CONFLICTS OF LAW
SUMMARY
2011

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Chapter 1: Jurisdiction

I. Introduction:

In a territorial dispute, there are always 3 questions to be answered:

(1) Does the Singapore courts have the jurisdiction to hear the dispute
(2) What law should the Singapore court apply (governing law)
(3) Will the judgment be recognized in a foreign country (enforcement)
For this week, we are purely concerned with the question ‘Does the Singapore Court have the **jurisdiction** to hear the dispute’?

**In personam jurisdiction:**

- Refers to the **authority of the court to make an order that will bind the parties** in the proceedings before it. Acting in its **in personam** jurisdiction, court can only make orders to bind those who are subject to the **in personam** jurisdiction of the court.

This is the only reason why the judgment is binding on the person.

*Generally, in personam jurisdiction is properly founded against a defendant when the defendant has been duly served with writ or other process, either inside or outside Singapore.*

### II. Basis of the **in personam jurisdiction:**

**Civil jurisdiction — general**

16. —(1) The High Court shall have jurisdiction to hear and try any action in personam where —

(a) the defendant is served with a writ or other originating process —

1. (i) **in Singapore** in the manner prescribed by Rules of Court; or
2. (ii) **outside Singapore** in the circumstances authorised by and in the manner prescribed by Rules of Court; or

(b) the defendant submits to the jurisdiction of the High Court.

(2) Without prejudice to the generality of subsection (1), the High Court **shall have** such jurisdiction as is vested in it by any other written law.

Basis of the jurisdiction of the High Court is found in the SCJA (Section 16). District Courts are conferred the same **in personam** jurisdiction as the High Court via the Subordinate Court Act (Cap 321, 2007 Rev Edn).

### III. Service within Jurisdiction (natural persons)

For this point, we will be dealing with the recognition of jurisdiction under the SCJA via s 16 (1)(a)(i), which states **the jurisdiction will be founded against an individual who is duly served while present in Singapore.**

Requirements: As per RC O 10 r 1
A. PRESENCE

Mere physical presence of the defendant within the territory gives the court lawful authority over the defendant (no matter how fleeting).

Rationale: Common law rationale, which is applicable here, is that the actual presence of the person within the territory brings a person within the protection of the sovereign and in turn requires the allegiance of that person to the sovereign.

Exception:
  • **Induced by fraud:**
    - If defendant has been induced by the fraud of the plaintiff to come to the jurisdiction, such fraud being intended to entice the defendant into the jurisdiction for the purpose of service of process, then the service may be set aside, on the basis of abuse of process (*Stein v Valkenbuesen* [1858] EB & E 65)
    - But it may not be an abuse of process if the plaintiff had bona fide intentions in inviting the defendant to the jurisdiction, even if the plaintiff had a collateral aim of serving process on the defendant (*Watkins v North American Land and Timber Co Ltd* (1904) 20 TLR 534)

B. SUBSTITUTED SERVICE

Means of service, typically through newspapers, to bring the attention of the defendant, when it is impractical for any reason to effect personal service.

- SCJA s 16(1)(a) requires the writ or other process to be served on the defendant, thus substitute service is as good as personal service, to find the jurisdiction of the courts under the SCJA.

*Requirements:
  • Defendant must be in Singapore at the time of service.
  • Rule is that if there cannot be personal service on a defendant because he is outside of the jurisdiction at the time of the issue of the writ, then substitute service will not be ordered.
  • However, if the defendant was in the jurisdiction but left the jurisdiction after having knowledge of the writ (whether to evade service or not), the courts may order substituted service instead.

C. SUBMISSION

Note the difference in submission in common law and the SCJA. In common law, submission removes the objections to any jurisdiction which are personal to the defendant (irregularities in the service of process) but it does not waive the need for service.

While, the statutory embodiment of submission, under s 16(1)(b), is wider as it a source of jurisdiction (albeit, *in personam* jurisdiction). However, submission under the SCJA
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does not confer on the court jurisdiction over subject matter which the courts does not have (exception: matter involving title to foreign immovable property).

C1.1 Voluntary submission to the jurisdiction (s 16 (1)(b))

It is always a question of fact whether there has been a voluntary submission to the court’s jurisdiction.

Examples:

- Defendant takes a step in the proceedings, which amounts to a recognition of the Court’s jurisdiction in respect of the claim. Mere opposition to the plaintiff’s application for an interim injunction may be regarded as a self-defence and not a submission ([International SOS v Overton Mark Harold George [2001] 4 SLR 226])

- Application to strike out a claim or part of claim would amount to voluntary submission (unless of course the striking out is based on a writ that is so defective that the defendant had no idea what was the case he had to meet)

- Defendant who enters an appearance merely to protest against the existence of the jurisdiction. In this case, the defendant submits only to the jurisdiction of the court to determine its own jurisdiction.

- It can be considered voluntary submission if the defendant has instructed the solicitors in Singapore to accept the service of process and the solicitors are duly served (unless the service is accepted only on the basis that the defendant reserves his right to contest jurisdiction).

- Filing a defence amounts to acknowledgment of the court’s jurisdiction to determine merits and therefore submission to the jurisdiction.

- An application to stay proceedings on the basis of forum non conveniens acknowledges the jurisdiction (as one has to acknowledge the jurisdiction of the court, to persuade the court that its jurisdiction should not be exercised)

- Stay application merely suspends all pending claims within the jurisdiction of the court and stay application without protest to jurisdiction, do acknowledge the existence of the court.

What if party has agreed to submit to the jurisdiction of the courts and a means of service is also provided in the agreement but the defendant is not in Singapore? By virtue of RC 0 10 r 3(1), the court is conferred jurisdiction. If the agreed mode of service is outside of the country, then leave of court under RC O 11 is required.

C1.2 Deemed to have submitted to the jurisdiction

- If a defendant fails in a jurisdictional challenge, then he is deemed to have submitted to the jurisdiction of the court.
He may also have been presumed to submit to the jurisdiction by estoppel. This is dependent on ‘if a reasonable person in the position of the plaintiff would have understood the defendant’s conduct as waiving any irregularity ad to service, and the plaintiff had suffered detriment or prejudice in reliance’.

IV. Service within Jurisdiction (Corporations)

⇒ For serving a writ refer to RC 0 62 r 4 (office holders) or RC 0 10 r 2 (local agent for a overseas principal)

A. Company incorporated in Singapore:

What is required for a corporation to be within the jurisdiction

*Either presence for writ to be served by SCJA s16 (1)(a) or;
*Submission to jurisdiction via SCJA s 16(1)(b)]

1. Presence + Means to serve writ: S 16(1)(a)(i)

Common law- If it has been carrying on business from a fixed place of business within the jurisdiction for a period of time.

Statutory-Arguable, by virtue of incorporation the company is statutorily present in Singapore. (Refer to Tao Commodity Trader v Fortis Bank NV [2004] SGHC 30, where it was held that registration satisfies the common law requirement of presence. Or mere registration means that the company has submitted to the jurisdiction under s 16(1)(b) of the SCJA.

Serving a writ: Refer to 0 62 r 4 first (by virtue of 16(1)(a)(ii))

Scenario A:
If company is incorporated in Singapore but not carrying out business in Singapore, then it can be argued that via Companies Act, it is possible to serve legal documents on the company at their registered address [CA s 387].

Such a solution is possible, as S 17(c) of the SCJA is read with S 16(2), which allows other written laws (CA) to provide in personam jurisdiction.

Any issues with such an interpretation? S 16(1)(a)(i) defines presence as service on the defendant under the RC and not the Companies Act. However, in this case, our jurisdiction is being gleamed from S 16(2) and not s 16(1)(a)(ii) there is no need to apply the strict word of s 16(1). OR it could be argued that by virtue of registration, the requirement of presence is fulfilled.

B. Registered foreign company

S 376 provides for the means of service of documents on a registered foreign company. Same interpretation is used here as above…This solution is viable if S 17(c) SCJA is read with S 16(2) and with S 376 (Companies Act)
C. Agent of foreign company

*Serving a writ: Leave of court is required under RC 0 10 r 2 to serve process on the agent or manager who is carrying on business on behalf of an overseas principal.

Conditions to be met:

1. Action must relate to any business or work against that person who does not reside within Singapore [O 10 r 2 (1)(a)]
   - Naturally includes people as well as companies and associations

2. Agent or manager must have personal control or management of ‘such business or work’ within Singapore [ O 10 r 2(1)(b)]
   - ‘Such’: the business or work which the agent is in control of
   - ‘Control or management’: Agent must have the authority to contract on behalf of the overseas principal; otherwise, the principal is merely trading through or by the agent in Singapore.

3. Agent of manager’s authority has not been determined or he is still in business relations with the principal.

Question: Must the agent be in Singapore physically when he is to be served with the writ?

- Nothing in the O 10 that states that the agent must be in Singapore. However, if service outside jurisdiction was intended, it would have been stated in O 11.
- Though, it is arguable that the a corporate body is physically present in Singapore by virtue of its business being carried out in Singapore, at the time of service. By extension, by carrying out their business in Singapore, the corporation has submitted to the jurisdiction of the courts [S 16(1)(b)]

III. Service OUTSIDE Jurisdiction

*Service out of jurisdiction for in personam claims begins with an ex parte (means application by one party) application for leave. Since leave would be granted without notice to the defendant, full and frank disclosure is required and material non-disclosure is a ground for setting aside.

3 necessary conditions to be satisfied before the case may be regarded as a proper one for service out of jurisdiction:

1. There must be a good arguable case under one of the heads under O 11 r 1
(2) There must be a serious issue (NEXUS) to be tried on the merits of the case
(3) Singapore is clearly the appropriate forum for the trial

If the court is satisfied and chooses to exercise its discretion, then service may be
effected out of jurisdiction in accordance with the RC O 11 r 3-9

A. Heads of Claims (requirement 1)

1. O 11 R 1(r) Submission:
   - Taking steps in proceedings: No service out of jurisdiction is required if the
defendant has in fact submitted to the jurisdiction by taking a step in legal
proceedings in Singapore with respect to the plaintiff’s claim.
   - Submission by agreement: Usually when the contract contains a jurisdiction
clause in favour of Singapore courts but fails to specify a mode of service. Under
R 1(e), there is no restriction on the nature of claim that may fall under. Thus,
both contractual and non-contractual claims may be pursued. However, under R
1(d)(iv) is confined to contractual claims only.

2. O 11 R 1(a):
   - Carrying out business in Singapore
     Concerned with the where the business activities are carried out
   - Owning property in Singapore
     If the defendant owns a property (be it movable, immovable, tangible and intangible) in
Singapore, then technically it could be a basis for ordering a service out of jurisdiction.

   However, the court might consider that the property left behind is de minimis.

3. O 11 R 1(p): Cause of Action arising in Singapore

   ‘Cause of action’ has been construed to mean ‘the act on the part of the plaintiff
which gave the plaintiff cause of complaint’ or ‘the essential ingredients in the
title to the right which it is proposed to enforce’

4. O 11 R 1 (d): Claim arising out of contract
   - Contract: What does contract refer to? Do we use common law definitions or is
the term contract wider to encompass agreements (which aren’t contract but are
enforceable under other systems of law)?
   - Parties to contract: Who does the rule apply to? Does the contract have to be
between the plaintiff and defendant? Can a 3rd party be enforcing a right
(independent right) conferred by the contract?
   - Who can bring a claim within this head?
CONFLICTS OF LAW SUMMARY

- A party denying the existence of a contract cannot bring a claim under this head as it would be tantamount to affirming the existence of a contract.
- A party that a contract is void or voidable would not bring a claim under this head.
- What about if the defendant is denying the existence of the contract and while the plaintiff is exerting the existence of the contract? The claim still fails within this head, as it is the plaintiff who is asserting the claim and he is asserting the existence of a contract. It always depends on who is suing whom.

5. O 11 R 1(e): Claim arising out of a contract not made in Singapore

Leave would be granted if the claim is brought in respect of a breach in Singapore of a contract made in or out of Singapore. This goes to determining whether the repudiation or breach of contract took place (which could cause considerable difficulty).

O11 R 1(b): When an injunction is sought

Leave might be granted if an injunction is sought which orders the defendant to do or refrain from doing anything in Singapore. The injunction must be the substantial relief sought and it must be sought to protect a substantive right (preventing a breach of contract or commission of tort).

Case law

Elements to be proved in a ex-parte application

| Bradley Lomas Electrok v Colt Ventilation East Asia Pte Ltd |

Appellants were companies incorporated in the UK and they commenced a writ action against Colt VEA (incorporated in Singapore). Later they obtained a court order to add Colt Intl and CG Ltd (Incorporated in the UK) as defendants to the action and to serve the writ out of jurisdiction.

After being served the writ, Colt Intl and CG Ltd applied to set the order aside. The senior assistant registrar dismissed this. Upon appeal, the judge held that Colt Intl was properly made a defendant but not CG Ltd further appealed against the High Court decision.

Holding:

(a) Required standard of proof that plaintiff must meet before the court would exercise its discretion under 0 11 to permit service out of jurisdiction:

Step 1: A plaintiff must satisfy the court to the standard of ‘a good arguable case’. This is the jurisdiction issue.

Law: What amounts to a good arguable case?
The court does not require proof to its satisfaction but it will require something better than a mere prima facie case. On questions of fact, the practice is to look at the plaintiff’s case (but not to try to dispute the facts on affidavits). The court must be satisfied that the alleged facts, if proven, will support the action. While for questions of law, the court may go fully into the issues and will refuse leave if it considers that the plaintiff’s case is bound to fail.

**Step 2:** Next, a court must consider the merit of the claim and this is no more than that the evidence should disclose that there is a serious issue to be tried.

- Once the burden of proving that a good arguable case existed, it would be unnecessary to go into the question of a ‘serious question to be tried’ on the merits of the case.

- However, there are some cases, in which the evidence required to establish jurisdiction may not touch on the merits of the claim. In those circumstances, there will be a need for the plaintiff to establish as regards the merits of his claim that there is ‘a serious question to be tried’.

Applying back to the facts:

The mere fact that Colt VEA and CG Ltd were closely related to one another by shareholding or otherwise is not evidence of CG Ltd’s involvement in the furthering of the common design of infringement. Naturally, CG Ltd being in the same group as Colt VEA, there would be links with the companies but this cannot lead to the *ipso facto* conclusion that CG was involved in all its subsidiaries actions.

Looking at the totality of evidence (same use of logo, consolidated accounts and common management), it has not been established that CG Ltd was a joint tort-feasor with its subsidiaries.

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