that section 3(3) requires an immediate and direct, causally linked, increase in another person's estate (rather than a "but for" increase) as a result of an omission. They argued that the fact that the private pension trustees had a discretion whether or not to follow Mrs. Staveley's non-binding nomination broke the chain of causation. Lady Black held that this argument failed as it was too technical and legalistic.

Of the three issues that faced the court, it is the second concerning associated operations which is likely to have the greatest influence on IHT. Whereas the case has provided some important exploration of the concept of association, Lady Black's formulation of "relevantly associated" is plainly question begging.

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CONTRACTUAL VARIATIONS: LONG LIVE THE DOCTRINE OF CONSIDERATION?

IN the realm of contract law, the doctrine of consideration has fascinated many for centuries and has unsurprisingly generated a wealth of commentary. While the doctrine has withstood the test of time in so far as the formation of contracts is concerned, serious doubts have been cast over its continued "reign" in the context of contractual variations. In 2018, the UK Supreme Court in *Rock Advertising Ltd. v MWB Business Exchange Centres Ltd.* [2018] UKSC 24 decided that it was "unnecessary" and "undesirable" to deal with the "difficult" issue of whether the oral variation was supported by consideration given that the variation was invalid for want of the writing and signatures required under the licence agreement (at [17]–[18]). Many were understandably disappointed by the UK Supreme Court's failure to deal directly with the issue of consideration (Janet O'Sullivan, "Party-Agreed Formalities for Contractual Variation: A Rock of Sense in the Supreme Court?" (2019) 135 L.Q.R. 1, 6). Very recently, a specially constituted five-judge bench of the Singapore Court of Appeal in *Ma Hongjin v SCP Holdings Pte Ltd.* [2020] SGCA 106 had occasion to consider whether the time has come for the doctrine of consideration to be abolished with regard to contractual variations. This decision is particularly significant because of the reasons given by the Singapore apex court in favour of retaining the doctrine even in the context of contractual variations.

Ma Hongjin involved a convertible loan agreement which was entered into between the appellant and the respondent on 6 January 2015. Under the convertible loan agreement, the respondent had to pay interest at the rate of 10 per cent per annum in exchange for the appellant's extension of a S$5 million loan for a period of two years. Subsequently, the parties

re-negotiated some of the terms of the convertible loan agreement and entered into a supplemental agreement on 16 April 2015. While the supplemental agreement imposed additional obligations on the respondent, none was imposed on the appellant. In January 2016, the respondent made payment of S$500,000 but did not pay the S$250,000 facility fee which was stipulated under the supplemental agreement. The appellant therefore brought an action against the respondent to recover, inter alia, payment of the facility fee. The main defence relied upon by the respondent was that the supplemental agreement was unenforceable because it was unsupported by consideration.

At first instance, the Singapore High Court held that consideration is required not only for the formation of contracts but also for contractual variations. In particular, the High Court ruled that it was bound by the doctrine of precedent to follow a previous decision of the Singapore Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] SGCA 3 that was handed down more than a decade ago, where it was decided that the doctrine of consideration was part of Singapore's law of contract. On appeal, the Singapore Court of Appeal in *Ma Hongjin* astutely pointed out that *Gay Choon Ing* involved the operation of the doctrine of consideration in relation to the formation of contracts while *Ma Hongjin* raised a different issue as to whether consideration is required for contractual variations (at [3]). On this basis, the Court of Appeal accepted that the latter issue was not foreclosed in Singapore by virtue of *Gay Choon Ing* (at [4]). This joy, however, was short-lived. The Court of Appeal unanimously dismissed the appeal and preferred to retain the doctrine of consideration in the context of contractual variations, offering five reasons for its decision.

Notably, three of the reasons related to *Gay Choon Ing*. First, the Court of Appeal reaffirmed its "provisional view" in *Gay Choon Ing* that maintenance of the status quo was the most practical solution as the courts will have a range of legal options to achieve a fair and just result (at [61]). Second, and relatedly, the Court of Appeal observed that there were still difficulties with regard to the possible alternatives to the doctrine of consideration which were mentioned in *Gay Choon Ing* (at [62]). Third, the Court of Appeal questioned whether the abolition of the doctrine of consideration in the context of contractual variations was "the thin end of the legal wedge" and raised a more general issue as to whether the doctrine as a whole should be abolished (a point which, in the Court of Appeal's view, was already dealt with in *Gay Choon Ing*) (at [94]). It is submitted that the Court of Appeal's over-reliance on *Gay Choon Ing* is concerning. To begin with, the issue of reforming consideration was merely addressed in a *coda* to the judgment in *Gay Choon Ing* as "no fundamental difficulties with respect to the doctrine of consideration were raised on the facts" (*Gay Choon Ing*, at [92]). Interestingly, the Judge of Appeal who delivered the judgment in *Gay Choon Ing* even revealed that he was "prepared to

leave [the coda] out" and "really did not mind if [his brother judges] thought it inappropriate to include this coda" (Address by Judge of Appeal Andrew Phang, "Valedictory Reference in Honour of Justice Chao Hick Tin", 27 September 2017, at [7]). In the light of this, the excessive weight placed on *Gay Choon Ing* is questionable, especially given that the Court of Appeal's "provisional view" in *Gay Choon Ing* did not constitute the *ratio decidendi* of the case itself.

The other two reasons given by the Court of Appeal are more significant. The Court of Appeal was reluctant to abolish the requirement for consideration in the context of contractual variations because it was of the view that other Commonwealth jurisdictions still very much retain the requirement (at [93]). Whilst the Court of Appeal's detailed review of the relevant case law in the Commonwealth is commendable, it is submitted that the Court of Appeal should not be constrained by the laws of other jurisdictions. Pertinently, a recent study shows that the Singapore courts have in fact developed Singapore's law of contract independently on a number of previous occasions (Andrew Phang, Goh Yihan and Jerrold Soh, "The Development of Singapore Law: A Bicentennial Retrospective" (2020) 32 Singapore Academy of Law Journal 804, 848). Looked at in this light, *Ma Hongjin* was a golden opportunity for the Court of Appeal to cut the apron strings of consideration with regard to contractual variations. Unfortunately, this opportunity was not taken up.

Finally, the Court of Appeal considered the argument that consideration is not required for contractual variations since parties who are already in a contractual relationship have a degree of interdependence and are likely to exercise flexibility in order to advance their common enterprise (Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 Singapore Academy of Law Journal 566, 578–80). The Court of Appeal was not persuaded by this argument as it thought that this was not the only possible perspective (at [64]). It is submitted that the Court of Appeal's rejection of this argument conflicts with the new reality we live in today, where cooperation and collaboration are extremely crucial. Against the backdrop of the COVID-19 pandemic, there are strong policy considerations justifying the need for "some give and take" and "team play" amongst parties who are already in a contractual relationship (Tan, p. 578). Incidentally, just last year, the UK Government issued a "Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency", where it highlighted the importance of "acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes" (at [14]). In this regard, the abolition of the doctrine of consideration in the context of contractual variations would better reflect "the notion in a going transaction situation that the parties are already in a contractual relationship and are simply adapting it to changed circumstances" (*Rosas*, at [180]). On the

contrary, the Court of Appeal's suggestion in *Ma Hongjin* that optimistic parties could exclude the requirement for consideration for contractual variations by making that clear at the point of contractual formation (at [66]) is unattractive given that "there is a limit to human foresight" (Tan, p. 579).

Ultimately, there is much merit in taking a closer look at *Ma Hongjin* and the reasoning therein. Whilst the fate of the doctrine of consideration in the context of contractual variations is largely sealed in Singapore, a beacon of hope remains in the UK (notwithstanding the disappointment caused by *Rock Advertising Ltd.*). Hopefully, one does not have to wait for another "134 years for this issue to finally reach [the] highest court" in the UK (Robert Harris, "Modifications, Wrangles, and Bypassing" [2018] L.M.C. L.Q. 441, 449). But when the day eventually comes, perhaps the "reign" of the doctrine of consideration for contractual variation may finally come to an end.

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APPLICABLE LAW AND ARBITRATION AGREEMENTS

In *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38 the Supreme Court considered what law applies to arbitration agreements.

The claim concerned a fire at a power plant in Russia. Chubb, the insurer, paid out to the owner, subrogated to its rights, and brought a claim in the Moscow court against a subcontractor, Enka, claiming its allegedly defective work during the construction of the plant was responsible for the fire. The arbitration agreement was part of Enka's subcontract. The subcontract was governed by Russian law. The arbitration agreement itself was silent on choice of law but provided for arbitration under the auspices of the International Chamber of Commerce, with its seat in London. Enka applied for an anti-suit injunction in London to force the dispute out of the Russian court and into arbitration. The governing law of the arbitration agreement was relevant because it would affect how widely the arbitration agreement would be construed, and whether Chubb's claim would fall into its scope, triggering injunctive relief.

The 1980 Rome Convention on the Law Applicable to Contractual Obligations and the Rome I Regulation (593/2008/EC) were not drafted to cover the applicable law for arbitration agreements. This was not for particularly convincing reasons, and against UK objections during negotiations on the Convention: see M. Giuliano and P. Lagarde, OJ C 282/2, 31 October 1980, 11–12. The UK should take advantage of leaving the EU