to practitioners in Asia, whose role becomes more important given the developments in the region. By articulating the scope and limitations of party autonomy and the grounds given by the courts in enforcing and limiting this principle, the complexities of international commercial litigation in Asia could hopefully become more manageable as practitioners are provided a clearer road map of the approaches of various jurisdictions towards the issues taken up in this thesis.

Moreover, the lessons gathered from this thesis have immense implications for the progressive development of the law on Choice-of-Forum clauses in Asia. By providing a better understanding of the approaches of these four Asian jurisdictions, this thesis could promote a more coherent approach among jurisdictions in Asia as regards Choice-of-Forum clauses. It could trigger multilateral discussions which may offer venues for the development of conventions providing for a regional legal framework on Choice-of-Forum clauses similar to that of the *Brussels I Recast*[72A] or the *Choice-of-Court Convention*. This, in result, will further reduce risks and transaction costs among foreign investors and players in international trade in Asia as interpretations of Choice-of-Forum clauses become more transparent, consistent and predictable.

While this thesis is not completely comprehensive because it does not cover all Asian jurisdictions, nonetheless, a study involving the four jurisdictions is significant, and an important step in understanding a region where no in-depth study had been done before. Singapore, Hong

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[72] *Choice-of-Court Convention* (n70).

[72A] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] *OJ L* 351/1 art 25 (1)(a)(b)(c) ('Brussels I Recast').

Kong, Malaysia and the Philippines represent important Asian economies, and are key players in international trade and investment. Moreover, Singapore and Hong Kong are important dispute resolution centres,[73] and the analysis gathered from the decisions in their courts provide important legal and practical insights on Choice-of-Forum clauses for the entire region. The middle income and resource-rich economies of the Philippines and Malaysia, on the other hand, may offer valuable lessons which may be representative of a large number of middle-income states in Asia. Given the existence of key sectors with strong public interests in the Philippines and Malaysia (*eg,* energy, forestry, agriculture, mining), it would be interesting to observe the interface of party autonomy vis-à-vis state interests in these sectors. Furthermore, the two are interesting jurisdictions given the influence of Islamic law, along with English common law in Malaysia, and the interesting hybrid legal system of largely Spanish civil law and American common law in the Philippines. Hong Kong, being part of China, also provides an interesting stage for observing interactions with the communist legal system in the field of contracts. Nonetheless, the four jurisdictions share the common law's doctrine of precedent and therefore court decisions are important and will be the basis of the thesis.

G. Scope of the Thesis

1. Key Limitations

This study only covers the decisions of the courts of Singapore, Hong Kong, Malaysia and the Philippines when Choice-of-Forum clauses are involved. Nonetheless, the study also looks at certain decisions which do not involve Choice-of-Forum clauses in order to illuminate and provide guidance as to how the courts may proceed with certain issues involving Choice-of-Forum clauses. The decisions considered for this study include the decisions of the following courts:

Singapore	Court of Appeal, High Court, and some lower courts
Hong Kong	Court of Final Appeal, Court of Appeal, Court of First Instance, and some lower courts

[73] Laura Philomin, 'Singapore to remake itself as Asia's legal hub with new commercial court', *Reuters* (Webpage, 12 February 2014) < http://in.reuters.com/article/2014/02/11/singapore-law-idINDEEA1A0JC20140211>.

Malaysia	Court of Appeal, High Court (Malaya and Sabah and Sarawak) and some lower courts
Philippines	Supreme Court

The decisions of the foregoing courts were included because their decisions are available in the published national law reports and journals, and other legal database (HKLII, LexisNexis, Westlaw, LawNet and CDAsiaOnline). Furthermore, as regards Malaysian decisions, only those written in English or with English translations were included. Please take note that the decisions of the predecessor courts of the foregoing courts are included (*ie,* when the relevant jurisdiction was still under the colonial rule of the United Kingdom as regards Singapore, Hong Kong and Malaysia, or the United States as regards the Philippines). Provided they involve Choice-of-Forum clauses, all published or available decisions from the very establishment of the relevant court system by the British or the Americans up until March 2019 are included.

The thesis is also circumscribed by how the terms 'international commercial contracts' and 'Choice-of-Forum clauses' are defined below.

2. International Commercial Contracts

This thesis aims to give the broadest possible definition of international commercial contracts. Hence, it adopts the definitional approach in the *UNIDROIT Principles*,[74] *Choice-of-Law Principles*,[75] *UNCITRAL Model Law*[76] and *Choice-of-Court Convention.*[77] Hence, contracts are 'international' 'unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.'[78] Even the stipulation of a foreign applicable law can supply the international character.[79] Moreover, contracts are 'commercial' when 'each party is acting in the exercise of its trade and profession.' Furthermore, employment contracts are generally

[74] International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (UNIDROIT, 2010).
[75] Hague Conference on Private International Law*, The Draft Hague Principles on Choice of Law in International Commercial Contracts*, Preliminary Document No. 6 (July 2014).
[76] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985), art 1 (3)(a) ('UNCITRAL Model Law').
[77] *Choice-of-Court Convention* (n70).
[78] *Choice-of-Court Convention* (n70) art 1(2).
[79] See *Convention on the Law Applicable to Contractual Obligations*, opened for signature 19 June 1980, 1980 OJ (L 266) (entered into force 1 April 1991), art 1.1 and 3.3 ('Rome Convention').

excluded but when cases involving them provide useful discussion on principles applicable to Choice-of-Forum clauses in general, these cases are considered in this thesis. Additionally, this thesis does not finely distinguish, unlike in certain jurisdictions, between commercial contracts vis-à-vis consumer contracts.

Because this thesis seeks to focus only on contracts exclusively between private parties, it excludes international commercial contracts where one of the parties is a state, government agency or international organisation. This eliminates from its analysis the privileges and immunities to which states, government agencies, and international organisations are generally entitled. [80]

3. Choice-of-Forum Clauses

Choice-of-Forum clauses, also referred to as 'jurisdiction agreements', 'jurisdiction clauses', 'Choice-of-Court clauses', 'forum selection clauses' or 'litigation agreements' are defined in this thesis as contractual clause(s) that identifies which jurisdiction(s) a party may litigate disputes arising from or connected to the international commercial contract. The clause, which may refer the disputes to a domestic, foreign or even international court, usually has two aspects. The first aspect involves prorogation, whereby jurisdiction is conferred by the agreement of the parties upon a certain court(s) which might not otherwise have jurisdiction if not for the agreement. The second aspect is derogation, whereby the jurisdiction of one or more forums which otherwise would have had jurisdiction have been excluded by the agreement of the parties.[81] While Choice-of-Forum clauses may have both aspects, certain clauses can only have prorogation effects (*eg,* non-exclusive clauses). Aside from these two aspects, Choice-of-Forum clauses may be exclusive (mandatory) or when jurisdiction is conferred on one forum to the exclusion of all other forums, or non-exclusive (permissive) where the agreement identifies a preferred forum or merely excludes one or more possible jurisdictions.[82] This thesis also considers 'unilateral' and hybrid clauses, which oblige one party to litigate, if at all, exclusively in one jurisdiction, and give the other party the right to choose to litigate in a range of fora.[83] In addition, also considered are Choice-of-Forum clauses which combine modes of alternative dispute resolution (ADR) such as arbitration and may have several permutations. Furthermore, while international treaties[84] and regional and domestic laws [85]may

[80] See Mortensen (n34) 80.
[81] Nygh (n36) 15.
[82] Ibid.
[83] Mortensen (n34) 97.
[84] *Choice-of-Court Convention* (n70) art 3(c).
[85] *Brussels I Recast* (n72A) art 25 (1)(a)(b)(c).

also provide for formal requirements for Choice-of-Forum clauses, this thesis considers all Choice-of-Forum clauses regardless of form.

H. Methodology and Research Design

The methodology of a thesis would necessarily depend on the research questions that it seeks to answer.[86] In this thesis, the goal is to explore, identify, compare and explain the approaches of courts in Singapore, Hong Kong, Malaysia and the Philippines, when Choice-of-Forum clauses in international commercial contracts are challenged in courts. Inevitably, achieving this involves the use of comparative law methods. Basically, these methods involve comparison which is 'a process of contrasting and comparing, juxtaposing the unknown and the known, and comprehending the phenomena around us by observing differences and similarities.'[87] Nonetheless, the actual steps or technique employed vary depending on the purposes of the research,[88] which in this thesis, in essence, are to 'enhance understanding of legal phenomena and create legal knowledge'[89] (*ie,* how the courts in the four Asian jurisdictions approach Choice-of-Forum clauses) and provide directions for the progressive development of the law on Choice-of-Forum clauses in Asia. As such, it is crucial that this thesis uses methods that probe into the legal reasoning involved in the court decisions, and identify the principles, values, concepts or any other factors, including their relative ordering (which takes precedence) vis-à-vis each other, which the court consider important in resolving disputes. In short, the methods should be able to identify the sources which the court uses in deciding the dispute concerning Choice-of-Forum clauses.

1. A Hermeneutic Vision of Law

In this thesis, the methodological approach is anchored on a vision of law as a mainly hermeneutic discipline.[90] This adoption is because of its consistency with the researcher's personal view of what the law is – one that preserves its normativity, creativity and intelligibility. Further, it is an approach that is familiar to any lawyer given the legal training's emphasis on the acquisition of interpretative techniques and modes of reasoning, such as linguistic and systematic

[86] See Maurice Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 229, 236.
[87] Esin Örücü, 'Methodological Aspects of Comparative Law' (2006) 8(1) *European Journal Law of Reform* 29, 29.
[88] Ibid 31.
[89] Ibid 32.
[90] Mark Van Hoecke, 'Legal Doctrine: Which Method (s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart Publishing Ltd, 2011) 1, 17.

interpretation, analogical reasoning and reasoning from precedent.[91] Likewise, the choice is also driven by the materials that this thesis will deal with, which are court decisions from the four Asian jurisdictions. Furthermore, the factors which were considered by the courts are better revealed if there is a strong focus on the court's manner of interpretation and legal reasoning. Moreover, in a comparative endeavour, the hermeneutic approach provides a bigger space for analysis which other approaches may not provide. A functionalist approach in comparative law, for instance, by focusing on the function of the institutions, *ie,* how legal institutions deal with the problem similar to the problem faced by another institution in another jurisdiction,[92] inevitably limits one's analysis to a determination of similarity, not to mention a strong agenda for unification or harmonisation,[93] or evaluation of which institution (or jurisdiction) deals better with the problem.[94] Hence, a comparative legal methodology built on the hermeneutic approach to law promises a rich analysis of how courts in the four jurisdictions approach Choice-of-Forum clauses.

A hermeneutic approach to law focuses on interpretation and legal reasoning. In his seminal work, Law's Empire, Dworkin boldly declares that 'legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practice as a whole, that it consists in the narrative story that makes of these practices the best they can be.'[95] This hermeneutic vision of law is echoed by Van Hoecke who argues, '…legal scholars are often interpreting texts and arguing about a choice among diverging interpretations. In this way, legal doctrine is a *hermeneutic*…. Interpreting texts has been the core business of legal doctrine since it started in the Roman Empire.'[96] He adds, '[i]n a hermeneutic discipline, texts and documents are the main research object and their interpretation, according to standard methods, is the main activity of the researcher. This is clearly the case with legal doctrine.'[97] Close to law's conception as a hermeneutic discipline, law can also be seen as an argumentative discipline, meaning, it is the argumentation to support some legal interpretation or solution that is emphasised, rather than the interpretation as such.[98] This, therefore, puts premium on the legal reasoning employed by the interpreter of the legal texts.

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[91] Carel Smith, 'The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor,' (2011) 4(1) *Erasmus Law Review* 21, 21.
[92] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Clarendon Press, 3rd rev ed, 1998) 34.
[93] See Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 339, 376.
[94] See Ibid 375.
[95] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) viii.
[96] Van Hoecke (n90) 4.
[97] Ibid.
[98] Ibid.

Legal hermeneutics do not propagate any one methodology of law as the proper one, unlike legal realism, critical legal studies or constructivism.[99] The concern of legal hermeneutics is not how the judge ought to understand the law but the act of understanding itself.[100] Since it does not offer any particular methodology for the judge, neither does it prescribe which interpretive standards have priority in law, nor does it hold a hierarchy of legal values.[101] The preference is left to the interpreter. What is offered by legal hermeneutics is a phenomenology of understanding the law.[102]

Legal hermeneutics has two main presuppositions. First, it presupposes an internal point of view, *ie*, an insider perspective which considers looking at the familiar vocabularies used by legal interpreter as manifestations of his understanding of law.[103] The view that legal theory has to understand legal practice in a manner that takes into account the way the practice is perceived by, at least, the legal actors, is generally accepted.[104] Second, it presupposes that the legal actors consider law as the authoritative source of rights and duties, and is the normative order that binds its members.[105] This may be what Dworkin was referring to when he said that the proper stance of the judge is not neutrality and objectivity but integrity: the disposition of someone whose personal opinions about justice, albeit bridled by the system, are a necessary condition for a true understanding of the law.[106]

Based on this, it is no wonder that Bell emphasises that this hermeneutic vision of law is normative because interpretation is aimed towards setting out the norms that apply in a particular legal system.[107] 'The researcher is stating what ought to be done according to the legal point of view within a particular legal system. The researcher is not reproducing the beliefs of lawyers about what ought to be done, but giving his or her best interpretation of the norms of the system….'[108] Bell adds that legal research is distinctive because the objects of study are essentially embedded within institutions, routines and procedures of the law and cannot be studied effectively from the outside, thus his stress towards the institutional character of law. In this light, he emphasises that

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[99] Carel Smith, 'The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor,' (2011) 4(1) *Erasmus Law Review* 21, 21.
[100] Smith (n91) 22.
[101] Ibid.
[102] Ibid.
[103] Ibid 25.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart Publishing Ltd, 2011) 155, 175.
[108] Ibid.

interpretation of legal texts requires establishing a context, *ie,* an understanding that the legal text is situated as part of the legal system. Hence, '[t]o interpret is to bring the text forward, out of its original context and into the present situation to which it is to be applied.'[109] He adds, 'what a good lawyer in the system would consider to be a compatible [interpretation]… would be a solution that is predominantly consistent and coherent with the rest of the law.'[110]

Legal argumentation is also not relative that just resorts to arbitrary conceptual schemes. Smith supports this view by using speech act theory developed by Wittgenstein and the works of Lakoff and Johnson on metaphor structure understanding.[111] According to Smith, law is framed in metaphors and legal metaphors can be found in all legal fields (*eg*, doctrine of corporations as legal persons, doctrine of standing, and terrorism as war).[112] Metaphors are conceptual schema or model that organises the body of statements that could intelligibly be stated about a topic.[113] The basic experiences provide the organising principles for the construction of conceptual models, the metaphors.[114] These are the way reality is experienced and perceived, and they are neither true nor false, because they are part of the conceptual structure that frames judgment.[115] Being grounded in experiences or ways of perceiving, legal metaphors used in legal argumentation does not render legal argumentation into arbitrary conceptual schemes.[116]

Bell highlights that a hermeneutic approach can be applied to comparative legal research, taking into account the following:

> The first is to understand the full institutional setting out of which the legal issues and solutions arise: the organisation of the legal system, its legal concepts and mental map of the relationships between legal institutions, its legal procedures, and the broader social and cultural context and assumptions. In one's own system, much of this is tacit knowledge. In relation to foreign system, the researcher needs to acquire more explicit knowledge and also has to make the tacit knowledge of his or her own system more explicit. Second, the hermeneutic approach requires the comparatist to adopt the internal point of view of the systems compared, but not necessarily to believe either of them is right or just. Third, the comparatist is not reporting an internal point of view that comes as clearly packaged, even if he or she makes use of questionnaires addressed to national lawyers. The comparatist has to interpret the systems to enable a dialogue between them.[117]

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[109] Ibid 165.
[110] Ibid 166.
[111] Smith (n91) 34-36.
[112] Ibid 37.
[113] Ibid 36.
[114] Ibid.
[115] Ibid.
[116] Ibid 38.
[117] Bell (n107) 175-176.

Bell also argues, however, that the problem of how a legal researcher can accurately describe and make normative statements about the standards of a foreign system acutely raises the limits of the hermeneutic method.[118] Taking into account Legrand's emphasis on the 'otherness' of a foreign legal system, he points out that the first challenge lies with the methodology of enquiry.[119] 'The comparative researcher has to undertake research seeking out the point of view of the representative lawyer or the ideal citizen who takes legal rules as reason for action.'[120] He adds, '[u]nderstanding the law in its institutional context, the comparative lawyer offers a rational reconstruction of the rules of the system, such that the representative lawyer would recognise as credible.'[121] The challenge here is how far it is plausible that the comparatist is able to understand the foreign legal system. Legrand may argue that this account of the comparatist is incommensurable.[122] Nonetheless, Bell replies by reference to Gordley's point that there is no self-contained law which speaks of a monolithic and closed culture, thus the whole endeavour of enquiry becomes possible because of 'what we share, even if there are also important differences.'[123] The foreign is accessible because of the hermeneutic approach to law, which presupposes that a person can make normative statements about the legal system from the internal point of view, without being committed to its rightness.[124] A similar challenge lies with the methodology of communication, *ie,* how the results of that enquiry are reported which focuses on the audience.[125] Bell recognises that the communication by comparative lawyers is bound to be significantly different in expression and even in content than the communication by the internal lawyer to an audience within his or her legal community.[126] While recognising the integrity of the comparative enterprise as both requiring openness to similarity and difference, he nonetheless points out that when it comes to communicating the results of enquiry, the communicative power of approximation is greater than a stress on difference.[127] 'Identifying difference is valuable and important, but enabling the reader to bridge the distance so as to gain a point of access into the other system is an essential task of comparative explanation.'[128]

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[118] Ibid 172.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid 173.
[123] Ibid 174.
[124] Ibid.
[125] Ibid 172.
[126] Ibid.
[127] Ibid 175.
[128] Ibid.

In understanding the foreign court's interpretation or legal reasoning employed, Sacco's theory of 'legal formants' is also instructive. 'Legal formants,'[129] according to Sacco, are elements which informs or influences a jurist's formulation of a legal rule which he will apply to a set of facts.[130] This may include the judge's background, attitude towards doctrinal innovation, or the text of the statute itself.[131] Hence, these 'legal formants' may come in the form of statutory rules, formulations of scholars and decisions of judges.[132] A hermeneutic approach which emphasises the legal reasoning and interpretation of the courts is helpful in unravelling these legal formants and is most apt for a thesis that deals a lot with court decisions.

One important aspect, however, that is not often discussed in comparative law literature is the porousness of the concepts, legal language and manner of legal argumentation across jurisdictions, which is along the lines of Gordley's point that law is not self-contained which speaks out of a monolithic and closed culture. While embedded in a local context, legal argumentation is done with a universal consciousness, appealing not only to a domestic audience but also to the foreign and even to the world at large. This may be true especially for private international law cases where a foreign element is involved. In fact, one of the foremost goals of private international law is decisional harmony across jurisdictions.[133] Hence, a judge in a conflicts case should consider the foreign and the interest of the international community in general. How this is translated into the legal reasoning would be an interesting subject which a hermeneutic approach may help to unravel.

2. Lessons for the Comparative Methodology of the Thesis

This thesis follows closely what Kamba suggests are the three main stages involved in the process of comparison: (1) descriptive phase which may take the form of a description of the norms, concepts and institutions of the systems concerned or it may consist in the examination of the socio-economic problems and the legal solutions provided by the systems in questions; (2) identification phase or the identification or discernment of differences and similarities between the systems under comparative consideration; and (3) explanatory stage under which the divergences

[129] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) 39(1) *American Journal of Comparative Law* 1, 22.
[130] Ibid.
[131] Ibid 23-24.
[132] Ibid 22.
[133] Mortensen (n34) 17.

and resemblances are accounted for.[134] These phases are not always distinctly separated from each other nor are they always dealt with in a particular order.[135] Moreover, the execution of these phases is influenced by three factors: (1) comparatist's jurisprudential outlook or the comparatist's general attitude to law which may be sociological or historically-oriented or positivistic, *ie,* concentration on the textual material;[136] (2) social context of the legal systems under comparison;[137] and (3) legal context of the legal topic or phenomena being compared in the case of micro-comparison.[138] These factors are similar to the factors identified by Bell and consistent with Sacco's concept of 'legal formants.'

Each chapter in this thesis focuses on a particular research question. Hence, the research done for each question usually begins with an enquiry on the relevant norms and legal concepts for the research question, an examination of the various views of the legal community on the relevant issues, and then a consideration of the relevant contexts (*eg,* the procedural system, institutional framework, other relevant political and cultural considerations). The choice of relevant norms and legal concepts for investigation is guided by the English, American and other Commonwealth decisions and scholarly writings which show the legal principles usually involved in the analysis of a particular Choice-of-Forum clause issue. The importance of referring to English, American and other Commonwealth decisions and scholarly writings is further highlighted by the fact that the four Asian jurisdictions have their legal systems patterned from the English (as regards Singapore, Hong Kong and Malaysia) and American (as regards the Philippines). Based on the research, the relevant case decisions are then identified from each jurisdiction in the hope that they would reveal how the relevant legal norms or concepts are applied, how the contrasting views are debated or settled, and how the analysis and decision is situated in the legal system and the wider cultural or political contexts. The legal reasoning in each case decision is then juxtaposed with the other decisions on the same or similar issues within the legal system and the other three jurisdictions in order to identify key similarities and differences. These similarities and differences are then accounted for and explained, before identifying key themes and lessons which are relevant to the thesis.

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[134] W J Kamba, 'Comparative Law A Theoretical Framework (1974) 23(3) *International and Comparative Law Quarterly* 485, 511-512.
[135] Ibid 512.
[136] Ibid 512-513.
[137] Ibid 513.
[138] Ibid 516.

The researcher's approach is very much influenced by his training and experience as a lawyer from the Philippines doing cross-border and foreign investments work. This training allowed him to appreciate the civil law system, the reasoning used in hybrid legal systems like the Philippines, and the complexities and practical problems surrounding cross-border transactions and dispute resolution in developing country settings. Likewise, his legal training in Australia, during LLM and PhD studies, and as a student completing the law subjects required for admission as a New South Wales lawyer, allowed a deep appreciation and familiarity with the common law and its reasoning. Certainly, this background and training have influenced the approach and analysis used in this thesis.

Chapter II.

The Nature of Choice-of-Forum Clauses

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A. Introduction

This chapter probes the varying approaches to Choice-of-Forum clauses by first examining the debates on their nature, primarily, the divergent characterisations, and then focusing on the debates among common law scholars. The chapter then introduces an approach – a framework of analysis – in looking at the issues that may arise in a Choice-of-Forum clause dispute. The general characterisation of these clauses by the courts of Singapore, Hong Kong, Malaysia and the

Philippines is then examined. To further understand their nature, the chapter then looks into the differences between Choice-of-Forum clauses and arbitration agreements and how the Choice-of-Forum clause relates to non-parties and the other provisions of the contract. The chapter then ends with a summary of key lessons.

B. The Varying Approaches to the Choice-of-Forum Clauses

1. The Debate on the Nature of Choice-of-Forum Clauses

(a) The Divergent Characterisations: Contract v Procedure

A strand of the debate would be to either characterise Choice-of-Forum clauses as either contractual or procedural, a debate which usually happens between common law and civil law jurisdictions. English common law decisions usually begin their analysis with a statement that says, 'the principle that a party should be bound by a jurisdiction clause to which he has agreed, unless there is strong reason to the contrary.'[139] This unmistakably contractual characterisation then signals the English courts' use of tools often associated with contract law. Hence, in common law, the Choice-of-Forum clause is considered a legally enforceable promise between parties, and thus a breach will not be sanctioned by the court unless there is a 'strong cause' to do so.[140] This approach is echoed in other common law jurisdictions. [141] In the United States, for instance, *The Bremen*[142] confirmed that a freely negotiated private international agreement, such as a forum clause, 'unaffected by fraud, undue influence, or overweening bargaining power,'[143] must be enforced.

The common law cases show that choosing a forum can be treated as a commodity worth bargaining for. If a party can waive certain protections by intentionally relinquishing them and forfeit their protections by ignorance (and the system is not then subverted), a party can also bargain away its litigation rights in exchange for consideration.[144] Furthermore, to enforce the

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[139] *The Eleftheria* [1970] P 94, 104.
[140] *Racecourse Betting Control Board v Secretary of the Air* (1944) Ch 114 ('Racecourse Betting'); *The Fehmarn* (1958) 1 WLR 159.
[141] See, eg, *Burrard-Yarrows Corp v The 'Hoegh Merchant'* [1982] 1 FC 248; [1983] 1 FC 495*; Nissho Iwai Corp v Paragon Grand Carriers Corp* (1987) 11 FTR 134; *Vokswagen Canada Ltd v Auto Haus Fröhlich Ltd* [1986] 1 WWR 380; JJ Fawcett, *Declining Jurisdiction in Private International Law: Reports to the XIV Congress of the International Academy of Comparative Law Athens, August 1994* (Clarendon Press, 1995) 137; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 79 ALR 9, 28 ('Oceanic Sun'); *Society of Lloyd's and Oxford Members' Agency Ltd v Hyslop* [1993] 3 NZLR 135, 142.
[142] *The Bremen* (n60).
[143] Ibid 12.
[144] Henry Noyes, 'If you (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image' (2006) 30(2) *Harvard Journal of Law and Policy* 579, 618-9.

contractual obligation, the court is willing to assist the party enforcing the contract with tools often used in preventing contractual breach – a stay order or an anti-suit injunction. Moreover, because Choice-of-Forum clauses are contracts, one can speak of them as a matter of a legal right not to be sued in a different court.[145] Hence, courts have awarded damages, albeit in extraordinary circumstances, to parties to compensate them for the costs of being sued in the wrong court or to penalise the other party for breaching the contract.[146]

The contractual characterisation extends not just to exclusive Choice-of-Forum clauses but even to non-exclusive clauses. Of course, the effect of the two varies, but this is because of the contractual nature given to them. As a contract, exclusive Choice-of-Forum clauses bind parties to a specific forum to the exclusion of any other forum because parties have agreed to such an exclusivity of jurisdiction to resolve their disputes. Non-exclusive Choice-of-Forum clauses, on the other hand, can have varied effects, depending on the words used by the parties, facts of the dispute, applicable choice-of-law rules, and procedural rules of the forum. What is common though is that parties are not limited to filing in just one forum. Rather, they have other options as to where to file, depending upon which jurisdictions the parties stipulated. In England, one important effect is that if an English court is named in the clause and a party chooses to file an action in that court, the other party is bound to recognise and proceed to litigate in such court.[147] This is because 'in the first place ... each of [the parties] does agree to submit to the jurisdiction if an action is brought against it' and '[s]econdly, as part and parcel of agreeing to submit to the jurisdiction each party must be taken to have recognised that this country would be an appropriate forum for the trial of the action.'[148] Similar effects have been given by Singapore and Hong Kong courts. In effect, the 'non-exclusive' becomes 'exclusive.' In other jurisdictions like Malaysia, the analysis does not provide this effect. Rather, a non-exclusive Choice-of-Forum clause is treated as only one among the many factors considered by the court to determine whether it is the natural forum for the dispute. England continues to apply this analysis to a non-exclusive clause that does not stipulate the courts of the forum.[149] In Singapore and Hong Kong, as will be discussed later in the thesis, courts also continue this approach when the parties intended or stipulated it to be so. Nonetheless, regardless of the common law jurisdiction involved, the starting point of the court's

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[145] Sara Sanchez Fernandez, 'Choice-of-Court Agreements: Breach and Damages Within the Brussels I Regime' [2010](12) *Yearbook of Private International Law* 377, 383.
[146] Eg, *Donohue v Armco* [2002] 1 Lloyd's Rep 425 ('Donohue').
[147] See *UBS AG v HSH Nordbank AG* [2009] 2 Lloyd's Rep 272, 287 ('UBS'); *British Aerospace Plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368, 376 ('British Aerospace').
[148] *Mercury v Communication Telesystems* [1999] 2 All ER 33, 40.
[149] See eg, *Chopra v Bank of Singapore* [2015] EWHC 1529, [140]-[154]; *Konkola Copper Mines plc v Cromin Ltd* (No 2) [2006] EWHC 1093, [31].

analysis is what the parties agreed – did the parties agree on just one jurisdiction to the exclusion of any other courts or did they agree to simply have a particular jurisdiction available for future litigation without excluding others? Clearly, this mode of analysis confirms the binding nature of the promises made by the parties to each other, even in situations where they end up having non-exclusive Choice-of-Forum clauses.

At the other end of the debate is the procedural characterisation of Choice-of-Forum clauses. This view is generally advocated by civil law jurisdictions and regimes which were strongly influenced by it, like, the *Brussels I Recast*. Takahashi noted that the European Economic and Social Committee excluded Choice-of-Forum clauses from the *Rome I Regulation*[149A] 'based on the same reasoning as that of procedural issues. This position is inherited from its predecessor, the *Rome Convention*,[149B] which also excluded a choice-of-court agreement on the same reasoning.'[150] The Giuliano-Lagarde Report provides a cogent expression of this procedural approach:

> There was a lively debate…on whether or not to exclude agreements on the choice of court. The majority in the end favoured exclusion for the following reasons: the matter lies within the sphere of procedure and forms part of the administration of justice (exercise of State authority).... It was also noted that rules on jurisdiction are a matter of public policy and there is only marginal scope for freedom of contract….[151]

Hence, in contrast to the contractual approach, the procedural characterisation of Choice-of-Forum clauses does not speak of rights or obligations arising from the agreement to sue in a particular forum and to desist from suing elsewhere. Instead, the analysis is framed from an administration of justice perspective – giving effect to Choice-of-Forum clauses is an exercise of the court's power to regulate its own jurisdiction which remains outside the parties' power, and over which they have no private rights.[152] In exercising its administration of justice powers, courts are given the discretion to resolve disputes by coming up with a solution which serves best the interests protected by its procedural rules, particularly, the orderly administration of justice. In the procedural approach, Choice-of-Forum clauses are recognised as special waivers of these default

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[149A] *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations* [2008] OJ L 177/6 ('Rome I Regulation').

[149B] *Convention on the Law Applicable to Contractual Obligations*, open for signature 19 June 1980, 19 ILM 1492 (1980) (entered into force 1 April 1991) ('Rome Convention').

[150] Koji Takahashi, 'Damages for Breach of Choice-of-Court Agreement' [2008](10) *Yearbook of Private International Law* 57, 67.

[151] Mario Giuliano and Paul Lagarde, Report on the Convention on the law applicable to contractual obligations, OJ C 1982, 21/10/1980, 11.

[152] See Edwin Peel, 'Forum Shopping in the European Judicial Area – Introductory Report' (Oxford Legal Studies Research Paper No 39/2006, University of Oxford Faculty of Law, September 2006) 2.

jurisdictional rules of the forum.[153] Hence, the civilian court approaches the Choice-of-Forum clause as the 'consent' of the parties which allows the court to ignore these default procedural rules, and not because of a contractual agreement of the parties.[154]

Even prior to the *Brussels Convention,* continental European countries usually approached Choice-of-Forum clauses as matters of procedure.[155] This is because in jurisdictions which adopted the Austrian inquisitorial procedural model, the 'mandatory character of procedural rules which are part of public law' is emphasised.[156] In this sense, because procedural rules are mandatory, and therefore, public law, they cannot be the subject of agreement between parties, and thus jurisdiction agreements cannot be contractual.[157] Nonetheless, the practice was not uniform. French courts, for example, had taken the view that jurisdiction involving matters with foreign elements, without exception, is a matter of purely private interest and not a matter of *ordre public*, thus emphasising the private law character of these clauses.[158] Consequently, in France, the construction of the rules of both territorial competence and exercise of jurisdiction on cases with foreign elements are construed based on the private interests involved.[159]

The civil law approach is important in understanding the Philippine approach, which as the discussion in the subsequent sections will highlight, consider Choice-of-Forum clauses as venue stipulations. Although Philippine courts, as this thesis will show, also provide contractual characteristics to certain aspects of the clause, the emphasis on the procedural nature can certainly explain why Philippine courts proceed with their analysis in such a manner. Furthermore, understanding the civil law approaches may also help understand the approaches of most of the jurisdictions in Asia, which are in the civil law tradition. Furthermore, international developments in treaty law, including the *Choice-of-Court Convention*, are also strongly influenced by the civil law approach.

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[153] See Joseph Perillo, 'Selected Forum Agreements in Western Europe,' (1964) 13(Winter) *American Journal of Comparative Law* 162, 162.
[154] See Ibid.
[155] Arthur Lenhoff, 'The Parties' Choice of a Forum: "Prorogation Agreements"' (1961) 15(3) *Rutgers Law Review* 414, 429, 454, 458, 466, 472-473, 481.
[156] Paul Oberhammer, 'Party Autonomy and Procedural Law: A Few Comments from an Austrian Perspective' in Mattias Dahlberg (ed), *Party Autonomy – Civil Procedural Views on Party Autonomy, Franz Klein, EU Law and more* (Iustus Förlag, 2011) 51, 60.
[157] Ibid 55-56, 61.
[158] Lenhoff (n155) 440.
[159] Ibid 441.

The next section shows that although the contractual approach underpins the common law approach, the effect of Choice-of-Forum clauses (*ie,* the issue of enforcement) is still determined by the procedural rules of the forum. Should the court exercise its jurisdiction or not, what remedies are available to enforce the Choice-of-Forum clause, what 'public interests' should the courts consider are all determined by forum law. Hence, 'while English courts attach a great deal of weight to party autonomy…that is always subordinate to the court's ability to police its own jurisdiction.'[160] Therefore, in one sense, as Merrett would point out, this shows the common law's convergence with the procedural approach of the civil law jurisdictions.[161] However, as she would also emphasise, the common law approach remains different because of the strong weight given to the parties' intention in its analysis and the unique private law consequences that follows breach like damages, albeit exceptionally awarded.[162]

(b) The Debate Among Common Law Scholars

When English courts in *Donohue v Armco*[163] ('Donohue') and other cases [164] began to award damages for breach of an exclusive English jurisdiction clause, this sparked fresh debates among the common law scholars on the nature of Choice-of-Forum clauses. Briggs, for example, considered damages the natural consequence of a breach of Choice-of-Forum clauses. He said that '[n]othing is more fundamental to the common law than the fact that breach of contract gives rise to a *right* to damages: that *pacta sunt servanda*, contracts are to be performed, and that damages for breach are a matter of right and entitlement.'[165] This position is also shared by Tan and Yeo who pinpointed that the 'breach of a jurisdiction clause, like the breach of any other contractual term, ought to ground an action for damages in the ordinary fashion.'[166] Some authors, like Tham, would also consider awarding damages for breach of Choice-of-Forum clauses but suggested to base it on tort law instead.[167]

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[160] Louise Merrett, 'Interpreting non-exclusive jurisdiction agreements' (2018) 14(1) *Journal of Private International Law* 38, 43.
[161] Ibid.
[162] Ibid.
[163] *Donohue* (n146) 443.
[164] *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517 ('Union Discount'); *A/S D/S Svendborg D/S of 1912 A/S Bodies Corporate trading in partnership as "Maersk Sealand" v Akar* [2003] EWHC 797.
[165] Briggs (n39) 10.
[166] Daniel Tan and Nik Yeo, Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy? [2003](4) *Lloyd's Maritime and Commercial Law Quarterly* 435, 437.
[167] Chee Ho Tham, 'Damages for breach of English jurisdiction clauses: more than meets the eye' [2004](1) *Lloyd's Maritime and Commercial Law Quarterly* 46, 71.

At the other end are scholars who argued that the approach taken in civil law jurisdictions is correct; thus, the award of damages for breaches of Choice-of-Forum clauses is inappropriate. Knight pointed out, for instance, that '[w]hat Professor Briggs does not really question…is the possibility that the methodology of the civilian…has a better understanding of what jurisdiction is about than the common law does.'[168] He argued that '[e]valuating the jurisdictional competencies of a judicial body is a quintessentially public law topic.'[169] Similarly, Ho argued that the Choice-of-Forum clause works only 'because the basis of jurisdiction is consent.'[170] In other words, a Choice-of-Forum clause is consent to the forum court's jurisdiction, nothing more.

Tham contradicted Ho's arguments by stressing that Choice-of-Forum clauses are not just between the parties and courts but also operate as mutual promises between the parties.[171] He argued that a jurisdiction clause 'does not merely operate as consent to the jurisdiction of the selected forum. It also operates at the level of mutual promise, the content of which will depend on the specifics of the clause itself…It is all a matter of construction.'[172]

While characterising Choice-of-Forum clauses as either contractual or procedural is convenient, there should be more to categorising them into either group. Tham's approach of recognising the two distinct relationships that are relevant in Choice-of-Forum clause analysis appears to point in the right direction. It is not helpful to simply ignore the strong procedural or public law character of these clauses, as raised by Knight and Ho. A way out from this debate is to characterise Choice-of-Forum clauses as having a dual procedural and contractual character. What warrants the application of either procedural or contract law would depend on the issue being resolved by the courts. Takahashi suggested that 'the issues forming part of the administration of justice which impinge directly on the resources of the State should be characterised as procedural and accordingly be determined by the law of the forum.'[173] As such, 'other issues should be characterised as substantive and accordingly be submitted to the normal choice-of-law process.'[174]

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[168] CJS Knight, 'The Damages of Damages: Agreements on Jurisdiction and Choice of Law' (2008) 4(3) *Journal of Private International Law* 501, 505.
[169] Ibid 507.
[170] Look Chan Ho, 'Anti-Suit Injunctions in Cross-Border Insolvency: A Restatement' (2003) 52(3) *International and Comparative Law Quarterly* 697, 708.
[171] Tham (n167) 57.
[172] Ibid 59.
[173] Takahashi (n150) 67.
[174] Ibid.

Takahashi's test is encouraging, but nonetheless may be hard to apply especially that issues which 'impinge directly on the resources of the State matters' may be hard to identify from those which are not. Furthermore, his test is vulnerable to the chicken-and-egg dilemma. As Knight had emphasised, '[d]ebates are always dependent upon starting points.'[175] For instance, the award of damages is inconceivable if the starting point of the analysis is that Choice-of-Forum clauses are procedural. However, if the regulation of jurisdiction is a matter of contract law, like in English law, there is room for private law principles of contractual party autonomy and *pacta sunt servanda*. By advocating that issues can be characterised differently, Takahashi appears to take this premise. Hence, unbundling of Choice-of-Forum issues may not be possible in some civil law jurisdictions which recognise Choice-of-Forum clauses as distinctly procedural.

Yeo also discussed a similar unbundling, albeit the distinction lies along the relationships identified by Tham. According to Yeo, 'the common law draws a distinction between the jurisdiction agreement as a contract, which is a matter of substance, and the effect of contract on the jurisdiction of the forum, which is a matter of procedure.'[176] This distinction allowed Yeo to categorise questions relating to the validity and interpretation as subject to the choice of law rules governing contracts.[177] On the other hand, the determination of the effect of a jurisdiction agreement (*eg,* what remedies are available and what are the requirements) is a matter of procedure. Therefore, 'the forum determines for itself how to give effect to the agreement of the parties (as interpreted in accordance with its governing law) in the light of its own rules of jurisdiction and judicial policies.'[178] In short, forum law resolves the issue of enforcement.

While Yeo recognised the dual character of Choice-of-Forum clauses, this analysis may be limited to common law jurisdictions and even when allowed, unbundling may still be difficult to achieve. For instance, when a court interprets the scope, the court is also determining the scope of the effects of the clause. Moreover, the court may be required to determine the remedies it may provide under the clause; and in a situation where the clause mentions a foreign principle or uses a linguistic label which is different from the one being used in the forum, the court may be required to determine whether there is a similar principle or remedy in the forum and whether it is willing to give the same. Answering these issues may require references to forum law. Furthermore, the

[175] Knight (n168) 512.
[176] Yeo Tiong Min, 'The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements' (2005) 17(1) *Singapore Academy of Law Journal* 306, 314.
[177] Ibid.
[178] Ibid 315.

forum has no power to award forms of relief existing under foreign law which has no counterpart under forum law.[179]

Moreover, Knight emphasised that even if the Choice-of-Forum clause is read as a private law matter, there is an important difference that sets them apart from any other contracts, such that remedies like damages for breach of these clauses, may not be acceptable.[180] '[T]here can be little uncertainty that the principle of damages for breach of jurisdiction agreements risks antagonising foreign courts….'[181] In short, Choice-of-Forum clauses, being distinctly transnational, the interests of foreign countries and the international community (in accordance with comity) should also be included in the analysis. The contractual approach, of course, already considers these matters, but between contractual promises and comity, there is a strong propensity to dismiss comity and resolve Choice-of-Forum clause disputes as a matter of contract between the parties. This point is expounded in Chapter 7.

What do these discussions suggest for the understanding of the nature of Choice-of-Forum clauses? Takahashi's approach of unbundling the issues still appears to be an attractive path as it recognises that not all issues about Choice-of-Forum clauses concern the administration of justice. Notably, recognition of the need to unbundle, and not to categorically classify Choice-of-Forum clauses into either procedural or contractual appears to be the path taken by the *Choice-of-Court Convention* and the *Brussels I Recast*. Article 6 of the *Choice-of-Court Convention*, for instance, provides that an exclusive Choice-of-Forum clause's validity is determined by the law of the chosen court.[182] Similarly, the law of the chosen court of the European Union member state determines the validity of the Choice-of-Forum clause under Article 25 of the *Brussels I Recast*.[183] Hence, by allowing foreign law to determine the validity of Choice-of-Forum clauses, the *Choice-of-Court Convention* and the *Brussels I Recast* recognise that Choice-of-Forum clauses are not just procedural but are also substantive in nature. Hence, forum law does not necessarily determine all aspects of Choice-of-Forum clauses, which is the case if they are categorised as fully procedural. Nonetheless, this dual treatment of Choice-of-Forum clauses is only possible because it was agreed to be so in an international convention or a regional organisation instrument. Recognition of the differences in approaches and the interaction of common law and civil law allowed such development in the European Union and the Hague Conference.

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[179] Garnett (n43) 295.
[180] Knight (n168) 512.
[181] Ibid.
[182] *Choice-of-Court Convention* (70), art 6.
[183] *Brussels I Recast* (n72A), art 25.

One must note that between the civil law and common law traditions, the latter appears to be more open to recognising the dual character of Choice-of-Forum clauses and the possibility of unbundling the issues involved. Although the common law has a distinctly contractual approach to the Choice-of-Forum clauses, matters regarding the enforceability of Choice-of-Forum clauses are considered procedural in common law. Furthermore, the 'ouster' rule has long prevailed in the common law countries – parties cannot by contract create a jurisdiction which the courts do not have and cannot by contract remove a jurisdiction which the courts do have. Hence, as the succeeding chapter shows, even in common law, Choice-of-Forum clauses are considered to have an administration of justice function, one that involves the regulation of jurisdiction. In contrast, the civil law's procedural position may close the door to recognising the contractual character of Choice-of-Forum clauses, unless, of course, there is an international treaty which changes the approach. Matters of public law, like procedural rules, simply do not provide any space for private rights to be recognised. Choice-of-Forum clauses, which express the consent of parties to the court's jurisdiction is like any other bases of jurisdiction. As Ho emphasised, '[t]he forum selection clause works only "because the basis of jurisdiction is consent".'[184] Court-led reforms towards the recognition of the dual character of Choice-of-Forum clauses, including the need to unbundle the issues, may be more difficult to achieve in civil law jurisdictions.

2. The Challenge of Classifying Choice-of-Forum Issues

(a) The Difficulty of Classifying Issues

Identifying which specific issues concerning Choice-of-Forum clauses should be classified as procedural/public or contractual/substantive/private is contentious. How does a Choice-of-Forum clause issue acquire an administrative connotation? When is an issue about the substantive rights of parties? This exercise is difficult even in common law jurisdictions, where unbundling of issues may be possible, because '[t]he concepts of substance and procedure were…often blurred and overlapping….'[185] Furthermore, the right-remedy distinction may not be very helpful especially that parties seek the enforcement of Choice-of-Forum clauses both as a matter of remedy and right. Characterising which issues or matters are procedural or substantive are important as matters

[184] Ho (n170) 708.
[185] Garnett (n43) 7.

of substance are governed by the choice of law rules while matters of procedure are generally governed by the law of the forum.

Takahashi suggested that issues about administration of justice which impinge directly on the resources of the state should be characterised as procedural. This echoes earlier formulations by Balduinus who defined procedural rules as norms which were '*ad ordinandam litem*' or the rules by which the judge conducted the proceedings.[186] In the Australian High Court case of *McKain v RW Miller & Co (South Australia) Pty Ltd*, Mason CJ suggested that 'the essence of what is procedural may be found in those rules directed to governing or regulating the mode or conduct of proceedings.'[187] Lorenzen formulated a similar test earlier when he defined procedure as 'that branch of law which governs the process of litigation.'[188] These statements imply that procedure should be understood as having an administrative connotation, relating to judicial machinery or protocol.[189] It must be noted, however, that procedural rules vary from one jurisdiction to another, albeit what constitutes procedure is often not explicitly defined in many jurisdictions, and contained in one corpus of procedural law. Moreover, in litigation, the range of issues that may come out may not be foreseeable; thus, creating a list of issues requiring the application of rules which may be characterised as procedural may be problematic. What is clear though is that issues that may be considered procedural are those that concern the relationship between the parties vis-à-vis the courts.

How about approaching the problem from the other end and define first what is substantive? This approach was used in *John Pfeiffer Pty Ltd v Rogerson* where the Australian High Court defined first what is substantive – 'matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action' are substantive, with everything else (presumably) procedural.[190] This test has been understood as an 'outcome determinative' formulation, 'whereby any rule which has the effect of altering the result of a given case will be classified as substantive.'[191] Nonetheless, as Garnett noted, this test has a clear flaw since potentially any procedural rule in a given context may affect the rights and duties of the parties and so alter the result.[192] He noted that many laws regulating the mode or conduct of court proceedings may also have a material effect

[186] Ibid 6.
[187] *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, 26.
[188] See Garnett (n43) 8.
[189] See Ibid.
[190] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [99]; Garnett (n43) 21.
[191] Garnett (n43) 21.
[192] Ibid.

on the outcome of a case.[193] Garnett argued that where 'a matter clearly falls within the scope of "mode or conduct of proceedings," the fact that it may also be outcome determinative should not disturb its procedural characterization.'[194]

At this point, to determine which issues are procedural and which issues are substantive, it may be useful to briefly describe what happens in litigation involving Choice-of-Forum clauses. In any international civil litigation, the first step is to determine whether the court has jurisdiction. In civil law countries, jurisdiction over the defendant is usually based on his domicile in the place where the action is brought, his ownership over a property in that place, or the existence of some connection with the law of that place.[195] Likewise, the civilian court also acquires jurisdiction when parties give their 'consent.' Notably, Choice-of-Forum clause are considered as 'consent' of the parties which allows the court to ignore default procedural rules.[196] Moreover, it does not necessarily presuppose that the chosen court would, in the absence of a stipulation, have jurisdiction over the case.[197] Whether the law of the stipulated forum provides for the creation of judicial authority by stipulation, a question often treated as a procedural matter, is an important question for the Choice-of-Forum clause to be given effect.[198] Furthermore, in most continental European states, when parties agree to 'confer' exclusive jurisdiction on the courts of a state, they surrender their legal privileges to bring an action in any other state, and their privileges to object to the jurisdiction of the state.[199]

In common law jurisdictions, jurisdiction is established by service of process.[200] Briggs' discussion of the English common law procedure illustrates the process usually followed in many common law jurisdictions including Singapore, Hong Kong and Malaysia. According to Briggs, often the question faced by the plaintiff or claimant is one of how and when the claimant may serve process upon a defendant.[201] If the defendant is present within the court's territorial jurisdiction, the claimant has a right to serve him.[202] If the defendant is outside, with no appointed agent to accept processes on his behalf, the claimant has no right to serve him.[203] Instead, the

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[193] Ibid 22.
[194] Ibid.
[195] Ernest Lorenzen, 'Huber's De Conflictu Legum' (1919) 13(2) *Illinois Law Review* 375, 390.
[196] See Perillo (n153) 162.
[197] Lenhoff (n155) 417
[198] See Ibid 417, 466, 473
[199] Perillo (n153) 162.
[200] Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 6th ed, 2015) 380.
[201] Ibid.
[202] Ibid.
[203] Ibid.

claimant has to obtain permission from the court for service out of the jurisdiction, subject to exceptions provided by law.[204] The grounds for the granting of such leave are generally based on connections between the forum and one of the following: the defendant, the subject matter of the dispute, or the cause of action.[205] Before leave is granted, the court must be satisfied that there is a good arguable case that the situation falls within one of the provisions providing for service of process out of jurisdiction,[206] that there is a serious issue to be tried on the merits,[207] and that it is a proper case for leave to be granted, which would require establishing that the court is the most appropriate forum to hear the case.[208] Similarly, where the defendant is out of the jurisdiction, a Choice-of-Forum clause (where it stipulates the forum courts) provides a firm basis for permission to serve out of the jurisdiction.[209] Nonetheless, in both situations, an agreement on jurisdiction for the English courts does not, as a matter of common law, establish the jurisdiction of the court: only service does that.[210]

After establishing subject matter and personal jurisdiction, the court should decide whether it will exercise this jurisdiction. In most common law countries, this involves largely the consideration of the 'natural forum' doctrine, also known as *forum non conveniens* or *forum conveniens* principle. Talking about the experience of Singapore courts, Yeo describes what happens at this stage:

> This question involves balancing the considerations of the interests of the parties involved (especially factors of costs and convenience), as well as wider concerns of convenience and justice to third parties involved in the litigation, wastage of resources, the risk of inconsistent judgments from different courts and justice in the broadest sense, as well as… international comity….[211]

In asking the court to exercise its jurisdiction, the plaintiff may pray for relief including an anti-suit injunction to restrain the defendant from commencing or continuing proceedings in another country.[212] Notably, an exclusive Choice-of-Forum clause in favour of English courts (and also for courts in other common law jurisdictions) may provide a cause of action for such anti-suit injunction to prevent a party in breach of it from suing in a court overseas, or controversially, ask

[204] Ibid.
[205] See, eg, 6B PD 3.1. (UK).
[206] Briggs (n200) 461.
[207] Ibid 462.
[208] Ibid 461-462.
[209] Ibid 431-432.
[210] Ibid 431.
[211] Yeo (n176) 311.
[212] Briggs (n200) 469.

for damages for breach of contract if any loss is proved.[213] In the case of an exclusive Choice-of-Forum clause stipulating a foreign court, the challenge may be in the form of a stay application.[214] A foreign exclusive Choice-of-Forum clause does not, however, as a matter of common law, oust or deny the jurisdiction established by service, but it does provide a firm basis for an application for a stay of those proceedings.[215]

Issues arising at the jurisdictional stage – whether service of process on a defendant has been made properly (the question of how and when the claimant may serve process upon a defendant), whether there are grounds for service out of the jurisdiction, whether a stay order should be issued, can the court issue a stay or anti-suit injunction, whether an anti-suit injunction should be issued – are generally procedural. Nonetheless, true to its nature, cases involving the enforcement of Choice-of-Forum clause would still require courts to resolve issues which fundamentally deal with the rights of parties before they can proceed to provide the relief sought. This is cogently noted by Briggs:

> Rights come before remedies; grounds come before relief. Before coming to the question of enforcement, a court will need to determine any questions of construction, validity, nature, and scope (material and personal) of the parties' agreement on choice of court on which the application will turn.[216]

Garnett similarly argued when he invited a re-examination of the nature of enforcement of Choice-of-Forum clauses as procedural. He noted that courts generally enforce Choice-of-Forum clauses through stay orders or anti-suit injunction, unless the claimant shows 'strong reasons' for the forum to retain or decline jurisdiction in each case.[217] Hence, while there is a connection with the forum's interest in determining access to its courts, the forum court is also being asked to enforce a contract of the parties with clear outcome determinative effect.[218] He therefore argued that 'enforceability of jurisdiction clauses is primarily contractual rather than jurisdictional and should be treated as substantive and governed by the law applicable to the clause.'[219]

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[213] Ibid 432.
[214] Ibid 431-432.
[215] Ibid 432.
[216] Ibid.
[217] Garnett (n43) 108.
[218] Ibid.
[219] Ibid.

In short, in a case which requires the court to enforce a Choice-of-Forum clause and to issue the relief sought, the courts may need to answer first issues which go beyond the court's exercise of governing or regulating 'the mode or conduct of proceedings.' Briggs have identified some of these issues earlier – 'questions of construction, validity, nature, and scope (material and personal) of the parties' agreement on choice of court.'[220] In these situations, the court may need to refer to its treasure chest of choice of law rules to answer these issues, and not just to the forum's procedural rules. Similarly, Garnett noted three main issues which may require the application of choice of law rules: the interpretation and meaning of the clause, formal and essential validity of the clause, and enforceability of the clause.[221] The choice of law rules used by courts in the four Asian jurisdictions to answer these issues are discussed in Chapter 6. At this point, it suffices to say that there are issues which are clearly substantive and require the application of choice of law rules.

Before going further, it may be helpful to discuss more the issue of interpretation of Choice-of-Forum clauses. Garnett, for instance, noted that the issue of interpretation has two aspects. One deals with whether the clause is 'exclusive' or 'non-exclusive' which is always determined by forum law.[222] Another is whether the clause, as a matter of scope, applies to the claims pleaded by the claimant against the defendant, which is an issue determined by the law governing the clause.[223] Hence, interpretation of a Choice-of-Forum clause may involve the application of both the forum law and the choice of law rule, which may point towards the application of a foreign law. Furthermore, as mentioned, there are instances during interpretation where the court may need to refer to its own procedural rules in determining whether there is an equivalent principle or remedy in the forum when the term used in the clause is different from the remedies or principles in the forum. As earlier noted, the forum has no power to award relief existing under foreign law which has no counterpart under the law of the forum.[224] Garnett also noted that even if the enforcement of Choice-of-Forum clauses is treated as procedural, common law courts have referred to foreign law in answering whether the foreign court would itself have jurisdiction over the dispute.[225] Hence, while the matter of enforcement is considered procedural, it may not be wholly subject to forum law (thus, his argument for a substantive treatment of the enforceability issue to avoid this situation).[226]

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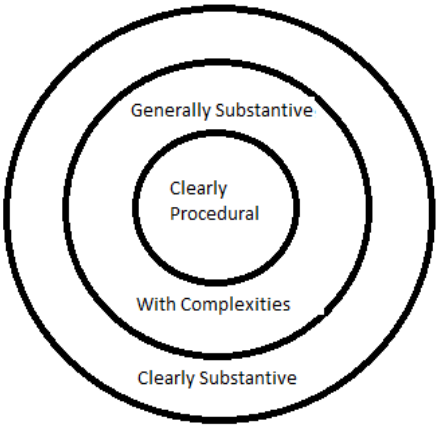
[220] Briggs (n200) 432.
[221] Garnett (n43) 105.
[222] Ibid.
[223] Ibid 106.
[224] Ibid 295.
[225] Ibid 108.
[226] Ibid.

(b) The Conceptual Framework of Classifying Issues

Based on these discussions, the issues related to the Choice-of-Forum litigation may be illustrated by three concentric circles:



This conceptual framework addresses the concerns of Knight and Ho that Choice-of-Forum clauses have a strong procedural or public law character – at its core, it involves the regulation of adjudicatory jurisdiction. It is therefore apt to put these issues at the core, as most likely these are the basic issues the court is required to deal with assuming that there are no issues in between parties. These are issues which are exclusively between the parties vis-à-vis the court, or those which deal with the court governing or regulating 'the mode or conduct of proceedings.' Examples of these procedural issues would be whether service of process on a defendant has been properly made (the question of how and when the claimant may serve process upon a defendant), whether there are grounds for service out of the jurisdiction, whether the grounds for the issuance of a stay order are present, can the court issue a stay or anti-suit injunction, whether a stay or an anti-suit injunction should be issued.

As the case becomes more complex, the court may need to look at issues which are substantive and come up with an adjudication of issues which allocates the rights between the parties. Hence, the court must move from the core to the outer circles. Represented by the two outer circles, these areas which contain substantive issues, acknowledge the second relationship recognised by Tham, *ie,* Choice-of-Forum clauses also represents mutual promises between the parties. Inclusion of these areas in the framework also reflects the approach in the *Choice-of-Court Convention* and the *Brussels I Recast*. Issues in the outermost circle are those substantive issues which

clearly concern the relationship of the parties. A good example would be issues concerning the essential validity of the Choice-of-Forum clause.

In the middle would be the area for issues which are characterised by their substantive dimension plus a close connection with the procedural or forum law, or vice versa. These issues require the application of forum law and/or choice of law rules, or foreign law. Within this middle circle are issues which have several aspects to them, *ie,* there is a further need to divide the issue and apply either the forum law and choice of law rules depending on the aspect being resolved. Also, within this area are issues which became problematic because the Choice-of-Forum clause uses terms which are alien or different from those available in the forum (*eg,* an application for an anti-suit injunction is named as among the actions a chosen court has jurisdiction when in fact its procedural rules do not provide for such remedy). Likewise included are issues which are traditionally classified as procedural, but their resolution requires reference to foreign law (*eg,* whether the foreign court chosen has jurisdiction over the dispute).

Based on these discussions and the conceptual framework developed, the following arguments can me made:

(1) a wholesale characterisation of Choice-of-Forum clause issues as either procedural/public or contractual/substantive/private is not helpful in understanding the nature of Choice-of-Forum clauses;
(2) Choice-of-Forum clause issues can be procedural or substantive depending on whether they concern the court's governing or regulating 'the mode or conduct of proceedings,' or otherwise;
(3) the determination of private rights of parties based on their Choice-of-Forum clause may involve procedural and substantive issues; and
(4) there are issues which are complex and can be difficult to resolve because their characterisation may depend on the complex interaction between characterisation, forum procedure, and forum choice of law process.

Nonetheless, as the succeeding chapters would show, the resolution of these issues is further circumscribed by three main areas of limitations – party interests which are reflected in their exercise of party autonomy, forum state interests which are reflected in its mandatory rules and public policy, and international community interests which are usually reflected in the principle of 'comity' and other international treaties and norms.

C. What is the Nature of Choice-of-Forum Clauses According to Asian Courts?

The Asian jurisdictions examined in this thesis recognise the dual character of Choice-of-Forum clauses as both a matter of contract and procedure, albeit to varying degrees. Hence, when courts enforce Choice-of-Forum clauses, their analyses do not only apply the principles of contract law, they juxtapose the parties' contractual rights with procedural rules and public interest, especially the court's core function of administering justice. The extent that courts lean towards contract law vis-à-vis procedural or public law vary across the four jurisdictions. Singapore and Hong Kong appear to favour more the contractual characterisation before exercising their discretion to apply procedural or public law principles in their analysis. In contrast, Malaysia and much further, the Philippines, have zealously emphasised court discretion and the public interests involved. This section provides a glimpse of these approaches.

The differences in approaches can be explained partly by the legal history of these jurisdictions. Singapore, Hong Kong and Malaysia are former British colonies, and consider as the building block of their legal systems, the English common law. Hence, the courts of these jurisdictions refer to English common law decisions as well as the decisions of the other Commonwealth countries, including each other's decisions. Malaysia's contract law, which is derived from common law, is primarily contained in *Contracts Act 1950*.[226A] Key differences, however, exist between each other's approaches largely because of the subsequent historical developments and differences in socio-cultural and political institutions and economic objectives, which will be discussed in subsequent chapters.

On the other hand, the Philippines, having been a Spanish and then an American colony, has become a hybrid civil law and common law jurisdiction. Much of its private law is contained in the *Civil Code of 1949* (Republic Act No 386), with most provisions derived from the colonial Spanish *Civil Code of 1889* as well as the civil codes of Latin American countries and some continental European countries.[227] Because of the American colonial rule and extensive reference to American case law, Philippine contract law has also adopted and referred at the doctrines and approaches of the American federal courts as well as the state courts of the various component

[226A] *Contracts Act 1950* (Malaysia).
[227] See Arturo Tolentino, *Commentaries and Jurisprudence on the Civil Code of the Philippines* (Central Professional Books, Inc, 1990) vol 1, 6-10.

states.[228] This has largely been achieved through the doctrine of precedent, another legacy of the American colonial rule.[229] Hence, judicial decisions form part of Philippine law.[230] Civil procedure, on the other hand, is largely American in origin, incorporating its adversarial approach and common law rules of civil procedure.[231] Notable common law remedies, however, are absent such as stay applications and anti-suit injunctions. The Philippines likewise does not have jury trials.

1. Singapore, Hong Kong and Malaysia

The Singaporean approach is illustrated in *Baiduri Bank Bhd v Dong Sui Hung*,[232] ('Baiduri') where the Singaporean High Court endeavoured to look into the agreement of parties in their Choice-of-Forum clause. By recognising that non-exclusive Choice-of-Forum clauses cannot just be grouped into one category but several, and that they are differently worded, and thus can have different effects,[233] the Singaporean High Court recognised Choice-of-Forum clauses as contracts with various effects depending on what is stated in the clause. Furthermore, the court also recognised the public or procedural law side of the analysis:

> …when deciding the question whether to decline jurisdiction in favour of a foreign jurisdiction because of the exclusive foreign jurisdiction clause, the pure contractual principle must necessarily be balanced against the plaintiff's right to have the matter heard and tried in Singapore, which he has established under the law here.[234]

This recognition of the dual nature of Choice-of-Forum clauses is also evident in the decision of the Hong Kong Court of First Instance ('Hong Kong CFI') in *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* ('Noble Power'):

> …when dealing with questions of jurisdiction and forum, as a matter of public policy, it is for the courts ultimately to determine where the interests of justice lie, and the courts may, in exceptional circumstances, ignore the contractual bargain between the parties.[235]

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[228] See Pacifico Agabin, *Mestizo: The Story of the Philippine Legal System* (University of the Philippines College of Law, 2011) 203-216.
[229] See Ibid 201-202.
[230] *Civil Code* (Philippines), art 8.
[231] Agabin (n228) 190-191.
[232] *Baiduri Bank Bhd v Dong Sui Hung* [2000] 2 SLR (R) 271 ('Baiduri').
[233] Ibid 276-277, 281-82.
[234] Ibid 279 [17] (High Court).
[235] *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] HKCA 255, [27] (Court of Appeal) ('Noble Power').

By contrast, the Malaysian Court of Appeal in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong*,[236] ('Inter Maritime') has strongly rejected an approach which undermines court discretion and would reduce the Choice-of-Forum clause analysis to a mere application of contractual principles.[237] In short, the Malaysian court rejected a purely contractual type of analysis, thus again recognising the dual nature of Choice-of-Forum clauses. The Malaysian court rejected the United States decision, *The Bremen*, by refusing enforcement of Choice-of-Forum clauses based only on grounds that effectively negate consent:

> in Zapata, a judge hearing an application for a stay mounted on a forum selection clause would have no discretion at all in the matter. He may only refuse a stay on grounds sufficient to avoid a contract, that is to say, grounds that effectively negate consent…. An adoption of the Zapata test by this court would…put at risk…authority…that recognize a wide discretion in a judge hearing an application for a stay….[238]

What issues are considered contractual or procedural in Singapore, Hong Kong and Malaysia are discussed in Chapters 4, 6 and 7. In brief, those issues concerning the enforcement of Choice-of-Forum clauses like requirements to allow service out of jurisdiction, granting of relief such as stay orders and anti-suit injunctions, and enforcement and recognition of foreign judgments are resolved by applying domestic procedural rules, thus implying their procedural characterisation. On the other hand, those issues about existence, validity and interpretation are resolved according to the law applicable to the contract or the forum's contract law, thus implying the substantive or contractual characterisation of these issues. Lastly, certain issues discussed in Chapter 7 have a distinctly public law dimension, thus requiring the application of mandatory rules and public policy.

2. The Philippines

In contrast, the Philippines has been ambiguous on its treatment of Choice-of-Forum clauses. In fact, the Philippine Supreme Court has not categorically declared what is the nature of these clauses under Philippine law. Nonetheless, it recognises that these clauses are valid and enforceable; but the basis for such treatment has not been explicit.

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[236] *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322 (Court of Appeal of Kuala Lumpur) ('Inter Maritime').
[237] Ibid 336.
[238] Ibid.

There are two possible sources for recognising Choice-of-Forum clauses in the Philippines. One arises from contract and another, from the Philippine procedural rules. Article 1306 of the *Civil Code* states that:

> The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.

Scholarly writings and legal opinions have cited this provision as the authority behind a whole range of contractual stipulations including Choice-of-Law and Choice-of-Forum clauses.[239]

Meanwhile, Rule 4, section 4(b) of the Philippine *Rules of Court* excepts parties from the mandatory application of the rules on venue:

> [w]here the parties have validly agreed in writing before the filing of the action on the exclusive venue thereof.

While this rule does not deal with jurisdiction but venue issues (*ie,* to which court that has jurisdiction should the dispute be brought), Philippine decisions have treated Choice-of-Forum clauses as falling within the ambit of this rule; thus, the rule on exclusivity of the choice as provided in Rule 4 has been strongly emphasised. In *Hong Kong and Shanghai Banking Corporation v Sherman* ('HSBC'), the Philippine Supreme Court applied Rule 4, Section 4(b) to determine whether it should dismiss the case filed in the Philippines in favour of Singapore, the forum named in the parties' Choice-of-Forum clause for lack of jurisdiction. Highlighting the technical requirements of Rule 4, Section 4(b), the court pinpointed that because the parties did not use words implying exclusivity in their choice of the courts of Singapore as the jurisdiction which can resolve their disputes, the parties, in effect, did not exclude other courts, including the Philippine courts.[240] The court did not dismiss the case in favour of the Singapore courts.[241] In *Philippine Banking Corporation v Tensuan* ('Tensuan'), the Supreme Court stated that the approach in *HSBC* is consistent with the other cases involving domestic Choice-of-Forum clauses, which all applied Rule 4, section 4(b).[242] The Supreme Court, in effect, confirmed that Choice-of-Forum clauses are venue stipulations.[243]

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[239] See, eg, Elizabeth Aguiling-Pangalangan, 'Chapter 9 Philippines' in Alejandro Carballo Leyda (ed) *Asian Conflict of Laws* (Kluwer Law International, 2015) 157, 161; Herminio Ozaeta and Marie Camille Bautista, 'Security over Collateral Philippines', *Lex Mundi* (Web Page) <http://www.lexmundi.com/images/lexmundi/practicegroups/bankfinance/socsurvey/philippines.pdf>.
[240] *Hong Kong and Shanghai Banking Corporation v Sherman* (1989) 176 SCRA 331, 337-338 ('HSBC').
[241] Ibid 338.
[242] *Philippine Banking Corporation v Tensuan* (1994) 230 SCRA 413, 420 ('Tensuan').
[243] Ibid.

The treatment of Choice-of-Forum clauses as agreements on venue and not on jurisdiction has also been approved in *Philippine International Trading Corporation v MV Zileena*[244] ('MV Zileena'). The court said that since parties cannot stipulate on jurisdiction but only on venue, then a Choice-of-Forum clause can only be a venue stipulation.[245] The Choice-of-Forum clause, on its own terms, clearly conferred exclusive jurisdiction to the Singapore High Court.[246] Nonetheless, the court said that such a clause could not be a '*competencia*' or an agreement on court jurisdiction, thus, 'the parties must have intended to fix the venue only, for jurisdiction over an action is conferred by law, and may not be changed by mere agreement of the parties….'[247]

Hence, the Philippines recognises Choice-of-Forum clauses but not as contracts vesting courts with jurisdiction, but as venue stipulations allowed by Rule 4, Section 4(b) of the *Rules of Court*. Notably, the decisions of the Supreme Court do not limit the choices available to domestic courts. Parties are also allowed to choose foreign courts as venues for these disputes. However, this choice, like any venue stipulations, must be exclusive and comply with the other formal requirements of Rule 4, Section 4(b).[248]

Moreover, in *Saudi Arabian Airlines (Saudia) v Rebensencio,*[249] ('Saudia') the Philippine Supreme Court has emphasised that aside from the need to comply with the technical requirements, the parties' choice of a forum is still subject to certain considerations – 'the availability and adequacy of recourse to a foreign tribunal…and…the question of where, as between the forum court and a foreign court, the balance of interests inhering in a dispute weighs more heavily.'[250] This explicitly brings into the equation the other public law considerations in the Philippine Choice-of-Forum clause analysis.

While the similarities and differences of the Philippine approach with Singapore, Hong Kong, and Malaysia are discussed throughout the thesis, it may be helpful to briefly outline them here. First, because Choice-of-Forum clauses are not seen as contracts capable of vesting parties with private rights, they may not be cited to avail remedies usually granted under contract law, such as damages, rescission or specific performance. Second, these clauses do not in any way affect the grant of leave to serve process extraterritorially. Rather, grant of leave to serve extraterritorially

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[244] *Philippine International Trading Corporation v MV Zileena* (1992) 215 SCRA 309 ('MV Zileena').
[245] Ibid 312-3.
[246] Ibid 310.
[247] Ibid 312-3.
[248] See *HSBC* (n240) 337-8.
[249] *Saudi Arabian Airlines (Saudia) and Brenda J Betia v Ma Jopette M Rebensencio* (2015) 746 SCRA 140, 169 ('Saudia').
[250] Ibid.

is based solely on meeting the procedural requirements under Rule 14, Section 15 of the *Rules of Court*,[251] which does not mention Choice-of-Forum clauses as a ground. Third, while Choice-of-Forum clauses stipulating foreign courts inform the exercise of discretion in granting a motion to dismiss under Rule 16, they are not considered through the grounds associated with jurisdiction (*e.g.,* non-existent subject-matter or personal jurisdiction),[252] but rather through other grounds, as argued in Chapter 3, such as improper venue,[253] *lis pendens*,[254] *res judicata*[255] or non-compliance with a condition precedent.[256] Fourth, as discussed in Chapter 4, their role in the *forum non conveniens* test, which may be argued at the merits stage, is subordinate to administration of justice and public interest factors. Lastly, as discussed Chapter 5, because Choice-of-Forum clauses are venue stipulations, issues of validity and interpretation are determined not by the law chosen by the choice of law process but by forum law. Furthermore, unlike in common law, even the parties' intention do not generally play a role in the interpretation of these clauses.

D. Differentiating Choice-of-Forum Clauses from Arbitration Agreements

1. Similar yet Different

As far back as 1796, beginning with *Gienar v Meyer,* English courts held that parties may agree to designate a forum to resolve their disputes.[257] In English law, however, the acceptance of Choice-of-Forum clauses really came through the path of arbitration agreements. The *Common Law Procedure Act 1854* was the first of several English statutes providing for a stay of proceedings where a contract contained a stipulation for submission of disputes to arbitration. In *Law v Garret*,[258] ('Garret') an English court, in staying proceedings instituted in contravention of a Choice-of-Forum clause, treated such clause as amounting to arbitration within the meaning of the English arbitration statute, thus allowing the court to grant a stay. Notably, *Garret* established the following: (1) the power of English courts to stay proceedings in breach of a Choice-of-Forum clause, (2) the power of parties to select courts for their disputes, and (3) the readiness of courts to provide a legal remedy. It was not clear, however, why English courts had to rely on the arbitration statutes

[251] *Dial Corp v Soriano* (1988) 161 SCRA 737, 742.
[252] *Rules of Court* (Philippines) r16, s1(a)-(b).
[253] Ibid s1(c).
[254] Ibid s1(e).
[255] Ibid s1(f).
[256] Ibid s1(j).
[257] *Gienar v Meyer* (1796)126 ER 728, 729.
[258] *Law v Garret* (1878) 8 Ch D 26 ('Garret').

and not the authority of cases like *Gienar v Meyer*.[259] Nonetheless, *Garret* became the authority and its reasoning was followed in later English, Canadian and Australian cases.[260] Curiously, the earliest recorded case in Hong Kong which involved Choice-of-Forum clauses, the 1905 case of *Schwer and Others v Von Uffel*,[261] mentioned *Garret*,[262] but questioned its applicability to cases involving Choice-of-Forum clauses.[263] In that case, the Hong Kong Supreme Court Chief Justice correctly noted that an arbitral award is different from a foreign judgment, and thus, pointed out that the applicable procedure may be different.[264]

In England, however, it was only in *Racecourse Betting*,[265] when English courts started to ground their decisions on contract law rather than on arbitration laws. In that case, Lord Greene lamented: "[i]t is…rather unfortunate that the power and duty of the court to stay the action was said to be under s. 4 of the *Arbitration Act*, 1889. In truth, that power and duty arose under a wider general principle….court makes people abide by their contracts….'[266] Hence, in *The Fehmarn,*[267] the English Court of Appeal, through Lord Denning stated, 'I do not regard this provision as equal to an arbitration clause…..'[268] The confusion, however, did not stop there.

The confusion stems from the similarities between the two clauses. First, both are dispute resolution clauses. Second, both identify the jurisdiction, venue or institution which will resolve the dispute. Third, both are products of procedural party autonomy. Fourth, both are capable of being enforced independent of the validity of the main contract. Fifth, both are supposed to facilitate international trade and enhanced judicial cooperation through acknowledgment of judgments or arbitral awards, as the case may be. Sixth, the resolution of the dispute is through (a theoretically) independent non-partisan judge(s) who will decide the case and its decision is binding on the parties (subject to appeal in the case of litigation). Because of these similarities, courts and scholars are prone to draw analogies between Choice-of-Forum clauses and arbitration agreements, and then conclude that certain effects should be similar.[269]

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[259] Zelman Cowen and Derek Mendes Da Costa, 'The Contractual Forum: Situation in England and the British Commonwealth' (1964) 13(1) *American Journal of Comparative Law* 179, 182.
[260] Ibid.
[261] *Schwer and Others v Von Uffel* (Unreported, Supreme Court of Hong Kong, CJ, 11 September 1905).
[262] Ibid 8.
[263] Ibid 9.
[264] Ibid.
[265] *Racecourse Betting* (n140) 126.
[266] Ibid.
[267] *The Fehmarn* (n140).
[268] Ibid 162.
[269] See *Scherk v Alberto-Culver Co*, 417 US 506, 519 (1974); David Taylor, 'The Forum Selection Clause: A Tale of Two Concepts' (1993) 66(3) *Temple Law Review* 785, 787; Ingrid Farquharson, 'Choice of Forum Clauses – A Brief Survey of Anglo-American Law' (1974) 8(1) *International Lawyer* 83, 95; Patrick Borchers, 'Forum Selection

A major difference between the two, however, is the dual character of Choice-of-Forum clauses as both public and private, contract and procedure, as opposed to the exclusively contractual nature of arbitration agreements. Although consent of parties is the foundation of both clauses, courts derive their power in giving effect to Choice-of-Forum clauses not just from the consent given by parties, but most fundamentally from the state itself.[270] Similarly, another major difference between litigation and arbitration would be the extent parties can shape the procedures and even the body of rules used to resolve the dispute. The fully contractual nature of arbitration means that parties can fully choose in their arbitration agreements the procedural and even substantive rules of law which will govern the proceedings and resolution of the dispute by the arbitral tribunal.[271] In contrast, except to the extent allowed by forum law, parties cannot provide in their Choice-of-Forum clauses that rules of procedure other than those of the forum shall apply, or vary the contents of the applicable law which will govern their dispute. Hence while parties can displace default jurisdiction through their Choice-of-Forum clause, they cannot displace, in general, procedural, substantive and institutional arrangements designed by the state to ensure the integrity of the dispute resolution process and protect public interests. Moreover, another key difference is in relation to the law applicable to the determination of validity and scope. As far as Choice-of-Forum clauses are concerned, it will certainly be a national law that will determine their validity and scope.[272] In contrast, and although this is not the case in common law jurisdictions, the validity and scope of arbitration agreements will not necessarily be determined by a national law.[273]

Another major difference would be the absence of a global system for the enforcement of Choice-of-Forum clauses. The *Choice-of-Court Convention* is nowhere near the *New York Convention*[274] in terms of its scope and acceptance among states. One of the reasons for this situation is that Choice-of-Forum clauses, by directly affecting state jurisdiction, necessarily implicate state

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Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform' (1992) 67(1) *Washington Law Review* 55, 61, 67; Linda Mullenix, 'Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court' (1988) 57(3) *Fordham Law Review* 291, 315-319.

[270] Tham (n167) 55.

[271] See Arthur Taylor von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study* (Brill Academic Publishers, 2006) 229.

[272] Stavros Brekoulakis, 'The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon it? (2007) 24(4) *Journal of International Arbitration* 341, 352.

[273] Ibid.

[274] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('New York Convention').

sovereignty, thus, making it harder for states to agree and adopt the *Choice-of-Court Convention*.[275] Furthermore, the lack of a model law which states may adopt similar to the UNCITRAL Arbitration Model Law, makes it harder to establish harmonised standards for the efficient protection of Choice-of-Forum clauses.[276] Unlike in arbitration agreements where the *New York Convention* has laid down the maximum formal requirements regarding arbitration agreements which national laws cannot override, this lack of international treaty (until recently) and model law have allowed the adoption of countries to impose, for instance, unduly stringent formal requirements on Choice-of-Forum clauses.[277] Even the *Brussels I Regulation* proved to be inadequate in bridging the wide differences in approaches between the common law and civil law traditions (e.g., use of anti-suit injunction and the approach of *lis pendens*), thus the need to draft the *Brussels I Recast*.

Notably, because of their more advanced enforcement mechanisms, arbitration agreements have erroneously been considered superior to the Choice-of-Forum clauses. There is no theoretical basis, however, for treating arbitration agreements as superior to Choice-of-Forum clauses especially that both are built on the same foundation – party autonomy.[278] Hence, unless the parties intended that one shall be preferred over the other, both should be treated equally. Furthermore, the *New York Convention*, the UNCITRAL Model Law and the associated national statutes are silent on situations where there are both arbitration and Choice of Forum clauses.[279] Hence, in situations where there are both arbitration and Choice-of-Forum clauses, Garnett emphasised that the 'conundrum must be resolved by courts using principles of contractual interpretation rather than contemporary notions of amiability towards arbitration'.[280]

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[275] See William Woodward Jr, 'Saving the Hague Choice of Court Convention' (2008) 29(3) *University of Pennsylvania Journal of International Law* 657, 660-661; Gabriel Sanchez, 'The Future of the Hague Convention on Choice of Court Agreements' (2008) 17(2) *International Law Students Association Quarterly* 12, 15.
[276] See Brekoulakis (n272) 345.
[277] Ibid 353.
[278] See Ibid 356.
[279] Richard Garnett, 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2013) 9(3) *Journal of Private International Law* 361, 362.
[280] Ibid.

2. Singapore, Hong Kong and Malaysia

(a) Different Set of Rules Apply

Courts in Singapore, Hong Kong and Malaysia recognise the differences between Choice-of-Forum and arbitration clauses. In *Well Hoped Ltd v Nippon Yusen Kaisha*,[281] the Hong Kong High Court emphasised that decisions involving arbitration clauses cannot be cited as authorities in cases involving Choice-of-Forum clauses because of the fundamental distinction between the two.[282] Similarly, in *The 'Dai Yun Shan'*,[283] the Singapore High Court emphasised that since the clause is not strictly an arbitration clause because there is an option to either go to the courts or proceed with arbitration in China, the law on arbitration agreements does not automatically apply.[284] Interestingly, since the arbitration law of Singapore does not apply, the court used *forum non conveniens* to conclude that the proceedings, either by arbitration or litigation, should be in China.[285]

(b) Inconsistencies in Interrelated Contracts

Confusion may arise in disputes involving interrelated contracts, with each contract not consistently referring to arbitration or litigation. The approaches of courts have so far been varied. The first approach is to identify the contract directly involved in the dispute and then proceed with the mode stated in the dispute resolution clause of such contract. This is illustrated by the Singapore High Court's decision in *Econ Corp International Ltd v Ballast-Nedam International BV*,[286] where the court clarified that that when the interrelated agreements provide different modes of dispute resolution, the provision in the relevant contract prevails.[287] Since the subject matter of the dispute arose from the bond and guarantee agreements, the Choice-of-Forum clauses in those agreements in favour of Singapore courts would prevail.[288] This was also the approach of the Hong Kong CFI in *China Medical Ltd v Autoscale Resources Ltd*,[289] where the court found that since the cause of action was based on the guarantee agreement which provided for a Choice-of-Forum

[281] *Well Hoped Ltd v Nippon Yusen Kaisha* [1982] 1 HKC 155, 159 (High Court) ('Well-Hoped').
[282] Ibid; See also *Joseph Ghossoub v Team Y & R Holdings Hong Kong Ltd* [2016] HKCFI 1793 (Court of First Instance).
[283] *The 'Dai Yun Shan'* [1992] 1 SLR (R) 461 (High Court).
[284] Ibid 466.
[285] Ibid.
[286] *Econ Corp International Ltd v Ballast-Nedam International BV* [2003] 2 SLR (R) 15 (High Court) ('Econ Corp').
[287] Ibid 20-22; see also *Astrata (Singapore) Pte Ltd v Portcullis Escrow Pte Ltd* [2011] 3 SLR 386, 394-395 (Court of Appeal) ('Astrata').
[288] [2003] 2 SLR (R) 15, 21-22 (High Court).
[289] *China Medical Ltd v Autoscale Resources Ltd* [2009] HKCFI 425 (Court of First Instance).

clause stipulating Hong Kong courts, no stay may be issued,[290] even if the related subscription agreement provided for arbitration.[291] Similarly, in *CPC Construction Hong Kong, Ltd v Harvest Engineering (HK) Ltd*,[292] ('CPC Construction') the Hong Kong CFI emphasised that the choice of litigation in Hong Kong, as stated in the Choice-of-Forum clauses in the loan agreement and guarantee, and supplemental agreement and supplemental guarantee, clearly expressed the desire not to resort to arbitration which was the mode found in the subcontract.[293] The court agreed with CPC that the payments advanced under the loan agreement and the supplemental loan agreement were stand alone and independent transactions, even though they may have been used for the expenses under the subcontract.[294] Likewise, when the dispute was intrinsically related to the main agreement which provided for arbitration, and the procurement agreement, which contained the exclusive Choice-of-Forum clause, is but an extension of the main agreement, the court proceedings should be stayed in favour of arbitration.[295]

The second approach involves interpretation with the goal of reconciling the differences between the relevant contracts and provisions. In *Bluegold Investment Holdings Ltd v Kwan Chun Fun Calvin,*[296] the Hong Kong CFI decided that because of the references to the arbitration agreement found in the subscription agreement, which is phrased widely, parties should resort to arbitration even if a related agreement – the guarantee agreement – contained a non-exclusive Choice-of-Forum clause.[297] Furthermore, the Hong Kong CFI pinpointed that the plaintiff's claims in this case can be argued to have arisen from the subscription agreement.[298] Nonetheless, the court noted that a non-exclusive Choice-of-Forum clause stipulating Hong Kong courts can operate in parallel with the arbitration provisions in the other contracts.[299]

In *The Yaoki*,[300] the confusion was caused by the fact that there were two relevant charter parties, and that the time charter party referred to the voyage charter party itself.[301] The voyage

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[290] Ibid [9].
[291] Ibid.
[292] *CPC Construction Hong Kong, Ltd v Harvest Engineering (HK) Ltd* [2015] HKCFI 1173 (Court of First Instance) ('CPC Construction').
[293] Ibid [58], [60]-[61].
[294] Ibid [84].
[295] *Juaramedic Sdn Bhd v MRCB Engineering Sdn Bhd* [2017] 11 MLJ 427,436,440 (High Court of Kuala Lumpur).
[296] *Bluegold Investment Holdings Ltd v Kwan Chun Fun Calvin* [2016] HKCFI 415 (Court of First Instance).
[297] Ibid [20].
[298] Ibid [17].
[299] Ibid [23]; see also *Neo Intelligence Holdings Ltd v Giant Crown Industries Ltd* [2017] HKCFI 2088, [29] (Court of First Instance).
[300] *The Owners of and/or Other Persons Entitled to Sue in Respect of Cargo Lately Laden on Board the Ship or Vessel Yaoki v The Owners of and/or Demise Charterers of the Ship or Vessel Yaoki & the Ships or Vessels Listed in Schedule Hereto* [2006] HKCFI 479 (Court of First Instance) ('*The* Yaoki').
[301] Ibid [3].

charter party, the provisions of which were incorporated in the time charter party, contained a Choice-of-Forum clause, while the time charter party contained an arbitration clause.[302] The Hong Kong CFI first declared that the bill of lading, the contract which was directly the subject matter of dispute, was issued pursuant to the time charter party, and not the voyage charter party.[303] Furthermore, the general reference alone in the time charter party to the voyage charter party, could not oust the clearly-stated arbitration clause in that contract.[304] Hence, the parties should proceed with arbitration.[305]

Similarly, in *Lembaga Pelabuhan Kelang v Kuala Dimensi Bhd*,[306] the Malaysian Court of Appeal observed that the Choice-of-Forum clauses in the subsequent supplemental agreements effectively express the parties' 'predominant agreement to submit to the court's jurisdiction' and abandonment of arbitration.[307] The court noted that the "'arbitration clause" and "the submission to the court jurisdiction clauses"…. contradict each other because effect could not be given to enable these clauses to function harmoniously.…It is either arbitration or litigation.'[308] The court observed that the use of the permissive 'may' allowed parties to abandon arbitration.[309] The court concluded that while parties had originally intended to refer their disputes to arbitration, they subsequently abandoned that choice when they have expressly submitted to the jurisdiction of the court.[310]

A third approach was mentioned in *CPC Construction*,[311] citing *Fiona Trust & Holding Corporation v Privalov*,[312] ('Fiona Trust') which emphasised the need to unify the resolution of disputes in one jurisdiction.[313] The Hong Kong CFI said, '…commercially minded parties are likely to want all disputes arising from their relationship to be decided by the same tribunal and will want to avoid different disputes being resolved by different tribunal or courts.'[314] While *CPC Construction* did not reject this approach, the court, however, did not follow it and instead, decided to proceed based on what has been clearly provided by parties.[315]

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302 Ibid.
303 Ibid [9].
304 Ibid [16].
305 Ibid [19].
306 *Lembaga Pelabuhan Kelang v Kuala Dimensi Bhd* [2011] 2 MLJ 606 (Court of Appeal of Putrajaya) ('Lembaga').
307 Ibid 629.
308 Ibid.
309 Ibid.
310 Ibid.
311 *CPC Construction* (n292).
312 *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254, [12]-[13], [31] ('Fiona Trust').
313 *CPC Construction* (n292) [55].
314 Ibid.
315 Ibid [61].

In *Oei Hong Leong v Goldman Sachs International*, while the Singapore High Court did not cite *Fiona Trust*, it nonetheless emphasised that 'fragmentation [of related proceedings]…in multiple jurisdictions is undesirable and could not have been reasonably intended by the parties.'[316] Expressing bias towards arbitration, the court reconciled the Choice-of-Forum and arbitration clauses in the ISDA Agreement and the Account Agreement Pack respectively by stating that 'the court should only refuse a stay of proceedings in situations of multiple applicable agreements with conflicting jurisdiction clauses (at least one of which is an arbitration clause) where parties' intentions are clear that the whole or part of the dispute between them should not be subject to the arbitration agreement.'[317] Since the court found that the parties had not clearly intended that the English non-exclusive Choice-of-Forum clause in the ISDA Agreement should apply to the dispute and not the arbitration agreement in the Account Agreement Pack, a stay was granted in favour of arbitration.[318]

(c) Which Prevails: Choice-of-Forum Clauses v Arbitration Agreements?

How about when the contract or the dispute resolution clause itself stipulates both arbitration and litigation – which prevails? A fundamental question which courts should answer is whether a clause which has both arbitration and litigation is void for uncertainty. In *William Co v Chu Kong Agency Ltd*[319] ('William Co'), the Hong Kong High Court rejected this proposition and emphasised the need to carefully construe the contract and as much as possible, give effect to the clause.[320] In instances where the clause provides for both litigation and arbitration, such situation may mean that parties have the choice to either seek arbitration or litigation, but once a choice has been made, 'that creates a binding choice to which the court will usually give effect.'[321] In this case, the court considered the application for stay under the Arbitration Model Law the election to seek arbitration in China.[322] In any case, the court noted that litigation in Hong Kong was not an option agreed upon by the parties, therefore the Hong Kong case should be stayed in favour of arbitration in China.[323]

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316 *Oei Hong Leong v Goldman Sachs International* [2014] SGHCR 2, [28] (High Court).
317 Ibid [21].
318 Ibid [27]-[29].
319 *William Co v Chu Kong Agency Ltd* [1993] 2 HKC 377 (High Court) ('William Co').
320 Ibid 380-381.
321 Ibid 381; see also *Syarikat Pembinaan Anggerik Sdn Bhd v Malaysia Airports Holdings Bhd* (Unreported, Malaysian High Court of Shah Alam, See Mee Chun J, 20 November 2017) [13] ('Syarikat').
322 *William Co* (n319) 381.
323 Ibid.

Faced with a contract with both Choice-of-Forum and arbitration clauses, the Hong Kong CFI in *Lee Cheong Construction & Building Materials Ltd v The Incorporated Owners of the Arcadia*,[324] emphasised that the Choice-of-Forum clause 'does not impose a positive obligation to resolve all disputes only in the Hong Kong courts…'[325] and that 'the two clauses have different purposes and run in parallel in the context of the whole contract. There is nothing to suggest that the parties regarded [the Choice-of-Forum clause] as the first choice of dispute resolution and clause 27 as the second choice.'[326] Similarly, in *PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited,* the Singapore High Court emphasised that the contract may not be interpreted that the parties may elect between arbitration and litigation, although both modes were mentioned.[327] Rather, the arbitration clause may only be interpreted as referring 'all disputes' to arbitration, while the clause about litigation as referring only to the supervisory jurisdiction of the Singapore courts over arbitration.[328]

In *R Kathiravelu a/l Ramasamy v American Home Assurance Co Malaysia*, the Malaysia Court of Appeal emphasised that although the insurance contract contained both arbitration under clause 10 and litigation under clause 12, both clauses could be read harmoniously.[329] In this case, clause 10 required that 'dispute, difference or question' should be resolved by arbitration and 'since the respondent had rejected the claim followed by the disagreement by the appellant,' such conditions 'were fulfilled then arbitration should proceed.'[330] On the other hand, clause 17 did not confer upon the court to decide such 'differences' as it only gives the Malaysia court exclusive jurisdiction on issues of contract interpretation.[331] Similarly, in *Allianz General Insurance Company (M) Bhd v Kapar Energy Ventures Sdn Bhd*, the Malaysia High Court emphasised that since the parties provided in their contract that only disputes on quantum, which is the amount payable under the insurance policy, should be resolved by arbitration while the rest are through litigation, the current dispute which is 'not amenable to the computation of dollars and cents,' should be resolved through the jurisdiction clause.[332]

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[324] *Lee Cheong Construction & Building Materials Ltd v The Incorporated Owners of the Arcadia* [2012] HKCFI 473 (Court of First Instance) ('Lee Cheong').
[325] Ibid [13].
[326] Ibid [21].
[327] *PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited* [2009] SGHC 13, [47] (High Court) ('PT Tri-MG').
[328] Ibid [47], [67].
[329] *R Kathiravelu a/l Ramasamy v American Home Assurance Co Malaysia* [2009] 1 MLJ 572, 578 (Court of Appeal of Putra Jaya).
[330] Ibid 578-9.
[331] Ibid 578.
[332] *Allianz General Insurance Company (M) Bhd v Kapar Energy Ventures Sdn Bhd* (Unreported, Malaysian High Court of Kuala Lumpur, Noorin Badaruddin JC, 27 October 2006) [129], [176].

This discussion on Choice-of-Forum and arbitration clauses shows the unique contractual nature of Choice-of-Forum clauses which is recognised in Singapore, Hong Kong and Malaysia. Unlike other contracts including arbitration agreements, however, Choice-of-Forum clauses have important aspects that are not entirely controlled by contract law. As this section illustrates, certain questions like the extent parties can control how their dispute be resolved by the courts, the extent principles of contractual law may be used in interpretation especially in harmonizing contradicting provisions within and between interrelated contracts, and the issues which should be considered contractual, may be determined as well by procedural law and other areas of law.

3. The Philippines

Philippine law recognises that arbitration agreements are different from Choice-of-Forum clauses and both are governed by separate legal regimes. Arbitration clauses are subject to the *Alternative Dispute Resolution Act* of 2004 (Republic Act No 9285), which recognises their contractual character.[333] In contrast, Choice-of-Forum clauses are venue stipulations, thus are primarily procedural in nature and governed by the *Rules of Court*. Notably, Philippine courts have yet to decide how a clause involving both arbitration and litigation would be resolved or interpreted.

E. Third Parties and Choice-of-Forum Clauses

An important principle in contract law is privity – a contract only binds those who are parties to it except in a few cases.[334] Choice-of-Forum clause analysis by the courts of Hong Kong and the Philippines has closely followed this principle. The emphasis on privity of contracts should also be the rule in Singapore and Malaysia, given their recognition of Choice-of-Forum clauses as contracts.

1. The General Rule

In *The Griesheim*,[335] the Hong Kong High Court noted that since the owner was not a party to the bill of lading which provides for cases to be litigated in Tokyo, he should not be allowed to

[333] *Alternative Dispute Resolution Act* (Philippines), s7(1); see also See *Korea Technologies Co, Ltd v Lerma* (2008) 542 SCRA 1, 21-2.
[334] *Dunlop Pneumatic Tyre v Selfridge and Co Ltd* [1915] AC 847.
[335] *The Griesheim* [1983] 1 HKC 251 (High Court).

take advantage of such Choice-of-Forum clause.[336] Likewise, in *The Mahkutai*,[337] the Hong Kong Court of Appeal emphasised the rule that only those who are parties to the contract can validly invoke it.[338] Since the bill of lading which provided for Jakarta in the Choice-of-Forum Clause did not include the shipowners as parties, but only the time charterers, the shipowners could not benefit from the clause and ask to stay the Hong Kong proceedings filed by the cargo owners.[339] Notably, the Privy Council confirmed this ruling and dismissed the appeal.[340] Nonetheless, non-parties, who are claiming benefit, have *onus* of showing that they can somehow derive benefit from the Choice-of-Forum clause under the law applicable to the contract.[341] Hence, in *Joseph Ghossoub v Team Y & R Holdings Hong Kong Ltd* ('Ghossoub'), the Hong Kong Court of Appeal precluded one of the defendants from invoking the exclusive Choice-of-Forum clause after failing to prove that under Indian law, the contract to which he is a party and another contract under which the exclusive clause is found but to which he is a non-party, constitute one agreement.[342]

Similarly, the Philippine Supreme Court in *KK Shell Sekiyu Osaka Hatsubaisho and Fu Hing Oil, Co Ltd v Court of Appeals*[343] decided that a third party to the Choice-of-Forum clauses cannot be bound, including sub-agents unless expressly stated.[344] This rule has also been confirmed in the related case, *Keihin Narasaki Corporation v Crystal Navigation*.[345]

Subsequently, the Choice-of-Forum clause is not a bar to a party from bringing proceedings against non-parties in a jurisdiction other than that stated in the clause. In *Ghossoub*,[346] the Hong Kong CFI ruled that since the respondents are not parties to the share purchase agreement which provided for England as the preferred jurisdiction for resolving disputes, plaintiffs can sue them in Hong Kong.[347] In instances where third parties are joined, and a stay has been reversed, these third parties may be compensated for their expenses and inconvenience.[348]

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336 Ibid 273.
337 *The Mahkutai* [1993] 2 HKC 71 (Court of Appeal).
338 Ibid 83-5.
339 Ibid.
340 *The Mahkutai* [1996] AC 650, 666-8.
341 See *Joseph Ghossoub v Team Y & R Holdings Hong Kong Ltd* [2017] HKCA 603, [22] (Court of Appeal) ('Ghossoub' is used to identify all decisions with the same case name).
342 Ibid [34].
343 *KK Shell Sekiyu Osaka Hatsubaisho and Fu Hing Oil, Co Ltd v Court of Appeals* (1990) 188 SCRA 145 ('KK Shell').
344 Ibid 151-2.
345 *Keihin Narasaki Corporation v Crystal Navigation, Kumagai Kaiun Kaisha, Ltd v Atlantic Venus Co* (1990) 193 SCRA 484, 492 ('Keihin').
346 *Ghossoub* [2016] HKCFI 1019 (Court of First Instance).
347 Ibid [46]-[47], [51], [63]-[67].
348 *Ghossoub* [2016] HKCFI 1793, [27] (Court of First Instance).

2. The Exceptions

Courts may allow third parties to benefit from a Choice-of-Forum clause through the principles of agency, incorporation by reference, assignment, novation, estoppel, waiver, succession, subrogation, alter ego, veil piercing, trust and equity to extend the effect of the Choice-of-Forum clause to non-parties.[349] Hence, in *Pemilik Kapal Atau Vesel 'Lavela' v Pemilik Kapal Atau Vesel 'Basilia'*, since the 'Letter of Understanding' ('LOU') which contained the exclusive Choice-of-Forum clause stipulating English courts was signed by the parties' agents, the defendant, while not a party to the LOU, should be entitled to stay the Malaysia proceedings.[350] Moreover, a beneficiary who wishes to take advantage of a trust can be expected to accept that he is bound by the terms of the trust, including its Choice-of-Forum clause. However, since the plaintiffs in *China Shanshui Investment Co Ltd as entrusted by Zhang Caikui v Zhang Caikui*,[351] were not seeking to enforce any rights or obligations under the trusts,[352] the Hong Kong CFI concluded that plaintiffs cannot be forced to litigate in the British Virgin Islands ('BVI') pursuant to the BVI trusts' Choice-of-Forum clauses.[353]

Singapore's accession to the *Choice-of-Court Convention* and the establishment of the Singapore International Commercial Court ('SICC') have allowed additional exceptions in Singapore where third parties may be joined in the Choice-of-Forum clause litigation. Under the *Choice-of-Court Convention*, third parties to the Choice-of-Forum clause may have standing to bring proceedings if they have taken over rights and obligations of the original parties.[354] In addition, the SICC has the power to join third parties if the additional person can be joined under the joinder rules in the Singapore *Rules of Court* and the claims can appropriately be heard by the SICC.[355]

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[349] Vaughan Black and Stephen Pitel, 'Forum-selection clauses: beyond the contracting parties' (2016) 12(1) *Journal of Private International Law* 26, 29.
[350] *Pemilik Kapal Atau Vesel 'Lavela' v Pemilik Kapal Atau Vesel 'Basilia'* (Unreported, High Court of Johor Bahru, Mohd Ivan JC, 31 October 2018) [19]-[41].
[351] *China Shanshui Investment Co Ltd as entrusted by Zhang Caikui v Zhang Caikui* [2015] HKCFI 780 (Court of First Instance).
[352] Ibid [104].
[353] Ibid [110].
[354] Trevor Hartley and Masato Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Courts Agreements,* ed Permanent Bureau (Hague Conference on Private International Law, 2013) 51 ('Hartley-Dogauchi Report').
[355] *Rules of Court* (Singapore, cap 322, 2014 red ed) ord 110, r 9(1).

Significantly, Hong Kong and Singapore have also passed legislations[356] which closely followed England's *Contracts (Rights of Third Parties) Act 1999*.[357] Therefore, additional exceptions to the privity rule have been created when Hong Kong or Singapore law governs the Choice-of-Forum clause. In Hong Kong, third parties can invoke the exclusive Choice-of-Forum clause when parties to the contract expressly provide for such benefit.[358] To affect third parties, (1) the Choice-of-Forum clause must be exclusive; (2) the contract should explicitly state that it can benefit third parties; (3) the third party must be identified expressly or belonging to the identified class of persons who may benefit from the clause; and (4) the dispute must involve a term in the contract.[359] In contrast, the Singaporean statute does not explicitly deal with Choice-of-Forum clauses.[360] Nonetheless, because the explanatory notes to the English law, which also does not explicitly mention Choice-of-Forum clauses, clearly assume that the law applies to Choice-of-Forum clauses,[361] one can argue that exclusive Choice-of-Forum clauses may also benefit third parties under Singapore law.

In the Philippines, *KK Shell Sekiyu Osaka Hatsubaisho and Fu Hing Oil, Co Ltd v Court of Appeals*[362] confirmed that third parties may benefit from Choice-of-Forum clauses as long as they are explicitly stated in the clause.[363] Notably, the Philippine *Civil Code* also allows contractual stipulations in favour of a third person.[364] Hence, parties may stipulate in a separate clause that third parties may benefit from the contract including the Choice-of-Forum clause.

Furthermore, the way a court interprets the Choice-of-Forum clause in a litigation involving some of the contracting parties but not all may also bind the other contracting parties and even third parties who are not part of the litigation.[365] Moreover, in the United States and Canada, courts have introduced other exceptions where the effect of a Choice-of-Forum clause can go beyond the contracting parties.[366] Among them are third party beneficiaries, parties to a 'global transaction' who may not be signatory to a specific contract, and 'closely related' non-parties 'so that enforcement of the clause is foreseeable by virtue of the relationship between

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[356] *Contracts (Rights of Third Parties) Ordinance* (Hong Kong) cap 623; *Contracts (Rights of Third Parties) Act 2001* (Singapore, cap 53B, 2002 rev ed).
[357] *Contracts (Rights of Third Parties) Act 1999* (UK).
[358] *Contracts (Rights of Third Parties) Ordinance* (Hong Kong) cap 623, s13(2).
[359] Ibid ss13(3),4.
[360] *Contracts (Rights of Third Parties) Act 1999* (Singapore, cap 53B, 2002 rev ed).
[361] Explanatory Notes to Contracts (Rights of Third Parties) Act 1999, [32].
[362] *KK Shell* (n343).
[363] Ibid 151-2.
[364] *Civil Code (Philippines),* art 1311.
[365] Black (n349) 29.
[366] Ibid 26.

them.'[367] While these exceptions have not been adopted in the jurisdictions covered by this thesis, they show that the doctrine of privity does not hold strongly in Choice-of-Forum clauses. Significantly, Black and Pitel also argued that the doctrine of privity is weaker in Choice-of-Forum clauses because 'public concerns, such as efficient use of court resources and the legitimate exercise of adjudicatory jurisdictions, are stronger.'[368]

In litigations where third parties are involved, courts may apply different tests. Courts, for example, may use the 'strong cause' test to the contracting parties to the exclusive Choice-of-Forum clause, while use the *forum non conveniens* to the other litigating parties who are not parties to the contract. Of course, this may lead to an odd result especially when the Choice-of-Forum clause is the only connection to the forum court. Hence, in this sense, adding third parties to the analysis makes Choice-of-Forum clause litigation go further beyond contract law. Not only would it require greater procedural complexities, it may also trigger the application of public interest concerns.

F. Choice-of-Forum Clauses and Other Contractual Provisions

Choice-of-Forum clauses usually operate as part of a larger contract or even a group of interrelated agreements. Hence, the other contractual provisions can affect its operation. For example, provisions on conditions precedent, interpretation, limitations on liability, causes of action, waivers, other procedural clauses, among others, may affect the Choice-of-Forum clause. The Hong Kong Court of Appeal correctly reminded in *Rich Village Ltd v Grand Pride Holdings Ltd*[369] ('Rich Village') that the 'true meaning [of a Choice-of-Forum clause] has to be discovered by looking at the agreement as a whole in the light of the relevant factual matrix.'[370] Hence, while the Choice-of-Forum clause is a distinct contract, and the principle of separability, which will be discussed below and extensively in Chapter 6, applies, the clause should still be read as part of, in connection and within the context of the other provisions of the contract.

One important provision which affects Choice-of-Forum clauses is the Choice-of-Law clause. Their complex interaction is the subject of Chapter 7. To illustrate, the Hong Kong CFI in *Rich Village*, has stressed that a Choice-of-Forum clause goes hand in hand with a Choice-of-

[367] *Freeford Ltd v Pendleton*, 53 AD 3d 32, 38-9 (NY App Div, 2008).
[368] Ibid 52.
[369] *Rich Village Ltd v Grand Pride Holdings Ltd* [2013] HKCA 33 (Court of Appeal) ('Rich Village').
[370] Ibid [16].

Law clause.[371] Hence, issues like validity, interpretation and even existence may be decided by the law applicable to the contract, which is normally the law stated in a Choice-of-Law clause.

However, the jurisdiction identified in the Choice-of-Law clause does not mean that such jurisdiction is also the chosen jurisdiction for disputes. In short, a choice of law is not a choice of forum. In *Raytheon International Inc v Rouzie*, the Philippine Supreme Court emphasised this point: 'That the subject contract…shall be governed by the laws of the State of Connecticut does not suggest that the Philippine courts, or any other foreign tribunal…are precluded from hearing the civil action. Jurisdiction and choice of law are two distinct concepts.'[372] Similarly, Hook also criticised the practice of some common law courts of taking jurisdiction because of the Choice-of-Law clause stipulating the forum law.[373] According to her, this practice undermined the policies behind conflict of laws, specifically the need to weigh other factors according to the principle of close connections.[374] Likewise, she added that it may undermine the parties' freedom to choose the forum for their dispute.[375]

As earlier noted, Choice-of-Forum clauses may also include conditions precedent – obligations that need to be complied with before litigation in the chosen jurisdiction may be pursued. In *PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd*[376] ('PT Selecta'), the Singapore High Court was very clear that a party cannot escape a Choice-of-Forum clause if he himself is responsible for breaching the conditions precedent.[377] The High Court emphasised that even if the Choice-of-Forum clause directs parties to first settle the matter 'amicably by negotiation' in a mandatory fashion, the plaintiff's failure to first attempt negotiation did not disentitle the defendant from relying on the Choice-of-Forum clause.[378] 'As a matter of principle, it would be wholly unsatisfactory if the plaintiff could circumvent the exclusive jurisdiction clause by relying on its own breach of the contractual requirement to negotiate.'[379]

Nonetheless, one unique feature of the Choice-of-Forum clause is the principle of separability – 'The mere fact that the validity of the contract was challenged by a party would not

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[371] Ibid.
[372] *Raytheon International Inc v Rouzie* (2008) 546 SCRA 555, 563 ('Raytheon').
[373] Maria Hook, 'The Choice of Law Agreement as a Reason for Exercising Jurisdiction' (2014) 63(4) *International and Comparative Law Quarterly* 963, 964.
[374] Ibid.
[375] Ibid.
[376] *PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd* [2016] 1 SLR 729 (High Court) ('PT Selecta').
[377] Ibid 740-1.
[378] Ibid 741.
[379] Ibid.

ipso facto infect the [choice-of-forum] clause.'[380] This principle is more extensively discussed in Chapter 6. Hence, when the underlying contract's validity is in dispute, the Choice-of-Forum clause is not necessarily affected.[381]

G. Key Lessons

Choice-of-Forum clauses are very complex. Nonetheless, there are important themes that permeate their analyses and at the core is the need to examine its nature within a particular jurisdiction. Wide variations exist from one jurisdiction to another. In the four Asian jurisdictions examined, the duality of character is emphasised albeit the degrees of contractual and procedural treatments unsurprisingly vastly vary from Singapore to the Philippines. These dual characteristics are further established when Choice-of-Forum clauses are compared against arbitration agreements and their effects of third parties and relationship with the other provisions of the contract are analysed. By developing a framework of analysis, this chapter hopes to provide further guidance in understanding the analysis and approaches employed by the courts of Singapore, Hong Kong, Malaysia and the Philippines on specific issues like provision of relief, determination of validity and existence, and interpretation.

[380] Ibid 743.
[381] Ibid.

Chapter III.

Party Autonomy and Choice-of-Forum Clauses

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A. Introduction

In the context of cross-border disputes, the lack of an international sovereign which can enforce rules and impose sanctions has highlighted the dependence on consensual relationships.[382] 'Indeed, consent to jurisdiction is and must be the keystone of international dispute resolution....'[383] This is also true even for litigation involving Choice-of-Forum clauses, which usually involves two

[382] See Mullenix (n269) 314.
[383] Ibid.

forms of consent. First, consent can be a form of 'bilateral exercise of party autonomy by which the parties seek to control ex ante the choice of forum in controversies to which they are or may become parties.'[384] Second, consent can be understood as consent expressed through participation in litigation.[385] As this chapter will discuss, these two forms of consent are integral components of the party autonomy involved in the litigation of Choice-of-Forum clauses. In a way, these two forms of consent also reflect the dual relationships involved in Choice-of-Forum litigation as discussed in Chapter 2 – the relationship between the courts and the parties, and the relationship between the parties.

This chapter explores the principle of party autonomy as manifested through the above-mentioned forms of consent. It begins by giving an overview of the principle of party autonomy in civil procedure. The chapter then probes the first form of consent by examining the freedom of parties to determine the contents of their Choice-of-Forum clause. It then proceeds by discussing the second form of consent, which is the freedom of parties to control and determine their participation in litigation, and how this affects the flow of Choice-of-Forum clause litigation. The chapter then looks at the ouster rule to illustrate the struggle between party autonomy and other interests which may play a role in court analysis. As party autonomy is now enshrined at a global-scale, the chapter then proceeds to consider how the *Choice-of-Court Convention* recognises the freedom of parties to determine the contents of their Choice-of-Forum clause and the course of their litigation. It then ends with a summary of key lessons.

B. The Principle of Party Autonomy in Civil Litigation

1. Developments in Civil Law and Common Law Procedures

Consent by parties as a basis of jurisdiction precedes the concept of a state. In ancient Roman law, where a cause did not fall within the particular jurisdiction of the court, both with respect to territory and subject-matter, the court could assume jurisdiction by consent of the parties.[386] This consent was deemed to exist when, with the parties aware of the lack of jurisdiction, *litiscontestation* (*ie,* matters in dispute were prepared for the investigation of the *judex* or the judiciary)

[384] von Mehren (n271) 176.
[385] See Ibid.
[386] Arthur Engelmann, *A History of Continental Civil Procedure* (Robert Wyness Millar trans, Little Brown & Co, 1927) 334.

had occurred without their objection.[387] These early Roman law concepts serve as the building blocks of the modern-day principle of party autonomy in civil procedure.

The term *prorogatio fori* or *forum prorogatum* (stipulation of a forum), however, was first used in canon law.[388] This canonical procedural rule explicitly allowed parties to choose a forum for their dispute.[389] Secular courts would later adopt this rule as part of their attempt to increase revenues related to court litigation.[390] Significantly, during this period, the principles prevailing in the civil procedures following the Romano-Canonical framework were described to support procedural party autonomy in a broader sense.[391] These procedures 'stayed loyal to the principle that the scope and content of the judicial controversy was to be defined by the parties or, conversely that the court was restricted to a consideration of what the parties had put before it.'[392] Moreover, parties had 'full control over [their] substantive and procedural rights and….[enjoy] the power of free choice in the exercise of these rights.'[393]

When the great procedural codes of Europe were drafted, the procedural rules giving parties considerable freedom in controlling their litigation,[394] including the ability to choose a forum were adopted and continued.[395] This adoption ensured that party autonomy would play a key role in the design of continental civil procedures.[396] Notably, even with the later changes to the European civil procedures brought about by the ideas of Frank Klein who advocated for stronger roles for judges in litigation, party autonomy survived and remain a fundamental principle of civil procedure in continental Europe.[397]

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387 Ibid 334.
388 Lenhoff (n155) 415-6.
389 Ibid 416.
390 See CH van Rhee, 'Chapter 3 Harmonisation of Civil Procedure: An Historic and Comparative Perspective' in XE Kramer and CH van Rhee (eds), Civil Litigation in a Globalising World (Asser Press, 2012) 39, 47.
391 RC van Caenegem, 'Chapter 2 History of European Civil Procedure' in Mauro Cappeloleti (ed), *Civil Procedure, International Encyclopedia of Comparative law Vol XVI* (Mohr Siebeck & Martinus Nijhoff Publishers, 2014) 14.
392 Ibid 14.
393 Ibid.
394 See Ibid.
395 See Sienho Yee, *Towards an International Law of Co-progressiveness* (Martinus Nijhoff Publishers, 2004) 88; Shabtai Rosenne, ed Malcolm Shaw, *Rosenne's Law and Practice of the International Court*, 1920-2015 (Brill Nijhoff, 5th ed, 2016) vol 2, [181]; Sienho Yee 'Article 40' in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian Tams (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2nd ed, 2012) 920, 985; Shabtai Rosenne, 'The Forum Prorogatum in the International Court of Justice' (1953) 6(1) *Revue Hellenique de Droit International* 1, 1-2.
396 See CH van Rhee, 'Introduction' in CH van Rhee (ed), *European Traditions in Civil Procedure* (Intersentia-Antwerpen-Oxford, 2005) 3, 6.
397 See Paul Oberhammer and T Domej, 'Germany, Switzerland, Austria (ca. 1800-2005) in CH van Rhee (ed), *European Traditions in Civil Procedure* (Intersentia-Antwerpen-Oxford, 2005) 103, 121; Oberhammer (n156) 52-5.

In contrast, English civil procedure, except for a limited number of 'general orders of the courts,' various statutes and reports of decided cases, grew from the 'silent development of traditional practice and conventions.'[398] Its adversarial system, nonetheless, exemplifies party autonomy in civil procedure. 'English civil litigation has always been regarded as a predominantly voluntary system….'[399] Hence, parties are generally free to formulate and develop the demand for a remedy, present factual and legal issues for determination by the court, bargain for settlement and withdraw the case at any stage prior to judgment.[400] Furthermore, English procedural rules point to the importance of the defendant's consent in the common law litigation process. Briggs succinctly states that the English rules of jurisdiction can be summarised very simply: the jurisdiction of the court depends upon the service of process.[401] A defendant who submits to the jurisdiction of the court confirms the court's jurisdiction over him.[402]

In the United States, Brand notes that party autonomy in the choice of forum was already recognised early in the First Restatement on Conflict of Laws.[403] For example, sections 81 and 88 of the First Restatement on Conflict of Laws allowed courts to acquire jurisdiction over an individual and a foreign corporation respectively, who consented to such exercise of jurisdiction by the court.[404] This choice of forum, however, was understood in terms of prorogation only. The fact that Choice-of-Forum clauses can have derogation effects was only accepted later in *The Bremen*.

Notably, despite having a procedural system exemplifying party autonomy, common law courts, for a long time, were generally unwilling to accept Choice-of-Forum clauses which derogated English or American jurisdiction in favour of foreign courts. According to English and American courts, parties cannot by their private agreement 'oust' the jurisdiction of the courts. The reasoning behind this is explored later in this chapter. Admiralty courts were the exception because these courts had a long tradition of implementing Choice-of-Forum clauses as a result of the realities (*eg,* high mobility of parties with high possibility of evasion of suit) surrounding

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[398] CH van Rhee, 'English Civil Procedure until the Civil Procedure Rules (1998)' in CH van Rhee (ed), *European Traditions in Civil Procedure* (Intersentia-Antwerpen-Oxford, 2005) 129, 132.
[399] Cyril Glasser, 'Civil Procedure and the Lawyers: The Adversary System and the Decline of the Orality Principle' (1993) 56(3) *The Modern Law Review* 307, 307.
[400] Ibid.
[401] Briggs (n200) 380.
[402] Ibid.
[403] Ronald Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments* (Hague Academy of International Law, 2014) 195-6.
[404] American Law Institute, Restatement (First) of Conflict of Laws (1933) § 81, 88.

admiralty litigation.[405] Furthermore, it was particularly hard for English courts to accept such clauses because unlike in the civil procedures systems which developed in continental Europe, English procedure was not fashioned after the Romano-Canonical procedure. Particularly, the rule on *prorogatio fori* is not an expressly incorporated mechanism in the common law rules. This was because England developed a modern, centralised and professional judicature at a very early date, and worked much with native elements even before the Romano-Canonical procedure had taken a definite shape.[406] Moreover, English courts would normally consider Choice-of-Forum clauses in the context of proceedings to stay actions brought in contravention of the provisions of such agreements,[407] applications for leave to serve process out of jurisdiction,[408] and anti-suit injunctions. Since these forms of relief are granted in the exercise of the court's discretion,[409] the English recognition of Choice-of-Forum clauses was also discretionary and thus, their acceptability took longer time to develop. Additionally, given that there was no clear statutory or common law basis, judges could not anchor their analysis on a rule like that in continental Europe. They needed to find the basis somewhere else, for example, initially, arbitration law, and later on contract law, which proved to be a sturdier legal bedrock for enforcing Choice-of-Forum clauses.

2. The Content and Scope of Party Autonomy

The modern principle of procedural party autonomy gives parties considerable freedom in controlling their litigation. An important aspect of this freedom is the parties' ability to designate the forum for their dispute. In civil law countries, the exercise of party autonomy is viewed from the vantage of public law, particularly procedural law. This means that the content and scope of the parties' freedom to determine the forum *ex ante* and freedom to control and determine their litigation are defined by public law and procedural law. The French model is an exception as the freedom to designate a forum, when exercised in the international sense, is considered a private law matter.[410] In contrast, common law countries view important aspects of party autonomy in Choice-of-Forum clauses as matters of 'private law of contractual promises.'[411]

[405] David Marcus, 'The Perils of Contractual Procedure: A Revised History of Forum Selection Clauses in the Federal Courts' (2008) 82(3) *Tulane Law Review* 973, 997.
[406] van Caenegem (n391) 15.
[407] Cowen (n259) 180.
[408] Ibid.
[409] Ibid.
[410] Lenhoff (n155) 440.
[411] See Merrett (n160) 39.

The scope and content of party autonomy in civil procedure mirror the changing preferences between state regulation (state planning) and party autonomy. Von Mehren would note that since the industrial revolution, 'blends or mixtures of central planning and private autonomy have dominated the theory and practice of social and economic ordering.'[412] He observed that in polities where state planning rather than private autonomy is the preferred method of ordering the economy and society, the parties have relatively little control over the identity of and the procedures used by the adjudicating authority.[413] This was the case in the former Soviet Union and the socialist systems of Eastern Europe, where plaintiffs were not free to withdraw suits, defendants could not concede, and the parties could not settle if to do so would, in the court's opinion, violate the law or the rights or legally protected interest of any person.[414] In contrast, in 'liberal' Western countries, private parties remain largely free to dispose by agreement contested substantive rights; albeit, less free to control the manner in which the proceedings will unfold.[415] This balance between state regulation or planning, and party autonomy, nonetheless, continually shift over the years.

The most recent developments in civil procedure for commercial disputes, however, shows party autonomy's further ascent. For example, among the recent developments is the increasing introduction of procedural flexibility especially in commercial courts.[416] With the Commercial Court in London as a forerunner,[417] flexible procedures (*eg*, UK's *Flexible Trial Procedure*[418]) are seen not only to make business litigation cheaper and simpler[419] but also to improve competitiveness and attract more investments and disputes to one's courts.[420] Countries like the United Kingdom, Ireland,[421] and Singapore[422] have allowed litigants to choose an applicable procedural regime by

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412 von Mehren (n271) 207.
413 Ibid 209.
414 Ibid.
415 Ibid 210.
416 See Shelby Gribbs and Peter North, *International Civil Procedure* (Kluwer Law, 2003) 183; Man Yip, 'The Resolution of Disputes Before the Singapore International Commercial Court' (2016) 65(2) *International and Comparative Law Quarterly* 439,445.
417 Judiciary of the United Kingdom, ' History,' (Web Page)<https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/58005-2/>.
418 See Judiciary of the United Kingdom, 'Shorter and Flexible Trial Procedures Pilot Schemes' (Web Page, October 2015)<https://www.judiciary.gov.uk/wp-content/uploads/2015/09/Shorter-and-Flexible-Trial-Schemes-Announcement.pdf>.
419 Judiciary of the United Kingdom, 'Shorter and Flexible Trial Procedures Pilot Schemes (Web Page, 30 September 2015) < https://www.judiciary.gov.uk/announcements/shorter-and-flexible-trial-procedures-pilot-schemes/>
420 Man Yip, 'The Resolution of Disputes Before the Singapore International Commercial Court' (2016) 65(2) *International and Comparative Law Quarterly* 439,444-5.
421 Cassandra Byrne and Jareth Heneghan, 'New Horizons? Trends Influencing Effective Projects and Construction Dispute Resolution in Ireland' (2011) 6(2) *Construction Law International* 9, 10.
422 Yip (n420) 439,445.

allowing them to opt for the application of alternative procedural rules as regards certain aspects of their case. In Sweden, for instance, parties are also allowed to even ask for a modification of judicial relief to suit their other interests including their business relationship.[423]

The scope and content of party autonomy in contracts similarly show these changing preferences between state regulation and party autonomy. While the *laissez-faire* approach to contracting initially prevailed, the later part of the 20th century shows the increasing desire of states to narrow party autonomy to protect economically weaker parties (*eg*, consumers and employees) and created new domains to the planning principle (*eg*, anti-trust legislations).[424] Nonetheless, party autonomy remains as the primary principle applicable to business-to-business contracting.

The debates then on how to classify Choice-of-Forum clauses reflect this tug-of-war between state regulation and party autonomy. Classifying them as matters of public or procedural law increases their proximity and vulnerability to state regulation. Nonetheless, as the discussions in the previous chapter had shown, the wholesale categorisation is no longer the preferred and correct approach; but rather, to approach the nature of Choice-of-Forum clauses on a per issue basis.

Furthermore, while in the West, its dominant liberalist philosophies are generally supportive of the development of party autonomy, the dominant philosophies and religions in the East do not specifically support party autonomy except in the case of Islam which recognizes the freedom of contract (*hurriyyat al-taaqud*).[424A] Nonetheless, a good argument can be made that nothing in Asia's dominant religions, philosophies or value systems preclude the adoption of party autonomy. Confucianism, for instance, has recognised the capacity of persons to make promises and has even emphasised that one of the moral virtues is honoring a promise, including those in contracts – 'a promise, once made shall worth thousand ounces of gold'.[424B] 'Therefore, a violation of agreement would be deemed as a violation of virtue and moral standard, for which a punishment

[423] Laura Ervo and Anna Nylund (eds) *Current Trends in Preparatory Proceedings: A Comparative Study of Nordic and Former Communist Parties* (Springer, 2016) 53.
[424] See von Mehren (n271) 211-2.
[424A] See Atikullah Abdullah, 'The Doctrine of the Freedom of Contract *(Hurriyyat al-Taaqud)* in Islamic *Mu'amalat*: An exposition on the concepts and rules of the contract of *muqaqalah* in the construction industry' (2011) 50 *Islamic Studies* 365, 366.
[424B] Mo Zhang, *Chinese Contract Law: Theory and Practice* (Martinus Nijhoff Publishers, 2006) 28.

shall be imposed.'[424C] Buddhism has also been argued to be not against personal freedom[424D] and thus, may be supportive of party autonomy.

C. The Freedom to Determine the Contents of Choice-of-Forum clauses

1. The Common Law Freedom of Contract

An important feature of the Choice-of-Forum clause analysis in common law is its treatment of these clauses as legally enforceable contractual promises. Unlike in civil law countries, Choice-of-Forum clauses in common law are considered to contain promises which give rise to private law rights.[425] This capacity to enforce promises contained in Choice-of-Forum clauses is anchored in the common law principle of freedom of contract. This principle asserts that parties to a contract are generally free to negotiate and agree to any lawful terms to serve their own interests.[426] This means that parties can include in their Choice-of-Forum clauses a wide range of promises, limited only by law. As discussed in the previous section, and as expounded later in Chapter 7, this freedom of contract is never an absolute and unfettered right. The extent of this right – what parties can promise to each other which can be legally enforced – is circumscribed by forum law,[427] through its choice of law rules and subject its mandatory rules and public policy.

What the parties promised each other should be the starting point of the Choice-of-Forum clause analysis. As earlier pointed out, what can parties validly promise depends on the forum's choice of law rules. In common law, the margins of the freedom of contract is dependent on the law applicable to the contract, subject to the forum's mandatory rules and public policy. The applicable law determines a whole range of issues most especially how to interpret the Choice-of-Forum clause. Hence, the interpretation rules of the applicable law should be able to determine the content of the contractual promises contained in the Choice-of-Forum clause.

Merrett provides a good discussion on what promises may be included in Choice-of-Forum clauses. She begins her discussion by noting that Choice-of-Forum clauses usually have positive and negative effects.[428] The positive effect, also referred as prorogation, is when parties

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[424C] Ibid.
[424D] See Ian Mabbett, 'Buddhism and Freedom' in David Kelly and Anthony Reid (eds), *Asian Freedoms: The Idea of Freedom in East and Southeast Asia* (Cambridge University Press, 1998) 19.
[425] Merrett (n160) 39.
[426] See, eg, *Printing and Numerical Registering Co v Sampson* (1875) 19 Eq 462, 465.
[427] Nygh (n36) 37.
[428] Merrett (n160) 43.

confer jurisdiction to a particular court(s).[429] The negative effect or derogation is when parties obligate each other not to sue in any other or certain jurisdiction.[430] However, in common law, the enforceability of these promises is a matter determined by the procedural law of the forum, and not by the parties themselves.[431] Merrett further notes that the difference between exclusive and non-exclusive Choice-of-Forum clauses lies in the interplay between these positive and negative effects.[432] She emphasises, however, that the difference between the two is not as 'clear-cut nor straightforward as a simple binary classification might imply.'[433] She further develops this point:

> Both the positive and negative aspects may confer a measure of discretion or choice. For example, a clause could positively confer jurisdiction on 2 named courts, say France and Germany, and only those courts. Such an agreement is exclusively non-exclusive, conferring a choice but in relation to a limited pool of courts. The obligations may also be different for each party (as in an asymmetric clause). And a party may have promised different things, expressly or impliedly, in different contexts: for example, never to sue anywhere other than England; not to object to English jurisdiction; conceding that England is the appropriate forum; or promising not to start proceedings elsewhere once proceedings have been commenced in England. Furthermore, apparently non-exclusive agreements may also contain express or implied obligations of a negative nature, for example, not to seek an anti-suit injunction from another court.[434]

In short, the usual practice of classifying Choice-of-Forum clauses into a simple binary of exclusive and non-exclusive clauses undermines the diversity of promises parties may provide in these clauses. Rather than interpreting the specific promises contained in the clauses, the courts usually begin their analysis by characterising the clauses as either exclusive or non-exclusive. Worse, the tests developed in relation to the remedies provided to enforce Choice-of-Forum clauses are dependent on this binary; thus, potentially disregarding the freedom of contract principle. As Merrett showed, parties run real risks that the effects they have intended, even those within allowed by the law, may be ignored because the simple binary prevailing in the Choice-of-Forum clause analysis. For instance, parties may have intended that parallel proceedings are acceptable, but the court may not allow such possibility, arguing that litigation can only proceed in one forum.

[429] Ibid 43.
[430] Ibid 44.
[431] Ibid 43.
[432] Ibid 44.
[433] Ibid.
[434] Ibid.

2. Singapore, Hong Kong and Malaysia

Court decisions from Singapore, Hong Kong and Malaysia do not usually explicitly discuss that the parties' freedom to determine the contents of their promises in the Choice-of-Forum clause is founded in the freedom of contract. Probably, the parties' capacity to determine the contents of their Choice-of-Forum clause has not been put as a litigation issue because such capacity is assumed as part and parcel of the parties' inherent right of freedom of contract. Moreover, the majority of the cases dwell on enforcement; thus, the usual argument raised against enforcement is the existence of certain circumstances which can avoid the effects of the Choice-of-Forum clause, rather than questioning the parties' freedom of contract. In any case, while courts do not mention the freedom of contract, they nevertheless repeatedly begin their analysis by emphasising that parties must generally be made to abide by their own agreement or bargain. This statement acknowledges impliedly that Choice-of-Forum clauses are products of the freedom of contract.

Furthermore, several decisions in Singapore, Hong Kong and Malaysia confirm that parties can indeed include a great diversity of promises in their Choice-of-Forum clauses, thus again confirming the freedom of contract principle. In *TMT Co Ltd v The Royal Bank of Scotland plc (trading as RBS Greenwich Futures)* ('TMT'), the Singaporean High Court confirmed that parties may provide for asymmetrical exclusive Choice-of-Forum clauses, even if such clause operates to benefit only one of the parties. In this case, the court emphasised that 'there is no reason why such an asymmetric clause should not be enforceable if it was entered into freely between the parties; the court would hold the parties to the bargain they entered into.'[435] In *Baiduri,* the Singaporean High Court acknowledged the various categories of Choice-of-Forum clauses – exclusive, non-exclusive and 'semi-exclusive' or those Choice-of-Forum clauses where a few countries are specified in the clause.[436] Furthermore, the Singapore High Court also confirmed that other promises may be included, such as a stipulation not to object to the chosen court's jurisdiction in their Choice-of-Forum clause.[437] The Hong Kong Court of Appeal has similarly confirmed the parties' freedom to vary the 'positive' and 'negative' effects of their Choice-of-Forum clauses depending on the court named therein.[438] In *HBZ Finance Ltd v Nippon Yusen Kaisha* ('HBZ Finance'), the Hong Kong Court of Appeal also confirmed that parties can even designate a 'floating' Choice-of-Forum clause,

[435] *TMT Co Ltd v The Royal Bank of Scotland plc (trading as RBS Greenwich Futures)* [2018] 3 SLR 70, 92 (High Court) ('TMT').
[436] *Baiduri* (n232) 276-85.
[437] *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2010] 4 SLR 904, 908-9 (High Court) ('OCBC Capital').
[438] *Noble Power* (n235) [33].

which is a clause that allows parties to only firm up their choice at a later stage.[439] The Hong Kong CFI also confirmed in *William Co* that parties can also indicate in their clauses that they can 'choose' between litigation or arbitration.[440] In *American Express Bank Ltd v Mohamed Toufic Al-Ozeir* ('American Express'), the Malaysian Supreme Court recognised the unilateral asymmetric Choice-of-Forum clause, which is common in financial contracts.[441]

The law applicable to the contract, subject to the mandatory rules and public policy of the forum, circumscribes what promises parties can include in their Choice-of-Forum clauses. These boundaries of party autonomy in Singapore, Hong Kong and Malaysia are discussed in Chapter 7. Furthermore, in common law, the enforceability of the promises in the jurisdiction clauses (*ie,* the actual effects given to promises contained in the Choice-of-Forum clauses) is determined by the procedural laws of the forum. This is discussed in Chapter 4.

Considering the importance of Islamic banking and finance in Malaysia, a special note on Choice-of-Forum clauses found in these contracts may be necessary at this point. As discussed in Chapter 6, Islamic law, also referred as *Shariah*, applies to these contracts along with the applicable substantive law.[441A] Nonetheless, as earlier noted, party autonomy is not necessarily contrary to Islamic law principles. Hence, even in contracts where Islamic law applies, parties should be free to choose the court which may hear their dispute. Nonetheless, as discussed in Chapter 6, Islamic law principles may apply in determining whether the parties' choice may be upheld, as well as any other promises which they may have included in their Choice-of-Forum clause. One must note, however, that there is no central authority or monolithic interpretation of Islamic law and as such, the differences in the understanding and interpretation of Islamic law (expressed through *fatwa* or authoritative interpretation of Islamic law rules and principles by certain bodies and Islamic law scholars) across countries provide incentives for parties to choose jurisdictions which may be more favourable to them should a dispute arise.[441B] In fact, *fatwa*-shopping is a real occurrence in Islamic banking and finance transactions.[441C] Parties may therefore choose the jurisdiction most favourable to their transaction, and this may be reflected in their choice of court

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[439] *HBZ Finance Ltd v Nippon Yusen Kaisha* [2002] HKCA 377, [32] (Court of Appeal) ('HBZ Finance').
[440] *William Co* (n319) 381.
[441] *American Express Bank Ltd v Mohamed Toufic Al-Ozeir* [1995] 1 MLJ 160, 165-6 (Supreme Court of Kuala Lumpur) ('American Express').
[441A] See *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408, 408 (Court of Appeal) ('Bank Kerjasama'); Ahmad Hidayat Buang, 'Islamic Contracts in a Secular Court Setting? Lessons from Malaysia' (2007) 21(4) *Arab Law Quarterly* 317, 324.
[441B] Umar Oseni, 'The Legal Implications of "*Fatwa* Shopping" in the Islamic Finance Industry: Problems, Perceptions and Prospects' (2016) 30(2) *Arab Law Quarterly* 107, 113.
[441C] Ibid 121.

3. The Civil Law Approach and the Freedom to Determine the Contents of Choice-of-Forum Clauses: Is the Philippines an example?

Even though civil law jurisdictions do not recognise promises contained in Choice-of-Forum clauses as private law rights and obligations, they nonetheless recognise certain freedoms which parties may exercise in drafting their Choice-of-Forum clauses. As discussed, the institution of *prorogatio fori* which allows party to bring disputes to a chosen forum, is an ancient feature of civil law procedures. Hence, parties, for instance, are also free to provide positive and negative effects in their Choice-of-Forum clauses. Specifically, they can provide for one or several courts which can hear their disputes and deny one, some or all other courts of jurisdiction. However, because Choice-of-Forum clauses are procedural in nature in the civil law tradition, the extent to which parties can provide, vary or mix the positive and negative effects of their Choice-of-Forum clauses would depend on forum law, particularly its procedural rules.[442] In some jurisdictions, only prorogation is allowed.[443] In others, parties are prohibited from varying the jurisdictional rules of the forum, albeit in situations where no particular jurisdictional rules are provided, parties are free to stipulate.[444] In other countries, while generally allowed, the stipulation is subject to additional requirements like reasonable connection between the dispute and the chosen forum.[445] And yet in other civil law jurisdictions, parties are given the freedom to choose one or more courts and at the same time, derogate the jurisdiction of one, some or all other courts.[446] Furthermore, whether a Choice-of-Law clause may modify the extent to which parties can vary their Choice-of-Forum clause would also depend on the forum's choice of law rules. Whether parties can provide other promises in their Choice-of-Forum clause, other than prorogating and derogating particular courts, would also depend on the choice of law rules of the forum which determine issues of validity. The

[442] See Emilio Gonzalez, 'The Hague Convention on Choice of Court Agreements of June 30, 2005: A Mexican View (2006) 13(1) *Southwestern Journal of Law and Trade in the Americas* 37, 44, 46.
[443] Eg, in Chinnawat Thongpackdee & Vanina Sucharitkul, 'Ch 12 Thailand' in Alejandro Carballo Leyda (ed) *Asian Conflict of Laws* (Kluwer Law International, 2015) 233, 236, stipulations derogating jurisdiction of Thai courts are void.
[444] Eg, in Naoki Iguchi and Naoko Kamimura, 'Chapter 4 Japan' in Alejandro Carballo Leyda (ed) *Asian Conflict of Laws* (Kluwer Law International, 2015) 67, 71, parties are free to choose a foreign court except when the Japanese courts have exclusive jurisdiction in; also in Munkhselenge Purevdorjiin, 'Chapter 8: Mongolia' in Alejandro Carballo Leyda (ed) *Asian Conflict of Laws* (Kluwer Law International, 2015) 145, 148, where parties are free to choose any foreign jurisdiction except for matters referred especially to Mongolian jurisdiction.
[445] Eg, in Young Seok Lee, Sae Youn Kin and Sy Nae Kim, 'Chapter 5 Republic of Korea' in Alejandro Carballo Leyda (ed) *Asian Conflict of Laws* (Kluwer Law International, 2015) 85, 89-90, there should be a reasonable connection between the dispute and the Korean forum under Korean law; also in Yongpiung Xiao and Wenwen Liang, 'Chapter 1 Mainland China' in Alejandro Carballo Leyda (ed) *Asian Conflict of Laws* (Kluwer Law International, 2015) 1, 8, parties may choose in writing, under Chinese law, a foreign court with real connections with the dispute.
[446] See Gonzalez (n442) 51-2.

effect of the Choice-of-Law clause and the law applicable to the contract are further discussed in Chapter 6.

The Philippines, as discussed in Chapter 2, has not specifically determined the nature of Choice-of-Forum clauses. In general, however, these clauses have been treated as venue stipulations, and therefore, procedural in nature, such that they are not considered to contain promises which give rise to private law rights. Hence, in this sense, the Philippine approach is closer to the civil law approach than the common law. Notably, to be given effect, Choice-of-Forum clauses need to comply with the specific requirements under the Rule 4, Section 4(b) of the *Rules of Cour*t: (1) in writing, (2) agreed before the action is filed, and (3) contains an exclusive choice of venue.[447] Courts have strictly enforced these requirements particularly the requirement that the choice should be exclusive.[448] As a result, the freedom which parties may exercise in drafting their Choice-of-Forum clauses, under Philippine law, is limited. They can promise that they would bring their disputes to a specific court, but the choice of court should be exclusive (*i.e.,* to the exclusion of any other court). Furthermore, other than designating the positive and negative effects, parties appear not to possess the right to include any other promises in their clause, especially those that may have the effect of varying the procedural rules of the Philippines.

D. The Freedom to Control Choice-of-Forum Clause Litigation

1. The Freedom to Control Litigation

Parties are also free to determine, within the procedural framework, what would be the content and form of this consent. They are free, for instance, to determine their cause of action or the subject matter of the action filed in court. In civil law systems, the freedom rests on the principle of party disposition. Von Mehren cogently analysed the consequences of this autonomy given to the parties:

> [Party disposition] contains several subsidiary propositions: (a) generally speaking, a court cannot institute a proceeding *ex officio*; (b) claims, defences, and counterclaims are to be asserted by the parties; (c) the court's judgment does not address issues that the parties have not raised nor accord relief that they have not requested; (d) in principle, only the parties can settle a case; and (e) only a party can challenge a judgment.[449]

[447] *Rules of Court* (Philippines), r 4 s4(b).
[448] See *Tensuan* (n242) 420-1.
[449] von Mehren (n271) 209.

Similarly, common law's adversarial system of civil procedure also highlights the litigants' power to control his litigation. Among the matters which parties can control are the decision to claim, choice of cause of action, choice of forum, choice of legal category (*eg,* contracts, torts, etc) and legal theory to substantiate their claim, choice of contents of their pleadings, choice of evidence to present, employment of procedural tactics to expedite or delay proceedings, choice of remedies to seek, and many more.[450] Both the plaintiff and the defendant have choices on the foregoing matters except that the defendant can also decide the extent of its participation in the proceedings. The discussion in the succeeding sections would show that the defendant's extent of participation may affect his rights under the Choice-of-Forum clause.

One important point which must be highlighted is that procedure fundamentally shapes the extent party autonomy is exercised in both civil law and common law systems. 'Accordingly, in every legal system, the outer limits of "cause of action" and functionally comparable concepts are closely connected with the system's procedural rules governing pleadings and discovery.'[451] The procedural framework that shapes the parties' exercise and the content of their consent, is moulded, in return, by the philosophy, values, or policies of the state. For example, in the United States, because of emphasis on economy and efficiency, multiple actions arising from the same transactions are discouraged and therefore, the grounds for allowing splitting causes of action are limited.[452] In contrast, splitting causes of action is problematic, under German rules, 'only if it results in a situation that is egregiously unfair to the other party.'[453] Therefore, while parties may freely determine the contents of their pleadings – their expression of consent with the court – and thus, need not seek the fullest measure of relief arguably due to them under the relevant facts and law, their failure to do so may result to their ineligibility to seek further relief in the future. These nuances of this exercise of freedom to steer the direction of litigation within the terms of procedural rules are highlighted in the next sections.

2. Singapore, Hong Kong and Malaysia

As common law jurisdictions, Singapore, Hong Kong and Malaysia adopt the adversarial system in their civil procedures. As such, the parties are given a wide range of freedoms to control

[450] See Fentiman (n23) 275-6.
[451] von Mehren (n271) 178.
[452] Ibid 180.
[453] Ibid 181.

the course of their litigation, including those involving Choice-of-Forum clauses. Cases discussed throughout the thesis show how the strategy employed by the parties not only affect the course and success of the litigation but may even affect how Choice-of-Forum clause issues are resolved. For example, how the parties exercise this freedom may allow them to totally avoid the Choice-of-Forum clause (*eg,* by choosing their cause of action from a legal category other than contracts),[454] vary its interpretation (*eg,* by not providing evidence of the foreign applicable law),[455] or even extinguish their rights under the Choice-of-Forum clause (*eg,* by waiving the Choice-of-Forum clause through their actions).[456]

How parties exercise their freedom to control their litigation and its effects on the rights existing under the Choice-of-Forum clauses can be best illustrated in the cases involving implied waivers of these clauses. In *The Thorscan*, the defendants were considered to have impliedly waived their rights when they brought an action in the wrong jurisdiction in breach of the Choice-of-Forum clause.[457] In that case, the Choice-of-Forum clause provided that parties should sue in the country where the carrier has its principal place of business.[458] Despite knowing that the plaintiff's place of business is in the Netherlands Antilles, the defendants opted to commence action in Amsterdam.[459] As a result, the Hong Kong court refused to stay the proceedings because 'the right [to ask for a stay in favour of the Antilles] had been waived.'[460] Similarly, the defendant's failure to timely object to the court's jurisdiction and his filing of counterclaims against the plaintiff may also prevent the defendant from alleging that there exists an exclusive jurisdiction clause in favour of the foreign courts.[461]

In *Bank of China v Ngan Ching Wen* ('Ngan'), the Malaysia High Court found that the defendant's unconditional appearance which included 'a total of eight applications, seven appeals and countless affidavits' constitutes a voluntary submission to the jurisdiction of the Malaysian court, notwithstanding a Choice-of-Forum clause in favour of Singapore in the relevant contract.[462] The Malaysia High Court also found in *Ng Lai Tien v Peregrine* that since the defendant

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[454] Eg, *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR (R) 377, 396 (Court of Appeal) ('Rickshaw'); *Rem Assets Ltd v MIR Investments Ltd* [2008] HKCFI 589, [18] (Court of First Instance) ('Rem Assets').
[455] *Yu Lap Man v Good First Investment Ltd* [1998] 1 HKC 726, 731 (Court of First Instance) ('Yu Lap Man').
[456] *The Thorscan* [1998] 4 HKC 536, 542 (Court of Appeal); *Bank of China v Ngan Ching Wen* [2011] 2 MLJ 645, 656 (High Court of Kuala Lumpur) ('Ngan'); *Ng Lai Tien v Peregrine* [1995] 4 MLJ 7, 14 (High Court of Johor Bahru).
[457] *The Thorscan* (n456) 542.
[458] Ibid 539.
[459] Ibid 540.
[460] Ibid 542.
[461] *Lam Yuk Cheung T/A Corbieres Wine Company v Maison Riviere Fils* [2014] HKDC 668, [31] (District Court).
[462] *Ngan* (n456) 656.

unconditionally appeared before the Malaysian court and even filed his statement of defence, he is considered to have waived his right to sue in Hong Kong under the Choice-of-Forum clause. [463]

3. The Philippines

The Americans brought to the Philippines the adversarial system of litigation. This means that under the Philippine procedural rules, parties also enjoy a wide latitude of freedom in determining the course of their litigation. Like in Singapore, Hong Kong and Malaysia, parties in a Philippine action may be deemed to have waived their rights under the Choice-of-Forum clause because of the litigation strategy employed. In *MV Zileena*,[464] the Philippine Supreme Court found that the respondents lost their right to question the venue because they have voluntarily submitted to the Philippine court's jurisdiction despite their exclusive Choice-of-Forum clause in favour of Singapore courts. The Supreme Court said that the filing of several motions to lift the writ of attachment, posting a counterbond to dissolve the writ of attachment, filing a demurrer on additional ground that the petitioner had no cause of action, and filing a reply to petitioner's opposition to their motion to dismiss amounted to voluntary submission.[465] The court highlighted that 'verily, venue involves no more and no less than a personal privilege which may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.'[466] Similarly, in *International Harvester Company in Russia v Hamburg-American Line*,[467] ('International Harvester') the Philippine Supreme Court noted that because the defendant appeared and answered generally without objecting to the court's jurisdiction, it was considered to have waived its right to sue in Hamburg under the Choice-of-Forum clause.

E. The Ouster Rule as an Illustration of Party Autonomy and Court Interaction

1. The Ouster Rule and its Demise

The view that Choice-of-Forum clauses 'oust' courts of their jurisdiction was the main complication which prevented common law courts from accepting these clauses for a long time. The difficulty lies in the 'derogation' effect of Choice-of-Forum clauses which refer matters to courts or bodies other than the default court or jurisdiction. Hence, the ouster rule was also applied

[463] *Ng Lai Tien v Peregrine* (n456) 14.
[464] *MV Zileena* (n244).
[465] Ibid 315.
[466] Ibid 314.
[467] *International Harvester Company in Russia v Hamburg-American Line* (1918) 42 Phil 845, 855 ('International Harvester').

to arbitration agreements. Fullagar J in *Compagnie Des Messageries Maritimes v Wilson* gave a good exposition of this rule:

> But, so far as such a clause purported to place beyond [the English courts'] reach disputes otherwise within their competence, they refused to give effect to it, and would entertain an action or suit in disregard of such a clause….[468] (citations omitted)

Citing the English case of *Scott v Avery*, the Hong Kong Supreme Court in the 1905 case *Schwer v Von Uffel*, confirmed the 'ouster' rule.[469] In *Scott v Avery*, Lord Campbell discussed that '[the ouster rule] probably originated in the contexts of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'[470] Hence, '[w]here an action is indispensable, you cannot oust the Court of its jurisdiction over the subject, because justice cannot be done without the exercise of that jurisdiction….This is the foundation of the doctrine that Courts are not to be ousted of their jurisdiction.'[471] It appears then that the English ouster rule is rooted on access to justice grounds.

Similarly, American courts considered stipulations which prevent a party from bringing actions in a certain forum as 'the most obvious example of an attempt to oust.'[472] Likewise, if parties intend 'to confine litigation to certain specified forums,' this also amounted to 'ouster of other available fora.'[473] The courts would further widen the range of what amounted to 'ouster' and in the process, courts employed 'whatever definition of the ouster rule.'[474] Notably, the ouster rule was justified on various public law grounds – public policy,[475] contravention of the basic right to access state courts,[476] unlawful waiver of right to sue initially in a particular court,[477] arguments concerning convenience,[478] prevention of upsetting the very 'symmetry of the law,'[479] and protection of the weaker parties.[480] The most reasonable justification, however, would be that 'the

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[468] (1954) 94 CLR 577, 587.
[469] *Schwer v Von Uffel* (n261).
[470] *Scott v Avery* (1855-56) 5 HLC 811, 853.
[471] Ibid 853.
[472] Patrick J Barrett, 'Choice of Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted? (1980) 48(4) *Fordham Law Review* 568, 569.
[473] *Eg*, *Prince Steam-Shipping Co v Lehman*, 39 F 704 (SDNY 1889); see Barrett (n472) 570 n9.
[474] Barrett (n472) 569.
[475] Ibid 570.
[476] *Slaughter-House Cases*, 83 US 36 (1872); see Ibid 570.
[477] *Insurance Co v Morse,* 87 US 445, 451-2, 458 (1874); see Barret (n472) 571.
[478] Barrett (n472) 572.
[479] Ibid.
[480] Ibid.

law, not the contracting parties, was expected to provide the remedy'[481] as '[m]atters of redress should not be disposed of by the fiat of the contracting parties.'[482]

Eventually in the United States, the ouster rule gave way to the *prima facie* valid test in *Mitthenthal v Mascagni*, where the Massachusetts Supreme Court considered Choice-of-Forum clauses *prima facie* valid.[483] Courts, however, continued to consider other factors under this test, like the convenience of the parties and the witnesses.[484] Notably, the validity of a Choice-of-Forum clause, in the early *prima facie* valid analysis, depended upon its reasonableness.[485]

This general hostility to Choice-of-Forum clauses took a radical turn in *The Bremen*.[486] The United States Supreme Court in that case said that the *prima facie* validity of the Choice-of-Forum clause can only be rebutted if its enforcement is 'unreasonable under the circumstances.'[487] These circumstances would include when the clause deprives the party of his day in court[488] or when it contravenes a strong public policy.[489] The Supreme Court also confirmed that the clause may be set aside based on the traditional contractual grounds for invalidity – 'fraud, undue influence, or overweening bargaining power.'[490] According to the court, this approach is consistent with the 'present-day commercial realities and expanding international trade…'[491] In sum, the court introduced a two-pronged approach: Choice-of-Forum clauses shall be enforced unless the resisting party 'could clearly show' that (1) 'enforcement would be unreasonable and unjust', ('unreasonable and unjust' test) or (2) 'that the clause was invalid for such reasons as fraud or overreaching' ('invalidity' test).[492]

Meanwhile, in England, the acceptance of Choice-of-Forum clauses, as discussed earlier, really came through the path of arbitration agreements. The 1944 case of *Racecourse Betting*,[493] broke this reasoning by removing the fiction that Choice-of-Forum clauses can be treated like arbitration agreements. Instead, the court based its analysis on contract law. The ouster rule however did not

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[481] see Ibid.
[482] Ibid.
[483] Ibid 573.
[484] Ibid 575.
[485] Ibid 574.
[486] *The Bremen* (n60).
[487] Ibid 11.
[488] Ibid 19.
[489] Ibid 16.
[490] Ibid 12.
[491] Ibid 16.
[492] Ibid 15.
[493] *Racecourse Betting* (n140) 126.

end with this reasoning. Lord Denning emphasised the ouster rule in his opinion in *The Fehmarn* in 1958: '[i]t is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust the courts of their jurisdiction….'[494]

The Eleftheria[495] in 1970 continued this approach but with an important modification. It placed a very high burden for plaintiffs asking for the continuance of proceedings which are contrary to the Choice-of-Forum clause. As a result, *The Eleftheria* made the English approach closer to the *prima facie* valid test used in the United States. Brandon J opined: 'I think…the court should give full weight to the *prima facie* desirability of holding the parties …[and] not just to pay lip service… and then fail to give effect to it because of a mere balance of convenience.'[496]

The Eleftheria forms the basis of approaches in common law courts including Singapore, Hong Kong and Malaysia, as regards exclusive Choice-of-Forum clauses. The decision is particularly notable because of the test it developed in determining whether there is a strong cause not to stay the proceedings, to wit:

> The principles…be summarised as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: - (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.[497]

[494] *The Fehmarn* (n140) 162.
[495] *The Eleftheria* (n139).
[496] Ibid 103.
[497] Ibid 99-100.

At this point, one must still note that in the Anglo-American common law, the 'ouster' rule remains in theory, the official view.[498] As a matter of practice today, however, English courts, however, routinely enforce Choice-of-Forum clauses and the cases where they are not enforced are exceptional.[499] As regards American courts, the rule against ouster has been described as being totally emasculated.[500] In *The Bremen*, the United States Supreme Court declared, '[t]he argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction.'[501]

This situation has placed the common law on a par with civil law jurisdictions in recognising and enforcing Choice-of-Forum clauses. Unlike the procedures under the civil law systems, however, which have hundreds of years of history behind their institution of *prorogatio fori*, the common law struggled in coming up with an approach towards Choice-of-Forum clauses. The use of 'vague and metaphormic'[502] arguments behind the ouster rule meant that the common law was ill-equipped in analysing them if the approach was through the language of procedural or public law. Only when it used the language of contract law did common law find better tools and clarity in its legal reasoning.

2. The Ouster Rule in Singapore, Hong Kong and Malaysia

In common law, Choice-of-Forum clauses, even those in favour of foreign courts, do not 'oust' *per se* the jurisdiction of forum courts. The Malaysia High Court in Kuala Lumpur in *Nutri Mills Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd* ('Nutri Mills') explained:

> In essence where there is a forum selection clause that in itself does not oust the jurisdiction of the court. The jurisdiction of the court exists, subject to the court's power to stay the matter in order to give effect to the forum selection clause.[503]

In short, what the Malaysian court is saying is that the jurisdiction of the court continues to exist even if the Choice-of-Forum clause has a derogation effect. Parties, in the first place, have no power whatsoever to modify the scope and effect of the court's jurisdiction. This is a matter of

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[498] Trevor Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge University Press, 2009) 181.
[499] Ibid 189.
[500] Barrett (n472) 582.
[501] *The Bremen* (n60) 12.
[502] Barrett (n472) 570.
[503] *Nutri Mills Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd* [2013] 8 MLJ 377, 386 (High Court of Kuala Lumpur) ('Nutri Mills').

legislation. When courts give effect to the Choice-of-Forum clauses, they do so through a specific procedural mechanism, which is usually a stay application, thus allowing them to exercise discretion. This conscientious exercise of discretion allows the court to weigh in several factors, but their starting point is still the need to enforce the Choice-of-Forum clause, subject to the plaintiff's heavy burden of establishing strong cause that effect ought not to be given to the Choice-of-Forum clause.

Hence, any remedy which enforces the Choice-of-Forum clause does not oust the court of its jurisdiction. Rather, the Choice-of-Forum clause goes into the propriety of exercising that jurisdiction. 'It is asking the court to exercise its discretion not to assume jurisdiction over the case but to let the case be heard in another more appropriate forum, in this instance, a contractual forum.'[504]

Nonetheless, because the analytic process is discretionary, the watering down of the ouster rule does not automatically result to a mechanical enforcement of Choice-of-Forum clauses. At least that has been the case in jurisdictions adhering to the English common law approach. Malaysia, as earlier noted in *Inter Maritime*[505]rejected the allegedly mechanistic purely contractual approach of *The Bremen*.[506] This reading of *The Bremen* may have been wrong but nonetheless, the Malaysian court emphasised discretion and its ability to consider other elements in its Choice-of-Forum clause analysis.[507] As such, since the Choice-of-Forum clause in favour of a foreign court does not *per se* 'oust' the jurisdiction of the local courts, the courts can still proceed to exercise jurisdiction over the case.[508] 'I would agree…that even though the parties…agreed that the enforcement of the agreement…through the Hong Kong court, that by itself did not oust the jurisdiction of the Malaysian court….' Notably, the court emphasised that jurisdiction is vested by law.[509]

The Eleftheria's approach was first followed in Singapore in the Court of Appeal case of *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd*[510]('Amerco'). Although the case did not explicitly cite *The Eleftheria* in its analysis, the court mentioned the same factors in determining

[504] *The Jian He'* [1999] 3 SLR (R) 432, 447 (Court of Appeal).
[505] *Inter Maritime* (n236).
[506] Ibid 334-7.
[507] Ibid 336.
[508] Ibid 337.
[509] *Ng Lai Tien v Peregrine* (n456) 13; see also *Elf Petroleum SE Asia Ltd v Winelf Petroleum Sdn Bhd*[1986] 1 MLJ 177, 179 (OCJ Kuala Lumpur).
[510] *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977-1978] SLR(R) 112 (Court of Appeal) ('Amerco').

whether a stay application may be granted. In Hong Kong, it was first adopted by the Hong Kong High Court in *Fine Furs Ltd v Louis Levine*.[511] In Malaysia, *The Eleftheria* was first adopted by the Penang Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad*[512]('Globus'). By following the 'strong cause' test developed in *The Eleftheria* in the 1970s, Singapore, Hong Kong and Malaysia have aligned themselves with the English approach.

3. The Ouster Rule in the Philippines

The 1906 Philippine case of *Molina v de la Riva*[513] ('Molina') sets the tone of the Philippine approach towards Choice-of-Forum clauses. Although the case involved a domestic Choice-of-Forum clause, the case has been cited as the authority in cases involving Choice-of-Forum clauses in favour of foreign courts. The court pointed out the following: (1) the jurisdiction of a court is filled by law and not by the will of the parties;[514] (2) as a matter of public policy, parties can only stipulate in regard to that which is expressly authorized by law;[515] (3) agreements made contrary to the jurisdictional rules under the law are null and void.[516] The Philippine Court cited these rules in *International Harvester,*[517] and reiterated that '[a]n express agreement tending to deprive a court of jurisdiction conferred on it by law is of no effect.'[518] In *International Harvester,* the bill of lading contained a clause which states that all disputes arising under the contract are, at the option of the Hamburg-American Line, to be decided according to German law and exclusively by the Hamburg courts.[519] The court said that 'it cannot be admitted that a provision of this character has the effect of ousting the jurisdiction of the courts of the Philippine Islands in the matter now before it.'[520]

The Supreme Court would stress that '[p]rimarily, jurisdiction is conferred by law and not subject to stipulation of the parties.'[521] The approach of the Philippine Supreme Court in *MV Zileena,*[522] is illustrative, where the court read Choice-of-Forum clauses as not synonymous to a '*competencia*' or an agreement on jurisdiction, to wit:

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511 *Fine Furs Ltd v Louis Levine* [1976] HKLR 544 (High Court).
512 *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154 (FC Penang) ('Globus').
513 *Molina v de la Riva* (1906) 6 Phil 12 ('Molina').
514 Ibid 15.
515 Ibid.
516 Ibid.
517 *International Harvester* (n467).
518 Ibid 855.
519 Ibid 854-5.
520 Ibid 855.
521 *Radiowealth Finance Co, Inc v Nolasco* (2016) 808 SCRA 639.
522 *MV Zileena* (n244).

> [I]t must be impressed upon petitioner that paragraph 10 of the Agreement may not be equated with *competencia* and neither does it suggest that Philippine courts are divested of authority by reason of the parties' express preference to vest jurisdiction in the High Court of Singapore.[523]

It is unfortunate though that the Supreme Court in that case, after recognising the Choice-of-Forum clause in favour of Singapore as valid,[524]did not develop a test on when a venue stipulation stipulating a foreign jurisdiction may be given effect and the Philippine case be dismissed. Instead, the Supreme Court resolved the case by concluding that the venue had been waived.[525]

Similarly, in *Ligner & Fisher GmbH v Intermediate Appellate Court*, the Philippine Supreme Court characterised the exclusive Choice-of-Forum clause as a 'covenant on venue.'[526] This means, therefore, that Choice-of-Forum clauses should only be read as venue stipulations, and that the jurisdiction of the local courts in the Philippines, can not in any way be affected or diminished by any agreement on where disputes may be heard. The corollary effect of this is that no one can argue that Philippine courts are without jurisdiction because of the Choice-of-Forum clause vesting jurisdiction to a foreign court. Choice-of-Forum clauses, in short, have no derogation effects. The court will just dismiss this argument because 'an agreement to deprive a court of jurisdiction conferred on it by law is void and of no legal effect.'[527] Notably, the Philippine approach also did not adopt the American *prima facie* valid test or an *Eleftheria*-type test which gives the plaintiff, the one preventing the enforcement of a foreign Choice-of-Forum clause, the high burden of establishing 'strong cause.' The starting point is not necessarily the need to enforce the Choice-of-Forum clause.

Significantly, the Philippine approach mirrors a sizable number of cases in the United States which characterise Choice-of-Forum clauses as 'venue selection clauses.'[528] In *Stewart Organization, Inc v Ricoh Corp*, for instance, the United States Supreme Court characterised the parties' Choice-of-Forum clause as a venue stipulation – 'Rather, the first question for

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[523] Ibid 312-3.
[524] Ibid.
[525] Ibid 320.
[526] *Ligner & Fisher GmbH v Intermediate Appellate Court* (1983) 125 SCRA 522.
[527] *Principe v Philippine-Singapore Transport Services Inc and Chuan Hup Agencies Pte Ltd* (1989) 176 SCRA 515, 522.
[528] See, eg, *Boyd v Grand Trunk W RR,* 338 US 263, 264 (1949); *Sun World Lines Ltd v March Shipping Corp,* 801 F 2d 1066, 1069 (8th Cir 1986); *Snyder v Smith*, 736 F 2d 409, 419 (7th Cir), 469 US 1037 (1984); *In re Fireman's Fund Ins Cos,* 588 F 2d 93, 95 (5th Cir 1979); *Richardson Eng'g Co v IBM*, 554 F Supp 467, 469 (D Vt 1981), 697 F 2d 296 (2d Cir 1982); *Anastasi Bros Corp v St Paul Fire & Marine Ins Co*, 519 F Supp 862, 863-64 (ED Pa 1981); *St Paul Fire & Marine Ins Co v Travelers Indemnity Co*, 401 F. Supp. 927, 929-30 (D Mass 1975); *Davis v Pro Basketball, Inc*, 381 F Supp 1, 3 (SDNY 1974); *Brown v Gingiss Int'l, Inc,* 360 F Supp 1042, 1044 (ED Wis 1973); *National Equip Rental v Sanders*, 271 F Supp 756, 761 (EDNY 1967); See Mullenix (n269) 325.

consideration should have been whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to a Manhattan court.' [529] (underscore supplied)

Is there a difference if Choice-of-Forum clauses are treated as venue stipulations and not as agreements on jurisdiction? The Philippine approach raises this important question. Jurisdiction, specifically subject-matter jurisdiction, and venue are two distinct concepts in procedural law. 'Subject matter jurisdiction refers to the institutional power of a court to adjudicate a case; venue dictates which among several courts having jurisdiction is appropriate as most convenient. A court must be seized of both jurisdiction and venue if properly to hear a case.'[530] Notably, subject-matter jurisdiction can only be conferred by law while venue has long been held to be something that parties may agree on. Furthermore, since a venue stipulation is subject to the rules on venue (*eg,* the formal and language requirements, defences), this means that the chosen venue has to be exclusive because that is what the rules require. As a result, the Choice-of-Forum clause analysis tends to be limited to the compliance with the exclusivity requirement. Moreover, because venue is considered a procedural technicality, unlike a jurisdictional defect, an objection to venue and defence may be waived.[531] Likewise, because it may be considered a procedural technicality, the court may be more liberal[532] and may not strictly enforce the Choice-of-Forum clauses because of a number of reasons.

Furthermore, when the Supreme Court refers to jurisdiction as not being a subject of party stipulation,[533] it appears that its understanding covers both subject-matter and personal jurisdiction. From the Philippine courts' perspective, there is not much about jurisdiction, in its two aspects, which can be subject to stipulation – Philippine law determines whether a court has subject-matter jurisdiction while proper service of summons determines personal jurisdiction. Notably, court decisions and the *Rules of Court* have not yet articulated or included Choice-of-Forum clauses as another way of submitting to the court's jurisdiction. Under the *Rules of Court*, voluntary appearance is the only exception to proper service of summons where the court acquires personal jurisdiction over the defendant.[534] Furthermore, there is not much controversy as to the prorogation aspect of a Choice-of-Forum clause vesting Philippine courts with jurisdiction.

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[529] *Stewart Organization, Inc v Ricoh Corp*, 487 US 22, 29 (1988).
[530] See Ibid 647 n7.
[531] See *Eusebio v Eusebio (*1976) 70 SCRA 268, 271.
[532] See *Alfonzo v Villamor* (1910) 16 Phil 315; *Ledesma Overseas Shipping Corporation v Avelino* (1978) 82 SCRA 396, 403-4.
[533] See *MV Zileena* (n244) 312-313.
[534] *Rules of Court* (Philippines), r14, s20.

Provided it has subject-matter and personal jurisdiction, Philippine courts will mostly likely exercise their jurisdiction, and thus, the Choice-of-Forum clause stipulating Philippine courts is a non-issue. In contrast, the derogation effect of Choice-of-Forum clauses stipulating foreign jurisdictions, especially in exclusive clauses, remains controversial under Philippine law. Hence, if the court has to give effect to derogation clauses, it appears that the best approach would be to treat them as venue stipulations.

Is the Philippine approach practically different from Singapore, Hong Kong and Malaysia where Choice-of-Forum clauses are also seen as not capable of taking the court's power to adjudicate as conferred by law but instead 'only encourages a court to exercise its discretion, which it has independent of the clause, to give effect to the parties' wishes'?[535] In other words, like the Philippines, the three jurisdictions also confirm that Choice-of-Forum clauses cannot affect subject-matter jurisdiction, and in that sense an agreement on 'jurisdiction' can be read as an agreement on 'venue.' Nonetheless, the Philippine approach is still different because while in Singapore, Hong Kong and Malaysia, a local Choice-of-Forum clause can deal with personal jurisdiction as it provides the basis for the court to serve summons for defendants outside jurisdiction or grant a stay of proceedings, matters which are discussed in detail in Chapter 4, the clauses in the Philippines have no role at all even at the level of the court's acquisition of jurisdiction over the persons of the parties. Rule 14 of the Philippine *Rules of Court* on the service of summons,[536] which determines how a court acquires jurisdiction over the persons of the parties, makes no mention of the role of a Choice-of-Forum clause. Only compliance with the specific requirements of Rule 14 does that. As discussed in Chapter 4, the Choice-of-Forum clause only plays a role after jurisdiction is acquired, both as regards the subject-matter and persons of the parties, particularly when courts determine an application for a motion to dismiss based on 'improper venue' under Rule 16 of the *Rules of Court*, and a dismissal based on the principle of *forum non conveniens* during the merits stage of the proceedings.[537] But even at this stage, the Philippine approach is different because the factors considered by the court, as seen in Chapter 5, are generally only the compliance with the technical requirements of the Rules of Court, rather than a whole array of factors which may amount to 'strong cause' or establish *forum non conveniens*. Even the clauses' role in the *forum non conveniens* test is different in the Philippines because they are subordinate to administration of justice and public interest factors.

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[535] See Marcus (n405) 1026.
[536] *Rules of Court* (Philippines), r14.
[537] See *Hasegawa and Nippon Engineering Consultants Co Ltd v Minoru Kitamura* (2007) 538 SCRA 261, 277-8 ('Hasegawa').

F. The Choice-of-Court Convention and Party Autonomy

1. An Affirmation of Party Autonomy

The desire to promote international trade and investments through enhanced judicial cooperation at a global scale has encouraged states and international organisations like the Hague Conference on Private International Law to promote treaties which institutionalise the recognition of Choice-of-Forum clauses. The earliest attempts were made in the *Hague Convention of 15 April 1958 on the Jurisdiction of the Contractual Forum in Matters Relating to the International Sale of Goods*,[538] and then *Hague Convention of 25 November 1965 on the Choice of Court*.[539] Both, however, did not enter into force due to lack of support among states. Outside Europe, there were also several regional attempts. In Latin America, the 1940 *Montevideo Treaty on International Civil Law*[540] and the *Bustamante Code on Private International Law,*[541] were successful and became the template for laws in several countries in the Spanish-speaking world. Another recent regional treaty dealing with Choice-of-Forum clauses is the 2008 *Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement*[542] between Australia and New Zealand which also recognises in Article 8(1)(c) that parties may agree about the court or place where proceedings may be heard, and a breach of such agreement is a ground for declining jurisdiction by the forum court. While these attempts were unsuccessful or limited, as in the case of regional treaties, they provide lessons for drafting a truly global instrument involving Choice-of-Forum clauses. Nonetheless, it was the European experience with the *Brussels Convention, Brussels I Regulation* and *Brussels I Recast* which finally breathed life to the global agenda to institutionalise recognition of Choice-of-Forum clauses.

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538 *Hague Convention of 15 April 1958 on the Jurisdiction of the Contractual Forum in Matters Relating to the International Sale of Goods,* opened for signature 15 April 1958 (not yet in force). <https://www.hcch.net/en/instruments/conventions/full-text/?cid=34>.

539 *Hague Convention of 25 November 1965 on the Choice of Court,* opened for signature 25 November 1965 (not yet in force) < https://www.hcch.net/en/instruments/conventions/full-text/?cid=77>.

540 *Treaty on International Procedural Law*, opened for signature 19 March 1940, 7 Lecciones y ensayos 80 (entered into force 19 March 1940). <https://web.archive.org/web/20150902082940/http://www.parlamento.gub.uy/htmlstat/pl/tratados/trat10272-7.htm>.

541 *Convention on Private International Law*, opened for signature 20 February 1928, (entered into force 20 April 1928) <http://www.oas.org/juridico/spanish/tratados/a-31.html>.

542 *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*, Australia-New Zealand, opened for signature 24 July 2008, [2013] ATS 32 (entered into force 10 November 2013).

While the original goal was to conclude a much grander Hague Convention on Jurisdictions and Judgments, the *Choice-of-Court Convention*[543] successfully institutionalised the recognition of Choice-of-Forum clauses into a global treaty, thus confirmed at a global-scale party autonomy in litigation. Currently with 30 party-states and regional economic integration organisations (REIOs), the *Choice-of-Court Convention* was adopted on 30 June 2005 and came into effect on 1 October 2015. On 25 March 2015, Singapore signed the *Choice-of-Court Convention* and ratified the same on 2 June 2016. It entered into force for Singapore on 1 October 2016.

The *Choice of Court Convention* has three basic rules. First, the court chosen by the parties must hear the case,[544] unless the agreement is null and void under the law of the chosen court.[545] Article 5 emphasises that the chosen court may not decline jurisdiction even if allowed by its internal law, including the application of *forum non conveniens*.[546] Article 5 though does not affect rules on subject matter jurisdiction and allows courts to transfer the case to another court if its internal law allows such discretionary transfer, albeit due consideration should still be given to the choice of the parties.[547] Second, under Article 6, any court not chosen must decline to hear the case.[548] This complements the first rule and removes the discretion from the non-chosen court to hear the action. The exceptions to this rule are when the agreement is null and void under the law of the chosen court,[549] a party lacked the capacity under the law of the court seised,[550] giving effect to the agreement would be contrary to local public policy,[551] the agreement cannot be reasonably performed because of reasons beyond the parties' control,[552] or the chosen court has decided not to hear the case.[553] These exceptions echo the grounds under the *New York Convention*: the agreement does not have to be respected where it is 'null and void, inoperative or incapable of being performed.'[554] Nonetheless, the grounds under the *Choice-of-Court Convention* are seen as an improvement because Article 6(a) specifies the test to determine the validity of the Choice-of-Forum agreements (*ie,* the law of the state of the chosen court), unlike the *New York Convention* which is silent on the applicable test. Third, any judgment rendered by the chosen court must be

[543] *Choice-of-Court Convention* (n70) preamble.
[544] Ibid art 5.
[545] Ibid art 5(1).
[546] Andrea Schulz, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements' [2005](7) *Yearbook of Private International Law* 1, 9; also Trevor Hartley, *Choice-of-Court Agreements Under the European and International Instruments* (Oxford, 2013) 177.
[547] Ibid 9.
[548] *Choice-of-Court Convention* (n70) art 6.
[549] Ibid art 6(a).
[550] Ibid art 6(b).
[551] Ibid art 6(c).
[552] Ibid art 6(d).
[553] Ibid art 6(e).
[554] *New York Convention*, art 2(3); Schulz (n546) 9.

recognised and enforced in other contracting state, except where a ground for refusal applies.[555] Grounds for refusal include nullity of the Choice-of-Forum clause under the law of the chosen court, lack of legal capacity of a party, failure to properly notify the other party, procedural fraud, and contravention of public policy and *res judicata*.[556] The judgment may also be refused recognition or enforcement if it awards exemplary or punitive damages that do not compensate a party for actual loss or harm suffered.[557]

Significantly, the *Choice-of-Court Convention* also addresses the issue of which law determines the substantive validity of the Choice-of-Forum clause. Under Article 5, the test for substantive validity of the Choice-of-Forum agreement is the law of the state where the chosen court is located.[558] While seen as an improvement, there is doubt whether Article 5 is truly effective. The application of the law of the chosen court, for example, by the court seised does not always lead to the same material result especially that the application of foreign law in the forum may be difficult.[559] Likewise, the law of the chosen court does not govern all the situations of substantial validity.[560] The determination of whether consent really exists, for instance, is a factual question which requires the application of the forum law.[561] Similarly, when the capacity of parties is challenged, the question shall be resolved using forum law pursuant to Article 6(b).[562] In addition, the *Choice-of-Court Convention* does not contain explicit rules on transmission of rights to third parties,[563] although in the Hartley-Dogauchi Report, the *Choice-of-Court Convention* is said to allow a third party to benefit from the Choice-of-Forum clause after they have taken over the rights and obligations of one of the original party as provided under the relevant national law.[564]

In addition, the *Choice-of-Court Convention* also has a much more limited scope compared to the *Brussels I Recast*. It only applies 'in international cases to exclusive choice of court agreements concluded in civil or commercial matters,'[565] albeit with an optional extension to non-exclusive choice-of court agreements through reciprocal declarations.[566] Nonetheless, the presumption of

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[555] *Choice-of-Court Convention* (n70) arts 8,9.
[556] Ibid art 9.
[557] Ibid art 11.
[558] Ibid art 5(1).
[559] Diana Sancho Villa, 'Jurisdiction over Jurisdiction and Choice of Court Agreements: Views on the Hague Convention of 2005 and Implications for the European Regime' [2010](12) *Yearbook of Private International Law* 399, 411.
[560] Ibid.
[561] Ibid.
[562] Ibid.
[563] Ibid.
[564] Hartley-Dogauchi Report (n354) 51.
[565] *Choice-of-Court Convention* (n70) art 1(1).
[566] Ibid art 22.

exclusivity may arguably widen its scope. Furthermore, Article 2 provides an extensive list of the subject matters that are excluded. Likewise, the *Choice-of-Court Convention* does not affect interim measures of protection. More importantly, however, the *Choice-of-Court Convention* has a complex interaction with treaties and legal regimes like the *Brussels I Recast* in Europe.[567]

In any case, the *Choice-of-Court Convention* may provide an important catalyst for any important developments in the law of Choice-of-Forum clauses in Asia. This was seen in Singapore. Nonetheless, based also on the Singapore experience, because the convention is limited in scope and Choice-of-Forum clauses can take many more forms other than exclusive clauses and the range of transactions which may employ them are much wider, countries should be ready to face a very complex multiple Choice-of-Forum clause regime. This increased complexity may discourage countries from adopting the *Choice-of-Court Convention.*

2. Freedom to Determine Contents of the Choice-of-Forum Clause

By limiting its application to exclusive Choice-of-Forum clauses concluded in civil or commercial matters except when a reciprocal declaration has been made under Article 22 in relation to non-exclusive clauses, the *Choice-of-Court Convention* maintains the usual dichotomy between exclusive and non-exclusive Choice-of-Forum clauses. Nonetheless, under Article 3(b), Choice-of-Forum clauses are presumed exclusive. Furthermore, the distinct obligations of the chosen court and non-chosen court under Articles 5 and 6 respectively also shows that the *Choice-of-Court Convention* recognises that parties can provide for 'positive' (prorogation) and 'negative' (derogation) effects in their Choice-of-Forum clauses. However, if parties would like the *Choice-of-Court Convention* to apply, they need to promise that they would submit their dispute only to the courts or specific courts of a party state.[568] Likewise, if parties would like the convention to apply, they also need to promise not to sue in any other courts except in the chosen court.[569] Hence, the positive effect recognised by the *Choice-of-Court Convention* is prorogation in favour of only one party state while the negative effect is total derogation of all courts except for the courts in the chosen jurisdiction. If parties vary the positive and negative effects, such as when they provide that the courts of two Choice-of-Court Convention parties may hear their disputes, their dispute may fall outside the scope of the *Choice-of-Court Convention*. The only situation where they can still avail of the convention regime is when the presumption of exclusivity is not challenged by either party.

[567] See Sancho Villa (n559).
[568] *Choice-of-Court Convention* (n70) art 3(a).
[569] Ibid art 3(a).

Notably, asymmetrical agreements or agreements which may be exclusive for one party but non-exclusive for the other is not considered exclusive under the *Choice-of-Court Convention*.[570]

Other than the promises giving rise to prorogation and derogation effects, the *Choice-of-Court Convention* does not specify what other promises parties can include in their Choice-of-Forum clauses. Provided that the promises do not involve matters specifically excluded under Article 2, the *Choice-of-Court Convention* may allow them. Furthermore, the *Choice-of-Court Convention* is silent as to whether the promises amount to promises which give rise to contractual rights. It is only concerned with making sure that the courts which were chosen by the parties would acquire and proceed to exercise its jurisdiction over the dispute, while those which were not chosen, would decline jurisdiction. Hence, the validity,[571] enforceability and the remedies available for the other promises in the same Choice-of-Forum clause but are not specifically regulated by the *Choice-of-Court Convention*, would depend on the law of the chosen forum. As such, if allowed under the relevant national law, parties may provide that breach of the exclusive Choice-of-Forum clause would entail damages.

Significantly, the exclusion of consumer and employment contracts under article 3 reflects the concerns regarding the 'authenticity' of the party autonomy which is supposed to be reflected in the Choice-of-Forum clauses contained in these types of contracts. There are doubts as to whether the promises and their contents are actually free and mutual especially in situations where there are recognised bargaining inequalities.[572] These 'limits' of party autonomy is recognised by the *Choice-of-Court Convention* and are discussed further in Chapter 7.

3. Freedom to Control Litigation

The *Choice-of-Court Convention* does not generally affect the parties' freedom to control litigation. While a contract with an exclusive Choice-of-Forum clause may be involved, a party is not precluded from filing a claim under a different cause of action, say under certain torts which are excluded under Article 2.[573] Of course, whether or not the court will still enforce the exclusive Choice-of-Forum clause is subject to the court's interpretation of the Choice-of-Forum clause and the provisions of the *Choice-of-Court Convention*. Moreover, the parties' choice of relief to enforce or

[570] Brooke Adelle Marshall and Mary Keyes, 'Australia's Accession to the Hague Convention on Choice of Court Agreements' (2017) 41(1) *Melbourne University Law Review* 246, 277-8.
[571] *Choice-of-Court Convention* (n70) art 6(a).
[572] See, eg, Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) 85-6.
[573] *Choice-of-Court Convention* (n70) art 2(2)(k).

avoid the Choice-of-Forum clause, like a stay, injunction or dismissal, remains with the party applicant, subject to the requirements under local procedural rules. Notably, Article 7 preserves a party's right to seek interim relief including an anti-suit injunction.[574] However, the manner a certain relief is granted, including the anti-suit injunction, may be affected by the *Choice-of-Court Convention*. For instance, the obligations of the chosen and non-chosen courts and the limited grounds which may be cited to avoid an exclusive Choice-of-Forum clause under Articles 5 and 6 may be inconsistent with the inherently discretionary nature of granting anti-suit injunctions.

Because of the requirements under Articles 5 to 9, the arguments which parties may raise to enforce or avoid an exclusive Choice-of-Forum clause, or during the recognition or enforcement of a foreign judgment may be limited. However, because the relevant national law governs the specific grounds which determine validity, scope of public policy, or circumstances amounting to fraud or violation of fundamental principles of procedural fairness, there may still be more grounds available to parties than what the *Choice-of-Court Convention* provides. Furthermore, while factors under the principle of *forum non conveniens* like convenience or place of evidence can no longer be relied on to avoid exclusive Choice-of-Forum clauses in favour of foreign courts, 'the width of the exceptions in Article 6 may allow scope for arguments based on differences in applicable law to be made.'[575]

As regards the enforcement and recognition of foreign judgments, parties need to comply with the procedural requirements under the *Choice-of-Court Convention* and the law of the requested court.[576] Article 13 provides the list of documents which an applicant should produce.[577] Particularly, the *Choice-of-Court Convention* even recommends a form for such an application.[578] In this sense, the extent of the parties' freedom to choose the manner which they can enforce a foreign judgment appear to be more limited. However, should a party fail to produce the required documents, '[t]he law of the requested State determines the consequences of failure to produce the required documents.'[579] Hence, whether or not the court is liberal or strict on the parties' failure to closely follow the requirements depends on the law of the requested court. The Hartley-

[574] Alex Mills, 'The Hague Choice of Court Convention and Cross-Border Commercial Dispute Resolution in Australia and the Asia-Pacific' (2017) 18(1) *Melbourne Journal of International Law* 1, 9.
[575] Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing' (2009) 5(1) *Journal of Private International Law* 161, 165.
[576] *Choice-of-Court Convention* (n70) arts 13-4.
[577] Ibid art 13(1).
[578] Ibid art 13(3).
[579] Hartley-Dogauchi Report (n354) 211; see Ibid art 14.

Dogauchi Report, however, emphasises that courts should avoid excessive formalism.[580] However, whether the other modes of enforcement like through registration or common law proceedings are still available, is debatable.

G. Key Lessons

Party autonomy in Choice-of-Forum clause litigation is manifested first, in the parties' freedom to determine the contents of their Choice-of-Forum clauses. In Singapore, Hong Kong and Malaysia, this means that parties can provide a wide range of promises which may provide positive (prorogation) and negative (derogation)effects including other terms like waiver of certain objections, among others. In addition, the parties expect that the promises in their Choice-of-Forum clause give rise to private law rights and obligations. In the Philippines, like in civil law jurisdictions, the parties' freedom is limited by the confines of the procedural rule allowing such prorogation or derogation. Hence, parties can only make an exclusive choice of venue and no other special promises which can vary the effects of Philippine jurisdictional rules.

The party autonomy manifested as the freedom to control the course of litigation is similarly enjoyed by parties in all four Asian jurisdictions. This freedom to control litigation fundamentally determines Choice-of-Forum litigation because of the choices made by the parties – whether to file a claim, which cause of action, what forum, which legal category (*eg*, contracts, torts, etc.) and legal theory to substantiate their claim, what should be contents of the pleadings, what evidence to present, what procedural tactics to employ, whether to expedite or delay proceedings, what remedies to seek, and many more. While parties are free to steer the litigation to where they want to go, they are still limited by the confines of the procedural rules. Hence, failure to appreciate the procedural rules may amount to losing one's right to sue under the Choice-of-Forum clause.

The ouster rule provides a good illustration of the interaction of party autonomy and the courts. How courts receive party autonomy is shaped by the very legal institutions present in its legal system. For instance, much of the conservatism that prevented the acceptance of the Choice-of-Forum clause in the common law world was due to its strong adherence to the doctrine of precedent. Prior to *Eleftheria*, the English courts have declared that parties cannot by their agreement oust the courts from their jurisdiction. The United States was no different. Change

[580] Hartley-Dogauchi Report (n354) 211.

only came when the English High Court and the United States Supreme Court changed their attitude towards Choice-of-Forum clauses and accepted that the agreement between parties should be enforced *prima facie,* thus abandoning the ouster rule. Because of this change, courts in the common law world, including the courts of Singapore, Hong Kong and Malaysia naturally followed. Unfortunately, despite its tendency to closely follow American decisions, the Philippines failed to adopt the approach in *The Bremen,* and likewise declared the vestigial status of the ouster rule under Philippine law. Until today, parties are held in the Philippines incapable of ousting Philippine courts from their jurisdiction. Philippine law, however, provides a peculiar mechanism of allowing courts of other jurisdictions to hear the dispute – the Choice-of-Forum clause as a venue stipulation. Hence, with the ouster rule alive and well and with its procedural treatment of Choice-of-Forum clauses as venue stipulations, the Philippines appears to prefer state regulation or interests over party autonomy.

The *Choice-of-Court Convention* institutionalised party autonomy at a global-level. Chosen courts have the obligation to enforce exclusive Choice-of-Forum clauses subject to very limited grounds. Non-chosen courts, on the other hand, have the corollary obligation to refuse these clauses. Further, courts need to recognise and enforce foreign judgments from courts chosen in the Choice-of-Forum clause. Notably, both the freedom to determine the contents of their Choice-of-Forum clause and to control their litigation are preserved albeit with limitations brought by the scope of the *Choice-of-Court Convention*.

The next chapter explores further the themes established in this chapter by looking into the remedies available in each of the four Asian jurisdictions. One important theme is that despite the importance of party autonomy in Choice-of-Forum clause litigation, the role of characterising Choice-of-Forum clauses as a simple binary of exclusive and non-exclusive clauses fundamentally affects the enforcement mechanisms of courts in the common law jurisdictions. Likewise, the next chapter shows that far from adopting a strictly contractual or mechanistic approach, all four jurisdictions highlight the important role played, albeit in different degrees, by court discretion in the enforcement of Choice-of-Forum clauses. Nonetheless, with Singapore's assent to the *Choice-of-Court Convention*, this discretion has been constricted as regards exclusive Choice-of-Forum clauses.

Chapter IV.

The Enforcement of Choice-of-Forum Clauses

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A. Introduction

This chapter discusses the forms of relief and remedies available in the four jurisdictions covered by this thesis when Choice-of-Forum clauses are enforced. As will be shown, each jurisdiction has mechanisms to enforce Choice-of-Forum clauses, albeit each has approaches which are unique; thus, demonstrating the complexity of Choice-of-Forum clause analysis even among jurisdictions which share a common legal heritage. As jurisdictions include new elements to their approaches, brought about by their economic ambitions, these new elements have contributed to greater complexity and divergence between jurisdictions. It is very interesting to note how each jurisdiction struggles within their respective legal frameworks, each keeping various degrees of court discretion or state regulation in the analysis vis-à-vis party autonomy. The elements of the tug-of-war between state regulation and party autonomy remain evident in the approaches, albeit in varying degrees. Singapore, for instance, represents the most contract-driven, party autonomy-oriented jurisdiction while the Philippines remains at the other end as the ouster rule appears to cripple its full recognition of Choice-of-Forum clauses as agreements on jurisdiction. Notably, with Singapore's establishment of the Singapore International Commercial Court ('SICC') and accession to the *Choice-of-Court Convention*, the city-state signals its readiness to adopt a more automatic, less court discretion-oriented Choice-of-Forum clause analysis. Hong Kong, with its more cautious approach and loyalty towards common law approaches, and Malaysia, with its emphasis on court discretion but not as much as the Philippines, lie in the middle of the scale. Furthermore, the approaches demonstrate that recognising Choice-of-Forum clauses involve recognising them as creatures of contract, procedure and private international law and that the analysis include tools from all three areas of law.

B. Singapore

1. Singapore's Approach to Jurisdiction

(a) The Court System

Singapore's *Constitution* provides that judicial power is vested in the Supreme Court and such subordinate courts created by law.[581] As such, all courts of Singapore are created by legislation and their authority and powers are derived from statute. The *Supreme Court of Judicature Act* ('SCJA') defines the jurisdiction of the Supreme Court of Singapore which is composed of the High Court and the Court of Appeal.[582] The High Court also has the power to transfer cases to any other court or to or from any subordinate court.[583] Unless a statutory rule or the *Rules of Court* prescribe a specific test, the High Court's exercise of its powers and jurisdiction generally follows the approaches of the common law. Below the Supreme Court are the District Courts, Magistrates' Courts and Small Claims Tribunal, whose jurisdiction depend on the amount of the claims to recover monies for debt, demand or damages.[584] Depending on the amounts of claims involved, cross-border cases involving Choice-of-Forum clauses may be heard in any of these courts and the High Court in its exercise of its civil jurisdiction.

(b) Singapore International Commercial Court

The *Supreme Court of Judicature (Amendment) Act 2014* (SICC Law) established the SICC as a new division of the High Court.[585] The *SICC Law*, which came into effect on 1 January 2015, introduced new approaches to jurisdiction which are relevant to cases involving Choice-of-Forum clauses. For instance, the *SICC Law* and the accompanying amendments[586] to the *Rules of Court* introduced new tests for grant of stay,[587] allowed the SICC to transfer cases and join third parties even in cases where there is a Choice-of-Forum clause,[588] established a presumption of exclusivity of choice in Choice-of-Forum clauses stipulating the SICC,[589] and removed the need for leave to

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[581] *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) s 93.
[582] *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) pt 2 s3 ('SCJA').
[583] Ibid sch 1 s10.
[584] 'Singapore Judicial System', *Supreme Court Singapore* (Web Page, 3 September 2018) <https://www.supremecourt.gov.sg/about-us/the-supreme-court/singapore-judicial-system>.
[585] *SCJA* (n582) pt 3 ss18A-18M.
[586] *Rules of Court* (n355) ord 110.
[587] Ibid r8.
[588] *SCJA* (n582) pt 3 s18J(1).
[589] *SCJA* (n582) pt 3 s18F(a).

serve process out of Singapore when there is a Choice-of-Forum clause.[590] In short, the *SICC Law* introduced approaches to the Choice-of-Forum clause analysis which are not found in common law.

Nonetheless, because the SICC is envisioned to be a specialist court, the cases which fall under its jurisdiction are limited and do not cover all instances where a Choice-of-Forum clause may be stipulated. Notably, the SICC has jurisdiction only in actions (1) which are of an international and commercial nature;[591] (2) where the parties have submitted to the SICC's jurisdiction under a Choice-of-Forum agreement[592] or where the High Court has transferred the action to SICC;[593] and (3) the parties are not seeking 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).[594] What actions are international and commercial are defined by the *Rules of Court*, Order 110 which provides a list of circumstances or transactions which makes a claim international (*eg,* when the parties' place of business are in different states)[595] and commercial (*eg,* supply or exchange of goods or services, distribution agreement, agency, factoring, leasing, construction works, consulting, engineering, carriage of goods or passengers).[596] More importantly, parties can simply agree that the subject matter of the claim is both international (*ie,* by agreeing that the subject-matter of the claim relates to more than one state)[597] and commercial in nature.[598] Remarkably, while the *Choice-of-Court Convention*'s jurisdictional approach is similar, more transactions fall under SICC's jurisdiction.[599] Moreover, because the SICC is a division of the High Court, it is also constrained in the same way as the High Court; thus, SICC's exercise of jurisdiction requires that the action is one which the High Court may hear and try in its original jurisdiction.[600]

Furthermore, the SICC may not decline to assume jurisdiction solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore, if there is a written Choice-of-Forum clause stipulating the SICC.[601] Nonetheless, a written Choice-of-Forum agreement can be entered orally or by conduct, if its contents are recorded in any form including

590 *Rules of Court* (n355) ord 110, r6(2).
591 *SCJA* (n582) pt 3 s18D(a); Ibid ord 110, r7(1)(a).
592 Ibid ord 110, r7(1)(b).
593 Ibid ord 110, r7(2).
594 Ibid ord 110, r7(1)(c).
595 Ibid ord 110, r1(2)(a).
596 Ibid ord 110, r1(2)(b).
597 Ibid ord 110, r1(2)(a)(iv).
598 Ibid ord 110, r1(2)(b)(iii).
599 *Cf Choice-of-Court Convention* (n70) art 2(a).
600 *SCJA* (n582) pt 3 s18D(c).
601 *Rules of Court* (n355) ord 110, r8(2).

an electronic communication.[602] Significantly, the *SICC Law* considers *prima facie* exclusive an agreement to submit to the SICC unless the parties have expressly provided otherwise.[603] One must note that this definition and treatment of Choice-of-Forum clauses differs from the common law where no presumption exists. Nonetheless, the SICC still maintains the dichotomy of exclusive and non-exclusive clauses, albeit the *SICC Law* removes, in both instances, the need for leave to serve process out of Singapore.[604] Furthermore, because the *Rules of Court* do not distinguish between both types of Choice-of-Forum clauses, both are subject to the same tests under Rule 8, Order 110, *Rules of Court* as to when the SICC should decline jurisdiction, *i.e.,* 'if it is not appropriate for the action to be heard in the Court,'[605] and has to state reasons, as mentioned, other than the dispute being connected to another forum.[606] Furthermore, the '…Court shall have regard to [the transaction/dispute's] international and commercial character'.[607]

The SICC can also hear cases which are transferred from the High Court.[608] Likewise, the SICC can join third or subsequent parties,[609] including those cases transferred from the High Court.[610] A liberal approach towards contractual privity, this power is present even in instances where there are Choice-of-Forum clauses. These two innovations raise significant jurisdictional issues and introduce approaches in the exercise of jurisdiction which are different from the traditional common law approaches. Important issues may arise, for instance, when there is a live issue over jurisdiction in the High Court prior to transfer (*eg,* what test should the SICC adopt to resolve the jurisdictional issue considering the differences in the tests applied under the *SICC Law* and common law?).[611] Similarly, transfers from the SICC to the High Court raise similar questions, although in reverse, especially in situations where the SICC has already declined jurisdiction and there is no consent from the parties.[612] Should the test under the common law be applied then by the High Court since it would be the court which is now seised of the matter? The inclusion of third parties also raises difficult issues. For example, because third parties are not parties to the Choice-of-Forum clause, leave is required and the SICC will necessarily use the 'natural forum'

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[602] Ibid ord 110, r1(2)(e).
[603] *SCJA* (n582) pt 3 s18F(1)(a),(2).
[604] *Rules of Court* (n355) ord 110, r6(2).
[605] Ibid ord 110, r8(1).
[606] Ibid ord 110, r8(2).
[607] Ibid ord 110, r8(3).
[608] Ibid ord 110, r7(2).
[609] Ibid ord 110, r9(1).
[610] Ibid ord 110, r9(1).
[611] Yeo Tiong Min, 'Staying Relevant: Exercise of Jurisdiction in the Age of SICC' (Yong Pung How Professorship of Law Lecture, Singapore Management University, 13 May 2015) 17.
[612] See Ibid.

test in *Spiliada Maritime Corp v Cansulex Ltd*[612A] ('Spiliada') if the clause is non-exclusive, or the 'strong cause' test under the *Eleftheria* if the clause is exclusive.[613] However, the SICC is governed by Order 110 which applies a different test - 'if it is not appropriate for the action to be heard in the Court.'[614] This raises the question of whether the SICC should harmonise this test with the 'natural forum' and 'strong cause' tests usually used in leave applications.[615] Furthermore, there are difficult enforcement and recognition of judgements issues involved when the judgements are against third parties.[616]

(c) Choice of Court Agreements Act 2016

On 14 April 2016, Singapore enacted the *Choice of Court Agreements Act 2016* ('CCAA'), thus implementing into Singaporean law the *Choice-of-Court Convention*. With the *Choice-of-Court Convention* regime becoming part of Singapore law, the treatment of Choice-of-Forum clauses in Singapore became more complicated. Nonetheless, because the *Choice-of-Court Convention* only covers exclusive clauses,[617] the new regime does not affect the law governing non-exclusive Choice-of-Forum clauses, albeit there is a presumption of exclusivity of choice.[618] Significantly, unilateral exclusive Choice-of-Forum clauses in common law are not regarded as exclusive for lack of mutuality.[619] Nonetheless, the *Choice-of-Court Convention* imposes a presumption of exclusivity on a clause 'which designates the courts of one Contracting State or one or more specific courts of one Contracting State…unless the parties have expressly provided otherwise.'[620] Furthermore, the convention is limited to exclusive Choice-of-Forum clauses in 'civil and commercial matters,'[621] a term which has an autonomous meaning under the *Choice-of-Court Convention*[622] and thus, does not entail reference to Singaporean law and is intended to exclude public law and criminal law from the convention's application.[623] Furthermore, certain matters, which may ordinarily be considered civil or commercial, are further excluded from the scope of the *Choice-of-Court Convention* under Article 2.[624] In addition, the *Choice-of-Court Convention* regime applies only to disputes after the treaty

[612A] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ('Spiliada').
[613] *Rules of Court* (n355) ord 11, r1(r); See Yeo (n611) 18.
[614] *Rules of Court* (n355) ord 110, r1(r).
[615] See Yeo (n611) 19-20.
[616] See Ibid 20.
[617] *Choice-of-Court Convention* (n70) art 1; *Choice of Court Agreements Act* (Singapore, cap 39A, 2017 rev ed), s8 ('CCAA').
[618] *Choice-of-Court Convention* (n70) art 3(b).
[619] Ibid art 3(a); *cf* Marshall (n570) 277-8.
[620] *Choice-of-Court Convention* (n70) art 3(b); *CCAA* (n617) s3(2).
[621] *Choice-of-Court Convention* (n70) art 1; *CCAA* (n617), s8.
[622] Hartley-Dogauchi Report (n354) 41.
[623] Ibid.
[624] *Choice-of-Court Convention* (n70) art 2; *CCAA* (n617) s9.

has come into force in Singapore on 1 October 2016. Notably, Singapore has not made any of the optional declarations.[625] Hence, matters and cases which are excluded continue to be covered by common law, Singapore statutes, or other relevant treaty regimes to which Singapore is a party.

Based on these discussions, Singapore today has several prevailing legal regimes which are applicable to exclusive and non-exclusive Choice-of-Forum clauses; thus, making Singapore a very complex jurisdiction when it comes to Choice-of-Forum clause analysis. This observation is also consistent with that of Yeo who notes:

> There used to be only two tests for international jurisdiction in the common law. Once the [Hague Choice of Court] Convention comes into force in Singapore, depending on the context, the exercise of international jurisdiction could be subjected to four different tests for exclusive choice of court clauses, two different tests for non-exclusive choice of court cases, and five different tests for joining third parties.[626]

In sum, Singapore presents a window where one can observe the complicated interactions of the *Choice-of-Court Convention* with the domestic legal system's own complexities. Hence, the vision of promoting harmony and uniformity of rules may not be easy to achieve given this Gordian interaction.

2. Service of Process

'*In personam*' jurisdiction is the aspect of jurisdiction which is relevant to the Choice-of-Forum clause in common law jurisdictions. Under Section 16 of the *SCJA*, *in personam* jurisdiction of the High Court may be established by proper service of writ of summons within Singapore, and outside Singapore 'in the circumstances authorised by and in the manner prescribed by Rules of Court…,'[627] or when the defendant submits to the jurisdiction of the High Court, or as vested by Singaporean law.[628] For purposes of illustrating the relevant issues involved in the service of process, the rules of the High Court are used.

Service within Singapore is a matter of right[629] while service outside Singapore is a matter of court discretion.[630] This means that any person can commence a civil action by serving the

[625] *Choice-of-Court Convention* (n70) art 22.
[626] Yeo (n611) 28.
[627] *SCJA* (n582) pt 3 s16(1)(a).
[628] Ibid pt 3 s16(1)(b).
[629] Ibid pt 3 s16(1)(a)(i).
[630] Ibid pt 3 s16(1)(a)(ii).

defendant the writ or other originating process in accordance to the *Rules of Court* if the defendant or his representative is within Singapore.[631] The High Court, as well as any Singaporean court, cannot deny this right to serve process within Singapore. And once service within Singapore has properly been made in accordance with the *Rules of Court*, the court acquires jurisdiction over the defendant. The general procedure and rules for service within Singapore are found in Orders 5, 10 and 62 of the *Rules of Court*. In actions involving Choice-of-Forum cases, once jurisdiction has been established as of right, the defendant may apply to stay the proceedings based on grounds depending on whether the Choice-of-Forum clause is exclusive or non-exclusive. These are discussed further in the following section.

Service out of Singapore, on the other hand, is also governed by the *SCJA*, Section 16(1)(a)(ii). A defendant may be served with process overseas provided leave of court is obtained in accordance with the *Rules of Court*, Order 11. While Order 11 spells out the grounds and conditions for leave to be granted,[632] the consideration of these grounds is left to the discretion of the court.[633] Significantly, extra-territorial service may also be effected pursuant to bilateral civil procedure conventions to which Singapore is a party[634] (*eg, Hague Convention on the Service Abroad and Extra-Judicial Documents 1965*[635]). Service out of Singapore is governed by three main principles: (1) there must be a good arguable case that at least one of the specified heads of jurisdiction under Order 11 Rule 1 is satisfied; (2) there must be at least a serious issue to be tried on the merits of the case; and (3) Singapore is clearly the appropriate forum for the trial of the dispute.[636] The burden of proof on all three points lies with the plaintiff.[637] Notably, Rule 1(r), Order 11 provides that extra-territorial service shall be granted when 'the claim is in respect of matters in which the defendant has submitted or agreed to submit to the jurisdiction of the Court.'[638] Hence, both exclusive and non-exclusive Choice-of-Forum clauses stipulating Singapore provide basis for leave to be granted.

Unless there is 'strong cause,' leave to serve out of jurisdiction is denied when the exclusive Choice-of-Forum clause stipulates for a foreign forum. In *BGC Partners (Singapore) Ltd v Tan Wee*

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631 Ibid pt 3 s16(1)(a)(i).
632 *Rules of Court* (n355) ord 11, r1(a)-(t).
633 Ibid ord 11, r1.
634 LexisNexis Singapore, *Halsbury's Laws of Singapore*, vol 6(2) (at 1 November 2009) 75 Conflict of Laws, '1 Jurisdiction' [75.030].
635 *Hague Convention on the Service Abroad and Extra-Judicial Documents 1965,* opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 November 1969).
636 Ibid [75.031].
637 Ibid.
638 *Rules of Court* (n355) ord 11, r1(r).

Hiong Kevin ('BGC Partners'), the High Court granted leave even though the partnership agreement's exclusive Choice-of-Forum clause stipulated Delaware courts because the main issues in dispute were intricately related to the defendant's termination in BGC Singapore as an employee, and 'it would be in the interests of justice' that the defendant's counterclaim in relation to his termination as a partner would also be resolved in Singapore.[639]

Cases under the SICC can be commenced through the same procedures in the *Rules of Court*. Order 110, however, foregoes the need for leave when there is a written Choice-of-Forum clause stipulating the SICC.[640] This radical procedural change applies to both exclusive and non-exclusive Choice-of-Forum clauses. By dispensing with the leave requirement, the SICC, in effect makes the service of process in and out of Singapore as a matter of right.[641] Notably, the defendant, in both instances, has the burden of convincing the court not to exercise its jurisdiction.[642] However, when a third party is joined, service out of Singapore still needs to comply with the leave requirement, following the standards under the common law.

The *Choice-of-Court Convention* and the *CCAA* do not deal with matters involving service of process to commence proceedings, actions or claims involving Choice-of-Forum clauses. Nonetheless, because the treaty affects exclusive Choice-of-Forum clauses in matters it covers, the test applicable to service out of Singapore is modified. The grant of leave appears to be no longer discretionary when a matter falls within the scope of the *Choice-of-Court Convention* and Singapore is the chosen court because service out of Singapore becomes a necessary step for the chosen Singaporean court to exercise jurisdiction. In the same way, if the Singapore court is not the chosen court, it has no discretion to grant leave to serve process out of Singapore. The Singapore court should simply dismiss a leave application under these circumstances. Nonetheless, leave may still be granted (*ie,* when Singapore court is not chosen) or refused (*ie,* when Singapore court is chosen), as the case may be, on the grounds stated in Article 5(1) (*ie,* the agreement is null and void under Singapore law)[643] and Article 6 (*ie,* the agreement is null and void under the law of the chosen court, a party lacks the capacity to conclude the agreement under Singapore law, giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to Singapore's public policy, the agreement cannot reasonably be performed because of exceptional reasons

[639] *BGC Partners (Singapore) Ltd v Tan Wee Hiong Kevin* [2017] SGHC 214, [6] (High Court) ('BGC Partners').
[640] *Rules of Court* (n355) ord 110, r6(2).
[641] Yeo (n611) 10.
[642] Ibid 11.
[643] *Choice-of-Court Convention* (n70) art 5(1).

beyond the control of the parties, or the chosen court has decided not to hear the case).[644] *CCAA* cases under the SICC do not encounter these issues as leave is not required when there are exclusive Choice-of-Forum clauses.[645]

3. Stay of Proceedings

(a) Common Law

In proceedings commenced by service within Singapore, the *SCJA* authorises the High Court's to stay proceedings 'where by reason of multiplicity of proceedings in any court or courts or by reason of a court in Singapore not being the appropriate forum the proceedings ought not to be continued.'[646] By allowing stays where there is multiplicity of proceedings or when the natural forum test demands it, this formula allows the court to grant a stay, whether the Choice-of-Forum clause involved is exclusive or non-exclusive. Similar to the tests used in granting leave for service out of Singapore, the tests in granting a stay also highlight the court's discretion regardless of the nature of the Choice-of-Forum clause. Notably, because an application for a stay is a matter of procedure, Singapore law applies.[647]

When there is an exclusive Choice-of-Forum clause, the test for granting a stay is the more stringent 'strong cause' test, while the 'natural forum' test applies when the clause is non-exclusive. Applicable whether the exclusive Choice-of-Forum clause stipulates either Singapore courts or foreign courts, the 'strong cause' test requires the applicant to establish a strong cause amounting to exceptional circumstances why he should not be held to that agreement.[648] In exercising its discretion, the court considers all the circumstances of the particular case.[649] Although the factors may be similar in both the 'natural forum' and 'strong cause' tests, the starting points of these tests are different. The 'strong cause' test begins by giving effect to the exclusive Choice-of-Forum clause as a matter of contract, and the plaintiff has the tall burden of establishing strong cause.[650] In the 'natural forum' test, on the other hand, because the plaintiff has invoked the court's jurisdiction as a matter of right, the defendant bears the legal burden of proving that there is an

[644] Ibid art 6.
[645] *Rules of Court* (n355) ord 110, r6(2).
[646] *SCJA* (n582) sch 1 s9.
[647] *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042, 1047 (High Court) ('Abdul Rashid').
[648] *Amerco* (n510) 115.
[649] Ibid.
[650] Ibid.

available and clearly more appropriate forum elsewhere.[651] If the defendant cannot discharge this burden, then ordinarily a stay will be denied.[652] If the defendant can demonstrate this, then a stay will be granted unless the plaintiff can show that there are circumstances by reason of which justice requires that the court should nonetheless not grant the stay.[653] The 'natural forum' test therefore involves two stages where the burden shifts from the defendant to the plaintiff. Singapore courts have also used the 'natural forum' test in mixed clauses where parties can choose between arbitration or litigation in a certain jurisdiction.[654] Nonetheless, as will be discussed in this section and Chapter 5, in instances when parties have intended the non-exclusive clause to have a greater weight vis-à-vis the other factors, the applicable test for non-exclusive Choice-of-Forum clauses can be closer to the 'strong cause' test.[655]

One must note, however, that although the treatment of exclusive and non-exclusive Choice-of-Forum clauses is different, courts may not engage in explicitly classifying them before applying either the 'strong cause' or 'natural forum' test. This is probably because of the approach in *Amerco*[656] which laid down the test for the issuance of stay in Singapore. In *Amerco*, the Court of Appeal did not specify whether the test it introduces applies to exclusive Choice-of-Forum clauses alone or to non-exclusive clauses as well. The court said:

> Where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign court, and the defendant applies to a stay, the Singapore court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so.[657]

Because of this approach, later Singaporean decisions appear to have followed this language with courts not seeing the need to qualify first whether the Choice-of-Forum clause is exclusive or non-exclusive.[658]

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651 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503, 520 (High Court) ('UBS').
652 Ibid.
653 Ibid.
654 See *The 'Dai Yun Shan'* [1992] 1 SLR (R) 461, 469 (High Court).
655 *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala,* [2012] 2 SLR 519, 532-3 (Court of Appeal) ('Orchard Capital'); *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779, 816 (Court of Appeal) ('Shanghai Turbo').
656 *Amerco* (n510).
657 Ibid 114-5.
658 Eg, *The 'Asian Plutus'* [1990] 1 SLR (R) 504, 512 (High Court); *The 'Eastern Trust'* [1994] 2 SLR (R) 511, 515, 519-20 (High Court); *The 'Botic'*[1999] 2 SLR (R) 494 (High Court); *The 'Jian He'* [1999] 3 SLR (R) 432 (Court of Appeal); *The 'Hung Vuong-2'* [2000] 2 SLR (R) 11 (Court of Appeal); *The Hyundai Fortune* [2004] 2 SLR (R) 213 (High Court).

In *Vishva Apurva*,[659] the Court of Appeal introduced new factors to the factors mentioned in *The Eleftheria*. The court said that it 'should accord full recognition to exclusive jurisdiction clauses which are freely negotiated between the parties and which are unaffected by "fraud, undue influence or overwhelming bargaining power."'[660] Notably, this shift plus a significant change in the list of factors which should be included in the 'strong cause' test (not those in *The Eleftheria* but the factors mentioned in *The Bremen*) show that the 'strong cause' test is not actually so strong but instead, malleable to the shifting preferences and appreciation of the various factors of the court. Moreover, factors considered in the 'strong cause' test are given limited weight if they were foreseeable at the time when the parties contracted.[660A]

Furthermore, because of the developments brought by the English case, *S & W Berisford plc v New Hampshire Insurance Co*[661] ('Berisford') to the 'natural forum' test, the 'strong cause' test was also applied in cases involving non-exclusive clauses. In *Bambang Sutrisno v Bali International Finance Ltd,*[662] ('Bambang') although the relevant Choice-of-Forum clause stipulating Indonesian courts was classified as non-exclusive,[663] the Court of Appeal used the 'strong cause' test to stay Singapore proceedings.[664] The court said, '[i]n our judgment, the appellant had shown exceptional circumstances amounting to strong cause for a stay of this action and Indonesian court is clearly and distinctly more appropriate than the Singapore forum for the trial of the matter in dispute.'[665] One notable feature of the Choice-of-Forum clause in this case was the waiver of 'any objections on the ground of venue or *forum non conveniens* or any similar grounds.'[666] This may have affected the court's analysis and may signal Singapore's change in approach on non-exclusive Choice-of-Forum clauses. Notably, the court cited *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd*[667] ('PT Jaya') which in turn referred to *Berisford* which extended the strong cause test to situations where English courts are named in the non-exclusive clause and the action is filed in an English court. In *Bambang*, however, the situation is different because the non-exclusive clause stipulated for Indonesian courts and not for Singapore courts.[668] Notably, in *PT Jaya*,[669] the

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[659] *The 'Vishva Apurva'* [1992] 1 SLR (R) 912 (Court of Appeal).
[660] Ibid 927.
[660A] *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR (R) 6, [38] (Court of Appeal) ('Golden Shore'); Hyundai Fortune (n658) [30]; *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271, 1292 (Court of Appeal) ('Vinmar').
[661] *S & W Berisford plc v New Hampshire Insurance Co* [1990] 2 QB 631 ('Berisford').
[662] *Bambang Sutrisno v Bali International Finance Ltd* [1999] 2 SLR (R) 632 (Court of Appeal) ('Bambang').
[663] Ibid 635.
[664] Ibid 637.
[665] Ibid 640.
[666] Ibid 635.
[667] *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 (High Court) ('PT Jaya').
[668] *Bambang* (n662) 640.
[669] *PT Jaya* (n667).

Singapore High Court first classified the clause non-exclusive[670] and still applied the usual *Spiliada* test[671] (not the 'strong cause' test), albeit the court considered the non-exclusive Choice-of-Forum clause as a 'strong' factor[672] after citing *Berisford*.[673]

Classifying clauses as either exclusive or non-exclusive became more explicit after *Baiduri*.[674] The High Court in *Baiduri* identified three types of Choice-of-Forum clauses and the test applicable for each type.[675] First are non-exclusive Choice-of-Forum clauses which the court held must be evaluated following the principles of *Spiliada*, which were adopted in Singapore in *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia*[676]('Brinkerhoff'). When a non-exclusive clause is involved, the court has to engage in a 'balancing exercise…necessary to ascertain the *forum conveniens*….'[677] The second type, according to the High Court, are the exclusive Choice-of-Forum clauses, which must be given effect unless vitiating factors such as fraud, undue influence, overwhelming bargaining power are present.[678] This formula appears to follow *Vishva Apurva* which introduced *The Bremen* factors to the 'strong cause' test in Singapore. The High Court identified as the third type those clauses where the 'jurisdiction clause limits the jurisdiction to a few countries, but no special or specific right of election or option is given to either party to select which of those countries to proceed in.'[679] The High Court called these 'semi-exclusive' clauses, otherwise known as hybrid clauses in other jurisdictions. These clauses require the application of the *forum non conveniens* principle. However, when the plaintiff has the right to select any one of these specified countries to institute his action,[680] and Singapore is one of the specified jurisdictions, the plaintiff, by filing a case in Singapore, is acting on his contractual right, thus the defendant must have the burden of showing 'exceptional circumstances' amounting to 'strong cause' why the action brought by the plaintiff in Singapore should be stayed.[681]

Baiduri provided a framework for future cases. Hence, courts would first categorise the Choice-of-Forum clause involved as either exclusive, non-exclusive or semi-exclusive, and then

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670 Ibid [62]-[63].
671 Ibid [66]-[67].
672 Ibid [65].
673 Ibid [64].
674 *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [2000] 2 SLR (R) 271 (High Court) ('Brinkerhoff').
675 Ibid 276-82 (High Court).
676 Ibid 276 (High Court).
677 Ibid.
678 Ibid 277 (High Court).
679 Ibid 281 (High Court).
680 Ibid 282 (High Court).
681 Ibid.

correspondingly apply the relevant test.[682] Subsequently, citing *Bambang*[683] as its authority, *Societe Generale v Tai Kee Sing @ Tai Hean Sing*[684] ('Societe Generale') moved the Singaporean approach in non-exclusive clauses closer to *Berisford* by applying the 'strong cause' test to non-exclusive clauses stipulating Singapore courts.[685] The Singaporeans, however, as seen below, will move further and create a test different from *Berisford*.

Notably, *Baiduri's* recognition of 'semi-exclusive' Choice-of-Forum clauses shows that non-exclusive clauses cannot be classified into one monolithic category, which can be subjected to one test – the 'natural forum' test. Referring heavily on Yeo's article, the Court of Appeal in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala*[686]('Orchard Capital'), said that two strands should be involved in analysing non-exclusive clauses.[687] The first strand looks into the contract, particularly the parties' intention.[688] The court said that a non-exclusive clause may have the effect of an exclusive clause (or at least have a similar effect) depending 'on the precise intention of the parties themselves which is to be gathered from the language utilised by the parties as well as the surrounding factual matrix.'[689] The court cautioned, nonetheless, about the contractual approach as it may lead to uncertainty and difficulties at the interlocutory level.[690] The second strand is the more general treatment of non-exclusive Choice-of-Forum clauses as 'a factor – in all cases – in ascertaining whether or not the action concerned ought to be stayed…although…its qualitative strength…will differ, depending on the precise circumstances before the court.'[691] It appears then based on *Orchard Capital*, that to ascertain whether or not a stay may be granted, one must look first into the intention of the parties (as may be discerned in the language of the Choice-of-Forum clause) to determine the relative weight of the non-exclusive clause vis-à-vis the other factors in *Spiliada's* 'natural forum' test. If the parties have intended an effect akin to exclusive Choice-of-Forum clauses or the parties' intended to give the clause a greater weight other than its being a factor in the *Spiliada* analysis, 'it may be a breach of the non-exclusive jurisdiction clause to object to the exercise of jurisdiction by the selected forum.'[692] In such case, 'strong cause would be

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682 *Asia-Pacific Ventures II Ltd v PT Intimutiara Gasindo* [2001] 2 SLR (R) 371 (High Court) ('Asia-Pacific Ventures'); *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR (R) 6 (Court of Appeal) ('Golden Shore'); *Rickshaw* (n454); *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR (R) 543 (Court of Appeal) ('CIMB Bank'); *OCBC Capital* (n437); *Citibank NA v Robert* [2011] 3 SLR 465 (High Court) ('Citibank').
683 *Bambang* (n662).
684 *Societe Generale v Tai Kee Sing @ Tai Hean Sing* [2003] SGHC 139 (High Court) ('Societe Generale').
685 Ibid [7].
686 *Orchard Capital* (n655).
687 Ibid 530.
688 Ibid 530-1.
689 Ibid 532.
690 Ibid.
691 Ibid.
692 Ibid 530.

required to be demonstrated by the party seeking to sue in a jurisdiction other than that stated in the relevant clause itself.'[693] Otherwise, if no such effect is intended, a grant of a stay would depend on the classical *Spiliada* analysis.[694] Citing the Hong Kong decision in *Noble Power*,[695] the court recognised that the defendant's burden may be less heavy where the action was commenced in a jurisdiction which was not the forum named in the non-exclusive Choice-of-Forum clause.[696] As explained in Chapter 5, this test developed in *Orchard Capital* is notably different from *Berisford* and the other relevant English cases.

Nonetheless, in *Abdul Rashid bin Abdul Manaf v Hii Yii Ann*,[697] ('Abdul Rashid'), the High Court rejected the attempt to move further the test. In *Abdul Rashid*, the court dismissed the argument that a non-exclusive Choice-of-Forum clause always means that 'parties agreed that the contractual jurisdiction is the [most appropriate jurisdiction] to hear their dispute.'[698] Whether the non-exclusive clause designates the named forum as the most appropriate jurisdiction will depend on 'the context and the rest of the terms…'[699] If such was the parties' intention, 'this will bring the negotiated [non-exclusive jurisdiction] clause very close to an [exclusive jurisdiction] clause.'[700] In such case, 'the evidential burden shifts to a plaintiff suing in the non-contractual jurisdiction to show strong cause as to why he should be permitted to do so.'[701]

The very recent decision, *Shanghai Turbo Enterprises Ltd v Liu Ming* ('*Shanghai Turbo*'), appears to confirm the authority of *Abdul Rashid* on this point – '[a] non-exclusive jurisdiction clause only indicates that the parties thought that the forum named therein was an appropriate one.'[701A] Hence, even when parties intended that their non-exclusive clause would have a stronger effect as contemplated in *Orchard Capital*, parties may be allowed to present evidence to establish 'strong cause,' thus allowing them to sue in a court other than the named forum. Notably, in *Shanghai Turbo*, the court emphasised that essentially, the factors which are relevant to the test of strong cause in the context of an exclusive jurisdiction clause would also apply in this situation.[701B] Further, the court noted that if *The Eleftheria* factors (a) and (c) (*eg,* location of evidence and parties)

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[693] Ibid 530.
[694] Ibid 532.
[695] *Noble Power* (n235).
[696] *Orchard Capital* (n655) 328-9.
[697] *Abdul Rashid* (n647).
[698] Ibid 1053.
[699] Ibid 1054.
[700] Ibid.
[701] Ibid 1054.
[701A] *Shanghai Turbo* (n655) 817.
[701B] Ibid 823.

were foreseeable at the time when the parties contracted, these factors carry little weight.[701C] Likewise, following the rule in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* ('*Vinmar*'),[701D] a case involving an exclusive clause and which will be discussed more extensively in Chapter 5, factor (d) of *The Eleftheria* (*ie,* whether the defendants genuinely desire trial in the contractual forum) would only be relevant if the applicant is acting abusively in applying for a stay of proceedings.[701E] The approach in *Shanghai Turbo* therefore represents the modified *Spiliada* as it currently stands in Singapore.

Shanghai Turbo also pointed out that when the non-exclusive Choice-of-Forum clause was freely negotiated, parties who stipulated that they 'submit' to the named forum, are considered to have waived their right to object that the named forum was an appropriate forum.[701F] The court, however, declined to determine whether this rule will also hold in instances when the non-exclusive clause is contained in a standard contract.[701G] Hence, a freely-negotiated agreement to submit to the non-exclusive forum prohibits either party from contesting the jurisdiction of the named forum, either in an application to set aside service of summons or for a stay of proceedings.[701H]

Aside from a traditional stay, Singaporean courts may also grant a 'partial' stay of proceedings. In *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK*,[702] ('Humpuss') the High Court said that one form of a partial stay is to stay one of the claims against a defendant but not the rest.[703] According to the court, it is possible when there are several defendants and the actions against them are not closely related and there is no possibility of inconsistent decisions being reached by courts in different jurisdictions.[704] Another instance is when there are several claims against a defendant but the forum is eminently the natural forum for deciding on one claim but not the others.[705] The court referred to *Hyslop v Society of Lloyd's* [706] where the New Zealand court declined to stay all the claims despite an exclusive Choice-of-Forum clause stipulating for English courts because of various New Zealand statutes containing

[701C] Ibid 824.
[701D] *Vinmar* (n660A).
[701E] *Shanghai Turbo* (n655) 824.
[701F] Ibid 820.
[701G] Ibid.
[701H] Ibid 820-1.
[702] *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 (High Court) ('Humpuss').
[703] Ibid 1349.
[704] Ibid.
[705] Ibid.
[706] (1992) 6 PRNZ 204.

mandatory rules and reflecting public policy.[707] Following *Humpuss*, the High Court in *Ivanishvili, Bidzina v Credit Suisse AG*[708] ('Ivanishvili') refused to partially stay the proceedings[709] because the 'centrality of Geneva as the theatre of action makes it inappropriate to try the trust part of the claim discrete from the claim against the [Credit Suisse AG].'[710] This is especially after the High Court construed the forum of administration clause in the trust deed as non-exclusive while the exclusive Choice-of-Forum clause between Ivanishvili and Credit Suisse AG could not bind all five plaintiffs in this case.[711]

Furthermore, Singaporean courts may also grant a temporary or limited stay. In *RBS Coutts Bank Ltd v Brunner Hans-Peter*,[712] the High Court differentiated this type of stay from a permanent stay which is the usual relief granted in Choice-of-Forum clause litigation. The court said that 'the granting of a limited stay order pending conclusion of foreign proceedings did not require the application of *forum non conveniens* principles…[because] the court has the full discretion.'[713] Notably, granting a temporary stay even when there is an exclusive Choice-of-Forum clause stipulating Singapore courts 'would not amount to the court assisting in a breach of a contractual arrangement.'[714] This is because '[a]fter the resolution of the Zurich action, the plaintiff could still continue with the present action in Singapore to determine its rights under the loan agreement.'[715] '[T]he predominant considerations in applications for a temporary stay of proceedings on the basis of a multiplicity of proceedings would be practical ones relating to international comity, case management and fairness to the parties.'[716] In this case, the court considered the undesirability to have both the Singapore and Swiss courts 'determine the same issue of whether or not the defendant was entitled to the Deferred Award,' the fact that the 'Zurich action had been commenced before the Singapore proceedings,' and 'that the Zurich action was at a more advanced stage, with arguments having already been exchanged' as the grounds for granting a temporary stay.[717]

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[707] Humpuss (n702) 1349 citing *Hyslop v Society of Lloyd's* (1992) 6 PRNZ 204.
[708] *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 (High Court) ('Ivanishvili').
[709] Ibid [78].
[710] Ibid [79].
[711] Ibid [28].
[712] *RBS Coutts Bank Ltd v Brunner Hans-Peter* [2010] SGHC 342 (High Court).
[713] Ibid [13] citing *Chan Chin Cheung v Chan Fatt Cheung* [2009] SGCA 64, [47] (Court of Appeal).
[714] Ibid [30].
[715] Ibid.
[716] Ibid [28].
[717] Ibid [29].

Before going any further, a comment on these alternative forms of stay should be given. While partial, temporary or limited stays may give parties additional forms of relief and provide courts some flexibility in managing a complex litigation, they may undermine the effects of Choice-of-Forum clauses and even lead to fragmented proceedings, which probably could be the reason why the parties stipulated a Choice-of-Forum clause. Notably, these alternative forms of stay have the potential of varying the effect of Choice-of-Forum clauses. For example, an exclusive Choice-of-Forum clause, following *The Eleftheria*, should direct parties to the exclusive forum unless there is strong cause. By granting a partial stay in disputes involving exclusive clauses, the court, in effect, may allow the plaintiff to escape the effects of an exclusive clause stipulating a foreign court without requiring him to establish 'strong cause.' He can simply argue that certain claims may be more appropriately heard in the forum, while others, in the chosen forum. Even in actions involving non-exclusive Choice-of-Forum clauses, the possibility of fragmented proceedings, inconsistent decisions, and the added litigation complexities and costs can make these types of stays undesirable. Their undesirability may be further highlighted when the other party has less resources to pursue claims in various forums. They give further incentive for the stronger party to engage in forum shopping especially in jurisdictions granting such relief, and thus, increasing the potential of abuse of the judicial process. In effect, this may further undermine the enforcement of Choice-of-Forum clauses.

Nonetheless, in instances when the foreign court decided not to assume jurisdiction after the proceedings in Singapore were granted a stay, the court which granted a stay remains seised of the proceedings and may in principle lift the stay at a later stage.[718] This is because in the first stage of the *Spiliada* framework, 'the court is engaged in only a prima facie determination of whether there is some other available forum that is more appropriate for the trial of the case.'[719] When 'the premise on which it decides to grant a stay should turn out to be mistaken or unduly optimistic, we see no reason why the stay cannot, in such "exceptional circumstances which strike at the very basis on which the stay was granted", be revisited.'[720] Given this reasoning, this should also arguably apply to cases involving exclusive Choice-of-Forum clauses.

Hence, in *Belbana NV v APL Co Pte Ltd*,[721] the High Court said that although the plaintiff have breached the exclusive Choice-of-Forum clause by filing the action in Belgium rather than in

[718] *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265, 300 (Court of Appeal) ('Rappo').
[719] Ibid.
[720] Ibid.
[721] *Belbana NV v APL Co Pte Ltd* [2014] SGHCR 17 (High Court).

Singapore, a stay rather than a discontinuance is the proper remedy because the exclusive Choice-of-Forum clause in any case stipulated for Singapore courts and that the nature of challenging jurisdiction in the Belgian courts (*eg,* where challenges to jurisdiction can only be determined after determination of the claim on the merits) meant that the plaintiff may potentially find himself without recourse if a discontinuance is ordered especially when the challenge to jurisdiction in the foreign court succeeds.[722] However, if the Belgian court's decision on the merits does not favour the plaintiff, he can no longer re-litigate in Singapore because he is deemed to have elected for Belgium proceedings.[723]

(b) Singapore International Commercial Court

When the SICC was established, it introduced a novel test for the issuance of a stay. As mentioned, the test does not distinguish between exclusive and non-exclusive clauses, albeit the factors and the relative weights would still be different between the two. Rule 8(1), Order 110 provides that a court may decline jurisdiction 'if it not appropriate for the action to be heard in the Court.'[724] The test in Rule 8(1) has two aspects.[725] The first deals with the internal allocation of jurisdiction, which is a way to delineate SICC's jurisdiction from that of the High Court.[726] This is where the need for cases to be both international and commercial comes into the picture. If a case is not international and commercial under the *Rules of Court*, the SICC has no jurisdiction.[727] The SICC has several options on what to do when it has no jurisdiction: (1) if the High Court has jurisdiction to the case and the parties consent to the proceedings being heard in the High Court, the SICC may transfer the case to the High Court;[728] (2) if the High Court has no jurisdiction or the parties do not consent, the SICC 'may dismiss or stay the proceedings, or make any other orders it sees fit.'[729]

The second aspect of Rule 8(1) deals with international jurisdiction itself and raises the question, in effect, of whether there is a clearly more appropriate forum abroad or if there is a strong cause not to hold the parties to the Choice-of-Forum clause.[730] Rule 8(1), however, is

[722] Ibid [33].
[723] Ibid [40].
[724] *Rules of Court* (n355) ord 110 r 8(1).
[725] See Yeo (n611) 12-3.
[726] Ibid 12.
[727] *Rules of Court* (n355) ord 110 r 7(1).
[728] Ibid ord 110 r 10(3)(a).
[729] Ibid ord 110 r 10(3)(b)
[730] Yeo (n611) 12-3.

differently worded from the 'strong cause' and 'natural forum' tests. According to Yeo, Rule 8(1) introduces a 'single test for international jurisdiction, to the exclusion of the common law tests.'[731] Nonetheless, whether Rule 8(1) supplants the common law tests is something that will have to be resolved by the SICC in future decisions. In any case, Rule 8(2) provides a clue on the grounds which may be used in determining whether 'it is not appropriate for the action to be heard' in the SICC, *ie,* that 'the dispute between the parties is connected to a jurisdiction other than Singapore.' In short, the SICC is compelled to justify its stay by citing factors other than connection of the dispute with the foreign jurisdiction. This appears to preserve the common law requirement of citing factors other than the connection to the foreign jurisdiction in establishing 'strong cause' or 'natural forum.'

Furthermore, whether a matter is not appropriate for the SICC to hear may also depend on whether the Choice-of-Forum clause is exclusive or non-exclusive. When the clause is exclusive in favour of SICC, it establishes a very high threshold and is almost impossible to argue for SICC's inappropriateness given that the parties have made the court their exclusive choice. The opposite is also true. When the SICC is not the chosen court in an exclusive Choice-of-Forum clause, one can establish its inappropriateness by pointing to the forum stated in the exclusive clause. The same even goes when the SICC is chosen in a non-exclusive Choice-of-Forum clause, albeit the relief available to the parties are more limited (*eg,* anti-suit injunction may not be available because the foreign suit is not vexatious and oppressive). As a named forum, SICC's appropriateness is difficult to overthrow because parties are deemed to have recognised SICC as an appropriate forum when they named it in their non-exclusive clause. In any case, the *SICC Law* presumes exclusivity in favour of the SICC,[732] and the analysis will usually proceed as if the Choice-of-Forum clause is exclusive. When the presumption of exclusivity is rebutted and there is clearly a non-exclusive Choice-of-Forum clause, debunking the choice of Singapore in the non-exclusive Choice-of-Forum clause remains very difficult given the explanation above. The foregoing analysis also applies to the Choice-of-Forum clauses where the SICC or other Singapore courts are named in the non-exclusive Choice-of-Forum clause along with the courts of another jurisdiction. However, when the chosen court(s) is a foreign court in a non-exclusive Choice-of-Forum clause, the SICC may decline jurisdiction.[733] This is because Rule7(1)(b) of Order 110 requires submission to the SICC's jurisdiction under a written jurisdiction agreement.[734] Based on the foregoing,

[731] Ibid 13.
[732] *SCJA* (n582) pt 3 s18F(1)(a).
[733] *Rules of Court* (n355) ord 110, Rule7(1)(b).
[734] Ibid ord 110, Rule7(1)(b).

although similar, the 'not appropriate for the action to be heard in the Court' test appears to be different because the analysis begins with the need for the defendant to override the presumption that Singapore is the appropriate forum. In the 'natural forum' test, there is no such presumption – Singapore has to be established as the appropriate forum to hear the action. Based on these, it appears then the test under Rule 8(1) is different from the 'strong cause' and 'natural forum' tests.

In *Rappo, Tania v Accent Delight International Ltd*[735] ('Rappo') the Court of Appeal emphasised that the Singapore High Court, in determining whether it should exercise international jurisdiction, should consider the possibility of transferring the case to the SICC. 'This is because in determining whether a particular forum is *forum non conveniens*, the court is required to take all factors into consideration, and this must include the possibility of a transfer to SICC.'[736] Nonetheless, the 'plaintiff must articulate the particular quality or feature of the SICC that would make it more appropriate for the dispute to be heard in Singapore by the SICC, as well as prove that the dispute was of a nature that lent itself to the SICC's capabilities.'[737]

The SICC confirmed in *BNP Paribas Wealth Management v Jacob Agam*,[738] where the non-exclusive clause stipulated for Singapore courts, that it can also grant a limited or temporary stay of proceedings. A relief firmly grounded in case management considerations, '[t]he application is ostensibly to avoid the risk of conflicting judgments on account of multiplicity of proceedings…'[739] Hence, the court has 'to inquire into the circumstances which brought about the multiplicity of proceedings, in particular the identity of the party responsible…whether the parallel foreign proceedings were…bona fide…or were contrived in aid of the stay application.'[740] The court, however, refused in this case to grant a temporary stay because the proceedings in France '[have] been commenced to deliberately stifle the expeditious resolution of the current action [in Singapore].'[741] Notably, the French counter-action was the mirror image of the Singapore action.[742] Although a temporary stay is usually issued to avoid the risk of conflicting judgments, such 'is not by itself sufficient reason for the grant of limited stay of proceedings.'[743] The court also has to

[735] *Rappo* (n718).
[736] Ibid 305.
[737] Ibid 306.
[738] *BNP Paribas Wealth Management v Jacob Agam* [2016] SGHC(I) 5 (SICC) ('BNP Paribas').
[739] Ibid [4].
[740] Ibid.
[741] Ibid [5].
[742] Ibid.
[743] Ibid [46].

consider 'all the circumstances of the case, and…the need to ensure the efficient and fair resolution of the dispute as a whole.'[744]

(c) Choice of Court Agreements Act

The *CCAA* removes the discretion of declining jurisdiction when a Singapore court is the chosen court in an exclusive Choice-of-Forum clause.[745] When a Singapore court is chosen, the only ground for refusing jurisdiction is when the Choice-of-Forum clause is null and void under Singaporean law.[746] Reasons for nullity may include fraud, mistake, duress, lack of capacity of parties to contract, and lack of subject matter jurisdiction of the chosen court.[747] However, since the test of nullity is under Singaporean law, the specific grounds can be different from those under the laws of the other party states of the *Choice-of-Court Convention*. Furthermore, a Singapore court which has jurisdiction may nonetheless, decline its exercise of jurisdiction and order the transfer of the case to another Singapore court.[748] When a foreign court is chosen, on the other hand, the Singapore court must stay or dismiss any case or proceeding to which the Choice-of-Forum clause applies except when: (a) the agreement is null and void under the law of the chosen court; (b) a party to the agreement lacked the capacity, under Singapore law, to enter into or conclude the agreement; (c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore; (d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or (e) the chosen court has decided not to hear the case or proceeding.[749] Note that Singapore law determines grounds (b), (c) and arguably also (d), while the law of the chosen court determines ground (a) alone. Moreover, aside from these grounds, the *CCAA* also states that Singapore courts retain their ability to dismiss or stay the case or proceeding on other grounds.[750] However, since the *CCAA* implements the *Choice-of-Court Convention*, it cannot be the case that the *CCAA* expanded the grounds stated in Article 6. Paragraph 12(2) of the *CCAA* may be referring only to the procedural grounds under the *Rules of Court* for stay or dismissal of an action or proceeding (*eg,* abuse of process).

Applications for a stay in *CCAA* cases at the SICC are governed by the grounds under the *CCAA*. SICC cases which are not under the *CCAA* (*eg,* those involving non-exclusive Choice-of-

[744] Ibid.
[745] *CCAA* (n617) pt 2 s11(1).
[746] Ibid pt 2 s11(1).
[747] See Hartley-Dogauchi Report (n354) 55.
[748] *CCAA* (n617) pt 2 s11(5).
[749] Ibid pt 2 s12(1).
[750] Ibid pt 2 s12(2).

Forum clauses and exclusive Choice-of-Forum clause in transactions outside the scope of the *CCAA*) are subject to the 'not appropriate' forum test under the *SICC Law* and the *Rules of Court*. Furthermore, the ability of the SICC to join third parties further complicates the picture as they too can apply for a stay. Yeo submits that as regards third parties, the test of 'appropriateness' under Order 110 may apply.[751] A different test, however, may be required when the case is under the *CCAA*. Although generally the *Choice-of-Court Convention* is envisioned to affect only parties, the Hartley-Dogauchi Report have actually considered third parties being involved[752] if they have taken over the rights and obligations of one of the original parties[753] under Singapore laws. Hence, in actions under the *CCAA* and the third party seeks for a stay, the SICC will apply the tests under the *CCAA*. However, there may be instances that *CCAA* applies and yet the third party involved is not the one contemplated under the Hartley-Dogauchi Report. In these instances, the test under Rule 9(1)(b)(ii) on appropriateness applies.

Applications for a stay in cases under the *CCAA* at the High Court or other courts of Singapore are still governed by the *CCAA* rules. This may include cases where the exclusive choice is the High Court or another Singapore court, especially where the parties refuse to consent to transfer to the SICC; and in cases where the claims are below S$250,000 which means that second tier courts should assume jurisdiction especially when the choice does not state any particular Singaporean court.[754] In cases where the *CCAA* does not apply (*eg,* non-exclusive Choice-of-Court cases and exclusive Choice-of-Court cases in transactions not covered by the *CCAA* and where the choice is not the SICC), the High Court and other courts continue to apply the rules under the common law (*ie,* the 'strong cause' test and 'natural forum' test or its modified version for exclusive and non-exclusive and non-exclusive Choice-of-Forum clause respectively). As regards third parties, those cases which fall in situations, as discussed above, contemplated by the *Choice-of-Court Convention* would apply the rules under the *CCAA*. Those which are not will follow the common law rules and the *Rules of Court*.

The picture, however, becomes complex in cases where the case would usually fall under the *CCAA* but the same involves interconnected legal issues in other areas of law (*eg,* a shareholders' agreement which would require the court to look into the rules of succession). Are these cases still subject to the *CCAA* rules? The *CCAA* explicitly excludes certain matters like

[751] Yeo (n611) 28.
[752] Hartley-Dogauchi Report (n354) 51.
[753] Ibid.
[754] 'Singapore Judicial System', *Supreme Court Singapore* (Web Page, 3 September 2018) <https://www.supremecourt.gov.sg/about-us/the-supreme-court/singapore-judicial-system>.

succession.[755] Hence, when a case involves matters explicitly excluded from the *Choice-of-Court Convention*'s scope and these matters are material and primary issues to the case, the case should not be subjected to its rules even if there is an international and commercial contract with an exclusive Choice-of-Forum clause. In these circumstances, the High Court and the other courts should apply the common law rules for stay.

4. Anti-suit Injunctions and Other Relief

Other remedies may be available to enforce Choice-of-Forum clauses. An anti-suit injunction, for example, is an order of the court compelling the party subject to the order to refrain from instituting or continuing with proceedings abroad. A discretionary remedy with origins in equity, an anti-suit injunction is granted based on the broad principle of 'when the ends of justice require it.'[756] Notably, the power to issue an anti-suit injunction is considered included in the powers which may be exercised by the court pursuant to a Choice-of-Forum clause.[757] In enforcing Choice-of-Forum clauses, an anti-suit injunction operates *in personam*, but its indirect effect on foreign legal proceedings has long been recognised.[758] As a result, considerable judicial caution is generally exercised in the interest of international comity, which is understood in Singapore as 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'[759]

Singapore courts' jurisdiction to issue an injunction is found in Section 4(10) of the *Civil Law Act*.[760] The *Rules of Court,* however, do not explicitly provide rules for its issuance. Nonetheless, the common law recognises various types, with the list neither exhaustive or exclusive - to protect the jurisdiction of the forum from interference, to protect legal rights, particularly the right not to be sued in a foreign jurisdiction, to prevent equitable wrongs.[761] Anti-suit injunctions may not be confined to substantive proceedings overseas since they may be granted to prevent a party from proceeding with an anti-suit injunction in a foreign court (an anti-anti-suit injunction).[762] Similarly,

[755] *CCAA* (n617) pt 1 s9(2)(c).
[756] *Morgan Stanley Asia (Singapore) Pte (formerly known as Morgan Stanley Dean Witter Asia (Singapore) Pte) v Hong Leong Finance Ltd* [2013] 3 SLR 409, 418 (High Court) ('Morgan Stanley').
[757] See *Teo Choon Mong Frank v Wilh Schulz GmbH* [1998] 2 SLR(R) 312, 318-9 (Court of Appeal) ('Teo').
[758] See eg, *British Airways Board v Laker Airways Ltd* [1985] AC 58, 95.
[759] *Morgan Stanley* (n756) 422 citing *The Reecon Wolf* [2012] SGHC 22, [23] (High Court).
[760] *Civil Law Act* (Singapore, cap 43, 1999 rev ed), s4(10).
[761] LexisNexis Singapore (n635) [75.125].
[762] Ibid.

an anti-anti-anti-suit injunction may be granted to prevent an application for an anti-anti-suit injunction in a foreign court.[763] Furthermore, to grant an anti-suit injunction, a court must have *in personam* jurisdiction over the respondent, either by service within jurisdiction or service outside jurisdiction.[764]

> In general, an anti-suit injunction may be issued based on the following factors:
>
> (a) whether the defendants are amenable to the jurisdiction of the Singapore court;
> (b) the natural forum for the resolution of the dispute between the parties;
> (c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue;
> (d) the alleged injustice to the defendants if an injunction would deprive the defendants of the advantages sought in the foreign proceedings; and
> (e) whether the institution of the foreign proceedings is in breach of any agreement between the parties.[765]

Factors (a) to (e) are not independent of each other and must be considered cumulatively.[766] In considering these factors, the court's analysis would generally involve two stages: (1) satisfaction of the 'natural forum' test, and (2) determination of whether the foreign proceedings involve any unconscionable conduct or unconscientious exercise of legal rights (the vexatious and oppressive test).[767] Notably, the principles governing the 'natural forum' test in anti-suit injunctions are the same as in the grant of leave for service out of Singapore, and in stay applications involving non-exclusive Choice-of-Forum clauses.[768] The applicant has the *onus* of showing that Singapore is clearly and distinctly the more appropriate forum and even if Singapore may be established as the natural forum, it does not automatically follow that foreign proceedings should be restrained.[769] Similarly, it does not follow that whenever a stay is refused, an anti-suit injunction may be granted as well[770] as an injunction is only granted and justified when the second step is also satisfied – 'in the clearest of circumstances that the foreign proceedings are vexatious or oppressive.'[771]

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[763] Ibid.
[764] Ibid [75.126].
[765] *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR (R) 428, 445-6 (Court of Appeal) citing *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457, [16] (High Court) ('Kirkham').
[766] *Morgan Stanley* (n756) 418.
[767] See Ibid 425.
[768] See *UBS* (n651) 540.
[769] *Morgan Stanley* (n756) 418.
[770] *UBS* (n651) 540.
[771] *Kirkham* (n765) 454.

Even so, where foreign proceedings are brought in breach of an exclusive Choice-of-Forum clause, the court may grant an anti-suit injunction without considerations of comity and further inquiry as to the vexatiousness or oppressiveness of the foreign conduct, unless 'there are strong reasons not to do so.'[772] It is instead an enforcement of a contractual right not to be sued in another jurisdiction which is the basis of the anti-suit injunction.[773] In any case, the 'strong reasons' referred to is akin to the 'strong cause' test used in stay applications. On the other hand, in non-exclusive Choice-of-Forum clauses, 'the law requires the applicant to demonstrate that the conduct of the foreign proceedings is vexatious and/or oppressive to warrant the court's intervention in granting an injunction.'[774] The High Court in *UBS AG v Telesto Investments Ltd*,[775] ('UBS') has clearly pointed out that in cases involving non-exclusive Choice-of-Forum clauses, 'a party could not ordinarily to be in breach of a contract containing a non-exclusive jurisdiction clause merely by pursuing proceedings in an alternative jurisdiction.'[776] Nonetheless, it can be a breach if the same may be evident from the wordings of the non-exclusive Choice-of-Forum clause (*eg,* if it may be shown that it is the intention of the parties that bringing of proceedings in more than one jurisdiction constitute a breach) or the forum treats non-exclusive Choice-of-Forum clauses in favour of the forum court as having the same effect as exclusive clauses. Moreover, since there is no presumption that multiplicity of proceedings is *ipso facto* vexatious, 'the burden is on the applicant to show that foreign proceedings are "vexatious or oppressive for some reason independent of the mere presence of the non-exclusive [jurisdiction] clause."'[777] '[T]he possibility of parallel proceedings and risks of conflicting judgments do not, by themselves, warrant the grant of an anti-suit injunction.'[778] Significantly, the existence of strong reasons in favour of the foreign jurisdiction would negate the claim that the action therein is vexatious and oppressive.[779]

The SICC, as a division of the High Court, retains the power to grant anti-suit injunctions. However, the *Rules of Court* do not provide any special rule for anti-suit injunctions granted in the SICC. Notably, except for the recognition and enforcement stage of judgments under Article 14, the *Choice-of-Court Convention* does not affect the internal procedural rules of party states, including

[772] *Morgan Stanley* (n756) 419; *Donohue* (n146).
[773] *Morgan Stanley* (n756) 425.
[774] *UBS* (n651) 541.
[775] *UBS* (n651).
[776] Ibid 544.
[777] Ibid.
[778] Ibid 550.
[779] See *Morgan Stanley* (n756) 429.

the provision of interim measures.[780] Hence, the *CCAA* likewise does not affect the rules concerning anti-suit injunctions or any other remedies to prevent breach of an exclusive Choice-of-Forum clause. In short, the rules under common law continue to govern anti-suit injunctions in the SICC and cases under the *CCAA*.

Controversially, English courts have awarded damages for expenses incurred in defending foreign proceedings commenced in breach of an English Choice-of-Forum clause.[781] In *Tradewaves Ltd v Standard Chartered Bank*,[782] ('Tradewaves') the Singapore High Court cited the English decision, *Union Discount Co Ltd v Zoller,*[783] to enumerate the exceptional features which may be present for Singapore courts to award damages:

> (i) The costs which the claimant seeks to recover in the English proceedings were incurred by him when he was a defendant in foreign proceedings brought by the defendant in the English proceedings.
> (ii) The claimant in the foreign proceedings brought those proceedings in breach of an express term, the EJC, which, it is assumed for present purposes, has the effect of entitling the English claimant to damages for its breach.
> (iii) The rules of the foreign forum only permitted recovery of costs in exceptional circumstances.
> (iv) The foreign court made no adjudication as to costs.[784]

In *Tradewaves*, the High Court refused to award damages because none of the exceptional features were present and proven.[785]

5. Recognition and Enforcement of Judgments

(a) Common Law and Statutes

In Singapore, foreign judgments may be enforced under common law or under the statutory regimes allowing registration.[786] Under common law, foreign judgments obtained in breach of Choice-of-Forum clauses are not clearly for that reason alone, not to be recognised in Singapore. This means that even in cases involving exclusive Choice-of-Forum clauses, foreign

[780] See *Choice-of-Court Convention* (n70) art 7 which preserves the national law on interim measures.
[781] See *Union Discount* (n164); *Donohue* (n146).
[782] *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 (High Court) ('Tradewaves').
[783] *Union Discount* (n164).
[784] *Tradewaves* (n782) [292] citing *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517.
[785] Ibid [293].
[786] *Reciprocal Enforcement of Commonwealth Judgments Act* (Singapore, cap 98, 1985 rev ed); *Reciprocal Enforcement of Foreign Judgments Act* (Singapore, cap 265, 2001 rev ed).

judgments may still be enforced especially if it can be established that such judgment was given following a rigorous test similar to the 'strong cause' test before the action was allowed to be heard in the foreign court in contravention to the letter of the Choice-of-Forum clause. 'It is a question of balancing the upholding of the parties' agreement on one hand, and the international comity underlying the recognition and enforcement of foreign judgments on the other.'[787] Likewise, no provision under statutory regimes deals with this scenario.

Foreign judgments may contain determination of Singapore's jurisdiction, but this may not bind a Singapore court. In *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* ('William Jacks'), the High Court emphasised that a decision of a foreign court that one forum is clearly more appropriate can never give rise to an issue of estoppel in Singapore.[788] Hence, 'any explicit pronouncement by a foreign court on the appropriateness of Singapore would not be binding on a Singapore court.'[789]

(b) Choice of Court Agreements Act

Singapore's accession to the *Choice-of-Court Convention* removed the possibility of a foreign judgment validly obtained from another party state but in breach of an exclusive Choice-of-Forum clause becoming enforceable or recognisable in Singapore.[790] Specifically, only foreign judgments obtained from courts designated in the exclusive Choice-of-Forum clause can be recognised and enforced in Singapore under Article 8(1).[791] In contrast, judgments given by non-chosen courts cannot be enforced under the *Choice-of-Court Convention*.[792] The Singapore High Court is given the task of recognition and enforcement of foreign judgements under the *Choice-of-Court Convention*.[793] The general rules on recognition and enforcement apply when the *CCAA* and Order 111, *Rules of Court* do not govern such specific matter.[794]

Under Order 111 of the *Rules of Court*, an application for recognition and enforcement of foreign judgments under the *CCAA* must first include an affidavit which states that the judgment

[787] LexisNexis Singapore (n635) [75.236].
[788] *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21, [60] (High Court) ('William Jacks').
[789] Ibid [61].
[790] *Choice-of-Court Convention* (n70) art 8.
[791] Ibid art 8(1).
[792] Ibid.
[793] *CCAA* (n617) pt 3 s13(1).
[794] *Rules of Court* (n355) ord 111, r2(1).

is a foreign judgment under the *CCAA*, that it has the same effect in the state of origin, that it is enforceable in the state of origin, etc.[795] This supporting affidavit must include the following: (1) a complete and certified copy of the foreign judgment, (2) the exclusive choice-of-Forum agreement, (3) in the case of default judgments, the original or certified true copy of a document stating that the party in default was notified of the proceedings, and (4) any other document establishing that the foreign judgment has effect and enforceable in the state of origin, and other matter like establishing that the Choice-of-Forum clause was concluded in a civil or commercial matter, *etc.*[796] Moreover, the application may be accompanied by a document, issued by the originating court, in the form mentioned in Article 13(3) of the *Choice-of-Court Convention* as published by The Hague Conference on Private International Law.[797]

The *CCAA* provides very limited grounds to refuse recognition and enforcement of foreign judgments under the *Choice-of-Court Convention*.[798] This approach mirrors the *Choice-of-Court Convention* as it explicitly prohibits the review on expanded grounds including the merits of the foreign judgments.[799] Furthermore, except in default judgments, Singapore courts are bound by the findings of fact on which the court of origin' jurisdiction is based.[800] Moreover, a judgment is only recognisable and enforceable in Singapore if it is enforceable in the state of origin.[801] Likewise, recognition and enforcement may be suspended or refused if there is still a review or the period of review has not yet expired.[802] Nonetheless, a court may still enforce foreign judgments obtained after a valid transfer has been made to another court under the *Choice-of-Court Convention*.[803]

There are compulsory and discretionary grounds for refusing recognition and enforcement under the *CCAA*. Like in common law, the High Court must refuse when proper notice to the defendant was absent, and when the judgment was obtained by fraud or manifestly incompatible with Singapore's public policy of Singapore including its fundamental principles on procedural fairness.[804] On the other hand, the High Court may refuse on grounds similar to when a non-chosen court is allowed to proceed with the proceedings (*eg,* the exclusive Choice-of-Forum clause

[795] Ibid ord 111, r2(2).
[796] Ibid ord 111, r2(3).
[797] Ibid ord 111, r4.
[798] *CCAA* (n617) pt 3 s14, 15.
[799] *Choice-of-Court Convention* (n70) art 8(2); *CCAA* (n617) pt 3 s13(3)(a).
[800] *CCAA* (n617) pt 3 s13(3)(b).
[801] Ibid pt 3 s13(2)(b).
[802] Ibid pt 3 s15(2).
[803] Ibid pt 3 s15(3)(4).
[804] Ibid pt 3 s14.

is null and void and lack of legal capacities of parties).[805] Moreover, the High Court may also refuse on *res judicata* grounds because of previous judgments given by a Singapore court or in another state on the same cause of action.[806] Similarly, the High Court may refuse when the defendant received the originating process in a manner incompatible with Singapore's fundamental principles of giving notice to the defendant.[807] Notably, while these grounds are the same grounds stated in Article 9 of the *Choice-of-Court Convention*, they are only discretionary grounds for refusal under the *CCAA*.

Similar to the *Choice-of-Court Convention*, if any of the excluded matters (*eg,* family law matters) under *CCAA*'s Sections 9(2) or 9(4)(a) arise as a preliminary question in a foreign judgment, the *CCAA* provides that rulings on these questions should be refused recognition and enforcement.[808] Similarly, foreign judgments based on rulings on matters under Section 9(4)(a) (*ie,* specific matters excluded by the minister under his power to issue regulations under the *CCAA*) may be refused to the extent that the foreign judgment was based on such ruling.[809] However, if the ruling is on the validity of an intellectual property right (other than copyright or related right), the High Court may refuse recognition and enforcement only if the ruling is inconsistent with a judgment or decision on that matter under the law of the state of which the intellectual property right arose, or proceedings concerning its validity are still pending in that state.[810]

Judicial settlements may also be enforced and recognised under the *Choice-of-Court Convention*.[811] The *CCAA* states that the High Court can enforce a judicial settlement when it is approved by or concluded before the chosen court and enforceable in the same manner and to the same extent as a judgment in the state of origin.[812] A judicial settlement can be refused based on the same compulsory and discretionary grounds generally applicable to foreign judgments under the *CCAA*.[813]

Because the *CCAA* only covers foreign judgments in cases involving exclusive Choice-of-Forum clauses originating from *Choice-of-Court Convention* states, foreign judgments not covered by

[805] Ibid pt 3 s15.
[806] Ibid pt 3 s15(1)(d)-(e).
[807] Ibid pt 3 s15(c).
[808] Ibid pt 3 s17(1).
[809] Ibid pt 3 s17(4).
[810] Ibid pt 3 s17(3).
[811] *Choice-of-Court Convention* (n70) art 12.
[812] *CCAA* (n617) pt 3 s20(2).
[813] Ibid pt 3 s20(3).

its scope (*eg*, judgments from cases involving non-exclusive Choice-of-Forum clauses and exclusive Choice-of-Forum clauses from non-party states and matters excluded by the *Choice of Court Convention* like contracts of carriage) are enforceable and recognisable in Singapore under the common law, *RECJA* and *REFJA* whichever is applicable. Hence, in practice, for purposes of recognition and enforcement of foreign judgments, a vast majority of foreign judgments involving Choice-of-Forum clauses, are still not generally different from any other foreign judgment, and therefore, to a large extent, still subject to all limitations and defences against any other ordinary foreign judgments *in personam*.

In *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd,*[814] the High Court enforced under the *CCAA* the summary judgment made by the High Court of Justice of England and Wales. In enforcing the judgment, the court noted that the judgment came from a contracting state (*i.e.*, UK), the enforcement application is an international case, there was an exclusive Choice-of-Forum clause in a 'civil or commercial matter,' and no interim measure of protection was being sought.[815] Although the plaintiff failed to provide a complete and certified copy of the foreign judgment as required by Order 111, Rule 2(3)(a) of the *Rules of Court*, the court said that such omission is not fatal.[816] The court said that 'other documents' may be presented to establish one or more of the requirements for recognition and enforcement.[817] Further, this approach, according to the court is consistent with the Hartley-Dogauchi Report which warns against excessive formalism.[818]

C. Hong Kong

1. Hong Kong's Approach to Jurisdiction

Hong Kong's court system is composed of the Court of Final Appeal at the top.[819] Below it is the High Court, which is composed of the Court of Appeal and the Court of First Instance.[820] Further below are the Districts courts.[821] Cases involving Choice-of-Forum clauses may be filed in the District courts or the Court of First Instance, depending on the amount or remedy involved.

[814] *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 (High Court).
[815] Ibid [17].
[816] Ibid [24].
[817] Ibid.
[818] Ibid.
[819] *Hong Kong Court of Final Appeal Ordinance* (Hong Kong) cap 484, s3.
[820] *High Court Ordinance* (Hong Kong) cap 4, pt 2 s3(1).
[821] *District Court Ordinance* (Hong Kong) cap 336, pt 2, s3.

Statutes are the primary sources of Hong Kong's law on civil procedure. In addition, the procedural rules issued by the Rules Committee of the various courts contained in *Hong Kong Court of Final Appeal Rules*,[822] *Rules of the High Court*,[823] and *District Court Rules*[824] supplement Hong Kong's procedural law and have the same effect as statutory law. Given that the rules of the Court of Final Appeal, High Court and District courts are similarly worded, the *Rules of the High Court* shall be used in this section as illustration, and the discussions about the High Court rules are deemed applicable as well to the other courts unless there are material differences, which shall be separately discussed or highlighted. Likewise, judicial decisions play a significant role in the development and interpretation of Hong Kong's rules of civil procedure.

The *Basic Law of the Hong Kong Special Administrative Region* ('Basic Law') and the *Hong Kong Reunification Ordinance*, which came into effect in Hong Kong upon its reunification with the People's Republic of China on 1 July 1997, state that the laws previously in force in Hong Kong including the common law will be maintained, unless they contravene the *Basic Law* subject to subsequent amendment by the legislature of the Hong Kong SAR.[825] As a result, the law involving Choice-of-Forum clauses remains largely governed by English common law until today except in the area of enforcement of foreign judgments where local ordinances have modified the rules.

2. Service of Process

Service within Hong Kong for process originating from the High Court is governed by Order 10 of the *Rules of the High Court*. Like in Singapore, service within Hong Kong is a matter of right. Service out of Hong Kong, on the other hand, is governed by Order 11. Unless a statute or the *Rules of the High Court* provide otherwise, leave is necessary to serve process outside Hong Kong.[826] When there is an exclusive Choice-of-Forum clause stipulating Hong Kong courts, parties are contractually bound to their chosen forum. This clause alone is sufficient basis for leave to serve out of Hong Kong as it would fall within Order 11 Rule 1(d)(iv): 'a contract which contains a term to the effect that the Court of First Instance shall have jurisdiction to hear and determine [the] action.' Also, the court need not engage in a *forum non conveniens* or *Spiliada*-type of analysis.[827] '[When] a party agrees to the jurisdiction of a particular forum, particularly if it is on an exclusive

[822] *Hong Kong Court of Final Appeal Rules* (Hong Kong) cap 484A.
[823] *Rules of the High Court* (Hong Kong) cap 4A.
[824] *District Court Rules* (Hong Kong) cap 336H.
[825] *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* art 8 ('Basic Law'); *Hong Kong Reunification Ordinance* 1997 s5.
[826] *Rules of the High Court* (Hong Kong) cap 4A, ord 11 r1(1).
[827] See *Lammas Global Corporation v Barclays Bank (Suisse) SA* [2011] HKCFI 247 (Court of First Instance) ('Lammas').

basis, there is far less room for it to suggest general *forum non conveniens* points...'[828] The burden of proof, however, lies with the plaintiff who must establish the existence of the exclusive Choice-of-Forum clause.[829] Similarly, an exclusive clause stipulating foreign courts would provide a ground for the court to deny an application for leave (assuming no other ground available for overseas service under Order 11). Since a filing of action in Hong Kong constitutes a breach of contract, only a 'strong cause' amounting to exceptional circumstances why the plaintiff should not be held to that agreement, can overthrow such presumption in favour of denying leave. Nonetheless, the Hong Kong CFI has considered as a 'strong cause' factor in leave applications when national security issues and public policy of another country are material to the case.[830] These factors, which are similar to those considered in stay of proceedings, are discussed further in the next chapter.

In *Lammas Global Corporation v Barclays Bank (Suisse) SA*,[831] the CFI pointed out that these factors establishing strong cause must be unforeseeable at the time of entering into the contract containing the exclusive Choice-of-Forum clause.[832] This unforeseeability requirement, however, appears to be new. In *Chinachem Financial Services Ltd v Century Venture Holdings Ltd,*[833] ('*Chinachem*') the CFI clarified, in the context of stay of proceedings, that 'there may be circumstances that were foreseeable, but may still amount to strong causes, overwhelming reasons and/or exceptional circumstances to displace the named/chosen forum.'[834] Nonetheless, in a later case, *Deltatre SPA v Hong Kong Sports Industrial Development Ltd* ('Deltatre'), the CFI pointed out that 'strong cause' can either be 'something unforeseeable at the time of contract' or 'something so exceptional that goes to the interests of justice.'[835] Although *Deltatre* appears to counter *Chinachem*, the two may be reconciled by arguing that the foreseeable factors referred in *Chinachem* are the 'exceptional' factors referred in *Deltatre*. Hence, as regards non-'exceptional' factors, unforeseeability is required in Hong Kong.

In cases involving non-exclusive Choice-of-Forum clauses stipulating Hong Kong courts, leave is again traditionally granted based on the ground in Order 11 referred to above and also the

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[828] *Pacific Aerosupplies Limited v Dakota Air Parts, Intl Inc* [2011] HKCFI 438 (Court of First Instance) ('Pacific Aerosupplies').
[829] See *Continental Mark Ltd v Verkerhrs-Club de Schweiz* [2002] 2 HKC 513 (Court of Appeal) ('Continental Mark').
[830] See *Pacific Aerosupplies* (n828).
[831] *Lammas* (n827).
[832] Ibid [33].
[833] *Chinachem Financial Services Ltd v Century Venture Holdings Ltd* [2015] HKCFI 20 (Court of First Instance) ('Chinachem').
[834] Ibid [90].
[835] *Deltatre SPA v Hong Kong Sports Industrial Development Ltd* [2018] HKCFI 1942, [46] (Court of First Instance) ('Deltatre'); see also *Li Lian International Ltd v Herport Hong Kong Ltd* [2019] HKCFI 826, [30] (Court of First Instance) ('Li Lian').

principles in *Spiliada*. Where proceedings were commenced in the named forum, the plaintiff could discharge the burden of showing that the named forum was clearly the appropriate one, by simply referring to the non-exclusive clause. A party choosing to contest the jurisdiction had an overwhelming burden to discharge; in effect, making a non-exclusive clause in practice, the same as an exclusive jurisdiction clause. On the other hand, when Hong Kong is not the named forum in the non-exclusive Choice-of-Forum clause, the court will determine the propriety of granting leave through the application of the other grounds in Order 11 and the usual *forum non conveniens* test.

3. Stay of Proceedings

(a) General Approaches

A defendant who disputes the jurisdiction of the High Court may ask for several forms of relief, including a stay order, under the *Rules of the High Court*, Order 12, Rule 8. Specifically, a stay order may be issued when the court lacks jurisdiction[836] or when the defendant asks the court to refrain from exercising any jurisdiction it may have.[837] A stay, for purposes of asking the court to refrain from exercising its jurisdiction, may be granted based on the following grounds: '(a) considering the best interests and convenience of the parties to the proceedings and the witnesses in the proceedings, the proceedings should be conducted in another court, (b) the defendant is entitled to rely on an agreement to which the plaintiff is a party, excluding the jurisdiction of the Court, and (c) in respect of the same cause of action to which the proceedings relate, there are other proceedings pending between the defendant and the plaintiff in another court.'[838] These grounds are drawn from common law. Ground (a) looks into the factors considered in the *forum non conveniens* test. Ground (b), on the other hand, gives effect to derogation clauses or exclusive Choice-of-Forum clauses which have the effect of excluding Hong Kong as a forum for their disputes. The burden of establishing exclusivity or the derogation effect of a Choice-of-Forum clause lies with the person invoking it, who is usually the defendant.[839] Common law, through *The Eleftheria* would elaborate that a stay shall be granted unless the plaintiff establishes 'strong cause' amounting to exceptional circumstances why he should not be held to his agreement. Notably, *The*

[836] *Rules of the High Court* (n826) ord 12 r8(1)(ga).
[837] Ibid ord 12 r8(1)(b).
[838] Ibid ord 12 r8(2A).
[839] See *Lucky Days Industrial Co Ltd v Translink Shipping (Hong Kong) Ltd* [2007] HKDC 163 (District Court) ('Lucky Days').

Eleftheria was first cited in Hong Kong in the 1981 case *The Nedlloyd Seine*.[840] Hong Kong courts would also cite *El Amria*,[841] as their authority for the 'strong cause' test, as adopted in the 1998 case, *The Thorscan*.[842] Lastly, ground (c) deals with parallel proceedings or *lis alibi pendens* (literally, a suit pending somewhere), which is usually resolved through the *forum non conveniens* test with the fact that litigation is already under way in another jurisdiction as an important factor.

(b) Exclusive Choice-of-Forum Clauses

Granting a stay when there is an exclusive Choice-of-Forum clause would largely depend on whether there is a 'strong cause', as developed in *The Eleftheria*, amounting to exceptional circumstances why the plaintiff should not be held to the agreement.[843] 'This requirement of "strong cause" is no more than a function of the bargain represented by the terms of the carriage.'[844] In exercising its discretion, the court considers all the circumstances of the case.[845] Furthermore, establishing 'strong cause' factors is a matter of evidence.[846] One must note that the 'strong cause' test, although the factors considered in the test may be are the same, is different from the *forum non conveniens* principle. The goal is not merely to show Hong Kong as the more convenient jurisdiction but to establish exceptional circumstances amounting to 'strong cause' and allow the plaintiff to breach his agreement with the defendant. '[T]o override the jurisdiction clause there is a greater burden on the plaintiff than merely to show that Hong Kong is the more convenient jurisdiction.'[847] Examples of circumstances or factors amounting to 'strong cause' are discussed in Chapter 5. Notably, when there is a foreign exclusive Choice-of-Forum clause, stays are rarely refused.

(c) Non-exclusive Choice-of-Forum Clauses

For a long time, in cases involving non-exclusive Choice-of-Forum clauses, on the other hand, the test that was applied was the *forum non conveniens* (also known as 'natural forum' or *forum conveniens*) principle developed in *Spiliada*. The same test has also been called the 'centre of gravity'

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[840] [1981] HKC 72, 74 (Court of Appeal).
[841] [1981] 2 Lloyd's Rep 119.
[842] *The Thorscan* (n456) 542-543; See also *Zhoushan Xinhong Aquatic Co Ltd v Sino Trans Ltd* [2006] HKDC 251, [17] (District Court).
[843] *Well Hoped Ltd v Nippon Yusen Kaisha* [1982] 1 HKC 155, 157 (High Court) ('Well Hoped').
[844] *Mashreq Asia Ltd v Furness Logistics (HK) Ltd* [1999] 4 HKC 317, 326 (Court of First Instance) ('Mashreq').
[845] *The Thorscan* (n456) 543.
[846] *Mashreq* (n844) 326.
[847] *AJ Lucas (Hong Kong) Ltd v Drilltec Gut Gmbh Grossbohrund Umweltechnik* [2006] HKCFI 144, [20] (Court of First Instance) ('AJ Lucas').

test (*ie,* whether Hong Kong is the forum to which the factors gravitate into in light of all the circumstances and the evidence before the court).[848] In the *forum non conveniens* test, the non-exclusive Choice-of-Forum clause is 'simply an element within the factual matrix upon which the court is asked to take a view in each case.'[849] While treated as just an element, the non-exclusive Choice-of-Forum clause 'is not something to which little weight should be attached in forming conclusion as to the appropriateness of the foreign forum' but rather must be seen as representative of the contractual agreement to recognise the named forum as an appropriate forum. [850] Nonetheless, unlike in exclusive clauses, the burden of showing that the foreign court(s) named in the non-exclusive clause is more appropriate, for the purpose of *forum non conveniens*, lies with the defendant. [851]

Hong Kong, however, eventually developed a more nuanced test in *Noble Power*[852] ('Noble Power'). Although the approach was developed in the context of setting aside leave granted to serve the writ of summons out of Hong Kong, the discussions were also applied in stay applications.[853] *Noble Power* emphasises that when proceedings are filed in the jurisdiction named in the clause, the effect of the non-exclusive Choice-of-Forum clause is no different from an exclusive clause. 'I see no difference in principle between an exclusive jurisdiction clause and a non-exclusive jurisdiction clause to the extent that in both situations, the parties agreed, if they are sued in the named forum, to submit.'[854] Where proceedings were commenced in a forum other than that identified in the non-exclusive Choice-of-Forum clause, the effect of a non-exclusive clause would depend on the precise wording of the clause in question. The court said that '[i]f the other forum is one to which the parties have also agreed to submit in the event of their being sued, it may be that there is little difference between the two situations.'[855] However, where the suit was commenced in a forum 'in which proceedings can be instituted without any obligation on the party sued actually to submit to that forum,' the party contesting the forum may be 'in a better position so to do…simply because he would not be seeking to avoid a forum to which he has contractually agreed to submit.'[856] The decision illustrates these three scenarios:

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[848] See *Brody Limited and Sonex Traders Limited v Chu Kong Shipping Enterprises (Holdings) Co Limited and Nippon Yusen Kaisha* [1998] HKCFI 476, [5] (Court of First Instance) ('Brody').
[849] *Peregrine Fixed Income Ltd v JP Morgan Chase Bank* [2005] 2 HKC 374, 383 (Court of First Instance) ('Perigrine').
[850] Ibid.
[851] Ibid 378.
[852] *Noble Power* (n235).
[853] See *Chinachem* (n833).
[854] *Noble Power* (n235) [29].
[855] Ibid [32].
[856] Ibid.

> (1) A sues B in Hong Kong. Hong Kong is named as a non-exclusive jurisdiction to which the parties have agreed to submit in the event of their being sued. The burden on B, if he contests the appropriateness of the Hong Kong courts, is a heavy one.
>
> (2) A sues B in Hong Kong. Hong Kong is on this occasion not named as a jurisdiction but the courts of, say, Japan are named as the non-exclusive jurisdiction. However, on a true construction of the relevant clause, the parties have nevertheless agreed to submit to the jurisdiction of the courts of any other forum (which would include Hong Kong) in the event of their being sued there. Again, in view of the agreement actually to submit, the burden on B is also a heavy one.
>
> (3) A sues B in Hong Kong. Again, Hong Kong is not named as the non-exclusive jurisdiction but the courts of Japan are. However, this time the parties have not agreed to submit to any jurisdiction other than the Japanese courts. In other words…no positive obligation exists for a party to submit to any jurisdiction other than Japan. Here, the burden on B is less heavy.[857]

Noble Power, as a result, modified the test applied when there is a non-exclusive Choice-of-Forum clause. Rather than a straightforward application of *forum non conveniens*, the decision highlights the need to be mindful of what is actually written in the clause – so as to properly determine its effect – and the need to distinguish depending on where the proceedings have been brought. If Hong Kong is named in the clause, the effect of the non-exclusive clause is the same as the exclusive clause. It will then be for the defendant to demonstrate the existence of 'strong cause.' If Hong Kong is not named, but the clause provides that the parties 'agreed to submit to the jurisdiction of the courts of any other forum (which would include Hong Kong) in the event of them being sued there,' the clause would be given the same effect as an exclusive Choice-of-Forum clause; thus, the 'strong cause' test would still apply. However, if Hong Kong is not a named jurisdiction and there is no positive obligation to submit to the forum eventually chosen, then the clause would not carry a heavier weight vis-à-vis the other factors considered in the *forum non conveniens* inquiry.[858] Furthermore, in cases where several contracts are involved, but not all have a non-exclusive Choice-of-Forum clause including the specific contract in issue, the court may still resort to a *Spiliada*-type analysis where the non-exclusive clause is just a factor to be weighed amongst the other factors.[859]

These *Noble Power* principles have been applied in *Chinachem Financial Services Ltd v Century Venture Holdings Ltd*[860]('Chinachem'). Plaintiff and defendant entered into an agreement which

[857] Ibid [33].
[858] See *MGM Grand Paradise Limited v Chiu Tak Wah* [2012] HKCFI 1529 (Court of First Instance) ('MGM'); *Marmor Hotavlje DOO v Peter Silling & Associates Hotel Interior Design Ltd* [2015] HKCFI 979 (Court of First Instance) ('Marmor').
[859] *High Hope Zhongding Corporation v Xiamen Dunfeng Import and Export Co, Ltd* [2017] HKCFI 56 (Court of First Instance) ('High Hope').
[860] *Chinachem* (n833).

provided in Clause 15 a Hong Kong non-exclusive Choice-of-Forum clause. Defendant commenced legal proceedings in Beijing against plaintiff for breach of the agreement ("PRC Litigation").[861] Subsequently, plaintiff commenced an action in Hong Kong against defendant ("HK Action").[862] Plaintiff claimed that Hong Kong would be the appropriate forum given (a) the parties' intention via the non-exclusive Choice-of-Forum clause to resolve disputes in Hong Kong, (b) the absence of identity in parties or issues, and (c) other convenience factors in favour of Hong Kong.[863] Following *Noble Power*, the CFI considered the non-exclusive Choice-of-Forum clause as having an effect similar to an exclusive clause given that the action was filed in Hong Kong, which was the named forum.[864] Furthermore, the court pointed out that it is inappropriate to proceed with a *Spiliada*-type analysis given the circumstances.[865] The court concluded that the defendant failed to establish strong grounds to stay the Hong Kong proceedings because '[a]ll the "convenience" connecting factors, eg witnesses, language, enforcement, PRC-related background etc,' were foreseeable at the time of the agreement, and no matter of public policy of interests of justice were involved in either Hong Kong or China litigation.[866]

Like in Singapore, Hong Kong courts may also grant case management stays, which the Court of Appeal emphasised in *Ghossoub,* as distinct from stays based on *forum non conveniens* 'in that the object is not to determine the most appropriate forum according to *forum conveniens* principles.'[867] Rather, '[t]hey operate where both courts are equally appropriate…or neither is an appropriate forum….'[868] Nonetheless, '[a] stay on case-management grounds is regarded as exceptional, to be made only in "rare and compelling circumstances", where the arguments for a stay clearly outweigh any resulting disadvantage to the claimant.'[869] In this case, while the plaintiff argued on the basis that there was an exclusive Choice-of-Forum clause or on *forum non conveniens* grounds, the Court of Appeal refused to grant a case management stay because of absence of rare and compelling circumstances.[870]

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[861] Ibid [6].
[862] Ibid.
[863] Ibid [9].
[864] Ibid [87].
[865] Ibid [93].
[866] Ibid [146].
[867] *Ghossoub* [2017] HKCA 298, [50] (Court of Appeal).
[868] Ibid.
[869] Ibid.
[870] Ibid [51]-[52].

(d) Some Confused Approaches

Similar to Singapore, however, the analysis in early Hong Kong cases (1980s) also did not begin by qualifying the relevant Choice-of-Forum clause as either exclusive or non-exclusive clauses, and then proceed with the applicable test. The analysis would usually begin by citing the Choice-of-Forum clause and then without qualifying it, apply the strong cause test developed in *The Eleftheria*.[871] Since the 1990s, however, Hong Kong courts adopted a more coherent approach by first identifying the type of the clause involved, and then applying the corresponding test.

Nonetheless, there have been few cases where Hong Kong courts would mix up their analysis. In *Samuel Hutchison Canavan v Brenton George Battenfeld*,[872] a 2010 case, the CFI classified the Choice-of-Forum clause exclusive in favour of Thai court and yet, the court proceeded to do both the 'strong cause' test[873] and *forum non conveniens*.[874] The court then concluded, 'I have no difficulty for the reasons given under the discussion on the exclusive jurisdiction clause in finding that the Defendants have amply demonstrated that Hong Kong is not the natural or appropriate forum.'[875] Rather, the court found the Phuket court 'clearly the more appropriate forum that is available to the parties to this action.'[876] While this result is correct and the stay was properly granted, the CFI analysis is misplaced since the Choice-of-Forum clause was exclusive, the analysis should have followed *Eleftheria's* 'strong cause' test analysis without going into *forum non conveniens*. Nonetheless, the court may have been constrained to proceed with such an analysis given the arguments and issues raised by the plaintiff.[877]

Similarly, in the 2013 case *Hyundai Engineering & Construction Co Ltd v UBAF (Hong Kong) Ltd*[878] ('Hyundai Engineering'), the CFI analysed an exclusive Choice-of-Forum clause by first referring to *Spiliada* and the *forum non conveniens* principle, and then stated that the 'presence of an exclusive jurisdiction clause is an important factor to be considered.'[879] The court, in short, erroneously reduced the exclusive Choice-of-Forum clause into a factor considered in the *forum*

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[871] See *The Nedlloyd Seine* (n840); *Well Hoped* (n843); *Confecciones del Atlantico v Lamont Shipping Incorporated, Palace Hotel Ltd v owners of the Ship or Vessel Happy Pioneer* [1982] 1 HKC 640 (High Court) ('Confecciones').
[872] *Samuel Hutchison Canavan v Brenton George Battenfeld* [2010] HKCFI 691 (Court of First Instance) ('Canavan').
[873] Ibid [16]-[37].
[874] Ibid [38]-[44].
[875] Ibid [42].
[876] Ibid [42].
[877] Ibid [1].
[878] *Hyundai Engineering & Construction Co Ltd v UBAF (Hong Kong) Ltd* [2013] HKCFI 1579 (Court of First Instance) ('Hyundai Engineering').
[879] Ibid [22].

non conveniens analysis. The court's confusion, however, becomes more apparent as in the statement directly following its declaration that an exclusive Choice-of-Forum clause is just a factor, it confirmed that the strong cause test still applies but cited *Noble Power*, a case on non-exclusive Choice-of-Forum clauses as its authority.[880]

Nonetheless, despite the foregoing cases, the bulk of the decisions by the Hong Kong courts are coherent and consistent with the approaches in common law.

4. Anti-suit Injunctions and Other Relief

As earlier discussed, *Rules of the High Court*, Order 12, rule 8(1) provides a list of relief which a defendant may ask for in contesting the jurisdiction of the court. A party, however, may also apply for an anti-suit injunction, like in other common law countries, the purpose of which is to restrain another person from pursuing proceedings on the same matters elsewhere in the world. Hong Kong's law on anti-suit injunctions is still very much aligned with the English approach, ignoring Australian and Canadian approaches as alternatives.[881] As held in common law, anti-suit injunctions are not addressed to the foreign courts but only to the other party – 'the injunction acts *in personam*' – but should be issued with much restraint because it may be regarded as a breach of comity. Moreover, given that Hong Kong does not have a technical notion of *lis alibi pendens*, Hong Kong courts may 'allow concurrent proceedings in Hong Kong and foreign jurisdictions to continue, refusing to stay the Hong Kong action and also refusing an anti-suit injunction.'[882] As such, a Hong Kong court can only grant anti-suit injunctions in only two situations: (1) where there is an exclusive Choice-of-Forum clause in favour of Hong Kong courts;[883] (2) in other cases, where there is unconscionability and the anti-suit injunction is required to support the 'ends of justice.'[884] Hence, 'where there is a risk of parallel proceedings and inconsistent decisions because the interests of parties in the foreign proceedings not bound by the…[exclusive jurisdiction clause] are involved or grounds of claim not the subject of the clause are part of the relevant dispute, the Court may well decline to grant an anti-suit injunction.'[885]

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[880] Ibid.
[881] Graeme Johnston and Paul Harris, *The Conflict of Laws in Hong Kong* (Thomson Reuters, 3rd ed, 2017) 125.
[882] *Chinachem* (n833) [106].
[883] See *XL Insurance Company SE v Manley Toys Ltd* [2015] HKCFI 1033, [23]-[24] (Court of First Instance) ('XL Insurance').
[884] *Liaoyang Shunfeng Iron and Steel Company Limited v Yeung Tsz Wang* [2011] HKCFI 453, [31]-[33] (Court of First Instance) ('Liaoyang').
[885] *Giorgio Armani SPA v Elan Clothes Co Ltd (formerly known as Dalian Les Copious Clothes Co Ltd)* [2019] HKCFI 530, [32] (Court of First Instance) ('Armani').

The existence of an exclusive Choice-of-Forum clause in favour of Hong Kong courts is a ground for the issuance of an anti-suit injunction.[886] 'Where the applicant is relying upon a contractual right not to be sued in the foreign country…he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract.' [887] Under these circumstances, comity plays a minimal role.[888] Nonetheless, even with an exclusive Choice-of-Forum clause, an anti-suit injunction is not automatically issued as its issuance remains discretionary.[889] For instance, delay and other timing considerations are important; thus, an application for an anti-suit injunction issued has to be sought promptly and before foreign proceedings are too far advanced.[890] Moreover, an injunction may be denied for strong reasons.[891] Furthermore, proof that there are grounds for anti-suit injunction would usually be sufficient proof of strong reasons for purposes of a stay.[892]

In other cases, like where the relevant Choice-of-Forum clause is not exclusive, the applicable principles are summarised in *Liaoyang Shunfeng Iron and Steel Company Limited v Yeung Tsz Wang*:[893]

> (1) …[The] wrongful or unconscionable conduct …amounts to vexation and oppression.
>
> (2) … the applicant's…legitimate interest should be the existence of proceedings in Hong Kong and the defendant has in bad faith commenced proceedings in another jurisdiction for the purpose of frustrating and obstructing the Hong Kong proceedings.
>
> For these purposes: (a) The applicant must be a party to the existing local litigation … (b) The applicant also has to show a "clear need to protect [local] proceedings"….[894]

Unconscionability is often understood to include conduct which is 'vexatious or oppressive or interferes with the due process of this court.'[895] Moreover, the fact that Hong Kong

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[886] See *XL Insurance* (n883) [23]-[24].
[887] *Worth Achieve Associates Ltd v Huang Sheng Yi* [2007] 3 HKC 7, 22 (Court of First Instance) citing *Turner v Grovit*, [2002] 1 WLR 107, [27].
[888] Ibid.
[889] *Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd* [2017] 1 HKCA 153, 166 (Court of Appeal) ('Sea Powerful').
[890] See Ibid 161.
[891] *Armani* (n885) [27].
[892] *Chen Hongqing v The Persons whose names are set out in the second column of the schedule hereto* [2018] HKCFI 1170, [42] (Court of First Instance) ('Chen').
[893] *Liaoyang* (n884).
[894] Ibid [33].
[895] Johnston (n881) 127.

is the natural forum is a necessary precondition for the grant of an anti-suit injunction.[896] Likewise, 'justice does not require that the action should nevertheless proceed in the foreign court.'[897]

In *XL Insurance Company SE v Manley Toys Ltd*,[898]the CFI awarded costs on indemnity basis because of the other party's recalcitrance to conform to the exclusive Choice-of-Forum clause. 'XL should not be faced with bearing some proportion of the legal costs when Manley's own conduct constitutes, in the words of Colman J, a misuse of the relevant, consequential judicial facilities.'[899]

5. Recognition and Enforcement of Judgments

(a) Common Law and Statutes

Two regimes apply to the recognition and enforcement of foreign judgments in Hong Kong, including those involving Choice-of-Forum clauses: (1) common law, and (2) statutes allowing registration of foreign judgments.[900] Under both common law and statutory regimes, a Hong Kong court may refuse to recognise and enforce foreign judgments if they are found to have been issued by an incompetent court, are products of unfair proceedings and fraud, and contravene the principles of *res judicata* and the public policy of Hong Kong.[901] Given that Hong Kong is not party to the *Choice-of-Court Convention* and other international Choice-of-Forum regimes, contravention of Choice-of-Forum clauses, even those which are exclusive, is not a direct ground for refusal of recognition and enforcement of a foreign judgment. Nonetheless, as discussed in Chapter 7, Hong Kong's mandatory rules and public policy may prevent the recognition and enforcement of foreign judgments involving Choice-of-Forum clauses. Particularly, foreign judgments which contravene Hong Kong's public policy are understood to be those which would be 'contrary to the fundamental conceptions of morality and justice' of Hong Kong.[902] Interestingly, Hong Kong may enforce Taiwan judgments, and this is not considered contrary to public policy.[903]

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[896] *Liaoyang* (n884) [34].
[897] Ibid.
[898] *XL Insurance* (n883) [24].
[899] Ibid.
[900] *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Hong Kong) cap 319; *Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance* (Hong Kong) cap 46.
[901] Johnston (n881) 595, 597.
[902] *ML v YJ* [2008] 3 HKC 362, 374 (Court of First Instance).
[903] *Chen Li Hung v Ting Lei Miao* [2000] 1 HKC 461 (Court of Final Appeal).

In *Compania Sud America de Vapores SA v Hin-Pro International Logistics Ltd*[904] ('Compania Sud'), the Hong Kong Court of Final Appeal assisted the English court in enforcing an award of damages for breach of an exclusive Choice-of-Forum clause. The court noted that if the action of the English court in awarding such damages involved a breach of comity towards Chinese courts, then enforcing those damages in Hong Kong would also involve a breach of comity.[905] However, in this case, there can be no breach of comity because the award of damages being enforced were for breach of contract (*ie,* breach of the English exclusive jurisdiction clause).[906] Since the action of the English court did not involve breach of comity, the court likewise found no breach of Hong Kong public policy which may prevent the enforcement.[907]

(b) China-Hong Kong Judgments Arrangement

When sovereignty over Hong Kong reverted to the People's Republic of China, the 'one country, two systems' policy was implemented.[908] Nonetheless, there was controversy as to how to treat judgments from other regions of China – the Mainland China, Macau and Taiwan. One possibility is to treat these judgments as municipal judicial awards.[909] The dominant trend, however, is to treat each other's judgments as foreign judgments.[910] The absence of clear approaches and mechanisms, however, led to certain problems: controversial interpretation of Choice-of-Forum clauses, parallel proceedings resulting in conflicting judgments, forum shopping, and using home court advantage for a declaratory ruling as a defensive tactic against any possible Mainland China proceeding.[911] Eventually in 2006, China concluded with Hong Kong and Macau arrangements on the recognition and enforcement of judgments in their respective courts.[912]

The *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of*

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[904] *Compania Sud America de Vapores SA v Hin-Pro International Logistics Ltd* [2016] HKCFA 79 (Court of Final Appeal) ('Compania Sud').
[905] Ibid [59].
[906] Ibid.
[907] Ibid.
[908] See, eg, *Basic Law* art 2, 5, 8.
[909] Xianchu Zhang and Philip Smart, 'Development of Regional Conflict of Laws on the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR' (2006) 36(3) *Hong Kong Law Journal* 553, 560.
[910] Ibid 561.
[911] Ibid.
[912] Ibid 563.

Court Agreements between Parties Concerned [913]('Judgments Arrangement') is a big step, albeit limited, that allows certain types of judgments (*ie,* judgments arising from Choice-of-Forum agreements involving civil and commercial matters) to be recognisable and enforceable in the courts of China and Hong Kong courts respectively. Significantly, the recognition and enforcement provisions of the *Choice-of-Court Convention* inspired the *Judgments Arrangement*.[914] Notable differences, however, exist: (1) the *Judgments Arrangement* only deals with the recognition and enforcement of judgments involving exclusive Choice-of-Forum clauses and not with how these clauses and the jurisdiction of the chosen and non-chosen courts are defined; (2) the *Judgments Arrangement* only deals with judgments involving payment of money;[914A] (3) the *Judgments Arrangement* was drafted with the issue of finality of Chinese judgments in mind, and as such, is very specific as to the courts covered by it;[914B] (4) by not enumerating the civil and commercial disputes which fall under it, the *Judgments Arrangement* appears to have a wider scope than the *Choice-of-Court Convention* as regards the type of civil or commercial cases which may fall within it;[914C](5) the enforcement and recognition under *Judgments Arrangement* has to be made within two years, presumably, from judgment.[914D] Under the *Judgments Arrangement*, judgments recognised shall have the same legal effect as the local judgment of the enforcing region.[915] On the mainland side, the *Judgments Arrangement* covers judgments from the Supreme People's Court, Higher People's Court at the provincial level, Intermediate People's Courts at the city level and 47 Basic People's Courts in 15 provinces and municipalities directly under the central government.[916] In Hong Kong, it covers any legally effective judgment of the Court of Final Appeal, Court of Appeal, CFI, and the District Courts.[917] The *Judgments Arrangements* is given effect in Hong Kong by the *Mainland Judgments (Reciprocal Enforcement) Ordinance*[918] and *Rules of the High Court,* Order 71A.[919] On 18 January 2019, the Supreme People's Court and Hong Kong SAR signed the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region*,[920] a new

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[913] Signed by the Supreme People's Court (China) and Department of Justice (Hong Kong SAR), 14 July 2006 <https://www.doj.gov.hk/eng/mainland/pdf/mainlandrej20060719e.pdf> ('Judgments Arrangement')
[914] See Zhang (n909) 570; Guangjian Tu, 'Recognition and enforcement of mainland China's civil and commercial judgments in Hong Kong – an update' (2017) 25(2) *Asia Pacific Law Review* 190,194.
[914A] *Judgments Arrangement*, art 1.
[914B] Ibid annex.
[914C] Ibid art 3.
[914D] Ibid art 8.
[915] Ibid art 11
[916] Ibid art 2(1), annex.
[917] Ibid art 2(2).
[918] *Mainland Judgments (Reciprocal Enforcement) Ordinance* (Hong Kong) cap 597.
[919] *Rules of the High Court* (n826) ord 71A.
[920] Signed by the Supreme People's Court (China) and Hong Kong SAR, 18 January 2019 <https://www.doj.gov.hk/eng/public/pdf/2019/Doc3_477379e.pdf>.

arrangement which will eventually replace the *Judgments Arrangement* once the respective implementation laws from both Mainland China and Hong Kong have been passed.[921]

For a judgment to be enforceable under the *Judgments Arrangements*, the following conditions must be complied: (1) there is a valid Choice-of-Forum clause in writing, and exclusively in favour of a court either in China or Hong Kong;[922] (2) the judgment concerned is 'enforceable and final';[923] (3) the judgment has to for payment of money;[924] (4) the subject matter must be 'civil and commercial';[925] (5) the application must be within a limitation period, which is shorter than the limitation period in other modes of enforcement under Hong Kong law;[926] (6) the judgment concerned does not fall in any of the excluded categories.[927] Specifically, the *Judgments Agreement* excludes employment contracts, consumer contracts concluded by natural persons, contracts on family matters or other non-commercial purposes.[928] Notably, the *Judgments Arrangement* is not restricted to judgments involving interregional elements. Parties to the judgment can both come from China but the judgment was obtained from a Hong Kong court. The judgment may not even involve transactions that take place across Hong Kong and China as parties can elect Hong Kong without such connection in their Choice-of-Forum clause. Similarly, the dispute may even have taken place completely outside Hong Kong and China or even between two foreign parties, as long as the Choice-of-Forum clause is in favour of Hong Kong or China.

In *Wang Qian Wei v Guo Wenyu*, the CFI clarified that even though the judgment creditor who was enforcing the Mainland judgment in Hong Kong was not a party to the exclusive Choice-of-Forum clause, he can still enforce the Mainland judgment because his rights was vested by way of assignment.[929] Furthermore, the court considered the Mainland judgment final because parties have not lodged an appeal within the period of appeal, and a certificate of effectiveness was issued.[930] Furthermore, although a retrial was filed at the higher court, this was dismissed and no appeal on the dismissal was made.[931]

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[921] Department of Justice Government of the Hong Kong Special Administrative Region, *Enforcement of civil and commercial judgments between Hong Kong and the Mainland* (Website, 11 February 2019) <https://www.doj.gov.hk/eng/public/enforcement.html>.
[922] *Judgments Arrangement,* art 1,3.
[923] Ibid art 1.
[924] Ibid.
[925] Ibid.
[926] Ibid art 8.
[927] Ibid art 3.
[928] Ibid art 3.
[929] *Wang Qian Wei v Guo Wenyu* [2018] HKCFI 2253, [23] (Court of First Instance).
[930] Ibid [45].
[931] Ibid [46].

Because the *Judgments Arrangement* does not define what makes Choice-of-Forum clauses exclusive, the domestic law of the enforcing court defines 'exclusivity' and its effects. As discussed in Chapter 2, this approach may lead to uncertainty as it may depend on the approach adopted by the enforcing court on the nature of these clauses (*eg,* whether it considers the Choice-of-Forum clause procedural or substantive) as well as the law applicable to specific issues (*eg,* is the issue substantive or procedural?). The result may not necessarily be the result intended by the parties and may even vary depending on which court is hearing the application. Furthermore, the applicable law to an issue (*eg,* how to interpret the Choice-of-Forum clause) may be substantive law, and therefore, would require a court to engage in the choice of law process, as discussed in Chapter 6. This would raise additional complexities. Nonetheless, Hong Kong courts have been liberal in determining whether the clause involved in a case under the *Judgments Arrangements* is exclusive.[931A] A Hong Kong court may even just assume that the clause involved is exclusive.[931B] In *Bank of China v Yang Fan*, the CFI highlighted that the parties' intention ultimately determines exclusivity although certain words used in the clause may not generally be construed to be imperative.[931C] In *The Export-Import Bank of China v Taifeng Textile Group Co Ltd*, the CFI emphasised that to have an exclusive Choice-of-Forum clause under the *Judgments Arrangement*, the parties need not use the word 'exclusive but [it is enough, if the agreement is] exclusive in substance and effect on a proper construction according to the relevant governing law.'[932] Likewise, the judgment also talks about the enforceability of the Mainland judgment which may be proven by other means other than the production of the original court certificate. 'The ultimate question is whether the Hong Kong court is satisfied that the Mainland judgment is enforceable in the Mainland.'[933]

[931A] See, eg, *Bank of China v Yang Fan* [2016] HKCFI 708, [31] (Court of First Instance) ('Yang Fan').
[931B] See, eg, *Wu Zuocheng v Liang Li* [2016] HKCFI 261 (Court of First Instance).
[931C] *Yang Fan* (n931A) [31].
[932] *The Export-Import Bank of China v Taifeng Textile Group Co Ltd* [2018] HKCFI 1840, [65] (Court of First Instance).
[933] Ibid [86] (Court of First Instance).

D. Malaysia

1. Malaysia's Approach to Jurisdiction

Malaysia's court system is composed of the High Courts,[934] Court of Appeal,[935] Federal Court,[936] Special Court,[937] and several other inferior courts. Because Islamic law forms part of Malaysian law,[937A] also included in the court system are the *Shariah* courts which possess jurisdiction, however, only in Islamic family law matters among Muslims.[937B] As such, even though disputes involving Islamic banking and other commercial contracts may be governed by Islamic law, they continue to fall within the jurisdiction of Malaysia's civil courts.[937C]

The *Rules of Court* 2012 prescribes the procedural rules applicable to all proceedings in the High Court, Sessions Court and Magistrates' Court.[938] Malaysia follows the general jurisdictional approach of common law jurisdictions –jurisdiction *in personam* broadly depends upon the service of process upon the defendant. As such, proper service of originating process – whether within or out of jurisdiction – determines whether a Malaysian court acquires jurisdiction over the defendant.[939] Likewise, even if the Malaysian courts have jurisdiction, it may still choose not to exercise such jurisdiction. '[E]ven if there is such jurisdiction…a Malaysian court has still the discretion to decide whether to deal with it on the doctrine of *forum non conveniens*.'[940] The *forum non conveniens* principle, also known in Malaysia as the natural forum test or *forum conveniens* principle, as will be seen in the succeeding subsections, is often used to determine the grant of leave for service out of the jurisdiction or stay of proceedings, when there is a non-exclusive Choice-of-Forum clause. In Malaysia, this test developed in *Spiliada* was first adopted in the 1994 case of *American Express*.[941] On the other hand, the 'strong cause' test developed in *The Eleftheria* is the test applied when the clause involved is exclusive. The principles of *The Eleftheria* were first adopted in Malaysia in the 1976 case of *Globus*.[942] Both the *forum non conveniens* and 'strong cause' test require the exercise

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934 *Federal Constitution* (Malaysia), pt 9, art121(1)(a)(b).
935 Ibid pt 9, art121(1B).
936 Ibid pt 9, art121(2).
937 Ibid pt15, art182.
937A Ibid art 76(2).
937B Ibid sch 9; see Ibid, art 121(1A); see Farid Schuaib, 'The Islamic Legal System in Malaysia' (2012) 21(1) *Pacific Rim Law & Policy Journal* 85, 94.
937C *Bank Kerjasama* (n441A) 408; Buang (n441A) 321-2.
938 *Rules of Court 2012* (Malaysia), ord 1, r2(2)(1).
939 *American Express* (n441) 166 (Supreme Court of Kuala Lumpur).
940 Ibid.
941 *American Express* (n441).
942 *Globus* (n512).

of discretion by the court and are used to argue against the exercise of jurisdiction by the Malaysian courts.

2. Service of Process

A civil action in Malaysia is usually commenced by writ or originating summons.[943] Of these modes, commencement by way of a writ of summons is the most common.[944] If the defendant is present within the jurisdiction, he is liable to be served with the writ in an action *in personam*.[945] An originating process must be served personally, unless the court authorises some alternative method.[946]

The *Rules of Court 2012*, Order 11 identify the circumstances, requirements, modes and effects of service out of the jurisdiction. Service out of the jurisdiction is treated as the exercise by the Malaysian court of judicial power over a foreigner who owes no allegiance to Malaysia or over a person who is resident or domiciled out of the jurisdiction but is nevertheless called upon to answers claims made against him in Malaysia.[947] This assumption of jurisdiction over the defendant who is not present within the jurisdiction is implicit when a Malaysian court grants leave.[948] Significantly, service out of the jurisdiction may be allowed with leave of court in cases involving contracts which 'contains a term to the effect that the court is to have jurisdiction to determine any claim in respect of the contract.'[949] This includes Choice-of-Forum clauses. In Malaysia, service out of the jurisdiction is allowed when there is an exclusive Choice-of-Forum clause in favour of Malaysian courts except when there is strong cause, applying the principles in *the Eleftheria,* to allow breach of such agreement.[950] On the other hand, when the Choice-of-Forum clause is non-exclusive, service out of the jurisdiction requires satisfaction of the principles of *forum non conveniens* developed in *Spiliada*.[951] While the non-exclusive Choice-of-Forum clause is just one of the factors to be considered by the courts, it is considered in Malaysia 'a very glaring factor'.[952]

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943 *Rules of Court 2012* (Malaysia), ord 5, r1.
944 Ibid ord 5, r2.
945 Ibid ord 10, r1(1).
946 Ibid ord 10, r1(1)
947 LexisNexis, *Halsbury's Laws of Malaysia* (online at 29 March 2019) 190 Civil Procedure, '2 Commencement of Proceedings' [190.2-063].
948 *American Express* (n441) 166.
949 *Rules of Court 2012* (Malaysia), ord 11, r2(2).
950 *Globus* (n512).
951 *American Express* (n441) 167.
952 Ibid 168.

3. Stay of Proceedings

A court may stay proceedings in Malaysia which were filed in breach of an exclusive Choice-of-Forum clause in favour of a foreign forum.[953] The burden to establish the existence of an exclusive Choice-of-Forum clause lies with the defendant. However, once the existence of such clause is established, the discretion to stay is exercised in favour of the defendant and the plaintiff has the burden of establishing a 'strong cause' why he should be allowed to breach his contract.[954] In exercising its discretion, the court will consider all circumstances of the case including: (1) where the evidence is located, (2) the governing law of the contract, (3) with what country the parties are closely connected, (4) whether the defendant genuinely desires trial abroad, (5) whether the plaintiff would be prejudiced by having to see in the foreign court, or unable to enforce any judgment obtained, or faced by a time bar not applicable in Malaysia, or for political, racial, religious or other reasons unlikely to get a fair trial.[955] The evidential burden rests with the plaintiff who is asserting the existence of a relevant factor.[956] These factors are similar to the factors considered in the *forum non conveniens* test, but the 'strong cause' test is considered distinct in Malaysia.[957] Furthermore, Malaysia rejected the allegedly mechanistic purely contractual approach of *The Bremen*.[958] The Malaysian court emphasised that the grant of stay is discretionary even if the Choice-of-Forum clause involved is exclusive.[959]

While cases consistently emphasise the discretion in favour of a stay when there is an exclusive choice-of-Forum clause stipulating foreign courts and would directly straightforwardly apply *The Eleftheria* principles,[960] Malaysian courts can still be zealous with their jurisdiction. There are cases where it appears that the factors constituting 'strong cause' appear to be treated in the same way as the factors in *forum non conveniens* – a balancing act which would ultimately point to a forum which is more convenient.[961] In *Inter Maritime*, the Court of Appeal, after citing *The Eleftheria*, said that the plaintiff established 'strong grounds' – 'the vessel and the appellant are… Malaysian…cargo was loaded at a Malaysian port… evidence is admittedly both here and in

[953] *Rules of Court 2012* (Malaysia), ord 12, r10(2).
[954] *Inter Maritime* (n236) 337-8.
[955] Ibid 331-332 (Court of Appeal of Kuala Lumpur).
[956] *Yong Songhua v Basic Venture International Ltd* [2017] 8 MLJ 681, 691 (High Court of Kuala Lumpur) ('Yong Songhua').
[957] *Inter Maritime* (n236) 337-8.
[958] Ibid 336 (Court of Appeal Kuala Lumpur).
[959] Ibid.
[960] *Globus* (n512); *Sealink Engineering And Slipways Sdn Bhd v Malayan Banking Bhd* (Unreported, Malaysian High Court of Miri, Stephen Chung Hian Guan JC, 21 July 2011).
[961] *Inter Maritime* (n236) 338.

Manila… [and] trial in [Malaysia]…will be less expensive and more convenient.'[962] Hence, the stay should be refused despite an exclusive Choice-of-Forum clause stipulating Tokyo courts.[963] A similar approach was applied in *Nutri Mills Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd*,[964] where the court deemed that the plaintiff has established 'strong cause' to avoid stay of proceedings in favour of the chosen forum (*ie, Tribunal de Commerce du Havre*) because 'the witnesses to the formation of the contract, the role of the parties, the admission of wrongdoing and the quantum of the loss are all in Malaysia.'[965] Hence, because the 'evidence…are largely situated or more readily available in Malaysia (or Gambia) rather than in France... I accept that it will cause the plaintiff substantial inconvenience and expense to take all these witnesses to France.'[966] Therefore, 'as such the relative convenience and expense of trial as between Malaysia and France weighs in favour of Malaysia in the present factual matrix and serves as a strong factor to rebut the prima facie case in favour of a stay.'[967] In *SRS Sports Centre Sdn Bhd v World Triathlon Corp* ('SRS Sports'), because the evidence on issues of fact is situated or more readily available in Malaysia, the High Court said that there was strong cause to refuse stay in favour of the exclusive forum, the Florida courts.[968]

Malaysian courts may also consider the 'strong cause' threshold to be not so tall to overcome. In the 1983 case, *The 'Lung Yung' & "Thai Yung" Owners v Sadit Timber Sdn Bhd*[969] ('Lung Yung') the Kuching Court used the balance of convenience test to justify its refusal to stay proceedings in Sarawak despite an exclusive Choice-of-Forum clause in favour of China.[970] In addition, the High Court has referred to the principle of estoppel to prevent a plaintiff from invoking the jurisdiction of Malaysian courts when there is an exclusive clause in favour of a foreign jurisdiction. In *Dato' Ho Seng v Rabobank Asia Ltd*,[971] the court said that it ought to decline jurisdiction because the plaintiff is estopped after choosing Singapore to be their exclusive chosen forum.[972]

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[962] *Inter Maritime* (n236) 338.
[963] Ibid.
[964] [2013] 8 MLJ 377 (High Court of Kuala Lumpur).
[965] *Nutri Mills* (n503) 387.
[966] Ibid.
[967] Ibid 388.
[968] *SRS Sports Centre Sdn Bhd v World Triathlon Corp* [2018] 8 MLJ 32, 40 (High Court of Kuala Lumpur) ('SRS Sports').
[969] *The 'Lung Yung' & "Thai Yung" Owners v Sadit Timber Sdn Bhd* [1984] 1 MLJ 29 (FC Kuching) ('Lung Yung').
[970] Ibid 43.
[971] *Dato' Ho Seng v Rabobank Asia Ltd* (Unreported, Malaysian High Court of Kuala Lumpur, Vincent Ng Kim Khoay J, 8 March 2002) ('Dato Ho').
[972] Ibid 17.

Significantly, Malaysia does not give non-exclusive Choice-of-Forum clauses a stronger effect other than being considered a factor in the *forum non conveniens test*.[973] Hence, the principles of *forum non conveniens* developed in *Spiliada* apply to applications to stay proceedings involving non-exclusive Choice-of-Forum clauses. This is emphasised in *American Express,* where the Supreme Court said that for the proceedings in Malaysia to be stayed, 'the defendant would have to satisfy the court that "some other forum is more appropriate" per Lord Templeman in *The Spiliada*.'[974] *American Express* is cited in the 2018 case of *KGI Securities (Singapore) Pte Ltd (previously known as Amfraser Securities Pte Ltd) v Nelson Fernandez* ('KGI Securities') as laying down the applicable test for non-exclusive Choice-of-Forum clauses in Malaysia.[975] In applying the *Spiliada* test, the Malaysian courts would consider various factors and are discussed further in Chapter 5.

Nonetheless, a different approach was suggested in *Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd*,[976] ('Southern Acids') where the Malaysian High Court characterised the non-exclusive clause stipulating English courts as a clause which has the purpose of identifying the 'primary place of jurisdiction.'[977] The court then said that by filing an action in Malaysia in breach of the non-exclusive Choice-of-Forum clause, the plaintiff had 'wantonly disregarded the non-exclusive jurisdiction clause.'[978] The court then said:

> [t]he burden is on the plaintiff to show why the suit should proceed in Malaysia since the parties had agreed to submit to the jurisdiction of the English courts. The agreement creates a strong *prima facie* case that the English jurisdiction is the appropriate forum.[979]

The court noted that the non-exclusive clause contained a waiver – 'waives any objection… that such Proceedings have been brought in an inconvenient forum…[and] such court does not have any jurisdiction over such party….'[980] The court read this to mean that the plaintiff 'has waived any objection that England is an inconvenient forum.'[981] Hence, by considering this contractual term, the court was giving the non-exclusive Choice-of-Forum clause an effect other than just being among the various factors considered in the *Spiliada* analysis. However, while the court cited

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[973] See *American Express* (n441); *Ngan* (n456).
[974] *American Express* (n441) 167.
[975] *KGI Securities (Singapore) Pte Ltd (previously known as Amfraser Securities Pte Ltd) v Nelson Fernandez* (Unreported, Malaysian High Court of Kuala Lumpur, Khadijah Idris JC, 29 June 2018) [64] ('KGI Secutirities').
[976] *Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd* (Unreported Case, Malaysian High Court of Kuala Lumpur, Mah Weng Kwai JC, 3 March 2011) ('Southern Acids').
[977] Ibid [14].
[978] Ibid.
[979] Ibid.
[980] Ibid.
[981] Ibid.

the English and Singaporean decisions of *Berisford* and *Bambang,* it did not mention that the plaintiff's burden is high or the test applicable under the circumstances is the 'strong cause' test. Probably, the reason for this was that while the waiver made the analysis different, the court nevertheless was not yet prepared to declare non-exclusive clauses with such waivers as having an effect similar to an exclusive clause. Notably, the test in the *Southern Acids* decision has yet to be adopted in subsequent cases. Malaysian courts appear to still favour the approach in *American Express* which gives courts a wider scope for discretion.[982]

Although involving an application for summary judgment, the approach in *KGI Securities*, further strengthens the point that in Malaysia, the non-exclusive Choice-of-Forum clause is still just one of the many factors considered by the court, with its weight no heavier than the others. While the High Court, in that case, said that 'foreign jurisdiction clauses… would in any event, in some significant way, militate against any argument for the bank customers, ie the plaintiffs, that the Malaysian court was the most appropriate forum,' the non-exclusive clause stipulating Singapore courts, nonetheless, was not given any heavier weight.[983] Rather, the court declared that the defendant's jurisdictional issue was not triable, following the doctrine of *forum non conveniens*, because the defendant was a Malaysian citizen and at all material times residing in Kuala Lumpur, despite the Plaintiff bank, including the potential witnesses, being located in Singapore.[984]

4. Anti-suit Injunctions and Other Relief

If the Malaysian court has jurisdiction over a person who commenced or threatens to commence proceedings against a party in the Malaysian proceedings, it may issue an injunction to restrain the respondent from continuing with or commencing such foreign proceedings.[985] This is because the bringing of, or a threat to bring proceedings in a foreign court may amount to invasion or threatened invasion of a legal or equitable right of the other party not to be sued abroad.[986] This injunction is directed at the respondent and not to the foreign court.[987] Nonetheless, because of its capacity to affect foreign proceedings, its issuance is exercised with great caution and in

[982] See *KGI Securities* (n975) [64].
[983] Ibid [64]-[66].
[984] Ibid [66].
[985] LexisNexis, *Halsbury's Laws of Malaysia* (online at 29 March 2019) 90 Conflict of Laws, '3 Jurisdiction' [90.090].
[986] *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd* [2000] 2 MLJ 70, 87-8 (Court of Appeal of Kuala Lumpur) ('BSNC').
[987] LexisNexis (n985) [90.090].

consideration of international comity.[988] The court can issue an anti-suit injunction when there is an exclusive Choice-of-Forum clause but only in relation to proceedings to which the clause is directly related. The basis for this is Section 52(1) to (2) of the *Specific Relief Act 1950* which provides courts with jurisdiction to grant an anti-suit injunction to prevent breach of contract.[989] In *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd*[990] ('Sabah Gas') the High Court in Kota Kinabalu emphasised that this discretion will only be exercised when the party seeking the court's intervention has proven that the facts and circumstances are 'so exceptional and in breach of the foreign arbitration/jurisdiction clause' in favour of local courts.[991] In these circumstances, the order will be granted unless strong cause or strong reasons are established that it should not. Nonetheless, the court may refuse to issue an anti-suit injunction when it can be shown that the plaintiff has submitted to the jurisdiction of the foreign court instead of relying on the exclusive Choice-of-Forum clause.

The court may likewise issue an anti-suit injunction in relation to a non-exclusive clause stipulating Malaysian court, but since no breach of contract is involved, it cannot be under the *Specific Relief Act*.[992] Rather, the anti-suit injunction is subject to the common law requirements, *i.e.,* that Malaysian court should be the 'natural forum' and that the foreign proceedings are oppressive and vexatious.

5. Recognition and Enforcement of Judgments

Like in Singapore and Hong Kong, there are two ways for a foreign judgment to be recognised and enforced in Malaysia – through common law and statute.[993] The principles in *Reciprocal Enforcement of Judgments Act* 1958 are derived from common law, its provisions on determining whether the foreign court has jurisdiction in issuing the judgment, and the grounds for setting aside registration are similar to those found in common law.[994] Significantly, under the act, a court is deemed to have no jurisdiction where the proceedings were brought before it in breach of an exclusive Choice-of-Forum clause.[995]

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988 See Arunachalam Kasi, 'Anti-suit Injunction in Enforcement of Arbitration Agreement and Exclusive Jurisdiction Agreement' [2013](6) *Malayan Law Journal* i, viii.
989 *Specific Relief Act 1950* (Malaysia) s 52(1)-(2); See Ibid iii.
990 *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd* [1993] 2 MLJ 396 (High Court of Kota Kinabalu) ('Sabah Gas').
991 Ibid 405.
992 See Kasi (n988) iii.
993 *Reciprocal Enforcement of Judgments Act 1958* (Malaysia).
994 See Ibid pt 2, s5.
995 Ibid pt 2, s5(3)(a).

E. Philippines

1. The Philippine Approach to Jurisdiction

The Philippine court system is composed by the Supreme Court,[996] Court of Appeals,[997] Regional Trial Courts (RTC),[998] Metropolitan Trial Courts (MeTC), Municipal Trial Courts (MTC) or Municipal Circuit Trial Courts (MCTC).[999] Depending on the amount involved and the remedy asked, original actions involving Choice-of-Forum clauses may be filed with the RTC, MeTC, MTC or MCTC. Civil procedure is composed of rules of procedure issued by the Supreme Court, which is vested with the power to promulgate such rules under the Constitution.[1000] These include the 1997 Rules of Civil Procedure which constitute Rules 1 to 71 of the *Rules of Court*. Furthermore, the decisions of the Supreme Court, including on civil procedure, form part of Philippine law.[1001]

Jurisdiction in the Philippines has two aspects – subject-matter jurisdiction and personal jurisdiction. Subject-matter jurisdiction is defined by law and determines the nature and type of cases which a particular court may hear and try.[1002] The subject-matter jurisdiction of lower courts, is mostly found in *Batas Pambansa 129* or *'The Judiciary Reorganization Act of 1980,'* [1003] while that of the Supreme Court is found in the *Constitution*.[1004] Jurisdiction over the person, on the other hand, is acquired by the voluntary appearance of a party in court and his submission to its authority, or by the coercive power of legal process exerted over the person,[1005] which is usually through service of summons. For a Philippine court to have jurisdiction over an action, these two aspects of jurisdiction must coincide. In addition, because the Philippines recognises procedural party autonomy, jurisdiction is also determined by the allegations in the complaint.[1006]

As earlier mentioned, Section 4(b), Rule 4 of the *Rules of Court* recognises the power of parties to determine the venue of their action *a priori* through writing, without which the default

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996 *Constitution* (Philippines) art 8, s1.
997 *Batas Pambansa Blg 129* (Philippines) ch 1, ss3-12 ('BP 129').
998 Ibid ch 2, ss13-24.
999 Ibid ch 3, ss25-38.
1000 *Constitution* (Philippines) art 8, s5(2).
1001 *Civil Code* (Philippines) art 8.
1002 *Hasegawa* (n537) 274.
1003 *BP 129* (n997) s9, 19-23, 32-37.
1004 *Constitution* (Philippines), art 8, s5.
1005 *Banco Español-Filipino v Palanca* (1918) 37 Phil 921, 927.
1006 *Hasegawa* (n537) 274.

rules on venue apply. Although this rule is designed for domestic litigation, the rule has been applied to stipulations in favour of foreign 'venues.'[1007] Because a Choice-of-Forum clause is a venue stipulation, as discussed in the previous chapters, the analysis tend to be a determination of whether the technical rules on venue stipulations (*i.e.,* the formal requirement of being in writing and exclusive) are complied with. More importantly, because of this approach, the case law applied by the courts includes cases on venue stipulations in general – without distinguishing whether the named forum involved in the case is domestic or foreign.

Unlike in Singapore, Hong Kong and Malaysia, the *forum non conveniens* principle is applied not at the jurisdictional stage but during the merits stage.[1008] As argued below and in Chapter 5 in relation to other factors, the Choice-of-Forum clause, even when it is non-exclusive, may play an important role during the application.

2. Service of Process

Proper service of summons is an important aspect of procedural due process in the Philippines. Lack of proper service is a ground for dismissal of action. Rule 14 of the *Rules of Court* provide that service can be done within and outside the Philippines. Within the Philippines, service on the person of the defendant is preferred,[1009] with access to other modes (*eg,* substituted service by leaving copies at the defendant's residence or place of business, or through publication in instances when the identity or whereabouts are unknown) available only as alternatives.[1010] Extraterritorial service is allowed to a non-resident defendant but only in actions *in rem* or *quasi in rem*, *ie,* actions which affect 'the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines.'[1011] Often, in actions *in personam*, to avail of extraterritorial service, a strategy is to also ask for an attachment of the defendant's property in the Philippines, which then transforms the action into a *quasi in rem*. Moreover, extraterritorial service is also allowed when the defendant who is a Philippine resident is temporarily outside the Philippines.[1012] In both instances of

[1007] Eg, *MV Zileena* (n244).
[1008] *Hasegawa* (n537) 277-8.
[1009] *Rules of Court* (Philippines), r14, s6.
[1010] Ibid r14, s7.
[1011] Ibid r14, s15.
[1012] Ibid r14, s16.

extraterritorial service, leave of court is required.[1013] Unlike in Singapore, Hong Kong or Malaysia, Choice-of-Forum do not play any role in granting of leave for service outside of the Philippines.

3. Stay of Proceedings

(a) Motion to Dismiss

Although a similar remedy is available, the Philippines has no rules on staying of proceedings. The Philippines, however, allows the dismissal of actions and under these circumstances, a Choice-of-Forum clause may play a role. The following grounds under Section 1, Rule 16 of the *Rules of Court* state that a motion to dismiss may be made on any of the following grounds:

(a) the court has no jurisdiction over the person of the defending party;
(b) the court has no jurisdiction over the subject matter of the claim;
(c) venue is improperly laid;
(d) plaintiff has no legal capacity to sue;
(e) there is another action pending between the same parties for the same cause;
(f) the cause of action is barred by a prior judgment or by the statute of limitations;
(g) the pleading asserting the claim states no cause of action;
(h) the claim or demand set forth in the plaintiff's pleading has been paid, waived, abandoned, or otherwise extinguished;
(i) the claim on which the action is founded is unenforceable under the provisions of the statute of frauds;
(j) a condition precedent for filing the claim has not been complied with.

Since the Choice-of-Forum clause cannot directly affect whether there is subject-matter or personal jurisdiction, the first two grounds cannot be invoked as grounds for dismissal. Unlike Singapore, Hong Kong or Malaysia, there is not even a presumption akin to a stay of proceedings whenever there is an exclusive Choice-of-Forum clause. The court will not dismiss an action, based on jurisdictional grounds, simply because there is a breach of a Choice-of-Forum clause.

[1013] Ibid r14, ss15-16.

Nonetheless, because the courts have treated Choice-of-Forum clauses as venue stipulations, an action may be dismissed because it was improperly laid. 'Clearly, stipulation on venue is permitted and must be recognized for as long as it does not defeat the purpose of the Rules which primarily aims for the convenience of the parties to the dispute.'[1014] 'Since convenience is the *raison d'etre* of the rules of venue…venue stipulations should be deemed permissive…and that interpretation should be adopted which most serves the parties' convenience.'[1015] Hence, 'stipulations designating venues other than those assigned by Rule 4 should be interpreted as designed to make it more convenient for the parties to institute actions arising from or in relation to their agreements….'[1016] Furthermore, the court may also not apply the Choice-of-Forum clause because substantial justice demands the relaxation of venue rules. 'Time and again, this [Supreme] Court has consistently held that rules [of procedure] must not be applied rigidly so as not to override substantial justice.'[1017] In addition, any objection on venue being improperly laid must be raised at the earliest opportunity, *ie,* upon the filing of a motion to dismiss.[1018] Furthermore, failure to raise the ground of improper venue may mean waiver especially as a result of the defendant's procedural conduct (*eg,* filing of motions to lift writ of attachment) are 'tantamount to voluntary submission to the jurisdiction of the lower court.'[1019] It appears then that the discretion to excuse the application even of an exclusive Choice-of-Forum clause in the Philippines is wide.

When a case has already been filed in the chosen forum, a motion for dismissal based on the fifth ground can be bolstered as the court can consider the foreign action as *lis pendens* or *litis pendentia* – a parallel action involving the same parties and the same cause of action - and the Choice-of-Forum clause can be presented as evidence that such is the case. Nonetheless, the defendant has to establish the sameness of parties, cause of action and likelihood that the foreign action will result to *res judicata* between parties.[1020] Similarly, when the foreign forum has already rendered judgment, the Choice-of-Forum clause may be presented as proof that the judgment rendered is between the same parties, on the same cause of action and that the foreign judgment bars any further litigation based on the principle of *res judicata.*[1021] Lastly, the Choice-of-Forum clause can be considered as an unfulfilled condition precedent which bars the defendant from filing an action in the Philippines.

[1014] *Radiowealth Finance Co, Inc v Nolasco* (2016) 808 SCRA 639, 645 ('Radiowealth').
[1015] Ibid 767-8.
[1016] Ibid.
[1017] *Sanchez v Court of Appeals* (2003) 404 SCRA 540.
[1018] *Radiowealth* (n1014) 646.
[1019] *MV Zileena* (n244) 313.
[1020] See *Villarica Pawnshop, Inc v Gernale* (2009) 582 SCRA 67, 78-9.
[1021] See *Saudia* (n249) 164.

(b) *Forum Non Conveniens*

The *Rules of Court* do not specifically provide for dismissal based on *forum non conveniens*. Philippine case law, however, has established it as a ground for dismissal in cases with a foreign element.[1022] The premise, however, of *forum non conveniens*, is that the Philippine court already has jurisdiction to begin with (both subject-matter and personal jurisdiction) but chose not to exercise the same because another forum is more appropriate to hear and try the case. The aim of *forum non conveniens* is not only to address 'parallel litigation and undermine a litigant's capacity to vex and secure undue advantages by engaging in forum shopping on an international scale' but to also consider 'principles of comity and judicial efficiency.'[1023] Peculiarly, however, *forum non conveniens* cannot be invoked directly as a ground for dismissal as it is not a ground stated under Rule 16 of the *Rules of Court*. In *Hasegawa v Kitamura*,[1024] the Supreme Court emphasised that the principle is best invoked as a matter of defence during the trial stage (merits).[1025] The specific factors considered in the Philippine version of *forum non conveniens* are discussed in Chapter 5.

The *forum non conveniens* principle has been applied in cases involving Choice-of-Forum clauses.[1026] In *HSBC*, the Philippine Supreme Court interpreted the Choice-of-Forum clause stipulating Singaporean courts non-exclusive because of failing to comply with Rule 4, Section 2(b).[1027] Absent such exclusivity, the Choice-of-Forum clause may not provide the court a ground for dismissal under Rule 16. Finding that there was jurisdiction and the venue was properly laid, the court then applied the principle of *forum non conveniens* to determine whether it should proceed to exercise its jurisdiction.[1028] The court noted that it was the Philippine residents themselves, and not the Singaporean parties, who were avoiding litigation in the Philippines and were seeking to enforce the Choice-of-Forum clause stipulating Singaporean courts.[1029] The court described this 'stance' as hardly comprehensible given the 'considerable expenses, not to mention inconvenience, than to have a Philippine court try and resolve the case…unless their ultimate intent is to evade,

[1022] See *HSBC* (n240) 338-9.
[1023] *Saudia* (n249) 164.
[1024] *Hasegawa* (n537).
[1025] Ibid 278.
[1026] See *HSBC* (n240) 339.
[1027] Ibid 337.
[1028] Ibid 338-9.
[1029] Ibid 336.

or at least delay, the payment of a just obligation.'[1030] The court said that while HSBC should not be allowed to take a stand contrary to the contractual stipulations, 'substantial basis exist' for its choice of forum. Arguably, the Supreme Court considered the defendants' lack of genuine desire for trial in Singapore and the convenience of trying the case in the Philippines as the reasons why the Philippine court should proceed to exercise its jurisdiction.

4. Anti-suit Injunctions and other Relief

Philippine courts do not issue anti-suit injunctions. Nonetheless, an injunction under Rule 58 of the *Rules of Court* may be available to prevent acts, and may produce the same effects as an anti-suit injunction.[1031] Under section 3 of Rule 58, a preliminary injunction may be granted by the court when (1) the applicant is entitled to the relief demanded, (2) the act complained of would probably work injustice to the applicant, or (3) there are some acts which are probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.[1032]

It may be argued that preventing a party from filing or pursuing an action in breach of an exclusive Choice-of-Forum clause is a relief which the plaintiff is entitled to. Furthermore, the additional costs, inconvenience and the prejudice the filing or continuance of a foreign action would 'probably work injustice to the applicant.' Significantly, a foreign judgment issued in breach of an exclusive Choice-of-Forum clause is not prevented from becoming *res judicata*; thus, in that sense, the judgment to be rendered by the Philippine court may become ineffectual. However, no decision yet has been rendered by the Supreme Court providing for a provisional injunction for breach or imminent breach of a Choice-of-Forum clause.

5. Recognition and Enforcement of Judgments

Because of international comity, Philippine courts allow the execution of foreign judgments pursuant to Section 48, Rule 39 of the *Rules of Court*. When a foreign judgment is upon a specific thing (*in rem*), it is conclusive upon the title to the thing.[1033] On the other hand, when a foreign judgment is against a person (*in personam*), it is a presumptive evidence of a right as between

[1030] Ibid.
[1031] See *Rules of Court* (Philippines), r58, s1.
[1032] Ibid r58, s3.
[1033] Ibid r39, s48(a).

the parties and their successors in interest.[1034] A foreign judgment may be refused 'by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.'[1035]

Notably, foreign judgments obtained in breach of Choice-of-Forum clauses are not invalid for execution and recognition in the Philippines unless such breach is considered a 'want of jurisdiction' by the foreign court. This would require evidence of the foreign court's basis for jurisdiction and how this was not met.[1036] Furthermore, the Philippines subscribes that 'a State does not have jurisdiction in the absence of some reasonable basis for exercising it.'[1037] Furthermore, 'to be reasonable, the jurisdiction must be based on some minimum contacts that will not offend traditional notions of fair play and substantial justice.'[1038] Hence, a breach of a Choice-of-Forum clause may not necessarily amount to want of jurisdiction if there are other elements which link the party to the foreign forum. Significantly, the foreign judgment may even bar any future litigation in the Philippines to enforce a Choice-of-Forum clause in favour of Philippine courts, because the foreign judgment can create a *res judicata* vis-à-vis the parties. Moreover, the breach of a Choice-of-Forum clause may also indicate 'collusion, fraud or clear mistake of law or fact.' This should be proven by facts established by preponderance of evidence.[1039]

F. Key Lessons

This chapter shows that the enforcement of Choice-of-Forum clauses in each jurisdiction is distinct. Substantial differences exist even between the jurisdictions which share the common law heritage. Singapore is the most complex jurisdiction, with three prevailing legal regimes applicable to Choice-of-Forum clauses – the common law, *SICC Law* and *CCAA*. Notably, with Singapore's establishment of the SICC and accession to the *Choice-of-Court Convention*, the city-state signals its readiness to adopt a more automatic, less court discretion-oriented Choice-of-Forum clause analysis. In contrast, Hong and Malaysia continue to rely only on the common law.

[1034] Ibid r39, s48(b).
[1035] Ibid r39, s48.
[1036] See *William Borthwick v Hon Floreliana Castro-Bartolome* (1987) 152 SCRA 229, 235.
[1037] *HSBC* (n240) 338.
[1038] Ibid.
[1039] *Rules of Court* (Philippines), r133, s1.

Singapore and Hong Kong generally enforce exclusive Choice-of-Forum clauses following the principles in *The Eleftheria,* except that in Singapore, lack of genuine desire for trial (*ie,* factor 'd' of *The Eleftheria*) has been narrowed to situations where there is abuse of process or denial of justice. In Malaysia, although *The Eleftheria* is also cited as the basis for enforcing exclusive clauses and requiring the plaintiff to establish 'strong cause' when there is an exclusive choice of a foreign court, courts still tend to follow the balancing act-type of analysis usually used in non-exclusive clauses. This approach becomes more evident in the next chapter when the role of the convenience factors in the enforcement of exclusive clauses is discussed.

As regards non-exclusive Choice-of-Forum clauses, the common law prevailing in Singapore and Hong Kong has explicitly recognised the capacity of parties to provide different promises which may vary the relief usually granted to a particular type of Choice-of-Forum clause. Malaysia's *Southern Acids* decision may also be representative of this approach, but the Malaysian courts still appear to generally favour the classic *Spiliada* analysis in resolving disputes involving non-exclusive Choice-of-Forum clauses. Hence, in Singapore and Hong Kong, since courts have recognised that there is no single type of non-exclusive Choice-of-Forum clauses, their enforcement should not be determined based on a uniform and singular test. Singapore and Hong Kong courts are even willing to blur the differences between exclusive and non-exclusive clauses if that is the effect intended by the parties. In this sense, the contractual dimension of Choice-of-Forum clauses determines more and more how Choice-of-Forum clauses are enforced.

Therefore, party autonomy, understood as the capacity of parties to determine the contents of their Choice-of-Forum clause, now plays a far greater role in the enforcement of Choice-of-Forum clauses. If before the contents of the Choice-of-Forum clause is mainly used by courts to determine which court is intended by parties to have jurisdiction, the other promises of parties especially in non-exclusive Choice-of-Forum clauses (*eg,* waiver of objections to the appropriateness of the named court) can be considered by courts in granting relief. This ascent of party autonomy further pushes the discretion of courts back. In certain types of Choice-of-Forum clauses, like those under the *CCAA*, this discretion is almost muted. Nonetheless, the extent to which party autonomy may be allowed to play a role in the enforcement of Choice-of-Forum clauses may be more than a legal question. Whether Hong Kong will follow Singapore by becoming party to the *Choice-of-Court Convention* and therefore, also muting court discretion in exclusive Choice-of-Forum clauses or whether Malaysia will eventually move closer to the

common law approaches of Singapore and Hong Kong or even also become a party to the *Choice-of-Court Convention* have policy dimensions as well.

It may be argued, therefore, that the differences across jurisdictions may be accounted for by history (*eg,* Hong Kong's reversion to China), economic ambitions (*eg,* Singapore's establishment of the Singapore International Commercial Court and accession to the *Choice-of-Court Convention*), and the type of cases and issues that go to court. The *Choice-of-Court Convention,* however, arguably can be described as the most important stimulus for change on how Choice-of-Forum clauses are approached in Asia. In Singapore, the *Choice-of-Court Convention* is adopted as part of local law, and its effects can be seen in the legislation and rules of the Singapore International Commercial Court. In Hong Kong, the *Choice-of-Court Convention* is a key inspiration to the *Judgments Arrangement* between Hong Kong and China.

In the Philippines, unless the courts recognise the promises of parties contained in Choice-of-Forum clauses as having a role in the way Choice-of-Forum clauses are enforced, there is little chance that party autonomy can play a role in the Choice-of-Forum clause analysis. Even exclusive Choice-of-Forum clauses have a limited effect especially if parties derogated the jurisdiction of Philippine courts in favour of a foreign court. Since convenience is considered as the *raison d'etre* of venue stipulations, Philippine courts may ignore this exclusive choice for foreign courts if convenience factors point towards Philippine courts, not to mention any public interest grounds they may cite.

Chapter V.

The Factors Considered in Granting Relief

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A. The Antecedents: *The Eleftheria* and *Spiliada*

Because Singapore, Hong Kong and Malaysia share the English common law approach and would cite each other's decisions, these three jurisdictions have identified similar factors as relevant in the analysis; and thus, are discussed together in this chapter. Furthermore, all three consider two English cases as normative. *The Eleftheria*,[1040] fifty years after its promulgation in 1969, still determines the approach of courts towards exclusive clauses, while *Spiliada,*[1041] decided in 1986, still moulds the approaches of courts to non-exclusive Choice-of-Forum clauses. Moreover, the three consider the existence of the relevant factors a factual issue, and thus, 'pre-eminently within the province of the trial judge.'[1042] Furthermore, the weight given to each factor depends on the facts and circumstances of the case. 'In coming to a decision, the court will take a cumulative approach and give each circumstance due weight. A single circumstance may not by itself be sufficient to justify refusing a stay.'[1043] Hence, the evaluation of these factors remains largely discretionary. Particularly, in cases involving non-exclusive Choice-of-Forum clauses, courts determine the more appropriate forum by listing the relevant factors and then by identifying the jurisdiction to which the majority of these factors point.[1044] Significant differences, nonetheless, exist between the three jurisdictions which are carefully noted in this chapter.

1. Exclusive Choice-of-Forum Clauses and the Dominance of *The Eleftheria* Approach

In the three jurisdictions, courts have followed *The Eleftheria* approach, albeit inconsistently especially in the early years following the decision. Under *The Eleftheria,* the following factors are relevant: (1) location of evidence and the effect on the relative convenience and expense of trial between the forum court and the foreign court; (2) whether the law of the foreign court applies to the merits; (3) with which country either party is connected, and how closely; (4) whether the defendant genuinely desires trial in the foreign country; (5) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be (i) deprived of security for

[1040] *The Eleftheria* (n139).
[1041] *Spiliada* (n612A).
[1042] See *Inter Maritime* (n236) 323.
[1043] *The 'Eastern Trust'* (n658) 519.
[1044] See *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007, 1010 (Court of Appeal) ('Siemens').

their claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in the forum court, or (iv) for political, racial religious or other reasons be unlikely to get a fair trial; (6) multiplicity of proceedings; and (7) others.[1045]

In Singapore and Hong Kong, 'strong cause' is established by factors which show that the defendant lacks genuine desire for trial and prejudicial factors exist against the plaintiff should the trial proceed in the chosen forum. While convenience factors were also considered sufficient to establish 'strong cause' during the early years following *The Eleftheria*, their significance has diminished over the years in Singapore and Hong Kong. In contrast, in Malaysia, 'strong cause' can still be established by convenience factors, along with factors concerning multiplicity of proceedings. The table below summarises which factors had been identified by the courts in Singapore, Hong Kong and Malaysia as amounting to 'strong cause':

Jurisdiction	Factors Amounting to 'Strong Cause'
Singapore	• Location of material elements (1 case)[1046] • Location of evidence, relative convenience and economy (3 cases)[1047] • Applicable law (1 case)[1048] • Lack of genuine desire for trial (5 cases)[1049] • Prejudicial factors (1 case)[1050]
Hong Kong	• Location of evidence, relative convenience and economy (4 cases)[1051] • Multiplicity of proceedings (1 case)[1052] • Lack of genuine desire for trial (3 cases)[1053] • Prejudicial factors (3 cases)[1054]

[1045] *The Eleftheria* (n139) 99-100.
[1046] *BGC Partners* (n639).
[1047] *Amerco* (n510); *The 'Eastern Trust'* (n658); *The 'Hyundai Fortune'* (n658).
[1048] *The 'Asian Plutus'* (n658) 514.
[1049] *The 'Hyundai Fortune'* (n658); *Golden Shore* (n682); *The 'Jian He'* (n658); *The 'Hung Vuong-2'* (n658); *Societe Generale* (n684) [12].
[1050] *The 'Hyundai Fortune'* (n658); *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814 (Court of Appeal) ('Trisuryo').
[1051] *The Thorscan* (n456) 543; *Star Cruises (HK) Ltd v Tung Ho Wah* [2006] HKCD 61(District Court) ('Star Cruises'); *Superstrong Industries Limited Trading as M & T International v Furness Logistics (HK) Ltd* [1999] HKCFI 314, [23] (Court of First Instance) ('Superstrong'); *Royal Skarkia Life Insurance Ltd v Sparkle Consultants (HK) Ltd* [2006] HKDC 118 (District Court) ('Royal Skarkia').
[1052] *Konsumex Foreign Trade Co v Sun Luen Transportation Co* [1990] 1 HKC 247 (High Court) ('Konsumex').
[1053] *The Thorscan* (n456); *Madison Communications Private Ltd v Le Ecosystem Technology India Private Ltd* [2017] HKCFI 1567(Court of First Instance) ('Madison'); *Superstrong* (n1051) [24]-[25].
[1054] *Confecciones del Atlantico v Lamont Shipping Incorporated* [1982] 1 HKC 327 (High Court) ('Confecciones'); *Ghossoub* (n346); *The Griesheim* [1984] HKC 416 (Court of Appeal).

Malaysia	• Location of material elements (2 cases)[1055] • Location of evidence, relative convenience and economy (5 cases)[1056] • Prejudicial factors (1 case)[1057]

In stay applications, for the analysis under *The Eleftheria* to apply, the defendant has to prove that the exclusive Choice-of-Forum clause stipulating the foreign forum exists. Once proven, the burden shifts to the plaintiff, who has to establish 'strong cause' why the court should override the agreed forum selection clause.[1058] However, if the defendant failed to prove the existence of the exclusive Choice-of-Forum clause and the court's jurisdiction was established of right, the court will proceed to hear the case unless there are grounds for stay under *forum non conveniens*.[1059]

2. *Forum Non Conveniens* and Non-Exclusive Choice-of-Forum Clauses

(a) *Spiliada's* Quest for the Natural Forum

Given the explicitly balancing nature of *forum non conveniens* test, identifying which factors are relevant is more complicated than the 'strong cause' test used in exclusive Choice-of-Forum clause cases. Often, courts need to identify not just one or two factors but several to establish which forum is more appropriate. This is because in the classic *Spiliada*, when the plaintiff instituted the action as of right, the proceedings are not easily stayed unless the defendant shows that there is a more appropriate forum.[1060] Hence, 'it is wrong to say that Singapore is *forum non conveniens*…because the connecting factors which point to Singapore are outweighed by all the connecting factors which point away from Singapore.'[1061]

Furthermore, 'the court is [also] required to focus on the appropriateness… from the point of view of the trial of the action.'[1062] Hence, '[d]etermination of the identity of the natural forum

[1055] *Inter Maritime* (n236); *SRS Sports* (n968).
[1056] *Inter Maritime* (n236); *Nutri Mills* (n503); *'Lung Yung'* (n969); *SRS Sports* (n968); *Rintis Malay Motors Sdn Bhd v Agasta Co Ltd* (Unreported, High Court of Kuala Lumpur, Faizah Jamaludin JC, 5 June 2017) ('Rintis').
[1057] *Ngan* (n456) 657.
[1058] *SRS Sports* (n968) 39.
[1059] See *Yong Songhua* (n956) 690-1.
[1060] *Spiliada* (n612A) 476.
[1061] *Siemens* (n1044) 1010.
[1062] *Rambas Marketing Co LLC v Chow Kam Fai David* [2001] 3 HKC 250, 255 (Court of First Instance) ('Rambas').

… must depend upon the nature of the disputed issues in any particular case….'[1063] Likewise, the *forum non conveniens* analysis may change over time as the *Spiliada* factors are also susceptible to change.[1064] For instance, witnesses may relocate or die and parties may concede to certain legal or factual issues.[1065]

Which factors are relevant and why (*ie,* a possible theoretical justification for their inclusion) are important questions which often elude many court decisions, prompting commentators to say that the English *forum non conveniens* analysis could be arbitrary.[1066] In *Spiliada*, Lord Templeman observed: '[t]he factors which the court is entitled to take into account in considering whether one forum is appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case.'[1067] Nonetheless, the history of stay of proceedings may explain why certain factors have been included. The inclusion of factors establishing convenience and legitimate advantages to the plaintiff may have resulted from the shift in the grounds in granting stay of proceedings. Traditionally, a stay is granted based on factors showing that the local action is 'oppressive and vexatious' to the defendant.[1068] Over time, these factors became no longer relevant.[1069] Rather, the factors established by the Scottish doctrine of *forum non conveniens*, which have been adopted by English courts have become central to the analysis.[1070] Hence, parties need to refer to factors showing legitimate advantages to the plaintiff juxtaposed with disadvantages which the defendant may suffer.[1071] Furthermore, the *forum non conveniens* principle also adopted elements associated with the concept of 'natural forum' in other legal contexts.[1072] The inclusion of factors showing 'substantial connection' to the forum may have been adopted from the emphasis under the *Matrimonial Causes Act 1950* of establishing England as the 'natural forum' for divorce

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[1063] Ibid 255.
[1064] *China North Industries Investment Ltd v Ronald RC Chum* [2006] HKCFI 407, [118] (Court of First Instance) ('China North').
[1065] Ibid.
[1066] See Wendy Kennett, 'Forum Non Conveniens in Europe' (1995) 54(3) *Cambridge Law Journal* 552, 555; JJ Fawcett, 'General Report' in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law Athens, August 1994* (Clarendon Press, 1995) 1, 23; *Cf* In Simona Grossi, 'Forum Non Conveniens as a Jurisdictional Doctrine' (2013) 75(1) *University of Pittsburgh Law Review* 31, the American *forum non conveniens* was also criticised as arbitrary.
[1067] *Spiliada* (n612A) 465; *The Atlantic Star* [1974] AC 436, 454; *MacShannon v Rockware Glass Ltd* [1978] 2 WLR 362, 367 ('MacShannon').
[1068] *MacShannon* (n1067) 813; *The Abidin Daver* [1984] AC 398, 401.
[1069] See *St Pierre v South American Stores (Garth & Chaves) Ltd* [1936] 1 KB 382, 398.
[1070] *The Abidin Daver* (n1068), 411; *Spiliada* (n612A) 475.
[1071] *Spiliada* (n612A) 477-8.
[1072] See Ibid.

proceedings,[1073] the requirement of substantial connection for the purposes of establishing discretionary jurisdiction under Order 11 of the *Rules of the Supreme Court*,[1074] and the approach employed in contract choice of law which also require substantial connection with a legal system.[1075] Hence, under the *forum non conveniens* principle nowadays, the applicable law becomes a significant factor. [1076] The over-all effect then is an English *forum non conveniens* analysis which includes connecting and convenience factors, applicable law, prejudicial factors, genuine desire for trial, and multiplicity of proceedings. This approach has been adopted in Singapore, Hong Kong and Malaysia.

(b) The Modified *Spiliada* in Singapore and Hong Kong

In the classic *Spiliada* analysis, a non-exclusive Choice-of-Forum clause (as a connecting factor) is just one of the many factors considered by the court to arrive at a determination of the more appropriate forum. The 1990s witnessed changes in the approach of English courts which led to the modification of the *Spiliada* approach. *Berisford* declared that the non-exclusive clause in favour of English courts creates a strong *prima facie* case that that jurisdiction is an appropriate one. [1077] In *British Aerospace,* even when the English Choice-of-Forum clause is non-exclusive, a party may be precluded from raising factors of convenience which were foreseeable during the contract negotiations. [1078] The cumulative effect of adopting the approaches in these English cases is to provide an effect to non-exclusive clauses akin to exclusive ones when the English forum is named by parties. In other words, these cases varied the weight of the English non-exclusive Choice-of-Forum clause vis-à-vis the other factors in the *forum non conveniens* analysis.

The Rothnie[1079] went further by extending the effect of *prima facie* appropriateness to non-exclusive Choice-of-Forum clauses stipulating foreign courts. Cresswell J justified this extension with two lines of reasoning. First, he highlighted that when there is a non-exclusive clause

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[1073] See JJ Fawcett, 'Forum Shopping – Some Questions Answered' (1984) 35(2) *Northern Ireland Legal Quarterly* 141, 146.
[1074] *Rules of the Supreme Court* (UK), ord 11, r1(1); see Alexander Reus, 'Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany' (1994) 16(2) *Loyala of Los Angeles International and Comparative Law Journa*l 455, 478-9; Fawcett (n1073) 151; David Robertson, 'Forum non conveniens in America and England: 'a rather fantastic fiction' (1987) 103(3) *Law Quarterly Review* 398, 411.
[1075] See Fawcett (n1073) 149-150.
[1076] See Guan Siew Teo, 'Choice of Law in Forum Non Conveniens Analysis' (2010) 22(2) *Singapore Academy of Law Journal* 440, 449-50.
[1077] *Berisford* (n661) 646.
[1078] *British Aerospace* (n147) 376.
[1079] [1996] 2 Lloyd's Rep 206.

stipulating foreign courts (*ie,* Gibraltar courts) and foreign law applies, these create a strong *prima facie* case that the foreign jurisdiction is an appropriate one.[1080] Second, he said that should he have erred in shifting the burden of proof, the dispute in this case had the most real and substantial connection with Gibraltar because of several factors pointing to Gibraltar. He emphasised that the non-exclusive Choice-of-Forum clause stipulating Gibraltar courts is a 'very strong factor.'[1081] *The Rothnie's* reasoning, however, appears to have not been followed in later English cases. In *Abdul Rashid*, the Singapore High Court noted, 'it was not clear to me whether *The Rothnie* represented English law or was not considered to be good law.'[1082] Therefore, it appears that English courts are not ready to extend further the logic of the modified *Spiliada*, recognise that the named foreign court is appropriate, and shift the burden to the plaintiff, who established the English court's jurisdiction as of right.

The effect of these English cases on the *forum non conveniens* test in Singapore, Hong Kong and Malaysia, however, remained unclear up until the 2000s. In the immediate period following the English decisions adopting the modified *Spiliada*, Lee argued that in Singapore, for instance, three approaches were considered possible.[1083] The first approach followed the *Spiliada* without modifications. In *PT Jaya*,[1084] for example, the Singapore High Court treated a non-exclusive clause stipulating Jakarta courts as only one of the factors considered in the *forum non conveniens* analysis, without giving it any special weight.[1085] The second approach, on the other hand, applied the *Spiliada*, but the court excluded factors that should have been foreseeable when the non-exclusive Choice-of-Forum agreement was entered. Lee argued that this was the approach in *Asia-Pacific Ventures II Ltd v PT Intimutiara Gasindo*[1086] and *Bayerische Landesbank Girozentrale v Kong Kok Keong*,[1087] which involved non-exclusive Choice-of-Forum clauses stipulating Singapore courts. Lee, however, admitted that it remained unclear whether these cases actually adopted the modified *Spiliada*.[1088] By applying the 'strong cause' test outside of an 'exclusive Choice-of-Forum' clause situation (*ie,* 'when the jurisdiction clause limits jurisdiction to a few countries, but a special or specific right is conferred on the plaintiff but not on the defendant to select any one of these

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[1080] Ibid 211.
[1081] Ibid.
[1082] *Abdul Rashid* (n647) 1051 (High Court).
[1083] See Joel Lee, 'Non-exclusive Jurisdiction Clauses-Changing Approaches?' [2003](2) *Singapore Journal of Legal Studies* 593.
[1084] *PT Jaya* (n667).
[1085] Ibid [65].
[1086] *Asia-Pacific Ventures* (n682) 383.
[1087] *Bayerische Landesbank Girozentrale v Kong Kok Keong* [2002] 1 SLR (R) 485, 490 (High Court) ('Bayerische').
[1088] Lee (n1083) 597-9.

specified countries to institute his action'), *Baiduri* is probably another example.[1089] The third approach is illustrated according to Lee in *Bambang*,[1090] where the Singapore Court of Appeal applied the 'strong cause' test to a non-exclusive clause stipulating Jakarta courts.[1091] The application of the 'strong cause' test, however, resulted from the joint effect of a non-exclusive Choice-of-Forum clause with the defendant's waiver of objections based on *forum non conveniens*.[1092] Notably, this makes the modified *Spiliada* in Singapore different as the distinction was not necessarily drawn based on whether Singapore is a named forum in the non-exclusive clause. Moreover, *Bambang* did not cite neither the *prima facie* appropriateness of the foreign forum named in the non-exclusive clause nor the status of the non-exclusive clause as a very strong factor, as provided in *The Rothnie*.

Hong Kong's change of approach was clearer. In *Noble Power*,[1093] the Hong Kong Court of Appeal declared that where the parties have submitted to the named forum, such obligation to submit should be treated as no different from cases where the Choice-of-Forum clause is exclusive.[1094] Given that the non-exclusive clause required parties submit to the jurisdiction of the Hong Kong courts, and that proceedings were commenced in Hong Kong, plaintiffs were considered to have demonstrated the appropriateness of Hong Kong as a forum in the context of an Order 11 application (*ie*, asking the court to exercise its discretionary jurisdiction and allow service out of Hong Kong).[1095] Hence, the *Noble Power* case was a situation 'where proceedings are instituted in the named forum (to which the parties have agreed to submit),' thus, 'the party who seeks a stay or otherwise to contest the jurisdiction or appropriateness…has a very heavy burden to discharge, since that party has by definition agreed contractually to submit to the jurisdiction.'[1096] Absent strong reasons, the defendant would not be allowed to escape the effects of his contract.[1097] Likewise, the same heavy burden applies when the parties have not named Hong Kong as a forum but the parties have nonetheless agreed to submit to the jurisdiction of the courts of any other forum (including Hong Kong) in the event of them being sued there.[1098] The court emphasised that the traditional *Spiliada* approach only applies when Hong Kong is not the named forum and

[1089] *Baiduri* (n232) 281.
[1090] Lee (n1083) 594.
[1091] *Bambang* (n662).
[1092] Lee (n1083) 594.
[1093] *Noble Power* (n235).
[1094] Ibid [29].
[1095] Ibid [63].
[1096] Ibid [31].
[1097] Ibid [35].
[1098] Ibid [33].

parties have not agreed to submit to its courts when sued there.[1099] In paragraph 40, however, the court discussed the possibility that 'proceedings were instituted in *the very forum* to which the parties had agreed to submit.'[1100] In that situation, parties still need to show 'strong reasons…as to why the agreement should not be enforced.'[1101] This reasoning appear to move further away from the approach in *Berisford* and has the same effect as in *The Rothnie*. Nonetheless, as will be explained later, *The Rothnie* could not be the basis of the court decision. In any case, *Noble Power* was confirmed in several subsequent lower court decisions in Hong Kong.[1102]

The approach in *Noble Power* was eventually adopted by the Singapore Court of Appeal in *Orchard Capital,*[1103]a case involving a non-exclusive Choice-of-Forum clause stipulating Hong Kong courts.[1104] Nonetheless, because *Noble Power* was an application to set aside leave to serve out of jurisdiction and not a request for a stay of proceedings like *Orchard Capital,* the Singapore court did not expressly endorse the principles articulated in *Noble Power*.[1104A] Instead, the court relied extensively on Yeo's article which advocated a contractual approach to non-exclusive clauses.[1105] It emphasised that a non-exclusive Choice-of-Forum clause can be given the same effect as an exclusive clause – 'in which case strong cause would be required to be demonstrated by the party seeking to sue in a jurisdiction other than that stated in the relevant clause itself.'[1106] Quoting Yeo, the court, however, was quick to point out that the non-exclusive clause is not the only factor nor it should be a strong indicator.[1107] Whether or not the non-exclusive clause would be given a similar effect as an exclusive clause would depend 'on the precise intention of the parties themselves which is to be gathered from the language utilised by the parties as well as the surrounding factual matrix.'[1108] In this case, the non-exclusive clause stipulating Hong Kong courts was not considered a strong indicator that Hong Kong is clearly more appropriate forum to hear the dispute because there was no evidence that such was the parties' intention.[1109] Absent such an intention, the court recognised that several other factors like the respondent's residence and the similarity between

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[1099] Ibid [33].
[1100] Ibid [40]
[1101] Ibid.
[1102] Eg, *Chinachem* (n833) [78]; *High Hope* (n859) [48]-[49]; *China Agri-Products Exchange Ltd v Wang Xiu Qun* [2013] HKCFI 1819, [129] (Court of First Instance).
[1103] *Orchard Capital* (n655).
[1104] Ibid 528-9.
[1104A] *Shanghai Turbo* (n655) 813.
[1105] Ibid 530.
[1106] Ibid.
[1107] Ibid 532.
[1108] Ibid.
[1109] Ibid 535.

Hong Kong and Singapore laws do not make Hong Kong a clearly or distinctly more appropriate forum.[1110] *Orchard Capital* has since been cited in several Singapore High Court decisions.[1111]

In Singapore, the contractual approach was only explicitly adopted recently in *Shanghai Turbo*,[1111A] which, like *Noble Power*, was also an application to set aside leave to serve out of jurisdiction.[1111B] *Shanghai Turbo* confirmed that the effect of a non-exclusive clause would depend on its precise construction.[1111C] Furthermore, when parties stipulate that they 'submit to the non-exclusive jurisdiction,' the meaning of the word 'submit' is that the 'parties consent to the exercise of jurisdiction by the courts of that forum and waive any objection….'[1111D] In short, to 'submit' means to 'waive any objection.'[1111E] Therefore, this prohibition from contesting the jurisdiction of the named forum applies 'with equal force to each of the jurisdictions to which the parties agreed to submit,'[1111F] including instances where the named forum is a foreign court. In these circumstances, 'strong cause' would be required to allow a party not to proceed in the named forum. In sum, this contractual approach in *Shanghai Turbo* confirms the primacy of the parties' intention in determining the effect of a non-exclusive Choice-of-Forum clause.

Significantly, the Hong Kong and Singapore courts have not cited *The Rothnie* even though their approaches may appear to follow the latter. This is probably because *The Rothnie* was explicitly rejected earlier in Hong Kong[1112] and doubts about it were later raised in Singapore.[1113] Hence, in Hong Kong and Singapore, the non-exclusive Choice-of-Forum clause stipulating foreign courts does not become a 'very strong factor' in itself or an indicator of *prima facie* appropriateness of the foreign court which could shift the burden to the plaintiff even if the forum court's jurisdiction was established of right. Rather, both the *Noble Power* and *Orchard Capital* decisions consider the non-exclusive Choice-of-Forum clause stipulating a foreign court a very strong factor because this effect is what the parties stipulated or intended.

[1110] Ibid 536.
[1111] Eg, *Morgan Stanley* (n756); *Abdul Rashid* (n647); *Humpuss* (n702); *Mann Holdings Pte Ltd v Ung Yoke Hong* [2016] SGHC 112 (High Court) ('Mann Holdings').
[1111A] *Shanghai Turbo* (n655) 814.
[1111B] Ibid 788.
[1111C] Ibid 814.
[1111D] Ibid 815.
[1111E] Ibid.
[1111F] Ibid 820-1.
[1112] *T&K Electronics Ltd v Tai Ping Insurance Co Ltd* [1997] 3 HKC 330, 336-7 (Court of First Instance) ('T&K Electronics')
[1113] See *Abdul Rashid* (n647) 1051.

(c) The Theoretical Justification for the Modified *Spiliada*

When parties expressly state that they would submit to the named forum (*eg,* by using the word 'submit' or other words with the same effect), they are obligated to submit to the named forum as a matter of contract.[1114] The effect of this submission, in the context of a non-exclusive clauses, is considered no different from the submission in the context of an exclusive clause.[1115] In both types of Choice-of-Forum clauses, there is a contractual obligation to submit the named forum.[1116] Hence, the effects provided in *Noble Power* result from this contractual approach.

While contract law is a basis for the modified *Spiliada*, the same basis also provides justification not to treat all non-exclusive clauses equally. Whether or not the non-exclusive clause justifies a heavier weight or 'burden' would depend on the very language of the clause. In *Noble Power*, this will depend on whether the parties have submitted to the jurisdiction of the named forum (*ie,* situations A and B).[1117] In *Orchard Capital*, it depends on the precise intention of the parties.[1118] *Orchard Capital* appears to provide a wider basis for allowing the effects of exclusive clauses to apply to non-exclusive ones since 'intention' can cover situations other than a submission (*eg,* waiver of objections to *forum non conveniens*) plus the fact that the test in *Orchard Capital* allows courts to consider the factual matrix when determining the parties' intent.[1119] In both *Noble Power* and *Orchard Capital*, the key is the interpretation of the non-exclusive clause – a very contractual approach to Choice-of-Forum clauses.

This contractual basis also allows courts to read into the agreement of the parties several obligations. Foremost is the right to sue in the named forum. This right to sue, although non-exclusive, is important because some scholars have equated it as a submission to jurisdiction from the point of view of common law rules of jurisdiction.[1120] 'The consequence is that the burden is always on the party seeking to have the action tried elsewhere to justify why the party who wishes the action to be tried in the forum should not be able to exercise the right to sue in the forum….'[1121] This submission also provides a contractual ground to allow service out of jurisdiction[1122] and even

[1114] Tan Seow Hon, 'A New-Found Significance for Non-Exclusive Jurisdiction Agreements' [2000](1) *Singapore Journal of Legal Studies* 298, 299.
[1115] *Noble Power* (n235) [29].
[1116] Ibid.
[1117] Ibid [33].
[1118] *Orchard Capital* (n655) 532.
[1119] Ibid.
[1120] Tan (n1114) 299.
[1121] Yeo (n176) 337.
[1122] *Noble Power* (n235) [15].

an anti-suit injunction absent 'strong reasons.'[1123] It also allows the application of the 'strong cause' test, a test imposing a higher burden in stay applications involving non-exclusive clauses.[1124]

The contractual basis likewise means that a breach is possible if the suit in the named forum is opposed through an application for a stay or to set-aside the service of process. 'So, refusal to accept service of a writ from the contractually chosen forum will usually be a breach of an agreement to submit to the jurisdiction.'[1125] Likewise, there may be a breach if one of the parties seeks an anti-suit injunction to defeat the action in the named forum.[1126] What is controversial, however, is whether an objection or the mere asking of the named forum not to exercise its jurisdiction is a breach in itself – an obligation which can be argued as flowing from a contractual treatment of Choice-of-Forum. In other words, is the other party precluded from questioning the appropriateness of the named forum, absent an explicit contractual waiver of objecting to the court's appropriateness? To answer this, one must go back to the tripartite framework discussed in Chapter 2. A distinction must be made on matters which are between parties (*ie*, matters agreed upon by the parties, contained in their contract and to be resolved as a matter of contract) and matters which are between the parties and the courts (*ie,* the enforcement portion and matters of public law or those outside the realm of contract). If parties have not explicitly provided in their contract that they have an obligation not to object to the forum court's appropriateness, then a subsequent objection by one party cannot be considered a breach of contract. Hence, if an objection is still considered by the court to be a breach, it follows that the theoretical justification cannot be under contract law but somewhere else.

What then could be the ground which allowed the English courts to say in *Berisford*[1127] and *The Rothnie*[1128] that the non-exclusive clause creates a strong *prima facie* case that that jurisdiction is an appropriate one, or in *British Aerospace,*[1129] where a party was precluded from raising convenience factors which are foreseeable during the contract negotiations? Is the reasoning of the English courts a product of reading into non-exclusive clauses a waiver of objection agreement as well? In England, the view is that the waiver of objection – an agreement not to object to the named forum exercising its jurisdiction on the principles of natural forum – is necessarily implied into every non-

[1123] *Morgan Stanley* (n756) [30]-[31].
[1124] *Noble Power* (n235) [37].
[1125] Yeo (n176) 339.
[1126] Ibid.
[1127] *Berisford* (n661).
[1128] *The Rothnie* (n1079).
[1129] *British Aerospace* (n147).

exclusive Choice-of-Forum clause at least where English law is the applicable law.[1130] This has the effect of turning all non-exclusive clauses into exclusive clauses when proceedings are commenced in the named forum, but not when commenced in another jurisdiction.[1131] Nonetheless, the absence of strong support for *The Rothnie* decision may indicate the English courts' hesitance to extend the same presumption of appropriateness to foreign courts especially when the jurisdiction of the English court is founded as of right.

Although the effect given to non-exclusive clauses is similar (*ie,* a modified *Spiliada*), *Noble Power* and *Orchard Capital* appear not to follow this reasoning. The Hong Kong and Singapore courts refused to read into the non-exclusive clauses implied waivers of objection. Of course, the effect would be different when the waiver is explicit such as in *Bambang*, where the combined explicit waiver of objection and non-exclusive clause amount to an exclusive clause when the proceedings are commenced in the named forum. When there is none, however, the courts of Hong Kong and Singapore appear to refuse implying waivers of objection. *Noble Power,* for instance, continues to acknowledge the right of the defendant to challenge the appropriateness of the named forum or the forum coupled with an agreement to submit to its jurisdiction; albeit such objection carries with it a very heavy burden.[1132] *Orchard Capital* is more explicit as it refuses to abandon the more general approach laid down in *Spiliada,* thus allowing objections to the court's exercise of jurisdiction.[1133] The Singapore Court of Appeal, however, noted that 'to the extent that the more general [*Spiliada*] approach…entails a consideration of the circumstances surrounding the making of the non-exclusive jurisdiction clause, there is – on a practical level – at least some possible blurring of the lines [with the contractual approach].'[1134] Even the reading of the waiver of objection in *Shanghai Turbo* was only a consequence of the use of the word 'submit' in the Choice-of-Forum clause.[1134A] Hence, it cannot be argued that a more general waiver of objection applicable to all non-exclusive clauses has been established by *Shanghai Turbo*. Thus, in Singapore, the non-exclusive clause remains just one of the many factors, albeit, an important one when parties have intended it to be so.

In Hong Kong and Singapore, therefore, neither contract law nor an implied waiver of objection could be the complete bases for their modified versions of *Spiliada*. In other words, the

[1130] Yeo (n176) 343.
[1131] Ibid 344.
[1132] *Noble Power* (n235) [33].
[1133] *Orchard Capital* (n655) 532,534.
[1134] *Orchard Capital* (n655) 534.
[1134A] *Shanghai Turbo* (n655) 815.

weight given to non-exclusive clauses could not be determined by contract alone. Likewise, no waivers of objection can be read into the non-exclusive clauses when proceedings are commenced in the named forum. Hence, the *Spiliada* approach – and the theoretical justifications behind its adoption – continue to provide the very backbone of the analysis of courts, and the much-valued discretion to 'determine where the interests of justice lie' provide justification of giving a heavier weight to non-exclusive clauses if warranted. It means that the contractual aspect of the non-exclusive clause is still just one of the many factors being weighed by the court in its *forum non conveniens* analysis. Nonetheless, what is different in *Noble Power* and *Orchard Capital* from the traditional *Spiliada* approach is that the contractual aspect of the non-exclusive clause becomes an important factor for the courts to consider relative to the other factors; thus, its practical effect is similar to the English decisions.

However, in instances when the intention to provide a stronger effect to their non-exclusive clauses is not clear or explicit, are there other circumstances that warrant a stronger weight being given to non-exclusive clauses? In Singapore, this may be possible when the intention to provide a stronger weight can be concluded from the factual milieu. A possible example is when there is already an independent basis for jurisdiction (*eg,* the foreign court already has jurisdiction because a party is domiciled in that country), and therefore 'it makes no sense for the parties to enter into the agreement unless they intend something more.'[1135] Nonetheless, parties may not be acquainted with the intricacies of the jurisdictional requirements of the named forum, [1135A] thus whether a stronger effect was actually intended may be doubtful. Another possibility is when the parties have deliberately stated in their contract that their choice of forum was chosen because of the foreign court's neutrality[1136] or expertise. In these circumstances, the factual matrix may show that the parties may have intended a stronger effect to their non-exclusive clause. An implied provision of a stronger weight, however, may be more difficult to establish in Hong Kong where the words or language of the non-exclusive Choice-of-Forum clause form the limits of determining whether the strong cause test may be applied to non-exclusive Choice-of-Forum clauses. Nonetheless, this is a matter of interpretation and as such Hong Kong courts may go beyond the explicit words of the Choice-of-Forum clause as warranted by the relevant interpretation rules.

While *Noble Power* and *Orchard Capital* appear to escape the problems present in the reasoning of the English courts (*ie,* to imply waivers by parties, which may not be theoretically

[1135] See Tan (n1114) 307.
[1135A] See *Shanghai Turbo* (n655) 816.
[1136] See Ibid 311-2.

justified by contract law) by basing the 'stronger' effect of non-exclusive clauses in the parties' contractual intention, the Hong Kong and Singaporean approaches may still remain problematic. As raised earlier, what happens if the parties' intention to provide a stronger effect to their non-exclusive clauses is not clear or explicit? There may not be a problem when the named forum is the forum court. In both *Noble Power* and *Orchard Capital*, the course of action is clear – the non-exclusive clause is treated as exclusive and the party questioning the clause needs to establish 'strong reasons.' This happens even when the parties have not clearly provided for a stronger effect to their forum court non-exclusive Choice-of-Forum clause. However, when parties have named a foreign court, how does the court determine that parties must have intended a stronger effect? Will the forum court's chosen approach of determining the parties' intention be theoretically and practically justified? As will be seen in Chapter 6, the process of determining the parties' contractual intention, as part of contract interpretation, is determined by the law applicable to the contract. There was no mention of this in *Noble Power* and *Orchard Capital*. Rather, the courts appear to base their reasoning on common law, *ie,* forum law. Hence, it may be difficult to justify from the vantage of private international law, the approach in *Noble Power* and *Orchard Capital* when the named forum is a foreign court.[1137] Furthermore, there are practical difficulties with determining the parties' intent as courts may be prone to engage in 'unnecessary extrapolation of the parties' intention' in order to say that there was this intention to provide a stronger effect.[1138] Again, the evidence which may be allowed to establish intent should be consistent with the interpretation rules of the contract's applicable law. Courts should be aware of this when they engage in the process of identifying the parties' intent.

Given these problems, Singapore and Hong Kong courts may need to reconsider whether the modified *Spiliada* approach should be extended to foreign non-exclusive Choice-of-Forum clauses. Courts may be better off by applying the classic *Spiliada* in those situations.[1139] Rather than using the factors which may considered to establish the parties' intention, why not consider those same factors directly as connecting factors (as in the classic *Spiliada* approach) to justify the appropriateness of the foreign court? In this way, the court may avoid the problem of having an approach that is inconsistent with private international law and prone to court error, or worse, abuse.

[1137] See also Ibid 321.
[1138] See also Ibid.
[1139] See also Ibid.

In the following sections, the other factors considered in the *forum non conveniens* analysis are discussed. Although some of these cases involving non-exclusive Choice-of-Forum clauses may have been decided before the modified *Spiliada* was adopted in Hong Kong and Singapore, the reasoning behind the evaluation of these factors continue to be relevant when the classic *Spiliada*-type analysis applies. These situations include when the forum court is not a named forum or when the parties have not intended that the non-exclusive Choice-of-Forum clause does not carry any weight heavier than the other factors, or when the case is before a Malaysian court, a jurisdiction which continues to apply the classic *Spiliada* for all types of non-exclusive Choice-of-Forum clauses.

B. Factors Considered by Common Law Jurisdictions

1. Location of Material Elements

(a) Characterising the Dispute

What elements are considered material would depend on the legal category or classification the plaintiff chooses to anchor his suit. If he chooses to bring his cause of action in contract, then contract law dictates the elements he needs to establish to get proper relief from the court. Moreover, the contentious issues specifically raised under that legal category would further identify which elements are considered material in resolving the dispute. This choice of legal category is strategic as it influences the applicable choice of law and is usually carefully chosen to influence the outcome of the case. Different legal categories require different elements to be proven, different legal burdens, different evidentiary requirements and different forms of relief. Hence, even if the suit involves a contract, but if the plaintiff establishes his claim under another legal category, say torts or equity, he is bound to proceed and prove his case based on torts or equity.[1140] What elements would be considered material will be dictated by the law of torts or equity, and not by contract law.

Nonetheless, the court may still disregard the plaintiff's choice and resolve the dispute under another category especially if the choice was made in order to escape the effects of the Choice-of-Forum clause. 'A plaintiff cannot avoid a foreign exclusive jurisdiction clause by simply

[1140] See *Kirkham* (n765) 452.

framing his action in tort…'[1141] Alternatively, the court may allow the pleading in tort (or any non-contract cause of action) to stand but still find that the Choice-of-Forum clause applies because the clause is broadly phrased to cover disputes 'arising out of or in connection with' the contract.[1142] In other words, a Choice-of-Forum clause may 'bite' even if the plaintiff's cause of action is not in contract. Similarly, the defendant's counterclaim based on a different legal category like tort cannot displace the natural forum of a dispute based on contracts (the cause of action in the main action).[1143]

In *Rickshaw*,[1144] since the claim was based on tort, the Singaporean conflicts rules dictated that the place of tort (*ie,* Singapore), along with other connecting factors, would be the most important factors in determining whether the court should exercise its jurisdiction.[1145] The Choice-of-Law clause stipulating German law no longer carried the same weight.[1146] Hence, Singapore was recognised 'the most natural and appropriate forum to hear the claims in tort' because of the general connecting factors and the fact that the tort happened in Singapore.[1147] Furthermore, even with the non-exclusive Choice-of-Forum clause stipulating German courts, where concurrent proceedings were already commenced, but because the Singapore action was based on tort, the Singapore Court of Appeal held that Germany was not necessarily more appropriate than Singapore following the classic *Spiliada* analysis.[1148]

(b) Location of the Party

The location of the party is an important element in the analysis. Often, the nationality, domicile or place of incorporation are important in determining issues like capacity to contract and a juridical person's scope of powers, and even practical issues like location of assets for satisfaction of judgments,[1149] location of security, etc., or just as a connecting factor to a particular forum.[1150]

[1141] *The 'Jian He'* (n658) 439 citing *The Eastern Trust* (n658) [36].
[1142] See, eg, *Ghossoub* [2017] HKCA 296, [8]-[18] (Court of Appeal).
[1143] *UBS* (n651) 531.
[1144] Rickshaw (n454).
[1145] Ibid 392.
[1146] Ibid 396, 410.
[1147] Ibid 410.
[1148] Ibid 409.
[1149] Eg, *Lehman Brothers Special Financing Inc v Hartadi Angkosubroto* [1998] 3 SLR (R) 664, 677 (High Court) ('Lehman Brothers').
[1150] See *Brinkerhoff* (n674) 355; *Yu Lap Man* (n455) 732; *Inter Maritime* (n236) 338.

(i) Exclusive Clauses

There are cases involving exclusive Choice-of-Forum clauses where the location of the parties was considered sufficient to establish strong cause, albeit such factor has not weighed more heavily against the other factors or was in itself capable of establishing strong cause. In *Amerco*, the Singapore Court of Appeal emphasised that the fact that Amerco is a Singaporean company 'merits some consideration…though the weight … would be slight.'[1151] Similarly, in *Inter Maritime*, the fact that both the vessel and the appellant were Malaysian was considered by the Malaysia Court of Appeal as among the factors constituting 'strong grounds' that can displace the exclusive Choice-of-Forum clause stipulating Tokyo courts.[1152] This factor, however, was considered along with other factors – the fact that the cargo was loaded at a Malaysian port, that the trial in Malaysia would be less expensive and convenient and that the evidence was available both in Manila and Malaysia.[1153] In *SRS Sports*, the Malaysia High Court also considered the fact that the plaintiff was incorporated and has its place of business in Malaysia as sufficient to establish 'strong cause.'[1154]

(ii) Non-exclusive Clauses

Similarly, even when the non-exclusive Choice-of-Forum clause stipulated for Hong Kong courts, the Singapore Court of Appeal in *Orchard Capital*, considered the plaintiff's residence in Singapore plus the fact that the relevant Singapore and Hong Kong laws are broadly similar, as sufficient to establish Singapore as the more appropriate forum. [1155] Likewise, in *MGM Grand Paradise Limited v Chiu Tak Wah*[1156] ('MGM') the non-exclusive Choice-of-Forum clause in favour of Macau was disregarded by the Hong Kong CFI because the defendant was domiciled in Hong Kong,[1157] had little connection with Macau,[1158] and a previous attempt to serve in Macau was unsuccessful.[1159] When the presence of either party in the forum court is temporary, this may be less relevant in establishing the forum court's connection to the case.[1160] However, when the

[1151] *Amerco* (n510) 118.
[1152] *Inter Maritime* (n236) 338.
[1153] Ibid.
[1154] *SRS Sports* (n968) 39.
[1155] *Orchard Capital* (n655) 536.
[1156] *MGM* (n858).
[1157] Ibid [41].
[1158] Ibid [44].
[1159] Ibid [42].
[1160] See *Brinkerhoff* (n674) 356.

plaintiff's absence or diminution of 'presence' in the forum court appears to be an evasion of litigation, the diminishing connection with the forum may not be given weight.[1161]

Note, however, that when parties have intended a 'stronger effect' in favour of the named forum in their non-exclusive clause, the location of the parties in other jurisdictions would not be an important factor in establishing 'strong cause' under the modified *Spiliada* formula. In Singapore and Hong Kong, factors like location of the parties, may be deemed foreseeable by the parties at the time of contracting, and thus little weight should be given to them.[1161A]This rule also applies to other factors like the place of contracting, location of breach, witnesses and other pieces of evidence.[1161B]

(c) Location of Subject Matter of the Dispute

(i) Exclusive Clauses

The location of the subject matter of the dispute (*eg,* place of performance is in a jurisdiction other than the forum court) is generally not considered a 'strong cause' to avoid an action in the exclusive forum. Possibly, this is because the *Eleftheria* did not explicitly refer to this factor, or the location of the dispute's subject matter is considered in other *Eleftheria* factors like the law applicable to the dispute or with what country either party is connected. Nonetheless, in *BGC Partners*, the Singapore High Court considered that since the main issues in dispute were intricately related to Kevin's termination in BGC Singapore as an employee, 'it would be in the interests of justice' that Kevin's counterclaim in relation to his termination as a partner would also be resolved in Singapore[1162] although the partnership agreement stipulated for Delaware courts.[1163]

(ii) Non-exclusive Clauses

The location of the subject matter of the dispute is, by contrast, a significant factor in the *forum non conveniens* analysis. In *Hwoo Huang Linda v Fu Being San* ('Hwoo Huang'), because the action concerned the ownership of a deposit made in the ABN AMRO account in Hong Kong pursuant to a deed signed by the parties in Hong Kong, the court decided that trial in Hong Kong should

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[1161] *Venetian Macau Ltd v Chen Mei Huan* [2014] HKCFI 128, [43]-[44] (Court of First Instance) ('Venetian Macau').
[1161A] *Shanghai Turbo* (n655) 824; *Deltatre* (n835) [46].
[1161B] See, eg, *Shanghai Turbo* (n655) 825.
[1162] *BGC Partners* (n639) [8].
[1163] Ibid [6].

proceed despite the non-exclusive clause stipulating US courts.[1164] Similarly, the location of the events forming the elements of the claim is a significant consideration.[1165] In *CIMB Bank Bhd v Dresdner Kleinwort Ltd*[1166] ('CIMB Bank') since the matters which were considered significant by the law applicable to the case (*ie,* unjust enrichment) occurred in Singapore,[1167] Singapore had the most and closest connection to the claim compared to the English non-exclusive Choice-of-Forum clause.[1168] In *PT Jaya*, since the relevant contracts with non-exclusive Choice-of-Forum clauses stipulating Jakarta courts were performed in Indonesia, the Singapore High Court considered this an important factor in staying proceedings in favour of Indonesia.[1169] In *Brinkerhoff*, although the non-exclusive clause stipulating 'the courts where the agreement [was] made' (*ie,* Jakarta) was voided for being contrary to the *Warsaw Convention*,[1170] the Singapore Court of Appeal nonetheless considered Indonesia as the natural forum because the accident which gave rise to the action under the contract of carriage occurred in Indonesia.[1171] In *Multi-Top Limited v BKE-Media (HK) (A Firm)* ('Multi-Top'), since all matters which related to the dispute occurred in Hong Kong – the marketing of equipment and the alleged tortious acts – then, despite the non-exclusive clause stipulating German courts,[1172] Hong Kong was deemed the natural forum.[1173] Likewise, in *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation)*, since the performance guarantee was issued in Malaysia by a Malaysian Bank and the money sought to be restrained by an injunction was at all material times in Malaysia, the court said that the dispute should more suitably be resolved in Malaysia than in Sudan, despite a non-exclusive Choice-of-Forum clause stipulating Sudanese courts.[1174] In contrast, in *American Express*, where the non-exclusive Choice-of-Forum clause stipulated Singapore courts, the Malaysia Supreme Court set aside the leave to serve outside jurisdiction after finding that all the foreign exchange transactions happened outside Malaysia, and the securities of the customers were deposited elsewhere.[1175]

However, if the location of the company assets was the sole connection to the forum court, this fact may not be given much weight in cases involving foreign non-exclusive Choice-of-Forum

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[1164] *Hwoo Huang Linda v Fu Being San* [2002] HKCFI 34, [77] (Court of First Instance) ('Hwoo Huang').
[1165] Ibid [78].
[1166] *CIMB Bank* (n682).
[1167] Ibid 566.
[1168] Ibid 574.
[1169] *PT Jaya* (n667) [66].
[1170] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, open for signature 12 October 1929, 137 LNTS 11 (entered into force 13 February 1933) ('Warsaw Convention').
[1171] *Brinkerhoff* (n674) 355.
[1172] *Multi-Top Limited v BKE-Media (HK) (A Firm)* [1999] HKCFI 551, [36] (Court of First Instance) ('Multi-Top').
[1173] Ibid [42].
[1174] *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation)* [2014] 6 MLJ 189, 204 (Federal Court of Putra Jaya) ('Petrodar').
[1175] *American Express* (n441) 168.

clauses. The Singapore High Court stated in *Lehman Brothers Special Financing Inc v Hartadi Angkosubroto*, that '[t]he important considerations in *forum non conveniens* cases relate more to the trial process than to the post-trial remedies (like execution of judgments and appeals).'[1176] In other words, '[t]hat one party may eventually seek to enforce a judgment there,' is not a sufficiently 'strong reason' to assume jurisdiction.[1177] Similarly, if the presence of assets in the named forum in the non-exclusive clause was its primary connection,[1178] this may not be sufficient in itself to establish the named forum as more appropriate especially when several elements of the dispute were connected to the court hearing the dispute, including the location of the defendant's assets.[1179] However, if the location of assets is the very connection required in the Choice-of-Forum clause, the location of these assets becomes important. In *Citibank NA v Robert* ('Citibank'), the 'semi-exclusive' Choice-of-Forum clause (hybrid clause) was purposely drafted in such a manner to ensure that the plaintiff, to facilitate his recovery, could submit a dispute to a court which has jurisdiction over the defendant's assets.[1180] Since the defendant had assets in Singapore, the Singapore High Court considered Singapore the more appropriate forum even if it was not a named forum in the Choice-of-Forum clause.[1181]

(d) 'All Circumstances'

The evaluation of these material elements, however, is taken along with other elements and factors. Especially when no element or factor is singularly or strongly determinative of which jurisdiction is more appropriate, what the court often does is an enumeration of various factors.[1182]

2. Location of Evidence, Relative Convenience and Economy

(a) Exclusive Clauses

An important question often asked by courts is in which country is the evidence on the issues situated. Hence, even in cases involving foreign exclusive Choice-of-Forum clauses, the location of evidence (*ie,* witnesses, documents, etc.) has been considered a factor capable of

[1176] *Lehman Brothers* (n1149) 678.
[1177] *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291, 295 (High Court) ('People's Insurance').
[1178] Eg, *Abdul Rashid* (n647) 1051-2.
[1179] See Ibid 1056-7.
[1180] *Citibank* (n682) 472.
[1181] Ibid.
[1182] See eg, *T&K Electronics* (n1112) 334.

establishing strong cause to refuse a stay.[1183] Nonetheless, when no evidence at all relating to the relevant issues is in the forum court, the importance of this factor is dramatically diluted.[1184] However, over the years, and except in Malaysia,[1185] the strength of this factor in the 'strong cause' analysis has diminished. The contractual choice may no longer be disturbed easily, and usually, issues of convenience like location of witnesses and other forms of evidence do not weigh heavily.[1186] In *The Vishva Apurva*, the irrelevance of this factor was seen as more pronounced because the plaintiffs themselves have not only commenced an action in Singapore but also in the chosen forum court, Bombay, India.[1187] According to the court, '[b]y a parity of reasoning, it could be said that the [plaintiffs] had also regarded India as an acceptable forum.'[1188] Likewise, in admiralty cases, where evidence can be located in places quite distant from one another, and there is no evidence that the witnesses and the other pieces of evidence cannot be brought to the chosen forum, this factor cannot be given any weight.[1189] Similarly, in *Hyundai Engineering*, the Hong Kong CFI stressed that '[i]f the parties could have foreseen…some inconvenience resulting from the application of the exclusive jurisdiction clause…then such inconvenience is generally irrelevant….'[1190] In *Longlife International (Hong Kong) Co Ltd v May Delight Ltd,* the Hong Kong CFI even stressed that defendants are precluded from raising issues relating to inconvenience of witnesses.[1191]

Nonetheless, there are cases where courts did not enforce the exclusive Choice-of-Forum clause for reasons of convenience and location of evidence. In *Star Cruises (HK) Ltd v Tung Ho Wah*, the Hong Kong District Court considered that because the majority of witnesses were in Hong Kong, this became the most compelling factor in disregarding the choice of Singapore or Malaysia (at the sole option of Star Cruises) as alternative exclusive forum.[1192] Likewise, courts may refuse to stay the local action because of the small amount of the claim involved. In *Superstrong Industries Limited Trading as M & T International v Furness Logistics (HK) Ltd*, the Hong Kong CFI refused to stay the action in favour of the foreign exclusive forum – Rotterdam, Netherlands – because the claim had been revised to be under tort law, and also because the amount of the claim

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1183 Eg, *Amerco* (n510) 120; *The 'Eastern Trust'* (n658) 523; *The 'Hyundai Fortune'* (n658) 217; *The Thorscan* (n456) 543; *Inter Maritime* (n236) 338.
1184 See *The "Carl Offersen"* [1977-1978] SLR (R) 589, 594 (High Court).
1185 Eg, *Nutri Mills* (n503) 387-8.
1186 See *The Vishva Apurva* (n659) 924; *The 'Botic'* (n658) 502.
1187 *The Vishva Apurva* (n659) 924-6.
1188 Ibid 924.
1189 See *Chan Chi Keung v Delmas Hong Kong Ltd* [2004] 4 HKC 28, 39 (Court of First Instance) ('Chan Chi').
1190 *Hyundai Engineering* (n878) [43].
1191 *Longlife International (Hong Kong) Co Ltd v May Delight Ltd* [2017] HKCFI 1381, [34] (Court of First Instance) ('Long Life').
1192 *Star Cruises* (n1051) [73].

involved was 'so relatively little.'[1193] Similarly, in *Royal Skarkia Life Insurance Ltd v Sparkle Consultants (HK) Ltd*, the Hong Kong District Court disregarded the exclusive Choice-of-Forum clause in favour of the Isle of Man 'in view of the size of the claim,'[1194] which the court considered to be insufficient to justify the travelling expenses.[1195]

Notably, Malaysian courts may still consider convenience factors to be sufficient to oust foreign exclusive Choice-of-Forum clauses. In *Inter Maritime*, the Malaysia Court of Appeal considered that there were 'strong grounds' to refuse a stay because trial in Malaysia 'will be less expensive and more convenient.'[1196] In *Nutri Mills*, because 'the evidence on the issues of fact are largely situated or more readily available in Malaysia (or Gambia) rather than in France,' 'it will cause the plaintiff substantial inconvenience and expense to take all these witnesses to France,'[1197] thus, this 'rebut(s) the *prima facie* case in favour of the defendants under the forum selection clause.'[1198] In *SRS Sports*, because the evidence and witnesses to the triathlon event, financing, fraud and conspiracy were all in Malaysia and the plaintiff would bear substantial expense and inconvenience to bring all these witnesses and evidence to Florida (the chosen forum), the court found 'strong cause' not to stay the Malaysian action.[1199] In *Rintis Malay Motors Sdn Bhd v Agasta Co Ltd*, because the plaintiff argued that the contract containing the exclusive choice for Tokyo courts was voidable and since most of the witnesses who may be able to provide evidence on the disputed facts were in Malaysia,[1200] the High Court refused to set aside the writ of summons.[1201] Interestingly, even when the convenience factors tend to point to the chosen foreign forum, a Malaysian court may still require a 'preponderance of (in)convenience' to justify a stay of proceedings.[1202]

The approach in Malaysia may have prompted the argument that in Malaysia, *The Eleftheria* only shifts to the plaintiff the burden of proof in a stay application, and nothing more.[1203] Based on the approach in dealing with convenience factors, the Malaysian approach arguably still does not elevate the parties' intention even in exclusive clauses in the same way as in Singapore and

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[1193] *Superstrong* (n1051) [23].
[1194] *Royal Skarkia* (n1051) [7].
[1195] Ibid.
[1196] *Inter Maritime* (n236) 338.
[1197] *Nutri Mills* (n503) 387.
[1198] Ibid 384.
[1199] *SRS Sports* (n968) 39-40.
[1200] *Rintis* (n1056) [24].
[1201] Ibid [26].
[1202] *Lung Yung* (n969) 43.
[1203] See, eg, Tan (n1114) 299.

Hong Kong.[1204] The parties' contract to exclusively settle their dispute in their chosen foreign court is still weighed along with convenience factors, and what results from this analysis remains subject to the court's discretion, albeit the plaintiff now bears the heavy burden of refusing stay. If *The Eleftheria* is to be given its full effect in Malaysia, and in order to promote greater predictability of litigation results, considerations of convenience should arguably be given less weight.

(b) Non-exclusive Clauses

In contrast, because the *forum non conveniens* principle is explicitly about convenience, factors such as location of evidence, relative convenience and economy are considered important. The weight given is usually heavy especially in cases where the witnesses and other pieces of evidence are not found in the forum court (not a named forum) but elsewhere.[1205] In *Lehman Brothers*, the Singapore High Court was prompted to conclude that 'if the forum is Singapore, practically everyone involved would have to travel. Clearly then, New York and Indonesia are more convenient and appropriate when compared to Singapore.'[1206] The reverse is also true when all or majority of the witnesses or evidence are in the forum court (not a named forum).[1207] When the witnesses or evidence, however, are located somewhere near the forum court (but outside its jurisdiction), like Hong Kong, Macau and the neighbouring regions of China, or Malaysia and Singapore, and there is no evidence that the witnesses cannot travel or the other pieces of evidences could not be brought to the forum court, then this factor is considered less important.[1208] Furthermore, because of the proximity of locations, the cost of bringing the witnesses and other evidence would be considered quite the same.[1209] Moreover, given the advancements in modern technology, documentary evidence has been noted to be easily transportable between jurisdictions[1210] and witnesses can easily give testimonies through video conferencing and similar technologies.[1211] Notably, only the location of witnesses and other pieces of evidence, which are material to the resolution of issues in the case, would be significant.[1212] Nonetheless, the plaintiff may be precluded from complaining about the litigation costs in the foreign court because his

[1204] See also *Inter Maritime* (n236) 336.
[1205] Eg, *The 'Dai Yun Shan'* (n283) 469.
[1206] *Lehman Brothers* (n1149) 677; See also *Southern Acids* (n976) [16]; *Industrial & Commercial Bank Limited v Banco Ambrosiano Veneto SPA,* [2000] SGHC 188, [18] (High Court) ('Banco Ambrosiano').
[1207] See *DFS Trading Ltd v Swiss Air Transport Co Ltd* [1997] 1 HKC 547, 551 (High Court).
[1208] See *Yu Lap Man* (n455) 734; *Medisell Medical Instrument Co Ltd v Sanyou International (Group) Co Ltd* [2007] HKDC 467, [12] (District Court) ('Medisell'); *American Express* (n441) 165; *MGM* (n858) [61].
[1209] See *American Express* (n441) 165.
[1210] See *Kirkham* (n765) 450.
[1211] See *Banco Ambrosiano* (n1206) [19].
[1212] *CIMB Bank* (n682) 569; *Venetian Macau* (n1161) [48]; *Mann Holdings* (n1111) [56].

agreement to choose such foreign court meant his agreement with the litigation costs associated with such court.[1213]

3. Applicable Law

(a) Exclusive Clauses

The applicable law can be the law intended by parties to govern their contract, which may be explicit (*ie,* as stated in the Choice-of-Law clause) or implicit. In the absence of choice, the conflict of law rules of the forum determines the applicable law. In stay of proceedings cases involving exclusive clauses stipulating foreign courts, the reasoning for granting a stay does not focus on this factor as the contractual obligation to bring disputes to the chosen forum is the justification usually provided. Hence, any concerns about the law or procedure in the chosen forum are not usually considered.[1214] Nonetheless, when the applicable law is the law of the chosen foreign court, courts may still express the view that the foreign applicable law is still best decided by the chosen court.[1215] Moreover, the same reasoning applies when the applicable law is the law of the forum (but not the chosen forum). Stays are still granted and the fact that the applicable law is the forum law does not amount to 'strong cause' sufficient to disregard the exclusive Choice-of-Forum clause stipulating the foreign court.

Nonetheless, foreign law may be exceptionally recognised as among the factors amounting to 'strong cause,' such as when the relevant foreign procedure is considered to suffer from serious defects.[1216] It appears that this objection against the foreign law is also anchored on public policy grounds.

(b) Non-exclusive Clauses

However, if the clause involved is non-exclusive, then the fact that a foreign law applies becomes an important factor in determining whether a stay should be granted. [1217] In instances where there is a foreign applicable law, courts would often declare that it is desirable that the

[1213] See *Southern Acids* (n976) [16].
[1214] See *The Vishva Apurva* (n659) 925.
[1215] See *Frans Bambang Siswanto v Coutts & Co AG* [1996] SGHC 250, [19] (High Court) ('Siswanto').
[1216] See *The 'Asian Plutus'* (n658) 514.
[1217] See *PT Jaya* (n667) [66]; *Praptono Honggopati Tjitrohupojo v His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2001] 3 SLR (R) 872, 885-6 (High Court) ('Praptono'); The 'Dai Yun Shan' (n283) 469; *Kirkham* (n765) 452.

foreign law be interpreted by the courts where that foreign law came from.[1218] If the applicable foreign law is also the law of the forum named in the non-exclusive clause, then the two constitute significant connecting factors in favour of the named jurisdiction.[1219] The reverse is also true. If forum law is the applicable law, the forum court would consider this as an important factor in determining itself as the more appropriate forum in the *forum non conveniens* analysis.[1220] The fact that the forum law is the applicable law can also be a significant factor in determining the appropriateness of the forum court when the non-exclusive clause contains another named forum, which is a foreign court.[1220A] Furthermore, if forum law is the law stated in the Choice-of-Law clause and the chosen law itself is the reason why parties have entered into contract, the forum court may see its refusal to exercise jurisdiction as amounting to assisting one of the parties to frustrate the contract.[1221]

However, if the applicable law is the law of the chosen court, it does not follow that the case should be heard in the chosen foreign court.[1222] For instance, the significance of a Choice-of-Law clause 'depends on the issues which are likely to arise at trial and other questions relating to the appropriate forum.'[1223] Furthermore, the applicable law may be the law of a neutral third country, in which case, 'it must have been the [parties'] deliberate and conscious decision to choose a neutral system of law.'[1224] Hence, courts must note such deliberate choice of a neutral law in its *forum non conveniens* analysis; and consider that the defendant's attempt to implement another law is tantamount to 'attempting to go back to its bargain and to defeat [the parties'] common intention.'[1225]

(c) Qualifying the Applicable Law Factor

When the stated foreign applicable law is unidentifiable[1226] or there is no difference between the forum law and foreign law,[1227] the fact that the foreign law is the applicable law may

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[1218] Eg, *Lehman Brothers* (n1149) 676.
[1219] See *Peregrine* (849) 384.
[1220] See *Asia-Pacific Ventures* (n682) 380; *UBS* (n651) 531; *Bayerische* (n1087) 490; *Perfect Direct Ltd v Dejin Resources Group Co Ltd* [2015] HKCFI 1087, [58] (Court of First Instance) ('Perfect Direct').
[1220A] *Shanghai Turbo* (n655) 826.
[1221] *Yantai Wanhua Polyurethanes Co Ltd v Pur Products Ltd* [2012] HKCFI 1992, [37] (High Court) ('Yantai').
[1222] *Venetian Macau* (n1161) [50].
[1223] *Yantai* (n1221) [26].
[1224] Ibid [30].
[1225] Ibid.
[1226] See *Hwoo Huang* (n1164) [60].
[1227] *CIMB Bank* (n682) 567.

not carry any weight in the analysis.[1228] In *Hwoo Huang*, the Hong Kong CFI found it problematic that the forum clause only referred to US law being the proper law, when for purposes of private international law, there are fifty state jurisdictions and one federal jurisdiction of the United States.[1229] In *CIMB Bank*, because the Singaporean law on unjust enrichment is similar, if not identical, to English law, no advantage may be created by the fact that English law applies.[1230] The same reasoning applies when the applicable law is Malaysian law and the forum is a Singaporean court.[1231] In *Nam Fatt Corporation Berhad v Petrodar Operating Co Ltd*, the Malaysia High Court emphasised that although the applicable law was Sudanese law, the Sudanese law of contract is not different from that in Malaysia, and the applicable Shariah principles in Sudan are very similar to the Shariah principles in Malaysia which are applicable to Shariah loans and facilities.[1232] Hence, despite the non-exclusive clause stipulating Sudanese courts, Malaysian courts can readily hear the action.[1233] Likewise, when the applicable foreign law's contents are 'very much part of the universal law' (*eg,* mercantile law) and 'are very similar in all countries,' and which the forum court had often applied in the past, little weight can be given to the foreign law in the *forum non conveniens* analysis.[1234] Similarly, even when the foreign applicable law was arguably complex, but the defendant failed to identify the provisions relevant to the plaintiff's claims that would require expert opinion, the need for such expert witness about the foreign law is downplayed and could not be considered a significant factor by the court.[1235]

Furthermore, the forum court may not see the need to refer the interpretation and application of the foreign law only to the courts of the chosen forum. This was the approach in *Amerco*, where the Singapore Court of Appeal said that that there is no material to show that a Singapore court would have difficulty in applying Indonesian law.[1236] This reasoning may have been given considering Singapore's experience with admiralty cases, and the fact that the relevant contract incorporated *The Hague Rules*[1237] which are part of Singapore law. Similarly, in *Wynn Las Vegas LLC v Lam Kwok Hung*, the Hong Kong CFI refused to stay the proceedings based on the argument that since Nevada law is the governing law, the Nevada courts should hear the case

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[1228] See *Orchard Capital* (n655) 536.
[1229] *Hwoo Huang* (n1164) [60].
[1230] *CIMB Bank* (n682) 536.
[1231] *OCBC Capital* (n437) 912.
[1232] *Nam Fatt Corporation Berhad v Petrodar Operating Co Ltd* (Unreported, Malaysian High Court of Kuala Lumpur, Lee Swee Seng JC, 30 June 2010).
[1233] Ibid.
[1234] *Harain Lai Navalani v Tokai Bank Ltd* [1994] 3 HKC 203, 207-8 (Court of Appeal) ('Harain').
[1235] *KGI Securities* (n975) [69].
[1236] *Amerco* (n510) 120.
[1237] *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, opened for signature 25 August 1924, 120 LNTS 187 (entered into force 2 June 1931) ('Hague Rules').

because 'the courts in Hong Kong are well able to deal with aspects of Nevada law relating to gaming.'[1238] In *Ko Lai Kuen v Li Tak Ming*, the Hong Kong CFI did not consider the importance of Indonesian law as the governing law of one of the relevant agreements because 'it is possible for expert evidence as to what is the Indonesian law is on the issue of implied terms to be adduced by the parties and for the Hong Kong courts then to apply that law,'[1239] not to mention that a number of events (*eg,* Hong Kong was the place where the parties entered into one of contracts) and convenience factors pointed to Hong Kong.[1240]

Likewise, because in English common law principles, foreign law is a factual and not a legal issue in the forum court,[1241] the absence of evidence or failure to sufficiently prove the foreign law's contents may lead the court to assume that foreign law has the same contents as forum law.[1242] In *The 'Hyundai Fortune,'* a case involving an exclusive Choice-of-Forum clause stipulating Korean courts, the Singapore High Court dismissed the need to consider Korean Law (which would give Korean courts the key advantage) because no evidence of Korean law was provided.[1243] Notably, the court may refuse to rely on affidavit evidence alone to determine the contents of foreign law.[1244] Similarly, unless the plaintiff raises legal issues involving the foreign law, and in effect establish that trial in the foreign court is more convenient, the court may not give a strong weight to foreign law as a factor.[1245] Hence, the court may not see the need to apply foreign law if the role of the foreign law is unclear or insufficiently shown to be material to the issues being tried.[1246] Likewise, the convenience of bringing in legal experts to testify on foreign law may also diminish the weight of foreign law as a factor.[1247]

[1238] *Wynn Las Vegas LLC v Lam Kwok Hung* [2008] HKCFI 434, [27] (Court of First Instance) ('Wynn-Lam'); *MGM Grand* (n858) [57].
[1239] *Ko Lai Kuen v Li Tak Ming* [2011] HKCFI 304 [51] (Court of First Instance) ('Ko Lai').
[1240] Ibid [58].
[1241] Eg, *The 'Hung Vuong-2'* (n658) 17.
[1242] Eg, *Amerco* (n510) 120.
[1243] *The 'Hyundai Fortune* (n658) 220.
[1244] *The 'Hung Vuong-2'* (n658) 17.
[1245] *The 'Jin Hui 588'* [2016] HKCFI 480, [54] (Court of First Instance).
[1246] See *S-Net Freight (HK) Ltd v Namsung Shipping Company Ltd* [2011] HKCFI 519, [41] (Court of First Instance).
[1247] *The 'Jin Hui 588'* (n1245) [54].

4. Lack of Genuine Desire for Trial

(a) Exclusive Clauses

Lack of genuine desire for trial is a ground for refusing a stay in cases involving both exclusive and non-exclusive Choice-of-Forum clauses.[1248] A genuine desire for trial is usually established by voluminous filings made by both sides and the existence of various points of disagreement between parties.[1249] Such scenario usually implies that a genuine defence or disagreement on points of law exists. The court is therefore entitled to consider the alleged defence to see whether there is any real substance in it.[1250] A lack of genuine defence, or worse, failure to state any defence at all,[1251] may indicate that there is no genuine desire for trial. Nonetheless, the threshold need not be high – 'so long as there are issues for a defence which can be identified' – and the court need not consider, in every case, the merits of the defence raised.[1252] When the law applicable is foreign law, 'it is up to the party applying for a stay to adduce evidence to state what the plausible defences under a different legal system are.'[1253] 'But once it is shown that there is no defence to the claim, and thus no dispute, as in the present case, then there is really nothing to go for trial at the contractual forum.'[1254] In *The 'Hyundai Fortune,'* because the defendants' liability was indefensible as the charts clearly showed that the 'reefer container was not able to maintain the requisite refrigerating temperature throughout the transit,' the Singapore High Court declared that the defendants had no arguable defence.[1255] Hence, their desire to be sued in Seoul lacked credibility.[1256]

Delay in asserting claims or failure to promptly apply for adequate remedies to protect one's rights are also considered important indicators of lack of genuine desire for trial. Moreover, the circumstances establishing delay should be proven by evidence.[1257] Furthermore, there should be no legal justification or defence for such delay.[1258] In *Societe Generale*, the Singapore High Court

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[1248] See *The 'Hung Vuong-2'* (n658) 15; *The 'Jian He'* (n658) 453; *Xu Ziming v Ruifeng Petroleum Chemical Holdings Ltd* [2014] HKCFI 1552, [14]-[15] (Court of First Instance) ('Xu Ziming'); *Madison* (n1053) [50].
[1249] *Citibank* (n682) 473; *Mashreq* (n844) 328-9.
[1250] See *The 'Hung Vuong-2'* (n658) 19.
[1251] *Royal Skarkia* (n1051) [10].
[1252] *China Construction Bank (Asia) Corp Ltd v Shanghai Pudong Development Bank Co Ltd* [2015] HKCFI 2251, [15] (Court of First Instance); see also *Madison* (n1053) [65]; *Bulthaup GMBH & Co KG v KHL Marketing Asia-Pacific Pte Ltd* [2007] SGDC 64, [28] (District Court).
[1253] *Madison* (n1053) [64].
[1254] *The 'Hung Vuong-2'* (n658) 19.
[1255] *The 'Hyundai Fortune'* (n658) 216.
[1256] Ibid.
[1257] *The Vishva Apurva* (n659) 925-6.
[1258] See *Brinkerhoff* (n674) 357.

saw the belated institution of the case in the named forum, Malaysia, more than six months after the Singapore action was commenced, as solely to thwart the Singapore proceedings.[1259] Similarly, in *The Thorscan*, since the defendant commenced proceedings in Amsterdam instead of the Netherlands Antilles (the forum chosen in the exclusive clause), this indicated not just a waiver of his right, but the lack of genuine desire to pursue an action in the chosen forum.[1260]

The lack or failure to establish a credible defence, through evidence, can also indicate lack of genuine desire for trial. In *Golden Shore Transportation Pte Ltd v UCO Bank* ('Golden Shore') the Singapore Court of Appeal agreed with the plaintiff UCO Bank that the defendant Golden Shore's desire for trial in India (the chosen forum in the exclusive Choice-of-Forum clause) was not genuine because the defences it raised were unmeritorious or highly speculative.[1261] In this case, Golden Shore had raised several defences but even the one which merited consideration (*ie,* that the UCO Bank had consented or acquiesced in the switched bill of lading) was still highly speculative.[1262] Lacking any real defence, Golden Shore was seen to lack any genuine desire for trial in the chosen forum.[1263] Similarly, in *Madison Communications Private Ltd v Le Ecosystem Technology India Private Ltd* ('Madison') where the Hong Kong CFI disregarded the exclusive Choice-of-Forum clause stipulating Bangalore courts because one of the defendants lacked any credible defence.[1264]In contrast, in *Deltatre*, the Hong Kong CFI disagreed with *Madison* and decided that lack of substantive merits in the defence *per se* does not amount to 'strong cause.'[1265] According to the court, only matters which are unforeseeable at the time of contract or something so exceptional that goes to the interests of justice can amount to 'strong cause.'[1266] Since a party, especially in commercial contexts, could have foreseen where one party would have no defence to a straightforward claim, lack of a credible defence *per se* is not 'unforeseeable, overwhelming or exceptional matter,' thus, cannot constitute a 'strong cause.'[1267] This is also consistent with the 'strong policy in favour of upholding contractual bargain.'[1268] Singapore would eventually follow the same approach in *Deltatre* in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* by emphasising that lack or failure to establish a genuine defence should not be a factor which

[1259] *Societe Generale* (n684) [12].
[1260] *The Thorscan* (n456) 547.
[1261] *Golden Shore* (n682) 18-9.
[1262] Ibid 19.
[1263] Ibid.
[1264] *Madison* (n1053) [52]; see also *Xu Ziming* (n1248) [14]-[15].
[1265] Deltatre (n835) [84].
[1266] Ibid [46].
[1267] Ibid [84].
[1268] Ibid [86].

the court should consider.[1268A] This approach, according to the Singapore Court of Appeal, would be consistent with party autonomy,[1268B] promote certainty in the business of international trade,[1268C] and give greater coherence in the law by aligning the law governing exclusive clauses with the position under *forum non conveniens* where the merits of the defence are irrelevant in the grant of a stay,[1268D] and in applications for anti-suit injunctions where 'no defence to the claim' is likewise irrelevant.[1268D] Hence, *Vinmar* modified factor (d) of *The Eleftheria* by narrowing it to situations where there is an abuse of process or denial of justice.[1268E] Emphasising that the threshold for abusive conduct is high, the court gave an example where the applicant had started a media campaign in the agreed forum to malign the plaintiff, thus undermining the prospects of a fair trial.[1268F] On the other hand, a denial of justice situation may arise where, for example, the agreed court had been dissolved or was not realistically available to determine the dispute because of war.[1268G]

Nonetheless, when the circumstances of the case are so straightforward, such that any commercial litigator in the forum can easily pursue the case, plus the fact that the amount of the claim was relatively small, the insistence to only sue in the chosen forum may be considered as a mere tactical move seeking procedural advantage. The defendant, in that scenario, may be considered to lack genuine desire for trial in the chosen forum.[1269]

(b) Non-exclusive Clauses

It appears that this factor has not yet been considered in cases involving non-exclusive Choice-of-Forum clauses. This is probably because of the non-mandatory nature of the obligation to sue in the named forum which may render irrelevant whether the defendant has genuine desire to sue in the named forum. For one, having such genuine desire to sue in the named forum does not make the named forum more appropriate *per se* vis-à-vis the forum hearing the dispute. It does not remove the need for the court hearing the dispute to decide which forum is more appropriate by considering the other factors.

[1268A] *Vinmar* (n660A) 1301.
[1268B] Ibid 1302.
[1268C] Ibid.
[1268D] Ibid 1303.
[1268D] Ibid.
[1268E] Ibid 1305-6.
[1268F] Ibid 1306.
[1268G] Ibid.
[1269] *Superstrong* (n1051) [24]-[25].

5. Prejudicial Factors

(a) Time-bar

(i) Exclusive

A time-bar may be considered prejudicial, thus prompting the court to refuse a stay even when there is a foreign exclusive Choice-of-Forum clause. However, the mere fact that the action would be time-barred in the chosen forum is not sufficient for the court to refuse a stay. For one, a time-bar may be waived by the defendant and the waiver may be given effect if allowed under the law of the country in which the stay is sought.[1270] 'It is really a neutral point…The plaintiffs must justify their conduct in allowing limitation to arise in the contractual forum. They must show that they did not act unreasonably in failing to commence proceedings within time in the contractual forum …'[1271] Hence, in *The 'Botic'*, the Singapore High Court noted that because the plaintiffs did little or nothing for almost a whole year from the period the goods landed in Croatia (the chosen forum) and the date when they took out the writ in this action, the time-bar argument could not be considered in their favour.[1272] 'It suggests that the failure to take protective action could be due as much to the lack of effort on the part of the plaintiffs or their advisors….'[1273] Oddly, in *The 'Hyundai Fortune'*, the Singapore High Court considered the time-bar factor not because the delay was justified but because the defendants were unwilling to waive the time-bar defence in the chosen forum.[1274] According to the court, without the waiver, the cargo damage 'could not realistically be determined in Korea.'[1275] This erroneously puts the burden on the defendant rather than on the plaintiff to justify the delay in the exclusive forum. Nonetheless, the plaintiff may not be blamed for failing to seek timely relief in the chosen forum before the time-bar sets in when he merely relied on expert advice.[1276] This is especially true when confirming the veracity of the expert advice is difficult to procure in the chosen forum,[1277] or when plaintiff's

[1270] See *Peregrine* (n849) 383-4.
[1271] *The 'Jian He'* (n658) 444; See also *Mashreq* (n844) 331-2.
[1272] *The 'Botic'* (n658) 501.
[1273] Ibid.
[1274] *The 'Hyundai Fortune'* (n658) 219.
[1275] *The 'Hyundai Fortune'* (n658) 219.
[1276] See *The Griesheim* (n1054) 427; see also *The Nedlloyd Seine* (n840) 75.
[1277] See *The Griesheim* (n1054) 427.

counsel had advised not to file the action in the chosen forum because of the relatively small amount involved.[1278]

(ii) Non-exclusive Clauses

In cases involving non-exclusive clauses, the weight of a time-bar in the chosen forum may be greater as parties are not contractually bound to seek relief in the chosen forum in the first place. In *Ngan*, Malaysia was considered the *forum conveniens* when the Malaysian court was shown to have validly acquired jurisdiction over the defendant and it would be prejudicial to force the plaintiff to sue in Singapore (the chosen forum), where the statute of limitations had already set in.[1279]

(b) Loss of Juridical Advantage

The loss of juridical advantage can vary from absence of a remedy available in the foreign court,[1280] lower limit of liability,[1281] inability to recover legal fees,[1282] enforcement-related issues,[1283] lower legal interest imposed on damages, to higher court fees and other legal costs.[1284]

(i) Exclusive Clauses

In *The Humulesti*, the Singapore High Court cautioned: 'I am also of the view that we must be careful in acting on any lost juridical advantage or inferring that any foreign system is inferior…without attempting a comprehensive or balanced comparison.'[1285] In *Li Lian International Ltd v Herport Hong Kong Ltd*, the Hong Kong CFI enforced the exclusive Choice-of-Forum clause stipulating Tokyo courts because the plaintiff's arguments that it will never get an enforceable judgment on liability in Japan (as the Japanese proceedings will only result to distribution of a 'limitation' fund) which it can enforce in foreign courts, and that under the Japanese procedural law, there is no way to obtain a monetary judgment, are not 'strong reasons'[1286]

[1278] See *The Nedlloyd Seine* (n840) 74.
[1279] *Ngan* (n456) 657.
[1280] See *Ghossoub* (n346) [85].
[1281] See *The 'Botic'* (n658) 500.
[1282] *Peregrine* (n849) 387.
[1283] *MGM* (n858) [61].
[1284] See *The 'Humulesti'* [1991] SGHC 161 (High Court).
[1285] Ibid.
[1286] *Li Lian* (n835) [25]-[27].

If there are parties to the suit whose status as parties to the Choice-of-Forum clause is contentious or not clear, a court may decline to stay the proceedings because the same may prejudice the other parties. In *Confecciones del Atlantico v Lamont Shipping Inc*, the Hong Kong High Court refused to stay the proceedings because if the first defendant was found not to be a party to the exclusive Choice-of-Forum Clause in favour of the courts of Caracas, Venezuela, the plaintiff may be deprived of any remedy especially that what appeared on the face of the dispute, was a 'straightforward action for a legitimate claim.'[1287]

(ii) Non-exclusive Clauses

In *William Co*, the Hong Kong High Court acknowledged the restrictions in the bill of lading which can be implemented under Chinese law (but not under the *Hague-Visby Rules* which are applicable under Hong Kong law) as sufficient juridical disadvantages to refuse stay. Nonetheless, the court stayed the proceedings because the non-exclusive Choice-of-Forum clause allowing litigation also stipulated for arbitration in China, which was the mode chosen by the defendants after applying for stay of proceedings under Hong Kong's arbitration law.[1288] In *Peregrine*, the Hong Kong CFI pointed out that while legal fees may not be recovered in the named forum, the fact that the amount involved in the suit is significantly higher, the nonrecovery of legal fees 'should not be permitted to be elevated into the status of a juridical disadvantage.'[1289] In *MGM*, the court said that forcing the plaintiff to sue in Macau based on their non-exclusive Choice-of-Forum clause would amount to depriving the plaintiff of juridical advantages because Macau and Hong Kong have no reciprocal enforcement arrangement and therefore the plaintiff may still need to relitigate in Hong Kong even after getting a favourable Macau judgment.[1290] Similarly, in *Wynn Resorts (Macau) SA v Wang Yen Liang*, the Malaysia High Court refused to stay the local action after noting that Macau is not listed under the Malaysia's *Reciprocal Enforcement of Judgments Act 1958*[1291] even if the non-exclusive clause stipulated for Macau courts.[1292]

The court may stay the local proceedings and not consider prejudicial the lower limits of recoverable liability in the foreign chosen forum if the contract itself incorporates a provision

[1287] *Confecciones* (n1054) 331-2.
[1288] *William Co* (n319) 392.
[1289] *Peregrine* (n849) 387.
[1290] *MGM* (n858) [61]-[62].
[1291] *Wynn Resorts (Macau) SA v Wang Yen Liang* [2017] 11 MLJ 169, 186 (High Court of Kuala Lumpur).
[1292] Ibid 183.

setting a higher limit or measure (presumably this higher limit will be applied by the chosen forum).[1293]

(c) Competence of Foreign Courts

(i) Exclusive Clauses

This factor is more extensively discussed in Chapter 7. At this point, it may be sufficient to say that comity precludes courts from making conclusions about the competence of foreign judges, independence of foreign courts, speed of resolution or whether a particular body of law was sufficiently developed.[1294] Furthermore, absent any 'positive and cogent evidence' that 'justice is unattainable in the natural forum because of inexperience or deficiencies of courts,' the court shall start with a working assumption that 'courts in other judicial systems will endeavour to do justice according to the law and will be free from improper interference or constraints.'[1295] Hence, 'it is not for this court to say whether the maritime law of Vietnam is sufficiently developed… when the parties themselves had agreed that Vietnam law would apply….'[1296] Likewise, concerns about the procedure of the chosen foreign court should not be prejudicial because 'inevitably there will always be procedural differences and disadvantages between competing jurisdictions...'[1297] Hence, the forum court's ability to call additional witnesses *moto propio* should not be a prejudicial factor.[1298] Similarly, the absence of a particular remedy in the foreign court is not prejudicial.[1299] In fact, the very choice of a forum may be considered as a choice of the procedure of the court.[1300] Hence, 'it is difficult to see how either party can…complain of the procedure of that court…by choosing the court, they have chosen the procedure.'[1301]

[1293] *The 'Botic'* (n658) 500.
[1294] See *The 'Hung Vuong-2'* (n658) 20; *PT Bali Hospitality Utama v Mathias Echene* [2010] HKCFI 115, [19] (Court of First Instance) ('PT Bali').
[1295] *Canavan* (n872) [30].
[1296] *The 'Hung Vuong-2'* (n658) 20.
[1297] *Mashreq* (n844) 329; see also *Palace Hotel Ltd v owners of the Ship or Vessel Happy Pioneer* [1982] 1 HKC 640, 649 (High Court) ('Palace Hotel'); *Hyundai Engineering* (n878) [38]; *PT Bali* (n1294) [21].
[1298] *The 'New Hailong'* [1994] HKCFI 321, [25] (High Court).
[1299] *BNP Paribas* (n738) [109]-[110].
[1300] *The 'Asian Plutus'* (n658) 514.
[1301] Ibid; See also *Mashreq* (n844) 329.

Absence of diplomatic relations does not also necessarily imply that parties would be discriminated against before each other's courts.[1302] Proof of actual bias, discrimination or impartiality of the courts should be presented.[1303]

(ii) Non-exclusive Clause

In *P T Jaya*, the Singapore High Court pinpointed that it would be hard for the court to 'accept how the plaintiffs could now legitimately complain that it would be unjust for them to litigate…in Indonesia especially with regard to a factor such as delay in proceedings in Indonesia which surely would have been known to the parties at the time of contracting.'[1304] Hence, like in exclusive clauses, the competence of foreign courts can be considered as a factor in cases involving non-exclusive Choice-of-Forum clauses but courts are reluctant to apply it.

6. Multiplicity of Proceedings

(i) Exclusive Clauses

Multiplicity of proceedings can be a situation where claims arising from the same set of operative facts are pursued in one or more jurisdictions. Parties include exclusive Choice-of-Forum clauses precisely to prevent this from happening. Hence, the possibility or reality of multiplicity of proceedings is a factor often considered in the context of non-exclusive choices, as courts determine which jurisdiction is the natural forum or the *forum conveniens*. Nonetheless, in *Konsumex Foreign Trade Co v Sun Luen Transportation Co*,[1305] the Hong Kong High Court did not enforce the exclusive Choice-of-Forum clause in favour of Chinese courts because of the need to try in the same forum the various interrelated disputes and determine who is responsible for what happened.[1306] The court recognised that allowing some of the claims to proceed in China while others in Hong Kong would be potentially disastrous and inconvenient.[1307]

[1302] *Palace Hotel* (n1297) 649.
[1303] Ibid.
[1304] *P T Jaya* (n667) [74].
[1305] *Konsumex* (n1052).
[1306] Ibid 251.
[1307] Ibid.

(ii) Non-exclusive Clauses

In cases involving non-exclusive clauses, multiplicity of proceedings is a possibility which parties are deemed to have accepted, subject to the limitations they may have stipulated in their non-exclusive Choice-of-Forum clause. Likewise, parties are also considered to have accepted the risks of inconsistent proceedings in the face of a non-exclusive clause, and thus, such risks of inconsistency do not become a strong factor to be considered by courts.[1308] Nonetheless, in assessing the weight of this factor, 'the degree of overlap of issues and parties is a relevant consideration.'[1308A]

In *Morgan Stanley*, because the Singapore action arose from the same set of operative facts as the many claims already pending in New York and New York appeared to be a more appropriate forum than Singapore, the Singapore High Court considered it proper to refuse an anti-suit injunction application. 'This is one case where this court could, in accordance with the ends of justice, help to ensure that all claims concerning the plaintiffs in relation to the Pinnacle Notes are heard in one jurisdiction.'[1309]

Multiple actions may also arise because of third-party claims. While 'the proposition that a multiplicity of closely-related proceedings continuing simultaneously before different courts in different jurisdictions is obviously undesirable,'[1310] nonetheless, 'whether a third-party action should be heard together with the main action is not that of connection alone but whether they are inextricably linked and the third-party action is an integral and inseparable part of the main action.'[1311] In *CIMB Bank*, since the Singapore Court of Appeal noted that the third party claim was not established to be integral to the main action, it cannot be considered a significant factor.[1312]

The fact that several interrelated cases pending before the courts of the chosen jurisdiction were consolidated in the forum court is an important factor not to stay the action. Staying consolidated proceedings is undesirable as '[t]his will result in increased legal costs and time costs for the Plaintiffs and a danger of conflicting results…'[1313] However, if the parties envisioned parallel proceedings by stipulating it in their contract (*eg,* different chosen forums for various

[1308] *Chinachem* (n833) [133]; *BNP Paribas* (n738) [46].
[1308A] *Shanghai Turbo* (n655) 826.
[1309] *Morgan Stanley* (n756) 431.
[1310] *CIMB Bank* (n682) 569.
[1311] Ibid 574.
[1312] Ibid 575.
[1313] *The 'Jin Hui 588'* (n1245) [33].

contracts) and actually providing for different national laws to be applicable to the various contracts, then the argument against multiplicity of proceedings cannot stand.[1314] By choosing different forums, parties have assumed the possibility of conflicting judgments as a risk. 'In my judgment, the best and the safe course for the Hong Kong court to take is not to disturb the parties' allocation of risk as reflected in their choice of governing law and exclusive forum ….'[1315]

Multiple actions may also happen when the named court takes jurisdiction over the dispute pursuant to the non-exclusive clause, but the facts related to the dispute may have exclusively arisen in another jurisdiction, where another case is pending. In such scenario, the very circumstance that the material facts of the case are more connected to a foreign forum does not make such foreign forum the natural forum especially when the named court has a long experience of dealing disputes related to that foreign jurisdiction. In *Chinachem*, the Hong Kong CFI refused to stay its proceedings because 'Hong Kong courts had a great deal of experience dealing with PRC related disputes given Hong Kong's role as a major financial centre …[and its experience with] disputes with PRC elements and documents in simplified Chinese.'[1316]

Generally, the further the foreign proceedings has progressed, the more important it becomes as a factor. Hence, if the foreign proceedings are still in their infancy, this cannot be readily taken against the plaintiffs.[1317] Nonetheless, '[t]he fact that proceedings have already been commenced in a foreign court is not a factor in determining whether the foreign court is in fact a natural and appropriate forum.'[1318] '[T]he precise characteristics of the particular foreign litigation (including the parties and subject matter) will have to be weighed, but only material parallel proceedings that have gone beyond the initial stage will be pertinent.'[1319] Moreover, if there is unlikely to be any irreconcilable decisions in the different fora, such becomes a strong factor for the named forum to proceed with the local proceedings even though the foreign proceedings may have reached a more advanced stage.[1320]

[1314] See *Hyundai Engineering* (n658) [32]-[33].
[1315] Ibid [40].
[1316] *Chinachem* (n833) [145].
[1317] See *PT Jaya* (n667) [75].
[1318] *Chinachem* (n833) [102].
[1319] Ibid [106].
[1320] *China REIT Ltd v Su Ping* [2007] HKCFI 282, [49] (Court of First Instance).

7. Others

(i) Exclusive Clauses

Language can be an important consideration by the forum court in granting a stay especially when the evidence (witness' testimony, documents, etc.) and the foreign law are in another language not used by the forum court. Nonetheless, the need to translate *per se* may not be given sufficient weight especially when the forum court is a multi-lingual society and the relevant documents are in a language which the forum court can conveniently use.[1321]

The Eleftheria did not mentioned factors like fraud, undue influence or overweening bargaining power, which were factors recognised by the United States Supreme Court in *The Bremen*.[1322] Nonetheless, in *The Vishva Apurva*, the Singapore Court of Appeal mentioned these three factors to be relevant as well,[1323] but since these three were absent, the exclusive Choice-of-Forum clause was given full effect.[1324] One must note, however, that it is more appropriate to consider fraud, undue influence or overweening bargaining power as going to the court's determination of the Choice-of-Forum clause's validity rather than the court's exercise of discretion in determining 'strong cause.' This is discussed further in Chapters 6 and 7.

(ii) Non-exclusive Clauses

In cases involving non-exclusive Choice-of-Forum clauses, the language used in the foreign proceedings can be appreciated as a convenience factor. In *Citibank*, the Singapore High Court refused a stay[1325] because the guaranty's applicable law – New York law – is in English, and thus, a suit in Indonesia would be inconvenient given that the proceedings would not be conducted in English but Indonesian.[1326]

[1321] See *The 'Eastern Trust'* (n658) 524.
[1322] The Bremen (n60) 12-3.
[1323] *The Vishva Apurva* (n659) 927.
[1324] Ibid 928.
[1325] *Citibank* (n682) 474.
[1326] Ibid 472.

The Cambridgeshire effect or the efficiency and skill generated by the accumulated experience of counsel and solicitors derived from their participation in highly complex and sophisticated disputes has been recognised as a relevant factor by Singapore courts.[1327]

The chosen forum in the other contracts, which are related but are not the subject-matter of dispute, can also be a factor which the court may consider. In *Praptono Honggopati Tjitrohupojo v His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj*, the choice of Malaysian courts in the four written loan agreements on the project's working capital was considered by the court, although the action involved the draft master agreement.[1328]

C. Factors Considered in the Philippine Approach

1. Choice-of-Forum Clause as a *Forum Non Conveniens* Factor

The Philippines differs from Singapore, Hong Kong and Malaysia in its approach towards Choice-of-Forum clauses. For example, no special distinction exists between exclusive and non-exclusive Choice-of-Forum clauses. Nonetheless, because Choice-of-Forum clauses are considered as venue stipulations, and the rules of venue require exclusivity of choice,[1329] it appears that only exclusive Choice-of-Forum clauses are recognised as venue stipulations. Both exclusive and non-exclusive Choice-of-Forum clauses, however, are relevant in the *forum non conveniens* analysis. In the Philippines, a court, which has jurisdiction to hear and try a case, can still dismiss an action, during the trial stage (merits), based on *forum non conveniens*.[1330] However, an exclusive Choice-of-Forum clause in the Philippines, in contrast to the approaches in the three common law jurisdictions, does not carry any heavier weight relative to the other factors considered in the *forum non conveniens* analysis. Hence, the clause is balanced against the other factors such as factors establishing the capacity and competence of local courts, abuse of court processes, or convenience.

Forum non conveniens was introduced in the Philippines through American case law. A prominent Filipino expert of private international law, Salonga discussed this doctrine in his 'Private International Law,'[1331] a book widely used in Philippine law schools. The doctrine,

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[1327] See *Morgan Stanley* (n756) 427-8.
[1328] *Praptono* (n1217) 885-6.
[1329] *Rules of Court* (Philippines) r4, s2(b).
[1330] *Hasegawa* (n537) 278.
[1331] Jovito Salonga, *Private International Law* (Regina Publishing Co, 1995).

however, was first mentioned by the Philippine Supreme Court only in 1989 in *HSBC*,[1332] a case which involved a non-exclusive Choice-of-Forum clause stipulating Singapore courts.[1333] Citing Salonga, the Supreme Court briefly described *forum non conveniens* as a test which 'depends largely upon the facts of the particular case and is addressed to the sound discretion of the trial court.'[1334] At this point, however, the court did not mention which facts or factors are relevant. Instead, the discussion focused on the lack of exclusivity in the Choice-of-Forum clause; thus, the Supreme Court missed the opportunity to discuss the Choice-of-Forum clauses as a *forum non conveniens* factor.

The Supreme Court first articulated the relevant factors in the *forum non conveniens* analysis in *Communication Materials and Design, Inc v Court of Appeals* ('Communication Materials').[1335] Citing Salonga, the court emphasised that it can dismiss an action based on *forum non conveniens* but may nevertheless assume jurisdiction because the Philippine court '1)… is one to which the parties may conveniently resort to; 2)… is in a position to make an intelligent decision as to the law and the facts; and, 3)… is likely to have power to enforce its decision.'[1336] In effect, what the Supreme Court listed are actually *forum conveniens* factors which Philippine courts may use to justify their exercise of jurisdiction. Finally, in *Puyat v Zabarte* ('Puyat'), the Supreme Court, again citing Salonga, identified the factors which courts may consider to refuse their exercise of jurisdiction:

> 1) … the main aspects of the case transpired in a foreign jurisdiction or the material witnesses have their residence there; 2) The belief that the non-resident plaintiff sought the forum[,] a practice known as forum shopping[,] merely to secure procedural advantages or to convey or harass the defendant; 3) The unwillingness to extend local judicial facilities to non-residents or aliens when the docket may already be overcrowded; 4) The inadequacy of the local judicial machinery…and [t]he difficulty of ascertaining foreign law.[1337]

While both *Communication Materials* and *Puyat* did not refer to the Choice-of-Forum clause or the parties' 'venue stipulation' as a factor in declining jurisdiction under *forum non conveniens*, arguably, its inclusion as a factor should not be difficult to establish. First, the right to choose a forum, including forums outside the Philippines, is clearly established under the *Rules of Court* and Philippine case law. Second, in *HSBC*, the reasoning given in not enforcing the relevant Choice-of-Forum clause (*ie,* because it lacks exclusivity which is a requirement for venue stipulations) [1338]

1332 *HSBC* (n240).
1333 Ibid 339.
1334 Ibid.
1335 *Communication Materials and Design, Inc v Court of Appeals* (1996) 260 SCRA 673 ('Communication Materials').
1336 Ibid 695.
1337 *Puyat* (n68) 751.
1338 *HSBC* (n240) 337-8.

means that if a clause satisfied the procedural requirements for venue stipulations, courts should be able to enforce it. Third, in both *Communication Materials*[1339] and *Puyat*,[1340] the Supreme Court did not specify that the list of factors is exhaustive, which is consistent with the discretionary nature of a dismissal based on *forum non conveniens*. Hence, a sound exercise of court discretion should be able to recognise the importance of the very forum chosen by parties in their analysis. Fourth, *Communication Materials* and *Puyat* should not preclude courts from considering Choice-of-Forum clauses because *forum non conveniens* analysis is inherently fact-intensive. Since both *Communication Materials* and *Puyat* did not involve Choice-of-Forum clauses, the Supreme Court could not have considered these clauses in these decisions. Fifth, the effect of considering the factors relevant to the *forum non conveniens* defence during the trial proper is to oblige the trial courts to consider all factors *in toto*. Given the Choice-of-Forum clause's importance, their existence and effect should have already been proven and established by the defendant, and the court may be able to weigh the clause together with the other *forum non conveniens* factors.

2. Choice-of-Forum Clauses vis-à-vis the Other Factors

How does the Choice-of-Forum clause relate to the other factors considered relevant in the Philippine version of *forum non conveniens*? The definition and characterisation of the *forum non conveniens* principle in *Bank of America, NT&SA, Bank of America International, Ltd v Court of Appeals* ('Bank of America') is instructive:

> [*F*]*orum non-conveniens*… deter[s] the practice of global forum shopping, that is to prevent non-resident litigants from choosing the forum or place wherein to bring their suit for malicious reasons, such as to secure procedural advantages, to annoy and harass the defendant, to avoid overcrowded dockets, or to select a more friendly venue. Under this doctrine, a court…may refuse impositions on its jurisdiction where it is not the most convenient or available forum and the parties are not precluded from seeking remedies elsewhere.[1341]

This definition highlighted the connection between *forum non conveniens* and global forum shopping, particularly as a way to stop scheming non-resident litigants from taking advantage of local remedies to the prejudice of the defendant. Furthermore, it also revealed the two main

[1339] *Communication Materials* (n1335) 695.
[1340] *Puyat* (n68) 751.
[1341] *Bank of America, NT&SA, Bank of America International, Ltd v Court of Appeals* (2003) 400 SCRA 156, 169 ('Bank of America').

functions of the Philippine version of *forum non conveniens*: (1) its administration of justice function, and (2) its function to locate the forum which is most convenient and available.

Given these two functions, the Philippine *forum non conveniens* mirrors the United States approach and differs from the approach adopted in jurisdictions following the *Spiliada*. In 1947, when *forum non conveniens* was addressed in *Gulf Oil Corp v Gilbert*,[1342] the United States Supreme Court stressed that both public and private interests are relevant. According to the court, the public interests that affect the appropriateness of a forum's exercise of jurisdiction include: (1) the court's caseload and other administrative difficulties, (2) burden of asking local juries to consider matters only tangentially related to their forum, and the (3) local interest in having localized controversies decided at home.[1343] Private interests, on the other hand, would include the (1) relative ease of access to sources of proof, (2) availability of compulsory processes and the cost of obtaining attendance of witnesses, (3) examination of premises when relevant to the action, and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive.[1344] Salonga would later publicise *forum non conveniens* in the Philippines in the 1960s, and taking cue from the United States approach, he would also highlight the dual functions of the principle.[1345] In turn, the Philippine Supreme Court would refer to Salonga in *Communication Materials* and *Puyat* to highlight both the administration of justice function and ability of the *forum non conveniens* principle to locate the most convenient and available forum. This dual function is elaborated in *Saudia:*

> Two (2) factors weigh into a court's appraisal…first, the vinculum which the parties and their relation have to a given jurisdiction; and second, the public interest that must animate a tribunal, in its capacity as an agent of the sovereign, in choosing to assume or decline jurisdiction. The first is more concerned with the parties, their personal circumstances, and private interests; the second concerns itself with the state and the greater social order.[1346]

(a) The Administration of Justice Function of *Forum Non Conveniens*

Communication Materials identified these administration of justice factors to include the capacity of the Philippine Court to make an intelligent decision as to the law and the facts;[1347] and

[1342] *Gulf Oil Corp v Gilbert,* 330 US 501 (1947).
[1343] Ibid 508-9.
[1344] Ibid 508.
[1345] See Salonga (n1331) 58.
[1346] *Saudia* (n249) 169.
[1347] *Communication Materials* (n1335) 695.

the power and ability of the Philippine court to enforce its decision.[1348] *Puyat*, on the other hand, identified as important factors the overcrowded court dockets, the inadequacy of the local judicial machinery for effectuating the right sought to be maintained;[1349] and the difficulty of ascertaining foreign law.[1350] *Bank of America* highlighted the ability of *forum non conveniens* to abate a serious administration of justice concern – forum shopping.[1351] Hence, a good majority of factors identified in *Communication Materials* and *Puyat,* and the emphasis on forum shopping in *Bank of America* highlight the administration of justice functions of the principle. Moreover, the majority of Philippine cases on *forum non conveniens* follow this line of reasoning. [1352] Significantly, in *Saudia*, the Supreme Court emphasised that: 'Should [the court] find that public interest weighs more heavily in favor of its assumption of jurisdiction, it should proceed in adjudicating the dispute…[notwithstanding] the preponderance of linkages...'[1353] Hence, public interests trump private interests of parties in the Philippine version of *forum non conveniens*.

Therefore, in a *forum non conveniens* analysis which focuses on the administration of justice function of the principle, the most relevant factors would naturally be those concerning the capability of the local court to provide justice to the parties – its capacity and competence (referring to the case-management issues of the courts), its position to effectively decide the case and make an intelligent decision as to the law and the facts, and, its power to enforce its decision. Given this, one can argue that the strength of administration of justice factors is not diminished even when a Choice-of-Forum clause is involved. Hence, when the chosen forum is a Philippine court, expecting the chosen Philippine court to renounce its jurisdiction is next to impossible unless strong deficiencies in its capability are established. Similarly, when a foreign court is chosen, there is a good chance that the Philippine court will not desist from exercising its jurisdiction unless strong deficiencies related to the administration of justice function of *forum non conveniens* are established (*eg*, foreign law is best applied by the jurisdiction where it originates, the complexity of the cross-border litigation will further strain the already clogged dockets of the local courts, etc). In other words, when parties invoke their rights under the Choice-of-Forum clause stipulating foreign courts and asked that the Philippine action be dismissed under *forum non conveniens,* they should strongly establish the absence and deficiencies of the local courts as regards their exercise of administration of justice function.

[1348] Ibid 695.
[1349] *Puyat* (n68) 751.
[1350] Ibid.
[1351] *Bank of America* (n1341) 169.
[1352] *Puyat* (n68) 751; *Bank of America* (n1341); *Pacific Consultants International Asia Inc v Schonfeld* (2007) 516 SCRA 209; *Raytheon* (n372) 564; *Saudia* (n249) 170.
[1353] *Saudia* (n249) 170.

(b) Choice-of-Forum Clauses and Abuse of Court Process

Another aspect of the administration of justice function of *forum non conveniens* is deterring abuse of court process.[1354] There are good reasons why the Choice-of-Forum clause and the consequent filing of an action pursuant to the clause should not amount to abuse of court process. Under the *Rules of Court* and Philippine case law, the right to choose a forum, including forums outside the Philippines, is clearly established. Hence, being a right given to litigants, choosing a forum could not be considered in itself an inherently malicious act. Furthermore, when a party exercises his right under the Choice-of-Forum clause, such submission and commencement of action in the chosen forum should not also be considered malicious and meant to 'annoy and harass' the other party because parties are deemed to have mutually chosen the forum. Likewise, the mutuality of choice may also mean that the parties, both plaintiff and defendant, have mutually considered the advantages or disadvantages with respect to procedure, the 'friendliness' of the chosen court, rules on evidence, costs, and other convenience factors (*eg,* the need to transport and present evidence and witnesses) when they chose the forum. Hence, arguments like the choice was made 'to secure procedural advantages,' or 'to select a more friendly venue' should not figure highly and carry much weight in the analysis. In that sense, the Choice-of-Forum clause and subsequent filing of action in the chosen court should be consistent with the *forum non conveniens*' avowed goal of stopping scheming non-residents from taking advantage of the local forum to the defendant's prejudice, as highlighted in *Bank of America.*[1355]A plaintiff, including a non-resident, who files an action in the Philippines pursuant to the Choice-of-Forum clause, should not be considered abusing the court's process. Rather, the abuse of court factor should be established through other facts or circumstances showing actual prejudice or abuse of court processes.

Nonetheless, the argument above holds only when there is mutuality between parties. However, when such mutuality is actually absent, *ie,* the Choice-of-Forum clause was not freely negotiated, or affected by fraud, undue influence or overweening bargaining power, the Choice-of-Forum clause and the subsequent filing of action may be considered an abuse of court process. In other words, abuse of court process may be established through evidence of the same factors which were considered relevant in *The Bremen*.

[1354] *Bank of America* (n1341) 169.
[1355] Ibid.

Moreover, the focus on the administration of justice function of *forum non conveniens* has important implications. Primarily, this means that the most relevant factor, even when there is a Choice-of-Forum clause involved, would still be those concerning the competence and capability of the local court to provide justice to the parties. Furthermore, when the chosen forum is the Philippines, and as earlier argued, much of the abuse of processes arguments, given the mutuality of choice, should not matter highly. Unless there are relevant public interest issues involved like clogged dockets, etc, Philippine courts should be most inclined to continue to exercise jurisdiction. However, when the chosen forum is in another country, and the defendant seeks the dismissal of the Philippine action pursuant to the Choice-of-Forum clause, at the very least, Philippine courts should not characterise such Choice-of-Forum clause stipulating the foreign forum and the subsequent exercise of such choice as a form of abuse. The local action may instead be characterised as an abuse of court process. Although the Philippines does not distinguish exclusive from non-exclusive clauses, the distinction may be relevant in determining whether the Philippine action is indeed malicious or not. If the clause stipulating the foreign court is exclusive (and thus, also complies with the venue requirements under the Philippine procedure), there is a strong indication that the Philippine action was sought to seek procedural advantages or at the very least, annoy or harass the defendant, especially when the defendant is a non-resident. On the other hand, when the clause is non-exclusive, the filing of the Philippine action is not contrary to the Choice-of-Forum clause; thus, the Philippine action may not be characterised as being done to seek procedural advantages or to annoy or harass the defendant. Besides, under the *Rules of Court*, non-exclusive Choice-of-Forum clauses would not be given effect anyway as venue stipulations.

(c) Choice-of-Forum Clauses and Convenience Factors

Convenience factors (*eg*, location of evidence and material witness, costs) are distinct factors which courts consider under *Communication Materials*[1356] and *Puyat*.[1357] As earlier argued, their importance in the *forum non conveniens* analysis can only be superseded by factors related to the court's administration of justice and abuse of court process.[1358] Hence, Choice-of-Forum clauses should not in themselves prevent the courts from considering convenience factors. Therefore, even when parties exclusively stipulated for a foreign court, this does not stop the Philippine courts to consider convenience factors in its *forum non conveniens* analysis.[1359]

[1356] *Communication Materials* (n1335) 695.
[1357] *Puyat* (n68) 751.
[1358] *Saudia* (n249) 170.
[1359] See *Communication Materials* (n1335) 695.

D. Key Lessons

This chapter, which discussed the various factors considered by the courts in granting forms of relief in relation to Choice-of-Forum clauses, emphasises the key role of court discretion in the Choice-of-Forum clause analysis. The discussion highlights the capacity of courts to identify and characterise certain facts or elements as factors capable of justifying the court's decision to grant a stay, order service out of the jurisdiction, an anti-suit injunction, a dismissal, a preliminary injunction and other forms of relief. One must note, however, that in the English common law system, the exercise of court discretion is dependent on the classification of the Choice-of-Forum clause as either exclusive or non-exclusive. The important role of this dichotomy is highlighted in the differentiated approach and tests applied depending on the classification of the clause involved – exclusive Choice-of-Forum clauses are resolved based on *The Eleftheria*, and non-exclusive Choice-of-Forum clauses are resolved based on the principles laid down in *Spiliada*. A closer scrutiny of the factors in the two approaches, however, reveals that the factors identified in both approaches are similar. Nonetheless, between the tests developed under *The Eleftheria* and *Spiliada*, the 'strong cause' test under *The Eleftheria* is arguably more protective of what the parties intended in their Choice-of-Forum clause as it gives courts less discretion in considering other factors such as convenience factors. However, the development of the modified *Spiliada* approach in England, Singapore and Hong Kong shows, at the very least, that far from being totally different, exclusive and non-exclusive clauses can be treated alike on certain aspects, and thus the strict dichotomy should be re-examined. Nonetheless, as shown in Malaysia, court discretion may still play a huge role even in the enforcement of exclusive Choice-of-Forum clauses.

Nonetheless, as earlier pointed out, the Hong Kong and Singapore version of modified *Spiliada* is different from the English approach as recognition of 'stronger effects' may be extended even to the named foreign forum.[1360] Furthermore, the approach appear to avoid the problems in the English approach of using an implied waiver of objection, by focusing instead on the parties' intention. Nonetheless, the Hong Kong and Singapore approaches may still be problematic because of possible issues with the requirements of private international law, not to mention the inherent practical problems associated with the extrapolation of the parties' intention.

[1360] Cf *The Rothnie* (n1079).

The effect of the modified *Spiliada,* whether it is the English or Hong Kong-Singapore version, narrows further the discretion available to courts and recognises the ascendancy of party autonomy in the Choice-of-Forum clause analysis. Prior to the adoption of the modified *Spiliada*, limited court discretion, as warranted by the 'strong cause' test, is only exercised in cases involving exclusive Choice-of-Forum clauses. Hence, by adopting the modified *Spiliada* for certain cases involving non-exclusive Choice-of-Forum clauses (*ie,* when the suit is filed in the named forum), Singapore and Hong Kong represent the jurisdictions where court discretion is narrowest in appreciating the various factors in granting relief. Of course, when the suit was filed in court which is not named by parties, court discretion remains wide. Malaysia, where courts continue to adhere to the classic *Spiliada* approach in cases involving non-exclusive Choice-of-Forum clauses, maintains a wider range of court discretion.

The Philippines presents a different model where discretion plays a much bigger role in the Choice-of-Forum clause analysis. The lack of explicit contractual treatment of Choice-of-Forum clauses and the focus on the administration of justice function of the *forum non conveniens* principle mean that the court's discretion is wider in identifying which factors are relevant in granting relief pursuant to Choice-of-Forum clauses. Without a contractual treatment serving as a starting point in the analysis, Philippine courts cannot read into these clauses private rights and obligations which should be enforced by the courts. In this sense, there is no contract which can limit the discretion which the court can exercise. Furthermore, the emphasis on the administration of justice function in the *forum non conveniens* equation means that the court can easily water down the importance of private interests. The result of these two unique features of the Philippine approach is a much bigger role for court discretion.

Notably, the wider range of court discretion in the Philippine approach is consistent with the findings in Chapter 3 that the Philippines is the jurisdiction where party autonomy has the most limited scope given its continued adherence to the ouster rule. This finding about court discretion adds another dimension to understanding the Philippine approach. Significantly, this wider range of discretion is well-suited given the current realities of Philippine courts of clogged dockets, slow resolution of civil cases and lack of expertise in resolving complex commercial issues. In a developing country like the Philippines, there is a greater imperative to efficiently use government funds allocated for administration of justice. In this context, *forum non conveniens* becomes a useful tool to ensure that only cases with stronger Philippine connections are heard,

and those where the Philippine connection is weak, like when the prorogation in favour of Philippine courts is the only connection, are sent for trial elsewhere.

Ultimately, this chapter questions the amount of court discretion which is desirable in the Choice-of-Forum court analysis. What is clear though is that all four jurisdictions reject a very mechanistic approach to resolving Choice-of-Forum clause issues, like the 'first to file' model previously adopted in the *Brussels I Regulation*. All four recognise that court discretion is important in the Choice-of-Forum clause analysis. However, the question remains – how much court discretion is desirable? Notably, the model adopted by Singapore and Hong Kong (*ie,* a narrow scope for discretion) supports their ambition of promoting their economies, including their goal of becoming dispute resolution centres of choice. This happens because businesses would want their contracts upheld with the least possibility of unpredictable outcomes. In this sense, the question of desirability then appears to be linked with the economic status and aspirations of a country. Hence, Malaysia and the Philippines may be able to attract more foreign investments and trade by ensuring court outcomes which are more consistent and predictable. This may mean a lesser role for court discretion. Specifically, as regards the Philippines, this means that the Philippines may need to give greater weight to factors relating to private interests (*eg,* convenience factors) vis-à-vis administration of justice factors.

Chapter VI.

Existence, Validity and Interpretation

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A. Choice-of-Forum Clauses and the Choice of Law Process

1. A Contentious Relationship

The applicable law's crucial role in determining the nature and effects of Choice-of-Forum clauses and its various aspects is well-accepted. Defining, however, the content, scope and consequences of this relationship can be controversial. For instance, identifying which legal system should govern a dispute in general, can be difficult to answer. Particularly, the answer would depend on several factors – where the action was filed, cause of action the plaintiff chose, how the court characterises Choice-of-Forum clauses, procedural rules including the extent parties exercised their party autonomy, rules of evidence used to prove the applicable law's contents, legal reasoning employed by courts, among others. For example, since the plaintiff, as discussed in Chapter 3, is free to determine the place of initial suit, if he chose to file in a jurisdiction which does not recognise Choice-of-Forum and Choice-of-Law clauses, the litigation may not implement the dispute resolution mechanism intended by the parties. Instead, the forum court may refer to forum law to resolve all issues in dispute. Furthermore, as discussed in Chapter 5, if the plaintiff characterises his action as non-contractual (*eg,* as an action based on tort instead of contract), this may remove the dispute from the scope of the Choice-of-Forum clause (assuming that the clause only covers disputes arising from the contracts excluding actions based on tort); therefore, allowing another set of legal rules to resolve the dispute. Sometimes, the failure to follow forum rules of evidence or the mere oversight of lawyers to inform the court about the applicable law may all lead to another law being applied to the dispute.

Nonetheless, even in jurisdictions which generally enforce Choice-of-Forum clauses, choosing the applicable law may still be contentious because of the inconsistent characterisation of Choice-of-Forum clauses and the issues involved. As discussed in Chapter 2, jurisdictions which favour the procedural characterisation of these clauses may apply the forum law based on the conflicts rule that forum law governs procedure. On the other hand, jurisdictions which consider Choice-of-Forum clauses as contracts or recognise the private law consequences of these clauses, would rely on the forum's substantive laws or even of another jurisdiction depending on the applicable conflicts rules governing contracts. The principle of party autonomy complicates this further because while parties are given the power to choose the applicable law through the Choice-of-Law clause, how courts should use this chosen law in resolving issues, (*eg,* Choice-of-Forum

clause's existence), may be contentious.[1361] For instance, why should courts allow a contractual provision like the Choice-of-Law clause determine at the outset the contract's existence in which it is found? Isn't this equivalent to putting the cart before the horse? Instead, should the forum law determine these issues because giving effect to the Choice-of-Forum clause is primarily a procedural issue?

Moreover, as discussed in Chapters 2 and 4, even in jurisdictions in the same legal tradition, the court may apply similar rules and yet arrive at different results. Furthermore, courts may approach legal problems differently simply because they adopt different approaches of legal reasoning. For example, the sequencing – what step follows which - may be determinative of the result, and thus, may controversially shape the flow of litigation. As seen in Chapter 4, the failure to classify the type of Choice-of-Forum clause involved as either exclusive or non-exclusive when the same is crucial in articulating the applicable test (*eg,* will the 'strong cause' test or *forum non conveniens* apply?), may lead to incorrect or unintended results. Ultimately, as will be discussed in the next chapter, state interests may overrule party autonomy, also, leading to results not intended by the parties.

This chapter articulates the content, scope and consequences of this intimate relationship between Choice-of-Forum clauses and the choice of law process by focusing on how issues involving existence, validity and interpretation of Choice-of-Forum clauses are examined by the courts of Singapore, Hong Kong, Malaysia and the Philippines. In these jurisdictions, the applicable law, *ie,* the law applicable to the underlying contract, determines the bulk of issues related to existence, validity and interpretation of the Choice-of-Forum clause. In the English common law jurisdictions, however, the law which determines existence of a contract remains ambivalent as court decisions appear to either refer to the 'putative' applicable law or forum law. Furthermore, the doctrine of separability is examined in this chapter to determine its impact on the applicable law.

[1361] See Kevin Bufford, 'Threshold or Procedural Issue: The Order of Interpretation Required by Contractual Choice-of-Law Provisions Versus the Law of the Forum Where the Suit is Commenced' (2016) 40(1*) American Journal of Trial Advocacy* 131, 131-2.

2. The Law Applicable to the Choice-of-Forum Clause

(a) Key Attributes

The prominence of party autonomy means that the law applicable to questions of existence, validity and interpretation shall be the law chosen by the parties, usually expressed through the Choice-of-Law clause. In the absence of a Choice-of-Law clause, however, the court is usually faced with three candidates for the applicable law: (1) forum law, (2) law of the chosen court (if the chosen court is not the forum court), and (3) applicable or 'proper' law of the underlying contract. Across jurisdictions, the applicable law of the contract may refer to any of the following: (1) law of the place where a contract is made *(lex loci contractus),* (2) law of the place where the contract is performed *(lex loci solutionis)*, (3) law intended by the parties, (4) law of closest connection, or simply (5) forum law.

Notably, the applicable law has to be determinate, and not a law which 'floats.'[1362] Moreover, while the applicable law applies from the time the contract is made, parties may subsequently change it by agreement. Nonetheless, various aspects of the contract or the Choice-of-Forum clause may be governed by more than one legal system.[1363] This situation is different from a floating proper law, where the applicable law is indeterminate, because the law which governs the various aspects of the contract or even the Choice-of-Forum clause, is determinate albeit not necessarily just one law alone. Moreover, traditionally, *renvoi* has no place in the law of contract at common law.[1364] Hence, the proper law of the contract usually means the domestic law of that law excluding its private international law rules.

(b) Common Law

In the English common law, unless otherwise expressly provided by the parties, the law applicable to the Choice-of-Forum clause is the law applicable to the underlying contract.[1365] This law, also referred to as the proper law of the contract, is the law intended by the parties.[1366] Parties may designate this law expressly through a Choice-of-Law clause or a similar provision in their

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[1362] *Chan Chi* (n1189) 36.
[1363] *Re United Railways of the Havana and Regla Warehouse* [1960] Ch 52, 92.
[1364] See *Amin Rasheed Shipping Corporation v Kuwait Insurance* Co [1984] AC 50, 61-2 ('Amin'); cf *O'Driscoll v J Ray McDermott SA* [2006] WASCA 25, [12], [59]-[60].
[1365] See *Amin* (n1364) 60.
[1366] See *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34, 50 ('Coast Lines').

contract.[1367] In the absence of express choice, the court examines the facts to determine whether the parties inferred or made an implied choice of law.[1368] If no choice was made, express or implied, the court ceases to consider the parties' intention and proceeds to determine the legal system which the transaction has the closest and most real connection.[1369] This law is determined by weighing connecting factors such as place of contracting, places of residence or business of the parties, nature and subject of the contract, and place of performance of the contract.[1370] Nonetheless, distinguishing implied choice from absence of choice can be difficult.[1371] In any case, there must be an applicable law and it is not possible to have a contract which was not governed by some legal system.[1372] Singapore, Hong Kong and Malaysia generally follow the foregoing approach.

In the United States, however, courts do not always apply the law applicable to the contract in the absence of a Choice-of-Law clause. This is because some states characterise Choice-of-Forum clauses as procedural, while others just ignore the need to go through the conflicts process.[1373] In *The Bremen*, for instance, the United States Supreme Court barely mentioned the choice of English law and how the conflicts process may affect the analysis. Clermont notes that the absence of 'looking to the place whose law will cover the contract, [is] perhaps because of the common distaste for the conflicts process's difficulty and uncertainty.'[1374]

One must note that in Malaysia, especially in Islamic banking and finance contracts, Islamic law may be the law applicable to the contract along with the applicable substantive law.[1374A] *Shariah* is applicable either because parties have explicitly chosen it as an applicable law, or because of the very nature of the transaction or the fact that an Islamic bank or financial institution is involved.[1374B] Furthermore, one must note that unlike the applicable law, which is the product of the choice of law process and identifies the law of a certain state or jurisdiction, Islamic law, being based on the *Quran*, is a-national law. Moreover, because there is no central authority on Islamic law, its content and interpretation (as maybe articulated in an opinion or *fatwa*) may vary from one country to another, or even between institutions and scholars.[1374C] Nonetheless, in Malaysia, these

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[1367] See *Amin* (n1364) 61.
[1368] See *The Assunzione* [1954] P 150, 185-6.
[1369] See *Coast Lines* (n1366) 44.
[1370] See Ibid 50.
[1371] See *R v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] AC 500, 529.
[1372] See *Amin* (n1364) 65.
[1373] Kevin Clermont, 'Governing Law on Forum-Selection Agreements' (2015) 66(3) *Hastings Law Journal* 643, 649.
[1374] Ibid.
[1374A] *Bank Kerjasama* (n441A) 408.
[1374B] See *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1, 30 ('Tahan Steel').
[1374C] See Oseni (n441B) 113.

differences across countries, institutions or scholars as to what constitutes Islamic law has not made Islamic law, as a law applicable to a contract, uncertain. Ultimately, the contents of the Islamic law applicable to the contract in Islamic banking and finance would depend naturally on the forum court. In Malaysia, this is determined by the National *Shariah* Advisory Council which is the ultimate authority for any questions on *Shariah* by financial institutions and civil courts.[1374D] Notably, any ruling made by it shall be binding on Islamic financial institutions, courts and arbitral tribunals.[1374E]

(c) Choice-of-Court Convention

Under the *Choice-of-Court Convention,* the law of the chosen court determines whether the Choice-of-Forum clause is null and void.[1375] Hence, in Singapore, cases which fall within the *Choice-of-Court Convention*, follow this approach.[1376] Rather than using the law applicable to the contract or even the law chosen by the parties, Singapore courts should apply the law of the chosen court to determine whether the Choice-of-Forum clause is null and void. The Hartley-Dogauchi Report clarifies that the 'null and void' provision applies only to substantive (not formal) grounds of invalidity under the chosen court's law (*eg,* fraud, mistake, misrepresentation, duress and lack of capacity).[1377] While the non-chosen court, under Article 6, may also decline jurisdiction because the Choice-of-Forum clause is 'null and void,' the difference with the chosen court applying the same ground under Article 5 is that the non-chosen court would be applying foreign law.[1378] Notably, because the law of the state of the chosen court referred in Articles 5(1) and 6(1) includes its choice of law rules,[1378A] this means that proof of the foreign law may be required not just under the non-chosen court's procedural rules but even when the suit is filed in the chosen court, *ie,* in situations when the chosen court's conflict of law rules point to a foreign law, thus requiring proof of its contents under the chosen court's procedural rules. Hence, in that sense, proof of foreign law may be required both where the Singapore court is chosen or non-chosen.

Interestingly, the *Choice-of-Court Convention* also recognises forum law as the law applicable to the other grounds for suspension and dismissal of actions. For instance, forum law determines

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[1374D] *Central Bank of Malaysia Act 2009* (Malaysia) s51(1).
[1374E] Ibid s57.
[1375] *Choice of Court Convention* (n70) arts 5(1), 6(a).
[1376] *CCAA* (n617) pt 2, ss11(1),12.
[1377] Hartley-Dogauchi Report (n354) 55.
[1378] Ibid 61.
[1378A] Ibid 55.

whether the clause is not valid due to lack of capacity of parties to conclude the agreement.[1379] Likewise, forum law also determines whether giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to public policy.[1380] The *Choice-of-Court Convention*, however, is silent on the two other grounds under Article 6 (*ie,* whether there are 'exceptional reasons beyond the control of the parties' which leads to the contract not being reasonably performed, and whether the chosen court has decided not to hear the case). Even so, there is good reason that the law which determines these grounds is likewise forum law. As discussed in Chapter 4, issues concerning enforceability are determined by forum law. Again, because forum law includes its conflict of law rules, proof of foreign law may also be required even in circumstances where the forum law applies especially in situations where the forum court's conflict of law rules point to the application of foreign law.

(d) The Philippines

The Philippines follows the common law approach that the law the parties intended shall be the law applicable to the contract. This means that Philippine law recognises and gives effect to the law expressly or impliedly chosen by parties.[1381] In the absence of express or implied choice, the law which has the closest and most real connection governs the contract.[1382] In the Philippines, this law is determined after considering various 'test factors' or 'points of contact' or 'connecting factors' like parties' nationality or domicile, location of the property, place of performance, etc.[1383]

This analysis, however, follows from the presumption that Philippine courts can recognise Choice-of-Forum clauses as contracts. As discussed, Philippine courts have struggled with recognising these clauses as having an identity beyond their procedural nature. The current state of Philippine law considers them as venue stipulations which are procedural and, thus, governed by forum law (*ie,* Philippine law) without the need of going through the conflict of law process. Hence, as seen in *HSBC*, a Choice-of-Forum clause in favour of Singapore courts was analysed using the standard under Philippine law, without determining whether the chosen law, Singapore law, would affect the analysis.[1384]

[1379] *Choice-of-Court Convention* (n70) art 6(b).
[1380] Ibid art 6(c).
[1381] *Philippine Export and Foreign Loan Guarantee Corp v VP Eusebio Construction Inc* (2004) 435 SCRA 202, 215 ('Philippine Export').
[1382] Ibid.
[1383] *Saudi Arabian Airlines v Court of Appeals* (1998) 297 SCRA 469, 491.
[1384] *HSBC* (n240) 336-9.

B. Issues of Existence and Validity

1. Singapore, Hong Kong and Malaysia

(a) Existence

(i) Law of the Forum v Putative 'Applicable Law'

In Singapore, Hong Kong and Malaysia, the law applicable to the contract, also referred as the putative 'applicable law,' as a general rule, determines whether a contract exists or not. However, as this section will discuss, there are decisions in Singapore which show that the court may also use forum law to determine a contract's existence. Nonetheless, what law applies to existence may remain unsettled for some time.[1385] Furthermore, how a court frames issues may influence the determination of the contract's existence not to mention, the need to establish facts which in turn depend on the forum court's rules of evidence. For example, each jurisdiction may have different ways of understanding when a contract is formed. While courts may refer to the applicable law to determine this issue, they are limited by their own rules of evidence which for instance limits presentation of certain pieces of evidence particularly those pertaining to the parties' state of mind or which would have the effect of altering the contents of the contract. Furthermore, the experience of judges on how pleadings are usually drafted, like how the arguments are stated and admissions are made by the parties, can easily influence their preference on where to look for clues in determining whether the contract exists or not.

When the facts and law show that the requirements for a contract to come into existence are missing, the consequence is that the contract has never come into existence. 'If the contract is …void because there was…no meeting of the minds…*eg*, where the defence of *non est factum* is applicable, then we cannot see any reason or logic to give effect to any of the clauses therein.'[1386] Under common law, whether a contract has come into existence may be determined by the putative 'applicable' or proper law of the contract. The few cases examined show that most of these cases involving issues concerning the clauses' existence have resolved the issues using the putative applicable law. In Singapore, *CIMB Bank*, by pinpointing that the applicable law clause in a void or non-existent agreement may still apply in certain situations, recognised the applicability

[1385] See *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21, [68] (High Court) ('William Jacks').
[1386] *CIMB Bank* (n682).

of the putative 'applicable law' on issues concerning contractual existence.[1387] Likewise in Hong Kong, *Star Cruises* referred to the putative applicable law to determine the issue of existence as well as validity.[1388]

There are logical difficulties, however, with the foregoing approach especially if the entire contract including the Choice-of-Law clause (if allegedly present) is inexistent in the first place. How can an inexistent contract guide courts as to what law should apply to its very own existence? But again, the doctrine of putative 'applicable' law is favoured because it provides a practical solution.[1389] Chong, however, warns about the dangers of this approach especially that the doctrine has not been applied in practice on a principled basis.[1390] 'Any alleged express or implied choice, or law of closest connection derived from alleged terms, will straightforwardly be identified as the putative law of the contract.'[1391] Furthermore, '[t]he lack of thought that goes into identifying the putative governing law of the contract favours the party who alleges validity.'[1392] In addition, the doctrine encounters problematic application when there are conflicting contractual terms.[1393] In short, while pragmatically desirable, the approach is severely challenged by its logical weakness and the inconsistent and unprincipled application of courts.

Probably because of these difficulties, certain common law decisions would instead refer to the forum law in determining whether a contract exists.[1394] In *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd,* the Singapore High Court mentioned the possibility referring to forum law in resolving the issue of existence.[1395] Nonetheless, because Singapore law was both the forum law and putative proper law of the contract, the court did not resolve what rule applies in Singapore.[1396]

[1387] Ibid 555; see also *Banco Ambrosiano* (n1206) [16].
[1388] Star Cruises (n1051) [21].
[1389] *CIMB Bank* (n682) 555-6.
[1390] Adeline Chong, 'Chapter 9 Choice of Law for Void Contracts and Their Restitutionary Aftermath: The Putative Governing Law of the Contract' in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment* (Koninklijke Brill, NV, 2007) 155, 159.
[1391] Ibid.
[1392] Ibid.
[1393] Ibid 160.
[1394] Eg, *Oceanic Sun* (n141) 29.
[1395] *William Jacks* (n1385) [68].
[1396] Ibid.

(ii) Specific Issues Concerning Existence

In common law, issues about the contract's existence are understood to refer to matters concerning formation, *ie,* questions as to what minimum acts had to be performed to give rise to a contract. This means that parties must come to an agreement, that they must have intended to contract, that their agreement must be supported by valuable consideration, and that any formalities, such as the need for the contract to be evidenced in writing, be satisfied.[1397] The guiding principle is based on the objective theory of contract which requires courts not to depend on the parties' subjective state of mind, 'but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations.'[1398] What has been said or done by the parties, which led to the agreement, is determined from the perspective of a reasonable person in the position of the parties.[1399] Often, this has been a purely objective quest based on available evidence.[1400]

Consequently, the question of contract formation is a factual issue, proven by evidence from conduct done prior, during and after the contract formation process. This is highlighted in *CIMB Bank*, where the Singapore Court of Appeal said that '[t]here is a need to examine the factual circumstances of each case to see the cause for the contract being void.'[1401] Notably, a practical issue is to determine which evidence is most reliable to establish the parties' intention. Determining whether the parties have reached an agreement requires evidence that they have agreed on the terms of bargain, that those terms be certain and complete, and that the bargain is informed by an intention to contract as well as an intention to immediately assume legal obligations.[1402] The traditional method of determining whether there is an agreement is that of offer and acceptance.[1403]

The importance of going through this thought process is emphasised when the alleged Choice-of-Forum clause is found elsewhere but alleged to be incorporated by reference in the main agreement. In *Star Cruises,* the Hong Kong District Court showed that in cases like this, the query on offer and acceptance would rely on the contemporaneous or subsequent acts of

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[1397] Michael Furmston, GJ Tolhurst and Eliza Mik, 'Chapter 1: Formation and the Concept of Agreement' in Michael Formston and G J Tolhurst (eds), *Contract Formation: Law and Practice* (Oxford University Press, 2nd ed, 2015) 1,1.
[1398] *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14.
[1399] See *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179.
[1400] See Ibid.
[1401] *CIMB Bank* (n682) 563.
[1402] Furmston (n1397) 6.
[1403] Ibid.

parties.[1404] In this case, the plaintiff disputed the inclusion of the confirmation slip, which contained the Choice-of-Forum clause. Nonetheless, the court rejected this argument by emphasising the defendant's failure to reject the confirmation slip when he boarded the vessel.[1405] Furthermore, the confirmation slip was faxed with the other documents the existence of which the plaintiff is not contesting.[1406] Contrast this with *Continental Mark Ltd v Verkehrs-Club de Schweiz*, where the Hong Kong Court of Appeal concluded that the export conditions were not accepted – the annex which included the alleged Choice-of-Forum clause – because '[t]he only evidence was that the export conditions were faxed to the defendant the day following the signing of the alleged contract.'[1407] There was no contemporaneous or subsequent circumstances which may point to the defendant having accepted the belatedly faxed export conditions containing the Choice-of-Forum clause.

While contemporaneous or subsequent circumstances may reveal whether parties have agreed to a Choice-of-Forum clause, the intention of parties to enter into an agreement may be read from the very arguments they raised during litigation. For instance, in *CIMB Bank,* the Singapore Court of Appeal pinpointed that both parties' argument that their contract was ineffective or there was contractual failure, 'presuppose that… [they] had intended to enter into the contract but that…the contract had become void or ineffective or a contractual failure had arisen. Clearly…the parties intended to enter into the contract….'[1408]

In *Vinmar*, the Singapore Court of Appeal used the following test to determine whether the exclusive Choice-of-Forum clause could be deemed incorporated in the contract which was the subject matter of the dispute:

> *[W]hether, at the time of contracting, each party as a reasonable person was* ***entitled to infer from the past dealings and the actions and the words of the other in the instant case****, that the [term] [was] to be a part of the contract.* (emphasis and italics in original)[1408A]

The court added that a high threshold should be met for a party to be 'entitled to infer' that a term sought to be incorporated is part of the contract.[1408B] In this case, the exclusive Choice-of-Forum clause was deemed incorporated because the previous contracts entered into by the parties

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[1404] *Star Cruises* (n1051) [33].
[1405] Ibid.
[1406] Ibid [32].
[1407] *Continental Mark* (n829) 515.
[1408] *CIMB Bank* (n682) 559.
[1408A] *Vinmar* (n660A) 1287 citing Michael Furmston (ed) *The Law of Contract* (LexisNexis, 6th ed, 2017) [3.18].
[1408B] Ibid.

included the same exclusive Choice-of-Forum clause,[1408C] were all for the purchase of chemical commodities,[1408D] were all concluded in the same manner – oral negotiations followed by correspondence setting out the key terms,[1408E] and the exclusive Choice-of-Forum clause was not an onerous or unusual term and in fact, could reasonably be expected to part of the contract which is the subject of the dispute in the case.[1408F]

There may be cases, however, where issues concerning the existence of a contract can also be a matter of interpretation. This is especially true when the contractual terms and conditions are brief, thus making it difficult to determine the parties' intention.[1409] For example, the parties may have erroneously referred to a court in a certain jurisdiction in their Choice-of-Forum clause when in fact, no such court exists or the court they intended is known under another name. Did the parties agree to some court or the error indicate an absence in the meeting of the minds? Likewise, because a Choice-of-Forum clause exists only between parties, interpretation may also be needed to determine whether a non-party should be bound by it as well.[1410]

(b) Validity

The question which should be asked here is whether the contract or some of its provisions are valid and enforceable under the applicable law. The validity of a contract may be an issue of form or substance, and such issues may affect either the whole contract or some of its provisions. Formal or extrinsic validity would refer to the formal requirements which need to be complied with, otherwise the contract or certain provisions are considered illegal. This may include contracts being required to be in writing, in a public document, or to be entered in a particular registry. On the other hand, substantive validity, also known as intrinsic or essential validity, is a wider concept and each legal system would have different conceptions of its scope and contents. With insights derived from the approaches in the *Vienna Convention on Contracts for the International Sale of Goods of 1980* ('CISG'),[1411] Drobnig groups the cause of substantial invalidity into four categories: (1) causes of invalidity which compete with remedies of non-performance – these often raise the question of whether these rules affect the validity of contract or rather its non-performance (*eg,* mistakes as to

[1408C] Ibid 1289.
[1408D] Ibid.
[1408E] Ibid.
[1408F] Ibid.
[1409] See Furmston (n1397) 7.
[1410] See, eg, *The Mahkutai* (n337) 77-81.
[1411] *Vienna Convention on Contracts for the International Sale of Goods,* opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) ('CISG').

the quality of goods or as to the seller's title); (2) causes of invalidity which does not compete with remedies of non-performance (*eg,* defects of consent, fraudulent misrepresentation, threat); (3) causes of invalidity in the general area of civil law but outside contract law (*eg,* invalidity, incapacity, lack of authority, immorality and illegality); (4) causes of invalidity which are located in the area of public law (*eg,* public policy, mandatory rules, states interests).[1412] Except for the first group, all of these issues may affect the validity of Choice-of-Forum clauses.

As seen from the four groups, the law which determines the scope and contents of the specific causes of substantial invalidity may come from different areas of the applicable law and not just from contract law. While the first two groups may be determined by contract law, the other areas of civil law (private law) govern the third group like the law on persons (*eg,* legal capacity) while the public law governs the fourth group. Nonetheless, contract law still determines the consequences (*eg,* whether the contract becomes void, voidable, unenforceable, etc.) which would also depend on the cause of invalidity involved. Naturally, each legal system would have differences in understanding these consequences.

In common law, the applicable law or the proper law of the contract determines the validity of a contract, and almost all other contractual issues.[1413] This is primarily the law intended by the parties, either expressly or impliedly, or in the absence thereof, the law which has the closest connection to the transaction.[1414] Common law has assigned the law chosen by the parties as the law which determines almost all issues concerning validity – from formalities, effect of mistake on the subject matter of the contract, defects of consent, effects of fraud to legal capacity. Nonetheless, the forum court draws from the law of the forum to determine whether its mandatory rules, public policy or any state interest would affect the validity of the contract.

Although validity is essentially a legal question, it relies on facts established before the court. This reliance is more compelling when the applicable law is foreign law because the question of validity also becomes a matter of evidence. Notably, the forum law determines how the foreign law would be proven. In *Venetian Macau Ltd v Chen Mei Huan* ('Venetian Macau'), the Hong Kong CFI needed to determine how Macau law would interpret the Choice-of-Forum clause with two apparently contradictory parts, and in effect also determine its validity.[1415] One of the expert

[1412] Ulrich Drobnig, 'Substantive Validity' (1992) 40(3) *American Journal of Comparative Law* 635, 637-643.
[1413] JG Collier, *Conflict of Laws* (Cambridge University Press, 2nd ed, 1994) 185.
[1414] Adrian Briggs, *Private International Law* (Oxford University Press, 2014) 503.
[1415] *Venetian Macau* (n1161) [21]-[30].

witnesses presented argued that the Choice-of-Forum clause contradicted Macau law and thus, the clause is invalid and ineffective.[1416] The other witness, on the other hand, argued otherwise.[1417] The court emphasised that such contradiction would be resolved by interpreting the relevant statute and contract with reference to the expert evidence.[1418] Clearly, this way of resolving the conflict was not done while referring to Macau law. Rather, the court's approach was informed by how common law would approach such situations. Hence, the court favoured the interpretation which upholds the validity of the entire clause.[1419] Rather than reading the second part as invalidating the first, and therefore rendering the entire clause invalid for being contrary to Macau law, the second part should be read as a qualification to the first.[1420]

Validity, as an essentially legal question, highlights the key role of contractual interpretation in the analysis. The way interpretation is done, however, is very much informed by the approaches prevailing in the forum court regardless of the applicable law. The method employed in *Venetian Macau*[1421] clearly shows this. Similarly, in *HBZ Finance*, the five different bills of lading contained the exclusive Choice-of-Forum clause which referred the disputes to the Tokyo courts, to be governed by Japanese law.[1422] However, subsequently stamped on the front page of each bill were sets of clauses which included a submission of disputes to Valparaiso courts and an agreement not to submit their disputes to arbitration unless agreed otherwise.[1423] The Chilean law experts agreed that the purpose of these stamped clauses was to allow the parties to opt out from the requirement under Chilean law which refers disputes to arbitration.[1424] Moreover, also established was the fact that Chilean law does not recognise the choice of foreign court and law.[1425] The Hong Kong court, rather than invalidating the exclusive Choice-of-Forum clause, used the quintessentially common law approach of emphasising the need to reconcile the various parts of the contract.[1426] The court said that the stamped clause would only apply if the action is commenced in Chile.[1427] Hence, the effect was that the stamped clauses and exclusive Choice-of-Forum clause could stand together.[1428] Because the exclusive Choice-of-Forum clause still applied and because no 'strong cause' was

[1416] Ibid [23].
[1417] Ibid.
[1418] Ibid [24].
[1419] Ibid [30].
[1420] Ibid.
[1421] *Venetian Macau* (n1161).
[1422] *HBZ Finance* (n439) [5].
[1423] Ibid [6].
[1424] Ibid [19].
[1425] Ibid [28].
[1426] Ibid [30].
[1427] Ibid [28].
[1428] Ibid [33].

established, the Hong Kong action was stayed.[1429] Notably, the court did not mention how Japanese or Chilean law would have affected the interpretation.

In Malaysia, the validity of Choice-of-Forum clauses in Islamic banking and finance contracts, would generally be governed by common law principles. A possible exception, however, is where a Choice-of-Forum clause is argued to be uncertain under Islamic law, such as to implicate the application of *gharar*, a principle of Islamic law that strikes down provision which is subject to an uncertainty. Rasyid, for example, notes that settlement of future disputes through arbitration is contrary to Islamic principles because '[a] dispute may or may not arise' and that a very long gap may occur between the point of contracting and the actual dispute and during this period, 'either party may lose its zeal and yet would still be legally forced into it with counterproductive consequences.'[1429A] While Rasyid has applied this analysis to arbitration clauses, the similarity of Choice-of-Forum clauses as regards their ability to settle future disputes means that such clauses may also be vulnerable to the principle of *gharar*. So far, however, no case law has addressed this issue or even ruled on whether Islamic law principles like *gharar* may apply to determine the validity of Choice-of-Forum clauses in Islamic banking and finance contracts.

(c) Some Practical Considerations

An important practical consideration for the plaintiff is that his cause of action should arise during the existence of the contract.[1430] Moreover, the challenge to the existence of the Choice-of-Forum clause can be waived such as when the defendant failed to contest the existence of the Choice-of-Forum clause and proceeded to argue based on the merits.[1431] Similarly, the challenge may also be lost when a party raises contradicting positions like when in the same breath a party relies on a clause in the contract while arguing that such contract was not binding at all. [1432]

These practical considerations again show how forum law affects litigation even if the law applicable is foreign law. Rules on causes of action, how arguments are pleaded and whether the court is limited to the arguments raised by the parties, and the failure to raise certain issues (*eg,* not questioning the Choice-of-Forum clause's existence) as amounting to waivers have been analysed

[1429] Ibid [36].
[1429A] Abdul Rasyid, 'Relevance of Islamic Dispute Resolution Processes in Islamic Banking and Finance' (2013) 27(4) *Arab Law Quarterly* 343, 358-9.
[1430] *The 'Kapitan Mezentsev'* [1995] 1 SLR (R) 652, 665 (High Court).
[1431] *Dene Hunt v Gordon William Fisher* (Unreported, Supreme Court of Hong Kong High Court, D Yam J, 4 October 1994).
[1432] Ibid.

through the lens of forum law without referring to the proper law of the contract. This is largely because courts continue to characterise these issues as procedural, even though these issues may be fundamentally related to substantive issues involving existence, validity and interpretation. Furthermore, the role of the applicable law in the resolution of issues like waivers, for example, has hardly been addressed in commentaries.[1433] Regarding waivers, Keyes notes that if the rights which have been waived are founded in the parties' agreements, then the role of the law of the forum in determining whether those rights have been lost becomes less obvious.[1434] She further argues that if waiver of rights under an arbitration agreement are determined by the governing law, by parity of reasoning, the same should also apply to Choice-of-Forum agreements.[1435]

(d) Choice-of-Court Convention

The law of the chosen court determines whether the Choice-of-Forum clause is null and void.[1436] Hence in Singapore, cases which fall within the scope of the *Choice-of-Court Convention*, follow this approach.[1437] Moreover, Choice-of-Forum clauses are required to be in writing, or by any other means of communication which renders information accessible so as to be usable for subsequent reference.[1438] The Hartley-Dogauchi report emphasises that states should not impose any additional other formal requirements under their national law.[1439] In any case, non-compliance with these formal requirements do not *per se* make the Choice-of-Forum clauses invalid but it removes them from the coverage of the *Choice-of-Court Convention*.

2. The Philippines

(a) Existence and Validity of Contracts

The Philippine law of contracts is heavily influenced by the principles of civil law introduced through the Spanish *Civil Code* of 1889, which was the law applicable in the Philippines up until 1949. Hence, in the Philippines, the perfection or birth of a contract – the moment when the contract is deemed to exist – is understood as the moment when the parties come to agree on

[1433] See Mary Keyes, 'Party Autonomy in Dispute Resolution: Implied Choices and Waiver in the Context of Jurisdiction' [2015](58) *Japanese Yearbook of International Law* 223, 242.
[1434] Ibid.
[1435] Ibid 245.
[1436] *Choice-of-Court Convention* (n70) arts 5(1), 6(a).
[1437] *CCAA* (n617) pt 2, ss11(1),12
[1438] *Choice-of-Court Convention* (n70) art 3(c).
[1439] Hartley-Dogauchi Report (n354) 53.

the terms of the contract.[1440] While no specific form is required on how minds should meet to create a contract (hence, it need not be in the form of an offer or acceptance), Article 1318 of the *Civil Code* requires the presence of these three elements for a contract to exist: (a) consent of the contracting parties, (b) object certain which is the subject matter of the contract, and (c) cause (*causa).*[1441] There is a perfection of a contract when there is a meeting of the minds of the parties on each of these requisites.[1442] *Moreno, Jr v Private Management Office* elaborates this further:

> To reach that moment of perfection, the parties must agree on the same thing in the same sense, so that their minds meet as to all the terms….nothing can be left open for further arrangement. So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract, and in fact, there is no contract at all. [1443]

If any of the three essential requisites is absent, this makes the contract non-existent. Examples of non-existent contracts are those which are simulated or fictitious, where the consent was not produced by the concurrence of the offer and the acceptance, and did not pass the stage of generation to the point of perfection, when the object is illegal or outside the 'commerce of man', when there is no cause or consideration, or when the cause is illicit.[1444] A non-existent contract produces no legal effects whatsoever and may not be cured even by ratification of parties.

While the law of another jurisdiction may become the law applicable to a contract, there is good reason to argue that the approach under the Philippine *Civil Code* may still inform the way Philippine courts approach the issue of existence of any contract. For one, the essentiality of the three requirements under Article 1318 has been emphasised in numerous decisions of the Supreme Court.[1445] Even Article 1318 itself mentions no exception. Given this treatment, it therefore appears that the rule is mandatory and should be applicable to all contracts regardless of the applicable law. Hence, as long as the three essential requirements are shown to be present, even though the applicable law gauges the existence of each requirement differently from Philippine law, Philippine courts should be able to recognise these international contracts as existent.

[1440] Arturo Tolentino, *Commentaries and Jurisprudence on the Civil Code of the Philippines* (Central Lawbook Publishing, Inc, 1991) vol 4, 410.
[1441] This is similar to common law's 'consideration' but unlike in common law, even mere 'liberality' in contracts of pure beneficence, is sufficient *causa*; see, eg, *Liguez v Court of Appeals* (1957) 102 Phil 577, 580.
[1442] *Spouses Pen v Spouses Julian* (2016) 778 SCRA 56, 67.
[1443] *Moreno, Jr v Private Management Office* (2006) 507 SCRA 63, 72.
[1444] Tolentino (n1440) 629-30.
[1445] Eg, *Francisco v Herrera* (2002) 392 SCRA 317, 323; *Manzano v Garcia* (2011) 661 SCRA 350, 362; *delos Reyes v Court of Appeals* (1999) 313 SCRA 632, 642; *Allied Banking Corporation v Spouses Villaluz*, GR No 202525, 12 September 2018.

Issues of validity in the Philippines, on the other hand, are usually understood from the standpoint of defects of any of the three essential requirements of the contract, and the type of invalidity the contract suffers depends on the type of defect involved. Hence, a void contract is a contract whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy.[1446] A voidable contract is a contract entered into by parties who are incapable of giving consent or the consent given was vitiated by mistake, violence, intimidation, undue influence or fraud.[1447] Notably, the legal capacity of Filipino contracting parties is always determined by Philippine law.[1448] Meanwhile, unenforceable contracts are those where the formalities, such as the requirements of the statute of frauds in the *Civil Code*, have not been complied with.[1449] Notably, except for contracts which may be void for being contrary to law, morals, good customs, public order or public policy of the Philippines (the classification applies regardless of the applicable law), these classification of defective contracts apply only when Philippine law is the applicable law of the contract.

Furthermore, there is a distinction between formal and substantive validity of contracts in the Philippines. Article 17 of the *Civil Code* states that 'the forms and solemnities of contracts, wills, and other public instruments shall be governed by the laws of the country in which they are executed.' In short, as regards formal validity, the Philippines follows the *lex loci contractus* as the general rule. However, the same article provides an exception – Philippine law applies when the contract is executed before Philippine diplomatic or consular officers in a foreign country.[1450] Further, the formal validity of contracts is subject to '[p]rohibitive laws concerning persons, their acts or property, and those which have, for their object, public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country.'[1451] As discussed in the next chapter, this appears to be among the bases of 'mandatory rules' in the Philippines.[1452]

As regards substantive validity, the Philippine Supreme Court declared in *Philippine Export and Foreign Loan Guarantee Corp v VP Eusebio Construction Inc*[1453] ('Philippine Export') that Philippine

[1446] *Civil Code* (Philippines), art 1409.
[1447] Ibid art 1390.
[1448] Ibid art 15.
[1449] Ibid art 1403.
[1450] Ibid art 17.
[1451] Ibid.
[1452] See *Industrial Personnel & Management Services, Inc (IPAMS) v de Vera* (2016) 785 SCRA 562, 582-3; *Pakistan International Airlines Corp v Ople* (1990) 190 SCRA 90, 99 ('Pakistan Airlines').
[1453] *Philippine Export* (n1381).

courts adopt the principle that 'parties [are allowed] to select the law applicable to their contract, subject to the limitation that it is not against the law, morals, or public policy of the forum and that the chosen law must bear a substantive relationship to the transaction.'[1454] Furthermore, when parties failed to expressly chose the applicable law, the law which 'bear[s] substantial connection to the transaction' determines the applicable law.[1455] This law had also been articulated to be the law which 'has the most significant relationship to the transaction and the parties.'[1456] Likewise, as noted in *Philippine Export,* the chosen law and even the applicable law derived under conflicts analysis are still circumscribed by 'law, morals, or public policy of the forum and that the chosen law must bear a substantive relationship to the transaction.'[1457] Hence, in the Philippines, like in common law countries, the applicable law determines substantive validity.

Nonetheless, if the applicable law is foreign law, its contents should be proven as a matter of fact.[1458] Absent such evidence, the contents of the foreign law shall be presumed to be the same as Philippine law.[1459] Furthermore, courts may encounter difficulty in dealing with foreign law, or may see no need of going through the conflicts process. Hence, in a number of cases involving international commercial contracts, the relevant contract may be analysed from the perspective of Philippine law despite the fact that a foreign law applies.[1460]

The premise of the foregoing analysis, however, is that Philippine courts can recognise Choice-of-Forum clauses as contracts. However, when the Choice-of-Forum clause is seen only as a venue stipulation, the court may resort to a completely procedural approach. This means that issues of existence and validity are determined based on the clause's compliance with the straightforward rule on venue under the Philippine *Rules of Court* – 'parties have validly agreed in writing before the filing of the action on the exclusive venue thereof.'[1461] Furthermore, because of the need to comply with the black letter of this rule, the usual distinction between existence and validity becomes irrelevant.

[1454] Ibid 215.
[1455] Ibid 215.
[1456] Ibid.
[1457] Ibid.
[1458] *Rules of Court* (Philippines), rule 132, s24.
[1459] See *Northwest Orient Airlines, Inc v Court of Appeals* (1995) 241 SCRA 192, 200.
[1460] See, eg, *HSBC* (n240) 335-7; *International Harvester* (n467) 855.
[1461] *Rules of Court* (Philippines), r4, s4(b).

(b) Choice-of-Forum clauses as Contracts?

In the Philippines, Choice-of-Law clauses are recognised as an 'offshoot of the fundamental principle of autonomy of contracts.'[1462] Choice-of-Forum clauses, on the other hand, struggle to be recognised as flowing from the same contractual principle. The most that they have been recognised by Philippine courts so far is that they are venue stipulations under the Philippine *Rules of Court*, and thus, are considered procedural in nature. This characterisation, however, does not necessarily preclude the possibility that Choice-of-Forum clauses, when governed by a foreign applicable law, can be recognised as having contractual characteristics, if not contracts in themselves. Since Choice-of-Law clauses are recognised in the Philippines, as long as they are 'not contrary to law, morals, good customs, public order or public policy' of the Philippines and has 'substantive relationship to the transaction,'[1463] it may be argued that if the validly chosen foreign applicable law characterises the Choice-of-Forum clauses as contracts, these clauses may therefore be regarded as contracts too. Since the foreign law stated in the Choice-of-Law clause determines validity, it follows that the validity of a Choice-of-Forum clause in the same contract shall not be determined by Philippine law. Rather, its validity should be tested against the relevant rules and principles of the foreign applicable law. In that sense, the application of the foreign law in a valid Choice-of-Law clause may allow Philippine courts to recognise Choice-of-Forum clauses as having contractual characteristics, if not contracts in themselves. However, this contractual treatment is just a possibility and no Philippine decision has confirmed this at this point. On the contrary, Philippine case law would show that Philippine courts may refuse to enforce the Choice-of-Forum clause even if the Choice-of-Law clause provided for a foreign law where the Choice-of-Forum clause is recognised as a contract.[1464]

[1462] *Saudia* (n249) 157.
[1463] *Philippine Export* (n1381) 215; *Saudia* (n249) 157.
[1464] *HSBC* (n240) 334.

3. The Doctrine of Separability

(a) Singapore, Hong Kong and Malaysia

The doctrine of separability, which applies to both the Choice-of-Law and Choice-of-Forum clauses,[1465] shields these two clauses from the invalidity of the underlying contract. Hence, the Choice-of-Forum clause can survive even when the underlying contract is found invalid. As such, when both the Choice-of-Law and the Choice-of-Forum clauses are contained in the same clause, and the former has been found invalid, this invalidity does not also render invalid the Choice-of-Forum clause, which is the second half of the same clause. This outcome follows, especially where '… the two parts…did not "hang together"…[but] were only connected by the word "and".'[1465A] Nevertheless, when the Choice-of-Forum clause is 'intimately linked' such as to 'convey any interdependence or contingency' with the invalid Choice-of-Law portion of the same clause, it may also be rendered invalid.[1465B] Furthermore, the doctrine of separability only follows when the Choice-of-Forum clause actually exists. Hence, '[in] situations where there was clearly no concluded contract at all such as where the parties were *ad idem* that there was no contract…or …the plea of *non est factum* [applies], would the choice of law clause [and the Choice-of-Forum] be infected to preclude its applicability altogether.'[1466] When there is no meeting of the minds between parties in the first place, and thus the entire contract, including the Choice-of-Forum clause, has evidently never come into existence, even the doctrine of separability finds no application.

(b) Choice-of-Court Convention

The doctrine of separability has found expression in Article 3 (d) of the *Choice-of-Court Convention*:

> an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

[1465] *PT Selecta* (n376) 743; *Hiromi Okada v Tomohiro Okada* [2019] HKCFI 2310, [38]-[43][46](Court of First Instance); *China Baoli Technologies Holdings Ltd v Orient Equal International Group Ltd* [2017] HKCFI 1047, [100] (Court of First Instance) .
[1465A] *Shanghai Turbo* (n655) 808.
[1465B] Ibid.
[1466] *PT Selecta* (n376) 743.

(c) The Philippines

The Philippines has a similar concept of separability, but it is only applicable to arbitration clauses.[1467] The doctrine has not been extended to Choice-of-Forum clauses because they have not been given a status beyond being venue stipulations.

C. Issues of Interpretation

1. The Challenge of Interpreting International Commercial Contracts in Asia

Interpreting international commercial contracts including the Choice-of-Forum clause is challenging. It may involve not just legal issues (*ie,* how the Choice-of-Forum clause is construed in light of the applicable law), but also factual and other evidentiary issues. Notably, contracts in Asia may not be written in English and may use a different writing system, which highlights the courts' reliance on translators during the evidentiary hearings. Notably, these translators and expert witnesses on foreign law may suggest contrasting or incongruent translations or meanings of Choice-of-Forum clauses. In such situations, how do courts interpret the clauses? This section shows that courts are generally guided by the principle that contracts should be interpreted according to the parties' intention.

However, the task is more complicated in Asia. For example, despite their commercial sophistication, parties to an Asian transaction may still lack a good command of the English language and may not have proper legal advice during drafting, which are made much worse by cultural differences about commercial expectations.[1468] Nevertheless, even with the help of local lawyers, these lawyers may not be familiar with the common law concepts and legal jargons. A strict textual and objective approach may not therefore align with the intention of parties and may lead to unreasonable results.

In most legal systems, courts interpret Choice-of-Forum clauses according to what the parties intended. Courts do this by looking at the language used as well as the surrounding factual matrix.[1469] Hence, if the language of the contract, particularly, the Choice-of-Forum clause shows

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[1467] *Alternative Dispute Resolution Act* (Philippines), app A, art 16(1).
[1468] See McConnaughay (n13) 446.
[1469] See *Orchard Capital* (n655) 532 (Court of Appeal); *PT Bali* (n1294) [12]; *Taiao Aluminium (Taishan) Co Ltd v Maze Aluminium Engineering Co Ltd* [2006] HKCFI 220, [26] (Court of First Instance).

that the parties wanted flexibility in enforcing the terms and the clause was specifically drafted to benefit one of the parties, then the interpretation of the Choice-of-Forum clause should be able to give effect to such an intention.[1470] Consequently, the understanding of the parties of their terms and conditions is crucial. Hence, parties are deemed to have carefully chosen their words and as such, unless otherwise provided, the ordinary meaning of the words used is preferred.[1471]

Notably, ascertaining the party's intention is harder when these Choice-of-Forum clauses are simple or generic. Choice-of-Forum clauses are often treated like other boiler-plate provisions, and therefore often drafted by lawyers and parties without giving much thought as to their meaning and effect.[1472] Briggs observes that '[i]t sometimes appears that by the time they reached the jurisdiction agreement, the drafters were out of time, energy, fresh coffee and clean shirts; and quality of work suffered accordingly.'[1473]As such, based on the language alone, there is unlikely to be any meaningful evidence as to the actual intent of the parties. At this point, the surrounding factual matrix may be helpful in determining the parties' intention. In *PT Bali Hospitality Utama v Mathias Echene*, for example, clause 13 stated that 'parties submit to the jurisdiction of the courts of Denpasar, Bali' without including any word or phrase indicating exclusivity of choice.[1474] Nonetheless, the Hong Kong CFI was convinced that clause 13 exclusively conferred jurisdiction on Balinese courts because everything about the dispute pointed to Bali – the legal relationship between plaintiff and defendant arose from a management agreement of villas in Bali; the plaintiff was incorporated in Indonesia and legally domiciled in Bali; the chosen law was Indonesian law.[1475] 'That exclusiveness is so obvious in all of these circumstances that it did not require the parties to go any further than they did in Clause 13.'[1476]

Parties' intention matters, and courts should refrain from putting any special meaning to the words and phrases other than those stated in the contract. Hence, the meaning of words in a negotiated contract should be no different than the meaning of the same words in standardised contracts. In *Abdul Rashid*, the Singapore High Court emphasised that a non-exclusive Choice-of-Forum clause does not morph into a 'most appropriate' Choice-of-Forum clause (which has the effect akin to exclusive clauses) simply because the contract is negotiated.[1477]

[1470] See *Orchard Capital* (n655) 532-3.
[1471] *Abdul Rashid* (n647) 1054.
[1472] See Briggs (n39) 112.
[1473] Ibid.
[1474] *PT Bali* (n1294) [3].
[1475] Ibid [12].
[1476] Ibid.
[1477] Abdul Rashid (n647) 1054.

Furthermore, all discussions or negotiations between the parties leading up to the contract are irrelevant and should be ignored in interpreting the clause.[1478] This is because once the contract has been concluded, only the words in the contract matter, and parties should not be allowed to vary its terms. The rules of evidence echo this prohibition. In the Philippines, for instance, the parol evidence rule prohibits parties from presenting evidence which will vary the written terms of a contract, except when there is intrinsic ambiguity, failure to express true intention, the contract's validity is questioned, and other terms were agreed after executing the contract.[1479] Being procedural in nature, in the Philippines, the rule may be applied regardless of the applicable law. Notably, the parol evidence rule is founded in the English common law[1480] and has been adopted in Singapore,[1481] Hong Kong[1482] and Malaysia.[1483] Nonetheless, because Singapore is party to the *CISG*, the parol evidence rule do not apply to contracts covered by this treaty.[1484]

The law applicable to the contract provides the canons of interpretation and other rules to be used in interpreting Choice-of-Forum clauses. In *The 'Jian He'*, the Singapore Court of Appeal recognised that since the governing law is Chinese law, such law governs the interpretation of the Choice-of-Forum clause.[1485] Since no evidence, however, was presented to establish the difference between the Chinese rules of interpretation from those in Singapore, the court proceeded to interpret the Choice-of-Forum clause using the Singaporean interpretation rules.[1486] This recourse to the forum court's interpretation rules is notably common. Hence, in practical terms, as the Singapore Court of Appeal observed in *Orchard Capital*, 'the *lex fori* would apply to questions of interpretation by default in most cases because of the presumption of similarity.'[1487] This situation also arises when the foreign law is not pleaded.

Notably, the forum court's determination of the contents of the applicable law (*eg*, whether it also includes the procedural law of the chosen law or just its substantive or internal law) has important implications on the interpretation of the Choice-of-Forum clause. In *Abdul Rashid,* the

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[1478] See *Ko Lai Kuen* (n1239) [20].
[1479] *Rules of Court* (Philippines), r130, s9.
[1480] Eg, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913 ('Investors Compensation'); *Prenn v Simmonds* [1971] 1 WLR 1381, 1383, 1385.
[1481] See *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR(R) 509, 518 (High Court).
[1482] See *Nanyang Commercial Bank Ltd v Fung Piu* [1999] HKCFI 420, [8] (Court of First Instance).
[1483] See *Evidence Act 1950* (Malaysia) ss91-92.
[1484] *CISG*, art 11.
[1485] *The 'Jian He'* (n658) 437.
[1486] Ibid; see also *Intergraph Cadworx & Analysis Solutions, Inc v EDS Asia Sdn Bhd* [2013] 8 MLJ 729, 735-736 (High Court of Kuala Lumpur).
[1487] *Orchard Capital* (n655) 532.

defendant argued that since the Choice-of-Law clause stipulated English law, the *onus* lies with the plaintiff to establish a strong case why a stay should not be granted in favour of Queensland, the jurisdiction named in the non-exclusive Choice-of-Forum clause.[1488] In contrast, the plaintiff argued that while the Choice-of-Law clause stipulated English law, the applicable test should be *Spiliada* as applied in Singapore.[1489] The Singapore High Court agreed with the plaintiff and emphasised that a stay based on *forum non conveniens* is a matter of procedure, thus, Singaporean law applies.[1490] Hence, the court, in effect, excluded the procedural law of the chosen applicable law. Therefore, English law governed the construction of the non-exclusive Choice-of-Forum clause, while Singaporean law determined the effect of such a construction.[1491]

The commercial nature of the relationship between parties is an important interpretation tool for the courts.[1492] For instance, because one of the most apparent intentions of the parties when they contract in the context of business is to give life to their business transactions, courts unsurprisingly prefer interpretations which uphold the validity of contracts, provided no clear ground for invalidating the contracts is present.[1493] Courts also declare that unless otherwise provided, commercially minded parties would want all disputes arising from their relationship to be decided by the same tribunal or court, and avoid disputes being resolved by different tribunals or courts.[1494] This is especially useful in interrelated agreements. Similarly, the business or industry one of the parties is engaged in can provide insight on what the parties intended, and therefore, inform the interpretation of the Choice-of-Forum clause.[1495]

One important implication of interpretations is that while the litigation is between certain parties, the interpretation adopted by the court can bind those who are not parties to the litigation.[1496] The interpretation can also bind third-party beneficiaries and those who will subsequently step into the rights of any of the contractual parties (*ie,* successors-in-interest). The same interpretation can also bind parties in other similar agreements, whose contents are the same as the contract being litigated. This is particularly true in situations where a party adopts standardised agreements vis-à-vis its many patrons or customers, such as in cruise ships or bank

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1488 *Abdul Rashid* (n647) 1045.
1489 Ibid.
1490 Ibid 1047.
1491 Ibid.
1492 See *Wynn Las Vegas, LLC v Mong Henry* [2009] HKCFI 501, [17] (Court of First Instance) ('Wynn-Mong').
1493 See eg, *William Co* (n319) 381-2; *Palace Hotel* (n1297) 644; *Shanghai Turbo* (n665) 809.
1494 *CPC Construction Hong Kong Ltd v Harvest Engineering (HK) Ltd* [2015] HKCFI 1173, [55] (Court of First Instance).
1495 See *Wynn-Mong* (n1492) [17]; *Star Cruises* (n1051) [53].
1496 Black (n349) 29.

loans. Standardised terms, interpreted in one case, may get the same meaning when another case comes up involving a similarly-worded contract.

2. Singapore, Hong Kong and Malaysia

The English common law adopts an objective approach to interpretation, with emphasis on the ordinary meaning of the text. Over the years, however, the strict objective approach has slowly evolved into an approach which requires courts to draw the objective meaning of the words in light of the relevant surrounding circumstances. 'Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'[1497]

(a) Interpretation and Procedural Law

Given that in principle, the applicable law determines the rules of interpretation, when the applicable law is foreign law, Singapore, Hong Kong and Malaysia require that the contents of such foreign law should be proven in evidence. Specifically, the interpretation rules under the applicable foreign law must be proven, otherwise, the forum court will assume that they are no different from the forum rules.[1498] Particularly, when the issue requires a specific question of construction, like whether the applicable law would interpret the clause as either exclusive or non-exclusive, and the same has not been proven sufficiently in evidence, the court may regard the specific foreign rule to have the same contents as that in the forum.[1499] To prove the foreign law's contents, the evidence which may be presented can range from testimony or affidavits of expert witnesses,[1500] written legal opinions,[1501]an agreement among the all parties' foreign law experts on the contents of the foreign law,[1502] and letters from foreign lawyers.[1503] Nonetheless, when parties provide expert evidence on how the Choice-of-Forum clause would be interpreted under the

[1497] *Investors Compensation* (n1480) 912.
[1498] *The 'Jian He'* (n658) 437; *Yu Lap Man* (n455) 730-1; *Winnitex Investment Co Ltd v Oxford Products (International) Ltd* [2004] 4 HKC 660, 678 (District Court); *Vander Limited v P&O Nedlloyd BV* [1998] HKCFI 473, [15] (Court of First Instance) ('Vander').
[1499] *P T Jaya* (n667) [62]-[63]; *Star Cruises* (n1051) [23]-[24]; *Wang* (n929) [33].
[1500] *Venetian Macau* (n1161) [24].
[1501] *P T Jaya* (n667) [37].
[1502] *Lammas* (n827) [37].
[1503] *Yu Lap Man* (n455) 731.

foreign law, such interpretation does not necessarily bind the forum court.[1504] The court, however, would still interpret the clause with reference to the expert evidence.[1505]

There may be differences in the expert evidence, and in such situations, the judge has to resolve these differences if he can.[1506] Otherwise, if there is so much inconsistency or lack of clarity based on the evidence presented, the court may declare that the foreign law has not been proven sufficiently and therefore consider the foreign rules to be the same as the forum rules. Nevertheless, in resolving conflicting expert evidence, the court would consider the expert's independence (*ie,* as an expert intending to assist the court as to the law),[1507] years of practice in the foreign jurisdiction,[1508] particular expertise in the relevant area of foreign law, and the cogency of the delivered legal opinion.[1509] Furthermore, if the other party has accepted the translation presented by the opposing party as accurate, without any objection, this admission would preclude him from contesting and proposing a contrary translation of a Choice-of-Forum clause written in a foreign language or a different writing system.[1510]

Sometimes, the Choice-of-Forum clause uses words which require presentation of evidence before the court can interpret it fully. In *The 'Botic,'* the parties chose to have their dispute settled in the carrier's 'principal place of business.'[1511] Since there was uncertainty as to who the carrier was,[1512] the court needed to know the carrier's identity before interpreting the phrase, 'principal place of business.'[1513] In this case, the bill of lading did not show the name of the carrier nor did it show the place where the carrier carried on business.[1514] Hence, the court noted the plaintiffs' process of finding out the carrier's identity which eventually led to a firm being instructed to accept service for the defendants.[1515] Eventually, the defendants filed an application for stay alleging that the carrier's principal place of business is Split, Croatia.[1516] Their allegation was supported by affidavits and documents showing that a certain entity, 'Santa Fe Shipping Co of Liberia' was the owner of the vessel; that Santa Fe was a Liberian company but was not doing

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[1504] *Venetian Macau* (n1161) [24].
[1505] *Mashreq* (n844) [26].
[1506] *Lammas* (n827) [16].
[1507] *Lammas* (n827) [17].
[1508] See *Wynn-Mong* (n1492)[16].
[1509] See Ibid.
[1510] See *Rickshaw* (n454) 855.
[1511] *The 'Botic'* (n658) 496.
[1512] Ibid 496-7.
[1513] Ibid 496.
[1514] Ibid.
[1515] Ibid 496-7.
[1516] Ibid 497.

business there; that its principal place of business was a certain address in Split, Croatia; and that all its officers were nationals and residents of Croatia.[1517] Hence, the defendants argued that the phrase 'principal place of business' in the Choice-of-Forum clause should be interpreted to mean Split, Croatia.[1518] The High Court did not comment on whether the plaintiffs contested the evidence presented by the defendants. Nonetheless, the court accepted the proposed interpretation, and stayed the Singapore proceedings.[1519]

Similarly, in *Mashreq Asia Ltd v Furness Logistics (HK) Ltd*, the Hong Kong CFI also needed to determine the carrier's identity to properly interpret the Choice-of-Forum clause.[1520] In that case, while the court noted that an admission was made in a parallel case in the Netherlands, it refused to recognise such an admission because Hong Kong courts are barred from giving effect to admissions made in a foreign court.[1521] Instead, the court considered the defendant a carrier because it 'established a good arguable case that the conditions of the carriage that undoubtedly was effected were governed by the conditions upon the reverse of the bill of lading.'[1522] Consequently, the court said that the exclusive foreign jurisdiction clause bites in terms of the legal relationship between parties, and the defendant should be able to benefit from the exclusive Choice-of-Forum clause in favour of Dutch courts.[1523] In short, the court established the defendant as a carrier by looking at the other provisions of the same contract and how it satisfied these conditions to be regarded as such.

Necessarily, the evidence to be presented should coincide with the issues raised. Hence, even when the dispute involves a transaction composed of several contracts, parties may be barred from presenting evidence on other contracts when only issues of certain contracts are brought before the court.[1524]

(b) Lost in Translation

Translation issues are expected to occur in Asia. In Singapore, Hong Kong and Malaysia, where courts use English (in Malaysia, English is used along with the official language, *Bahasa*

[1517] Ibid.
[1518] Ibid.
[1519] Ibid 502.
[1520] *Mashreq* (n844) 325-6; also see *The Griesheim* (n336).
[1521] *Mashreq* (n844) 326.
[1522] Ibid.
[1523] Ibid.
[1524] *Xu Ziming* [2014] HKCFI 2315, [10] (Court of First Instance).

Malaysia), residents may speak and contract using the various local languages. They may even write their contracts using a different writing system. Notably, in Hong Kong, translation issues have become a common component of Choice-of-Forum clause disputes when one of the parties is from Mainland China, and the contract is in Chinese or has a Chinese-language counterpart.

In *Yu Lap Man v Good First Investment Ltd*, the dispute involved identical Choice-of-Forum clauses found in two agreements, with both written in Chinese.[1525] Two English translations were obtained by the parties, with slight differences.[1526] The first translation read, 'All disputes arising hereunder shall be subject to the jurisdiction of the Courts in the People's Republic of China…'; while the second read, '…all disputes are subject to the jurisdiction of the Courts in the [PRC].'[1527] The court translator certified both translations but because of the differences, the court asked him to clarify the difference in translation.[1528] The translator admitted that the clause is capable of both translations but later admitted that the Chinese character does not connote the more assertive 'shall be.'[1529] Hence, the clause should translate as 'all disputes are subject,'[1530] and therefore, non-exclusive.[1531] The judge, who was a bilingual speaker, accepted the reasons of the translator and adopted this translation.[1532] In effect, the personal knowledge of the local language by the judge resolved the differences in translation.[1533]

The *Yu Lap Man* case was appealed. In the Court of Appeal, the defendant argued that since the parties were not given proper legal advice during the drafting of the clause, the court should have adopted a common sense understanding and interpreted the clause to mean that the parties wish to exclusively submit to the jurisdiction of Chinese courts.[1534] The court, however, disagreed and stressed that lack of proper legal advice during the drafting of the clause is an insignificant consideration.[1535] The court instead noted that both parties have strong Hong Kong connections and 'if a dispute arose on any other means than one specifically relating to the parcel

[1525] *Yu Lap Man* (n455) 729.
[1526] Ibid.
[1527] Ibid.
[1528] Ibid.
[1529] Ibid 730.
[1530] Ibid.
[1531] Ibid 732-3.
[1532] Ibid 730.
[1533] See also *Tianjin Yufenglong Asset Management Co, Ltd v Ho Kin Wa* [2019] HKCFI 556, [21] (Court of First Instance) ('Tianjin').
[1534] *Yu Lap Man* [1999] 1 HKC 622, 625 (Court of Appeal).
[1535] Ibid.

of land in Xiamen, it would make obvious sense for the litigation to be conducted in Hong Kong.'[1536]

In *Bank of China Ltd v Yang Fan,* the Hong Kong CFI needed to interpret as either exclusive or non-exclusive the two similarly-worded Choice-of-Forum clauses in two contracts written in Chinese. [1537] The dispute came about because of two inconsistent translations.[1538] The court, however, observed that the ordinary meaning of the relevant clauses in Chinese would generally be non-exclusive rather than exclusive.[1539] It declared, nevertheless, that this observation is only *prima facie* since parties can give the phrase a special meaning, and that ultimately, the parties' intention should control the interpretation.[1540] To resolve the dispute, the court referred to the principles of construction in the English case *Investors Compensation Scheme Ltd and West Bromwich Building Society*[1541] which it declared pertinent to the case.[1542] The application of these English common law principles appears misplaced, however, considering that the court already noted that Chinese law applies.[1543] Nonetheless, with the English rules in mind, the court looked at the different dispute resolution procedures envisioned in the clause, *ie,* to resolve disputes first through mediation or negotiation and only upon failing to do so, by litigation.[1544] The court observed that based on this scenario, the parties appeared to limit their option to instituting legal proceedings in China should mediation fail.[1545] Hence, ultimately, the Chinese phrase should be interpreted as having the imperative meaning 'shall,' thus making the clauses exclusive.[1546]

In *Rich Village*, the recorder translated the opening line of the Chinese-language Choice-of-Forum clause as 'matters not covered in the Agreement' and opined that the nature of the operative words in the said clause is assertive rather than permissive.[1547] He admitted, however, that this interpretation led to an unreasonable result as the order by the Ningbo court, the designated jurisdiction, cannot be enforced in Hong Kong.[1548] To properly construe the clause, the Hong Kong Court of Appeal looked at the agreement in totality while considering the relevant

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[1536] Ibid.
[1537] *Yang Fan* (n931A) [28]-[31].
[1538] Ibid [28].
[1539] Ibid [31].
[1540] Ibid [31].
[1541] *Investors Compensation* (n1480).
[1542] Yang Fan (n931A) [32].
[1543] Ibid [28].
[1544] Ibid [34].
[1545] Ibid.
[1546] Ibid.
[1547] *Rich Village* (n369) [12].
[1548] Ibid

factual matrix of the transaction,[1549] and given the importance of an exclusive Choice-of-Forum clause, [1550] it noticed the conspicuous absence in the Choice-of-Forum clause of certain Chinese phrases which would mean 'should, shall, must, etc.', but were found in other parts of the agreement. [1551] Furthermore, the court noted that reading the clause as non-exclusive partially addressed the anomaly – 'in relation to those provided for in the agreement, there is no jurisdiction clause at all; in relation to those not provided for in the agreement, they are covered by a non-exclusive clause.'[1552] Moreover, this interpretation also made sense given that 'the most natural and convenient forum for an action to enforce obligations for the transfer and buy back of the Rich City shares must be Hong Kong, these being shares of a Hong Kong company.'[1553] Hence, the court held the Choice-of-Forum clause as non-exclusive.[1554]

(c) Meaning of Words and Phrases

(i) Identifying Choice-of-Forum Clauses

The words chosen matter. Hence, when a clause lacks the words usually associated with a Choice-of-Forum clause such as 'disputes' and only includes 'claims,' its nature as Choice-of-Forum clause may be doubtful. In *The Sinar Mas,* the defendant asked for a stay pursuant to clause 17, which stated, 'Claims. Any claims that may arise hereunder must be made at the port of delivery for determination and settlement at that port only….'[1555] Referring to the Shorter Oxford Dictionary to determine the ordinary meaning of the word 'claims,' the Malaysian court concluded that the word 'claims,' in the context of clause 17, does not amount to litigation.[1556] 'It is confined to "claims" pure and simple as, for example, where a consignee wishes to claim for the goods under the Bill of Lading, then it must be done only in Kuching, which is the port of delivery.'[1557] Hence, clause 17 was not a jurisdiction clause.[1558]

In *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd*, the clause - 'In the event of loss or damages which may involve a claim under this insurance, immediate notice thereof and application

[1549] Ibid [16].
[1550] Ibid [17].
[1551] Ibid.
[1552] Ibid [19].
[1553] Ibid [23].
[1554] Ibid [26].
[1555] *The Sinar Mas* [1982] 1 MLJ 279, 279 (OCJ Kuala Lumpur).
[1556] Ibid.
[1557] Ibid.
[1558] Ibid.

for survey should be given to: Survey Settling Agents…Tuticorin' – was held to refer only to the initial stages in processing a claim and not to filing a claim or commencing litigation in the courts in India.[1559] The best interpretation, according to the Singapore Court of Appeal, is to construe it as a payment clause which only indicates a place of payment, and thus incapable of limiting the processing of a claim to India or Singapore, and determine the proper forum for the dispute.[1560]

In *Golden Shore*, the defendant argued that the sentence – 'Any claims that may arise hereunder must be made at the port of delivery for determination and settlement at that port only' – is not an exclusive Choice-of-Forum clause but rather just a provision for the place of notification and making of a claim.[1561] The court disagreed after construing 'claims' and 'determination' as referring to suits and disputes.[1562] According to the court, '[a] claim which is not met becomes a dispute which would require determination.'[1563] Hence, the clause is an exclusive Choice-of-Forum clause.[1564]

(ii) Exclusive and Non-Exclusive

Usually, whether a Choice-of-Forum clause is exclusive would depend on the words indicative of exclusivity. Words and phrases like 'only', 'exclusive', 'to the exclusion', *etc* may indicate that the clause is an exclusive Choice-of-Forum clause. The courts have been consistent, however, in emphasising that the word 'exclusive' is not necessary to establish exclusivity.[1565] Ultimately, the 'the true question is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction….'[1566] The burden of establishing its nature as an exclusive Choice-of-Forum clause lies with the party asserting its exclusivity.[1567]

In *Yu Lap Man*, the Choice-of-Forum clause, which was discussed in the previous section, did not contain the word 'exclusive' but the defendant argued that the clause is exclusive because the phrases 'subject to,' and '[b]oth parties agree' were included and that, it referred to Chinese

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[1559] *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1997] 3 SLR (R) 363, 371-2 (Court of Appeal) ('Oriental Insurance').
[1560] Ibid 372.
[1561] *Golden Shore* (n682) 11.
[1562] Ibid.
[1563] Ibid 15.
[1564] Ibid 16.
[1565] See *Yu Lap Man* (n455) 732.
[1566] *Wang* (n929) [29]; see also *T&K Electronics* (n1112); *Vander* (n1498) [10].
[1567] See *Multi-Top* (n1172) [37].

mainland law as the governing law.[1568] The court disagreed because 'subject to' does not necessarily connote exclusivity.[1569] Furthermore, '[b]oth parties agree' only meant agreement by both parties like in every contractual term.[1570] Moreover, the reference to Chinese law only meant that the parties agreed to Chinese law, but being governed by Chinese Law did not make the Choice-of-Forum clause, exclusive.[1571] When this case was appealed, the Court of Appeal confirmed this interpretation.[1572]

In *Vander Limited v P&O Nedlloyd BV*, the Hong Kong CFI found a clause exclusive because the words 'all claims' and 'shall' are found together in the Choice-of-Forum clause.[1573] Furthermore, the court noted that the phrase 'no other court shall have jurisdiction… unless the Carrier appeals…' also supported this interpretation.[1574] Hence, the court interpreted the clause to mean that no other court except those in the Netherlands should have jurisdiction over the disputes between parties.[1575] Moreover, the use of the same Chinese character in other parts of the contract to express mandatory obligations meant that the same mandatory meaning was intended for the same Chinese character in the Choice-of-Forum clause.[1576]

In contrast, the Hong Kong CFI in *Multi-Top*, found the relatively simple clause – 'This contract is settled under German (law). Legal domicile is Goettingen Germany' – non-exclusive because '[t]he wordings used is non-assertive of exclusive jurisdiction.'[1577] Similarly, the Singapore High Court in *PT Bank Bali v Santosa Widjaja* interpreted the choice of domicile provision in the Indonesian language – 'That in respect of this agreement and all its consequences…the guarantor elects as the general and permanent legal domicile at the Registry of District Court at West Jakarta' – as non-exclusive because while the Jakarta court was identified, it did not say that courts outside Indonesia will not have jurisdiction.[1578] Similarly, the use of the Chinese character which means 'absolute' to qualify 'jurisdiction' does not necessarily make the clause exclusive.[1579] 'The word "absolute" refers to the extent or scope of the jurisdiction rather than its exclusivity.'[1580]

[1568] *Yu Lap Man* (n455) 731.
[1569] Ibid 732.
[1570] Ibid.
[1571] Ibid 732-3.
[1572] *Yu Lap Man* (n1534) 628.
[1573] *Vander* (n1498) [11].
[1574] Ibid.
[1575] Ibid [15].
[1576] *Tianjin* (n1533) [23].
[1577] Multi-Top (n1172) [36]-[37].
[1578] *PT Bank Bali v Santosa Widjaja* [1997] SGHC 142, [12] (High Court).
[1579] *Chen* (n892) [39].
[1580] Ibid.

Determining whether a Choice-of-Forum clause is exclusive becomes more difficult when parties have stipulated for different parallel processes or sets of rules in resolving disputes. In *Chan Chi Keung v Delmas Hong Kong Ltd* ('Chan'), the Hong Kong CFI needed to interpret a relatively complex clause which stated:

> Any claim or dispute against the Carrier…shall be governed, for the maritime part of the carriage either by….and, for the nonmaritime part of the carriage either by the provisions contained in any International Convention or National Law compulsorily applicable, or by the French Law applicable to the means of transport utilized and shall be determined in France by the "Tribunal de Commerce du Havre".[1581]

The Hong Kong CFI considered the clause exclusive 'whereby the parties the parties have agreed that any claim or dispute against the defendant as carrier shall be determined in France by the "Tribunal de Commerce du Havre."'[1582] To reach this conclusion, the court had to ask– '(1) what is it that "shall be governed"? and (2) what is it that "shall be determined"?'.[1583] Based on the plain reading of the clause, the court said that the answer to both questions must be 'any claim or dispute against the Carrier arising under this Bill of Lading.'[1584] Hence, the clause was exclusive.[1585]

At the other end are non-exclusive Choice-of-Forum clauses which are usually identifiable with the use of words and phrases like 'non-exclusive,' 'proceedings in any other jurisdictions,' 'without limiting the right to file in other courts.' The idea is that the word or phrase should make the filing of an action in the named jurisdiction optional or permissive. In *Ko Lai Kuen v Li Tak Ming*, the defendant asked the Hong Kong CFI to interpret as exclusive the Choice-of-Forum clause which stated:

> 11.3 The Customer irrevocably and unconditionally submits to the jurisdiction of the courts of Indonesia to settle any dispute arising out of or in connection with this Agreement, and hereby agrees that any legal action or proceedings arising out of or in connection with this Agreement may be brought in those courts. Nothing in the foregoing shall however limit the Company [i.e.3rd defendant].[1586]

The defendant argued that the words 'irrevocably and unconditionally submits to the jurisdiction of the courts of Indonesia' could only mean exclusivity. The Hong Kong CFI disagreed and pinpointed the inclusion of the phrase 'may be brought in those courts' found in other parts of

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[1581] *Chan Chi* (n1189) 33.
[1582] Ibid 34.
[1583] Ibid.
[1584] Ibid.
[1585] Ibid.
[1586] *Ko Lai* (n1239) [16].

the clause. According to the court, given the non-exclusive meaning of the phrase and the limitation in the last sentence which means that the company may litigate in some other jurisdiction other than Indonesian courts, the Choice-of-Forum clause was non-exclusive.

Not all non-exclusive clauses have the same effects, in which case, words and phrases are also helpful in guiding courts determine their specific effects. In *Abdul Rashid*, the Singapore High Court determined whether the phrase 'irrevocably submit' in the non-exclusive Choice-of-Forum clause added anything or varied the meaning of the word 'non-exclusive.'[1587] The court noted that the word 'irrevocably' qualifies 'submit' but not the adjective, 'non-exclusive.'[1588] Hence no special meaning can be given to the word 'non-exclusive' other than its ordinary meaning.[1589] In short, based on the language of the clause, it was not transformed into a 'most appropriate jurisdiction' clause.[1590]

In *Ho Siu Pui v Yue Sheng Finance Ltd*, the Hong Kong Court of Appeal was required to interpret a curiously-worded Choice-of-Forum clause in the guarantee agreement, to wit:

> The laws of Hong Kong or the laws of the People's Republic of China are applicable to the formation…interpretation and the resolution of dispute…these matters are protected by the laws of both places. In the event of a dispute, Party A [i.e. Yue Sheng] has the right to choose to resolve the dispute via legal channel under the laws of Hong Kong or … People's Republic of China. [1591]

Yue, the defendant, first argued that the clause was not a Choice-of-Forum clause but a Choice-of-Law clause.[1592] The court dismissed this argument because the second sentence in the clause specifically referred to a 'legal channel' under either Hong Kong or Chinese law, which according to the court implies resort to either Hong Kong or China courts.[1593] Second, Yue argued that under the clause, he has the option to choose the forum but not Ho, the plaintiff in the Hong Kong action.[1594] The court again disagreed and stressed that the clause clearly provided that 'these matters' (*ie,* disputes arising from the guarantee agreement) were protected by the laws of both places.[1595] 'It would be idle to suggest that Hong Kong law and the jurisdiction of the Hong Kong

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[1587] *Abdul Rashid* (n647) 1055-6.
[1588] Ibid 1056.
[1589] Ibid 1055-6.
[1590] Ibid 1056.
[1591] *Ho Siu Pui v Yue Sheng Finance Ltd* [2003] 1 HKC 621, 629 (Court of Appeal).
[1592] Ibid 630.
[1593] Ibid.
[1594] Ibid.
[1595] Ibid.

courts can be excluded from the other party…at the whim of Yue Sheng.'[1596] Likewise, the court emphasised that since Ho was not a party to the Chinese action previously filed by Yue, the latter's right to choose the forum had not arisen against the former, who can therefore still exercise his right to choose the forum.[1597]

In *Citibank*, the asymmetric Choice-of-Forum clause stated that the parties irrevocably submit to the non-exclusive jurisdiction of New York state and federal courts but the plaintiff Citibank had the right 'to commence any legal action or proceeding in any appropriate jurisdiction including without limitation…Indonesia.'[1598] Furthermore, the clause stated '[w]ithout limiting the foregoing, the [defendant] agrees that [Citibank] may at its option submit any dispute to any other District Court or to District Court where the [defendant]'s Deed of Establishment is registered or any court in Indonesia or elsewhere having jurisdiction over the [defendant's] assets.'[1599] The Singapore High Court interpreted the clause as conferring on Citibank a right to sue based on the location of the defendant's assets.[1600] Since the defendant had assets in Singapore, Citibank had the right to file an action in Singapore.[1601] The court noted that the clause also effectively limited the relative weight of other factors (*eg*, convenience factors, defendant's Indonesian nationality) and even the fact that the dispute's subject matter has tenuous connection with Singapore.[1602] Applying *Baiduri,*[1603] the court concluded that the defendant failed to establish strong cause warranting the grant of a stay.[1604]

(iii) Ordinary and Special Meaning

Courts stress that words and phrases be given their ordinary meaning unless otherwise provided or intended by the parties. The ordinary meaning is also referred as the 'plain meaning,' which is often the meaning attributed by an ordinary reasonable person. In *The 'Jin Hui 588',* the Hong Kong CFI interpreted the Choice-of-Forum clause – 'All disputes arising under and in connection with this Bill of Lading shall be determined by the Court in the Mainland of People's

[1596] Ibid.
[1597] Ibid.
[1598] *Citibank* (n682) 471-2.
[1599] Ibid 471-2.
[1600] Ibid 472.
[1601] Ibid.
[1602] Ibid.
[1603] *Baiduri* (n232).
[1604] *Citibank* (n682) 474.

Republic of China.'[1605] – as non-exclusive,[1606] after noting that the proposed 'exclusivity' of the clause was not obvious at all. Further, the court said that it was difficult to see the logic of a Hong Kong company requiring a Hong Kong shipper to bring litigation in the Chinese courts 'irrespective of whether such a PRC forum is appropriate, convenient or relevant to the disputes in question' nor the Hong Kong shipper agreeing to such choice.[1607] Hence, 'this court is not satisfied it is so obvious that it goes without saying [the Choice-of-Forum clause] is an exclusive jurisdiction clause.'[1608]

When a contract confers special meaning on a provision, this is usually done by explicitly defining certain words or phrases in the contract or provision itself. Nonetheless, parties may also implicitly confer such special meaning based on the overall effect of the words and phrases they used. In *Sun-Line (Management) Ltd v Canpotex Shipping Services Ltd*, Canpotex argued that the phrase 'this agreement may be made a rule of the court'[1609] implied submission of the judgment debtors to the jurisdiction of the English courts.[1610] The Singapore High Court disagreed by noting that the dispute resolution clause clearly stated arbitration in London, and nothing more.[1611] Specifically, the phrase 'rule of the court' did not mean 'rules of the English courts' but 'rules of the arbitration proceedings.'[1612] The court, in short, deviated from the ordinary meaning of the word 'court' and conferred a different meaning to such word, *ie*, arbitration proceedings. This approach may have resulted from the overwhelming references to arbitration and its elements (*eg,* arbitrators, award) in the clause.[1613] Furthermore, other than the phrase 'rule of the court', there were no explicit references to courts, or presence of words associated with litigation. Hence, reading 'rule of the court' as conferring jurisdiction on English courts would have deviated from the general nature of the dispute resolution clause, which was an arbitration clause.

In some instances, the court proceeds with interpretation by looking for alternative words which parties would have used if they intended a different meaning. For example, in *OCBC Capital Investment Asia Ltd v Wong Hua Choon*, the non-exclusive Choice-of-Forum clause included a waiver of the objection that the proceedings have been brought in an inconvenient forum.[1614] The two-

[1605] *The 'Jin Hui 588'* (n1245) [6].
[1606] Ibid [22].
[1607] Ibid [20].
[1608] Ibid.
[1609] *Sun-Line (Management) Ltd v Canpotex Shipping Services Ltd* [1985-1986] SLR (R) 695, 697(High Court).
[1610] Ibid 699.
[1611] Ibid 703.
[1612] Ibid.
[1613] See Ibid 697.
[1614] *OCBC Capital* (n437) 908.

part clause was governed by Malaysian law and conferred non-exclusive jurisdiction on Malaysian courts.[1615] The issue was whether this waiver to object on *forum non conveniens* extended to cases filed in courts outside Malaysia, including the current Singaporean action. The Singapore High Court narrowly construed the waiver's scope by interpreting the phrase, '[p]roceedings in any court' to mean proceedings in any court in Malaysia only.[1616] The court said that if the parties had intended to extend the waiver to actions outside Malaysia, they should have used the word, 'jurisdiction' instead of court.[1617] Notably, the court observed that parties used the word 'jurisdiction' in the second paragraph of the same Choice-of-Forum clause where the plaintiff was given the right file '[p]roceedings in any other jurisdictions.'[1618] According to the court, this use of different words implied that parties intended different meanings for 'court' and 'jurisdiction.'[1619] Hence, the defendant could still validly raise objections based on *forum non conveniens* in the Singaporean action.[1620]

(iv) To Harmonise and Clarify the Various Parts

Interpretation is an important tool to harmonise and clarify contradictory or ambiguous portions of the underlying contract or the Choice-of-Forum clause. [1621] In *Shanghai Turbo,* the Singapore Court of Appeal provided an authoritative interpretation of the word 'submit' and the part of the clause naming the two non-exclusive fora[1621A] – '…and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People's Republic of China.'[1621B] Finding the clause not 'too ambiguous to be enforceable,'[1621C] the court said that the parties must have meant submitting to the non-exclusive jurisdiction of both Singapore and China, 'and not that they would submit to the non-exclusive jurisdiction of the forum where the claim was subsequently brought.'[1621D] This is because the parties 'could not have known in advance where the claim will be brought [thus,] this could only mean that the parties submitted to the jurisdiction

[1615] Ibid.
[1616] Ibid 909-10.
[1617] Ibid 909.
[1618] Ibid 909-10.
[1619] Ibid.
[1620] Ibid 910.
[1621] See *Venetian Macau* (n1161)[24]; *HBZ Finance* (n439) [30]; *Habib Finance International Limited v APL Co Pte Ltd* [2001] HKCFI 51, [8] (Court of First Instance).
[1621A] *Shanghai Turbo* (n655) 809
[1621B] Ibid 788.
[1621C] Ibid 809.
[1621D] Ibid 809-10.

of *whichever* forum the claim was brought in, whether China or Singapore….'[1621E] Hence, the parties 'probably intended their submission to extend to the non-exclusive jurisdiction of *both* fora.'[1621F]

Similarly, apparent contradictions and inconsistencies brought about by incorporation of related contracts may be resolved through interpretation. In *The Yaoki*, the bill of lading incorporated a 'charter party' agreement by reference but failed to identify whether it is the voyage or time charter party.[1622] This situation raised problems because while the time charter party provided for a London arbitration, the voyage charter party contained an exclusive Choice-of-Forum clause stipulating the English High Court.[1623] To add to the confusion, the bill of lading itself had its own arbitration clause.[1624] Nonetheless, the Hong Kong CFI noted that both the shipowner and the shipper, based on evidence established, preponderantly never intended litigation.[1625] Furthermore, the court noted that the time charter party mandated that some of its provisions be included in the bill of lading, and in fact were indeed included in the bill of lading.[1626] Hence, the court interpreted the bill of lading to be referring to the time charter party and thus, disputes arising from it should be resolved through arbitration.[1627] A stay was therefore granted.[1628]

Contract headings should be able to guide courts in their interpretation of an agreement but should not control the meaning of its provisions especially when the words and phrases therein state the contrary. In *Mayar (HK) Ltd v Sayal*, the Hong Kong CFI was asked to consider the clause – '[Any] dispute or difference arising between the parties out of this agreement shall be governed by the Laws of Hong Kong'[1629] – which has 'jurisdiction' as its heading, as a Choice-of-Forum clause or alternatively, an arbitration clause (since there was no mention of a court).[1630] The court disagreed because based on the wording of the clause, it was only a Choice-of-Law clause.[1631]

When contracts are subsequently amended, revised or supplemented, there may be a need to harmonise the provisions of the various parts or versions. In *Lembaga Pelabuhan Kelang v Kuala Dimensi Bhd*, the Malaysian Court of Appeal observed that the Choice-of-Forum clauses in the

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[1621E] Ibid.
[1621F] Ibid 810.
[1622] *The Yaoki* (n300) [3].
[1623] Ibid.
[1624] Ibid [2].
[1625] Ibid [8]-[9].
[1626] Ibid [9]-[10].
[1627] Ibid [13]-[15].
[1628] Ibid [19].
[1629] *Mayar (HK) Ltd v Sayal* [2005] 2 HKC 389, 392 (Court of First Instance).
[1630] Ibid.
[1631] Ibid 394.

subsequent supplemental agreements effectively express the parties' 'predominant agreement to submit to the court's jurisdiction' and abandonment of arbitration, which was the mode of dispute resolution in the earlier versions.[1632]

(d) Questions of Scope

Choice-of-Forum clauses should identify where an action may be filed. In *TMT*, the Singapore High Court emphasised that in interpreting the scope, 'it would be natural to assume …that any jurisdiction clause would be intended to be given wide import, with all disputes being heard in the same court.'[1633]

Choice-of-Forum clauses should be able to guide the chosen court on the types of disputes the parties could submit. Parties, however, do not usually exhaustively list all types of cases, actions, proceedings or disputes in their Choice-of-Forum clause. Furthermore, there may be issues which should be resolved as preliminary questions. An example is the existence of the contract. In *PT Selecta*, the Choice-of-Forum clause mentioned 'all disputes arising in connection with the contract including but not limited to the validity…' but not the issue of existence, which was being disputed by the defendant.[1634] The court first noted that the phrase 'all disputes arising in connection with the contract' should be wide enough to include disputes involving existence.[1635] Likewise, the court found that the defendant raised issues related to validity and not merely existence, and as such the Choice-of-Forum clause should be able to cover the dispute.[1636] Similarly, in *AJ Lucas (Hong Kong) Ltd v Drilltec Gut Gmbh Grossbohrund Umwelttechnik*, the Hong Kong CFI interpreted the exclusive Choice-of-Forum clause to include not just contractual disputes but also litigation in tort.[1637] According to the court, the Choice-of-Forum clause stated, 'any dispute whatsoever' and on its plain reading, should be able to embrace litigation in tort.[1638] In contrast, the Singapore High Court in *Ivanishvili* interpreted the 'forum of administration clause' contained in the trust deed – '…the Courts of the Republic of Singapore shall be the forum of administration [of the trust deed]' – not an exclusive jurisdiction clause for all types of litigation related to the trust because there are certain aspects of the trust, which could not be or intended to be covered by such clause.[1639]

[1632] *Lembaga* (n306) 629; see also *Longlife* (n1191) [25].
[1633] *PT Selecta* (n376) [60].
[1634] Ibid 738.
[1635] Ibid; see also *Okada* (n1465) [37].
[1636] *PT Selecta* (n376) 738.
[1637] *AJ Lucas* (n847) [18].
[1638] Ibid [18].
[1639] *Ivanishvili* (n708) [44].

Interpretation may also help courts determine the kinds of relief they may issue. An important question which a court may ask is whether it should be limited to the relief expressly requested by the parties or can it include relief which may be issued within the court's usual exercise of its jurisdiction, for example, interim relief? In *Teo Choon Mong Frank v Wilh Schulz GmbH*, the Singapore Court of Appeal interpreted the Choice-of-Forum clause which vested the jurisdiction in the Singapore High Court to settle any dispute and differences touching on the interpretation or application of the shareholder agreement[1640] to include the power to issue interim injunctions.[1641] Hence, courts could issue relief which it may order in its usual exercise of its jurisdiction.

(e) Choice-of-Court Convention

The *Choice-of-Court Convention* provides that Choice-of-Forum clauses shall be interpreted as exclusive unless proven otherwise.[1642] Aside from this presumption of exclusivity, however, it is silent on the other interpretation rules which a court may apply. Hence, it appears that the forum law, specifically its choice of law rules, should be able to guide the forum court as to which law should govern interpretation. As such, in Singapore, the rules under the applicable law determine how courts should interpret these clauses. Failure to prove these rules would lead to Singapore courts applying the common law principles on contractual interpretation.

(f) Singapore International Commercial Court

Parties who submitted to the SICC through a Choice-of-Forum clause are presumed to submit to SICC's exclusive jurisdiction; to carry out any judgment or order of the SICC without undue delay; and to waive any recourse to any court or tribunal outside Singapore against any judgment or order of the SICC, and against the enforcement of such judgment or order, insofar as such recourse can be validly waived.[1643] Furthermore, under the *Rules of Court*, the SICC shall take into account the international and commercial character of the transaction in deciding whether to decline or stay the action.[1644] This compels the SICC to consider the international and commercial nature of the contract in interpreting the scope of the Choice-of-Forum clause should a stay application be made.

[1640] *Teo* (n757) 314.
[1641] Ibid 318-9.
[1642] *Choice-of-Court Convention* (n70) art 3(b).
[1643] *Supreme Court of Judicature Act* (Singapore) s18F(1).
[1644] *Rules of Court* (Singapore), ord 110, r8(3).

3. The Philippines

Since Choice-of-Forum clauses are recognised as venue stipulations, their interpretation follows the principles applied in interpreting any rules of procedure. Notably, being venue stipulations, 'in the absence of qualifying or restrictive words, [the Choice-of-Forum clause] should be considered merely as an agreement on additional forum, not as limiting venue to the specified place.'[1645] 'For, to restrict venue only to that place stipulated in the agreement is a construction purely based on technicality which, on the contrary, should be liberally construed.'[1646] Hence, courts would proceed with a liberal interpretation of Choice-of-Forum clauses unless restrictive words are clearly provided by the parties. This is because the Philippines has no presumption of exclusivity of Choice-of-Forum clauses. Hence, restrictive words should be present for a clause to be considered exclusive, and thus, enforceable as a venue stipulation. Nonetheless, courts may still proceed with a liberal interpretation even when restrictive words are present when their objective is to assist the parties in obtaining just, speedy and inexpensive determination of every action and proceeding.[1647]

While giving effect to the Choice-of-Forum clauses is a matter of procedural law, and consequently, their interpretation proceeds according to the principles applicable to the rules of procedure, there are instances when Philippine courts approached the interpretation of these clauses in the same manner as they would approach any contractual stipulation. In *KK Shell*, which was discussed in Chapter 2, the Philippine Supreme Court needed to determine whether a sub-agent is bound by the Choice-of-Forum clause stipulating Japanese district courts.[1648] In resolving the issue, the court referred to the other provisions of the agreement,[1649] and noted that neither the Choice-of-Forum clause nor the text of the other provisions of the agency agreement made express reference to sub-agents.[1650] Hence, pending further evidence to the contrary, the plaintiff, the alleged sub-agent, may proceed with its action in the Philippines.[1651]

[1645] *Unimasters Conglomeration Inc v Court of Appeals* (1997) 267 SCRA 759, 769.
[1646] Ibid 773.
[1647] See *HSBC* (n240) 337.
[1648] *KK Shell* (n343) 151-2.
[1649] Ibid.
[1650] Ibid.
[1651] Ibid 152.

D. Key Lessons

The law that is selected by the choice of law process resolves the substantive issues of existence, validity and interpretation of Choice-of-Forum clauses. Nonetheless, which law specifically applies to these issues can be controversial as the choice of law process can be complex and the application of party autonomy provides an added difficulty to the situation by allowing the possibility of parties including conflicting or multiple legal systems which may apply to their Choice-of-Forum clauses. Of these three issues, existence is the most controversial. In common law, for example, the law that determines existence can either be the law of the forum or the law applicable to the contract, which both suffer from their respective logical and practical difficulties. In the Philippines, while a case has declared that substantial validity is determined by the law applicable to the underlying contract, the issue of contractual existence is a fundamental question which may prompt Philippine courts to mandatorily apply the requirements under Philippine law. On the other hand, issues involving validity are resolved by the law applicable to the contract. The process, however, of determining validity highlights the reliance on establishing facts and the key role of contractual interpretation.

Interpretation issues are also determined by the applicable law. The review of cases, however, shows problems unique to international commercial contracts in Asia. Often, these issues result from the court's dependence on translators, the absence of direct translation of certain important legal concepts, and the difficulty of ascertaining intention due to cultural differences. Notably, the cases emphasise how the oft-used common law interpretation rule of preferring the plain meaning of the words may fail in Asian settings. Nonetheless, the commercial context of these transactions provides a powerful tool for courts in interpreting Choice-of-Forum clauses. Common interpretation issues include classifying the clauses as either exclusive or non-exclusive, whether to select the ordinary or special meaning for the words used, how to harmonise the various parts of the contract, and determining the scope of the clause.

In the Philippines, because Choice-of-Forum clauses are considered as venue-stipulations, the rules of interpretation applicable to procedural rules apply. Nonetheless, courts may resort to a contractual approach to interpretation where there is a need to refer to the other provisions of the contract to determine the meaning of the Choice-of-Forum clause.

Chapter VII.

Mandatory Rules, Public Policy and International Interests

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A. The State and International Community in the Choice-of-Forum Clause Analysis

Because of the nature of disputes involving Choice-of-Forum clauses, the forum state or another state, as well as the international community, have interests in the way these disputes are resolved. As discussed in Chapter 3, the use of the 'ouster principle' to prevent Choice-of-Forum clauses from being given effect is a prominent manifestation of the involvement of state interests in the Choice-of-Forum analysis. Eventually, as attitudes shifted to accept Choice-of-Forum clauses as necessary features of international commerce, and particularly the increased acceptance of party autonomy in procedure and contract, the 'ouster principle' has been used less and less to

prevent the enforcement of Choice-of-Forum clauses.[1652] This does not mean, however, that state interests have been removed from the Choice-of-Forum clause analysis. Rather, the interests of the state and likewise, the international community, are important considerations in the Choice-of-Forum clause analysis, albeit articulated in a different manner.

This chapter discusses the role of the interests of the forum state and the international community in Choice-of-Forum clause disputes. This chapter, therefore, investigates the contentious and uneasy interface between public and private law in the Choice-of-Forum clause analysis. It probes into the various contemporary manifestations of state interests like mandatory rules, public policy and other analogous concepts. Furthermore, it examines the role of state and international community interests in determining substantive issues (*eg,* existence, validity and interpretation), provision of relief (*ie,* as factors considered during enforcement), and recognition and enforcement of foreign judgments. Special consideration is given to the state's interest in protecting weaker parties, and how such interest affects the Choice-of-Forum analysis in the context of asymmetric agreements, standard-form contracts, and instances where specific groups requiring protection, like consumers, are parties to the contract.

B. Mandatory Rules

Because mandatory rules embody important state interests, they are applied necessarily, mandatorily and directly 'regardless of whether a choice-of-law rule authorizes their application, and even if a choice-of-law rule calls for the application of another law.'[1653] Their application by the forum is compulsory even though a foreign law may characterise the legal relationship differently.[1654] Notably, breach of a mandatory rule, because of the public interests involved, can also be characterised as breach of public policy and can therefore make a contract void or unenforceable.[1655]

Although a statute can expressly declare a certain rule mandatory, often, whether a certain rule is mandatory is a question of construction and its mandatory nature can usually be established

[1652] See *The Bremen* (n60) 12.
[1653] Symeon Symeonides, *Private International Law: Idealism, Pragmatism, Eclecticism. General Course on Private International Law* (Brill Nijhoff, 2017) 164-5.
[1654] *Star City Pty Ltd v Tan Hong Woon* [2002] 1 SLR (R) 306, 322 (Court of Appeal) ('Star City'); Yeo Tiong Min, 'Statute and Public Policy in Private International Law: Gambling Contracts and Foreign Judgments' [2005](9) *Singapore Year Book of International Law* 133, 135.
[1655] *Star City* (n1654) 322; *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR (R) 183, 222 (High Court) ('Star Services').

conclusively after a court decision has declared it as such. The court, in determining whether a certain rule is mandatory, probes into whether the rule is intended to protect some fundamental value or interest of the forum, or if 'the statutory objective was not intended to be circumvented by the existence of foreign elements in the dispute.'[1656] Nonetheless, in common law countries as well as in the Philippines, mandatory rules are more commonly understood in the context of illegality of contracts. Hence, unlike in continental European jurisdictions where the concept of mandatory rules is well established,[1657] common law courts may apply provisions akin to mandatory rules to render a contract illegal, void or unenforceable, without specifically labelling it as a 'mandatory' rule.[1658]

When the mandatory rule's application is triggered, its effect on Choice-of-Forum clauses can be two-prong. The first situation is when the mandatory rule directly provides for a different forum for the dispute contemplated in the Choice-of-Forum clause. In such instance, the court applies the mandatory rule regardless of the forum chosen by the parties. In this case, the mandatory rule can render the clause invalid and the mandatory forum is applied to the contract such that the Choice-of-Forum clause would not be enforced because of 'strong cause.'[1659] The second situation is when the mandatory rule overrides the applicable law, in which case, the mandatory rule can affect the validity or interpretation of the Choice-of-Forum clause.[1660] Violation of mandatory laws can also prevent the recognition and enforcement of foreign judgments, albeit courts need to balance them with comity and other interests of the international community.[1661]

1. Singapore, Hong Kong and Malaysia

In Singapore, examples of statutes with mandatory provisions include sections of the *Unfair Contract Terms Act*,[1662] *Carriage by Air Act*,[1663] *Carriage by Air (Montreal Convention, 1999) Act*,[1664]

[1656] Yeo Tiong Min, *Articles on Singapore Law (2005)* (Singapore Academy of Law, 2005) 6.3.2.
[1657] See JJ Fawcett, 'Evasion of Law and Mandatory Rules in Private International Law' (1990) 49(1) *Cambridge Law Journal* 44, 57.
[1658] See Trevor Hartley, 'Mandatory rules in international contracts: the common law approach' in Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law* (Brill Nijhoff, 1997) vol 266, 385.
[1659] See *The 'Epar'* [1983-1984] SLR (R) 545, 552 (High Court); *Brinkerhoff* (n674) 357; *DFS Trading* (n1207) 551; see also *Akai Pty Ltd v People's Insurance Company Ltd* [1996] HCA 39, [16].
[1660] See *Brinkerhoff* (n674) 357.
[1661] See *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR (R) 690, 700, 703 (Court of Appeal) ('Liao').
[1662] *Unfair Contract Terms Act* (Singapore, cap 396, 1994 rev ed) s27(2).
[1663] *Carriage by Air Act* (Singapore, cap 32A, 1994 rev ed) sch1, art23.
[1664] *Carriage by Air (Montreal Convention, 1999) Act* (Singapore, cap 32B, 2008 rev ed) sch1, art34.

Carriage of Goods by Sea Act,[1665] *Securities and Futures Act*,[1666] *Consumer Protection (Fair Trading) Act*,[1667] *Pawnbrokers Act 2015*,[1668] and Section 5 of the *Civil Law Act* which prevents recovery of gambling debts.[1669] In *The 'Epar'*, the Singapore High Court voided the Choice-of-Forum clause stipulating Jakarta court because it contravened the provisions of the *Hague-Visby Rules*.[1670] Hence, the court refused to stay the proceedings. Similarly, in *Brinkerhoff,* the Singapore Court of Appeal gave the same mandatory status to the *Warsaw Convention*.[1671] In this case, the court voided the entire clause containing both the chosen jurisdiction and law (*ie*, the law and courts where the agreement is made which was Singapore), and stayed the proceedings in favour of Indonesia.[1672]

In Hong Kong, ordinances which contain mandatory rules include the *Carriage by Air Ordinance*[1673] which implements the *Warsaw Convention*, *Merchant Shipping (Limitation of Shipowner's Liability) Ordinance*[1674] which implements the *1974 Athens Convention*, the *Employment Ordinance*,[1675] the discrimination at work ordinances (*Sex Discrimination Ordinance*,[1676] the *Family Status Discrimination Ordinance*,[1677] the *Disability Discrimination Ordinance*,[1678] and the *Race Discrimination Ordinance*[1679]) which contain express choice of law provisions, and the *Labour Tribunal Ordinance* which provides for the mandatory non-exclusion of the exclusive jurisdiction of Hong Kong's Labour Tribunal for employment-related cases.[1680] While Hong Kong has no ordinance which expressly limits the choice of jurisdiction for consumer-related disputes, the *Unconscionable Contracts Ordinance*[1681] has been argued to be capable of rendering a Choice-of-Forum clause unenforceable insofar as relevant links in favour of Hong Kong are present.[1682] Likewise, the choice of Swiss law and a Choice-of-Forum clause stipulating Swiss courts would not prevent a Hong Kong court from applying the mandatory jurisdictional provisions of the *Warsaw Convention*.[1683]

1665 *Carriage of Goods by Sea Act* (Singapore, cap 33, 1998 rev ed) art3, r8.
1666 *Securities and Futures Act* (Singapore, cap 289, 2006 rev ed) s 81SJ; *Goldilocks Investment Co Ltd v Noble Group Ltd* [2018] SGHC 108, [10] (High Court).
1667 *Consumer Protection (Fair Trading) Act* (Singapore, cap 52A, 2009 rev ed) s13.
1668 *Pawnbrokers Act 2015* (Singapore) s69.
1669 *Civil Law Act* (n760) s5; *Star Services* (n1654) 194; cf: *Liao* (n1661) 695; *Las Vegas Hilton Corporation v Khoo Teng Hock* [1996] 2 SLR(R) 589, 601 (High Court).
1670 *The 'Epar'* (n1659) 552.
1671 *Brinkerhoff* (n674) 356.
1672 Ibid.
1673 *Carriage by Air Ordinance* (Hong Kong) cap 500, s32.
1674 *Merchant Shipping (Limitation of Shipowner's Liability) Ordinance* (Hong Kong) Cap 434, art18.
1675 *Employment Ordinance* (Hong Kong) cap 57, s70.
1676 *Sex Discrimination Ordinance* (Hong Kong) cap 480, s87.
1677 *Family Status Discrimination Ordinance* (Hong Kong) cap 527, s65.
1678 *Disability Discrimination Ordinance* (Hong Kong) cap 487, s83.
1679 *Race Discrimination Ordinance* (Hong Kong) cap 602, s81.
1680 *Labour Tribunal Ordinance* (Hong Kong) cap 25, s7.
1681 *Unconscionable Contracts Ordinance* (Hong Kong) cap 458, s5.
1682 Johnston (n881) 135.
1683 *DFS Trading* (n1207) 551.

The court, nonetheless may not totally override the entire Choice-of-Forum clause to give effect to the mandatory law. In *Ghossoub*, the Hong Kong CFI held inoperative the exclusive Choice-of-Forum clause in favour of English courts but only to the extent that it deprived the plaintiff's right as a minority shareholder to present an unfair prejudice petition under Hong Kong's *Companies Ordinance*.[1684] The Hong Kong Court of Appeal sustained this ruling on appeal.[1685] While the court said that the ground for invalidating the exclusive Choice-of-Forum clause was based on public policy considerations,[1686] this reading of the Hong Kong's *Companies Ordinance* Section 724 is consistent with the nature of a mandatory rule.

In Malaysia, examples of statutes with mandatory provisions include the *Carriage By Air Act 1974*,[1687] *Consumer Protection Act 1999*,[1688] and the *Carriage of Goods by Sea Act 1950*.[1689] Also considered as a possible mandatory rule is the rule against gambling contained in Section 26 of the *Civil Law Act 1956* and Section 31 of *Contracts Act 1950*.[1690]

The enforcement of the mandatory rules of another country by the forum court is controversial. In general, Hong Kong courts do not consider the mandatory rules of another jurisdiction.[1691] Illegality in the place of performance appears to be the sole exception which would lead a Hong Kong court to refuse enforcement of the contract regardless of its validity under its applicable law or forum law.[1692] In Singapore, the contravention of a foreign law is relevant only when it is referred at by a choice of law rule, a forum mandatory rule or the fundamental policy of the forum.[1693] Hence, in these circumstances, the foreign rule is not really 'mandatory' in the sense that their enforcement is compulsory in all circumstances.

In *William Co*, a court may hesitate to use mandatory rules as its basis in issuing relief at the jurisdictional stage, unless the mandatory rule itself directly provides where the case should be

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[1684] *Ghossoub* (n346) [111].
[1685] *Ghossoub* (n867) [31].
[1686] Ibid [43].
[1687] *Carriage By Air Act 1974* (Malaysia) s32.
[1688] *Consumer Protection Act 1999* (Malaysia) ss4,6.
[1689] *Carriage of Goods by Sea Act 1950* (Malaysia) sch1, art3, s8.
[1690] *Jupiters Ltd v Gan Kok Beng* [2007] 7 MLJ 228, 240 (High Court of Kuala Lumpur); see Chen Chieng Ning, 'Recovery of Gambling Debts in Malaysia and Singapore' [2001] 1 *Malayan Law Journal* i
[1691] Johnston (n881) 135.
[1692] See eg, *Dow MBF Ltd v Detrick Ltd* [1987] 2 HKC 495 (Court of First Instance); *Bank of Credit and Commerce International (Overseas) Ltd v Bank of Credit and Commerce International (Overseas) Ltd – Macau Branch* [1997] HKCA 573 (Court of Appeal).
[1693] *Belfield International (Hong Kong) Ltd v Sheagar s/o T M Veloo* [2014] 1 SLR 24, 44 [61] (High Court).

heard.[1694] This is because at the jurisdictional stage, questions involving choice of law may not be dealt with. Hence, mandatory rules which have effects at the choice of law level may have a limited effect at the jurisdictional stage. Particularly, when the Choice-of-Forum clause is exclusive, and the chosen court is the forum court, absent strong cause, the court will not stay the proceedings and will allow the litigation to proceed in the forum. Nonetheless, when a forum mandatory rule designates a foreign court as the mandatory jurisdiction for the dispute, such as in *Brinkerhoff,* the forum court shall issue a stay.[1695] When the Choice-of-Forum clause is exclusive, and the chosen court is a foreign court, absent strong cause, the court will stay the proceedings unless a forum mandatory rule which directly gives jurisdiction to the forum courts is involved. In which case, the court will allow the proceedings to continue in the forum court. The effect of mandatory rules on exclusive clauses should be the same in cases involving non-exclusive Choice-of-Forum clauses.

In applications for anti-suit injunctions, when a forum mandatory rule provides that the dispute be heard in the forum, an anti-injunction may be issued to prevent litigation in other venues. When the forum mandatory rule provides for a foreign forum and the pending or threatened litigation is in the mandated foreign forum, then the application will be denied unless the pending or threatened litigation is in another foreign forum. This may be the situation when a party commences an action and applies for an anti-suit injunction in the forum court, which is located in a *Warsaw Convention* party state but is not among the mandatorily designated fora under Article 28(1) of the treaty. In such case, the forum court may deny the anti-suit injunction application to enforce the mandatorily designated fora under the *Warsaw Convention* even if the parties may have actually chosen the forum in their Choice-of-Forum clause.

Those forum mandatory rules which designate a certain forum or affect the choice of law rule can prevent the enforcement and recognition of foreign judgments in the forum court. Nonetheless, because of comity and other interests of the international community involved in the enforcement of foreign judgments, the court may engage in a balancing of interests.[1696] This may be the case in most of the foreign judgments cases involving Choice-of-Forum clause issues. However, when the international interests and the forum interest protected by the mandatory rule are aligned, there is greater chance that the foreign judgment may be refused enforcement. This may be the case in the enforcement and recognition of foreign judgments which violate provisions of the *Warsaw Convention* where both the state of the issuing foreign court and the forum state are

[1694] *William Co* (n319) 390.
[1695] Brinkerhoff (n674) 356.
[1696] See *Liao* (n1661) 703.

parties. Similarly, the forum court may refuse recognition and enforcement pursuant to an international treaty. In the case of Singapore, its courts may refuse foreign judgments under the *Choice-of-Court Convention* where the grounds provided in Article 9 are present.[1697] For instance, since contravention of forum mandatory rules may be considered as contravention of the forum's public policy, Singapore courts may refuse the recognition and enforcement of the contravening foreign judgment pursuant to Article 9(e), which allows refusal when the recognition or enforcement would be manifestly incompatible with Singapore's public policy and its fundamental principles of procedural fairness.[1698] The *Choice-of-Court Convention*, however, requires a high standard for such a contravention of fundamental principles of procedural fairness.[1699] Hence, they may only possibly include contraventions of fundamental principles of procedural fairness which are constitutionally mandated.[1700]

2. The Philippines

The Philippines has no express doctrine of mandatory rules. The Philippine Supreme Court, however, has briefly mentioned 'mandatory laws', along with domestic public policy, as standards to be used in determining whether a foreign judgment may be recognised and enforced in the Philippines.[1701] Article 17 of the *Civil Code* also mentions 'prohibitive laws' which 'shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country.'[1702] However, whether 'prohibitive laws' are the same or similar to mandatory rules has not been articulated in Philippine case law. Furthermore, Article 1306 of the *Civil Code* which recognises the autonomy of parties to contract also provides that contractual stipulations shall not be contrary to law. This does not mean, of course, that parties may contract out of certain provisions of Philippine laws. Tolentino, echoing the opinions of Spanish civilists, stresses that 'law' under Article 1306 refers to laws which 'expressly declare their obligatory character…are prohibitive…express fundamental principles of justice….or which impose essential requisites without which the contract cannot exist.'[1703] This broad understanding of what is 'contrary to law', certainly includes rules akin to mandatory rules, albeit, Philippine courts have yet to label them as such. From this perspective, rules which are of most fundamental character like the nationality restrictions and other limitations contained in Article XII ('National Economy and

[1697] *Choice-of-Court Convention* (n70) art. 9; *CCCA* (n617) ss14-15.
[1698] *CCAA* (n617) ss14(c).
[1699] Hartley-Dogauchi Report (n354) 71.
[1700] Ibid.
[1701] *Fujiki v Marinay* (2013) 700 SCRA 69, 91 ('Fujiki').
[1702] *Civil Code* (Philippines), art17.
[1703] Tolentino (n1440) 416.

Patrimony') of the Philippine *Constitution*, and laws legislated pursuant to these Constitutional provisions, can be seen as mandatory rules.[1704] Significantly, Section 22 of Article XII of the Philippine *Constitution* states that 'acts which circumvent or negate any of the provisions of this Article shall be considered inimical to the national interest….'[1705] Hence, when a contract operates within the scope of the Article XII provisions (*eg,* mining operations, energy contracts, contracts on the operation of public utilities, etc), Philippine law shall be applied regardless of the applicable law.

Aside from the limitations imposed by the *Constitution*, there are other laws which contain provisions which may be characterised as 'mandatory', 'obligatory' or 'prohibitive'. This includes the *Carriage of Goods by Sea Act,*[1706] *Philippine Competition Act,*[1707] and the *Consumer Act of the Philippines.*[1708] Although these laws do not directly provide a forum which may directly supplant the stipulated forum in the Choice-of-Forum clause, they can arguably affect their validity, scope and interpretation.

In the Philippines, another possible way of understanding 'mandatory rules' is from the standpoint of waiver of statutory rights – mandatory rules contain rights which parties cannot waive through contract, even when the applicable law is foreign law. Notably, Article 6 of the *Civil Code* echoes the same limitations provided in Article 1306, among them, that waivers should not be contrary to law.[1709] From this vantage, Choice-of-Forum clauses may be viewed as a waiver of a right to invoke any of the venues provided in the Philippine *Rules of Court*. Certainly, not all rules on venue or jurisdiction are mandatory. There may be forums, however, like the settlement of construction-related disputes before the Construction Industry Arbitration Commission (CIAC), which may not be waived by parties.[1710]

Furthermore, 'mandatory' laws on Choice-of-Forum clauses may affect the substantive issues (*ie,* validity and interpretation) and the enforcement and recognition of foreign judgments (*ie,* pursuant to Article 17 of the *Civil Code*). They may also affect the *forum non conveniens* analysis, in the sense that they represent important state interests and therefore may be considered by courts

[1704] *Constitution* (Philippines), art12, s1-22.
[1705] Ibid art12, s22.
[1706] *Carriage of Goods by Sea Act* (Philippines), s3(8)
[1707] *Philippine Competition Act* (Philippines), ss14, 15, 20.
[1708] *Consumer Act of the Philippines* (Philippines), art 106.
[1709] *Civil Code* (Philippines), art 6.
[1710] *National Irrigation Administration v Court of Appeals* (1999) 318 SCRA 255, 268.

in justifying the Philippine proceedings, regardless of the chosen forum.[1711] They do not influence, however, the grant of a motion to dismiss as mandatory rules or similar concepts are not among the grounds for granting a dismissal of action.[1712] They may be considered in the granting of preliminary injunctions when it is shown that the acts (*eg,* the enforcement of a contractual provision) contravening a mandatory rule would probably work injustice to the applicant.[1713] In the context of Choice-of-Forum clauses, however, establishing this would be difficult because preliminary injunctions under Rule 58 of the *Rules of Court* are not traditionally used for this purpose, and also because 'mandatory rules' is an unfamiliar legal concept in the Philippines.

C. Public Policy

Public policy, also known as *ordre public*, has already been considered a limitation on the application of the conflict of law rules since the early stages of development of private international law. Notably, the ideas of Savigny, [1714] Story,[1715] and Maccini, [1716] continue to shape the contemporary understanding of public policy: (1) its compulsory character (2) its capacity to limit recognition of foreign acts and its intrinsic link with comity, and (3) its being territorial in scope and application. Each jurisdiction has its own concept and definition of public policy. Significantly, the concept may also vary according to the context, nature or elements of the dispute. For example, the public policy in purely domestic disputes may be different in content and scope than that applicable in international disputes or disputes with a foreign element. Moreover, public policy applies to both substantive and procedural aspects of a litigation and may be applied at any stage of a conflicts case. As with mandatory rules, the forum court can refer to its own public policy, and when the chosen law is foreign law, the public policy of another state. In the case of foreign public policy, it should be pleaded and proven according to the rules of evidence of the forum. Nonetheless, illegality under foreign public policy is generally a matter that should be considered when determining the substantive merits of the action, and not during the jurisdictional stage.[1717]

Public policy is drawn from the fundamental policies of the state found in its constitution, statutes, court decisions and administrative issuances of the government. It can also be based on

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[1711] See *Saudia* (n249) 169-70.
[1712] *Rules of Court* (Philippines), rule 16, s1.
[1713] Ibid rule 58, s3.
[1714] Edgar Bodenheimer, 'The Public Policy Exception in Private International Law: A Reappraisal in the Light of Legal Philosophy' (1954) 12 *Seminar (Jurist)* 51, 53-54.
[1715] Ibid 56.
[1716] Ibid 57.
[1717] *Trisuryo* (n1050) 836.

the general customs, practices and principles observed by the various governmental instrumentalities, and even the public at large. The principle may even be based on public morals. Hence, concepts like public order, natural justice, customs, public morals and public interests are subsumed or interchangeably discussed with public policy.[1718] Furthermore, the content of public policy reflects ever-changing state interests and policies, and thus, are expected to remain fluid in content and application.[1719]

Public policy affects Choice-of-Forum clauses at different levels. First, it can render a Choice-of-Forum clause illegal, void or unenforceable. This happens when it affects the substantive issues of the Choice-of-Forum clause like its validity or existence, or when it affects the applicable law of the contract, thus, possibly varying the interpretation of the Choice-of-Forum clause.[1720] Second, public policy can be considered as a factor in the provision of relief (*eg*, as a factor in the determination of 'strong cause' as regards exclusive clauses, and in the *forum non conveniens* test applicable to non-exclusive clauses).[1721] Third, it can deny the recognition and enforcement of judgments or orders involving Choice-of-Forum clauses.[1722] Although public policy can affect Choice-of-Forum clauses at many fronts, it is only applied exceptionally in most jurisdictions and only rarely successfully invoked by parties.[1723] In fact, while public policy can be used to oppose the enforcement of Choice-of-Forum clauses, the enforcement of these clauses is also a matter of public policy because of the importance given to party autonomy.[1724]

1. Singapore, Hong Kong and Malaysia

There are very few cases in Singapore and Hong Kong, and apparently none in Malaysia which involved the application of the public policy doctrine in Choice-of-Forum clauses. As earlier pointed out, public policy can affect Choice-of-Forum clauses by directly affecting their validity. In *Ghossoub,* which was discussed earlier, the Hong Kong CFI held 'inoperative' the exclusive Choice-of-Forum clause on public policy considerations insofar as it limits the plaintiff's right as

[1718] See eg, *Gabriel v Monte de Piedad* (1941)71 Phil 497, 500-501; *Banque Nasionale de Paris v Wuan Swee May* [2000] 3 MLJ 587, 597 (High Court of Kuala Lumpur) ('Banque Nasionale').
[1719] See *Banque Nasionale* (n1718) 597.
[1720] See *Ghossoub* (n346) [111].
[1721] Eg, *Pacific Aerosupplies* (n828) [109]; *Trisuryo* (n1050) 834.
[1722] See *Compania Sud* (n904) [59]; *Wynn-Mong* (n1492) [33]; *China North* (n1064) [85].
[1723] See Johnston (n881) 170.
[1724] *Chinachem* (n833) [88].

a minority shareholder to present an unfair prejudice petition under Hong Kong's *Companies Ordinance*.[1725]

Public policy can be considered a factor during enforcement. In *Pacific Aerosupplies Limited v Dakota Air Parts, Int'l Inc,* the Hong Kong CFI found strong cause not to enforce the exclusive Choice-of-Forum clause stipulating Hong Kong courts[1726] because of the relevance of United States national security concerns in the dispute.[1727] Since the dispute involved claims arising from breaches of a military-related contract,[1728] this probably prompted the court to say that 'matters of US public policy [are better] decided by the US Court.'[1729] Hence, the court refused to grant leave to serve outside Hong Kong.

In *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd*, the Singapore Court of Appeal stressed that the mere invocation of foreign public policy, without more, should not avoid the exercise of jurisdiction by the Singapore courts.[1730] Nonetheless, the court pointed out that this did not mean that issues of foreign public policy may not be considered in granting a stay, whether it should be considered 'will depend on the facts and circumstances of the particular case, including the nature of the foreign policy involved.'[1731] Notably, 'whether a…[foreign] rule arises to the level of public policy must be amply demonstrated by way of evidence.'[1732] In this case, the court did not consider the Indonesian public policy argument,[1733] – that Indonesian public policy prohibited the holding of shares in a foreign company on trust.[1734] Rather, because the SKP companies may not receive adequate relief due to non-recognition of trust arrangements in Indonesia by virtue of their nature of claim, the court considered this as 'strong cause' not to stay the proceedings despite the exclusive Choice-of-Forum clause stipulating Indonesia courts. [1735]

Public policy may also prevent the enforcement and recognition of foreign judgments in disputes involving Choice-of-Forum clauses, albeit it has not been invoked successfully. In *Compania Sud,* the English judgment awarding damages for breach of an exclusive Choice-of-

[1725] Ghossoub (n346) [111]; see *Ghossoub* (n867) [31].
[1726] *Pacific Aerosupplies* (n828) [22].
[1727] Ibid [109].
[1728] Ibid [4].
[1729] Ibid [109].
[1730] *Trisuryo* (n1050) 834.
[1731] Ibid.
[1732] Ibid.
[1733] Ibid 846.
[1734] Ibid 832.
[1735] Ibid 848.

Forum clause was enforced in Hong Kong because the judgment was considered not contrary to public policy and comity towards Mainland Chinese courts.[1736] This was largely because the damages being enforced in Hong Kong involved a breach of contract (the exclusive Choice-of-Forum clause).[1737] In *Wynn Las Vegas, LLC v Mong Henry,* the Nevada judgment arising from a gambling debt (which had an exclusive jurisdiction clause stipulating Nevada courts) was enforced in Hong Kong because its public policy could not deny the creditor's right to be repaid even if it involved a gambling debt.[1738] In *China North Industries Investment Ltd v Ronald Rc Chum*, the Hong Kong CFI recognised the Bermuda judgment, and stopped the plaintiffs from relitigating the same issues in Hong Kong,[1739] because even if the foreign judgment allegedly resulted from a 'badly managed litigation,' such would still not amount to contravention of Hong Kong's public policy.[1740]

In Malaysia, because of the importance of Islamic banking and finance, Islamic notions of morality are important even in commercial and financial contracts and may affect Choice-of-Forum clauses in the same way as public policy. For instance, the prohibition against penalty interest (*riba*) under Islamic law was a consideration in denying an application for an injunction in *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd*.[1741] The court noted that since the Islamic law forbids penalty interest, the loss which an Islamic bank may suffer from delay in recovering monies because of an injunction is non-compensable. Notably, the court elevated this effect on Islamic banks by an injunction as a question of public policy. Although the dispute did not involve Choice-of-Forum clauses, this application of Islamic rules and principles to international commercial contracts related to Islamic banking and finance may become relevant especially when shariah law is chosen as the governing law, during applications for anti-suit injunctions, and during the interpretation and determination of scope of the Choice-of-Forum clauses.

2. Choice-of-Court Convention

Under Article 6 of the *Choice-of-Court Convention*, the non-chosen court has the obligation to suspend or dismiss proceedings except when the 'giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised.' Hence, the *Choice-of-Court Convention* recognises public policy as a ground to disregard the

[1736] *Compania Sud* (n904) [59].
[1737] See Ibid [57]-[59].
[1738] *Wynn-Mong* (n1492) [31]-[33].
[1739] *China North* (n1064) [58],[86],[90].
[1740] Ibid [85] (Court of First Instance).
[1741] *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd*, 6 MLJ 1 (High Court of Kuala Lumpur).

exclusive Choice-of-Forum clause. Nonetheless, since the phrase 'manifestly contrary' qualifies this ground, the standard imposed is high.[1742] The Hartley-Dogauchi Report clarifies that the 'public policy' referred to here includes 'basic norms or principles of that State.'[1743] The concept excludes situations where disregarding the Choice-of-Forum clause is 'because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised,'[1744] or '[the Choice-of-Forum clause] is not binding under the [forum court's] domestic law.'[1745] Arguably, the report is unclear as to 'what' mandatory rule these exclusions are referring to here and 'how' the mandatory rule might be violated 'in some technical way.' Probably, the report may be referring to technical violations of procedural rules, which in certain countries may be characterised as 'violations of mandatory rules'[1746] or even, 'procedural injustice.'[1747] But not all technical procedural violations would be 'manifestly contrary to the public policy of the court seised.' Hence, unless these 'technical violations' reach that level, they should not prevent the enforcement of the exclusive Choice-of-Forum clause.

Public policy is also mentioned as a ground for refusing recognition and enforcement of foreign judgments under Article 9 of the *Choice-of-Court Convention*. Under Article 9(e), the party state's own public policy may prevent such enforcement, 'including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.' Again, like in Article 6, the threshold imposed is high. Notably, there is emphasis on procedural fairness because 'in some countries fundamental principles of procedural fairness (also known as due process of law, natural justice or right to fair trial) are constitutionally mandated.'[1748] Hence, it might be unconstitutional to recognise a foreign judgment obtained under such circumstances.[1749]

3. The Philippines

In the Philippines, while parties are free to stipulate in their contract whatever is convenient to them, these stipulations should not be contrary to public policy, morals, good customs and

[1742] Hartley-Dogauchi Report (n354) 61.
[1743] Ibid.
[1744] Ibid.
[1745] Ibid.
[1746] See, eg, Oberhammer (n156) 61.
[1747] See, eg, Ronald Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2009) 93.
[1748] Hartley-Dogauchi Report (n354) 71.
[1749] Ibid.

public order.[1750] Contracts which are contrary to public policy are void.[1751] Furthermore, Philippine courts, like those in common law jurisdictions, are barred from recognising or enforcing any foreign law, judgment, contract or claims obnoxious to the forum's public policy.[1752]

In *Saudia*,[1753] the Philippine Supreme Court emphasised that public policy is one of the *forum non conveniens* factors that courts consider in determining whether to give effect to the parties' choice of foreign forum.[1754] Notably, Philippine public policy acts as a counterweight to the private interests of parties. Hence '[s]hould it find that public interest weighs more heavily in favor of its assumption of jurisdiction, it should proceed in adjudicating the dispute, any doubt or contrary view arising from the preponderance of linkages notwithstanding.'[1755] Notably because of the 'public interests' factors considered in the Philippine version of *forum non conveniens* (*eg,* clogged dockets, lack of expertise, etc), the public policy grounds may be considered independent of the parties' interests, and arguably, even if not raised by one of the parties. Moreover, the scope of this public policy which may be weighed against the private interests of parties appears to be as broad as the one applied in purely domestic cases because no distinction has been made so far as regards conflict of law cases. In fact, in cases on recognition and enforcement of foreign judgments, the Supreme Court mentioned the use of 'domestic public policy,'[1756] 'local standards,'[1757] and 'constitutional values'[1758] in reviewing foreign judgments, including the original claim[1759] behind the foreign judgment.

The formula in *Saudia* also seems to allow the recognition of foreign public policy in the Philippines – 'It must, thus, determine if the interests of the sovereign (which acts through it) are outweighed by those of the alternative jurisdiction.'[1760] Hence, if foreign public policy outweighs local public policy, the Philippine court may consider itself as *forum non conveniens*. Foreign public policy, however, must be pleaded by parties and proven as a fact according to the rules of evidence.[1761]

[1750] *Civil Code* (Philippines) art 1306.
[1751] Ibid art 1409.
[1752] *Bank of America* (n1341) 762.
[1753] *Saudia* (n249).
[1754] Ibid 168-70.
[1755] Ibid 170.
[1756] *Fujiki* (n1701) 91.
[1757] *Mijares v Ranada* (2005) 455 SCRA 397, 420.
[1758] Ibid 421.
[1759] Ibid.
[1760] *Saudia* (n249) 170.
[1761] *Rules of Court* (Philippines), r132, s24.

Employment contracts involving overseas Filipino workers have been characterised as being imbued with public interest, thus 'otherwise applicable Philippine laws and regulations cannot be rendered illusory by the parties agreeing upon some other law to govern their relationship.'[1761A] This stems from Section 3, Article 3 of the *Constitution* which provides: 'The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.' Likewise, Article 1700 of the *Civil Code* confirms the public interest in employment contracts in general – '[t]he relation between capital and labor are not merely contractual. They are so impressed with public interest that labor contracts must yield to the common good.' In *Pakistan International Airlines v Ople*, the exclusive choice of Karachi courts in the Choice-of-Forum clause contained in the employment agreement involving a Filipino flight attendant of Pakistan International Airlines was not enforced because 'the multiple and substantive contacts [of the dispute] with Philippine law and Philippine courts…point to the Philippine courts and administrative agencies as a proper forum for the resolution of contractual disputes between the parties.'[1761B] 'Under these circumstances… [the Choice-of-Forum clause] cannot be given effect so as to oust Philippine agencies and courts of the jurisdiction vested upon them by Philippine law.'[1761C] In *Saudia*, the Supreme Court confirmed this – '[a]s the present dispute relates to (what the respondents allege to be) the illegal termination of respondents' employment [from Saudi Arabian Airlines due to her pregnancy], this case is immutably a matter of public interest and public policy.'[1761D] Hence, '[t]here is no compelling basis for ceding jurisdiction to a foreign tribunal. Quite the contrary, the immense public policy considerations attendant to this case behove Philippine tribunals to not shy away from their duty to rule on the case.'[1761E] Nonetheless, when an overseas Filipino contracted in a foreign country to work in another foreign country, and all the facts relevant to the dispute occurred in the latter, with the Philippines having no connection except the plaintiff's Filipino nationality, the Philippine court or administrative tribunal may consider itself a *forum non conveniens*.[1761F]

[1761A] *Pakistan Airlines* (n1452) 103.
[1761B] Ibid.
[1761C] Ibid.
[1761D] *Saudia* (n249) 174.
[1761E] Ibid 144-5.
[1761F] See, eg, *Manila Hotel Corporation v National Labor Relations Commission* (2000) 343 SCRA 1, 12-4.

D. Comity and International Interests

Comity, according to Huber, allows the recognition of foreign acts beyond the territorial boundaries of states.[1762] Generally, how the principle is understood is based on the formulation in *Hilton v Guyot*,[1763] which has been cited by courts in several jurisdictions including Singapore,[1764] Malaysia[1765] and the Philippines.[1766] Nonetheless, the intricacies of its application and operation in conflicts litigation are still largely misunderstood.[1767] Briggs would note that comity is seen to operate positively (*eg,* assisting foreign courts in obtaining evidence, cooperation in insolvency proceedings, giving effect to judicial orders)[1768] and negatively (*e.g.,* not asserting jurisdiction over an absentee defendant, not adjudicating because of *forum non conveniens*, not questioning the conclusiveness of foreign judgments or lawfulness of foreign state acts, not applying local law).[1769] As the following discussion shows, the principle of comity is important at all stages of Choice-of-Forum clause litigation – jurisdiction, choice of law, and recognition and enforcement of judgment — and has a complex but necessary relationship with the other factors relevant in the Choice-of-law analysis.

1. Singapore, Hong Kong and Malaysia

(a) Comity and Choice of Law

Comity is relevant at the level of choice of law because it can assist the forum court to properly delineate the scope of the local law's application, in the sense that it prevents the court from unnecessarily extending the scope of the local law's application.[1770] Conversely, comity can also provide justification for the court to refer to foreign law.[1771] Comity also precludes the forum court from passing judgment on the law and the legal system of another state.[1772] As regards

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[1762] See Irina Getman-Pavlova, 'The Concept of "Comity" in Urich Huber's Conflict Doctrine' (Working Paper No. BRP 13/Law/2013, National Research University Higher School of Economics, 2013) 8; see also Hessel Yntema, 'The Historic Bases of Private International Law' (1953) 2(3) *American Journal of Comparative Law* 297, 306.
[1763] *Hilton v Guyot*, 159 US 113, 163-164 (1895)
[1764] Eg, *The 'Reecon Wolf'* (n759) 297-8 (High Court).
[1765] Eg, *Sakuragawa Pump S Pte v Perkapalan Mesra Sdn Bhd* [2007] 7 MLJ 555, 560 (High Court of Kuching).
[1766] Eg, *JA Sison v The Board of Accountancy* (1949) 85 Phil 276, 282.
[1767] Eg, Adrian Briggs, *The Principle of Comity in Private International Law* (Brill Nijhoff, 2012) 77-78, 87-88.
[1768] Ibid 85.
[1769] Ibid.
[1770] Ibid 108-9; see *Rickshaw* (n454) 397; *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] SGHC 155, [25] (High Court).
[1771] See *Trisuryo* (n1050) 834.
[1772] See *The 'Hung Vuong-2'* (n658) 20; *The 'Asian Plutus'* (n658) 514; *Oriental Insurance* (n1559) 371; *Sea Powerful* [2016] 2 HKC 566, 583 (Court of First Instance); *Lehman Brothers* (n1149) 678; The *'Rainbow Joy'* [2005] 3 SLR(R) 719, 725 (Court of Appeal); see also Briggs (n1767) 109.

Choice-of-Forum clauses, these principles translate to courts not arbitrarily using local law to determine their existence, validity and interpretation. Likewise, limitations or problems of the foreign legal system would only be recognised exceptionally when argued as a factor during the enforcement of Choice-of-Forum clauses.

(b) Comity and the Enforcement of Choice-of-Forum clauses

When an exclusive Choice-of-Forum clause is involved, granting leave to serve out of jurisdiction because the forum is the chosen forum, or granting stay because the chosen forum is the foreign court, the grant of these forms of relief involve enforcement of contract and is considered consistent with comity.[1773] When there is a non-exclusive clause, comity becomes one of the factors, following the *forum non conveniens* principle, considered during enforcement.[1774] Notably, the doctrine of *forum non conveniens* is based on the principle of comity.[1775] Hence, when the non-exclusive clause names another forum as the chosen court, and there is an already pending case in that jurisdiction, comity may provide the forum court the ground to stay the action. On the other hand, when no case is pending in the foreign court, and therefore there is no interference of foreign court to begin with, the court may consider comity as playing a lesser role.

(c) Comity and Anti-Suit Injunctions

Comity plays a greater role in granting applications for an anti-suit injunction. Nonetheless, if the anti-suit injunction is issued pursuant to an exclusive Choice-of-Forum clause, this involves contractual enforcement and is considered consistent with comity. Hence, in *John Reginald Stott Kirkham v Trane US Inc,* the Singapore Court of Appeal said, '[w]here there is such an agreement, the court may not feel diffident about granting an anti-suit injunction as it would only be enforcing a contractual promise and the question of international comity is not as relevant.'[1776]

In contrast, when the anti-suit injunction is issued following the application of the *forum non conveniens* principle, like in cases involving non-exclusive Choice-of-Forum clauses, comity plays an important role. The Singapore High Court in *Morgan Stanley* emphasised that '[c]onsiderations of comity are necessary given the impact a grant of an anti-suit injunction would have on foreign

[1773] *Yantai* (n1221) [29].
[1774] See *The 'Reecon Wolf'* (n759) 297.
[1775] The *'Rainbow Joy'* (n1772) 725.
[1776] Kirkham (n765) 446; *UBS* (n651) 541; *Compania Sud* (n904) [56]-[58].

proceedings.'[1777] Similarly, in *Sea Powerful,* the Hong Kong Court of Appeal emphasised that granting an anti-suit injunction would be regarded 'an intrusion or obstruction of the judicial sovereignty of the Chinese courts.'[1778] Hence, to order the plaintiff to halt existing foreign proceedings may be regarded as offensive to comity.[1779]

Comity, however, may play an additional role in anti-suit injunctions as among the factors the court may consider in determining whether the institution or threatened proceedings in vexatious or oppressive. This is relevant when the Choice-of-Forum clause is non-exclusive. In *BSNC,* the Malaysia Court of Appeal emphasised that in deciding whether the institution or threatened institution of proceedings in a foreign court would be vexatious or oppressive, 'a court must have regard to all the circumstances of the case including such matters as comity…and the need to exercise caution when restraining foreign proceedings.'[1780]

(d) Comity and the Recognition and Enforcement of Foreign Judgments

Comity prevents courts from reviewing foreign judgments, absent contraventions of certain fundamental principles of law. According to Briggs, 'comity requires us to respect, and not to question, the adjudication.' '[It also] explains that the compulsion in a foreign judicial order is confined to the foreign state and has no effect, as compulsion or as entitlement in England' (the forum court).'[1781] Nonetheless, when the enforcement of a foreign judgment is an object of private agreements between parties,[1782] Briggs notes that comity is not offended because 'comity would not require the non-recognition of the judgments in the first place.'[1783] *Compania Sud* confirms this as the enforcement of the damages awarded by the English court in Hong Kong was considered by the court as not to offend comity[1784] because the damages can be considered as a necessary consequence of the parties' agreement.

[1777] *Morgan Stanley* (n756) 422.
[1778] Sea Powerful [2016] HKCA 205, [23] (Court of Appeal).
[1779] *Indian Corridor Sdn Bhd v China Idea Development Ltd* [2008] HKCFI 88, [16] (Court of First Instance).
[1780] *BSNC* (n986) 91.
[1781] Briggs (n1767) 150.
[1782] Ibid 152.
[1783] Ibid 153.
[1784] See *Compania Sud* (n904) [57]-[59].

2. The Philippines

In the Philippines, comity is used to justify non-exercise of jurisdiction, after applying the *forum non conveniens* principle.[1785] However, when other key factors point to the Philippines as the jurisdiction with the strongest connection to the dispute, comity plays little or no role.[1786] The reasoning usually shifts towards protecting local sovereignty.[1787] Hence, in a jurisdiction where a Choice-of-Forum clause is just another factor in the *forum non conveniens* equation, appealing to the principle of comity (*ie,* that the enforcement of the Choice-of-Forum clause is consistent with comity) is something which parties need to highlight in their pleading especially when the Choice-of-Forum clause is the only connection to the chosen foreign forum.

Furthermore, Philippine courts have expressed their willingness to evaluate the fitness of the foreign jurisdiction. In fact, whether the contracting parties' choice of forum will be upheld would depend first on 'the availability and adequacy of recourse to a foreign tribunal.'[1788] In *Saudia*, the Philippine Supreme Court characterised this requirement as a matter of practical 'viability'.[1789] The list of what the Philippine court may review about the foreign court is extensive: 'exigencies, like the statute of limitations, capacity to enforce orders and judgments, access to records, requirements for the acquisition of jurisdiction, and even questions relating to the integrity of foreign courts, may render undesirable or even totally unfeasible recourse to a foreign court.'[1790] Whether this evaluation of the foreign court's fitness is consistent with comity or not, even in the guise of evaluating practical 'viability,' is also something which the Philippine Supreme Court saw no need of justifying. Furthermore, the recognition and enforcement of foreign judgments in the Philippines is also grounded in comity.[1791]

E. The Choice-of-Forum Clause and Protecting Weaker Parties

The rationale for protecting weaker parties is that unequal bargaining power makes the weaker party vulnerable to being abused, and in such a scenario, the contract ends up containing terms which are asymmetrically in favour of the much stronger party to the prejudice of the weaker

[1785] *Eg, Saudia* (n249) 164.
[1786] See *Philippine National Construction Corp v Asiavest Merchant Bankers (M) Berhad* (2015) 767 SCRA 458, 483.
[1787] See *HSBC* (n240) 338.
[1788] *Saudia* (n249) 169.
[1789] Ibid.
[1790] Ibid.
[1791] *Ingenohl v Walter E Olsen & Company, Inc* (1925) 47 Phil 189, 239.

party.[1792] Hence, such asymmetric contracts are seen problematic, unfavourable or undesirable. Notably, the Singapore High Court has recognised in *The 'Eastern Trust'* that the Singaporean courts are ready to step in to help another party in instances where there is an 'overwhelming [discrepancy in] bargaining power,' albeit only exceptionally. [1793] In Asian jurisdictions, this problem has an added dimension as inequality of bargaining power may also result from lack of proper comprehension of English language contracts, and other translation issues.

This issue of unequal bargaining power also affects Choice-of-Forum clauses since some of these clauses may amount to depriving weaker parties of access to courts and waiving their procedural rights. Court decisions on unequal bargaining power have extended the same approaches found in contract law, including remedies to cases involving 'problematic' Choice-of-Forum clauses. In addition, however, international and regional law have addressed this problem specifically. For example, the *Brussels Convention*[1794] and the subsequent *Brussels I Regulation*[1795] and *Brussels I Recast*[1796] have provided specific remedies and approaches on how to address the problem of unequal bargaining power in jurisdictional matters, including giving effect to the Choice-of-Forum clauses. In Singapore, Hong Kong, Malaysia and the Philippines, the problem of unequal bargaining power in Choice-of-Forum clauses can be addressed generally through contract law principles of unconscionability, undue influence, public policy and mandatory rules, special statutes.[1797]

The analysis of unequal bargaining power in Choice-of-Forum clauses necessarily includes the tension between giving effect to party autonomy (*ie,* the intention of the parties) on one hand, and the state's special interests in protecting weaker parties, on the other. To proceed with such an analysis, however, one needs to first characterise the situation as a case involving inequality of bargaining power. This threshold question, however, on inequality in bargaining power is difficult to answer, and often treated as a given without much articulation. [1798] Current literature has highlighted the difficulty of ascertaining what constitutes 'unequal' bargaining power, what

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[1792] See, eg, *Fry v Lane* (1888) 40 ChD 312, 322.
[1793] *The 'Eastern Trust'* (n658) 518-9; also *The 'Vishva Apurva'* (n659) 927 citing *The Bremen* (n60) 12.
[1794] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, opened for signature 27 September 1968, 1262 UNTS 153 (entered into force 1 February 1973), art 5, 7-12a, 13-15, 17.
[1795] *Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition of judgments in civil and commercial matters* [2001] OJ L 012/1, arts 8-13, 15-17, 18-21.
[1796] *Brussels I Recast* (n72A) arts 10-16, 17-19, 20-21, 26(2), 31, 45.
[1797] *Unfair Contract Terms Act* (n1662); *Misrepresentation Act* (Singapore, cap 390, 1994 rev ed) s3; *Consumer Protection (Fair Trading) Act* (n1667); *Unconscionable Contracts Ordinance 1994* (n1681); *Consumer Protection Act 1999* (n1688), *Consumer Protection (Amendment) Act 2010* (Malaysia); *Consumer Act of the Philippines* (Philippines).
[1798] Max Helveston and Michael Jacobs, 'The Incoherent Role of Bargaining Power in Contract Law' (2014) 49(4) *Wake Forest Law Review* 1017, 1021.

constitutes 'weaker parties', the required 'threshold' of inequality which can trigger the provision of remedies, and other details like evidence, burden of proof, etc..[1799] Furthermore, there has also been difficulty reconciling this need to protect weaker parties with the existing legal doctrines and approaches under contract law. In common law, for example, there is historical allegiance to contractual freedom. As such, there is no doctrinal constraint on stronger parties from exercising their relatively stronger bargaining power during contractual negotiations, or obligation to negotiate in good faith. Furthermore, parties are regarded to assume contractual obligations to fulfil their needs or wants; hence, it is for them to determine the terms of their contract. Therefore, parties are held responsible to his actions when he enters into a transaction.

1. Asymmetric Choice-of-Forum clauses

Asymmetric Choice-of-Forum clauses can be considered a manifestation of unequal bargaining power. In France, for instance, the *Cour de Cassation* has invalidated clauses where only one party is given the option where to commence litigation, while the other party lacks such ability to choose.[1800] These clauses have been known as unilateral optional jurisdiction clauses commonly found in international financial agreements[1801] and are often justified as a risk-management strategy which can reduce the price of finance for borrowers.[1802] In the *Rothschild* case, however, the French *Cour de Cassation* did not consider the risk-management benefit such unilateral clauses provide. The French court rather focused on the asymmetry and how the clause gave the bank an unreciprocated advantage against the borrower by giving it complete discretion to choose where to file the litigation. Hence, the clause had a 'potestative' character, (*ie*, conditioned completely on the will of the promisor) which is void under French law.[1803]

Common law courts have taken a more benign approach to asymmetric clauses even if they reflect unequal bargaining power. Upholding contractual freedom, English courts have held unilateral optional agreements legitimate and enforceable. In *Baiduri*, clause 18 of the guarantee agreement stated that while both parties submit to the jurisdiction of the Brunei courts, the bank is also given the right to enforce the guarantee in any court. [1804] During the stay application, the

[1799] See Ibid 1021-32.
[1800] See Cour de cassation [French Court of Cassation], 11-26.022, 26 September 2012 ('Rothschild'); Cour de cassation [French Court of Cassation], 13-27264, 25 March 2015 ('ICH v Credit suisse').
[1801] Mary Keyes and Brooke Adele Marshall, 'Jurisdiction agreements: exclusive, optional and asymmetrical' (2015) 11(3) *Journal of Private International Law* 345, 346.
[1802] Ibid.
[1803] Ibid 370; see *Civil Code* (France) art 1304-2.
[1804] *Baiduri* (n232) 282.

Singapore High Court interpreted the clause as non-exclusive from the bank's perspective, while the defendants can only sue in Brunei.[1805] In arriving at this interpretation, the court referred to the Brunei High Court decision, in a related case, that the jurisdiction under clause 18 of Brunei courts was not exclusive.[1806] Hence, the Singapore court refused to stay the proceedings.[1807]

While Hong Kong courts have yet to extend the same recognition to unilateral optional jurisdiction agreements, the Hong Kong CFI has recognised the validity of unilateral option clauses in arbitration.[1808] Given this attitude, there is no reason, based on the principle of freedom of contract, why Hong Kong courts cannot extend the same recognition to unilateral optional Choice-of-Forum clauses.

Like the French *Civil Code*, the Philippine *Civil Code* also prohibits 'potestative' obligations in Article 1182 – '[w]hen the fulfillment of the condition depends upon the sole will of the debtor, the conditional obligation shall be void.'[1809] Hence, if the choice of the venue for litigation relies solely on the will of one party, Article 1182 may be invoked to void such Choice-of-Forum clause. However, as the treatment of Choice-of-Forum clauses remains procedural rather than contractual, the enforcement of unilateral option Choice-of-Forum clauses may be resolved by just applying the technical rules of venue. In such case, the clause will be treated as non-exclusive, and since there is no valid waiver of the default venue rules, the *Rules of Court* would just apply, thus ignoring the provisions of the Choice-of-Forum clause. Furthermore, the court may also consider the unequal bargaining power between the parties as a compelling reason to simply ignore the Choice-of-Forum clause especially 'with the view of promoting substantial justice.'[1810] Hence, under Philippine law, a unilateral option Choice-of-Forum clause may be difficult to enforce.

2. Consumers, Franchisees, Insured and Small Businesses as Weaker Parties

Another approach to the protection of weaker parties is to rely on party stereotypes and characteristics. Under this approach, certain categories of parties are characterised as the weaker party according to the nature of the transaction involved. Hence, consumers in consumer transactions, franchisees in franchise contracts, the insured in insurance contracts, and small

[1805] Ibid 285.
[1806] Ibid 283.
[1807] Ibid 285.
[1808] *China Merchants Heavy Industry Co Ltd v JGC Corporation* [2000] HKCFI 544, [22] (Court of First Instance).
[1809] *Civil Code* (Philippines) art 1182.
[1810] See *Santos v Court of Appeals* (1979) 90 SCRA 223, 226.

businesses in business-to-business transactions are considered the 'weaker party'. Their very status in the transaction is the relevant factor that determines their protection, which is usually done through special statutes or international treaty.

Consumers receive the most protection amongst the 'weaker parties.' All four jurisdictions have consumer protection laws which may be extended to render void or unenforceable Choice-of-Forum clauses. The consumer laws in the four jurisdictions, however, do not specifically deal with such clauses but may nonetheless void them because these terms may be considered unconscionable, unfair or illegal under their relevant consumer statutes.

Singapore's *Consumer Protection (Fair Trading) Act 2003* voids terms in a consumer contract which are unconscionable, *ie,* harsh, oppressive or excessively one-sided.[1811] The Act, however, only covers transactions by consumers who are defined as individuals, receiving goods or services or incurring legal obligations to pay for such goods or services, in a transaction other in the course of business.[1812] Parties cannot opt out of the provisions of the Act for any transactions where the supplier or consumer is a Singapore resident or the consumer transaction was made or sent from Singapore.[1813] Any contrary term or waiver shall be void.[1814] Since the Act covers all contractual provisions in a consumer contract, Choice-of-Forum clauses which are harsh, oppressive or excessively one-sided may be voided under the Act.

In Hong Kong, the *Unconscionable Contracts Ordinance 1994* (Cap 458) protects consumers in consumer transactions from unconscionable contracts and provisions. When a contract with a consumer is considered unconscionable,[1815] the court may refuse to enforce the contract, exclude the unconscionable provision, limit, vary or alter the effect of the unconscionable part.[1816] Even if the Choice-of-Law clause provides for foreign law, the Hong Kong Ordinance still applies when the choice of foreign law was done to evade the ordinance and when the consumer involved is a Hong Kong resident and that the essential steps in making the contract were done in Hong Kong.[1817] Notably, because the Ordinance is not limited to any type of contractual provision in a consumer transaction, its provisions should also apply to Choice-of-Forum clauses in consumer

[1811] *Consumer Protection (Fair Trading) Act 2003* (n1667) sch2, pt1(11).
[1812] Ibid s2(1).
[1813] Ibid pt2s3, pt4s13.
[1814] Ibid pt4, s13.
[1815] See *Unconscionable Contracts Ordinance* (n1681) cap 458, s6(1).
[1816] Ibid cap 458, s5.
[1817] Ibid cap 458, s7(2).

transactions. An unconscionable Choice-of-Forum clause may therefore be held invalid, unenforceable or may be varied by the court.

Similarly, Malaysia's *Consumer Protection Act 1999* through its 2010 amendment which inserted Part IIIA on 'Unfair Contract Terms' protects consumers from contracts and terms which may be procedurally or substantively unfair. Nonetheless, although Part IIIA is incorporated in the *Consumer Protection Act*, its Section 24B appears to apply the provisions of Part IIIA on unfair contract terms to all contracts, whether involving consumers or not. Significantly, an unfair term may have resulted from procedural unfairness which is defined as the unfairness that took place during the negotiation stage,[1818] or substantive unfairness (i.e., when the term itself is unfair).[1819] Both procedural and substantive unfairness can lead to the contract and term being declared unenforceable or void.[1820] If the unfair term is severable, the remaining terms of the contract may be enforced.[1821] Because procedural and substantive unfairness may affect any contractual term, Choice-of-Forum clauses may also be voided pursuant to the *Consumer Protection Act*. Notably, when the insertion of the Choice-of-Law clause providing for foreign law was made to evade the operation of the *Consumer Protection Act*, its provisions including Part IIIA applies nonetheless.[1822]

The *Consumer Act of the Philippines*[1823] also identifies consumers as requiring special protection but does not specifically deal with terms in consumer contracts which may be unfair, unreasonable, oppressive or unconscionable. The protection of consumers as regards unconscionable contract terms remains with general contract law. The obligation to observe fair dealings flows from Article 19 of the *Civil Code*, which requires every person, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.[1824] Hence, unlike in common law, the Philippines provides for good faith obligation between contracting parties during negotiations, birth and performance of the contract. Furthermore, unconscionable contract terms have also been considered contrary to morals and public policy.[1825] Hence, interest rates, damages, attorney's fees, and penalties which are iniquitous

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[1818] *Consumer Protection Act 1999* (n1688) s24C(1); Adnan Trakic, 'Statutory protection of Malaysian consumers against unfair contract terms: Has enough been done?' (2015) 44(3) *Common Law World Review* 203, 212.
[1819] *Consumer Protection Act 1999* (n1688) s24D(1); Trakic (n1818) 213.
[1820] *Consumer Protection Act 1999* (n1688) s24G(1)-(2).
[1821] Ibid s24g(2).
[1822] Ibid s4.
[1823] *Consumer Act of the Philippines* (Philippines).
[1824] *Civil Code (Philippines)*, art 19.
[1825] *Malinao v National Labor Relations Commission* (1999) 319 SCRA 65, 74-5; *Imperial v Jaucian* (2004) 427 SCRA 517, 525 ('Imperial').

and unconscionable have been voided by the Supreme Court.[1826] Although the Supreme Court has yet to apply the doctrine of contractual unconscionability to Choice-of-Forum clauses, the principle against unconscionable contract terms can be extended to them as well following Article 19 of the *Civil Code*.

Policyholders of insurance contracts also receive special protection in the four jurisdictions through legislation.[1827] The regulation of insurance contracts deviates from the usual principle of *caveat emptor* which prevails in contract law.[1828] Rather, in dealing with the insured (policyholders), the insurers have the obligation of utmost good faith.[1829] The insurance legislation, however, in the four jurisdictions does not contain specific rules on Choice-of-Forum clauses. Whether a Choice-of-Forum clause in an insurance contract is unconscionable, unfair or unreasonable, and the effects thereof are governed by general contract law. Likewise, because insurance contracts can be considered as consumer transactions, the analysis under consumer law also applies.

In contrast, the protection of other weaker parties such as franchisees and small businesses have not been specially addressed through legislation. Rather, these 'weaker parties' are protected through general contract law. The only exception is Malaysia which has special legislation on franchising.[1830]

Singapore, as a party to the *Choice-of-Court Convention* excludes from the scope of the convention, transactions by a 'consumer,'[1831] who is understood as a 'natural person acting primarily for personal, family or household purposes.'[1832] Hence, Choice-of-Forum clauses in consumer contracts are governed by Singapore's *Consumer Protection (Fair Trading) Act 2003* and any other applicable law validly chosen by the parties and consistent with the consumer protection law.

[1826] See *State Investment House Inc v Court of Appeals* (2001) 361 SCRA 201, 208; *Imperial* (n1825) 525.
[1827] *Insurance Act 1966* (Singapore, cap 142, 2002 rev ed); *Insurance Ordinance* (Hong Kong) cap 41; *Insurance Act 1996* (Malaysia); *Insurance Code* (Philippines).
[1828] See, eg, Simon Goh, 'Chapter 24 Insurance Law' in Singapore Academy of Law, Laws of Singapore (webpage, 25 January 2019) 24.4.1 < https://www.singaporelawwatch.sg/Results/ch-24-insurance-law>
[1829] See eg, Ibid.
[1830] See *Franchise Act* (Malaysia).
[1831] *Choice-of-Court Convention* (n70) art 2(1)(a).
[1832] Ibid art 2(1)(a).

3. Contracts-of-Adhesion

The term 'contracts of adhesion,' popularised by Friedrich Kessler,[1833] refers to contracts where the terms have not been negotiated, included as standardised terms or boilerplate provisions, or made on a take-it-or-leave-it basis. Because they are considered as a manifestation of unequal bargaining power, the fact that the underlying contract or the Choice-of-Forum clause is a 'contract-of-adhesion' can be considered as an important factor in determining issues of validity, interpretation and the effect to be given to such clause. Nonetheless, the overwhelming adherence to contractual freedom makes 'contracts-of-adhesion' to be recognised generally as valid and enforceable. They are also considered reasonable means of conducting business especially that such approach minimises costs and risks, and thus reducing prices which consumers need to pay.[1834] The challenge then for the courts is to determine when to strike and aid 'weaker parties' without necessarily weakening the fundamental principle of contractual freedom.

In Singapore, Hong Kong and Malaysia, the adherence to contractual freedom means that courts will enforce, as a general rule, validly concluded contractual terms including Choice-of-Forum clauses which are contracts-of-adhesion.[1835] The fact that these clauses were not negotiated does not necessarily affect their validity. Rather, their validity is determined by reference to general principles of contract law including unconscionability or undue influence, consumer laws, public policy, mandatory rules or other equitable doctrines. Notably, whether the contract is in standard form is a factor in determining whether a term is reasonable or unconscionable.[1836] Similarly, the fact that a Choice-of-Forum clause has not been negotiated should not *per se* play a role in its interpretation. The Singapore High Court has rejected the approach in *British Aerospace*,[1837] which argued that certain convenience factors may not be raised because the contract was not negotiated, because '[i]t is not possible to draw a bright-line between freely negotiated jurisdiction agreements and jurisdiction agreements found in contracts of adhesion.'[1838]

Philippine courts, in contrast, have always expressed their readiness to invalidate venue stipulations which are contracts-of-adhesion if they provide an undue burden on weaker parties.

[1833] Friedrich Kessler, 'Contracts of Adhesion – Some Thoughts about Freedom of Contract' (1943) 43(5) *Columbia Law Review* 629.
[1834] Ibid 631-2.
[1835] See Lee Mason, 'Inadequacy and Ineffectuality: Hong Kong's Consumer Protection Regime Against Unfair Terms in Standard Form Contracts' (2014) 44 *Hong Kong Law Journal* 83, 84;
[1836] Eg, *Consumer Protection Act 1999* (Malaysia) s24D(2)(c).
[1837] *British Aerospace* (n147) 376.
[1838] *Abdul Rashid* (n647) 1053-4; *cf Deltatre* (n835) [46]; see *Vinmar* (n660A) 1307.

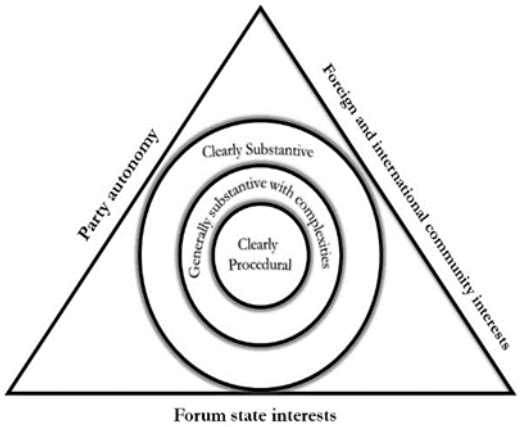
This follows from Article 24 of the *Civil Code* which states that '[i]n all contractual…relations, when one of the parties is at a disadvantage on account of his moral dependence, ignorance, indigence, mental weakness, tender age or other handicap, the courts must be vigilant for his protection.'[1839] The general rule, however, continues to be the promotion of contractual freedom. Nonetheless, if peculiar circumstances are present in the case,[1840] such as those mentioned under Article 24 of the *Civil Code*, the court can void or vary the effect of a 'standard' contractual term. In *Sweet Lines Inc v Teves*,[1841] the Supreme Court refused to enforce a standard domestic Choice-of-Forum clause in a passenger ticket which provided for litigation only in the city where the headquarters of the shipping company were located and far from the passengers' habitual residence.[1842] The court justified this by noting the crowded conditions at the ports,[1843] the lack of proper opportunity to examine the terms and conditions of the ticket,[1844] the fact that the clause was drafted solely for the benefit of the shipping line,[1845] and the nature of inter-island shipping in the Philippines virtually granted the shipping company a monopoly.[1846] Significantly, the court said that 'the bulk of those who board these inter-island vessels come from the low-income groups and are less literate, and who have little or no choice but to avail of petitioner's vessels.'[1847] Given these 'peculiar circumstances,' the Choice-of-Forum clause was declared void and unenforceable for being contrary to public policy.[1848] Furthermore, Philippine courts construe contracts of adhesion against the drafter.[1849]

F. Key Lessons

Keyes identified three interests which prominently determine a court's exercise of jurisdiction - interests of the parties (in this thesis, party interest is represented by how parties exercise their party autonomy), interests of the forum state and foreign and international community interests.[1850] Chapter 3 discussed party interests while this chapter discussed the interests of the state and the international community. In light of all the discussions, one can also say that these three sets of interests likewise affect the analysis of issues arising from Choice-of-

[1839] *Civil Code* (Philippines) art 24.
[1840] *Sweet Lines Inc v Teves* (1978) 83 SCRA 361.
[1841] Ibid.
[1842] Ibid 371-2.
[1843] Ibid 371.
[1844] Ibid.
[1845] Ibid.
[1846] Ibid.
[1847] Ibid.
[1848] Ibid 370-2.
[1849] *HSBC* (n240) 339.
[1850] Keyes (n22) 178-225.

Forum clause litigation. Hence, the framework of how courts approach issues involving Choice-of-Forum clauses may be further refined by including the three interests – party interests, state interests, and interests of the international community – as limiting the way courts resolve Choice-of-Forum clause issues. The illustration below demonstrates this:



This chapter shows how state interests expressed through mandatory rules, public policy, and the protection of weaker parties shape Choice-of-Forum clause litigation. In Singapore, Hong Kong and Malaysia, mandatory rules affect Choice-of-Forum clauses at two-levels. First, when the chosen forum is supplanted by the forum designated under the mandatory rules. Second, when the choice of law is supplanted, modified or limited by the mandatory rules, thereby affecting the validity and interpretation of Choice-of-Forum clauses. In the Philippines, there is no express concept of mandatory rules, but similar concepts are present which may affect the validity of the chosen forum and interpretation of the Choice-of-Forum clause. Public policy, on the other hand, is only exceptionally invoked in Singapore, Hong Kong and Malaysia where it can affect the validity and interpretation of Choice-of-Forum clauses and enforcement and recognition of foreign judgments involving Choice-of-Forum clauses. In the Philippines, public policy assumes a more prominent role as it acts as a counter-balance to the party interests and an important factor in *forum non conveniens*. The protection of weaker parties is an important state interest. These specific protections determine the validity and interpretation of Choice-of-Forum clause as they apply to 'weaker parties' like consumers, insured and other 'weaker parties.'

The interests of the international community and foreign states, on the other hand, are best contained in statements concerning international comity. Likewise, international interests are also reflected in statements involving treaties to which the forum state is a party (*eg, Warsaw*

Convention, Hague-Visby Rules). As discussed in this chapter, international and foreign state interests can provide grounds for refusing Choice-of-Forum clauses.

Chapter VIII.

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A. How do courts reason and decide Choice-of-Forum Clause Issues?

This thesis seeks to explore, identify, compare and explain the approaches in Singapore, Hong Kong, Malaysia and the Philippines when Choice-of-Forum clauses in international commercial contracts are challenged in courts. The scope of the query includes looking into the characterisation of these clauses by the courts, role of party autonomy, enforcement and factors considered by the court in granting relief, resolution of issues concerning existence, validity and interpretation, and the role of state and international interests in the analysis. In other words, the query boils down to how courts in the four jurisdictions decide Choice-of-Forum clause issues. This question also emphasises the key role of legal reasoning employed by the courts in resolving

the various issues, and thus, the appropriateness of a methodological approach which is anchored on a vision of law as a mainly hermeneutic discipline.

1. First Lesson: Characterisation determines the legal tools available.

So how do courts in the four jurisdictions reason and decide Choice-of-Forum clause issues? The first key lesson is that the reasoning of the court depends foremost on the legal tools available to them, which in turn ultimately depends on how they characterise Choice-of-Forum clauses. Hence, as discussed in Chapter 2, courts in Singapore, Hong Kong and Malaysia approach these clauses from the standpoint of both contracts and procedure while courts in the Philippines, approach them mainly as procedural mechanisms, albeit with certain contractual characteristics as well. Nonetheless, the extent that courts would lean towards contract law vis-à-vis procedural law analysis, expectedly varies across the four jurisdictions. Singapore and Hong Kong appear to emphasise more the contractual consequences flowing from Choice-of-Forum clauses; while Malaysia and much more, the Philippines, emphasise the administration of justice aspect, including the discretionary character and the public law aspects involved in the Choice-of-Forum clause analysis. The consequence of this dual treatment means that the legal tools available to courts in the four jurisdictions come from both contract and procedural law in varying degrees.

Nonetheless, courts recognise that Choice-of-Forum clauses are not just like any other contracts. First, they differ from arbitration agreements because of the source of their authority (*ie,* arbitration derive their power from consent of the parties while Choice-of-Forum clauses also are based on consent, but most fundamentally, also the authority of the state itself) and the bigger role that court discretion plays in Choice-of-Forum clause litigation. Second, unlike other contracts, the doctrine of privity accepts more exceptions as non-parties can be more easily joined by courts as part of their administration of justice function. Lastly, the doctrine of separability shields the Choice-of-Forum clause from the defects which may afflict the underlying contract, thus differentiating the clause from the other provisions of the underlying contract. Because of these unique features, courts are given further reason to hesitate from employing a strictly contractual approach in deciding Choice-of-Forum clause issues.

2. Second Lesson: Party autonomy leads and shapes how courts approach the issues.

The second key lesson is the important role of party autonomy in shaping how courts in the four jurisdictions approach Choice-of-Forum clause issues. Chapter 3 shows how two aspects of party autonomy are relevant. The first aspect is the freedom to determine the contents of the Choice-of-Forum clause, while the second aspect is the freedom to control the flow of litigation. The exercise of party autonomy in both aspects fundamentally determines how courts approach and resolve issues, provide remedies and exercise its discretion.

The first aspect of party autonomy which allows parties to determine the contents of their Choice-of-Forum clauses is a feature common to common law, civil law and *Choice-of-Court Convention* regimes. In common law, the aspect is understood as the freedom of contract, *ie,* the freedom of parties to freely negotiate and agree on lawful terms to serve their own interests. In Singapore, Hong Kong and Malaysia, case law confirms the variety of promises which parties may include in the Choice-of-Forum clauses – where to sue, where not to sue, who has the power to choose, what arguments could not be raised, etc. Nonetheless, despite the variety of promises which parties may introduce in their clauses, the enforcement of these specific promises may be constricted by the binary prevailing in the classification of Choice-of-Forum clause, *ie,* that Choice-of-Forum clauses are either exclusive or non-exclusive. By commencing the analysis with a classification rather than interpreting the specific promises contained in the clauses, the courts may not be able to provide the results originally intended by the parties. The *Choice-of-Court Convention* also recognises party autonomy by acknowledging the parties' freedom to choose the court which will exclusively hear their dispute, and also, in effect, choose which courts or jurisdictions could not. The *Choice-of-Court Convention,* however, is silent as to what other promises parties can include. This may depend on the law of the chosen court, the law which determines the validity of the clause. Lastly, the civil law tradition also recognises such freedom, but its extent depends on what is specifically provided in the procedural rules of the relevant jurisdiction. The Philippines appears to follow more closely the civil law approach in this regard because the freedom given to the parties depends on the specific requirements provided in the rules of venue under Rule 4, Section 4(b) of the *Rules of Court* – parties can choose the court where to bring their dispute, but such choice must be exclusive.

The second relevant aspect of party autonomy is the extent parties can control their litigation. This freedom is recognised in both civil law and common law procedures but is

circumscribed by the procedural rules and other public law doctrines of the forum. In Singapore, Hong Kong and Malaysia, this freedom includes the freedom to choose the cause of action, the parties against whom the action is brought, where to file the action (even if this would be in breach of the Choice-of-Forum clause), specific answers which the defendant may provide, the evidence which may be submitted to the court, tactics and strategies which both parties may employ to expedite or delay the proceedings, and even the matters which may be raised during the enforcement stage of the judgment. Likewise, parties may choose to waive their right to sue under the Choice-of-Forum clause, either expressly or impliedly. Notably, by following the adversarial system of litigation, the Philippines also recognises the same freedoms of parties.

The ouster rule illustrates the tug-of-war between party autonomy and state regulation in the courts. For a long time, common law courts refrained from giving effect to Choice-of-Forum clauses because parties could not, by their agreement, oust courts of their jurisdiction. The ouster rule is no longer followed in Singapore, Hong Kong and Malaysia after they adopted *The Eleftheria*'s approach of giving exclusive Choice-of-Forum clauses *prima facie* enforceability. The Philippines, in contrast, still embraces the ouster rule, and continues to declare Choice-of-Forum clauses as incapable of depriving Philippine courts of their jurisdiction. Hence, the derogation effect of Choice-of-Forum clauses, to the extent that they may prevent Philippine courts from hearing the case, is not recognised.

3. Third Lesson: Enforcement is determined by the forum court's procedure.

The third key lesson is that even if Choice-of-Forum clauses are considered contracts, their enforcement still depends on the procedural rules of the forum court. A close examination of each jurisdiction reveals that each jurisdiction has unique approaches to the enforcement of Choice-of-Forum clauses. This is true even between jurisdictions sharing the common law heritage. These differences may be accounted for by history (*eg,* Hong Kong's reversion to China), economic ambitions (*eg,* Singapore's establishment of the Singapore International Commercial Court and accession to the *Choice-of-Court Convention* in order to establish itself as a premier dispute resolution centre), and the type of disputes and issues that go to court. The differences also result from the deep interplay between procedure and party autonomy, and the role of court discretion in the enforcement of Choice-of-Forum clauses. The *Choice-of-Court Convention,* by removing much of the court discretion in the analysis, arguably can be described as the most important factor introducing changes in Asia.

Among the four jurisdictions, Singapore has the most complex enforcement mechanism. Aside from the tests available in common law, Singapore courts also use the tests under the laws and procedural rules implementing the *Choice-of-Court Convention* and those in relation to the establishment of the SICC. The common law 'strong cause' test under *The Eleftheria* determines whether a Singapore court other than the SICC grants service out of the jurisdiction in the case of a Singapore Choice-of-Forum clause or a stay in disputes involving a foreign exclusive Choice-of-Forum clauses. The Singapore Court of Appeal in *Vinmar*, however, has modified factor (d) of *The Eleftheria* by declaring that a failure to establish a genuine defence to the claim is irrelevant, thus narrowing such factor to situations where there is abuse of process or denial of justice. On the other hand, the modified *Spiliada* test governs the enforceability of non-exclusive Choice-of-Forum clauses, and as such, when the parties intended their non-exclusive Choice-of-Forum clause to have the same effect as an exclusive clause or intended to give the clause greater weight vis-à-vis the other *forum non conveniens* factors, the 'strong cause' test applies as well. As the modified *Spiliada* stands in *Shanghai Turbo*, this means that in instances where the intention to give the clause greater weight (*eg,* stating that parties 'submit' to the jurisdiction of the named forum), the factors which are relevant to the test of 'strong cause' in the context of exclusive clauses should also apply. Nonetheless, factors which are foreseeable at the time of contracting should carry little weight in determining 'strong cause'. When no such intention is present, the classic *Spiliada* analysis applies. However, for cases under the *Choice-of-Court Convention*, the test for service out of Singapore and stay applications in all Singapore courts is the test prescribed under Articles 5 and 6 of the convention. Notably, the *Choice-of-Court Convention* presumes that a Choice-of-Forum clause is exclusive. As regards cases at the SICC involving exclusive Choice-of-Forum clauses which are not under the *Choice-of-Court Convention* and non-exclusive clauses, the 'clearly more appropriate forum' test applies for stay applications. Notably, at the SICC, leave is not required for service out of the jurisdiction whenever there is a Choice-of-Forum clause, whether exclusive or non-exclusive. An anti-suit injunction is available in all Singapore courts to enforce exclusive and non-exclusive Choice-of-Forum clauses, and the tests under the common law apply. Enforcement and recognition of foreign judgments involving Choice-of-Forum clauses are enforceable under common law and the other two-related statutory regimes allowing registration. The enforcement of foreign judgments under the *Choice-of-Court Convention* is governed by Articles 8 to 15.

Hong Kong, except in enforcement and recognition of judgments from the Mainland China, continues to apply the tests under the common law. This means that as regards exclusive

Choice-of-Forum clauses, relief is granted based on *The Eleftheria* test. The 'strong cause' test only considers factors which are unforeseeable at the time of contract and those which are extraordinary and should be considered in the interest of justice. Like Singapore, Hong Kong adopts the modified *Spiliada* for non-exclusive clauses, and the test to be used in granting relief depends on whether the parties have submitted to the named forum or the forum where the action is commenced. Anti-suit injunctions are also available for cases involving both exclusive and non-exclusive clauses, and their grant depends on the tests under common law. Recognition and enforcement of foreign judgments is generally governed by common law and the related statutes allowing registration. For enforcement of judgments from the Chinese Mainland which involves exclusive Choice-of-Forum clauses, the *Judgments Arrangement* applies. Notably, the provisions of the *Judgment Arrangements* are similar to the enforcement and recognition provisions of the *Choice-of-Court Convention*.

Malaysia adheres to the 'strong cause' test of *The Eleftheria* in granting relief in cases involving exclusive Choice-of-Forum clauses, albeit convenience factors, in contrast to Singapore and Hong Kong, are apparently considered more easily. As to disputes involving non-exclusive clauses, Malaysia continues to adopt the traditional *forum non conveniens* test under *Spiliada*, where the Choice-of-Forum clause is just one of the many factors the court considers. The grant of an anti-suit injunction is dependent on the tests under common law. Likewise, enforcement and recognition of foreign judgments are determined using the common law principles and the related *Reciprocal Enforcement of Judgments Act* 1958, which allows registration of foreign judgments.

Compared to the other jurisdictions, the Philippines does not grant the common law remedies of stay and anti-suit injunction, albeit comparable forms of relief may be available under the Philippine *Rules of Court*. Likewise, Choice-of-Forum clauses do not play any role in extra-territorial service of summons. Rather, grant of leave to serve extraterritorially is based solely on meeting the procedural requirements under Rule 14, Section 15 of the *Rules of Court*,[1851] which does not mention Choice-of-Forum clauses as a ground. Hence, in this sense, the Philippine approach to Choice-of-Forum clauses stands in contrast to the approaches in Singapore, Hong Kong and Malaysia. Nonetheless, breaches of Choice-of-Forum clauses can be a ground for dismissal of proceedings under Rule 16 of the Philippine *Rules of Court*, which allows dismissal when the venue is improperly laid, when there is another action pending between the same parties for the same cause, and when a condition precedent for filing the claim has not been complied with. Moreover,

[1851] *Dial Corp* (n251) 742.

during trial, breaches of Choice-of-Forum clauses can be considered in the court's determination of *forum non conveniens*. Similarly, foreign judgments obtained in breach of Choice-of-Forum clauses may be refused recognition in the Philippines when such a breach is considered to amount to 'want of jurisdiction' by the foreign court.

4. Fourth Lesson: Court discretion is an important element in the resolution of Choice-of-Forum clause issues.

Chapter 5, which discussed the various factors considered by the courts in granting relief emphasises the key role of court discretion in the Choice-of-Forum clause analysis. The discussion highlights the capacity of courts to identify and characterise certain facts or elements as factors capable of justifying the court's decision to grant a stay, service out of the jurisdiction, anti-suit injunction, dismissal, preliminary injunction and other relief. In Singapore, Hong Kong and Malaysia, the Choice-of-Forum clause as a contract is the starting point of the analysis undertaken in providing relief to parties. This means that there is an important distinction between exclusive and non-exclusive clauses. The provision of relief pursuant to an exclusive Choice-of-Forum clause takes its cue from the approach of *The Eleftheria.* Hence, courts in Singapore, Hong Kong and Malaysia continue to look at the factors identified in *The Eleftheria* in granting service out of the jurisdiction and stays, except in Singapore, where factor '(d)' (*ie,* genuine desire for trial in the chosen court) has been narrowed to situations where there is an abuse of process or denial of justice. On the other hand, the provision of relief pursuant to non-exclusive Choice-of-Forum clauses has changed over time but continues to rely on the *forum non conveniens* test laid down in the *Spiliada*. Hence, the factors identified in *Spiliada* are the same factors considered by courts in Singapore, Hong Kong and Malaysia. Nonetheless, when the parties have stated or have intended that their non-exclusive Choice-of-Forum clause shall have the same effect as an exclusive clause when an action is filed in the named forum, which can be a foreign court, this makes the effect of the non-exclusive clause similar to an exclusive clause. This modified *Spiliada* approach has been adopted in Hong Kong and Singapore while Malaysia still follows the classic *Spiliada* analysis.

Nonetheless, despite the differences in treatment, the factors identified in *The Eleftheria* and *Spiliada* are similar. The weight accorded to particular factors, however, depends on the classification of the clause. Hence, factors like location of evidence, relative convenience and efficiency do not usually provide strong cause to grant a stay of proceedings when the forum court is the chosen forum in the exclusive Choice-of-Forum clause. In contrast, because of the need to

look for the more convenient forum in the *forum non conveniens* test, convenience factors are seriously considered. In the same manner, the applicable law is not important in disputes involving exclusive Choice-of-Forum clauses but are very important in disputes involving non-exclusive cases. Nonetheless, factors which have important public policy implications like lack of genuine desire for trial, prejudicial factors like time-bar, loss of juridical advantage, competence of foreign courts and multiplicity of proceedings are important for both exclusive and non-exclusive Choice-of-Forum clause analysis.

In the Philippines, the lack of explicit contractual treatment of Choice-of-Forum clauses and the focus on the administration of justice function of the *forum non conveniens* principle have made the Philippine version different. Hence, even when an exclusive Choice-of-Clause is present, the most relevant factors in the Philippines are those concerning the competence and capability of the local courts to provide justice to the parties – their capacity and competence (referring to the case-management issues of the courts), their position to effectively decide the case and make an intelligent decision as to the law and the facts, and their power to enforce its decision. Also relevant is whether the filing of the action, whether in the Philippines or elsewhere, is attended by abuse of court process. Furthermore, since convenience factors are distinct factors in the Philippine version of *forum non conveniens*, Choice-of-Forum clauses should not in themselves prevent the courts from considering these factors.

5. Fifth Lesson: Other than the issue of existence which can be determined by forum law, the applicable law closely determines issues of validity and interpretation of Choice-of-Forum clauses.

The law that is selected by the choice of law process has a crucial role in defining the existence, validity and interpretation of Choice-of-Forum clauses. Defining, however, the nature, scope and consequences of this relationship can be controversial. Particularly, the answer would depend on several factors – where the action was filed, the cause of action the plaintiff chose, how the court characterises Choice-of-Forum clauses, procedural rules including the extent parties are allowed to determine the course of their litigation, rules of evidence, burden of proof, legal reasoning employed, etc.

The law applicable to Choice-of-Forum clauses varies from one jurisdiction to another. Nonetheless, there has to be a national law that applies to Choice-of-Forum clauses. The law needs to be determinate but various aspects of the Choice-of-Forum clause can be governed by more

than one legal system. In common law, the law applicable to Choice-of-Forum clauses is the law applicable to the underlying contract, which is usually the law expressly or impliedly intended by the parties. In the absence of choice, the law is determined by weighing various connecting factors such as the place of contracting, places of residence or business of the parties, nature and subject of the contract and place of performance of the contract. Significantly, the law applicable to the underlying contract determines issues concerning the validity and interpretation. The law which determines existence, however, remains uncertain under common law as some decisions refer to the forum law while others refer to the putative 'applicable law.' In Malaysia, one must note that in contracts in Islamic banking and finance, the Islamic law applies together with the applicable substantive law selected by the choice of law process. Nonetheless, Malaysian courts have not yet decided whether Islamic law principles would also affect the validity of Choice-of-Forum clauses contained in Islamic banking and finance contracts.

Under the *Choice-of-Court Convention*, the law of the chosen court determines whether the Choice-of-Forum clause is null and void. Nonetheless, the other grounds for suspension and dismissal of actions are determined by forum law.

In the Philippines, because the Choice-of-Forum clause is seen only as a venue stipulation, the court may resort to a completely procedural approach. This means that issues of existence and validity are determined based on the clause's compliance with the straightforward rule on venue under the Philippine *Rules of Court* – 'parties have validly agreed in writing before the filing of the action on the exclusive venue thereof.'[1852] Furthermore, because of the need to comply with the black letter of this rule, the usual distinction between existence and validity becomes irrelevant.

6. Sixth Lesson: The interests of the forum state and the international community can override party autonomy and the applicable law.

The interests of the forum state, international community, as well as the interests of third-party states further limit the effects of Choice-of-Forum clauses. These state interests are manifested through mandatory rules, public policy or other analogous concepts like public interest, public morals, and good customs.

[1852] *Rules of Court* (Philippines), r4, s4(b).

Mandatory rules embody important state interests and affect Choice-of-Forum clauses in Singapore, Hong Kong and Malaysia at two levels. First is when the mandatory rule directly provides for a certain forum for the dispute contemplated in the Choice-of-Forum clause. Second is when the mandatory rule overrides the applicable law, in which case, the mandatory rule can affect the validity and interpretation of the Choice-of-Forum clause. While the mandatory character of certain rules can be declared expressly in the statute itself, often, whether a certain rule is mandatory is a question of statutory construction and its mandatory nature can only be established conclusively after a court decision declaring it as such. The Philippines, on the other hand, has no express doctrine of mandatory rules, albeit certain concepts like 'mandatory laws,' 'prohibitive laws' or those Constitutional provisions which could not be contravened in any manner are akin to mandatory rules. 'Mandatory' laws may affect Choice-of-Forum clauses as regards their validity and interpretation, and at the enforcement and recognition of foreign judgments.[1853] They may also affect the *forum non conveniens* analysis, in the sense that they represent important state interests and therefore may be considered by courts in justifying the Philippine proceedings, regardless of the chosen forum.

State interests are also expressed as public policy, a principle which often includes analogous concepts like public order, natural justice, customs, morals and other public interests. In Singapore, Hong Kong and Malaysia, public policy can affect Choice-of-Forum clauses at various levels – (1) by rendering the Choice-of-Forum clause illegal, void or unenforceable, (2) as a factor in determining 'strong cause' and *forum non conveniens*, (3) by denying the enforcement and recognition of foreign judgments or orders involving Choice-of-Forum clauses. Nonetheless, it is rarely used to prevent the enforcement of Choice-of-Forum clauses. On the other hand, public policy is an important concept which can oppose Choice-of-Forum clauses in the Philippines. In the Philippine *forum non conveniens* test, for example, the public policy of the forum is recognised as an important counterweight to any private interests of parties, and may be assessed independently from the interests of parties.

The state likewise has special interest in protecting weaker parties or those with lesser contractual bargaining power. In the four jurisdictions, consumers and insureds receive the most protection. Specifically, courts consider this protection in determining whether asymmetric clauses are valid, whether a specific statutory protection can render a Choice-of-Forum clause

[1853] See *Civil Code* (Philippines), art 17.

unconscionable, unfair or invalid, and whether a Choice-of-Forum clause found in standard-form contract is invalid.

The interests of foreign states are usually considered under the principle of international comity, which affects the Choice-of-Forum clause analysis at the choice of law level, during service out of jurisdiction, stay applications, applications for anti-suit injunctions, recognition and enforcement of foreign judgments involving Choice-of-Forum clauses, and when the other forum is deemed 'unsuitable.'

7. Answer to the Research Question

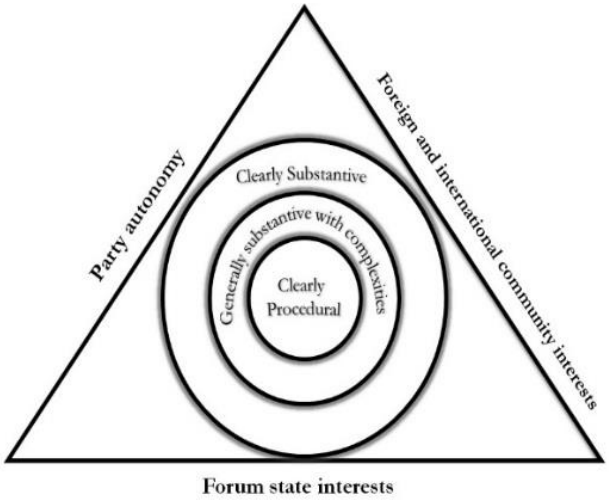
The following factors determine how courts in Singapore, Hong Kong, Malaysia and the Philippines reason and decide cases and specific Choice-of-Forum clause issues: (1) the way courts characterise Choice-of-Forum clause issues, (2) the manner and extent parties exercise their party autonomy, (3) the specific procedural rules of the forum which are relevant during enforcement, (4) the manner and extent courts exercise their discretion in considering and weighing the various factors relevant in granting relief, (5) the choice of law process of the forum court and how it affects the determination of existence, validity and interpretation of Choice-of-Forum clauses, and (6) the extent and capacity of state and international interests to modify or affect party autonomy and the choice of law process.

Moreover, in Chapter 2, a conceptual framework was introduced which classifies Choice-of-Forum clause issues into three categories: (1) purely procedural (*eg*, issues on the enforcement aspect of the Choice-of-Forum clause or those concerning the court's administration of justice), (2) purely substantive (*eg*, issues of validity and existence) and (3) both substantive and procedural (*eg*, issues of interpretation). This framework reflects the dual relationship involved in Choice-of-Forum clause litigation – the relationship between the courts and parties, and the relationship between the parties. Furthermore, as discussed in Chapters 3 and 7, the three interests previously identified by Keyes which are relevant in determining a court's exercise of jurisdiction in international litigation (party interests, forum state interests, and foreign and international community interests)[1854] also affect the analysis of Choice-of-Forum clause issues. Hence, how courts approach specific Choice-of-Forum clause issues involving Choice-of-Forum clauses is

[1854] Keyes (n22) 178-225.

limited by these three interests – party autonomy, state interests, and interests of the international community.

How courts approach the specific issues can therefore be illustrated as such:



B. Implications for the Progressive Development of the Law in Asia

The goal of this thesis is not to create a theory of judicial adjudication of Choice-of-Forum clause issues or even provide an overarching, universal or comprehensive normative standard or approach for the resolution of disputes. Simply, the goal is to know and understand how courts in the four jurisdictions decide Choice-of-Forum clause issues in actual court disputes. The first section summarised how this is done in the four jurisdictions. With these key lessons in mind, the final question which this thesis seeks to answer is to identify implications for the progressive development of the law of Choice-of-Forum clauses in Asia. In answering this final research question, the interests of parties, forum state and foreign and international community are again considered.

1. Implications for Parties

The findings of this thesis emphasise the need for parties to be careful in drafting Choice-of-Forum clauses. Not only should parties consider the Choice-of-Forum clause's direct effects (*eg,* whether it will be enforced in the chosen forum, whether it will be valid, whether judgments from cases involving these clauses will be enforced in another forum and whether the other

contractual promises such as waivers of objections to appropriateness or *forum non conveniens* contained in the clause or in other contractual provisions will be enforced), they should also be aware of its indirect effects (*eg,* their role in determining the applicable law and the factors which may be considered by the court during their enforcement). Furthermore, because Choice-of-Forum clauses affect transaction risks, parties should consider these clauses as an important commercial consideration which they can bargain for during negotiations. In that sense, these clauses should not be treated as mere boilerplate provisions but rather as clauses with significant legal and commercial effects. Moreover, parties, corporations, industries, law organisations, and even law firms can develop model clauses which can be adopted in certain cross-border contracts. Through constant use within industries, these clauses can generate unique customs, interpretation or practices which courts may take notice.

Furthermore, the passive role of courts in procedures adopting the adversarial system means that the development of the law of Choice-of-Forum clauses in Asia can very much depend on the type of disputes and issues parties submit. Especially because the adversarial system is adopted in Asia's top dispute resolution centres (*ie,* Singapore and Hong Kong), this raises the importance of party autonomy in developing further the law in Asia. Arguably, this active use and enforcement of party autonomy in Singapore and Hong Kong may be the reason why both jurisdictions represent, at this point, the most sophisticated and complex law of Choice-of-Forum clauses.

Notably, parties in Asian transactions should be able to increasingly embrace party autonomy and recognize its significance. One key reason is that party autonomy favours the business approaches of many Asian businesses, particularly their preference towards flexibility.[1855] Recent surveys also show strong support for party autonomy in the region.[1856] Likewise, the increasing number of cases involving Choice-of-Forum clauses especially in Singapore and Hong Kong may indicate the readiness of parties to enforce and act according to party autonomy. Remarkably, the Asia Pacific Economic Cooperation (APEC) member states support this position.[1857]

[1855] See Veronica Taylor and Michael Pryles, 'Chapter 1 The Cultures of Dispute Resolution in Asia' in Michael Pryles (ed), *Dispute Resolution in Asia* (Kluwer Law International, 3rd ed, 2006) 5.
[1856] See Singapore Academy of Law, *Study on Governing Law & Jurisdictional Choices in Cross-Border Transactions* (Survey, 11 January 2016).
[1857] Report on the APEC EC Workshop on effective enforcement of business contracts and efficient resolution of business disputes through the Hague Choice of Court Agreements Convention, Cebu, Philippines (1 September 2015) <https://www.hcch.net/upload/apec2015rpt.pdf>.

Likewise, because transactional risks in Asia are higher, as discussed in Chapter 1, parties should be able to see the importance of Choice-of-Forum clauses in reducing these risks. Moreover, the consistency, cogency and reliability demonstrated by courts in Singapore and Hong Kong show that Choice-of-Forum clauses can indeed effectively manage risk. They may be less effective in countries, like in Malaysia and the Philippines, where courts exercise greater discretion as more factors are considered during enforcement. Nonetheless, as this thesis has shown, exclusive Choice-of-Forum clauses are more generally enforced in the four jurisdictions. On the other hand, non-exclusive Choice-of-Forum clauses, while giving parties greater flexibility, may be less successful in managing risks. Even with a modified *Spiliada* in Hong Kong and Singapore, the effect of non-exclusive Choice-of-Forum clauses is still dependent on the court's findings of the parties' intent, which therefore allows a greater role for court discretion. This stands in contrast with the approach used in exclusive Choice-of-Forum clauses where once their existence is established, the court will proceed to impose the 'strong cause' test to the party opposing the clause and need not engage in determining the parties' intent except when there is a dispute with the scope. By narrowing further court discretion, the *Choice-of-Court Convention* further strengthens the reliability of exclusive Choice-of-Forum clauses in the region.

2. Implications for the Forum State

Forum states play an important role in the progressive development of the law on Choice-of-Forum clauses. To better understand their role, this section will first discuss the implications for the forum court and then for the forum state in general.

(a) Implications for the Forum Court

(i) Predictability, Reliability and Coherence

Generally, the decisions considered in this thesis show that courts have been very careful in resolving disputes. All court decisions show that the judicial reasoning employed was based on the legal norms found in case law, statutes, and procedural rules. Since all four jurisdictions adopt the doctrine of precedent, this involved looking at previous decisions and citing relevant rules from statutes and procedural rules. Often, the process involved not just identifying the relevant norms and then applying it to the facts but also, carefully finding similarities and differences with the previous decisions. Moreover, courts have made frequent references to case law from England,

United States and other Commonwealth countries, and therefore, engaged in comparative legal analysis in their decisions. When no specific guidance may be provided by case law, courts refer to writings of eminent private international law scholars.[1858] Furthermore, the judicial reasoning is often done with a keen awareness of the complexities of the commercial and cross-border transactions involved, and thus, the need to consider the commercial interests of parties and interests of the international community. Even in cases where courts have emphasised their discretion and the public interests involved, the reasoning remained persuasive and articulate. At no moment can any decision be described whimsical, based on non-legal considerations, or wholly reflective of the judge's private views. The decisions show that judges, in varying degrees, were concerned with the effect of their decision upon the general structure of the law. Hence, as regards the courts of the four jurisdictions, this gives great promise that the judicial reasoning employed in cases involving Choice-of-Forum clauses would be predictable, reliable and coherent.

Nonetheless, Asia remains a region where judicial institutions may not be strong and independent, lack the necessary competence and resources to resolve complex cross-border issues, and may be prone to corruption and abuse by parties. Court decisions considered in this thesis have identified these problems when discussing the role of comity or the administration of justice factor in the Choice-of-Forum clause analysis. This situation may be true especially in the lower courts. For example, judges in the Philippine lower courts, especially in the provinces, may not have the proper skill and competence in resolving disputes requiring application of private international law norms. Hence, there remains a very real need to strengthen the rule of law, make litigation results more predictable, and the law developed more coherent. One way to address these issues is to revise the procedural rules. The judiciary has a key role in this regard either through their direct role in prescribing procedural rules, if given such role like in the Philippines, or in its interpretation of these rules through its decisions. For example, the procedural rules should clearly provide that a forum exclusive Choice-of-Forum clauses should be a ground for granting leave to serve process outside jurisdiction and a foreign exclusive Choice-of-Forum clause, a stay of proceedings. In the Philippines, *forum non conveniens* should be included as a ground for dismissal under Rule 16, *Rules of Court*. This would resolve the anomaly that in the Philippines, *forum non conveniens* is considered at the merits stage and not at the jurisdictional stage.

[1858] See, eg, *PT Selecta* (n376) [40] citing Adeline Chong; *Orchard Capital* (n655) [3] citing Yeo(n176); *HSBC* (240) 336 citing Jovito Salonga; *Kirkham* (n765) [34] citing Adrian Briggs; *Deltatre* (n835) [4] citing Briggs (n39).

Nonetheless, having a purely legal solution may be insufficient. Any judicial reform project should directly address the very concerns mentioned in the cases – clogged dockets, lack of competence in deciding cross-border commercial issues, or even lack of translators. Hence, any legal development should be supported by strengthening the competence and resources of courts in Choice-of-Forum clause litigation. Addressing the lack of translators, for example, is important especially because translation issues are common, and given the increasing volume of trade and investments between Asian countries, there is now a greater possibility that Asian courts would be asked to rule on issues involving non-English language Choice-of-Forum clauses. Likewise, given the complexity and the changes happening in this area of law, judges should be updated regularly with legal developments.

Furthermore, Asia is not immune from the challenges identified by Muir-Watt that private international law, in general, currently faces. She stressed that private international law's "'international" reach mirrored the representation carried by public international law of a world of multiple territorial states, so that it dealt exclusively with the consequences of contacts between state laws, ignoring forms of transnational normativity beyond the territorial community….'[1859] Hence, traditional notions of private international law rules including those concerning party autonomy in Choice-of-Forum clauses are challenged by these profound changes brought by globalisation and approaches towards territoriality, among others. In any case, these developments only raise the importance of having consent as the basis of jurisdiction, therefore highlighting the key role of Choice-of-Forum clauses in the civil procedures of the future.

(ii) Court Discretion

Party autonomy continues to push and limit the discretion of judges in granting relief. In Singapore, in cases falling under common law, the continued push in favour of party autonomy is evident in the watering down of factor '(d)' of *The Eleftheria*. In certain areas, like in disputes under the *Choice-of-Court Convention*, this discretion is almost muted. Hence, what the parties provide in the exclusive Choice-of-Forum clause dictates the relief which the court may grant. Nonetheless, the discussion in Chapter 5 still highlights the key role played by court discretion in the Choice-of-Forum clause analysis and in ensuring that justice is properly rendered to parties. For example, none of the jurisdictions examined adopt a mechanistic approach to resolving the disputes.

[1859] Horatia Muir-Watt, 'The Relevance of Private International Law to the Global Governance Debate' in Horatia Muir-Watt and Diego Fernandez-Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press, 2015) 1, 2.

Furthermore, given the nature of legal reasoning in common law, there is always a need for court discretion in the analysis.

In Asia, the importance of court discretion is further highlighted by the need to account for local customs and contexts. As discussed in Chapters 6 and 7, local customs inform interpretation, provide evidence on the resolution of certain issues, and provide substance or rationale to certain important mandatory rules and public policy. Hence, while the rules may be similar, courts are required to adopt these rules in local contexts to dispense proper justice to parties. Moreover, court discretion also gives recognition to the diversity and complexity of the Asian region. The need for court discretion also allows flexibility much needed in certain sectors, such as in taking into account differences in Islamic law opinions or *fatwas* which may be important in disputes involving cross-border Islamic banking and finance contracts. For instance, Taylor and Pryles cautioned against expecting a 'uniform legal and commercial culture between 'Asia' and 'the West.' Notably, local legal, commercial and political culture and economic endowments cannot be reduced to core components that will remain static and polarized.'[1860] Hence, for example, to expect a monolithic Asian approach to party autonomy is unrealistic.

Furthermore, there are pockets where forum interests of Asian countries may be more prominent than others. For instance, the idea of excluding consumer and employment contracts is expected, and their protection may continue to echo the rationale that parties with weak bargaining power require protection.[1861] As discussed in Chapter 7, the Philippines have consistently raised the 'public interest' doctrine to avoid Choice-of-Forum clauses in contracts involving overseas Filipino workers.[1862] This is expected to continue as long as the Philippines remains a major labour-exporting country. Consumer welfare-related concerns may continue to shape the approaches of even advanced jurisdictions like Singapore and Hong Kong. Maintaining court discretion gives court the space to give effect to these important state interests.

Nonetheless, as seen in Chapter 5, even with court discretion, courts rarely decide cases arbitrarily, inconsistently or incoherently. First, party autonomy provides an important constraint on how courts exercise this discretion. For example, the court can only consider those factors which are raised by parties and proven in evidence. Second, embedded in the nature of the legal

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[1860] Taylor (n1855) 18.
[1861] Isabelle Veillard, The General and Commercial Character of the UNIDROIT Principles of International Commercial Contracts, 2007(4) *International Business Law Journal* 479, 487-90.
[1862] See, eg, *Saudia* (n249); *Pakistan Airlines* (n1452).

reasoning employed in cases involving foreign elements is the need to weigh the interests of the international community. This requirement becomes more imperative for jurisdictions seeking to attract more international trade, investments and business as dispute resolution centres. Third, the nature of legal reasoning in common law, which emphasises the doctrine of precedent provides further constraint to court discretion. Hence, even with an approach which maintains court discretion, the exercise of this discretion is never unfettered.

(iii) Judicial Cooperation

The cross-border character of Choice-of-Forum clause litigation plus the wide differences in procedural rules across the various Asian countries highlight the need for judicial cooperation. For example, international procedural standards may be agreed and such harmonisation of procedural rules according to these standards may minimise the possibility of inconsistent legal treatment of disputes.[1863] Moreover, issues like global forum shopping or wasting valuable judicial resources because of parallel proceedings may be addressed. Furthermore, the cooperation of judges is needed to promote awareness about each other's approaches, problems, best practices and solutions in Choice-of-Forum clause litigation. Cooperation may even directly address problems concerning the competence and resources of courts. For example, court translators may learn from the practices of other courts through regular training in other jurisdictions.

(b) Implications for the Forum State

This thesis has identified several problems or limitations which may require legislative attention. In Chapter 4, because of the *SICC Law* and *CCAA*, Singapore was described to have become a very complex jurisdiction when it comes to Choice-of-Forum clause analysis – 'four different tests for exclusive choice of court clauses, two different tests for non-exclusive choice of court cases, and five different tests for joining third parties.'[1864] Because of these complexities, there is a greater probability that parties and even courts may get confused on the test applicable on a specific issue. Worse, these complexities may affect the predictability, reliability and coherence of the law. It may be prudent, therefore, that the Singapore Legislature revisit this area of law, and introduce amendments which may simplify or unify the various approaches. For example, rather than adopting a different test, the *SICC Law* may be aligned with the *Choice-of-Court*

[1863] See Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009) 288.
[1864] Yeo (n611) 28.

Convention and the modified *Spiliada*. Moreover, because five potential tests may apply, there is also a need to simplify or unify the tests used for joining third parties.

Given the ease of enforcement of judgments and the imminent accession of China, Hong Kong should reconsider its position on becoming a party to the *Choice-of-Court Convention*. The wait-and-see attitude may undermine its role as a dispute resolution centre in Asia. Besides, the favourable experience under the *Judgments Arrangement*, given its similarity to the *Choice-of-Court Convention,* should also provide good reason to join. Moreover, Hong Kong courts should be able to fare well even with the adoption of the *Choice-of-Court Convention* regime as shown by its adoption of the modified *Spiliada*. The recent cases adopting the new test show that Hong Kong courts can navigate and apply the relevant principles even in more complex situations.

Malaysia, on the other hand, should revisit the role of the 'convenience' factors in the 'strong cause' test. To make the effect of exclusive Choice-of-Forum clauses more predictable, the Malaysian Parliament may consider legislating a definitive rule. It may be desirable to adopt *The Eleftheria* in full force and consider in the 'strong cause' test only those factors which are unforeseeable at the time of contracting or those 'so exceptional that [they go] to the interests of justice.'[1865] This makes results more predictable and aligned with the other common law jurisdictions. Likewise, Malaysia given its global prominence in Islamic banking and finance and proximity to Singapore, should also consider becoming a party to the *Choice-of-Court Convention*. This makes judgments involving Islamic banking and finance transactions more easily enforceable in other jurisdictions, especially in the European Union countries.

The Philippines lags behind in enforcing Choice-of-Forum clauses because of absence of clear rules. This problem is exacerbated by the lack of awareness among many Filipino lawyers, judges and legislators on the importance, complexities and relevance of Choice-of-Forum clauses. The approach in *The Bremen*, for example, is still not mentioned in Supreme Court decisions, which is odd considering the propensity of Philippine courts to refer to American decisions. This lack of awareness is probably because party autonomy in dispute resolution has only been belatedly highlighted. For instance, the law on international arbitration was only introduced in 2004[1866] and institutions like the Integrated Bar of the Philippines and the Philippine Dispute Resolution Center are still in the process of increasing public awareness about arbitration. Given the ongoing focus

[1865] See *Deltatre* (n835) [46].
[1866] *Alternative Dispute Resolution Act of 2004* (Philippines).

on arbitration and based on the experiences of other jurisdictions as regards arbitration and Choice-of-Forum clauses, it may take some time for Filipino practitioners and businesses to fully appreciate the importance and complexities of Choice-of-Forum clauses in international commercial contracts. Nonetheless, it is desirable that a law, similar to the law on international arbitration, would eventually be passed by the Philippine Congress, which has the goal of clarifying the nature, effects and remedies which may be available in relation to Choice-of-Forum clauses. As discussed in this thesis, the procedural rules on venue or even the *Civil Code* are inadequate to clarify the effects of Choice-of-Forum clauses in the Philippines.

Aside from these specific reforms in each jurisdiction, certain rules which are relevant to the Choice-of-Forum clause analysis require clarification. For example, the law applicable to the existence of Choice-of-Forum clauses should be settled. It is advisable that given the fundamental nature of this issue and the public interests involved, the issue of existence should be determined by forum law. Furthermore, it may also be good practice for the respective legislatures of the four jurisdictions to clarify whether a certain rule is mandatory or not (*ie,* will it supplant the Choice-of-Forum clause or the law chosen by the parties?).

3. Implications for Asian countries and the International Community

(a) A Region Conducive to Party Autonomy

While party autonomy has found its way in the four Asian jurisdictions through colonialism, one must note that the four jurisdictions, as discussed in Chapter 3, have embraced the principle and provided mechanisms to nurture it. This is notwithstanding the political rhetoric of the 1990s that invoked 'Asian' values inherent in positive law and asserted an 'Asian' approach to human rights that is not amenable to international (Western) norms.[1867] In fact, despite the acceleration of economic integration within Asia and between Asian economies and their non-Asian trading partners, for the most part, the default models for legal reform in Asia are not regional but remain the United States, England, European Union and Japan.[1868] This is apparent in the latest legislative initiatives concerning party autonomy in Choice-of-Forum clauses, like the *CCAA* which implemented the *Choice-of-Court Convention* in Singapore. Furthermore, court

[1867] Taylor (n1855) 7.
[1868] Ibid.

decisions especially from common law jurisdictions, including the Philippines, continue to refer to English, American and other Commonwealth cases.

Notably, party autonomy supports the policy goals of many Asian states. Since economic growth and modernising former colonial economies and infrastructure are policy priorities for most Asian states, wealth creation has become a fundamental aspect of political legitimacy in many Asian countries.[1869] This goal is usually achieved by attracting foreign investments, therefore highlighting the need to have laws that are familiar to Western investors. The move of Singapore to adopt the *Choice-of-Court Convention* and establish the SICC are meant to attract foreign investments and firmly and lucratively establish Singapore as a dispute resolution centre. Likewise, Asian countries continue to rely on foreign aid and loans to improve their infrastructure, and foreign governments, multilateral and bilateral donors may require that certain laws in relation to these activities, including those promoting party autonomy, should be legislated.

The resulting landscape in Asia in the 21st century is therefore an environment which is conducive to strengthening laws concerning party autonomy. Projects like the *Choice-of-Court Convention* are likely to be received positively by Asian countries.

(b) A Case for the Choice-of-Court Convention

Although limited in scope, the *Choice-of-Court Convention* may provide an important catalyst for important developments in the law of Choice-of-Forum clauses in Asia. This was seen in Singapore, and in Hong Kong and China as regards their *Judgments Arrangement*. Nonetheless, given its complex effects to the domestic legal system, as seen in Singapore, it is expected that countries may hesitate to join the treaty. There is good reason, however, why Asian countries would be open to adopt the *Choice-of-Court Convention*. For example, a report on the APEC Economic Committee workshop held in 2015 noted that some member economies are actively considering the *Choice-of-Court Convention*.[1870] With more Asian countries considering the *Choice-of-Court Convention*, this would further motivate other countries to become parties as well. As earlier mentioned, competition for foreign investments is likely to increase across Asia, and the adoption of a legal framework allowing more predictable outcomes to exclusive Choice-of-Forum clauses could be

[1869] Ibid 9.
[1870] Report on the APEC EC Workshop on effective enforcement of business contracts and efficient resolution of business disputes through the Hague Choice of Court Agreements Convention, Cebu, Philippines (1 September 2015) <https://www.hcch.net/upload/apec2015rpt.pdf>

seen as an edge in attracting these investments. Likewise, upholding party autonomy recognises the need to firmly establish consent as the basis of judicial adjudication. The *Choice-of-Court Convention* addresses this.

At the moment, drafting an Asian treaty on Choice-of-Forum clauses is unrealistic because reaching wide consensus during treaty negotiations may be difficult to achieved. Significantly, Asia remains a complex region in terms of variety of legal systems, economic development and policies. Given the experiences at the Hague Conference during the negotiations leading to the *Choice-of-Court Convention*, bridging these differences may be too difficult to achieve.[1871] Furthermore, the treaty record of Asian countries in addressing private law and procedural matters on their own is not promising. Hence, the *Choice-of-Court Convention* may provide an easier way for Asian countries to address the need for reform and create a party autonomy-friendly environment in the region.

C. Final Thoughts and Reflections

This thesis has shown that while Asian courts are generally confronted with legal issues which are common to many Choice-of-Forum clause disputes, there are unique issues and practical challenges which Asian courts encounter. One particular area is the interpretation of Choice-of-Forum clauses written in local languages. In the attempt of Asian courts to get into the minds of parties on what they have intended in their Choice-of-Forum clause, courts may be able to make a uniquely Asian contribution to the Choice-of-Forum clause analysis. First, by giving meaning to certain local words and phrases, courts attach particular legal significance to these words, and therefore, provide what could be the local language equivalent of a legal term in English. In this way, the legal vocabulary of local languages is enhanced, which in turn, may promote greater predictability and coherence in the interpretation of non-English language international commercial contracts. This is remarkably needed as Asian parties, who may not be using English language contracts, are increasingly playing a more active role in international business transactions. In Hong Kong, the increase in Choice-of-Forum clause disputes involving Chinese-language contracts in recent years may be reflective of this trend. Nonetheless, this process of interpretation may also have another dimension. In the attempt of courts to understand the meaning of words and phrases, courts may be required to discuss further the significance of the

[1871] See, eg, David Bennett, 'The Hague Convention on Recognition and Enforcement of Foreign Judgments – A failure of characterisation' in Talia Einvborn and Kurt Siehr (eds), *Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter E. Nygh* (TMC Asser Press, 2004) 19.

Asian way of doing business, and how this may affect the Choice-of-Forum clause analysis. For example, in their process of interpretation, courts may see the need to strike a balance between the Asian preference for flexibility in doing business vis-à-vis the need for legal certainty in contracts. How should Asian courts approach this query? While this task may not be easy, it will certainly push further the development of the law in Asia and allow a uniquely Asian contribution to the Choice-of-Forum clause analysis. In turn, this firmly secures the relevance of Choice-of-Forum clauses in this Asian century.

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2 *Malaysia*

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3 *Philippines*

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5 *United Kingdom*

Short Title	Full Citation
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	Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191
	A/S D/S Svendborg D/S of 1912 A/S Bodies Corporate trading in partnership as "Maersk Sealand" v Akar [2003] EWHC 797
British Aerospace	*British Aerosplace Plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368
	British Airways Board v Laker Airways Ltd [1985] AC 58
	Chopra v Bank of Singapore [2015] EWHC 1529
Coast Lines	*Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34
Donohue	*Donohue v Armco* [2002] 1 Lloyd's Rep 425
	Dunlop Pneumatic Tyre v Selfridge and Co Ltd [1915] AC 847
	El Amria [1981] 2 Lloyd's Rep 119
Fiona Trust	*Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254
	Fry v Lane (1888) 40 ChD 312
	Gienar v Meyer (1796)126 ER 728
Investors Compensation	*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896
	Konkola Copper Mines plc v Cromin Ltd (No 2) [2006] EWHC 1093
	Law v Garret (1878) 8 Ch D 26
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	Prenn v Simmonds [1971] 1 WLR 1381
	Printing and Numerical Registering Co v Sampson (1875) 19 Eq 462
	R v International Trustee for the Protection of Bondholders Aktiengesellschaft [1937] AC 500
Racecourse Betting	*Racecourse Betting Control Board v Secretary of the Air* (1944) Ch 114
	Re United Railways of the Havana and Regla Warehouse [1960] Ch 52

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Berisford	*S & W Berisford plc v New Hampshire Insurance Co* [1990] 2 QB 631
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Spiliada	*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460
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	The Abidin Daver [1984] AC 398
	The Atlantic Star [1974] AC 436
	The Assunzione [1954] P 150
	The Eleftheria [1970] P 94
	The Fehmarn (1958) 1 WLR 159
	The Mahkutai [1996] AC 650
	The Rothnie [1996] 2 Lloyd's Rep 206
	Turner v Grovit, [2002] 1 WLR 107
	UBS AG v HSH Nordbank AG [2009] 2 Lloyd's Rep 272
	Union Discount Co Ltd v Zoller [2002] 1 WLR 1517
	Re United Railways of the Havana and Regla Warehouse [1960] Ch 52

6 *United States of America*

Short Title	Full Citation
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	Boyd v Grand Trunk W RR, 338 US 263 (1949)
	Brown v Gingiss Int'l, Inc, 360 F Supp 1042 (ED Wis 1973)
	Davis v Pro Basketball Inc, 381 F Supp 1(SDNY 1974)
	Freeford Ltd v Pendleton, 53 AD 3d 32
	Gulf Oil Corp v Gilbert, 330 US 501 (1947)
	Hilton v Guyot, 159 US 113 (1895)
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	National Equip Rental v Sanders, 271 F Supp 756 (EDNY 1967)
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The Bremen	*The Bremen v Zapata Off-Shore Co,* 407 US 1(1972)
	Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

7 *Other*

Short Title	Full Citation

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	McKain v RW Miller & Co (South Australia) Pty Ltd (1991) 174 CLR 1
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Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

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Disability Discrimination Ordinance (Hong Kong) cap 487

District Court Ordinance (Hong Kong) cap 336

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Employment Ordinance (Hong Kong) cap 57

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Hong Kong Court of Final Appeal Rules (Hong Kong) cap 484A

Hong Kong Reunification Ordinance 1997

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Labour Tribunal Ordinance (Hong Kong) cap 25

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Merchant Shipping (Limitation of Shipowner's Liability) Ordinance (Hong Kong) Cap 434

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2 *Malaysia*

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Franchise Act (Malaysia)

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3 *Philippines*

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4 *Singapore*

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