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CURRENT PERSPECTIVES ON THE CHOICE OF SINGAPORE JURISDICTION AND GOVERNING LAW IN CROSS-BORDER TRANSACTIONS IN ASIA

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I. Introduction

1 Singapore's exponential growth as a dispute resolution hub over the past decade has taken place in parallel with the rise of cross-border business transactions in Asia.[2] Today, Singapore is largely recognised as the pre-eminent centre for dispute resolution and legal services in Asia, particularly for arbitration. It is increasingly the preferred choice of arbitral seat in cross-border transactions (where arbitration is the preferred mode of

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2 "2019 Study on Governing Law & Jurisdictional Choices in Cross-Border Transactions" *Singapore Academy of Law* (April 2019).

dispute resolution) in Asia due to, among other factors, its "law-neutral" stance as an arbitral seat and its strong pro-arbitration legal regime.

2 The increasing popularity of Singapore as the preferred venue for arbitration has been highlighted, most recently, in White & Case's 2021 International Arbitration Survey, where Singapore was chosen as the most preferred seat amongst survey respondents.[3] Commentators have remarked that the popularity of Singapore as the seat of choice is likely to persist, given its longstanding and recognised reputation as a "safe seat" for international arbitration.[4] Singapore was also ranked in the top five most preferred seats in all regions, alongside Hong Kong and Paris.[5] Some interviewees also mentioned the presence of well-established arbitration institutions, such as the Singapore International Arbitration Centre ("SIAC"), as an additional factor in favour of Singapore.[6]

3 Growing in tandem with the popularity of Singapore as the preferred arbitration venue is the choice of Singapore law as governing (substantive) law. Following the development of Singapore's history, Singapore's legal system is based on the English common law system.[7] Major areas of law relating to business, trade and commerce, such as, for example, contract law, arbitration law, property law and equity and trusts law are based on English law principles laid down in English cases.

3 White & Case, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" at p 6. London and, for the first time, Singapore were the most preferred seats with scores of 54%, *ie*, each was included in the top-five picks of 54% of the respondents.

4 White & Case, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" at p 6. It is also worth noting that the respondents' preference for Singapore has increased significantly – for example, Singapore was the third most frequently chosen seat in 2018, selected by 39% of respondents, whereas it came in fourth in 2015, chosen by 19% of respondents.

5 White & Case, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" at p 7.

6 White & Case, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" at p 7.

7 The English common law system was first introduced in 1826 under the Second Charter of Justice of 1826, and continues to be in force in Singapore under s 3 of the Application of English Law Act 1993 (2020 Rev Ed).

While Singapore has by now established a substantial body of local jurisprudence[8] and even departed from English law on certain issues,[9] it remains common for English cases to be cited to the Singapore courts.[10] Nevertheless, Singapore jurisprudence has come a long way and the decisions of the Singapore courts on issues of arbitration law are frequently cited by the courts of other jurisdictions[11] and discussed by leading international commentators.[12]

4 Over the years, familiarity with and consequently acceptance of Singapore law has increased amongst users. In an independent survey commissioned by the Singapore Academy of Law ("SAL") and conducted by global research company Ipsos Pte Ltd in 2019, Singapore law was shown to be the second most widely adopted in cross-border transactions in Asia after English law.[13] Although English law remains the most frequently chosen

8 The judiciary has urged the Singapore Bar to refer to and cite local decisions in their submissions and arguments where a point has been considered by the local courts. Academics have also been urged to write on Singapore law to assist with the development of jurisprudence.

9 Eugene K B Tan & Gary Chan, "Ch. 01 The Singapore Legal System" *Singapore Law Watch* (7 February 2019).

10 Until recently, the Singapore Supreme Court consisted of the High Court (a superior court with unlimited original jurisdiction) and the Court of Appeal. Due to the rising number and complexity of cases, the Singapore Supreme Court was recently restructured and an intermediate appellate court was created, *ie*, the Appellate Division of the High Court. From the perspective of *stare decisis*, a High Court is not bound by previous decisions of the High Court even though such decisions would be regarded as being persuasive. Therefore, until the Court of Appeal has occasion to consider a particular legal issue, there may be differing High Court decisions on that issue. An example is the law on penalties. Until the issue was authoritatively decided by the Singapore Court of Appeal in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631, the UK Supreme Court decision of *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 was approached differently in various High Court decisions.

11 For example, the Hong Kong High Court cited the Singapore Court of Appeal case of *BBA v BAZ* [2020] 2 SLR 453 in *C v D* [2021] HKCFI 1474 and the UK Supreme Court referred to Singapore case law in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

12 See generally, Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021).

13 "Singapore Law the Second-most Adopted Governing Law in Cross-Border Transactions in Asia" *Singapore Academy of Law* (17 April 2019) at Appendix A, p 4. The top two reasons given were: (a) that Singapore has an established legal system and jurisprudence; and (b) familiarity with the chosen governing

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governing law, the adoption of Singapore law in cross-border transactions has increased from 25% in 2015 to 29% in 2019.[14]

5 The rise in the comparative standing of Singapore as the preferred dispute resolution centre in Asia (particularly for arbitration) and of Singapore law as the preferred governing law has sustained over the period 2015[15] to 2019. In 2015, Singapore was already the preferred venue for dispute resolution (52%) over Hong Kong (22%), a trend which continued up to 2019. The 2019 survey showed that Singapore's popularity as the dispute resolution venue of choice had increased to 63% as compared to Hong Kong's which declined from 22% to 4%. Furthermore, the survey found that where Singapore was chosen as the dispute resolution venue, the most frequently used governing law was Singapore law (37%).

6 Growing in tandem with the rise of Singapore as the preferred dispute resolution centre, Singapore has also seen increased usage of three of its dispute resolution platforms, namely the SIAC, the Singapore International Mediation Centre ("SIMC"), and the Singapore International Commercial Court ("SICC"), all of which are well-equipped to handle cross-border disputes. Although the Covid-19 pandemic has had adverse effects on the economies of many countries worldwide, this trend has in fact persisted over the past two years.

7 In the following section, the authors set out statistics which demonstrate the increased usage of the SIAC, the SIMC and the SICC. The article then explores the considerations which influence the choice of Singapore as the preferred dispute resolution centre, in particular, as preferred arbitration venue, from the perspective of transaction (M&A, banking, and project finance) counsel from international firms based in Singapore.

law (*ie*, Singapore law). The survey polled 606 "local (*ie*, based in Singapore) and foreign legal practitioners".

14 "2019 Study on Governing Law & Jurisdictional Choices in Cross-Border Transactions" *Singapore Academy of Law* (April 2019).

15 Herbert Smith Freehills, "Trends in Choice of Governing Law & Jurisdiction in Cross-Border Transactions in Asia: Singapore Academy of Law Publishes Study" (20 January 2016). The author comments on the findings of the 2015 survey done by the SAL.

As part of this review, the article considers the extent to which the parties' choice of governing (substantive) law is associated with the choice of dispute resolution forum in cross-border transactions. The findings on the considerations or factors which influence the parties' choice of dispute resolution forum and choice of law are then "mapped" against a selection of cross-border M&A and finance transactions with an Asia nexus[16] to ascertain the extent to which these considerations or factors find support from an empirical perspective.[17] The article concludes with thoughts and suggestions for actions to further promote the use of Singapore as a dispute resolution venue and the adoption of Singapore law.

8 Surveys conducted by the authors also reveal that transaction counsel typically drive decisions relating to governing law and/or the choice of dispute resolution forum in cross-border international transactions. These raise interesting considerations (which are briefly addressed below as these are beyond the scope of this discussion) as counsel are arguably exercising "party autonomy", which underpins contract and arbitration law, on behalf of their clients.

II. Increased popularity of the SIMC, SIAC and SICC

A. Singapore International Mediation Centre

9 Since its launch in November 2014 to September 2020, the SIMC has received 127 mediation case filings with the value of claims totalling S$4.1 billion.[18] The Arb-Med-Arb Protocol (the "AMA Protocol") has also been generally well-received by the

16 Identifying information has been redacted for reasons of confidentiality.

17 This review was not intended to be an in-depth study of the respective weight to be attributed to the "usual" indicia such as enforceability, fairness, cost, speed and (in the case of arbitration, confidentiality). Rather, it was undertaken to ascertain the extent to which actual transactions reflected counsel's views and, in turn, whether these continue to mirror the findings of the 2019 Ipsos survey.

18 *Mediation in Singapore: A Practical Guide* (Danny McFadden & George Lim SC gen eds) (Sweet & Maxwell, 3rd Ed, 2021) ch 1 at para 1.061.

public:[19] despite its relative newness,[20] the SIMC has seen 21 such cases from 2015 to September 2020.[21]

10 In 2019, parties made 23 case filings with the SIMC.[22]

11 In 2020, parties made 43 case filings with the SIMC, nearly twice the number of cases filed in 2019. The majority of these cases were filed under the SIMC Covid-19 Protocol, which included standalone mediations or mediations arising during the course of adjudicative proceedings (arbitration or litigation). There were also other cases filed under the SIAC-SIMC AMA (*ie*, Arb-Med-Arb) Protocol.[23]

12 In 2021, parties made 68 filings with the SIMC, nearly three times the caseload for 2019.[24] The average dispute value of cases in 2021 was US$46 million, about 2.7 times the value of the cases in 2019 (about US$17 million).[25] The total value of disputes in 2021 alone amounted to over US$3 billion, exceeding slightly the US$3 billion total dispute value over the six years from 2014 to 2020 since the establishment of the SIMC.[26]

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19 Aziah Hussin, Claudia Kück & Nadja Alexander, "SIAC-SIMC's Arb-Med-Arb Protocol" (2018) 11(2) *New York Dispute Resolution Lawyer* 85 <https://nysba.org/app/uploads/2020/03/DisputeResolutionLawyerFall18.pdf> (accessed August 2021).

20 The Singapore International Mediation Centre's Arb-Med-Arb Protocol was introduced on 5 November 2014, in conjunction with the launch of the centre.

21 These statistics were provided directly by the Singapore International Mediation Centre.

22 These statistics were provided directly by the Singapore International Mediation Centre.

23 These statistics were provided directly by the Singapore International Mediation Centre ("SIMC"). The Covid-19 Protocol has been extended due to the significant demand and the ongoing importance of promoting access to efficient and effective cross-border mediation, especially during the pandemic period. Given the success of the Protocol, the SIMC has launched two additional protocols with partner institutions in Japan and India, respectively: the JIMC-SIMC Joint Covid-19 Protocol, and the SIMC-CAMP Joint Covid-19 Protocol. Information on these protocols can be found on the SIMC website.

24 These statistics were provided directly by the Singapore International Mediation Centre.

25 These statistics were provided directly by the Singapore International Mediation Centre.

26 "Increase in Firms Seeking Mediation Amid the Pandemic" *Singapore International Mediation Centre* (11 April 2022) <https://simc.com.sg/

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13 The authors believe that the introduction of the AMA Protocol has contributed to the increased popularity of mediation, since mediation on its own is unlikely to be chosen as the sole method of dispute resolution. The AMA Protocol serves as an opportunity to give parties and counsel greater exposure to and familiarity with mediation as a form of dispute resolution, in addition to the possibility of a successful resolution of the parties' dispute. Going forward, the authors expect that the popularity of mediation (either alone or as part of the AMA Protocol) may increase with the adoption of the Singapore Convention on Mediation.[27]

B. Singapore International Arbitration Centre

14 In 2019, there were 479 new case filings made to the SIAC. Of these filings, 454 (95%) were administered by the SIAC, while 5% were ad hoc appointments.[28]

15 2020 was quite a remarkable year for the SIAC. In that year, it saw 1080 new case filings, which was a 125% increase from the 479 new cases filed in 2019.[29] Of these filings, 1063 (98%) were administered by the SIAC, while 2% were ad hoc appointments.[30]

blog/2022/04/11/increase-in-firms-seeking-mediation-at-simc-amid-the-pandemic/> (accessed June 2022).

27 Formally, the United Nations Convention on International Settlement Agreements Resulting from Mediation, which was signed in 2019 by 46 countries and came into force on 12 September 2020: <https://www.singaporeconvention.org/> (accessed August 2021).

28 "2019 SIAC Annual Report" *Singapore International Arbitration Centre* (30 June 2020) <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20AR_FA-Final-Online%20(30%20June%202020).pdf> (accessed August 2021).

29 "2020 SIAC Annual Report" *Singapore International Arbitration Centre* <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf> (accessed March 2022).

30 "2020 SIAC Annual Report" *Singapore International Arbitration Centre* <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf> (accessed March 2022).

16 In addition, 1,018 (about 94%) of the new cases were international in nature.[31]

17 In 2021, the SIAC handled 469 new cases, of which 446 (95%) were administered by the SIAC and 23 (5%) were ad hoc appointments;[32] 86% (405) of the new cases in 2021 were international in nature, originating from parties across 64 different jurisdictions.[33]

18 To date, the SIAC has been nominated as the second most preferred arbitral institution amongst the respondents of White & Case's 2021 International Arbitration Survey.[34] Of all the nominations, the International Commercial Court ("ICC") stood out as the most preferred institution (57%), followed by the SIAC (49%), Hong Kong International Arbitration Centre (44%) and London Court of International Arbitration (39%).

19 These top-four choices have been market leaders for well over a decade, but the 2015 and 2018 surveys highlighted a noticeable growth in the percentage of respondents selecting the SIAC. This trend was clearly confirmed in the 2021 survey, with the SIAC taking second place overall.

20 In addition, while the ICC ranks first in all regions, it is outranked by the SIAC in the Asia-Pacific region. The SIAC is also ranked among the first five choices in all regions.[35]

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31 "2020 SIAC Annual Report" *Singapore International Arbitration Centre* <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf> (accessed March 2022). The report lists the "geographical origin of parties for new cases handled in 2020" and states that the Singapore International Arbitration Centre ("SIAC") "received cases from parties from 60 jurisdictions", suggesting that the SIAC considers a case to be "international in nature" if the geographical origin of the parties includes a country (or countries) except Singapore at p 18.

32 "2021 SIAC Annual Report" *Singapore International Arbitration Centre* <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC-AR2021-FinalFA.pdf> (accessed June 2022).

33 "2021 SIAC Annual Report" *Singapore International Arbitration Centre* <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC-AR2021-FinalFA.pdf> (accessed June 2022).

34 White & Case, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" at pp 9–10.

35 White & Case, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" at p 10.

C. Singapore International Commercial Court

21 As at 28 February 2019, the SICC had a docket of 29 international and commercial cases since its establishment in 2015. Of these cases, 28 were transferred from the Singapore High Court to the SICC and the SICC also saw its first fresh filing since its establishment. Together with the 11 cases which were transferred from the Singapore High Court, the SICC saw 12 cases added to its docket in 2018, an increase from the nine cases added in 2017.[36]

22 As at the end of 2019, the SICC had a docket of 45 international and commercial cases since its establishment in January 2015. Of these, 40 were transferred from the Singapore High Court to the SICC and five were fresh filings. Together with the 12 cases which were transferred from the Singapore High Court, the SICC saw 16 cases (including four fresh filings) added to its docket in 2019. This was the highest number of cases added to the SICC's docket in its brief history, and an increase from the 12 cases added in 2018.[37]

23 As at the end of 2020, the SICC had a docket of 62 international and commercial cases, which meant that 17 cases were added to its docket in 2020.[38]

24 In 2021, 21 cases were added to the SICC's docket, increasing the total number of cases to 83 first-instance matters.[39] The SICC

36 "SICC News Issue No 16" *Singapore International Commercial Court* (February 2019) <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-news-no-16-(feb-2019)_9d10edd0-8eaf-4a64-8639-5e06681f3a2f.pdf> (accessed August 2021).

37 "SICC News Issue No 21" *Singapore International Commercial Court* (April 2020) <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-news-no-21_4d5ae552-be4f-443f-8c5f-a8325491906b.pdf> (accessed August 2021).

38 SICC News Issue No 26" *Singapore International Commercial Court* (February 2021) <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-brochure-english-june-2020_47a6c710-9d83-41fa-b502-f0a76a1f77ed.pdf> (accessed March 2022).

39 "SICC News Issue No 27" *Singapore International Commercial Court* (February 2022) <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-news-no-27-(feb-2021)_bc09f7f5-2053-4508-8ff1-5fca6031d46e.pdf> (accessed June 2022).

ended 2021 with 104 published written judgments, including 85 first-instance written judgments of the SICC and 19 written judgments on appeals against SICC decisions.[40]

25 To date, there are a total of 116 published written judgments.[41] Of these, 12 were published in 2022.[42]

III. Factors influencing choice of Singapore as dispute resolution venue and Singapore law as governing law

26 This section considers the factors which influence the choice of Singapore as a dispute resolution forum and Singapore law as governing law, noting that party autonomy is a fundamental tenet of contract law and arbitration law in most legal systems. Interestingly, during the course of surveys the authors conducted (see below), it became apparent that in practice, parties sometimes do not drive discussions in relation to choice of forum and choice of law in their transactions, instead leaving it to transaction counsel. This raises interesting questions since the Singapore courts approach party autonomy as the "cornerstone underlying judicial non-intervention in arbitration"[43] in Singapore. As noted by the Singapore High Court in *CJD v CJE*:[44]

> 1 The principle of party autonomy lies at the very heart of arbitration and permeates practically all aspects of it. Party autonomy allows parties a wide latitude to agree on almost all aspects of how a dispute is to be arbitrated …
>
> 2 Underpinning the principle of party autonomy is the fundamental principle of consent or agreement of the parties. …

40 "SICC News Issue No 27" *Singapore International Commercial Court* (February 2022) <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-news-no-27-(feb-2021)_bc09f7f5-2053-4508-8ff1-5fca6031d46e.pdf> (accessed June 2022).
41 "SICC Judgments" *Singapore International Commercial Court* <https://www.sicc.gov.sg/hearings-judgments/judgments> (accessed June 2022).
42 "SICC Judgments" *Singapore International Commercial Court* <https://www.sicc.gov.sg/hearings-judgments/judgments> (accessed June 2022).
43 *Tjong Very v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28].
44 [2021] 4 SLR 734 at [1] and [2].

27 The concept of party autonomy engages related issues concerning choice of law, choice of forum and dispute resolution mechanisms, which are not merely (or entirely) theoretical. For example, certain jurisdictions[45] such as India,[46] France[47] and Spain[48] recognise the concept of "composite" transactions or contracts and/or the single economic entity/group of companies doctrine.[49] This potentially lowers the bar for related companies of a party to arbitration to be subject to the arbitral tribunal's jurisdiction even though the related company may not have been a party to the contract containing the arbitration agreement

45 Even though the group of companies doctrine has not been expressly accepted into German law, the German Federal Court of Justice in a decision dated 8 May 2014 (case number III ZR 371/12) opined that the application of the doctrine under the applicable law of the arbitration agreement does not necessarily amount to a violation of German public policy.

46 The group of companies doctrine was adopted into Indian law following the Indian Supreme Court case of *Chloro Controls India Private Ltd v Severn Trent Water Purification Inc* [2013] 1 SCC 641.

47 The French courts have recognised the group of companies doctrine in case law such as in *Kis France v Société Générale* (31 October 1989) (Court of Appeal, Paris) which followed *Dow Chemical Company v Isover Saint Gobain* (ICC Award No 4131, 23 September 1982).

48 Spain has recognised the group of companies doctrine when specific conditions were fulfilled, see *STSJ C. Valenciana* No. 14/2014 of 19 November and No. 13/2015 of 5 May. In addition, it is stated in the IBA Spanish Guide for 2018 that "[i]n practice, the criteria established in the Rules of the International Chamber of Commerce (ICC), as put forward in the ICC case *Dow Chemical France v Isover Saint Gobain's* (where a non-signatory may benefit from or be bound by an arbitration agreement signed by a group company because of its role in the transaction), is generally followed": see *IBA Arbitration Committee, Arbitration Guide: Spain* (2018) at pp 8–9 <https://www.ibanet.org/MediaHandler?id=E5431E65-E56C-4866-8E48-FF9996CF1AC5> (accessed February 2022). It has also been observed that Spain is an exception to the many countries that have excluded the group of companies: see Yves Derains, "Is there A Group of Companies Doctrine?" in *Multiparty Arbitration* (Eric Schwartz & Bernard Hanotiau eds) (ICC Institute of World Business Law, 2010) at p 136.

49 The "single economic entity" doctrine was rejected in the leading case of *Adams v Cape Industries plc* [1990] Ch 433 at 539. The doctrine has also been rejected in Singapore: see the Singapore position in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [88]–[136]. The group of companies doctrine was rejected in *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm) at [62], where Langley J said that "English law treats the issue as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law". In addition, in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [35], the High Court stated that "English law requires that an intention to enter into an arbitration clause must be clearly shown and is not readily inferred".

between the main actors (sometimes also referred to as a "forced joinder", although careful treatment is required in the use of such a term).

28 Counsel clearly have a duty to advise their clients on matters relating to choice of law, choice of forum and dispute resolution mechanisms – but, to what extent?[50] Does counsel's duty extend to advising their clients of *substantive* choice of law issues? It is not unreasonable to take the view that counsel ought to do so. Moreover, where the client is merely going along with the suggestion or advice of their counsel, can they be said to have properly exercised autonomy? The issue is of no small moment, considering that the choices in this respect may result in real consequences for the clients.[51] As the Singapore Court of Appeal has stated, "[j]ust as the parties enjoy many of the benefits of

50 For example, "the laws of Blackacre are generally similar to Greenacre and Blackacre is known to be a neutral and pro-arbitration jurisdiction." As the authors see it, there may be situations where such statements may arguably not be sufficient. A client may agree to have disputes referred to arbitration and yet wish to have the relevant supervisory court exercise a greater degree of supervision over the arbitral proceedings. Additionally, other situations may call for a more detailed analysis of why the laws of one jurisdiction may, or may not, be preferable, when considered against the laws of another jurisdiction.

51 For example, in the recent case of *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd* [2021] SGCA 116, the Singapore Court of Appeal considered that the reflective loss principle arose from the unity of economic interests which bind shareholders and the company. The court held that it was wrong to conflate a specific principle of company law (*ie*, the reflective loss principle) with the general principle proscribing double recovery, resulting in the dilution or undermining of what was otherwise a clear and specific rule that had a clear and coherent rationale in the context of company law (see, *eg*, at [3]). The court held (at [201]) that:

> when a wrong is done to the company which causes the company loss, even when this results in a diminution in the value of the shares or a reduction in distributions, this is not ultimately a loss that the law recognises as being suffered by the shareholder personally. It is the company's loss, and the company is the proper plaintiff to pursue the claim.

In so holding, the court endorsed the majority decision in the recent English case of *Marex Financial Ltd v Sevilleja* [2021] AC 39 on the reflective loss principle and departed from the previous approach in the court's own decision in *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 – which it clarified is no longer the law. This development would certainly be relevant when considering any potential claims under Singapore law by a shareholder for diminution in the value of shares in the company, and should also be borne in mind when advising on shareholders' agreements which are proposed to be governed by Singapore law.

party autonomy, so too must they accept the consequences of the choices they have made." [52] In the authors' view, these are all interesting questions that are beyond the scope of the present discussion but which warrant further consideration.

29 As part of the (informal) survey which the authors conducted, several transaction (M&A, banking and finance, project finance) counsel[53] practising in international firms who have substantial experience as transaction counsel advising on cross-border transactions in their respective practice areas were approached. These lawyers were selected based on their practice areas across well-established international firms as being representative of the approach of transaction counsel from international firms in general. They were asked as experienced transaction counsel about the reasons they or their clients would have for preferring a particular dispute resolution forum or governing law. These transaction counsel are the ones responsible for advising clients and drafting the transaction documentation,[54] and who are often primarily responsible for advising clients on choice of law and forum issues. The review of the various factors is structured according to the following questions:

(a) In relation to choice of forum and governing law, who is the decider? Are these matters decided by the parties independently or under advice of transaction counsel?

(b) Is the choice of Singapore law as substantive law driven primarily by the parties' (or their counsel's) choice of Singapore as a dispute resolution forum, in particular, Singapore-seated arbitration?

(c) Would the parties or their counsel still choose Singapore as the dispute resolution forum where some other law is chosen as the governing law and, if so, why?

52 *AKN v ALC* [2015] 3 SLR 488 at [37]; *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2021] 5 SLR 228 at [43].

53 The (informal) survey was conducted between May and July 2021 and January to March 2022.

54 See para 8 above.

A. Is choice of forum and governing (substantive) law driven by transaction counsel?

30 There was a divergence of views on this. M&A and project finance counsel who were interviewed agreed that the choice of dispute resolution forum and choice of governing (substantive) law are generally driven by counsel's recommendation and clients' corresponding comfort levels. On the other hand, banking and finance counsel did not think so. In their experience, the choice of substantive law and dispute resolution forum are primarily driven by clients, the need for market standardised loan and, to a lesser extent, securities documentation[55] used by the markets.

31 From the perspective of M&A counsel, there is generally a readiness on the part of clients to accept the recommendation or advice of their counsel on these issues. Counsel are typically regarded as being best placed to advise on these issues given their experience, knowledge and familiarity with the various advantages and disadvantages associated with a particular choice and the clients' circumstances, and many clients do not usually turn their mind to these issues. In this regard, many if not most firms who do cross-border work would have standard dispute resolution or arbitration clauses on hand, and counsel would already have a "good sense" of which governing law and fora are preferred. There are exceptions, mainly where clients have a view which is influenced by their own experience and in these cases the choice tends to be "exclusionary" based on past experience, in that the clients will decide against (rather than in favour of) a particular forum or law.

32 From the perspective of M&A counsel, given the major, and possibly decisive, role of counsel in the selection of forum and governing law, counsel who were interviewed felt that efforts to promote the choice of Singapore as dispute resolution forum and the adoption of Singapore law should focus on transaction

55 For example, the Asia Pacific Loan Market Association produces a suite of standard documents for use in syndicated loan transactions in the Asia-Pacific region: see <https://www.aplma.com/> (accessed February 2022).

(M&A) counsel rather than disputes counsel or arbitrators as has tended to be the case in the past.

33 In contrast, banking and finance counsel did not agree that the choice of substantive law and dispute resolution forum are driven by counsel. In their view, these issues are driven by clients who tend to choose the substantive law and forum with which they are (most) familiar and comfortable. In particular, it is usual to see clients, especially savvy and sophisticated corporates, seeking advice on these issues in "bespoke situations" where the advice would be customised to the particular facts and circumstances of the transaction. Additionally, and specifically in relation to financing transactions, the marketability of loans in the international syndicated loan markets is another key factor that determines these issues.

B. Choice of forum versus *choice of governing law*

34 Based on the interviews with various counsel, the authors concluded that there is a difference in emphasis on choice of forum *versus* choice of governing law – that is, these are separate issues, and the choice of Singapore as dispute resolution forum did not necessarily (or invariably) mean that Singapore law would be chosen. The authors found that the distinction between choice of forum and choice of governing law largely held true in both cross-border M&A and finance transactions.

35 With respect to choice of forum, and in the context of arbitration, Singapore, and in particular the SIAC, has made enormous headway as the leading dispute resolution centre of Asia, which has possibly been aided to some degree by developments in Hong Kong. Although other dispute resolution centres have made attempts to promote themselves, none have achieved the success that Singapore has in the region.[56] Many counsel and clients are aware of the benefits of choosing Singapore as their dispute

56 International Chamber of Commerce, "ICC Dispute Resolution 2020 Statistics" <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf> (accessed August 2022). In 2020, Singapore (selected in 24 cases by the parties and fixed twice by the ICC Court of Arbitration) remained the most preferred seat in Asia, and ranked sixth among the most

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resolution venue, often (but not invariably) with the choice of Singapore law as governing law. From the perspective of parties who are situated in or in close proximity to Asia, this is aided in no small part by the cost savings associated with Singapore as compared to venues such as Paris, London and Stockholm.[57]

36 The rise of Singapore as a dispute resolution venue is enormously aided by the fact that the key institutions, particularly the SIAC, are able to accommodate a range of governing laws. Singapore as an arbitral seat and the SIAC are regarded as being "law neutral", in the sense that the parties can receive the same legal "services" in Singapore even if they are arbitrating or litigating according to English law or some other law. Counsel interviewed felt that it is this neutrality, the "preparedness" to "embrace" all laws, that has made Singapore such a success as the leading dispute resolution venue across a range of institutions. Additionally, in counsel's view, and no less important than neutrality, are the following factors: stability, progressive legislation, a supportive judiciary, and good infrastructure. Post-pandemic, considerations of security, stability and geographical proximity (in so far as Asian transactions are concerned) would tend to favour Singapore. Hence, even if the parties were to choose another governing law, that would not detract from the choice of Singapore as a venue for dispute resolution.[58]

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frequently selected cities after Paris (87), London (85), Geneva (60), New York (49) and Zurich (37).

57 The Singapore International Arbitration Centre is widely regarded as being one of the most "cost-friendly" options among arbitral institutions: see, *eg*, Wei Ming Tan, Shriram Jayakumar & Jolyn Khoo, "Costs and Duration: A Comparison of the HKIAC, LCIA, SCC and SIAC Studies" *Singapore International Arbitration Blog* (13 March 2018); Claudia T. Salomon & Shreya Ramesh, "A Primer on International Arbitration Costs" (2019) <https://www.jdsupra.com/post/fileServer.aspx?fName=69a9a43b-e127-4a26-a476-b235990af4ae.pdf> (accessed August 2022); and Cavinder Bull, "An Effective Platform for International Arbitration: Raising the Standards in Speed, Costs and Enforceability" in *International Organizations and the Promotion of Effective Dispute Resolution* (AIIB Yearbook of International Law 2019) (Peter Quayle & Xuan Gao eds) (Brill, 2019).

58 However, if the parties have chosen Singapore law, then it is likely that they would be equally comfortable with Singapore as the dispute resolution forum, especially if they are Singapore entities. The parties' acceptance of Singapore law may stem from factors such as the transaction having a nexus to Singapore, the applicability of mandatory rules of law and the supporting regulatory framework. However, these are not dispositive in relation to the

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37 On the other hand, it was observed that Singapore law, although enjoying increased adoption, has not had quite the same level of success.[59] Counsel opined that even if a wider survey were to be conducted, such a survey would likely find sufficient evidence that English law is still the preferred governing law[60] with dispute resolution to take place in Singapore, for the reasons mentioned above. As a general observation, the authors note that this is consistent with the 2019 Ipsos survey which found that English law (43%) is the most widely adopted in cross-border transactions in Asia followed by Singapore law (29%).

38 The reality is, as counsel observed, international clients have become very comfortable with English law. They recognise Singapore law and appreciate it for its clarity, stability and neutrality, but they are familiar with English law and are comfortable with it as the governing law. The preference for English law followed closely by Singapore law must be understood in the context of the concern felt by many counsel with the choice of a civil law as governing law, which in their view brings many problems such as the lack of contractual freedom, for example, where the provisions of a civil code could influence the contract – an outcome that common law lawyers would be surprised at. For completeness, counsel also mentioned that the prevalence of English law (and Singapore law as a close second) should be juxtaposed against the observed decline in the adoption of New York law which, one M&A counsel commented, appears to have "lost some ground" in Asia, particularly in M&A transactions. In

selection of the forum for the resolution of disputes, where neutrality is the decisive factor. Accordingly, it is possible for parties to choose Singapore law as the governing law and arbitration in Paris, London or Geneva.

59 In the project finance market, for example, there is widespread acceptance of local law to govern the key project documents (*eg*, power purchase agreement, concession agreement). However, there is (still) a strong preference for *neutral* dispute resolution, which necessarily involves a different location.

60 This observation appears to be borne out by recent statistics published by the International Chamber of Commerce. The most frequently selected *lex contractus* was English law with 122 cases (13% of all cases registered), the laws of a US state (104 cases), followed by Swiss law (66 cases), French law (56 cases), and the laws of Brazil (42 cases): see International Chamber of Commerce, "ICC Dispute Resolution 2020 Statistics" <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf> (accessed August 2021).

this regard, the authors note from the 2019 Ipsos survey that there was actually a marginal increase in the adoption of New York law from 7% (in 2015) to 8% (in 2019). Although the increase might have been insignificant especially when viewed in comparison to the proportion of respondents who preferred Singapore law (29%), this did not mean that Singapore law has replaced New York law as the default choice of law. Rather, what has happened is that the parties have tended to choose a combination of English and Singapore law (and even New York law), depending on the transaction and the client.[61]

39 All the counsel interviewed agreed that from their experience of international/cross-border work, English law (arising from its perceived "neutrality", and for reasons of familiarity and comfort) is typically regarded as the default choice for parties that is frequently "paired" with Singapore dispute resolution. Often, the "stronger" contracting party will indicate their preferred governing law and dispute resolution venue, and the other party will usually agree to it. Since the parties do not wish to arbitrate in the location of the counterparty (or litigate in a local court), they settle on English law coupled with dispute resolution in Singapore as the mutually acceptable "compromise" solution. An example of this preferred paradigm is in the area of growth equity where investors (particularly those who take a minority interest) are "very careful" about the choice of governing law, as one finance counsel noted. The authors note that a key consideration as regards the parties' choice of law is whether that choice would be accepted by the courts of the chosen forum,[62] which is especially pertinent where the parties are from different jurisdictions or there is a cross-border element in the transaction. In this regard, counsel cautioned that it is important to confirm with local lawyers that the parties' choice would be accepted by the forum courts, and that there are

61 For instance, where the client is a US fund, there might be a preference for New York law.

62 Counsel observed that they had experience of some cases involving Malaysian entities where English law was chosen specifically because the approach to liquidated damages/penalties in construction contracts is different under Malaysian law. Again, counsel advised that the validity and enforceability of the parties' choice of governing law should be checked with local counsel.

no applicable mandatory rules of law that would supersede the chosen governing law. That the Singapore courts will uphold the parties' choice of governing law[63] is a factor that contributes to Singapore's attractiveness as a dispute resolution forum, since the parties can be assured that their choice would be respected.

40 In relation to cross-border transactions that "happen to be done" in Singapore, if there is a Singapore law nexus, then it is likely that Singapore law will be chosen. Thus, having a party (whether a holding entity or subsidiary) or asset situated in Singapore or where there is otherwise a Singapore nexus might tip the scales in favour of Singapore. Counsel observed that there is increasing acceptance of Singapore law as a "neutral" law, although not to the extent of English (or possibly New York) law. This typically happens in situations where the parties are not prepared to accept a "Western" governing law but nevertheless desire the traits of a common law system (for instance, certainty of contract, plain language interpretation, *etc*). It would certainly assist in the promotion of Singapore law if a "strong" party (such as a government-linked company) advocates for the use of Singapore law (or the use of law firms that are able to practise Singapore law). One finance counsel observed that this paradigm (involving the choice of Singapore law as a "neutral" governing law) can be seen in many cross-border "regional" deals (done in, for example, Indonesia, the Philippines and Vietnam) where the holding company is a Singapore incorporated company or the assets are situated in Singapore.[64] In such instances, there would

63 In general, the Singapore courts will respect the parties' chosen governing law. Where an express choice of law has been made by the parties, it is "virtually conclusive" of the proper law governing the contract if the choice is *bona fide* and legal, and the application of foreign law would not be contrary to public policy (*Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [12], [17] and [18]). In addition, where there is an exclusive jurisdiction clause, the principle of party autonomy is "deeply infused" into the law governing the enforcement of the clause such that a high threshold, the "strong cause" test, has to be satisfied by the party seeking to breach the agreement (*Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [115]).

64 Counsel commented that in certain commercial contracts (*eg*, construction or offtake contracts) between two entities from the same jurisdiction (*eg*, Indonesia) there may be a local requirement to adopt local law. Likewise, it would be logical for a shareholder's agreement for a joint venture company to be governed by the law of the entity given that it would need to "dovetail"

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be compelling arguments for the parties to choose Singapore law as the governing (substantive) law of the transaction.[65] Otherwise, and since the parties do not wish to have the transaction governed by "local" law[66] and disputes resolved in the "local" courts, they usually settle on a compromise solution – that is, English law as the governing law and Singapore dispute resolution.

41 The preference for English law is particularly marked in cross-border financing transactions where, in addition to considerations of familiarity and comfort level, there is the added imperative of marketability of the loans in the international syndicated loan market. Consequently, a key factor affecting the choice of law would be the willingness of lenders to take on the risk/exposure associated with a loan and their corresponding familiarity and comfort with the relevant governing law. In this respect, although the "default" choice is still English law (since that is what the market is accustomed to), lenders are increasingly "open" to Singapore law and there has been a definite increase in the use of Singapore law which is increasingly regarded as a viable alternative, including among sophisticated lenders.[67] Certainly,

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with the local company law. Although that would not necessarily be the case in all scenarios, there would need to be valid or legitimate reasons to choose another law.

65 In the M&A context, this would typically entail the share sale and purchase agreement and shareholders agreement being governed by Singapore law.

66 In the financing context, unless the loan is a local currency loan, the transaction would not be governed by "local" law and English law would be the law of choice.

67 There is, however, in counsel's view, some concern with the application of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA") if parties were to choose Singapore law, as the Singapore insolvency regime under the IRDA is perceived as being (more) "debtor-friendly" than was previously the case. One counsel opined that if and when asked for advice on choice of law from the perspective of insolvency, they would not advise the clients to choose Singapore law, since they would then "come under" the IRDA and "lose" the ability to apply for a scheme of arrangement under English law. Counsel noted that some lenders have expressed a preference against choosing Singapore law for these reasons, and this "unease" among lenders may well be "stopping some deals from coming into Singapore". However, the authors consider that the choice of forum for the purpose of debt restructuring is a complex issue and does not necessarily influence the choice of law *ex ante*.

To illustrate, parties may choose Singapore law as the substantive law, but that does not prevent them from applying to the UK courts to restructure so long as there are sufficient connecting factors. Certainly, if the debt is governed by English law then this will make it more likely (from the

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this would be the case where a Singapore bank is involved and the bank's "in-house" legal team is Singapore law-qualified and thus able to advise on Singapore law.

42 An exception to this paradigm involving the predominance of English law is M&A transactions involving Japanese parties. In the following discussion, the factors influencing the choice of dispute resolution venue and governing law are examined from the perspective of Japanese M&A counsel advising mainly Japanese corporates who do business in Asia. Here, the findings point to a marked preference for Singapore dispute resolution coupled with Singapore law as the governing law, even where the parties have no nexus with Singapore.

43 To begin with, Japanese M&A counsel would not advise their clients to adopt Japanese law as the governing law, as this is unlikely to be acceptable to the counterparties. Japanese law, like some other Asian civil law jurisdictions, is not "exportable" in the same way as English or Singapore law. From this starting point, counsel consider what would be the best choice in the circumstances having regard to, importantly, considerations of cost. Cost considerations feature prominently, especially for smaller M&As. In this regard, there is a clear preference for Singapore law for its neutrality, clarity and stability, coupled with a clear preference for Singapore as the dispute resolution forum – again, for considerations of cost, convenience and

creditors' perspective) for the restructuring to take place in the UK, since the rule in *Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802 ("*Gibbs*") is still good law. Under the so-called *Gibbs* rule, English law debt can only be compromised in English proceedings; therefore, unless a creditor submits to a foreign proceeding, a foreign proceeding designed to bring about the cancellation of a debtor's obligations will discharge only those liabilities governed by the law of the country in which that proceeding took place.

Singapore law has departed from this position. Under Singapore law, Singapore law-governed debt can be compromised by foreign proceedings if those proceedings are recognised: see the High Court decision in *Re Pacific Andes Resources Development Ltd* [2018] 5 SLR 125. Additionally, to the authors' mind, to the extent that there are concerns relating to the applicability of the IRDA, these can be addressed through an intercreditor agreement ("ICA"): see, for example, the form of ICAs drawn up by the Loan Market Association at <https://www.lma.eu.com/developing-markets/documents>. In the authors' view, this is a fascinating area which is beyond the scope of this paper.

geographical proximity (*versus* London, Paris or Geneva). The authors note that this correlates to the findings of the 2015 and 2019 surveys, however, it does suggest that most of the survey respondents would likely have been based in or in close proximity to Singapore. This was the case in relation to the counsel interviewed for this article.

44 In counsel's experience, there are three "basic" patterns in Japanese clients' approach to choice of law in M&A transactions:

(a) The law of the main target company's jurisdiction (*eg*, if the target is a Malaysia company, then Malaysian law) would be selected as the governing law, with disputes to be resolved through Singapore-seated arbitration[68] – this is considered the most cost-efficient approach at the transaction stage. Even where the counterparty is based in Singapore, Japanese clients will accept the choice of Singapore law as the substantive law with disputes to be resolved through Singapore-seated arbitration, because the neutrality of Singapore, especially in arbitration, engenders trust.[69]

(b) Where the main target companies exist in multiple jurisdictions, Singapore law and Singapore-seated arbitration would be the first choice.[70]

(c) Where the counterparty (*eg*, European parties or other "Western" countries) prefers English law or some other law with which they are familiar (*eg*, Dutch law), counsel would (counter) propose Singapore law with Singapore-seated arbitration as a compromise.[71] Again, cost considerations feature prominently with London, Paris or Geneva being perceived as "too far" and more costly.

45 There are of course exceptions to this pattern, though they are in the minority. For instance, where a party has a strict

68 See Project Z in Appendix A.
69 See Project X in Appendix A.
70 See Project F in Appendix A.
71 See Project H in Appendix A.

policy in favour of English law and that party is in a position to influence the counterparty's choice of law, then that law is chosen as governing law. In this regard, one of the counsel interviewed recalled a transaction where he had to accept the seller's choice of English law in an M&A transaction where the target was an India company.[72] The seller was a global private equity fund and had a strict policy in favour of English law, thus English law was chosen as the governing law even though counsel would have preferred to adopt Singapore law. In summary, therefore:

(a) Japanese parties have no particular preference for English law as the governing law;

(b) Singapore law is considered to be as clear and stable as English law; and

(c) Singapore-seated arbitration is a trusted means of dispute resolution.

46 The geographical proximity of Singapore to Japan and associated cost management considerations favour Singapore as the choice for dispute resolution venue for Japanese corporates. Japanese M&A counsel, in particular, emphasised that they would not choose English law if to do so would entail the incurrence of additional costs, a consideration that was particularly pertinent in the "smaller" M&As. However, other M&A counsel cautioned against attributing too much significance to this factor. Counsel opined that where clients choose a premier international law firm to represent them in cross-border transaction, they expect the level of fees they would pay for the services of that firm to be commensurate with the appointment of that firm. Accordingly, costs decisions are being made at the (prior) level of the clients' choice of law firm – which in turn influences the choice of governing law, since that choice (in so far as many M&A transactions are concerned) is often led largely by transaction counsel.[73]

72 See Project I in Appendix A.
73 See paras 30–32 above.

47 Where the chosen law firm is enabled to practise Singapore law,[74] it remains to be seen whether counsel in that firm would advise or recommend that their clients choose Singapore law and Singapore as the dispute resolution venue. Anecdotally, this seems to have taken place to some extent, based on the sample of transactions examined.[75] However, where that firm is not enabled to practise Singapore law,[76] it would almost certainly advise its clients to adopt English law as the governing law, and compromise on Singapore dispute resolution. Where the law firm is not enabled to practise either English law or Singapore law, counsel may take the view that both are equally acceptable but cost considerations and being in Asia appear to weigh quite heavily in favour of choosing Singapore law as the governing law.

C. Empirical observations based on recent cross-border transactions

48 The authors found these observations to be largely accurate based on a small sample of recent (or, in some cases, ongoing) cross-border M&A transactions.[77] These transactions were selected on the basis of their currency and cross-border elements (in some cases, the transaction did not have a Singapore nexus) and thus form a useful representative sample from which to derive conclusions.

49 Out of the 12 transactions listed in Appendix A, in eight transactions Singapore law was chosen as the governing law in combination with arbitration in Singapore under the SIAC Rules and, in one case, litigation in Singapore. In three of these

74 The Singapore legal practice regulatory framework permits foreign law firms to practise Singapore law in limited circumstances and generally through an associated Singapore law firm and/or Singapore advocates and solicitors: "Types of Licence or Registration" *Ministry of Law* (30 August 2018) <https://www.mlaw.gov.sg/law-practice-entities-and-lawyers/licensing-or-registration-of-law-practice-entities/types-of-licence-or-registration/> (accessed August 2021).

75 See Appendices A and B.

76 That is, typically, where the firm is an English law firm that has not been enabled to practise Singapore law under the legal practice regulatory framework.

77 See Appendix A.

cases,[78] there was no Singapore nexus at all – none of the parties were Singapore parties and there were no assets situated in Singapore. It is noteworthy that in the cases where there was no Singapore nexus at all, at least one of the parties was Japanese. In another two transactions,[79] the parties chose English law as the governing law and arbitration in Singapore. In the remaining transaction,[80] the parties chose Singapore law as the governing law with disputes to be settled through arbitration in Tokyo under the Commercial Arbitration Rules of the Japan Commercial Arbitration Association (JCAA).

50 These observations largely held in the authors' review of a similar sample of cross-border banking and finance transactions, which were selected on the same basis as the M&A transactions.[81] Out of the seven transactions listed, in six transactions[82] Singapore law was chosen as the governing law in combination with arbitration in Singapore under either the ICC's Rules of Arbitration or the SIAC Rules and, in three cases,[83] litigation in Singapore. The authors observe that this is consistent with the preference for court litigation in banking transactions where there are particular concerns with the enforceability of a court judgment. In one transaction, Singapore law and the Singapore courts were chosen as the exclusive forum despite the fact that neither the parties nor the transaction had any nexus with Singapore.[84] In the remaining transaction,[85] the parties chose Indonesian law as the governing law and arbitration in Jakarta under the SIAC Rules. The last mentioned case is noteworthy in that the parties chose arbitration under the SIAC Rules (albeit with Jakarta as the arbitral seat) despite the parties and the transaction having no nexus to Singapore.

78 See Projects M, F and H in Appendix A.
79 See Projects K and I in Appendix A.
80 See Project T in Appendix A.
81 See para 48 above and Appendix B.
82 See Projects K, O, V, W and C in Appendix B.
83 See Project K (Disputes and Transactional Phases) and Project V in Appendix B.
84 See Project V in Appendix B.
85 See Project L in Appendix B.

IV. Concluding remarks

51 First, there are, and have for some time been, concerns about the increasing costs and issues with the speed of arbitration, particularly where the dispute involves a substantial monetary sum. Based on the authors' interviews, counsel interviewed observed that there appears to be a "push back" of sorts where the parties are more inclined to have their disputes resolved by the courts (particularly, in counsel's view, the UK commercial courts), and/or mediation. Interestingly, the importance of enforceability as a factor influencing the mode of dispute resolution increased in relation to litigation (from 46% in 2015 to 51% in 2019)[86] as compared to arbitration (which declined from 43% in 2015 to 39% in 2019). Going forward, and having regard to these concerns, advocates for the increased use of Singapore dispute resolution institutions, such as the Singapore courts and the SICC in particular, could consider how they can promote the use of these institutions to a wider audience.[87]

52 Second, given the oftentimes key role that transaction counsel play in advising their clients in relation to the choice of law and dispute resolution forum, promoters of Singapore law and Singapore dispute resolution venues should consider actively

86 A relevant factor may be the adoption of the Convention of 30 June 2005 on Choice of Court Agreements ("Hague Convention"), which was introduced into law by the Choice of Court Agreements Act 2016 (2020 Rev Ed). The Hague Convention enhances cross-border recognition and enforcement of Singapore court judgments. As at August 2022, the Hague Convention had 32 Contracting Parties, including the European Union.

87 Choice of Court Agreements Act 2016 (2020 Rev Ed) s 2(1). The Choice of Court Agreements Act which implements the Convention of 30 June 2005 on Choice of Court Agreements ("Hague Convention") expressly provides in s 2(1) that where the High Court or the General Division of the High Court (as the case may be) is designated in an exclusive choice of court agreement, the designation is to be construed as including the Singapore International Commercial Court ("SICC"), unless a contrary intention appears in the agreement. For completeness, the SICC is a division of the High Court. Consequently, parties could have their cases heard and decided by the SICC, and thereafter have the SICC judgment enforced in accordance with the Hague Convention without the need to specify the SICC as their designated court. This could result in increased usage of the SICC. See also "Note on Enforcement of SICC Judgments" *Singapore International Commercial Court* <https://www-sicc-gov-sg-admin.cwp.sg/docs/default-source/guide-to-the-sicc/sicc-note-on-enforcement-(with-letterhead)-18-may-2020.pdf> (accessed 17 August 2022).

engaging transaction counsel[88] rather than disputes counsel (or arbitrators) as has tended to be the case. Certainly, when considered from the perspective of current issues with which transaction counsel would be *au fait*,[89] it would be worthwhile to engage with transaction counsel in order to understand the issues and concerns from the perspective of both counsel and their clients.

53 From a broader (global) perspective, the policy decision to have Singapore law closely mirror English law may be a double-edged sword. When presented with a choice between Singapore or English law, sophisticated international clients and their counsel are more likely than not to choose English law, given their familiarity and comfort with English law. There needs therefore to be a reason or incentive for clients and their advisers to choose Singapore law over English law. From a marketing or brand building perspective, Singapore law must find its own niche or unique selling proposition. How Singapore law should position itself to achieve this, whether by more or less judicial activism or otherwise, is a fascinating topic which on this occasion the authors think to be outside the scope of this paper.

54 Lastly, and the authors recognise that this suggestion is not without controversy, there may be structural issues inhibiting the wider adoption of Singapore law. If Singapore wants to do more to promote the use of Singapore law, it could consider enabling more foreign lawyers to advise on Singapore law in

88 A recent development which could aid these efforts, particularly for the Singapore International Commercial Court ("SICC"), is the announcement that from 28 June 2021, Singapore will permit third-party funding of, among others, proceedings in the SICC "including appeal proceedings arising from any decision made" in those proceedings. Prior to this, third-party funding was permitted for international arbitration and related court and mediation proceedings only. See Ministry of Law, "Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore" (21 June 2021). However, it remains to be seen if the loosening of restrictions in respect of third-party funding will have a direct correlation with the use of Singapore as a dispute resolution venue and/or Singapore law as the governing law in contracts.

89 For example, the concerns surrounding the application of the Singapore insolvency regime under the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) (see n 67 above).

foreign/cross-border transactions. This too is a fascinating topic which on this occasion is outside the scope of this paper.

Appendix A

Project G			
Type of document	Shareholders' agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Company	Geneva, Switzerland
	B	Target company	Singapore
	C	Director of the target company	Singaporean
	D	Director of the target company	Singaporean
Subject matter/ asset	Shares in the target company representing 80% of the issued and paid-up share capital of the company pursuant to a share purchase agreement		
Governing law clause	Singapore law		
Dispute resolution clause	ICC arbitration seated in Singapore		

Project K			
Type of document	Shareholders' agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Shareholder	New Zealand
	B	Shareholder	Singapore
	C	Shareholder	Singapore
	D	Holding company	Singapore
Subject matter/ asset	The parties entered into the shareholders' agreement for the purpose of recording their agreement regarding the relationship between the shareholders and the regulation of the business, namely, the acquisition and development of power plants and ancillary assets in Asia		
Governing law clause	English law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project Q			
Type of document	Shareholders' agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Target company	Singapore
	B	Shareholder	Mauritius
	C	Shareholder	Mauritius
	D	Shareholder	Mauritius
	E	Shareholder	Japan
Subject matter/ asset	E was allotted and issued shares in the company pursuant to a share subscription agreement between the company and E		
Governing law clause	Singapore law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project B			
Type of document	Shareholders' agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Company	Singapore
	B	Subscriber of shares	Singapore
	C	Subscriber of shares	France
	D	Subscriber of shares	France
Subject matter/ asset	Ordinary shares representing approximately x% of the shares in issue immediately following completion on a fully-diluted basis reserved for the employees and the founders of the company		
Governing law clause	Singapore law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project T			
Type of document	Sale and purchase agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Seller	Singapore
	B	Purchaser	Japan
Subject matter/ asset	The purchase of shares representing 100% of the issued and outstanding capital of the company		
Governing law clause	Singapore law		
Dispute resolution clause	Japan Commercial Arbitration Association arbitration seated in Tokyo, Japan		

Project A			
Type of document	Share sale agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Purchaser	Singapore
	B	Seller	Australia
Subject matter/ asset	Purchase of shares in the company		
Governing law clause	Singapore law		
Dispute resolution clause	Non-exclusive jurisdiction of Singapore courts; failing which SIAC arbitration seated in Singapore		

Project M			
Types of document	Share purchase agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Purchaser	Japan
	B	Seller	Indonesia
Subject matter/ assets	The intended acquisition of a substantial interest in a power plant located in Indonesia, which also involved a joint venture arrangement between the parties		
Governing law clause	Singapore law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project Z			
Types of document	Share purchase agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Purchaser	Japan
	B	Seller 1	Malaysia
	C	Seller 2	Malaysia
	D	Seller 3	Malaysia
	E	Seller 4	Malaysia
	F	Target company 1	Malaysia
	G	Target company 2	Singapore
Subject matter/ assets	The sale and purchase of 100% of the issued and paid up share capital of the target companies		
Governing law clause	Malaysia law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project X			
Types of document	Share purchase agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Purchaser	Japan
	B	Seller 1	Singapore
	C	Seller 2	Singapore
	D	Seller 3	Singapore
	E	Target company	Singapore
Subject matter/ assets	The sale and purchase of 60% of the issued and paid up share capital of the target company		
Governing law clause	Singapore law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project F			
Types of document	Share subscription and purchase agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Purchaser/subscriber of shares	Japan
	B	Seller	Jersey (Channel Islands)
	C	Company (for subscription of shares)	Malaysia
	21 entities	Target entities (for acquisition of shares)	Malaysia Hong Kong Macau Philippines Singapore Thailand UK
Subject matter/ assets	The acquisition of 100% of the issued and paid up share capital of the company and subscription of 100% of the shares of the relevant target entities		
Governing law clause	Singapore law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project H			
Type of document	Share purchase agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Seller	Japan
	B	Purchaser	Turkey
	C	Target company	Netherlands
Subject matter/ asset	The purchase of shares representing 60% of the issued shares of the target company incorporated in the Netherlands		
Governing law clause	Singapore law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project H			
Type of document	Shareholders' agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Shareholder	Japan
	B	Shareholder	Turkey
	C	Target company	Netherlands
Subject matter/ asset	The parties entered into the shareholders' agreement for the purpose of recording their agreement regarding the affairs of the target company, respective rights as the shareholders and the regulation of the business		
Governing law clause	Singapore law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Project I			
Types of document	Share purchase agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Purchaser 1	Japan
	B	Purchaser 2	India
	C	Seller 1	Singapore
	D	Seller 2	Cayman Islands
	E	Target company	India
Subject matter/ assets	The sale and purchase of approximately 90% of the issued and paid up share capital of the target company		
Governing law clause	English law		
Dispute resolution clause	SIAC arbitration seated in Singapore		

Appendix B

Project K (Disputes Phase)			
Type of document	Deed of settlement and release		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Company	Cayman Islands
	B	Sponsor	Singapore
	C	Operator	Indonesia
	D	Servicer	Indonesia
	E	Original noteholder	Singapore
	F	Registrar	Singapore
	G	Security trustee	Singapore
Subject matter/ asset	N/A		
Governing law clause	Singapore law		
Dispute resolution clause	Exclusive jurisdiction of Singapore courts		

Project K (Transactional Phase)			
Type of document	Senior loan note issuance agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Company	Cayman Islands
	B	Sponsor	Singapore
	C	Operator	Indonesia
	D	Servicer	Indonesia
	E	Original noteholder/ noteholder	Singapore
	F	Original noteholder/ noteholder	Singapore
	G	Registrar	Singapore
	H	Security trustee/agent	Singapore
Subject matter/ asset	The subscription by the noteholders for notes issued by the company		
Governing law clause	Singapore law		
Dispute resolution clause	Exclusive jurisdiction of Singapore courts in favour of finance parties only		

Project K			
Type of document	Subordinated loan agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Company	Cayman Islands
	B	Subordinated loan provider	Singapore
	C	Security trustee	Singapore
Subject matter/ asset	The provision of a subordinated loan by the subordinated loan provider		
Governing law clause	Singapore law		
Dispute resolution clause	Exclusive jurisdiction of Singapore courts		

Project L			
Type of document	Loan intermediary agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Company	Cayman Islands
	B	Operator	Indonesia
Subject matter/ asset	The provision of loans for the purpose of the operator's P2P lending business to eligible Indonesia customers		
Governing law clause	Law of the Republic of Indonesia		
Dispute resolution clause	SIAC arbitration seated in Jakarta		

Project O			
Type of document	Senior facilities agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Original borrower	Singapore
	B	Original borrower and company	Singapore
	C	Original lenders	Singapore
	D	Original lenders	UK
	E	Agent	UK
	F	Security agent	UK
Subject matter/ asset	The provision by the lenders of term loan facilities and a multicurrency revolving credit facility		
Governing law clause	English law		
Dispute resolution clause	ICC arbitration seated in Singapore		

Project V			
Type of document	Warrant to purchase shares		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Shareholder	Delaware, US
	B	Sponsor	Singapore
	C	Company	Cayman Islands
	D	P2P operator	Indonesia
	E	MFC operator, servicer	Indonesia
	F	Arranger, registrar, agent	Indonesia
	G	Security trustee	Indonesia
	H	Original noteholder	Delaware, US
	I	Original noteholder	Delaware, US
	J	Original noteholder	Delaware, US
	K	Original noteholder	Delaware, US
	L	Original noteholder	Delaware, US
	M	Original noteholder	Delaware, US
	N	Original noteholder	Delaware, US
	O	Original noteholder	Delaware, US
Subject matter/ asset	The subscription by the original noteholders for notes		
Governing law clause	Singapore law		
Dispute resolution clause	Exclusive jurisdiction of Singapore courts in favour of finance parties only		

Project C			
Type of document	Facility agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Borrower	Bangladesh
	B	Lender	China
	C	Arranger, lender	China
	D	Arranger, lender	China
	E	Arranger, lender	China
	F	Facility agent, offshore security agent, lender	Singapore
	G	Lender	China
	H	Onshore security agent, lender	Singapore
Subject matter/ asset	The provision by the lenders to the borrower of a US dollar term loan facility		
Governing law clause	English law		
Dispute resolution clause	ICC arbitration seated in Singapore		

Project W			
Type of document	Share subscription agreement		
Parties and where parties are situated	**Party**	**Role in transaction**	**Situated/ incorporated in**
	A	Investment company	Singapore
	B	Investor	Japan
Subject matter/ asset	The investor, B, undertook to subscribe for new shares in A		
Governing law clause	Singapore law		
Dispute resolution clause	SIAC arbitration seated in Singapore		