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WARNINGS FOR A NEW BEGINNING

Torts (Choice of Law) Bill[1]

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I. INTRODUCTION

In striking contrast with some of the Commonwealth developments in the area of tort choice of law,[2] where notably even the United Kingdom has abandoned the English common law position in relation to tort choice of law for a statutory regime embodied by Part III of the *Private International (Miscellaneous Provisions) Act 1995*,[3] Singapore has largely maintained its adherence to the English common law position with the unequivocal acceptance by the Singapore Court of Appeal that the "applicable choice of law rule in Singapore with respect to torts committed overseas is that laid down in *Phillips v. Eyre*"[4] and that the "exception to the rule as formulated in *Boys v. Chaplin*,[5] *Johnson v. Coventry Churchill*[6] and *Red Sea Insurance*"[7] is part of Singapore law as well.[8]

From the pressure generated by comparative tort choice of law developments particularly in Canada, Australia and even England, it is unsurprising that the Singapore Law Reform Committee[9] has turned its sight upon this aspect of Singapore private international law. In March 2003, an attempt at reform was made by a report presented by the Singapore Committee for the introduction of the Singapore *Torts*

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1 [Singapore Bill]. This draft legislation can presently be viewed at: http://agcvldb4.agc.gov.sg/agc/Tort%20Bill3%20(31-Mar-03).pdf.

2 Australia and Canada have abandoned the *Phillips v Eyre* [1870] L.R. 6 Q.B. 1. rule at their highest courts. For Australia, see *Pfeiffer v Rogerson* (2000) 203 C.L.R. 503 and *Renault v Zhang* (2002) 187 A.L.R. 1. For Canada, see *Tolofson v Jensen*, [1994] 3 S.C.R. 1022.

3 S. 9(2), *Private International (Miscellaneous) Act* (c. 42, U.K.) [*1995 Act*].

4 [1870] L.R. 6 Q.B. 1.

5 [1971] A.C. 356.

6 [1992] 3 All. E.R. 14.

7 [1995] 1 A.C. 190. [*Red Sea*]

8 *Parno v SC Marine Pte. Ltd.* [1999] 4 Sing. L.R. 579 at para. 36.

9 [Singapore Committee].

(Choice of Law) Act.[10] What the proposed Act does is to undertake an overhaul of Singapore tort choice of law by adopting almost entirely Part III of the English *1995 Act*. As will be seen below, there are still differences between the *1995 Act* and the *Singapore Bill* particularly with the Singapore emphasis on the "application of the general rules of applicable law to acts of infringement of intellectual property rights,"[11] a focus not shared by the *1995 Act.*

On careful scrutiny of the *Singapore Committee's Report* on tort choice of law, one can observe that no mention whatsoever was made of the numerous criticisms levied on the English *1995 Act* by various members of the academic community in the United Kingdom. As such, the purpose of this piece is to highlight the key academic disagreements with the *1995 Act* and to critically examine the strengths of these arguments particularly in relation to the Singapore context. More importantly, it is essential that we realise that we have a rare opportunity here to improve on a heavily criticised piece of legislation and that we should learn from the United Kingdom experiences to do so. Accordingly, amendments to the *Singapore Bill* will be proposed where necessary. It must be noted that at the time of this note, the *Bill* has not been enacted as law.

II. Differences Between Part III of the *1995 Act* and the Singapore Tort Choice of Law Bill

As was mentioned above, differences do exist between the English *1995 Act* and the *Singapore Bill*.

1. Firstly, in relation to the initial characterisation exercise, the *Singapore Bill* makes clear that "the infringements of or any other tort affecting intellectual property rights occurring in Singapore or in any other country"[12] is an issue relating to tort. In comparison, there is no express mention of the infringement of intellectual property rights as a tort in the *1995 Act* itself and thus it is up to the English courts to decide whether it is so. Unfortunately, no case involving the *1995 Act* has necessitated the judicial characterisation of this issue. As *Cheshire and North* have pointed out, there is "still uncertainty or a lack of agreement on its characterisation"[13] although it is clear that the English common law has classified such issues as tortious in nature.[14] As such, the Singapore Committee is to be commended for their attempt to clarify the state of the law in this area.
2. Secondly, to work out the applicable law for a "cause of action in respect of infringement of intellectual property right" in a case of "multi-country

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[10] Singapore, Singapore Academy of Law, "A Report of the Law Reform Committee of the Singapore Academy of Law on the Reform of the Choice of Law rule relating to Torts," 31 March 2003. The text of this report can be presently viewed at: http://agcvldb4.agc.gov.sg/agc/report%20(31-Mar-03).pdf, [*Singapore Committee's Report*].

[11] *Ibid.* at para. 1.

[12] S. 3(3), *Singapore Bill, supra* note 1.

[13] P.M. North & J.J. Fawcett, *Cheshire & North's Private International Law*, 13th ed. (London: Butterworths, 1999) at 618 [*Cheshire and North*].

[14] See e.g., J.J. Fawcett and P. Torremans, *Intellectual Property in Private International Law* (Oxford: Clarendon Press, 1998) at 608-611.

infringement," section 5(2)(c) of the *Singapore Bill* requires the Singapore courts to apply "the law of the country where the infringement occurred."[15] As there is no similar emphasis on the infringement of intellectual property rights in the *1995 Act*, this tort (if it is a tort under the *1995 Act*) will have to be tackled under section 11(2)(c) of the *Act*. Again, there are no English authorities on this matter.

3. Thirdly, in defining a "defamation claim", the *Singapore Bill* has predictably provided that it extends to libel and slander under the law of Singapore as well as corresponding causes of action under a foreign law.[16] However, unlike the *1995 Act*, it "does not include a claim under the law of Singapore for slander of title, slander of goods or other malicious falsehood or under the law of any other country corresponding to or otherwise in the nature of such a claim"[17] According to the *Singapore Committee's Report*, these actions were omitted to counter the criticism that the *1995 Act* does not "distinguish between personal defamation and defamation of a business competitor on the ground that the latter does not raise issues of free speech and freedom of the press."[18] Although, in principle, this amendment is fundamentally sound, it does raise the problem of having to distinguish between the defamation of persons on one hand and the defamation of title, goods and businesses on the other, when at times, the two may be inextricably linked.

As such, it can be observed that the changes made to the *1995 Act* by the Singapore Committee are more to establish specific rules for the resolution of choice of law issues with respect to the infringement of intellectual property rights rather than to improve the structure and drafting of the *1995 Act* for the Singapore context. It will be seen below that it is these particular aspects of the *Act* that require amendments.

III. Academic Criticisms Made in Relation to the *1995* Act

In this section, key academic criticisms made in relation to the *1995 Act* will be scrutinised to examine their significance in the Singapore context if the *Singapore Bill* is to become law. Specifically, there has been a great deal of academic comment on the drafting of the *Act* as well as on the policy to "de-parochialise"[19] tort choice of law.

A. *Drafting Difficulties*

To entrench the *1995 Act* as the new English tort choice of law regime, a section to abolish the old English common law rules is necessary. However, this task is complicated by the fact that for certain torts, rules other than the double actionability rule may be applicable[20] and since there is no intention on the part of the Law

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15 S. 5(2)(c), *Singapore Bill*, *supra* note 1.

16 S. 7(2)(a), *Singapore Bill, Ibid.*

17 S. 7(2)(b), *Singapore Bill, Ibid.*

18 Para. 37, *Singapore Committee's Report*, *supra* note 10.

19 B. J. Rodger, "Ascertaining the Statutory *Lex Loci Delicti:* Certain Difficulties under the *Private International Law (Miscellaneous Provisions) Act 1995* [1998] 47 I.C.L.Q. 205 at 10.

20 There are special tort choice of law rules applicable to maritime and aerial torts.

Commissions for Scotland and England[21] to interfere with the law for such torts, they cannot simply provide for a section that abolishes all the English common law rules for tort choice of law. Careful drafting is thus essential to achieve the precision they require. Unfortunately, difficulties do arise from the manner in which the relevant sections are drafted and oddly enough, despite numerous academic criticisms of these provisions in the United Kingdom, the Singapore Committee has endorsed them without any amendments.

1. *Torts Committed within the Forum: The Clash between Section 9(6) and Section 10 and 14(2) of the 1995 Act*

Section 9(6) of the *1995 Act* is clear in providing that the rules in Part III of the *Act* applies equally to torts committed within England itself as well as torts committed abroad. However, this picture is muddled when section 9(6) is viewed in conjunction with section 10 and 14(2) for the combined effect of the latter two sections is to say that only questions which formerly fell within the scope of the *Phillips v. Eyre* rule are to be dealt with under Part III of the *1995 Act.*[22] The problem stems from the English common law position pertaining to torts committed within England for it is unclear as to whether the rule in *Szalatnay- Stacho v. Fink*[23] is the result of applying the *Phillips v. Eyre* rule where both the *lex loci delicti* and the *lex fori* are one and the same or whether the rule is an application of the *lex fori* alone as a single choice of law rule?[24] The former situation would pose no difficulties to the interpretation of section 10, 14(2) and 9(6). The latter, however would create a situation where the rule in *Fink* is not abolished; the corollary of which is, the section 12 exception is not available to torts which are committed within the forum. This would of course be in direct conflict with section 9(6).

In defence of this drafting peculiarity, the draftsman of the *1995 Act* has argued in favour of the former situation as he considered that doubts have been cast on the position provided by *Fink* in the case of *Red Sea* with the application of the flexible exception to apply the *lex loci delicti.*[25] It is questionable whether *Red Sea* did have such an effect on torts committed within the forum[26] but the intention of the British Parliament to abolish *Fink's* rule is clear as the language of section 9(6) could not be more explicit. Likewise, if the *Singapore Bill* does become law, it is unlikely that the Singapore courts would read the statute as excluding from its scope torts committed within Singapore.

However, aside from all that, would it not be better for the Singapore Committee to make use of this opportunity to draft the language and structure of the relevant provisions of the *Singapore Bill* with a greater degree of elegance to make clear that torts committed within the forum fall within the scope of Part III of the 1995 *Act* rather than to force judges to resort to techniques of statutory interpretation to

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21 [Law Commissions].

22 See A. Briggs,"Choice of Law in Tort and Delict" [1995] L.M.C.L.Q. 519 at 520, n. 18 [Briggs].

23 [1947] K.B. 1. [*Fink*]

24 *Law Commission Working Paper* No. 87 (London: Her Majesty's Stationary Office, 1984) at paras. 2.47-2.48.

25 A.J. Hogarth in *Written Evidence, HL Paper* No. 36 (London: Her Majesty's Stationary Office, 1995) at 61.

26 See North & Fawcett, *supra* note 13 at 625, n. 16.

achieve the same effect? Section 4 of the *Singapore Bill* can easily be amended by inserting a subsection (c):

> 4. The rules of the common law, in so far so they—
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> (c) apply to events occurring in Singapore[27]
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> are hereby abolished so far as they apply to any claim in tort which is not excluded from the operation of this Act by section 7 (exclusion of defamation claims).

2. *Severance from the old law: Difficulties with section 10 of the 1995 act*

To reiterate, under section 10 of the *1995 Act*, the statutory tort choice of law rules provided for by section 11 and 12 of the *Act* are only applicable in relation to "matters, which were previously governed by the rule in *Boys v. Chaplin*."[28] Unfortunately, the range of torts the double actionability rule was applicable to was never satisfactorily resolved by the English courts. With the example of breach of confidence, *Briggs* highlighted the limitations of section 10 and 14(2) in abolishing the common law rules, by pointing out that on one hand, for the purposes of private international law, it is conceivable that breach of confidence would be regarded as a tort.[29] On the other hand, as there was no authority under the English common law rules to establish that *Boys v. Chaplin* would apply to it, there is a possibility that it may fall out of the scope of the *1995 Act*.[30] As expounded by Briggs:

> In effect the Act asks the court (i) to determine how the law would have developed over the previous 130 years if *The Halley* had not been decided and (ii) to decide which claims were decided under the rule in *Boys v. Chaplin*, as opposed to separate choice of law rules as a matter of common law.[31]

The above comments apply equally to foreign torts unknown to English substantive tort law as there is no authority to state that they fall within the scope of the *Phillips v. Eyre* rule; no one would bring an action based on such claims as they would automatically fail under the first limb of the double actionability rule.

Again, it seems very unlikely that the Singapore or even the English courts would adopt such a laborious line of reasoning in interpreting section 10 of the *1995 Act.* In the English context, it is clear that the Law Commissions, in drafting the *1995 Act* intended that the above torts would be caught by the statutory regime[32] and that it is only when "at common law, a special tort choice of law rule was applied"[33] to particular torts that such torts would fall out of the Act. For Singapore, however, no discussion was made by the Singapore Committee on this matter and as such, we do not know what their expectations are with regards to the torts to which the *Singapore Bill* would be applicable. This is a most unfortunate omission. Arguably, it

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27 See Fawcett and Torremans, *supra* note 14 at 618.

28 Briggs, *supra* note 22 at 519.

29 *Ibid.* at 522. Even though, it is "not a tort according to English domestic law"

30 *Ibid.*

31 *Ibid.*

32 See, in general, *Law Commission Working Paper* No 87 (1984), *supra* note 24 and *HL Paper* No. 36 (1995), *supra* note 25.

33 North and Fawcett, *supra* note 13 at 623.

is quite improbable that the Singapore Committee would want to depart from the Law Commissions' views by excluding "torts" such as breach of confidence in Briggs' example from the scope of the *Singapore Bill*. As such, if it is just the special common law tort choice of law rules which the Singapore Committee wishes to omit from the scope of the Singapore Bill, would it not be better for them to redraft section 4 of the *Bill* to make clear their intentions? One possible insertion is as follows: "It will be presumed that all torts are caught by the above rules of the common law unless it can be established that a rule of law other than the above rules of the common law was applied before the commencement of this Part."[34]

B. *Drafting Uncertainties*

Another major criticism of the *1995 Act* is that it is "characterised by the complex use of a multiplicity of words and phrases of flexible meaning" and that its enactment would only lead to "very considerable confusion and uncertainty."[35] In particular, there are three main provisions where this critique is directed at.

1. *Characterisation: Section 9(2)*

How do we characterise claims as tortious under section 9(2)? The section does not provide us with much information as to the criterion that is to be applied during the characterisation exercise except that it is "a matter for the courts of the forum" and that the characterisation is to be made "for the purposes of private international law."[36]

Foreign torts unknown to the domestic law of a forum in question are often used in academic literature to illustrate the uncertainty of this section. In particular, are claims characterised according to English substantive tort law or with a broad internationalist view of torts? In other words, can the English courts adjudicate upon unknown foreign torts? It is likely that they can do so as section 9(2) provides that characterisation is "for the purposes of private international law" thus indicating that the classification criteria is not to be limited to English domestic law. Furthermore, the Law Commissions were clearly of the view that such torts would be caught by the 1995 *Act*.[37] That said, one question remains unanswered; which unknown foreign tort would be caught by the *1995 Act*? No statutory criterion is provided by the *1995 Act* and effectively, the drafters of the *Act* are leaving it up to the judiciary to formulate their own criterion. At the time of this piece, no English case involving unknown torts has arisen under the *1995 Act* which would have necessitated a judicial examination of the criteria. This gap in the law would of course be a source of uncertainty and unpredictability.

As for the *Singapore Bill* on the subject of unknown foreign torts, the Singapore Committee made no clear indication whatsoever as to whether such torts can be

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[34] *Ibid.* at 624-625.

[35] P. B. Carter, "Choice of Law in Tort and Delict" 107 Law Q. Rev. 405, at 414–415.

[36] S. 9(2), *1995 Act*, *supra* note 3.

[37] See Cl. 1(4) of the *Draft Bill, Law Com.* No. 193 (1990), Appendix A, *Law Commissions' Report*, and in general, *HL Paper* No. 36 (1995), *supra* note 25.

heard in the Singapore courts thus exacerbating the uncertainty of the classification exercise in the Singapore context. All that was said was that "unknown causes" was better dealt with as a factor "in considering the issue of *forum non conveniens* or whether entertaining the action would violate the public policy of the forum jurisdiction"[38] and thus the implication here is that they should fall within the scope of the *Singapore Bill*. On the issue of which unknown foreign tort would be caught by the Bill, the *Singapore Committee's Report* is silent. More importantly, there are policy considerations inherent in unknown foreign torts which were not dealt with in any detail in the *Report* and it is the view of this author that they must be addressed. This will be examined in a later section.

2. *Determining the lex loci delicti in relation to torts which do not involve personal injury or property damage: section 11(2)(c)*

How do we determine the most significant element or elements of a tort under section 11(2)(c)? As no definition of "significant" is provided by the *1995 Act* itself, it is clear that the section provides for a flexible sub-rule that "leaves it to the courts to work out a solution"[39] to the problem of locating the *locus delicti* for torts aside from those that involve personal injury or property damage. English cases have shed more light on this matter. In the case of *Morin v. Bonhams & Brooks Limited*,[40] the English Court of Appeal endorsed the approach of *Moore Bick J* in *Protea Leasing v. Air Cambodge Co Ltd*[41] which rejected any reliance on the English common law position in applying section 11(2)(c). In particular, they held that the section requires "an analysis of all the elements constituting the tort as a matter of law and a value judgement regarding their significance"[42] More importantly, section 11(2)(c) provides for a "much more flexible principle and one which might yield different answers in difference cases in relation to the same kind of tort."[43]

Unsurprisingly, it has been criticised by some that section 11(2)(c) is vague and uncertain. As such, should the equivalent of section 11(2)(c) in the *Singapore Bill*[44] be redrafted to inject more certainty into the location of the *locus delicti* of a tort? It is submitted that it is difficult to see what more they can do with the section. Certainty has been provided to some extent with section 5(2)(a) and (b) of the *Bill* providing for a place of harm rule for personal injury and property damage torts and section 5(2)(c) which provides for the place of infringement rule for the infringement of intellectual property rights. Conceivably, the *Singapore Bill* can provide an even longer list of torts aside from the infringement of intellectual property rights and specify a *locus delicti* and thus the *lex loci delicti* for each of them. The problem with this approach aside from being impracticable and time-consuming is that torts not involving personal injury or property damage are often made up of "complex facts" in that there "may be no single place of conduct and no single place of result."[45] Any

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38 *Singapore Committee's Report*, *supra* note 10 at paragraph 22.
39 North & Fawcett, *supra* note 13 at 634.
40 [2003] E.W.C.A. [Court of Appeal, Civil Division] 1802 at paras. 17–18. [*Morin*]
41 [2002] All. E.R. 224. [*Protea*]
42 *Morin, supra* note 40 at para. 16.
43 *Protea, supra* note 41 at para. 78.
44 S. 5(2)(d), *Singapore Bill*, *supra* note 1.
45 Law Commission Working Paper, *supra* note 24 at para. 4.84.

reliance on specific rules for such torts will be difficult to apply in practice and more importantly, it may "produce results which begin to offend our common sense".[46] Ultimately, what the Law Commissions hoped to achieve with section 11(2)(c) of the *1995 Act* was to merge the certainty of statutory provisions with the flexibility of common law reasoning to address the problem of complex torts. Where statute is unlikely to provide an appropriate result with the use of rigid rules, discretion is provided to the judges to "select the law which in all the circumstances it would be most appropriate to apply".[47] In short, it is the view of this author that no amendment is necessary for this section in the *Singapore Bill***.**

3. *The exception to the lex loci delicti: Section 12*

Section 12 which provides for an exception to the *lex loci delicti* has often been criticised as "complex"[48] for the process that has to be undergone. Firstly, we have to identify the issues arising for dispute. Secondly, we have to identify the factors which connect the tort with the country which provides the applicable law as well as the factors connecting the tort to any other possible country. Thirdly, we have to determine the significance of the above factors and compare them, and finally we ask whether another law aside from the law located under section 11 of the *1995 Act* is substantially more appropriate for resolving the issues that arise from the dispute in question. Furthermore, in relation to certain key terms in the section itself, it has been argued that the *1995 Act* lacks precision of drafting and definition on a number of concepts.

1. Firstly, the *1995 Act* fails to provide much guidance on the definition of "significance" as well as how it is to be gauged. The English judiciary, too, has provided little insight into this matter except to say that a connecting factor may be more significant depending on the "particular issue which arose."[49]
2. Secondly, with regards to the threshold requirement of the section; that the law of another country has to be "substantially more appropriate"[50] than the law identified under section 11 in order to displace it, when exactly is it satisfied? Walker LJ, in *Roerig v. Valiant Trawlers Ltd*[51] has held that the key word here is "substantially" and that "the general rule is not to be dislodged easily."[52] Beyond that, the *1995 Act* itself does not provide the English judges with any guidance as to when exactly that threshold is reached.

Again, the question we have to ask in light of these criticisms is: what can the Singapore Committee do to redraft the section? It is submitted that the section is unduly complicated and that in essence, there are little or no differences between the section 12 exception and the common law flexible exception as provided for in

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46 *Ibid.* at para. 4.17.
47 *Ibid.* at para. 4.16.
48 North & Fawcett, *supra* note 13 at 637.
49 Per Garland J., *Edmunds v Simmonds* [2001] 1 W.L.R. 1003 at para. 30: "heads of damage is an issue strongly linked to the country where the claimant normally resides, a link which is rendered even stronger when the defendant resides in the same country."
50 S. 12, *1995 Act*, *supra* note 3.
51 [2002] 1 All. E.R. 961.
52 *Ibid.* at para. 12.

Boys v Chaplin. In particular, the only apparent differences are: firstly, the factors relevant to the application of the flexible exception is limited to the occurrence and the parties involved whereas section 12, on the other hand, would include all factors which connect the tort to a country; secondly, the section 12 exception allows for the application of a third country's law aside from the *lex loci delicti* and the *lex fori* but it is not clear as to whether this is so under the flexible exception. There were more significant differences between the approaches in earlier drafts of the *1995 Act*, most notably, in relation to the threshold of the test as well as the use of *depecage* in the exception but these differences were eventually removed when the *1995 Act* was passed.[53] Looking beyond the above differences, it is important to note that at the core of these approaches, both are effectively inquiring as to whether there is a more appropriate law aside from the applicable law located under their respective tort choice of law rules for the resolution of the tort choice of law dispute in question. As such, since both exceptions are basically the same, the complexity of the section 12 exception must make it a less worthy candidate for the exception in the *Singapore Bill*. Accordingly, one would replace section 6(1) of the *Singapore Bill* with the following: "6. – (1) A particular issue between the parties to litigation may be governed by the law of any country which with respect to that issue has the most significant relationship with all the circumstances of the case".[54]

Granted that the application of this exception would still be characterised by general uncertainty and unpredictability, we have to recall that the discretionary exception envisaged by the Law Commissions was to make use of common law discretion to mitigate the possible harshness and arbitrariness of results flowing from a rigid tort choice of law rule and as such, this uncertainty can be justified by the resulting flexibility which would ensure that the most appropriate law be identified for the tort choice of law dispute in question.

C. *Abolition of the lex Fori*

One of the most vehement criticism of the *1995 Act* is that the decision to abolish the *lex fori* should never have been made. A number of academics have written on this matter at great lengths[55] and it is possible to break down their arguments into two levels: firstly, as a matter of principle, the abolition of the *lex fori* in tort choice of law would allow defendants to be found liable in the English courts under a foreign law even though English domestic law imposes no such liability and secondly, practical difficulties caused by the inherent bias for the *lex fori* by the English judiciary.

1. *Abolition of the lex fori is wrong as a matter of principle*

The *lex fori* limb of the rule in *Phillips v Eyre* has been savagely attacked for a large part of its legal history[56] and these criticisms have been reflected in the *Law*

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[53] See, in general, *Law Commission Working Paper* No 87 (1984), *supra note 24, Law Com*. No. 193 (1990), *supra* note 37, and *HL Paper* No. 36 (1995), *supra* note 25.

[54] As modified from the common law flexible exception provided for in *Red Sea, supra* note 7 at 206.

[55] See eg., Briggs, *supra* note 22, Carter, *supra* note 35 and A. Reed, "The *Private International Law (Miscellaneous Provisions) Act 1995* and the Need for Escape Devices" (1996) 15 C.J.Q. 305.

[56] See eg., P. North, *Private International Law Problems in Common Law Jurisdictions* (London: Martinus Nijhoff Publishers, 1993) at 147-148.

Commissions' Report with their comments that the retention of the *lex fori* is "anomalous," "parochial" and "unjust."[57] Accordingly, the abolition of the *lex fori* was not perceived as a controversial move. Yet to some academics, the *lex fori* was seen as performing an important function; it allows the English courts to avoid the application of foreign laws which are unfamiliar or unacceptable to their ideas of justice. Numerous examples of such instances were provided[58] in these discussions and one common vein running through these examples is that unfortunate consequences may be imposed on the unwary English defendant with the abolition of the *lex fori* rule. In particular, the defendant may conduct his activities in accordance with English law but as his actions have caused harm in another jurisdiction, the tort would be deemed to have been committed there thus necessitating the application of a foreign law. If the foreign law has a different view of liability as compared to English law, the defendant may be held liable even though under English law, he would not be so. Another group of cases is in relation to foreign torts which are unknown to English substantive law; if English law admits no liability for the insults one party throws at another, why should a foreign law be allowed to do so simply because a foreign claimant brings such a claim in the English courts?

It is submitted that these disagreements in principle stem largely from a variance of views in relation to the nature of tortious obligations. Specifically, should English substantive law be accorded a direct role in the choice of law process on the ground that "torts stand halfway" between criminal and contract law such that its very nature generates a "clear element of public interest, public policy or civil liberty[59]? Or should we regard tort choice of law as a structural matter in that its objective is to locate the jurisdiction whose notions of liability should apply and that there is nothing to distinguish tortious obligations from other civil obligations, primarily contractual ones, where the *lex fori* plays little or no part whatsoever? It is the view of this author that the latter view is to be preferred. It is also a view that is shared by the Law Commissions and the British Government who conducted a comprehensive analysis of this issue before deciding that such torts should be adjudicated upon in the English courts.[60]

Accordingly, this is a policy choice for the Singapore Parliament and as such, one lamentable omission from the *Singapore Committee's Report* on the *1995 Act* is that it makes no mention of this fundamental change to Singapore tort choice of law. This issue must be examined and debated thoroughly in the Singapore Parliament before the *Singapore Bill* is enacted as law. Until this issue is resolved by the Singapore Government, it would not be possible to propose any amendments to the *Bill* on this point as well as in relation to characterisation under section 3(2) of the *Bill*.

2. *Homing instinct and the distortion of the 1995 act*

It has been commented that "tort is an area of conflict of laws in which courts have displayed a uniquely marked homing instinct"[61] in applying the forum's law

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57 *Law Commissions' Report*, *supra* note 37 at paras. 2.7-2.9.

58 See e.g., A. Briggs in *Written Evidence, HL Paper* No. 36 (1995), *supra* note 25 at 10-11 and Reed, *supra* note 55 at 315-320.

59 Briggs, *Ibid.* at 6.

60 See, in general, *Law Commission Working Paper* No. 87 (1984), *supra* note 24, *Law Com.* No. 193. (1990), *supra* note 37, and *HL Paper* No. 36 (1995), supra note 25.

61 Carter, *supra* note 35 at 409.

to the dispute either with the construction of rules that automatically includes the *lex fori* or by the use of escape devices such as characterisation, public policy or the procedure/substance distinction to reach the same result. And so the argument goes, the *1995 Act's* abolition of the *lex fori* would be incapable of removing this phenomenon, thus increasing the risk of judicial misuse of particular provisions in the *1995 Act*. This would of course, lead to the distortion of the purposes behind these provisions, thwart the aims of the *Act*'s drafters in providing for the abolition of the *lex fori* and in so doing increase uncertainty and unpredictability in the process.

It is interesting to note that in the recent English Court of Appeal case of *Harding v. Wealands*,[62] even though English law would provide for higher damages to a claimant who was "rendered a tetraphegic"[63] as a result of the defendant's negligence as compared to the law of New South Wales which imposes a statutory limit on damages payable, Lady Justice Arden and Sir Aldous were careful not to expand the definition of procedural matters which would indicate a wider scope for the *lex fori.* In particular, Sir Aldous stated that:

> Any judge would wish to award full compensation, but the issues before us are issues of law and any decision could have lasting consequences in a society where the compensation culture has become or is becoming endemic and there is a tendency for forum shopping.[64]

One can thus observe that at least certain members of the English judiciaries are actively resisting the call of the homing instinct preferring an application of the *1995 Act* based on the objectives provided for by the Law Commissions. That said, one must note that the homing instinct is not dead as yet under English tort choice of law for Wall L.J. who gave a dissenting judgment in *Harding v. Wealands* employed the procedure/substance distinction as an escape device to apply the *lex fori.*[65]

As there is a dearth of Singapore tort choice of law cases, we simply do not know whether the Singapore courts share a similar preference for the *lex fori* in the litigation of such disputes. Judicial activism does not appear to be prevalent in the Singapore courts and as such, it is arguable that this matter will not pose a serious problem to the application of the *Singapore Bill* if it is to become law.

IV. Conclusion

In advocating the adoption of the *1995 Act* as the tort choice of law regime for Singapore, it appears that the Singapore Committee has failed to take note of academic criticisms relating to the drafting peculiarities of the *1995 Act* and to address these concerns, amendments have been proposed which would arguably remove these difficulties. In relation to the drafting uncertainties inherent in the *Act* itself, it is submitted that this flows from the sound principle that statutes cannot provide certainty in all cases and that discretion has to be provided to the judiciary to locate the most appropriate law for the dispute in question. As such, it is the author's view that no changes need to be made to section 5(2)(d) of the *Singapore Bill*, the general

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62 [2004] E.W.C.A. [Court of Appeal, Civil Division] 1735.

63 *Ibid.* at para. 1.

64 *Ibid.* at para. 74.

65 *Ibid.* at paras. 39–40.

section on locating the *locus delicti* of the tort. However, in relation to section 6 of the *Singapore Bill*, the exception to the statutory tort choice of law rule, its replacement by the common law flexible exception is proposed as the latter is less complex in comparison. As for the abolition of the *lex fori*, it is hoped that this article highlights the policy decision that has to be made in relation to this issue and more specifically unknown foreign torts. A move away from the double actionability rule without a thorough debate of this matter will not be beneficial to the future interpretation and application of the *Singapore Bill.*