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INTERNATIONAL TORT LITIGATION: REVISITING ORDER 11 RULE 1(F)[1]

This article examines the establishing of discretionary jurisdiction for International Tort Litigation. The amended Order 11 Rule 1(f) is examined with a view to identifying possible interpretative approaches. Difficulties with past approaches are discussed and a new approach suggested. It is submitted that this new approach will provide the right amount of consistency and flexibility required to meet the challenges of international tort litigation.

I. INTRODUCTION

TECHNOLOGY has caused the world to seemingly shrink. In the short space of 24 hours, a person can be in a number of countries and make many transactions. Indeed, with the Internet, these transactions can even be made with the person remaining in one jurisdiction. Contracts may have parties from two different jurisdictions. Formation of the contract may occur in a third jurisdiction with performance in a fourth. Similarly, tortious acts are no longer necessarily located in one jurisdiction. The elements of any particular tort may now be spread over a number of different jurisdictions.

This has obvious implications for the law as contractual and tortious acts increasingly take on international aspects. Generally, this gives rise to problems in three main areas. The first area deals with the jurisdictional issues in such international transactions. It would be a simple matter if the defendant were in the plaintiff's chosen forum for the action. However, more often than not, the defendant is in a different jurisdiction. How then may the courts of the forum obtain jurisdiction over the defendant? The second area deals with the question of, after having obtained jurisdiction over the defendant, what law does the court of the forum apply in resolving the legal matters before it? The third area deals with the question of, after having obtained a judgment, how might the victorious plaintiff enforce that judgment in a jurisdiction other than the one sued in? These areas, of course, are the province of Private International Law.[2]

[1] Rules of Court (Cap 322, R 5, 1990 Ed).
[2] Also referred to as Conflict of Laws.

This article seeks to focus on the first area, that of jurisdiction. Specifically, the writer will examine the jurisdiction issues relating to international tort litigation. While this area has been explored elsewhere,[3] the recent amendments[4] to the discretionary jurisdiction portions of the Rules of Court[5] justify a second look.

This article will first look at the amended Order 11 Rule 1(f)[6] and compare it to its predecessors. The writer will then examine how its predecessors have been interpreted in the past and consider the intersection between the jurisdictional question and choice of law. Finally, the writer will offer some thoughts relating to future interpretation of the provision.

II. Discretionary Jurisdiction: Order 11

A. *Pre-Requisites*

As mentioned, in transactions with an international nature, the defendant is often not present within the jurisdiction nor would s/he have submitted to the jurisdiction in which the action is commenced. In order to obtain jurisdiction, the plaintiff must then apply for leave for service out of the jurisdiction under the forum's rules for discretionary jurisdiction. Order 11 Rule 1[7] provides the "long-arm" jurisdiction of the Singapore courts.

Because Order 11 Rule 1 seeks to extend the court's jurisdiction beyond it's territorial boundaries, such applications are generally viewed with caution. Before leave will be granted for service out of jurisdiction, the plaintiff must satisfy the court of 3 matters.[8] First, the plaintiff must show that the claim falls within one of the heads of jurisdiction in Order 11 Rule 1 and that there is a good arguable case.[9] Secondly, the plaintiff must show that there is a serious question to be tried on the merits of the case.[10] Finally, the plaintiff must show that Singapore is the natural forum for the claim.[11]

3 Yeo TM "Jurisdiction Issues in International Tort Litigation: A Singapore View" (1995) 7 SAcLJ 1.

4 The Rules of Court (Amendment) Rules 1998 (S425/98).

5 *Supra*, note 1.

6 *Ibid*.

7 *Ibid*.

8 While three matters are listed, they may not always exist separately and overlap will occur.

9 *Seaconsar Far East Ltd* v *Bank Markazi Jomhouri Islami Iran* [1993] All ER 756.

10 *Ibid.*

11 *JH Rayner (Mincing Lane) Ltd* v *Teck Hock & Co (Pte) Ltd & Ors* [1989] SLR 1174.

B. *Order 11 Rule 1(f)*

The tort head of jurisdiction is the province of Order 11 Rule 1(f). The *former* rule provides that leave for service out of jurisdiction may be granted by the court if:

> "(i) the claim is founded on a tort committed in Singapore;
>
> or
>
> (ii) the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring;"[12]

Rule 1(f)(i) was amended[13] to read:

> "(i) the claim is founded on a tort, wherever committed, which is constituted, at least in part, by an act or omission occurring in Singapore;"[14]

Rule 1(f)(ii) was left unchanged. In analysing the effect and rationale of this change, Pinsler[15] states:

> "The effect of the amendment is to extend para f(i) beyond claims 'founded on a tort committed in Singapore' to a tort 'wherever committed, which is constituted, at least in part, by an act or omission occuring in Singapore'. Paragraph f(i) is now a much wider provision. The Singapore courts have jurisdiction even if the tort is committed elsewhere, as long as the 'act or omission' which occurs in Singapore partially constitutes that tort."[16]

It is clear then, that the intention of the amendment is to widen the scope of Rule 1(f)(i) by changing the connecting factor from "a tort committed in Singapore" to "a tort, wherever committed". Even the requirement of having the tort being constituted in part by an act or omission in Singapore

[12] *Supra*, note 1.
[13] *Supra*, note 4.
[14] *Supra*, note 1.
[15] Pinsler J "An Analysis of the Rules of Court (Amendment No 3) Rules of 1997 and the Rules of Court (Amendment) Rules of 1998" (1998) 10 SAcLJ 300.
[16] *Ibid*, at 307-308.

does not limit its scope much as there is no requirement for this act or omission to even be an element of the tort.[17] The writer will address later in this paper whether the intention to widen the scope of Rule 1(f)(i) has been successful. For the moment, it is sufficient to note this intention.

C. *Past Approaches*

It is useful at this point to consider how courts have interpreted Order 11 Rule 1(f) to get a sense of how courts in the future may proceed. Will the amendments affect the way the courts will apply Order 11 Rule(1)(f)? Or are the amendments merely cosmetic? As Yeo has noted, there is a dearth of local authorities addressing the interpretation of Rule 1(f).[18] Hence, recourse must be had to cases from other jurisdictions to assist in interpreting the local provision.

The former Rule 1(f)(i) required the localisation of the commission of the tort to Singapore.[19] This would present no difficulties if every element of the tort was committed within the jurisdiction. For example, if Mr Smith from England came to Singapore and defamed Mr Tan here before returning to England, there would be no question of satisfying this head of jurisdiction.

However, problems occur when the elements of the tort are committed in different jurisdictions. Suppose Mr Smith made his defamatory statement in England and the damage to Mr Tan's reputation occurred in Singapore. It becomes less clear whether this head of jurisdiction is satisfied. Can it properly be said that the action was based on a tort committed in Singapore? Does the tort occur where the defamatory statement was made? Or where the damage was suffered?

This matter came up for consideration by the Privy Council in the Australian case of *Distillers Co (Biochemicals) Ltd* v *Thompson*.[20] In that case, the Privy Council had to consider if there was "a cause of action which arose within the jurisdiction". While this is certainly a wider question than whether a tort was committed within the jurisdiction, the approach used by the Privy Council has been applied to the latter question.[21]

17 *Ibid*, at 308.

18 *Supra*, note 3, at 1.

19 This is similar to the predecessor of the present English equivalent Order 11 Rule 1(f). The predecessor, Order 11 Rule 1(h), provided for service out if the action is "founded on a tort committed within the jurisdiction".

20 [1971] AC 458 (PC NSW).

21 See *Castree* v *ER Squib & Sons Ltd* [1980] 2 All ER 589; *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391.

In resolving the question, the Privy Council considered a number of approaches. The first approach required the whole cause of action *ie*, every ingredient of the cause of action to have occurred within the jurisdiction. This approach was considered too restrictive and was rejected by the Privy Council. The second approach required the last ingredient or element of the cause of action to have occurred within the jurisdiction. The Privy Council also rejected this approach.

The third approach required the act of the defendant that gave the plaintiff his/her cause of action to have occurred within the jurisdiction. This led to what is termed as "the substance of the tort test". In every case, the right approach is "when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?"[22]

Two points can be made about this approach. First, while this is a general test for all torts, each tort must be separately considered to know where in substance it arose. While this means that it is a flexible approach, its flexibility may itself lead to difficulties. One such difficulty is that the substance of the tort test may point to different jurisdictions depending upon how the tort is characterised. This is illustrated by *Castree* v *ER Squib & Sons Ltd*.[23] In this case, a German-manufactured machine was sold in England. The machine disintegrated, injuring the plaintiff in England. It would not be a stretch to suggest that the tort was negligent manufacture of the machine. However, the English Court of Appeal held that the negligence occurred within the jurisdiction because the defective machine was sold on the English market without warning as to its defects. This characterisation of the negligence seems strained. The more charitable commentator might say that this "fickleness" is a downside of the substance of the tort approach. The less charitable might suggest that this approach is ideal for one interested in the furtherance of jurisdictional chauvinism.

The second point is a related one. Should the court decide that the substance of the tort in question occurred within the jurisdiction, the requirements of the order are satisfied and the court has jurisdiction. While it is possible that during the choice of law stage the court might conclude that the *locus delicti, ie,* the place of the commission of the tort, was different from the one identified by the substance of the tort test, it would make more sense for the *locus delicti* to point to the same place identified by the substance of the tort test.[24] Similarly, should the court decide that the substance of

[22] *Supra*, note 20, at 468.
[23] [1980] 2 All ER 589.
[24] Tan YL "Choice of Law in a Question of Jurisdiction" (1990) 32 Mal LR 363, at 365-366.

the tort occurred outside the jurisdiction, jurisdiction is not founded and there will be no choice of law stage.

In either situation, the consequence is that under this formulation of Order 11,[25] there is little question about the application of choice of law at the jurisdictional stage. It is important that this be made clear because with later formulations of the same provision, choice of law considerations begin to encroach upon the jurisdictional realm and this may affect how the amended provision will be interpreted.[26]

At this point, it may be useful to briefly discuss the notion of choice of law in tortious matters. The purpose of choice of law rules is to point the court to a particular jurisdiction's law that is to govern the substantive legal issues before the court. This is referred to as the *lex causae ie*, the law governing the cause. In tort, the *lex causae* is determined by the application of the double actionability rule. Generally, the rule provides that the *lex causae* is the *lex fori ie*, law of the forum, provided that civil liability under the *lex loci delicti ie*, law of the place of the commission of the tort, exists.[27]

Therefore, in order for a tort to be actionable in the forum, it must also be actionable in the *locus delicti*. This presents a problem when the act in question may or may not constitute a tort, depending on which jurisdiction's law one refers to. In the approach in *Distillers Co,* there would be no problem as the *locus delicti* is likely to be the same as the forum. However, this does form another piece to the bigger question of the interpretation of our amended provision.

So far, the discussion has centred on a formulation of Order 11 that requires the commission of the tort within the jurisdiction. For various reasons,[28] the English provision was subsequently amended. The operative words now read:

> "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction."[29]

[25] The former English provision Order 11 Rule 1(h) and Singapore's former Order 11 Rule 1(f)(i).

[26] See text accompanying notes 40 to 51.

[27] *Chaplin* v *Boys* [1971] AC 356, at 384-387. This rule, and its associated exceptions are accepted as the legal position in Singapore. See *Goh Chok Tong* v *Tang Liang Hong* [1997] 2 SLR 641; *Parno* v *SC Marine Pte Ltd* (Unreported, Civil Appeal 11 of 1999, Court of Appeal).

[28] *Supra*, note 3, at 13.

[29] *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc* [1989] 3 All ER14, at 25.

This new provision no longer required the tort to have occurred within the jurisdiction as long as the damage was sustained or the act, which caused the damage, was committed within the jurisdiction. This certainly widened the scope of the provision and allows for the courts to exercise jurisdiction even though the substance of the tort may not have occurred within the jurisdiction. It also led to a number of interpretative issues that have been explored elsewhere.[30] In this article, the writer is more interested in the jurisdiction and choice of law interface.

This interface came up for consideration in *Metall und Rohstoff AG* v *Donaldson Lufkin & Jenrette Inc*.[31] In this case, the plaintiff was seeking leave to serve outside England on the basis of the torts of conspiracy and of inducing breach of contract. As mentioned, the court no longer had to consider whether the respective torts occurred within the jurisdiction. All that was needed was if the damage was sustained or the act, which caused the damage, was committed within the jurisdiction.

The problem was that leave for service out needed to be "founded on a tort". The question that springs to mind is "tort according to whom?" By which jurisdiction's law should one define if a tort exists?

This did not create problems in the previous provision because if the substance of the tort was found to be committed within the jurisdiction, and if the *locus delicti* is likely to be the same as the forum, then there will be consistency according to the *lex fori* and the *lex loci delicti* as to whether the tort exists.

Under the new provision however, it is possible for the *locus delicti* to be a different place from the forum. What happens if the act complained of constitutes a tort in the forum and not the *locus delicti* or vice versa? The former permutation was exactly the situation faced by the court in *Metall und Rohstoff*.

In that case, while the tort of conspiracy was actionable in the forum *ie*, England, it would not have been actionable in New York because there was no separate tort of conspiracy in that jurisdiction.[32] Further, the tort of inducement of breach would not have been actionable in New York because it was time-barred.[33] Hence, an application of the double-actionability rule would have rendered it impossible to obtain leave for service out on the basis of these torts.

[30] *Supra*, note 3, at 14-16.
[31] *Supra*, note 29.
[32] *Ibid*, at 25.
[33] *Ibid*, at 25.

What approach then, should the court adopt? One approach, as already contemplated above, would have been to apply the double-actionability rule in what is essentially a question of jurisdiction. The other approach would have been to ignore the double-actionability rule and solely have reference to the *lex fori* in determining whether a tort exists for the purpose of jurisdiction.

What Slade LJ did was neither. He proposed and applied a two-stage approach. The first stage involved the application of the substance of the tort test from *Distiller's Co*. If the court decides that that the substance of the tort occurred within the jurisdiction, then the double-actionability rule should be disregarded.[34] This would mean that the definition of a tort would be purely with reference to the *lex fori.* This is what occurred in relation to the tort of inducement of breach. Applying the substance of the tort test, the court held that the substance of the tort of inducement of breach occurred within the jurisdiction.[35] Hence, this head of Order 11 jurisdiction was satisfied without proceeding to stage two.

If the court decided in the first stage that the substance of the tort occurred outside the jurisdiction, then the double actionability rule will be applied. If the tort satisfies this rule, then the head of jurisdiction will be founded. The definition of the tort will be with reference to the *lex fori* and the *lex loci delicti*.

It is not clear whether the court in *Metall und Rohstoff* even proceeded to stage two. In relation to the tort of conspiracy, the court held that it was not established because it was lacking an essential ingredient according to the *lex fori*.[36] What is not clear was whether this finding was based on a stage one or a stage two consideration. While the court engaged in a lengthy discussion of the tort of conspiracy, they did not seem to apply the two-stage test that they proposed.

There are three possible ways of looking at this. First, that the court implicitly found that the tort had occurred within the jurisdiction and that based on the *lex fori*, the tort of conspiracy was not made out.

The second possibility is that the court implicitly found that the tort did not occur within the jurisdiction and that applying the double-actionability rule, the tort of conspiracy was not made out according to the *lex fori.* As an aside, assuming that the *locus delicti* was New York, the *lex loci delicti* would not have recognized the tort of conspiracy in any event. These

[34] *Supra*, note 29, at 32.

[35] *Supra*, note 29, at 33-34. As an aside, the analysis undertaken and conclusion drawn by the court seems as strained as the characterisation of the negligence in *Castree* v *Squib.*

[36] *Supra*, note 29, at 34-48.

first two possibilities are consistent with the two-stage framework proposed by the court.

The third and final possibility is that the court did not even initiate a stage one inquiry and that there is a "pre-qualification" requirement before even one may embark upon the two-stage framework. This "pre-qualification" requirement would be that the tort before the court must first be established according to the *lex fori.* If this "pre-qualification" requirement is satisfied, then the query of where the tort in substance occurred in stage one begins.

In a sense, this third possibility may re-written as a three-stage framework. In stage one (referred to earlier as the "pre-qualification" requirement), the court considers whether the tort upon which the Order 11 application is based is established according to the *lex fori.* If yes, the query shifts to the second stage (what is presently stage one in *Metall und Rohstoff*) where the court considers where in substance the tort occurred. If the substance of the tort was found to have occurred within the jurisdiction, then the query stops there and the Order 11 application is granted. If the substance of the tort was found to have occurred outside the jurisdiction, then the query shifts to stage three (what is presently stage two in *Metall und Rohstoff*) where the court seems to apply the double-actionability rule but is merely considering whether the tort is actionable in the *locus delicti.*

Two comments may be made about the viability of this third possibility as a way of understanding the decision of the court in *Metall und Rohstoff* with respect to the tort of conspiracy. First, if this third possibility is accepted, then the double-actionability rule is not really applied in the writer's proposed stage three but is spread out over stage one and stage three. Secondly, this third possibility adopts a parochial attitude towards the definition of a tort as the alleged act in question must first be classified as a tort according to the *lex fori* regardless of where the tort in substance occurred.

All three theories are possibilities to explain the decision of the court. At the end of the day however, it is perhaps not significant which theory is correct,[37] as any of these three possibilities will exclude torts that are not recognized by either the *forum* or the *loci delicti.*

What is important to note is that Slade LJ did not apply only the *lex fori* or the *lex loci delicti* in defining the tort. As Tan indicates, it would have been easy for Slade LJ to have said that the question of jurisdiction be governed by the *lex fori* as is the normal position for matters of jurisdiction and procedure.[38] However, as is pointed out, this would not have resolved

[37] Except insofar as for conceptual clarity.
[38] *Supra*, note 24, at 368.

the problem adequately especially when the tort in question is a double-locality tort.[39] Further, the writer suggests that adopting the *lex fori* solely would be too narrow and chauvinistic an approach.

D. *Possible Interpretative Approach*

In light of these past approaches, how then should the amended Order 11 Rule 1(f)(i) be interpreted? As an aside, any discussion as to a possible approach is equally applicable to an interpretation of Order 11 Rule 1(f)(ii) which provides for discretionary jurisdiction where the claim is founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring.

As mentioned earlier, there is no longer any need to localise the tort in Singapore. The problem arises when the tort in question may not be recognized by the *lex fori* or *lex loci delicti* and this question is essentially the same one that was faced by Slade LJ in *Metall und Rohstoff*. Should Singapore adopt the two-stage approach suggested by Slade LJ? Or should Singapore apply the *lex fori*? Or perhaps some other approach should be adopted?

One obstacle to adopting Slade LJ's two-stage approach is that it has been criticised for introducing choice of law matters into the jurisdictional inquiry.[40] The question then, must be asked, what is the objection to introducing choice of law considerations into the jurisdictional inquiry?

There are two main objections to introducing choice of law considerations into the jurisdictional inquiry.

The first objection is one that is based on sovereign integrity. On this view and with reference to the Rules of Court, it is "inconceivable that Parliament, [...] can have intended rules [...] to be applied by reference to the rules of conflict of laws of any other country."[41] Hence, having reference to anything other than the *lex fori* would be inappropriate.

It seems ironic that an argument based on sovereign integrity can now operate to severely limit the jurisdiction of the courts. However, this is what will happen if the *lex fori* is the sole measure by which a tort is defined. Torts not stemming from the common law system would not be recognized even though the damage suffered may occur in Singapore and the plaintiff a Singapore national. This is certainly inconsistent with the spirit and intention of the 1998 amendments which was to widen the scope of Order

[39] *Ibid.*
[40] Fentiman R "Tort – Jurisdiction or Choice of Law" [1989] CLJ 191.
[41] *The TS Havprins* [1983] 2 Llyod's Rep 356, at 358.

11 Rule 1(f).

The second objection is that matters of characterisation and jurisdiction are traditionally governed by the *lex fori.*[42] To apply choice of law considerations in determining choice of law creates a circularity that is difficult to rationalize.

To illustrate, in relation to an Order 11 Rule 1(d)[43] application, how does one prove that for the purposes of discretionary jurisdiction, a contract exists? A valid contract would have its own proper law. Assume the proper law is the law of the state of California and that it is explicitly chosen by the parties to the contract. Does one use the proper law to determine whether the contract, of which it is the proper law of, is valid? Yet, if the contract was not valid, then the choice of proper law would equally be invalid. It is this circularity and paradox that gives rise to the generally accepted view that the *lex fori* be applied in matters of jurisdiction.

2 points can be made here. First, the choice of the *lex fori* is one made to avoid circularity. The objection is against applying the *lex causae* (in the above illustration the proper law of the contract) and not in favour of applying the *lex fori.* Put another way, the argument could easily be made that, instead of applying the *lex causae*, the objective proper law should apply. This leads to the second point, which is while the circularity presents a problem when consideration a existence of a contract for the purposes of discretionary jurisdiction, there is no circularity when it comes to Order 11 Rule 1(f).

Further, there are advantages to applying choice of law considerations at the discretionary jurisdiction stage.

First, it can forestall unarguable cases at the jurisdictional stage. Suppose we have a situation similar to *Metall und Rohstoff* where the tort in question, as defined by the *lex fori* as conspiracy, is in substance committed in New York. However, the tort of conspiracy is not recognized as a tort in New York. If we solely defined the tort according to the *lex fori*, as long as damage was suffered here or an act or omission constituting the tort occurred here, the Singapore courts would have discretionary jurisdiction.[44] Yet, when the matter proceeded to trial, the application of the double-actionability rule would mean that the plaintiff's case would fail. This would be an inefficient use of the court process. By allowing the tort to be defined using the two-stage framework in *Metall und Rohstoff*, it will become clear at the ju-

[42] *Ibid*. See also *The Andres Bonifacio* [1993] 3 SLR 521, at 530.

[43] *Supra*, note 1. This rule provides for discretionary jurisdiction where the claim is brought to, *inter alia*, enforce a contract.

[44] Assuming of course that the other requirements for an Order 11 application are satisfied. See text accompanying notes 8 to 11.

risdictional stage that the case is untenable and this will save much court time.

This is, of course, only one view. If one takes the view that the three requirements for an Order 11 application are separate and distinct, then the argument can be made that the *lex fori* be applied to satisfying the "heads of jurisdiction" requirement while the double-actionability rule be used to determine whether there is a serious question to be tried.[45] The end result, however, is the same as an unarguable case is forestalled at the jurisdictional stage. Further, this would still constitute the application of choice of law at the jurisdictional stage.

Secondly, and this is the flip-side of the previous point, applying choice of law considerations at the jurisdictional stage can help cases which may be unsustainable if measured solely by the *lex fori.* Again, referring to *Metall und Rohstoff*, suppose the tort of abuse of process occurred in New York and was recognized as a tort according to the law there. The tort of abuse of process is not one recognized by Singapore law. If the tort is defined solely by the *lex fori*, an Order 11 application would clearly fail. Admittedly, even with the application of choice of law rules, there would be no jurisdiction.[46]

However, if one were to apply the exception in *Chaplain* v *Boys*,[47] then the tort could be solely defined by the *lex locus delictus* and jurisdiction would be founded.[48]

At this point, it is clear that while there may be some objections to introducing choice of law at the jurisdictional stage, there are also clear advantages. It should be noted that even if the Singapore courts adopt the two-stage approach from *Metall und Rohstoff*, the application of the double-actionability rule at the trial stage would still prevent cases that are not recognized in the forum or the *locus delictus*, unless the exception applies. This would seem contrary to the intention of the drafters of the amendments to widen the scope of Order 11 Rule 1(f).[49] Indeed, there is some suggestion that the intention was to do away with the "substance of the tort" test.[50]

If the intention of the drafters is to widen the scope of Order 11 Rule

[45] *Supra*, note 3, at 17.

[46] This is because the rule would require the tort to be actionable in both the forum and the *locus delictus*. See text accompanying note 27.

[47] This exception provides for the sole application of the *lex causae* in certain instances. *Supra,* note 27.

[48] *Supra*, note 3, at 17. Also see *Red Sea Insurance Co Ltd* v *Bouygues SA* [1994] 3 WLR 926.

[49] See text accompanying note 16.

[50] Personal corespondence with Assoc Professor Pinsler.

1(f), then the writer submits that an entirely new approach be taken to the question of defining the tort for the purposes of the rule. This is a point relating to the categorisation of the cause of action. In order for jurisdiction to be founded under Order 11 Rule 1(f), the cause of action must be categorised as an actionable tort. Further, the applicable choice of law rules at the trial stage must be consistent with the approach adopted at the jurisdictional stage. Otherwise, as was illustrated earlier, jurisdiction may be established only to be defeated at trial. A final concern would be for the categories to be flexible enough to meet the intention of widening the scope of Order 11 Rule 1(f).

One possible approach would be that provided for by England in Part III of its Private International Law (Miscellaneous Provisions) Act 1995.[51] The Private International Law (Miscellaneous Provisions) Act 1995 was intended to reform, *inter alia*, the choice of law rule in tort and delict. In essence, there was dissatisfaction with the common rule of double-actionability and statutory reform was desired.

It is not within the scope of this paper to fully examine the relevant provisions of the PIL Act nor does the writer intend to comment on its provisions.[52] For the purposes of this paper, it will be sufficient to look at the adopted approach and consider how this might apply to Order 11 Rule 1(f).

As a starting point, the PIL Act abolishes the common law rule of double-actionability[53] except with respect to defamation claims.[54] The common law rule is replaced by a general rule set out in Section 11 which is to be used for, *inter alia*, the purposes of determining whether an actionable tort has occurred.[55] This will ensure the consistency of result at the jurisdictional and trial stages.

Admittedly, this consistency can be ensured as long as the test for both stages is the same.[56] However, this alone does not meet the need for flexibility in categorising the torts in question. It is submitted that the approach adopted by the PIL Act allows for both consistency and flexibility. The flexibility

51 Hereafter referred to as "PIL Act".

52 A useful discussion and comment can be found in PM North & JJ Fawcett *Cheshire and North's Private International Law*, (Butterworths, 13th ed, 1999), at 614.

53 Private International Law (Miscellaneous Provisions) Act 1995, s 10.

54 *Ibid*, s 13.

55 *Ibid*, s 9(4).

56 Except where the test applied is the double-actionability rule as discussed earlier. See text accompanying notes 48 to 49.

57 *Ibid*, s 11(1).

of this approach will now be examined.

The general rule is that:[57]

> "the applicable law is the law of the country in which the events constituting the tort or delict in question occur"

This, in effect, applies the law of the place where the tort was committed. This intuitively makes sense and is consistent with the policy considerations of promoting uniformity and discouraging forum shopping.[58] Of course, this general rule presupposes that all the events constituting the tort occur in one country.

Where the events constituting the tort occurs in more than one country, the common law approach was to apply the "substance of the tort test".[59] Under the PIL Act, Section 11(2) provides that the applicable law is localised according to specified events of the type of cause of action, *eg*, personal injury[60] and property damage.[61]

To illustrate, for a cause of action in respect of personal injury, the applicable law is that of the country in which the injury was sustained. In effect, this "codifies" the "substance of the tort" approach and removes the element of uncertainty inherent in that test.

Where the cause of action is not one relating to personal injury or property damage, section 11(2)(c) provides that the applicable law is the country in which the most significant element of the relevant events occurred. This is intended to be a catch-all and leaves the courts to work out a solution in much the same way they presently do under the common law.[62]

What has been discussed so far is the general approach. The PIL Act provides for the displacement of this general approach if, through a comparison of the factors connecting the tort to a country identified under section 11 and the factors connecting the tort to another country, it is substantially more appropriate for the applicable law to be the law of the other country.[63] Section 12 also provides a non-exclusive list of factors for the purposes of this comparison.[64]

While there is some uncertainty as to how the factors are to be weighted and what would satisfy the test of "substantially more appropriate", it is

58 PM North & JJ Fawcett *Cheshire and North's Private International Law*, (Butterworths, 13th ed, 1999), at 629.

59 See text accompanying notes 20 to 25.

60 *Supra*, note 53, s 11(2)(a).

61 *Ibid*, s 11(2)(b).

62 *Supra*, note 58, at 634-637.

63 *Supra*, note 53, s 12.

64 For a discussion of these factors, see *supra*, note 58, at 638-639.

submitted that this should not present a problem for the courts as it seems to require a balancing process similar to that used in applications for *forum non conveniens*.

To summarize, it is submitted that there are two things that commend the adoption of this approach in interpreting Order 11 Rule 1(f). First, it allows for a consistent approach at both the jurisdictional and trial stages which prevents those situations where jurisdiction is founded for a tort only to be defeated at trial because of the application of different choice of law rules. Secondly, the localisation of the tort in question through various "connecting" factors means that events leading to a tort overseas will not be defeated simply because it is not actionable according to the *lex fori.*

Two questions remain. The first question is whether the courts are open to adopting this approach. As mentioned earlier, there is a dearth of local authorities in this area of the law. Further, even if the court were minded to adopt the suggested approach for the purposes of discretionary jurisdiction, the application of the double-actionability rule at the trial stage will defeat certain actions unless the exceptions to the rule apply.[65] Ideally, the approach in the PIL Act should be applied at both the jurisdictional and trial stages for both consistency and flexibility.[66] Perhaps the solution is either for legislation similar to Part III of the PIL Act to be enacted in Singapore or for Part III of the PIL Act to be made part of Singapore law pursuant to the Application of English Laws Act.[67] Either way, this will provide the authoritative impetus for the courts to adopt this approach.

The second question is, if the above suggestion is adopted, whether defamation should be excluded, as is the case in the UK. Without going into the details, defamation was excluded because of concerns that English newspapers sold abroad may be subject to repressive foreign laws without the benefit of defences available under English law. While these is a valid concern, it has been argued by North and Fawcett that excluding the entire tort of defamation is too severe especially since this concern may be dealt with by having recourse to public policy. Further, not every act of defamation raises the issue of freedom of speech and it is better left to the courts to

[65] *Goh Chok Tong* v *Tang Liang Hong* [1997] 2 SLR 641; *Parno* v *SC Marine Pte Ltd* (Unreported, Civil Appeal 11 of 1999, Court of Appeal).

[66] The writer is assuming, of course, that there is no particular investment in the double-actionability rule by the Singapore legal system.

[67] Cap 7A, 1994 Ed, s 4.

[68] *Supra*, note 58, at 656-657.

make the discrimination.[68] The writer submits that if the suggested approach is adopted, then it should be applied across the board.

III. Conclusion

This article has examined the amendments made to Order 11 Rule 1(f) from the perspective of adopting a particular interpretative approach consistent with the intention of the drafters. To this end, the article has looked at how similar provisions have been examined by other jurisdictions in the past and the difficulties with applying these approaches to the amended provision. This article then looked to the English PIL Act for a new approach to interpreting Order 11 Rule 1(f). It was argued that adopting this new approach would promote both consistency and maximal flexibility in establishing jurisdiction for torts committed elsewhere.

At the end of the day, the likelihood of torts spanning multi-jurisdictions is a real one. Further, with the differences in law in the various jurisdictions, it is also a reality that acts committed in another jurisdiction may not be recognised in the forum as an actionable tort. Yet, the damage suffered is real. The writer hopes that the suggested approach will go some way towards meeting the challenges of an increasingly shrinking world.

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