**School of Law, SMU**

**AY 2017-2018, Term 2**

**LAW 302 Commercial Conflict of Laws**

**Week Three: Singapore International Commercial Court and Choice of Court Agreements Act 2016**

**Learning Objectives:**

1. To understand the jurisdictional rules that apply to the SICC.
2. To understand the jurisdictional rules that apply to cases falling within the Choice of Court Agreements Act.

**Readings:**

*Statutes/Subsidiary Legislation/Conventions:*

* Supreme Court of Judicature Act, ss 18A, 18D, 18F
* Rules of Court, O110, r1 r3, r6, r7, r8, r9, r10 and r12
* Choice of Court Agreements Act 2016, Parts 1 and 2

*IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6, [20]-[32], [107]-[116], [139], [141]-[145]

*Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265

*Sinco Technologies Pte Ltd v Singapore Chi Cheng Pte Ltd* [2017] SGHC 234, [64]-[67]

*BNP Paribas Wealth Management v Jacob Agam* [2017] 3 SLR 27

*Secondary Materials:*

* Yeo, *Commercial Conflict of Laws in Singapore (CCOLS)*,Chapter 3A (note: separate file from the main text)
* Yip, ‘The Resolution of Disputes Before the Singapore International Commercial Court’ (2016) 65 *ICLQ* 439
* Yeo, ‘Staying Relevant: Exercise of Jurisdiction in the Age of the SICC’, *8th Yong Pung How Professorship of Law Lecture 2015*

(available at: <http://law.smu.edu.sg/sites/default/files/law/CEBCLA/YPH-Paper-2015.pdf>)

* Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005

(available at: <http://www.sal.org.sg/digitallibrary/Lists/Law%20Reform%20Reports/Attachments/37/01%20LRC%20Hague%20Convention%202005.pdf>)

**Questions:**

1. What sort of cases can be heard by the Singapore International Commercial Court (SICC)? What implications arise from the fact that the SICC is one of the divisions of the High Court?

2. How may jurisdiction be conferred on the SICC? What are the differences between the SICC’s jurisdictional rules and the jurisdictional rules which apply to the other divisions of the High Court?

3. What test does the SICC apply to decide whether to exercise jurisdiction? Is the *Spiliada* test relevant? Should it be relevant? Is the Australian test of *forum non conveniens* relevant? Should it be relevant?

4. Is the possibility of transfer of the case from the High Court (*sans* SICC) to the SICC be a factor within the *Spiliada* test when the High Court is determining the issue of jurisdiction? Should it?

5. If the defendant is a party to a written jurisdiction agreement for the SICC, must leave be obtained to serve the writ on the defendant abroad?

6. What is the purpose of the Hague Choice of Court Agreements Convention? What is its scope? What are its essential principles?

7. In what circumstances will a Contracting State court have jurisdiction under the Hague Choice of Court Agreements Convention? In what circumstances may a Contracting State court which has jurisdiction under the Convention’s rules decline to exercise jurisdiction? In what circumstances may a non-chosen Contracting State court assume jurisdiction under the Convention’s rules?

8. Is leave required to serve on a defendant abroad in a case which falls within the scope of the Choice of Court Agreements Act 2016 where Singapore is the exclusively chosen forum?

9. Would the SICC have jurisdiction under the Choice of Court Agreements Act 2016 if the parties agree on:

(i) an exclusive choice of court agreement for the ‘High Court of Singapore’;

(ii) a non-exclusive choice of court agreement for the ‘High Court of Singapore’?

10. If the parties agree on an exclusive choice of court agreement for the ‘High Court of Singapore’ and the case commences in the High Court, can the case be transferred to the SICC without breaching the Hague Convention’s rules?

11. If the parties agree on an exclusive choice of court agreement for the ‘SICC’ and the case commences in the SICC, can the case be transferred to the SICC without breaching the Hague Convention’s rules?

**Seminar Outline:**

**1. Singapore International Commercial Court (SICC)**

(A) Scope

S18D SCJA, Rules of Court O110 r1(2)(a), (b)

(B) Existence of jurisdiction

i. Jurisdiction agreement

S18F SCJA, Rules of Court O110 r1(2)(c)-(e), r7, r6(2)

*Question*: Is leave required to serve the writ on the defendant abroad?

ii. Transfercases

Rules of Court O110 r7

*Sinco Technologies Pte Ltd v Singapore Chi Cheng Pte Ltd* [2017] SGHC 234

iii. Joinder of third parties

Rules of Court O110 r9

*Question*: Is leave required to serve the writ on the third party abroad? If it is, is the test applied the same as the test which applies at common law?

(C) Exercise of jurisdiction

Rules of Court O110 r8, r10

*BNP Paribas Wealth Management v Jacob Agam* [2017] 3 SLR 27

(D) The SICC as a factor within the *Spiliada* test

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

*Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265

**2. Choice of Court Agreements Act 2016**

(A) Scope and interpretation

ss 2, 3, 4, 8, 9, 10

(B) Jurisdiction of the chosen court

s 5, s 11

*Question*: Is leave required to serve on a defendant abroad?

(C) Obligations of the non-chosen court

s 12

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**LAW 302 Commercial Conflict of Laws**

**Week Four: Injunctions (anti-suit and *Mareva*)**

**Learning Objectives:**

1. To understand the function and purpose function of the anti-suit injunction in international commercial litigation.
2. To understand the function and purpose of the *Mareva* injunction and its significance in international commercial litigation.
3. To understand the concepts of jurisdiction, power and discretion as they apply to the anti-suit and *Mareva* injunction.
4. To understand the principles which guide the Singapore court in deciding when it can or may grant an anti-suit or *Mareva* injunction.

**Readings:**

*Statutes/subsidiary legislation:*

* Supreme Court of Judicature Act, s 18, sch 1, para 5
* Civil Law Act (Cap 43, 1999 Rev Ed), s 4(10)
* International Arbitration Act (Cap 143A), s 12A

*Cases:*

* *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871
* *Airbus Industrie GIE v Patel* [1999] 1 AC 119
* *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 (HL), esp [23]-[39], [45]-[49], [53]-[76]
* *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428
* *AQN v AQO* [2015] 2 SLR 523, [24]-[26]
* *People’s Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291
* *Grover v SetClear Pte Ltd* [2012] SGCA 20, [2012] 2 SLR 625, [25]-[38]
* *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409
* *Mercedes Benz AG v Leiduck* [1996] 1 AC 284
* *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000, [116]-[119]
* *Trung Nguyen Group Corp v Trung Nguyen International Pte Ltd* [2016] SGHC 256, [50]

*Secondary Materials:*

* Yeo, *Commercial Conflict of Laws in Singapore (CCOLS)*,Chapter 3

*Further Reading (Optional):*

* Chng, ‘Breach of Agreement Versus Vexatious, Oppressive and Unconscionable Conduct’ (2015) 27 *SAcLJ* 340
* Spigelman CJ, ‘Freezing Orders in International Commercial Litigation’, Inaugural Lecture, Distinguished Speaker Series, Singapore Academy of Law, 6 May 2010, available at: http://www.sal.org.sg/Lists/Speeches/Attachments/80/Freezing Orders in International Commercial Litigation Singapore.pdf

**Questions**

1. What does an anti-suit injunction do? What purpose does it serve?

2. When does the Singapore court have jurisdiction to grant an anti-suit injunction against the defendant? When does the Singapore court have the power to grant an anti-suit injunction against the defendant? What are the limitations based on international comity that the court has set for itself under the common law?

3. What are the preconditions to obtaining an anti-suit injunction from the Singapore court where: (a) there is no jurisdiction agreement between the parties; (b) where there is a breach of an exclusive choice of court agreement; and (c) where there is a breach of a non-exclusive choice of court agreement?

4. In view of the fact that most international commercial litigation today is litigation about where to litigate, is the role played by the *Mareva* injunction in cross-border litigation enhanced or diminished as compared to domestic litigation?

5. When does the Singapore court have jurisdiction to grant the *Mareva* injunction in a cross-border litigation? When does the Singapore court have the power to grant the *Mareva* injunction in a cross-border litigation?

6. Is it desirable, as the Canadian courts have thought so, to require as a general rule that the party must ask the foreign court to stay proceedings before the court of the forum would take his application for an anti-suit injunction seriously (and to reject the application if the foreign court found itself to be the natural forum, unless the foreign decision is somehow perverse)?

7. What (if at all) should be the significance of the fact that the cause of action relied on by the defendant before the foreign court is one he could not have succeeded on before a Singapore court?

8. Is it an invariable requirement that the Singapore court must be the natural forum for the trial before it regards itself has having the power to grant an anti-suit injunction?

9. When, if ever, should the Singapore court grant an anti-suit injunction to enforce a foreign exclusive choice of court clause?

10. Should we believe that the foreign courts are not offended by anti-suit injunctions (see Re Enforcement of an English Injunction [1997] ILPr 320 (Düsseldorf CA) and General Star Indemnity Ltd v Stirling Cooke Browne Reinsurance Brokers Ltd [2003] ILPr 19, [[2003] EWHC Comm 3](http://www.bailii.org/ew/cases/EWHC/Comm/2003/3.html)? Are there alternative strategies or remedies to the anti-suit injunction which are less damaging to international comity?

11. Should it make any difference to the Singapore court if it is known that the foreign court, where the defendant’s proceedings are sought to be stopped by an anti-suit injunction from the Singapore court, regards foreign injunctions as interference with the defendant’s constitutional right to proceed in that court?

12. What is the effect of the following factors on the jurisdiction and power of the court to grant a *Mareva* injunction:

a. the defendant is overseas;

b. the defendant’s assets are overseas;

c. the trial will be held overseas.

13. Consider whether the Singapore court has the jurisdiction and/or power to grant a *Mareva* injunction against the defendant in the following cases:

a. P serves a writ on D in Singapore. D has assets in Singapore, Malaysia and Switzerland, but only the assets in Singapore are sufficient to meet the sum P is claiming. D’s application to stay the proceedings on the basis that Switzerland is clearly the more appropriate forum succeeds.

b. P obtains leave ex parte to serve a writ on D in Switzerland. D has assets in Singapore, Malaysia and Switzerland, but only the assets in Singapore are sufficient to meet the sum P is claiming. D instructs counsel to set aside the leave. It is common ground that Switzerland is clearly the more appropriate forum.

Does it make any difference if we assume that under the law of Switzerland, pre-judgment asset- freezing orders are regarded as unconstitutional?

14. Can the use of anti-suit injunctions and *Mareva* injunctions be controlled by contractual clauses?

**Seminar Outline:**

**1. Anti-suit Injunctions**

The five elements below are from *Kirkham John Reginald Stott v Trane US Inc* [2009] 4 SLR(R) 428, [28]-[29]:

(a) Amenability of the defendant to the jurisdiction of the Singapore court

(b) Singapore is *forum conveniens*

*Question*: Must Singapore always be the natural forum for the dispute?

i. Alternative fora cases, where Singapore is one of the available fora

*Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871

*Kirkham v Trane US Inc* [2009] SLR(R) 428

ii. Single forum case

*British Airways v Laker Airways* [1985] AC 58

*Midland Bank v Laker Airways* [1986] QB 689

*Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409

iii. Dual fora case, but neither forum is Singapore

*Airbus Industries GIE v Patel* [1999] 1 AC 119

*People’s Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291

(c) Vexation or oppression to the plaintiffs

*Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871

*Kirkham v Trane US Inc* [2009] SLR(R) 428

*AQN v AQO* [2015] 2 SLR 523, [24]-[26]

(d) Alleged injustice to the defendants

(e) Breach of any agreement between the parties

i. Breach of a jurisdiction clause

*Donohue v Armco* [2002] 1 All ER 749

ii. Breach of a settlement agreement?

*Grover v SetClear Pte Ltd* [2012] 2 SLR 625

iii. Breach of a choice of law clause?

*Ace Insurance Limited v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (you will read this case in more detail later on in the course)

**2. *Mareva* Injunctions**

Worldwide injunction – usually against the banks rather than the party itself

Procedure:

Ex parte in nature – full and frank disclosure – draconian effect of the injunction – undertaking to compensate for losses if the injunction was not justified

Conflicts:

Jurisdiction and power

Non-SICC: heads of jurisdiction – r 1(a) having assets within the jurisdiction – you cannot rely on (b) – not a substantive claim

Setting aside – the injunction must be lifted – there is no jurisdiction

Stay – the injunction does not have to be lifted – there is still jurisdiction over the df

Dissent – protection of a foreign cause of action – but injunctions are meant to protect the local judgment – up to the legislator to change

* AC: the dissent makes sense – courts should be prepared to assist foreign courts – consider the international nature of commerce and movement of assets
* Australia has reformed its law – no longer called an injunction

Civil Law Act, s 4(10)

Supreme Court of Judicature Act, Schedule 1, para 5

(a) Court must have jurisdiction over D

(b) Court must have the power to grant the injunctions: a justiciable cause of action

i. Substantive proceedings in Singapore

ii. No substantive proceedings in Singapore

*The Siskina* [1979] AC 210

*Mercedes-Benz v Leiduck* [1995] 3 WLR 718 (PC)

Cf *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36

iii. Singapore proceedings are stayed

*Multi-Code Electronics Industries (M) Sdn Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000

*Trung Nguyen Group Corp v Trung Nguyen International Pte Ltd* [2016] SGHC 256, [50]

Cf s 12A International Arbitration Act