Ang Ming Chuang v Singapore Airlines Ltd (Civil Aeronautics Administration, Third Party) [2004] SGHC 263

Case Number : Suit 1295/2002, SIC 900/2004

Decision Date : 24 November 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Lok Vi Ming (Rodyk and Davidson) for the defendant; Loo Choon Chiaw and Lim Tong Chuan (Loo and Partners) for the third party

Parties : Ang Ming Chuang — Singapore Airlines Ltd — Civil Aeronautics Administration

Conflict of Laws – Natural forum – Forum non conveniens – Defendant bringing in Taiwanese party as third party in action in Singapore courts – Defendant also suing Taiwanese party in Taiwan – Whether Taiwan clearly or distinctly more appropriate forum than Singapore – Whether court should stay or dismiss Singapore action

Conflict of Laws – Natural forum – Lis alibi pendens – Defendant bringing in Taiwanese party as third party in action in Singapore courts – Defendant also suing Taiwanese party in Taiwan – Whether court should stay or dismiss Singapore action to avoid multiplicity of proceedings

24 November 2004 *Judgment reserved.*

Woo Bih Li J:

Introduction

1 The plaintiff, Ang Ming Chuang ("Ang"), initiated this action in or about October 2002 against the defendant, Singapore Airlines Limited ("SIA"), for damages and other relief arising from an accident involving an aircraft operated by SIA as flight SQ006 at Chiang Kai-Shek International Airport in Taiwan ("CKS International Airport"), Republic of China, on 31 October 2000 at about 2317 hours Taiwan time. While the aircraft was taking off in severe weather, it hit some construction machinery as a result of which the aircraft crashed on a runway. The aircraft had sought to take off on the wrong runway, *ie* Runway 05R instead of the designated Runway 05L.

2 On 9 January 2003, SIA was granted leave to issue a third party notice to bring in the Civil Aeronautics Administration ("CAA"), which is part of the government of Taiwan, as a third party in the action. I will refer to the third party proceedings in the present suit as SIA's Singapore action. SIA intended to seek an indemnity or contribution from CAA should SIA be found liable to Ang. After CAA's application in Singapore claiming sovereign immunity was unsuccessful, CAA applied for SIA's Singapore action to be stayed, dismissed and/or discontinued on the ground that the courts in Taiwan are more appropriate to determine the claim in respect of the third party proceeding and/or to avoid multiplicity of proceedings. This is the application before me.

3 CAA's application covers not only SIA's Singapore action but claims by other plaintiffs from the same flight who had commenced their own actions in Singapore against SIA who in turn had commenced third party proceedings against CAA. Strictly speaking, CAA's application should be confined only to SIA's Singapore action although it is open to SIA and CAA to agree that a decision on CAA's present application will apply to SIA's claims against CAA in the other proceedings in Singapore. Indeed, I was informed that SIA and CAA have agreed to apply my decision on CAA's present application to all the other proceedings in Singapore which SIA is taking against CAA.

4 Although SIA had obtained leave to issue a third party notice against CAA in this action on 9 January 2003, SIA subsequently commenced an action in Taiwan on 30 April 2003 against CAA in respect of the same accident. SIA's Taiwan action was wider for the following reasons. In so far as SIA was seeking an indemnity or contribution from CAA, this was not limited to the claims against SIA already filed in Singapore and included claims against SIA worldwide. SIA's Taiwan action also included a claim for hull and cargo losses.

5 In these circumstances, CAA's arguments about *lis alibi pendens* should be considered ahead of its arguments on *forum non conveniens*.

First argument – *Lis alibi pendens*

6 In *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 3 SLR 121, a Singapore-incorporated employer had sought an injunction to restrain its employee from continuing his action in California, USA, which was for unlawful dismissal. The employee had been working in California for the employer. Chief Justice Yong Pung How, delivering the judgment of the Court of Appeal, said at [22]:

> Having said that, we have to remind ourselves that, while the same principles and approach apply to every case of this nature, each case turns strictly on its individual facts. Further, in dealing with cases such as the present one, where the appellant had only started proceedings in one jurisdiction, the courts should be more cautious than not in granting injunctions compared with situations, in which a party had commenced actions concurrently in two jurisdictions. In the latter situations, it is understandable that any court should feel uncomfortable about allowing both actions to go on. Not only would the same issue be litigated twice but there would also be the risk of having two different results, each conflicting with the other. And these problems would have arisen simply because one party decided to sue in one place too many. In such circumstances, courts, including those in Singapore, should prevent the inherent abuse of the different judicial systems in different jurisdictions by compelling that party to choose the jurisdiction that he wants to litigate in. The underlying need to prevent a multiplicity of similar proceedings justifies the courts being more prepared to grant an injunction.

7 In *Yusen Air & Sea Service (S) Pte Ltd v KLM Royal Dutch Airlines* [1999] 4 SLR 21, Federal Insurance Co, the insurers of some missing cargo, had commenced an action in New York against Yusen Air & Sea Service Pte Ltd ("Yusen"), a freight forwarding company incorporated in Singapore. Yusen joined KLM Royal Dutch Airlines ("KLM") as a third party in the New York proceedings seeking contribution and/or an indemnity from KLM. Subsequently, Yusen also commenced action in Singapore against KLM and the cargo handling agents Changi International Airport Services Pte Ltd seeking a declaration for an indemnity in respect of the claim by Federal Insurance Co and Yusen's costs and expenses in the New York proceedings.

8 KLM applied to strike out Yusen's Singapore action. It succeeded before an assistant registrar whose decision was upheld by a judge. However, on appeal, the Court of Appeal allowed Yusen's appeal, finding that Yusen had not affirmatively elected to proceed against KLM exclusively in New York because the evidence showed that Yusen intended to pursue its claim in Singapore for an indemnity for its costs and expenses in the New York proceedings for which it was advised would not be recoverable under New York law. As Yusen had elected to proceed against KLM in Singapore, it was allowed to do so but the Court of Appeal granted an injunction restraining Yusen from continuing the prosecution of the New York proceedings against KLM. Karthigesu JA said at [27]:

> In our judgment, when a plaintiff sues the same defendant in two or more different jurisdictions

over the same subject matter, the defendant can take up an application to compel the plaintiff to make an election as to which set of proceedings he wishes to pursue. For the purposes of an election, the considerations of forum conveniens do not come into play. However, the defendant would need to demonstrate a duplicity of actions in the different jurisdictions. Once this is established, the burden of proof then shifts to the plaintiff to justify the continuance of the concurrent proceedings by showing 'very unusual circumstances'. If the plaintiff fails to demonstrate such unusual circumstances, he would have to make an election.

9 CAA placed reliance on these two cases, especially on that part of the judgment of Karthigesu JA in *Yusen* which said that once a duplicity of actions was established, the burden of proof then shifted to the plaintiff to justify the continuance of the concurrent proceedings by showing very unusual circumstances.

10 However, I note that the last sentence of [27] of that judgment said that if the plaintiff failed to demonstrate such unusual circumstances, he would have to make an election. Therefore, it seems to me that if SIA has not already elected to pursue its action in Taiwan and if it were to elect to carry on with its Singapore action, then the burden would shift back to CAA to establish its argument on *forum non conveniens*.

11 In the present case, SIA did not elect to proceed with the Singapore action and to stay its Taiwan action until in the hearing before me when, in the course of arguments, SIA's counsel submitted, firstly, that the prosecution of the two actions was not vexatious and if it were vexatious and SIA were called upon to elect, SIA would then elect to continue with the Singapore action and stay the Taiwan action. This submission was made on the assumption that SIA had not yet elected to continue with the Taiwan action.

12 Since 30 April 2003 when SIA filed the Taiwan action, there have been a number of hearings in Taiwan. In my view, it is *prima facie* vexatious for SIA to continue with both its Taiwan action and its Singapore action. Although there is some evidence that SIA cannot stay the Taiwan action unless CAA agrees and even then, only for a limited period of four months, it is still open to SIA to limit its Taiwan action to claims not covered by SIA's Singapore action. This it did not do. In my view, SIA has also failed to demonstrate very unusual circumstances for continuing with its Taiwan and Singapore actions.

13 In any event, there is also the question whether SIA has elected affirmatively to carry on with the Taiwan action. Significantly, the facts before me are the opposite of those in *Yusen*. In *Yusen*, the Singapore action was commenced to claim relief which was not sought in the New York action, *ie* Yusen's costs and expenses in the New York action. On the facts before me, SIA's Taiwan action is claiming a wider scope of relief than in the Singapore action, as I have mentioned. Therefore, although the mere commencement of an action in a foreign jurisdiction does not *per se* amount to an election to proceed there, I am of the view that SIA has affirmatively elected to proceed against CAA in the Taiwan action. In my view, the fact that SIA has not elected to proceed exclusively in either Taiwan or Singapore is neither here nor there because it is still carrying on with both actions and that gives rise to a duplicity of actions.

14 In the circumstances, it is not necessary for me to put SIA to an election and SIA's Singapore action should either be dismissed or stayed on the ground of *lis alibi pendens*.

Second argument – *Forum non conveniens*

15 In the event that I am wrong on the issue of *lis alibi pendens*, I will also deal with the issue of

forum non conveniens. The *classicus locus* on the factors to be considered for such an application is the case of *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] AC 460 although that case actually involved the question whether an order granting leave to serve a writ out of jurisdiction should be discharged. The House of Lords in *The Spiliada* concluded that the same fundamental principle was applicable to both a stay of English proceedings on *forum non conveniens* and the grant of leave to serve English proceedings out of jurisdiction, *ie* the court would choose the forum in which the case would be tried more suitably for the interests of all the parties and the ends of justice.

16 *The Spiliada* is authority for the principle that it is for CAA to show not merely that Singapore is not the natural or appropriate forum but that there is another available forum which is clearly or distinctly more appropriate than the Singapore forum. The principle enunciated in *The Spiliada* has been applied from time to time by the Singapore courts, which have also applied the factors enunciated in *The Spiliada* in considering whether an applicant seeking a stay has discharged its burden. Naturally, the factors enunciated in *The Spiliada* are not exhaustive. I will now deal with the factors before me.

Where the parties operate from

17 CAA operates only in Taiwan. On the other hand, while SIA is a company incorporated in Singapore with its headquarters in Singapore, SIA operates worldwide. Its flights commence from locations and reach destinations all over the world, including Taiwan. It also has offices all over the world, including Taiwan.

Location of witnesses

18 As for the location of witnesses, the affidavit of Mr Billy K C Chang, Director-General of CAA, filed on 18 February 2004, states the following as a list of possible witnesses of fact who are located in Taiwan:

(a) the local controller;

(b) the ground controller;

(c) the flight data controller;

(d) the clearance delivery controller;

(e) the Chief of Tower of CKS International Airport;

(f) employees or agents of the Aviation Safety Council;

(g) Mr Chang himself as the Director-General of CAA;

(h) other employees or agents of CAA;

(i) SIA's employees or agents in Taiwan.

19 CAA's point was that greater inconvenience and costs of transporting these witnesses would occur if the trial were in Singapore instead of Taiwan. Secondly, witnesses who were not employees of CAA are not compellable to give evidence in Singapore.

20 SIA did not dispute the possible list of witnesses mentioned by Mr Chang. SIA's response,

through the first affidavit of its attorney in Taiwan, Mr Ta-Kai Shao, filed on 11 March 2004, was that the argument cuts both ways as witnesses for SIA who are not resident in Taiwan would similarly then have to travel to Taiwan if the hearing were held there. However, I note that SIA did not list out who those witnesses might be. Given that the incident occurred in an airport in Taiwan and the alleged acts of negligence which SIA is raising against CAA would have occurred in Taiwan, it seems to me that it is more likely that there will be more witnesses from Taiwan than from Singapore.

21 As for the issue about the non-compellability of witnesses in Taiwan to give evidence in Singapore, Mr Shao's view was that they could be compelled to give evidence in Taiwan. He said that the Taiwanese court may summon a witness and compel him to testify. After the witness has given his statement of evidence, the Taiwanese court will relay the same to the Taiwanese Ministry of Foreign Affairs who will relay the same to its Singapore counterpart. CAA's attorney in Taiwan, Mr Wellington Koo, disagreed that a Taiwanese court would compel a witness to give evidence although the Taiwanese court would render judicial assistance to obtain evidence if the witness were prepared to give evidence.

22 In my view, even if a witness in Taiwan were compellable to give evidence there for an action in Singapore, Mr Shao was not asserting that the witness would also be compelled to give evidence in Singapore. Moreover, he was also not asserting that the Taiwanese court would compel evidence to be given by the witness through video conferencing or other facilities during a trial in Singapore but rather that the evidence would be recorded in a statement in Taiwan and then forwarded to Singapore. Apparently, there would be no cross-examination of that witness, although that is the usual procedure available in Singapore.

23 I also note that there was no suggestion by SIA that it would have difficulty in getting its witnesses to fly to Taiwan.

Translation costs

24 Mr Chang also asserted that as SIA's claims are based upon, *inter alia*, the inadequate operation and maintenance of the CKS International Airport by CAA, many of the relevant documents will be located in Taiwan, including the documents of CAA. Mr Koo added that most of the documents of CAA are in Chinese and would have to be translated, into English, for Singapore proceedings.

25 On the other hand, Mr Shao's point about CAA's argument cutting both ways applied to the issue of translation costs too. Mr Shao said that non-Chinese documents tendered to a Taiwanese court would have to be translated into Chinese. He added that translation, and interpretation, costs might therefore well be higher if proceedings were to continue in Taiwan rather than in Singapore.

26 It seems to me that it is more likely that there will be more documents from Taiwan than from Singapore and that most of the documents from Taiwan will be in Chinese which will require translation to be done if the proceedings were to continue in Singapore.

Site inspection

27 Mr Koo asserted that the physical conditions at CKS International Airport might be in contention and fundamental to the trial and a Taiwanese court would be in a better position to conduct a site inspection of various items:

(a) Runway designs of Runways 05R and 05L and their relative positions to each other;

(b) Physical characteristics of Runways 05R and 05L, their similarities and their differences;

(c) Runway designations at the holding positions of Runways 05R and 05L;

(d) Guard lights at holding positions of Runway 05L;

(e) Bar lights at holding positions of Runway 05L;

(f) Taxiway centreline lights on Taxiway N1 across the threshold of Runway 05R;

(g) The lighting and radar system at CKS Airport.

28 Mr Shao did not dispute that a Taiwanese court would be better placed to do a site inspection. Indeed, this was obvious. However, Mr Shao was of the view that it was pure assumption that a site visit by the court was necessary. SIA's counsel, Mr Lok Vi Ming, added that the accident site had been thoroughly examined and inspected by experts after the accident and accident reports had been completed a long time ago. It would be pointless to inspect the accident site now.

29 It seems to me that, unless the inspection is done on board a similar aircraft from where the pilots were seated and in similar severe weather as on that fateful day, the value of a site inspection is likely to be low since it is not disputed that the accident site has been inspected and accident reports have been prepared. Nevertheless, the possible value of a site inspection cannot be ruled out at this stage.

Governing law

30 SIA's Taiwan action against CAA is based on certain legislation there such as the Civil Code and the State Compensation Law which imposes liability for intentional or negligent conduct. SIA's Singapore action against CAA is based on common law negligence.

31 In para 7.3 of the affidavit of Mr Koo filed on 18 February 2004, he opined that the nature of SIA's Singapore action was essentially similar (if not identical) with SIA's Taiwan action. In paras 8 to 10 of his affidavit filed on 27 October 2004 he repeated this view. Yet I noted that in para 13 of Mr Koo's earlier affidavit, *ie* the one filed on 18 February 2004, Mr Koo had said under the heading, "Governing law of the Tort":

> If the matter is to be tried in the Courts of Singapore, there may be inconvenience and difficulties, in applying the laws of Taiwan by the Singapore Courts. The laws of Taiwan are markedly different from the laws of Singapore. Taiwan's legal system is a civil law system basically borrowed from Germany while the laws of Singapore originate from the Common Law of Great Britain. Thus, the former is codified whereas the latter emphasizes upon judicial precedents. Certain legal concepts of the laws of Taiwan may be foreign and unfamiliar to the Singapore Courts, which may result in difficulty in its application.

32 It seems to me that Mr Koo had contradicted himself. If the law on negligence in Taiwan is substantially similar as common law negligence then the substantive law in both jurisdictions is not markedly different. Differences in procedure are a different point from the governing law which deals with substantive law.

33 On his part, Mr Shao was of the view that there were differences in the substantive law of both jurisdictions.

34 Eventually, notwithstanding what Mr Koo had opined about substantial similarity in the laws of negligence in both jurisdictions, CAA's counsel, Mr Loo Choon Chiaw, had to submit that there must be some differences.

35 I am of the view that it is inevitable that there will be some differences in the relevant substantive law of both jurisdictions. This then makes the question as to the governing law of some significance to CAA's application.

36 Mr Koo said that since the accident took place in Taiwan, the governing law is the law of Taiwan. He also suggested that this would be the law a Singapore court would apply if the proceedings between SIA and CAA were to be heard in Singapore.

37 As for Mr Shao, he appeared to accept that SIA's Taiwan action is governed by the law of Taiwan. However, as for SIA's Singapore action, he said that he had been advised by SIA's Singapore solicitors that whether the law of Taiwan would govern was a conflict of laws issue for the Singapore court to decide.

38 Mr Loo took me through the double actionability rule in *Phillips v Eyre* (1870) LR 6 QB 1 and the qualification of that rule in *Chaplin v Boys* [1971] AC 356 and the further qualification in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 ("*Red Sea Insurance*"). Mr Loo submitted that *Red Sea Insurance* appeared to have established the following:

(a) The double actionability rule is not inflexible, and it is possible to depart from it on clear and satisfying grounds in order to avoid injustice by holding that a particular issue between the parties should be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties.

(b) The application of the *lex loci delicti* is not necessarily limited to any particular issue, but may apply to the whole claim, if virtually all of the significant factors are in favour of that country.

39 In *Goh Chok Tong v Tang Liang Hong* [1997] 2 SLR 641 ("*Goh Chok Tong*") and *Parno v S C Marine Pte Ltd* [1999] 4 SLR 579 ("*Parno*"), the Court of Appeal said that the rule in *Phillips v Eyre* and the qualifications in *Chaplin v Boys* and in *Red Sea Insurance* are part of the law in Singapore.

40 In England, the double actionability rule is no longer the general rule. The *lex loci delicti* rule has been adopted by the Private International Law (Miscellaneous Provisions) Act 1995 (c 41) since 1 May 1996 as the general rule, subject to exceptions.

41 Mr Loo also drew my attention to two other common law jurisdictions which, by judicial decision, have applied the *lex loci delicti* as the general rule.

42 In *Tolofson v Jensen* (1994) 120 DLR (4th) 289 ("*Tolofson*"), a plaintiff passenger was injured in 1979 in a car driven by his father which collided with another car in Saskatchewan. The passenger and his father resided in British Columbia where the father's car was registered and insured. The other car was registered and insured in Saskatchewan and driven by a Saskatchewan resident. Saskatchewan law then imposed a one-year limitation period on an action arising from the accident, whether or not the plaintiff was an infant. It also provided that a driver had to be grossly negligent before a gratuitous passenger could recover damages. In 1987, the plaintiff sued his father and the Saskatchewan driver in British Columbia. A chambers judge dismissed the Saskatchewan driver's application for a declaration that the action be stayed because Saskatchewan law applied. The British

Columbia Court of Appeal dismissed his appeal holding that the law of the forum should apply.

43 The Supreme Court of Canada allowed the Saskatchewan driver's appeal. La Forest J delivered the main judgment which four other judges concurred with. The other two judges also concurred with his judgment subject to a qualification which is not relevant for present purposes. As I have been anxious about the double actionability rule, I will quote extensively from La Forest J's learned exposition. To avoid confusion, I should mention that the Supreme Court of Canada was dealing with two appeals, one being the accident in Saskatchewan and another being an accident in Quebec, the facts of which I need not relate. The outcome of the other appeal was the same as that in *Tolofson*. La Forest J said at 297–308:

> **Historical Highlights of Choice of Law Rule in Tort**
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> The genesis of the existing Canadian rule for the determination of choice of law for torts arising outside a court's territorial jurisdiction is the seminal case of *Phillips v Eyre*, *supra*. There the plaintiff brought an action in England for assault and false imprisonment against the defendant who, at the time of the torts, was Governor of Jamaica. The acts of which the plaintiff complained were part of a course of action taken by Jamaican authorities to suppress a rebellion. Later the governor caused an act of indemnity to be passed absolving all persons of liability for any unlawful act committed in putting down the rebellion. Much of the judgment given by Willes J is devoted to questions concerning whether a colony like Jamaica could constitutionally enact such a statute; these the court answered in the affirmative. But the major import of the case relates to the final objection of the plaintiff that, assuming the colonial statute was valid in Jamaica, it could not have the effect of taking away a right of action in an English court. Willes J replied that the objection rested on a misconception of a civil obligation and the corresponding right of action, which later he stated is only an accessory to the obligation and subordinate to it. As in the case of contract, the general rule was that "the civil liability arising out of a wrong derives its birth from the law of the place, *and its character is determined by that law"* (emphasis added) (at p 28). The substantive law, he affirmed, is governed by the law of the place where the wrong has been committed. That, of course, would be Jamaica because the torts were wholly committed there.
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> Willes J then went on to say that English courts are said to be more open to admit actions founded on foreign transactions than those of other European countries, but he added, at p 28, that there are restrictions (*eg*, trespass to land) that exclude certain actions altogether, and "even with respect to those not falling within that description our courts do not undertake universal *jurisdiction*" (emphasis added). He then immediately continued with the following frequently cited passage, at pp 28-9:
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> > As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. … Secondly, the act must not have been justifiable by the law of the place where it was done.
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> In this passage, Willes J appears to commingle the law dealing with what we would today call jurisdiction and choice of law. The first rule is strictly related to jurisdiction as is evident from its context, which I have just related. The second rule we would normally think of as dealing with choice of law, which it is apparent from his earlier remarks was the place of the wrong, the *lex loci delicti*. It was not, however, necessary for Willes J to engage in this type of modern analysis. All he was doing was expressing a rule of double actionability to permit suit in England: see *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co*

(1883), 10 QBD 521 at
pp 536-7.

The law was not to remain in this form. In *Machado v Fontes*, [1897] 2 QB 231 (CA) (an interlocutory appeal heard in a summary way by two judges), Willes J's judgment was read in a rather wooden manner to mean something quite different from what he, in my view, had intended. In that case the plaintiff brought action in England for libel alleged to have been published in Portuguese in Brazil. Though the report leaves us to surmise, the names of the parties would indicate that they were Brazilian and, the language being Portuguese, the libel would seem to have taken place there. The court interpreted Willes J's language as meaning that an act committed abroad could be brought in England in the same way as if it had taken place in England, so long as it was not justified or excused under the law of the place where it was committed. It was, in other words, actionable under English law even if not actionable where it was committed if it was "unjustifiable" there; for example, if it constituted a criminal act there.

The approach taken in *Machado v Fontes* was subjected to considerable judicial and academic criticism; see Professor Moffat Hancock's biting "Case and Comment on *McLean v Pettigrew*" (1945), 23 Can Bar Rev 348. In particular, so far as Canadian cases are concerned, Viscount Haldane in *Canadian Pacific R Co v Parent*, [1917] AC 195 at p 205, early expressed some reservations about it. For my part, I would have thought the question whether a wrong committed in Brazil by a Brazilian against another Brazilian gave rise to an action for damages should be within the purview of Brazil, and that its being made actionable under English law by an *ex post facto* decision of an English court would constitute an intrusion in Brazilian affairs which an English court, under basic principles of comity, should not engage in. I could understand the approach if the parties were both English nationals or domiciled in England and there is some support in English cases for that measure of intervention: see *Chaplin v Boys*, [1969] 2 All ER 1085 (HL), at p 1094 *per* Lord Hodson, and Lord Wilberforce, at p 1104; see also Lord Denning in the same case in the Court of Appeal, [1968] 1 All ER 283 at pp 289-90. I add parenthetically that it could well be argued (though the facts were not conducive to that possibility) that, unlike a motor vehicle accident, the tort of libel should be held to take place where its effects are felt, but the court simply assumed that the place of the tort was Brazil.

In England, *Machado v Fontes* was ultimately overruled by the House of Lords in *Chaplin v Boys*, *supra*. There the plaintiff, a passenger on a motor cycle, was injured through the negligence of the defendant whose car had hit the motor cycle. The plaintiff and defendant were British soldiers stationed in Malta. In upholding the action, their Lordships adopted a test of double actionability. Substantive British law would be applied if the conduct was actionable both in England and in the place where the conduct occurred, with a residual discretion to depart from the rule where justice warranted. Here the conduct was actionable both in England and in Malta, and there was no ground for a discretion to be exercised. The majority thus determined that the rule in *Phillips v Eyre* was a double actionability test. While the *ratio* of the case is difficult to define with precision (see *Red Sea Insurance Co v Bouygues SA* …), the summary of the result set forth in the well-known text of Albert Venn Dicey and JHC Morris, *Dicey and Morris on the Conflict of Laws*, 11th ed (London: Stevens & Sons Ltd, 1987), [vol 2] at pp 1365-6, has been generally accepted:

> Rule 205(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England; only if it is both
>
> > (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and

(b) actionable according to the law of the foreign country where it was done.

(2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

None the less it was on the insecure foundation of *Phillips v Eyre* as interpreted in *Machado v Fontes* that the existing Canadian law was erected by this court's 1945 decision in *McLean v Pettigrew* [[1945] 2 DLR 65]. There, it will be remembered, a driver and his gratuitous passenger, both domiciled in Quebec, had a car accident in Ontario, and the passenger sued the driver in Quebec. Under Ontario law, the claim would not have been actionable. It would, however, have been actionable in Quebec had it occurred there. Applying the prevalent English law, the court found that since the tort was actionable in Quebec, and the driver's conduct, though not actionable in Ontario, was prohibited under the *Highway Traffic Act* of that province, it was not "justifiable" in Ontario. It, therefore, upheld the plaintiff's action under Quebec law.

The law as enunciated in *McLean v Pettigrew* has remained the basic rule in Canada ever since. However, its fundamental weaknesses began to be revealed in a series of Ontario cases beginning in the 1980s. …

…

Critique and Reformulation

What strikes me about the Anglo-Canadian choice of law rules as developed over the past century, is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seemed to be based on the expectations of the parties, a somewhat fictional concept, or a sense of "fairness" about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed, in the present context, it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem. While that structural problem arises here in a federal setting, it is instructive to consider the matter first from an international perspective since it is, of course, on the international level that private international law emerged.

On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a by-product of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be reflected and accommodated in private international law.

The earlier 19th century English cases, such as *Phillips v Eyre*, were alive to the fact that these are the realities and forces to which courts should respond in the development of principles in this area. By the turn of the century, however, the English courts adopted a positivistic rule-oriented approach that has since seriously inhibited the development of rational principles in this area: see [*Morguard Investments Ltd v De Savoye* (1990) 76 DLR (4th) 256], for an illustration of this in a different context. It is to be the underlying reality of the international legal order, then, that we must turn if we are to structure a rational and workable system of private international law. …

…

The major issue that arises in this case is this: once a court has properly taken jurisdiction (and this was conceded in both the cases in these appeals), what law should it apply? Obviously the court must follow its own rules of procedure; it could not function otherwise; see *Chaplin v Boys*, *supra*. What is procedural is usually clear enough though at times this can raise difficult issues. …

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, ie, the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There, territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J pointed out in *Phillips v Eyre*, *supra*, at p 28, "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law". In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and well-grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

Leaving aside the British practice, which itself is giving increasing deference to the *lex loci delicti*,

the practice of most states until recently favoured exclusive reference to the *lex loci*. Thus the "Mémorandum Dutoit" in *Actes et documents de la Onzième session* (at p 20) of the Hague Convention of Traffic Accidents has this to say (translation):

> And in fact, courts in nearly all the member States have ruled in favour of recourse in principle to the *lex loci actus* in cases of automobile collisions occurring abroad.

This statement is supported by an extensive footnote quoting the sources of this law in all the member states. Quebec law, following European tradition, did the same: see art 6, *Civil Code of Lower Canada*. This was the case, as well, in the United States. This is attested to in *Babcock v Jackson,* 12 NY 2d 743 (1963), where Fuld J stated, at p 746: "The traditional choice of law rule, embodied in the original Restatement of Conflict of Laws (§384), and until recently unquestioningly followed in this court … has been that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort." Similarly, Australia has bypassed British precedents by adopting the *lex loci delicti* as the rule governing the choice of law in litigation within Australia; see *Breavington v Godleman* (1988), 80 ALR 362 (HC).

There may be room for exceptions but they would need to be very carefully defined. It seems to me self-evident, for example, that state A has no business in defining the legal rights and liabilities of citizens of state B in respect of acts in their own country, or for that matter the actions in state B of citizens of state C, and it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces. What is really debatable is whether state A, or for that matter province A, should be able to do so in respect of transactions in other states or provinces between its own citizens or residents.

It will be obvious from what I have just said that I do not accept the former British rule, adopted in *McLean v Pettigrew*, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being "unjustifiable" in the other country. As I see it, this involves a court's defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. As well, if this approach were generally adopted, it would, in practice, mean that the courts of different countries would follow different rules in respect of the same wrong, and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Applying the same approach to the units of a federal state like Canada would be even worse. Given the constant mobility between the provinces, as well as similar legal regimes and other factors, forum shopping would be much easier.

…

What then can be said of the double actionability rule along the lines adopted in England in *Chaplin v Boys*? I have already indicated, of course, that I view the *lex loci delicti* rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion of the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.

If one applies the *lex loci delicti* rule as the rule for defining the obligation and its consequences, the requirement under the English rule that the wrong must also be a tort when committed under English law seems to me to be related more to jurisdiction than choice of law. There appears to be some merit to the requirement, especially when coupled with a discretion not to enforce the requirement, but it may be wondered whether it is not excessive, particularly if this calls for a

meticulous examination of the law. Some breathing room was allowed in *Chaplin v Boys*, where the court there retained a discretion to deal with a case without complying with the double actionability rule, and it is of interest that in the recent case of *Red Sea Insurance Co v Bouygues SA*, *supra*, the Privy Council used the discretion to deal with a contract under the law of the place where the contract was made rather than the law of the forum. However, given the fact that the jurisdiction of Canadian courts is confined to matters in respect of which there is a real and substantial connection with the forum jurisdiction, I seriously wonder whether the requirement that the wrong be actionable in that jurisdiction is really necessary. It may force or persuade litigants who are within the territorial jurisdiction of the court to sue elsewhere even though it may be more convenient for all or most of the parties to sue here. The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there, might be a factor better weighed in considering the issue of *forum non conveniens* or, on the international plane, whether entertaining the action would violate the public policy of the forum jurisdiction.

44 The other common law jurisdiction which Mr Loo relied on was Australia and he cited the case of *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ("*Renault*"), a decision of the High Court of Australia. I will adopt part of the headnote:

A resident of New South Wales was seriously injured in a motor vehicle accident in New Caledonia. In proceedings commenced in the Supreme Court of New South Wales, he alleged his injuries were caused by the negligent design and manufacture of the vehicle by the defendants which were foreign companies whose principal place of business was in France. Neither maintained any office or had any employees in Australia. The defendants applied under Pt 10, r 6A of the Supreme Court Rules 1970 (NSW) to have the proceedings stayed on the ground that the Court was an inappropriate forum for the trial.

Held, (1) by Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, Callinan J not deciding, that the substantive law for the determination of rights and liabilities in respect of foreign torts was the lex loci delicti, and the "double actionability" rule had no application in Australia to international torts.

John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503 and *Tolofson v Jensen* [1994] 3 SCR 1022, considered.

Per Gleeson J, Gaudron, McHugh, Gummow and Hayne JJ. A flexible exception should not be recognised in addition to the application of the lex loci delicti in respect of foreign torts.

45 The judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ (at [59] and [60]) stated:

In the past, the first limb of the "double actionability" rule has been characterised as a technique of forum control specifically applicable in tort cases. In the choice of law rules applicable in Australia, in intra-Australian torts, it has now been put aside. *Pfeiffer* established that, in the case of intra-Australian torts, principles of public policy have no role to play in the choice of law to be applied to the lex causae, just as those principles have no role to play in the rules respecting recognition and enforcement in Australia of the judgments of Australian courts.

The "double actionability" rule should now be held to have no application in Australia in international torts. To the extent that the first limb of that rule was intended to operate as a technique of forum control, we should frankly recognise that the question is about public policy

and confront directly the issues that this may present. It cannot be suggested, however, that such considerations were engaged in the present litigation. … It is sufficient to say that, should a question arise as to whether public policy considerations direct that an action not be maintained in Australia, that question is appropriately resolved as a preliminary issue on an application for a permanent stay of proceedings.

46 I quote from the judgment of Kirby J also where he said (at [127]–[133]):

The predominant choice of law rule for torts: The predominant international principle for the choice of law in respect of wrongs (torts or delicts) has long been that the applicable law is that of the place where the wrong was committed (lex loci delicti). One analysis suggests that this principle was established in Europe as long ago as the thirteenth century. At the latest, it was firmly entrenched there by the end of the eighteenth century. It was by direct borrowing from the civilians in Europe that the rule initially became that observed in the United States of America. *Phillips v Eyre* never gained acceptance in that country. The rule of that place of the wrong was also the rule reflected in the First Restatement on Conflicts of Laws published by the American Law Institute in 1934. Some jurisdictions that previously adhered to applying the law of the place of the wrong have tended more recently towards introducing greater flexibility in these rules. However, this has usually been a result of legislative changes after careful consideration of the issues relating to different types of tort actions with specific rules developed to deal with particular situations. In the United States, where the flexibility has been the result of a judicial revolution which resulted in the widespread abandonment of the rule of the place of the wrong, it has led to considerable uncertainty and difficulty of application. Indeed, the outcome has been described as "hopelessly confused, chaotic, unpredictable, and – despite all laudable efforts to explain it – incomprehensible". Australian law should resist all such temptations.

When advocating the legislation later enacted, the English and Scottish Law Commissions placed evidence before the United Kingdom Parliament concerning the choice of law rules applicable in the jurisdictions of Europe and beyond, in respect of torts or delicts. Their analysis indicated that the rule upholding the law of the place of the wrong is that which commands almost universal contemporary allegiance. It is the rule observed by most jurisdictions of the world: common law, civil law and otherwise. The Supreme Court of Canada regarded its adoption as "axiomatic". In a matter of international law, whatever may be the criticisms that can be levied at the rule, there is a strong premium in Australia's observing the rule upheld by so many and diverse legal systems.

In further support of the foregoing propositions it may be recognised that the rules of private international law exist to fulfil foreign rights and duties, not to destroy them. After a brief flirtation with a different rule for intra-national torts, this Court has now accepted the rule that enjoys overwhelming international observance. There are powerful, perhaps even greater, reasons following that logic into cases involving international torts.

Supporting the preferred rule involves more than adherence to legal symmetry or majority legal opinion. It represents a reflection of the time-honoured maxim locus regit actum. Apart from everything else, this rule has "sure foundations in human psychology". A person will ordinarily assume that he or she is governed by the law of the law area in which the event, critical to legal liability, happens. Admittedly, there may be exceptions. Analysis may confound ordinary expectations. In a particular case, exceptionally, the presence of a long term pre-existing relationship of the parties in the forum may make it unreasonable to attribute to them an ordinary expectation according primacy to the law of the place of the wrong. However, normally it is otherwise. The ordinary expectations of most parties are, I would suggest, that the law of the place of the wrong will govern the rights and duties of the parties. Such expectations are based

on notions connected with the usual territorial reach of law. They are usually resistant to its over-reach. Generally speaking, the law should not be applied in a way that takes ordinary expectations by surprise. The normal rule should not be distorted just because, in a particular case, its outcome imposes a burden to a particular plaintiff. The law must be just to defendants as well as plaintiffs. … The clearer and simpler the applicable rule, the less difficult will it be to advise parties on their rights; the less temptation will there be to shop around for a judicial forum advantageous to one but disadvantageous to another party; and the more even-handed and certain will the law be, and appear to be, to the parties and to society.

The law of tort, although now chiefly compensatory in purpose, has additional objectives of establishing standards of reasonable civic conduct, promoting prevention of wrongs and distributing costs amongst the community concerned. A choice of law rule that permits a plaintiff to pick and choose, according to the forum it selects, the law that would be applied, would derogate from the effective control of a given law area over those aspects of its law. Applying the law of the place of the wrong tends to help defendants to minimise their exposure to risk by accident prevention, to insure effectively and allocate appropriately for potential costs. All of these are reasons for adopting, as the applicable law of an international tort, the law of the place which is classified as the place where the wrong was committed.

…

I am not blind to the defects of the law of the place of the wrong. It has persuasive critics. Sometimes, for example, it may be debatable as to where precisely the "wrong" occurred. However, when the arguments for and against the competing rules are weighed and the inadequacies of the competing rules are evaluated, the preferable course is to adopt a common Australian standard. For torts, the applicable primary law is that of the place where the tort was committed (lex loci delicti). Accordingly, in the present appeal whether the place was metropolitan France (where the vehicle driven by the respondent was principally designed and manufactured) or New Caledonia (where the alleged defect led to damage to the respondent) the applicable law was in either case, the law of France. The primary judge was correct to so conclude.

47 I should mention that although the High Court of Australia was of the view that the governing law was the law of France being the *lex loci delicti*, the court decided, by a majority of five to two, that the action in New South Wales should not be stayed because the Renault companies had not shown that a trial in New South Wales would be oppressive or vexatious. However, that is not the test in Singapore for a stay application. As I have said, the test is whether there is a clearly more appropriate forum than Singapore, subject to any question raised about the ends of justice.

48 Mr Loo submitted that since the location of any breach by CAA was Taiwan and any damage caused to SIA would be in Taiwan, the governing law would still be the law of Taiwan even if the proceedings were to be heard in Singapore. For this submission, Mr Loo was relying initially on the *Red Sea Insurance* exception to the double actionability rule and, alternatively, on the *lex loci delicti* as the general rule.

49 On the other hand, Mr Lok submitted that the governing law would be Singapore law under the double actionability rule which, he stressed, was still the general rule applicable in Singapore as acknowledged by our Court of Appeal. Mr Lok also submitted that an exception to this rule would be applied to avoid depriving a plaintiff of redress but not otherwise. To this, Mr Loo countered that SIA was the tortfeasor and it was CAA who was the victim, presumably because the accident caused some physical damage to CKS International Airport. I should add that CAA has made a claim in Taiwan

for damages and for which a ruling, I understand, has been given after arguments were presented to me. As regards SIA's claims against CAA, whether in Singapore or Taiwan, SIA remains the plaintiff.

50 It seems to me that *Tolofson* was not drawn to the attention of our Court of Appeal in *Goh Chok Tong* and in *Parno*. As for *Renault,* it was reported after these two local cases. It may be that our Court of Appeal will also consider it time to depart from the double actionability rule but, until then, that rule is the general rule in Singapore for international torts. If I were not bound by the doctrine of precedence, I would have departed from the double actionability rule for the reasons stated by La Forest J in favour of the *lex loci delicti* as a general rule for international torts. For present purposes, it is not necessary for me to venture a view as to whether the *lex loci delicti* should be subject to an exception and what the exception should be since neither counsel before me suggested that an exception to the *lex loci delicti* would be applicable on the facts.

51 In any event, I am of the view that even with the application of the double actionability rule, the exceptions to that rule are not confined to a situation where a plaintiff will otherwise be deprived of recourse although that might have been a powerful motivation in the past. As Kirby J observed in *Renault*, the law must be just to defendants as well as plaintiffs.

52 I have also taken into account the fact that SIA's flights into and out of Taiwan would be subject to Taiwan law. Its operations from CKS International Airport would be subject to the rules and regulations of CAA. For the purpose of the application before me, I am of the view that the *Red Sea Insurance* exception applies and that the law of Taiwan will apply to SIA's Singapore action if the trial of that action were to be in Singapore. The significant factors are clearly in favour of the law of Taiwan being the governing law.

Eventual enforcement in Taiwan

53 Mr Loo also submitted that if the Singapore proceedings were not stayed and if SIA were to obtain judgment against CAA, SIA would still have to seek redress in Taiwan. There is no reciprocity between Taiwan and Singapore as would enable a Singapore judgment of a superior court to be registered in Taiwan. Furthermore, the opinion of Mr Koo was that SIA would not be allowed to sue upon the Singapore judgment and SIA would have to sue afresh in Taiwan. On the other hand, Mr Shao's opinion on this point was, in summary, that Mr Koo's opinion was premature.

54 Even if Mr Koo's opinion were correct and SIA would have to sue afresh in Taiwan, I am of the view that this would be a problem for SIA to contend with and it was not for CAA to raise it as a factor in favour of a stay application. A similar view was expressed by Lee Seiu Kin JC in *Bayerische Landesbank Girozentrale v Kong Kok Keng* [2002] 4 SLR 283. Although that case involved a consideration of two common law jurisdictions where the action might be pursued, Lee JC said at [13] that if the plaintiff should choose to sue in a jurisdiction that made enforcement more difficult, it was a problem that would be faced by the plaintiff and it was rather surprising that the defendant should be the one to complain.

The scope of SIA's Taiwan action

55 However, the fact that SIA's Taiwan action is wider in scope than its Singapore action is, in my view, an important factor. As I have mentioned, SIA's Taiwan action is for an indemnity or contribution for damages paid or payable by SIA to passengers and crew under various jurisdictions as well as for hull and cargo losses.

56 Accordingly, the question arises as to whether a finding of liability or exoneration of liability

on the part of CAA by a Singapore court will be binding between SIA and CAA in the Taiwan action when the additional claims of SIA are considered.

57 Mr Koo was of the opinion that it would not be binding. Mr Shao did not venture an opinion on this point. It seems to me that there is clearly a risk that the issue of liability as between SIA and CAA will have to be re-litigated all over again for the additional claims with the real possibility of a different conclusion if I were to refuse CAA's application. In my view, this is another factor favouring a stay.

CAA's connection with Singapore

58 Mr Loo submitted that in *The Spiliada*, Lord Goff of Chieveley said at 477:

> I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

59 Mr Loo submitted that the Singapore court's jurisdiction over CAA is not founded as of right as the jurisdiction over CAA is exercised by virtue of service of proceedings outside of Singapore on CAA under O 11 r (1)(q) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). That provision allows a party to seek leave of the court to serve process on a party outside Singapore if the applicant is seeking a contribution or an indemnity in respect of liability enforceable by proceedings in Singapore.

60 On the other hand, Mr Lok submitted that once the Singapore court has jurisdiction, the quality of the jurisdiction should not be considered.

61 In my view, either the Singapore court has jurisdiction or it does not. I agree that the quality of the jurisdiction *per se* should not matter. However, if the jurisdiction is based on a slim ground, then it should be easier for CAA to establish that there is clearly a more appropriate forum than Singapore, but the slim ground is not another discrete factor in favour of a stay.

62 It is not necessary for me to venture a view as to whether the exercise of jurisdiction under O 11 r (1)(q) was exorbitant in the circumstances as there was no application before me to set aside the order granting SIA leave to serve process out of jurisdiction.

Other factors

63 Mr Lok also relied on two other factors to resist the stay application.

64 First, he said that the dispute between SIA and CAA is a matter of public and national interest that should be tried in Singapore. It seems to me that the dispute is no less a matter of public and national interest in Taiwan. It may even be said to be of greater interest in Taiwan as the tragedy occurred there and the operation of CKS International Airport will be under scrutiny as contrasted with the operation of a few crew members on board an aircraft.

65 Mr Lok's second point was that the role of CAA will be material in SIA's defence in the claim by Ang against SIA. Mr Lok submitted that:

> Without the participation of [CAA] and the examination of the roles played by them … [SIA] will be prejudiced in their Defence of the Singapore proceedings and deprived of a legitimate juridical

advantage in presenting a full defence …

I am of the view that while the role of CAA may be material in SIA's defence, it does not follow that SIA will be prejudiced if CAA does not participate in the Singapore action. The reality is that if CAA does not participate, SIA will be at liberty to make whatever assertions it wishes about CAA's role in the accident without challenge from CAA. It seems to me that this will be an advantage to SIA *vis-à-vis* Ang rather than a prejudice.

The ends of justice

66 In the circumstances, I am of the view that Taiwan is clearly the more appropriate forum. Having reached this conclusion, I come to certain allegations made by Mr Shao which may give the impression that SIA will not get justice in Taiwan.

67 In para 15 of Mr Shao's first affidavit filed on 11 March 2004, Mr Shao said that there was some concern in some quarters that SIA would face difficulty in its claim in Taiwan as it is a claim against the government. However, he went on to say that while this concern might be unfounded, it was understandable that such a perception might exist. I am of the view that such statements are not helpful and should not have been made. Either Mr Shao has an opinion as to whether SIA can get justice in Taiwan or he has no opinion on it. If it were the latter position, as his statements suggest, then he should refrain from saying anything instead of expressing the views or concerns of others.

68 Furthermore, in para 10 of Mr Shao's second affidavit filed on 17 August 2004, Mr Shao went on to say that while he would comment no further on this issue, he would raise the following pertinent facts which were not in dispute:

(a) The accident was investigated by the Taiwanese Aviation Safety Council ("the ASC"), an independent Taiwanese government agency;

(b) CAA is a branch of the Taiwanese government;

(c) The findings in the investigation report issued by the ASC ("the ASC Report") were not favourable to SIA;

(d) The findings in the ASC Report had received wide publicity in Taiwan and were now the main substantive evidence relied on by CAA in the Taiwanese proceedings; and

(e) SIA is not a Taiwanese party.

69 Yet again Mr Shao stopped short of asserting that SIA would not get justice in Taiwan. In my view, Mr Shao should not have listed out the above facts which were calculated to give the impression that SIA would not get justice in Taiwan.

70 Another point raised by Mr Shao was that the actions by the plaintiffs in Singapore against SIA are based mainly on the Warsaw Convention or subsequent versions of it. If SIA were found liable under the Warsaw Convention, CAA is likely to raise the defence in the Taiwan action that such judgments are not recognised under Taiwan law as Taiwan is not a signatory to any version of the Warsaw Convention. Mr Shao was suggesting that SIA would have difficulty in claiming indemnity, or contribution, on liabilities founded on judgments based on a convention which Taiwan was not part of.

71 In my view, this argument cuts both ways. Why should CAA be deprived of this defence by a

refusal to order a stay of SIA's Singapore action? This point raised by Mr Shao is a neutral factor.

72 Accordingly, I am of the view that SIA's Singapore action should be stayed on the ground of *forum non conveniens* as well.

Conclusion

73 In the circumstances, I grant CAA's application for a stay of SIA's Singapore action until further order pending the outcome of SIA's Taiwan action. SIA is to pay the costs of this application to CAA, such costs to be agreed or taxed.

Third party's application granted.