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Introduction

When Singapore joined the Hague Conference on 9 April 2014,[1] it was widely anticipated that it would adopt the Hague Convention on Choice of Court Agreements 2005[2] ("the Convention") shortly thereafter. This article explores the differences between the Convention regime and the common law position in Singapore, the likely effects of the adoption of the Convention under Singapore law, as well as the

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1) http://www.hcch.net/index_en.php?act=states.details&sid=128 (as of 18 August 2014).

2) *International Legal Materials*, Vol. 44, Issue 6 (2005), p. 1294, at http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (as of 18 August 2014). An outline can be found at http://www.hcch.net/upload/outline37e.pdf (as of 18 August 2014).

considerations that are likely to influence Singapore's approach to the adoption of the Convention.

I Objectives and Scheme of the Convention

After a highly ambitious effort to harmonise global rules on jurisdiction and judgments was aborted due to, among other factors, fundamental differences regarding the bases of recognition of foreign judgments, the Hague Conference on Private International Law succeeded in obtaining broader support for a more focussed project on the effect of choice of court agreements which resulted in the Convention. The negotiations processes clearly contemplated that courts in Contracting States will refer to the *Explanatory Report* that accompanies the Convention[3] interpreting the Convention, even though it is not an official part of the Convention.[4]

The Convention will come into force in Contracting States after the deposit of the second instrument of ratification, acceptance, approval or accession.[5] Mexico is the first and only country to have done so.[6][7] The United States[8] and the European Union[9] have signed but not ratified the Convention. The Convention is open to all countries for signing.

By leveraging on the growing recognition of the importance of giving effect to party autonomy in international commercial litigation, the Convention proposes to promote international trade through judicial co-operation in the form of mutual enforcement of

3) Trevor Hartley & Masato Dogauchi, *Explanatory Report* (HCCH Publications, 2005), at http://www.hcch.net/index_en.php?act=publications.details&pid=3959&dtid=3 (as of 18 August 2014).

4) A useful reference is Ronald A. Brand & Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) ("Brand & Herrup").

5) Article 31. Unless otherwise indicated, all article references are to the Hague Convention.

6) http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (as of 18 August 2014).

7) See http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (as of 18 August 2014).

8) The federal-state structure of the United States is a complicating factor: compare Curtis R. Reitz, "Globalization, International Legal Developments, and Uniform State Laws," *Loyola Law Review*, Vol. 51 (2005), p. 301 *et seq.* with Stephen B. Burbank, "Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States," *Journal of Private International Law*, Vol. 2 (2006), p. 287 *et seq.*. It appears that a mix of federal and state level implementation will be likely: Daniel H. R. Laguardia, Stefan Falge & Helena Francesci, "The Hague Convention on Choice of Court Agreements: A Discussion of Domestic and Foreign Points," *United States Law Weekly*, Vol. 80 (2012), p. 1803. The Uniform Law Commission has been tasked with drafting the uniform state legislation and appropriate declarations that are necessary to assist in the implementation of the Convention: http://www.uniformlaws.org/Committee.aspx?title=Choice%20of%20Court%20Agreements%20Convention%20Implementation%20Act (as of 18 August 2014).

9) After working out the relationship between the Convention and the European rules of international civil procedure, the European Commission adopted a proposal for a Council decision to approve the Convention on behalf of the European Union on 30 January 2014: COM(2014) 46 final, 2014/0021 (NLE). The Council approved on 10 December 2014 (Council Decision 2014/887/EU). The Convention should come into force three months after the EU has deposited the instrument.

choice of court agreements and recognition and enforcement of judgments resulting from the chosen court. More specifically, it aims to create an international legal regime for court judgments based on what the New York Convention has done for arbitral awards. One major reason that parties prefer international arbitration to court adjudication is the wider scope of enforceability of the resulting award compared to court judgments. The many signatory states to the New York Convention are bound to apply uniform rules to recognise arbitral awards from other contracting states. In contrast, the enforcement of foreign judgments depends on the laws of each enforcing state and these rules can vary considerably from state to state. The Convention hopes to present commercial parties with a wider range of dispute resolution options by making litigation a more practically realistic alternative to arbitration.

A choice of court clause represents an agreement between contracting parties that some or all disputes arising in connection with the contract should be adjudicated by the court of a chosen country. The Convention effects a scheme that is broadly similar to the common law applicable in Singapore. It directs that the chosen court in a Contracting State should not decline jurisdiction, and a non-chosen court in a contracting state should not take jurisdiction unless the clause was invalid, or unless exceptional circumstances exist. It further provides that the resulting judgment from a chosen court of a contracting state can be recognised or enforced in another Contracting State, subject to defences (which are broadly similar to common law defences).

II The Common Law Position in Singapore

1 Choice of Court Agreements

A choice of court clause is an agreement between contracting parties that certain or all disputes between themselves may be adjudicated by the court of a chosen country. Under the common law, choice of court agreements are generally enforced as contracts. However, the issue whether the court will eventually exercise its jurisdiction is one of procedure governed by the law of the forum. Thus, while the question of jurisdiction ultimately a procedural one, heavy reliance is placed on contractual principles in the common law approach.[10] A choice of court agreement may be exclusive or non-exclusive. A choice of court agreement may specify a permissible venue for adjudicating a dispute. If it does not prohibit recourse to other venues, the choice is *non-exclusive*. The distinguishing feature of an *exclusive* choice of court agreement is that it expressly or impliedly stipulates that disputes shall not be brought anywhere else but to the chosen court.

The issues of validity and interpretation of a choice of court agreement are governed by the law governing the choice of court agreement. This has been assumed to be the

10) *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519; T. M. Yeo, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements," *Singapore Academy of Law Journal*, Vol. 17 (2005), pp. 306-360.

law governing the main contract if — as is usually the case — no law is chosen to govern the choice of court clause independently.[11] Where the parties have expressly chosen a law to govern the entire contract, it is probably a strong inference that they intended it to govern the choice of court clause also. However, in the absence of express choice, in tandem with the growing importance of dispute resolution clause as a distinct agreement rather than being an afterthought that is merely adjunct to the main contract, the contracting parties may well have selected the forum with knowledge and expectation of how the chosen forum will enforce the choice of court agreement,[12] and therefore impliedly intended that law to govern the choice of court clause. In the absence of express or inferred choice, it could similarly be argued that because of the independent nature of the choice of court agreement, it has its closest connection with the country or system of law of the chosen court rather than that which governs the substantive obligations in the agreement.[13] However, should the common law in Singapore move in this direction, it will not necessarily bring its position in line with that under the Convention (or the Brussels I Regulation (Recast)[14] in the EU), unless the reference is to the choice of law rules of the chosen court, but *renvoi* has generally been strongly resisted in common law choice of law rules for contracts.[15]

Moreover, whether this test should also apply to the issue of the existence of consent to the clause is more controversial. In this context, this approach begs the question why the law of an allegedly chosen court should answer the question whether it has actually been chosen.[16] The proper law of the main contract solution attracts a

11) See, eg, *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala, ibid*; *Abdul Rashid bin Abdul Manaf v. Hii Yii Ann* [2014] SGHC 194.

12) T. M. Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004), at para. 4.58. In *Belbana NV v. APL Co Pte Ltd* [2014] SGHCR 17, a contract expressly governed by Belgian law contained an exclusive choice of Singapore court clause. The Belgian court had assumed jurisdiction under Belgian law. Belgian law arguably rendered the choice of court clause invalid but this issue was not decided by the Belgian court. The validity of the clause under Singapore law was not challenged. The court did not decide the choice of law issue. It decided on procedural grounds, allowing the stay of the Singapore proceedings pending final decision of the Belgian court on its own jurisdiction.

13) *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd* [2014] SGHCR 12 decided that an arbitration agreement is governed by the law of the seat of arbitration in the absence of choice (not following English common law authorities).

14) *Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,* [2012] OJ L 351/1, Article 25(1) and para. (20) of the Preamble. Choice of court clauses are excluded from *Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I),* [2008] OJ L 177/6, Article 1(e) so each member state will apply the conflict of laws of its own *lex fori.*

15) *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.* [1984] AC 50 at pp. 61-62. However, since the resistance is based on the presumed intention of contracting parties, it remains arguable that the contracting parties intended to choose the law to be applied by the chosen court including private international law principles in its law.

16) Adrian Briggs, "What Should Be Done about Jurisdiction Agreements?," *Yearbook of Private International Law,* Vol. 12 (2010), p. 311, at pp. 321-322.

similar criticism, but only if the existence of the main contract is also disputed. The only other realistic alternative solution of applying the *lex fori* is subject to the criticism of potential abusive forum shopping.

In the case where the issue of interpretation of the choice of court clause is governed by the common law, a pragmatic view is taken that generally commercial parties prefer a one-stop venue for their dispute resolution, and generally broad scope is given to choice of court clauses. Whether a choice of court clause is exclusive or not is also a question of interpretation, without the application of any presumption.[17] A choice of court agreement may be *unilaterally* exclusive only, ie, one party has agreed not to bring the dispute anywhere else except the chosen court, but the other party has not made any such promise.[18] The promisor in a unilateral promise in such an agreement is bound by the same contractual effect as in the case of a bilateral promise.

2 Jurisdiction

Under Singapore law, jurisdiction over a defendant for the purpose of an *in personam* claim (ie, an action determining personal rights and liabilities in contrast to rights in things) is established by service of process on the defendant. Process may be served within the territory if the defendant is present to be served, or if the defendant has agreed to a mode of service within the territory. Process may be served outside the territory if leave of court is obtained. Leave may be obtained in many situations where the defendant or the subject matter of the dispute is connected in certain specified ways with Singapore. One key provision is that leave may be obtained if the defendant had agreed to submit to the jurisdiction of the Singapore court. Thus, a choice of the Singapore court clause, whether it is exclusive or non-exclusive, will confer jurisdiction on the Singapore court, allowing service of process on the defendant in Singapore where so provided in the contract, or outside Singapore if necessary.[19]

The common law distinguishes between *existence* and the *exercise* of jurisdiction. The issue of exercise of jurisdiction has led to much litigation in itself, and the formulation of a complex *forum non conveniens* doctrine of judicial discretion. Where there is an exclusive choice of court agreement, however, the *forum non conveniens* doctrine is not applicable. What applies instead is a more limited discretion. The starting point is that the exclusive choice of court clause, provided that it is valid and it covers the dispute in question, will be given effect to unless it is unreasonable in the circumstances to do so. There is still some degree of judicial discretion, but it is not simply about the balancing the factors of costs and convenience as in the case of *forum*

17) But now see main text following footnote 36 *et seq.*

18) This is commonly seen in the banking context where the bank usually insists on being sued in its home jurisdiction but reserves the right to sue the customer anywhere. The practical motivation is that many Singapore banks service foreign clients with assets in various countries.

19) Supreme Court of Judicature Act (Cap. 322, 2007 Rev. Ed.), section 16, and Rules of Court (Cap. 322, R. 5).

non conveniens.[20] Thus, generally, the court will give effect to an exclusive choice of court agreement by exercising jurisdiction in the case of an exclusive choice of Singapore court, and by refusing to exercise its jurisdiction in the case of an exclusive choice of foreign court, unless exceptional circumstances amounting to strong cause can be demonstrated by the party seeking to breach the contract.[21] The effect of non-exclusive choice of court agreement potentially raises complex issues, and the consequences are sometimes the same as if it were an exclusive choice of court agreement. For present purposes, it suffices to state there is likely to a question of what the parties have actually agreed to in the choice of court clause, and a separate question of the weight to be assigned to the clause in the context of the exercise of balancing factors in the natural forum doctrine.[22]

In the case of an exclusive choice of Singapore court agreement, generally an anti-suit injunction to restrain the commencement or continuation of foreign proceedings may also be readily obtained from the Singapore court, unless the party seeking to breach the choice of court agreement can demonstrate exceptional circumstances amounting to strong cause. It would generally be easier to obtain an injunction to restrain a breach of contract than in the situation where the applicant is seeking an anti-suit injunction to restrain the defendant from legal proceedings abroad on the basis that Singapore is the natural forum and that the conduct abroad is vexatious and oppressive. International comity plays a diminished role where the parties have contractually agreed not to start proceedings elsewhere than in the chosen forum.[23]

The common law has gradually been developing the doctrine of separability of the choice of court clause; thus challenges to the main contract itself would not generally affect the choice of court clause, which must be specifically impugned.

A valid choice of court clause may not be given effect to if so doing would contravene an overriding mandatory law[24] or fundamental public policy of the forum. A choice of court clause may also amount to an exclusion or limitation clause under the Unfair Contract Terms Act[25] in some circumstances. This Act could apply in some cases with sufficient connections with Singapore as overriding mandatory rule of the forum irrespective of the governing law.[26]

There may be further contractual consequences. In English law, damages for expenses incurred in staying foreign proceedings commenced in breach of contract have

20) The distinction is sometimes under-appreciated: T. M. Yeo, "Natural Forum and the Elusive Significance of Jurisdiction Agreements," *Singapore Journal of Legal Studies* (2004), pp. 448-461; Y. L. Tan, "Natural or Agreed Forum?," *Singapore Journal of Legal Studies* (1995), pp. 661-669.

21) *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977-1978] SLR(R) 112.

22) *Orchard Capital I Ltd v. Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519.

23) *Ashlock William Grover v SetClear Pte Ltd* [2012] 2 SLR 625.

24) Eg, *The Epar* [1984-1985] SLR 409.

25) Cap. 396, 1994 Rev. Ed.

26) *Ibid.*, section 27(2).

been recovered,[27] and presently the English bar appears generally to assume that substantial damages may also be obtained for the breach of a choice of court agreement,[28] although the proposition has not been tested in Singapore. The recent decision of the highest Spanish court[29] allowing substantial damages for breach of a jurisdiction agreement within the context of the jurisdiction regime of the European Union may reinforce the common law trend.

A dispute as to the existence of a choice of court agreement can raise vexing choice of law questions. If the existence of the main contract is not in dispute, then in most cases, the problem can be resolved by the application of the proper law of the contract to determine whether the contract incorporates the choice of court clause.[30] Where the main contract is itself in dispute, or where the proper law of the main contract is in dispute, the question of the applicable law to determine the existence of the choice of court clause is more difficult to resolve. It is not clear whether the correct approach is to first determine the existence of the contract and its proper law, and then apply the proper law to determine whether the choice of court clause is part of the contract (ie, approach the problem as two issues in sequence: formation of the main contract, and then incorporation of the jurisdiction clause), or to determine whether the main contract exists with or without the choice of court clause (ie, approach the problem as one issue of formation), and it may well be that there is no universal approach. Further, it is unclear whether the law applicable to the issue of formation itself is the *lex fori* or the law that would govern the contract if the contract is valid (proper law of the putative agreement),[31] though the Court of Appeal has suggested that it is the latter.[32] Particularly difficult questions can arise if there are two competing choice of court clauses leading to two potential governing laws.[33]

A party may be regarded to have waived compliance with a choice of court agreement by an unequivocal and unambiguous act,[34] eg, by voluntarily going into the merits of the case in spite of an exclusive choice of foreign court agreement. However,

27) *Union Discount Co. Ltd. v. Zoller* [2002] 1 WLR 1517 (CA); *Sunrock Aircraft Corporation Ltd v. Scandinavian Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ. 882, at para. [37].

28) See also *Donohue v. Armco Inc.* [2002] 1 Lloyd's Rep. 425 (HL), at para. [48].

29) STS (Sala de lo Civil, Sección 1a), sentencia núm. 6/2009 de 12 Enero. R. J. 2009\544 (Supreme Court, Spain). *Contra* Gilles Cuniberti & Marta Requejo, "La sanction des clauses d'élection de for par l'octroi de dommages et intérêts," *ERA Forum*, Vol. 11, No. 1 (2010), pp. 7-18, arguing that the European Court of Justice is not likely to validate this remedy except in very special circumstances.

30) Unless the issue of its existence is to be tested by the law of the chosen court. See *infra*, main text to note 13 *et seq.*

31) Kelvin Low, "Choice of Law in Formation of Contracts," *Journal of Contract Law*, Vol. 20 (2004), p. 167-192 surveys the arguments and argues in favour of the *lex fori*.

32) *CIMB Bank Bhd v. Dresdner Kleinwort Ltd* [2008] 4 SLR 543 (CA), at para. [30].

33) See, eg, *The Heidberg* [1994] 2 Lloyd's Rep. 287.

34) See *The Vishva Apurva* [1992] 2 SLR 175 (CA), at p. 185 and *The Jian He* [2000] 1 SLR 8 (CA), at paras. [47]-[50]. See also *Carona Holdings Pte Ltd v. Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 (CA) in the context of arbitration agreements.

a distinction needs to be drawn between waiver of objection to the court's jurisdiction, and waiver of a breach by the contracting counterparty ; and one does not necessarily imply the other. There has been little discussion of whether waiver in this context is an issue of procedure governed by the *lex fori* or an issue of substance governed by the proper law of the contract.[35] The effect of the waiver is that the court will consider the issue of the exercise of jurisdiction as if there had been no choice of court clause.

Jurisdiction rules are somewhat modified for the Singapore International Commercial Court (SICC),[36] established in 2015 as a division of the High Court of Singapore[37] to hear actions which are international and commercial in nature.[38] The court will have jurisdiction if the parties have agreed to it in writing, or if the High Court transfers a case to it.[39] Reflecting the thinking in the Convention, a choice of SICC clause will, in the absence of contrary expression, be deemed to be exclusive,[40] at least if it is governed by Singapore law. In addition, the contracting parties are rebuttably presumed to agree to carry out the resulting order of the SICC and to waive any recourse against the enforcement of the SICC order overseas.[41] Leave of court is not necessary for service of process out of jurisdiction on a party to a written jurisdiction agreement.[42] An important modification to the existing rules on the exercise of jurisdiction is that where the parties have consented to the *non-exclusive* jurisdiction of the SICC, the court has no discretion to stay the proceedings on the ground that the dispute is more closely connected to another jurisdiction,[43] although it may decline jurisdiction on the basis that dispute is not an appropriate one to be heard in the SICC.[44] In the case of an exclusive choice of the SICC, it is less clear how the standard for stay of proceedings differs from the "strong cause" test developed in the common law.[45] Given the thinking behind the SICC proposal, it is likely to be at least as strict.

3 Foreign Judgments

A foreign *in personam* judgment (ie, a foreign judgment pronouncing on the rights

35) Whether the clause becomes unenforceable in this way arguably raises a substantive issue, by analogy with the related doctrine of estoppel by convention which is governed by the proper law of the contract (*First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* (2012) 15 HKCFAR 569).

36) See http://www.sicc.gov.sg (as of 20 February 2015).

37) The High Court and the Court of Appeal together constitute the Supreme Court of Singapore.

38) Supreme Court of Judicature Act, *supra* note 18, section 18D.

39) Rules of Court, *supra* note 18, Order 110 Rule 7.

40) Supreme Court of Judicature Act, *supra* note 18, section 18F.

41) *Ibid.*

42) Rules of Court, *supra* note 18, Order 110 Rule 6(2).

43) Rules of Court, *supra* note 18, Order 110, Rule 8(2).

44) Rules of Court, *supra* note 18, Order 110, Rule 8(1). The dispute may be transferred to the domestic division of the High Court if the parties agree to the transfer and SICC is satisfied that the domestic division has and will exercise jurisdiction before ordering the transfer : Rules of Court, *supra* note 18, Order 110, Rule 10(3)(a).

45) Main text to *supra* note 20.

and liabilities of the parties as opposed to the status of a person or a thing) may be recognised in Singapore if the judgment is from a court of law with competent jurisdiction, the order is final and conclusive under the foreign law, the decision is on the merits, and the foreign court had international jurisdiction (according to the private international law of Singapore) over the party sought to be bound.[46] International jurisdiction is established if the party sought to be bound was present or resident in the foreign jurisdiction at the time the foreign proceedings commenced, or had submitted or agreed to submit to the jurisdiction of the foreign court.

Recognition of a foreign judgment can create an issue or cause of action estoppel. The purpose of recognition is to foreclose any dispute between the parties on any issue of law or fact that has already been decided by the foreign court. The purpose of enforcement is for the judgment creditor to obtain the judgment sum from the judgment debtor without suing on the original cause of action again. For the purpose of enforcement, a foreign judgment must meet the criteria for recognition, and must in addition be for a fixed or ascertainable sum of money. The recognition or enforcement of a foreign judgment is subject to certain defences, principally, fraud, the contravention of fundamental public policies and international mandatory rules of Singapore, estoppel from prior conduct or prior judgments, and breach of natural justice.

Enforcement of foreign judgment may effected by suing on the judgment as a debt at common law, or by registration under the Reciprocal Enforcement of Commonwealth Judgments Act[47] ("RECJA") (for the United Kingdom and gazetted Commonwealth countries)[48] and the Reciprocal Enforcement of Foreign Judgments Act[49] ("REFJA") (for gazetted countries).[50] These statutory regimes only simplify the enforcement process, bypassing the need to sue on the foreign judgment as a common law debt. The substantive principles for recognition and enforcement under these regimes are substantially the same as the requirements under the common law. Registration of foreign judgment allows for the foreign judgment to be executed as if it were a Singapore judgment, thus obviating the need to start separate proceedings on the debt. Reciprocity by itself is not a ground for recognising or enforcing foreign *in personam* judgments.[51]

46) For a summary of the Singapore position, see T. M. Yeo, "Recognition and Enforcement of Foreign Judgments in Singapore," *Yearbook of Private International Law,* Vol 15 (2013/2014), pp. 451-465.

47) Cap. 264, 1985 Rev. Ed.

48) New Zealand, Sri Lanka, Malaysia, Windward Island, Pakistan, Brunei Darussalam, Papua New Guinea, India (except the states of Jammu and Kashmir), Commonwealth of Australia (High Court, Federal Court and Family Court), New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Australian Capital Territory, Norfolk Island and Northern Territory.

49) Cap. 265, 2001 Rev. Ed.

50) Only Hong Kong SAR has been gazetted.

51) A Memorandum of Guidance on the mutual enforcement of judgments was signed between the Supreme Court of Singapore and the Dubai International Financial Centre (DIFC) Courts on 19 January 2015 (see http://difccourts.ae/memorandum-guidance-enforcement-difc-courts-supreme-court-singapore/ (as of 20 February 2015)). This is a non-binding document and merely clarifies the↗

Whether a foreign judgment is enforced through the common law or by registration, a contractual choice of court agreement — whether exclusive or non-exclusive — selecting the court from which the foreign judgment originated has the effect that the parties have agreed to submit to the jurisdiction of the foreign court, thereby establishing the international jurisdiction of the chosen foreign court.

It remains to be decided whether a foreign judgment obtained in breach of an exclusive choice of court agreement is enforceable at common law by the party in breach. The RECJA is silent on this question, but there is a judicial discretion to disallow registration where it is not just and convenient to do so.[52] The REFJA specifically prohibits the registration of such a foreign judgment.[53] In comparison, there is specific legislation in the UK creating this defence for foreign judgments falling outside the European jurisdiction regime.[54] In any event, there is a possibility of damages for breach of contract which could neutralise the effect of a foreign judgment in monetary terms.

4 Summary

The Singapore position on the effect of choice of court agreements is generally aligned with other common law jurisdictions. Considerable effect is given to party autonomy, both at the point of the decision on jurisdiction as well as the point of the enforcement of foreign judgments. At the jurisdiction stage, an exclusive choice of court agreement, provided it has not been waived, will be given effect to unless exceptional circumstances amounting to strong cause is demonstrated by the party seeking to breach the contract. It may also be given effect to by an injunction to restrain a party from carrying on foreign proceedings in breach of an exclusive choice of Singapore court agreement unless strong reasons are shown otherwise.

Because of the strong contractual flavour in the way the common law approaches choice of court agreements,[55] some distinctive features of the common law are that:

a. issues of validity, meaning and scope of a choice of court clause (including whether it is exclusive or not) are determined by the proper law of the choice of court agreement;
b. where the issue is governed by the common law, the meaning and scope of the clause is a question of contractual construction and there is no presumption whether the clause is exclusive or non-exclusive;
c. in principle, there is no difference in the effect of a choice of court clause whether the Singapore court or a foreign court has been chosen;

↘ grounds on which foreign judgments may be enforced mutually.

52) *Supra* note 47, section 3(1).

53) *Supra* note 45, section 5(3)(b).

54) Civil Jurisdiction and Judgments Act 1982, c. 27, section 32.

55) See generally, Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008).

d. an injunction may be sought to restrain the breach of a choice of court agreement at least where Singapore is the chosen court;
e. damages may be available for the breach of a choice of court agreement;
f. just as the common law of contract does not differentiate between different classes of contracts (eg, consumer contracts, employment contracts), neither do the common law principles relating to the effect of a choice of court agreement;
g. there is a question (which has not yet been answered) whether a foreign judgment obtained in breach of a choice of court agreement can be enforceable in Singapore.[56]

Ⅲ The Convention

1 Scope

Unlike the common law, the Convention does not apply to *all* choice of court agreements. It is limited in a three ways. First, it does not apply to cases which are not "international," ie, where the parties are resident in the same contracting state and the relationship of the parties and all other elements relevant to the dispute (other than the choice of court clause) are connected only to that same state.[57] In contrast, the common law does not share this concept of an "international" contract. Secondly, the Convention only applies in "*civil and commercial*" matters.[58] This is not defined in the Convention, but the phrase is clearly borrowed from European instruments where it has received a very broad interpretation. It applies even if one of the parties is a state, but claims of an administrative law nature will not be included. Thirdly, the Convention only applies where there is an *exclusive* choice of court agreement which designates a court in a Contracting State.[59] It is important to note, as discussed below,[60] that "exclusive" under the Convention has a different meaning from the common law. In addition, the Convention specifically excludes a wide range of contracts, including consumer and employment contracts, family and succession issues, carriage of persons and goods, competition matters, claims for personal injury, rights *in rem* in immovable property, validity and infringement of property rights other than copyright and related rights, and arbitration proceedings.[61] The Convention does not apply to interim measures,[62] while an appropriately drafted choice of court agreement may be so applicable under the common law.

56) Except for a judgment from Hong Kong SAR in which case it is a defence under the REFJA.
57) Article 1(2).
58) Article 1(1).
59) Article 3(a).
60) See Part V below.
61) Article 2.
62) Article 7. This has the effect of excluding interim orders from the recognition and enforcement scheme. Similarly, under the common law, a foreign judgment needs to be final and conclusive on the merits of the case to be recognised, although there line may not be drawn in the same place.

A Contracting State may declare the exclusion of specific matters where it has a strong interest in not applying the Convention to those matters.[63] The state is required to ensure that the exclusion is no broader than is necessary and the exclusion is clearly and precisely defined. Where such a declaration is made, the matter is reciprocally excluded from the application of the Convention when an exclusive choice of court agreement designates the declaring State. None of the three signatories so far (EU, US and Mexico) had made a reservation under this provision.

2 Jurisdiction

The Convention is mandatory once applicable, and parties may not opt out of it. This does not present any serious practical difficulty as party autonomy may be exercised through appropriate drafting. In contrast to the common law which requires no formalities, the Convention has formal requirements for the choice of court clause, but they are very basic. The agreement may be in writing, or be by any means of communication which renders the information accessible so as to be usable for subsequent reference.[64] It clearly includes electronic records. An exclusive choice of court clause found within a contract will be treated as independent of the contract;[65] this is consistent with common law trends.

The jurisdictional scheme of the Convention is similar to the common law approach. The chosen court in a Contracting State must hear the case unless the clause is null and void.[66] A non-chosen court in a Contracting State should not hear the case, unless:[67] the clause is null and void;[68] the parties lacked capacity;[69] it would lead to manifest

63) Article 21.

64) Article 3(c).

65) Article 3(d).

66) Article 5. The chosen court is expected to apply its own law to the question. This is generally understood to mean its private international law: *Explanatory Report, supra* note 3, paras. 3 and 125; Brand & Herrup, *supra* note 4, at pp. 80-81; Paul Beaumont & Burcu Yüksel, "The Validity of Choice of Court Agreements under the Brussels I Regulation and the Hague Choice of Court Agreements Convention," in Katharina Boele-Woelki, Talia Einhorn, Daniel Girsberger & Symeon Symeonides (eds), *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr* (Eleven, 2010), p. 563 at p. 575.

67) Article 6.

68) Article 6(a). There is some uncertainty in the meaning of "null and void," which is intended to bear an autonomous meaning. The content of this phrase is assumed by commentators to be defined by the private international law of the chosen court: *Explanatory Report, supra* note 3, at paras. 4 and 149; Brand & Herrup, *supra* note 4, at p. 90. A separate argument may be mounted that the agreement does not *exist* as a matter of fact; this may be governed by the law of the forum as a matter falling outside Convention: Brand & Herrup, *supra* note 4, at p. 79. See *infra,* main text to notes 104-106.

69) Article 6(b). This is stipulated to be tested by the "court seised" (the *lex fori,* presumably its choice of law rule). To the extent that lack of capacity may render the clause null and void, the law of the chosen court would also apply. Further, recognition or enforcement may be refused if capacity is lacking under the (choice of law) rule of the state in which the recognition or enforcement is sought (Article 9(b)).

injustice or would contravene forum public policy to do so;[70] there are exceptional circumstances such that it is not reasonable for the choice of court agreement to be performed;[71] or the chosen court has decided not to hear the case.[72]

3 Foreign Judgments

The Convention provides that a judgment from a chosen court in a Contracting State will be recognised or enforced in other Contracting States,[73] subject to defences that are broadly similar to those in the common law.[74] However, the possibility that the defences under the Convention may receive different interpretation from the common law cannot be ruled out. One notable feature of the Convention is that recognition or enforcement may be refused to the extent that a foreign award for damages is non-compensatory.[75] The common law position in Singapore law on this issue is unclear, but English[76] and Canadian[77] authorities have allowed enforcement of foreign punitive damages while Australian[78] authorities have taken a more cautious approach that requires some equivalence with what an Australian court would have been prepared to award.

A Contracting State may by declaration extend the scope of the recognition and enforcement provisions to a judgment of the court of another Contracting State designated in a *non-exclusive* choice of court clause, provided that the other Contracting State has also made a similar declaration.[79] This allows for a group of like-minded Contracting States to allow for reciprocal enforcement of judgments where the choice of court clauses technically falls outside the jurisdictional provisions of the Convention because they are not exclusive choice of court clauses. The law of Singapore already allows for the recognition and enforcement of foreign judgments where the parties have chosen the foreign court in a non-exclusive choice of court clause. To the extent that other Contracting States also make this declaration, a declaration to this effect could widen the scope of enforceability of Singapore judgments.[80]

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70) Article 6(c). No choice of law is specified. As these issues are founded on public policy, the applicable law will presumably be the *lex fori*, subject to the consideration that it is dealing with an international case.

71) Article 6(d). No choice of law rule is specified. Presumably hope has been pinned on harmonised approaches being adopted by Contracting States.

72) Article 6(e).

73) Article 8.

74) Article 9.

75) Article 11.

76) *S. A. Consortium General Textiles v. Sun and Sand Agencies Ltd.* [1970] QB 279.

77) *Beals v. Saldanha* [2003] 3 SCR 416.

78) *Schnabel v. Lui* [2002] NSWSC 15; *Benefit Strategies Group Inc. v. Prider* [2005] 91 SASR 544.

79) Article 22. The EU, US and Mexico have not made this declaration.

80) Article 22 is not expressly subject to the defences in Article 9, but the reference in Article 22(2) to recognition and enforcement "under this Convention" presumably requires the application of Articles 8 and 9.

Ⅳ Key Differences between the Convention and the Common Law

One significant difference between the Convention and the common law is that the Convention *presumes* a choice of court agreement to be exclusive unless expressly provided otherwise by the parties. In contrast, while the common law does not require the word "exclusive" to be present to construe a choice of court agreement as exclusive, there is no presumption either way; it is a question of construction of contract according to the proper law of the choice of court agreement. A further significant distinction is that unilaterally exclusive choice of court agreements in the common law are not regarded as exclusive under the Convention because the exclusivity is not mutual.[81] A third point of distinction is that while the common law court will recognise a clause stipulating litigation in either X or Y and not anywhere else as having the same force of an exclusive choice of foreign court agreement because the parties had promised not to sue in the forum, this clause will not be regarded as an exclusive choice of court agreement under the Convention because it designates more than one court as the venue for dispute resolution.

The common law refers to the proper law of the choice of court agreement for issues of validity and interpretation.[82] The Convention refers the issue of validity to the law of the chosen court,[83] including its choice of law rules.[84] It is silent on the law governing the interpretation of the scope of the clause, but it is likely that the same law that governs validity would also govern interpretation. If the chosen court is a common law country, then the result is likely to be the same, as its relevant choice of law rules are likely to be the similar to Singapore's. Civil law countries, however, tend to look at choice of court clauses not as contractual agreements but as a matter of international civil procedure, and tend to apply their own law to such questions. However, it is a matter of some speculation to what extent the modern civil law attitude (at least within the EU) may be changing in the light of two recent developments. First, a decision from the highest court in Spain awarded substantive damages for the breach of a choice of court clause.[85] Secondly, the Brussels I Regulation (Recast)[86] introduced the concept of substantive validity of the choice of court agreement.

Under the common law, when the court is faced with an exclusive choice of forum court clause, the court retains a discretion to stay proceedings nevertheless, though in practice it is rarely exercised in England, and has never been exercised in Singapore in any reported case.[87] Under the Convention, there is no such discretion. In highly

81) Described as "asymmetric agreements" in the *Explanatory Report, supra* note 3, at para. 105.
82) See main text to *supra* note 13.
83) Article 5(1).
84) See *supra* note 64.
85) See *supra* note 28.
86) *Supra* note 14.
87) See however, *Belbana NV v. APL Co Pte Ltd* [2014] SGHC 17, discussed in *supra* note 12, where↗

complex litigation spanning different jurisdictions involving parties some of whom are party to the choice of court agreement and some not, this could lead to fragmentation of proceedings. For example, the House of Lords had refused to give effect to an exclusive choice of English court clause so that all issues between all parties could be tried in a single (foreign) forum.[88] Similarly, if the Singapore is faced with an exclusive choice of forum court clause and litigation is taking place in a foreign country (whether Contracting State or not) which has a strong national interest or public policy in taking jurisdiction in the case,[89] it would not have any flexibility under the Convention which it would have under the common law.

In the context of an exclusive choice of foreign court clause, the differences generally appear to be of degree rather than kind. Thus, similar to the position under the Convention, the court acting on common law principles will not give effect to the choice of court agreement if the clause is invalid, or if the parties lacked incapacity, or if it would contravene public policy, and it is likely to exercise its discretion not to give effect to the clause to do so would lead to manifest injustice, or if there exceptional circumstances in the case, or if the chosen court has decline jurisdiction. The common law test of "exceptional circumstances amounting to strong cause" is linguistically similar to the Convention's "for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed,"[90] but it should be cautioned that the phrase in the Convention is intended to have an *autonomous* meaning.[91] Although there is no supra-national court to determine its meaning conclusively, the interpretation of such conventions require the domestic courts to have regard to interpretations by courts in other Contracting States, and it may lead to a standard that is less flexible than the common law standard. The *Explanatory Report,* which suggests[92] a very high standard akin to frustration of an agreement (a test to which the Singapore court alluded in the early 1990's[93] but subsequently modified to be less stringent[94]), is intended to influence

↘ the court was prepared to stay proceedings in the face of an exclusive choice of Singapore court clause, but the validity of the clause was in dispute and the subject of foreign proceedings.

88) *Donohue v. Armco Inc* [2002] 1 Lloyd's Rep. 425 (HL).

89) In *OT Africa Ltd v. Magic Sportswear Corp.* [2005] EWCA 710, [2005] 2 Lloyd's Rep. 170, the contest was between the contractual choice of the English forum and the mandatory statutory jurisdiction of Canada. On its facts, this was a carriage of goods case which would not have been subject to the Convention anyway. Similar considerations arise in *Belbana NV v. APL Co. Pte Ltd* [2014] SGHC 17 discussed in *supra* note 12, but the litigation took a different route because the plaintiff's proceeded in Singapore only to protect against time limitation.

90) Compare with the statement on choice of court clauses that "contracts freely entered into must be upheld and given full effect unless their enforcement would be unreasonable and unjust": *The Asian Plutus* [1990] SLR 543, at para. [9].

91) Ie, the meaning is not defined by any domestic law but as a matter of interpretation of the Convention.

92) *Explanatory Report, supra* note 3, at para. [154].

93) *The Vishva Apurva* [1992] 2 SLR 175 (CA); *The Humulesti* [1991] SGHC 161.

94) *The Eastern Trust* [1994] 2 SLR 526; *Golden Shore Transportation Pte Ltd v. UCO Bank* [2004] 1 SLR 6 (CA); *The Hyundai Fortune* [2004] 4 SLR 548 (CA).

the interpretation by courts of Contracting States.

It is not clear, however, how the common law waiver of agreement fits — if at all — into the Convention scheme, given the high thresholds suggested for "manifest injustice" as well as "exceptional reasons." Insofar as the waiver would render the clause unenforceable[95] under the law applied by the chosen court, the situation may fall under one of invalidity. Alternatively, it may be seen as a matter of procedure governed by the law of the forum,[96] or as raising a substantive issue of modification of an agreement.[97]

For the purpose of recognising or enforcing a foreign judgment, under the common law the requirement of international jurisdiction is determined by the law of the court where the recognition or enforcement of the foreign judgment is sought. Hence, a Singapore court will apply its own choice of law rules to determine whether the parties have agreed to submit to the jurisdiction of the foreign court. The foreign court's finding on this issue cannot be determinative because the prior question of its recognition must first be answered with reference to the law of the forum.[98] On the other hand, under the Convention, the validity of an agreement to submit to the jurisdiction of the chosen court must be tested by the law of the Contracting State of the chosen court, and a finding of validity by such a court is conclusive on the issue.[99] This safeguard of international jurisdiction under the common law is replaced by the mutuality of treatment of a similar judgment from the Singapore court in another Contracting State.

Unlike in the case of the common law,[100] a non-monetary foreign judgment from a chosen court may be directly enforced in Singapore under the Convention. This, however, may not be as substantial a distinction as it first looks. For example, a foreign judgment from a chosen court ordering specific performance could be directly enforced under the Convention. But under the common law, it could be used to create an issue estoppel on the validity and enforceability of the underlying contractual obligation, and the judgment creditor could then sue for specific performance in the Singapore court on

95) The phrase "null and void" in Article 5(1) has an autonomous meaning under the Convention, so its meaning and scope are unclear.

96) But *Goh Suan Hee v. Teo Cher Teck* [2010] 1 SLR 367 (CA) signalled a more restrictive approach towards the private international law meaning of "procedure" in Singapore common law.

97) *Supra*, main text to footnote 13.

98) Unless international jurisdiction is independently established, eg, presence of the judgment debtor in the foreign jurisdiction at the time of commencement of the foreign proceedings, in which case submission is otiose. But a binding foreign judgment on the validity and interpretation can raise issue estoppel in subsequent proceedings.

99) Article 9(a). It may be argued that the choice of court clause did not *exist* in the first place, and so does raise an issue of validity but of existence. However, the chosen court's finding of jurisdictional facts will be binding unless the judgment was given by default: Article 8(2).

100) Singapore, like most common law countries, will only enforce money judgments: *Poh Soon Kiat v. Desert Palace Inc. (trading as Caesars Palace)* [2010] 1 SLR 1129 (CA). A small number of common law jurisdictions have moved towards the enforcement of non-monetary judgments from foreign countries: *Pro Swing Inc. v. Elta Golf Inc.* (2006) SCC 52 (Supreme Court, Canada); *The Brunei Investment Agency and Bandone Sdn Bhd v. Fidelis Nominees Ltd* [2008] JRC 152 (Royal Court, Jersey).

that basis.

V Unresolved Issues of Scope and Application of the Convention

There is a risk that the Convention may be the subject of differing interpretations in national courts. The Convention directs that state courts applying the Convention should pay regard to the international character of the Convention and the need to promote uniformity in its application.[101] There is practically no real control over how different countries may approach the Convention as there is no supranational appellate body.

For example, it is not clear whether a choice of court clause where the venue is subject to variation falls within the scope of the Convention. The Convention appears to be premised on the chosen court being constant. Further, there may be cases where one party is given the unilateral power to change the chosen venue for dispute resolution (a "floating" choice of court clause which is valid under the common law[102]). It is not clear whether this type of choice of court clause falls within the scope of the Convention, and there could be complications if a contracting party can change the chosen venue from a Contracting State to a non-Contracting State (or vice-versa), and thus assert control over the question whether the Convention is applicable, post-formation of the contract.

Further, there is a risk that national courts may take different views of what amounts to a judgment "on the merits" for the purpose of recognition and enforcement.[103] The Convention assumes that judgments given in default may be on the merits,[104] provided grounds for the chosen court taking jurisdiction can be established independently of such default.[105] While modern Anglo-Singapore common law is inclined to view default judgments as being on the merits at least where the time for setting aside such judgments has passed, some other countries regard such judgments as not being on the merits and therefore unenforceable.[106]

The question whether the parties have actually consented to the clause is likely to be a contentious issue in practice.[107] It is not entirely clear whether the Convention governs this issue. On one hand, it is one aspect of whether the clause is "null and void."[108] On the other hand, respected commentary has suggested that it is an independent issue not regulated by the Convention.[109]

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101) Article 23.
102) *The Star Texas* [1993] 2 Lloyd's Rep. 445.
103) Article 4(1).
104) See Article 13(1)(c).
105) Article 8(2).
106) This is the case in India and countries with laws modelled on the Indian Code of Civil Procedure: *supra* note 44, at p. 456.
107) Adrian Briggs, *supra* note 16.
108) Article 5(1) and Article 6(a).
109) Brand & Herrup, *supra* note 4, at p. 79, suggested that it is probably governed by the *lex fori*↗

The Convention does not provide for a clear resolution in the case of competing chosen courts. The Convention assumes that there is no dispute as to the identity of the chosen court. There may be cases where the court is not expressly identified but mentioned by reference to other facts (eg, location of a business) that could be the subject of a dispute between the contracting parties. There may be a dispute as to the law governing the validity of the choice of court clause that could have a bearing on its existence. There may be a dispute as to which of several possible choice of court clauses the parties had been incorporated into their contract.[110] If each of the courts of two Contracting States takes the respective view that the parties have chosen its own court, the Convention does not provide any solution for this contest of jurisdiction. It is also silent on whether the court of a Contracting State can issue an anti-suit injunction to protect the parties' choice of what it perceives as its own court.

Further issues may also arise in respect of the relationship between the Convention and the common law. The Convention does not apply to all issues arising from choice of court agreements falling within its ambit. It is unclear whether the attributes of a choice of court clause falling within the ambit of the Convention will persist for the purpose of the application of the common law for issues falling outside the Convention. For example, a choice of court clause which would be interpreted as non-exclusive under the common law (in accordance with the proper law of the agreement) is deemed to be exclusive under the Convention. This clause also purports to bring interim measures within its scope. For the purpose of determining the appropriateness of jurisdiction for interim measures under common law, is the clause to be taken to be exclusive (as determined for the purpose of the Convention) or non-exclusive (as determined under the common law)? The same issue arises if one party is claiming damages for breach of a choice of court clause, or an anti-suit injunction to prevent a breach of contract (matters not covered under the Convention), or that the breach of a choice of court agreement provides a defence to the recognition or enforcement of a foreign judgment. There are strong arguments against a "schizophrenic" choice of court clause. On the other hand, if the meaning of clause under the Convention is taken to be determinative, then the Convention has wider implications beyond matters which are actually within its ambit.

Assuming that Singapore becomes a Contracting State, if its court stays proceedings under the Convention because of an exclusive choice of foreign court clause, then that would ordinarily be the end of the matter. However, if the court applies the Convention but decides to hear the case, can the defendant argue that the proceedings should nevertheless be stayed under the common law? Similarly, if a judgment from a chosen court of another Contracting States is refused recognition in Singapore because a defence

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↘ including its conflict of laws rules. The *Explanatory Report, supra* note 3, at para. 92 states that national rules of evidence apply to determine the existence of a choice of court agreement. However, this is not conclusive because the issue of existence engages questions of both fact and law.

110) *Supra* note 32.

under the Convention applies, then can the judgment creditor try its luck to get the judgment recognised under the common law? The Convention is silent on these issues. There is a powerful argument in the interest of finality for taking the view that respective issues should be disposed of once and for all under the Convention.

Finally, if Singapore becomes a Contracting State, and a foreign country to which either the RECJA or the REFJA applies also becomes a Contracting State, then presumably the Convention will have to take precedence as it involves an obligation of Singapore under international law to apply it. In contrast, the gazetting of countries in RECJA and REFJA is based on ministerial decisions. The Convention will not supersede the RECJA and REFJA entirely as there will be non-Convention situations (eg, non-exclusive jurisdiction clauses, and where the judgment debtor was resident in the foreign jurisdiction) and judgments on non-Convention matters (eg, lump sum maintenance orders) which may continue to fall within the existing statutory regimes. Thus, consequential amendments will be required to bring the RECJA and REFJA into line with the Convention. This should, however, be fairly straightforward.

Ⅵ Policy Considerations

The Convention scheme is highly comprehensible to common lawyers because it is essentially similar to the common law structure for giving effect to party autonomy. However, there are likely to be costs involved in the adoption of the Convention which need to be weighed against the potential gains. The direct costs are: the costs of educating lawyers about the distinction between Convention and the common law (especially the scope of the Convention particularly its meaning of "exclusive"); complexity costs of maintaining dual regimes for the enforcement of choice of court clauses and the recognition and enforcement of the resulting judicial orders; uncertainty costs as a number of provisions of the Convention need to receive interpretative clarification; and the loss of some judicial flexibility to override an exclusive choice of court agreement in appropriate circumstances.[111]

Commercial entities stand to gain from greater clarity and certainty in the enforcement of exclusive choice of court agreements and a potentially wider scope for the recognition and enforceability of the resulting court orders. In particular, multinational businesses stand to gain from lower transaction costs due to harmonisation of the legal regimes for taking jurisdiction.[112] Further gains may also be realised at the

111) There are concerns that the Convention does not give sufficient space for public interest considerations: Mary Keyes, "Jurisdiction under the Hague Choice of Courts Convention; Its Likely Impact on Australian Practice," *Journal of Private International Law*, Vol. 5 (2009), p. 181 *et seq.*

112) The International Chamber of Commerce has expressed strong support for the Convention: see "ICC calls on governments to facilitate cross-border litigation," (29 November 2012), at http://www.iccwbo.org/News/Articles/2012/ICC-calls-on-governments-to-facilitate-cross-border-litigation (as of 18 August 2014).

enforcement stage since a qualifying Convention judgment becomes enforceable automatically without the need to start a separate enforcement action (eg, as required in the case of enforcement at common law).[113]

However, there could be some business costs too. The Convention has been criticised for its over-emphasis on party autonomy at the expense of protecting weaker parties.[114] However, the Convention does not apply to consumer and employment contracts (where the more flexible common law standards would continue to apply) and it is arguable that commercial parties can take care of themselves so that it is generally acceptable to subject them to a stricter regime of enforcement of choice of court agreements.[115] There may, however, still be some legitimate concern about small and medium enterprises and their relatively weaker bargaining power when dealing with multinational corporations, state enterprises, or governments—though this may be ameliorated to some extent by the applicable substantive principles of contract law applicable to the choice of court clause. For example, a choice of court clause could amount to an exclusion or limitation of liability clause under some municipal laws.[116] The large commercial area of carriage of goods, where there is systemic risk of parties being caught by surprise by choice of court clauses because of statutorily imposed contracts (bills of lading) and sub-bailment relationships, is excluded from the scope of the Convention. In any event, general imbalance of bargaining power has been found to be acceptable as a systemic risk in the common law and international arbitration context.

From the political and pragmatic perspective, the greatest potential gain lies in the wider enforceability of Singapore judgments and the facilitation of enforcement of such judgments in other Contracting States which otherwise would not recognise or enforce such a Singapore judgment under their own private international law. Under the current system, where the Singapore judgment is the result of a choice of court agreement (whether exclusive or non-exclusive), the judgment is likely to be recognised in most common law countries (because the agreement to submit amounts to international jurisdiction). It is also likely to be enforceable in another common law country provided that it is for a fixed or ascertainable sum of money. It may be recognised or enforced in some civil law countries which adopt a reciprocity test. However, it may not be recognised in some countries at all.

Experience in international arbitration has shown that some jurisdictions have been more co-operative than others in respect of the enforcement of foreign awards. Realistically, a similar experience ought to be anticipated in the operation of this

113) One cannot make too much of this as enforceability may be challenged in further litigation.

114) Christian Schulze, "The 2005 Hague Convention on Choice of Court Agreements," *South African Mercantile Law Journal,* Vol. 19 (2007), p. 140 *et seq.*

115) Burkhard Hess, "The Draft Hague Convention on Choice of Court Agreements," in Arnaud Nuyt & Nadine Watté (eds.), *International Civil Litigation in Europe and Relations with Third States* (Bruylant, 2005) p. 263, at p. 278.

116) The Unfair Contract Terms Act of Singapore exempts arbitration but not choice of court clauses from its scope; *supra* note 24, section 13(2).

Convention.[117] However, there may be net gain and little marginal cost to Singapore arising from mutuality of recognition and enforcement of judgments, because the private international law of Singapore already recognises foreign judgments where the parties have agreed to submit to the jurisdiction of the foreign court, and defences under the Convention are broadly similar to existing Singapore law. At this stage, any substantial benefit to Singapore is not to be obtained from its becoming party to the Convention as such but from other countries which would not otherwise recognise Singapore judgments becoming parties. This consideration may not be limited to the major trading partners of Singapore as such; the practical consideration in enforcement proceedings is the location of assets. Foreign contracting parties may be more inclined to choose Singapore as a neutral litigation forum if the resulting judgment can be enforced more widely against the assets of the judgment debtor wherever they may be found.[118] Pragmatically, if the objective is to attract more cross-border commercial litigation arising from regional transactions, substantial benefits will really accrue from more Asian countries adopting the Convention.[119]

Adopting the Convention could be seen as a manifestation of Singapore's commitment to be a global player in facilitating international commerce. It can provide the Singapore courts with further opportunities to contribute to the development of an international jurisprudence on the interpretation of the Convention, similar to what it is

117) Richard Garnett, "The Hague Choice of Court Convention: *Magnum Opus* or Much Ado about Nothing?," *Journal of Private International Law*, Vol. 5 (2009), p. 161 *et seq.* points out the danger of a non-chosen court of a Contracting State taking an expansive view of its own mandatory rules to override the exclusive choice of court clause.

118) The key consideration in enforcement of judgments is the location of the assets of the judgment debtor, which in this globalised age may not coincide with its place of business. However, the place of business is likely to remain significant because of potential availability of execution measures like attachment or garnishment of debts.

119) Gains from existing signatory states will be found in the additional scope of enforceability of Singapore judgments in some parts of Europe. Recognition and enforcement of foreign country (money) judgments is a state matter in the United States. Most states will enforce foreign country judgments where the foreign court has exercised competent jurisdiction and subject to conditions familiar to those in the common law, but some additionally require reciprocity: Symeon C. Symeonides, *American Private international Law* (Kluwer, 2008), paras. 725-767. Since Singapore will enforce a foreign judgment where there is a valid choice of court foreign court clause, reciprocity does not appear to be an obstacle. Mexico enforces foreign judgments where the parties have chosen the relevant court, provided the choice is not exclusively one-sided and does not amount to denial of justice: Federal Code of Civil Procedure, Articles 566-567; Jorges A. Vargas, "Conflict of Laws in Mexico as Governed by the Rules of the Federal Code of Civil Procedure," at http://ssrn.com/abstract=977242 (as of 18 August 2014). Enforcement of foreign judgments in EU states outside the scope of European treaties is a complex subject: see Samuel P. Baumgartner & Gerhard Walter, *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions, 3 Civil Procedure in Europe: Recognition & Enforcement* (Gerhard Walter & Samuel P. Baumgartner (eds.)), (Kluwer, 2000) and Mikael Berglund, *Cross Border Enforcement of Claims in the EU: History, Present Time and Future* (Kluwer, 2009), at para. 4.2.1. Some will not recognise foreign judgments absent treaty obligations, while others have rules for the enforcement of foreign judgments. Some, like Spain and Germany, require reciprocity.

doing in the sphere of international commercial arbitration. Unlike the case of the United Nations Convention on the International Sale of Goods (Vienna Convention) where contracting parties frequently opt out (with the result that no case has ever come before the Singapore court), the Hague Convention on Choice of Court Agreements has no opt-out provision, and commercial parties who prefer litigation as their mode of dispute resolution are likely to continue to use exclusive choice of court clauses in their contracts.

On the other hand, it is arguable that because the Convention makes it more difficult to displace the exclusive choice of foreign court clause, Singapore may lose judicial business to other courts. This needs to be balanced against the value of certainty of the choice of court clause to the contracting parties, as well as the value of a judicial reputation for Singapore for enforcing parties' agreements. There is also a countervailing consideration that other Contracting States also have to give equal force to exclusive choice of Singapore court clauses. So long as Singapore remains attractive as a venue for choice of court clauses in transnational commercial contracts, it stands to gain from the mutual enforcement of choice of court clauses. The gain is potentially reinforced by the presumption of exclusivity of such clauses.

There could also be potential loss of business in the arbitration sphere if contracting parties see that it is more advantageous to bring their dispute to a court of law. However, this must be seen in the context of presenting contracting parties with viable alternatives so that they can make an informed choice of their preferred mode of dispute resolution, and the potential overall increase in business to the legal industry in Singapore. There is a further argument from the perspective of the development of Singapore law to attract more complex international commercial disputes into its courts.

Conclusions

The Law Reform Committee of the Singapore Academy of Law studied the desirability of the adoption by Singapore of the Convention, and the prevailing view was that a restrained approach should be taken as the Convention would not bring significant practical benefits to Singapore at least for the moment because of the dearth of, especially Asian, Contracting States, and it recommended a wait and see attitude instead.[120] Nevertheless, it is ultimately a political question whether Singapore should be an early adopter of this international instrument. Singapore is well-known for its very pragmatic policies. One relevant consideration will be the extent to which adoption of the Convention will facilitate international trade for Singapore. Singapore's eight major trading partners are : China, European Union, Hong Kong SAR, Indonesia, Japan, Malaysia, South Korea and the United States. Of these, only EU and US have signed

120) See *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005* (March 2013), at http://www.sal.org.sg/digitallibrary/Lists/Law%20Reform%20Reports/DispForm.aspx?ID=37 (as of 18 August 2014).

the Convention.

Perhaps an even more important consideration is Singapore's ambition to develop itself as a hub offering cross-border commercial dispute resolution services. Thus, its approach and attitude to the Convention must be understood in the context of establishment of the SICC[121] in 2015. International Judges may be appointed to sit on the court. Its primary role is to hear commercial cases involving cross-border elements where contracting parties have chosen Singapore as the litigation venue. Two other imperatives are aspirations towards greater uniformity of international business laws, and ASEAN economic integration. The Chief Justice of Singapore has expressed keen interest that Singapore should play a leading role in the harmonisation of international commercial laws,[122] and he has in fact taken on an evangelisation role within ASEAN, urging the 10 member states to consider adopting the Convention as a convenient ready-made international platform for ASEAN to harmonise its laws in the area of dispute resolution.[123] Moreover, the *Report of the Singapore International Commercial Court Committee* had suggested that Singapore should consider acceding to the Convention,[124] and the Ministry of Law is actively studying the feasibility of adoption.[125] It is in this context that there has been widespread anticipation of Singapore adopting the Convention.

Meanwhile, the Hague Conference on Private International Law opened its Asia Pacific Regional Office in Hong Kong SAR on 13 December 2012, and the promotion of the Convention is clearly a prominent item on its agenda. Many eyes are naturally on the economic powerhouse of mainland China. One study has suggested that the recognition and enforcement of a resulting foreign judgment is an important consideration for judges in China in deciding whether to give effect to an exclusive choice of foreign court clause in an agreement.[126] This suggests that the Convention may well be seen to be a pragmatic instrument from the perspective of China as well.

121) See main text to note 35 *et seq.* See also *Report of the Committee on the Singapore International Commercial Court* (29 November 2013), at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf (as of 18 August 2014); Denise Wong, "The rise of the international commercial court: what is it and will it work?," *Civil Justice Quarterly,* Vol. 33, Issue 2 (2014), pp. 205-227.

122) Chief Justice Sundaresh Menon, "The Somewhat Uncommon Law of Commerce," *Singapore Academy of Law Journal,* Vol. 26 (2014), pp. 23-49; "Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence," *Singapore Journal of Legal Studies* (2013), pp. 231-252.

123) Keynote Address by Chief Justice Sundaresh Menon, "ASEAN Integration through Law," *The ASEAN Way in a Comparative Context: Plenary on Rule of Law in the ASEAN Community,* 25 August 2013 (Singapore), at http://app.supremecourt.gov.sg/data/doc/ManagePage/4943/ASEAN%20Integration%20Through%20Law%20Project%20Keynote.pdf (as of 18 August 2014).

124) *Supra,* note 118, at para. [46].

125) Speech by Mr K Shanmugum SC, Minister for Law, in Parliament on 5 March 2014: https://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/speech-by-minister-during-cos-2014.html (as of 18 August 2014), (at para. [10]).

126) Zheng Sophia Tang, "Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts — A Pragmatic Study," *International Comparative Law Quarterly,* Vol. 61, Issue 2 (2012), pp. 459-484.

The government of Hong Kong SAR itself has decided to take a wait and see attitude.[127] Hong Kong SAR has a reciprocal arrangement with mainland China for the mutual enforcement of judgments in relation to commercial contracts.[128] While bilateral arrangements may represent one way forward, this methodology cannot match the effects and benefits of a multilateral convention.

Postscript: Singapore signed the Hague Convention on Choice of Court Agreements on 25 March 2015.

127) Reply of Mr Rimsky Yuen SC, Secretary for Justice, in the Legislative Council (25 June 2014), at http://www.doj.gov.hk/eng/public/pr/20140625_pr.html (as of 18 August 2014).

128) Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, which came into effect in August 2008.