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LOANS FOR EXTRATERRITORIAL GAMBLING AND THE PROPER LAW

Loh Chee Song v *Liew Yong Chian*

I. INTRODUCTION

"[G]AMES of chance, indeed, are not worthy of serious judicial consideration, nor of scholarly discussion", one scholar had noted,[1] but unfortunately, with the modern ease of travel and communication, there is a need for serious consideration and discussion, so that it becomes clear when such gaming or wagering contracts and other contracts ancillary thereto are indeed not deserving of curial and academic attention, and when they may be validated by foreign law. Where the transaction is not entirely territorial, there are two questions to be answered:

(1) whether foreign law validates such transactions; and

(2) the extent to which forum law and public policy invalidate such transactions.

The two questions are generally related, and in this context, the commentator had previously made the following points:[2]

(1) a loan, valid by its foreign governing law, made for the purpose of gaming that is entirely overseas and legal there, would be valid and enforceable in Singapore;

(2) a loan governed by Singapore law for the same purpose is probably valid and enforceable, unless there is a co-incidence of domestic public policies, based on principles of general morality, in both

1 Rabel, *Conflict of Laws: A Comparative Study* (2nd ed, 1958), Vol 2, 572.

2 "Are Loans for International Gambling against Public Policy? *Las Vegas Hilton Corporation t/a Las Vegas Hilton* v *Khoo Teng Hock Sunny*" [1997] SJICL 593.

the forum and the country in which the gaming activities occur, against such loan contracts; but

(3) more problematic issues of policy are engaged when loans are made for gaming technically falling outside of the criminal prohibitions of Singapore, but which may otherwise have deleterious social and economic effects in Singapore, and the courts may have recourse to the techniques of forum mandatory statute or overriding forum public policy to deal with such cases.

The recent case of *Loh Chee Song* v *Liew Yong Chian*,[3] argued before Judicial Commissioner Choo Han Teck in the High Court of Singapore, technically presented only the second question for consideration, as it would appear that there was no serious attempt to prove any foreign law contending for application. Unfortunately, the decision appeared to have left more questions open than answered. This commentary seeks to determine what the case decided in terms of loan contracts for extraterritorial gambling and questions some aspects of the process of determination of proper law adopted by the court.

II. Facts and Decision

The plaintiff, curiously designated a "junket",[4] worked as an independent contractor for a casino that operated on cruise ships only on international waters. These ships were berthed in Singapore, offered "cruises to nowhere" generally, but provided free accommodation for patrons of the casinos. The relevant facts of the case happened before the authorities restricted such activities through the control of berthing privileges.[5]

The plaintiff procured customers to patronise the casino. He obtained chips from the casino at a discount of 1.7% off the counter price, and re-sold them to his customers at 1.4% off that price. The difference was kept as commission. The defendant was a regular patron of the casino and the plaintiff's client. In due course, the defendant owed the plaintiff almost $115,000 by way of advances given by the plaintiff in respect of the chips sold to the defendant. The defendant also took two direct loans from the

3 [1998] 2 SLR 641.

4 He was probably named after the activities that he organised for his customers.

5 The restrictions were unsuccessfully challenged elsewhere: *Lines International Holding (S) Ltd* v *Singapore Tourist Promotion Board* [1997] 2 SLR 584, affirmed by the Court of Appeal, *Straits Times*, 10 July 1997.

plaintiff, totalling $40,000. The plaintiff asked for the repayment of the balance of the loan amounting to $150,000, after setting off certain sums of money. The defendant gave three post-dated cheques, drawn on a Singapore bank, to the plaintiff, but on the due date, the plaintiff was notified by his bank that the cheques had been dishonoured. The plaintiff thus commenced action against the defendant on the cheques.[6]

The defendant proffered three defences. In a reserved judgment, all were dismissed. The first two, based on duress and breach of the Moneylenders Act,[7] were summarily rejected for lack of evidence. The third defence was based on the operation of public policy through the Civil Law Act[8] and the Common Gaming Houses Act.[9] The learned Judicial Commissioner held that section 6 of the Civil Law Act did not apply to the loan agreements. It was further held that although Singapore law, as the law governing the loan agreements, would include the Common Gaming Houses Act, the statute was inapplicable as no offence had been made out under it. The plaintiff's claim therefore succeeded.[10]

III. Analysis

A. *Gambling Loans*

1. *Section 6, Civil Law Act*

In *Las Vegas Hilton Corporation t/a Las Vegas Hilton* v *Khoo Teng Hock Sunny*,[11] the Singapore High Court left open the question whether a loan governed by Singapore law for legal gambling abroad would contravene section 6 of the Civil Law Act. The instant case presented the court an opportunity to clarify this issue. However, the answer given is equivocal.

6 Nothing was made of the distinction between the cheque and the loan, even though the connecting factors for conflicts purposes are different. The distinction is crucial as a matter of English law because of a peculiarity of statutory construction. However, the cheques were in all likelihood governed by Singapore law, and so the only relevant law would only have been Singapore law anyway.

7 Cap 188, 1985 Ed.

8 Cap 43, 1985 Ed.

9 Cap 49, 1985 Ed.

10 Subject to a minor counter-claim which is not relevant to this note.

11 [1997] 1 SLR 341, 353. Hereinafter referred to as *Las Vegas Hilton*.

In response to counsel's argument that the loan contravened section 6 of the Civil Law Act, the learned Judicial Commissioner, after setting out subsections (1),[12] (2)[13] and (5)[14] of the section, held:[15]

> "Subsections (1) and (2) nullify any gaming or wagering contract and any prize won cannot be recovered with the assistance of the court. These provisions do not nullify loans made for the purposes of gaming or wagering. The two are distinct transactions."

So much is clear as a matter of law. However, the learned Judicial Commissioner went on to elucidate:[16]

> "If A lends money to B who used it to lay a wager with C, the contract between B and C is affected by section 6, but not the contract between A and B. Whether common law or public policy would render the contract between A and B unenforceable is a separate question that is extraneous of section 6 of the Civil Law Act."

The effect of this proposition is less clear. There are three possible interpretions:

(a) when A lends money to B without stipulating that the money is to be used for wager or not, the contract between A and B is not affected by the statute;

(b) even when A lends money to B stipulated expressly or impliedly for the purpose of laying wagers, the contract between A and B is not affected by the statute; or

[12] "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void."

[13] "No action shall be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made."

[14] "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by subsections (1) and (2), or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." There appears to be a typographical error in the judgment in referring to this section as s 6(3).

[15] *Supra*, note 3, at 645.

[16] *Supra*, note 3, at 645.

(c) when A lends money to B stipulated expressly or impliedly for the purpose of wagering, the contract between A and B is not affected by the statute where the extra-territorial wagering transactions are not null and void by the statute.

It is clear that where a loan is made by A to B without any conditions imposed on the use of the money, and B uses the money to repay gaming debts, the transaction falls outside the mischief of the gaming legislation, even if the parties had in fact contemplated such use.[17] In respect of section 6(5), the law is clearly stated by Denning LJ (as he then was) in *MacDonald* v *Green*, with reference to section 1 of the Gaming Act 1892, which is *in pari materia*:

> [W]hen a loan is hampered by a stipulation that the money is to be used for payment of a betting debt, then, no matter whether the stipulation is express or implied or to be inferred from the circumstances, the loan is a payment in respect of the betting debt and is hit by the Act.[18]

However, there is no direct authority on the question whether a loan by A to B stipulated for the purpose of enabling B to lay a wager with C is caught by the legislation.[19] In *Carney* v *Plimmer*,[20] the English Court of Appeal held that where A lent money to B to be used by B to lay a wager with C, on the condition that B was to repay the money if he won but not if he lost, such a loan contravened section 1 of the Gaming Act 1892 because it was made "in respect of any contract or agreement rendered null and void" by the Gaming Act 1845 (UK) (section 6(1) Civil Law Act). It is submitted that the absence of such repayment conditions should not make any difference in principle to the application of the provision, and that logically the principle in *MacDonald* v *Green* also applies to loans stipulated for the purpose of incurring wagering or gaming debts.[21] Such

17 *MacDonald* v *Green* [1951] 1 KB 594.

18 *Ibid*, at 605-606. Cohen and Asquith LJJ delivered concurring judgments.

19 The English position is different from Singapore in this respect, as the Gaming Acts of 1710 and 1835, which deems securities in respect of loans knowingly made for gaming purposes to be given for illegal consideration, do not have equivalents in Singapore.

20 [1897] 1 QB 634.

21 Treitel, *Law of Contract* (9th ed, 1995), at 485-488; Phang, ed, *Cheshire, Fifoot and Furmston: Law of Contract (Singapore and Malaysian Edition)* (1994), 506-507; Dicey, "Loans for the Making or Payment of Wagers" (1904) 20 LQR 436; Beatson, ed, *Anson's Law of Contract* (27th ed, 1998), 346.

a condition may, of course, be important to found an inference of the stipulation.[22] Such a loan is equally "in respect of" a wagering or gaming contract. Unless there are clear words in the statute indicating otherwise, there is no reason in policy to draw a distinction based on the accident of the time of creation of the gambling debts.

However, it is uncertain whether the court took this view of the law. It is not clear from the judgment whether it was assumed that the loans were stipulated, either expressly or impliedly by inference from the circumstances, for gambling purposes only. Such an inference can be drawn if a loan is made in circumstances such that the money cannot practically be used for any other purpose. On one hand, the loans appeared to have arisen from the purchase of the chips from the plaintiff on credit for use on board the cruise ships only, and the learned Judicial Commissioner had separately dismissed the defences for the two distinct loans of $20,000 each on the basis that they were not directly used for gambling. On the other hand, there did not appear to be any evidence to indicate that the chips could *only* be used for gambling,[23] although in the circumstances this is not necessarily fatal, and there was no express finding of fact of any contractual stipulation for gambling purposes. It is open to a court to find such a stipulation if the amount likely to be spent on other items is not significant, or to treat amounts actually spent on gaming as amounts lent for that purpose. The courts are unlikely to allow parties to hide behind technicalities when chips are used for gambling.[24] Indeed, it may be argued that a loan in the form of chips is more likely to be found to be "in respect of" a gaming contract within the statutory prohibition[25] than a loan of cash.[26]

There are two possible indications that the court did not take this view. The learned Judicial Commissioner had dismissed counsel's arguments based on section 6 Civil Law Act as "totally off the mark".[27] This is perhaps

[22] It is submitted that this is the correct explanation of *Carney* v *Plimmer*, *supra*, note 20. The case was in terms decided under s 1 Gaming Act 1892 (UK) (s 6(5) Civil Law Act). It is not a case of money deposited with a party to abide an event of wager under s 18 Gaming Act 1845 (s 6(2) Civil Law Act): *Burge* v *Ashley & Smith Ltd* [1900] 1 QB 744.

[23] The gamblers were given free accommodation on the ships, but it is not clear whether all other services were provided free to them.

[24] In the context of the 1710 and 1835 Gaming Acts (UK): *Carlton Hall Club Ltd* v *Laurence* [1929] 2 KB 153. In a different context: *Lipkin Gorman* v *Karpnale Ltd* [1991] 2 AC 548.

[25] S 1, Gaming Act 1892 (UK); s 6(5), Civil Law Act, *supra*, note 8.

[26] Guest, *et al*, eds, *Chitty on Contracts* (27th ed, 1994), Vol II, §38-080.

[27] *Supra*, note 3, at 644.

suggestive that in the view of the court section 6(5) did not apply to loans stipulated for future gambling debts at all. However, the remark was more probably elicited by the way counsel had put forward the argument than a reference to potential applicability of the provisions themselves. The argument has only to be mentioned – that section 6 Civil Law Act applied because the gambling was illegal by the Common Gaming Houses Act – to understand the point made here. Secondly, the judgment proceeded to state that "Section 6 of the Civil Law Act ... does not render loans for gambling and wagering *per se* null and void".[28] But this is not unequivocal, as there is a legal difference between a loan known to be used for gambling and a loan stipulated for such use.[29]

If the loans were indeed stipulated for gambling, then either the court had implicitly rejected the view above, or the statement must have been intended to mean that the loan contracts fell outside section 6(5) *taking the foreign elements into account.* This is the subject of the discussion in the next section.

2. *Conflict of Laws – Section 6 Civil Law Act*

The court found the loan contracts to be governed by Singapore law. If the view of the law in the preceding section is correct and (assuming that) the loans had indeed been stipulated for gambling, then the question is whether section 6(5) would nevertheless have applied to a loan governed by Singapore law for gaming outside Singapore's territorial jurisdiction. It is to be noted that section 6(5) is applicable only if the principal transactions are caught by section 6(1).[30]

The learned Judicial Commissioner did not decide the governing law of the gaming transactions. The court observed that it was unlikely that the operators of the casino would have intended the gaming contracts to be governed by Singapore law, in view of the fact that they took evasive measures, by operating only when the ships are out of Singapore's territorial waters, to avoid Singapore law.[31] However, this raises the question whether such a choice of law, even if agreed to by the gambler, would have been

[28] *Supra*, note 3, at 646.

[29] The former is the test for the Gaming Acts 1710 and 1835 (UK), while the latter is the test for the s 1, Gaming Act 1892 (UK) (s 6(5), Civil Law Act).

[30] *Harold Meyers Travel Service Ltd* v *Magid* (1975) 60 DLR (3d) 42; *Boardwalk Regency Corp* v *Maalouf* (1992) 88 DLR (4th) 612.

[31] *Supra*, note 3, at 646.

a non-*bona fide* choice,[32] or possibly even evasive of a protective forum mandatory statute,[33] and therefore ineffective. In any event, since there was no proof of any foreign law, Singapore law would have been applicable.[34]

On the assumption that Singapore law governed these transactions, the question then turns to whether section 6(1) of the Civil Law Act applies to wagering or gaming transactions occurring outside the territories of Singapore.[35] The editors of Dicey & Morris opine that the Gaming statutes applied only where the wagering contract is governed by English law.[36] On the other hand, a number Canadian cases have expressed the view that the relevant statutes were confined to debts incurred within the jurisdiction.[37] Recently, the Singapore Court of Appeal has emphasised that statutes of Singapore are presumed not to have extraterritorial effect in the absence of clear Parliamentary intention to the contrary.[38] Hence, to the extent that the loans can be said to be stipulated for gaming purposes, this case would be authority for the proposition that a loan governed by Singapore law for the purpose of entering into wagering or gaming contracts made beyond the physical territories of Singapore, is not subject to section 6(5) of the Civil Law Act.

In the modern context, the legal policy behind section 6 of Civil Law Act is arguably not only the discouragement[39] of behaviour which is, though not considered fundamentally immoral,[40] at least undesirable,[41] but also the

[32] *Vita Food Inc* v *Unus Shipping Company Ltd* [1939] AC 277; *Golden Acres Ltd* v *Queensland Estates Pty Ltd* [1969] Qd R 378; *Pacific Electric Wire & Cable Ltd* v *Neptune Orient Lines Ltd* [1993] 3 SLR 60.

[33] *Queensland Estates Pty Ltd* v *Golden Acres Ltd* (1970) 123 CLR 418.

[34] *Cf* doubts expressed in some cases as to the validity of this proposition where statute law is concerned, but see Collins, *et al*, ed, *Dicey & Morris: Conflict of Laws* (12th ed, 1993), at 238.

[35] Yeo, *supra*, note 2, at 599-600, 604-605.

[36] Dicey & Morris, *supra*, note 34, at 1467-1468. But *cf Moulis* v *Owen* [1907] 1 KB 746, 755, where Collins MR, in brief passage, considered that s 18 Gaming Act 1845 (UK) and s 1 Gaming Act 1892 (UK) conjointly operated to invalidate a foreign gambling loan.

[37] *Harold Meyers Travel Service Ltd* v *Magid, supra*, note 30, at 56; *Boardwalk Regency Corp* v *Maalouf, supra*, note 30, at 614, 621. It should be noted that s 6(2) Civil Law Act (and the corresponding provision in s 18 Gaming Act (UK)) does not render the transactions null and void, but only unenforceable, and s 6(5) Civil Law Act (s 1, Gaming Act 1892 (UK)) only refers to contracts rendered null and void. See also Dicey & Morris, *supra*, note 34, at 1468.

[38] *Nippon Fire & Marine Insurance Co Ltd* v *Sim Jin Hwee* (CA 200/97, 30 April 1998).

[39] Albeit in a weak form, as the only sanctions are non-validity and non-enforcement.

[40] *Las Vegas Hilton, supra*, note 11, discussed *infra*, text to note 54.

[41] *Supra*, note 11, at 35. The undesirable effects are discussed in Yeo, *supra*, note 2.

prevention of such disputes from occupying the time and resources of the court, which are better spent on other more deserving matters.[42] These are essentially domestic concerns, and may be outweighed by countervailing grounds for giving effect to foreign law that validate such contracts.

Neither the connecting factor of the (subjective) governing law nor of the place of contracting for the application of section 6(1) of the Civil Law Act is really satisfactory. Where a debt is incurred can be arbitrary, particularly in the context of modern communications, and is in any event subject to easy evasion, as demonstrated in this case. While there is good reason to apply the provision if the parties choose Singapore law as the governing law of a foreign wagering or gaming contract as a choice of internal Singapore policy to govern their relations,[43] the converse is not necessarily true in a case where the parties choose a foreign law to govern a wagering or gaming contract with substantial connections with Singapore. The better solution may be a *via media*. It may be reasonable to apply section 6(1) to contracts which are chosen to be governed by Singapore law, or which have the closest and most substantial connection with Singapore.[44] Two techniques may be utilised to achieve this result. One is to lend section 6 Civil Law Act the character of a forum mandatory statute.[45] So long as the territorial limits of its application are carefully considered, it can be justifiable from a modern view of the policy of the statute in protecting the social interests of forum.[46] The alternative approach is to apply the provision only to transactions governed by Singapore law, but to disregard any choice of governing law where the objective connections are clearly with Singapore, and applying the provision either as the law with the closest connection with the contract or as the *lex fori* in default.

On this view, it is arguable that the gambling transactions in the circumstances of this essentially domestic case, made just outside of Singapore territories and designed specifically to evade Singapore law,[47] fell within the statute. Even if the lesser position is taken that the policy behind the statute is so weak that parties should be able to evade it by subjective choice

[42] See quotation in text to *supra*, note 1; Beatson, ed, *Anson's Law of Contract, supra*, note 21, at 340, in respect of wagers.

[43] There is a further practical reason for this, to avoid having to look at questions of objective connections when it is clear that there is a choice of Singapore law.

[44] Some support for the objective connections test can be gleaned from Cheshire & North, *Private International Law* (11th ed, 1987), at 482.

[45] *Moulis* v *Owen, supra*, note 36, at 753, *per* Collins MR.

[46] See the arguments canvassed in *supra*, note 2.

[47] There is no doctrine of evasion of forum law in the Commonwealth version of conflict of laws. The same work needs to be done through the selection of appropriate connecting factors, construction of legal policy and application of public policy.

of law, in the circumstances of the present case where no foreign law is in contention, it is difficult to see why the policy of the statute should not prevail.

The scope of section 6(5) Civil Law Act was not called into question in this case as the loans were found to be governed by Singapore law. If so, it may be appropriate to apply the same approach suggested above. On this approach, the loans governed by Singapore law, if stipulated for paying gaming debts within section 6(1), would also be within the statute. This approach is consistent with *Las Vegas Hilton*. In that case, the loan was found to have the closest connection with Nevada. Even if the loan in that case had been governed by Singapore law, the gaming contracts had no connection with Singapore whatsoever, and were properly valid by Nevada law.[48]

3. *Common Gaming Houses Act*

The court then considered whether the gambling activities were in breach of the Common Gaming Houses Act[49] as part of the proper law of the loan agreements. This approach is probably in excess of caution. A contract that is intended to promote the commission of a criminal offence by the law of the forum would clearly be against the forum's fundamental public policy, whatever its proper law. In any event, the court held that the Act was not breached. The gaming activities were found to have been conducted in international waters outside the territorial jurisdiction of Singapore, and no evidence was adduced of the nationality of the ships.[50] The learned Judicial Commissioner held that the statute was inapplicable. Therefore, the court decided that the Common Gaming Houses Act only applied to activities within the physical territories of Singapore, such territories possibly to include ships flying the Singapore flag.[51] This strict approach is justified for penal statutes.

[48] Similarly, it is consistent with the example given in *D'Almeida* v *D'Menzies* (1886) 5 Kyshe 126, 127-128, of a loan between two local residents for legal gambling abroad as valid. In most cases of gambling on *terra firma*, the objective proper law of the gambling transactions would be the law of the place of contracting.

[49] *Supra*, note 9.

[50] It appeared that no evidence was adduced of the identity or nationality of the ships involved.

[51] This case thus deals only with the prescriptive powers of the state (the territorial limits of the Common Gaming Houses Act), and not its adjudicative powers, which is a different question. On its adjudicative powers over extra-territorial offences, see s 15(1), Supreme Court of Judicature Act, Cap 322, 1993 Reprint; s 50(2), Subordinate Courts Act, Cap 321, 1985 Ed, especially at ss 15(1)(b), (c) and 50(2)(b), (c) respectively. The difference is significant: a Singapore national gambling in a foreign registered ship on the high seas is technically within Singapore's adjudicative jurisdiction (on the nationality principle), but the relevant activities may still fall outside Singapore's prescriptive jurisdiction.

4. *Public Policy*

The only public policy arguments raised by counsel were based on the contravention of the two statutes above. It did not appear that any further arguments were addressed to the question of whether apart from these statutes, any public policy of the forum would be contravened by the enforcement of the loans for gambling purposes.[52] Given that the loan contract was found to be governed by Singapore law, it is domestic public policy that should govern in the first instance. However, two points should be noted. First, public policy should only be invoked in exceptional cases, where it is clear that the courts should protect an essential interest of society.[53] Secondly, the territorial reach of the public policy should also be considered. In *Las Vegas Hilton*,[54] the High Court of Singapore held that there was no public policy against gaming *per se* in Singapore, and it upheld a loan contract governed by Nevada law for gambling in Nevada, where the gambling was legal. The present case raises a more difficult problem, as the effects of the organised gambling are more likely to be felt closer home. Further, it is not distance travelled away from, but the objective connections with, the forum that ought to matter.

However, as the court was duty bound to take judicial notice of any law or public policy rendering a transaction illegal or void,[55] by implication, this case affirmed that there is nothing in the domestic public policy of Singapore against the enforcement of loans for gambling where the gambling is not illegal where it occurs. What *Las Vegas Hilton* decided in respect of the application of public policy to loans governed by foreign law has now been applied to loans governed by Singapore law. This, however, does not detract from the arguments made in the previous section. Public policy arguments are necessarily more difficult to invoke than arguments based on statutory construction and legislative policy.

B. *Determination of the Proper Law*

The court found that there was no express choice of law, and that the parties

[52] It should also be noted that an argument based on breach of public policy would not require the "stipulation" for gambling purpose. It would be enough if the lender knew about the borrower's purpose and actively participated in it by encouragement.

[53] *Monkland* v *Jack Barclay Ltd* [1951] 2 KB 252; *Las Vegas Hilton, supra*, note 11, at 356.

[54] *Supra*, note 11.

[55] *Montefiore* v *Menday Motor Components Co Ltd* [1918] 2 KB 241; *Chettiar* v *Chettiar* [1962] AC 294.

had not given any thought to the choice of law, so that it was up to the court to determine for itself the proper law of the loan contracts. It held that the proper law was Singapore law. Two aspects of the decision in this respect merit comment: the relevance of the law of the flag; and the formulation and application of the objective proper law test.

1. *The Role of Law of the Flag*

Counsel had cited *R* v *Anderson*[56] as an authority to apply the law of the flag to determine the dispute. The argument was dismissed on the basis of lack of evidence of the nationality of the relevant ships. However, the learned judicial commissioner went on to state: "If the law of the flag cannot be applied, the courts will apply the law of the country which was in the contemplation of the parties."[57] To the extent that this remark may be construed as a relegation of the choice of the parties to a secondary test after the law of the flag, it must be regarded as inconsistent with leading common law authorities.[58] While the law of the flag may be relevant for both prescriptive and adjudicative criminal jurisdiction,[59] its relevance in civil cases is more limited: as an indication, but nothing more, of the proper law of the contract; and possibly a factor to be considered in determining the territorial scope of application of the statutes of the forum.[60] In *Coast Lines Ltd* v *Hudig & Veder Chartering NV*,[61] the English High Court had used the law of the flag to turn the scales in a case where the objective factors were finely balanced between English and Netherlands law. But the same court also noted and dismissed the old presumption of the law of the flag as governing law, and cautioned against the use of presumptions generally in the determination of the proper law. It would be incongruous for Singapore to regress to the rigid use of presumptions. Moreover, the contracts in question, unlike that in the *Coast Lines Ltd* case, had little to do with the carriage itself.

It is suggested that the statement should be read in context, and that court was not addressing the question of how to determine the proper law

56 (1868) LR 1 CCR 161.

57 *Supra*, note 3, at 645.

58 *R* v *International Trustee for the Protection of Bondholders AG* [1957] AC 500; *Vita Food Inc* v *Unus Shipping Company Ltd, supra*, note 32. See also *Pacific Electric Wire & Cable Ltd* v *Neptune Orient Lines Ltd, supra*, note 32.

59 Which was effectively what was decided in that case. But in Singapore's context, that aspect is now covered by statute: see *supra*, note 51.

60 For example, the territorial scope of s 6, Civil Law Act, *supra*, note 8.

61 [1972] 2 QB 34.

of the contract but counsel's argument on the legality of the shipboard activities. Thus (notwithstanding the headnotes to the case),[62] where the legality of the gaming cannot be determined by the law of the flag as the *lex loci solutionis* (since there is no evidence what this law is),[63] the only other source of illegality (in the absence of any arguments stemming from *lex fori* illegality) is by way of the proper law of the contract, the law of the country which was in the contemplation of the parties.

2. *Objective Proper Law*

In determining the proper law of the contract, the court found that there was neither an express nor implied choice by the parties. The judgment went on to consider what would be the proper law in such a case. Adopting the language of the Privy Council in *Mount Albert Borough Council* v *Australasian Temperance and General Mutual Life Assurance Society Ltd*,[64] the court held that it had to "determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract". In contrast, it may be noted that Chao Hick Tin J, in *Las Vegas Hilton*, preferred the more objective language of determining "with which law has the transaction the closest and most real connection."[65] The editors of Dicey and Morris describe the overlap between the inferred and imputed intention in terms of evolution: before the objective test became fully established, the test couched in the language of imputed intention was already in fact an objective test of connections.[66]

It would seem preferable to cast aside the language of "inferred" intention altogether at the stage of objective determination of the proper law.[67] Indeed it is incongruous for a court to say no intention can reasonably be inferred from the facts and then, in the next breath, to infer what reasonable parties in the position of the parties would have intended as the proper law. One danger of the continued use of the language of inference is that the arguments may slip back into an attempt to elicit the subjective intentions of the parties.

62 *Supra*, note 3, at 642.

63 There is no necessary presumption of identity with the *lex fori* in a case where the reference to foreign law is as *datum*. Hence, there is no presumption that there is illegality by the *lex loci solutionis* simply because the facts, if transposed to the forum, would have constituted an illegality: see *Florance* v *Hutchinson* (1891) 17 VLR 471.

64 [1938] AC 224, 240 (PC NZ).

65 *Supra*, note 11, at 350.

66 Collins, *et al*, ed, *Dicey & Morris: The Conflict of Laws* (11th ed, 1987), 1162.

67 In *James Scott and Sons Ltd* v *Del Sel* [1922] SC 592, 596-597, it was said that such language relates "to nothing in the minds of the parties at the time the contract was made."

This case provides an illustration.

The court found the following factors to be relevant in pointing to Singapore law as the objective proper law:

(a) in the circumstances, Singapore jurisdiction would have been the choice forum for the parties to resolve any disputes;

(b) the parties would have chosen Singapore law in spite of any possible illegality, since it could have defeated a claim by either party;

(c) although it could be inferred that the operators of the casino would have wanted to avoid the application of Singapore law, the same intention of avoidance cannot be inferred in respect of the plaintiff and the defendant;

(d) both parties were Singapore nationals resident in Singapore;

(e) both parties were not commercially minded people and would have adopted the law and jurisdiction most familiar to them;

(f) the vessels were berthed in Singapore and returned to Singapore after each cruise; and

(g) the cheques to repay the loans were drawn on a Singapore bank and intended to be paid in Singapore.[68]

In many cases, the same factors are relevant to both the inferred intention test and the objective connections test. However, the weight to be accorded to the factors can differ.[69] For example, if indeed a Singapore jurisdiction clause[70] can be implied into the contract ((a) and (e) above), then its weight can differ considerably depending on whether one is ascertaining subjective intentions or objective connections.[71] Furthermore, if the courts are looking at objective connections, evasive intentions of parties ((b) and (c) above),

[68] This last factor was an occurrence subsequent to the formation of the loan contracts. It is doubtful whether it can be taken into consideration either in the subjective or objective test (*Whitworth Street Estates (Manchester) Ltd* v *James Miller and Partners Ltd* [1970] AC 583, 603; *Amin Rasheed Shipping Corp* v *Kuwait Insurance Co* [1984] AC 50, 69; *Las Vegas Hilton, supra*, note 11, at 352; *cf* Dicey & Morris*, supra*, note 34, at 1210-1211), but the point was apparently not argued.

[69] *The Komninos S* [1991] 1 Lloyd's Rep 370.

[70] Putting aside possible difficulties of the double implication.

[71] *Supra*, note 69.

[72] *The Rosso* [1982] 2 Lloyd's Rep 120, 131.

if any, should not be relevant.[72] This also has a bearing on the applicability of the limitation of good faith on subjective intention.[73] A formulation in terms of whether the parties would have accepted Singapore law as the proper law of the contract had they been asked at the time they made the contracts steers the inquiry dangerously close to a test of subjective intention, away from objective connections.[74] Although no difference would have resulted in the present case from taking either approach, the conceptual distinction between the subjective and objective stage of the choice of law process should nevertheless be clearly maintained.

IV. Conclusion

The following propositions summarise the discussion above:

(a) It is not clear what was the construction of section 6, Civil Law Act, in both domestic and conflictual senses, taken by the court in *Loh Chee Song* v *Liew Yong Chian.*

(b) Although the language of the judgment appears to suggest that loans for gambling fall outside section 6 altogether, it has been submitted that it is not conclusive and that there is scope for the application of section where the loan is expressly or impliedly stipulated for the payment of wagering or gaming debts to be incurred.

(c) If the above view is the correct one to take on the domestic law, then it is crucial to determine whether there had been such a stipulation. Although it might have been possible to draw such an inference from the circumstances, there was no express finding of fact on this issue. To the extent that the loans in the form of chips were stipulated for gaming, and that the interpretation of section 6(5) Civil Law Act[75] put forward above is correct, then the case must have proceeded on the basis that the provision

[73] *Vita Food Inc* v *Unus Shipping Company Ltd, supra*, note 32; *Pacific Electric Wire & Cable Ltd* v *Neptune Orient Lines Ltd, supra*, note 32; In *James Capel (Far East) Ltd* v *YK Fung Securities Sdn Bhd (Tan Koon Swan, third party)* [1996] 2 MLJ 97, 112 (affirmed in [1997] 4 MLJ 621), Peh Swee Chin FCJ observed that the objectively determined proper law was not subject to such a limitation.

[74] *Supra*, note 69, at 374.

[75] *Supra*, note 8.

did not apply to gaming contracts made outside the territories of Singapore. It has been argued that neither this nor the (subjective) governing law is satisfactory as the connecting factor for the application of the statute, and that if section 6 of the Civil Law Act serves any useful modern purpose at all, better effect can be given to it by its application on the basis of Singapore law being the subjective or objective proper law of the contract. The fact that there was no proven foreign law in contention is also significant. While there are legitimate considerations in favour of upholding contracts valid under foreign law, the facts suggest that this was an essentially domestic case.

(d) The Common Gaming Houses Act[76] does not criminalise activities outside Singapore territories (possibly including Singapore ships). This is a penal statute and in the absence of clear words or Parliamentary intention to the contrary, a strict territorial approach, is justified.

(e) The court implicitly affirmed that there is no domestic public policy in Singapore that will prevent the enforcement of a loan contract for gambling outside Singapore, since it was duty bound to take judicial notice of such objections even if parties do not raise them.

(f) It was highly unlikely that the court intended to depart from the general three-stage approach to the determination of the proper law of the contract, and it has been suggested that the reference to the law of the flag should be read in context.

(g) The court appeared to have conflated the subjective and objective stages in the determination of the proper law of contract, though it would not have made a difference to the results in this case.

This is the second decision (to the commentator's knowledge) of the High Court in very recent times in Singapore relating to loans for gambling activities outside Singapore territories, taking place where they not illegal. In the previous case, the loan was in respect of two non-residents for gambling in Nevada. In this case, the loans were between two Singapore residents for gambling in the high seas just outside Singapore territorial waters. On

[76] *Supra*, note 9.

a comparison, one contract had considerably more substantial connections with Singapore than the other. There will be factual situations in between and judgment calls to be made. However, if the policies against wagering and gaming in section 6 of the Civil Law Act serves any useful modern purpose at all, it should not be so easy evaded. A more sophisticated approach towards the interpretation of the statute is called for, especially when one considers the possibilities that internet casinos will open for gambling in Singapore.[77]

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[77] Yeo, *supra*, note 2.

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