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THE NEW RULES OF COURT AND THE SERVICE-OUT JURISDICTION IN SINGAPORE

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The new civil procedure rules for the General Division of the High Court in Singapore, excluding the Singapore International Commercial Court—the *Rules of Court 2021*—were gazetted on 1 December 2021, and will come into operation on 1 April 2022. This article examines the impact of the new civil justice regime on the Singapore courts' approach to assuming jurisdiction over foreign-based defendants (the "service-out jurisdiction"). Prior to its publication, it had been anticipated that *ROC 2021* would significantly alter the manner in which the service-out jurisdiction would be asserted. However, as this article highlights, under *ROC 2021*, and the accompanying Supreme Court Practice Directions 2021, the courts' overall approach to exercising jurisdiction over defendants outside Singapore is destined to remain largely unaltered. In general terms, this outcome is to be welcomed, as it avoids the conceptual and practical problems that would have arisen had some of the more far-reaching reforms proposed when drafting *ROC 2021* been, in fact, implemented.

I. Introduction

The new civil procedure rules for the General Division of the High Court in Singapore, excluding the Singapore International Commercial Court—the *Rules of Court 2021*[1]—were gazetted on 1 December 2021, and will come into operation on 1 April 2022. The new regime represents the first significant overhaul of the civil justice system in Singapore in the past three decades. *ROC 2021* sets out to enhance various aspects of civil procedure by, among other things, streamlining the process of litigation, and making court hearings more expeditious and cost-effective. The first steps towards drafting *ROC 2021* were taken with the establishment of the Civil Justice Commission ("CJC") in January 2015, and the Civil Justice Review Committee ("CJRC") in May 2016. Each of these bodies then outlined its recommendations as to how to improve and modernise Singapore's civil litigation practices.[2] Subsequently, in late October 2018, these proposals were put

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1 (Cap 322, No S 914, 2020 Rev Ed Sing) [*ROC 2021*].

2 Ministry of Law, "Report of the Civil Justice Review Committee" (October 2018), online: <https://www.mlaw.gov.sg/files/Annex_B_CJRC_Report.pdf/>; Ministry of Law (October 2018), "Civil Justice

before the public for consultation.[3] The penultimate step in the process of reform was taken in June 2021 with the release of a response to public feedback on the recommendations of the CJC and the CJRC.[4] *ROC 2021* is, therefore, the result of this collective effort.

One of the proposals in the CJC's report concerned the approach in Singapore to assuming jurisdiction over defendants outside the forum (the "service-out jurisdiction"). The CJC indicated that this area of law should remain mostly unchanged under the new rules.[5] Nevertheless, it proceeded to state that, a party seeking to obtain permission to initiate proceedings against a defendant outside Singapore should no longer be required to show that the claim fits at least one of the jurisdictional grounds (or "gateways"), which were listed under Rule 1 of Order 11 of the *Rules of Court 2014* ("*ROC 2014*, O 11 r 1(a)–(t)").[6] Instead, the CJC proposed that all that the plaintiff effectively had to show was that "the court [in Singapore] has jurisdiction or is the appropriate court to hear the case."[7] Given that these recommendations remained unchallenged during public consultation,[8] it was widely anticipated that they would be implemented as the new basis for applying the service-out jurisdiction in Singapore. Therefore, in the immediate run-up to the publication of the new civil justice regime, and notwithstanding the CJC's remarks to the contrary, it seemed as though the approach to the service-out jurisdiction in Singapore was about to undergo major alteration: the gateway precondition for obtaining service-out orders looked destined to be eliminated, and whether Singapore is *forum conveniens* appeared set to become the sole basis for serving proceedings outside the forum on the grounds that Singapore court is appropriate for hearing the case.[9]

However, as this article proceeds to highlight, rather surprisingly, this is not how things evolved. An assessment of the impact of *ROC 2021*, and the accompanying Supreme Court Practice Directions 2021, on the service-out jurisdiction in Singapore illustrates that the gateways remain broadly as significant in the courts' exercise of the service-out jurisdiction under the new regime as they were under the previous one. It is argued that this state of affairs is to be welcomed, as it avoids some of the conceptual and practical problems that would have arisen had the

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Commission Report", online: <https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf/> [Ministry of Law, "CJC Report"].

3 Ministry of Law, "Public Consultation on Civil Justice Reforms, Recommendations of the Civil Justice Review Committee and Civil Justice Commission" (October 2018), online: <https://www.mlaw.gov.sg/files/Annex_A_Public_consultation_paper_on_civil_justice_reforms.pdf/>.

4 Ministry of Law, "Response to Feedback From Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee" (June 2021), online: <https://www.mlaw.gov.sg/files/news/public-consultations/2021/Consolidated_Response_to_Civil_Justice_Public_Consultation_Feedback.pdf> [Ministry of Law, "Response to Feedback From Public Consultation"].

5 Ministry of Law, "CJC Report", *supra* note 2, ch 6(1) at 16.

6 *Ibid*, ch 6(2) at 16.

7 *Ibid*.

8 Ministry of Law, "Response to Feedback From Public Consultation", *supra* note 4 at 18.

9 See *eg*, Yeo Tiong Min, "Exit, Stage 2, for the Plaintiff in Service Out of Jurisdiction?" (2021) 33 Sing Acad LJ 1237 at 1249–1250 [Yeo, "Exit, Stage 2"]; Adrian Briggs, *Civil Jurisdiction and Judgments*, 7th ed (Abingdon: Informa Law from Routledge, 2021) at para 24.06, n 46 [Briggs, *Civil Jurisdiction and Judgments*].

gateway precondition been jettisoned altogether, and the court's decision to serve proceedings outside the forum on the basis that it was the appropriate court for hearing the claim exclusively turned on whether Singapore is *forum conveniens*.

The discussion that follows is presented in three parts. The article begins by briefly outlining the courts' approach to service-out jurisdiction in Singapore before *ROC 2021*. Subsequently, the article proceeds to examine the impact of *ROC 2021* on the Singapore courts' power to summon foreign-based defendants. Finally, reasons are given as to why the retention of the gateways under the new regime is preferable to an approach to the service-out jurisdiction which does not envisage a role for them, and instead bases the issuing of service-out orders solely on whether Singapore is *forum conveniens*.

II. The Approach to Service Out of Jurisdiction in Singapore Before *ROC 2021*

Along with presence and submission, the service-out jurisdiction constitutes a basis for asserting *in personam* jurisdiction in international private disputes in Singapore. The defendant's submission to the proceedings in Singapore,[10] or presence within the forum, at the time of service,[11] is usually sufficient to afford jurisdiction to the court. However, the court has a discretion whether to assume jurisdiction over a defendant who is outside Singapore.[12] As outlined in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd*,[13] the plaintiff must overcome three hurdles to persuade the court to exercise its discretion in favour of the service of proceedings on the foreign-based defendant.

First, the plaintiff must show that the claim fits at least one of the jurisdictional gateways under *ROC 2014*, O 11 r 1(a)–(t). Broadly speaking, these provisions signify points of connection between the foreign-based defendant, or his or her conduct, and Singapore which are sufficiently strong to warrant the summoning of the defendant to appear in proceedings in Singapore. As Lord Leggatt observed in his dissenting judgment in *FS Cairo (Nile Plaza) LLC v Brownlie*,[14] with regard to the equivalent provisions under English law:[15]

> The territorial nature of jurisdiction demands that there should be a substantial connection between the territory of the state from which the court's authority derives and either the proposed defendant or something which that person has

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10 *Supreme Court of Judicature Act* (2020 Rev Ed), s 16(1)(b) [*SCJA*]. See Yeo Tiong Min, *Halsbury's Laws of Singapore—Conflict of Laws, vol 6(2)* (LexisNexis, 2019) at paras 75.008–75.015 [Yeo, *Halsbury's*].

11 *SCJA*, *ibid*, s 16(1)(a)(i). See Yeo, *Halsbury's*, *ibid* at paras 75.005–75.007 (for individuals) and paras 75.016–75.022 (for corporations).

12 *SCJA*, *ibid*, s 16(1)(a)(ii). See Yeo, *Halsbury's*, *ibid* at para 75.029.

13 [2014] 4 SLR 500 (CA) at para 26 (*per* Sundaresh Menon CJ) [*Zoom Communications*].

14 [2021] UKSC 45 [*Brownlie II*].

15 The heads of jurisdiction under English law are currently outlined within paragraph 3.1 of Practice Direction B, accompanying Part 6 of the Civil Procedure Rules.

done before the assertion of personal jurisdiction over the proposed defendant is justified.[16]

The same observation could be made vis-à-vis the role of gateways within *ROC 2014*, O 11 r 1(a)–(t) in the exercise of the service-out jurisdiction in Singapore. It would be helpful at this juncture to highlight some of the more prominent gateways which were in operation when the possible reforms to the civil justice system in Singapore were being examined. In the context of cross-border litigation arising from breach of contract, courts in Singapore may exercise service-out jurisdiction if the breach had occurred in Singapore.[17] In other international contractual claims, where the proceedings are brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, courts in Singapore may issue service-out orders where the contract: (i) was made in Singapore, or was made as a result of an essential step being taken in Singapore;[18] (ii) was made by or through an agent trading or residing in Singapore on behalf of a principal trading or residing out of Singapore;[19] (iii) is by its terms, or by implication, governed by the law of Singapore;[20] or, (iv) contains clause conferring jurisdiction on the courts in Singapore.[21] Where the claim is brought in tort, leave could be obtained to serve proceedings outside Singapore where the tort is constituted, at least in part, by an act or omission occurring in Singapore,[22] or where the claim concerns recovery of damage suffered in Singapore, regardless of where the tort causing that harm had been committed.[23]

Second, the plaintiff must show that the claim in relation to which the foreign-based defendant is being summoned has a "sufficient degree of merit". This requirement is in place to ensure that the defendant is only brought before the courts in Singapore where "there is a serious question to be tried on the merits".[24] As noted by Chao Hick Tin JA in *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd*, "a mere statement by a deponent that he believes there is a good cause of action is insufficient" for establishing that the claim has a sufficient degree of merit.[25] Rather, the plaintiff is likely to be deemed to have surmounted this hurdle "where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff *bona fide* desires to try".[26]

Finally, the plaintiff must satisfy the court that Singapore is the proper forum for entertaining the action—that is to say, Singapore is *forum conveniens*.[27]

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16 *Brownlie II*, *supra* note 14 at para 193.
17 *ROC 2014*, O 11 r 1(e).
18 *Ibid*, O 11 r 1(d)(i).
19 *Ibid*, O 11 r 1(d)(ii).
20 *Ibid*, O 11 r 1(d)(iii).
21 *Ibid*, O 11 r 1(d)(iv).
22 *Ibid*, O 11 r 1(f)(i).
23 *Ibid*, O 11 r 1(f)(ii).
24 Yeo, *Halsbury's*, *supra* note 10 at para 75.071.
25 [1999] 3 SLR (R) 1156 (CA) at para 16 [*Bradley Lomas*].
26 *Per* Lord Davey in *Chemische Fabrik Vormals Sandez v Badische Anilin und Soda Fabriks* (1904) 90 LT 733 (UKHL) at 735, cited by Chao Hick Tin JA in *Bradley Lomas*, *ibid* at para 17.
27 See *eg*, *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1997] 3 SLR (R) 363 (CA) at para 16.

In this context, the plaintiff is expected to establish that Singapore is "on balance and in the final analysis, the most appropriate forum to try the dispute, and it matters not whether Singapore is the most appropriate forum by a hair or by a mile."[28] The relevant principles applied for determining whether Singapore is *forum conveniens* have been adopted[29] from Lord Goff of Chieveley's speech in *Spiliada Maritime Corporation v Cansulex Ltd*.[30] As Sundaresh Menon CJ noted in *Zoom Communications*, the *Spiliada* formulation applies both in cases concerning applications for staying of proceedings brought in Singapore during the defendant's presence, and cases where permission is sought to serve claims on defendants outside Singapore.[31] Therefore, the same factors are consulted by Singapore courts in deciding whether to exercise jurisdiction in both types of case. The main difference is that, in service-out cases, plaintiffs bear the burden of satisfying the court that Singapore is the proper forum—*ie*, one where the case may be most suitably tried for the interests of all the parties and the ends of justice.[32] For this purpose, plaintiffs must show that the dispute has the most real and substantial connection with Singapore. The factors which point to the existence of such connection include the dispute's governing law,[33] the location of evidence and witnesses,[34] and whether any parallel proceedings are pending elsewhere.[35] If the plaintiff is able to show that Singapore is the proper forum based on the connection between the claim and the forum then the court would allow for proceedings to be served outside Singapore. However, if the plaintiff fails at this stage, then there seems to be some uncertainty as to what should happen to the service-out application.[36] The uncertainty here stems from the *obiter* remarks in the Singapore Court of Appeal's judgment in *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*.[37] It is suggested that, if the plaintiff has adduced "cogent evidence" that the foreign forum which is more closely connected to the dispute cannot justly dispose of it, the more prudent approach would be for the Singapore court to find that it is *forum conveniens* and serve proceedings outside Singapore.[38]

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28 *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 (CA) at para 8 (*per* Chao Hick Tin JA).

29 See, eg, *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR (R) 345 (CA).

30 [1987] AC 460 (UKHL) at 476–478 [*Spiliada*].

31 *Zoom Communications*, *supra* note 13 at para 70.

32 Yeo, *Halsbury's*, *supra* note 10 at para 75.083, paraphrasing Lord Goff's statement in *Spiliada*, *supra* note 30 at 476.

33 *Ibid* at para 75.093.

34 *Ibid* at paras 75.091–75.092.

35 *Ibid* at para 75.094.

36 For examples in English case law of courts deciding to serve proceedings outside England if satisfied that the claim cannot be entertained justly in the more closely connected forum elsewhere see, eg, *Oppenheimer v Louis Rosenthal & Co AG* [1937] 1 All ER 23 (EWCA), *Roneleigh Ltd v MII Exports Inc* [1989] 1 WLR 619 (EWCA), *Cherney v Deripaska* [2008] EWHC 1530 (Comm) (affirmed by the Court of Appeal [2009] EWCA Civ 849) and *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.

37 [2020] 1 SLR 226 at para 80(d) [*Oro Negro*].

38 See, especially, Yeo, "Exit, Stage 2", *supra* note 9.

III. The Service-Out Jurisdiction Following the Implementation of ROC 2021

Before examining the impact of the new civil justice regime on the service-out jurisdiction in Singapore, it would be helpful to consider briefly the reform proposals concerning this aspect of the law which were made in the process of articulating what ultimately became *ROC 2021*. As pointed out in the introduction, it was in a report published in late 2017, where the CJC made the following recommendations about how the approach to the service-out jurisdiction should evolve under the new civil justice regime:

> Instead of enumerating all the permissible cases for service of an originating process out of Singapore, Rule 1(1) prescribes the criteria for obtaining the Court's approval for service out of Singapore, namely showing that the Court has the jurisdiction or is the appropriate court to hear the case. This makes it unnecessary for a claimant to scrutinise the long list of permissible cases set out in the existing Rules in the hope of fitting into one or more descriptions. It also avoids the possibility that a particular category of cases which could and should be heard in Singapore is actually not in the list.[39]

To all outward appearances, this aspect of the CJC's proposals seems to form the basis for the relevant provision concerning service out of Singapore under *ROC 2021*: Rule 1(1) of Order 8 of *ROC 2021* ("*ROC 2021*, O 8 r 1(1)"). It provides that "[a]n originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action." Separately, the new *ROC 2021*, O 8 r 1(3) states that "[t]he Court's approval is not required if service out of Singapore is allowed under a contract between the parties."

This article focuses on the Singapore courts' service-out jurisdiction under *ROC 2021*, O 8 r 1(1). Under this provision, Singapore courts could serve proceedings on defendants outside the forum in two broad situations. The first is where the Singapore court has "jurisdiction". The CJC's report did not state what jurisdiction meant in this context. However, it has been understood to include a basis for adjudicatory competence other than the traditional grounds for asserting jurisdiction in Singapore—namely, the Singapore courts' service-out jurisdiction, the defendant's presence in Singapore, or submission to proceedings before the courts in Singapore. As pointed out by one scholar,[40] one example of where the court in Singapore would be deemed to have jurisdiction is likely to be where the court's adjudicatory competence is rooted in the *Choice of Court Agreements Act 2016*.[41] The present discus-

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[39] Ministry of Law, "CJC Report", *supra* note 2, ch 6(2) at 16. It appears that, to a large extent, the CJC's objective that a party who wishes to serve proceedings on a defendant outside Singapore should no longer have to show that his or her claim fits into one of the gateways was achieved following the Court of Appeal's interpretation of O 11 r 1(n) in *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 (CA). For an evaluation of the ruling, see Marcus Teo, "Service out for Scandalising Contempt: An International Constitutional Jurisdiction?" [2019] Sing JLS 477.

[40] See *eg*, Yeo, "Exit, Stage 2", *supra* note 9 at 1250 and n 71.

[41] (No 14 of 2016).

sion is not concerned with this basis for serving proceedings on defendants outside Singapore. Instead, its focus is on the second basis under *ROC 2021* for Singapore courts to issue service-out proceedings: Singapore is the "appropriate court" for hearing the claim.

Again, the CJC's report was silent about what made the Singapore court "appropriate" for it to serve proceedings on a defendant outside the forum. However, given the wording of the CJC's proposals, it was reasonable to infer that, in the CJC's view, all that plaintiffs had to do, under the new regime, to obtain permission to serve proceedings on defendants outside Singapore, would be to show that Singapore is *forum conveniens*. Indeed, based on the report, the CJC's proposals appeared to envisage no role for the gateways in the context of exercising the service-out jurisdiction. What is more, until recently, it was anticipated that courts in Singapore would embark on granting service-out orders with the appropriateness of the Singapore court for hearing the case depending entirely on whether Singapore is *forum conveniens*.[42]

The jurisdictional gateways which featured under *ROC 2014*, O 11 r 1(a)–(t) are nowhere to be seen in the final version of the new rules. Be that as it may, and in a surprising twist, they have been retained under the new civil litigation regime in Singapore, albeit in *The Supreme Court Practice Directions* 2021.[43] Significantly, they are to be consulted in the process of determining whether Singapore is the appropriate court for hearing the claim, before the court proceeds to grant a service-out order. Practice Direction 63 ("PD 63") contains the relevant details regarding applications for service out of Singapore. PD 63(2) spells out the relevant requirements for those wishing to serve proceedings on foreign-based defendants on the basis that the Singapore court is the appropriate court to hear the action. According to PD 63(2), the onus is on them to show that: "(a) there is a good arguable case that there is sufficient nexus to Singapore; (b) Singapore is the *forum conveniens*; and (c) there is a serious question to be tried on the merits of the claim." PD 63(3)(a)–(t) contains a non-exhaustive list of factors which those seeking to obtain a service-out order "should refer to" in order to meet the requirement under PD 63(2)(a). It is here where all the jurisdictional gateways under *ROC 2014*, O 11 r 1(a)–(t) are incorporated in the new civil justice regime. Although not legally binding, practice directions have always been upheld by the courts, and the latest version is intended to be read together with the provisions under *ROC 2021*. Consequently, despite being relegated to paragraphs within the practice directions, the gateways continue to play broadly the same role that they did under *ROC 2014*.

In practice, a party who seeks to obtain permission to serve proceedings on a defendant outside Singapore would have to show that the claim fits one of the paragraphs listed within PD 63(3)(a)–(t), or, instead, point to another connecting factor which signifies a sufficient nexus between the claim and Singapore. The list of connecting factors under PD 63(3)(a)–(t) is non-exhaustive. Nevertheless, it is hard to envisage that there are many instances outside those spelt out within PD 63(3)(a)–(t), which connote "sufficient nexus to Singapore" for the purpose of exercising

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[42] Yeo, *ibid* at 1249–1250; Briggs, *Civil Jurisdiction and Judgments supra* note 9 at para 24.06 and n 46.

[43] Sing, *The Supreme Court Practice Directions* (2021), online: <https://www.judiciary.gov.sg/docs/default-source/new-roc/supreme-court-practice-directions-2021(final-as-published).pdf?sfvrsn=382e30c0_4>.

the service-out jurisdiction. In any event, it is reasonable to expect that a point of connection to Singapore outside the list cannot be weaker than those set out in PD 63(3)(a)–(t). For example, it is unlikely that the claimant's residence in Singapore alone would establish sufficient nexus to Singapore to then warrant the granting of the service-out order. If successful in establishing a sufficient nexus to Singapore, the applicant would need to also show that Singapore is *forum conveniens*, and that the issue at the heart of the claim raises a serious question.

IV. Analysis

The preceding discussion has highlighted that the approach to applying the service-out jurisdiction in Singapore under *ROC 2021* has scarcely changed. As a result, there is unlikely to be radical differences in the way in which courts exercise jurisdiction over defendants outside Singapore. In these circumstances, some may have found it more appealing to have simply retained the pre-*ROC 2021* framework. After all, by comparison, the law in this area prior to the introduction of the new regime arguably provided a simpler and more straightforward means of exercising jurisdiction over foreign-based defendants. To this extent, the new regime's (predominantly cosmetic) alterations of the bases for exercising the service-out in Singapore could be questioned.

Ultimately, though, the fact that the new regime stops short of fully embracing the CJC's proposals for reforming the law in this area by abandoning the gateways, and instead solely relying on whether Singapore is *forum conveniens*, is to be welcomed. There are both conceptual and practical reasons why the gateway precondition serves a valid purpose in deciding whether proceedings should be served on defendants outside Singapore, and that sole reliance on *forum conveniens* for this purpose would give rise to problems. Conceptually, the gateway and *forum conveniens* preconditions play distinct roles in the service-out enquiry. In terms of principle, the purpose of the gateways is to ensure that the court in Singapore does not proceed to summon a defendant outside the forum unless there is sufficient connection between the foreign-based defendant, or his or her conduct, and Singapore. The *forum conveniens* part of the enquiry, though, is about deciding *between* two competent fora, rather than deciding whether a forum *is* competent.

Nevertheless, in certain academic and practitioner publications in England, it has been proposed that gateways should be dispensed with and the service-out jurisdiction should be exercised based entirely on whether England is *forum conveniens*.[44] In response, the existence of the conceptual distinction between the gateway and the *forum conveniens* requirements has been reiterated in *obiter* remarks in a number

[44] See, chiefly, Briggs, *Civil Jurisdiction and Judgments supra* note 9 at para 24.06; Adrian Briggs, *Private International Law in English Courts* (Oxford: Oxford University Press, 2014) at paras 4.458–4.459, and Adrian Briggs, *The Conflict of Laws*, 4th ed (Oxford: Oxford University Press, 2019) at 110. For an account which examines the case for jettisoning the gateways in England, but in the end argues that they should be maintained, albeit in a refined form, see Ardavan Arzandeh, "'Gateways' within the Civil Procedure Rules and the future of service-out jurisdiction in England" (2019) 15 J Priv Intl L 516.

of recent judicial pronouncements. For example, in his dissenting judgment in *Brownlie v Four Seasons Holdings Inc*,[45] Lord Sumption observed that:

> The jurisdictional gateways and the discretion as to forum conveniens serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to forum conveniens authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on forum conveniens grounds is not the relationship between the cause of action and England but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court's jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways. English law has never in the past and does not now accept jurisdiction simply on the basis that the English courts are a convenient or appropriate forum if the subject-matter has no relevant jurisdictional connection with England.[46]

In the same vein, in his dissenting judgment in *Brownlie II*, Lord Leggatt was keen to underscore the distinctiveness of the gateway and *forum conveniens* preconditions as concepts. According to his Lordship

> Whereas the gateways look back to the events which gave rise to the claim, the test of forum conveniens looks forward to the nature and shape of the dispute at a trial. A key factor is usually where witnesses and documentary evidence are located …; but other factors are also relevant such as the law which the court will have to apply and the places where the parties respectively reside or carry on business … In exceptional cases it may also be necessary to consider an allegation that the claimant would not be able to receive a fair trial in the alternative forum. None of those factors is relevant to whether there is a sufficient connection between the defendant and England to make it legitimate for the English court to assume jurisdiction in a case where the defendant has not submitted to the jurisdiction of the English courts, and it is wrong in principle as well as inconsistent with how the law has been applied to trade off the absence of such a connection against the relative advantages of England as a place to hold a trial. To elide the two questions, in my view, involves a category error.[47]

These observations serve as a reminder that, conceptually, it would be questionable to assume that the *forum conveniens* requirement would, by itself, provide a sufficient basis for the court to assert jurisdiction over foreign-based defendants. The fact that they were made in the course of dissenting judgments should not, it is suggested, detract from their relevance or significance. After all, the conceptual

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45 [2017] UKSC 80 [*Brownlie I*].

46 *Ibid* at para 31.

47 *Brownlie II*, *supra* note 15 at para 198.

distinction between the gateway and *forum conveniens* requirements was not the issue which led Lord Sumption, in *Brownlie I*, and Lord Leggatt, in *Brownlie II*, to dissent. It is argued that their analysis is also pertinent when considering the application of the service-out jurisdiction in Singapore. The fact that the CJC's proposals, which appeared to conceive of no role for the gateways, and instead linked the granting of the service-out order to Singapore being *forum conveniens*, have not been fully adopted under *ROC 2021* means that what Lord Leggatt in *Brownlie II* characterised as a "category error" has been avoided.

Additionally, the retention of the gateways under *ROC 2021*, albeit in the form of a non-exhaustive list of factors within the practice directions which those applying for a service-out order should refer to so to establish a good arguable case that the claim has sufficient nexus to Singapore, helps to side-step some of the practical problems which could otherwise have arisen. Until relatively recently, a broadly similar approach to that proposed by the CJC provided the basis at common law for the Canadian courts' assertion of jurisdiction over out-of-province defendants,[48] known as "assumed jurisdiction".[49] Under this approach, the decision to summon defendants outside the forum was mostly based on factors generally resembling those underpinning the operation of the *forum conveniens* test.[50] This manner of exercising assumed jurisdiction in Canada was criticised for leading to uncertainty in the law, as broadly similar cases were being decided differently by the courts.[51] In response to these criticisms, the Supreme Court of Canada in *Club Resorts Ltd v Van Berda* in 2012,[52] altered the way in which assumed jurisdiction is exercised. The revised process, which continues to be in operation, resembles the classic basis for applying the service-out jurisdiction at common law, where gateways and *forum conveniens* are both relevant and play distinct roles in determining whether proceedings should be served on a defendant outside the forum. While not without its critics,[53] the decision in *Club Resorts* to refine the law in this way has led to greater predictability in the application of the law in this area. It is argued that it is entirely conceivable that similar problems as those which transpired in Canada before the ruling in *Club Resorts* could have arisen in Singapore, had the gateways been jettisoned altogether and the decision whether to serve proceedings outside Singapore been made exclusively based on whether Singapore is *forum conveniens*.

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[48] For present purposes, references to out-of-province defendants relate to both situations in which the defendants are present in another province in Canada or, indeed, outside Canada altogether.

[49] See *eg*, *Muscutt v Courcelles* (2002) 60 OR (3d) 20 (CA); *Samson v Hooks Industrial Inc* (2003) 42 CPC (5th) 299; *Wood v Sharp* [2006] OJ No 1925.

[50] For a fuller discussion of the law's development in Canada, see Arzandeh, *supra* note 44 at 528–534.

[51] See, eg, Joost Blom and Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 UBC L Rev 373; Tanya J Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007) 33 Queen's LJ 179.

[52] 2012 SCC 17 [*Club Resorts*].

[53] *Eg*, Vaughan Black, "Simplifying Court Jurisdiction in Canada" (2012) 8 J Priv Intl L 411, Tanya J Monestier, "(Still) A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013) 36 Fordham Intl LJ 396; Vaughan Black and Stephen Pitel, "Assumed Jurisdiction in Canada: Identifying and Interpreting Presumptive Connecting Factors" (2018) 14 J Priv Intl L 193.

V. Conclusions

Implementation of *ROC 2021* is sure to modify various aspects of the civil justice system in Singapore. The Singapore courts' jurisdiction to serve proceedings on defendants outside the forum was one area which was expected to undergo much change following the introduction of the new regime. More specifically, there were signs that those seeking to sue foreign-based defendants on the ground that Singapore is the appropriate court would merely need to establish that Singapore is *forum conveniens*, and would no longer be required to show that the claim passes through one of jurisdictional gateways. In other words, the gateways seemed on the cusp of erasure. However, as the discussion in this article has sought to highlight, rather surprisingly, this is not what happened. Despite certain apparent differences, the mechanism and approach to the service-out jurisdiction under *ROC 2021* remain substantially the same as they were before, and are liable to give rise to similar outcomes in practice.

Under the new regime, a litigant who wishes to summon a foreign-based defendant on the basis that Singapore is the appropriate court for hearing the case will have to show that the claim fits one of the paragraphs listed within PD 63(3)(a)–(t), or, alternatively, point to another connecting factor which shows that the claim has sufficient nexus to Singapore. The paragraphs within PD 63(3)(a)–(t) are identical to the jurisdictional gateways which featured within *ROC 2014*, O 11 r 1(a)–(t). The gateways, therefore, have remained relevant in establishing whether the court can assert service-out jurisdiction under the new regime, despite the fact that they have been relegated to the practice directions and are no longer an exhaustive list of factors. Nevertheless, given the comprehensiveness of the range of connecting factors codified within PD 63(3)(a)–(t), there are unlikely to be many situations other than those outlined within these sub-paragraphs which would be deemed to signify "sufficient nexus to Singapore" in this context. As such, the gateways have survived the process of reform which led to the articulation of *ROC 2021*, and will continue to play a significant role in the courts' exercise of the service-out jurisdiction. If successful in establishing a sufficient nexus with Singapore, the applicant would then have to satisfy the court that Singapore is *forum conveniens*, and that the issue at the heart of the claim raises a serious question to be able to obtain a service-out order on the basis that the Singapore court is appropriate to hear the claim.

As this discussion has sought to highlight, conceptual and practical problems would have arisen had the mechanism for asserting the service-out jurisdiction under *ROC 2021* been reformed in such a way whereby gateways were removed from the equation altogether, and the appropriateness of the Singapore court hinged solely on it being *forum conveniens*. Accordingly, the retention of the gateways under the new regime, albeit as a non-exhaustive list of connecting factors within the practice directions, is to be regarded as a positive development. It is to be hoped that an analysis of the sort of problems which would have arisen had the gateways been jettisoned as a factor required in order to establish jurisdiction over foreign-based defendants will serve to assist policy makers, should the issue of reforming this aspect of the law in Singapore is brought up again for discussion in the future.