

**Credit Suisse AG**  
**v**  
**Owner of the Vessel “CHLOE V”**

[2022] SGHCR 9

General Division of the High Court — Admiralty Suit No 102 of 2021 (Summons No 2171 of 2022)

Colin Seow AR

15, 19, 26 July, 2, 8 August 2022; 28 September 2022

*Civil Procedure — Costs — Security — Court’s discretion to allow security — Whether security stifled counterclaim — Whether overlap between claim and counterclaim militated against grant of order for security*

*Conflict of Laws — Jurisdiction — Asymmetric jurisdiction clauses — Whether such clauses fell within scope of Choice of Court Agreements Act 2016 (2020 Rev Ed) — Choice of Court Agreements Act 2016 (2020 Rev Ed)*

**Facts**

The claimant was the mortgagee of a vessel in connection with a loan facility extended by the claimant to the defendant. The claimant sued the defendant and obtained a warrant of arrest in respect of the vessel, on account of six events of default including, among other things, the defendant’s failure to make repayment under the facility. In respect of the claimant’s claim, the claimant obtained summary judgment and an appeal against this decision was dismissed. This left only the defendant’s counterclaim outstanding in these proceedings. The present application was filed by the claimant for security for costs in respect of the defendant’s counterclaim.

In the facility agreement, an asymmetric or unilateral jurisdiction clause was included providing that the courts of England had exclusive jurisdiction to settle any dispute arising out of or in connection with the agreement, but that the clause “is for the benefit of the [claimant] only. As a result, [the claimant] shall [not] be prevented from taking proceedings ... in any other courts with jurisdiction”. The preliminary issue was thus whether such asymmetric or unilateral jurisdiction clauses fell within the scope of the Choice of Court Agreements Act 2016 (2020 Rev Ed) (“CCAA”), which implemented the Convention on Choice of Court Agreements done at The Hague on 30 June 2005 (“Hague Convention”), such that the Singapore court, not being the chosen court, would be required to stay or dismiss the defendant’s counterclaim such as to render the present application moot.

**Held, allowing the application for security for costs:**

[Editorial note: The paragraphs enclosed within parentheses in the holdings below are not reported; they can be found in the unreported version of the judgment ([2022] SGHCR 9) on LawNet. The “Case(s) referred to” and “Legislation referred to” below list the cases and legislation referred to in the headnote and/or the paragraphs reported below.]

(1) Asymmetric or unilateral jurisdiction clauses were not intended to fall within the scope of the Hague Convention, and therefore the CCAA. It was clear from the preparatory work of the Hague Convention and the circumstances of its conclusion that such clauses were excluded from the meaning of "exclusive choice of court agreements" in that Convention. Thus, an order for a stay or dismissal of the defendant's counterclaim could not fundamentally even begin to be engaged under s 12 of the CCAA, irrespective of whether such an order was being applied for by the claimant or otherwise being considered by the court on its own motion: at [16] and [19].

(2) The jurisdictional threshold necessary to invoke the court's discretion on whether to order security for costs to be furnished had been met under both O 23 r 1 of the Rules of Court (2014 Rev Ed) and s 388 of the Companies Act 1967 (2020 Rev Ed) ("Companies Act"): (at [28]).

(3) In considering whether the court's discretion should be exercised to allow the grant of security for costs against the defendant in the present case, the two main issues were, based on the parties' respective cases: (a) whether an order for security for costs would stifle the counterclaim which the defendant contended was a genuine one; and (b) whether there was a close overlap between the claim and counterclaim such as to militate against the grant of an order for security for costs against the defendant: (at [30]).

(4) On whether ordering security would stifle the defendant's counterclaim, the court was not convinced that the counterclaim could be said to be ingenuine or likely to fail at the outset. However, it did not follow that the counterclaim would be unduly stifled if an order was made requiring the defendant to furnish security for costs. In this regard, the defendant was a corporation and not a natural person; the defendant had not complied with any of its outstanding adverse costs orders arising out of earlier summary judgment proceedings; and despite the defendant's apparent lack of funds and assets, the evidence revealed that it had a demonstrated ability to muster substantial financial resources to fund its dispute resolution needs, if required. To the extent s 388 of the Companies Act was being considered, the case for ordering security was also more compelling as the defendant was not ordinarily resident in Singapore: (at [35], [36], [39], [40] and [44]).

(5) On whether there was a close overlap between the claim and counterclaim such as to militate against the grant of security, the counterclaim had clearly found a life of its own in the action, especially given the outcome in the earlier summary judgment proceedings: (at [49]).

(6) In determining the quantum of the security to be ordered, the court had complete discretion and the Appendix G cost guidelines were a useful starting point. Given the appreciable measure of legal and industry-central complexities requiring the engagement of a number of experts for the present case, the estimated number of trial days, and the estimated disbursements, a fair and just estimate of the quantum of security for costs was S\$265,000. This sum was to be paid by the defendant either into court or by providing a first-class banker's guarantee on wording satisfactory to the claimant, within 14 days of this judgment failing which the counterclaim shall be stayed without need for further order or attendance: (at [65] and [66]).

**Case(s) referred to**

*Commerzbank AG v Liquimar Tankers Management Inc* [2017] 1 WLR 3497 (refd)  
*Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 (refd)  
*Etihad Airways PJSC v Flöther* [2020] QB 793, HC (Eng) (refd)  
*Etihad Airways PJSC v Flöther* [2022] QB 303, CA (Eng) (refd)  
*Gearing, Matthew Peter QC, Re* [2020] 3 SLR 1106 (refd)  
*Sahand, The* [2011] 2 SLR 1093 (refd)

**Legislation referred to**

Choice of Court Agreements Act 2016 (2020 Rev Ed) ss 3, 3(1)(b), 12  
Companies Act 1967 (2020 Rev Ed) s 388  
Evidence Act 1893 (2020 Rev Ed) s 59(1)(a)  
Rules of Court (2014 Rev Ed) O 23 r 1

*Daniel Liang, Corina Song and Teo Jen Min (Allen & Gledhill LLP) for the claimant; Thomas Tan and Kashvinder Kaur (Haridass Ho & Partners) for the defendant.*

[Editorial note: The appeal in Registrar’s Appeal No 304 of 2022 was dismissed by the High Court on 14 November 2022.]

28 September 2022

**Colin Seow AR:**

[Editorial note: Paragraphs 1 to 8 and 22 to 67 are summarised in the headnote, while paras 9 to 21 (summarised in the headnote in holding (1)) are reported below in full.

The complete text of the unreported version of the judgment in [2022] SGHCR 9 is available on LawNet.]

[...]

**Analysis*****Ancillary issue concerning the applicability of the Choice of Court Agreements Act 2016 (2020 Rev Ed)***

9 In the course of oral submissions in the application, it came to my knowledge that the facilities agreement dated 26 June 2019 (and as subsequently amended and supplemented on 30 August 2019 and 23 January 2020) (the “Facilities Agreement”) carries a jurisdiction agreement by way of cl 44.1, as follows:

**44.1 Jurisdiction of English Courts**

44.1.1 The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement or any non-contractual

obligations connected with it (including a dispute regarding the existence, validity or termination of this Agreement) (a **Dispute**).

44.1.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

44.1.3 This clause 44.1 is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.

[emphasis in original]

10 Clause 44.1 of the Facilities Agreement appears to be an asymmetric or unilateral jurisdiction clause not uncommonly adopted in international loan and financing agreements. It subjects the defendant in the present case to the exclusive jurisdiction of the courts of England if it wished to pursue legal proceedings against the claimant, but not the same *vis-à-vis* the claimant in respect of any legal proceedings that the claimant would pursue against the defendant.

11 Taking judicial notice – in accordance with s 59(1)(a) of the Evidence Act 1893 (2020 Rev Ed) – of the Choice of Court Agreements Act 2016 (2020 Rev Ed) (“CCAA”) which implements the Convention on Choice of Court Agreements done at The Hague on 30 June 2005 (the “Hague Convention”), a question which arises is whether an asymmetric or unilateral jurisdiction clause may be regarded as an exclusive jurisdiction clause falling within the scope of the CCAA, given that the United Kingdom and Singapore are contracting states to the Hague Convention since the time before the parties concluded the jurisdiction clause in cl 44.1 of the Facilities Agreement. If the answer to this question is in the affirmative, a second question would arise as to whether the Singapore court, not being the chosen court, is required to stay or dismiss the defendant’s counterclaim (that being the only claim pending in High Court Admiralty Suit No 102 of 2021 (“ADM 102”)), such as to render any application seeking security for costs from the defendant in Singapore court proceedings moot. In this regard, s 12 of the CCAA provides:

#### **Where Singapore court is not chosen court**

12.—(1) Despite any other written law or rule of law, if an exclusive choice of court agreement does not designate any Singapore court as a chosen court, a Singapore court must stay or dismiss any case or proceeding to which the agreement applies, unless the Singapore court determines that —

- (a) the agreement is null and void under the law of the State of the chosen court;
- (b) a party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement;

- (c) giving effect to the agreement would lead to manifest injustice or would be manifestly contrary in the public policy of Singapore;
  - (d) the agreement cannot reasonably be performed for exceptional reasons beyond the control of the parties to the agreement; or
  - (e) the chosen court has decided not to hear the case or proceeding.
- (2) This section does not affect the ability of a Singapore court to stay or dismiss the case or proceeding on other grounds.

12 As mentioned earlier at [7] above, the parties were invited to present further written submissions relating to the applicability of the CCAA to cl 44.1 of the Facilities Agreement. On this, the defendant concedes that cl 44.1 falls within the meaning of “exclusive choice of court agreement” as defined in s 3 of the CCAA. However, the defendant contends that no stay or dismissal of its counterclaim should be ordered pursuant to s 12 of the CCAA, because there has been no application made by the claimant seeking such a stay or dismissal.

13 The claimant accepts that there should be no stay or dismissal of the defendant’s counterclaim under s 12 of the CCAA as well, albeit on different grounds. In this regard, the claimant’s primary submission is that the CCAA does *not* apply to cl 44.1 of the Facilities Agreement, because cl 44.1 does not satisfy s 3(1)(b) of the CCAA which requires a jurisdiction clause, in order to qualify as an “exclusive choice of court agreement” under the Hague Convention, to:

- (b) [designate], for the purpose of deciding any dispute that arises or may arise in connection with a particular legal relationship, the courts, or one or more specific courts, of one Contracting State to the exclusion of the jurisdiction of any other court.

14 The claimant’s justifications in this regard are summarised as follows:

- (a) First, cl 44.1 does not designate “the courts, or one or more specific courts, of *one Contracting State to the exclusion of the jurisdiction of any other court*” [emphasis added] for the purposes of hearing any dispute arising out of the Facilities Agreement. Read as a whole, cl 44.1 admits of the possibility of having more than just the courts of one State having jurisdiction over any dispute arising out of or in connection with the Facilities Agreement, depending on whether it is the claimant or the defendant who is pursuing legal proceedings against the other.

- (b) Second, the *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (2013) published by the Hague Conference on Private International Law (“the Hague Convention Explanatory Report”), as well as Singapore’s Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005* (March

2013), reveal that asymmetric or unilateral jurisdiction clauses were *not* intended to be included within the scope of the Hague Convention.

15 The claimant also highlights that the English Court of Appeal in a 2020 decision (*ie*, *Etihad Airways PJSC v Flöther* [2022] QB 303 (“*Etihad Airways (EWCA)*”) has opined in *dicta* that the Hague Convention “should probably be interpreted as not applying to asymmetric jurisdiction clauses” (see *Etihad Airways (EWCA)* at [85]). This *dicta* in *Etihad Airways (EWCA)* takes precedence over two prior English High Court *dicta* decisions suggesting otherwise (see *Commerzbank AG v Liquimar Tankers Management Inc* [2017] 1 WLR 3497 at [36]–[39] and [74] (“*Commerzbank AG*”); *Etihad Airways PJSC v Flöther* [2020] QB 793 at [183]–[184] and [215]–[217] (“*Etihad Airways (EWHC)*”).

16 After careful consideration of the parties’ submissions, I am satisfied that asymmetric or unilateral jurisdiction clauses are indeed not intended to fall within the scope of the Hague Convention (and therefore the CCAA). Although, as the English High Court decisions in *Commerzbank AG* and *Etihad Airways (EWHC)* suggest, the wording in the definition of “exclusive choice of court agreements” in Art 3(a) of the Hague Convention may potentially include asymmetric or unilateral jurisdiction clauses (see *Commerzbank AG* at [74]; *Etihad Airways (EWHC)* at [215]), I am mindful that the interpretation of international instruments (including treaties) is not to be undertaken by reference only to the text, important as no doubt it is (see, *eg*, *The Sahand and other applications* [2011] 2 SLR 1093 at [66]). In this connection, the application of the Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331 (entered into force 27 January 1980) (“VCLT”) in the interpretation of treaties is not alien to the Singapore courts (see, *eg*, *Re Gearing, Matthew Peter QC* [2020] 3 SLR 1106 at [40]). Article 32 of the VCLT provides that:

#### Article 32

##### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

17 I find no difficulty regarding the Hague Convention Explanatory Report as an instructive supplementary means of interpreting Art 3(a) of the Hague Convention, having previously considered it to be a useful guide in relation to a case concerning the application of the Hague Convention for the purpose of the enforcement of an English judgment in Singapore

(see *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8). Paragraphs 105 and 106 of the Hague Convention Explanatory Report are germane to the present case:

105 **Asymmetric agreements.** Sometimes a choice of court agreement is drafted to be exclusive as regards proceedings brought by one party but not as regards proceedings brought by the other party. International loan agreements are often drafted in this way. A choice of court clause in such an agreement may provide, ‘Proceedings by the borrower against the lender may be brought exclusively in the courts of State X; proceedings by the lender against the borrower may be brought in the courts of State X or in the courts of any other State having jurisdiction under its law.’

106 *It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So agreements of the kind referred to in the previous paragraph are not exclusive choice of court agreements for the purposes of the Convention.* However, they may be subject to the rules of the Convention on recognition and enforcement if the States in question have made declarations under Article 22.

[emphasis added]

18 In *Etihad Airways (EWCA)* at [85]–[86], Henderson LJ (with whom Hickinbottom and Newey LJJs agreed) similarly opined the following (in *dicta*):

85 I am prepared to proceed on the basis that the Hague 2005 Convention should probably be interpreted as not applying to asymmetric jurisdiction clauses, although I emphasise that it is unnecessary for us to decide that question, and I do not do so. A strong indication that this was the deliberate intention of the framers of the Convention is provided by the Explanatory Report of Professors Trevor Hartley and Masato Dogauchi, who in their discussion of asymmetric agreements said at para 106:

‘It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So agreements of the kind referred to in the previous paragraph [i.e. asymmetric agreements] are not exclusive choice of court agreements for the purposes of the Convention.’

86 Further support for this conclusion may be found in the Diplomatic Minutes of the Meeting of Wednesday 15 June 2005, to which we were also referred by Mr Joseph. The minutes show that a proposal by the Swiss delegate to amend the proposed definition of an ‘exclusive choice of court agreement’ so as to make it clear that it included asymmetric jurisdiction agreement (by inserting the words ‘for some or all of the parties to the agreement’) was debated, but found no support. The amendment was then withdrawn.

19 It is therefore clear from the preparatory work of the Hague Convention and the circumstances of its conclusion that asymmetric or

unilateral jurisdiction clauses are excluded from the meaning of “exclusive choice of court agreements” in the treaty. Given also the clear illustration in para 105 of the Hague Convention Explanatory Report regarding the formulation in which an excluded asymmetric or unilateral jurisdiction clause may take (see [17] above), I find myself further assured in the present case that cl 44.1 of the Facilities Agreement as drafted indeed falls outside the scope of the Hague Convention. It follows that an order for a stay or dismissal of the defendant’s counterclaim cannot fundamentally even begin to be engaged under s 12 of the CCAA in the present case, irrespective of whether such an order is being applied for by the claimant or otherwise being considered by the court on its own motion.

20 Given the above analysis, it suffices for me to leave the issue concerning the applicability of the Hague Convention (and the CCAA) to asymmetric or unilateral jurisdiction clauses as determined. Any secondary issues raised (*eg*, whether s 12 of the CCAA may be invoked by the court on its own motion) are strictly speaking not necessary for my determination given the conclusion I have reached, and thus best left to be decided in a future case.

21 For completeness, I also highlight that the claimant has not advanced any alternative argument seeking a stay of the defendant’s counterclaim under general law.

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Reported by Kenneth Wang Ye.

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