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Jurisdiction Issues in International Tort Litigation: A Singapore View

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JURISDICTION ISSUES IN INTERNATIONAL TORT LITIGATION: A SINGAPORE VIEW

This article looks at the issues that arise at a jurisdictional stage when a claim in tort containing foreign elements is made in a Singapore court. In particular, the amended Order 11 Rule 1 (f) RSC is examined. Because of the paucity of local authorities, extensive references are made to relevant Commonwealth cases to aid in the interpretation of the local provision.

I. INTRODUCTION

A tort may be described as possessing an international character if there are foreign elements involved. For example, the parties involved may be from different countries. Even if the parties are from the same country, the act or damage may have been done in a different country, or in different countries. In such cases, the plaintiff's choice of forum for litigation is not confined to a single jurisdiction. Apart from practical points like cost and convenience, the choice of the forum is also affected by the consideration that the forum will apply its own private international law to choose the governing substantive law to determine the claim. Another important consideration in choosing the jurisdiction in which to sue is the question of whether the defendant has assets within that jurisdiction, and if not, whether the judgment obtained from the jurisdiction is enforceable in the country where such assets are to be found.

Singapore, like many other common law countries, can assert jurisdiction over a defendant if he is present in,[1] or if he has submitted to,[2] the jurisdiction. International tort cases present problems for both. The defendant may have minimal or no dealing within the jurisdiction. For example, defective goods may be distributed by a foreign manufacturer without any presence within the jurisdiction, or a negligent misrepresentation may be made by a foreign firm having no business within the jurisdiction, to a party in the jurisdiction. In many cases, the parties do not have a pre-existing contractual relationship in which to submit to the jurisdiction in advance, and even if they have such a relationship, it is a matter of interpretation[3] whether the jurisdiction clause, if there is one, will also cover the dispute in tort.[4]

1 S 16(1)(a)(i), Supreme Court of Judicature Act (Cap 322,1985 Rev Ed), and O 10, Rules of the Supreme Court (Cap 322, R 5,1990 Ed). S 19(3)(a)(i), Subordinate Courts Act (Cap 321, 1985 Rev Ed), and O 10, Rules of the Subordinate Court (Cap 321, R 1, 1993 Ed).

2 S 16(1)(b), Supreme Court of Judicature Act, *ibid*. S 19(3)(b), Subordinate Courts Act, *ibid*.

3 Governed presumably by the proper law of the contract containing the jurisdiction clause: Cheshire & North, *Private International Law* (12th ed, 1992), at 237.

4 See, *eg*, the restrictive attitude in: *Peterson* v *AB Bahco Ventilation* (1980) 107 DLR (3d) 49, 56; *Mohamad Toufik Al-Ozeir & Anor* v *American Express Bank Ltd* [1994] 2 MLJ 687, 691; *Contra Continental Bank NA* v *Aeokos Cia Naviera SA* [1994] 2 All ER 540.

In many cases the plaintiff has to resort to service out of jurisdiction. Order 11 Rule 1[5] spells out many grounds under which the plaintiff can apply for leave to serve process outside the jurisdiction, *e.g.*, where the defendant is domiciled, ordinarily resident, carrying on business or has property, within the jurisdiction.[6] The purpose of this article is to examine the specific issues of jurisdiction arising with respect to tort litigation,[7] and the focus will be on the heads which have a direct bearing on tort actions.

II. ORDER 11 GROUNDS FOR TORT ACTIONS

Under Order 11 Rule 1(f),[8] leave of the court for service out of jurisdiction may be applied for if in the action –

(i) the claim is founded on a tort committed in Singapore; or

(ii) the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring.

Rule 1(f) replaces the old rule which only allowed for service out of jurisdiction in cases where the claim was founded on a tort committed within Singapore. Another relevant provision for tort actions is Rule 1(p) where "the claim is founded on a cause of action arising in Singapore".

III. PRE-REQUISITES FOR SERVICE OUT OF JURISDICTION

Order 11 is an extension of the common law grounds of jurisdiction, and courts generally view applications under it with caution, because the purpose of the exercise is to compel a defendant abroad, owing no necessary allegiance to the jurisdiction, to trial within the jurisdiction, and also because the grounds of jurisdiction are wider than that which the forum recognises in foreign courts.[9] The plaintiff has to show a good arguable case that the claim falls within the specific head of Order 11.[10] The action must fall within the letter and spirit of the rule.[11] It has also been said that any doubts as to whether a claim falls within a head of jurisdiction should be

5 Rules of the Supreme Court (RSC), *supra*, note 1; S 278/93; S 299/93. See also, Rules of the Subordinate Court, *supra*, note 1; S 279/93; S 298/93.

6 O 11 r 1(a) RSC.

7 This article does not deal with admiralty jurisdiction, for which, see High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Rev Ed).

8 *Supra*, note 5.

9 *Mackenda* v *Feldia AG* [1967] 2 QB 590, 599, *per* Diplock LJ; *The Chapparal* [1968] 2 Lloyd's Rep 158, 163, *per* Diplock LJ; *George Monro Ltd* v *American Cyanamid and Chemical Corporation* [1944] KB 432, 437, *per* Scott LJ.

10 *Seaconsar Far East Ltd* v *Bank Markazi Jomhouri Islami Iran* [1993] 3 WLR 756; [1993] 3 All ER 756.

11 *Johnson* v *Taylor Bros* [1920] AC 144.

resolved in favour of the defendant.[12] Because the application is *ex parte*, there must also be full and frank disclosure.[13]

The plaintiff also has to show that there is a serious question to be tried on the merits.[14] The degree of difficulty for the plaintiff at this stage depends on the ground that is being invoked. If the ground has a direct bearing on the substance of the claim (*eg*, Rule 1(f)), as opposed to the general ground of the domicil or residence of the defendant, the plaintiff would have already gone into the question of the claim on the basis of a good arguable case, so that he has nothing left to show.[15] On the other hand, if a general ground has been invoked, then the question of merits must be independently assessed. Finally, it must also be shown that Singapore is the natural forum to hear the action.[16] In tort cases, the place where the tort is committed has generally been considered a critical pointer determining the natural forum.[17]

IV. TORT COMMITTED WITHIN THE JURISDICTION

This phrase has spawned sufficient varying interpretations, conflicting authorities, and academic commentary to earn the dubious honour of being arguably the most complex ground of Order 11 and generating some of the most difficult issues in the conflict of laws.

Before the relevant authorities are examined, it is necessary to point out the relationship between the place of the tort as a jurisdiction concept, and as a choice of law concept. The question of where a tort is committed arises both in a jurisdictional and a choice of law context, and even in jurisdictional litigation, the issue can arise in a choice of law context. Many countries utilise the law of the place of the tort as at least one connecting factor to determine choice of law.[18] In jurisdictional litigation, the place of the tort can be relevant in two ways apart from being the basis of obtaining jurisdiction. It is itself relevant for determining the natural forum. Moreover, the applicable law may also be a relevant indicator of the natural forum,[19] and to that end the place of tort needs to be identified to determine choice

12 *The Siskina* [1979] AC 210. But *contra* Carter (1981) 52 BYBIL 319, 320.
13 *The Hagen* [1908] P 189.
14 *Seaconsar Far East Ltd* v *Bank Markazi Jomhouri Islami Iran*, *supra*, note 10.
15 *Seaconsar Far East Ltd*, *supra*, note 10. Subject to choice of law considerations, see *infra*, Part VI.
16 *The Albaforth* [1984] 2 Lloyd's Rep 91; *The Spiliada* [1987] AC 460; *JH Raynor (Mincing Lane) Ltd* v *Teck Hock & Co (Pte) Ltd* [1990] 2 MLJ 142. This article only deals with the issue of *forum conveniens* insofar as tort claims raise special considerations. For a fuller discussion of the doctrine as such, see D Chong, "*Forum Conveniens*" (1993) 5 SAcLJ 1.
17 *Infra*, Part VII.
18 This will be true for jurisdictions following *Boys* v *Chaplin* [1971] AC 356 or some variation of it, and that includes almost the entire Commonwealth.
19 *Voth* v *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *The Spiliada*, *supra*, note 16.

of law.[20] The authorities, however, reveal that cases on jurisdiction are considered authoritative on choice of law questions.[21] This also suggests that the cases on choice of law will also be considered relevant to jurisdiction.

Nevertheless, it is important to bear in mind the material differences between the jurisdictional and choice of law concepts. First, the question in jurisdictional litigation is whether the tort is committed within the jurisdiction, and the court need not go further, while in choice of law a specific location must be found for the tort. Secondly in jurisdiction cases, the court has a discretion whether to grant leave for service out of jurisdiction, while there is no discretion in choice of law. As a matter of policy, the *locus delicti* for jurisdiction and that for choice of law do not necessarily have to coincide.[22] In jurisdiction cases, the search is primarily for the court which is most closely connected to the case in a procedural sense (*eg*, the location of evidence and witnesses), but in choice of law, the considerations must be substantive. In the jurisdiction context the forum always has some interest in hearing the case where the effects of the tort are felt within the jurisdiction, but when it comes to choice of law, it may not necessarily want to apply its own law. In other words, it may be possible to say that the tort is committed in more than one place for jurisdiction purposes,[23] but it can only have a single location for choice of law purposes. Where that is the case the interchangeability of concepts must be highly suspect.[24]

A. The Place of the Tort

One classical approach has been to fix the *locus delicti* at the place where the defendant acted.[25] This emphasises the regulatory aspects of tort law. Today the justification has more to do with fairness to the defendant as reflected in the maxim, *locus regit actum*. Another classical approach is to localise the tort at the place of damage. The damage completes the tort

20 The place of the tort can also be relevant in yet another way: see *infra*, Part VI.

21 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391; *Armagas Ltd* v *Mundogas SA* [1986] AC 717; *Church of Scientology* v *Metropolitan Police Commissioner* (1976) 120 Sol Jo 690; *Voth* v *Manlldra Flour Mills Pty Ltd*, *supra*, note 19.

22 Carter (1979) 50 SYBIL 241, 242-243.

23 As in Canada and Ireland – see *infra*, Section B.

24 *Contra Interprovincial Co-operative* v *The Queen* (1975) 53 DLR (3d) 321, where a minority in the Canadian Supreme Court applied the jurisdiction test in choice of law. See Collins,"Where is the *Locus Delicti?*" (1975) 24 ICLQ 325, 328.

25 *Eg*, many of the older Canadian cases looked to the place of acting: *Anderson* v *Nobel's Explosive Co* (1906) 12 OLR 644 (where explosives were manufactured in Scotland and sold in Ontario and caused injury there, the tort was committed in Scotland); *Beck* v *Willard Chocolate Co Ltd* [1924] 2 DLR 1140 (where chocolates negligently manufactured in Ontario caused injury in Nova Scotia, the tort was committed in Ontario).

and it is only then that the cause of action arises and the tort can be said to be committed. This "last-event" theory has close links with the now debunked vested rights theory.[26] It has been rejected by the Privy Council.[27] The place of harm also finds support in the perception of tort law as a compensatory vehicle, which therefore lays emphasis on the loss for which compensation is sought. The main problem with these two approaches is that the act or harm may occur over several localities. One approach that had some judicial support is that all the ingredients of the tort must occur within the jurisdiction,[28] but the weight of authority is correctly against it.[29] It would mean that no country would have jurisdiction over a tort spanning several jurisdictions. An elective technique allows the plaintiff to choose either the place of acting or place of harm.[30] This method also suffers from the definitional problems of the individual limbs in multiple-locality torts.[31]

The modern English and Australian approach is to use the substance of the tort test. In the words of Lord Pearson in the Privy Council case of *Distillers Co (Biochemicals) Ltd* v *Thompson*:[32] "The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?"
This test was developed in respect of "a cause of action which arose within the jurisdiction",[33] but its application to a "tort committed within the jurisdiction" is undoubtedly correct.[34] It appears to be a general test for all torts,[35] but it has been emphasised that in its application each tort must be separately considered to see where it is committed.[36]

26 *Eg*, in American Law Institute, *Restatement on Conflict of Laws* (1934) (First Restatement), the place of wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place (§ 377). The author of the First Restatement was Beale, who brought the vested rights theory to America. Under this theory, foreign law is applied because rights are vested in foreign territory. As many have pointed out, the argument is circular in assuming the relevance of the foreign legal system in the first place.

27 *Distillers Co (Biochemicals) Ltd* v *Thompson* [1971] AC 458 (PC NSW).

28 *Abbot-Smith* v *Governors of University of Toronto* (1964) 45 DLR (2d) 672 (NS); Asprey JA, *Thompson* v *Distillers Co (Biochemicals) Ltd* [1968] 3 NSWLR 3.

29 This was also rejected in *Distillers Co (Biochemicals) Ltd* v *Thompson*, *supra*, note 27.

30 Cook, *Logical and Legal Basis of Conflict of Laws* (1942), at 345. See *Handelskwekerij GJ Bier BV* v *Mines de Potasse d'Alsace SA* [1977] 3 WLR 479 in relation to the Brussels Convention.

31 See, *eg*, *Minster Investments Ltd* v *Hyundai Precision & Industry Co Ltd* [1988] 2 Lloyd's Rep 621.

32 *Supra*, note 27, at 468.

33 S 18(4), Common Law Procedure Act (Act 21 of 1899) (NSW). *Cf* O 11 r 1(p) RSC in Singapore.

34 *Castree* v *ER Squib & Sons Ltd* [1966] 1 WLR 1248; *Buttigieg* v *Universal Terminal & Stevedoring Corp* [1972] VR 626, 628. *Contra* Asprey JA and Wallace P in *Thompson* v *Distillers Co (Biochemicals) Ltd*, *supra*, note 28.

35 It has been applied, *inter alia*, to negligence, defamation, inducement of breach of contract and misrepresentation.

36 *Diamond* v *Bank of London and Montreal Ltd* [1979] QB 333, 346, *per* Lord Denning MR.

The clearest advantage of this test is that it does not necessarily put any special significance to any particular element of the tort, although the Board did express preference for the theory that "the cause of action arose within the jurisdiction if the act on the part of the defendant, which gives the plaintiff his cause of complaint has occurred within the jurisdiction."[37] The act and the harm in that case were found to have occurred within the jurisdiction, and it reserved its opinion in cases where they occurred in different places. The *Distillers* test is meant to be a flexible approach: "... the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor."[38] The question is not whether it is flexible, but how flexible it is. In Canada, it has evolved into a teleological approach.[39] In England and Australia, the courts have taken a more traditional approach that attempts to isolate the gist of the action. However the authorities are not easy to reconcile. For the purpose of this article, three problematic areas will be examined.

I. Negligence

It was essentially in this area that the "substance of the tort" test developed. In the *Distillers* case,[40] the British defendant had imported the drug thalidomide from Germany, manufactured a soporific containing that drug, and sold it in England to an Australian company that sold it in New South Wales, where the plaintiff's mother had bought and ingested it during her pregnancy, causing the plaintiff to be born with deformed limbs. The Privy Council held that the cause of action arose in New South Wales because the act of the defendant which gave the plaintiff the cause for complaint was the distribution of the drug in New South Wales without warning of possible side-effects for pregnant women. Significantly, the damage was also suffered in the forum.[41]

In *Castree* v *ER Squib & Sons Ltd*,[42] a machine had been manufactured in Germany by the defendants, but was sold in England to the employer of the plaintiff. The plaintiff was injured in England when the machine disintegrated. The Court of Appeal held that the alleged tort was committed within the jurisdiction because the "substantial wrongdoing" of the defendant was "putting on the English market a defective machine with no warning as to its defects."[43] In *Jacobs* v *Australian Abrasives Pty Ltd*,[44] the

37 *Supra*, note 27, at 468.
38 *Supra*, note 27, at 467.
39 *Infra*, Section B.
40 *Supra*, note 27.
41 Lord Denning MR opined that the basis of *Distillers* was in fact that the damage was suffered there: *Diamond* v *Bank of London and Montreal*, *supra*, note 36, at 346.
42 *Supra*, note 34.
43 *Supra*, note 34, at 1252.
44 [1971] Tas SR 92.

plaintiff alleged in the Tasmanian court that a grinding wheel manufactured in New South Wales and bought in the forum had broken and injured the plaintiff in the forum. The judge[45] held that the tort had been committed in Tasmania, because the defendant had failed to warn the ultimate consumer of the defects in the product.

In contrast, there are cases where the courts have been less generous to the plaintiff. In *George Monro Ltd* v *American Cyanamid and Chemical Corp*,[46] rat-poison was sold by the defendant to the first plaintiff in New York, who in turn purveyed it to the second plaintiff who sold it to a farmer in England. The poison devastated the farm, and the plaintiffs were attempting to recover from the defendant the compensation paid to the farmer. Although the Court of Appeal also purported to apply the "substance of the tort" test,[47] it considered in *obiter dicta*[48] that the act of selling the poison without warning as to its defects occurred in New York. However, this case has generally been distinguished,[49] or not followed.[50] In *Buttigieg* v *Universal Terminal & Stevedoring Corp*,[51] where it was alleged that improper stowage of cargo in New York caused the plaintiff to be injured in Melbourne, it was held that the tort was committed in New York. Crockett J held, applying the "substance" test, that the allegation that the defendant had failed to warn of the dangers caused by improper stowage was "unreal", and the gist of the action was the negligent stowage in New York. In *MacGregor* v *Application des Gaz*,[52] the allegation was that a defective lamp manufactured in France was sold in Queensland without warning as to its dangers, causing the plaintiff to be injured in Queensland. Matthews J in the Brisbane Supreme Court held that these allegations were "unreal and artificial" and having regard to the substance of the action, the tort was one of defective manufacture committed in France.

There has been an undoubted emphasis in all these cases on where the defendant acted. Indeed the Privy Council in *Distillers* had stressed the justice of making the defendant answer for his wrongdoing in the place where he did the wrong.[53] However, the characterisation of the act does present problems. There is indeed some artifice in saying that the manufacturer is negligent in failing to warn of defective products. Taking this approach, any kind of product liability negligence can be characterised

45 Burbury CJ in Chambers.
46 [1944] KB 432.
47 In that sense it was a precursor to the *Distillers* decision.
48 The pleadings in the case were so badly drafted as to justify dismissal on that basis alone.
49 *Eg*, *Diamond* v *Bank of London and Montreal Ltd*, *supra*, note 36, where it was confined to negligent acts, having no application to misrepresentation.
50 *Eg*, *Moran* v *Pyle National (Canada) Ltd* (1974) 43 DLR (3d) 239.
51 *Supra*, note 34.
52 [1976] Qd R 175.
53 *Supra*, note 27, at 468.

as a tort occurring where the injury occurs.[54] It is a question of degree how offensive it is to common sense, and a question of the extent to which the court is prepared to look beyond the plaintiff's allegations. There is admittedly less contortion when a product that is otherwise safe is dangerous if used by particular persons (*eg*, the drug in *Distillers*). In such a case a reasonable manufacturer should know about the side-effects and should have put out a warning. But if a product is defectively manufactured, then cases like *Castree* v *ER Squib & Sons Ltd* require the case to be argued on the basis that the reasonable manufacturer should have known which products are defective, and attached warnings to them. Put at a higher level of abstraction, when a defendant creates a dangerous situation (*eg*, the improper stowage in *Buttigieg*), he ought reasonably to know about the danger and therefore ought to have given due warning to anyone coming into it. Thus it is not surprising that the "failure to warn" technique has been described as nothing more than a "device".[55]

II. Misrepresentation

In *Cordova Land Co* v *Victor Bros Inc*,[56] a fraudulent representation was alleged to have been made by the defendants to the plaintiffs in England. The representation, contained in bills of lading, were issued and handed over to shippers in Boston. The plaintiff had received and acted on them in England. The English High Court found that the substance of the wrongdoing occurred in Boston. On the other hand, in *Diamond* v *Bank of London and Montreal*,[57] the English Court of Appeal held that for the purpose of service out of jurisdiction, where fraudulent or negligent misrepresentations are made by telephone or telex originating from outside the jurisdiction, the substance of the tort is committed in England where they were received and acted upon.[58] The *Cordova* case was distinguished on the basis that there the representation was made in Boston generally to whoever might receive the bill of lading, but the representations in the present case were specific and directed to the plaintiffs in England. However, the *Diamond* rule is not a rigid one. It may not apply if the place of acting is fortuitous, and cannot apply if the receipt and the reliance occur in different countries.[59]

54 Collins, "Some Aspects of Service Out of Jurisdiction in English Law" (1972) 21 ICLQ 657, 666.

55 Fawcett, "Product Liability in Private International Law: A European Perspective" (1993) I Hague 9, 201.

56 [1966] 1 WLR 793.

57 *Supra*, note 36.

58 Followed in *The Albaforth*, *supra*, note 16. See, in the choice of law context, *Armagas Ltd* v *Mundogas SA*, *supra*, note 21.

59 *Voth* v *Manildra Flour Mills Pty Ltd*, *supra*, note 19, at 568–569, 579.

In contrast, in *Voth* v *Manildra Flour Mills Pty Ltd*,[60] where the defendant, based in Missouri, had given improper professional advice to the plaintiff in New South Wales, the High Court of Australia held[61] that, although the alleged act of negligence in the case could be characterised either as negligent misrepresentation,[62] or the negligent provision of services, on the facts of the case the substance of the action was the latter, and therefore the tort took place in Missouri. It was stressed that, following *Distillers*, "it is some act of the defendant, and not its consequences, that must be the focus of attention."[63] On the other hand, Brennan J thought, following the English authorities,[64] that the consequences of the defendant's act were more important. Dissenting, his Honour preferred to classify the action as misrepresentation, taking place in the forum.[65]

The pattern that emerges is that the Australian court will place considerable importance on where the defendant actually acted, at least where the representation is a part of services rendered,[66] while the English courts exhibit a greater tendency to look at consequential acts. This is confirmed in *Minster Investments Ltd* v *Hyundai Precision & Industry Co Ltd*.[67] In a slightly different context,[68] Steyn J in the English High Court held that in an action under *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*[69] for negligent misrepresentation, the essence of the action is the misstatement and reliance, and "not the historical carelessness which led to the misstatement or wrong advice."[70]

There are two recent High Court cases from Malaysia on negligent provision of advice, but unfortunately neither is very helpful. In *Tengku Aishah binti Sultan Hj Ahmad Shah* v *Wardley Ltd*,[71] the Malaysian plaintiffs entered

60 *Supra*, note 19.
61 By Mason CJ, Dean, Dawson and Gaudron JJ. Toohey J agreed on this point.
62 The majority had assumed that if the tort was characterised as misrepresentation, then it would take place in New South Wales. Brennan J (dissenting) dealt with the question in greater detail and held that a misrepresentation takes place when received and acted upon.
63 *Supra*, note 19, at 567.
64 *Diamond* v *Bank of London and Montreal*, *supra*, note 36; *The Albaforth*, *supra*, note 16; *Armagas Ltd* v *Mundogas SA*, *supra*, note 21; *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc*, *supra*, note 21.
65 *Supra*, note 19, at 578–579.
66 But see Cheshire & North, *supra*, note 3, at 556, who support the approach in *Voth* v *Manildra Flour Mills Pty Ltd*, *supra*, note 19.
67 *Supra*, note 31.
68 The documents containing the alleged misrepresentations had been produced in France and South Korea, and received by the plaintiff and acted upon in England. The question was whether England was "where the harmful event occurred" under the Civil Jurisdiction and Judgments Act 1982 (s 5(3), Sch 1). Nevertheless Steyn J applied the substance of the tort test to hold that it was: *supra*, note 31, at 624.
69 [1964] AC 465.
70 *Supra*, note 31, at 624.
71 [1992] 2 CLJ 1278.

into a contract with the defendant, a merchant banker operating in Singapore. The defendant agreed to lend money to the plaintiffs and to render advice relating to the loan. Dato'Siti Norma Yaakob J applied the "substance of the tort" test and found the alleged tort to be that of failing to render the banking service of giving advice, and thus characterised, the tort was held to be committed in Singapore. This case was reversed by an unreported Supreme Court judgment, but the reasons for the reversal are not known to this writer.[72] More recently, in *Mohamad Toufik Al-Ozeir & Anor* v *American Express Bank Ltd*,[73] on virtually identical facts, Abdul Malek J characterised the tort as misrepresentation, and following the *Diamond* v *Bank of London and Montreal Ltd*[74] test, found the tort to be committed within Malaysia. The point was, however, conceded by counsel.[75]

III. Inducing Breach of Contract

In *Atlantic Underwriting Agencies Ltd* v *Compagnia di Assicurazione di Milano SPA*,[76] the defendant's act that was alleged to constitute the inducement to breach the contract took place in Italy, but the harm was suffered in England. Lloyd J found the alleged tort to have been committed, if at all, in Italy. No reference was made to the place where consequential act of the induced breach of contract occurred.[77] However, in *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc*,[78] where the acts of inducement occurred in New York causing breaches of contract and economic loss to the plaintiff in England, the Court of Appeal held, after careful consideration, that the tort was committed in the forum.[79] This case illustrates that the place where the defendant actually acted is not necessarily the governing consideration in the substance of the tort test.

B. Alternative Approaches

i. *Significant Elements Within the Jurisdiction*

The Irish court has taken a different interpretation to the phrase "tort committed within the jurisdiction", at least where the act and the harm occur in separate jurisdictions. In *Patrick Grehan* v *Medical Inc and Valley*

72 11 November 1993 *vide* Supreme Court Civil Appeal No 01-79-91: see *Mohamad Toufik's* case, *infra*, note 73, at 692.

73 [1994] 2 MLJ 687.

74 *Supra*, note 36.

75 *Supra*, note 73, at 691.

76 [1979] 2 Lloyd's Rep 240.

77 Indeed it is difficult to determine what that place is, since the judge had proceeded on the hypothesis that the tort had indeed taken place without discussing what constituted the induced breach of contract.

78 *Supra*, note 21.

79 However, in the analogous tort of intimidation, it had been assumed without argument that the tort was committed where the acts of inducement took place: Philips J in *Dimskal Shipping Co SA* v *International Transport Workers Federation, The Evia Luck (No 2)* [1989] 1 Lloyd's Rep 166.

Pine Associates,[80] the plaintiff had been injured in Ireland by a heart valve alleged to have been defectively manufactured in the United States. It might have been said that, following *Castree* v *ER Squib & Sons Ltd*[81] the tort was one of selling defective heart valves in Ireland without warning as to its defects. Instead, the Supreme Court held that it was "sufficient if *any* significant element [of the tort] has occurred within the jurisdiction."[82]

This achieves by judicial means the statutory reform in England. In England, service out of jurisdiction is now permissible "if in the action begun by writ ... (f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction".[83] In *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc*,[84] the Court of Appeal held that to satisfy the first limb, it was enough if some significant damage has been sustained in the jurisdiction. As for the second limb, the Court held that it "requires the court to look at the tort alleged in a common sense way and ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere)."[85]

ii. *Real and Substantial Connection*

In *Moran* v *Pyle National (Canada) Ltd*,[86] the Supreme Court of Canada chose to read *Distillers* merely as an example of the real and substantial connection test. Dickson J, delivering the judgment of the court, was prepared to consider a tort to have occurred within the jurisdiction if it is substantially affected by the defendant's activities and its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. As applied to the issue of product liability that arose in that case:

> ... where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.[87]

80 [1986] IR 528.
81 *Supra*, note 34. See *supra*, main text following note 42.
82 *Supra*, note 80, at 542, *per* Walsh J (original emphasis), Finlay CJ and Giffen J concurring. See also, Collins, *supra*, note 24, at 327-328.
83 O 11 r 1(1)(f) RSC.
84 *Supra*, note 21.
85 *Supra*, note 21, at 437.
86 (1974) 43 DLR (3d) 239.
87 *Ibid*, at 250-251. For academic support, see Bisset-Johnson, "Jurisdiction over the Manufacturer of Imported Goods in Cases of Negligence — The British Commonwealth Approach" (1970) 48 Can Bar Rev 548.

C. When is a Tort Committed within Singapore?

Should Singapore adopt the flexible approaches of Ireland or Canada? In *Moran* v *Pyle National (Canada) Ltd*,[88] and the cases following it,[89] the place where the damage occurred played a significant role in the application of the real and substantial connection test. The same can be said of the significant elements test in *Patrick Grehan* v *Medical Inc and Valley Pine Associates*.[90] To that extent, a place of damage rule like Singapore's Order 11 Rule 1(f)(ii) will give effect to much of the underlying policy. Indeed, the adoption of the latter interpretation will render Rule 1(f)(ii) superfluous. The Canadian approach goes further in having an additional protective mechanism of foreseeability for the defendant. The foreseeability element, though relevant,[91] has not been elevated to a test[92] in Anglo-Australian jurisprudence, and neither is it reflected in Singapore's Order 11 Rule 1(f)(ii). These judicial approaches are attempts to overcome the problems posed by the narrow jurisdictional ground of tort committed within the jurisdiction, and does not fit in the structure of the new Order 11 Rule 1(f). However, the issue of foreseeability can still be relevant when considering the question of *forum conveniens*.

It appears that the Anglo-Australian substance of the tort test, in spite of its difficulties, will probably be followed. It reflects the finest balance between certainty and flexibility that is achievable in the circumstances. It is difficult, if not dangerous, to attempt to generalise from the authorities examined above. It does seem that the English and Australian courts have chosen to emphasise different aspects of the *Distillers* test. The Australian courts stress the defendant's acts in its characterisation of the tort.[93] The English approach gravitates towards the consequences of the defendant's

88 *Supra*, note 86. The plaintiff's husband died in the forum allegedly as a result of defective manufacture of an electric lamp outside the jurisdiction.

89 *Peterson* v *AB Bahco Ventilation* (1980) 107 DLR (3d) 49 (tort of conspiracy and fraud took place within the jurisdiction where the victims were resident and sustained damage there, and the subject matter of the fraud were sold and distributed there); *Ichi Canada Ltd* v *Yamauchi Rubber Industry Co* (1983) 144 DLR (3d) 533 (tort of inducing breach of contract occurred within the jurisdiction where the plaintiff suffered economic loss within the jurisdiction); *Elguindy* v *Core Laboratories Canada Ltd* (1987) 60 OR (2d) 151 (tort of inducing breach of contract occurred within the jurisdiction where induced acts and damage happened in the jurisdiction).

90 *Supra*, note 80.

91 See, *eg*, *Voth* v *Manildra Flour Mills Ltd*, *supra*, note 19, at 568, and *Diamond* v *Bank of London and Montreal Ltd*, *supra*, note 36. Foreseeability is also an important consideration in the New Zealand position, although the wording of the relevant statute is different: see *Biddulph* v *Wyeth Australia Pty Ltd* [1994] 3 NZLR 49, 55.

92 See, *eg*, *Buttigieg* v *Universal Terminal & Stevedoring Corp*, *supra*, note 34, and *MacGregor* v *Application des Gaz*, *supra*, note 52.

93 But see Sykes & Pryles, *Australian Private International Law* (3rd ed, 1991), at 41, where the authors support a more flexible approach, not unlike that mentioned *supra*, in Section B.

acts,[94] and even when it does stress the defendant's acts, it also recharacterises the tort to bring the acts and consequences together.[95] Ultimately, it is a matter of what the judges conceive to be the characteristics[96] and nature[97] of, and what are the important policy considerations[98] in, each kind of tort. A certain amount of subjectivity is probably inevitable. On the whole the test is able to achieve certainty in simple cases, while retaining sufficient flexibility for complex ones.

The forum has a strong interest in allowing those who are injured within its territory to sue defendants from abroad. While it may be argued to be unfair to force the defendant to come to the forum if he did not act there, it does not seem unfair if the effects of his act are felt there. On the other hand, it does not follow that the foreign defendant should therefore be subject to the substantive tort laws of the forum.[99] However, the combination of the interchangeability of the jurisdictional and choice of law concepts of the *locus delicti*[100] and the rule that choice of law considerations are irrelevant when the tort is committed within the jurisdiction[101] has this unfortunate effect. As the head of jurisdiction then stood, the only avenue for the plaintiff to sue the foreign defendant[102] in the forum also led to the certainty of subjecting the foreigner to the exclusive application of the local law. This is highly undesirable. However, the availability of an alternative ground of jurisdiction based on damage within the jurisdiction ought to lead to greater sensitivity to the choice of law implications of locating the tort within the forum in order to found jurisdiction. Hence, it is likely that there will be greater recourse to the new basis of jurisdiction based on damage occurring within the forum.

V. DAMAGE SUSTAINED WITHIN THE JURISDICTION

Unhappiness with the substance of the tort test led to the judicial re-interpretation and statutory reform discussed above. Some jurisdictions have added a new ground of jurisdiction based on damage suffered within the jurisdiction instead of replacing the ground of "tort committed within

94 As can be seen from the misrepresentation and inducement of breach of contract cases.
95 *Castree* v *ER Squib & Sons Ltd*, *supra*, note 34. See also, *supra*, main text following note 42.
96 See also, Rabel, *The Conflict of Laws: a Comparative Study* (2nd ed, 1945), Vol 2, at 301–333.
97 *Eg*, the essence of tort law may be its regulatory aspect (Fridman, "Where is a Tort Committed" (1974) 24 UTLJ 247, 262–263) or its compensatory aspect (Morse, *Torts in Private International Law* (1978), at 119).
98 *Eg*, the use of foreseeability as a policy consideration in Canada. On this point, see also, Rabel, *supra*, note 96, at 332–333.
99 Although that may or may not turn out to his disadvantage.
100 See *supra*, note 21.
101 *Metall und Rohstoff AC* v *Donaldson Lufkin & Jenrette Inc*, *supra*, note 21; *Szalatnay-Stacho* v *Fink* [1947] KB 1. See also, *RJ Sneddon* v *AG Shafe* [1947] MLJ 197.
102 Assuming that the defendant has no other contact with the jurisdiction.

the jurisdiction" with a new test.[103] The main concern is that the application of the *Distillers* test may not enable the forum to exercise jurisdiction even though the resident of the forum suffers damage within the forum.[104] There are differences of phraseology in the implementation, and the Singapore version in Order 11 Rule 1(f)(ii) is perhaps closest to, but not the same as, the New South Wales provision. No cases have been decided in Singapore on the new rule, and recourse must be had to cases from Australia and Canada on its meaning.

A. Does "Damage" Include Consequential Damage?

The first issue that arises is whether "damage" includes consequential damage. The weight of the Commonwealth authorities is in favour of a broad interpretation. The New South Wales Court of Appeal in *Flaherty* v *Girgis*[105] was faced with this issue. McHugh JA held:[106] "Damage ... is to be contrasted with the element necessary to complete a cause of action; it includes all the detriment, physical, financial and social which the plaintiff suffers as the result of the tortious conduct of the defendant."

In Australia, it has been held that the damage had been suffered within the jurisdiction in the case of a resident who was injured and hospitalised outside the forum but returned home, because of the continuing need for medical attention and the loss of earning capacity suffered in the forum.[107] To the same effect are the Canadian authorities.[108] Where pecuniary losses are suffered in the jurisdiction, damage has also occurred within the jurisdiction.[109] These decisions give effect to the forum's interest in allowing persons injured therein to sue persons outside the jurisdiction. It is very likely that these authorities, which seem to be sound, will be followed in Singapore.

103 See, *eg*, Australia: New South Wales, Victoria, Northern Territory – see Sykes & Pryles, *Australian Private International Law*, *supra*, note 93, at 43; Canada: Ontario, New Brunswick – see Castel, *Canadian Conflict of Laws* (2nd ed, 1986), at 123.

104 See *Flaherty* v *Girgis* (1985) 4 NSWLR 248.

105 *Ibid*. The decision was affirmed by the High Court (1988) 71 ALR 1. The issues relating to the meaning of the rule were not contested in the High Court, but the Court did note that the conclusion of the Court of Appeal was supportable. The constitutionality of the jurisdiction rule was contested in and upheld in the High Court.

106 *Supra*, note 104, at 266. Kirby P and Samuels J concurred on this point.

107 *Flaherty* v *Girgis*, *supra*, note 104. See also, *Challenor* v *Douglas* [1983] 2 NSWLR 405 and *Brix-Neilson* v *Oceaneering Australia Pty Ltd* [1982] 2 NSWLR 173.

108 *Vile* v *Von Wendt* (1980) 103 DLR (3d) 356; *Poirier* v *Williston* (1980) 113 DLR (3d) 252.

109 *Vile* v *Von Wendt*, *ibid* (loss of wages and business profits due to personal injury); *Bouchard* v *J L Le Saux, Ltée* (1984) 45 OR (2d) 792 (wife's pecuniary loss as a result of loss of her husband); *Poirier* v *Williston* (1980) 113 DLR (3d) 252 (loss of income due to personal injury); *Skyrotors* v *Carriere Technical Industries* (1979) 102 DLR (3d) 323 (economic loss due to inducement of breach of contract occurred at head office where the financial records were kept).

B. Must the Damage in the Jurisdiction be Significant?

The English Court of Appeal in *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc* qualified the word "damage" in the English Order 11 with"significant".[110] The Australian and Canadian authorities have not dealt with this issue. It might be argued that because leave for service out of jurisdiction is discretionary anyway, a wide meaning should be given. But it is submitted that if the damage within the jurisdiction is insignificant, then there is no sound basis for the forum to assert jurisdiction on this ground, and the defendant should not be put to argument on *forum non conveniens.* Although the English provision is worded differently, the reasoning in *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc* is nevertheless persuasive:"But it would certainly contravene the spirit, and also we think the letter, of the rule if jurisdiction were assumed on the strength of some relatively minor or insignificant act having been committed here, perhaps fortuitously."[111] This reasoning applies equally to damage.

C. Can an Action Proceed for Damage Outside the Jurisdiction When Damage is also Suffered within the Jurisdiction?

This issue raises a unique problem in Singapore. In *Flaherty* v *Girgis*,[112] an argument was also made that the jurisdiction could be founded in respect only of the damage that was suffered within the jurisdiction. At that time, the relevant provision was that leave could be applied for "where the proceedings are founded on, or are for the recovery of, damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring".[113] The provision did not make clear whether the proceedings must be in relation only to the damage in the jurisdiction. Nonetheless, McHugh JA held that the provision was applicable for the "recovery of damage caused by a tortious act or omission wherever occurring if either the whole or the part of that damage was suffered in New South Wales."[114] This provision has since been changed. Presently, leave for service out of jurisdiction may be given "where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring."[115] This endorses the judicial interpretation in *Flaherty* v *Girgis.*

110 *Supra*, note 21, at 437.
111 *Supra*, note 21, at 437.
112 *Supra*, note 104.
113 Supreme Court Rules1970, Pt 10 r 1(1)(e). Counsel and the Court accepted that "recovery of damage" should read "recovery of damages in respect of damage" to make sense of the provision.
114 *Supra*, note 104, at 267. Kirby P and Samuels J concurred on this point.
115 See, *eg, Voth* v *Manildra Flour Mills Pty Ltd*, *supra*, note 19.

In the Singapore Rule 1(f)(ii), the word "is" appears twice,[116] so that grammatically the phrase "wholly or partly" qualifies only the first of the two limbs thus:

the claim
is wholly or partly founded on, or
is for the recovery of damages in respect of,
damage suffered in Singapore caused by a tortious act or omission wherever occurring.

The judicial route taken by *Flaherty* v *Girgis* does not seem to be open to the Singapore courts when there is an express statutory qualification on only one of the limbs. Hence, whether the claim is confined to the harm suffered in Singapore must depend on the nature of the alleged tort. The first limb deals with torts derived from the old action on the case, where damage completes the cause of action so that the tort is founded on it, while the second limb deals with torts where damage is not part of the cause of action. Hence, in an action for negligence, where damage is partly suffered in Singapore and partly abroad, the plaintiff can claim for his entire losses under the rule. But if the action is in trespass the plaintiff can only sue in respect of the damage suffered within the jurisdiction. It is uncertain whether this distinction is intended. In principle there is no cause for the distinction. In contrast, in the amended New South Wales provision, the phrase "wholly or partly" clearly qualifies both limbs. The same effect can be achieved in the local provision by a minor legislative amendment so that it reads: "the claim is, wholly or partly, founded on, or for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring."

VI. CHOICE OF LAW ISSUES AT THE JURISDICTION STAGE

The approach of the English Court of Appeal to the question in jurisdiction in *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc*[117] was to consider whether there was a "tort" in the private international sense, *ie*, by the application of the choice of law rules.[118] Under the English Order 11, it must first be shown that there is a "claim founded in tort" and "tort" is used in the choice of law sense. This line of reasoning might have been considered irrelevant to Singapore under the previous Order 11 Rule 1(1)(f) because once the tort is committed within the jurisdiction choice of law rules are irrelevant anyway.[119] This same argument can also be made for

116 See main text after *supra*, note 8.
117 *Supra*, note 21.
118 The reasoning in the case is far from clear. Slade LJ appeared to consider choice of law relevant to the question of whether there was a good arguable case that the case fell within Order 11 as well as to the question of whether there was a good arguable case on the merits (this was decided before *Seaconsar Far East Ltd*, *supra*, note 10).
119 See main text after *supra*, note 99.

the present Order 11 Rule 1(f)(i), but it is to be noted that Rule 1(f)(ii) requires"tortious" acts or omissions to occur, and not necessarily in the jurisdiction. Even if they happen within the jurisdiction, the place of the tort is not necessarily the forum when the *Distillers* test is applied. Hence the question may arise whether"tortious" acts have indeed been committed for the purposes of Rule 1(f)(ii).

If this reasoning in *Metall und Rohstoff* is followed, then it is necessary to determine the place where the tort is committed under Rule 1(f)(ii), because only then can it be determined if the acts or omissions are tortious by the private international law of the forum. *Metall und Rohstoff* has been criticised for bringing unnecessary choice of law complications into jurisdiction issues,[120] but it also has its defenders.[121] The main point in favour of using the choice of law approach is that it can forestall unarguable cases at the jurisdictional stage. After *Red Sea Insurance Co Ltd* v *Bouygues SA*,[122] which allowed actions based on totally foreign tort law in exceptional circumstances, it can also be said that it prevents such tort claims from failing at the jurisdiction threshold.

Cheshire & North chose to interpret[123] the choice of law considerations in *Metall und Rohstoff* as arising not in the issue of whether the claim fell within the head of jurisdiction, but in the question of whether the plaintiff had a good cause of action.[124] This interpretation of the case puts the plaintiff to proof at the standard of a serious question to be tried,[125] instead of a good arguable case.[126] Indeed it may be questionable whether choice of law questions are relevant at all if all the plaintiff has to show is that his case is not unsustainable. However, it is submitted that choice of law considerations have a bearing on whether the plaintiff has a serious question to be tried, for what may be a frivolous claim by domestic law may turn out not to be so by the application of choice of law rules. For example, if a claim is based exclusively on the *lex loci delicti*, it will be unsustainable if tested solely by the *lex fori*.[127] Similarly, a claim sustainable by the *lex fori* may turn out to be frivolous once choice of law methodology is considered.[128]

120 Fentiman,"Tort – Jurisdiction or Choice of Law?" [1989] CLJ 191.
121 Tan,"Choice of Law in a Question of Jurisdiction" (1990) 32 Mai LR 363.
122 [1994] 3 WLR 926 (PC HK).
123 See comments in *supra*, note 118.
124 Cheshire & North, *supra*, note 3, at 191; Fawcett,"The Interrelationships of Jurisdiction and Choice of Law in Private International Law" [1991] CLP 39, 42-43; Dicey & Morris, *Conflict of Laws* (12th ed, 1993), at 341, footnote 88.
125 *Seaconsar Far East Ltd* v *Bank Markazi Jomhouri Islami Iran*, *supra*, note 10.
126 *Seaconsar Far East Ltd*, *supra*, note 10. Cheshire & North, *supra*, note 3, at 191, puts the question as one of good arguable case, but that passage must now be read in the light of *Seaconsar Far East Ltd*, *supra*, note 10.
127 See, eg, *Red Sea Insurance Co Ltd* v *Bouygues SA*, *supra*, note 122.
128 *Eg*, where there is no liability by the *lex loci delicti*, and no prospect of invoking the exception.

There is force in the view of the House of Lords in *Seaconsar Far East Ltd* v *Bank Markazi Jomhouri Islami Iran*[129] that jurisdictional considerations should be kept apart from the merits of the claim. The question of whether there is indeed a tort by private international law quite clearly goes to the question of the strength of the plaintiff's claim and it is therefore submitted that the interpretation by Cheshire & North is to be preferred. Whatever interpretive difficulties this may give rise to in England, in Singapore the reasoning of *Metall und Rohstoff* could be distinguished because it interpreted a different phrase, but its albeit unarticulated rationale could be adopted for testing the merits of the claim. It will still be possible to weed out totally unarguable cases at the jurisdiction stage. As for the totally foreign tort, it will still fall within Rule 1(f)(ii) if the word"tortious" is given a meaning wider than under domestic law,[130] without actually engaging the choice of law rules.

Another jurisdictional issue that may invoke choice of law considerations is: what law determines where the tort is committed for the purpose of Rule l(f)(i)? A further and related question is: what law governs the question of where the tort is committed for the purpose of applying tort choice of law rules (which may also be relevant at the jurisdiction stage)? According to *Metall und Rohstoff*, the *lexfori* governs the second question.[131] It is suggested that the *lex fori* answers both questions. In the first case, it is a connecting factor for the court to assume jurisdiction.[132] In the second case it is a connecting factor leading to the application of the relevant foreign law. In both cases, the question precedes the application of the foreign law, and so the *lex fori* must be applied. Given the rule that the *lex fori* applies exclusively to torts committed within the jurisdiction,[133] realistically only the *lex fori* needs to be applied to determine whether Rule 1(f)(i) is satisfied.[134] For choice of law purposes, however, it does not necessarily follow that the entire domestic law of the forum is applied in determining the place of the tort. It will be impossible to apply such a test to torts governed exclusively by foreign law.[135] On the other hand, it goes

129 *Supra*, note 10.

130 In an enlightened *lex fori* approach: see Kahn-Freund, *General Problems in Private International Law* (1980) 227–231. But *contra The T S Havprins* [1983] 2 Lloyd's Rep 356, where Staughton J considered the *lex fori* domestic meaning to be applicable for the meaning of "contract" for the contract heads of Order 11.

131 *Supra*, note 21, at 434. The court did not have to deal with the first question because it was dealing with the new O 11 RSC.

132 See the reasoning (but not necessarily the conclusions) in *The TS Havprins*, *supra*, note 130, and *The Andres Bonifacio* [1993] 3 SLR 521, 530.

133 See main text, *supra*, after note 99.

134 On the assumption that the same test applies in respect of the locality of the tort for jurisdiction and for choice of law purposes. See main text, *supra*, before and after note 22.

135 See, *eg*, *Red Sea Insurance Co Ltd* v *Bouygues SA*, *supra*, note 122. There would simply be no elements of any legally recognisable tort to test for locality.

too far to say that it is the foreign law's test of locality of tort that is determinative. That is circular because until the locality is determined, no question of foreign tort law arises. In applying the test of the forum,[136] it is possible to take account of foreign law as *datum.* In the case of an exclusively foreign tort, the elements of the foreign tort (as determined by the foreign law) should be tested to determine where in substance the foreign tort had allegedly occurred.

VII. FORUM CONVENIENS

The plaintiff must also show that the forum is the natural forum to hear the case.[137] It is to be noted that the substance of the tort test already takes into account some consideration of appropriateness of the forum.[138] In *The Albaforth*,[139] the Court of Appeal held that where the tort has been found to be committed within the jurisdiction, it must also be the natural forum unless there are strong indicating factors otherwise. Where the jurisdiction is argued on the basis of Rule 1(f)(i), this creates two stages in which to test whether the case is an appropriate one to be tried in the forum. This is far from ideal, but such problems are bound to inhere to a metaphysical notion like the place of the tort. The purpose of the presumption is to minimise the overlap between these two stages. Hence, the presumption is desirable, provided the rationale for its existence is always borne in mind. For example, conversion does not raise the complications of place of tort like negligence. In one case where the tort of conversion was found to be committed within Singapore, the High Court did not proceed to apply the presumption that Singapore was thereby the natural forum, but found that it was so only by a careful examination of the facts.[140] As another example, in cases of collision between ships in the territorial waters of a country the strength of the presumption cannot be very strong.[141] It does not follow that the presumption has no place where jurisdiction is obtained under Rule l(f)(ii). It may appear tortuous to determine the substance of the tort, and then use it to raise the presumption of the natural forum. But the court may need to determine the place of the tort anyway.[142]

136 Be it the substance of the tort test, or the significant elements test, or the real and substantial connection test.

137 See cases cited in *supra*, note 16.

138 See main text at *supra*, note 38.

139 *Supra*, note 16.

140 *JH Raynor (Mincing Lane) Ltd* v *Teck Hock & Co (Pte) Ltd*, *supra*, note 16.

141 *The Forum Craftsman* [1985] 1 Lloyd's Rep 291. See also, *The Planeta* (Hong Kong unreported judgment dated 18 January 1993), noted in Margolis,"Staying an Action because the Foreign Law is Ambiguous" [1994] LMCLQ 30.

142 See *supra*, note 19, and Part VI.

VIII. THE MOÇAMBIQUE RULE

The *Moçambique* rule prevents the English court from taking jurisdiction over disputes over title to foreign land.[143] The bases for the rule are restraint from infringing foreign sovereignty and the unlikelihood of enforcement of the judgment in the foreign territory.[144] This common law rule also extends to trespass to foreign land even when the title is not in dispute,[145] but this aspect of the rule has been legislatively abrogated in England.[146] There is no express adoption of the *Moçambique* rule under the Supreme Court of Judicature Act,[147] or in the Rules of the Supreme Court.[148] A literal reading might suggest that the prohibition no longer applies in Singapore. However, this interpretation contradicts a basic tenet of private international law, and for that reason, it is suggested that the Supreme Court of Judicature Act be read purposively to be consistent with it.[149] Indeed, the application of the *Moçambique* rule in Singapore was recently accepted in the recent case of *Eng Liat Kiang* v *Eng Bak Hern*.[150] Although what was controverted in that case was not the applicability of the rule in the light of the Supreme Court of Judicature Act, but its exceptions in equity, the arguments against the existence of the exceptions were rejected by Judith Prakash JC (as she then was) with the observation that the *Moçambique* rule and its exceptions were very well-established principles in the conflict of laws. On the other hand, it is arguable that the extension of the rule to torts where the title is not in dispute does not fall within the policy of the prohibition, and there is no cogent reason to follow it.[151]

The *Moçambique* rule also applies to foreign intellectual property rights.[152] It appears that under the present choice of law rules,[153] a breach committed abroad of foreign intellectual property law cannot be actionable as a tort in the forum if the facts had occurred in the forum, due to territorial

143 *British South Africa Co* v *Companhia de Moçambique* [1893] AC 602. There are exceptions in equity which are not in issue here: see Cheshire & North, *supra*, note 3, at 255-262.

144 *Hesperides Hotels Ltd* v *Aegean Turkish Holidays Ltd* [1979] AC 508; *Duke* v *Andler* [1932] 4 DLR 429.

145 *Hesperides Hotels Ltd* v *Aegean Turkish Holidays Ltd*, *ibid*. The *Moçambique* rule does not apply to *in rem* jurisdiction in respect of maritime torts: *The Tolten* [1946] P 135 (action to enforce maritime lien arising from damage by ship to foreign wharf).

146 S 30(1), Civil Jurisdiction and Judgments Act 1982.

147 See s 16, *supra*, note 1.

148 *Supra*, note 5.

149 A recent application of this principle of statutory interpretation can be found in *Arab Bank Plc* v *Mercantile Holdings Ltd* [1994] 2 WLR 307. See also, Tan,"Supreme Court of Judicature (Amendment) Act 1993" [1993] SJLS 557, 563-566.

150 [1995] 1 SLR 577.

151 See also, Morse, *supra*, note 97, at 94.

152 *Tyburn Productions Ltd* v *Conan Doyle* [1991] Ch 75.

153 *Boys* v *Chaplin*, *supra*, note 18. *Red Sea Insurance Co Ltd* v *Bouygues SA*, *supra*, note 122.

nature of such rights.[154] Neither is a foreign breach of the forum's intellectual property laws actionable as a tort in the forum.[155] Hence, as the law now stands, there is both a jurisdictional and a choice of law bar to actions based on breaches of foreign intellectual property rights.[156]

IX. CONCLUSION

The updating of the jurisdiction provision for tort claims in Order 11 is a move in the right direction. The extension of jurisdiction to cases where the damage is suffered in Singapore is a progressive step. It prevents over-reliance on the ground of a tort committed within the jurisdiction that invariably led to the application of the *lex fori* as the substantive law. It does not, however, do away with considerations of the place of the tort completely, as the concept is still relevant insofar as choice of law is relevant in the argument on *forum conveniens*, and on the merits. In spite of this, it is anticipated that there will be greater recourse to this new ground of jurisdiction. However, the clause could have been better worded. As it stands, in certain cases, it may allow the plaintiff to claim only for damage suffered in Singapore but not for damage suffered outside arising from the same tortious conduct.

The retention of the ground of jurisdiction based on the tort committed within Singapore is also defensible, in spite of the difficulties inherent in the concept of the place of the tort, in the light of the likelihood that Singapore would in such a case be the natural forum, and the principle that in such a case the law of Singapore applies exclusively to the claim. The tie-in with the choice of law concept of the place of the tort also renders it economical to decide the place of the tort once for both purposes. However, this head of jurisdiction will need reconsideration should the choice of law rules for tort be reformed in such a way as to remove the concept of the place of the tort.[157] If this development should take place, then it would be better to have a ground of jurisdiction that is not dependent on the localisation of the tort as such. In such a case, a test based on significant events occurring within the jurisdiction would be more appropriate.

154 *Tyburn Productions Ltd* v *Conan Doyle*, *supra*, note 152.

155 *Deff Lapp Music* v *Stuart-Brown* [1986] RFC 273.

156 For a criticism of the lacuna in conflict of laws for intellectual property, see Carter (1990) 61 BYBIL 395, 400.

157 See, *eg*, the statutory reform proposed by the English Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Law Com No 193).

What remains is a jurisdictional lacuna in respect of significant acts occurring within Singapore, where neither the damage nor the tort occurred in Singapore. In such a case, arguably the forum also has an interest in exercising jurisdiction because of its concern with the regulation of conduct.[158] The gap is not a serious one as, in the first place, the place of acting often coincides with either the place of damage or the place of wrong as such, and in the second place, the plaintiff can still try to invoke some other ground of Order 11. However, it is still desirable to close the gap. Indeed, one might go so far as to suggest that Rule l(f) be replaced entirely by a provision based on any significant events constituting the tort that occur in Singapore.[159] This will be able to handle both the acts and damage aspects of the tort. The place of the tort will still be relevant at the jurisdiction stage, but only in the choice of law sense. This reform does no harm to jurisdictional policies, and may indeed be beneficial in the development of choice of law rules, if only to prevent clouding by jurisdiction policies.

Postscript

In *American Express Bank Ltd* v *Mohamed Toufic Al-Ozeir* [1995] 1 MLJ 160, the Supreme Court of Malaysia varied the High Court decision in [1994] 2 MLJ 687. The Court affirmed that the tort was committed in Malaysia because the misrepresentation was received and acted upon there. However, it did not apply the presumption that Malaysia was thereby the natural forum, but by considering factors like the location of witnesses and evidence, it found Singapore to be the natural forum, and so refused leave to serve out of jurisdiction. One significant factor was the jurisdiction clause in the contract in favour of Singapore. It thereby implicitly accepted that tort claims were within the ambit of the clause.

YEO TIONG MIN*

158 See, *eg*, the English and Irish position, *supra*, Part IV, Section B.

159 This is not unlike the Irish position, *supra*, Part IV, Section B, but to attempt the reform under the verbal forumula of a "tort committed within the jurisdiction" can be productive of confusion.

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