CHOICE OF LAW CLAUSES AND COURT JURISDICTION CLAUSES:

SOME VERY PRACTICAL ASPECTS OF THE CONFLICT OF LAWS

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1. The purpose of this lecture is to draw attention to certain aspects of the law which arise from contract terms which choose the law which will govern a legal relationship, and contract terms which deal with the question where litigation between parties will and will not take place. I intend to do so by reference to ten example clauses, which will provide a basis for me to make some general points and some very specific ones.

2. Let us begin, and let us start with terms in contracts which stipulate the law which will govern and apply to the contract.

A THE LAW WHICH WILL GOVERN THE CONTRACT, AND THE LAW WHICH WILL APPLY TO DISPUTES CONCERNING THE CONTRACT

3. Is there any statutory provision in the laws of Myanmar which explains whether and when the parties may choose the law to govern their contract ? There appears to be none. This makes things easier, but also more difficult, than they would otherwise be.

4. Is there case-law which explains whether and when the parties may choose the law to govern their contract ? There is very little. The closest one comes is the decision of the High Court in *China-Siam Line v Nay Yi Yi Stores* (1954) BLR 270 (HC). This was a case for damages for failure to deliver cargo shipped from Hong Kong to Rangoon on a bill of lading which said, in material part, 'All claims must be made at the port of delivery'. On its face that wording says nothing about the law which is intended to govern the contract, for it simply states where the claim must be brought. However, the Chief Justice interpreted the clause by saying this:

> 'the implication is that the intention of the parties to the bill of lading is that the law of Burma is to apply to the claims made in respect of the goods which were to be delivered at Rangoon'.

5. He later said:

> 'It is also open to the parties in the present case to make provision that the law of the country where goods were to be delivered should apply, should any dispute arise there, ie at Rangoon. We consider that Clause 13 of the Bill of Lading has made provision for this purpose, in that the effect of Clause 13 is to make the law of Burma applicable to claims arising out of the contract of carriage by sea made at Hong King between the parties to this litigation.'

6. This is the basis on which it can be said that, so far as a court in Myanmar is concerned, a contract is governed by the law which is intended by the parties to govern it; and that the most obvious way to find that intention is by looking to see whether the parties have made a

choice of law. (If there were more time, we might find fault with the reasoning of the High Court, but this will do for now.)

7. A further reason for coming to this conclusion is that the laws of almost all civilised countries allow (or say that they allow) the parties to choose the law to govern the contract which they make. But what we will see, and what we should know about international contracts litigated by courts outside Myanmar, is that the court will usually take a much closer look at the words used by the draftsman. Had that been done in *China-Siam Line*, we might have asked whether a statement about where you must sue really is a statement about the law which you intend the court to apply if you sue there. Despite those difficulties, which may arise, the starting point appears to be this: that the rules of private international law in Myanmar provide that a contract will be governed by the law intended by the parties to govern it; and that the parties may express their common intention in a term of the contract, to which the court will look for an answer to the question of what the parties intended.

8. We should note this important fact, though. In *China-Siam Line*, the High Court agreed that if the parties to an international contract intended Burmese law to apply to it, Burmese law would indeed apply to the contract. The judges did not say, at least they did not expressly say, that a choice which showed an intention that the contract be governed by the laws of a foreign country would also be respected, in just the same way. In principle, of course, there should be no difference: as I said just now, almost all civilised countries agree that parties may choose a foreign law to govern their contract. But it is very likely that the High Court will have found it easier to accept the intention of the parties because it pointed to Burmese law. We assume, but we do not know for sure, that they would be just as happy to accept that a contract was governed by the laws of a foreign country: we assume it, but we do not know for sure.

9. Of course, if we proceed on the basis that the parties are allowed to choose the law to apply to their contract, and that this will be taken to show their intention, and that intention will be give effect by a court, we will need to look carefully at their contract to see what, precisely, they did choose and intend. Here come four specimen contract terms for us to think about.

(1) This contract shall be governed by the laws of Myanmar, and all disputes arising out of or in connection with it shall be determined in accordance with the laws of Myanmar

10. This works in the sense that a court in Myanmar will give effect to it; it is very likely that a court outside Myanmar would give effect to it as well. We would expect a court in Myanmar to have no trouble at all in giving effect to such a provision: it did in *China-Siam Line v Nay Yi Yi Stores*. In this kind of case, the court can proceed as though there was no issue of the conflict of laws at all: it will just apply Myanmar law. What is more interesting is what happens if a contract says that it is to be governed by a foreign law. So let us proceed.

(2) This contract shall be governed by the laws of China, and all disputes arising out of or in connection with it shall be determined in accordance with Chinese law

11. Does this clause work ? Does it show that the parties intended that the contract be governed by Chinese law ? It does show that intention, and if we interpret *China-Siam Line* broadly, a court in Myanmar will accept that the parties intended their contract to be governed by Chinese law, and will give effect to that choice. If, for example, it is argued that the work under the contract has not been properly done, or that the goods delivered under the contract were incomplete or that the services supplied under the contract were not done to an appropriate standard, the court will, in principle, apply Chinese law to decide whether the complaint was justified or not.

12. If an issue is to be determined in accordance with Chinese law, how will the court establish what Chinese law actually means and provides ? According to Section 45 of the Evidence Act, it will be assisted by expert witnesses:

> **45. Opinions of experts.** When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to the identity of handwriting or finger impressions, the opinions of persons upon that point of persons specially skilled in such foreign law, science or art, or in questions as to the identity of handwriting, or finger impressions, are relevant facts. Such persons are called experts.

13. If Chinese law has been chosen and is therefore what the parties intended to govern the contract, what will kinds of question will it apply to ? It will apply to claims that a contract has not been performed, that compensation is due for non-performance, as I have just said.

14. But suppose that one of the parties has rescinded the contract for failure to perform the obligation in its entirety, so that (as a matter of Myanmar law, at least) the contract would become void. What if one party claims to have avoided or rescinded the contract because of fraud, misrepresentation, coercion or undue influence, so that as a matter of Myanmar law the contract would become void ? Or suppose that the contract has become impossible or illegal to perform, so that, as a matter of Myanmar law, it becomes void. In all of these cases, someone might say that although the contract was governed by Chinese law when it was valid, if a contract has become void, every term of a contract must also have become void, with the result that Chinese law will not apply after all. Can the contract be governed by a law which would be identified by a term of the contract which has become void ?

15. This is a well-known problem, and the usual answer is this: that the law which the parties intended to govern the contract if it were valid will also be the law which determines whether the contract is valid, and what the consequences are if it is not valid. In other words, the intention of the parties as to the law governing the contract is in some sense separate from the contract which it is to govern.

16. Here are three reasons why this must be so. First, when the parties intend a law to govern a contract, they surely intend that to be the law which will answer practically all the

questions which can arise, including the question whether there really is a contract by which the parties are bound. If they intend that law to answer the questions which follow if the contract is valid, they also intend it to answer the questions which can arise if the contract is held to be void. Second, the law which governs the contract results from the intention of the parties, and it is perfectly possible to say that the parties intended and agreed on a law at the same time as saying that the contact which they thought they had made was a void contract. Third, it is now well understood in the law of arbitration that a promise to arbitrate is severable, separate, from the contract in which it is contained, so that it continues to bind the parties and apply even if the contract has been rescinded by one of them: see in particular Section 18 of the Arbitration Act. This provides a sensible model for dealing with agreements on choice of court (which are coming next) and for dealing with choice and intention as to governing law.

17. If this is right, it will follow that Chinese law will, in principle, determine whether the contract was valid, whether the contract may be avoided or rescinded because of something which has gone wrong, whether the contract is still valid even though a supervening event, or supervening legislation, has affected the performance of the contract, and so on.

18. It is less obvious that the reasoning is the same if the question was whether the parties had reached an agreement, or a common intention, in the first place. Consider it this way.

19. Suppose a Japanese seller sends a letter to Myanmar merchant, in which the terms of an offer are set out, and suppose that the letter says that unless the merchant says within seven days that he does not want the goods, there will be contact made on the terms of the offer. Suppose also that the offer letter says that the contact will be governed by Japanese law. If the merchant does not respond, Myanmar contract law would say that there is no agreement, and hence no contract. But according to Japanese law, the position may be different. This is because Article 509 of the Japanese Commercial Code says this: '(1) When a merchant has received, from a person with whom he makes transactions ordinarily, the offer of a contract in the line of the business in which he works, he shall dispatch a notice of acceptance or refusal of the offer of the contract without delay. (2) When a merchant fails to dispatch a notice as set forth in the preceding paragraph, he/she shall be deemed to have accepted the offer of the contract set forth in said paragraph.'

20. In these circumstances it would be very surprising if a Myanmar court would apply Japanese law to decide whether there was a contract. It would instead say that the question whether the parties had agreed on the law to be apply to the contract, or the potential contract, was a question for Myanmar law to answer, not for a foreign law to answer. If Myanmar law would say that there was an agreement on the law to be applied to the contract, it will apply the law which has been agreed to. But if Myanmar contract law would say that there had not been such an agreement, then there will be no basis for applying a foreign law, which will not be shown to have been agreed to or intended to apply.

(3) This contract shall be governed by the laws of Myanmar or, at the option of the seller, the laws of China

21. If the parties can agree on the law which will apply to a contract, you may think that they can choose and intend two possible laws: but can they, or should they, do this ? Obviously no such question has come before a court in Myanmar, but there are real reasons to be doubtful about whether this is a good idea. I think it is a bad idea, and a bad clause, and it will not do the job it may have been intended to do.

22. Think about it this way. The law which will be applied to the contract when a dispute has to be resolved will also be the law that decides whether a contract was created, what its terms were and required, who the parties to it were, what was required and not required by way of performance, whether the contract could be rescinded, whether compensation could be recovered, and so on. In other words, the law which applies at the end, when the parties are all in court, also has to be the law which tells the parties, as they perform the contract, what they are required to do, what their options are, and so on. It would be very difficult to do that if we did not know what law governed the contract from the beginning; it would be very difficult for a party to know what he had to do if the other party could simply alter the law which governed the contract. For this very practical reason, many common law legal systems take the view that it is not possible to choose two laws to govern a contract, or to agree that the law which governed a contract can be replaced by another. Other legal systems may see matters differently; but Myanmar is a common law legal system, and there is no sense in making a choice of law which might be dismissed as no choice at all by a court in another common law country, such as England, Hong Kong, or Singapore.

23. The question for a Myanmar court will be whether the parties had a common intention to choose the law which would govern their contract. It is for a Myanmar court to decide, as a matter of Myanmar private international law, whether this counts as a choice, and in my opinion it will say that it is not an effective choice of law; it does not identify the law which the parties intended to govern their contract. There is no (single) law which reflects the intention of the parties; and such a choice of law would not really work.

(4) This contract shall be interpreted in accordance with and governed by the principles of international law

24. This example is easier: it will not work, even if it is the intention of the parties that it should work. There are no rules of international law which explain how to interpret a contract, because that is not what international law does or is designed to do. There is no rule of international law which can explain whether a contract may be rescinded or whether (and how much) compensation must be paid if one party has failed to perform his obligations. A contract made between states is a rather different thing, and in that context it is a little more likely that such choice could be made to work. But not otherwise.

25. There are other choices which cannot be made, or which, if made, cannot be given effect by a court. It is not possible to choose and intend the contract to be governed by Buddhist law, or by sharia law, or anything like that. A court may not be able to apply such laws, because it does not properly understand them; and these systems, even if they are considered to be laws, may also be incomplete on the issues with which we are concerned. It is not possible to choose and intend the laws of Shan State, because there is no such thing: equally, it is not possible to choose and intend the law of the European Union, because this is not a complete legal system. So also the laws of the United Kingdom: the United Kingdom may be a country (at the moment, at least), but it does not have laws. There is English law, Scottish law, the laws of Northern Ireland; but there is no such thing as 'British law'. It is not possible to choose and intend the contract to be governed by the Vienna Convention on the International Sale of Goods, for Vienna is not a country, and the Convention is not a comprehensive set of legal rules making up a legal system.

26. If contracting parties really want this to be the basis on which they engage with each other, what can they do ? The answer is that they can contract on these terms if they wish, and they can agree at the same time that their differences should be settled by arbitration. Section 32 of the Arbitration Act gives pretty wide scope to the arbitrators to apply sets of rules which are not the laws of countries, so if the parties want their contract to be dealt with as though it had always been governed by the rules of something which is not a state, or a set of principles which is rather different in nature, such as 'justice, equity and good conscience', Section 32 allows this to happen if they agree to arbitrate. But if their dispute is to be resolved by legal proceedings before a court, the choice is likely to be limited to the laws of a single legal system.

B THE COURT BEFORE WHICH DISPUTES WILL BE SETTLED

27. Is there any statutory provision which explains whether and when the parties may choose the country before whose courts disputes arising from their contract will be litigated ? There is. And it is important to know what it says before we ask two big questions: can the parties, by their contract, provide that the courts in Myanmar shall adjudicate their disputes even though the Code of Civil Procedure does not provide that the courts of Myanmar had jurisdiction ? Can the parties, by their contract, provide that the courts of Myanmar shall not adjudicate their disputes even though the Code of Civil Procedure would consider that the courts of Myanmar had jurisdiction ?

28. We start with the most relevant provisions of the Code of Civil Procedure (excluding the Illustrations), which state as follows:

> **9.** The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> **15.** Every suit shall be instituted in the Court of the lowest grade competent to try it.

16. Subject to the pecuniary or other limitations prescribed by any law, suits

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate, or, in the case of suits referred to in clause (c), at the place where the cause of action has wholly or partly arisen:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or, in the case of suits referred to in clause (c), at the place where the cause of action has wholly or partly arisen, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.- In this section 'property' means property situate in the Union of Burma.

17. Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate:

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

19. Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

20. Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction:

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually or voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually or voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation I.- Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.- A Corporation shall be deemed to carry on business at its sole or principal office in Myanmar or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

21. No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

29. A number of points need to be made in relation to these provisions. I wish to mention five. First, it will be immediately apparent that there is no rule of statute law which states, clearly and precisely, that if the parties agree by a term in their contract that the Myanmar court is to have jurisdiction, that will be enough to ensure that the court has jurisdiction. We will have to think hard about this. Second, it is equally apparent that there is no rule of statute law which states, clearly and precisely, that if the parties agree by a term in their contract that the courts of a country outside Myanmar are to have jurisdiction, and that the courts of Myanmar are not to have jurisdiction, the Myanmar court will not adjudicate. Third, when these rules about jurisdiction were drafted, over 100 years ago, the idea that parties to a contract would stipulate in which country litigation would take place would have made no sense in Burma: the courts of Burma simply did not do international business. Fourth, these jurisdictional rules are drafted as rules for the internal jurisdiction of Burmese courts: to decide whether proceedings should be brought against the defendant in Rangoon or Mandalay, for example. They were not drafted with international jurisdiction in mind, although they can be used and perhaps must be used, for that purpose. And fifth, the thinking of common lawyers across the common law world has developed over the last 100 years. It is now accepted, much more than it once was, that the parties should be able to choose where to litigate and where to not litigate. Their power to choose may not be completely unrestricted, and the courts may not always treat the choice as decisive, as tying its hands; but the idea of choice of jurisdiction, as well as of law, as legitimate and entitled to respect is, now, a fundamental aspect of the common law of us all.

30. That is the statutory background against which we assess the terms which we are about to consider. To the extent that there is case-law to help us understand the law, I will deal with that where it is most relevant. I have six example clauses for us to examine, and because we had four clauses dealing with choice of law, we start the numbering at (5).

(5) All disputes arising from this contract shall be determined by the courts of Myanmar

31. If the parties have agreed to the jurisdiction of the courts of Myanmar, it seems very likely that the court will exercise jurisdiction if proceedings are begun. This might be thought to follow from *China-Siam Line*, in which it was agreed that all claims must be made at the port of delivery. In fact, there are two big problems with this example. The first concerns the Code of Civil Procedure; the second concerns its meaning. We will take them in that order, starting with the Code of Civil Procedure.

32. In the *China-Siam Line* case, the court had jurisdiction over the Hong Kong party under Section 20(c) of the Code of Civil Procedure, because the cause of action (see the judgment at p 279) had arisen at Rangoon, the port of delivery. So it was not necessary to ask whether the answer would have been different if there had been no basis for jurisdiction in the provisions of the Code, simply a promise by the parties that they would litigate in Myanmar. But suppose the port of delivery had been in Malaysia (because that was where the Myanmar-based buyer actually wished to have the goods delivered), but the contract had still provided that the courts

of Myanmar were to have jurisdiction. Section 20 would not give jurisdiction over the Hong Kong defendant. Would the fact that the parties have made an agreement to sue in the Myanmar courts be able to overcome the difficulty ?

33. Here is the argument on one side. If the written law does not give the Myanmar court jurisdiction there is a perfectly good argument that the court does not have jurisdiction, whatever the parties may have agreed between themselves and intended. According to this view, it is for the legislature to decide whether courts have jurisdiction; it is not for litigants to do that. The argument would be that a contractual term about the place where disputes will and will not be resolved is a promise which binds the parties, and which explains which proceedings, and where, *they* will and will not accept without objection. But that is very different from establishing that the courts of a particular country, that the judges of a particular country, may or must allow the proceedings to take place before them. It may be said that whether judges have power to hear cases is for the authorities of the state to establish (and in Myanmar, that is mostly done by the Code of Civil Procedure), and all that commercial parties can do is to promise each other to do certain things which the law allows them to do, and to not do other things which the law allows them to do. But it does not allow them to override what the law actually provides. This view could derive some support from two decisions: *Shantilal Surajmal Mehta v Mariam Bibi* (1960) BLR 359 (HC) and *State Commercial Bank v Thibaw Commercial Syndicate Ltd* (1966) BLR 1131 (CC), but it is also echoed in *Steel Bros v Ganny*, a very important decision which we will consider in detail later. If this is taken seriously, an agreement to the jurisdiction of the Myanmar courts would not be effective unless a provision of the Code of Civil Procedure also applied to the claim made against the defendant.

34. Here is the argument on the other side. The Code of Civil Procedure does not actually say that the courts are barred or prohibited from hearing a dispute unless it falls within Sections 16 to 20. Sections 16 to 20 deal with particular place within Myanmar in which proceedings may be brought, but were not designed to be a comprehensive statement of the international jurisdiction of the court. And Section 9 may then mean that the court has jurisdiction because it is not barred from it. At this point one may look to the wise observation of the court in *Steel Bros & Co Ltd v YA Ganny Sons* (1965) BLR 449 (CC), at p 463, where the Chief Court said:

> 'The Act may not be exhaustive, and a particular point not specifically dealt with must be governed upon general principles. It is not necessary that every order of a Court should be supported by a specific statutory provision, and where there is neither provision nor prohibition it has to be guided by ordinary principles of common sense, justice, equity and good conscience. Since the laws are general rules, they cannot regulate for all time to come so as to make express provisions against all the cases that may possibly happen. The inherent power of the Court to act *ex debito justitiae* is expressly recognised in Section 151 of the Code of Civil Procedure.'

35. The crucial words are *where there is neither provision nor prohibition*. It may be possible to say that the case with which we are concerned is one 'where there is neither provision nor prohibition' concerning the jurisdiction of the Myanmar court, and where,

therefore, the court 'has to be guided by ordinary principles of common sense, justice, equity and good conscience'. According to those ordinary principles, if both parties have agreed to the jurisdiction of the Myanmar courts, it should be possible for a Myanmar court to find that it had jurisdiction and to exercise it if proceedings were begun by one party against the other when the other had promised, by contract, not to object to those proceedings. Ordinary principles of common sense point, arguably or even clearly, in that direction.

36. I am not sure how helpful it is, but the Indian courts, which have the same statute law, have decided that if a defendant submits to the jurisdiction of the court, that is sufficient by itself to give the court jurisdiction: *Viswanathan (R) v Rukm-ul-Mulk Syed Abdul Wajid* (1963) 1 SCR 22; *British India Steam Navigation Co Ltd v Shanmugha Vilas Cashew Industries* (1990) 3 SCC 481. It is not difficult to look at the contract term as a submission to the jurisdiction.

37. Even so, the difficulty created by this point needs to be understood, because if it is not dealt with, it may be a big problem. As I say, the best way of dealing it is to read those as cases in which the court made the point as cases in which there was an actual prohibition on jurisdiction, so that the more general principle in *Steel Bros v Ganny* could not apply. But this is a really important point, and we will come back to it again, briefly, in connection with example (8).

38. There is still a separate, second, question about the meaning of 'disputes arising from this contract'. What, precisely, does it cover ?

39. Claims about formation, interpretation, performance and non-performance of the contract, for example, will fall within it. But what about claims framed in the law of tort, where the allegation is that the defendant converted the goods which he had contracted to carry to his own use, or that he was now unlawfully detaining them rather than deliver them to the plaintiff. Does that dispute arise from the contract or from something else, such as the law of tort or personal property ? Or suppose there are, in fact, two contracts between the parties: a broad, framework, distribution agreement setting out the terms of their long term relationship, and an individual sale or supply contract, made under the umbrella of the distribution agreement, but which does not contain a jurisdiction agreement. In cases like this – and there are many possible sets of fact – the court will have to interpret the contract which contains the jurisdiction agreement, so as to be able to answer the fundamental question, which is whether the parties agreed and intended that the present claim should be brought before the courts of Myanmar. It is a question which is easy to state; in practice it can be harder to answer.

40. It can also arise when one party says that, actually, there was no contract concluded between the parties, and that his claim is for the return of money, or for a payment on the basis of Sections 68 to 72 of the Contract Act. How, one may ask, can a dispute arise from a contract when there is no contract for it to arise from ? This awkward question leads us neatly to the next example.

(6) All disputes arising from this contract, including disputes concerning the negotiation, parties, validity, effect and consequences of the contract (as well as the consequences of its invalidity), shall be determined by the courts of Myanmar

41. This example is an expanded version of the last one, and its advantage is that it makes it clear that the intention of the parties is for the Myanmar court to deal with questions which may be thought to arise at the edges of a contractual relationship, including the question whether there is such a relationship at all. It is possible that this is not needed, and that the court would be able to interpret example (5) as though it had this expanded meaning, but why take the risk ? If the parties want to prevent someone arguing that the claim he has made is not one arising from the contract, and that the agreement on jurisdiction does not apply to his claim, the answer is to draft one which is more expansive, more explicit, and harder to wriggle out of.

42. We should pause to ask another question, which arises in relation to example (5) as well as example (6). The terms of the example seek to show that the Myanmar courts have jurisdiction, so that either party may sue the other there. But do they also mean that if one if the parties to the agreement decides to sue somewhere else, he does something wrong; breaks his contract ? The answer is hard to give; but it may be important to think about it.

43. For example, let us suppose that the parties have agreed to the jurisdiction of the Myanmar courts, but that when a dispute arises, the plaintiff decides that it would be to his advantage to sue the other in the United States, or in some other, foreign, country in which the damages which may be recovered are much higher. For example, suppose such a jurisdiction agreement forms part of the contract between a passenger and a Myanmar airline; but that when there is an accident, the passenger starts proceedings before the courts of the United States against Boeing (who built the plane which may be defective) and against the airline. Does the plaintiff, who has made the agreement on jurisdiction in a contract in the terms set out, do anything wrong by bringing proceedings in the United States ? Because if they do, it ought to be possible to apply for an injunction, to restrain the party who is breaking his contract, in circumstances in which it would be very hard to assess monetary compensation.

44. Everything depends on whether there is anything wrong in suing in America. And that depends on whether the agreement on jurisdiction meant and intended that proceedings would be brought only before the Myanmar courts: before the courts of Myanmar but not anywhere else. Do they mean that ?

45. It is not easy to say. In the English language, the wording ‘shall be determined’ could be understood to mean ‘must be determined’. Indeed, that is probably what I would say it meant: the word ‘shall be’ has the same general meaning as ‘must be’. It seems to impose an obligation on the parties to ensure that this is what happens.

46. But if example (5) had said that ‘The courts of Myanmar shall have jurisdiction to determine all disputes arising from this contract’, the answer would be different. This is because the clause now says something about the courts, rather than saying something about

the parties (and what they will and will not do). It can all get rather complicated; but there may very well be cases, or contracts, in which it is essential that the disputes are litigated in Myanmar, and in which suing overseas would be seriously wrong. This therefore brings us to our next example:

(7) The courts of Myanmar shall have exclusive jurisdiction to determine all disputes between the parties to this contract

47. This clause answers two questions: it says, as clearly as it can, that as far as the parties are concerned, the Myanmar courts will hear any dispute which falls within the terms of the clause; and it says, as clearly as it can, that it is a breach of contract for one party to sue the other in a court outside Myanmar. That ought to make it much easier to do something – to obtain an injunction – to prevent the party who is proposing to sue outside Myanmar (or to obtain compensation for loss cause by such a breach of contract).

48. It all rests on the word 'exclusive'. Although the English courts have said that use of the word 'exclusive' is not essential, there is every reason to use it if the contract is being drafted in the English language. It offers an easy solution to the question whether the parties have agreed that proceedings *may* be brought in Myanmar (but could also be brought somewhere else) and that proceedings *must* be brought in Myanmar (and cannot be brought elsewhere without this being a breach of contract).

49. If you combine example (7) with example (6), the results are even better: 'All disputes arising from this contract, including disputes concerning the negotiation, parties, validity, effect and consequences of the contract (as well as the consequences of its invalidity), shall be determined exclusively by the courts of Myanmar.' It's not difficult to do: it just requires the person drafting the contract to sit down and work out exactly what he or she wants to say. Of course, this does not guarantee that the court will give you everything you have provided for, but if you do not use the words which would produce the result you want, there is nothing which a friendly court can actually do.

50. It is now time to look at a really poor example of an agreement on jurisdiction.

(8) The parties to this contract submit to the jurisdiction of the High Court at Yangon

51. One quite often finds this kind of clause in a contract. I am afraid that there is a lot wrong with it: let me ask three questions which show what the problem are. First, does it mean that the parties promise each other that they will not object if sued in Yangon, or that they promise each other that all proceedings must be brought in Yangon and must not be brought anywhere else ? It is an important distinction, but this example does not provide the answer to the question. Second, what kinds of claim is the submission made in respect of ? If it is contained in a contract, how closely related to the contract does the claim need to be ?

52. And third, we come back to the tricky point made in relation to example (5). In this context it operates slightly differently, though the basis is the same. Suppose the case is one in which Sections 16 to 20 of the Code of Civil Procedure would not give the court a statutory basis for jurisdiction over the defendant. In such a case, if a party had made a contract with another by which he promises the other to submit to the jurisdiction of the court, but that court does not have jurisdiction under the Code of Civil Procedure, what, exactly, can the parties be held to have agreed to submit to ? Is there a jurisdiction in the Myanmar court for them to submit to at all ? Does this clause mean that they have they promised to submit to whatever jurisdiction the court may have (that is, they have promised not to object if either party relies on whatever jurisdiction the court may have), but if the court has no jurisdiction, there is nothing to submit to ? Have they made a contract to do the impossible ? Because if they have, Section 56 of the Contract Act clearly says the contract is void. Seen from this point of view, example (8) is even more problematic than example (5).

53. There is little sense in using a clause in a contract when its meaning can give rise to such fundamental doubt. The whole point of a contractual agreement about jurisdiction is that there should be no room for argument about whether the proceedings can be brought here or there. If we can ask these questions about this one – and there are other questions which one could ask if time were not short – that very fact shows what a bad clause it is. The problem with the wording of the Code of Civil Procedure is a separate problem, for which a separate solution needs to be found (*Steel Bros v Ganny* should be that solution); but this example of an agreement on jurisdiction would be a very bad one indeed.

54. We have been looking at jurisdiction agreements for the courts of Myanmar. It is time to look at agreements about suing in foreign courts. In doing so we will not be asking whether the foreign court has jurisdiction according to its own law, for that is a matter for the law of the foreign court in question. Instead, what we are doing is considering the effect of such clauses on proceedings before the courts of Myanmar.

(9) All disputes arising from this contract shall be determined by the courts of Singapore which shall have exclusive jurisdiction to determine them

55. Suppose a contract has been concluded and that, for one reason or another, it has included a term of the kind given above. You will observe that it says that the foreign court shall have *exclusive* jurisdiction. That means that the courts of that foreign country, and only that foreign country, shall be asked to adjudicate. It means that if one party to the contract starts proceedings against the other before the courts of Myanmar, by relying – for example – on Section 20(c) of the Code of Civil Procedure, they will certainly appear to be breaking their promise. How shall we analyse this ?

56. First, we may ask whether the agreement is legally binding. Can it be argued that the clause is void by reference to Section 28 of the Contract Act, which is as follows:

> **28. Agreements in restraint of legal proceedings void.** Every agreement by which any party thereto is restrained absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

57. Can it be said that this clause seeks to restrain a party from bringing proceedings before the Myanmar courts, and that it is therefore void ? The answer is very clearly no: it is not void. An agreement to bring proceedings before the courts of a country outside Myanmar, or to proceed to arbitration, can be construed as being partial, but not an 'absolute', restraint on access to a court. It is therefore not prohibited by Section 28 of the Contract Act. This was the actual decision in *Steel Bros v Ganny*; it was also so held in *U Maung San v The American International Underwriters (Burma) Ltd* (1962) BLR 191 (CC). If the term is not made void by Section 28, it will be difficult to argue that it is void under Section 23 as being opposed to public policy: see *Steel Bros v Ganny* at pp 459-461. It is hard to see that the public policy of Myanmar law, which seeks to uphold and enforce contracts, especially when a company has made the contract with its eyes wide open (see *Steel Bros v Ganny* at p 456), is offended by the idea that parties should agree to settle their disputes somewhere other than in the courts of Myanmar. It makes perfect sense that parties who could find themselves in litigation in several possible places make an agreement between themselves to cut down the number of places in which this may happen. Such an agreement is to be encouraged, not criticised.

58. The contract cannot oust, or annul, the jurisdiction of the courts as this is set out in the Code of Civil Procedure: two contracting parties cannot rewrite the Code of Civil Procedure. So for example, if one of them brings proceedings before the Myanmar court, and the other does not object, Sections 9 and 21 of the Code of Civil Procedure will mean that the court can and will adjudicate. That is because the contract does not, because it cannot, remove the jurisdiction of the court; and if one party who could enforce this term of the contract against the other decides not to do so, nobody else is going to interfere. The contractual promise will be treated as having been dispensed with, in accordance with Section 63 of the Contract Act, which provides that 'Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him...'

59. So the contract term will be considered to be legally valid. What will happen if, on the first occasion on which he has the chance to do so, the defendant objects to the jurisdiction of the Myanmar court ? The short answer is that the Myanmar court should put an end to the proceedings before it, on the basis that the plaintiff has contracted not to bring them. The most likely basis for its order will be Section 151 of the Code of Civil Procedure:

> **151. Saving of inherent powers of Court.** Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

60. Whether it dismisses the proceedings, or just suspends them temporarily, will be a matter for the court. If for example it is obvious that the foreign court will allow the proceedings

to be brought before it, the Myanmar court may just dismiss the proceedings. But if it is not yet clear whether the foreign court will agree that it does have jurisdiction, or if it is not clear that the proceedings will be able to be brought before the foreign court within a reasonable time, the Myanmar court may decide to suspend the Myanmar proceedings, to wait and see what happens overseas.

61. And suppose that, for some reason, the Myanmar court allows proceedings to continue even though the plaintiff has promised not to bring them. There will be a breach of contract, because the plaintiff has failed to perform his promise. There will be a cost, a loss, incurred by the defendant in defending himself in those proceedings which the plaintiff promised not to being; and Section 73 of the Contract Act provides that where loss is caused by a breach of contract, compensation may be claimed. It would appear that the defendant to those proceedings will have a perfect claim, or counter-claim, for damages.

62. All of this suggests that if the parties agree to the exclusive jurisdiction of the courts of a foreign country, this will be accepted by the Myanmar court as valid and binding on the parties, and will mean that any proceedings brought before the Myanmar court will be stopped. And if, by some chance, this does not happen, and the action in Myanmar is allowed to proceed, the defendant to those proceedings will be able to claim damages for breach of contract before the foreign court, even if he chooses not to bring such a claim in Myanmar.

63. It follows that to make a promise in these terms, agreeing to the exclusive jurisdiction of the foreign courts, is a very serious matter. There is little chance to back out of it if the other party decides to stick with it. But what difference does it make if the jurisdiction of the foreign court is said to be, or is held to be, be *non*-exclusive ? This brings us to our final example.

(10) All disputes arising from this contract shall be determined by the courts of Singapore which shall have non-exclusive jurisdiction to determine them

64. Why would anyone agree to the non-exclusive jurisdiction of a foreign court ? Let us suppose it means that the parties agree that either can sue there if they want, but that neither has to. What is the point of that ?

65. One answer emerges if we think about the enforcement of judgments after litigation. To put it simply, if you think your opponent's assets, such as his bank account, is in Singapore, the best way to get at those assets is to sue in Singapore and then enforce what will be a local judgment. But you may realise that by the time you come to sue, the assets which were once in Singapore have moved to some other place; and if you have to sue in Singapore, you will then have to try to enforce a Singapore judgment in a foreign country, and that will just make life more complicated, more expensive, more risky. So what you agree to is to the non-exclusive jurisdiction of the foreign court, so that – so far as you can arrange for it – you can sue the other party there if you wish, but do not have to sue there if, when the time comes, it is better to sue somewhere else. That is the main reason.

66. Let us think a bit more about this kind of contract term. What happens if – say – proceedings are commenced in Myanmar, but then the defendant to those proceedings starts proceedings in Singapore under the terms of this clause. What effect, if any, does this have on the Myanmar proceedings.

67. The starting point is: none; no effect. This follows from Section 10 of the Civil Procedure Code, which states that ‘

> Explanation:- The pendency of a suit in a foreign court does not preclude the courts in the Union of Myanmar from trying a suit founded on the same cause of action’

68. That means that the fact that there are proceedings in Singapore does not mean that the Myanmar court cannot proceed to hear the case before it. But stop and ask this: what did the non-exclusive jurisdiction clause actually mean ?

69. One possibility is that either side to the agreement promised not to object if sued in that country. But another is that neither side was under any obligation to sue in Singapore, but that if either party to the agreement did take advantage of it, did rely on it, then the other would show up and defend the claim in Singapore, and would not take, or continue, legal proceedings elsewhere. If that is the true meaning of it, it would become a breach of contract to sue or to continue to sue in Myanmar after one party has exercised the option of suing in the designated court.

70. This debate – about what a non-exclusive jurisdiction agreement actually means and involves – is still being carried on in England (and also in Singapore). It is not an easy question to answer; and it may be that there is more than one possible answer, the court being required to decide in each individual case what it meant. But for our purposes it is enough to show what such a clause looks like, and to pose the question what effect it may have.

C ONE FINAL POINT

71. Is it correct to say that where the parties to a contract have agreed on and chosen the court which they say will have jurisdiction to adjudicate any claims, they have also agreed on and chosen the law which will govern their contract, even though they have said anything about the law which will apply, at least in explicit terms ?

72. *China-Siam Line* suggests that one can make this connection. Where the contract said:

> ‘All claims must be made at the port of delivery’

the court felt able to say that

> ‘the implication is that the intention of the parties to the bill of lading is that the law of Burma is to apply to the claims made in respect of the goods which were to be delivered at Rangoon’.

73. Although that view was widely accepted at the time, it is less reliable today. What made it fashionable was that there were a number of English cases which had said that where parties made an express choice of English courts, they made an implied choice of English law (it was much less common for this to be said about choices of foreign courts). It was even ‘justified’ in Latin: *qui elegit iudicem elegit ius*: who chooses the court chooses the law.

74. It is less reliable today, and is probably wrong. Here is the reason any. It is nowadays quite common for a contract to contain a choice of law and a choice of jurisdiction. Where it contains one but not the other, it is much easier to see that the parties agreed on the law, but did not want to tie themselves to a choice of court; or (if it is the other way round), that they chose the court but did not want to choose the law. Why might they do that ? Perhaps because the law is always liable to change; perhaps because they could not agree, so decided to leave the matter open: who can say ? But the idea that if you choose the court you have already also chosen the domestic law of that court seems simply wrong. If you choose London to litigate, it would certainly not follow that you had also, and equally, chosen English law, say, to govern your contract. To choose the place where you will resolve disputes if a problem ever arises is a very different thing from choosing the law which will from the very first day of its birth govern the obligations of the contract from which a dispute may never arise.

75. It is even clearer with a choice of arbitration: if you choose to arbitrate in a particular city, you certainly do not choose the law of that place to govern your contract. You may choose that law to govern the process of arbitration, but certainly not to govern the contract. After all, most arbitrators are not legal experts; their expertise lies elsewhere.

76. All this means that if you want to choose the court, choose the court and say so; if you want to choose the law, choose the law and say so. Do it properly.

D CONCLUSIONS

77. The question where to sue, and the question of what law should be applied to the legal relationship – usually a contract – between the parties is a very important one. There is a common view that although these things are important, they are not given the focus and attention which they deserve. Of course, the real danger is that when a Myanmar party, with limited experience of these things, comes up against a foreigner who understands all too well how these clauses can be used to maximum advantage, the balance is an uneven one. No game is won unless you first understand the rules. My purpose was to try and show how, and why, contract terms of this kind matter, and may matter very much. Thank you for your attention.