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Legislation Comment

SERVICE OUT UNDER THE NEW RULES OF COURT

The new Rules of Court 2021 seek to provide a more accessible and efficient justice system. The extensiveness of the overhaul, however, brings with it as much unfamiliarity as excitement. This legislation comment examines the changes in the provisions governing service out of jurisdiction and argues that the textual changes also effect substantive changes to how the law is applied. This comment also explores the related issues on the grant of Mareva injunctions in aid of foreign proceedings under the new Rules of Court 2021.

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I. Introduction

1 The new Rules of Court 2021[2] ("ROC 2021") were gazetted on 1 December 2021, taking effect from 1 April 2022.[3] This overhaul of the Rules of Court 2014 ("ROC 2014") was the product of "blue-sky thinking, informed by international best practices … [reflecting an] earnest desire to modernise the civil justice landscape" as Chief Justice Sundaresh Menon recently stated.[4] It seeks to "transform the litigation process by

1 This legislation comment is written in the authors' personal capacities, and the opinions expressed herein are entirely the authors' own views.
2 S 914/2021.
3 Rules of Court 2021 (S 914/2021) O 1 r 1.
4 The Honourable the Chief Justice Sundaresh Menon, "Response by Chief Justice Sundaresh Menon", speech at Opening of the Legal Year 2022 (10 January 2022) <https://www.judiciary.gov.sg/docs/default-source/news-docs/oly-2022.pdf?sfvrsn=5cf4384b_2> (accessed 6 January 2022).

modernising it, and enhancing the efficiency and speed of adjudication, while maintaining legal costs at reasonable levels".[5]

2 Naturally, there has been much fanfare over the more unique features of the ROC 2021. Some examples include the "Ideals" contained in O 3 r 1 of the ROC 2021, the simplification in terminology, as well as the various changes in validity of originating processes. Exciting times lie ahead as we are promised a more accessible and efficient justice system.

3 But the extensiveness of the overhaul brings with it as much unfamiliarity as excitement. To help litigants and their lawyers navigate the new landscape, there will be a transitional learning phase from 1 April 2022 to 30 June 2022, during which the courts will be more sympathetic when dealing with non-compliance attributable to unfamiliarity.[6] As Menon CJ puts it, "[w]e must all approach the transitional learning phase in the spirit in which this is intended and do our best to understand, comply with and implement the new Rules, so that together we may achieve the ideals that animate them".[7]

4 This legislation comment seeks to contribute to the growing space of academic literature on the ROC 2021.[8] Its focus is on an important aspect of the civil procedure system – service out of jurisdiction. In a world where disputes often span across jurisdictions, the importance of the regime in relation to service out of jurisdiction cannot be overstated. Its importance becomes even more pronounced with the recent decision by the Singapore Government to accede to the Hague Service Convention and with the draft legislation in the pipeline.[9]

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5 "Media Release: New Rules of Court to transform and modernise Singapore's civil justice system" *Singapore Courts* (1 December 2021) <https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-new-rules-of-court-to-transform-and-modernise-singapore%27s-civil-justice-system> (accessed 6 January 2022).

6 The Honourable the Chief Justice Sundaresh Menon, "Response by Chief Justice Sundaresh Menon", speech at Opening of the Legal Year 2022 (10 January 2022) at para 17 <https://www.judiciary.gov.sg/docs/default-source/news-docs/oly-2022.pdf?sfvrsn=5cf4384b_2> (accessed 6 January 2022).

7 The Honourable the Chief Justice Sundaresh Menon, "Response by Chief Justice Sundaresh Menon", speech at Opening of the Legal Year 2022 (10 January 2022) at para 18 <https://www.judiciary.gov.sg/docs/default-source/news-docs/oly-2022.pdf?sfvrsn=5cf4384b_2> (accessed 6 January 2022).

8 A useful blog post has also been written on this, see: Adeline Chong, "New Civil Procedure Rules in Singapore" *ConflictofLaws.net* (14 December 2021) <https://conflictoflaws.net/2021/new-civil-procedure-rules-in-singapore/> (accessed 6 January 2022).

9 "Written Answer by Minister for Law, Mr K Shanmugam, to Parliamentary Question on the Possibility of Singapore Acceding to the Hague Service Convention" *Ministry of Law Singapore* (15 February 2022) <https://www.mlaw.gov.sg/news/parliamentary-

(cont'd on the next page)

5 The discussion on the service out of jurisdiction provisions will ensue in the following manner. This legislation comment first highlights the differences in the text of the ROC 2014 and of the ROC 2021. It then examines in detail the two grounds under which service out of jurisdiction is permitted, *ie*, the "Jurisdiction" limb and the "Appropriate Court" limb. Through this examination, this comment seeks to answer the question of whether the changes in the text of the provisions are only in form or in substance as well. Thereafter, this comment explores issues relating to the granting of a Mareva injunction ("MI") under the ROC 2021. It then concludes with an overall assessment of the new regime in relation to service out of jurisdiction.

II. The 2014 and 2021 provisions

6 In relation to service out of Singapore, the Civil Justice Commission specifically emphasised in its 2017 report (the "CJC Report") that O 8 of the ROC 2021 "largely retains the existing Order 11 with a simplification and rearrangement of its provisions".[10] The new provisions, however, appear at first glance to be vastly different from those in the ROC 2014, and the difference lies not only in the language used but also in the way the provisions are organised.

7 Under the ROC 2014, Order 11 governed service of process out of Singapore. In particular, O 11 r 1 stipulated that the "service of an originating process out of Singapore is permissible with the leave of the court" if the action falls within any of the 20 specific grounds listed.[11] Order 11 r 2 then stipulated the manner in which an application for the grant of leave under O 11 r 1 must be made; it also provided that such an application must be made by *ex parte* summons, supported by an affidavit stating, among other things:[12]

(a) the grounds on which the application is made;

(b) that in the deponent's belief the plaintiff has a good cause of action; and

(c) in what place or country the defendant is, or probably may be found.

speeches/2022-02-15-written-answer-by-minister-for-law-k-shanmugam-to-pq-on-possibility-of-singapore-acceding-to-the-hague-service-convention> (accessed 6 January 2022).

10 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairman: Justice Tay Yong Kwang) at p 24.

11 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 11 r 1(1)(*a*)–(*t*).

12 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 11 r 2(1)(*a*)–(*c*).

8 The requirements under O 11 are reflected in the test for valid service out of jurisdiction. As Andrew Ang SJ set out in *Allenger, Shiona v Pelletier, Olga*[13] ("*Allenger, Shiona*"):

> Where a foreign defendant is sued in Singapore, the issue of proper forum arises at two different stages of the proceedings. The first stage is when the plaintiff applies for leave to serve the defendant out of jurisdiction under O 11 r 1 of the Rules of Court. To obtain such leave, three requirements must be satisfied, namely that:
>
> (a) the plaintiff's claim comes within one of the heads of claim in O 11 r 1 of the [ROC 2014];
>
> (b) the plaintiff's claim has a sufficient degree of merit; and
>
> (c) Singapore must be the proper forum for the trial of the action.
>
> These requirements are well established and endorsed in various decisions including [*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500] at [26], *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 ('*Siemens AG*') and *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 ('*PT Gunung*') at [29].

9 Turning to the ROC 2021, O 8 r 1 provides as follows:

> **Service out of Singapore with Court's approval (O. 8, r. 1)**
>
> 1.—(1) An originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action.
>
> (2) To obtain the Court's approval, the claimant must apply to the Court by summons without notice and supported by affidavit which must state —
>
> (*a*) why the Court has the jurisdiction or is the appropriate court to hear the action;
>
> (*b*) in which country or place the defendant is, or probably may be found; and
>
> (*c*) whether the validity of the originating process needs to be extended.
>
> (3) The Court's approval is not required if service out of Singapore is allowed under a contract between the parties.
>
> (4) The Court's approval is not required for service of court documents other than the originating process if the Court's approval has been granted for service of the originating process out of Singapore.

13 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [114].

10 For ease of comparison, the ROC 2021 also included a Table of Derivations. The Table shows that both O 11 rr 1 and 2 of the ROC 2014 are fully encapsulated within O 8 r 1 of the ROC 2021:

Rule heading	*Rule*	*Rules of Court (2014 Revised Edition)*
ORDER 8 SERVICE OUT OF SINGAPORE		
Service out of Singapore with Court's approval	1(1)	O. 11, r. 1
	1(2)	O. 11, r. 2
	1(3)	New
	1(4)	O. 11, r. 8(1)

11 Immediately apparent is the difference in the language between O 11 rr 1 and 2 of the ROC 2014 and O 8 r 1 of the ROC 2021. There is neither any mention of the O 11 r 1 ROC 2014 grounds nor the O 11 r 2 ROC 2014 requirement that a good cause of action is required. Under O 8 r 1 of the ROC 2021, the key test is that leave for service out of jurisdiction may now be granted where the court "has the jurisdiction or is the appropriate court to hear the action".[14]

12 What were once fairly lengthy provisions on service out of jurisdiction are now reduced to just four short sub-paragraphs under O 8 r 1 of the ROC 2021.[15] This raises some important questions. First, are the changes as drastic as they appear to be? Secondly, what does it mean when a court "has jurisdiction" under O 8 r 1(1) of the ROC 2021 (what was referred to above as the "Jurisdiction" limb)? Thirdly, what does it mean to be the "appropriate court to hear the action" under O 8 r 1(1) of the ROC 2021 (the "Appropriate Court" limb)?

III. The "Jurisdiction" limb

13 It is well established that the jurisdiction of the Singapore courts is territorial in nature; and such jurisdiction over a foreign defendant arises where that defendant has consented, or been validly served with an originating process out of jurisdiction.[16] When taken purely at face value, the test enumerated above in O 8 r 1 of the ROC 2021 appears to give rise

14 Rules of Court 2021 (S 914/2021) O 8 r 1.
15 See above at para 9.
16 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26].

to a certain circuity in logic: that leave would be granted for service out of jurisdiction where the court *already* possesses jurisdiction – all in an attempt to establish that self-same jurisdiction of the court.[17]

14 While this is not explicitly addressed in the ROC 2021 or the Supreme Court Practice Directions 2021 ("SCPD 2021"), the above interpretation could not have been what the drafters had intended. The correct approach then, is as described by Professor Adeline Chong as follows:[18]

> There will be two alternative grounds of service out: either the Singapore court 'has the jurisdiction' to hear the action or 'is the appropriate court' to hear the action. The first ground of service out presumably covers situations such as where the Singapore court is the chosen court in accordance with the Choice of Court Agreements Act 2016, which enacts the Hague Convention on Choice of Court Agreements into Singapore law. …

15 Broadly, s 11(1) of the Choice of Court Agreements Act 2016[19] ("CCAA 2016") provides that "[a] Singapore court, designated in an exclusive choice of court agreement for the purposes of deciding a dispute, has jurisdiction to decide the dispute, unless the agreement is null and void under the law of Singapore". Section 3(1)(*b*) defines an exclusive choice of court agreement as an agreement that "designates, for the purpose of deciding any dispute that arises or may arise in connection with a particular legal relationship, the courts, or one or more specific courts, of one Contracting State to the exclusion of the jurisdiction of any other court".[20]

16 As such, if the Singapore courts are designated in an exclusive choice of court agreement under the CCAA 2016 (and assuming other requirements are satisfied), the Singapore courts *have jurisdiction* and in fact, under s 11(2) of the CCAA 2016, "*cannot decline* to exercise jurisdiction on the ground that the dispute should be decided in a court of another State" [emphasis added]. Professor Chong's interpretation is

17 Another situation to consider is where a defendant had submitted to the jurisdiction of the Singapore courts. In such situations, the court would be seized with jurisdiction without the need for service out. As will be explained below, however, such service should not be dispensed with as it serves a critical function of providing notice to the defendant.

18 Adeline Chong, "New Civil Procedure Rules in Singapore" *ConflictofLaws.net* (14 December 2021) <https://conflictoflaws.net/2021/new-civil-procedure-rules-in-singapore/> (accessed 6 January 2022).

19 2020 Rev Ed.

20 For completeness, s 3(2) of the CCAA 2016 provides that a choice of court agreement that designates the courts of *one* Contracting State *without* the exclusion of the jurisdiction of any other court would be deemed as an exclusive choice of court agreement, unless the parties to the agreement expressly provide otherwise.

therefore an eminently sensible one that resolves the apparent circuity in logic: the Singapore courts have jurisdiction by virtue of the CCAA 2016 and jurisdiction is not dependent on the valid service of an originating process out of jurisdiction. Service is needed only to give notice of the claim to the defendant.

17 That the Singapore courts cannot decline to exercise jurisdiction under s 11(2) of the CCAA 2016 is reflected in the SCPD 2021. The information that should be included in the supporting affidavit, as found in para 63(2) of the SCPD 2021 (set out below at para 19) apply only *for the purposes of the "Appropriate Court" limb*. Presumably, however, the claimant must still show a "good arguable case" that an exclusive choice of court agreement under the CCAA 2016 exists and governs the dispute in question.[21]

18 The above interpretation raises two related questions. Firstly, does the "Jurisdiction" limb apply to exclusive choice of court agreements that *do not* fall within the scope of the CCAA 2016?[22] Secondly, does the "Jurisdiction" limb apply to non-exclusive choice of court agreements? It is posited that both these agreements do not fall within the "Jurisdiction" limb for the simple reason that s 11(1) of the CCAA 2016 does not apply to such agreements. In the absence of any legislation providing that the Singapore courts *have* jurisdiction, jurisdiction can only be established by consent or by valid service on the defendant.[23] This means that it is instead the "Appropriate Court" limb that applies to such agreements (see below at para 26), and it is to that limb that the analysis now turns.

IV. The "Appropriate Court" limb

19 In relation to the second ground of jurisdiction, it is immediately apparent that the familiar grounds under O 11 r 1 of the ROC 2014 are no longer present in O 8 r 1 of the ROC 2021. Instead, these grounds can now be found by first referring to para 63(2) of the SCPD 2021 which provides as follows:[24]

21 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [32]–[34].

22 Not all exclusive choice of court agreements fall within the scope of the CCAA 2016. For instance, ss 4 and 8 of the CCAA 2016 provide that the case must be an "international case" as defined under the CCAA 2016. Section 9 of the CCAA 2016 also stipulates certain matters that fall outside the scope of the CCAA 2016.

23 See *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26].

24 Supreme Court Practice Directions 2021 at p 72.

> **Application for service out of Singapore of originating process or other court document**
>
> …
>
> (2) For the purposes of showing why the Court is the appropriate court to hear the action, the claimant should include in the supporting affidavit any relevant information showing that:
>
> (*a*) there is a good arguable case that there is sufficient nexus to Singapore;
>
> (*b*) Singapore is the *forum conveniens*; and
>
> (*c*) there is a serious question to be tried on the merits of the claim.

Paragraph 63(3) of the SCPD 2021 then provides that, for the purposes of para 63(2)(a) of the SCPD 2021, "a claimant should refer to any of the 20 non-exhaustive list of factors"[25] contained therein in the supporting affidavit. These 20 factors essentially mirror those found in O 11 r 1 of the ROC 2014.

20 It is critical that the 20 factors listed in para 63(3) of the SCPD 2021 are now explicitly stated to be *non-exhaustive* in nature. In contrast, where these grounds could previously be found under O 11 r 1 of the ROC 2014, the case law had arguably treated them as exhaustive such that a claim "*must* come within the scope of one or more" of the O 11 r 1 grounds.[26] This difference has also been emphasised in the CJC Report, where it was observed that O 8 r 1 only prescribes criteria instead of "enumerating all the permissible cases" such that it is now:[27]

> … unnecessary for a claimant [to] scrutinise the long list of permissible cases set out in the [ROC 2014] in the hope of fitting into one or more descriptions. It also avoids the possibility that a particular category of cases which could and should be heard in Singapore is actually not in the list.

21 The more permissive language used in para 63(2)(*a*) of the SCPD 2021 presents the opportunity for the *expansion* of the grounds under O 11 r 1 of the ROC 2014. Two examples come to mind.[28] First, there is uncertainty as to whether the term "contract" in O 11 r 1(*d*) of

25 Supreme Court Practice Directions 2021 at pp 72–75.

26 *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007; *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26].

27 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairman: Justice Tay Yong Kwang) at p 16.

28 It is noted that a further excellent example has been raised by Professor Chong in relation to the Court of Appeal's interpretation of O 11 r 1(*n*) of the ROC 2014 in *Li Shengwu v Attorney-General* [2019] 1 SLR 1081.

the ROC 2014 is limited to that as defined in common law, or whether it can be widened to contracts enforceable under other systems of law. As Professor Yeo Tiong Min notes, a "classic example" is an agreement without consideration, that is enforceable in many other jurisdictions, although not so in Singapore.[29] The expansion of existing grounds would allow such contracts to fall within O 11 r 1(*d*) of the ROC 2014 (mirrored in para 63(3)(*d*) of the SCPD 2021).[30] Another uncertainty in this regard is whether a claim for a declaration that a contract does not exist falls under O 11 r 1(*d*) of the ROC 2014.[31] Such a claim is expressly stipulated in the UK Civil Procedure Rules Practice Direction 6B.[32] The more permissive language used in the SCPD 2021 arguably leads to the addition of such grounds.

22 Secondly, the tortious gateway found in O 11 r 1(*f*) of the ROC 2014 may also be substantially widened as a result of the new language used. An example of possible expansion to O 11 r 1(*f*)(i) of the ROC 2014[33] is found in the attempt made in *IM Skaugen SE v MAN Diesel & Turbo SE*[34] ("*IM Skaugen*"). In that case, the first plaintiff sourced six marine engines from the MAN group in 2000 and 2001, and it was alleged that in promoting the model of the engine, the defendants had negligently or fraudulently misrepresented the specifications of the engines.[35] Specifically on O 11 r 1(*f*)(i) of the ROC 2014, the plaintiffs had contended before the assistant registrar that the words "tort … constituted … by an act or omission in Singapore" were wide enough to encompass the acts or omissions by the victim of the tort – on the facts, being that their own acts of reliance constituted the tort of misrepresentation.[36] Coomaraswamy J, in *obiter*, agreed with the assistant registrar that the relevant acts or omissions must be that of the defendant;[37] this being justified on the basis that as a matter of fairness, it should be the defendant's own connections that ground the nexus for

29 Yeo Tiong Min, *Commercial Conflict of Laws in Singapore* (Academy Publishing, 2nd Ed, 2022) ch 2, at Annex.
30 Supreme Court Practice Directions 2021 at p 73.
31 Adeline Chong, "New Civil Procedure Rules in Singapore" *ConflictofLaws.net* (14 December 2021) <https://conflictoflaws.net/2021/new-civil-procedure-rules-in-singapore/> (accessed 6 January 2022).
32 Adeline Chong, "New Civil Procedure Rules in Singapore" *ConflictofLaws.net* (14 December 2021) <https://conflictoflaws.net/2021/new-civil-procedure-rules-in-singapore/> (accessed 6 January 2022).
33 The full provision provides: "the claim is founded on a tort, wherever committed, which is constituted, at least in part, by an act or omission occurring in Singapore".
34 [2018] SGHC 123.
35 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [2].
36 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [134].
37 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [135].

in personam jurisdiction.[38] It remains to be seen, however, whether such a "defendant-centric"[39] approach will be maintained, particularly with the claimant-centric language used in the CJC Report.[40] Moreover as Professor Yeo also observed, there may be cases where the plaintiff's acts were induced as targeted by the defendant[41] – a possibility that may now be expanded to allow claims to be brought under O 11 r 1(*f*)(i).

23 Such an expansionary approach also strengthens the position decided in *IM Skaugen*, where it was held that indirect damages suffered also fell within O 11 r 1(*f*)(ii) of the ROC 2014.[42] A similar point was recently decided by the Supreme Court of the UK ("UKSC") in *FS Cairo v Brownlie*[43] ("*Brownlie II*"). In *Brownlie II*, Lady Brownlie and Sir Ian Brownlie were on holiday in Egypt together with their family in 2010. In advance of the holiday, Lady Brownlie had booked, with the hotel's concierge, a tour involving a guide excursion to Fayoum in a chauffeur-driven car. Unfortunately, during the journey, the vehicle crashed. Sir Ian and his daughter were killed, while Lady Brownlie and the two grandchildren were seriously injured. In the latest round of litigation, the UKSC was asked to consider whether the jurisdictional gateway for claim in tort had been satisfied, as Lady Brownlie's claim was based on indirect or consequential losses flowing from the accident.[44] In agreeing with Lady Brownlie, the UKSC (Legatt JSC dissenting) held that the gateway of "damage … sustained … within the jurisdiction" would be satisfied so long as *significant* damage, direct or indirect, was sustained within the jurisdiction. It is also interesting that the majority had observed that with the "safety valve" of *forum conveniens*, there was "no need to adopt an

38 Reference was made by the assistant registrar to the English Court of Appeal's decision in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 437G; see *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [97].

39 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [99], referring also to *ABCI v Banque Franco-Tunisienne* [2003] 2 Lloyd's Rep 146 at [41].

40 Yeo Tiong Min, *Commercial Conflict of Laws in Singapore* (Academy Publishing, 2nd Ed, 2022) ch 2, at Annex; Prof Yeo has also observed that this provision lacked the express reference to acts of others found in O 11 r 1(*o*). While that point is forceful under the ROC 2014, the same concerns abound now, given that one would not strictly need to refer to the descriptions in the rules.

41 Yeo Tiong Min, *Commercial Conflict of Laws in Singapore* (Academy Publishing, 2nd Ed, 2022) ch 2, at Annex.

42 The full provision provides: "the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring".

43 *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45.

44 This included damages for personal injury in her own right, in her capacity as executrix of her husband's estate, and a claim for damages for bereavement and loss of dependency: *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at [27].

unnaturally restrictive reading of the domestic gateways".[45] This applies with greater force in relation to O 11 r 1(*f*)(ii) of the ROC 2014, where the wording expressly speaks of the claim being "partly founded on" damage suffered in Singapore, as Coomaraswamy J also observed.[46] Additionally, it should be noted that *IM Skaugen* does not appear to place a requirement of significant damage on such tortious claims in Singapore – and indeed this should not be necessary given the permissive wording adopted in the ROC 2021.

24 Moving beyond the expansion of the existing grounds, the further implication from the language in the ROC 2021 and SCPD 2021 would be that claimants would be able to bring their claims based on *new* jurisdictional gateways. In this regard, the commentary in *Singapore Civil Procedure* states that where there is any uncertainty as to whether the case falls within the ambit of Order 11, the uncertainty is generally resolved in favour of the foreign party.[47] It is posited that this rule would no longer apply as strictly, in light of the more permissive language used in the SCPD 2021. As long as there is no principled objection against the reliance on a certain ground, uncertainty may in fact be resolved in favour of the claimant. This, however, should be done in an incremental approach, to prevent an overexpansion, which could lead to uncertainty in the law. It should also be borne in mind that the overarching enquiry still remains whether there is a sufficient nexus to Singapore; and that there must be a link between the putative defendant and Singapore, in order to justify the defendant being called to defend a claim in Singapore.[48]

25 The authors also make the general observation that under O 11 r 1 of the ROC 2014, a plaintiff must rely on one or more of the grounds contained therein when making an *ex parte* application for leave to serve the originating process out of Singapore. However, he may be allowed to rely on an alternative ground in an *inter partes* application by the defendant to set aside service of the originating process, even if that ground was not relied upon in the initial *ex parte* application, subject to the court's overarching power to prevent abuse of process.[49] The rationale behind allowing a plaintiff to do so is to prevent wastage of time and

45 *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at [77].
46 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [147].
47 *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 11/1/7.
48 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 437.
49 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [183]–[197]; *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21 at [7]–[20]; *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [80]–[88].

costs. It is observed that this rationale would apply even more strongly in light of the Ideals contained in O 3 r 1 of the ROC 2021.

26 Finally, we return to examine how the choice of court agreements stated above at para 15 interact with the "Appropriate Court" limb. Such agreements may fall under O 11 r 1(*d*)(iv) of the ROC 2014 (mirrored in para 63(3)(*d*) of the SCPD 2021)[50] as they are contracts which contain a term to the effect that the Singapore court will have jurisdiction to hear and determine any action in respect of the contract. Such agreements would also fall under O 11 r 1(*r*) of the ROC 2014 (mirrored in para 63(3)(*r*) of the SCPD 2021),[51] which relates to claims in respect of matters in which the defendant has submitted or agreed to submit to the jurisdiction of the court. The authorities in this regard are well established.[52] Broadly, if Singapore was the forum named in the choice of court agreement, the defendant must show "strong cause" why he should not be bound to his contractual agreement to submit.[53] It will be difficult for him to do so unless he can point to factors which were not foreseeable at the time of contracting; the usual connecting factors in the *Spiliada*[54] analysis will generally not suffice.[55] Although these requirements are not expressly stated in the ROC 2021 or the SCPD 2021 (unlike the requirements for valid service outside of jurisdiction established in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* ("*Zoom Communications*")),[56] there is no reason why they should not continue to apply. After all, the ROC 2021 and SCPD 2021 do not purport to contain all the requirements and case law should continue to supplement the regime (as it did under the ROC 2014).

V. The requirements for the granting of a Mareva injunction in aid of foreign proceedings

27 The analysis thus far has centred on the service of originating processes out of Singapore for an action *in Singapore*. Moving beyond that, the new provisions in the ROC 2021 also raise an interesting issue

50 Supreme Court Practice Directions 2021 at p 73.
51 Supreme Court Practice Directions 2021 at p 75.
52 See generally, *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at paras 11/1/13 and 11/1/27 and Halsbury's Laws of Singapore vol 6(2) (LexisNexis, 2021) at paras 75.109–75.122.
53 See *Spiliada Maritime Corp v Casulex Ltd (The Spiliada)* [1987] AC 460.
54 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [88]; *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [112].
55 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [88]; *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [112].
56 Supreme Court Practice Directions 2021 at para 63(2).

in relation to the grant of an MI and the requirement of *forum conveniens* in the context of an MI in aid of *foreign court proceedings*.

28 In the seminal case of *Bi Xiaoqiong v China Medical Technologies, Inc*[57] ("*Bi Xiaoqiong*"), the Court of Appeal held at [62] that the Singapore courts have the power to grant of an MI in aid of foreign proceedings. The Court of Appeal then explained the two requirements that need to be satisfied. First, the court must have *in personam* jurisdiction over the defendant. Second, the plaintiff must have a reasonable accrued cause of action against the defendant in Singapore.

29 On the first requirement in *Bi Xiaoqiong*, it is well established that the Singapore courts must be the proper forum, *ie*, *forum conveniens*, in order for the Singapore courts to assume *in personam* jurisdiction over the foreign defendant.[58] But where an MI is sought in support of foreign proceedings, this must necessarily mean that in *many if not most* cases, the foreign court, and not the Singapore court, is *forum conveniens*. In such cases, the *forum conveniens* requirement of the *Zoom Communications* test will not be satisfied, and a plaintiff will find it impossible to obtain leave to serve the originating process in the first place.

30 This difficulty was identified by Ang SJ in the recent decision of *Allenger, Shiona*. There, the defendants and related parties had engaged in a series of suspicious activities; this led to the plaintiff commencing proceedings in the Cayman Islands and obtaining a worldwide MI there. The plaintiff also sought an MI in Singapore to prevent the defendants from removing their Singapore assets, which Ang SJ granted. The defendants then challenged the jurisdiction of the Singapore court and sought to set aside the MI. At the hearing, it was accepted by both parties that Singapore was *forum non conveniens*. Ang SJ found the plaintiff's argument that the *forum conveniens* requirements should be abolished where MI is sought in aid of foreign proceedings to be "eminently persuasive", in particular where "transnational fraud is alleged and the principles of territoriality are … being exploited by the alleged fraudster".[59] Regardless, Ang SJ noted that he was bound by the pronouncements of the Court of Appeal in *Bi Xiaoqiong* and declined to abolish the requirement of *forum conveniens*.[60]

31 It should be noted that on a closer examination of *Bi Xiaoqiong*, the Court of Appeal did not explicitly say that the Singapore courts must

57 [2019] 2 SLR 595.
58 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26].
59 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [142].
60 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [146].

be *forum conveniens*; all that was said was that there must be *in personam* jurisdiction over the defendant. Ang SJ in *Allenger, Shiona* appeared to have recognised this as he held that "[t]hese pronouncements in *Bi Xiaoqiong* therefore make clear that before any inquiry on injunction can be undertaken, the Singapore court must already possess jurisdiction over the defendant. *As a consequence, Singapore would already need to be forum conveniens before a Mareva injunction can be granted*"[61] [emphasis added].

32 The need for *forum conveniens* in this context stems from a *judicial interpretation* of O 11 r 2(2) ROC 2014, that the case is a "proper one for service", as recognised by Woo Bih Li J in *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun*[62] ("*PT Gunung*"). That case also concerned the granting of an MI in aid of foreign court proceedings and Woo J upheld the requirements of *forum conveniens*. However, Woo J also acknowledged the merits of an MI in aid of foreign proceedings even where no *in personam* jurisdiction exists but preferred to leave it to a higher court or legislature.[63]

33 In light of the ROC 2021's extensive changes to the service out of jurisdiction provisions, the question that arises is whether these changes open the door for the abolition of the *forum conveniens* requirement in the specific context of granting an MI in aid of foreign proceedings. On the wording of ROC 2021, the drafters have specifically removed the wording that the "case is a proper one for service" and introduced the broader inquiry whether the court is the "appropriate court" to hear the action.[64] The changes in the ROC 2021 therefore present an opportunity to argue that the *forum conveniens* requirement is no longer necessary in such instances, for several reasons. First, the change opens the pathway for the courts to consider afresh the requirements for service out of jurisdiction. Given that it has been accepted that the *forum conveniens* requirement is a *judicial interpretation* of O 11 r 2(2) of the ROC 2014, the ROC 2021 changes would, strictly speaking, mean that the court is no longer bound to follow such an interpretation. It is also noted that in the context of an MI in support of foreign proceedings, there has never been a case interpreting the old requirement that service must be a "proper one".[65]

61 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [146].
62 [2018] 4 SLR 1420 at [30].
63 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [54].
64 See above at section II.
65 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [138].

34 Secondly, the courts themselves have arguably signalled that the old requirements need no longer be followed. The *forum conveniens* requirement, amongst others, has specifically been placed in the SCPD 2021. While the SCPD 2021 itself does state that it is to be read with the ROC 2021, practice directions are, by definition, only intended to "regulat[e] court practice and procedure".[66] This much is seen from the actual wording of para 63(2) of the SCPD 2021, that states that parties *should* include *in the supporting affidavit* any relevant information – as opposed to requiring them to definitively show these points as part of their case. In any case, the practice directions do not have the force of law,[67] and *can* be departed from.[68]

35 Thirdly, the "appropriate court" inquiry is intended (in principle) to be a much broader, all-encompassing inquiry. This intention is expressed in the 2017 report of the Civil Justice Commission where it was observed that O 8 r 1 only prescribes criteria instead of "enumerating all the permissible cases" such that it is now:[69]

> … unnecessary for a claimant [to] scrutinise the long list of permissible cases set out in the [ROC 2014] in the hope of fitting into one or more descriptions. It also avoids the possibility that a particular category of cases which could and should be heard in Singapore is actually not in the list.

This is also reflected in the fact that the 20 jurisdictional gateways previously found in O 11 r 1(1) of the ROC 2014 are now stated to be *non-exhaustive* in nature. While this is not stated in reference to the *forum conveniens* requirement, the same reasoning should apply given that the "appropriate court" remains the overarching inquiry.

36 Fourthly, the words have now shifted from the "properness" (of the case or the court) to the "appropriateness", which would suggest a more policy-based approach. In this regard, the policy arguments that were made in *Allenger, Shiona* (and which Ang SJ agreed with) can be made as follows:

> (a) The court's approach for service out of jurisdiction was based on the traditional notion that a foreigner should not be

66 "Supreme Court Practice Directions 2013" *Supreme Court Singapore* <https://epd.supremecourt.gov.sg/> (accessed 6 January 2022).

67 *BNP Paribas v Polynesia Timber Services Pte Ltd* [2002] 1 SLR(R) 539 at [37]; *Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR(R) 18 at [29] and [30]; *Tan Hup Yuan Patrick v The Griffin Coal Mining Co Pty Ltd* [2014] 4 SLR 221 at [15].

68 See for instance, *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd* [2001] 2 SLR(R) 246.

69 Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairman: Justice Tay Yong Kwang) at p 16.

inconvenienced by having to defend his rights in a foreign country. These considerations play lesser role in the interconnected and borderless world of today, and particularly where effort is made to disperse assets across jurisdictions.

(b) The *forum conveniens* requirement was developed to constrain judicial discretion in the context of selecting between competing jurisdictions in the interests of comity. Where an MI is sought in *aid* of foreign proceedings, comity would dictate a more permissive approach.

(c) The gridlock caused by the *forum conveniens* requirement – where a defendant's assets are in country A so that court B cannot reach them, but he is in country B so that court A cannot reach him – could be solved. This would prevent "instances of cross-border fraud and easy dissipation of assets".[70]

(d) A move towards removing the *forum conveniens* requirement would bring Singapore in line with other common law jurisdictions such as Australia and the United Kingdom that have sought to deal with the legal quandary above.

37 Finally, the wording of an "appropriate court" brings the ROC in line with s 12A(3) of the International Arbitration Act 1994[71] ("IAA") where the court may refuse to make an order if the fact that the arbitration is outside Singapore makes it "inappropriate to make the order". Doing away with the *forum conveniens* requirement would also substantively bring the ROC 2021 in line with the IAA where judicial remedies may be sought in aid of foreign arbitrations. Indeed, there would be "little sense if the courts are less equipped than arbitral tribunals to prevent injustices occasioned by international fraud", as Ang SJ observed in *Allenger, Shiona*.[72]

VI. Conclusion

38 The new ROC 2021 brings with it extensive changes, and this legislation comment has sought to point out how some of these changes allow for the interpretation and re-interpretation of new and old requirements alike. It remains to be seen which direction the new ROC 2021 will take and the road ahead would no doubt be unfamiliar and at times daunting. While the courts appear to have wider discretion to be seized of jurisdiction today, this expansion brings with it more

70 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [151].
71 2020 Rev Ed.
72 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [153].

uncertainty that will only be resolved when a respectable body of case law is eventually built up. In the meantime, it is hoped that this comment goes some way in ameliorating the difficulties faced when navigating the unfamiliar landscape in the area of service out of jurisdiction.