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NATURAL OR AGREED FORUM?

The Kapitan Mezentsev[1]

EVERY student of the Singapore conflict of laws scratches his head in puzzlement when he is asked to explain the relationship between the *Spiliada*[2] principle of forum non conveniens and *The Asian Plutus*[3] principle of exclusive jurisdiction. He begins quite confidently by stating that the former is about staying proceedings begun within the forum or about to be begun by service of a writ out of the forum and he explains that in the case of a stay of proceedings a two-stage test is involved in which at the first stage the party who desires a stay must show that another forum is clearly and distinctly more appropriate than Singapore and if he succeeds in this, he will obtain his stay of proceedings unless the party who opposes the stay is able to show that he will be deprived of a legitimate personal or juridical advantage which is available to him in Singapore but not in that other more appropriate forum;[4] in the case of service of a writ out of jurisdiction, he tells us, the party who seeks the service out must show that Singapore is the natural forum for the trial of his cause. Thus far all is well and he proceeds to state that *The Asian Plutus* principle of exclusive jurisdiction is that where the party who desires a stay points the court to an exclusive foreign jurisdiction clause, the court will grant a stay of proceedings unless the party who has begun the proceedings can show the existence of exceptional circumstances amounting to strong cause why the proceedings

1 [1995] 3 SLR 55.

2 [1987] AC 460.

3 [1990] 2 MLJ 449; following *Amerco Timbers Pte Ltd* v *Chatsworth Timber Corp Pte Ltd* [1977] 2 MLJ 181, which followed *The Eleftheria* [1969] 1 Lloyd's Rep 237 and *The El Amria* [1981] 2 Lloyd's Rep 119. See also *Globus Shipping & Trading Co (Pte) Ltd* v *Taiping Textiles Bhd* [1976] 2 MLJ 154.

4 There appears to be some disagreement as to the incidence of the burden of proof of deprivation of personal or juridicial advantage: *cf Perwira Habib Bank Malaysia* v *Soon Peng Yam* [1995] 1 SLR 783; *The Hooghly Mills Co Ltd* v *Seltron Pte Ltd* [1995] 1 SLR 773 and *Charm Maritime Inc* v *Kyriakou* [1987] 1 Lloyd's Rep 433 at 447.

5 The court must have a residual discretion to do justice because "no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.": *The Fehmarn* [1958] 1 All ER 333 at 335.

should nevertheless continue.[5] What then are these exceptional circumstances? He tells us that they include the convenience of trial, the advantages and disadvantages of both parties in relation to stay or continuance of the proceedings.

It is here that problems begin to surface. For when the factors which must be considered for purposes of the *Spiliada* principle are compared with the factors which are supposed to make up exceptional circumstances amounting to strong cause they seem to be quite similar. And when the rationales of both are considered, they also seem to be quite similar; for, the broad rationale for the *Spiliada* principle seems indistinguishable from the rationale for the requirement of exceptional circumstances amounting to strong cause that is to say that in both cases, the court can be regarded as seeking to promote the ends of justice and as inquiring as to the forum in which the case can be tried in the interests of justice.

The acid test whether the two principles are in essence one and the same is this: "Suppose that Singapore is in fact the more appropriate forum than the agreed forum and that the defendant will not be deprived of any personal or juridical advantage in the agreed forum, will the court nevertheless grant a stay of proceedings in Singapore under *The Asian Plutus* principle?"

If this question is posed in England, the answer is that a stay would be unlikely. Such a situation would amount to strong cause.[6] In England then, the view is taken that the principles are in essence the same; if they were before different, they apparently have been assimilated.

In Singapore, however, one could easily suppose that the answer would be different and that the court will grant a stay of the proceedings in Singapore despite the fact that Singapore turns out to be the more approriate forum than the agreed forum and the defendant will not be deprived of any personal or juridical advantage. First, the sanctity of the exclusive jurisdiction agreement seems to be greater and *The Asian Plutus* teaches that parties must be firmly held to their bargain; that is why there must be exceptional circumstances amounting to strong cause before the court will sanction a breach of the jurisdiction agreement. Then, the Court of Appeal in *The Vishva Apurva*[7] in an attempt to elucidate the balance to be struck cites an American authority[8] and adopts its language; and the principle is reformulated as follows: there will not be exceptional circumstances amounting to strong cause unless the

6 See Toh, "Stay of Actions Based on Exclusive Jurisdiction Clauses under English and Singapore Law" [1991] SJLS 103, 410. See also *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399; [1994] 1 Lloyd's Rep 382. See also Briggs, "Jurisdiction Clauses and Judicial Attitudes" (1993) 109 LQR 382.

7 [1992] 2 SLR 175.

8 Namely, *Bremen* v *Zapata Off-Shore Co* 407 US 1 (1972).

conclusion is that the plaintiff will not have his day in court. "Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain."[9]

Our sympathies are understandably with the Malaysian court in the case, *Inter Maritime Management Sdn Bhd* v *Kai Tai Timber Co Ltd, Hong Kong*[10] when it refuses to follow *The Vishva Apurva* saying that the test there laid down is of American origin and is unsuitable because it lacks the concomitant greater ease and facility with which such agreements can be set aside in America.

Whether aware or unaware of the possibility of such a criticism, the Singapore court in *The Eastern Trust*[11] valiantly strives to show that there has been no departure from *The Asian Plutus*.[12] In the result, stay was refused because Singapore was the more appropriate forum than the agreed exclusive forum; but lest we jump to the conclusion that everything is clear once more, we must remember that the court did say that the test would not be applied strictly as against the plaintiff because he had no reasonable way of discovering or ascertaining the whereabouts of the agreed forum in that case.[13]

Evidently, further consideration will have to be given to the question; and the recent decision in *The Kapitan Mezentsev*[14] adds to the need for clarification.

The facts of the dispute in that case were of the usual kind in carriage disputes. The defendant shipowners carried goods belonging to the plaintiffs in their ship, the Kapitan Mezentsev, to Singapore and on arrival engaged stevedores to unload the goods. Damage was caused by the stevedores and the plaintiffs sued the defendants who of course contended that they could not be held responsible for the tort of the stevedores whom they alleged

9 *Cf* the proposition in *The Humulesti* (unreported) that: "If the jurisdiction clause is accorded real recognition rather than lip service, then only very severe factors should be taken into consideration, such as a paralysis of the court system, the breakdown of law and order, the unavailability of legal representation, the unavailability of translation or interpretation services, or a fundamental change in the legal system of the agreed country of jurisdiction."

10 [1995] 1 MLJ 322. See also *Sabah Gas Industries Sdn Bhd* v *Trans Samudera Lines (S) Sdn Bhd* [1993] 2 MLJ 396 where Syed Ahmad Idid J appears to have held that to succeed the action abroad must be shown to be vexatious and useless.

11 [1994] 2 SLR 526.

12 The Court of Appeal in *The Vishva Apurva* was said to have used "strong language" but that "must be viewed in the context of all the circumstances of the case." The Court of Appeal, the learned Judge thought, did not intend to lay down "a new test which should be applied to all cases where an exclusive jurisdiction clause is present."

13 The exclusive forum was the shipowners' principal place of business; but that was reasonably thought to be Liberia and no one could reasonably have discovered that it was in fact Taiwan.

14 [1995] 3 SLR 55.

were independent contractors.

Now the plaintiffs brought their action in Singapore in spite of an exclusive jurisdiction agreement that "Disputes arising under the bill of lading shall be determined at the place where the carrier has his principal place of business. No proceedings may be brought before other courts unless the parties both expressly agree on the choice of another court or arbitration." And the court held that the defendants' application for a stay would be refused because the plaintiffs succeeded in showing strong cause for the proceedings to continue.

The applicable principle was stated as follows:

> "In a nutshell, as restated by the Court of Appeal in *The Vishva Apurva* the court in the exercise of its discretion should take into account all the circumstances of the case, in particular:
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> (a) the country where the evidence is most readily available;
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> (b) whether the foreign law applies and whether it is different from the local law in any material aspects;
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> (c) which country the parties are connected with, and how closely;
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> (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.[15]

In balancing all these factors and circumstances of the case, the ultimate objective of the court is to determine whether enforcing the agreement would be unjust and unreasonable."[16]

Oddly enough though, having stated the ultimate test in this manner (whether enforcing the agreement would be unjust and unreasonable), the court proceeded to look for "strong cause". The seduction of "strong cause" is evident.

What then were the exceptional circumstances amounting to strong cause? Two factors were identified. First, the court thought that the claim was a claim in tort. The damage "occurred after the contract of carriage on the

[15] These are the factors listed in *The Eleftheria* [1969] 2 All ER 641.
[16] At 66.

vessel had ended ... [and] That being the case, what relevance does the B/L and thereby the jurisdiction clause have, to the plaintiffs' claim?"[17]

With respect, the irrelevance of the jurisdiction agreement has not hitherto been regarded as a matter of strong cause. The exclusive jurisdiction agreement affected all disputes arising under the bill of lading and so the question whether the tortious claim was a dispute arising under the bill of lading is doubtless an important question to be resolved. In resolving such questions, the principles in *The Playa Larga*[18] have often been applied. And so one looks to see whether the tortious claim bears a sufficiently close connection to a claim under the contract. This may be the case when the resolution of the contractual issue is necessary for a decision on the tortious claim, or when the contractual and tortious claim are so closely knitted together on the facts that an agreement to submit the dispute arising can cover the other. In other words, the mere fact that the damage occurred after the end of the carriage can seldom be conclusive.

But if indeed the tortious claim fell outside the exclusive jurisdiction agreement, then the plaintiffs would not be seeking to break any jurisdiction agreement by bringing their proceedings in Singapore. And the whole of *The Asian Plutus* law is not engaged. The plaintiffs' case would fall simply to be resolved by application of the principles in *Spiliada*. What then is one to make of the court treating the inapplicability of the jurisdiction agreement as a strong cause? Is this a statement that the two principles are assimilated?

In the court's view, the second circumstance contributing to strong cause, although not decisively, was that "[t]he defendants' conduct smacked of seeking a procedural advantage, to the plaintiffs' prejudice."[19] This conduct was evidenced in inordinate delay on the part of the defendants' in applying for a stay of the proceedings. The writ was first served on the defendants and one and a half years of correspondence between the plaintiffs' and defendants' solicitors elapsed. As the headnote writer puts it, "There was no reason for the defendants to spend $1^1/_2$ years corresponding with the plaintiffs' solicitors as to the merits of the case if they intended to insist on strict compliance with the jurisdiction clause. There [also] appeared to be some basis for the plaintiffs' surmise that the defendants realized that there was no valid defence [to] the claim and the only way out was to stifle it by insisting on proceedings being commenced in Odessa."

In these reasons, there are two very different things. If the defendants had led the plaintiffs to think that they would not insist on compliance

[17] [1995] 3 SLR 55 at 66.
[18] [1983] 2 Lloyd's Rep 171.
[19] [1995] 3 SLR 55 at 67.

with the jurisdiction agreement, then that agreement drops out of the picture; and the court should simply apply the principle in *Spiliada* and stay the proceedings if so warranted by that principle. The case is taken out of *The Asian Plutus* principle if there is a waiver of the right to insist on compliance with the jurisdiction agreement, just as much as if there had been a jurisdiction agreement which was null and void and of no effect.[20]

On the other hand, if there is no waiver of this right to insist on compliance with the jurisdiction agreement, the plaintiffs must bear the risk that their action will be stayed unless they can show strong cause and the defendants are entitled to request a stay at any time since the jurisdiction agreement is in their favour. "[T]here is no half-way house."[21] If the defendants' conduct falls short of waiver, the court cannot nevertheless consider that it is reprehensible and that the defendants are seeking a procedural advantage by insisting on the jurisdiction agreement to the plaintiffs' prejudice. The risk being on the plaintiffs, they should take out a protective writ in the agreed forum and if they fail to do so, the defendants by insisting on compliance with the jurisdiction agreement, cannot be said to be seeking a procedural advantage in the agreed forum in that the plaintiffs' claim would be time barred in the agreed forum.

Whether the defendants had in fact waived their right to insist on compliance with the jurisdiction agreement depends on findings of fact. As appears from the judgment, the evidence relied on is quite compatible with the defendants' not having waived their right to insist on compliance with the jurisdiction agreement. The dispute was whether the claim itself was within the jurisdiction agreement. The case was not open and shut in that it could be said that the claim was indisputably within the jurisdiction agreement. What the defendants did was to ask for clarification of the plaintiffs' case. And as long as the plaintiffs thought it fit to discuss the merits of the case, perhaps with an eye to settlement, the plaintiffs unless they were confident that the defendants by their actions were waiving their right should have taken out a protective writ in Odessa.

The judgment on this point therefore only makes sense if there was a finding of waiver; but if so there was no matter of strong cause but a case of the irrelevance of the jurisdiction agreement the benefits of which had been waived.

[20] This is the true meaning of the proposition in *The Vishva Apurva* that "Delay by the defendants is a factor in favour of the plaintiffs only if it amounts to a waiver of the defendants' rights under the exclusive jurisdiction clause."

[21] *The Ruben Martinez Villena (No 2)* [1988] 1 Lloyd's Rep 435.

[22] This is the point raised in *The Eastern Trust* [1994] 2 SLR 526 and *The Humulesti* (unreported) that the plaintiffs had no say and no notice of the choice of jurisdiction until receipt of their bill of lading.

Apart from another matter,[22] the judgment makes no attempt to deal comprehensively with all the submissions of counsel, though it summarizes them in very systematic fashion. These submissions invite a general comment. Submissions are still focused on a whole host of individual factors such as convenience of trial, advantages and disadvantages, and the court goes through these factors, either dismissing them or accepting them, sometimes without regard to the ultimate test, whether it is that the proceedings will be unjust or unreasonable or that the plaintiff will not have his day in court.

One would have thought that detailed consideration of many of these factors would be unnecessary unless they were in the first place unforeseen or unforeseeable by the parties at the time they agreed the jurisdiction agreement. For if the parties have agreed an exclusive jurisdiction agreement they should have or may be presumed to have weighed the advantages and disadvantages of litigating in the agreed forum as well as the convenience of litigating there *vis-à-vis* elsewhere.[23] Giving full and maximum effect to their jurisdiction agreement simply means that neither party can rely on any foreseeable factor by way of avoiding trial in the agreed forum. But if a factor was unforeseeable, and this may happen as a result of unforeseeable changes, and if that unforeseeable factor affects the ends of justice, then in exercise of the residual discretion which the court has in matters of jurisdiction and process, either party can be allowed to avoid or escape the agreement.

The germ of this notion was already in *The Asian Plutus* where the plaintiffs sought to avoid bringing proceedings in Tokyo, which was the agreed exclusive forum, by arguing *inter alia* that trial in Tokyo would deprive them of certain advantages in Singapore. The court's answer was rightly that: "where parties have agreed beforehand on the choice of jurisdiction, they must be deemed to have done so with sufficient knowledge of how it works, and what it can and cannot do, and to accept the situation for what it is."

If there is any criticism of the court's judgment in that case it is that the court did not also apply that same limitation to the question of the more appropriate forum. Instead of holding by the same token that the fact that trial in Singapore would be more convenient than in the agreed forum was irrelevant if that was foreseeable by the parties, the court refused to consider

[23] In the present view, this proposition is not the only premiss that may be maintained. The alternative premiss is that the parties by agreeing an exclusive jurisdiction agreement are no more than agreeing that prima facie the agreed forum will be the natural forum and that whoever seeks to show otherwise bears the burden of proof of doing so. This alternative is not implausible. But the argument here is that if the premiss in the text is maintained, as it seems to be by the courts in Singapore, then it must be applied across the board to all the factors which are relevant in determining strong cause, whether they are convenience of trial factors or matters of advantages and disadvantages.

the fact that trial would be more convenient in Singapore (as the damage, as the plaintiffs alleged, occurred in Singapore), saying that "the purely geographical location of the accident can be of relatively minor significance."; with ever improving means of travel between countries, the transportation of witnesses was said to be a neutral factor. This seems to understate the fact that convenience of trial is also concerned with the dislocation and disruption of the affairs of witnesses and not only the ease with which they may be brought to another forum. If the court was serious that "where parties have agreed beforehand on the choice of jurisdiction, they must be deemed to have done so with sufficient knowledge of how it works, and what it can and cannot do, and to accept the situation for what it is" then likewise they must be deemed to have known that trial might be more convenient in some place other than the agreed forum. If then the parties nevertheless agreed on an exclusive forum, they must be deemed to have been prepared to forego a more convenient trial for whatever other benefits litigation in the agreed forum will bring. Afterwards, neither party surely can complain that trial is in fact more convenient in another forum.

In other words, whether convenience of trial or advantages and disadvantages are in view, only those which were not foreseeable at the time the jurisdiction agreement was made should count. But still there are few signs of a comprehensive application of this logic.

In *The Vishva Apurva* the plaintiffs sought to avoid bringing proceedings in India, the agreed exclusive forum, by arguing that trial in India would involve considerable delay. The Court of Appeal held that "there was no suggestion whatever that the Indian consignees did not know that the goods were being shipped on one of the defendants' vessels. That being the case, they must be deemed to have assumed the risk of any delay in the trial of any actions in the chosen forum." But the Court of Appeal did not apply this reasoning to the other factors which were raised for consideration. There was for instance the question of the recoverability of higher litigation costs in Singapore as opposed to India. This was said to be a neutral factor; a factor which cut both ways. But with respect, even if it was not, the parties must be deemed to have assumed the risk involved. There was also the question of the exchange control regulations; and on this point, the court seems to have agreed that although the plaintiffs must have been aware of the exchange control restrictions, the court was entitled, nevertheless, to take some account of them.[24] Notwithstanding, the court found that they were only of marginal significance.

There is no doubt then that the concept of foreseeability is here and there in the cases. Had it been insisted upon more often, the law in this

[24] Agreeing with *The Indian Fortune* [1985] 1 Lloyd's Rep 344 at 347.

area would not be as uncertain and perplexing. In any clarification, one hopes that the Singapore courts will be persuaded that if foreseeability is an answer to the procedural advantages, it must also be an answer to the more appropriate forum. Any such clarification that strong cause is constituted only by unforeseeable factors will be more transparent than such pet formulas as "enforcing the agreement would be unjust and unreasonable" or that "the plaintiff would not have his day in court" and so on.

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