

ENFORCEMENT OF EXCLUSIVE JURISDICTION CLAUSES IN THE ENGLISH, SINGAPORE AND HONG KONG COURTS



A COMPARATIVE ANALYSIS

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When instituting proceedings, forum is one of the most important decisions to make as opting for the wrong forum could leave the claimant with a dismissed claim, in addition to bearing costs.

In this article, we will discuss the attitude of the English, Singapore, and Hong Kong courts when faced with exclusive jurisdiction clauses, and the general rules applicable.



England & Wales

As the Brexit transition period ended on 31 December 2020, in determining the validity and enforceability of exclusive jurisdiction clauses, the applicable regime depends on when the proceedings were instituted.

For proceedings instituted on or before 31 December 2020, the jurisdiction of the English courts is largely dictated by the Recast Brussels Regulation,¹ under which English courts generally shall defer to the courts of the EU member state which has jurisdiction under an exclusive jurisdiction agreement.

From 1 January 2021, the applicable convention is now the Hague Convention² which requires English courts to uphold qualifying exclusive jurisdiction clauses in favour of another contracting state³.

Where neither the Recast Brussels Regulation nor the Hague Convention apply, the English court will apply the common law rules of private international law. English courts have a broad inherent discretion but will generally uphold exclusive jurisdiction clauses unless there are strong reasons not to. In considering whether to depart from an exclusive jurisdiction clause, the approach is still to apply the well-established forum non conveniens test formulated in *Spiliada Maritime Corporation v Cansulex Ltd*⁴ (the “Spiliada Test”).

¹ Regulation (EU) No 1215/2012
² 2005 Hague Convention on Choice of Court Agreements, to which the UK acceded as an independent state
³ Other than the UK, the contracting states to the Hague Convention are the EU, Singapore, Mexico and Montenegro.
⁴ [1987] AC 460



One reason to depart from an exclusive jurisdiction clause can be a risk of parallel, irreconcilable judgments. The principles set out in the *Spiliada* Test in relation to this ground were recently considered in *Axis Corporate Capital UK Ltd v Absa Group Ltd* ⁵. The court held that a clause in a reinsurance contract in which the parties agreed to submit to the jurisdiction of the English courts “to comply with all requirements necessary to give such court jurisdiction” was an exclusive English jurisdiction clause. However, it held the equivalent clause in the primary layer reinsurance contract by which the parties agreed to submit to “worldwide jurisdiction”, could not be interpreted as an implied English exclusive jurisdiction clause, despite the risk of inconsistent decisions and increased expense.

This case demonstrates the primacy given by the English courts to the parties’ choice of law and jurisdiction, even where such choices may result in an inconvenient and undesirable multiplicity of proceedings.

Singapore

In deciding whether an exclusive jurisdiction agreement exists and applies under common law rules, the Singapore courts require a “good arguable case”.



Once an exclusive jurisdiction clause is established to apply, its effect can only be challenged if there is shown “strong cause” or “exceptional circumstances” amounting to a “strong cause” as to why the Singapore courts should not enforce the jurisdiction bargain agreed between the parties: *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* ⁶.

An exclusive jurisdiction clause is therefore useful to have as, generally, absent an exclusive (or non-exclusive) jurisdiction clause, the Singapore courts will apply the *Spiliada* Test, under which a party contesting the Singapore court’s jurisdiction only needs to show that there is another more appropriate forum to hear and determine the action.

Whilst it is clear that the Singapore courts are ready to uphold exclusive jurisdiction clauses, it should also be borne in mind that one’s right to rely on an exclusive jurisdiction clause can be lost as a result of conduct. For example, if the steps taken by a party were steps incompatible with an assertion that the Singapore court should not assume jurisdiction over the proceedings commenced by the respondent, the Singapore courts may find that effectively the party had waived its right to rely on the exclusive jurisdiction clause contained in the contract: *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* ⁷.



Hong Kong

In Hong Kong, albeit none of the private international rules mentioned above applies, Hong Kong courts are also keen to uphold exclusive jurisdiction clauses generally, other than in exceptional circumstances: *Noble Power Investments Ltd and another v Nissei Stomach Tokyo Co Ltd* ⁸.

For instance, in the recent case of *Quaestus Capital Pte Ltd v Everton*

Associates Ltd ⁹, the Hong Kong Court of First Instance refused to invoke an exclusive jurisdiction clause in favour of the English courts, on the basis of potential multiplicity of proceedings.

In *Quaestus*, the plaintiff and the 1st defendant entered into a loan agreement and a pledge agreement, both subject to exclusive Hong Kong jurisdiction, for a loan to be provided by the 1st defendant and a share pledge by the plaintiff as security. Separately, the plaintiff and the 1st and 2nd defendants entered into a brokerage agreement, subject to exclusive English jurisdiction, for the pledged shares to be transferred to the 2nd defendant.

After the pledged shares were sold without any loan having been provided, the plaintiff, alleging fraud, commenced proceedings against the defendants in Hong Kong pursuant to the brokerage agreement subject to exclusive English jurisdiction.

Notwithstanding its recognition that the claim should be subject to exclusive English jurisdiction under the agreement, the Hong Kong court considered that there was a strong cause for not giving effect to the exclusive jurisdiction clause, as it is in the interests of justice to have one tribunal adjudicating the plaintiff’s claims against the defendants in the same suit in order to avoid the waste of costs and the potential disaster of having separate actions in different jurisdictions which may result in inconsistent findings.

Conclusion

The courts of all three jurisdictions are generally keen to uphold exclusive jurisdiction agreements. However, as is clear from this analysis the courts may depart from the general rule in view of “strong cause” or “exceptional circumstances”. Despite applying similar tests, the outcome may vary and each dispute has to be examined on a case-by-case basis.



5 [2021] EWHC 861
6 [1977-1978] SLR(R) 112
7 [2021] 2 SLR 341
8 [2008] HKCA 255
9 [2021] HKCFI 1367