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

[Continued from p. 125}

III. SOME WEAKNESSES OF THE *ELEFTHERIA* APPROACH

Although the *Eleftheria* approach seems entrenched in English law, the same inconsistency in the application of the approach is found in English decisions. So it is by no means a problem endemic to the local cases. This inconsistency is attributable to both the defects inherent in an approach that is based on discretion as well as the erroneous laxity in the satisfaction of the 'strong cause' criterion. As a consequence of the latter, the dichotomy between the two discretionary approaches towards stay of action seems to be preserved more in form rather than in substance; that is, courts purporting to apply the *Eleftheria* approach have in effect been deciding along the reasoning of *forum non conveniens.*

A. *Discretionary Aspects of the Eleftheria Approach*

Our earlier discussion of the Singapore cases reveals that despite the clearer emphasis on 'exceptional circumstances', they are not free from inconsistency. The explanation suggested was that the weight ascribed to a particular factor could vary from case to case, depending on the matrix of facts and from judge to judge, depending on his perception as to the importance of that factor measured against other relevant factors. When judges exercise their discretion on the basis of a composite of factors, whose individual importance is subjectively determined, it is not surprising that they reach diametrically different conclusions in the treatment of similar factors. Such inconsistencies which we have seen to be evident in the local cases can also be found in English cases.

Such inconsistencies frequently emerge from a comparison of one case with another. Sometimes though, even within a *single* case, there is a difference of judicial opinion as regards the importance of a factor. The issue of an operative time bar in the agreed forum arose in the English case of *"The Adolf War ski'.*[6] At first instance, Brandon J. preferred the view that it was a factor against stay since granting the stay would defeat the plaintiff's claim altogether which has the undesirable effect of allowing a jurisdiction clause to prevent a claim from being ever

[86] [1976] 1 Lloyd's Rep. 107; on appeal [1976] 2 Lloyd's Rep. 241.

decided on its merits. Cairns L.J. sitting on appeal left the point undecided. Stephenson L.J. and Sir Gordon Willmer assumed a neutral view towards the issue, as Brandon J.'s reason must be weighed against the fact that allowing the action to proceed in England would deprive the defendant of the accrued time-bar defence in the agreed forum.[87]

There are also precedents for yet another permutation of judicial inconsistency - the same judge attaching different weights to a common factor in different cases. Thus, in the decision of *'The Adolf Warski'*, the critical factor in the plaintiff's favour was the feasibility, convenience and cost of placing before the court the main evidence and this lay in favour of England as English surveyors and expert witnesses were engaged. Whereas in *'The MakefjelV*** which was decided earlier by the same trial judge, Brandon J., matters of convenience and costs in relation to the calling of witnesses were only to be given "their proper weight in the light of modern conditions and no more,"[89] and were thus not such an exceptional circumstance as to afford the strong cause to try the case in England.

'The MakefjelT concerned damage to maritime cargo. A large number of such cargo claims have to do with damage to goods discovered on or after discharge. As such, much of the evidence is likely to be found in the country of discharge.[90] If all these cases are treated as exceptions of the *Eleftheria* rule, there is a danger that these exceptions might engulf the rule. Hence, the location of evidence and witnesses in England was held to be insufficient to tilt the balance in the plaintiff's favour. If such reasoning is supportable and it is, why was the plaintiff in *'The Adolf Warski'* successful in defeating a stay on the same ground when the claim also involved damage to cargoes discovered upon discharge?[91] With respect, this is remarkable inconsistency emanating from the same judge!

Given the inconsistent treatment of this factor of location of evidence, it is scarcely surprising that when *'The Adolf Warski'* was taken on appeal, counsel for the defendant argued that if the trial judge had been right in *'The Makefjell'*, he must have been wrong in the instant case. Yet, *'The Adolf Warski', just* like *'The Makefjell'*, was upheld on appeal and the Court of Appeal in both cases expressed enormous hesitation in interfering with the exercise of discretion by the trial judge. Appeals taken on grounds that the trial judge attached insufficient or excessive

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87 See *'The Blue Wave'* [1982] 1 Lloyd's Rep. 151 where the preclusion of legal remedy reasoning was preferred except when the plaintiff had deliberately and unreasonably allowed the action to become time-barred. See also *'The Vishva Prabha'* [1979] 2 Lloyd's Rep. 286.

88 [1975] 1 Lloyd's Rep. 528.

89 *Ibid.*, at p. 533. See Yong J.'s similar opinion on the same point in *'The Asian Plutus'*.

90 This reasoning is also similar to that given by Yong J. in *'The Asian Plutus'* when his Honour considered the importance of the location of evidence.

91 See the rather artificial distinction drawn by Cairns L.J. in *'The Adolf Warski', supra*, note 86 at p. 245 to explain the discrepant results.

92 *Supra*, note 14 (Part I of article in [1991] S.J.L.S. 103). Brandon L.J. in *'The El Amria'*

weights to certain factors are almost always doomed to fail. Indeed, in the subsequent case of *'The El Amria',*[92] the Court of Appeal was prepared not to intervene even if the appellate judges, had they sat in the first instance, would have perceived the importance of the various factors differently from the trial judge.

Hence, the prevailing judicial attitude appears to be that the exercise of discretion by the trial judge, involving as it does the balancing of different factors is one which the appellate judges would be reluctant to interfere with. After all, the receptiveness of a trial judge towards the relevant factors is a purely subjective matter for which quite vastly different views could be tolerated. So it is not altogether surprising that appellate judges are anxious to leave untrammelled any decision made at trial level even though their own inclinations towards the case might be different.

This policy of minimal interference with discretionary decisions is understandable. But the consequence is an abdication of appellate control over a trial judge so long as he dutifully recites the *Eleftheria* test and purports to apply it, even though the factors acceptable to him as constituting strong cause might be nothing more than greater convenience of trial in the view of most other judges. Hesitation at surveillance have, in some cases, resulted in a practical undoing of the dichotomy.[93]

Another example of inordinate reluctance to review the trial judge's discretion is the case of *Carvalho* v. *Hull, Blyth (Angola) Ltd.*[9]* As an alternative ground to finding that the parties never agreed to submit to a court that was put in place of the chosen forum after a political revolution, the trial judge, Donaldson J. (as he then was) exercised his discretion and held that it was just and proper not to remit the trial to the chosen forum, Angola, even though as he conceded, all other elements were pointing towards trial there. The exact language used is as follows:

> All the usual reasons for sending the matter back to Angola [the chosen forum], including the exchange control difficulties, are present, and all the elements here point to allowing the case to go ahead in Angola except the one thing that really matters, whether it is just and proper to remit the matter to Angola.[95]

Why it was not just and proper was not clearly explained in a short judgment delivered *ex tempore.* There was a hint that because of the political turbulence, the parties would be denied a fair trial in the chosen

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limited interference to situations where the trial judge misdirected himself in law, misapprehended important facts, considered irrelevant matters, failed to consider relevant matters or made a plainly wrong decision.

93 See the section of this article entitled 'An Insubstantial Distinction?'

94 [1979] 3 All E.R. 280.

95 *Ibid.,* at p. 285.

96 A survey of the cases reported in Lloyd's Law Reports from 1975 to 1990 indicates that

forum. No attempt was made to attach any weight to the countervailing factors, or to balance factors on both sides. Still, such translucent reasoning did not move the Court of Appeal to interfere. Perhaps in vindication of the trial judge's finding, it held that the decision below could not have rested on the sole factor of political instability but was unable to distill any other factor that could explain the outcome.

It could be that as a result of this non-interventionist stance, the number of appeals from decisions of trial judges in stay applications have waned in recent years.[96] This reduces the possibility of an overhaul of existing principles by the higher courts and perpetuates the unsatisfactory state of the law. But the number of actions commenced in breach of such clauses and corresponding stay applications have remained consistently high.[97] This suggests that quite a number of plaintiffs are still prepared to breach the forum agreement and when confronted with an application for stay, gamble on the sympathy of the trial judge to find the necessary strong cause. Sadly, the unhealthy frequency of proceedings of this nature is evidence that the commercial certainty in the venue of litigation, which is the primary rationale for having these clauses, is being frittered away.

B. *An Insubstantial Distinction?*

As envisaged in *'The Eleftheria'*, the test of 'strong cause', is to be satisfied only by factors that go beyond proving the actual forum to be *a forum conveniens.* 'Exceptional circumstances' was the accurate epithet used in some early *post-Eleftheria* English (and all the local) decisions to describe the factors that go towards the stringent 'strong cause' criterion. The proposition that the task confronting the plaintiff is more onerous than showing an appropriate forum is supported by Dicey and Morris:

> [t]he court's discretion to refuse to grant a stay will only be exercised if the plaintiff shows a strong case, *more than that England is the forum conveniens*, why the English proceedings should not be stayed.[98]

A proper reading of the guidelines listed in *'The Eleftheria'* affirms the heavy odds staked against the plaintiff. Factors (a) to (c) are basically

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there are about twenty reported decisions applying the *Eleftheria* approach. But only five of them went up on appeal, of which just one went all the way to the House of Lords: *'The Sennar (No. 2)'* [1985] 1 Lloyd's Rep. 521.

97 *Ibid.*

98 *Supra*, note 3 (Part I of this article) at p. 412. Emphasis added. This statement is supported by *'The Frank Pats'*, *supra*, note 3, where the court remarked that the factors considered under the *Eleftheria* approach *includes* the factors considered under *forum non conveniens* and that if the plaintiff has succeeded in showing strong cause under the former approach, then by parity of reasoning, the defendant would be unable to discharge his burden of proving *forum non conveniens* to obtain a stay.

connecting factors that determine where the trial should most appropriately be held (and therefore relevant to the *forum non conveniens* approach as well). *In addition,* where it is relevant, the plaintiff has to strengthen his cause by showing factor (d), that the defendant is only seeking procedural advantages and does not genuinely desire trial in the foreign country, and factor (e), that for a variety of reasons, he would be prejudiced by having to sue in the foreign court as well as any other special circumstances of the case."

It is important to remember the different policy considerations that underscore the distinction between the approaches: *inforum non conveniens* cases, the court starts with the neutral inquiry of where "the case should be tried more suitably for the interests of all the parties and the ends of justice,"[100] whereas in cases involving an exclusive jurisdiction clause, the court's predisposition would be towards holding the parties to their forum agreement so that the plaintiff's task of dissuasion becomes correspondingly more onerous.

Unfortunately, a close analysis of many cases involving exclusive jurisdiction clauses shows that trial judges have, in substance, decided them on the basis of *forum non conveniens,* after making perfunctory reference to the *Eleftheria* approach of presuming a stay. Put another way, they have concentrated on factors (a) to (c), without looking hard enough for or at the remaining factors listed or any other special circumstances of the case. Since such decisions that turned on convenience of trial were discretionary and so, scarcely appealable, the 'strong cause' criterion was effectively reduced to a hollow label.

For instance, in *'The Adolf Warski',* both Brandon J. and Sir Gordon Willmer acknowledged that but for the critical fact that the evidence and witnesses were located in England, the other factors were fairly evenly balanced. Trial in England would no doubt be cheaper and more convenient, but surely this fact alone was nothing so exceptional that should impel the court not to give effect to the forum clause. Otherwise, given that concentration of witnesses and evidence in a particular forum is a common phenomenon, the frequency of the exceptions may undermine the rule which "will be nearly as much honoured in the breach as in the observance."[101] If anything, such matters are well within the parties' anticipation when selecting the forum and in all likelihood were taken into consideration, so the weight accorded should in fact be lessened.[102] Perhaps, it is no wonder that the apt if exacting embellishment of 'exceptional circumstances' to the 'strong cause' criterion did not survive long after its introduction. Without that qualification, the 'strong cause' test becomes more manoeuvrable.

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[99] For the various factors considered under the *Eleftheria* approach, see Part I of this article at p.105.

[100] *per* Lord Goff, *'The Spiliada', supra,* note 27 (Part I of this article) at p. 854.

[101] *'The Make/jell', supra,* note 58 (Part I of this article) at p. 535.

[102] See R. Schuz, "Controlling Forum Shopping: the Impact of *MacShannon* v. *Rockware Glass Ltd"* (1986) 35 I.C.L.Q. 374 at p. 405.

Then came the case of *'The El Amria'*[103] in which the Court of Appeal reaffirmed and purported to apply the *Eleftheria* approach. The availability of expert evidence in England and the desirability of hearing different actions involving similar factual issues in one forum enabled the court to find the necessary strong cause for allowing the action to continue. This was so although the defendant's connection with the agreed forum, Alexandria, was closer than the plaintiff's connection with England and he genuinely desired to have the trial heard there, which did not prejudice the plaintiff in any way.

Briggs[104] analyses the results as follows: despite the appearance of being a straightforward application of the *Eleftheria* approach, the case was in effect decided based on a different approach where the court's paramount concern was that "the trial should take place where it can most conveniently be held."[105] That place was England because of the availability of evidence and commencement of related proceedings there. The exclusive jurisdiction clause was not a sufficiently strong reason to move the trial away from the most convenient forum, so a stay was refused.

The reasoning of the court can be broken up into two stages. First, the court determines the location of the most convenient, which is often also the most appropriate forum. If the forum itself is found to be the most convenient, that finding is then balanced against factors militating towards a stay such as deprivation of the legitimate advantage of a foreign forum agreement. Briggs goes on to conclude that the primacy of the agreed forum has been replaced by the primacy of the natural forum.[106]

Reference can be made to two other decisions which are also susceptible to this " 'natural forum' under the guise of *Eleftheria"* explanation.

In *'The Panseptos'*,[107] the court accepted the plaintiff's strong cause which like *'The El Amria'*, consisted of no more than the location of most of the evidence in England and the institution of a related action involving the same issues there.

A time-bar in Greece, the agreed forum, was the critical reason for not staying the action in the decision of *'The Blue Wave'*.[m] The court appeared to be concerned about the possibility of injustice done to the plaintiff if he was precluded from pursuing his remedy by reason of the

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[103] *Supra,* note 14 (Part I of this article).

[104] *Supra,* note 21 at p. 243 (Part I of this article).

[105] *Ibid.*

[106] *Ibid.* Although at the time of Briggs' writing, the *forum non conveniens* doctrine was still at a tentative stage of development, nevertheless, the language he used was greatly prophetic of the current formulation of the natural forum doctrine as laid down in *'The Spiliada'.* For this reason, his arguments are still relevant even though the law has developed considerably since the time they were made.

[107] [1981]! Lloyd's Rep. 152. Also see *'The Atlantic Song'* [1983] 2 Lloyd's Rep. 394 where again the location of evidence was given much prominence.

108 [1982] 1 Lloyd's Rep. 151. The court did not grant a stay conditional upon the waiver of a time bar by the defendant in the agreed forum, as would be usual in cases like this, for there was a possibility that the Greek court might take up the objection on its own accord, in which case the parties, having been put to the expense and delay of going to Athens, would then have to return to London to lift the stay.

time-bar. Since the plaintiff had acted reasonably in commencing action there and did not deliberately allow the time limit to expire in the foreign jurisdiction, the action was permitted to continue. The ends of practical justice seemed eminently well served by deciding for the plaintiff.

The underlying rationale bears a strong likeness to the then prevailing *MacShannon* reservation[109] in depriving plaintiffs of procedural advantages which they only enjoy in England. This reservation is of course expressed in the second limb of Lord Diplock's celebrated formula for stay which is now regarded as a tentative statement in the development of the natural forum doctrine.[110] Further attestation to the use of some form of natural forum analysis in this case lies with the fact that its approach towards time-bar has received the blessings of Lord Goff in *Spiliada.*[lu] However, as a decision that purported to apply the *Eleftheria* approach, it is erroneous because the time-bar issue has been authoritatively settled as favouring neither party.[112]

In the cases cited so far, the shift in approach has been subterranean, confined to a liberal application of the *Eleftheria* principles to the facts. However, in *Trendtex* v. *Credit Suisse,*[n3] the pretension of maintaining two distinct approaches began to wear loose. Before considering the *Eleftheria* guidelines *in seriatim,* the trial judge, Goff J. (as he then was) observed that the *Eleftheria* principles were similar to those in *MacShannon* v. *Rockware,* which is of course a landmark decision in the development of the *forum non conveniens* doctrine. He considered the only differences to be a reversal of the burden of proof and the inadmissibility of any complaint about the procedure of the chosen forum. Significantly, the difference in the policies that underscore the two approaches was not alluded to.

He then applied the two approaches as alternatives and arrived at the same conclusion: the English proceedings should be stayed. Interestingly, when he applied the *MacShannon* formula as an alternative, he held that the jurisdiction agreement (pointing to Switzerland) was an implicit, mutual acceptance of the procedure of the agreed forum and could be used to neutralise a procedural advantage the plaintiff would have enjoyed in England.

When *Trendtex* went up on appeal, Oliver L.J. (as he then was)[114] considered the jurisdiction clause only as a relevant factor in the determination of the appropriate forum under the *MacShannon* formula, in the sense that the parties' confidence in the agreed forum raises its potential of actually being the appropriate forum. There was no separate analysis using the *Eleftheria* approach. The learned Lord Justice stated:

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[109] Supra, note 23 (Part I of this article) at p. 812.
[110] *Supra,* note 27 (Part I of this article) at p. 854.
[111] *Ibid.,* at p. 860.
[112] Supra, see p. 111.
[113] [1980] 3 All E.R. 721.
[114] Bridge L.J. agreed with him. The House of Lords did not object to the judgment of either Oliver L.J. or Goff J.

> I would not consider it inappropriate, when weighing in the balance what is an appropriate forum for the hearing of a given dispute, to take into account of the fact that two of the parties to that dispute have already, themselves agreed on a suitable forum."[5]

Oliver L.J.'s treatment of the forum agreement is different from that of Goff J. The former regarded it as relevant to the first limb of the *MacShannon* formulation, the latter the second limb. Whichever is the better treatment, "[i]f it is proper to look at the fact that there is a choice of forum clause in deciding whether to grant a stay on *MacShannon* grounds ..., it cannot be argued that the two sets of rules are mutually exclusive.""[6] The significance of the *Trendtex* case therefore lies in having initiated the coalescence of the two approaches by acknowledging that roughly the same set of principles apply to both of them and that the forum agreement has a significant bearing on both parts of the *MacShannon* formula.

In *The Sennar (No.* 2)"[7] another case involving an action commenced in breach of an exclusive jurisdiction clause, the House of Lords, while affirming as unassailable the Court of Appeal's decision which made direct reference to *'The El Amria',* simply sought to ask itself with which country the claim was mostly connected. Upon finding that "the only *connection* the claim had with England""[8] was the arrest of a sister ship in an English port, Lord Brandon said "in these circumstances, this is not a case where a careful and meticulous weighing of the factors for and against a stay of action is necessary","[9] and a stay was ordered.

The rather brief reasoning can be further developed in the following manner. As England had little connection with the dispute other than being the place of arrest of the ship, it clearly could not be the appropriate forum. The plaintiff, on his part, could not show any legitimate advantage of trial in England which he would be deprived of by a stay of proceedings. That being so, the second limb of the *MacShannon* formulation need not be looked at and the court is also relieved of the further task of having to balance factors for and against a stay. The converse extrapolation of this *dictum* seems to be that if the plaintiff could show some real and legitimate advantages of trial in England which he would be bereft of if the action is stayed, then notwithstanding the minimal connection between the dispute and England, the court would be prepared to weigh the factors from both sides. The tacit reasoning of their Lordships was again recognisably similar to the *MacShannon* formula enunciated by Lord Diplock and qualified by the balancing process in *'The Abidin Dover'.*[120]

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[115] *Supra,* note 113 at p. 758.
[116] Briggs, *supra,* note 21 (Part I of this article) at p. 244T.
[117] *Supra,* note 96.
[118] *Ibid.,* at p. 528. Emphasis added.
[119] *Ibid.*
[120] *Supra,* see p. 107 of Part I of this article.

Although the words 'natural forum' were not employed, the reference to the *connection of the dispute with the forum,* was, it is submitted, an implicit attempt to ascertain the natural forum, no less. This assertion gains support from the resemblance between the italicised phrase and Lord Keith's definitional statement in *MacShannon* of what a natural forum is.[121] The phrase also bears some likeness to Lord Denning's test in *'The Fehmarn'*[122] which, as discussed earlier, some commentators feel is leaning towards the natural forum doctrine.[123]

C. *Whither the Distinction?*

We have seen so far that the distinction between the two approaches is attributable to the difference in policy considerations. Although in application, the distinction is frequently not maintained and some recent *dicta* have even blurred the line somewhat, it would still be rash to say that the two approaches have already merged. Notwithstanding the inconsistent *dicta* above, many cases after 1981[124] (the year *'The El Amria'* which reaffirmed *'The Eleftheria'* was decided), including one as recent as July 1990,[125] that dealt with stay based on exclusive jurisdiction clause have steadfastly cited *'The El Amria'* and applied the familiar approach of presumption of stay.

The dichotomy maintained in the case law is echoed by academic commentators. *Dicey and Morris* baldly assert that under the *Eleftheria* approach, the plaintiff has to do more than show the presence of *a. forum conveniens,*[126] impliedly favouring a delineation between the approaches. The editors *of Cheshire and North* opine that "the law has not yet reached the stage where the two forms of discretion can be assimilated."[127]

Cheshire and North offer three reasons for their opinion. The primary reason is the difference in policy justification, which leads to a reversal of the burden of proof. It has also been argued elsewhere that *the forum non conveniens* approach places insufficient emphasis on the intention of the parties and the principle of holding them to their agreement. By

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[121] *Supra,* note 48 (Part I of this article).

[122] *Supra,* note 7 (Part I of this article). The test is remarkably simple, 'with what country is the dispute most closely concerned?'

[123] *Supra,* note 49 (Part I of this article). This is because Lord Denning regarded the jurisdiction clause only as a connecting factor within the wider question of with which forum is the dispute most concerned and there was no *prima facie* case of stay solely on account of the agreement.

[124] For a sampling of these cases, see *'The Biskra'* [1983] 2 Lloyd's Rep. 59, *'The Atlantic Song'* [1983] 2 Lloyd's Rep. 394, *'The Pia Vesta'* [1984] 1 Lloyd's Rep. 169, *'TheIndian Fortune'* [1985] 1 Lloyd's Rep. 344 and *'The Ruben Martinez Villena'* [1988] 1 Lloyd's Rep. 435.

[125] *'TheRewia'* [1991] 1 Lloyd's Rep 69, a High Court decision of Sheen J.; it was reversed on appeal, but the Court of Appeal did not appear to have dealt with the application of the *El Amria* test at first instance, see *Financial Times,* July 12 1991.

[126] *Supra,* p. 105 (Part I of this article).

[127] *Supra,* note 30 (Part I of this article) at p. 239.

showing that the present forum as opposed to the chosen forum is the *forum conveniens,* a party may repudiate the forum agreement which is an important term of the contract and thereby upset underlying contractual expectations.[128] But leaving this policy motivated distinction aside, the reversal of the burden of proof *per se* is not a great hindrance towards merging the approaches. After all, *'The Spiliada'* has established that the doctrine *of forum non conveniens* applies to both stay of proceedings as well as service of notice of writ out of jurisdiction, even though the burdens of proof are also reversed in the exercise of those two forms of discretion.

Cheshire and North's second reason is that any advantage of trial in the forum which is in the plaintiff's favour is not even considered under the *Eleftheria* approach. With respect, it is submitted that this is misconceived because the plaintiff's advantage is in fact looked into, albeit indirectly and in the course of a broader inquiry. The first factor of the *Eleftheria* approach requires an investigation into the relative convenience and expense of trial as between the agreed and the actual fora. As this cannot be done in *vacua,* reference must be made to, *inter alia,* the circumstances that would affect the parties' convenience of trial *vis-a-vis* each of the fora. This requires the court to examine the advantages (and disadvantages) to the plaintiff if the trial is continued in the actual forum, then that to the defendant and make a comparison, before repeating the same for the agreed forum.

The third reason given is that in the *Eleftheria* approach, the plaintiff cannot complain about procedural disadvantages in the chosen forum. It is submitted that this is nothing more than an offshoot of the principle of being held to one's agreement. Having chosen a forum, parties are deemed to have thought through the procedural consequences of beginning a trial there. In other words, by choosing the forum, they have chosen its procedure as well[129] and what they have chosen as regards its procedure, they cannot afterwards renege.

It appears from the above discussion that the distinction can only be accounted for by the difference in the underlying policy considerations. If the imperative policy of ensuring compliance with the contractual agreement could somehow be accommodated within a modified *forum non conveniens* approach, then the existence of a separate approach for exclusive jurisdiction clause might be argued to be superfluous.[130]

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[128] See Robertson, *supra,* note 49 (Part I of this article) at pp. 303 - 304.

[129] *Trendtex Trading Corporation* v. *Credit Suisse, supra,* note 113 at p. 736.

[130] Some commentators, such as Briggs as well as Barma and Elvin have argued for some kind of accomodation of the different policies. See, for the former's view, 'Staying of Actions on Ground of *"Forum non Conveniens"' supra,* note 21 at pp. 243 - 245, and *"Forum non Conveniens* — Now We Are Ten?' *supra,* note 21 at p. 87; for the view of Barma and Elvin, see their article, *"Forum non Conveniens:* Where to from Here?" (1985) 101 L.Q.R. 48 at p. 65.

IV. THE MODIFIED *FORUM NON CONVENIENS* APPROACH

The *Spiliada* approach to *forum non conveniens* which emerged from the thicket of confusion surrounding the earlier case law in this area also came in the wake of those forum agreement cases which made tentative forays into the doctrine either by subtly liberalising the *Eleftheria* approach or purporting to search for the (inelegantly expressed) most convenient or closely connected forum. The present task is to consider how the trend manifested in these cases towards a unitary *forum non conveniens* approach may be further developed and brought in confluence with the *Spiliada* approach.

A. *Combining the Effects of Jurisdiction Clauses with the Spiliada Approach*

Ascertaining the appropriate forum to hear a case in the interest of justice is a broad ideal. Given the enormous, almost nebulous latitude of this ideal, the delineation between it and the policy of holding parties to their contractual forum looks like something of an anomaly since the 'open-endedness' of the former could well encompass the latter[131] which, as we have discussed earlier, is the only reason for maintaining the separate *Eleftheria* approach.

A historical explanation could perhaps be propounded for the existing distinction. The *Eleftheria* approach which was based on the sanctity of contractual agreement was enunciated at a time when the prevailing justification for staying proceedings was to control abuse of process.[132] Thus it began with a separate policy consideration and also antedated the first of a series of cases that catalysed the doctrine *of forum non conveniens, 'The Atlantic* Star'.[133] Before this case, the *Eleftheria* approach was substantially the lone basis for granting a stay.[134] It was only in 1984, after a morass of tentative principles expressed in earlier cases, when *'The Abidin Dover'*[135]* was decided that the doctrine *of forum non conveniens* received full legitimation by English courts and in 1986 when its principles were laid down with definitiveness in the *Spiliada* decision. But by then, a formidable body of cases had already applied and entrenched the *Eleftheria* approach. Despite the occasional startle of an incorrect *dictum* that threatened to subsume the *Eleftheria* approach under the still formative doctrine *of forum non conveniens,* most judges, at least outwardly, were probably reluctant to integrate a well established approach which had a firm policy justification with another that until recently

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[131] Furthermore, there is some attraction for a higher degree of harmony in the approach of the common law towards stay.

[132] It must be shown that the plaintiff is acting oppressively and vexatiously before the action is stayed: *St Pierre* v. *South American Stores Ltd.* [1937] 3 All E.R. 349.

[133] [1974] A.C. 436.

[134] Briggs, *supra,* note 21 (Part I of this article) at p. 245.

[135] [1984] A.C. 398.

was still groping for certainty and maturity; to do so would be to confound even further the already considerable confusion in this whole area of the law. So it may be that up to the time of *'The Spiliada'*, there was still a good reason to preserve the *Eleftheria* approach as a distinctive one.

However, this probable historical explanation for the distinction looks decidedly thin now that the *forum non conveniens* doctrine has reached fruition and its principles appear well settled. Indeed, Briggs considers the harmonisation of the two forms of discretion as an inevitable process.[136] Already, it is heralded in recent case law employing the *Eleftheria* approach. Apart from *dicta* suggestive of a merger, commonality of some of the factors together with more liberal applications of the *Eleftheria* approach have diminished the polarity between the two approaches in practical terms. It is submitted that the time has come to bring under the umbrella of the broad 'ends of justice' policy rationale, the specific policy of holding parties to the agreed forum. In conceptual terms, this subsuming process would require engrafting onto the *Spiliada* formulation *offorum non conveniens*, certain principles which safeguard the sanctity of contractual adherence. What follows is an attempt to modify the *Spiliada* approach to achieve this end.

Under the *Spiliada* approach, ascertaining an appropriate forum is the task of the trial judge, whose finding an appellate court is unlikely to disturb.[137] In the proposed modified *forum non conveniens* approach, this task of ascertaining the natural forum is left to the parties. Being commercial parties dealing at arm's length, they can be expected to consider factors similar to those that a court would, such as convenience and expense of trial, availability of witnesses, governing law and connection of the parties with the different possible fora before they negotiate on the forum agreement. Since business parties are deemed to be able to look after their own commercial interests, any forum selected must be regarded as their sensible and deliberate choice.[138] So while it is true that freedom of contract vests absolute autonomy of choice, the spectre of an arbitrarily picked, unconnected forum is so practically unlikely of business parties that, in the absence of any evasive intent, the possibility can be discounted.[139] More practical, however, is the problem of a party who accepts a contractual forum without any forethought or deliberation, particularly where the jurisdiction clause is buried in fine print amongst the other terms of the bill of lading. The answer to this is simple: unless

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[136] In his article, *"Forum Non Conveniens* - Now We Are Ten?" *supra*, note 21 (Part I of this article) at p. 87.

[137] Both Lord Goff and Lord Templeman, who delivered a short speech, made the same point. *Supra*, note 27 (Part I of this article).

[m] *Sohio* v. *Gatoil* [1989] 1 Lloyd's Rep. 588 at p. 592.

[139] One might argue by analogy from choice of law clauses. The commonly cited reason for the ratification of such clauses by the courts is the freedom to contract but underlying that must surely be a judicial belief that the parties are in the best position to decide which law should govern their transaction and as such, there is no need to fetter their choice.

there was no reality of consent, such a party have no one to blame if in his hastiness he failed to discover the clause and negotiate to protect his jurisdiction interest.[140]

In addition, there might be matters pertaining to a foreign forum which, for comity reasons, the forum cannot compare itself or other fora within the investigation of the *forum conveniens.* These include the quality of justice that the forum could dispense, the relative experience of its judiciary in handling disputes of a nature similar to the case and various aspects of its procedural law. However, these are some of the very important practical concerns of the parties when they decide on the choice of the forum. If not for judicial comity, it would be both relevant and realistic for a court to consider these matters. The advantage of this modified approach is that there is nothing to restrain the parties from considering these factors in their decision.

If having deliberated on the usual connecting factors and wider practical considerations, the parties have a common predisposition towards a particular forum, it could safely be said that their interests are best served if any dispute between them is resolved there. Even where initial preferences differ, the process of negotiation and compromise ensures that the eventual consensus reached as regards the forum can optimally accomodate divergent interests.

Hence, it is not extravagant to suggest that such a forum freely and deliberately chosen by the parties as the best place to resolve their potential disputes should be deemed as *prima facie* the appropriate forum. The subjective adoption of a forum based on intimate knowledge of the litigational interests involved is not inferior to, if anything, probably more expedient (and so more conducive to commercial certainty) and less expensive than the forensic, determinative process which is ostensibly objective but in actuality also filters through an 'unstructured and unstructurable"[41] discretion - that of the trial judge.

This part of the proposed approach corresponds with the first stage of the *Spiliada* approach except that the primary ascertainment of the appropriate forum is left to the parties and the court's role is confined to giving effect to that ascertainment by according to the result of such an ascertainment a *prima facie* appropriate forum status. By leaving to the parties to choose the appropriate forum and sanctioning their choice, a court is in fact upholding the narrower policy of keeping parties to their contractual agreement. This effectively takes care of the policy concern of the *Eleftheria* approach within the framework *of forum non conveniens.* However, the court does not just rubber-stamp the parties' choice. It retains the supervisory role of insisting that there is a true bargain in the choice of the forum. If the forum chosen is not the outcome

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[140] Contract law has never been very sympathetic towards a party who did not scrutinize the terms despite having the opportunity to do so. See *L'Estrange* v. *F. Graucob* [1934] 2 K.B. 394.

[141] Briggs, *supra,* note 21 (Part I of this article) at p. 77.

of any reality of agreement,[142] the court may refuse to accord it the status of *the prima facie* appropriate forum and instead proceed to determine the latter by the usual *Spiliada* process.[143]

If a forum is appraised to be appropriate by two commercial parties in the light of their litigational interests, then deeming it as *prima facie* the natural forum in deference to which the trial must be stayed is tantamount to holding the parties to their agreement. The broad interest of justice is served in that the sanctity of contractual agreement is preserved and the parties' assessment of appropriateness of the forum is at least as, if not more accurate than, that of the trial court.

The establishment of a *prima facie* appropriate forum will require an action to be stayed unless the plaintiff can discharge the burden of proving some special circumstances by the reason of which justice requires the action be allowed to continue. This is identical to the second stage of the *Spiliada* approach. The court has to take into account all the circumstances of the case, beyond the usual connecting factors which the parties have already themselves considered.

Whatever the logical attractiveness may be, in the unlikely situation[144] where the actual forum is ascertained by the court to be the natural forum, that fact by itself should not be sufficient to rebut the defendant's case. To begin, where a court has respected the parties' agreement as the *prima facie* appropriate forum, to then second-guess, even if with apparent objectivity, where else might the case be most appropriately heard is an inconsistent retreat from the principle of contractual sanctity it has upheld in the first place.

In any case, a conclusion otherwise would have the substantial effect of reversing the burden of proving *forum non conveniens* on the part of the defendant in the normal *Spiliada* situation into one of proving *forum conveniens* by the plaintiff where a forum agreement is breached. Such a task is certainly lighter than that which would otherwise confront the plaintiff under the *Eleftheria* approach. It leads to the consequence that proof of *forum conveniens* alone would enable the plaintiff to escape from his forum agreement and give the go-by to the principle of contractual sanctity. Furthermore, the plaintiff would now be placed in a similar position as a plaintiff seeking leave for service out of jurisdiction. This is untenable because the former plaintiff who breaches his jurisdiction clause is not asking the court to exercise its discretion in his favour by showing the court to be the natural forum; he is asking for more, that the court should condone his breach in the greater interest of justice.

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[142] *Supra,* see pp.118-121 (Part I of this article).

[143] Alternatively, it may regard the want of contractual freedom as a special circumstance that justice requires the action be allowed to continue. The result is likely to be the same either way.

[144] Where the natural forum has to be objectively ascertained, the jurisdiction agreement and the choice of law clause (which usually follows the jurisdiction clause) are weighty factors which often swing the natural forum to the agreed forum.

Where the interest of justice is concerned, a compromise might be to consider the situation as a matter a court can consider but not by itself,[145] sufficient to rebut the defendant's case. This is concession to the fact that notwithstanding the importance of commercial certainty, courts must have some say too in questions of jurisdiction, as a matter of general administration of justice,

In contrast, the circumstances surrounding the choice of forum agreement, by themselves, may necessitate some special considerations. The starting point is that a court has the residual power not to enforce a contractual term if so to do would offend against public policy. Thus, if judging from the relevant connecting factors, a forum is selected despite being totally unrelated to the action, then it is likely to be a deliberate attempt at forum shopping. As blatant forum shopping offends against public policy and hurts judicial comity, such an agreement should not be enforced.[146] Enforcement is also unlikely where the forum agreement is used as a device to evade mandatory statutes of the actual forum, since such evasion would be stigmatized by the forum's public policy.[147] Another special circumstance is where the choice of a forum was made without the effective participation of one party so that there may be said to have been no reality of agreement, such as the previously discussed situation of a *Brandt* v. *Liverpool* contract or a statutorily transferred contract under the Bills of Lading Act. A possible further objection, though perhaps not a decisive one, is where the express proper law is not the *lex fori of* the chosen forum.[148]

B. *How is the Suggested Approach Different from the Eleftheria Approach?*

At first glance, the suggested approach may appear to be very similar to the *Eleftheria* approach in practical terms in so far as once proof of a chosen forum eslewhere is shown, the plaintiff has to rebut a *prima facie* case of a stay. But there are, in fact, significant differences. In

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[145] A further objection may be that the factor by itself is not of such exceptionality as is envisaged by the *Spiliada* approach.

[146] See the caution against forum shopping by use of forum agreements expressed by the Alberta Court of Appeal in *Volkswagen Canada Inc.* v. *Auto Haus Frohlich Ltd.* [1986] 1 W.W.R. 380 at p. 381.

[147] See *'The Hollandia', supra,* note 4 (Part I of this article) where the House of Lords pronounced as void a forum agreement which had the effect of evading the Hague-Visby Rules by moving the resolution of the dispute to a court where the Rules do not apply. It is possible to think of situations where despite the overwhelming connections of the transaction with a forum, say Y, nevertheless, to avoid the contract being invalidated by a mandatory statute of forum Y, parties choose an unrelated forum, X (usually along with the laws of X as proper law if forum X does not automatically apply its own laws.) In such situations, the forum agreement is effectively an evasive device. See also the recent New Zealand decision *of Apple Computer Inc. v. Apple Corps S.A.* [1990] 2 N.Z.L.R. 598.

[148] Besides the usual difficulties with proof of foreign law, such a situation may be some indication of a capricious choice by the parties.

terms of the policy justification underlying a *prima facie* case of stay, the sanctity of the contractual forum, on which alone the *Eleftheria* approach is premised, is brought under the wider umbrella of 'ends of justice' under this suggested modified approach.

The two approaches also differ in what must be shown in the rebuttal *of tiie prima facie* appropriate forum. A faithful application of the *Eleftheria* approach requires strict proof of exceptional circumstances comprising, *inter alia,* the demonstration of the present forum as the natural forum, and where applicable, possible prejudices to the plaintiff of a foreign trial, the defendant's lack of genuine desire to have the trial in a foreign tribunal and any special circumstances of the case. On the other hand, factors pertinent to the rebuttal of the *prima facie* appropriate forum under the proposed approach are less restricted. This makes it possible to consider factors which are not commonly referred to in the *Eleftheria* approach, such as the circumstances surrounding the forum agreement. No doubt it is still open to a court applying the *Eleftheria* approach to declare that certain factors, hitherto not commonly referred to in applications of the approach, to be relevant to its exercise of discretion. However, any hint of residual workability in the *Eleftheria* approach if these more pertinent factors are looked into quickly vaporises because the inherent problem of trial judges not viligantly demanding that the plaintiff discharge his onerous burden, remains unsolved. Wider considerations cannot ensure that a trial judge do not transform the whole exercise into practically a natural forum determination if he so wishes, secure in the knowledge that there is almost no appellate control over his discretion so long as perfunctory mention is made to the relevant principles.

Upon closer examination, this complaint about the *Eleftheria* approach is actually two-fold. First, the objective ascertainment of the natural forum by the court purporting to apply the *Eleftheria* analysis is too easy on the plaintiff; second, unchecked ascertainment itself, under the guise of objectivity, leaves too much room for manipulation by the trial judge. The *Spiliada* approach can arguably be faulted for the latter as well;[149] but not, it is submitted, the modified approach proposed. Also for two reasons, the proposed approach ensures that the plaintiff's task of rebuttal of the *prima facie* case of stay remains heavy and not easily subject to judicial manoeuvring. First, the ascertainment of natural forum is left primarily to the parties. What they agreed upon is deemed the natural forum, there is little scope for judicial meddling. Second, once the agreed forum is deemed the appropriate forum, it is very rare that the second limb of the *Spiliada* approach can be invoked to rebut the *prima facie* case of stay. Circumstances that could induce the court to proceed with the action despite a *prima facie* appropriate forum elsewhere must be truly exceptional. This is apparent from the second limb of the *Cambridgeshire* factor in the *Spiliada* decision itself.[150] On

[149] The High Court of Australia preferred not to accept the *Spiliada* approach for this reason, see *Oceanic Sun Line* v. *Fay, supra,* note 27 (Part I of this article).

the other hand, proof of the deprivation of a legitimate advantage would not deter the court from staying the proceedings provided that substantial justice can still be done at the agreed and hence, appropriate forum. Since deprivation of substantial justice must be shown, the second limb of the approach does not lend itself to easy overriding of the selected appropriate forum. Thus, even though an appellate court is similarly slow to interfere with the trial judge's finding as to the weight to be given to the various factors under the *Spiliada* approach, that does not mean that an unfastidious trial judge can apply the label of special circumstances to a factor that *in substance* was nothing more than a mere advantage to the plaintiff. To do so would transcend the exercise of judicial discretion. It becomes either an error in principle or a plainly unfounded decision, either of which warrants appellate interference. In sum, because neither limb of the proposed approach offers much avenue for judicial manipulation, it is not plagued with the central weakness of lenient but inviolable exercise of judicial discretion so prevalent in the *Eleftheria* approach.

C. *Authorities for the Suggested Approach*

Authorities for the suggested approach are not wanting. It was held in *Berisford v. New Hampshire*[131] which affirmed the unreported judgment of *Canon Screen Entertainment* v. *Handmade Film (Distributors) Ltd.*,[152]

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[150] See the *Cambridgeshire* factor in that case. It involved the very substantial preparation and conduct of a related litigation in England with a rather similar factual matrix as the *Spiliada* action. In the *Cambridgeshire* action, complex scientific questions were raised and teams of experts, witnesses and lawyers were assembled. Furthermore, both actions involved the same defendants, defence counsel, insurers and trial judge. The vast expenditure of money, time and effort incurred as a result of the *Cambridgeshire* action would be duplicated if the *Spiliada* action were stayed in England and fresh proceedings commenced in Canada. Apart from economy, the expedition and efficiency in the resolution of the dispute and the possibility of settlement were also in the objective interests of justice.

Post-Spiliada cases have shown that using the second limb to override the natural forum eslewhere is rarely resorted to because of the exceptionality of the circumstances required. See for instance, *Du Pont* v. *Agnew* [1987] 2 Lloyd's Rep. 585, *de Dampierre v. de Dampierre* [1988] 1 A.C. 92 and *Irish Shipping Ltd. v. Commercial Union Assurance Pic & Alliance Assurance Co. Ltd., 'The Irish Rowan'* [1989] 2 Lloyd's Rep. 144. There is, however, one notable exception where substantial justice was held not to be done in the objectively ascertained natural forum as the plaintiff's success there would in monetary terms be substantially reduced because he could not obtain an order for costs: *Roneleigh Ltd.* v. *Mil Exports Inc.* [1989] 1 W.L.R. 619. This case can be criticised because the inability to obtain damages on a higher scale is just as much a reduction of the plaintiff' s monetary success as an inability to obtain costs but the former is regarded by Lord Goff in *Spiliada* as being insufficent in deterring a stay in favour of a foreign natural forum. By the Court of Appeal's own admission, *Roneleigh* was not an easy decision and there was perhaps excessive caution in not wanting to interfere with the trial judge's exercise of discretion.

[151] *Supra*, note 5 (Part I of this article).

[152] A decision of the English Queen's Bench Division given on 11 July 1989, also referred to in *Berisford.*

that even as regards a non-exclusive jurisdiction clause, the fact that a forum was chosen creates a strong *prima facie* case that it is the appropriate forum. As Hobhouse J. put it:

> [I]t should in principle be a jurisdiction to which neither party to the contract can object as inappropriate; they have both implicitly agreed that it is appropriate.[153]

The argument would be *a fortiori* if the chosen forum had been an exclusive one. The authoritativeness of these two cases is not diminished simply because the chosen forum was England (where the action was commenced and sought to be stayed), instead of a foreign forum. Conceivably, any forum could be selected because the choice is nothing more than an incidence of the parties' preference. So a court would not consider itself *prima facie* an appropriate forum simply because it, as opposed to a foreign forum, has been chosen; to decide in this way would border on judicial chauvinism. It would have to regard an agreed forum, whether itself or a foreign forum as *prima facie* the appropriate forum. Thus the *Berisford* decision could stand for the wider proposition that any chosen forum, including a foreign one, must be accorded the status of a *prima facie* appropriate forum. The case is therefore support for the modified approach proposed here.

D. *Other Possible Approaches*

Besides the modified approach proposed above, there are at least two other ways of assimilating the *Eleftheria* principles within the broader doctrine of *forum non convenient.*

The first is a suggestion made by the learned editors of *Cheshire and North,*[154] which is to give considerable weight to the chosen jurisdiction clause in the determination of the appropriate forum. No reasons for this opinion are offered by the editors but presumably, the parties' preference of one over several possible fora is some indication to the court of where that appropriate forum would be. This is, in a sense, a half-way house approach because (unlike the approach proposed) it accords some but not paramount importance to the parties' choice.

This approach differs from the proposed approach in two respects, the lesser degree of importance it gives to the clause and the ultimate task of ascertaining the natural forum remaining with the court. But in according importance to the clause, there is no reason not to go the

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[153] *Supra,* note 5 (Part I of this article) at p. 333.

[154] That the editors should advocate such an approach is surprising. It will be remembered that they prefer to keep the two approaches of *Eleftheria* and *Spiliada* distinct because of the different policy rationales. Between the two approaches, a defendant seeking a stay is better off applying the *Eleftheria* approach, where there is a presumption of stay in his favour, provided the clause covers the dispute in question. There is no need for him to resort to the clause for the purpose of showing an appropriate forum elsewhere.

full length. The danger of saying that it operates only as a weighty factor in favour of a stay is precisely that it may be relegated to the ranks of other 'weighty factors', such as the *lex causae,* convenience and expense of trial, parties' residence and place of business and so on. What then becomes of the policy of holding people to their contract? The short answer is that its importance is brought down from the pedestal because the clause is just a hint to the court as to where the appropriate forum might be. It is not examined in order that effect can be given to the parties' forum agreement.

Furthermore, some of these 'weighty factors' must have exercised the parties' minds when they chose the forum. These factors are mentioned in *'The Spiliada'* to deal with the commoner situation where there is no contractual forum so that the court has to have some bases before beginning to determine which forum the action has the closest connection with. Where they have been deliberated on by the parties before the contractual forum is selected, a court would be indulging in needless second guessing if it has to consider them afresh.

The other way of assimilating the two approaches is to determine the natural forum first without any regard to the exclusive jurisdiction clause. If the natural forum is the actual forum itself, the court should then consider whether in the light of the other circumstances, predominant among which would be the jurisdiction clause, justice, nevertheless, dictates that the case be stayed. This approach is open to several objections as well. First, there is no reason why the contractual forum should not figure at all in the determination of the natural forum, if a less direct factor such as a choice of law clause would by being the *lex causae.* Secondly, supposing the natural forum is a foreign forum other than the chosen one, the presence of a jurisdiction clause would be inconsequential because the action would be stayed on that score alone and a court is unable to use the chosen forum as a rebutting factor to support the continuance of the action before itself. Thirdly, compared with the two approaches suggested above, it gives even less weight to contractual choice by consigning it to the miscellany of circumstances that a court might look at.

It is probably fair to conclude that between the three approaches, the last two do not accomodate the diverse policies involved quite as well as that which is proposed.

V. CONCLUSION

Under English law, stay of an action brought in defiance of a foreign jurisdiction agreement is to be decided on principles different from those relating to stay based *on forum non conveniens.* Since the leading decision of *'The Eleftheria',* it is well settled that the staying of actions of the former kind is premised on the justification that the plaintiff should not be allowed to renege his forum agreement unless he has very strong reasons for doing so and this is reflected by the presumption of stay

which he has to rebut. In contrast, stay of an action on account *of forum non conveniens* raises the broader concern of finding a forum where the case could be heard in the interests of all the parties and the ends of justice.

The local cases have adopted the *Eleftheria* approach, but with the desirable refinement of requiring the plaintiff to show exceptional circumstances to back up his claim of strong cause for breaching the jurisdiction agreement. A *dictum* in the decision of *'The Asian Plulus'* suggests that the distinction between the two kinds of stay mentioned above also applies locally.

However, in the application of the *Eleftheria* approach, a number of English and local cases have preserved the dichotomy between the discretionary approaches only in form but not in substance. The *Eleftheria* approach sets the plaintiff an onerous task of dissuading the court from its predisposition to uphold the agreement. What has, however, happened is that some trial judges have allowed actions to continue on grounds that amount to nothing more than a greater convenience of trial in their forum. Perception as to the importance of a factor clearly differs from judge to judge. Since decisions of trial judges on stay applications (on the ground of breach of foreign jurisdiction agreement) are largely the result of the exercise of discretion, appellate courts are loath to interfere so long as they make perfunctory reference to the *Eleftheria* approach and apply the label of 'strong cause' to the grounds that persuaded them. Some *dicta* from English cases have gone further to suggest that maintaining two distinct approaches is somewhat artificial. If one ignores any explanation in terms of the chronological development of the two approaches, these *dicta* may yet be right since the search for a forum that can most suitably serve the ends of justice, as a policy rationale, has sufficient lattitude to accomodate the narrower policy of holding parties to their agreement. To this end, certain modifications to the current formulation of *the forum non conveniens* doctrine as expounded in the *Spiliada* case have been proposed.

First, a forum chosen by two parties in the light of their commercial and litigational interests should be *prima facie* the appropriate forum. Since the parties can be expected to consider the same connecting factors as a trial judge would as well as procedural matters of foreign courts which a trial judge would hesitate to consider, their interest would be best served if any dispute between them is resolved in the forum they eventually choose.

Secondly, the action would normally be stayed in deference to this forum, thus answering the need to preserve the sanctity of contractual agreement.

Thirdly, there might be special circumstances of such exceptionality that the interest of justice is better served by allowing the action to continue. In particular, certain circumstances attaching to the forum agreement may be examined. This corresponds with the second limb of the *Spiliada* formulation.

Fourthly, where the forum chosen is not the result of a real agreement between the parties, the court could either ascertain the appropriate forum by the normal *Spiliada* process or regard that fact as a special circumstance to take into account in the second limb of the *Spiliada* formulation.

Although the *Eleftheria* approach seems entrenched locally, there is no reason why a flawed approach should be perpetuated. As Singapore courts begin to accept the *Spiliada* formulation of *the forum non conveniens* doctrine,[155] perhaps we should have the wisdom to adopt a unified approach to stay of actions and abandon the imperfect dichotomy based on the presence or absence of a contractual forum.

[Concluded]

TOH KIAN SING*

[155] In the recent High Court decision of *J.H. Rayner* v. *Teck Hock, supra,* note 32 (Part I of this article), the *Spiliada* approach was referred to with approval and it may arguably be said that *'The Asian Plutus'* also approved the *Spiliada* approach *supra,* note 17 (Part I of this article).

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