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Case Comment

CHOICE OF LAW GOVERNING A CONTRACT WHERE ITS EXISTENCE IS IN DISPUTE

Clarifications from the Singapore International Commercial Court in

Lew, Solomon v Kaikhushru Shiavax Nargolwala
[2020] 3 SLR 61

The Singapore International Commercial Court's judgment in *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 is noteworthy as it heralds a modest development in Singapore private international law, especially in respect to the not uncommon issue of disputes over cross-border contracts where its existence is challenged. This case represents one of the handful of Singapore precedents which directly addresses the difficult conundrum where both the governing law and the existence of the underlying contract are in dispute. Under this context, it articulates a default choice of law position – the *lex fori* – where it is impossible to objectively identify, factually, the law parties would have chosen. This article provides an inquisitive and critical comment of the case.

Shouyu **CHONG**[1]
LLM (National University of Singapore);
Research Fellow, Singapore International Dispute Resolution Academy, Singapore Management University; Visiting Lecturer, The Dickson Poon School of Law, King's College London; PhD Research Student, Centre of Construction Law & Dispute Resolution.

1 I would like to thank the anonymous reviewer for his comments, which were incredibly insightful. In any event, all errors and omissions remain mine. I would also like to pay a tribute to my colleagues working tirelessly in the UK National Health Service in London, as well as Douglas, Taylan and Elliot for their deep moral support during this time of crisis. Finally, I dedicate this article to the memory of my uncle, Mr H B Chong, who passed away suddenly on 30 April 2020, and to the incomparable Professor Michael P Furmston, who taught me contract law in my first year of law school.

I. Introduction

1 Discerning the choice of law governing a disputed relationship, where a challenge to the fundamental existence of that relationship contractually is litigated, between parties to an international business transaction is undoubtedly a difficult exercise for courts. Whilst international commercial transactions have become increasingly common, Singapore private international law has been slow to fashion a solution to respond to this difficult problem, entirely leaving it to gradually evolve through judicial precedents in its courts (that is, the common law). Mavis Chionh JC in *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd*[2] remarked that the precedents available in the common law on this issue are "admittedly insubstantial".[3]

2 Thus, a case from the Singapore International Commercial Court ("SICC") – *Lew, Solomon v Kaikhushru Shiavax Nargolwala*[4] ("*Solomon Lew*") – ruling specifically on the matter is noteworthy and merits deeper analysis, for it will shape the way Singapore courts will decide on matters as to governing law, until a Court of Appeal decision is rendered.

II. Facts

3 The pertinent facts of this litigation may be briefly summarised as follows. In September 2017, the plaintiff, Lew, had approached Mr and Mrs Nargolwala (the first and second defendants) to purchase a luxury villa in Phuket, Thailand. Mr and Mrs Nargolwala had purchased that villa in 2007 through a company incorporated in the British Virgin Islands, Querencia Ltd ("Querencia"). The purchase would be effected from a transfer of shares in Querencia to the purchaser. Lew alleged that on 11 October 2017, he had concluded a binding oral agreement for the purchase of the villa, with Daniel Meury, the general manager of the villa. Lew further alleged that Meury was acting as an authorised agent of Mr and Mrs Nargolwala. Unfortunately for Lew, the ownership of the villa was transferred to a third party (Quo Vadis Investment Ltd, controlled by Christian Larpin, the third and fourth defendants, respectively) in November 2017. How this transfer was executed is not relevant for the purposes of this article.

4 In the SICC, Lew applied for remedies flowing from a breach of the alleged oral contract, a breach of fiduciary duties, and breach of trust.

2 [2019] SGHC 47.
3 *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [73].
4 [2020] 3 SLR 61.

For the purposes of this article, the author will only focus on examining the court's conflict of laws analysis with respect to the breach of the alleged oral contract.

5 As it was the existence of an oral agreement that was in dispute, it was incredibly difficult for parties to discern and show in court what express law was chosen to apply to it. Believing that it would be advantageous to his case, Lew submitted that Singapore law should be the governing law of the disputed contract. Conversely, Mr and Mrs Nargolwala submitted that Thai law should be the governing law of the disputed contract. The SICC had to decide – by applying the conflict of laws rules of Singapore – which law ought to apply, in its determination of whether there was a binding contractual relationship between Lew and Mr and Mrs Nargolwala. This was a fairly novel issue to be determined in Singapore law, as the precedents only provide guidance on cases where there is no dispute that a binding contract exists between disputing parties.[5]

III. Decision of the SICC

6 The SICC ruled that Singapore law – which is the *lex fori* – would govern the disputed relationship between Lew and Mr and Mrs Nargolwala. Taking reference from the Singapore Court of Appeal decision in *JIO Minerals FZC v Mineral Enterprises Ltd*[6] ("*JIO Minerals*"), the court applied a three-stage "putative proper law test"[7] in order of priority:

> (a) The court will look for what parties have expressly chosen as the law governing their disputed relationship;
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> (b) Where (a) is unavailable, the court searches for what the parties' intention as to the governing law of the contract may be by inferring from the facts available in the surrounding circumstances;

5 See *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391. There may also be the case of *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 to consider. However, in that case the defendants had denied the existence of a collateral contract which had marginal connections to Mexico law but strong connections to Singapore law; in any event, the success of the defendant's claim did not turn on the disputed possible governing laws of Mexican and Singapore law, because the court thought that in all circumstances under both laws a contract would not exist.

6 [2011] 1 SLR 391.

7 *Cf Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [72].

(c) Where (a) and (b) prove inconclusive, the court will put its mind to discerning which law had the closest and most real connection with the disputed relationship.

7 Interestingly, Simon Thorley IJ had expressed reservations about applying the *JIO Minerals* test given this particular factual matrix, where parties at litigation are disputing the existence or binding nature of a contract to begin with:[8]

> Applying the three-stage approach introduces an element of circularity in that it involves first trying to ascertain what the governing law would have been if a contract had been made and then applying that law to determine whether it has in fact been made.

8 However, the court recognised that the *JIO Minerals* test provided a helpful framework which may be tempered by some necessary nuance to account for the context under which the basis or existence of the contract is fundamentally in dispute at litigation. Furthermore, Thorley IJ had articulated the default position of the court where it is impossible to discern objectively what the parties would have wanted, and if the connecting factors would not assist either parties: "In cases of doubt, the counsel of prudence would be to apply the *lex fori*."[9] In other words, the *lex fori* may be applied as a matter of last resort.

9 The court first regarded the disputed relationship between the parties as a "putative contract". In that putative contract, the court was unable to find an express choice of governing law (stage one). However, at the second stage of the inquiry, the court thought that it may be discerned from the circumstances leading to that putative contract, through the parties' common intention and conduct, that the parties would have intended the governing law of their relationship to be Singapore law.[10] The court had drawn the inference on the basis that the parties insisted and agreed that Singapore lawyers would be instructed at the moment in time when the disputed contract was formed. In an abundance of caution, Thorley IJ proceeded to the third stage of the inquiry. However, the analysis was futile: taking into account all relevant connecting factors, the court would have been unable at this stage to discern whether Thai law or Singapore law would provide the closest and most real connection to the putative contract.[11] In this instance, the court was prepared to apply

8 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [160].
9 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [164].
10 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [165]–[166].
11 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [169].

the *lex fori* by default, but for the fact that it found at the second stage that Singapore law ought to apply.[12]

10 Applying Singapore law, the SICC found that there was no binding oral contract concluded between Lew and Mr and Mrs Nargolwala.[13]

IV. Comment

11 It bears note that this judgment from the SICC has illuminated the state of Singapore law on this difficult problem in the conflict of laws. Here, it is prudent to set out some of the settled principles where the choice of law of a cross-border relationship between parties is in dispute, particularly over the existence or formation of a contract.

A. Determining the governing law of contracts

12 First, the conflict rules for contractual obligations in Singapore private international law remain substantially similar to that of the English common law before the year 1991.[14] Under the common law,[15] the governing law of a relationship between parties across borders is generally defined, as Briggs has put it succinctly, as "the law chosen, expressly or impliedly, by the parties, or if no law had been chosen, the law with which the contract had its closest and most real connection".[16] Where it is impossible factually[17] to identify objectively what law parties

12 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [169].
13 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [246].
14 The English conflict of laws governing contractual obligations in relation to civil and commercial deals concluded after 1 April 1991 was modified by way of legislative intervention (Contracts (Applicable Law) Act 1990 (c 36)), which brought the rules defined by the Rome Convention on the Law Applicable to Contractual Obligations (19 June 1980; entry into force 1 April 1991) into English law.
15 *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [79].
16 Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 4th Ed, 2019) at p 195.
17 This is in contrast with a case where there is an inherent indeterminacy of the proper law, where after examining the connecting factors one does not logically come to the conclusion that only one body of law governs the relationship, but rather two (or possibly more) bodies of law are clearly identified. See *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's Rep 475 at [17]; in this case the insurers and reinsurers in dispute were bound by incorporated standard forms from England and Mauritius which contain conflicting express choices of English and Mauritius law respectively, resulting in a stalemate in the determination of the proper law governing a dispute over whether a Mauritius jurisdiction clause was validly incorporated into the overall agreement. Here, the *lex fori* may be administered in the event that there is a gap stemming from any inherent indeterminacy in the applicable law: see Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172 at 187–188, para 21.

would have chosen, and if the connecting factors do not assist the court in any way (as in *Solomon Lew*, where the factors were equally divided between Singapore and Thailand), the court may apply the *lex fori* as a measure of last resort. These conflict of laws principles apply to the determination of the governing law of a contract, in the context where its existence or formation is in dispute.[18]

B. Elucidating a default rule

13 Secondly, the default rule established in *Solomon Lew* that the court may administer the *lex fori* as a measure of last resort if the proper law may not be discerned from express or implied choice, and, if the remaining connecting factors do not assist the court in any way (resulting in factual[19] indeterminacy),[20] may find support in a theory proffered by Briggs in an article written in 1990.[21] He had argued that this default position would inevitably result in circumstances where parties are simply not agreed that they have concluded a contract with each other.

14 But it is noteworthy that Briggs had also argued in the same article that courts should avoid an analysis of putative law (to which he refers ironically as some "pretended quasi-proper law")[22] governing a putative contract: it is evident that the SICC has not been inclined to adopt those views in *Solomon Lew*,[23] as the court's determination of the proper law turned on the ruling that an implied proper law of the disputed business relationship between the parties may be discerned successfully. In any case, Thorley IJ was not in favour of prioritising the default *lex fori* rule over the examination of putative law:[24]

> This would, to my mind, be to introduce an approach which constitutes too much of a blunt instrument to serve the interests of justice. There will be cases where it is the appropriate course to take … but there will be others where the facts are sufficiently clear that justice can better be done by approaching the matter by reference to the three-stage test in *JIO Minerals* [which embraces the examination of a 'putative contract' and a 'putative law'], with necessary adjustments to take into account that there is the fundamental dispute as to the existence of the contract in the first place.

18 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [162].
19 That is, where the factual connections are fairly evenly balanced and it is difficult to identify which is the system of law that has the closest connection with the transaction and the parties.
20 See *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.353.
21 Adrian Briggs, "The Formation of International Contracts" [1990] LMCLQ 192.
22 Adrian Briggs, "The Formation of International Contracts" [1990] LMCLQ 192 at 202.
23 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [162].
24 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [162].

C. "Putative proper law" of a "putative contract"?

15 Thirdly, the controversy behind the notion of a "putative contract"[25] is probably an overstated or exaggerated problem. This controversy stems from the seemingly circular proposition that international contracts may not subsist without a governing law, implying that the governing law (or proper law) is determined *before* the existence of a contract, whilst the three-stage "putative proper law test" administered to determine the governing law appears to be paradoxically applied *with reference to* a concluded contract.

16 It is submitted that if the "putative contract" were reframed from the perspective of "potential business relationships yet to be concluded", it is not inconceivable that parties during their process of conducting good faith negotiations leading to some sort of a more-than-marginal relationship with each other – which may not necessarily cross a contractual threshold – may:

> (a) expressly state and/or record in some form a governing law which they would have desired their disputed relationship to be governed by;[26] or
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> (b) be engaged in some sort of activity with each other,[27] the context from which a desired governing law they would have intended their disputed relationship to be governed by be discerned by implication.[28]

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25 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [163]. Tan Yock Lin has opined that the search for a putative proper law of a putative contract is an endeavour that may be "pragmatic [but] dubious in logic": Tan Yock Lin, "Good Faith Choice of a Law to Govern a Contract" [2014] Sing JLS 307 at 319.

26 A caveat to this assertion would be that in practice, such an express record of the desired governing law would be "unlikely" to occur, as observed by Thorley IJ: *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [163].

27 See *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [165]–[166].

28 Consider the case of *Zebrarise Ltd v De Nieffe* [2005] 1 Lloyd's Rep 154 as an illustration: in this case, the court opined that an English solicitor who practised in Belgium, who as a result argued that Belgian law should be applied as the law most closely connected to the dispute, and who was in dispute with an Irish property dealer who resided in England, had impliedly chosen English law to be the governing law of a loan contract concluded in Switzerland. This was because the disputing parties had stronger connections to England, and the court also found that the solicitor possessed no knowledge of Belgian law. Also consider *Enka Insaat Ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] EWCA Civ 574 at [91] *ff*, where the English Court of Appeal found that where parties have agreed to a seat of arbitration, the curial law would, as a matter of implied choice, govern that arbitration agreement. It is noteworthy that the majority of the UK Supreme Court (consisting of Lords Hamblen, Leggatt and Kerr) has overturned the use of a selection of a seat of arbitration in London as an indicator of an implied choice of English law applying to

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17 These are the two prioritised connecting factors which the Singapore courts would consider as benchmarks when attempting to discern the proper law governing a disputed business relationship over the existence or formation of a contract, paying due regard to protecting the reasonable expectations of the parties who engaged in good faith negotiations.[29]

18 But it bears emphasis that *the substantive contract is not engaged by the court at this stage* in its examination of such connecting factors. This is because the search for the law that governs the formation of the contract between the disputing parties may be separately defined as an inquiry that precedes the search for the law which governs the substance of the contract.[30] Such an approach was observed when the English Court of Appeal in *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd*[31] ("*The Amazonia*") was asked in part to determine, in a dispute over a charterparty, (a) whether an *ad hoc* arbitration agreement was concluded between the parties; and (b) if so concluded, whether the agreement was enforceable under its proper law.[32] It was contended that either English or Australian law could apply. Delivering the leading judgment, Staughton LJ first considered the English law authorities in his speech, to determine if there was an agreement to arbitrate concluded between the parties,[33] but acknowledging that this was done because of the concession that there was no difference between English and Australian law on the point.[34] Having concluded that there was such an agreement, Staughton LJ then proceeded to determine what the governing law of the *ad hoc* arbitration agreement was,[35] so that it may be applied to determine its enforceability.[36] Therefore, from a broad and chronological reading

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the arbitration agreement by the English Court of Appeal, in *Enka Insaat Ve Sanayi AS v OOO* "*Insurance Co Chubb*" [2020] UKSC 38 at [73] *ff*; yet it remains open for argument whether the Singapore courts would prefer the approach taken by the English Court of Appeal or the UK Supreme Court.

29 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.353.

30 *Cf* Maria Hook, *The Choice of Law Contract* (Hart Publishing, 2016) at p 91. It is noteworthy that Hook goes further to observe that the separate definitions could "increase the likelihood that the choice of law agreement and the underlying contract are submitted to differing laws".

31 [1990] 1 Lloyd's Rep 236.

32 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236 at 240.

33 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236 at 241–244.

34 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236 at 244.

35 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236 at 244. It was concluded that English law was the governing law.

36 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236 at 245.

of *The Amazonia*, it appears that it may be theoretically possible for the law which governs the conclusion of a contract to be different from the substance of the contract.[37]

19 The SICC also appears to have applied this approach recently. In *Michael A Baker v BCS Business Consulting Services Pte Ltd*[38] ("*Michael Baker*"), the existence and validity of a trust agreement allegedly created by a deceased American business woman was disputed.[39] Without reference to a "putative" proper law, the SICC undertook a thorough review of whether the trust was formed, where it was found that there was, on a *prima facie* basis, an existence of a trust agreement.[40] The SICC subsequently undertook a review of the governing law of the trust agreement, and determined that it was Singapore law,[41] before applying it to evaluate if it was valid and enforceable.

20 Yet it must be caveated that this observation in no way endorses the splitting of the proper law, because there is good argument that the law governing the matter of contract formation is spent when the courts conclude that it exists (or does not exist); where a contract was found to be concluded between the parties, the court (as observed in *The Amazonia*) may need to probe further to identify the proper law that governs issues of enforceability of the contract.[42] In any event, it would still be the norm that the law governing the conclusion of the contract would coincide with the law governing the rights and obligations contained within it, including issues as to its validity and enforceability.[43]

21 Hence, it is submitted that the labelling of the proper law to be determined as "putative" is superfluous, because one is actually concerned about determining an observable governing law from a set of benchmarks available, distinctly different from *subsequently applying* that determined governing law to assess defects in relation to the underlying

37 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.353.
38 [2020] 4 SLR 85.
39 *Michael A Baker v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 at [63].
40 *Michael A Baker v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 ("*Michael Baker*") at [187]–[188]. Of note, it is possible that the Singapore International Commercial Court in *Michael Baker* adopted such an approach because the defendants had elected not to call evidence at trial (at [66]).
41 *Michael A Baker v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 at [206] and [211]–[214].
42 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.353.
43 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.353. For instance, in *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236, the law which was determinative of the issue of existence of the impugned arbitration agreement was the same as the law applied to determine its validity and enforceability (that is, English law).

disputed relationship which may or may not cross a contractual threshold. The notion of a "putative contract" is also imprecise as the courts, when determining the law governing potential business relationships which may have yet to be concluded, have already evidently put their mind to the possibility that a contract may or may not be found to subsist and bind the disputing parties, avoiding any circularity. For completeness, it is worth stating that the Singapore courts may next consider objective connecting factors linking the parties in their more-than-marginal (but disputed) relationship, if the two prioritised factors yield no indications as to the proper law, as benchmarks to identify the proper law.

D. (Non-)contractual nature of choice of law

22 Fourthly, the choice of law is an element of a cross-border relationship between parties that may be technically devoid of any substantive contractual content, unless the contractual parties intend otherwise.[44] This thesis was persuasively put forward by Tan, based on the astute observation that when the court seeks to determine the choice of law governing a disputed relationship in circumstances where there is no indication otherwise by the parties, "there is no concern with whether its binding nature is itself suspect when the contract is allegedly not formed".[45]

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44 If the parties so intend, there must be a "meeting of the minds" for there to exist a choice of law which engenders promissory content: *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [50]. In cases where parties intend that their choice of law has promissory content, it bears note that if that choice is, in fact, a faulty one (for instance, if they agree that a floating proper law would apply, which is not permissible as at the time of contracting, *one* governing law ought to apply), logically, it may result in a failure to conclude a binding contract (see Tan Yock Lin, "Good Faith Choice of a Law to Govern a Contract" [2014] Sing JLS 307 at 320). The common law's response to such an inherent indeterminacy in the proper law is to either (a) consider the contract not constituted; or (b) refer to the *lex fori* (*cf Dornoch Ltd v The Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's Rep 475 at [17]) to make an objective determination of what governing law ought to apply (*cf* Adrian Briggs, "The Formation of International Contracts" [1990] LMCLQ 192).

45 Tan Yock Lin, "Good Faith Choice of a Law to Govern a Contract" [2014] Sing JLS 307 at 319. In contrast, the proposition put forward by Dr Maria Hook, who had attempted to examine how choice of law is an element founded in contract and party autonomy, yields an incoherent and undesirable conclusion, to which she proposes sweeping reforms over its determination: see Maria Hook, *The Choice of Law Contract* (Hart Publishing, 2016) at p 222 *ff*. A related conundrum is observed in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543, where the Court of Appeal was asked to give contractual weight to an express choice of law clause which arose from a fraudulent transaction. The Court of Appeal declined to do so because it found that there was no "meeting of the minds" between parties, and hence there was no agreement concluded as to the choice of law clause (at [50]). Whilst it was unclear from the judgment which governing law was applied in the determination of whether a choice of law *agreement* was concluded, it was suggested that the *lex fori*

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23 Consequently, an express choice of law, made in the context of a disputed relationship that may or may not cross a contractual threshold (which may appear to engender some binding effect but for the lack of indication of a "meeting of the minds"[46] between parties), leads merely to an *evidentiary presumption* in the forum that that expressly chosen law would apply as the governing law of the relationship between parties at litigation.[47] When read from this perspective, concerns over the circularity ensuing when courts attempt to discern what the governing law would have been if a contract had been concluded, and subsequently administer that law to decide if indeed that contract had been concluded, would be marginalised. In this way, an express choice of law by parties to govern (generally) their business relationship is prioritised as the element which best elucidates the proper law to be applied by the courts.

24 In the absence of an express choice (and in the same context as discussed above), where the courts seek (and are able) to discern an implied choice of law of the parties based on their conduct and the surrounding factual circumstances leading to the conclusion of an alleged contract, the derivation of that implied "choice" should not fall foul of similar concerns of circularity. To be doubly clear and for avoidance of doubt, this proposition proceeds on the basis of a non-contractual and evidentiary content of a choice of law proffered by Tan: this means the benchmark indicators that inferences may be drawn from the determination of an implied choice of law would be quite different from those taken to buttress an implied contractual term.[48] The function of an implied choice of law diverges from an implied contractual term because its derivation shades into the identification of a system of law with which the contract has its closest and most real connection.[49] As a result it may be the norm for courts to look at fictional indicators to discern the implied choice of

was applied: Adeline Chong, "Void Contracts and the Applicability of Choice of Law Clauses to Consequential Restitutionary Claims – *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543" (2009) 21 SAcLJ 545 at 555, para 32. But under such circumstances, where the existence of the agreement in dispute was essentially a procedural question of law (that is, what law is to be applied by the proper forum, which is the Singapore courts, to govern the dispute), it is not surprising to find that the Court of Appeal indeed applied the *lex fori* directly without recourse to the *JIO Minerals* test (as elucidated in 2008 in *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 [36]): *cf Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 at 399.

46 *Cf CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [50].

47 Tan Yock Lin, "Good Faith Choice of a Law to Govern a Contract" [2014] Sing JLS 307 at 319.

48 See Maria Hook, *The Choice of Law Contract* (Hart Publishing, 2016) at pp 152–155.

49 *Enka Insaat Ve Sanayi AS v OOO* "*Insurance Co Chubb*" [2020] EWCA Civ 574 at [70].

law.[50] Take for instance, the mere fact of selection of *London* arbitration clauses may be recognised by courts as indicators of implied choice of *English law* with respect to that forum selection clause, even though its contractual validity or existence is in dispute.[51]

V. Critique

25 It is submitted that the SICC's approach to discerning the choice of law governing a disputed relationship (that is, where a challenge to the fundamental existence of that relationship contractually is litigated) between parties to an international business transaction is difficult to impeach. In the absence of legislative guidance,[52] maintaining the "putative proper law test"[53] is desirable, as it mitigates raising too high the hurdles to contract formation in the cross-border context,[54] preserving any good faith parties – who (or which) originate from contrasting backgrounds and legal traditions – may possess when they proceed to negotiate deals with a view to conclude cross-border business relationships.

A. Governing law of contract formation or existence

26 As a general observation, the SICC in *Solomon Lew*, in its determination of the existence (or formation) of a contract between the parties at litigation, appears to apply a slightly different proper law analysis from the approach taken by a separate three-judge bench on the SICC in *Michael Baker*. To recall, in *Michael Baker*, the existence and validity of a trust agreement allegedly created by a deceased American businesswoman was disputed.[55] Without reference to a "putative" proper law (which was alleged to be either Singapore or California law), the SICC in *Michael Baker* first undertook a thorough review of whether the trust was formed. The court found that there was, on a *prima facie* basis, an existence of a trust agreement.[56] The SICC *subsequently* undertook

50 Maria Hook, *The Choice of Law Contract* (Hart Publishing, 2016) at pp 155–159.

51 See *Enka Insaat Ve Sanayi AS v OOO* "*Insurance Co Chubb*" [2020] EWCA Civ 574 at [91] *ff*; *Compania Naviera Micro SA v Shipley International Inc* [1982] 2 Lloyd's Rep 351 at 353; and *Egon Oldendorff v Liberia Corp (No 1)* [1995] 2 Lloyd's Rep 64 at 69–71. Note the decision of the UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO* "*Insurance Co Chubb*" [2020] UKSC 38, discussed at n 28 above.

52 *Cf* Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

53 See *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [162].

54 See Tan Yock Lin, "Good Faith Choice of a Law to Govern a Contract" [2014] Sing JLS 307 at 319.

55 *Michael A Baker v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 at [63].

56 *Michael A Baker v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 ("*Michael Baker*") at [187]–[188]. It is possible that the Singapore International Commercial

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a review of the governing law of the trust agreement and determined that it was Singapore law.[57]

27 In contrast, the SICC in *Solomon Lew* first undertook an examination of what the "putative" proper law governing the formation of the disputed contract should be (which was alleged to be either Singapore or Thai law),[58] ruling that Singapore law was the implied choice of law.[59] Applying Singapore law, Thorley IJ found that there was no binding oral agreement concluded between the parties.[60] The SICC later proceeded, in an abundance of caution, to consider in *obiter dicta* if a binding oral agreement had been concluded if Thai law were the governing law.[61] Thorley IJ ruled that there would also be no binding oral agreement concluded under Thai law.[62] Also in an abundance of caution, Thorley IJ examined in *obiter dicta* – if the court were to be incorrect with its application of Singapore and Thai law on the issue of contract formation – how *both* Thai and Singapore law would have applied to enforce the disputed contract.[63]

28 It is submitted that the approach taken in *Solomon Lew* is the more logical one, as the proper law should be first discerned *before* a judgment may be made over whether an agreement *has been concluded* between the disputing parties.[64] Only if the court has satisfied itself that there is no difference in the result engendered by the competing laws regarding the issue of contract formation[65] then could the approach in *Michael Baker* be endorsed.[66] It should also logically follow that if there

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Court in *Michael Baker* adopted such an approach because the defendants had elected not to call evidence at trial (at [66]).

57 *Michael A Baker v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 at [206] and [211]–[214].

58 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [156]–[170].

59 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [170].

60 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [246].

61 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [257]–[266].

62 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [266].

63 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [249]–[275].

64 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236 at 244.

65 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236 at 244. Take for instance, in *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [74], Mavis Chionh JC found that the existence of a collateral contract in dispute between the parties was not found, having considered both Singapore and Mexican law.

66 Yet it is acknowledged that the SICC adopted such an approach in *Michael A Baker v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 because of the way the case was pleaded and argued, given that the defendants had elected not to call evidence at trial (at [66]). Under such circumstances, it may be prudent (or logical) that the *lex fori* is to be applied in the *prima facie* determination; but in any event the court

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is indeed a difference in the result[67] engendered by the competing laws regarding the issue of contract formation (for instance, if Singapore law would be inclined to find a binding contract formed, while Thai law would not), the same approach must be taken. The determination of the governing law should not, in principle, hinge on the outcome of whether the arrangement between the disputing parties would, under one or the other law, be considered a concluded contract.[68] In Singapore, the High Court in *BNA v BNB*[69] when rejecting the "validation principle"[70] – a controversial choice of law methodology sometimes applied in international commercial arbitration that informs the court of what the proper law of an arbitration agreement *is not*, based on whether it would lead to the finding of a binding and valid agreement[71] – had persuasively explained that such a methodology applied to derive the governing law of a contractual agreement would offend the principle of effective interpretation of a contract,[72] and is inconsistent with legal authority.[73]

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did not provide any further elaboration on which law it applied as a benchmark for that *prima facie* determination (*cf Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236).

67 Here it is observed from the reported Singapore cases that where Singapore law and a competing foreign law may be applied as the governing law to determine if a disputed contract has been formed, the same result would have been reached if either Singapore law or that foreign law had been applied. Apart from *Solomon Lew*, see *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [74], where Mavis Chionh JC found that the existence of a collateral contract in dispute between the parties was not found, even if either Singapore or Mexican law (as pleaded by the parties' experts on Mexican law) were to be applied by the court.

68 *BNA v BNB* [2019] SGHC 142 at [53].

69 [2019] SGHC 142.

70 Gary Born, "International Commercial Arbitration" (Kluwer Law International, 2nd Ed, 2014) at pp 24–27.

71 *BNA v BNB* [2019] SGHC 142 at [51].

72 That is, courts must respect party autonomy to form contracts and do their level best to ascertain and give effect to the parties' intention, not to give effect to contractual relationships, come what may, without directly addressing the intentions of the parties: see *BNA v BNB* [2019] SGHC 142 at [53].

73 *BNA v BNB* [2019] SGHC 142 at [52]–[66]. It is noteworthy that the majority of the UK Supreme Court (consisting of Lords Hamblen, Leggatt and Kerr) has appeared to endorse the application of the validation principle in the common law, in *Enka Insaat Ve Sanayi AS v OOO* "*Insurance Co Chubb*" [2020] UKSC 38 at [95] *ff*. Yet it remains open for argument whether the Singapore courts would ultimately adopt the approach taken by the UK Supreme Court. It may also be possible that the Singapore courts could limit the general application of the validation principle to arbitration agreements.

B. Lex fori *and factual indeterminacy in cross-border disputes over contract formation*

29 The SICC has also elucidated a default conflict of laws position in the common law, in the matter of choice of law governing the formation of a contract with international elements, as a matter of procedural necessity, where there is factual indeterminacy[74] in relation to the connecting factors indicating the law that ought to be the proper law. The reliance on the *lex fori* under such circumstances of factual indeterminacy may be prudent, for where the governing law of a disputed relationship (that may or may not cross a contractual threshold) is also in dispute, it is said that the reliance on either party's submission of what the proper law ought to be may be equally unfair to the other party.[75] Applying the law of the forum by default breaks the stalemate. Yet this may be viewed as a significant departure from the common law choice of law methodology. If factual indeterminacy (in the context of a disputed relationship that may or may not cross a *contractual* threshold) provides a reason for the courts to abandon the three-stage *JIO Minerals* test and proceed directly to applying the *lex fori* instead, there is a chance that similar principles may apply to cross-border tort and family disputes in private international law.

30 At least for the litigation of cross-border tort disputes in Singapore, it is submitted that the weight of precedents prevents such a default rule from applying. In cross-border tort litigation, where the relevant connecting factors are spread *evenly* across several states,[76] it is conceivable that factual indeterminacy may provide the impetus for the Singapore court to apply the *lex fori* without resort to the second limb of the "double actionability rule",[77] which engenders a search and

74 That is, where the factual connections are fairly evenly balanced and it is difficult to identify which is the system of law that has the closest connection with the transaction and the parties. This is in contrast to a case where there is an inherent indeterminacy of the proper law, where after examining the connecting factors, one does not logically come to the conclusion that only one body of law governs the relationship, but rather two (or possibly more) bodies of law are clearly identified.

75 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.353.

76 This was referred to as a "miasma of uncertain connections" in *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [55].

77 The double actionability rule has been laid out in *Boys v Chaplin* [1971] AC 356 and restated in Singapore law by the Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [53]:

> Put simply, this rule states that in order for a [cross-border] tort to be actionable in Singapore, the alleged wrong must be actionable not only under the law of the forum (the *lex fori*) but also under the law of the place where the wrong was in fact committed (the *lex loci delicti*). In other words, both these limbs must be satisfied.

identification of the *lex loci delicti*.[78] In this scenario, attention must be paid to the applicability of a "flexible exception",[79] set out by the Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull*.[80]

31 Of course, if the relevant connecting factors are spread across states *to the exception of Singapore*, it is unlikely for the Singapore courts to seize proceedings over the cross-border tort to begin with, without a jurisdiction agreement, nipping the question of whether the *lex fori* ought to apply at its bud.[81] But if there were a jurisdiction agreement presented under the same scenario, the "flexible exception" may preclude the applicability of the *lex fori* because the tort has no connection at all with Singapore,[82] but any subsequent inherent indeterminacy in the search for the applicable law may bring back the relevance of the *lex fori*.[83] In circumstances where the relevant connecting factors are spread across several states *including Singapore* (and assuming that Singapore is the most appropriate forum or chosen forum to hear the dispute), it is submitted that the courts may also apply the "flexible exception" into its analysis: in doing so, the courts are bound by a default rule which modifies the proper law analysis by eschewing unfairness and injustice arising from a rigid application of the "double actionability rule" (that is, the *lex fori* and whatever the *lex loci delicti* may generally be).[84] The default rule in *Solomon Lew*, which conceives that factual indeterminacy (in the context of a disputed relationship that may or may not cross a *contractual* threshold) may provide a reason for the courts to abandon the usual proper law analysis and proceed directly to applying the *lex fori* instead, must be subordinate to the "flexible exception" analysis, a specific rule that is applicable in the context of cross-border tort litigation in Singapore.

32 Here, it bears emphasis that the default rule in *Solomon Lew* is to be applied exceptionally, when the three-stage *JIO Minerals* test leads to

78 That is, the place where the tort was, in fact, committed.

79 *Cf Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [66].

80 [2007] 1 SLR(R) 377.

81 See *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [136]–[137]. In this case, from the reported judgment it appears that the possible *lex loci delicti* spans across Norwegian and German law, but it was clear, in any event, that Singapore law was not applicable at all. Hence, the Court of Appeal ruled that the Singapore courts cannot be said to be a more appropriate forum to hear the dispute and set aside service of proceedings issued by the Singapore High Court to hear the case.

82 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [57].

83 *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's Rep 475 at [17]; Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172 at 187–188, para 21.

84 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [56]–[66]; and *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [62].

factual indeterminacy. In this way, undesirable forum shopping incentives are diminished, as the Singapore court is not bound to apply the *lex fori* in all circumstances, especially in this context where a determination of whether a disputed international business relationship has indeed been crystallised in contract is crucial. The unique or idiosyncratic features of Singapore contract law,[85] which may lead to disadvantages to the defendant party who is left with no choice but to defend a suit filed first-in-time by the plaintiff in the Singapore court, would be less of a factor when parties choose to litigate in Singapore. It is commendable that in an abundance of caution, the SICC took pains to consider in *obiter dicta* if the disputed contract were validly constituted under both Singapore and Thai contract law;[86] even though the court ruled that Singapore law is to apply; such an examination in a rendered court judgment is strictly unnecessary.

C. Clarification over notion of "putative contract" and "putative proper law"

33 Finally, it is submitted that it would have been desirable for the SICC to have taken the opportunity to provide some clarification over

85 Take the following (and interesting) precedent in Singapore contract law on contract formation for instance, from the case of *Oei Hong Leong v Chew Hua Seng* [2020] SGHC 39. In that case, the High Court found that a *signed* note containing obligations between two experienced businessmen for one to procure a purchaser of shares held by the other at a stated price one month from the date of the drafting of that note in exchange for an amicable resolution of an ongoing dispute had no enforceable contractual content, for a number of reasons. The court, when ruling that it did not find any demonstration of an intention to create legal relations between the experienced businessmen, thought (at [54]):

> Had the [note] been meant to be legally binding, as commercial men, they would have instructed their lawyers to draft a legal document to capture their obligations accurately. But they did not do so. They considered the [note], drafted by a layperson, to be adequate precisely because it *did not* hold a legal function. It is [furthermore] important to reiterate the context of the 16 October Meeting [when the note was drafted], which was a gathering for [the businessmen in dispute] to resolve their differences. Against this backdrop [of a casual, friendly setting], it is plausible that the pair may have wanted to use the [note] as a symbolic gesture, evidencing their reconciliation. This also explains why they both signed the [note] and made [a close relative] witness this.

This precedent in Singapore law (which is, at the time of writing, subject to appeal) may be exploited by a party hoping to avoid obligations recorded in a *signed* document, if they were to first lodge their suit in the Singapore courts and the *lex fori* would apply in all circumstances where the fundamental existence of an international business contractual relationship is challenged in court.

86 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [249]–[275].

the notion of a "putative contract",[87] leading to the determination of a "putative proper law". As this article has argued above, the notion of a "putative contract" is probably an overstated or exaggerated problem. This was a missed opportunity to put the controversy to rest.

VI. Conclusion

34 The SICC's judgment in *Solomon Lew* is noteworthy as it heralds a modest development in Singapore private international law, especially with respect to the not uncommon issue of disputes over cross-border contracts where its existence is challenged. This case represents one of the handful of Singapore precedents which directly addresses the intellectually-challenging conundrum where both the governing law and the existence of the underlying contract are in dispute. In this context, the SICC has articulated a default choice of law position – the *lex fori* – where it is impossible to objectively identify factually the law parties would have chosen. Aside from litigation over whether substantive cross-border contractual agreements have been concluded under the relevant law, *Solomon Lew* could be a useful precedent to consider in future when the existence of forum selection clauses (for instance, choice of court and arbitration agreements) is in dispute:[88] such challenges in court have become fairly common in recent times.[89] As Singapore has been slow to legislate to regulate the law applicable to contractual obligations in cross-border contracts, the Singapore courts must rely on the common law for guidance.[90] Subject to legislative intervention or any possible modifications on appeal, it is believed that *Solomon Lew* will define how the law applicable to contractual obligations (where its existence is challenged) is determined by the Singapore courts in the years to come.

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87 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [163].

88 *Cf* Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306.

89 See *Enka Insaat Ve Sanayi AS v OOO* "*Insurance Co Chubb*" [2020] EWCA Civ 574 at [69] *ff*.

90 *Cf Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [66].