Singapore Journal of Legal Studies
[1999] 674 – 677

JURISDICTION CLAUSES AND WAIVER OF *FORUM NON CONVENIENS*

Bambang Sutrisno v *Bali International Finance Ltd & Ors*[1]

IN *Bambang Sutrisno* v *Bali International Finance Ltd & Ors*, the appellant gave a personal guarantee in respect of a syndicated loan granted by the respondents to an Indonesian company. The guarantee included a clause which conferred upon the District Court of Central Jakarta or other Indonesian courts non-exclusive jurisdiction. Under that clause, the respondents were however also able to proceed in any other court chosen by them. The clause further provided that the appellant was to waive objections to the choice of the respondents on *forum non conveniens* grounds. Subsequently, owing to the inability of the Indonesian company to repay interest under the loan, the respondents sought and obtained in Singapore a Mareva injunction against the appellant. The appellant applied for a discharge of the Mareva injunction or, alternatively, a stay of the action. This was refused by the judge in chambers, whose decision was appealed to the Court of Appeal.

The Court of Appeal held that in respect of the waiver by the appellant of *forum non conveniens* objections, the court still retained a discretion whether or not to grant a stay on principles found in *The Eleftheria*,[2] and subsequently elaborated in *The Eastern Trust*.[3] Thus, exceptional circumstances showing strong cause have to be shown before a court will consider granting a stay. It was noted that the clause in question confers non-exclusive jurisdiction on the Indonesian courts. The Court of Appeal approved of *PT Jaya Putra Kundur Indah & Anor* v *Guthrie Overseas Investments Pte Ltd*,[4] a decision of Lai Siu Chiu J, that such clauses should be upheld wherever possible, and the parties could not be heard to complain of the inappropriateness of the choice. *PT Jaya Putra* itself followed *S & W Berrisford* v *New Hampshire Insurance Co*,[5] which was approved of by the Court of

1 [1999] 3 SLR 140, ("*Bambang Sutrisno*").
2 [1969] 1 Lloyd's Rep 237.
3 [1994] 2 SLR 526.
4 Unreported, High Court, Suit No 395 of 1996. Judgment dated 7 December 1996.
5 [1990] 2 QB 631, ("*Berrisford*").

Appeal as well. On the facts, given the complexity of various issues, which had to be determined by Indonesian law, it was found that strong cause was shown, and the appellant was entitled to a stay.

The first comment that may be made is that while the Court of Appeal treated the clause in question, or at least the waiver of objection of *forum non conveniens*, as creating an obligation akin to an exclusive jurisdiction clause, it is not apparent why this should be so. The clause simply states that the Jakarta courts were to have jurisdiction, but in addition, so would the courts of any other jurisdiction chosen by the respondents. That hardly makes it an exclusive choice of jurisdiction. It is true that the waiver of objections on *forum non conveniens* grounds prevented the appellant from disputing any choice by the respondents, but, with respect, this is not similar to an exclusive choice. It is suggested that whether a stay should or should not have been granted ought to have been determined on principles governing non-exclusive choice.

An exclusive choice fixes the forum that may be resorted to by obliging parties to resort to only one forum, or more infrequently, one of several *fori*. The principles developed in *The Eleftheria*[6] governing the granting of a stay are founded upon balancing the desire to keep parties to the bargain against the possibility of injustice to one of the parties. That is why strong cause is required. Where the parties have not chosen a foreign jurisdiction to determine their dispute exclusively, breach of a bargain does not figure as a consideration, and no such strong cause ought to be required. The determination should made on the normal *Spiliada* v *Cansulex*[7] analysis, with the choice being a strong factor (and indeed, *Berrisford*[8] is one of the authorities for this proposition). A non-exclusive choice either merely adds to the *fori* available an additional forum, or removes any uncertainty about the availability of a particular forum. Whether a stay ought to be granted in respect of proceedings ostensibly covered by a non-exclusive jurisdiction clause is determined by a *Spiliada*[9] type analysis – the clause is a factor, albeit a strong one, in showing whether a forum is more appropriate. The waiver of objections on *forum conveniens* grounds provided in the clause in question was clearly intended to preclude any dispute as to the appropriateness of the forum chosen by the appellants.

If, as is suggested, the clause in question should be treated as a non-exclusive jurisdiction clause, then it needs to be considered what the burden of proof would be. Where jurisdiction is founded as of right, as seems to

6 *Supra*, note 2.
7 [1987] AC 640, ("*Spiliada*").
8 *Supra*, note 5.
9 *Supra*, note 7.

be the case here, the appellant would have the burden of showing that some other forum is more appropriate. He is precluded from arguing so. But if he had been able to so argue, the burden would have shifted to the respondents to show some element of injustice in sending them to the other forum. The inquiry moves on from determining the more appropriate forum to one of justice between the parties. This suggests that an alternative to the approach taken by the Court of Appeal would be to allow the respondent to show some ground of injustice in litigation in Singapore rather than Indoneisa. Such injustice would probably have to be concerned with either the fairness of trial here, or with some serious inability on the part of the respondent to pursue his action here. It is not likely that any could have been shown on the facts of *Bambang Sutrisno*.

Another point that may be made about the approach of the Court of Appeal is that even if the clause was akin to an exclusive jurisdiction clause, where such a clause operates in favour of the forum, it has been said that it is doubtful whether any court (or an English court at any rate) will grant an injunction: *Berrisford*.[10] An argument could be made that the waiver of objections should be treated in the same way. However, the Court of Appeal in *Bambang Sutrisno* did not avert to this distinction between exclusive jurisdiction in favour of a foreign court and such in favour of the forum. It may be that *Bambang Sutrisno*, though dealing with a waiver clause, could be regarded as authority for exclusive jurisdiction clauses generally. An argument in favour of disregarding such a distinction is that it is at least symmetrical with the position with regard to exlusive foreign jurisdiction clauses. But it must also be noted that it will be highly unlikely that *The Eleftheria*[11] considerations could ever point towards a stay in the forum in favour of foreign proceedings – in most cases, the party seeking the stay would be left in the unenviable position of showing strongly some inadequacy of the forum court.

The Court of Appeal in *Bambang Sutrisno* also found, in applying *The Eleftheria,*[12] that there was such strong cause in favour of stay because of issues which had to be determined by Indonesian law. In *The Eleftheria*,[13] the applicability of the law of the foreign court was stated to be a factor which should be taken into account by the court in deciding whether to grant a stay. But it is suggested that this factor is not all that determinative, particularly where the parties have expressly bargained for other courts to

[10] *Supra*, note 5.
[11] *Supra*, note 2.
[12] *Ibid*.
[13] *Ibid*.

have exclusive jurisdiction. It may be that when in *The Vishva Apurva*[14] a differently constituted Court of Appeal expressed the view that the law of a particular country should be determined by that court, such an observation was in the context of an exclusive choice of the court of the country whose law was being applied. On the facts of *Bambang Sutrisno* though, the approach of the Court of Appeal has much to commend it given the possibility that the respondents were able to bring proceedings in any jurisdiction they saw fit.

A final point concerns the treatment of the local authorities on principle in *The Eleftheria*.[15] The Court of Appeal appears to have endorsed the approach taken in *The Eastern Trust*.[16] There was no reference to the divergence in cases such as *The Vishva Apurva*[17] and *The Asian Plutus*[18] which arguably take a harder line against breaches of jurisdiction clauses. While Justice Lai Kew Chai in *The Eastern Trust*[19] did not think that *The Vishva Apurva*[20] introduced a stricter approach than *The Eleftheria*,[21] a strong argument could be made that it did. Some comment on this would have been welcome.

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14 [1992] 2 SLR 175.
15 *Supra*, note 2.
16 *Supra*, note 3.
17 *Supra*, note 14.
18 [1990] 2 MLJ 449.
19 *Supra*, note 3.
20 *Supra*, note 14
21 *Supra*, note 2.

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