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A NEW-FOUND SIGNIFICANCE FOR NON-EXCLUSIVE JURISDICTION AGREEMENTS?

This article examines the English and local cases dealing with jurisdiction agreements that point non-exclusively to a particular forum. It considers the effect the law has accorded, and should accord, to such agreements in two main contexts: the granting of leave for service out of jurisdiction or the stay of proceedings commenced in the local forum, as the case may be, and the granting of anti-suit injunctions to restrain parties from commencing or continuing with foreign proceedings in non-contractual fora. It argues that an approach sensitive to the parties' intention for having such agreements, the inference of which depends on the finding of particular factors in each case, would perhaps provide the best guide for the effect the law should accord to such agreements.

THE applicability of ordinary private international law principles to exclusive jurisdiction agreements has been the focus of many articles[1] since *The Eleftheria*[2] was decided. At least in the case where the court considers an application for a stay of proceedings commenced in breach of a foreign jurisdiction clause, Lord Goff has said that the principles in *The Spiliada*[3] do not apply. Generally, where there are jurisdiction agreements – exclusive or not – cases show that special considerations apply on top of the private

1 See, for example, Edwin Peel, "Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws" [1998] LMCLQ 182; Otto Kahn-Freund, "Jurisdiction Agreements: Some Reflections" (1977) 26 ICLQ 825; Andrew S Bell, "Jurisdiction and Arbitration Agreements in Transnational Contracts" (1996) 10 Journal of Contract Law 53, 97; Toh Kian Sing, "Stay of Actions based on Exclusive Jurisdiction Clauses under English and Singapore Law" [1991] SJLS 103, 410.

2 [1969] 1 Lloyd's Rep 237.

3 The *forum conveniens* doctrine was developed under a restrictive power to stay proceedings on the ground of vexation and oppression in *The Atlantic Star* [1974] AC 436. The power to stay on *forum non conveniens* was enlarged in *MacShannon* v *Rockware Glass Ltd* [1978] AC 795 and *The Abidin Daver* [1984] AC 398, and settled in *Spiliada Maritime Corporation* v *Cansulex Ltd* [1987] AC 460.
Briefly, where stay of an action is sought, the defendant must show that there is some other available forum having competent jurisdiction in which the case may be more suitably tried for the interests of the parties and the ends of justice. The search is for the clearly and distinctly more appropriate forum. If there is such a forum, the defendant has established a *prima facie* case for stay. The burden is then on the plaintiff to show that special circumstances

international law considerations. But the focus has mostly been on exclusive jurisdiction agreements as it is in such cases that a suit in a non-contractual forum constitutes a clear breach of contract for which it is argued that damages are manifestly inadequate.[4] In such cases, various epithets such as "strong case", "strong reasons", "strong grounds" and "strong cause" have been used to describe what must be satisfied before the suit may be commenced or continued in a non-contractual forum. Whether this merely amounts to a shift in the burden of proof in showing a particular court is the natural forum, or the test requires a focus on different factors, varies from jurisdiction to jurisdiction. In Malaysia, for example, *The Eleftheria* is interpreted as only causing the burden of proof to shift in a stay case.[5] While the defendant ordinarily has to show that there is a more appropriate forum elsewhere to get a stay of the local proceedings, the plaintiff now has to show why proceedings in the local non-contractual forum should continue. In contrast, in Singapore, the view is that *The Eleftheria* does lay down a new test in the sense that consideration of all the factors ordinarily pointing towards a forum as the natural forum may not be appropriate in the light of the jurisdiction agreement.[6]

Non-exclusive jurisdiction agreements, on the other hand, have attracted less academic comment as they were thought to be merely an indication of submission to the contractual forum such that there was created a right but not obligation to sue in that jurisdiction. As to what exactly was meant by a "right" to sue in a particular forum, it was at most thought that they

exist by reason of which justice requires that trial should take place in the local forum. Here, factors amounting to legitimate personal and juridical advantages, over and above factors of convenience, are considered. More recently, the question has been variously framed as whether justice requires that a stay be denied, or whether substantial injustice would result from the stay of proceedings.

Where leave is sought by the plaintiff to serve out of jurisdiction, the search is for the most appropriate forum. The plaintiff has to show it is a "proper case" for service out of jurisdiction under Order 11 Rule 2(2), Rules of Court, and it is a proper case when the forum is the natural forum. The burden being the obverse of that in stay cases, where the plaintiff establishes a *prima facie* case for stay, the court will ask if justice demands that leave be denied.

4 The exact justification in the inadequacy of damages do not appear from the old cases but it must be some sort of an assumption. More recent cases mention this: *Continental Bank* v *Aeakos* [1994] 2 All ER 540; *Bankers Trust* v *PT Jakarta* [1999] 1 Lloyd's Rep 910, at 915.

5 *Inter Maritime Management Sdn Bhd* v *Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322.

6 Locally, the Court of Appeal in *Amerco Timbers* v *Chatsworth* [1977] 2 MLJ 181 adopted the factors in *The Eleftheria*, albeit without mentioning the case. There was also a slight change in wording, which was latched upon by the High Court in *The Asian Plutus* [1990] SLR 543 as evidencing a deliberate emphasis on the "exceptional circumstances" that must

constituted some concession that the contractual forum was appropriate. A suit in a non-contractual forum thus involved no breach of contract. With the increased use and importance in recent years, particularly of non-exclusive choice of neutral fora not having any connection with the parties or the dispute, they merit separate consideration.

This article begins by examining the rationale for non-exclusive jurisdiction agreements with a view to gathering the intention of the parties which would in turn impinge on the effect which the law accords to non-exclusive jurisdiction agreements. In Part II, the effect of non-exclusive jurisdiction agreements in the following contexts is considered: (A) Whether to grant leave for service out of jurisdiction or to stay proceedings in the local forum as the case may be; (B) in granting anti-suit injunctions to restrain foreign proceedings commenced in non-contractual fora. Attention

be shown by the plaintiff to amount to strong cause for the plaintiff's proceedings locally to continue. This emphasis on exceptional facts, as opposed to a mere balance of convenience under the *Spiliada* analysis, before the plaintiff is allowed to be relieved of his contractual obligation to sue in the designated foreign jurisdiction, is reiterated by the Court of Appeal in *The Vishva Apurva* [1992] 2 SLR 175. Further, the Court of Appeal clarified that not all factors in the *Spiliada* balance of convenience analysis were to be considered. The factors foreseeable at the time of contract were taken to be agreed upon by the parties, and hence could not "count" towards the plaintiff's case for proceedings locally. The analysis is thus a contractual one, particularly fortified by the Court's view that full recognition should be accorded to exclusive jurisdiction clauses "which are freely negotiated between the parties and which are unaffected by "fraud, undue influence or overweening bargaining power"." To avoid his contractual obligation to sue in the foreign jurisdiction, the plaintiff must show that "trial in the contractual forum will be [so] gravely difficult and inconvenient that he will, for all practical purposes, be deprived of his day in court." This seems to be a heavier burden on the plaintiff than in *Amerco Timbers*.

This line of local cases left much to be clarified. The position was settled in *The Eastern Trust* [1994] 2 SLR 526 which clarifies the Singapore approach in the following ways. First, it held that *The Vishva Apurva* accepts *Amerco Timbers* and does not lay down a new alternative test. The strong language in the case, which gave the impression of a more onerous burden on the plaintiff, was used because on the facts itself, the case for a stay was so strong that the plaintiff had to show extra strong cause to persuade the Court to refuse a stay. There was certainly no need in every case to show that the plaintiff would be deprived of his day in the court of the contractual forum before a stay was refused. The strength of the *prima facie* case for a stay shown by the defendant by the exclusive foreign jurisdiction clause, coupled with the other connecting factors, impinges on the exceptional circumstances the plaintiff must show for a stay to be refused. The analysis involves two main categories of factors, though these are linked in that some factors which may ordinarily be considered under a natural forum analysis may not be considered in view of the contractual agreement for a particular forum:

(i) Natural forum factors
   - Where apart from the contractual clause the case "cries out to be tried in the contractual forum", as in *The Vishva Apurva*, exceptional circumstances have to be shown.

would be paid to recent cases from Singapore and England with a view to determining if the approaches are consistent or defensible. The following differences, or lack thereof, would be analysed: First, those in the treatment of jurisdiction agreements in favour of the local forum and those in favour of a foreign forum; second, those in the treatment of exclusive and non-exclusive jurisdiction agreements. Where appropriate, suggestions would also be made for possible refinements in the reasoning. The article concludes with a summary of the issues that remain to be clarified.

I. Rationale for Having Non-Exclusive Jurisdiction Agreements

A dispute arising out of a cross-border transaction, where one or more parties come from foreign jurisdictions, or where the transaction has foreign elements, or both, presents complex problems of choice of forum for the plaintiff's lawyer. In deciding where to sue, he has to address the following issues: First, which court has jurisdiction to hear the case; and second, what the law to be applied to the dispute is. As both issues are dealt with by the private international law rules of the particular forum, and as these rules are part of domestic law and thus differ from forum to forum, the dispute may be resolved differently according to which court it is heard in. Thus, as a matter of practical tactic, the lawyer's advice to his client would be based on two main considerations: First, based on the choice of law applied by the forum, where the case is likely to be most favourably received; second, considerations of procedural and other advantages.

(ii) Contractual factors

- Where the jurisdiction agreement is an essential term of a freely negotiated contract, exceptional circumstances have to be shown before the plaintiff is allowed to go back on his word.
- The plaintiff must be taken to have conceded to certain inconveniences and disadvantages in choosing the contractual forum and cannot be easily allowed to rely on these to make his case for the refusal of a stay. Only "very severe" factors are considered, such as paralysis of the court system, the breakdown of law and order, the unavailability of legal representation where this is necessary, the unavailability of translation or interpretation services where these are crucial, or a fundamental change in the legal system of the agreed country of jurisdiction. Procedural disadvantages like the inability to apply for summary judgment, to have pre-trial discovery, the lower rate of interest on judgments and the payment of court fees, are not sufficient.
- A distinction should be drawn between those cases where the plaintiff knew or should have known at the time of contracting that he was agreeing to litigate disputes in a particular forum, and those where he could not have easily known. In the former cases, the rule should apply with full rigor; in the latter, the burden on the plaintiff is less onerous.

But the plaintiff's lawyer is not unconstrained in his choice of where to litigate: In many fora, apart from the concept of jurisdiction over the defendant, there exists some requirement of connection with the forum which has to be met before the court will exercise its jurisdiction. In England and Singapore,[7] for example, if proceedings are not started in the "natural forum", they may be stayed, or, in an Order 11 case,[8] leave may not be given for the plaintiff to serve the originating process out of jurisdiction. As the principles enunciated in *Spiliada*, like all principles which involve attaching weight to different factors, by no means dictate a result that can be predicted with scientific accuracy, one can foresee the amount of money and time that could go into litigation over where to sue.

It is against such a backdrop that parties to transnational contracts pre-emptively forum-shop by choosing before a dispute arises the forum in which parties may or are bound to litigate, or if arbitration is preferred, by agreeing in advance to a venue for arbitration.[9] With exclusive jurisdiction agreements, which create an obligation to sue in a particular forum and nowhere else, it is possible for the Court to employ a contractual analysis insofar as this does not amount to allowing parties to oust the jurisdiction of the courts, and does not otherwise contravene public policy. It is thus possible to read into the agreement an intention of the parties to ignore, or at least accord less weight to, the factors which would otherwise normally point to the inappropriateness of the contractual forum, at least if these are foreseeable at the time of contract. One party is taken to have conceded to the disadvantages and the concession may even have been factored into the contractual bargain. This, together with the argument that damages are manifestly inadequate, is used to justify an approach requiring strong reasons for a suit in a non-contractual forum.

In the case of non-exclusive jurisdiction agreements, the issue is whether the parties intend merely to give themselves a right to sue in the contractual jurisdiction, or further intend to designate the contractual forum as the appropriate forum. For example, an option – perhaps without more – may be intended when the locally incorporated insurer wants to assure the foreign

7 *Spiliada* followed in *Brinkerhoff Maritime Drilling Corporation* v *P T Airfast Indonesia* [1992] 2 SLR 776 and *Eng Liat Kiang* v *Eng Bak Hern* [1995] 3 SLR 97.

8 Order 11, Rules of Court (Cap 322, 1997 Rev Ed), provides for service of process out of Singapore.

9 Prorogation agreements may be viewed as a form of anticipatory forum shopping, argues Andrew S Bell in "Jurisdiction and Arbitration Agreements in Transnational Contracts" (1996) 10 *Journal of Contract Law* 53. However, to the extent that they are negotiated and consensual, and could be an antidote to undesirable forum shopping, they do not face the conventional objections against forum shopping (at 53-54, 118).

insured that the latter can sue the former in that jurisdiction.[10] However, at the outset it may be asked, in those cases where discretionary jurisdiction would apart from the jurisdiction agreement exist anyway by virtue of the contract being made in the forum or the governing law of the contract being the *lex fori*, whether more is intended by the parties. It may be that in such cases, the parties intend by the non-exclusive jurisdiction agreement to preclude the objection of the defendant to the proceedings in the contractual forum on the grounds of *forum non conveniens*. Indeed, in the very example given of the locally incorporated insurer, the insurer is considered present within the jurisdiction and if the insured wants to sue the insurer in the place of incorporation, jurisdiction already exists as of right. The intention of the parties in including the jurisdiction clause may thus well be over and above providing an option to sue. The implicit agreement may well be for the defendant to refrain from objecting to the exercise of the jurisdiction of the court on the ground of it not being the natural forum. It will be argued that the deduction of intention depends on the peculiar facts of each case, as well as the view one takes of the distinction between jurisdiction as of right and discretionary jurisdiction.

As will be seen, in cases where non-exclusive jurisdiction agreements are treated like exclusive jurisdiction agreements in that strong reasons are required for a suit in a non-contractual forum, the courts perhaps too simplistically deduce the intention of the parties to designate the contractual forum as appropriate. It will be argued that the inferences the courts draw are not often justifiable in the light of other factors. In any case, there are several conceptual problems with reading an intention on the part of the parties to designate the forum as the appropriate forum. First, if such an analysis is employed, some justification will be required for determining the effect of such agreements under the *lex fori* instead of the proper law of the contract, as it is usually the proper law that determines issues of interpretation of contract.[11] Further, in what way would such agreements be any different from exclusive jurisdiction agreements if we read such an intention on the part of the parties? Also, would the approach towards the grant of anti-suit injunctions be liberalised for consistency with the treatment in cases of granting leave or stay? All these will be examined in the following part.

[10] *S&W Berisford* v *New Hampshire Insurance* [1990] 1 Lloyd's Rep 454.
[11] *Forsikringsaktieselskapet Vesta* v *Butcher* [1988] 2 All ER 43.

II. Effect of Non-exclusive Jurisdiction Agreements

A. *The Exercise of the Court's Jurisdiction*

Non-exclusive jurisdiction agreements may be categorised into those in favour of the forum and those in favour of a foreign jurisdiction. Different considerations may come into play and I will deal with each in turn.

(i) *Non-Exclusive Forum Jurisdiction Agreements*

Cases show that the chief consideration of the courts is to see that parties keep their word. Where service out of jurisdiction is needed because the forum jurisdiction agreement does not provide for service within, the courts readily grant leave because where there is already submission to the jurisdiction, this would not be contrary to comity.[12] In the absence of "strong reasons" to the contrary, the contractual forum will exercise jurisdiction, and the same test is used when the court is considering whether to grant leave or set aside the writ or grant a stay.[13] The test is different from that in cases where there is no jurisdiction agreement when *Spiliada* applies.

Several distinct concerns, which emerge from the cases, have to be addressed.

[12] Lord Diplock made these statements in *obiter* on forum jurisdiction clauses in general in *The Chapparal* [1968] 2 Lloyd's Rep 158 at 163.

[13] Saville J in *Commercial Bank of the Near East Plc* v *A, B, C, and D* [1989] 2 Lloyd's Rep 319.

In this case, the clause in question stated that the undersigned (the guarantor) submitted to the jurisdiction of the English courts but it would be open to the bank to enforce the guarantee in any court of competent jurisdiction (at 320). Based on the principle of *expressio unius est exclusio alterius*, it should have been treated as analogous to an exclusive forum jurisdiction clause *vis-à-vis* the guarantor when the bank has chosen to sue in the forum (so that it is harder for the guarantor to insist on a suit elsewhere). But the court treated it as a non-exclusive jurisdiction clause in favour of the English courts although the bank was suing the guarantor. The court, however, held that the non-exclusivity made very little different to the principle that the court will hold the parties to their bargain in the absence of strong reasons to the contrary (at 321).

(1) *Submission founding jurisdiction as of right: what does the focus on the submission of the parties founding jurisdiction as of right entail?*

In the absence of a jurisdiction agreement, the principles in *Spiliada* apply.[14] Where jurisdiction exists as of right because of the presence or submission of the defendant, no leave is required for service of the writ and the defendant can only raise the natural forum considerations by seeking a stay of the local proceedings. Where leave is required for service out of jurisdiction, the plaintiff already has to show that the local forum is the natural forum. The defendant can either challenge the application for leave or seek to set aside the writ served or seek a stay of proceedings, but in all these cases, the natural forum considerations are the same. The difference lies in the incidence of the burden on the plaintiff in a leave case, as compared to it being on the defendant in a stay case.

On principle, different considerations ought to come into play when forum jurisdiction agreements exist because from the point of view of the forum, the jurisdiction agreement constitutes submission, which is traditionally a ground of jurisdiction as of right. Submission of the parties may explain the readiness of the court's to grant leave for service out of jurisdiction on the ground that it would not be contrary to comity because it is almost as if the court has jurisdiction as of right. But it does not explain why the defendant has to show "strong reasons" to convince the court to stay the proceedings in the forum. If the analogy is with jurisdiction as of right cases, then *Spiliada* shows that the court will still decide not to exercise its jurisdiction even in such cases if some other court is shown to be the clearly and distinctly more appropriate forum. If this is the only analogy, then the courts in the case of non-exclusive forum jurisdiction agreements would have two main concerns: First, readily grant leave where it is needed,[15] without consideration of the natural forum factors since these are not the precondition for the service of a writ in a plain jurisdiction as of right case; second, apply *Spiliada* where the application for stay is concerned. The fact that the court does not apply *Spiliada* needs another justification.

[14] Lord Goff appears at least to agree that cases where there are foreign jurisdiction clauses should be treated differently from cases where there are no such clauses. The principles of stay for these two categories of cases should not be the same. See *Spiliada* v *Cansulex* [1986] 3 All ER 843 at 857-858.

[15] It must be noted that leave is not always needed because the contract may provide for service in some manner within jurisdiction (Order 10 rule 3(1), Rules of Court). Where it does not do so, however, then leave is needed (Order 10 rule 3(2), Rules of Court).

(2) *Distinction from* Spiliada *cases: What is the justification for the different test from cases where no jurisdiction agreement applies?*

In *British Aerospace* v *Dee Howard*,[16] the Court, in *obiter dictum*, said the approach in a stay of proceedings begun based on Order 11 where there is a non-exclusive forum jurisdiction clause is equivalent to that in proceedings commenced as of right. But it goes further to say that the jurisdiction agreement creates a strong *prima facie* case that the local forum is appropriate. Neither party can object that it is inappropriate. The test really is a modified *Spiliada* test where the burden is now on the defendant to show that the local court should not take jurisdiction. The factors to be considered in such a modified test are those not foreseeable at the time the contract was concluded.

This approach where a strong *prima facie* case that the forum is an appropriate forum is created from the non-exclusive forum jurisdiction agreement without more seems to involve unnecessary and unjustifiable extrapolations of the parties' intentions. The criticism is two-fold. In the first place, even if the parties did implicitly designate the forum as an appropriate forum, this does not mean that leave should be granted or stay denied in the absence of strong reasons to the contrary. If the approach is modified from *Spiliada*, the plaintiff needs to show that the forum is the most appropriate forum before leave is granted, and the defendant needs to show that there is a clearly and distinctly more appropriate forum elsewhere in order to get a stay. The appropriateness of the local forum is an isolated rather than comparative appropriateness: It does not mean it is the most appropriate, or that there is none other more appropriate. So, if the implicit intention of the parties is to designate the contractual forum as appropriate without more, one fails to see how this aids either the plaintiff's or the defendant's case. Second (and this is related), the court's finding that leave would be granted and stay denied in the absence of strong reasons to the contrary is dependent on finding that there is an implicit intention to designate the contractual forum as the most appropriate. This seems to be an unjustifiable extrapolation if the jurisdiction agreement alone is the source of it.

The better approach is to treat the jurisdiction agreement as a strong factor that points towards the appropriateness of the contractual forum in the *Spiliada* analysis. Treating it as one "strong factor" counting towards a *prima facie* case is very different from treating it as *ipso facto* creating a "strong *prima facie* case" that the forum is the natural forum.

[16] [1993] 1 Lloyd's Rep 368 at 375-376. This is expressed in *obiter* as the court had found the jurisdiction clause to be an exclusive forum jurisdiction clause.

(3) *If jurisdiction exists apart from the jurisdiction agreement: Should cases where, apart from the jurisdiction agreement, there exists either jurisdiction as of right or discretionary jurisdiction (*eg *by virtue of the contract being made in the forum or the governing law being the* lex fori*), be treated differently from those where the only ground of jurisdiction arises from the contractual submission?*

In *S&W Berisford* v *New Hampshire Insurance*,[17] the English High Court had jurisdiction over the defendant which was a New York insurer carrying on business, and thus present, in London through its London office. Additionally, there was a non-exclusive jurisdiction clause in favour of English courts. It was held that a "strong case" was needed before the local court would say that the contractual right to sue locally should not be recognised and the plaintiff must sue elsewhere.[18] Although the phrase, "strong case", instead of "strong reasons" was used, the court did not say if the burden was different from the case where the court did not, apart from the jurisdiction clause, have jurisdiction as of right. But the court said that the choice of the local forum, albeit non-exclusive, creates a "strong *prima facie* case" that the jurisdiction is an appropriate one: "(I)t should in principle be a jurisdiction to which neither party to the contract can object as inappropriate" and "they have both implicitly agreed that it is appropriate."[19]

The reasoning of the court in *S&W Berisford* that an agreement not to object to the court's jurisdiction on the ground of *forum non conveniens* is intended in such cases is defensible. Where jurisdiction already exists apart from the jurisdiction agreement, it makes no sense for the parties to enter into the agreement unless they intend something more. Thus, they may be taken to have agreed not to object to the exercise of the jurisdiction of the contractual forum on the grounds of *forum non conveniens*. But more accurately, as already argued, the court should read into the agreement an intention of the parties to designate the forum as the natural forum or "the most appropriate forum" for the ends of justice and the interests of the parties, rather than "an appropriate forum".

Likewise, the factual holdings in *Commercial Bank* v *A, B, C and D* and *The Chapparal* are defensible on the same reasoning. In both cases, apart from the jurisdiction agreement, discretionary jurisdiction was established by virtue of the governing law of the contract being the *lex fori*.

[17] [1990] 1 Lloyd's Rep 454. Various other points are made in this case, but most deal with matters under the Brussels Convention.

[18] *Ibid*, at 458.

[19] *Ibid*, at 463.

Thus, it may be argued that the parties intended something more by including the jurisdiction clause, even if such reasoning was not evident in the respective judgments.

(4) *Where apart from the jurisdiction agreement, jurisdiction is founded as of right instead of being merely discretionary: should there be a further distinction between cases where apart from the jurisdiction agreement there exist jurisdiction as of right and cases where the court has only discretionary jurisdiction?*

When leave is not needed because apart from the jurisdiction clause amounting to submission to local courts, the defendant is additionally present within, or otherwise submits to, the jurisdiction, the question arises as to whether the burden on the defendant must be greater than the case when there exists, apart from the jurisdiction agreement, only discretionary jurisdiction.

In *S&W Berisford*, where jurisdiction as of right could be established apart from the jurisdiction agreement, the court used the epithet "strong case" instead of "strong reasons". But it did not say if this was a different burden.

It is submitted that there are good reasons for holding that the burden should not be different in the two cases. First, to "equalise" the burden is more in line with the approach in cases not involving jurisdiction clauses. In such cases, there, arguably, in Singapore at least, does not appear to be any bifurcation of the standard of proof whether one seeks a stay in a jurisdiction as of right case based on *forum non conveniens*, or in a case where jurisdiction was founded on Order 11.[20] Second, the holding that it is harder for a defendant to stay proceedings when jurisdiction had been founded as of right, rather than based on the court's discretionary jurisdiction,

[20] See, for example, *Oriental Insurance* v *Bhavani* [1998] 1 SLR 253 at para 16, where the bifurcation in standard in *The Hooghly Mills* [1995] 1 SLR 773 was rejected. However, the reasoning in *Oriental Insurance* may be criticised as the Court held that it was senseless to speak of the different burden of proof, since in an Order 11 case the burden was on the plaintiff to show that the court was the most appropriate forum, whereas in a stay case where jurisdiction was founded as of right, the burden was on the defendant to show that some other jurisdiction was more appropriate. The court reasoned that the burden in Order 11 and stay in jurisdiction as of right cases were on different persons to begin with. This reasoning seems flawed because if the defendant was staying proceedings in an Order 11 case, the burden would be on the defendant, just like it would in a case where the defendant was staying proceedings where jurisdiction had been founded as of right. The Court thus does not address the issue of whether it would be harder for the defendant to stay proceedings where jurisdiction had been founded as of right, rather than based on discretionary jurisdiction of the court under Order 11.

seems to be based on the archaic ideas of territoriality and the consequent superiority of jurisdiction founded as of right based on presence or submission. Surely the very development of the requirement of natural forum debunks the idea of the "superiority" of jurisdiction that is founded as of right.

(5) *Should there, additionally, be a difference in the burden in cases where service within is possible (either because of the presence of the defendant or the contractual provision for service within) and where service within is not possible?*

Where service is to be effected outside the jurisdiction because the agreement does not provide otherwise, the technical requirement of leave has to be satisfied according to the rules of procedure, even though jurisdiction has already been founded as of right by virtue of the submission to the jurisdiction through the jurisdiction agreement.[21] By parity of reasoning with cases in which there are no jurisdiction agreements, there should generally be no difference in the considerations whether it is a case of application for leave or stay.

However, additionally, in view of the submission to the jurisdiction, although the parties may have omitted to provide for service within, it may be desirable to overlook the technicality. One treats this as one would treat a jurisdiction as of right case, since the parties have essentially submitted to the jurisdiction. In jurisdiction as of right cases where no jurisdiction agreement is considered, it is not a precondition for service to find that the jurisdiction is the natural forum. Thus, by extrapolation from the cases in which there are no jurisdiction agreements, in every case where there exists a forum jurisdiction agreement, the defendant should not be allowed to resist the application for leave or set aside the writ even if the defendant shows "strong reasons". This is because while leave is required *technically,* jurisdiction is founded *substantially* as of right. If the defendant wants to challenge the court's jurisdiction, he has to apply for a stay of proceedings instead. But because (in a non-exclusive forum jurisdiction agreement case) the burden is always on the defendant seeking to challenge the proceeding commenced in a contractual forum to show "strong reasons" why it should not be commenced (in challenging leave) or continued (in seeking stay), this suggestion makes little difference to the defendant's case except procedurally. The defendant simply has to frame his challenge as an application for stay rather than seek a setting aside of the writ.

[21] Order 10 rule 3(2), Rules of Court.

On the other hand, it may be argued that even if one considers this as essentially a jurisdiction as of right case, the defendant should be allowed to challenge the granting of leave. After all, the very requirement of "strong reasons" for a successful challenge in such cases already distinguishes them from cases where there are no jurisdiction agreements but jurisdiction is founded as of right. So the two cannot be treated the same way. This seems more correct in principle, though it makes little difference to the results, because whether it is application for leave or for stay, the defendant simply has to show "strong reasons".

(6) *Distinction from exclusive forum jurisdiction agreements: does any meaningful distinction remain?*

One ought, however, to question whether an approach requiring "strong reasons" is defensible in the light of the treatment of exclusive jurisdiction agreements. These create not just a contractual right, but an obligation, to sue in the contractual forum. Generally "strong cause" is needed to justify proceedings in a non-contractual forum.[22] Certainly, courts have expressed that exclusive and non-exclusive jurisdiction agreements are treated differently even though there is discretion in both cases to disregard the agreement. Stronger grounds are required to justify proceedings in a non-contractual forum for exclusive jurisdiction agreements than for non-exclusive jurisdiction agreements.[23]

It may be argued that the *S&W Berisford* approach may be used for both exclusive and non-exclusive jurisdiction agreements, as long as the court bears in mind in its exercise of discretion that the burden is heavier in the case of the former. The criticism is that saying the burden is heavier in one case than the other does not inform a court on how to exercise its discretion in future cases.

Further, in *British Aerospace*, the Court went so far as to hold that the factors to be considered to establish "strong reasons" for not allowing the proceedings in the contractual forum were factors not foreseeable at the time of contract. This seems to raise the burden to be as high as, if not more than, that in exclusive jurisdiction agreement cases. This is exacerbated by the holding in *S&W Berisford* that there is an implicit agreement not

[22] *The Chapparal* [1968] 2 Lloyd's Rep 158 stands for this proposition in relation to exclusive forum jurisdiction clauses. Where, in addition to such agreements, there is jurisdiction as of right, it has been suggested in *S&W Berisford* v *New Hampshire Insurance* [1990] 1 Lloyd's Rep 454 that the court has no discretion to stay on the grounds of *forum non conveniens*.

[23] See, for example, *Evans Marshall & Co* v *Bertola SA* [1973] 1 Lloyd's Rep 453 at 461.

to object to the contractual forum on the ground of it being inappropriate. If together the result is that factors of legitimate personal and juridical advantages may not be counted towards "strong reasons" because they were foreseeable, this may fetter the court's discretion in a way that is unacceptable by public policy. Factors of justice (as opposed to mere convenience) should always be considered. Further, it may raise the burden to one heavier than in cases of exclusive forum jurisdiction agreements! In exclusive jurisdiction agreement cases, the fact that substantial injustice will result from trial in the contractual forum qualifies as strong cause under *The Eleftheria*.[24] It is not clear if it would be considered under *S&W Berisford*. Perhaps a clarification is needed with regard to the reasoning of the court. It should be clarified that the parties have implicitly agreed to the comparative appropriateness of the forum from the point of view only of convenience and expense, rather than justice which is always within the domain of the court's discretion.

More recently in *Mercury Communications Ltd* v *Communication Telesystems International*,[25] Moore-Bick J agreed in principle with the approach in *British Aerospace*, stating that the parties would be held to the bargain which was freely negotiated unless there were "overwhelming reasons to the contrary". However, he added that he would not go so far as to say that the court would never grant a stay unless circumstances had arisen which could not have been foreseen at the time of the contract. Nevertheless, the cases in which it would grant a stay would be rare. This may additionally be more acceptable as it provides a distinction from exclusive jurisdiction agreement cases that can be easily grasped (since different factors are considered) and less abstract than the idea of "heavier burden".

(7) *Choice of neutral forums: should special considerations apply?*

The case where a neutral forum has been chosen should be treated specially. Where the jurisdiction agreement points non-exclusively to a neutral forum, it may be the parties have only implicitly designated the neutral forum as an appropriate, rather than the most or more appropriate, forum. However, as was noted in a different context in relation to neutral fora in *Egon Oldendorff* v *Liberia Corporation*,[26] the parties may have deliberately designated a forum as appropriate even though it is unconnected

[24] Though this case deals with an exclusive foreign jurisdiction agreement, exclusive forum jurisdiction agreements are not treated differently.

[25] Lexis Transcript, Judgment of the Queen's Bench Division (Commercial Court) dated 27 May 1999.

[26] [1995] 2 Lloyd's Rep 64.

to the parties or the dispute. Therefore, the *forum non conveniens* factors related to convenience and expense should be of no relevance, or should at least take on a diminished role. The parties must have had in mind factors such as the need to transport evidence and witnesses, to instruct lawyers and to travel.[27] This is reinforced recently by the English High Court in *Akai* v *People's Insurance*:[28] Parties have obviously chosen the forum despite the lack of connections, possibly because of their beliefs in the efficiency of the legal system and for other reasons. It is only in very special circumstances, for example, where trial in the neutral forum leads to real substantial injustice to one party, that the court may allow one party to disregard the contractual choice. In other words, effectively, in neutral forum cases, "strong reasons" are necessary for trial in a non-contractual forum. This is justifiable even where the forum would have had no jurisdiction over the parties or the dispute but for the jurisdiction agreement.

(8) *Compared with non-exclusive foreign jurisdiction agreements: are the approaches consistent?*

This is the subject matter of the next part.

(ii) *Non-Exclusive Jurisdiction Agreements in Favour of a Foreign Jurisdiction*

I will discuss the effect of such agreements by focusing on the ways they are, or ought to be, treated differently from forum jurisdiction agreements. From the foregoing, there are two views one may take of a non-exclusive foreign jurisdiction agreement.

(1) *A non-exclusive foreign jurisdiction agreement amounts to submission to the foreign jurisdiction and a designation of the foreign jurisdiction as an appropriate forum.*

On principle, a non-exclusive jurisdiction clause in favour of a foreign jurisdiction does not prohibit a plaintiff from suing locally. A submission to the foreign jurisdiction says nothing about the jurisdiction of the forum. One would have to decide on normal principles if the forum has jurisdiction, after which one decides whether to exercise that jurisdiction. As to the

[27] In the context of choice of a neutral arbitration venue, Moore-Bick J noted this in *Fast Ferries One SA* v *Ferries Australia Pty Ltd* (Lexis Transcript, Judgment of the Queen's Bench Division (Commercial Court), Hearing dated 24 May 1996.)

[28] [1998] 1 Lloyd's Rep 90.

exercise of jurisdiction, though the foreign jurisdiction agreement may prohibit a plaintiff from arguing in the foreign forum that the foreign forum is not appropriate, it says nothing about whether the local court is an appropriate forum. Thus, at least where granting of leave is concerned, whether or not the local court is an appropriate forum should be decided on *Spiliada* principles. The jurisdiction clause in favour of the foreign court is just one factor, amongst many others, pointing to another forum such that it becomes harder for the plaintiff to show that the local forum is the most appropriate one in the interests of the parties and for the ends of justice. It may well be treated as a "significant" factor militating against the argument that the local forum is the most appropriate, but the *Spiliada* test is used nonetheless. This was the approach of the Supreme Court of Kuala Lumpur in *American Express Bank Ltd* v *Mohamed Toufic Al-Ozeir & Anor*[29] when faced with an application by the appellants to set aside a writ served out of jurisdiction from Malaysia. The court held that the non-exclusive jurisdiction agreement in favour of the foreign courts militated "in some significant way" against any argument that the local court was the most appropriate forum. Where stay is concerned, the defendant has to show that the foreign forum is more appropriate. The question arises as to whether the non-exclusive foreign jurisdiction agreement should just be one of many factors considered on a normal *Spiliada* approach, or it should lead to a strong *prima facie* case for saying that the foreign forum is more appropriate. Logically, the approach for granting an application for stay should take into account the same factors considered in the approach for granting an application for leave. This would suggest that the *Spiliada* approach is preferable.

In Singapore, the High Court had initially applied the *Spiliada* approach in dealing with such agreements. In *Lehman Brothers Special Financing Inc* v *Hartadi Angkosubroto*,[30] the High Court did not attach any special weight to the non-exclusive foreign jurisdiction clause in favour of the courts of New York but allowed a stay on the grounds of *forum non conveniens* nonetheless as Singapore had little connection with the dispute.

(2) *For consistency with the treatment of forum jurisdiction agreements, a non-exclusive foreign jurisdiction agreement may in certain cases amount to designation of the foreign jurisdiction as the more appropriate forum.*

The second possible view of non-exclusive foreign jurisdiction agree-

[29] [1995] 1 MLJ 160.
[30] [1999] 2 SLR 427.

ments takes into account the foregoing discussion about jurisdiction agreements amounting to a designation of comparative appropriateness by the parties which the courts should not ignore. At least in the case where one finds that apart from the jurisdiction agreement, the foreign court would have jurisdiction as of right or discretionary jurisdiction over the foreign defendant,[31] the additional agreement to the foreign court's jurisdiction amounts to a designation of the foreign court as the most appropriate. Thus, in the absence of strong reasons, the forum should not grant leave in a leave case and should grant a stay in a stay case because some other court has been designated as clearly and distinctly more appropriate. However, in the case where the foreign jurisdiction does not, apart from the jurisdiction agreement, have jurisdiction over the parties or the dispute, the jurisdiction agreement in favour of it may be taken to be a mere submission to its jurisdiction without a designation of comparative appropriateness. This is subject to the exception in the case of the jurisdiction agreement for a neutral forum. In this exceptional case, by parity of reasoning with non-exclusive forum jurisdiction agreements, generally *forum non conveniens* factors are not relevant.

The treatment of foreign jurisdiction agreements under the second view is more in line with the approach towards forum jurisdiction agreements. The first view, on the other hand, leaves one open to the criticism of inconsistency in approaches apparently stemming from a willingness to exercise jurisdiction. In any case, the first view seems to depend on the mistaken idea that a forum jurisdiction agreement involves an implicit agreement that the forum is an appropriate, rather than the most appropriate, forum. As already argued, appropriateness *per se* cannot justify the court's exercising of jurisdiction so readily. It has to be a comparative appropriateness. If so, then the view of foreign jurisdiction agreements would have to be similarly modified.

Recent cases dealing with applications for stay appear in line with the second view, though not always justifiably, and certainly without such reasoning.

In *The Rothnie*,[32] the parties submitted to the non-exclusive jurisdiction of the Courts of Gibraltar. When the plaintiff commenced proceedings in England, the defendant applied for a stay based on *forum non conveniens*. The English High Court held that the existence of the foreign jurisdiction clause "creates a *prima facie* case that the jurisdiction is an appropriate one" so that the defendant *ipso facto* satisfies the Court that there is a clearly

[31] By this we mean the party who is the defendant in the foreign court.

[32] *ED & F Man Ship Ltd* v *Kvaerner Gibraltar Ltd (The "Rothnie")* [1996] 2 Lloyd's Rep 206.

and distinctly more appropriate forum elsewhere. The Court did go on to reason in the alternative, and held that even if the jurisdiction clause is just one of the many factors in the *Spiliada* approach, it is still a strong factor.

It may be argued, at least with regards to the first option considered by the Court, that the Court was really confusing the principles with those applicable in the case of non-exclusive forum jurisdiction agreements. This is fortified by the citation of the Court of the cases which deal with forum jurisdiction agreements: *The Chapparal, British Aerospace* v *Dee Howard*, and *S&W Berisford* v *New Hampshire Insurance*. The criticism is that if these cases were cited, there needs to be an attempt to explain the reference to appropriateness of the forum in these cases. In a forum jurisdiction agreement case, one can say that the intention to choose a forum points to the appropriateness of the forum, such that the balance tilts in favour of the forum even without any need to read an intention to imply comparative appropriateness. However, in the case of a foreign jurisdiction agreement, the first view as expressed in (1) would suggest that the parties' concession to the appropriateness of the foreign jurisdiction says nothing much about the appropriateness of the local forum. The approach in *The Rothnie* can only be justified on the second view. Indeed, on the facts, the contract to repair the vessel was already governed by the law of Gibraltar so that there may have been discretionary jurisdiction according to the conflicts rules of Gibraltar. Thus, the jurisdiction agreement pointed towards something more – and in this case, an intention to designate Gibraltar as the comparatively more appropriate forum.

(3) *The complication introduced by the Bambang*[33] *type of clause: What happens when a non-exclusive jurisdiction agreement is coupled with an option of one party to sue anywhere else?*

The Singapore Court of Appeal adopted the approach in *S&W Berisford* for non-exclusive foreign jurisdiction agreements in *Bambang Sutrisno* v *Bali International Finance Ltd*.[34] In *Bambang*, the clause in question was more complex. There was a non-exclusive jurisdiction clause in favour of Indonesian courts, together with a contractual right of the respondent to proceed in any competent court, and an agreement by the appellant to waive any objections on the ground of *forum non conveniens*. The respondent sued in Singapore, and the appellant applied for a stay on the ground of

[33] [1999] 3 SLR 140.
[34] *Ibid*.

forum non conveniens. On the facts, the Singapore Court of Appeal allowed a stay as strong cause had been shown as the Indonesian court was clearly and distinctly more appropriate than the Singapore forum. There are two main parts to the Court's reasoning.

First, where the post-contract choice of the Singapore Court was concerned, the Court reasoned that the situation was "analogous to that of an exclusive jurisdiction clause" but held that even in such situations the Court had the discretion to stay. The cases dealing with exclusive foreign jurisdiction clauses were cited: *Amerco Timbers* v *Chatsworth*,[35] *The Asian Plutus*,[36] *The Vishva Apurva*,[37] and *The Eastern Trust*.[38] The Court applied the principles in these cases, but as far as the parties were concerned, in the reverse order, since it was the appellant who, in breach of the contract, was seeking a stay, and hence had to show strong cause. Thus, the Court in fact treats the case as one of an exclusive forum jurisdiction clause by virtue of the contractual promise not to object to the forum chosen *ex post* based on *forum non conveniens.*

Several comments may be made on the Court's approach. First, if indeed the clause is to be treated as an exclusive forum jurisdiction clause, the case that is more directly applicable is *The Chapparal*, though the principle is, as the court says, that in *The Eastern Trust*, but applied where the parties are concerned in the reverse order. Second, and more importantly, it might be argued that different considerations arise that prohibit treatment as an exclusive jurisdiction clause by analogy. This is in view of the fact that it could not have been foreseen, till the dispute had arisen and one party had chosen the forum, which forum would have been the one that the appellant could not object to. It was precisely in *The Eastern Trust* where the Court held that if the designated forum was not known in advance, the party seeking an application in breach of contract could not be said to have conceded in advance to disadvantages in that forum, since these could not have been foreseen. If so, the burden on the party seeking an application in breach of the contract is less onerous. It would be more correct in principle to treat this as a non-exclusive forum jurisdiction clause the moment the forum is chosen. However, even for such clauses, there need be no contractual promise not to object to jurisdiction, since in the cases mentioned above, the Courts have always held that the inclusion of a non-exclusive forum jurisdiction clause amounts to a promise not to object to the forum's jurisdiction. Thus, there would have been no practical difference in result. In fact, even on the facts, the Court held that strong cause had been shown by the appellant

[35] [1977] 2 MLJ 181.
[36] [1990] SLR 543.
[37] [1992] 2 SLR 175.
[38] 1994] 2 SLR 526.

for a stay of the local proceedings, even when the clause was treated as an exclusive forum jurisdiction clause.

The second part of the Court's reasoning (apparently not in the alternative, but made for the purposes of reinforcing the first part) concerned the more traditionally phrased jurisdiction clause in favour of the non-exclusive jurisdiction of the Indonesian courts. It is here that the Court adopts the *S&W Berisford* reasoning for non-exclusive foreign jurisdiction clauses, following the approach of the Singapore High Court in *PT Jaya Putra Kundur Indah* v *Ang & Sons Investment Ptd Ltd*.[39]

A digression to this earlier case is necessary. In *PT Jaya*, Lai Siu Chiu J, finding the strangely worded clause[40] to be a non-exclusive foreign (Indonesia) jurisdiction clause, had held that its presence "showed that, *prima facie*, the parties had agreed that Indonesia would be an appropriate forum for the trial of the action than elsewhere *(sic)*". Following Hobhouse J in *S&W Berisford*, the learned judge held that the non-exclusive jurisdiction clause meant that the parties should not be heard to argue that the foreign jurisdiction would not be an appropriate forum, because they had implicitly agreed that it was appropriate. However, she qualified that she would not go as far as Waller J in *British Aerospace* v *Dee Howard*. Waller J advocated the approach where parties who freely agreed to a non-exclusive jurisdiction agreement would be precluded in their application for a stay from raising any factor which was eminently foreseeable at the time of contract. Lai J also added that she preferred the approach in *S&W Berisford* where "a non-exclusive jurisdiction clause would be considered merely as one of the factors, albeit a strong one, which went to determining the appropriateness or otherwise of a particular jurisdiction." With respect, this later statement is somewhat peculiar as the earlier portion of *S&W Berisford* that was quoted seemed to go further than considering the non-exclusive jurisdiction agreement as merely a strong factor pointing to the appropriateness of a forum. Rather, it was taken to create a strong *prima facie* case that the forum was appropriate. This is a clearly different and stronger stand.

The Court of Appeal in *Bambang* does not deal with this apparent inconsistency in the earlier case, but cites the earlier portion of Lai J's reference to *S&W Berisford*. The Court used the non-exclusive choice of Indonesian forum to fortify the appellant's case for a stay of the local proceedings. As the respondent had a jurisdiction agreement in favour of

[39] Unreported, Suit No 395 of 1996.

[40] The initial part of the clause stated that the Indonesian courts had exclusive jurisdiction, but this was immediately followed by a statement that the parties could sue anywhere else which but for this clause would have had jurisdiction.

the Indonesian courts, the Court reasoned that it could not then object to the appropriateness of the Indonesian courts.

It is submitted that it is difficult to see how the Court in *Bambang* could have applied the *S&W Berisford* reasoning outright. In *The Rothnie*, it was possible to say that the non-exclusive choice of foreign jurisdiction amounted to a promise not to object to foreign jurisdiction as being inappropriate because there was only a non-exclusive foreign jurisdiction clause and nothing more. But even so, it was already difficult to see how such a promise not to object to foreign jurisdiction could lead to the party seeking leave or resisting stay having to show strong cause unless one took the view that comparative appropriateness was intended. Thus, to have held as the Court did in *The Rothnie* involved implying from a non-exclusive choice of foreign jurisdiction an intention of the parties to designate the foreign jurisdiction as the "more appropriate" and not just an appropriate forum. In *Bambang*, there are further facts that militate against such an implication. In *Bambang*, there is not just a non-exclusive foreign jurisdiction clause, but a contractual right given to the respondent to choose any other forum, and if one is chosen, the appellant promises to waive objections to the post-contract choice. If so, surely there is no promise on the part of the respondent not to object to the foreign jurisdiction as being inappropriate. Or, putting the proposition more conservatively and restrictively, there can at the very least be no implication on the part of the respondent to designate Indonesia as the more appropriate forum. Rather, the respondent specifically reserved the right to choose any other forum. It is a well-accepted rule of common sense that what is to be implied may not contradict what is express, or which equally may be implied from other terms! Surely it is only in the case when the appellant (*ie*, the party without the option to sue anywhere else) is the one invoking a non-contractual jurisdiction that the non-exclusive foreign jurisdiction agreement should be held against him as a concession to the appropriateness of the foreign court.

As an aside, it may be noted that the same arguments could be raised in all cases in which the submission to the particular jurisdiction is unilateral, whether it is to a foreign court or to the forum. Even if the unilateral submission is not coupled with an express choice of the other party to choose any other court, the courts are likely to hold that this is intended by the maxim of interpretation, *expressio unius est exclusio alterius*. Where the other party then chooses to sue in a non-contractual jurisdiction, the fact that there is a jurisdiction agreement should not be held against him. As far as he is concerned, it is a non-exclusive jurisdiction agreement, and additionally, because of the presence (implicit at least) of the option to sue anywhere else, the courts should not imply from the non-exclusive jurisdiction agreement an intention to designate the contractual jurisdiction as comparatively appropriate. If, however, the party that unilaterally submits

chooses to sue in other than the agreed jurisdiction, the jurisdiction agreement should be counted against him as if it is exclusively in favour of the contractual forum where he is concerned.

(4) *Should it be easier for the plaintiff to commence proceedings locally despite the non-exclusive foreign jurisdiction agreement when there exists jurisdiction as of right rather than discretionary jurisdiction over the defendant?*

Supposing, however, that one accepts the *S&W Berisford* approach for non-exclusive foreign jurisdiction agreements. A separate issue is whether it may be easier for the plaintiff to commence proceedings locally in face of such an agreement in cases when the local court has jurisdiction as of right over the defendant. There is authority to the effect that it is so. Edmund Davies LJ in the English Court of Appeal judgment of *Evans Marshall & Co* v *Bertola SA*[41] spoke of the trial judge Kerr J as having properly directed himself when he held that there was a heavier burden on the plaintiff who wanted to bring the defendant within the jurisdiction in an Order 11 case, than in cases of applications for staying actions properly instituted.[42] Kerr J had gone on to say that "(t)o bring a defendant before the English Courts in the face of a foreign jurisdiction clause...clearly goes further than merely allowing an action against a defendant properly served here to proceed".[43] Should this be so? It may be noted that for cases of forum jurisdiction agreements and cases not concerning jurisdiction agreements, it has been argued earlier that the burden should not be different depending on whether leave is needed or not. It is submitted that it should not be any different for cases involving non-exclusive foreign jurisdiction agreements. No doubt the court has jurisdiction as of right over the defendant and thus the plaintiff easily commences proceedings against the defendant despite the foreign jurisdiction agreement. However, because of the development of the doctrine of the natural forum, to hold that a less strong case needs to be shown by the plaintiff just because the defendant is within the jurisdiction may seem to be based on the same archaic ideas of territorial sovereignty that today has diminished importance.

(iii) *Non-exclusive Jurisdiction Agreements Reviewed: Consistency of Approaches between Forum and Foreign Agreements?*

41 [1973] 1 Lloyd's Rep 453.
42 *Ibid,* at 478.
43 *Ibid*, at 462.

To summarise, there are three possible approaches for non-exclusive jurisdiction agreements:

(1) *Apply* Spiliada *for foreign jurisdiction agreements, and* S&W Berisford *for forum jurisdiction agreements:*

The justification for such a dichotomy of approaches depending on whether the agreement points to the local or foreign forum is that in the case of choice of local forum, we are considering the appropriateness of our forum. The jurisdiction agreement is an important factor that tilts the balance so that it is for the party resisting leave or seeking stay to show strong reasons why we should not allow leave or why we should grant a stay. When parties choose a foreign forum, it may be argued that in addressing the question of whether we are the appropriate forum, the concession of the parties to the appropriateness of a foreign forum says nothing about the appropriateness of the local forum.

(2) *Apply the* S&W Berisford *approach for both types of agreements:*

A strong counter-argument that may be made against an application of the *Spiliada* approach for non-exclusive foreign jurisdiction agreements is the apparent inconsistency in attitudes where non-exclusive forum and foreign jurisdiction agreements are concerned. It seems that the attitude in favour of taking jurisdiction when there is a non-exclusive forum jurisdiction agreement, but not when the agreement is in favour of foreign jurisdiction, may only be justified if we hold that the non-exclusive choice of local forum amounts to a designation that the local forum is the most appropriate, while the non-exclusive choice in favour of foreign jurisdiction does not amount to designating the foreign jurisdiction as more appropriate. Courts adopting such differential treatment possibly lend themselves to the criticism of judicial chauvinism that manifests itself in the willingness to assume jurisdiction. This may justify the adoption of the *S&W Berisford* approach for non-exclusive foreign jurisdiction agreements.

(3) A*pply the* Spiliada *approach for both types of agreements:*

This does away with any argument of inconsistency of approaches. Additionally, the Court has the flexibility of regarding the agreement as one factor which may carry extra weight in pointing towards the appropriateness of a particular forum. And that, without obliging the Court to say that a strong *prima facie* case has been made for the appropriateness,

such that the other party has a greater burden of proving otherwise. In reality, however, as the factual decision in *Bambang* perhaps shows, whether one applies *Spiliada* or *S&W Berisford*, the courts are not hindered from finding on the facts that another forum is more appropriate.

It is submitted nonetheless that the third approach is the best approach on principle. First, it remains open for the court to attach great weight to the jurisdiction agreement, and achieve the same practical results, depending on the presence or absence of other factors. Second, any approach involving a *prima facie* giving effect to jurisdiction agreements and requiring strong cause otherwise is in need of a theoretical justification because the private international law factors would seem to take on less importance. Such a justification would probably be found in the contractual principle that specific performance may be ordered where damages are manifestly inadequate. However, the Court then needs to explain why the effect of a jurisdiction agreement is ordinarily determined by the *lex fori*. If the theoretical justification is in contract, it should be the *lex loci contractus* that governs the issue of whether damages are adequate for a particular kind of contract. Third, a distinction is drawn between the cases of exclusive jurisdiction agreements and non-exclusive jurisdiction agreements. Finally, where reliance is placed on the jurisdiction agreement alone, it seems to involve unnecessary extrapolation of the parties' intentions to say that there was a concession to comparative appropriateness. Of course, such an implication may be justifiable where special considerations arise in the case of a neutral forum agreement, or where the contractual jurisdiction had jurisdiction apart from the jurisdiction agreement. But even in these cases, the modified *Spiliada* approach rather than an approach requiring strong reasons may suffice.

B. *Anti-Suit Injunctions to Restrain Foreign Proceedings Commenced in Non-Contractual Fora*

If the jurisdiction agreement is non-exclusive, there is no outright breach of contract when a party sues in a non-contractual forum. The enjoining party thus cannot rely on Lord Brandon's first situation for granting in-

[44] This is first situation enunciated by Lord Brandon in *South Carolina Insurance* v *Assurantie Maatschappij* [1986] 3 All ER 487. The second situation is where there is unconscionability. The only exception relevant to us, where apart from these two situations, an injunction may still be granted, is where the foreign plaintiff sues in what is not the natural forum. However, in this case, there is a three-two split on this point made in *obiter dictum*. Lord Goff, on the other hand, had stated that it was undesirable to list exhaustive situations.
Notably, the exception to the two situations, mentioned by Lord Brandon, is the case where the foreign court in question is not the natural forum. As this decision precedes *Spiliada*, the test was whether the proceedings in the foreign court were vexatious and oppressive.

junctions – that of breach of legal or equitable right – in *South Carolina Insurance* v *Assurantie Maatschappij*. [44] Granted however, that in certain cases mentioned, the non-exclusive jurisdiction agreement may amount to a concession of comparative appropriateness, one must ask if it is unconscionable for one party to commence an action elsewhere, thus falling into Lord Brandon's second situation.

The requirements and principles for granting an anti-suit injunction restraining one party from proceeding in a foreign forum have been developed since *SNIA* v *Lee Kui Jak* and are not entirely clear,[45] and further, vary according to whether it is a case where there is an alternative forum, or a case where

Effectively, Lord Brandon saw this as the exceptional situation where apart from the two categories, an anti-suit injunction could be granted. When Lord Goff, who opposed the categorisation in *South Carolina Insurance*, decided *SNIA* v *Lee Kui Jak* about a year later, consistent with his preference for a general principle, he enunciates vexation and oppression as the general principle for anti-suit injunctions. As will be seen, the question then arises as to whether the breach of legal or equitable rights was a situation where the court was likely to grant an anti-suit injunction, or if vexation and oppression had to be separately found.

[45] In *SNIA* v *Lee Kui Jak* [1987] AC 871, Lord Goff in the Privy Council enunciated the principles for granting anti-suit injunctions, which has been followed since.

The jurisdiction is only to be exercised against a party who is amenable to the jurisdiction of the court. It is to be exercised when the ends of justice requires, and since it has the effect of indirectly affecting a foreign court, even though it is overtly directed *in personam*, this power is to be exercised with caution.

The court granting the injunction must first be the natural forum. What this means is controversial. It must be noted that under Lord Brandon's original classification of the court's power to grant injunctions, enunciated in a judgment of the House of Lords in *South Carolina Insurance* v *Assurantie Maatschappij* [1986] 3 All ER 487, the requirement of the enjoining court being the natural forum is not express. But one could argue that Lord Brandon was only stating the principle by which one was to exercise the discretion for anti-suit injunctions, and not concerned about the other requirements aside from the principle. Or it may be that when it was enunciated in *SNIA*, the requirement may have come about with the development of the natural forum concept in *Spiliada*, in that before the court will exercise jurisdiction in any case, it must be the natural forum. What factors exactly have to be considered is not clear.

Must the enjoining court be the natural forum for the substantive cause of action, or merely for the anti-suit? Local cases like *Koh Kay Yew* v *Inno-Pacific Holdings* [1997] 3 SLR 121 and *Bank of America* v *Djoni Widjaja* [1994] 2 SLR 816 apply the *Spiliada* test for natural forum. But one might note that under the Canadian approach in *Anchem Products* v *British Columbia (Workers' Compensation Board)* 102 DLR (4th) 96, the domestic court entertains the application "if it is alleged to be the most appropriate forum and is potentially an appropriate forum" (at 118). This may support the argument that we need only be an appropriate, rather than the most appropriate, forum for the anti-suit injunction. The counter-argument is that the Singapore High Court, adopting *Airbus* v *Patel* in *People's Insurance* v *Akai* [1998] 1 SLR 206, has stated that it would not "assume the role of an international busybody", and if so, the *Anchem* test should not be adopted as there was a risk that in

there is only a single forum for that cause of action. It is nonetheless fairly settled since *SNIA* that where there is vexation or oppression, if other requirements are met, the court has discretion to grant an injunction. Again the question is whether in those cases mentioned, where there is a designation of comparative appropriateness, a suit in a non-contractual forum amounts to vexatious and oppressive conduct.

It is submitted that recent developments strengthen the case that such proceedings would be unconscionable or vexatious and oppressive conduct justifying an injunction. The English High Court in *Akai* v *People's Insurance*[46] held that the principles applicable to the grant of an anti-suit injunction are similar to those applicable to stay. Instead of an analysis where one looks at a breach of contract as *ipso facto* vexatious and oppressive, the general policy is to hold the parties to the bargain, unless strong reasons are shown why they should be allowed to proceed in a non-contractual forum. It may be argued that if such an approach is taken, it does not matter that the jurisdiction agreement is non-exclusive. If, in the context of stay, the *S&W Berisford* approach is preferable or justifiable as the cases suggested in the earlier part of this article, then the approach towards the exercise of discretion in the context of anti-suit injunctions should be to require strong reasons before a suit is allowed to proceed in a non-contractual forum. Even if the modified *Spiliada* approach is preferable, a non-exclusive jurisdiction

the end we would not take jurisdiction over the substantive cause of action. However, there was a clear cut case in *People's Insurance* in that the Singapore Court was clearly not a competing forum as there was no intention of the parties to litigate the matter here.
As for the substantive principle for deciding whether or not to grant an injunction, the injustice to the applicant if the respondent be allowed to continue with foreign proceedings, and the injustice to the respondent if he not be allowed to continue, are considered. The relevant test here is that of vexation and oppression, and as to when this is satisfied, Lord Goff refused to restrict it by definition. Additionally, an injunction will not be granted where to do so would be to deprive the respondent of advantages of suing in the foreign forum for which it would be unjust to deprive him, though this may be overcome by undertakings of the applicant. A recent case provides an example of an advantage that it would be unjust to deprive the respondent of. In The *"Irini A"* [1999] 1 Lloyd's Rep 196, the respondent (foreign plaintiff) had arrested the applicant's vessel in the foreign country and if the trial proceeded there, the vessel could be easily sold there should the claim succeed. The Court held, *inter alia*, that it would be unjust to deprive the respondent of this advantage.
As the Singapore Court of Appeal has adopted *SNIA* in *Bank of America* v *Djoni Widjaja* [1994] 2 SLR 816, the principle for granting injunction has thus been to see if vexation and oppression is found on the facts. When Lord Goff's approach in *SNIA* is compared with Lord Brandon's approach in *South Carolina*, it may be seen that under Lord Goff's approach, vexation and oppression is the unifying principle rather than the exceptional situation where an injunction may be granted. But cases have accepted Lord Brandon's first situation as a classical case of vexation and oppression anyway.

46 [1998] 1 Lloyd's Rep 90 at 104-105.

agreement may count as a concession of the comparative appropriateness of the contractual forum in those cases mentioned, and if so, it may be that an anti-suit injunction would be readily granted.

There are two sub-categories of cases affected by such a proposed approach.

First, where the contractual forum is the local forum, the respondent in such an application is amenable to the jurisdiction of the forum by virtue of submission by the agreement. The respondent also cannot argue that the court from which the injunction is sought is not the appropriate forum since there is already that same jurisdiction agreement.[47]

The second category involves cases where the contractual forum is a "third court" – the forum from which the injunction is sought is not a competing forum because neither party intends to sue there. Any injunction issued to restrain foreign proceedings would effectively protect proceedings not in the enjoining court, but in the third court which is the contractual forum. This may be more problematic. Recently, pertaining to anti-suit injunctions in general, the courts have, in what is purported to be in the interest of comity, developed what seems to be an additional requirement of "sufficient interest" before the courts will grant the injunction. The House of Lords in *Airbus* v *Patel*[48] and the Singapore High Court in *People's Insurance* v *Akai*[49] have declined to grant the injunction on the ground that they do not have sufficient interest in the matter.[50] In the context of jurisdiction agreements, it may be noted that courts have generally dealt with the cases where the clause being breached is one in favour of the forum. In *People's Insurance*, the Singapore High Court declined to give an injunction when dealing with a clause in favour of English courts, adding that it will not be an "international busybody", even though this was an even clearer case – that of an exclusive jurisdiction agreement.[51] It may be asked whether this approach is genuinely more, or in fact less, in line with the idea of comity. Arguably, especially if one takes jurisdiction agreements seriously, there should be no difference in approach whether the choice is in favour of the forum or a foreign court. The reluctance in granting anti-suit injunctions may only be justifiable in cases where the local forum is not at all an appropriate forum, such that the requirement of natural forum is not met.

[47] This is especially pertinent since it is common to choose a neutral forum in many international contracts. It seems futile in such cases to assess the appropriateness of the forum in terms of connecting factors. See Thomas J's comment in *Akai* v *People's Insurance* [1998] 1 Lloyd's Rep 90.

[48] [1998] 2 All ER 257.

[49] [1998] 1 SLR 206.

[50] *Supra*, note 45.

[51] There was at this time only the Court of Appeal decision in *Airbus* v *Patel*.

Otherwise, it may be argued that where the local forum is, apart from the jurisdiction agreement, an appropriate forum, there should be no diffidence in granting an anti-suit injunction to protect proceedings in a foreign contractual forum. The argument is especially strong if the contractual forum is a neutral forum because as has been argued, the *S&W Berisford* approach is particularly justifiable in such cases. Also, neutral fora are precisely those which have little or no connection with the parties or the transaction. If it be so, then an injunction issued by the neutral forum, which has jurisdiction over the enjoined party by virtue of the non-exclusive jurisdiction agreement, may in many cases have little practical restraint over the enjoined party who may have no assets and no connection with the neutral forum. It is surely in such cases when the court, which is apart from the jurisdiction agreement the natural forum, should help to protect the proceedings in the contractual neutral forum.

Another issue arises from this new approach towards anti-suit injunctions which is applicable to such injunctions in general. If an analysis by analogy with stay is used, it may be asked, supposing the foreign court has the same private international law rules relating to stay, whether the foreign defendant who is applying for an anti-suit injunction locally, must first attempt to obtain a stay in the foreign court. Additionally, if the foreign court has declined to stay, because it has found that strong reasons exist why a breach should be allowed and stay refused, it may be asked if the local court would then make a finding to the contrary on these same principles. The interests of comity may be pressing on the local court, particularly when the foreign court has exactly the same private international law rules relating to stay.

III. Conclusion

The cases dealing with non-exclusive jurisdiction agreements have been decided in a somewhat *ad hoc* fashion, without much consideration of how different they are from exclusive jurisdiction agreements and how that difference should be reflected in the effect accorded to them in law. This is peculiar especially since much attention is at times given to the interpretation of such agreements to see if they are exclusive or not. If eventually they have the same effect as exclusive jurisdiction agreements, one wonders why so much time and effort was spent proving they were one or the other. Much remains to be clarified as far as the theoretical reasoning employed by the courts is concerned. It is suggested that more thought needs to be given to the question of the rationale for having such agreements, and the law be modified accordingly to give effect to the parties' intention. The focus really should be on the facts of the case, especially as to whether there exists jurisdiction apart from the jurisdiction agreement so that the

jurisdiction agreement can be taken to mean something more. Neutral forum agreements should also fall into a separate category. With the increased preference for neutral fora in cross-border transactions, attention should also be given to the special considerations at stake. As long as there are no public policy reasons against the choice of the neutral forum, it seems that private international law factors should take on a diminished role in such cases. Finally, with the decision of the English High Court in *Akai* that the principles for granting an injunction are similar to those for stay (and rightly so),[52] the resolution of the effect of non-exclusive jurisdiction agreements in the context of stay takes on added importance.

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[52] The principles should be the same in the sense that just as a court would grant an anti-suit injunction to protect proceedings in its jurisdiction which it deems to be the natural forum, the court should grant a stay to "force" proceedings in the natural forum when it is itself not the natural forum; and vice versa.

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