

A NOTE ON THE APPLICATION OF THE STATUTE LAW OF SINGAPORE WITHIN ITS PRIVATE INTERNATIONAL LAW

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The purpose of this Note is to raise a question on which the rules of private international law of the common law, including Singapore, are less satisfactory than they should be. It is written in the light of one part of a seminar conducted at the Singapore Academy of Law in April 2005,¹ but the proximate cause of the investigation was an enquiry as to the application of certain aspects of Singapore's statutory employment law² in cases in which the factual and legal context contains points of contact to countries outside Singapore, or to laws other than the law of Singapore. It is presented in the form of a Note because its aim is to raise the issue as one for thought and further analysis, rather than pretending to give answers which are, in the writer's opinion, fixed and final. In the current state of the law's development it is not possible to claim any more for any individual analysis.

I. INTRODUCTION

The rules of the common law conflict of laws tell a court which country's laws to apply in a case in which there is more than one country, or one country's laws, having a connection to the facts of a case. It has stood the test of time so far as it is concerned to operate within a system of judge-made rules, and foreign rules which are analogous to them. But the same claim cannot be made of the way it deals with statutes, local and foreign.³ This is a problem which can be seen to arise in two distinct ways. First, a Singapore court may find itself dealing with a Singapore statute which could, on the face of it, be applied to the dispute which has arisen for decision, and yet it may still feel that it is not clear that the statute was supposed to apply to the case at hand. Secondly, in an issue which is not further pursued here, it may find itself asked to apply and grant relief in accordance with the provisions of a foreign statute

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¹ Jointly organized by the Singapore Academy of Law and the Faculty of Law of the National University of Singapore and held on April 14th, 2005. The audience participation which is referred to below requires an acknowledgment of genuine gratitude to those who did as they were asked and answered the questions on the worksheet: it could not have been done without them. I am further indebted to the Academy and to the Faculty for their joint invitation to me to address the participants, and in particular and especially to my colleague Yeo Tiong Min, who pointed me in the direction of material of which I was unaware, and who then chaired the session and collated the results of the empirical research.

² *Employment Act* (Cap. 91, 1996 Rev. Ed. Sing.).

³ In Singapore, at least, there are few of the complications which now bedevil English law and which derive from the fact that legislative authority is not exclusively confined to the parliament at Westminster: see Adrian Briggs, "The Real Scope of European Rules for Choice of Law" (2003) 119 L.Q.R. 352.

which does not fall neatly within Singapore's conflicts rules on the characterisation of issues. In some ways this uneasy approach to statutes is surprising. Much of our law is statutory, and so far as civilian states like France are concerned, all their law is statutory. English courts can still apply French law; and courts in Singapore can apply the law of China or Japan. Yet despite this, the perception is that the conflict of laws does not do statutes well. In making an attempt to shine some light into the darkness, it is proposed to consider the law in relation to two distinct questions:

- (A) In what circumstances should a provision of Singapore statute law be applied by a Singapore court hearing a case which has international points of contact?
- (B) In what circumstances, if ever, should a provision of Singapore statute law be held not to apply when a Singapore court hears a case in which the law of Singapore is, on the face of it, the *lex causae*?

The principal vehicle for illustration will be certain provisions of the *Employment Act*, particularly those which confer rights on employees and impose duties on employers, in relation to childbirth and childcare.⁴ The employment relationship illustrates the problem quite neatly, for two reasons. First, the contractual relationship between employer and employee may not be governed by the law of Singapore, yet it may still be argued that Singapore legislation should still be applied, at least when the case comes before a Singapore judge for decision.⁵ The grounds on which this may be done need to be analysed. Secondly, there may be cases in which the employment, or other relationship between the parties, is governed by the law of Singapore, and yet there is reason to feel that a particular provision of the legislation should not be applied. In sum, the large issue to identify the rules which allow us to decide whether the particular provision of local statute law does or does not apply in the particular case. The conclusion will be that it is not enough to apply the choice of law rules of the common law and Singapore, and then apply or not apply the statute according to what they tell us about the *lex causae*. There is some further science which has to be developed.

Difficulties arise for courts, and no doubt for others, when legislators do not define and then make clear the bounds within which they intend their own legislation to be applied by their own judges. The better crafted the legislation is, the fewer will be the problems; but in keeping with the unhappy tradition of English law, Singapore's lawmakers are not good at providing answers to these questions. When the legislators fail, it is left to others to do the best they can by developing guidelines to help those who have to apply these rules and who need answers before a judge has had time and occasion to provide them. It cannot be claimed that the suggestions made here are vouched for by much in the way of authority, but there is little to contradict them either.

⁴ This paper will concentrate on the issues raised by sections 76 and 87A of the *Employment Act*, but the techniques examined will be of general application.

⁵ It is no part of the present analysis, but it is accepted that the answer which may be given by a judge in relation to the application of local statute law may well be different from that given by a foreign judge considering the same case but to which the issue is one of applying foreign statute law.

II. LOCATING THE ISSUE IN ITS CONTEXT

An uncontroversial point of departure can be found by taking a simple example from the private international law of contract. Suppose there is a contract for the sale of goods under which a Singapore buyer has undertaken to acquire the goods from a Japanese seller⁶ and to pay for them in yen at a Japanese bank. Should some dispute arise as to the quality of the goods and the seller sue the buyer for damages for refusal to take delivery, a Singapore court will say that the issue which arises for decision in the case is a contractual one; that the substance of the contract is governed by the proper law of the contract; that for practical purposes, the rights and duties of the parties are governed by the proper law of the contract; that if the proper law of the contract is the law of Japan, either because that is what the parties chose, or because this is the law with which the contract has its closest connection, Japanese law will determine whether the buyer is liable to the seller; and that if the buyer is liable to the seller, Japanese law will specify the kinds or heads of damages which are recoverable. And that will be that. If the buyer points to the *Sale of Goods Act*⁷ and demonstrates that according to the statute law of Singapore the answer is or would be different from that given by the law of Japan, that will be quite irrelevant. The judge will say that the proper law of the contract is not the law of Singapore, and that as a result there is no justification for looking to the statute law of Singapore. And that will be the beginning and the end of the debate.

Few would quarrel with that. As their contractual autonomy means that the parties may choose the terms they want to govern their contract, it must follow that they can choose the law to govern it: it is a convenient short-hand method of achieving the same result as writing it all out at length. If the parties may choose the terms on which they are prepared to deal, they can choose and exclude the substantive laws of Singapore if they wish; and a judge will simply defer to their choice of law and laws. The *Sale of Goods Act* is simply a statute which the parties may choose to invoke or to not invoke.

The next example is *Lawson v. Serco Ltd.*,⁸ a case which came before the English Court of Appeal early in 2004. Lawson, who was a British national domiciled in England, was employed by Serco, an English company with its head office in London. His contract of employment required him to operate as a security guard, and it was governed, as one would expect, by English law. He was sent by his employer to work on Ascension Island, a British possession and a dependency of St. Helena, a British colony in the South Atlantic Ocean. He was, he said, made to work such long hours that his job became unbearable to him, and when he resigned he alleged that he had been placed in a position in which he had no practical choice: he had, as English employment law regards it, been “constructively dismissed”. He returned to England and took proceedings against his employer for unfair dismissal. The right of an employee not to be unfairly dismissed⁹ is a statutory right given to employees

⁶ Japan not being party to the 1980 Vienna Convention on the Contracts for the International Sale of Goods.

⁷ (Cap. 393, 1999 Rev. Ed. Sing.)

⁸ [2004] E.W.C.A. Civ. 12; [2004] 2 All E.R. 200. Leave to appeal to the House of Lords was given, and the appeal was set down for hearing in December 2004. At the date of writing the appeal has still not been heard.

⁹ Whether constructively or otherwise.

and now found in *Employment Rights Act 1996*,¹⁰ and which is separate and distinct from any contractual claim for damages for breach of contract. According to the *Employment Rights Act 1996*, an employee has a right not to be unfairly dismissed; no limitation is placed on the particular employee or the employment. But *Serco* contended that as the employment had been carried on wholly outside the United Kingdom the *Employment Rights Act 1996* in general, and the right to sue for unfair dismissal in particular, was inapplicable to it, even though the employer was English, the employee was English, and contract of employment was governed by English law. The court agreed with the employer's submission. The material provisions of the *Employment Rights Act 1996* were inapplicable, it held, because if one traced the legislative history, it could be deduced that it was confined to employments in which the employee ordinarily works in the United Kingdom. The court was certainly relieved to find a way to this conclusion, because the very width of the literal words of statute was rather embarrassing, and cutting it down to size was important.¹¹ It was confirmed in its view that the Act was inapplicable by the proposition that legislation is presumed to be of limited territorial scope, and that an employment outside England was outside the legislative grasp of the Act. Even so, the wording of the statute provided no express limitation which would exclude Lawson's employment, or that of anyone else, from its scope. The court was very keen to find something which could do it.

Had the historical trail of the legislation not been as clear as the court considered it to be, the court would have had to reason from the wording of the Act and from principle. It would have had to identify the "legislative grasp"¹² of the provisions. One would then have had to ask why and how the *Employment Rights Act 1996* could support the conclusion that it was inapplicable to a case which was wholly and in every respect English save for the single fact that the duties of the employment were carried out overseas. And one may build on this to propose another case. Suppose a New Yorker is sent to England to work for an American financial institution in the City of London and that his contract of employment is expressed to be governed by the law of New York, but he is so badly treated at work that he feels driven to resign, claims constructive dismissal, and sues the employer under the provisions of the *Employment Rights Act 1996*. Would the court say that the Act applies because the employment was ordinarily in England, and that the connections with New York and its law are irrelevant to the operation of the Act?

III. SINGAPORE STATUTE LAW: MATERNITY AND CHILDCARE LEAVE

With this background we may approach the law of Singapore. The *Employment Act*, as amended in 2004, gives rights to maternity leave which may be more generous than

¹⁰ (U.K.), 1996, c. 18.

¹¹ It could not have been supposed that any employee of an English employer, or of an employer which had a presence in England which allowed jurisdiction to be asserted over it, was entitled to bring a claim for unfair dismissal. In *Crofts v. Cathay Pacific Airways Ltd.* [2005] E.W.C.A. Civ. 599, the Court of Appeal accepted that the law established by *Serco* had to be applied to a case concerning international airline pilots whose employment was arguably based in England, but divided on the question whether the test in *Serco* could be applied with sufficient flexibility to extend the benefits of the *Employment Act 1996*, *supra* note 10, to them.

¹² The expression is taken from the speech of Lord Wilberforce in *Clark (Inspector of Taxes) v. Oceanic Contractors Inc.* [1983] 2 A.C. 130 at 152.

may be available under the laws of some other countries; and it gives certain rights to childcare leave. The provisions are in sections 76 and 87 respectively, but they give no indication of their intended personal or material scope, or of their legislative grasp. Section 76(1) simply starts by providing that:

Subject to this section, every female employee shall be entitled to absent herself from work—

And then sets out some complicated arithmetic to identify the period of leave which may be claimed. It says nothing about the international scope of the provision.

Likewise, section 87A (1) provides that:

Subject to subsection (2), where any employee—

- (a) has served an employer for a period of not less than 3 months; and
- (b) has any child below the age of 7 years at any time during any relevant period, he shall be entitled to childcare leave of 2 days for that relevant period.

And as with the maternity leave provisions, it says no more about the intended scope of the provision. No doubt Parliament directed its attention to local employees of local employers, and did not long ponder the issues of private international law which such legislation may raise. There is nothing to indicate what is intended to be the legislative grasp of these provisions: which employers? which employees? which employments? which proper laws? and so on. So suppose that a mother is refused maternity leave despite the language of section 76, or that a parent is denied childcare leave despite the language of section 87A, and that they bring their employer before the court to complain. To predict and explain what the outcome will be, it will be necessary to identify a number of distinct factual cases, and to proceed incrementally.

In a typical employment law case there may be, one may suppose, four or five potential points of contract with Singapore and its law. These are: the residence or domicile of the employer; the residence or domicile of the employee; the place where the duties of the employment were discharged; the law which governs the contract of employment; and in some cases, the law which would have governed the contract of employment if there had been no express choice of law in it. At one easy extreme it is certain that if the claimant mother is Singaporean, the defendant is Singaporean, the duties of the employment are performed in Singapore, the contract of employment is expressed to be governed by the law of Singapore, and the contract of employment would have been governed by the law of Singapore even in the absence of choice, then any Singapore judge, trying a claim brought by the mother or other parent against the employer, would have no trouble in holding that the plaintiff was entitled to rely on section 76 or 87A of the Act. At the other, it also seems pretty certain that if the claimant parent is English, the defendant is English, the duties of the employment are carried on in England, the contract of employment is expressed to be governed by English law, and the contract of employment would have been governed by English law even in the absence of choice, a Singapore judge in the improbable position of trying a claim against the employer would have no trouble holding that the plaintiff was not entitled to rely on section 87A of the Act.

But this does not tell us how to deal with cases where the facts are less clear-cut. Taking the maternity leave question, and the right of the mother to have her employer provide her with it, how might we deal with these following example cases?

Table 1.
Employment law relationships and connecting factors

	Employer	Employee	Place of work	Chosen law	Default law ¹³
1	Singapore	Singapore	Singapore	Singapore	Singapore
2	Singapore	Singapore	Singapore	England	Singapore
3	Singapore	Singapore	England	Singapore	
4	Singapore	Singapore	England	England	
5	Singapore	England	Singapore	Singapore	
6	Singapore	England	Singapore	England	Singapore
7	Singapore	England	England	Singapore	
8	Singapore	England	England	England	
9	England	Singapore	Singapore	Singapore	
10	England	Singapore	Singapore	England	
11	England	Singapore	England	Singapore	
12	England	England	Singapore	Singapore	
13	England	England	Singapore	England	
14	England	England	England	Singapore	
15	New York	Singapore	Hong Kong	England	

So far as this table is concerned, it could be much longer. If Singapore and England alone were in issue there would be 120 possible combinations, but these fifteen suffice to indicate the range of the enquiry. The point of departure is that the answer, whatever it is, cannot be deduced from the express terms of the statute, as none is provided.

IV. A TRADITIONAL APPROACH

If one starts by going back to basics, a traditional view of the conflict of laws would direct us to enquire whether the law of Singapore be the *lex causae*. If it is, Singapore law will be held to govern, and the Act will apply in every case. If it is not, the Act will not apply at all unless Parliament has given the judiciary a clear and specific direction to apply the statute even though Singapore law is not otherwise picked out for application by the rules of the conflict of laws.¹⁴ As Dr F.A. Mann put it, writing from the perspective of English private international law¹⁵:

¹³ That is, the law which would have governed the contract of employment if the parties had not exercised their right to choose the governing law. Where none is specified, it was intended that there be no difference between the chosen law and the default law, though it is not certain that all those who responded to the survey necessarily understood that this was the intention.

¹⁴ That is, Singapore's rules for the choice of law, which are in very large part the choice of law rules of the common law.

¹⁵ F.A. Mann, "Statutes and the Conflict of Laws" (1972) 46 Brit. Y.B. Int'l L 117 at 123-124. It is fair to say that this classic article finds fault with the views of every other writer, English or foreign, who had looked at the question. Mann's article, famously put down as "otherwise excellent" was discussed by J.H.C. Morris, "The Scope of the Carriage of Goods by Sea Act 1971" (1979) 95 L.Q.R. 59, but the

If we are confronted by a conflict rule, it has to be applied. It is mandatory ... Rules of internal law ... are, at least in principle, applicable only if it has been previously ascertained that, by virtue of the conflict rule, English substantive law applies ... The principle is that English law, including statute law, even though of mandatory character, is only applicable if, in accordance with the rules of the conflict of laws, the *lex causae* is English.

Dr. Mann's view was, in effect, that rules of the conflict of laws are of a higher order than the laws made by Parliaments. Transposed to Singapore, the consequence of this would be that the Singapore law as contained in the *Employment Act* would in principle apply only if the *lex causae*, the law governing the employment contract, identified by the choice of law rules of the common law, were the law of Singapore. Now with respect to those who see matters differently, it is submitted that this simply cannot be right. If one takes example 2 from Table 1, it is almost impossible to believe that Parliament intended the maternity and childcare rules to apply if but only if Singapore law was the law which governed the employment relationship. It would be surprising to discern a legislative intention which made it so very easy for an employer to contract his employee out of these social advances by the simple expedient of choosing another law to govern the employment contract. To take a case closer to the other extreme, can it really be intended that the provisions of the *Employment Act* should apply in example 14, just because Singapore is the law which governs the employment relationship? It is submitted that the answer is negative; that the common law conflict of laws, if Dr. Mann's account is taken to summarise the way it works, simply cannot be correct. It is no answer to say that this *is* the orthodox approach, for it is heretical to maintain that the doctrines of choice of law are ossified and incapable of rational development.¹⁶

V. TAKING STATUTES SERIOUSLY

In a world in which most of our law is statutory, an approach to choice of law which sees statutes as constricted by a higher law is simply untenable. We need a new point of departure. We need to start from the proposition that there is no reason to suppose that Parliament¹⁷ legislates only within the straitjacket of the rules of the conflict of laws, or does not make laws which take effect only within the rules for choice of law, which it has to take as given, for that would describe a very peculiar form of parliamentary democracy. One might ask a law-maker whether he or she intended a law to be applied only when the rules of the common law conflict of laws ordained that Singapore law was entitled to be applied. The answer may be yes, that the new law was intended to work within the framework of the rules of the conflict of laws, higher rules which Parliament did not make, did not read, did not address, did not change, but simply took as given. But such an answer would be surprising. It does

particular disagreement as to the drafting of the Hague Visby Rules is another illustration of a general problem rather than a solution to it which may be of general application.

¹⁶ Rather the reverse: see *e.g. Raiffeisen Zentralbank Österreich v. Five Star General Trading LLC* [2001] Q.B. 825.

¹⁷ The paper is being written from the perspective of Singapore, so references to Parliament may be taken as references to the Parliament of Singapore. But the analysis which is put forward is not intended to be specifically Singaporean.

involve making an assertion, but it is hard to believe that parliamentary democracies make their laws in such limited ways, or that the power to legislate, and the legislation made, is tied down with invisible cords. It is, of course, absolutely correct to take this local view of foreign legislation, for foreign law, statutes not excluded, applies always subject to the choice of law rules of the forum. But when the legislative arm of state power gives a direction to the judicial arm, does it really write, in invisible ink: "but you only need to apply these rules where the rules of the conflict of laws quite independently confirm that the law of Singapore is applicable. If the rules of the conflict of laws do not do that, you shall utterly ignore this piece of legislation."? No such statement is to be found in any Act of Parliament; such a statement does not strike me as something which is needed to give efficacy to the law which Parliament thinks it has made.

It is, of course, true that Dr. Mann did qualify the absolute character of his analysis by saying that *in principle* the legislation works only if the conflict of laws allows it to do so. This certainly accepts that exceptional cases may be foreseen. But this approach, or general rule and exception, has two substantial drawbacks. First, Parliament may intend the law to be applied but be unaware that a court which follows the advice of Dr. Mann will only accept this if a magic formula appears in the legislation. Secondly, but surely more significantly, it means that a presumption lies against the application of a local statute which, according to its plain language, does cover the case at hand. This is not an impossible state of affairs, but its appropriateness is open to serious question; and even if it may be said to be dictated by the common law, that does not serve to explain why a local court must find that there is such a limitation on the sovereignty of the local legislature.

It is submitted the converse is the right approach, and that a court, asked to apply the words of a local statute, should expect to do so unless the statute, on a true construction, was meant to be applied only if the rules of the conflict of laws so provided. In other words, there will be a presumption that statutes are meant to be applied to cases which fall within their terms. There should be no presumption that statutes should not apply unless the invisible rules of the conflict of laws allow for it. The starting point should be that if the legislation was drafted to apply, one needs a good reason not to apply it, rather than the reverse. The starting point should not be that the legislation does not apply unless the common law gives it the green light.

So one will start with the statute law of Singapore, and see what it says. The decision will be easy if Parliament¹⁸ has given an indication of its intention, of the legislative grasp which it wanted the law to have. Certainly, the court may be able to reach the conclusion that, for example, the legislation cannot have been intended to govern activity taking place outside the territory of Singapore: it has been held, for example, that the *Factories Act*¹⁹ does not apply to premises in Burma.²⁰ Now it is all too frequent that the legislation is, from this point of view, incomplete; and if Parliament will not say what the intended scope is, what the legislative grasp is, it is less surprising to see the old approach, as exemplified by the writings of Dr. Mann, being preferred by the industrious and busy judge. So let us go back to the

¹⁸ Or, to the extent which such evidence is admissible in judicial proceedings, the relevant minister has stated the view of the government.

¹⁹ (Cap. 104, 1998 Rev. Ed. Sing.)

²⁰ *Parno v. SC Marine Pte. Ltd.* [1999] 4 S.L.R. 579.

Employment Act and see what its legislative grasp was supposed to be: who are the people, which are the contracts, where are the employments to which the provisions of the Act are to be applied.

The persons bound by the obligations in the *Employment Act* are defined by section 2. The definition of “employer” and “employee” is wholly free from limitation. It is quite broad enough to apply, for example, to any female employee of the University of Oxford, but no one will expect that section 76 was intended to apply to such a person, no matter what Parliament actually said.

We also know that the Act contains an anti-avoidance provision, section 86 providing that:

Any contract of service whereby a female employee relinquishes any right to maternity benefit under this Part shall be null and void in so far as it purports to deprive her of that right or to remove or reduce the liability of any employer to make any payment under this Part.

But it would be a surprise to learn that this provision could be applied to prevent parties making a choice of law other than that of Singapore, on the footing that this would be seen as their contracting out of the provisions of the Act. But it would also be a surprise, though a different surprise, to think that the primary legislation could be avoided by the parties²¹ simply having a different law chosen to govern the contract of employment. Choice of law is a strange way to contract out of a statutory regime, and occasionally it is legislated against,²² but the answer cannot be found in section 86.

In any case, there may be many points of contact between the facts and the law. Where the contract in question is governed by the law of Singapore, one may easily suppose that these provisions should be applied: the provision in section 86 about not being able to contract out goes some way to support that. But what if the contract is not governed by the law of Singapore: should that make the Act irrelevant? Perhaps not. Where there is employment being carried out in Singapore, one may argue that when one is in Rome, one should do as the Romans do, and expect to be done unto as the Romans do unto. But does the Act really apply to the worker who is on a temporary posting or assignment to Singapore, who is not otherwise part of Singapore’s civil society? And what about employment outside Singapore, such as where a Singapore employer sends a Singapore employee to work in Jakarta: should we not assume that their employment rights and duties remain those which would have applied if they had stayed in Singapore? Where a Singapore employee is sent to work temporarily outside Singapore, does she not take with her her rights under the *Employment Act*?

VI. A PROPOSED APPROACH

If the draftsman does not assist in the task of discerning the intention of the legislator from the wording in which the legislation is cast, we need a rule to help us. The present submission, as the basis for a workable rule, lies along approximately these lines.

²¹ Which really means the employer.

²² See e.g. *Unfair Contract Terms Act* (Cap. 396, 1994 Rev. Ed. Sing., s. 27).

First, if the question is one on which the rules of the conflict of laws direct the court to apply the law of Singapore, as in Question (A) stated above, any Singapore legislation will be applied, according to its terms. This should be the end of the story *unless it is shown to the satisfaction of the court that there is no real or substantial connection with Singapore* as a country. Another way of capturing the idea, though it is not quite the same idea, might be to say that Singapore law will be applied unless it is substantially more appropriate to apply the corresponding rule of a foreign law than it is to apply the provisions found in the law of Singapore. But this alternative poses the question in terms which resemble a competition between laws; and many will think that it is not appropriate to ask a Singapore judge to umpire a contest between two laws of potential application. Moreover, it asks the question in terms of laws rather than countries, but the only proper basis for not applying Singapore law as a law could be that there is no connection to Singapore as a country. The submission therefore is to prefer the “no real or substantial connection” formulation, expressed in terms of country. So if neither the employer nor the employee is Singaporean, and Singapore is not the place of work either, the fact that Singapore law governs the contract should not lead to the conclusion that the maternity and childcare provisions will be applicable. The reason is that though Singapore law is the contractual *lex causae*, the statute can be and should be construed as inapplicable to the personnel and the employment relationship in the case.

Secondly, if the question is one on which the rules of the conflict of laws would not otherwise direct us to apply the law of Singapore, but there is Singapore legislation which would in terms cover the case, which was Question (B) stated above, that statute should still be applied *if there exists a real and substantial connection to Singapore* as a country. It should not be necessary to have to go so far as to construe the legislation as being of overriding effect or to say that the legislation is mandatory in its application, before it may be applied. There should be no presumption against the application of the statute, if Parliament has legislated in terms which do cover the particular case. So if the contract of employment is governed by English or New York law, but there is a real and substantial connection to Singapore, the legislation should be considered as applicable, and not as inapplicable.

The advantage of this formulation, even if there may be uncertainty as to the answer it may give in a particular case, is that it can vary according to the context. What counts as a real and substantial connection in the case of employment law might not be the same as a real and substantial connection in the regulation of financial services or the securities market. Context will be important. Of course, the allegation of uncertainty cannot be dismissed. It appears to have had an impact on the English Court of Appeal in *Re Paramount Airways Ltd.*,²³ where the Court, rather unexpectedly, declined to adopt it.²⁴ But the common law has a long and satisfactory history of utilising tests of “real and substantial connection”, and it is consistent with its methodology to allow a test framed in such general terms to develop incrementally.

²³ [1993] Ch. 223.

²⁴ However, as English law was applicable to the issue, which was one of insolvent administration, the question was not whether the provisions of the Act should override the contrary prescription of the *lex causae*, but whether the statute should still apply according to its terms. The case was therefore concerned with Question (B), which is discussed in more detail in the following section.

Of course, it would have been so much easier if Parliament had said what it meant. No fault can be found with the judges if they mistake what the legislators meant to achieve by the words they used. This paper does not offer a draftsman a form of words which will work as a magic formula, for any such wording will obviously depend on the context. But for the corpus of existing legislation which is silent as to its legislative grasp, the conclusion proposed above has clear advantages over the solution offered by the traditional approach of the conflict of laws, which treats the rules for choice of law as being of a higher order than laws made by Parliament. The main reason for preferring this view is that it pays more attention than is customary to the proposition that local legislators are sovereign, and that there is no proper reason to suppose that they intended to be tied down by the conflict of laws before they acted to make the law of Singapore.

VII. AN APPLICATION OF THE PROPOSED APPROACH

This should provide some guidance to a judge who needs to decide whether a provision of Singapore statute law should be applied to override what would otherwise be prescribed by the *lex causae*. To give another recent example, the English High Court in *Office of Fair Trading v. Lloyd's TSB Bank plc*²⁵ had to consider the application of the *Consumer Credit Act 1974*²⁶ in circumstances where the Act applied to the relationship between the parties but there were further reasons to consider that it should not be applied on the facts of the case. Section 75 of that Act provides that if a consumer has entered into a transaction with a supplier of goods or services, and credit has been supplied to him, by a third party, for the purposes of the transaction, he has a statutory cause of action against the party providing the credit, (such as a bank, or credit card company) if the supplier of the goods or services breaches certain of his obligations under the contract of sale or supply. A question arose whether an English consumer was entitled to rely on section 75 against an English provider of credit if the contract for the supply of goods or services were not wholly English. Gloster J ruled that the statute did not apply where (a) the contract was made wholly outside the United Kingdom, and (b) the contract was governed by a law other than English, and (c) the goods or services were delivered or supplied wholly outside the United Kingdom. This seems entirely correct. The relationship between consumer and provider of credit is governed by English law, and the wording of section 75 would cover the case. But in a case having the further characteristics listed by Gloster J, there is no real or substantial connection to England, and (in the present submission) this means that it would be appropriate for the court to conclude that the Act did not apply. Gloster J declined to rule on what the answer would be in a case in which not all three of her conditions were satisfied, which just goes to show that the issue is a live and difficult one.

But it is now convenient to revisit the second question about Singapore statutes, which is slightly more difficult, and examine a case in which the law of Singapore plainly does apply, as *lex causae*, to the particular issue raised for decision, and the wording of the statute appears equally to apply to it. Where this is so, one could

²⁵ [2005] 1 All E.R. 843.

²⁶ (U.K.), 1974, c. 39.

take the view that it is not really a question for the conflict of laws at all, for the application of Singapore law has been admitted and the only question is as to what that law actually provides. But there may still be uncertainty whether a Singapore statute should be construed as extending to the facts of a case which has connections to other countries, or which has rather less of a connection to Singapore. The problems which will still arise if Parliament does not specify the legislative grasp of its rule are closely analogous to those we have considered above. In a sense we have already thought about this in those cases above²⁷ where the proper law of the employment contract was that of Singapore. It may make matters clearer to take a second example drawn from a context where the law of Singapore is plainly applicable. In bankruptcy and insolvency, the law which is applied to the insolvent administration is the *lex fori*, the law of the forum. Almost all legal systems adopt the same basic approach to choice of law for bankruptcy and insolvency. The question is how that law should be applied when the case has, arguably, a weaker connection with Singapore than with some other country.

Suppose in the context of Singapore bankruptcy or insolvency that it is alleged that the bankrupt or the company had entered into a transaction at an undervalue, or had given an unfair preference to another. The material provisions of the *Bankruptcy Act*²⁸ state that:

98(1) *Subject to this section and to sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) entered into a transaction with another person at an undervalue, the Official Assignee may apply to the court for an order under this section ...*

99(1) *Subject to this section and to sections 100 and 102, where an individual is adjudged bankrupt and he has at the relevant time (as defined in section 100) given an unfair preference to any person, the Official Assignee may apply to the court for an order under this section ...*

*Companies Act*²⁹ section 329 applies this provision to corporate insolvencies.

Who counts as “another person” for the purposes of the Acts? Does it embrace persons outside Singapore, or persons who dealt under a contract which was governed by something other than the law of Singapore? Is it affected by the question of where the property was situated? The question has arisen before the English courts, and has received a rather unsatisfactory answer. In *Re Paramount Airways Ltd.*³⁰ the English Court of Appeal had to decide whether the English version of *Bankruptcy Act* section 98 applied to a transaction entered into between the insolvent on the one hand, and on the other, a foreign bank with no place of business in England. The Court came to the conclusion that the legislation did apply, but the structure of its reasoning was quite extraordinary. The reasoning may be boiled down to four propositions. (1) The proposition that the legislation applied to any person anywhere, no matter the lack of his connection to England and of the transaction to English law, was incredible: the proposition that Parliament had intended such a sweep for the legislation was “truly extraordinary”. However, (2) it was impossible to come up with a sensible

²⁷ Table 1, examples 1, 3, 5, 7, 9, 11, 12, and 14.

²⁸ (Cap. 20, 2000 Rev. Ed. Sing.)

²⁹ (Cap. 50, 1994 Rev. Ed. Sing.)

³⁰ *Supra* note 23.

limitation: “In the end I am unable to discern any satisfactory limitation ... The case for some limitation is powerful, but there is no single, simple formula which is compelling, save for one expressed in wide and loose terms (*e.g.* that the person, or the transaction, has a ‘sufficient connection’ with England) that would hardly be distinguishable from the ambit of the section being unlimited territorially and the court being left to display a judicial restraint in the exercise of the jurisdiction”.³¹ Nor was it possible for the judge to say that the legislation was limited to transactions governed by English law, or that the sections applied only to property which had been in England at the material time. And therefore (3) “The solution to the question of statutory interpretation ... does not lie in retreating to a rigid and indefensible line ... As I see it, the considerations ... lead irresistibly to the conclusion that, when considering the expression ‘any person’ in the section, it is impossible to identify any particular limitation which can be said with any degree of confidence to represent the presumed intention of Parliament ... The expression must therefore be left to bear its literal, and natural, meaning: any person”.³² Which may or may not be what Parliament intended, but according to the judge, it is the meaning of what it said. But (4), as the Court had discretion to order the transaction to be set aside, it would elect not to do so.

It is hard not to sympathise with the court. But a preferable answer would have been to hold that the *lex causae* for issues of insolvent administration, which this was, is to apply the law of the forum. That being so, the provisions of English law corresponding to sections 98 and 99 should have applied unless in the particular case it could be shown that there was no real or substantial connection to England. Now when that test is applied to the facts of the case, reasonable opinions may differ as to the answer. But if the property in question was, for example, foreign land, and the transaction was a disposal to a foreign bank which in accepting the interest which it had taken had acted in accordance with the law of the place where the land was, there is a perfectly good case to be made for the view that the foreign bank should not be regarded as “any person” for the purposes of the legislation. If the facts were altered to deal with Singapore rather than England, one could properly say that the transaction had no real or substantial connection to Singapore, and that for this reason it would be wrong to apply the particular provision of Singapore law to it. To be accurate and to repeat, this does not involve dis-applying the statute law of Singapore, but construing its meaning in a way which has the effect that it will not be applied, though this is a distinction without a difference, for this is how one dis-applies a statute, and in this context one would be doing it by reason of the overwhelmingly non-Singapore elements in the story.³³

VIII. SAMPLING THE VIEWS OF LAWYERS, OR THE WISDOM OF CROWDS

When the seminar at the Academy had reached this point the participants, over forty in number, were asked to concentrate and to give their views on what the answer should

³¹ *Ibid.* at 237.

³² *Ibid.* at 239.

³³ To some extent this conclusion is supported by the approach of the Court of Appeal in *Velstra Pte. Ltd. v. Dexia Bank NV* [2005] 1 S.L.R. 154, where the Court declined to give s. 98 a reach capable of upsetting a Belgian transaction which was otherwise unobjectionable.

be to the questions raised by the fifteen examples in Table 1. They were asked to offer their view of first impression upon whether the material provisions of Singapore employment law should be applied by a Singaporean court. The justification for conducting such a poll may be three-fold. First, there is a view, held by some statisticians,³⁴ that there is a wisdom from the averaged conclusions of the many are superior to the wisdom of one person alone. Secondly, there was a reasonable chance that some of the judiciary of tomorrow was present in the audience, and it was interesting to know what their instinct told them. For in the end, the answer which appeals to instinct will be hard to displace. Thirdly, as the general issue is one to which no generally-accepted answer exists, it seemed appropriate to see what people thought, and to try to construct a rule from the answers. Those participating were therefore invited to choose from four possible answers: ($\checkmark\checkmark$) yes, it should be applied; (\checkmark) probably it should be applied; (\times) probably it should not be applied; ($\times\times$) no, it should not be applied; and they were not given a formal option of replying that they did not know. The opinions were as set out in Table 2:

Table 2.
Opinions in respect of examples set out in Table 1

	$\checkmark\checkmark$	\checkmark	\times	$\times\times$	Employer	Employee	Place of work	Proper law	Default law
1	31	1	0	0	Singapore	Singapore	Singapore	Singapore	Singapore
2	25	7	0	0	Singapore	Singapore	Singapore	England	Singapore
3	14	21	13	0	Singapore	Singapore	England	Singapore	
4	4	11	21	12	Singapore	Singapore	England	England	
5	31	16	1	0	Singapore	England	Singapore	Singapore	
6	8	19	4	2	Singapore	England	Singapore	England	Singapore
7	0	18	26	4	Singapore	England	England	Singapore	
8	3	3	13	29	Singapore	England	England	England	
9	33	15	0	0	England	Singapore	Singapore	Singapore	
10	7	32	7	2	England	Singapore	Singapore	England	
11	2	17	28	1	England	Singapore	England	Singapore	
12	13	26	7	2	England	England	Singapore	Singapore	
13	3	17	18	10	England	England	Singapore	England	
14	0	4	17	27	England	England	England	Singapore	
15	1	3	10	34	New York	Singapore	HongKong	England	

Vox populi, vox iuris, as one may say. The most striking feature of these opinions is the correlation between the place of work and the application of the legislation, and the relative lack of coordination between the proper law of the contract and the application of the legislation. The existence of a common personal law was significant but certainly not decisive: if both parties were Singaporean there was a prevalent, although not dominating, view that the legislation would apply; if both parties were English the general, although not overwhelming view that the legislation should not apply. The number of cases in which the proper law of the contract was the law of Singapore and yet the view was that the legislation should not, or probably should not, apply was, to the writer, unexpectedly large; and this therefore does not

³⁴ See especially James Surowiecki, *The Wisdom of Crowds* (Little, Brown, 2004).

provide clear support for the proposition advanced in the paper. But where the proper law was not that of Singapore, the legislation was considered to be applicable where Singapore was the place of work, and (a little less clearly) where both parties were Singaporean. This is more consistent with the views outlined above, though subject to the qualification that a real and substantial connection is more likely to be seen in the place of the activity than in the personal laws of the parties.

No one would claim that the methodology was up to the standard of modern social scientific research; and others will observe that factors such as whether the law of Singapore was more generous³⁵ than the corresponding provision of a competing law. No room was left for such concerns. Even so, the results suggest that the traditional approach of common law scholarship is not in tune with the intuition of a group of intelligent lawyers, and also suggest that the proper role of local statutes in the conflict of laws requires a more nuanced approach than that which has been handed down as the tradition of the common law. One attempt has been made to explain and to justify an alternative to the traditional approach. Others may be advanced by those who prefer them.

³⁵ Or onerous, according to perspective.