Singapore Journal of Legal Studies
[1991] pp. 103 - 125

STAY OF ACTIONS BASED ON EXCLUSIVE JURISDICTION CLAUSES UNDER ENGLISH AND SINGAPORE LAW *(PART I)*

This article examines the problems arising from the current approach relating to the stay of proceedings commenced in breach of exclusive jurisdiction agreements. Both Singapore and English cases are referred to. A new approach is proposed in response to these problems.

I. THE CONCEPTUAL FRAMEWORK

A. *The Eleftheria*[1] *Approach*

IN international contracts, parties often include a clause whereby they agree to refer any dispute arising from the contract[2] to the exclusive jurisdiction of the courts of a particular country. The insertion of such a clause serves two main purposes, both of which can be traced to the need for commercial certainty in litigation: first, to enable the contracting parties to agree on a specified forum, which is to have sole competence over any dispute arising out of the contract, thereby reducing the possibility of one party having to litigate in an unfamiliar forum, and, secondly, by such agreement to submit the potential defendant to the jurisdiction of that forum.

The validity of such a clause is controlled by the proper law of the contract,[3] though a clause valid by the proper law of the contract may

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1 *The Owners of Cargo lately laden on board the ship or vessel "Eleftheria"* v. *"The Eleftheria" (Owners), 'The Eleftheria'* [1969] 1 Lloyd's Rep. 237.

2 Parties cannot escape from the jurisdiction clause simply by framing their action in tort. The essential issue is whether upon a construction of the clause, the parties agreed to refer the dispute at hand to the specified forum. See *'The Sindh'* [1975] 1 Lloyd's Rep. 372. See also S. Knight, "Avoidance of Foreign Jurisdiction Clauses in International Contract" (1977) 26 I.C.L.Q. 664.

The factors that influence forum selection are legal as well as extra-legal. These include the convenience and familiarity of the forum to the two parties, the experience of the judiciary in dealing with the subject matter of the contract, court procedure, possible judicial partiality in favour of local interests or policies, the express choice of law as well as the relative bargaining powers between the parties. See E.F. Scoles and P. Hay, *Conflict of Laws* (1982), pp. 351-363. See also, G. Delaume, *Law and Practice of International Contracts* (1988), pp. 173-198 for a comparative perspective.

3 *Dubai Electricity Co.v. Islamic Republic of Iran Shipping Lines,' The Iran Vojdan* '[1984] 2 Lloyd's Rep. 380; *'The Frank Pats'* [1986] 1 Lloyd's Rep. 529. See also L. Collins *et al.* (eds.) *Dicey and Morris on the Conflict of Laws* (11th ed., 1987), Vol. 1, comment to Rule 34, p. 405 and O. Kahn-Freund, "Jurisdiction Agreements: Some Reflections" (1977) 26 I.C.L.Q. 825 at 827.

still be nullified by any mandatory statutes of the forum in which the action is subsequently brought.[4] Whether a jurisdiction clause is exclusive or not is a matter of interpretation and hence, a matter also to be resolved by the proper law,[5] as is the infrequent question of whether, if the clause is exclusive, the claim which is the subject matter of the action falls within its ambit.[6] Even though the parties cannot by an exclusive preference for a foreign forum oust the jurisdiction of the local court if it otherwise exists, their choice has the effect of furnishing a ground against the exercise of jurisdiction possessed by the local court.[7]

Notwithstanding these fundamental limiting principles, the contractual autonomy of deciding on a forum is still very great and commercial parties bargaining at arm's length should weigh the procedural and substantive advantages[8] before deciding on a particular forum. Should one party subsequently and in breach of the contract institute an action in a forum other than the agreed one,[9] the forum in which the action

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4 *'The Hollandia'* [1982] 3 All E.R. 1141. See also the local decision of *'The Epar'* [1985] 2 M.L.J. 3. *Cf. Lister (R.A.) & Co. Ltd. and Others* v. *E.G. Thomson {Shipping) Ltd. and Others, 'The Benarty'* [1984] 2 Lloyd's Rep. 244. These cases deal with the effect of the Hague-Visby Rules, which form part of the statutory *lexfori*, on exclusive jurisdiction clauses.

5 *Evans* Ma«Aa//v.Berfo/a[1973] lW.L.R.349atp.361;f/oerterv. *Hanover Caoutchouc, Gutta Percha and Telegraph Works* (1893) 10 T.L.R 103; Dicey and Morris *supra,* note 3 at p. 404. However, some cases appear to apply local principles of construction without reference to the foreign proper law. M. Pryles in his article, "Prorogation and Arbitration Agreements" (1976) 25 I.C.L.Q. 543, 552, explains this apparent inconsistency on the basis that the foreign proper law in these cases is not proved to be different from the *lex fort* and so, the presumption is that the foreign law is the same as the *lexfori.* The exclusivity of the clause is a question entirely of construction, irrespective of whether the word "exclusive" is used. See *Sohio Supply Co* v. *Gatoil* (USA) Inc. [1989] 1 Lloyd's Rep. 588, at p. 591 citing with approval Dicey and Morris *supra,* note 3 at p. 404 footnote 93, subject to the possible exception of insurance contracts, see *S & W Berisford* v. *New Hampshire Insurance* [1990] 2 All E.R. 321. *Cf. Westcott* v. *Alsco Products* (1960) 26 D.L.R. (2d) 281; *Contractors Ltd.* v. *M.T.E. Control Gear Ltd.* [1964] S.A.S.R. 47 which held that use of the word "exclusive" is necessary. If a clause is held to be non-exclusive, its effect is to confer jurisdiction on the specified forum without foreclosing the parties' right to sue elsewhere. Thus under English law, if an action is commenced outside the specified non-exclusive forum, it cannot be stayed solely on account of the jurisdiction clause.

6 *DSV Silo-und Verwaltungsgesellschaft GmbH* v. *"The Sennar"* (Owners), *'The Sennar' (No. 2)* [1984] 2 Lloyd's Rep. 142.

7 *TheFehmarn'* [1958] 1 W.L.R. 159; M. Pryles, "Prorogation and Arbitration Agreement" see *supra,* note 5 at p. 556.

8 As Chief Justice Burger remarked in the seminal decision of M.S. *Bremen* v. *Zapata Off-Shore Co.* 407 U.S. 1 (1972), at p. 14 "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing their monetary terms, with the consequences of the forum clause figuring prominently in their calculations." After *Zapata's* case, the American approach towards jurisdiction clause may be said to be broadly similar to the English approach. See J. Becker, "Forum Selection and Anglo-American Unity" (1973) 22 I.C.L.Q. 329.

9 The discussion in this article is confined to the situation where the jurisdiction of the forum in which the action is actually brought is invoked as of right. For an example of a case where the plaintiff is seeking the court to exercise its discretionary jurisdiction under Order 11 Rule 1(1) of the Rules of Supreme Court notwithstanding a foreign jurisdiction clause, see *Evans Marshall* v. *Bertola SA* [1973] 1 W.L.R. 349.

is brought will usually exercise its inherent discretion to grant a stay of the action. By exercising its jurisdiction negatively, the forum court is indirectly enforcing the jurisdiction clause and so realising the parties' legitimate expectations.[10] This is nothing more than an application of the principle of the freedom of contract: parties should be held to what they have voluntarily agreed upon. As Brandon J. (as he then was) observes in the leading English case of *'The Eleftheria':*

> I think it is essential that the court should give full weight to thepn'/na *facie* desirability of holding the parties to their agreement. In this connection I think that the court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience.[11]

Prima facie, a court would stay an action; however, if the plaintiff can discharge the burden of proving a strong cause for bringing the action before it instead of the agreed forum, a court may exercise its discretion to refuse to stay the action. The task confronting the plaintiff is a difficult one; it involves showing more than that the present forum is *a forum conveniens.*[n] In exercising its discretion, a court has to take into account all the circumstances of the case. In particular, Brandon J. in *'The Eleftheria"* set down the following guidelines for the court's consideration:[13]

(a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the forum or abroad.
(b) Whether the law of the foreign court applies and, if so, whether it differs from the *lex fori* in any material respect.
(c) With what country either party is connected and, if so, how closely.
(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
  (i) be deprived of security for their claim;
  (ii) be unable to enforce any judgment obtained;
  (iii) be faced with a time-bar not applicable here; or
  (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

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[10] *Zapata's* case, see *supra,* note 8 at p. 12.
[11] See *supra,* note 1 at p. 245.
[12] *Dicey and Morris,* comment to Rule 34 clause(2); see *supra,* note 3 at p. 412.
[13] See *supra,* note 1 at p. 242.

More than one decade after it was enunciated, this *Eleftheria* approach of presumption of stay was re-affirmed in 1981 by the (English) Court of Appeal in *'The El Amria'*.[14] Cases thereafter tend to cite *'The El Amria'* instead of *'The Eleftheria'* but the approach throughout has been similar.

These guidelines were accepted in Singapore in the case of *Amerco Timbers Pte Ltd.* v. *Chatsworth Timber Corporation*[15] (although the Court of Appeal did not refer specifically to *'The Eleftheria'*), with one refinement. It was held that for there to be a strong cause, the presence of "exceptional circumstances" must be demonstrated by the plaintiff who wants to resist the stay of his action. The *Amerco* decision was followed, and hence the modified *Eleftheria* guidelines reiterated, in three other local decisions, namely that of *The 'Maldive Importer'*,[16] and more recently, *'The Asian Plutus'*[11] and *'The Vishva Apurva'*.[1]*

B. *The Spiliada Approach*

The *Eleftheria* approach set out above is inapplicable where an action has been commenced without breaching any exclusive foreign jurisdiction agreement.[19] Barring the presence of an arbitration agreement,[20] if such an action is sought to be stayed, the court will instead consider whether there is another forum clearly more appropriate than itself to hear the case. This approach is based on the doctrine of *forum non conveniens.*

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[14] *Aratra Potato Co Ltd* v. *Egyptian Navigation Co, 'The El Amria'* [1981] 2 Lloyd's Rep. 119.

[15] [1977] 2 M.L.J. 181.

[16] *Owners of Cargo laden on the M.V. "Maldive Victory"* v. *Owners of the M.V. "Maldive Importer", 'The Maldive Importer'* [1986] 1 M.L.J. 12.

[17] *Owners of Cargo lately laden on board the Ship or Vessel "Asian Plutus"* v. *Owners and other persons interested in the Ship or Vessel "Asian Plutus", 'The Asian Plutus'* [1990] 2 M.L.J. 449.

[18] *The Owners of Cargo lately laden on board the ship or vessel "Vishva Apurva"* v. *The Owners of and other Persons interested in the ship or vessel "Kalidas", 'The Vishva Apurva'.* Unreported judgment of Chua J. sitting in the High Court of Singapore (Admiralty *in rem* No 230 of 1988, written judgment dated 29 Jan 1991). The same learned judge followed the *Eleftheria* approach in another decision, *Weaving Supplies Cooperation & Ors.* v. *The "Carl Offersen" Owners, 'The Carl Offersen'* [1979] 2 M.L.J. 55 although it was, with respect, probably a misapplication because nowhere in the judgment did he indicate that an exclusive foreign jurisdiction clause was present.

[19] This statement covers the situation where trial is commenced at the agreed forum, see *S &W Berisford* v. *New Hampshire Insurance Co.* [1990] 2 All E.R. 321. In *Berisford,* the court held that it had no jurisdiction to stay the proceedings because of provisions found in the (U.K.) Civil Jurisdiction and Judgment Act, 1982 but went to say that if it had the jurisdiction, the forum agreement would be an important matter to consider in the exercise of its discretion. See Part II of this article.

[20] Two regimes of statutory rules govern stay of action brought in England in breach of arbitration agreements, depending on whether the agreement is domestic or not. See the English Arbitration Acts of 1950 and 1975. The Singapore position is similar, see Arbitration Act (Cap. 10, 1985 Rev. Ed.) and Arbitration (Foreign Awards) Act (Cap. 10A, 1985 Rev. Ed.). This third approach towards stay of proceedings adopted in arbitration cases is not within the scope of this article and nothing further shall be said of it.

The development of this doctrine[21] was set in motion by the breakthrough achieved in *'The Atlantic Star'*.[22] It gained momentum with the next landmark decision of *MacShannon* \. *Rockware Glass Ltd.*[23] where the existing abuse of process justification for stay was abandoned in favour of a formula that was, in substance if not in theory,[24] based on the appropriateness or naturalness of the forum, the latter being defined in terms of the convenience and expense of trial. This formula is found in Lord Diplock's statement:

> In order to justify a stay, two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.[25]

Lord Diplock's formula was somewhat qualified by Lord Brandon in *'The Abidin Daver'*[26] who while agreeing with the above statement, went on to balance the factors in favour of and against granting a stay, apparently reinstating the need for a "critical equation" which was first proposed by Lord Wilberforce in *"The Atlantic Star"*. With this additional requirement, proof of a legitimate advantage by the plaintiff would not neccessarily lead to a stay. *'The Abidin Dover'* was also significant for marking the eventual approval of the doctrine *of forum non conveniens* by English courts. The evolution of the doctrine culminated with Lord Goff's seminal judgment in *'The Spiliada'*[27] where his Lordship revised and expanded on the policy basis of the doctrine which was hitherto thought to be confined mainly to convenience of trial.[28] Citing the Scottish decision of *Sim* v. *Robinow*[29] he clarified that the basic principle that

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21 For a fuller account, see A. Briggs, *"Forum non Conveniens* — Now We are Ten ?" (1983) 3 L.S. 74 and "The Stay of Actions on the Ground of *"forum Non Conveniens"* in England Today" [1984] 2 L.M.C.L.Q. 227.

22 *The Motor Vessel "Atlantic Star" (Owners)* v. *Motor Vessel "Bona Spes" (Owners), 'The Atlantic Star'* [1974] A.C. 436 where the prevailing test that governed stay of proceedings, that of vexation and oppression on the part of the plaintiff, was given a more liberal interpretation.

23 [1978] A.C. 795.

24 In *MacShannon,* the House of Lords did not consider the doctrine to be part of English law.

25 *Supra,* note 23 at p. 812.

26 [1984] A.C. 398.

27 *Spiliada Maritime Corporation* v. *Cansulex Ltd., 'The Spiliada'* [1986] 3 All E.R. 843. At p. 854, Lord Goff regarded Lord Diplock's formula in *MacShannon* as a "tentative statement at an early stage of a period of development". The *Spiliada* approach has, however, been rejected by the High Court of Australia in *Oceanic Sun Line Special Shipping Co. Ltd.* v. *Fay* (1988) 79 A.L.R. 9 and *Voth* v. *Manildra Flour Mills* (1990) 65 A.L.J. 83.

28 His Lordship exhorted trial judges to look beyond factors relating to convenience and expenses. See [1986] 3 All E.R. 843 at p. 856.

29 (1892) 19 R. 665.

underpins the whole doctrine of *forum non conveniens* is the search for an appropiate forum, one where the case may be tried more suitably for the interests of all the parties and the ends of justice.

According to Lord Goff, the defendant who moves to have the proceedings stayed has the burden of proving that the forum in which the action is commenced is not appropriate for the trial. That there is another available forum, having competent jurisdiction, which is clearly more appropriate, taking into account connecting factors such as convenience and expense of trial (including availability of witnesses), the *lex causae* and the parties' residence or place of business. If such other forum exists, it becomes *prima facie* the appropriate forum. The burden of proof then shifts to the plaintiff to show the presence of *special circumstances* by reason of which justice requires that the trial should, nevertheless, take place in the original forum. In the latter inquiry, the court would look at all the circumstances of the case including factors that go beyond those already taken into account in the ascertainment of the natural forum, since its ultimate concern is the interests of the parties and the ends of justice. However, proof of the deprivation of a legitimate personal or juridical advantage to the plaintiff in having the action stayed would be accorded less importance henceforth. It has been said that this approach tends towards "a more one-sided stance in favour of normally granting a stay in cases where there is a clearly more appropriate forum abroad."[30]

Recently, the High Court in Singapore adopted the *Spiliada* approach in *JH Rayner* v. *Teck Hock & Co*,[31] a case involving service of notice of writ out of jurisdiction. It is submitted that the application of the approach should extend to a stay of proceedings started in Singapore as well, although there is yet to be a direct authority locally.[32]

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[30] P.M. North and J.J. Fawcett (eds.) *Cheshire and North's Private International Law* (11 ed., 1987), at p. 231.

[31] [1990] 2 M.L.J. 142.

[32] In *'The Spiliada'*, Lord Goff made it clear that the doctrine applies both to stay of proceedings as well as service out of jurisdiction. The *Spiliada* approach towards stay was referred to in *'The Asian Plutus'* without any objection and the court in *JH Rayner* did not expressly confine the doctrine to the immediate issue of service out of jurisdiction. In at least one neighbouring jurisdiction, the *Spiliada* approach towards stay of proceedings has been enthusiastically endorsed, see *Syarikat Bumiputra Khamis* v. *Tan Kok Voon* [1988] 2 CLJ 883 (decision of the High Court of Brunei). Two local decisions on this area, *Lake Wan Tho* v. *MacDonald(l949)* 15 M.L.J. 293 and Sea *Breeze Navigation Company SA* v. *Owners of the "HsingAn", 'The H sing An'* [1974] 1 M.L.J. 45 applied the Sf. *Pierre* and' *The Atlantic Star'* tests. See *supra*, note 22 and *infra*, note 132. Furthermore, in *"The Blue Fruit", otherwise known as "The Bright Fruit", Owners and Others* v. *Keppel ShipyardLtd, 'The Blue Fruit'* [1979] 2 M.L.J. 279, the Singapore Court of Appeal made a finding *of forum conveniens* without much elaboration of principles which suggests that local law was perhaps even ahead of English law at the corresponding period which was still resisting the idea *of forum non conveniens.* See also R.H. Hickling "Singapore as a *Forum Conveniens: 'The Blue Fruit'"* (1980) 22 Mai L.R. 153. Judging from the fairly parallel developments in Singapore and England, similar local following could therefore be anticipated of the *Spiliada* doctrine *of forum non conveniens* as applied to stay of proceedings. See also, R.C. Mohan, "New Rules on *Forum Conveniens (Spiliada Maritime Corp.* v. *Cansulex Limited)"* (1987) 29 Mal.L.R. 104.

C. *Dichotomy of Approaches*

From the above discussion, it can be surmised that English law recognises two distinctive approaches towards stay of actions, depending on whether or not the proceedings have been brought in breach of a foreign jurisdiction agreement. Where such a breach exists, the *Eleftheria* approach applies; otherwise, the approach relevant is the *Spiliada* formulation *of forum non conveniens.* By and large, English courts have eschewed the merging of the two approaches, an attitude typified by the following *dictum* from Stephenson L.J. in *'The El Amria':*

> *I* would go no further towards assimilating the court's duty in considering a stay to enforce a foreign jurisdiction clause to its duty in considering a stay sought for a different purpose as in *MacShannon* v. *Rockware Glass.*[33]

This dichotomy of approaches has been accepted by the local courts recently. In *'The Asian Plutus'*, Yong J. (as he then was) drew a clear distinction between staying an action on the ground of an exclusive foreign agreement and staying it on the ground *offorum non conveniens.* Consequently, landmark authorities on the latter, such as *'The Altantic* Star',[34] *MacShannon* v. *Rockware Glass Ltd^* and *'The* S/?//iada'[36]were not relevant for the resolution of the case. One major difference perceived by Yong J. between the two approaches is the burden of proof. The plaintiff has the burden of proving strong cause to deny effect being given to the jurisdiction agreement whereas in the absence of such agreement, it is incumbent upon the defendant seeking a stay to show that there is another clearly more appropriate forum.[37]

The difference in the burdens of proof can be explained by the difference in the underlying policies of the two approaches. Since it is imperative

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[33] See *supra,* note 14 at p. 129.
[34] See *supra,* note 22.
[35] See *supra,* note 23.
[36] See, *supra* note 27.
[37] *Quaere,* however, what is the position here if the plaintiff is seeking leave for service out of jurisdiction in the face of a foreign jurisdiction agreement? Would our courts follow *Evans Marshall's* case, *supra,* note 5 which imposes a very heavy burden on the plaintiff to persuade the court not to give effect to the clause, or would the jurisdiction clause be regarded as a connecting factor, albeit a weighty one, to be taken into account in the determination of the forum conveniens, applying *'The Spiliada'l* See *Re Jogia (a bankrupt)* [1988] 2 All E.R. 328 where the brief reasoning of the court provides no clear support for either of the above approaches. See also *Oceanic Sun Line's* case, *supra,* note 27, a case involving service out of jurisdiction where the jurisdiction clause was held not to have been incorporated in the contract. *Cf.* on the point of incorporation, *Re Jogia, loc. cit.*

that parties should adhere to their agreement, a plaintiff who breaches his jurisdiction agreement has to show a strong cause (which is more than showing the actual forum to be convenient or even appropriate) before he is allowed to continue with the action, while an action properly commenced in a forum should not be discontinued unless the defendant can persuade the court that justice and the interest of the parties are better served if the action is heard elsewhere.

With the above conceptual framework in mind, this article seeks to make three inquiries:

i. to examine the extent to which the local cases mentioned above, particularly *'The Asian Plutus*,* have faithfully applied the *Eleftheria* approach,
ii. to identify some of the problems encountered in the application of the *Eleftheria* approach and consider whether in the light of these problems, the dichotomy should nevertheless be preserved, and
iii. if, as it would be argued, the stringency of the *Eleftheria* approach has been *(albeit* subtly) watered down by the English courts and the dichotomy consequently reduced into a matter of form, to suggest an alternative approach which encapsulates both the doctrine of *forum non conveniens* as well as the policy considerations that underscore the *Eleftheria* approach, and which Singapore courts might consider adopting.

II. SINGAPORE CASES

The position in Singapore is incontrovertible after the repeated acceptance of the *Eleftheria* approach but what still remains as fruitful exploration is the extent to which it has correctly been applied. As the following analysis attempts to demonstrate, the usual alacrity in adopting English principles is no assurance that they will be thoroughly understood or uniformly employed.

A. *Amerco* v. *Chatsworth*[3]*

This Court of Appeal decision, the first reported local decision in this area, concerned an action started in Singapore by the plaintiffs, who were the owners of a cargo of logs damaged by sea water, in defiance

38 See *supra,* note 15.

of a jurisdiction clause[39] found in the bill of lading which referred all disputes to the Djakarta courts.

The defendants, who issued the bill of lading, quite naturally sought to stay the proceeding on account of the foreign jurisdiction clause. Their first contention, that the contract was governed by Indonesian law, did not persuade the court because that law was not shown to be so materially different from Singapore law. The court also rejected the claim that it was extremely difficult to get Indonesian witnesses to testify in Singapore since they were not material witnesses to begin with.

However, concerning the plaintiffs' submissions, the court did not attach much weight to the fact that a greater connection existed between the parties and Singapore than Indonesia nor was it convinced that the Indonesian courts would not give effect to the Hague Rules, to which the contract was subject, simply because they were not part of Indonesian domestic law. The defendants' offer to waive the time-bar in Indonesia and to furnish security for any judgment obtained there effectively neutralised a strong procedural advantage which the plaintiff would have had in bringing the action in Singapore. Thus far, the case was finely balanced.

The ground that swung the case in the plaintiffs' favour was the availability of all the key witnesses of both parties to testify in Singapore. The presence of practically all the evidence locally strengthened the plaintiff's case, since trial here would be more convenient and inexpensive, while failing "to add any weight whatever to the [defendants'] *prima facie* case for a stay of proceedings here based on the foreign jurisdiction clause."[40]

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[39] The clause provided that "all actions under this contract be brought before the court at Djakarta and no other court shall have jurisdiction with regard to any such action *unless the carrier appeals to another jurisdiction or voluntarily submits thereto."* (Emphasis added.) [1977] 2 M.LJ. 181 at p. 182. It is possible to look upon the clause as *& floating* choice of jurisdiction clause (analogous to a floating choice of law clause) since it provides for a subsequent variation of the exclusive forum at the option of the carrier, if he brings an action under the contract. The wording of this clause is broadly similar to that in *'The Frank Pals'* [1986] 1 Lloyd's Rep. 529. The validity of such clauses is determined by the proper law of the contract, see *'The Iran Vojdan'* [1984] 2 Lloyd's Rep. 380. Under English law, such a floating clause would probably be permitted, see *Armadora Occidental S.A.* v. *Horace Mann Insurance Co* [1977] 1 W.L.R. 1098 and *CantieriNavaliRiuniti SpA* v. *NVOmne Justitia, 'The Stolt Marmaro'* [1985] 2 Lloyd's Rep. 428 but *'The Frank Pats', ibid.,* appears to have come to an opposite conclusion. See the helpful article written by A. Briggs, "The Validity of 'Floating' Choice of Law and Jurisdiction Clauses" [1986] L.M.C.L.Q. 508. The point was not argued in the *Amerco* decision, unfortunately. One ventures to suggest that had it been, the clause would probably be valid since the proper law of the contract, being Indonesian law, was not proved to be dissimilar to Singapore law which probably adopts the English position. But in any case, since the action was not brought by the carrier, he could not exercise his right under the clause to vary the venue even if he was so minded. The practical effect of the clause was that it conferred exclusive jurisdiction on Indonesian courts, an inference confirmed by the court's employment of the *Eleftheria* guidelines. If deemed invalid by the English proper law, it is likely that merely the portion of the clause providing for the floating facility would be struck off, see *'The Frank Pats', ibid.*

[40] See *supra,* note 15 at p. 184.

It would appear from the decision that the "exceptional circumstances" that overrode the jurisdiction clause consisted of nothing more than the location of evidence and witnesses in Singapore which made trial here more convenient. Whereabouts of evidence and witnesses might be a material factor that made Singapore, to use the plaintiff counsel's language which the court did not object to, "a more appropriate forum",[41] but could appropriateness of venue *per se* be an *exceptional* circumstance? With respect, it could not be so. The Court of Appeal has erred in precisely the way that Brandon J. has warned against, which is deciding the issue on a preponderance of convenience after paying lip service to the sanctity of the chosen forum.[42]

B. *'The Maldive Importer'*[43]*

If the first local decision applying the *Eleftheria* approach failed to appreciate that rebutting the presumption of stay requires more than the demonstration of a convenient or even appropriate forum, the second decision of *'The Maldive Importer'* did not fare very much better either.

The plaintiffs were cargo owners who sued for loss of cargo in Singapore although the relevant bill of lading referred all disputes arising out of the contract to England or at the option of the defendants, to the port of destination which was the port of Male in the Maldives.[44] Several related actions concerning other cargoes damaged on board the same ship were also instituted in Singapore. A common issue in all these actions, including the plaintiffs', was the seaworthiness of the vessel.

After a recitation of the locally modified *Eleftheria* principles, the judge found as a fact that the possible witnesses were either located in Singapore or would be available to testify here. Evidence on the quantum of the claim was also situated in Singapore. Since practically all the evidence was in Singapore, it was the forum with which the transaction had the "closest nexus".[45] The court therefore refused to stay the action. A subsidiary factor was that since the related actions began in Singapore also involved similar factual disputes arising out of the common issue of seaworthiness, it was desirable to have all the actions, including the present one, tried by the same tribunal to avert the potentially embarassing result of having the same issue determined differently by

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41 See *supra*, note 15 at p. 182.

42 Stephenson L.J. in *'The ElAmria'* also cautioned against "treating the question whether to stay as one of convenient forum." See *supra*, note 14 at p. 129.

43 See *supra*, note 16.

44 This jurisdiction clause is also a floating one since there is an unilateral option to vary the forum. However, just as in *Amerco* v. *Chatsworth*, the point was not raised in this case. The discussion in note 39 applies here as well.

45 See *supra*, note 16 at p. 13.

two different tribunals.[46] The defendants' only contention, that trial in England would entitle them to a statutory limitation of liability was dismissed as an attempt purely to seek a procedural advantage.

Regrettably, the court did not consider the other factors listed in *'The Eleftheria'*, such as whether the governing law was a foreign law materially different from Singapore law, the court with which the parties had the closest connection and whether the plaintiff would be prejudiced if he had to sue in the chosen forum. A proper consideration of these factors might have added a different complexion to the outcome.

The two critical factors and the final outcome of the case though are very similar to what happened in *'The El Amria'* (little wonder the latter case was cited in support), which has been thought of as having subtly digressed from the principles of *'The Eleftheria'* towards the broader doctrine *of forum non conveniens.*^ Furthermore, the reference to "closest nexus" is infelicitious language for a stay action based on the *Eleftheria* approach. Emphasizing as it does the connection between an action and the forum, the court appears to veer towards the idea of *forum non conveniens.*[4]* The expression in substance rather resembles Lord Denning's quest in *'The Fehmarn'* for a country with which the dispute is most closely concerned, an approach regarded by some academics to be closely akin to *forum non conveniens.*[49]

C. 'The Asian Plutus'[50]

This recent decision of the High Court of Singapore concerned an appeal against the Registrar's order to stay an action which was commenced in Singapore in breach of an exclusive jurisdiction clause which stipulated the Tokyo District Court as the exclusive forum. The claim arose out of a contract of carriage of some lathe machines which arrived in Singapore damaged. The court was seised of jurisdiction to hear the claim under

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[46] This ground was implicit from the court's reference to a dictum in *'The El Amria'*, see *supra*, note 14 which stresses the need for consistent results in actions involving the same issues.

[47] See A. Briggs, "The Staying of Actions on the Ground of *'Forum Non Conveniens'* in England Today" [1984] L.M.C.L.Q. 227 at pp. 243-245.

[48] See Lord Keith's judgment in *MacShannon* v. *Rockware Glass Ltd.* where he defined a natural forum as one 'with which the action has the most real and substantial connection.' See *supra*, note 23 at p. 829.

[49] See *supra*, note 7 at p. 162. This case has been described as going "to the verge of the law", see Cheshire and North, *op. cit., supra*, note 30 at p. 238, footnote 2, a description Kahn-Freund concurred, see *supra*, note 3 at p. 851 footnote 147. In footnote 150 of Kahn-Freund's article, it is said that the decision was based on a doctrine of convenience closely akin *to forum non conveniens*, an opinion shared by G. Robertson in his article, "Jurisdiction Clauses and the Canadian Conflict of Laws" (1982) 20 Alberta L.R. 296 at p. 301. See also *Lewis Construction Co. Pty Ltd* v. *Tichauer SA* [1966] V. R. 341 which followed Lord Denning's test in *'The Fehmarn'*.

[50] See *supra*, note 17.

section 3(l)(g) of the High Court (Admiralty Jurisdiction) Act[51] since this was a claim for damage to goods carried in the ship. The plaintiffs were the owners of these lathe machines and they sued the defendants, who were owners of the "Asian Plutus", for breach of contract or alternatively, in negligence. The exclusive jurisdiction clause in question was found in the bill of lading which, *inter alia*, also contained a clause stipulating Japanese law as the proper law of the contract. Before the Registrar, the defendant obtained a stay of proceedings on certain conditions. Against this decision, the plaintiff appealed to the High Court but was unsuccessful.

"[I]n the absence of a relevant local law,"[52] Yong J. began by importing the *Eleftheria* appproach by virtue of section 5 of the Civil Law Act.[53] It may be recalled that under this approach, a court is likely to exercise its discretion to stay any proceedings brought in defiance of an exclusive jurisdiction clause. Allowing the action to continue would provide scope for the parties to dishonour their agreement into which they had freely entered. Another related policy justification pointed out by Yong J. is the court's reluctance to arrogate jurisdiction over parties who by the jurisdiction clause have already submitted themselves to another forum.

This is a commendable exercise of judicial comity because by refusing to hear a case, the Singapore court is in effect enjoining the parties to litigate in the agreed forum. It demonstrates, on the part of our courts, rightful avoidance of the kind of judicial chauvinism typified by some English courts in the past which assumed that England was a natural forum for foreign litigants and were not averse to refusing to give effect

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[51] Cap. 123, 1985 Rev. Ed..

[52] See *supra*, note 17, at p. 450.

[53] Cap. 43, 1985 Rev. Ed. This being no place to consider the full implications of this decision with respect to the thorny issue of s. 5, only some comments would be offered. With due respect to the learned judge, the *Eleftheria* approach has been the "relevant local law" since its adoption by the Court of Appeal in *Amerco v. Chatsworth* where there was no reference to s. 5 presumably because this is an area of common law and s. 5 only imports mercantile statutes. See C.H. Soon and A. Phang, "Reception of English Commercial Law in Singapore - A Century of Uncertainty", chap. 2 in *The Common Law of Singapore* (1985, A. Harding, ed.) Since that decision was binding on him, the judge could have applied the *Eleftheria* principles without having recourse to s. 5, which was what Lai J. appeared to have done in *'The Maldive Importer'*. Besides, since this approach is part of the common law, our courts could apply it by regarding the *Eleftheria* decision as persuasive authority. Furthermore, it is not clear how the learned judge came to the conclusion that s. 5 could be applied since the precise issue here could be classified as procedural for the court was dealing with a stay of proceedings. If the issue had been more broadly classified as one arising in the context of an affreightment contract, then the use of s. 5 would have been more justifiable since this could then conceivably be regarded as an issue "with respect to the law ... of carriers by ... sea." The literature on s. 5 is very rich: for a sample, see W. Woon, "The Continuing Reception of English Commercial Law", chapter 5 in *The Singapore Legal System* (1988, W. Woon, ed.), C.H. Soon and A. Phang, *op. cit.*, Y.L. Tan, "Characterization in Section 5 of the Civil Law Act" (1987) 29 Mai L.R. 289 , S.K. Chan, "The Civil Law Ordinance: Section 5(1)" [1964] M.L.J. xvii.

to foreign jurisdiction clauses. Such an 'mtemationalistic' outlook displayed by Yong J. is both antithetical and preferable to a parochial, egocentric bias towards one's own forum.

Apart from clarification of the policy justifications, it is pertinent to note that in *'The Asian Plutus'*, considerable stress was laid on the refinement introduced by the *Amerco* decision to the *Eleftheria* approach. Yong J. put it thus:

> *It is of* interest and *significance that the Court of Appeal in effect thought fit to clarify what amounts to strong cause by emphasising the 'exceptional circumstances'* which the plaintiff must show to succeed.[54]

The presumption of stay is a very tenacious one. The plaintiff must show that "the facts and circumstances of the case are *so exceptional* as to amount to strong cause"[55] to succeed in his rebuttal. Indeed, a very onerous task is placed on the plaintiff, but justifiably so. After all, the parties must be taken to have acquainted themselves with the knowledge of how the foreign court works and what it can or cannot do before agreeing to it, so that any subsequent rescission should not be lightly entertained. Although there was no elaboration on what would amount to "exceptional circumstances", that is not entirely surprising since the issue is primarily a factual one.[56]

The phrase, "exceptional circumstances" has a chequered history. It was first employed by Lord Denning in the case of *YTC Universal* v. *Trans Europa Campania"* and subsequently adopted by Brandon J. in *'The Makefjell',*[5]* but thereafter, its appeal to the English courts began to wane. When *'The MakefjeW* went up on appeal,[59] it was just regarded as another way of saying that strong reasons must be shown. The Court of Appeal in *'The Adolf War ski'*[6] finally sloughed it off as being not essential. Although abandoned by the English courts as mere verbiage, it is, nevertheless, a very accurate description of the plaintiff's onerous task of rebuttal. By 'salvaging' it from disuse and emphasising it, the court in *'The Asian Plutus'* correctly appreciated that the full import of the *Eleftheria* approach is very much weighted against the plaintiff.

The need for a criterion of "exceptional circumstances" before the parties' agreement is denied effect is not so obvious as to be left unsaid.

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54 See *supra,* note 17 at p. 451. Emphasis added.
55 See *supra,* note 17 at p. 452. Emphasis added.
56 Presumably, the court would have to adapt the *Eleftheria* guidelines to the Singapore context, as the Court of Appeal did in the *Amerco* decision.
57 [1973] 1 Lloyd's Rep. 480.
58 *Kitchens of Sara Lee (Canada) & Another* v. *AIS Falkefjell and Another, 'The Make/jell'* [1975] 1 Lloyd's Rep. 528.
59 [1976] 2 Lloyd's Rep. 29 at p. 34.
60 [1976] 2 Lloyd's Rep. 241.

Often in the past, English courts have paid only lip service to the *Eleftheria* principles while deciding the case on a balance of convenience. The result, as Yong J. observed, is a lack of uniformity in these decisions. Cases on very similar facts have gone both ways.[61] If this formidable 'exceptional circumstances' criterion is enforced to the letter and not merely touted as a hollow label, almost all applications for stay would be successful. In this way, the absence of uniform results that has since become the drawback of the *Eleftheria* approach in England will not plague future local decisions.

Applying the *Eleftheria* approach to the facts, the first issue the court considered was where the trial could most conveniently be held in terms of the location of evidence and the availability of witnesses. The parties could not agree on the geographical location of the accident. This disagreement was material because trial would most conveniently be conducted in the country of that location since evidence and witnesses would usually be found there. The plaintiffs, not surprisingly, argued that the accident occurred in Singapore, probably during the discharge of the cargo while the defendants contended that it was in Japan, before shipment. However, even if the plaintiffs were right, the convenience of trial in Singapore would only be unilateral as the defendants would then have to bear the expenses and inconvenience of arranging for their lawyers and witnesses to be brought to Singapore for the trial.

Without making a specific finding as to the location of the accident, the judge held that this was therefore not a one-sided argument. In Yong J.'s opinion, the purely geographical location of an accident is only of

> ... relatively minor significance. It does lead inevitably to some connexion with that location, as a large number of such claims would be for damage discovered after discharge, and much of the evidence would be in the country of discharge.[62]

As for transportation of witnesses across national boundaries, it is an unavoidable consequence of using exclusive jurisdiction clauses, and can be ameliorated by modern means of travel.

The diminution in importance of this factor is interesting for it marks a departure from some English cases[63] where the strong cause necessary for the court to refuse a stay consisted of not much more than the convenient location of evidence and witnesses. Elevating the convenience of trial into a disproportionately important factor has been said to change the character of the *Eleftheria* approach into one of *forum non*

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[61] See Part II of this article.
[62] See *supra*, note 17 at p. 453.
[63] See Part II of this article.

conveniens.[64] Yong J.'s observation is supportable in another way. Evidence pertaining to cargo damage discovered after discharge is usually located in the country of discharge. Cargo damage of this kind is a relatively frequent maritime claim. If the location of evidence greatly enhances the convenience of trial in that country as to amount to a strong cause sufficient to rebut the presumption of stay, then the frequency of the exception might well eclipse the rule and defeat the whole purpose of the *Eleftheria* approach.[65]

Still on convenience and expenses of trial, the court was surprisingly unimpressed by the fact that the documentary evidence was in English and that possible problems of communication and translation could arise if the case was heard in Japan. Yong J. found it "difficult to attribute much weight to [the language problem] in a court in the multi-lingual society of Singapore, where ... the use of interpreters in court proceedings can be an established daily routine."[66] With respect, however, the practice of the Singapore courts is irrelevant as far as a possible linguistic barrier in the Japanese courts is concerned.

The plaintiffs' complaint about certain aspects of Japanese procedural law did not convince the court either. The court reasoned that before the parties select a forum, they should have considered the procedural implications in terms of what can or cannot be done there, so that once they decide to submit to a particular forum, they cannot afterwards find fault with its procedure. As Yong J. succinctly put it, "by choosing the court, they have chosen the procedure."[67] The only instance in which complaint may still be possible is when there are very serious defects in the procedure of the foreign court concerned.

As their last contention, the plaintiffs disclosed to the court that they had instituted an action against the defendants' agent, which involved similar issues and evidence as the present case. They argued that it would be highly undesirable to have two actions based on similar factual and legal disputes heard by different tribunals. However, the court thought that the plaintiffs' action against the defendant's agent need not have been started at all and distinguished the authorities of *'The El Amria'* and *'The Maldive Importer'*, though the reasons for the lack of merit in the second action were not explicit from the judgment. Since starting an action does not require much effort, accepting an argument based on the multiplicity of actions where there was no justification for additional actions would provide the plaintiffs with an easy escape from their jurisdiction agreement.[68]

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[64] See Briggs, *supra,* note 21 at p. 243. This is because *in substance* what the plaintiff needs to show is no more than that the present forum is a *forum conveniens.* Applying the *Eleftheria* approach in this manner would unjustifiably assuage his difficult task.

[65] See Brandon J's observation in *'The Make/jell', supra,* note 58 at p. 535.

[66] See *supra,* note 17 at p. 453.

[67] *Ibid.*

[68] See also *'The Makefjell'; supra,* note 58 at p. 533.

On the other hand, the choice of Japanese law as the proper law of the contract was rightly considered a weighty factor on the side of the defendant.[69] There was a finding that the Japanese law is dissimilar to English law in material aspects, although the court did not elaborate on the differences. Thus, the presumption that, in the absence of evidence, foreign law is the same as the *lex fori* would not apply.[70] The court felt that it was more satisfactory for a Japanese court to pronounce on Japanese law. In this way, the trouble of having to adduce expert evidence on Japanese law may be obviated. Another reason, which was not mentioned, is that foreign law will be treated as a question of fact before the Singapore court and as such, not easily appealable.

On the grounds discussed above, Yong J. dismissed the plaintiffs' appeal against the Registrar's order to stay the action. On the facts as found by the court, the application of the *Eleftheria* approach and the result reached is quite beyond reproach. However, the court could possibly have taken a different construction of one aspect of the factual matrix. On this particular construction, it might be argued that the *Eleftheria* approach should not have been applied at all. For the rest of the discussion on *'The Asian Plutus'*, we shall explore the possibility of raising this exception to the use of the *Eleftheria* approach.[71]

Although the facts are not altogether clear on the point, the plaintiffs appeared to be the indorsees[72] of the bill of lading,[73] rather than shippers of the damaged cargo. The headnotes of the case in the law report state that the contract was contained in the bill of lading. Contractual terms are found in the bill of lading as between the carrier and an indorsee, when the contract of carriage has been statutorily transferred over to

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[69] See also *'The Eleftheria' supra*, note 1.

[70] *'The Athenee'* (1922) 11 LI. L. R. 6.

[71] It is a coincidence that in all the local cases on the point, the jurisdiction clause was a term of the bill of lading. If the underlying transaction in all of them was the same as that described in note 73, then the following exception should be extended to apply to them as well.

[72] Or the consignees named in the bill of lading. Any reference to indorsees in this section of the article is intended to include consignees.

[73] The whole transaction probably arose from an international c.i.f. contract for the sale of goods, in which the plaintiffs were the buyer of goods that had been shipped by the seller. It was the seller who entered into the contract of carriage with the carrier and then endorsed the bill of lading over the buyer. In some f.o.b. contracts, the seller also makes the shipping arrangement, including the procurement of the contract of carriage on his own account, and then indorses the bill of lading over to the buyer against payment. For an example of such a contract, see *'The El Amria & The Minia'* [1982] 2 Lloyd's Rep. 28. The arguments in this section proceed on the assumption that the transaction in *'The Asian Plutus'* was similar to what has been described in this note.

the indorsee[74] or there is an implied *Brandt* v. *Liverpool* contract.[75] If the plaintiffs had been the/shippers, the bill of lading would only be evidence of the contract of carriage, and not the contract itself.[76]

The parties to both the transferred contract of carriage and the *Brandt* v. *Liverpool* contract are the carrier and the indorsee. The terms of both contracts are found in the terms of the bill of lading. However, prior to indorsement, the terms of the bill of lading also constitute evidence of the terms of the contract of carriage entered into by the carrier and the shipper. Hence, the terms that go into the bill of lading primarily depend on what those two parties originally agreed upon. It follows that upon indorsement of the bill of lading, a contract arising either by statutory transfer or by implication will contain the terms in the bill of lading which have not been directly negotiated by the carrier and the indorsee.

As such, it is harsh on an indorsee to be held to an exclusive jurisdiction clause found in the bill of lading on the reasoning of abiding by his own agreement, since he had no direct hand in that choice or, even if he had an indirect hand, his freedom to choose the forum is very limited, as will be explained presently. It is submitted that here is an instance in which the fundamental policy of the *Eleftheria* approach is not at stake and the approach produces unfair results if applied with unmitigated rigour. It is further submitted that, at the very least, such a situation should be one of the special circumstances of the case to

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[74] This is, *in substance*, the effect of the operation of s. 1 of the Bills of Lading Act, 1855 (18 & 19 Viet. c. Ill), since s. 1 transfers the rights and duties of the original shipper arising under the contract of carriage to the indorsee when property in the goods referred to in the bill of lading passes upon or by reason of the endprsement. The Bills of Lading Act applies locally by virtue of s. 5 of the Civil Law Act, see *Owners and other Persons interested in the m.v."The Jag Shakti"v.Chabbra Corporation Pte. Ltd., 'TheJagShakti'* [1983] 1 M.L.J. 58. See *sdsoLeduc* v. *Ward* (1888) 20 Q.B.D. 475 which establishes that the terms of the transferred contract are found in the terms of the bill of lading.

[75] *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.* [1924] 1 K.B. 575. Such a contract is implied between the carrier and the transferee of the bill of lading (which would include an indorsee) when the latter presents the bill of lading, takes delivery of the goods and pays freight or other charges in respect of the goods. It now appears that the courts will not strain to find such a contract unless the parties conduct themselves in a way that is beyond the contemplation of the original contract of carriage, see *Owners of Cargo lately laden on "The Aramis"* v. *Aramis Maritime Corporation, 'The Aramis'* [1989] 1 Lloyd's Rep. 213 but Bingham L.J. in an *obiter dictum* in *Campania Portorafti Commerciale S.A.v. Ultramar Panama Inc. and Others,'The Captain Gregos'* (No. 2) [1990] 2 Lloyd's Rep. 395 felt that there might be a need to reconsider *'The Aramis'*. The *Brandt* v. *Liverpool* contract, as it is commonly known, is usually resorted to when s. 1 of the Bills of Lading Act does not apply. For a detailed treatment of the problems in this area of the law, see G. H. Treitel, "Bills of Lading and Implied Contracts" [1989] L.M.C.L.Q. 162 and Sir A. Lloyd, "The bill of lading: do we really need it?" [1989] L.M.C.L.Q. 47.

[76] *Sewell* v. *Burdick* (1884) 10 App. Cas. 74 at p. 105. See also the local decision of *Peninsular & OrientalSteamNavigationCo.Ltd& Ors. \.RamblerCycleCo.Ltd.* [1964] M.L.J. 443.

take into account in the rebuttal of the presumption of stay. It may even be that since the plaintiff has not 'agreed' to what he is now accused of breaching, the justification for setting a presumption adverse to him does not exist. The *Eleftheria* approach ought not to be applied and recourse should instead be had to the general *Spiliada* approach towards stay.[77]

Theoretically, of course, the buyer may, through the contract of sale, oblige the seller to insert certain terms that he (the buyer) desires in the contract of carriage, into which the seller then enters when he ships the goods. Thus, the buyer could specify in the contract of sale which, if any, forum he wants in the contract of carriage, so that the seller is contractually bound to select that forum when he subsequently contracts with the carrier. Or, if he does not want to have an agreed forum, a specification to that effect in the contract of sale would similarly bind the seller. In this way, one might argue that there is still contractual freedom to pick a forum for the buyer to exercise, albeit indirectly.

There are several flaws in this argument. For a start, an exclusive jurisdiction clause in the contract of carriage is a term that, *inter alia*, affects matters of procedure which will in turn affect the litigational interest of the shipper as well if any dispute arises between him and the carrier. The seller may not want to bind himself to the buyer's preferred forum if his litigational interest is likely to be prejudiced there. In the same vein, a carrier on his part might prefer a forum different from that which the seller is bound to select or he may want a jurisdiction clause when the contract of sale forbids the seller to agree to any. Such a scenario would put the shipper in a dilemma; unless he finds a carrier who agrees to the buyer's terms, he is in breach of the contract of sale. So it is unlikely that the seller would yield to such an obligation in the contract of sale. But in the event that he does and fails to carry it out, thereby resulting in the selection of a different forum, his breach of the contract of sale should be a significant factor to look at when a court exercises its discretion. After all, there can be no clearer instance of a party not agreeing to the jurisdiction clause eventually chosen.

Furthermore, what if the contract of sale is entered into after the contract of carriage, which is not uncommon in string sales, for then the buyers or sub-buyers would be in no position to influence the choice of the jurisdiction clause though they too would be bound by the terms of the bill of lading that has been endorsed over to them.[78]

The objection that the plaintiffs as indorsees of the bill of lading had had no real opportunity to decide on the jurisdiction clause contained

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[77] Such a jurisdiction clause should not carry much weight as a connecting factor under the *Spiliada* approach. The connection that it reflects is between any action arising between *the carrier and the shipper* and the agreed forum.

[78] By virtue of s. 1 of Bills of Lading Act 1855. See A.G. Guest *et at.* (eds.) *Benjamin's Sale of Goods* (3rd ed., 1987), para 1461.

in the bill of lading was raised in *'The El Amria'*.[79] Unfortunately, the trial judge, Sheen J. rejected that submission on the rather facile ground that the plaintiffs, being a party to the contract, cannot pick and choose between the terms; they must accept all. However, Sheen J.'s comments were purely *obiter*, for he had already refused to stay the proceedings on other grounds. In contrast, the Court of Appeal, though inclining towards Sheen J.'s opinion, felt it was unnecessary to adjudicate on the point as it was already persuaded by other firmer grounds.

So the argument cannot be said to have been authoritatively settled. In any case, Sheen J.'s extremely brief reasoning appears to be based on nothing more than freedom of contract. Being a party to a contract, one must be bound by all the terms because one has agreed to them. But this is precisely what the plaintiffs were contending, namely, that they never agreed to them in the first place.

While Sheen J.'s reasoning is unattractive, perhaps his conclusion, from a commercial standpoint, is. To distinguish the jurisdiction clause from other terms of the bill of lading which bind the transferee by the insistence of a more specific agreement between the parties might just be impractical at times. Besides, evidential problems of proving want of consent could be quite convoluted given the complexity of some of these transactions. Nonetheless, commercially convenient solutions cannot always be overriding. Being denied one's day in court to argue the substantial merits of the claim is a serious setback to any plaintiff, for he may not have the resources or indeed, patience to begin afresh in the chosen forum. It is even more bitter a pill to swallow if the rationale for staying the proceedings is not applicable to begin with.

The above discussed scenario of an international sale of goods carried by sea is a common example where such consent may be missing. However, it is submitted that in other similar situations where there has been non-observance of the reality of agreement, there is no basis for applying the *Eleftheria* approach as well.

D. *'The Vishva* Apwrva'[80]

Like its predecessors, this case also relates to a cargo claim. The plaintiffs sought for damages in respect of the total loss of their cargo carried by the defendants' ship which sank as a result of a collision.

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[79] See *supra*, note 14. See also *Partenreederei ms. "Tilly Russ" & Another* v. *Vervoebedrijf NovaN.V. & Another, 'The Tilly Russ'* [1985] Q.B. 931, a decision of the European Court of Justice where it was held that the ultimate receiver of the bill of lading would be bound by the jurisdiction clause found in the bill if the holder, by the relevant national law, succeeds to the shipper's rights and obligations. But *'The Tilly Russ'* can be distinguished because it was decided with specific reference to Art. 17 (now amended) of the 1968 Brussels Convention.

[80] See *supra*, note 18.

The exclusive jurisdiction clause in the bill of lading submitted all disputes to the Indian courts.

Chua J. duly laid out the locally refined *Eleftheria* approach[81] and went on to find that the plaintiffs had proved that circumstances were so exceptional as to warrant a refusal of stay. Some of the grounds of his decision are set forth below.

There would be a very considerable delay of about ten years if the matter were to be tried in India, while the Singapore proceedings were already substantially under way and the trial date that had been set was far less distant in time. Although not included in the *Eleftheria* guidelines, substantial delay in the foreign trial was correctly considered as a pertinent matter since justice delayed is justice denied.[82] The defendants on their part were also guilty of unreasonable delay in applying for a stay of the Singapore proceedings and such laches obviously prejudiced the seeker of a discretionary remedy.

As the defendants were saddled with numerous claims in India arising out of the same casualty, they obtained an order for limitation of their liability but that order was subsequently set aside. The limitation fund which would otherwise have been set up in India was far lower than that which would be set up in Singapore and the court found that it would be unjust to deprive the plaintiffs' of the higher Singapore limits. Furthermore, the pursuit of lower limits of liability in India showed that the defendants did not genuinely desire trial in India but were merely seeking a procedural advantage there, an observation substantiated by the fact that they found Singapore to be an acceptable forum for another related action which they instituted here.

The many claims commenced in India also touched on similar legal and factual disputes as to the cause of the collision and the responsibilities of the parties involved. This prompted the defendants to put up the familiar argument of the need for consistent results in multiple actions relating to the same disputes which is more likely to be achieved if only one tribunal hears all the actions. However, the court's response was not altogether clear. A passage in the judgment of Sheen J. in *'The Vishva Abha'*[83] (a case involving the sister ship of the "Vishva Apurva" which was arrested in England in connection with the same accident) was cited in which it was said that the commencement of related proceedings in other jurisdictions did not concern the court because the claimants before the English courts were owners of cargo carried by the other

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[81] His Honour also applied English law by virtue of s. 5 of the Civil Law Act (Cap. 43, 1985 Rev. Ed.). See *supra,* note 53.

[82] *Two/arum non conveniens* decisions, *'The SidiBishr'* [1987] 1 Lloyd's Rep. 42 and *'The Vishva Ajay'* [1989] 2 Lloyd's Rep. 558, were cited in support. Long delay in foreign proceedings might be regarded as a procedural defect sufficiently serious to warrant the court's intervention.

[83] [1990] 2 Lloyd's Rep. 312.

ship that was involved in the collision, and not owners of cargo carried on the "Vishva Apurva" whose claims were in contract.

The relevance of the passage was not apparent or explained. Perhaps, Chua J. meant it as support for placing little weight on the fact of related proceedings elsewhere based on another cause of action which presumably raised different issues. But it was not shown if the other claimants in India made their claim based on different causes of action, or indeed that issues raised there were so very different. The court might also have been influenced by the plaintiffs' offer to discontinue their Indian actions against the defendants if the local action is allowed to proceed and their speculation that both Indian and Singapore courts would reach similar conclusions on the common disputes.

Rather surprisingly as well, the court took exception to several aspects of the procedure of Indian courts, such as the inability of the plaintiffs to recover cost on a realistic scale (so that any success would be reduced in monetary terms) and exchange control regulations relating to remittance of monies to a foreign judgment creditor. Critical examination of foreign procedure is usually restricted to very serious defects and it is unfortunate that the court accepted the plaintiffs' complaint about something which they themselves had chosen. A more deferential attitude towards foreign procedure, exemplified by that of Yong J. in *'The Asian Plutus'*, would be more in order.

Far more consistent with *'The Asian Plutus'* is the court's guarded response to the issue of the inconvenience and expense of having to bring evidence and witnesses into Singapore for trial. Transportation of evidence was certainly not an insuperable problem in this modern age. As for the witnesses who were part of the crew of the "Vishva Apurva", it would not be more convenient for them to go to India than to Singapore, as being sailors, they could be in any part of the world when the present case is eventually heard. Besides, the defendants were prepared to bring evidence into Singapore for the other related action which they started here. In any event, even if most of the evidence were in India (which the court was not prepared to accept), any convenience of trial there would be negated by an enormous intervening delay before the case is heard which could result in inaccurate testimony due to faded memories and difficulty in locating witnesses long after the accident.

E. *Conclusions and Comments on the Singapore Position*

Having examined the Singapore decisions on this area, this is a convenient juncture to state the position in Singapore which is that a plaintiff bringing an action here in the face of a foreign jurisdiction clause risks having it stayed unless he could demonstrate a strong cause, constituted by "exceptional circumstances", for the action to be continued. Thus, a party to a transnational contract who wishes to bring an action in Singapore in a case involving a contractual dispute must either select

Singapore as the exclusive forum, or if not, at least not nominate another exclusive forum,[84] for to do the latter would, assuming Singapore has undoubted jurisdiction over the action, almost certainly lead to the action being stayed unless a strong cause constituted by "exceptional circumstances" could be shown. Whilst it is incontrovertible that the refined *Eleftheria* approach applies here, our courts have so far not gone behind the clause to examine the reality of the agreement.

' On this framework of settled principles hangs the inconsistency in the weight that is attached to the same factors by different courts. In the four Singapore decisions, the following factors were given varying degrees of prominence. The location of witnesses and evidence alone constituted the plaintiffs' strong cause in the *Amerco* decision but in both *'The Asian Plutus'* and *'The Vishva Apurva'*, the issue was rightly given lesser weight since the crux of the approach was not convenience of trial. The issue of a foreign governing law received vastly different treatments in *'The Asian Plutus'* and in *Amerco* v. *Chatsworth* depending on whether it was substantially different from the *lexfori.* The question of multiple proceedings were also dealt with differently in the cases of *'The Asian Plutus'*, *'The Maldive Importer'* and *'The Vishva Apurva'*. *'The Maldive Importer'*, whilst factually distinguished by *'The Asian Plutus'*, did not appear to give much weight to the factor beyond saying that it was relevant on the facts and *'The Vishva Apurva'* dismissed it without any convincing explanation. In *'The Vishva Apurva'*, critical comments were made of defects of foreign procedure, something which Yong J. in *'The Asian Plutus'* correctly demurred to doing on the ground that it might be injurious to judicial comity.

One plausible explanation for this inconsistency is that proof of "strong cause" is essentially a factual issue and the factual matrix of a case is unique in itself. But the explanation can only be partial. It is submitted that the more convincing though related explanation is that the approach permits different judicial perceptions as to the importance of the various factors to bear heavily upon the outcome which is almost inviolable on appeal because this is an exercise of judicial discretion over a factual issue. If a trial judge feels that a particular factor is so critical as to amount to an exceptional circumstance sufficient to rebut the presumption of stay, that is usually conclusive, for an appellate court is unlikely to disturb the exercise of his discretion. So the strength of the plaintiff's case could, by a quirk of judicial leniency, consist of nothing more than a mere greater convenience of trial, neatly cloaked behind the label of "exceptional circumstances", which was essentially what happened in *Amerco* v. *Chatsworth.*

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[84] That would have the effect of conferring jurisdiction on Singapore courts by submission. See Cheshire and North, see *supra*, note 30 at p. 192. See also section 16(2) of the Supreme Court Judicature Act (Cap. 322, 1985 Rev. Ed.)

Under the *Eleftheria* approach, the rebuttal of the *prima facie* case of stay is restricted only to truly exceptional circumstances which entails more than proving the actual forum to *be forum conveniens*. The inconsistency described above could be minimised if there is judicial realisation of the very difficult task facing the plaintiff. Although the result envisaged by the *Eleftheria* approach is that the action is almost always stayed, yet in three out of the four local decisions, the action endured.[85] Pessimistic as it may seem, for so long as the element of masked judicial subjectivity in any exercise of discretion remains ineradicable and undisturbed by appellate courts, the hope for future consistency from proper applications of the *Eleftheria* approach is not very great. And much as it has logical appeal as an alternative solution, coming up with a uniform set of weights for commonly occurring factors is not workable as well for the approach has to be applied to a wide diversity of factual matrices.

(To be continued)

Ton KIAN SING*

[85] Though one concedes to statistical limitations when there are only four cases.

* LL.B. (Hons.) (N.U.S.), Senior Tutor, Faculty of Law, National University of Singapore.