

*Catch Me If You Can: Claiming jurisdiction over an overseas defendant*  
*Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11

**I. Summary of Facts**

The appellant, Shanghai Turbo Enterprises Ltd (“**Shanghai Turbo**”), is a Singapore-listed company that owns Hong Kong-incorporated Best Success (Hong Kong) Ltd, which in turn owns China-incorporated Changzhou 3D Technological Complete Set Equipment Ltd (“**CZ3D**”). The respondent, Liu Ming (“**Liu**”), owned approximately 30% of the shares in Shanghai Turbo. He was also a director of all three companies, and held other management positions there. In April 2017, Shanghai Turbo fired Liu from all his positions in the companies, allegedly because of declining levels of profit under his management. Subsequently, Shanghai Turbo filed a suit against Liu for breaching his service agreement (“**the Agreement**”) with Shanghai Turbo in several ways, including disclosing confidential information to a competitor, and diverting business away from CZ3D.

The complication for Shanghai Turbo was that Liu was a Chinese citizen who resided in Changzhou, China. Generally, the court can only adjudicate on disputes between parties if it has *jurisdiction* (or authority to hear and determine the matter) over them. However, Singapore courts generally do not have jurisdiction over parties, unless those parties voluntarily submit to the court’s jurisdiction or have been served with the necessary originating processes. Furthermore, where a defending party resides outside of Singapore, the initiating party has to go through the added step of obtaining the court’s permission to serve the originating processes overseas.

Shanghai Turbo applied for leave to serve a writ of summons<sup>1</sup> and other papers “out of jurisdiction” on Liu, under Order 11 rule 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Under this rule, the court’s leave to serve originating processes (such as a writ of summons) overseas may be granted only if Singapore is the proper forum to hear the dispute, and the claim concerns, amongst other things:

- a contract explicitly or implicitly governed by Singapore law (Order 11 rule 1(d)(iii));
- a contract containing a term to the effect that the Singapore courts have jurisdiction to hear and determine any action in respect of the contract (Order 11 rule 1(d)(iv)); and/or
- matters which the defendant has submitted or agreed to submit to the jurisdiction of the Singapore courts (Order 11 rule 1(r)).

Shanghai Turbo relied on Clause 17 of the Agreement (“**Clause 17**”) to argue that the court should grant it permission to serve the writ of summons on Liu in China under Order 11 rule 1. Clause 17 provided that:

“This Agreement shall be governed by the laws of Singapore/or People’s Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People’s Republic of China.”

The first half of Clause 17, known as a *choice of law* clause, expresses the parties’ choice as to which law governs the contract. The second half of Clause 17, known as a *choice of jurisdiction* clause, expresses the parties’ choice as to which court will hear disputes concerning the contract. Shanghai Turbo relied on the first half of Clause 17 to argue that Singapore law governed the contract, and hence that the claim fell under Order 11 rule 1(d)(iii). It further relied on the second half of Clause 17 to argue that the parties had consented to the Singapore courts’ jurisdiction, and hence that the claim would also fall under Order 11 rules 1(d)(iv) and 1(r). Shanghai Turbo was eventually granted permission to serve the writ of summons overseas (“**the Service Order**”).

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<sup>1</sup> A writ of summons is a court document used to begin court proceedings in Singapore.

Shanghai Turbo also later obtained two interim injunctions:<sup>2</sup> one to prevent Liu from dealing with his assets in Singapore (which included his shares in Shanghai Turbo), and another to restrain Liu and two other Shanghai Turbo shareholders (“**Other Shareholders**”) from exercising their voting rights as shareholders of Shanghai Turbo (“**Voting Injunction**”). In response, the Other Shareholders sought a variation to the Voting Injunction (the “**Variation Application**”), purportedly to restrain Shanghai Turbo from (among other things) diluting the shareholding of any of its shareholders.

Liu supported the Other Shareholders’ Variation Application. He also asked the High Court (“**HC**”) to set aside the Service Order and the two injunctions, arguing that Chinese law governed the Agreement because Clause 17 was invalid and unenforceable, and that China was the more appropriate forum to hear the dispute.

## **II. HC Decision**

The HC set aside the Service Order. It found that there was a good arguable case that the Agreement was governed by Singapore law, such that the claim fell within Order 11 r 1(d)(iii). However, it found that Clause 17 in its entirety was invalid and unenforceable under Singapore law, and as such did not engage Order 11 r 1(d)(iv) or Order 11 r 1(r). The first half of Clause 17, which stated that the Agreement was governed by the laws of “Singapore/or People’s Republic of China”, was invalid as the proper law of a contract had to be ascertainable at the time the contract came into existence, and could not “float in suspense”. This invalid first half also could not be severed from the second half (“each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People’s Republic of China”), as the choice of jurisdiction was dependent on the choice of law, and there was no mechanism to choose between the Singapore and Chinese courts.

Despite finding that the claim fell under Order 11 r 1(d)(iii), the HC nevertheless decided that China, and not Singapore, was the more appropriate forum to hear the case. This was because, among other reasons: Liu and CZ3D were both based in China; the place of performance for Liu’s duties was China; the alleged breaches of the Agreement occurred in China; the witnesses were located in China; and there were related proceedings in China. Finally, the HC also found that Shanghai Turbo had not made full and frank disclosure of all material facts when applying for permission to serve the writ of summons on Liu. Both of these reasons justified the setting aside of the Service Order.

Since the Service Order was set aside, the Singapore courts had no jurisdiction over Liu, which in turn justified the HC setting aside Shanghai Turbo’s two interim injunctions as well.

## **III. CA Decision**

On appeal, the Court of Appeal (“**CA**”) restored the Service Order, as well as Shanghai Turbo’s injunctions. In its decision, the CA discussed the following issues:

- whether Liu had, through his actions, submitted to the Singapore courts’ jurisdiction;
- whether the Agreement was governed by Singapore law (Order 11 rule 1(d)(iii));
- whether Clause 17 constituted a submission to the jurisdiction of the Singapore courts (Order 11 rules 1(d)(iv) and 1(r));
- the effect of a submission to the non-exclusive jurisdiction of the Singapore courts; and
- whether Shanghai Turbo failed to make full and frank disclosure in its application for leave to serve out of jurisdiction.

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<sup>2</sup> An interim injunction is an interim court order compelling a party to do an act, or refrain from doing an act (as specified in the order), until a final decision on the case has been made.

*A. Whether Liu had, through his actions, submitted to the Singapore courts' jurisdiction*

In his affidavit supporting the Variation Application, Liu asserted that his participation in the application should not be taken as a submission to jurisdiction – it was merely necessary to stop Shanghai Turbo from diluting his shareholding and to protect his interests and rights. He also made express reservations of his right to challenge the Singapore court's jurisdiction over him. However, the CA held that an express reservation against submission to jurisdiction, in and of itself, was insufficient if a party had unequivocally demonstrated, through its conduct, a clear and consistent intention to submit to the Singapore court's jurisdiction. The CA found that Liu's conduct unequivocally signified his acceptance and invocation of the court's jurisdiction, and could not realistically be construed in any other way. This is because Liu had taken more than mere "neutral procedural step[s]" in this matter. The Variation Application was in effect an application for a new interim injunction against Shanghai Turbo. And Liu had supported the Variation Application even though he was not compelled to respond to or otherwise participate in it, since it was an application by the Other Shareholders against Shanghai Turbo. Liu had filed written submissions and made oral arguments in support of the Variation Application. Additionally, he even provided an undertaking as to damages when the Variation Application was granted.<sup>3</sup> Thus, the CA held that such conduct had nothing to do with attempting to discharge an injunction against him. Instead, it amounted to Liu's deliberate and knowing invocation of the court's jurisdiction, and an implied acceptance of the same.

*B. Whether the Agreement was governed by Singapore law (Order 11 rule 1(d)(iii))*

For a claim to fall under Order 11 rule 1(d)(iii), it must concern a contract explicitly or implicitly governed by Singapore law.

The CA agreed with the HC that Singapore law had the closest and most real connection to the Agreement. As such, the claim satisfied Order 11 rule 1(d)(iii). This was because the Agreement was entered into between Liu and Shanghai Turbo, rather than the actual income-generating company CZ3D, which suggested that this commercial arrangement was entered into deliberately. Liu was also obligated to serve under the direction of Shanghai Turbo's board, which itself had to comply with the rules and laws of the Singapore Stock Exchange ("SGX"), because Shanghai Turbo was based in Singapore and was listed on the SGX. Furthermore, pursuant to the Agreement, Liu was paid an amount in Singapore dollars equivalent to RMB220,000 every four months (in addition to his basic salary of RMB30,000). Additionally, the Agreement made express references to Singapore statutes, while no Chinese statutes were referred to in the Agreement.

While it was true that Liu was resident and working in China, this was counter-balanced by the fact that he entered into the Agreement with the Singapore-based Shanghai Turbo, instead of the China-based CZ3D. Though he attended three out of four board meetings in China every year, the venue of the meetings was not as significant as the fact that Shanghai Turbo was listed in Singapore and was subject to Singapore's listing rules and laws. Finally, though Liu was paid his basic salary in RMB in China and his bonus payments were based on a RMB-denominated amount, this was not significant since Liu was himself Chinese and this arrangement could have been made for consistency and ease of comparison and understanding. Of greater significance were the place and currency in which the bonus payments were to be made: in Singapore, in Singapore dollars.

*C. Whether Clause 17 constituted a submission to the jurisdiction of the Singapore courts*

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<sup>3</sup> When an interim injunction is granted, the party seeking the injunction (i.e. the applicant) is often required to give an undertaking as to damages. This undertaking requires the applicant to compensate the party against whom the injunction is sought for any losses suffered by such party, if the court later decides that the applicant was not in fact entitled to the injunction.

*(Order 11 rules 1(d)(iv) and 1(r))*

For a claim to fall under Order 11 rule 1(d)(iv), it must concern a contract with a term to the effect that the Singapore courts have jurisdiction to hear and determine any action arising from the contract. For a claim to fall under Order 11 rule 1(r), it must concern matters which the defendant has submitted or agreed to submit to the jurisdiction of the Singapore courts. Contrary to the HC, the CA found that through Clause 17, the Agreement engaged Order 11 rules 1(d)(iv) and 1(r).

The CA held that the law which governs a contract will also generally govern the jurisdiction clause in such contract. Since there was a good arguable case that Singapore law governed the Agreement (*see section B above*), the CA considered the effect of Clause 17 under Singapore law only.

As the parties did not dispute the HC's finding that the first half of Clause 17 was invalid, the CA analysed Clause 17 on that basis. The CA held that the second half of Clause 17 could (contrary to the HC's holding) be severed from the invalid first half. The CA found that nothing in Clause 17 made the choice of jurisdiction portion (the second half) parasitic upon the choice of law portion (the first half), such that the former must fall with the latter. As such, it was possible to give Clause 17 a sensible meaning by severing the first half of Clause 17.

The CA further held that the choice of jurisdiction portion of Clause 17 was not too ambiguous to be enforceable. The CA interpreted this part of Clause 17 to mean that the parties submitted to the jurisdiction of *both* the Singapore and Chinese courts. While it observed that “/or” normally carries a disjunctive meaning, it was clear from the Agreement as a whole that the parties were not very precise with their choice of words. The CA noted that the parties could have used this word because realistically the claim would only be pursued either in Singapore *or* China. The parties also probably intended their submission to extend to the non-exclusive jurisdiction of both venues. This made commercial sense because it accommodated the preferences of both parties: Mr Liu would probably favour China, while Shanghai Turbo would probably favour Singapore.

*D. The effect of a submission to the non-exclusive jurisdiction of the Singapore courts*

The CA held that the choice of jurisdiction portion of Clause 17 (“each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People’s Republic of China”) was a non-exclusive jurisdiction clause. These are contractual clauses that name a jurisdiction(s) to which the parties may agree to submit any dispute that fall within the scope of the clause, even though the named jurisdiction(s) is not the *only* jurisdiction(s) to which the parties may resort.

However, by agreeing to a non-exclusive jurisdiction clause, the parties have also agreed to waive any objections to having a claim brought in that named jurisdiction. This is because the word “submits” (which was also used in Clause 17) means that parties consent to the exercise of jurisdiction by the chosen courts and waive any objection otherwise. Thus, if a party brings a claim in the named jurisdiction(s), any challenge to that court’s exercise of jurisdiction – for example an application to set aside a court order granting the initial party permission to serve a writ of summons out of jurisdiction, or to suspend those proceedings in favour of proceedings in another jurisdiction – amounts to an attempt to be released from that non-exclusive jurisdiction clause. In order to be released from its obligations, the objecting party must show *strong cause* why the claim *should not* be tried in the named jurisdiction. It is only when a party seeks to institute proceedings in a forum *other than* the one named in the non-exclusive jurisdiction clause, that the objecting party may object (as Liu did) on the grounds that the other forum is not the more appropriate forum. And because Singapore was a named jurisdiction in Clause 17, the CA held that Liu had to show *strong cause* why he *should not* be bound to his contractual agreement to

submit.

Although the CA noted that the Agreement was freely negotiated between the parties, it declined to decide whether the same approach should be taken to a non-exclusive jurisdiction clause which was not freely negotiated.

#### Strong Cause

The CA listed certain factors that would constitute strong cause, including: where the evidence is located; whether the applicable law differs materially from Singapore law; the jurisdictions that each party is connected to; whether the initiating party genuinely desires trial in Singapore; and whether the defending party would be prejudiced by having to defend itself in Singapore.

Additionally, the CA noted that the strong cause test reflects the philosophy that the court should generally give effect to the parties' agreement. As such, the factors concerning the location of the evidence, and the countries with which parties have connection, have little weight if they were *foreseeable* at the time when the parties made the agreement. The CA further stated that generally, it would be difficult for the objecting party to show strong cause as to why he should not be bound to his contractual agreement to submit to a named jurisdiction, unless he can point to factors which were *not foreseeable* at the time of contracting.

Applying those principles to the facts, the CA held that Liu had not shown strong cause why the case should not be tried in Singapore. Liu had cited several factors, including: his and CZ3D's residence in China; the performance of his duties, and the occurrence of the alleged breaches and related proceedings largely being in China and being mostly connected with CZ3D (rather than being connected with Singapore or Shanghai Turbo); the witnesses mostly being in China; and the relevant documents being in Chinese. However, these were generally found to be insufficient to constitute strong cause, in part because they had been known to, or were *foreseeable* by the parties at the time of contracting.

The CA also noted that there was a good arguable cause that Singapore law governed the Service Agreement (*see section B above*). As such, the court hearing the dispute would have to determine whether there was in fact a breach of the Agreement under Singapore law, and a Chinese court (as compared to a Singapore court) would generally be less adept in applying Singapore law.

Finally, the CA cautioned that its analysis here should not be applied "unthinkingly" to all jurisdiction clauses.

#### *E. Whether Shanghai Turbo failed to make full and frank disclosure*

The CA declined to set aside the Service Order on the basis that Shanghai Turbo failed to make full and frank disclosure of the material facts in its application for permission to serve the writ of summons out of jurisdiction. In this regard, it observed that the applicable test is whether a party had disclosed sufficient facts for the court to make an informed and fair decision on the application.

The CA held that the supporting affidavit filed by Shanghai Turbo adequately disclosed the relevant facts regarding whether Singapore was the more appropriate forum: it identified the grounds under Order 11 on which Shanghai Turbo relied, and reproduced Clause 17 (and attached the Agreement). As to whether Singapore was *not* the more appropriate forum, it would have been clear from the affidavit that the relevant assets and events occurred in China. It was not necessary for Shanghai Turbo to draw attention to counter-arguments which the other parties might later raise in a challenge.

#### **IV. Lessons Learnt**

If a contract contains a non-exclusive jurisdiction clause naming the Singapore courts as a possible forum for a contract dispute, a defendant will have to show exceptional circumstances amounting to *strong cause* to justify why the Singapore courts should *not* hear the case. It would seem that this negative standard, based on the factors stated, would be difficult to achieve, especially given the emphasis that the CA placed on the *foreseeability* of certain factors.

For example, the parties are deemed to have agreed to a court's jurisdiction with knowledge of how it works and what it can or cannot do. Thus, complaints about the procedure of that court will therefore rarely amount to strong cause. As such, if a claimant under such a contract decides to commence proceedings in the Singapore courts, it may well be that the defending parties will generally have to litigate their claims in the Singapore courts.

In conclusion, Singapore-based parties who contract with parties resident overseas may wish to insert, in their contracts, similar non-exclusive jurisdiction clauses naming the Singapore courts as a possible forum for disputes, to avoid situations where the non-Singaporean parties seek to avoid litigating in Singapore. Conversely, non-Singapore based parties may wish to actively avoid naming Singapore as a possible forum in their contracts.

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