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Position Paper

ADOPTION OF SINGAPORE LAW AS THE GOVERNING LAW FOR OTC DERIVATIVE TRANSACTIONS

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ABSTRACT:

This paper analyses the legal issues arising out of the adoption of Singapore law as the governing law of OTC derivative transactions. It first sets the scene by describing the Asian OTC derivatives market and Singapore's status as an OTC derivatives hub. This then leads to the question as to whether there is scope for Asian market participants to consider using a governing law other than English or New York law for their OTC derivative transactions. It then explores in brief certain factors that contracting parties typically take into account when faced with a choice of governing law and the particular issues in relation to OTC derivative transactions. After having considered the various factors that are relevant to the choice of governing law, it discuss the significance of the governing law of a contract from a conflict of laws perspective.

The paper then considers in detail the use of Singapore law as the governing law for OTC derivative transactions and how the use of Singapore law will interact with the documentation used to govern OTC derivative transactions. The focus will be on the enforceability of the ISDA Master Agreement and its credit support documents, if they were governed by Singapore law. It also considers the amendments that are likely to be required if contracting parties elect to use Singapore law as the governing law of their ISDA Master Agreement and credit support documents. In addition, it considers certain potential ramifications from a practical perspective if contracting parties were to use Singapore law as the governing law of their ISDA Master Agreement and credit support documents.

Finally, the paper concludes that the use of Singapore law will be a viable option for Asian counterparties from a legal perspective. That said, the question as to whether market participants would adopt the use of an alternative governing law will depend on both legal and other practical and commercial considerations, as with the manner of any such adoption.

1. Introduction

Over-the-counter ("**OTC**") derivative transactions have been a feature of the financial markets for a number of decades, and the ISDA Master Agreement, which is used to govern OTC derivative transactions, is "probably the most important standard market agreement used in the financial world".[1] The United Kingdom ("**UK**") and United States ("**US**") are the leading OTC derivatives hubs in the world, together accounting for 79.7% of the global net turnover for interest rate derivatives and 56.5% of the global net turnover for foreign exchange ("**FX**") derivatives in April 2016.[2] It is therefore no coincidence that the ISDA Master Agreement was drafted based on English and New York law,[3] which are also the most commonly encountered governing laws in the OTC derivatives market.[4] In Asia, it is more common to use English law than New York law as the neutral third country governing law, and it is against this backdrop that this paper examines the adoption of Singapore law as the governing law for OTC derivative transactions.

1.1. Purpose and scope

1.1.1. **Purpose**. The purpose of this paper is to examine whether, from a legal perspective, using Singapore law as the governing law for OTC derivative transactions is a feasible option for Asian market participants.[5] Although market participants are likely to have used governing laws other than English or New York law for their ISDA Master Agreements before, this tended to take place on an *ad hoc* basis, often in response to a request from a particular counterparty and without the benefit of a detailed analysis. Accordingly, the aim of this paper is to undertake a legal analysis of the choice of Singapore law as the governing law for OTC derivative transactions, with a view to inform and facilitate the thought process in this regard.

1.1.2. **Scope**. It is to be noted that the scope of this paper is limited to an analysis of the *legal* issues arising out of the choice of Singapore law as the governing law for OTC derivative transactions. That said, this paper also addresses certain commercial considerations and practical implications relating to the choice of governing law. The extralegal discussion is solely intended to present a balanced view of the topic, rather than to advocate any particular course of action for market participants. This is because, ultimately, whether (and the manner in which) market participants adopt the use of an alternative governing law will depend on legal as well as other considerations, and the relevance and significance attached to the various factors will differ from one market participant to another.

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[1] *Lomas v JFB Firth Rixson Inc & Ors* [2010] EWHC 3372 (Ch) at [53].
[2] *BIS Triennial Central Bank Survey*, OTC interest rate derivatives turnover in April 2016 and foreign exchange turnover in April 2016, published by the Monetary and Economic Department of the Bank for International Settlements ("**BIS**").
[3] The governing law of the ISDA Master Agreement is specified in the Schedule, and Section 13(b)(i) of the ISDA Master Agreement expressly contemplates parties choosing either English law (in which case, the English courts will have jurisdiction) or the laws of the State of New York (in which case, the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City will have jurisdiction).
[4] *Supra* n 1.
[5] For the purposes of this paper, "Asian" market participants (or contracting parties) is not intended to be a term of art. It is used to loosely describe natural and legal persons having a connection with Asia and will cover persons domiciled, resident, incorporated or established in Asia and can include persons incorporated elsewhere but that have a substantial presence in Asia.

1.2. Structure and approach

1.2.1. This paper is divided into nine sections. Section 1 introduces the purpose and scope of this paper, as well as the structure, which will be explored in greater detail in this Section 1.2.

1.2.2. Section 2 contains the executive summary of this paper, and Section 3 sets the scene by describing the Asian OTC derivatives market and Singapore's status as an OTC derivatives hub. This then leads to the question as to whether there is scope for Asian market participants to consider using a governing law other than English or New York law for their OTC derivative transactions.

1.2.3. Section 4 explores in brief certain factors that contracting parties typically take into account when faced with a choice of governing law and the particular issues in relation to OTC derivative transactions. This section is intended to serve as a useful recapitulation because, in many instances, market participants are already accustomed to, and/or familiar with, a particular governing law for their commercial relationships, e.g. the laws of their home jurisdiction or English law. However, given that this paper is looking at the exercise afresh, it is important to consider the point from first principles in order not to lose sight of why English and New York law are so firmly established as the governing law for OTC derivative transactions in the first place.

1.2.4. After having considered the various factors that are relevant to the choice of governing law, Section 5 discusses the significance of the governing law of a contract from a conflict of laws perspective. Although it may seem obvious and trite that the governing law of a contract will regulate the contractual aspects of the parties' relationship, it is also important to consider whether, by choosing a particular law as the governing law of their contract, other aspects of the parties' relationship also fall to be governed by such law.

1.2.5. Section 6 considers in detail the use of Singapore law as the governing law for OTC derivative transactions. It first describes in brief the Singapore legal framework before it considers whether Singapore law is an appropriate governing law for OTC derivative transactions. It also discusses the use of arbitration in financial transactions (including OTC derivative transactions) and considers the issues with using Singapore or English law in the context of two Asian contracting parties.

1.2.6. Section 7 considers how the use of Singapore law will interact with the documentation used to govern OTC derivative transactions. The focus will be on the enforceability of the ISDA Master Agreement and its credit support documents, in particular, the 1995 Credit Support Annex (Transfer – English Law) (the "**1995 English CSA**") and the 1995 Credit Support Deed (Security Interest – English Law) (the "**1995 CSD**"), if they were governed by Singapore law. This section also considers the amendments that are likely to be required if contracting parties elect to use Singapore law as the governing law of their ISDA Master Agreement and credit support documents.

1.2.7. Section 8 considers certain potential ramifications from a practical perspective if contracting parties were to use Singapore law as the governing law of their ISDA Master Agreement and credit support documents.

1.2.8. Finally, Section 9 sets out the conclusions of this paper.

2. Executive Summary

2.1. The Asian OTC derivatives market is dominated by the more advanced Asian economies, namely Australia, Hong Kong, Japan, New Zealand and Singapore. FX is the dominant asset class, followed by interest rate and then commodities, equity-linked and credit default swaps. Singapore features prominently both within Asia (second only to Japan in terms of annual turnover in 2012)[6] and globally (third in OTC FX derivative turnover and fifth in interest rate derivative turnover, based on the most recent BIS Triennial Central Bank Survey for the second half of 2016). The impact of regulatory reforms also suggests that the cost of regulatory compliance may result in banks concentrating their activities in a few countries, and Singapore could be used as a hub for South-east Asia. Strategic realignment and optimisation of resources are also likely to result in banks renewing their focus on centres that are strong contributors to their profits, and Asia is likely to be an important geographical location for many market participants. The statistics and trends therefore suggest that the Asian OTC derivative market will continue to play an important role in the global economy. Against this backdrop, it is instructive to consider whether an alternative governing law (to English or New York law) is a viable option for Asian market participants entering into OTC derivative transactions with one another.

2.2. If contracting parties were to consider the choice of governing law question afresh, there are a multitude of factors that are relevant. From a legal perspective, parties will need to consider the following: (1) certainty and predictability, (2) commerciality and robustness, (3) established body of case law, (4) freedom of contract/absence of mandatory or default provisions, (5) flexibility/gap filling mechanisms and (6) consistency with choice of method of dispute resolution. From a commercial perspective, parties will need to consider the following: (7) familiarity with law and cost of learning (self), (8) likelihood of counterparty acceptance and (9) flexibility in structuring of transaction/contract. Furthermore, factors related to choice of court are also relevant because choice of law and jurisdiction tend to (but not always) go hand in hand: (10) length and cost of proceedings, (11) political risk, (12) practical convenience to parties, (13) competence and independence of judiciary and (14) mature legal services market. In the context of OTC derivative transactions, factors (1), (2), (4), (5) and (6) assume particular importance.

2.3. The ISDA Master Agreement, being the industry standard master agreement used to govern OTC derivative transactions, was drafted based on English and New York law. However, it is possible to use other governing laws, at least in the case of the laws of other common law jurisdictions. For example, Singapore and Hong Kong law are used from time to time, albeit on an *ad hoc* basis and typically only when between two Singapore entities and Hong Kong entities respectively. Some jurisdictions have also

[6] Celent, "The Asian OTC Derivatives Markets" (23 April 2013) at p 34, available at http://www2.isda.org/attachment/NTYxOQ==/Celent ISDA Asian OTC Derivatives Markets FINAL.pdf.

developed their own form of the ISDA Master Agreement, which is governed by local laws.

2.4. The significance of the governing law of the contracts lies beyond the contractual aspects of the parties' relationship. Its relevance will ultimately depend on the conflict of laws rules in question, but for the purposes of this paper, we will compare the position under English and Singapore conflict of laws rules to consider the similarities and differences should a dispute be brought before an English court versus a Singapore court. Broadly speaking, the governing law of a contract is also a connecting factor (in some cases, a potential connecting factor) for other matters under both English and Singapore conflict of laws rules, such as formation of contract (as the putative proper law), formal validity, capacity of corporations (but not natural persons), tort, equitable obligations and restitutionary obligations. In the context of arbitration, it is also a relevant connecting factor in determining the law of the arbitration agreement.

2.5. The Singapore legal system is based on the English common law, and a number of Singapore statutes are also based on English statutes. The similarities between Singapore and English law suggest that for the same reasons that parties choose English law, they should be open to choosing Singapore law as well. That said, there are some differences between Singapore and English contract law, but these are not so material as to result in a wholly different commercial outcome for the parties. The recent survey commissioned by the Singapore Academy of Law on governing law and jurisdictional choices in cross-border transactions also indicates an awareness of choosing Singapore law as the governing law (second only to English law) and Singapore as the venue for dispute resolution. The increasing importance of arbitration as a method of dispute resolution among Asian market participants and the Singapore International Arbitration Centre (the "**SIAC**") as an arbitration centre in Asia also underscores the importance of consistency between the governing law of a contract and the seat of the arbitration. The use of Singapore law as the governing law is also not expected to give rise to unintended legal consequences. The significance of the governing law discussed above shows that other matters will also fall to be governed by the proper law of the contract, and there is nothing to suggest that this is an inappropriate outcome. It is instructive that although the English conflict of laws rules are, strictly speaking, different from the Singapore conflict of laws rules due to the application of the Rome I Regulation[7] and Rome II Regulation,[8] the role played by the proper law of the contract is very similar. Although the new insolvency regime suggests that the governing law of the contract is a factor that will be taken into account by the Singapore courts in determining whether it will exercise its discretion to wind up or approve a scheme of arrangement for a foreign company, it is just one of a multitude of factors. The lack of Singapore case law should also not be a fatal objection to the adoption of Singapore law as the governing law for OTC derivative transactions. It should be borne in mind that the significant English case law on the ISDA Master Agreement arose as a result of the Lehman collapse, but market participants have been using English law as the governing law of the ISDA

[7] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[8] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

Master Agreement for a number of decades. The ability of the Singapore courts to have regard to both English and other Commonwealth case law to establish their own body of case law should provide sufficient machinery to overcome this issue. An established body of Singapore case law can only develop after parties start choosing Singapore law as the governing law of their ISDA Master Agreements.

2.6. On the other hand, there is a question as to whether Brexit would have an impact on the choice of English law and English courts. Broadly speaking, it not expected that Brexit would affect the choice of English law. The recognition of the choice of English law should not depend on whether the UK is part of the European Union ("**EU**") and, within the EU, the courts of the other Member States are obliged to recognise the parties' express choice of governing law, even where the laws are of a non-Member State. The status of English jurisdiction clauses and English judgments, however, face greater uncertainty because the UK will have to agree a mutual recognition and enforcement regime with the EU, and it is not clear what form this regime might take. The current regime is unlikely to remain, and there are a number of "fallbacks" based on other European conventions, which govern the EU's relationship with certain countries, such as Denmark, Iceland and Norway. In short, it is unclear how English judgments will be recognised and enforced within the EU post Brexit. For Asian market participants, this might all be irrelevant because it is likely that it is enforcement in a local Asian jurisdiction (rather than within the EU) that is critical. A local Asian jurisdiction may not even recognise foreign judgments and, if so, Brexit or otherwise, the answer is likely to be arbitration. If litigation is still an option, it may be that exclusive jurisdiction clauses are used to ensure that the Hague Convention on Choice of Court Agreements (the "**Hague Convention**")[9] applies. This assumes that the UK will sign up to the Hague Convention in its own right post Brexit and, if so, the other EU Member States will be bound to recognise the exclusive choice of English courts and the resulting English judgment. Given that the Hague Convention is only in its nascent stage of development, it may be that Brexit will provide an impetus for parties to elect for arbitration in order to rely on the New York Convention.[10]

2.7. An examination of the ISDA Master Agreement and the relevant credit support documents published by the International Swaps and Derivatives Association, Inc. ("**ISDA**") also supports the conclusion that the use of Singapore law as the governing law for OTC derivative transactions is a viable option. The ISDA Master Agreement is expected to be enforceable as a matter of Singapore contract law, similar to the position under English law. It is also expected that any amendments to the ISDA Master Agreement that are required as a result of the use of Singapore law as the governing law would be minimal. These relate to the governing law and jurisdiction clause as well as the inclusion of an appropriate third party rights clause, and all such changes can be made in the Schedule to the ISDA Master Agreement. It is not expected that any amendments will be required to be made to the 1995 English CSA. In the case of the 1995 CSD, more extensive amendments will be required to localise the document. In particular, the references therein to English statutory provisions will have to be amended to refer to the Singapore equivalent ones. Historically, the 1995 CSD is not widely used in the Asian market because of the difficulties relating to the taking of security in various Asian jurisdictions. This applies equally to the New York

[9] Convention of 30 June 2005 on Choice of Court Agreements.
[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

law Credit Support Annex (the "**1994 NY CSA**"). Indeed, it is even less likely for parties to use a New York law security document when the ISDA Master Agreement is not governed by New York law, and there is no other US nexus.[11]

2.8. In conclusion, the adoption of Singapore law as the governing law for OTC derivative transactions is a viable option for Asian market participants from a legal perspective. Singapore law ticks the right boxes as regards the factors that are relevant to the choice of governing law. Having Singapore law govern both the contractual aspects of the parties' relationship and other aspects (by operation of the relevant conflict of laws rules) should not create any issues from a legal perspective. The enforceability of the documentation governing OTC derivative transactions also should not be affected if such documentation were governed by Singapore law, and any amendments required to be made to such documentation as a result of using Singapore law as the governing law are expected to be minimal.

2.9. However, it should be noted that in order for market participants to obtain the necessary legal comfort, they would require an opinion that confirms the validity and enforceability of the relevant ISDA documentation (as a matter of contract) if governed by Singapore law as well as the enforceability of netting and collateral rights against their respective counterparties where the ISDA documentation is governed by Singapore law. Market participants would not automatically be able to rely on the relevant ISDA industry netting and collateral opinions, as these assume that the ISDA documentation is governed by English or New York law. These opinions would have to be updated (or a bring-down opinion would have to be obtained) to include in their assumptions that the relevant ISDA documentation could be governed by, and are enforceable under, Singapore law (in addition to English and New York law).

2.10. In Australia and New Zealand, the Australian Financial Markets Association ("**AFMA**") and New Zealand Bankers' Association ("**NZBA**") have produced standard amendments and documentation for use with Australian and New Zealand law ISDA Master Agreements respectively. If there is sufficient demand among market participants, consideration can be given to produce a Singapore equivalent, including the commissioning of the relevant legal opinions to support such documentation.

3. Background

3.1. Asian OTC derivatives market

3.1.1. ISDA/Celent Study. In April 2013, Celent prepared a study (the "**ISDA/Celent Study**") titled, "The Asian OTC Derivatives Market" for ISDA.[12] The ISDA/Celent Study covered 10 Asian financial markets: Australia, China, Hong Kong, India, Indonesia, Malaysia, New Zealand, Singapore, South Korea and Taiwan, and it showed that in 2012, there was US$42.6 trillion in

[11] That said, one instance where the 1994 NY CSA is used is when transacting with Korean banks and "Korean collateral" (i.e. cash denominated in Korean Won and Korean government securities) is taken as security. Under Korean law, it used to be the case that only security interest arrangements were permitted, so market participants were unable to use the 1995 English CSA (which operates by way of title transfer) for "Korean" collateral unless they included "Korean pledge" provisions in their documentation. The alternative was to use the 1994 NY CSA (which operates by way of security interest). However, Korean regulators have recently passed regulations permitting rehypothecation so market participants may transition to title transfer arrangements with the passage of time.

[12] *Supra* n 6.

notional outstanding in these markets and the total annual turnover was US$186 trillion. Dealers (being commercial and investment banks and securities houses) accounted for 57% of the turnover and other financial institutions (i.e. other banks, central counterparties, insurance companies, hedge funds, etc.) accounted for 34%. The remaining 9% comprised non-financial customers (mainly corporates and governments).

3.1.2. **Country turnover**. Of the 10 Asian financial markets surveyed by the ISDA/Celent Study, the dominant markets were Australia, Hong Kong and Singapore, and this was consistent across the various asset classes.[13] In a separate report by Celent titled "OTC Derivatives in the Advanced Asian Economies", it was stated that Australia, Hong Kong, Japan, New Zealand and Singapore accounted for more than 90% of the OTC derivatives trading volume in Asia in 2012.[14] Although the ISDA/Celent Study omitted Japan, it was clear from both reports that the OTC derivatives turnover was heavily concentrated in the more advanced Asian economies.

3.1.3. **Asset class**. In terms of asset class, FX dominated and accounted for 76% of total turnover. Interest rate derivatives came a distant second at 18%, with commodities, equity-linked and credit default swaps at 3%, 2% and 1% respectively. The dominance of FX arose out of the multiplicity of currency regimes and regulatory frameworks in Asia. The need to hedge the currency exposures arising out of the real economic activities in the various Asian economies underpinned the continued growth of FX in the region. This can be contrasted with the global phenomenon, which, broadly speaking, is the dominance of interest rate with FX at a distant second.[15]

3.1.4. **OTC regulatory reforms**. Although the Asian countries are in varying stages of implementing the regulatory reforms contemplated by the G20 commitments, it is clear that, compared with the landscape before the global financial crisis, the OTC derivatives market has become much more regulated.

(i) The three main areas of regulation affecting OTC derivative transactions are currently (a) trade reporting, (b) clearing and (c) margining of uncleared OTC derivatives.

(ii) Although it has been suggested that mandatory margining of uncleared OTC derivatives is likely to prompt market participants to clear more of their OTC derivative contracts or abandon OTC derivatives in favour of exchange-traded derivatives, there are many aspects to this issue and it is beyond the scope of this paper to delve

[13] *Ibid*, Table 2 at p 10.
[14] Celent report, "OTC Derivatives in the Advanced Asian Economies" by Arin Ray, 24 September 2013.
[15] This is borne out by the latest statistics from BIS in the form of its semi-annual OTC derivatives statistics, which showed that for H2 2016, interest rate derivatives accounted for 76.3% of the notionals outstanding and FX accounted for 14.2%. However, it should be noted that the measure adopted by BIS is notionals outstanding, which is different from the ISDA/Celent Study, which used turnover.

into the effects of regulation on OTC derivatives trading.[16] For the purposes of this paper, it is sufficient to note that this assertion is by no means clear-cut, and some of the findings from the ISDA/Celent Study tend to suggest that the OTC derivatives market will still have an important role to play in the global economy, notwithstanding the relentless tide of regulatory changes.[17]

(iii) The latest statistics from BIS noted a downward trend in global notionals outstanding since 2014 (after rising steadily since 2008), with an uptick in the first half of 2016 reported in the half-year statistics ending June 2016, though this was reversed in the second half of 2016. The decline in recent years can be attributable to (a) a significant drop (of almost 30%) in EUR interest rate notionals since 2014, noting that interest rate derivatives accounted for more than 75% of total notionals outstanding globally, and (b) the steady decline in notionals outstanding for commodities and credit default swaps (although commodities is fairly insignificant overall).

3.2. Singapore's status as an OTC derivatives hub

3.2.1. **ISDA/Celent Study**. According to the ISDA/Celent Study, Singapore ranked eighth in the world in overall OTC derivative trading and accounted for around 5% of global turnover. Singapore also ranked fourth and fifth in OTC FX and interest rate derivative trading, respectively.

3.2.2. **BIS Triennial Central Bank Survey and GFCI Report**. According to the more recent BIS Triennial Central Bank Survey, in April 2016, Singapore ranked **third** in OTC FX derivative trading and accounted for 7.9% of the total OTC FX derivative turnover, behind UK (36.9%) and US (19.5%) but ahead of both Hong Kong (6.7%) and Japan (6.1%). As for OTC interest rate derivative turnover, Singapore still ranked **fifth** globally and accounted for 1.9% of the total OTC interest rate derivative turnover, behind US (40.8%), UK (38.8%), France (4.6%) and Hong Kong (3.6%). The continued growth of OTC FX and interest rate derivatives is also complemented by Singapore's consistently strong position in the Global Financial Centres Index ("**GFCI**"). Singapore is ranked **third** behind London and New York in the latest GFCI report of March 2017,[18] and, although there has been no change in the rankings, it is noteworthy that the ratings for London and New York have fallen, suggesting that Brexit and the election of Donald Trump as the US president have had an impact. At the same time, the ratings for Singapore, Hong Kong and Tokyo have risen, narrowing the gap between the Asian financial centres on the one hand and London and New York on the other hand.

[16] See, for example, *Regulatory reform of over-the-counter derivatives: an assessment of incentives to clear centrally*, a report published by BIS in October 2014 and *Non-Cleared OTC Derivatives: Their Importance to the Global Economy*, a report published by ISDA in March 2013.

[17] For example, 58% of the respondents thought the regulations would not be likely to impact their use of OTC derivatives, 34% thought they would be likely to trade more OTC derivatives as a result of the regulations and only 8% thought they would trade less OTC derivatives as a result of the regulations.

[18] The most recent GFCI rankings and ratings are available at http://www.longfinance.net/images/gfci/gfci_21.pdf.

3.2.3. **Dominance of Singapore in Asian markets**. If one focuses on Singapore's share of the turnover among the 10 Asian financial markets surveyed by the ISDA/Celent Study, Singapore's status as an OTC derivatives hub in Asia is evident. Singapore had the highest annual turnover in 2012, although it should be noted that the ISDA/Celent Study omitted Japan, which would have ranked ahead of Singapore.[19] However, among the 10 Asian financial markets surveyed by the ISDA/Celent Study, Singapore ranked first in FX (43%), commodities (60%) and credit default swaps (56%), and second in interest rate (32%) and equity-linked (33%). It is noteworthy that for FX, commodities and credit default swaps, the second tended to be Australia or Hong Kong, ranking a distant second. For equity-linked, Hong Kong was a narrow first at 34%.

3.2.4. **Impact of regulatory reforms**. The global regulatory reforms also present potential opportunities for Singapore. For example, there is a continuing debate as to whether the increasingly complex web of regulations in the US (e.g. Dodd Frank) and EU (e.g. EMIR,[20] MiFiD II[21] and MiFIR[22]) may incentivise certain players to move their operations to Asia. That said, it is not entirely clear whether differences in the regulations are sufficient conditions to result in meaningful arbitrage,[23] noting that regulatory arbitrage is unlikely to be condoned by the regulators.[24] Nevertheless, it is undeniable that the cost of regulatory compliance has increased by an unprecedented scale for many financial institutions. Even if regulatory arbitrage is not contemplated, the cost of regulatory compliance could force global dealers to revisit their strategy both globally and in the Asia Pacific. For example, Barclays announced in January 2016 that it is closing its offices in, among other countries, South Korea, Taiwan, Malaysia, Indonesia, Thailand, Philippines and Australia, and, in Asia, it is retaining a physical presence only in China, Hong Kong, India, Japan and Singapore.[25] Although this translated into job cuts for the jurisdictions concerned, to the extent that the bank continues to service customers in those jurisdictions out of the countries it continues to maintain a presence, it will concentrate activities out of the remaining countries and Singapore will be a natural hub for South-east Asia.

4. Choice of governing law of contracts

4.1. General

4.1.1. When parties enter into a contract, absent special circumstances,[26] the

[19] *Supra* n 14.
[20] EMIR (or the European Market Infrastructure Regulation) refers to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.
[21] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast).
[22] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.
[23] Christian Johnson, "Regulatory Arbitrage, Extraterritorial Jurisdiction and Dodd Frank: The Implications of US Global OTC Derivative Regulation" (2014) Vol 14 Nevada Law Journal 542.
[24] Kevin Brown, "Asia to clamp down on regulatory arbitrage", *Financial Times*, 3 October 2011.
[25] Martin Arnold and Don Weinland, "Barclays retreats from Asia, Brazil and Russia", *Financial Times*, 22 January 2016.
[26] For example, security documents may, depending on the nature of the secured assets, have to be governed by a particular governing law.

governing law clause is unlikely to be one of the provisions on which they will focus a great deal of attention. This is because, the governing law clause will be one of the boilerplate clauses in a contract, and, almost invariably, the default position tends to apply without a conscious drafting decision on the part of the lawyer preparing the draft contract.

4.1.2. In a purely domestic scenario where both contracting parties are domiciled or incorporated in the same jurisdiction, it may be natural to use the laws of that jurisdiction as the governing law of the contract. However, this is an increasingly unlikely scenario given the cross-border nature of commercial relationships. In other words, when two contracting parties domiciled or incorporated in different jurisdictions enter into a contract, the home jurisdiction approach is no longer tenable. Depending on the relative bargaining power of the parties and the status of the governing law in question, it might be equally untenable for one party to insist on using the laws of its jurisdiction as the governing law because that could be perceived as non-neutral and unfair.

4.1.3. Accordingly, it is fairly common to use a third country's laws as the neutral governing law, and this section considers the various factors that are relevant in selecting an appropriate governing law. Broadly speaking, they fall into two categories, those that are relevant from a legal perspective and those that are relevant from a commercial perspective. There is also a separate set of factors that, strictly speaking, affect the choice of court as opposed to the choice of governing law. However, it is important to consider these factors as well for completeness because, in many cases, the governing law and jurisdiction clauses in a contract go hand in hand, even though there is no strict requirement for this to be the case. However, as discussed below, there are good reasons for consistency. Therefore, if a certain jurisdiction is sub-optimal from a choice of court perspective, it then brings into question the choice of that jurisdiction's laws as well. Finally, it should be noted that the list below is not intended to be exhaustive because, in practice, one would expect a huge amount of variance and subjectivity[27] in terms of the relevance and significance attached to the various factors by contracting parties.

4.2. Relevant factors from a legal perspective

4.2.1. **Certainty and predictability**. For contracting parties, it is important that the interpretation and application of the governing law is sufficiently certain and predictable. This is because, they have to be able to rely on their understanding of the relevant governing law to conduct their affairs and manage their contractual relationship.

4.2.2. **Commerciality and robustness**. A jurisdiction's laws also have to provide sufficient content for application in commercial transactions. The relevant laws should be robust enough in the sense that the application of such laws is clear and consistent and not, for example, riddled with exceptions such that,

[27] See, for example, a study by Luiz Gustavo Meira Moser, "Choice of Law in Practice - a Global Empirical Survey", which illustrates the multitude of factors that parties consider relevant in the context of international sale of goods.

depending on the type of transaction, a different legal outcome ensues.

4.2.3. Established body of case law. Although this factor suggests a common law bias, the practical reality is that, even in civil law jurisdictions where case law is not formally binding, precedents have an important role to play in the development of jurisprudence.[28] The existence of an established body of case law is a useful tool to promote certainty and predictability because contracting parties will then know how certain issues and provisions of their contract have been dealt with by the courts.

4.2.4. Freedom of contract/absence of mandatory or default provisions. The factors under this heading revolve around party autonomy. It is important for parties to know that their contractual bargain will be given effect to by the courts and that there is limited room for terms to be implied into their contract. It is also important that mandatory rules that parties are unable to contract out of and/or default rules that apply if parties had been silent in their contract are limited.

4.2.5. Flexibility/gap filling mechanisms. This factor focuses on the ability of the relevant laws to develop and evolve to respond to the changes in the commercial landscape over time. This is an important feature, because, for a system of law to serve its purpose and function in society and remain relevant, it cannot be static. It has to be able to adapt to societal changes in an incremental and principled manner.

4.2.6. Consistency with choice of method of dispute resolution.

(i) Although there is, strictly speaking, no requirement for the choice of governing law to be the same as the choice of court, there are certain advantages for consistency. This is because, one would typically expect the courts in country X to be best placed to adjudicate on any disputes arising out of a contract governed by country X's laws. It is, of course, perfectly possible for parties to choose the laws of country X as the governing law and the courts of country Y to resolve disputes in their contract. However, in such a case, if country Y is Singapore, foreign law becomes an issue of fact that has to be proved. Such proof can be adduced in two ways, by either (a) directly adducing raw sources of foreign law as evidence or (b) adducing the opinion of an expert in foreign law.[29] Either way, the court will have the unenviable task of having to work out what is the correct position in relation to one or more issues under a foreign law, which, by definition is unclear, ergo the dispute before the court.

(ii) A case in point was *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd*,[30] where the Singapore High Court remarked

[28] See, for example, in the case of French law, Laurent Cohen-Tanugi, "Case Law in a Legal System Without Binding Precedent: The French Example", Stanford Law School China Guiding Cases Project, 29 February 2016, available at http://cgc.law.stanford.edu/commentaries/17-Laurent-Cohen-Tanugi.
[29] *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [54].
[30] [2006] 4 SLR(R) 451.

that:

> *"The reality of the situation, in this case at least, was that the expert evidence, which was diametrically opposed (and not surprisingly, at that), was singularly unhelpful."*.[31]

That case involved PRC law, and whilst it might be argued that the problem should be less acute with English law on the basis that it is similar to Singapore law, this does not detract from the fundamental proposition that the English courts are best placed to adjudicate on English law issues.

For example, in *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)*,[32] the Singapore Court of Appeal directed the judgment creditor to refer to the English court to determine if the English judgment remained enforceable in England by way of a garnishee order despite the lapse of time. Such direction and the need for expert evidence adds to the cost and complexity of litigation, that can be avoided if the governing law of the contract is also the law of the forum.

4.3. Relevant factors from a commercial perspective

4.3.1. **Familiarity with law and cost of learning (self)**. When choosing a governing law, parties will have to be familiar with the contents of the relevant laws. Otherwise, parties will have to incur time and cost to learn them. This can be a significant obstacle because, without knowing the position under a particular jurisdiction's laws, it is not possible to assess, from a legal perspective, whether such jurisdiction's laws will be appropriate as the governing law of the contract in question.

4.3.2. **Likelihood of counterparty acceptance**. Whether the counterparty will accept the proposed governing law is also crucial because it is futile if the other party will not accept it. The counterparty may reject a proposed governing law for any number of reasons, but the most obvious one is the lack of familiarity. If the counterparty has never used a particular law as the governing law before and does not otherwise know how it works, it will be difficult to convince the counterparty to accept such law as the governing law. Even if a robust legal opinion confirming the validity of the contract is obtained, it is not simply a case of reading the opinion. This is because, a standard enforceability opinion will contain many assumptions and qualifications, and a proper understanding of the relevant laws will be necessary to appreciate the relevance and significance of such assumptions and qualifications.

4.3.3. **Flexibility in structuring of transaction/contract**. This feature will make a jurisdiction's laws attractive because it allows parties to structure their commercial arrangements without being restricted by mandatory legal frameworks. For example, Indonesia has a very rigid framework when a

[31] *Ibid*, at [14].
[32] [2009] 2 SLR(R) 166.

creditor wishes to take security over movable assets. Only a fiduciary transfer and pledge are contemplated under Indonesian law, and, if parties wish to use a title transfer collateral arrangement, there is a real risk that such arrangement will be recharacterised and unenforceable under Indonesian law. This is because, Indonesian law recognises only certain types of security interests, and parties are not free to deviate from this closed legal system by creating their own forms of security interest.[33]

4.4. Relevant factors from a choice of court perspective

4.4.1. **Length and cost of proceedings**. This is an important factor because if a particular jurisdiction's courts are expensive and/or slow,[34] litigating there would be a particularly unattractive option. Outside of a purely domestic scenario, it is unlikely that contracting parties will elect to use the law or courts of such jurisdictions, except in limited cases.[35]

4.4.2. **Political risk**. It is also recognised that certain jurisdictions carry political risk. For example, corruption can be a problem in certain jurisdictions.[36] As such, even if a contract is in theory enforceable in such jurisdictions and is supported by a robust legal opinion, the existence of political risk means that, in practice, it may not be capable of being legally enforced with certainty if proceedings were brought before those courts.

4.4.3. **Practical convenience to parties**. In theory, parties should choose to litigate at the forum that is most convenient to them, and this could be dictated by practical factors, such as availability of witnesses, location of parties to the dispute and the centre of gravity of the transactions giving rise to the dispute. To a certain extent, this reflects some of the connecting factors considered by the courts when a defendant applies to stay proceedings by invoking the doctrine of *forum non conveniens*, and it suggests that there is merit for contracting parties to consider these factors when making the choice of court decision at the outset. In other words, even if contracting parties wish to maintain maximum flexibility by having a non-exclusive jurisdiction clause, they should, for practical reasons, specify the courts that are the most "convenient" in their non-exclusive jurisdiction clause.

4.4.4. **Competence and independence of judiciary**. Contracting parties need to know that if they have a dispute, they can resolve it before judges who are impartial and have the relevant expertise. This allows parties to be confident in the integrity of the adjudication and to have a fair trial before a judge who will apply the law free from outside influences. There are two dimensions to judicial independence.[37] First, institutional independence, which is ensured by the

[33] Ali Budiardjo, Nugroho, Reksodiputro, "Memorandum of Law for the International Swaps and Derivatives Association, Inc. on Validity and Enforceability of Collateral Arrangements under the ISDA Credit Support Documents: Indonesian Law", 16 February 2004 and Update dated 4 January 2006.
[34] See, for example, Tom Lasseter, "India's Stagnant Courts Resist Reform", BloombergBusinessWeek, 9 January 2015, available at https://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-314-million-cases.
[35] For example, when local law is a requirement in the case of security documents, and the creditor will have to enforce in the local courts in any case.
[36] See, for example, Simon Butt, *Corruption and Law in Indonesia* (Routledge, 2011).
[37] Canadian Judicial Council, "Why is Judicial Independence Important to You?", May 2016.

separation of powers among the executive, legislature and judiciary. Second, adjudicative independence, which depends on factors such as security of tenure and remuneration. The increasing complexity of disputes going before the courts has also given rise to specialist courts in jurisdictions such as the UK[38] and Singapore.[39] Although there are arguments for and against having specialist courts,[40] the increasing complexity of commercial cases going before the judiciary is a practical reality, and one way of ensuring that the judges have sufficient expertise is to create specialist courts.

4.4.5. Mature legal services market. Having a competent and impartial judiciary is only half the equation because contracting parties also require sound legal advice, whether at the stage of entering into a transaction or resolving a dispute. This requires a mature legal services market, consisting of lawyers, both private practice and inhouse, with substantial experience to support the relevant industry. A legal ecosystem is only complete when there are also practitioners with sufficient depth and breadth of experience in the relevant markets to advise the industry players.

4.5. Particular issues to consider in relation to OTC derivative transactions

4.5.1. Certainty and predictability; commerciality and robustness.

(i) As with other types of commercial transactions, it comes as no surprise that certainty and predictability are very important factors. In the context of OTC derivative transactions, this is particularly so because they are governed by the ISDA Master Agreement, which is an industry standard document. As Briggs J exhorted in one of the Lehman cases:

> *"It is axiomatic that [the ISDA Master Agreement] should, as far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand".*[41]

(ii) The relevant laws should also be robust enough to ensure that the legitimate commercial expectations of the contracting parties are given effect to. For example, credit derivative transactions should not be easily recharacterised as contracts of insurance because this could have potentially serious regulatory implications. Another example would be title transfer collateral arrangements, which are commonly used to collateralise OTC derivative transactions. It is important that title transfer collateral arrangements be upheld under

[38] In the English High Court, there are various divisions consisting of the Queen's Bench, Family and Chancery, and within each division, there are specialist courts. For example, the Queen's Bench Division consists of, among others, the Administrative Court, the Admiralty Court, the Commercial Court and the Technology and Construction Court. In October 2015, a Financial List was set up to hear cross-border issues arising from the financial markets.
[39] In Singapore, specialist courts like the Admiralty Court, the Intellectual Property Court and the Arbitration Court have also been set up in the Supreme Court.
[40] Markus B. Zimmer, "Overview of Specialized Courts" (2009) Vol 2 No. 1 International Journal for Court Administration 46.
[41] *Supra* n 1 at [53].

the relevant laws because any risk of recharacterisation as a security interest could have adverse consequences. For example, if the security interest was registrable, but the parties failed to register it because they erroneously assumed that they entered into a title transfer collateral arrangement (which was not registrable), the security interest may be rendered void against the liquidator and other creditors. In the context of title transfer collateral arrangements, English law, as opposed to New York law, can be said be more robust. This can be seen in the Lehman "Repo 105" matter, whereby Lehman relied on repurchase transactions governed by English law to obtain short term funding to improve its financial ratios and shift risky or impaired assets off its balance sheet. It used English law because it was able to obtain robust English law true sale opinions to satisfy its accountants that it could account for the relevant repurchase transactions as sales as opposed to secured loans. On the other hand, Lehman was not able to obtain an equivalent opinion from US counsel due to the uncertainties under US law in this regard.[42]

4.5.2. Freedom of contract and flexibility in structuring of transaction/ contract. These factors are highly desirable in the context of OTC derivative transactions because OTC derivative transactions can be highly complex and bespoke in nature.

(i) An example can be found in the "flip clause" litigation in the UK and US. The "flip clause" is the name given to the contractual priority of payment provisions in certain Lehman Brothers structured finance transactions. These provisions are fairly common in the market for such types of transactions. They operate such that if a swap counterparty is in default, its ranking in the payment waterfall will be "flipped" such that it will be subordinated to the noteholders. This is to be contrasted with the non-default position whereby the swap counterparty would have priority over the noteholders. The issue before the English courts was whether the "flip clause" contravenes the anti-deprivation principle. In upholding the validity of the "flip clause", the English Supreme Court recognised that "party autonomy is at the heart of English commercial law" and, although there are limits to party autonomy in an insolvency scenario, "there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal".[43]

(ii) In contrast, the US position is wholly unsatisfactory. It started with Judge Peck's ruling (in relation to the same facts) in 2010 that invalidated the "flip clause" on the basis that it violates the *ipso facto*

[42] D Kershaw and R Moorhead, "Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession" (2013) 76 MLR 26.
[43] *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38 ("*Belmont*") at [103] *per* Lord Collins.

prohibition under the US Bankruptcy Code.[44] This resulted in conflicting positions under English and New York law, and it has been suggested that Lehman Brothers have secured favourable settlements in the US on the strength of that ruling.[45] In a recent development, Judge Chapman in *Lehman Brothers Special Financing Inc. v. Bank of America National Association, et al*[46] changed tack and upheld similar "flip clauses" in other Lehman Brothers structured finance transactions. It is beyond the scope of this paper to analyse the US decisions from a substantive insolvency law perspective, but what the US cases illustrate is the shift in judicial attitude in recognising the importance of party autonomy in the area of structured finance.

4.5.3. Flexibility/gap filling mechanism. The complexity of OTC derivative transactions also means that the laws need to be able to adapt in order to be applied to novel situations. The *Belmont* case is also a good example of the flexibility of the common law in this regard. The anti-deprivation principle has been applied by the English courts since the 18th century, but in 2010 and 2011, the English courts had to consider it in the context of a Lehman Brothers structured finance transaction. The anti-deprivation principle has been applied in a variety of situations, ranging from provisions in a partnership deed[47] to a lease[48] that provide for certain consequences upon a bankruptcy. The English courts therefore had to distill the principles from two centuries of case law to arrive at a proposition that could be applied to the transaction at hand. This exercise is only possible if the law is sufficiently flexible for the judges to fill the gaps.

4.5.4. Consistency with choice of method of dispute resolution. Given the rise in the use of arbitration for disputes arising out of complex financial transactions (including OTC derivative transactions), consistency between the governing law of the contract and other connecting factors assumes greater importance. This is because, in international arbitration, parties generally face a greater variety of choice of law questions than in international litigation. For example, there could be issues relating to which law governs (i) the arbitration agreement (which is regarded as a separate agreement from the underlying contract), (ii) the arbitral procedure and (iii) supervisory, supportive and enforcement measures, that parties would not have to face if they had chosen to litigate their dispute in court. The fact that there are more choice of law questions means that there is greater scope for having a multiplicity of laws apply. Therefore, if parties were able to choose the laws of country X as the governing law and have the seat of the arbitration in country X as well, this

[44] *Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee Services Ltd. (In re Lehman Bros. Holdings Inc.)* 422 B.R. 407 (Bankr. S.D.N.Y. 2010).
[45] Karen O'Flynn and Flora Innes, "The Courts flip-flopping (again) on the validity of "flip clauses"", 1 September 2016, available at https://www.claytonutz.com/knowledge/2016/september/the-courts-flip-flopping-again-on-the-validity-of-flip-clauses.
[46] Ch. 11 Case No. 08-13555, Adv. No. 10-03547 (Bankr. S.D.N.Y June 28, 2016).
[47] *Whitmore v Mason* (1861) 2 John & H 204.
[48] *Ex p Jay; In re Harrison* (1879) 14 Ch.D. 19 (CA).

would go some way towards avoiding any unnecessary complexity.[49]

4.6. ISDA Master Agreement - Current Practice

4.6.1. Either English or New York law

(i) As described above, the ISDA Master Agreement was drafted with English and New York law in mind. Even though Section 13(a) of the ISDA Master Agreement appears to give contracting parties a free choice as to the governing law of the contract (being the law specified in the Schedule), Section 13(b)(i) of the ISDA Master Agreement expressly contemplates that the parties would choose either English or New York law. Section 13(b)(i) is the jurisdiction clause, which allocates jurisdiction to the English courts (if the contract is expressed to be governed by English law) or the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City (if the contract is expressed to be governed by New York law).

(ii) In Asia, English law is more commonly used and is often the default position because it is perceived to be the neutral third country governing law that more market participants in the region are familiar with and are therefore more willing to accept. The multiplicity of jurisdictions in Asia means that it would be difficult for one party to insist on the laws of its home jurisdiction to be the governing law because to do so would be perceived as non-neutral and unfair.

4.6.2. Possibility of other governing laws

(i) Although the ISDA Master Agreement was drafted with English and New York law in mind, the User's Guide to the 1992 ISDA Master Agreements expressly contemplates the use of laws other than English or New York law, and the example given was the laws of a State or Territory in the Commonwealth of Australia.[50] In fact, the use of Australian law is commonly encountered when the ISDA Master Agreement is used to govern swaps hedging a financing where the facilities agreement, intercreditor agreement and other finance documents are all governed by Australian law. AFMA facilitates the use of Australian law as the governing law of the ISDA Master Agreement by maintaining a subscription-based online tool titled, "Guide to Australian OTC Transactions", which provides legal commentary and the recommended approach to ensure that the amendments made to the ISDA Master Agreement for use under Australian law are as uniform as possible. Similarly, NZBA has also published various documentation for use when two New Zealand counterparties enter into OTC derivative transactions, including the

[49] See, for example, the conflict of laws position as regards the law of the arbitration agreement at para 5.3.7 below. If the governing law of the underlying contract is the same as the laws of the seat, then there will be less scope for dispute as to what the law of the arbitration agreement should be.
[50] See II.N. para 1.

form of the ISDA Schedule when the ISDA Master Agreement is governed by New Zealand law. As such, the use of governing laws other than English or New York law is not a novel phenomenon, and certain jurisdictions like Australia and New Zealand have taken the approach of publishing standard form documentation for domestic parties to use should they wish to adopt domestic law as the governing law of their ISDA Master Agreement.

(ii) There are also instances in which parties may also use Hong Kong or Singapore law as the governing law of their ISDA Master Agreement.

(a) For example, when a Singapore bank enters into an ISDA Master Agreement with an entity that is incorporated in Singapore, even though English law might be the default position, Singapore law is sometimes used if the counterparty so requests.

(b) Similarly, Hong Kong law might be used if the ISDA Master Agreement is between a bank in Hong Kong (whether a branch or subsidiary) and a counterparty that is incorporated in Hong Kong.

(c) In the private wealth management world, some private banks will use Hong Kong law as the governing law of their ISDA Master Agreements if the customer opens its account with the Hong Kong branch of the private bank and Singapore law if the customer opens its account with the Singapore branch of the private bank.

(iii) However, it should be noted that for civil law jurisdictions, it may not simply be the case of expressing the ISDA Master Agreement to be governed by French law, for example. It tends to be a different local law master agreement because the ISDA Master Agreement was drafted based on English and New York law, i.e. legal systems based on the English common law. As such, there are various other types of local law master agreements in the market but they are usually confined to purely onshore transactions. To name a few, there are the FBF Master Agreement (French law), the Deutscher Rahmenvertrag für Finanztermingeschäfte (German law) and the NAFMII (National Association of Financial Market Institutional Investors) Master Agreement (PRC law).

5. Significance of governing law of contract

5.1. General

5.1.1. After considering the various factors that are relevant to the choice of governing law of a contract, it would be useful at this juncture to examine the significance of the governing law from a conflict of laws perspective. This is because, the governing law of a contract is a connecting factor for the purposes of the common law choice of law methodology.

5.1.2. Generally speaking, when the courts in common law jurisdictions have to deal with a dispute with foreign elements, the first step is to characterise the issue before the court and then categorise it for choice of law purposes. Examples of such categories include contract, tort, succession, etc., and each category can have its own sub-categories. These categories and subcategories serve no particular purpose other than to identify the connecting factor associated with it and the connecting factor will in turn point the court to the applicable law that governs the particular issue at hand (the *lex causae*).

5.1.3. In other words, by choosing the laws of country X as the governing law of their contract, the contracting parties would have also implicitly chosen the *lex causae* for a number of other matters as well, even though they probably would not have consciously applied their minds to the question. This "choice" operates by virtue of the application of the relevant conflict of laws rules, and, given that each jurisdiction will have its own conflict of laws rules, how the governing law of a contract is relevant will differ from jurisdiction to jurisdiction.

5.1.4. For instance, the Hong Kong Court of First Instance has held that a contract governed by English law imported the common law anti-deprivation rule.[51] While this was based on Hong Kong conflict of laws rules, it is possible that the choice of Singapore law may also import common law principles such as the anti-deprivation rule. However, this should not worsen the position for Singapore law documents as opposed to English law documents.

5.1.5. In practice, there will be some element of uncertainty as to which jurisdiction's conflict of laws rules would apply because it ultimately depends on the courts before which proceedings are brought. That said, for the purposes of this paper, we will consider the issue from the English and Singapore conflict of laws perspective to compare and contrast the position of contracting parties who have chosen English courts and those who have chosen Singapore courts. It should be stated at the outset that the key difference arises from the fact that English conflict of laws rules are subject to EU law and, accordingly, the Rome I Regulation and Rome II Regulation will apply. On the other hand, Singapore conflict of laws rules follow the common law approach.

5.1.6. For completeness, it is also important to consider the approach of arbitral tribunals in this regard. The courts are bound to apply the conflict of laws rules of the forum, but the arbitrator is typically not bound to follow the approach of the courts.

5.1.7. Under Singapore law, an arbitral tribunal seated in Singapore governed by the International Arbitration Act, Chapter 143A of Singapore (the "**IAA**") shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.[52] Failing such choice, the arbitral tribunal shall apply *the law determined by the conflict of laws rules*

[51] *Peregrine Investments Holdings Ltd. v Asian Infrastructure Fund Management Co. Ltd. L.D.C.* [2003] 1 HKC 455 at [127]-[129] (upheld on appeal).
[52] Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**"), which has the force of law by virtue of the IAA.

which it considers applicable.[53] In practice, it is probably unlikely that the parties would have expressly spelt out in their contract the relevant conflict of laws rules that they wish to apply in the event of a dispute. As such, it is likely that the fallback will apply, which means that the arbitral tribunal has considerable discretion in determining the *lex causae*. Under the domestic regime, Section 32 of the Arbitration Act, Chapter 10 of Singapore (the "**AA**") also states that the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. However, if parties fail to make such a choice, the fallback position is different from the IAA. In this situation, Section 32(2) of the AA provides that the arbitral tribunal shall apply *the law determined by the conflict of laws rules*. This begs the question as to which conflict of laws rules the arbitral tribunal should apply, but there are good arguments which support the proposition that it should be the Singapore conflict of laws rules.[54] In other words, in the case of an arbitral tribunal seated in Singapore and not governed by the IAA, the approach ought to be the same as that of the Singapore courts.

5.1.8. Under English law, the position is similar to the IAA (Model Law). Section 46(1) of the Arbitration Act 1996 gives effect to the choice of the parties, and, failing such choice, Section 46(3) provides that the arbitral tribunal shall apply *the law determined by the conflict of laws rules which it considers applicable*.

5.1.9. It should be noted that, in practice, contracting parties will usually incorporate by reference the relevant arbitration centre's institutional rules into their contract. So, for example, if parties choose to use the SIAC, Rule 31.1 of the SIAC Rules 2016 will apply, and it is substantially the same as Articles 28(1) and 28(2) of the Model Law. On the other hand, the London Court of International Arbitration (the "**LCIA**") Arbitration Rules (2014) do not contain an equivalent provision.

5.2. Proper law of contract

5.2.1. Under both English and Singapore conflict of laws rules, if parties have made an express choice of governing law in their contract, such governing law will, subject to certain limited exceptions, be the proper law of the contract, which will govern the contractual aspects of their relationship (e.g. interpretation, performance and consequences of breach).[55]

5.2.2. Under Singapore conflict of laws rules, an express choice of law by the parties will be recognised by a Singapore court, subject to the following limitations: (i) the application of the law chosen by the parties should not be contrary to the public policy of the forum (i.e. Singapore),[56] (ii) the choice should be *bona fide* and legal[57] and (iii) the application of overriding mandatory provisions of the

[53] Article 28(2) of the Model Law.
[54] *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon, editor in chief) (Sweet & Maxwell, 2014) at paras 5.064 to 5.066.
[55] See, for example, Article 12(1) of the Rome I Regulation.
[56] *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 at [12].
[57] *Ibid*.

forum (i.e. Singapore).[58] These limitations are construed restrictively because the Singapore courts have recognised the importance of legal certainty and that market participants enter into commercial arrangements on the basis that their choice of law in the contract will be given effect to.[59]

5.2.3. Under English conflict of laws rules, a contract is governed by the system of law chosen by the parties,[60] subject to, among other things, (i) the application of overriding mandatory provisions of the laws of the forum[61] and (ii) the public policy of the forum.[62] Furthermore, where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties must not prejudice the application of provisions of the law of that other country that cannot be derogated from by agreement.[63]

5.3. Other matters

5.3.1. **Formation of the contract**. For example, questions relating to offer and acceptance, consideration and vitiating factors (i.e. whether the contract is void or voidable for mistake, duress, unconscionability, etc.) will generally fall within this choice of law category.

(i) Under Singapore conflict of laws rules, the position as regards the appropriate connecting factor for questions relating to formation of the contract is said to raise "intractable difficulties".[64] Under common law, there is judicial support for both the putative proper law and *lex fori* as being the appropriate connecting factor.[65] The associated issues have received considerable attention elsewhere[66] and, for the purposes of this paper, it would suffice to note that the proper law of the contract is a potential candidate for the connecting factor as the putative proper law or, rather, the proper law of the putative contract.

(ii) Under English conflict of laws rules, the existence and validity of a contract shall be determined by the law that would be the applicable law if the contract were valid,[67] i.e. English law follows the putative proper law approach. However, a party may rely on the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with

[58] This is a question of statutory interpretation, i.e. whether Parliament intended the relevant statutory provision to have such an effect. See, for example, Section 27(2) of Unfair Contract Terms Act, Chapter 396 of Singapore.
[59] *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.345.
[60] Article 3(1) of the Rome I Regulation.
[61] Articles 9(1) and 9(2) of the Rome I Regulation provide that these are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Rome I Regulation.
[62] Article 21 of the Rome I Regulation provides that the application of the law chosen by the parties may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.
[63] Article 3(3) of the Rome I Regulation.
[64] *Supra* n 59 at para 75.353.
[65] Yeo Tiong Min, *Private International Law: Law Reform in Miscellaneous Matters* (28 March 2003) at para 193.
[66] *Ibid*. at paras 192 to 204 and Law Reform Sub-Committee, Singapore Academy of Law, *Report on Reform of the Law Concerning Choice of Law in Contract* (16 September 2003) at paras 64 to 76 (Chairman: Woo Bih Li J).
[67] Article 10(1) of the Rome I Regulation.

the applicable law.[68]

5.3.2. Formal validity

(i) Under Singapore conflict of laws rules, there is *obiter dicta* to the effect that the formal validity of a contract is to be tested by either the proper law of the contract or the law of the place where the contract was made.[69] As such, the governing law of the contract is one of the connecting factors that will determine the formal validity of the contract.

(ii) Under English conflict of laws rules, the formal requirements of a contract are tested by either the applicable law of the contract or the law of the place where the contract was concluded, if made between parties in the same country.[70] If the parties are in different countries, then the contract is formally valid if the formal requirements of the law applicable to the contract, the law of one of those countries or the law of the country where either of the parties had his habitual residence at the time of conclusion of the contract are met.[71] Once again, the governing law of the contract is one of the connecting factors that will determine the formal validity of the contract.

5.3.3. Capacity

(i) **Natural persons**. Under both Singapore and English conflict of laws rules,[72] although case law is not entirely clear on the appropriate test for the capacity of natural persons to enter into contracts, the governing law of the contract does not appear to be a potential candidate. There are various possibilities, but the prevailing view seems to be that the law of the domicile ought to be relevant. Older authorities also point to the law of the place of contracting (either as the relevant connecting factor in its own right or as an alternative to the law of the domicile), whereas more modern authorities point to the objective proper law.[73] However, the latter is not to be equated with the parties' express choice of governing law of the contract, which may have no connection at all with the parties or the contract.

(ii) **Corporations**. Under both Singapore and English conflict of laws rules, a corporation has capacity to enter into a contract if the requirements under the proper law of the contract **and** the law of its place of incorporation are met.[74] As such, the proper law of the contract clearly has a role to play in this regard.

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[68] Article 10(2) of the Rome I Regulation.
[69] *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 at [39].
[70] Article 11(1) of the Rome I Regulation.
[71] Article 11(2) of the Rome I Regulation.
[72] English conflict of laws rules will generally apply common law in respect of issues relating to capacity of natural persons and corporations because such issues are excluded from the scope of the Rome I Regulation (subject to Article 13). As such, English and Singapore conflict of laws rules in relation to questions of capacity are expected to be broadly similar.
[73] *Supra* n 59 at para 75.370.
[74] *Id.* at para 75.371; *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444.

5.3.4. Tort

(i) Under Singapore conflict of laws rules, the double actionability rule applies whether the wrong is committed in Singapore or abroad, subject to the flexible exception.[75] In other words, a plaintiff can sue in Singapore for a wrong wherever committed if (1) the wrong is actionable as a tort by the law of the forum (i.e. Singapore) if the tort had been committed in the forum (i.e. Singapore) and (2) the wrong gives rise to civil liability by the law of the place where the tort was committed. However, in an exceptional case, the court may apply the law of the forum to the exclusion of the law of the place of the wrong, the law of the place of the wrong to the exclusion of the law of the forum, or the law of a third country that has the closest connection with the parties and the occurrence to the exclusion of both the law of the forum and the law of the place of the wrong, in respect of specific issues or the entire cause of action. As such, it is possible that the governing law of the contract from which the tortious claim arose could be relevant for the purposes of the flexible exception.[76] The Singapore High Court also suggested in a recent case that it is still open for the Singapore courts to give effect to party autonomy in choice of law for non-contractual obligations.[77]

(ii) Under English conflict of laws rules, where the Rome II Regulation applies,[78] contracting parties pursuing a commercial activity will be able to agree in their contract the law that governs the non-contractual obligations arising out of the contract.[79] This will include tortious claims, but where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country that cannot be derogated from by agreement.[80]

5.3.5. Restitutionary claims

(i) In the case of restitutionary claims, the Singapore Court of Appeal[81] applied Rule 230 in *Dicey, Morris and Collins*,[82] which states as follows :

(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.

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[75] *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377.
[76] Yeo Tiong Min, "The Effective Reach of Choice of Law Agreements" (2008) 20 SAcLJ 723 at [12].
[77] *Ong Ghee Soon Kevin v Ho Yong Chong* [2017] 3 SLR 711 at [107] to [111].
[78] Article 1(2) of the Rome II Regulation sets out the situations in which the Rome II Regulation does not apply.
[79] Article 14(1)(b) of the Rome II Regulation.
[80] Article 14(2) of the Rome II Regulation.
[81] In *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543.
[82] *Dicey, Morris and Collins: The Conflict of Laws* (Lord Collins gen ed) (Sweet & Maxwell, 15th Ed, 2016) at para 34R-001.

(2) The proper law of the obligation is (semble) determined as follows:

(a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;

(b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);

(c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

(ii) As such, where the obligation arises in connection with a contract, the relevant connecting factor for restitutionary claims will be the proper law of the contract. This will be the case even if the contract is void or rescinded, unless the vitiating factor impugned the choice of law clause itself, in which case, limb (c) above will apply.[83]

(iii) Under English conflict of laws rules, where the Rome II Regulation applies, contracting parties pursuing a commercial activity will be able to agree in their contract the law that governs any restitutionary claims arising out of the contract, in the same way as in the case of tort.[84]

5.3.6. Equitable obligations

(i) Under Singapore conflict of laws rules, it is recognised that the principles relating to equitable claims are not entirely clear, but where the equitable duties arise from "a factual matrix where the legal foundation is premised on an independent established category such as contract or tort", the relevant connecting factor should follow the established category concerned.[85] As such, at least where the equitable obligations arise out of a contractual relationship, the governing law of the contract is once again relevant as a connecting factor.

(ii) Under English conflict of laws rules, even though there is no clear formulation of principle, both case law and academic texts tend to suggest that equitable obligations do not belong to a separate category for choice of law purposes.[86] In other words, a claim relating to a breach of fiduciary duty or other equitable wrong would be characterised by the English courts as one of the other existing categories. This is presumably on the basis that equitable principles are part of a system of law, so the applicable law has to be identified first, and equity becomes relevant if and only if it is part of the

[83] *Supra* n 59 at para 75.395.
[84] *Supra* n 79.
[85] *Supra* n 75 at [81].
[86] *Supra* n 82 at para 2-037, *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, *Douglas v Hello! Ltd (No 6)* [2005] EWCA Civ 595, *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm).

applicable law identified by the relevant connecting factor.[87] On this basis, equitable obligations cannot give rise to a separate connecting factor.

5.3.7. Law of arbitration agreement

(i) Under Singapore and English conflict of laws rules, it is generally accepted that the courts will determine the law of the arbitration agreement by applying the same three-step test as when determining the proper law of the underlying contract.[88] In other words, the court will first look at the parties' express choice of law. In the absence of an express choice of law by the parties, the court will determine if the intention of the parties can be inferred from the circumstances, i.e. the parties' implied choice. Finally, if no implied choice can be found, the court will have to determine the law with which the arbitration agreement has its closest and most real connection, i.e. the objective proper law.

(ii) However, if the parties did not make an express choice, which is fairly common because the typical governing law clause in a contract will not make specific reference to the arbitration clause, there appears to be some uncertainty as regards the application of the second and third steps of the test.

(iii) In *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA*,[89] the English Court of Appeal held that, in the absence of any indication to the contrary, the *express choice* of the governing law of the underlying contract would be a strong indication of the parties' *implied choice* as regards the law of the arbitration agreement.[90] However, there is conflicting case law, which suggests that it would be "rare" for the law of the arbitration agreement to be different from the law of the seat.[91] Singapore case law also presents a similar picture. In *BCY v BCZ*,[92] the Singapore High Court preferred the *Sulamérica* approach and disagreed with the approach in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd*,[93] which favoured the seat of the arbitration.

(iv) It is beyond the scope of this paper to analyse the relative merits of either approach and, for present purposes, it is sufficient to note that once again, the governing law of the contract is a potential candidate for the connecting factor for the law of the arbitration agreement.

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[87] Yeo Tiong Min, *Private International Law from the Equitable Jurisdiction: Imperialism, Universalism and Pluralism*, Third Yong Pung How Professorship of Law Lecture, 13 May 2010 at para 19.
[88] Strictly speaking, the comparison is with the common law approach because under English conflict of laws rules, the Rome I Regulation applies to the determination of the proper law of the contract, but arbitration agreements are expressly excluded. Therefore, the English courts will apply common law, rather than the Rome I Regulation to determine the law of the arbitration agreement.
[89] [2013] 1 WLR 102 ("*Sulamérica*").
[90] *Ibid*, at [26] *per* Moore-Bick LJ.
[91] *C v D* [2008] 1 All ER (Comm) 1001 at [26].
[92] [2017] 3 SLR 357.
[93] [2014] SGHCR 12.

6. Adoption of Singapore law as the governing law for OTC derivative transactions

6.1. Singapore legal framework

6.1.1. **Common law**. Singapore is a common law jurisdiction and derives its legal system from the British common law. Until 1994, Singapore's court of final appeal was the Privy Council in the UK, and decisions on the common law by the House of Lords were taken as being virtually binding on the local courts. It is expressly provided in the Application of English Law Act, Chapter 7A of Singapore (the "**AELA**") that the English common law, in so far as it was part of the law of Singapore before 12 November 1993, continues to be a part of the law of Singapore. Contract law in Singapore is not codified and remains largely based on the English common law of contract, although it has been modified by certain statutes. Many of these statutes are English in origin, incorporated into Singapore law by virtue of the AELA, or modelled after English statutes, e.g. the Contracts (Rights of Third Parties) Act, Chapter 53B of Singapore.

6.1.2. **Court structure**. The civil court structure consists of four layers, namely, the Magistrates' Court, District Court, High Court and Court of Appeal. In January 2015, the Singapore International Commercial Court (the "**SICC**") was launched as a division of the High Court. The SICC is designed to deal with transnational commercial disputes where the claim in the action is of an international and commercial nature.[94]

6.1.3. **Arbitration**. The Singapore courts encourage the use of arbitration as a means to resolve disputes, and this is evidenced by the fact that they recognise arbitration agreements and will, subject to certain exceptions,[95] stay legal proceedings to give effect to such agreements. The SIAC was established in July 1991 as a not-for-profit, non-governmental organisation to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution in Asia. The SIAC comprises a Court of Arbitration, which oversees the case administration and arbitral appointment functions of the SIAC, and the Board of Directors, which oversees its corporate and business development functions. SIAC is now among the top five most preferred arbitral institutions in the world.[96] SIAC's caseload has nearly quadrupled in the last decade, and continues to increase year on year. In 2016, SIAC set record highs for number of cases filed, number of cases administered and dispute quantum.[97]

6.1.4. **Legal profession**. The legal profession in Singapore is fused as lawyers are not divided into barristers and solicitors. All Singapore lawyers and foreign lawyers registered with the Legal Services Regulatory Authority are regulated

[94] Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 7(1).
[95] IAA s 6 and AA s 6.
[96] *Singapore Parliamentary Debates, Official Report* (10 January 2017) vol 94 (Indranee Rajah, Senior Minister of State for Law).
[97] Singapore International Arbitration Centre Press Release, "SIAC Announces All-Time Record Numbers for 2016" (10 March 2017), available at http://siac.org.sg/images/stories/press_release/2017/[Press%20Release]%20SIAC%20Announces%20All-Time%20Record%20Numbers%20for%20%202016.pdf.

by the Law Society of Singapore and are bound to comply with the Legal Profession (Professional Conduct) Rules 2015, which set out the professional standards expected of these lawyers.

6.2. Why is Singapore law an appropriate governing law for OTC derivative transactions between Asian counterparties?

6.2.1. Singapore law retains the commercial strengths of English law due to its roots in the English common law tradition. However, it has the advantage of being relatively insulated from the political and legal developments of the EU today. In particular, Singapore law is transparent, neutral and predictable, fulfilling the major criteria for choice of law and ticking the right boxes with respect to certainty and commercial robustness. Singapore law seeks to give effect to the parties' commercial intentions and may be chosen to govern transactions, even if there is no connection between the parties or the transaction, and Singapore.[98] For the same reasons that parties choose English law, they should be open to choosing Singapore law as well.

6.2.2. Furthermore, the pro-business environment and legal infrastructure in Singapore is world-class. Singapore consistently tops the World Bank's Doing Business rankings as the world's easiest place to do business, ranking 2nd in the world for 2017. Transparency International's Corruption Perception Index 2016 ranks Singapore as the least corrupt country in Asia and the 7th least corrupt country in the world. The World Justice Project's Rule of Law Index 2016 ranks Singapore as the top Asian country and 9th globally.

6.2.3. While Singapore contract law is similar to English contract law in many respects, it is worth noting that it is not an exact copy. This is because, the Singapore courts also refer to cases from other Commonwealth jurisdictions and, in the common law tradition, have made incremental developments. For example, in respect of remoteness of damage, the position in Singapore is slightly broader, as the Singapore courts have departed from the English position,[99] preferring the more traditional formulation in *Hadley v Baxendale*[100] and rejecting an additional requirement of assumption of responsibility.[101] Nevertheless, the net position is that Singapore contract law is still based on English contract law, and the local refinements are unlikely to make a material difference to the commercial bargain between the contracting parties.[102]

6.2.4. There is also an increasing awareness and acceptance of Singapore law. The Singapore Academy of Law's Promotion of Singapore Law Committee recently commissioned an independent study on governing law and jurisdictional choices in cross-border transactions by surveying 500 commercial law practitioners and in-house counsel who deal with cross-border transactions in

[98] Singapore Academy of Law, "Singapore: Leading Asia in Dispute Resolution", available at http://www.singaporelaw.sg/sglaw/images/sglawbooklet_eng/.
[99] *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61.
[100] (1854) 156 ER 145.
[101] *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [89].
[102] *The Law of Contract in Singapore* (Andrew Phang gen ed) (Academy Publishing, 2012) at para 02.085.

Singapore and the region.[103] In the survey, while English law was found to be the preferred choice of governing law, respondents indicated an awareness of choosing Singapore law as the governing law for cross-border contracts, with 25% of respondents stating Singapore law to be their preferred governing law. In addition, Singapore was the preferred venue for dispute resolution, with 52% of respondents choosing Singapore, citing proximity, efficiency and neutrality as their top three reasons.

6.2.5. Consistency with choice of method of dispute resolution. In this regard, there are practical reasons for the adoption of Singapore law as the governing law. If Singapore is the preferred venue for dispute resolution/ seat of arbitration, then it would be a natural advantage to select Singapore law, as it is likely that the judges or arbitrators would have a greater familiarity with Singapore law. Conversely, if foreign law is chosen as the governing law, then it becomes necessary to prove that law, leading to greater costs incurred as expert evidence would have to be adduced. Asian contracting parties may choose Singapore as a venue for dispute resolution due to factors such as proximity, efficiency and neutrality,[104] and the choice of Singapore law may correspondingly become more attractive.[105]

6.2.6. Neutral court in Asia. In terms of enforceability, a Singapore judgment is no less valuable than an English judgment with respect to key Asia-Pacific OTC derivatives markets. In particular, a Singapore judgment can be expected to be enforceable in Australia,[106] Hong Kong,[107] India,[108] Japan, [109] Malaysia[110] and New Zealand, [111] among others. [112] It may even be more valuable – on 9 December 2016, the Nanjing Intermediate People's Court (Jiangsu Court) issued a judgment recognising and enforcing a civil judgment made by the Singapore High Court based on the principle of reciprocity.[113]

6.2.7. Hague Convention. In addition, since 1 October 2016, the Hague Convention came into force in Singapore following Singapore's ratification of the Hague Convention in June 2016. This strengthens Singapore's position as a venue for dispute resolution because the courts of the other contracting states will be obliged to recognise an exclusive jurisdiction clause in favour of the Singapore courts and recognise and enforce the resulting judgment from the Singapore courts.

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[103] Singapore Academy of Law, "Study on Governing Law & Jurisdictional Choices in Cross-border Transactions" (11 January 2016), available at http://www.sal.org.sg/Documents/SAL_Singapore_Law_Survey.pdf.
[104] *Ibid.*
[105] See para 4.5.4 above.
[106] Statutory regime under the Australian Foreign Judgments Act 1991 (Cth).
[107] Statutory regime under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319, The Laws of Hong Kong).
[108] Statutory regime under the Indian Code of Civil Procedure 1908.
[109] Reciprocity is required under the Japanese Code of Civil Procedure, and Singapore is one of the countries that the Japanese courts have found reciprocity.
[110] Statutory regime under the Malaysian Reciprocal Enforcement of Judgments Act 1958.
[111] Statutory regime under the New Zealand Judicature Act 1908.
[112] "Note on Enforcement of SICC Judgments", available at http://www.sicc.gov.sg/documents/docs/SICC_Enforcement_Guide.pdf.
[113] Cynthia Y S Tang and Anthony K S Poon, "First Time PRC Court Recognizes a Foreign Judgment Based on Principle of Reciprocity" (7 February 2017), available at http://www.bakermckenzie.com/en/insight/publications/2017/01/first-time-prc-court-recognizes-a-foreign.

6.2.8. SIAC as forum for derivative-related disputes in Asia.

(i) Singapore is an increasingly popular venue for arbitration.[114] For parties which are situated in the region, Singapore is an even more attractive venue due to proximity and similarity in timezones.

(ii) Arbitral procedures under the SIAC's Arbitration Rules are flexible, effective and user-friendly and therefore appropriate for a wide range of disputes. The 6th Edition of SIAC's Arbitration Rules (which came into effect 1 August 2016) introduces a number of innovations, including a new procedure for the early dismissal of claims and defences (the first of its kind among the major institutional rules for commercial arbitration) as well as new provisions to deal with multi-party and multi-contract disputes.[115]

(iii) In addition, SIAC's Arbitration Rules provide for certain special procedures. SIAC was the first international arbitral institution to introduce provisions for the appointment of an emergency arbitrator to deal with requests for urgent interim relief prior to the constitution of a tribunal and has received and accepted over 50 emergency arbitrator applications since the inception of this rule in July 2010. Secondly, there is an Expedited Procedure under SIAC's Arbitration Rules that provides a fast-track 6-month procedure for more efficient and cost-effective resolution of cases.

(iv) In respect of the enforcement of arbitral awards, Singapore is a signatory to the New York Convention, affording ease of enforcement. The judiciary has also consistently delivered pro-arbitration decisions with a policy of minimal curial intervention. In particular, SIAC arbitral awards have been enforced in Australia, China, Hong Kong, India, Indonesia, among other New York Convention countries.[116]

6.2.9. Other advantages

(i) **Harmonisation.** Generally, harmonising the choice of governing law with the choice of court would tend to avoid the issue of having to deal with a multiplicity of laws. As mentioned above, it is usually the case that the courts of a country would be best placed to adjudicate on the laws of that country.[117] In the case of Singapore parties, there is necessarily a Singapore nexus. This is because, netting agreements are intrinsically tied up with issues of insolvency law. Collateral arrangements may also be subject to requirements of local law (for instance, questions of registration under Section 131 of the Companies Act, Chapter 50 of Singapore (the "**Companies Act**")), and, where the *situs* of the collateral is in Singapore, Singapore law

[114] See paras 6.1.3 and 6.2.4 above.
[115] *infra*98 at p 8.
[116] *Ibid*.
[117] See para 4.2.6 above.

would usually govern perfection requirements relating to security interests over that collateral. Choosing Singapore law as the governing law could minimise having to deal with English law with regards to contractual aspects on the one hand, and matters of Singapore law (where mandatory requirements of Singapore law apply) on the other hand. As a corollary, if a dispute is heard before a Singapore court, parties would not have to adduce evidence on the position under English law nor contend with a situation where the Singapore courts would have to interpret English law.

(ii) **Transfers by way of scheme.** There is an additional advantage for certain types of Singapore financial institutions to using Singapore law as the governing law for their OTC derivative transactions. Under the Banking Act, Chapter 19 of Singapore, Securities and Futures Act, Chapter 289 of Singapore, Monetary Authority of Singapore Act, Chapter 186 of Singapore, Finance Companies Act, Chapter 108 of Singapore, Insurance Act, Chapter 142 of Singapore and the Trust Companies Act, Chapter 336 of Singapore, a statutory scheme of transfer of the whole or any part of the business of certain types of financial institutions in Singapore by court order is available. In this regard, where the contract is governed by Singapore law, the effectiveness of the scheme of transfer is relatively certain. However, where the contract is governed by a foreign law, the effectiveness of the transfer of foreign law assets, liabilities and/or contracts (the "**Foreign Law Contracts**") is unclear in so far as it is a matter to be determined under the relevant conflict of laws rules of the applicable foreign law. Specific advice would have to be obtained from foreign legal counsel as to whether the Singapore court order will be recognised and whether the scheme of transfer would be accepted as a valid means of transferring the Foreign Law Contracts. Unless the advice from foreign legal counsel is sufficiently watertight, the Foreign Law Contracts would have to be transferred separately from the statutory scheme.

6.3. Any potential issues with using Singapore law?

6.3.1. **Regulatory**. With respect to regulatory compliance requirements, it is unlikely that the choice of Singapore law as the governing law of the contract would alter the position at law. Typically, regulatory compliance issues are triggered by the identity of, and activities conducted by, the party in question, rather than by the contracting parties' choice of governing law.

6.3.2. **Insolvency.** One theoretical issue that may arise is the possibility that a foreign company may be wound up, placed under judicial management or subject to a scheme of arrangement in Singapore simply by virtue of having Singapore law as the governing law of the agreements to which it is a party. Pursuant to the most recent amendment to the Companies Act on 23 May 2017, governing law is now a factor that is taken into account under Section 351(2A) of the Companies Act in determining whether the Singapore courts have the jurisdiction to wind up a foreign company, and correspondingly, place the

foreign company under judicial management[118] or approve a scheme of arrangement in respect of it.[119] This could theoretically render counterparties that do not otherwise have any Singapore nexus susceptible to winding up, judicial management or a scheme of arrangement in Singapore. It remains to be seen how the Singapore courts will interpret Section 351 when an actual case comes before them. However, it should be noted that under Section 351(2A), governing law is only one of the factors which the court may take into account in determining whether the foreign company has a "substantial connection" with Singapore, others being, for instance, whether Singapore is the centre of main interests of the company, whether the company is carrying on business in Singapore or has a place of business in Singapore, whether the company is a foreign company registered under the Companies Act, or whether the company has substantial assets in Singapore. Ultimately, the test under Section 351(1)(d) of the Companies Act is whether a foreign company has a "substantial connection" with Singapore and the importance of the governing law will likely depend on the facts of the case.

6.3.3. Lack of Singapore case law

(i) There are many English cases on the ISDA Master Agreement, especially following the collapse of Lehman Brothers Holdings, Inc. In contrast, there is only one Singapore case dealing directly with the interpretation of the ISDA Master Agreement.[120]

(ii) As such, there is value in having agreements governed by English law because of the availability of precedents. However, it should be noted that most of the significant case law that elucidates the meaning and effect of certain provisions in the ISDA Master Agreement post-dates the Lehman collapse but, clearly, English law has been used by market participants for decades.

(iii) Should there be increased take up of Singapore law as the governing law of the ISDA Master Agreement, this issue would likely be resolved over time. In any case, the Singapore courts would treat English cases as persuasive and often have regard to the jurisprudence from other Commonwealth jurisdictions in developing Singapore's case law. Given the flexibility of the common law approach, it is submitted that Singapore law has the ability to evolve and contribute to the case law on the ISDA Master Agreement over time. This is after all a chicken and egg problem. Until there is increased take up of Singapore law, any case law will inherently be limited. As such, the lack of case law should not in and of itself be an objection to the adoption of Singapore law as the governing law of the ISDA Master Agreement.

6.3.4. BRRD and other resolution regimes

[118] Companies Act s 227AA, read with s 351.
[119] Companies Act s 210(11), read with s 351.
[120] *Tan Poh Leng Stanley v UBS AG* [2016] 2 SLR 906.

(i) One issue that has arisen in recent years is the requirement to include an "Article 55" provision in agreements that are not governed by English law (or another EU law). The background to this is, under the Bank Recovery and Resolution Directive ("**BRRD**"),[121] subject to limited exceptions, EU banks and other in-scope entities are required to include a provision in their agreements that contractually obliges the counterparty to acknowledge and accept that*, inter alia*, the liabilities under the relevant agreement may be subject to bail-in and it is bound by the effects of a bail-in. This provision is colloquially known as the "Article 55" provision. Accordingly, if an EU bank enters into an agreement that is governed by Singapore law (or any other non-EU law for that matter), it will be required to include an "Article 55" provision in that agreement.

(ii) However, this is unlikely to be a material issue for a number of reasons. First, in the context of two Asian counterparties, the BRRD should not apply and, accordingly, the "Article 55" provision is unlikely to be relevant. Secondly, whatever the governing law of the agreement, given that more jurisdictions are implementing bank recovery and resolution laws, the equivalent of the "Article 55" provision under another resolution regime may be required even if parties avoid the issue under BRRD by using English law. It should also be noted that post Brexit, English law agreements may also require the "Article 55" provision.

(iii) Ultimately, the "Article 55" provision (or its equivalent under another resolution regime) is no more than a contractual term that provides for the acknowledgment and acceptance by a party that the relevant liabilities of the other party could be subject to a bail-in if the other party becomes subject to resolution measures. It is intended to serve as a stopgap measure until a more comprehensive international solution can be found to ensure that if a bail-in under law X occurs, the governing law of the agreement, where it is not law X, will recognise the effects of the bail-in. It is therefore arguable whether the requirement to include such provision is an issue *per se* because whether the contracting parties use law X or another governing law (and thereby have to include the "Article 55" provision (or its equivalent)), they are accepting the effectiveness of the bail-in under the relevant resolution regime. The tension between conflict of laws and recovery and resolution is beyond the scope of this paper, and it is sufficient for present purposes to conclude that this issue (and it is arguable whether this should be considered an issue in the first place) is not one that arises out of the use of Singapore law *per se*. Rather, it is part of a wider problem that relates to the cross-border effectiveness of bank resolution regardless of the governing law

[121] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

used.[122]

6.4. Are there any issues with using English law when the OTC derivative transaction is between two Asian counterparties?

6.4.1. Impact of Brexit on choice of English law

(i) The question here is whether Brexit might affect the continued viability of choosing English law as the governing law of the contract, in particular, between two Asian counterparties that have entered into an OTC derivative transaction. In this regard, there are two key points to be noted.

(ii) First, the reasons for choosing English law as the governing law of a contract are likely to remain relevant post Brexit. At a general level, English law ticks the right boxes as being certain and predictable as well as commercial and robust. The established body of case law and the familiarity to market participants will also be enduring reasons to choose English law. Furthermore, substantive English contract law and the core concepts of netting and collateral, which underpin the enforceability of the documentation governing OTC derivative transactions, are largely unaffected by EU law. The provisions found in documentation governing OTC derivative transactions would also usually not refer to European legislation or European legal concepts, with the notable exceptions of the jurisdiction clause in the ISDA Master Agreement (which is discussed further below) and EMIR. This can be contrasted with commercial contracts that contain provisions relating to European environmental, data protection and employment law. As regards EMIR, it should be noted that it applies by virtue of the fact that one or both parties to the OTC derivative transaction is established in the EU. As such, although it raises the question as to how English entities will be regulated post Brexit, it is not strictly speaking an issue that arises out of choosing English law as the governing law of the contract. In other words, if two Asian counterparties choose English law as the governing law of their ISDA Master Agreement, the choice of English law would not in and of itself oblige them to comply with EMIR.[123]

(iii) Separately, given that the governing law of a contract is likely to be a connecting factor for other matters as well,[124] it would be important to consider the content of English law beyond the area of contract law. As discussed above, how the governing law of a contract will be relevant will depend on the conflict of laws rules of the jurisdiction in question. In the context of OTC derivative transactions, the areas of

[122] See further, M Lehmann, "Bail-In and Private International Law: How to Make Bank Resolution Measures Effective Across Borders" (6 April 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759763.
[123] For the sake of completeness, it should be noted that EMIR does contain extra-territorial provisions, but these do not key off the governing law of the contract.
[124] See para 5.3 above.

tort law (e.g. claim for misrepresentation[125]), equitable obligations (e.g. breach of fiduciary duties[126]) and restitutionary obligations (e.g. claim for unjust enrichment for payments made under *ultra vires* swaps[127]) are likely to be relevant as well. However, as with substantive contract law, one would expect the relevant areas of tort law, equitable obligations and the law of restitution to be deeply rooted in the English common law tradition and generally unaffected by EU law. Accordingly, the "loss" of EU law from English law post Brexit should not affect the relationship between two parties to an OTC derivative transaction to the extent that the choice of English law as the governing law would have to be revisited.

(iv) Second, would Brexit affect the validity of the choice of English law?

(a) Outside the EU (e.g. in Asia), this would depend on the conflict of laws rules of the relevant jurisdiction, but it is unlikely that the validity of the choice of English law would depend on whether or not the UK is part of the EU. It is expected that common law jurisdictions, such as Singapore, will generally uphold the parties' express choice of law in their contract.

(b) Within the EU, other Member States will still be obliged to recognise the choice of English law post Brexit. This is because, both the Rome I Regulation and Rome II Regulation are predicated upon giving effect to the express choice of the contracting parties, even where the chosen laws are of a non-EU Member State.

(c) Finally, even though it is not certain how English conflict of laws rules will be applied post Brexit, the White Paper published by the UK government has confirmed that, to the extent possible, all existing EU law will be enshrined into UK law under the Great Repeal Bill once the UK leaves the EU.[128] As such, it is expected that party autonomy will continue to be respected by the English courts, by applying rules similar to those in the Rome I Regulation and Rome II Regulation.

6.4.2. Impact of Brexit on choice of English courts

(i) The next question is whether Brexit would affect the continued viability of choosing English courts as the forum for dispute

[125] See, for example, *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 471 (Comm) and *Hockin v Marsden* [2014] EWHC 763 (Ch).
[126] A claim for breach of fiduciary duties is often made in conjunction with a claim for misrepresentation. See, for example, *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] EWHC 1331 (Comm) and *Intesa Sanpaolo SPA v Regione Piemonte* [2013] EWHC 1994 (Comm).
[127] See, for example, the series of local authority cases: *Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, *Westdeutsche Landesbank Girozentrale v Islington London BC* [1994] 4 All ER 890, *Kleinwort Benson Ltd v South Tyneside Metropolitan BC* [1994] 4 All ER 972 and *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545.
[128] United Kingdom, *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446, March 2017).

resolution, in particular, between two Asian counterparties that have entered into an OTC derivative transaction. Unlike the choice of English law, it should be noted at the outset that in certain Asian jurisdictions, foreign judgments (including English and Singapore judgments) may not be (readily) enforceable. In such situations, this question becomes moot because contracting parties will likely have to choose arbitration.

(ii) As with the choice of law, there are two key points to be noted. First, the attractions for choosing the English courts are likely to remain relevant notwithstanding Brexit. These include access to a mature legal services market, which is particularly important in the context of complex financial transactions. However, the second question, as regards the recognition of the choice of English courts and the enforceability of English judgments, raises a great deal of uncertainty, at least within the EU. This is because, unlike choice of law, the question of jurisdiction involves reciprocity (i.e. mutual recognition of proceedings and enforcement of judgments), which, under the current European regime, is only extended to EU Member States. This is also not assisted by the intricate web of European conventions that have emerged over the years. For the UK, if the Brussels I Recast[129] (which is the European regulation to which the UK is currently subject) ceases to apply, there is a question as to whether (1) the Brussels Convention[130] will be revived, (2) the 2007 Lugano Convention[131] could apply, (3) the UK would have to rely on bilateral treaties with individual EU Member States and/or (4) the UK would sign up to the Hague Convention in its own right. It could even be that none (or a variant) of the above would apply.

(iii) Outside the EU (e.g. in Asia), whether a local court would recognise the choice of English courts and/or enforce an English judgment is unlikely to depend on whether the UK is part of the EU, except in the case where the Hague Convention applies. This is because, currently, the UK is a party to the Hague Convention as a member of the EU, and not in its own right. That said, the Hague Convention only applies to exclusive jurisdiction clauses and, to date, there are only a handful of signatories and ratifications.[132] Of course, the Hague Convention can be expected to grow in importance, and it is very likely that the UK will also sign up to it in its own right. That said, in the majority of cases, an English judgment will be a foreign judgment, whether or not the UK is part of the EU, and it is a question of how easily a party can enforce a foreign judgment in the jurisdiction concerned. If local laws present an enforcement issue

[129] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast).
[130] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.
[131] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[132] The EU, Mexico, Singapore, Ukraine and the US are signatories but note that Ukraine and the US have not yet ratified the Hague Convention. Until this step is taken, the Hague Convention is not in force in Ukraine and the US. Signature is merely an indication of willingness to proceed with such a step. The status table is available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

(e.g. where the Hague Convention does not apply and local laws do not have established recognition and enforcement mechanisms), then the answer will invariably be arbitration, because parties can then rely on the New York Convention, which has more than 150 Contracting States, to enforce their arbitral awards.[133]

(iv) In the UK, the English courts will accept jurisdiction on the basis of the parties' express choice, even if we assume that no treaty or convention applies. This is by virtue of English common law and, in this scenario, there is no cross-border issue as regards the recognition and enforcement of English judgments. However, even in this straightforward scenario, the jurisdiction clause in the ISDA Master Agreement will have to be amended post Brexit because it currently refers to the various European conventions, even though it is essentially either an exclusive or non-exclusive choice of the English courts when English law is chosen as the governing law.

(v) The crux of the problem is within the EU. As illustrated above, there is a great deal of uncertainty as to how English judgments will be recognised and enforced within the EU. As such, if enforcement within the EU is an important consideration, parties may have to reconsider the choice of English courts in their contracts. This is because, unlike the choice of English law that a European court will be obliged to recognise under the Rome I Regulation and Rome II Regulation, there is no clarity as regards the status of English jurisdiction clauses and English judgments within the EU. It may be that the English courts will have more latitude to grant anti-suit injunctions if proceedings were commenced in the courts of an EU Member State in breach of an English jurisdiction clause, but it remains to be seen as to whether anti-suit injunctions will be revived in this manner.

(vi) There are various ways to address the issue of uncertainty within the EU. One option is to enter into exclusive jurisdiction agreements. This will ensure that the Hague Convention applies, and, so long as the UK signs up to the Hague Convention, that EU Member States will have to give effect to an exclusive jurisdiction clause in favour of the English courts. However, there are still gaps because the Hague Convention does not apply to non-exclusive or asymmetric[134] jurisdiction clauses. The other option would be to use arbitration. This is arguably the more straightforward solution because enforcement risk outside the EU can also be addressed at the same time.

(vii) In the Asian context, enforcement risk within the EU is unlikely to be a major issue, so the uncertainty described above may not be as

[133] The list of Contracting States is available at http://www.newyorkconvention.org/list+of+contracting+states.
[134] T Hartley and M Dogauchi, Explanatory Report on the Hague Convention of 30 June 2005 on Choice of Court Agreements (HCCH Publications, 2013), at paras 105 and 106. This is in contrast with the current English position as regards the torpedo action whereby asymmetric clauses are considered "exclusive" for the purposes of the Brussels I Recast: *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc.* [2017] EWHC 161 (Comm).

unsettling for Asian counterparties as it might be for EU counterparties. For Asian counterparties, the issue might be more fundamental. If a counterparty has assets in an Asian country that does not recognise foreign judgments, choosing English courts (or Singapore courts for that matter) is a non-starter. Arbitration is likely to be the dispute resolution method of choice and given that parties are in Asia, an Asian arbitration centre (for example, SIAC) is likely to be more appropriate and convenient than, say, the LCIA. As such, Brexit may become an impetus for more market participants in general to use arbitration, not least because they can derive comfort from the ability to rely on the widespread acceptance of the New York Convention, as compared to the Hague Convention, which is at best in its nascent stage of development.

7. Documentation governing OTC derivative transactions

7.1. Overview of documentation governing OTC derivative transactions

7.1.1. The ISDA Master Agreement is the standard master agreement that typically governs OTC derivative transactions. Besides the ISDA Master Agreement, there are also other master agreements in respect of specific types of transactions. These include the Global Master Repurchase Agreement for repurchase transactions, the Global Master Securities Lending Agreement for securities lending transactions, the Gas Industry Standards Board Base Contract for Short-Term Sale and Purchase of Natural Gas and the International Energy Credit Association Master Netting Agreement for commodity derivatives transactions, the International Currency Options Market Master Agreement, the International Foreign Exchange Master Agreement, the Foreign Exchange and Options Master Agreement and the International Foreign Exchange and Currency Option Master Agreement for currency option transactions and foreign exchange transactions, to name a few. However, none of these are as widely used as the ISDA Master Agreement to govern OTC derivative transactions.

7.2. Enforceability of the ISDA Master Agreement under Singapore law

7.2.1. In general, the ISDA Master Agreement should be enforceable if governed by Singapore law, in the same manner as any other Singapore law contract. This is because, even though the enforceability of the ISDA Master Agreement under Singapore law has not been tested, Singapore law generally recognises party autonomy and seeks to give effect to the commercial intentions of parties,[135] unless it is contrary to public policy.[136] As Singapore regards itself as a good netting jurisdiction,[137] it is unlikely that the Singapore courts would hold

[135] Assuming that the parties are acting in good faith and the documentation is properly entered into and reflects the parties' actual intentions.

[136] Certain restrictions may apply, such as limitation periods, consumer protection laws (when transacting with consumers) and rules on penalties, but these are not specific to the ISDA documents. In addition, restrictions may apply where bankruptcy or insolvency proceedings have commenced, but such proceedings are generally governed by the law of the jurisdiction under which the proceedings have been commenced.

[137] See, for instance, *Singapore Parliamentary Debates, Official Report* (15 March 2013) vol 90. During the second reading of the Monetary Authority of Singapore (Amendment) Bill, Ms Tan Su Shan, Nominated Member of

that giving effect to close-out netting as a matter of contract is contrary to public policy.

7.2.2. As mentioned, there is at present a dearth of case law interpreting the provisions of the ISDA Master Agreement. Accordingly, the precise effect of certain provisions, such as Section 2(a)(iii), which has been the subject of litigation before the English courts,[138] is not certain under Singapore law. However, English cases are persuasive in Singapore, and the Singapore courts are likely to take into account the approach of the English courts in determining the effect of such provisions under Singapore law.

7.2.3. The choice of Singapore or English law as well as the choice of court may have an impact on whether debts under the ISDA Master Agreement may be discharged under foreign bankruptcy law, such as a foreign law scheme of arrangement or other composition with creditors. In the UK, the *Gibbs*[139] principle remains good law.[140] The *Gibbs* principle refers to the principle that a discharge of a debt is not effective unless it is in accordance with the law governing the debt.[141] This means that, in respect of a debt incurred under an English law agreement, the English courts may not consider the discharge of that debt under a foreign law scheme or other composition with creditors as effective.

7.2.4. On the other hand, the Singapore High Court in *Pacific Andes* has indicated that it is not precluded from compromising debts governed by non-Singapore law agreements under Section 210 of the Companies Act.[142] In the spirit of providing mutual assistance and recognition to foreign insolvency proceedings, the Singapore courts may be willing to recognise and give effect to foreign law schemes or creditor arrangements, including the discharge of debts under a Singapore law agreement under such foreign law scheme or creditor arrangement.

7.2.5. Consider the scenario where a Malaysian company undergoes a scheme of arrangement in Malaysia that discharges a non-Malaysian law debt. Where the debt is governed by English law, under the *Gibbs* principle, the English courts may not recognise the Malaysian scheme as being effective to discharge that debt. In contrast, where the debt is governed by Singapore law, the Singapore courts may recognise the Malaysian scheme as being effective to discharge that debt.

7.2.6. In practice, this is a technical point that contracting parties are unlikely to place weight on. In the first place, this point is unlikely to be relevant if the ISDA Master Agreement is terminated and netting has occurred pursuant to the close-out netting provisions before the scheme or creditor arrangement has taken effect (except possibly to the limited extent that the net amount has not

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Parliament, and Mr Tharman Shanmugaratnam (Deputy Prime Minister and then Minister for Finance) acknowledged the importance of bilateral netting arrangements.

[138] *Lomas v JFB Firth Rixson Inc & Ors* [2012] EWCA Civ 419.

[139] *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 ("*Gibbs*").

[140] *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038.

[141] *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210 ("*Pacific Andes*") at [46].

[142] *Id.* at [52].

yet been paid and still constitutes a debt between the parties). Even if the ISDA Master Agreement has not been closed out, a departure from the *Gibbs* principle by the Singapore courts should not interfere with the enforceability of an ISDA Master Agreement governed by Singapore law, as it is unlikely that the Singapore courts, in granting recognition and assistance to foreign schemes, would go so far as to disrupt netting and set-off arrangements (or collateral arrangements in support of such netting and set-off arrangements). This means that, even if a Singapore court does provide recognition and/or assistance in respect of a foreign law scheme, such recognition and/or assistance is likely to affect only the net amount due ***after*** the operation of the close-out netting provisions.[143] This would mean that the primary function of the ISDA Master Agreement, which is to achieve credit risk mitigation by way of close-out netting, is not impaired regardless of whether the *Gibbs* principle is adopted or not.

7.3. Required Amendments to the ISDA Master Agreement if governed by Singapore law

7.3.1. The amendments required to be made to the ISDA Master Agreement where the governing law is Singapore law are minimal:

(i) **Governing law.** Singapore law would need to be specified as the governing law in the Schedule. The Singapore courts will generally uphold the express choice of Singapore law as the governing law (subject to certain limitations).[144]

(ii) **Jurisdiction.** If the Singapore courts (including SICC) or SIAC are used, Section 13(b)(i) would have to be amended as appropriate. In this regard, the 2013 ISDA Arbitration Guide already includes a set of model arbitration clauses for SIAC's Arbitration Rules.

(iii) **Third party rights.** It is common to include a clause in the Schedule providing that persons who are not parties to the ISDA Master Agreement shall have no right under the Contracts (Rights of Third Parties) Act, Chapter 53B of Singapore, to enforce or enjoy the benefit of any term of the agreement.

7.3.2. Given that a Singapore law ISDA Master Agreement should be enforceable,

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[143] Singapore has adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, which would assist the Singapore courts in providing recognition and assistance to foreign insolvency proceedings. The UNCITRAL Model Law, however, is subject to the principle that the Singapore court must not grant any relief, or modify any relief already granted, if such relief or modified relief would, in the case of a proceeding under Singapore insolvency law, be prohibited by the Companies Act or certain other written laws. It is unclear whether "prohibited" includes situations where transactions are simply carved out from the scope of a moratorium (as opposed to an express prohibition against the imposition of a moratorium), but the Ministry of Law has stated that, "*the exclusion of prescribed transactions from the moratorium addresses a further concern that set-off and netting rights should be preserved under the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law"). Under the Model Law, a Singapore court may not grant relief or co-operation that is contrary to the provisions of the Companies Act. Since certain prescribed arrangements, including set-off and netting arrangements, are excluded from the moratorium under the Companies Act, the enforcement of these arrangements may not be restrained under the Model Law.*". See Ministry of Law, *Responses to feedback received from Public Consultation on Proposed Amendments to the Companies Act to Strengthen Singapore as an International Centre for Debt Restructuring* (27 February 2017) at para 2.2.6.

[144] See para 5.2.2 above for further details.

and the required changes are minimal and easily effected through the Schedule, Singapore law should be a viable choice of governing law for market participants.

7.4. Enforceability of English Law CSAs if governed by Singapore law

7.4.1. In general, both the 1995 English CSA and the 2016 Credit Support Annex for Variation Margin (VM) (Title Transfer – English Law)[145] (the "**VM CSA**" and, together with the 1995 English CSA, the "**English Law CSAs**") should be enforceable if governed by Singapore law. The question of the enforceability and characterisation of a title transfer collateral arrangement has not been tested under Singapore law, but, as mentioned above, the Singapore courts generally seek to give effect to the commercial intentions of the parties.[146] Accordingly, it is unlikely that the Singapore courts would recharacterise the title transfer collateral arrangements under the English Law CSAs.

7.4.2. In this regard, where an English Law CSA is expressed to be governed by Singapore law, there would be no additional amendments required, on the basis that Singapore contract law would not differ from English contract law in its treatment of the English Law CSA. Where parties wish to use Singapore law to govern both the ISDA Master Agreement and the English Law CSAs, there would not be an issue from a legal perspective, provided that such choice of governing law is made *bona fide* and not for the purposes of evading requirements of applicable law.

7.5. Enforceability of CSDs if governed by Singapore law

7.5.1. In general, both the 1995 CSD and the 2016 Phase One IM Credit Support Deed (Security Interest – English Law) (the "**IM CSD**" and, together with the 1995 CSD, the "**CSDs**") would be enforceable if governed by Singapore law. The 1995 CSD is not commonly encountered because, in the OTC derivatives market, market participants prefer title transfer collateral arrangements. There are a number of reasons for this. A title transfer collateral arrangement relies on the effectiveness of set-off, which tends to be less problematic than the issues that arise in connection with taking security, especially in Asian jurisdictions. This is because, title transfer collateral arrangements, unless recharacterised, are generally not subject to restrictions affecting security interests, such as perfection requirements (including registration) and restrictions on enforcement (such as moratoria).[147] Title transfer collateral arrangements would generally also have "priority" even over secured creditors, as set-off generally occurs before assets are distributed to creditors. Title transfer collateral arrangements also enable the security taker to use the collateral in any way it sees fit, including using the collateral transferred to it to

[145] Note that the VM CSA was developed by ISDA to address the implementation of margin rules globally. Although the bulk of the VM CSAs would have been entered into by the end of this year (2017), should the scope of margin rules be expanded or if more Asian jurisdictions implement margin rules, the VM CSA may assume greater importance.

[146] Assuming that the parties are acting in good faith and the documentation is properly entered into and reflects the parties' actual intentions.

[147] As the secured party already has legal and beneficial title to the collateral and is only subject to a contractual obligation to return equivalent collateral, there is no question of enforcement.

secure its OTC derivative transactions with other counterparties. On the other hand, if parties are required to exchange initial margin, then they may have to enter into the IM CSD (or, alternatively the 2016 Phase One Credit Support Annex for Initial Margin (IM) (Security Interest – New York Law) (the "**IM CSA**")) because the margin rules of the various jurisdictions generally require initial margin to be segregated and therefore, held by way of security interest.

7.5.2. When parties use either of the CSDs, certain references to English statutory provisions in the CSDs (for instance, references to the Law of Property Act 1925, the Contracts (Rights of Third Parties) Act 1999, and the Insolvency Act 1986) should be amended to refer to the corresponding provisions under Singapore law. Amendments may also have to be made to exclude enforcement by third parties.[148] The execution blocks may also have to be amended to ensure that the CSD takes effect as a deed. However, this is likely to depend on the execution requirements applicable to the parties, and the laws of the place of incorporation of the parties would likely be relevant, rather than being solely a question of the governing law.

7.6. Enforceability of NY Law CSAs if governed by Singapore law

7.6.1. The 1994 NY CSA and the IM CSA (together, the "**NY Law CSAs**") are both credit support documents that create security interests in favour of the secured party. Unlike the English Law CSAs, they do not operate by way of title transfer. As market participants generally prefer title transfer collateral arrangements, the 1994 NY CSA is rarely used outside of the US.[149] Some financial institutions may use the IM CSA in order to comply with margin rules.

7.6.2. If, for any reason, parties wish to use Singapore law for their NY Law CSAs, various amendments will have to be made. It is likely that the amendments will be fairly extensive because the concept of a New York law "pledge" is not consistent with how security over intangible property is taken under Singapore (and English) law. Under Singapore law, a "pledge" can only be taken over tangible property. Furthermore, it is common in Singapore law security agreements to reference certain provisions of Singapore law – for instance, by excluding Section 25 of the Conveyancing and Law of Property Act, Chapter 61 of Singapore. Consideration should also be given to the question of whether to execute the NY Law CSAs as standalone deeds – security interests over

[148] Apart from the exclusion of the Contracts (Rights of Third Parties) Act, Chapter 53B of Singapore (the "**Third Parties Act**"), additional amendments may be required for Singapore law deeds. At common law, a deed can be (i) a deed *inter partes* or an indenture (i.e. a deed that expressly states that it is made between two or more named parties) or (ii) a deed poll (i.e. a deed whereby one or more persons named or sufficiently identified in the deed may generally enforce an obligation undertaken in it in their favour, even though they have not executed the deed). Certain formalities may have to be complied with to ensure that a deed takes effect as a deed *inter partes* rather than a deed poll. Section 56(2) of the English Law of Property Act 1925 modifies the common law position by doing away with the formal requirements for a deed *inter partes*. However, there is no equivalent statutory provision in Singapore. Accordingly, in the absence of express language providing that the deed takes effect as a deed *inter partes*, a Singapore law Credit Support Deed is likely to take effect as a deed poll, and a third party may therefore be able to enforce obligations under the deed. This is notwithstanding the contractual exclusion of third party rights under the Third Parties Act, as these enforcement rights arise out of general law and are not conferred under the Third Parties Act. In practice, this may not be a major issue, given that the Credit Support Deed rarely confers benefits on a third party. This issue may also be resolved by either providing that the Credit Support Deed takes effect as a deed *inter partes*, or by the inclusion of a provision excluding enforcement rights by third parties under any applicable law.

[149] See para 7.5.1 above.

certain types of collateral (such as land) may need to be by way of deed.[150]

7.6.3. Practically speaking, the CSDs are conceptually more similar to Singapore law security documents (including in terms of drafting), whereas the NY Law CSAs, which (for instance) refer to the concept of a New York law pledge, would be less appropriate. Therefore, if parties prefer to use security interest, it is more likely they will adapt the CSDs for use with Singapore law, rather than attempt to modify the NY Law CSAs.

8. Other ramifications from a practical perspective

8.1. **Netting and collateral opinions.** The enforceability of netting and collateral arrangements depends on the governing law of the relevant documentation as well as the laws of the jurisdiction of the counterparty and the *lex situs* of the collateral. As such, in order to obtain the requisite legal comfort that their ISDA documentation is enforceable, market participants would require legal opinions confirming the enforceability of their netting and collateral rights against each type of counterparty in each jurisdiction that they deal with. Furthermore, apart from their own internal due diligence, market participants that are financial institutions are often subject to regulatory requirements to obtain reasoned legal opinions confirming such enforceability (for instance, to comply with Basel regulatory capital requirements), failing which such financial institutions may not be able to calculate their exposures on a net basis or take into account the credit risk mitigation of having taken collateral. This in turn could lead to higher regulatory capital charges for such financial institutions. For this reason, prudentially regulated financial institutions may not be willing to enter into Singapore law ISDA documentation unless they are able to obtain the requisite opinions.

8.2. To facilitate compliance by such financial institutions with the requirement to obtained reasoned legal opinions, ISDA has commissioned opinions in respect of the enforceability of the termination, bilateral close-out netting and multibranch netting provisions of the 1992 and 2002 ISDA Master Agreements as well as the enforceability of the ISDA Credit Support Documents in the event of an insolvency of the counterparty (the "**ISDA Industry Opinions**"). These opinions cover more than 60 jurisdictions and are generally updated annually. The ISDA Industry Opinions are available to members of ISDA, and they assume that the ISDA Master Agreement and Credit Support Documents would be governed by either English or New York law.

8.3. As the ISDA Industry Opinions do not contemplate Singapore law as one of the possible governing laws, parties who require netting and collateral opinions would have to obtain from external legal counsel an extension of the relevant opinions or separate opinions. This means that such parties would require, firstly, an opinion confirming the enforceability of the ISDA documentation from a contractual perspective under Singapore law (and advice on any amendments that may be required as a result), and secondly, netting and collateral opinions for each counterparty type in each jurisdiction that confirms the validity and enforceability of

[150] Section 53 of the Conveyancing and Law of Property Act, Chapter 61 of Singapore provides that a mortgage of land shall be void at law unless it is by deed in the English language. However, land is unlikely to be used as credit support under ISDA Credit Support Documents.

the ISDA documentation against that counterparty if governed by Singapore law. Market participants may also have separately commissioned their own opinions dealing with counterparty types that are not covered by the ISDA Industry Opinions, that may also have to be extended if such opinions do not cover Singapore law ISDA documentation.

8.4. For example, if a Malaysian bank is facing an Indian corporate and uses Singapore law documentation, the Malaysian bank (and the Indian corporate) would require a Singapore law enforceability opinion in relation to the relevant documentation, and the assumptions in the Indian (and Malaysian) netting and collateral opinions would have to be extended to include Singapore law as one of the possible governing laws.

8.5. If there is sufficient demand, parties may be able to commission common opinions. If a standard opinion confirming the enforceability of the ISDA documentation from a contractual perspective under Singapore law is produced, parties should generally be able to fulfil the requirements for their opinions by obtaining extensions to their existing opinions for each counterparty type confirming that the conclusions would not be affected where the documentation is governed by Singapore law. Such extension of existing opinions generally should not require a detailed examination of the requirements of Singapore law or extensive modifications to existing opinions – it should be sufficient for opinion counsel to assume the enforceability of the documentation as a matter of contract under Singapore law (as they would also have done in the case of English and New York law).

8.6. **Standardisation.** The major advantage of the ISDA Master Agreement and its accompanying Credit Support Documents is that they are standard documents. Standardisation promotes certainty and can reduce the time and expense incurred on bilateral negotiations and, as such, a standard set of Singapore law amendments may be of assistance. In this regard, AFMA and NZBA have both developed and published standard documentation in the form of Schedules (governed by Australian and New Zealand law respectively) for use with the ISDA Master Agreement. In fact, AFMA also published an Australian netting opinion that assumes that the ISDA Master Agreement is governed by the laws of an Australian jurisdiction and an Australian collateral opinion that assumes that the 1995 English CSA is governed by the laws of an Australian jurisdiction (together, the "**AFMA Opinions**"). The AFMA Opinions, however, are limited to use in the domestic Australian market because they are in respect of only Australian entities and are not updated as frequently as the ISDA Industry Opinions. Nonetheless, this is an important feature because Australian banks will no doubt require such netting and collateral opinions for regulatory capital purposes when entering into Australian law ISDA Master Agreements with Australian counterparties.

9. Conclusion

9.1. In conclusion, the use of Singapore law as the governing law for OTC derivative transactions between Asian market participants is a feasible option from a legal perspective. As a governing law, Singapore law fulfils the necessary requirements of being certain and predictable as well as commercial and robust. Party autonomy is also central to Singapore contract law, which, in the common law tradition, is sufficiently flexible to adapt to novel situations. These are important features in the context of OTC derivative transactions, and it is expected that the documentation

governing OTC derivative transactions would be enforceable if governed by Singapore law. The ISDA Master Agreement and the relevant credit support documentation should not have to be amended substantially for use with Singapore law. As such, Asian market participants should be open to using Singapore law as the governing law of their OTC derivative transactions for the same reasons as using English law as the neutral third country governing law.

9.2. Between two Asian market participants, an added complication is the ability to enforce foreign judgments in the relevant local jurisdiction(s) concerned. This depends on the location of the assets of the counterparty, and, if foreign judgments are not easily enforced in the relevant local jurisdiction(s), parties will have to rely on arbitration. Even if foreign judgments are enforceable, it is not immediately obvious why litigation before the English courts is necessarily the most appropriate option. The centre of gravity of any dispute is likely to be in Asia, so it is unlikely that litigation before the English courts will be practically convenient to the parties. Given this, whether parties choose litigation or arbitration, an Asian venue is likely to make more sense, and whilst it is entirely possible to continue to use English law as the governing law, parties should consider whether this is always the most appropriate choice, taking into account the merits of aligning the governing law and the place of adjudication.

9.3. The fact that the ISDA Master Agreement may be governed by laws other than English or New York law is a useful starting point. It is also instructive to note that both Australia and New Zealand have standard provisions and amendments relating to using Australian and New Zealand law respectively as the governing law of the ISDA Master Agreement. However, whether market participants adopt the use of an alternative governing law will depend on both legal and other considerations, as with the manner of any such adoption. Therefore, whilst it is possible to conclude that the use of Singapore law as the governing law of OTC derivative transactions is viable from a legal perspective, its implementation will necessarily involve other practical and commercial considerations.