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NON-EXCLUSIVE JURISDICTION CLAUSES—CHANGING APPROACHES?

Asia-Pacific Ventures II Limited v. P.T. Intimutiara Gasindo; Bayerische Landesbank Girozentrale v. Kong Kok Keong[1]

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I. INTRODUCTION

The common law's treatment of non-exclusive jurisdiction clauses has never been as clear as its approach to exclusive jurisdiction clauses. In relation to exclusive jurisdiction clauses, the courts in both the U.K. and Singapore require the defendant to show "strong cause" before a stay of proceedings will be granted. As for non-exclusive jurisdiction clauses, there seem to be two broad approaches in the common law. The first is to apply the test from *The Spiliada*[2] and treat the non-exclusive jurisdiction clause as a pointer towards the determination of natural forum in stage one of the test. Stage two of the test allows for proceedings to continue in the existing forum if the plaintiff could show that she would be deprived of a legitimate, personal or juridical advantage if the proceedings were to be stayed. The second approach is to apply the test from *The Spiliada* but to exclude any factors that should have been foreseen at the time the non-exclusive jurisdiction agreement was entered into.[3] This is sometimes referred to as "the modified Spiliada" test. The consequence of this second approach is that a stricter test is applied to non-exclusive jurisdiction clauses than that applied to exclusive jurisdiction clauses.

In Singapore, the question seemed to be settled by *P.T. Jaya Putra Kundur Indah & Anor v. Guthrie Overseas Investments Pte Ltd*.[4] In that case,

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1 [2002] 3 S.L.R. 326 [*Asia-Pacific Ventures*]; [2002] 4 S.L.R. 283 [*Bayerische*].

2 *Spiliada Maritime Corp v. Cansulex, The Spiliada* [1987] A.C. 460.

3 *British Aerospace v. Dee Howard* [1993] 1 Lloyd's Rep. 368.

4 Suit 395/1996, H.C., unreported judgment dated 7 December 1996 [*P.T. Jaya Putra*].

Lai Siu Chiu J. adopted the approach from *The Spiliada* with the non-exclusive foreign jurisdiction clause as a strong factor pointing towards the appropriate forum. However, two fairly recent cases of the Singapore High Court indicate that a change in approach might be happening.

Before looking at these two cases, it is also necessary to point out that there appears to be a third approach established by *Bambang Sutrisno v. Bali International Finance*.[5] In that case, the Court of Appeal applied the test of "strong cause" to a non-exclusive jurisdiction clause. While this may seem odd at first blush, it is submitted that because the non-exclusive jurisdiction clause was coupled with an obligation on the part of the defendant to waive any objections on the ground of *forum non conveniens*, it was appropriate to hold the defendant to the standard of "strong cause". In essence, the juxtaposition of the two obligations created, in effect, an exclusive jurisdiction clause.[6] This paper will now turn to the first of the two High Court cases.

II. *Asia-Pacific Ventures II Limited v. P.T. Intimutiara Gasindo*[7]

Stated simply, a bond subscription agreement was entered into between the first defendant and the plaintiffs. This agreement provided for a bondholder to redeem all or part of the bond should the net profit after tax for 1998 or 1999 be less than 90% of the projected net profit after tax. The plaintiffs also entered into a shareholders' undertaking agreement with the second to fifth defendants. The second defendant was a major shareholder of the first defendant and the third to fifth defendants were shareholders in the second defendant. The shareholders' undertaking agreement provided that should the first defendant fail to redeem the bonds, they would purchase the bonds from the plaintiffs. It also functioned as a guarantee of the obligations of the first defendant under the bond subscription agreement.

The plaintiff bondholders claimed that in both years, the net profit after tax was less than the projected net profit after tax. Pursuant to the agreement, they issued redemption notices claiming amounts totalling US$21m. The defendants failed to pay and the plaintiffs commenced action in Singapore. The defendants claim that a collateral agreement or implied term relieved them of their obligation due to circumstances beyond their control.

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5 [1999] 3 S.L.R. 140 [*Bambang Sutrisno*].

6 For a discussion of this case, *see* A. Abdullah, "Jurisdiction Clauses and Waiver of *Forum Non Conveniens*" [1999] Sing. J.L.S. 674. Contrast with *Sabah Shipyard (Pakistan) Ltd v. The Islamic Republic of Pakistan* [2002] E.W.C.A. Civ. 1643 where it was held that a similar coupling of a non-exclusive jurisdiction clause (selecting England) and an obligation to waive objections on the grounds of *forum non conveniens* did not create an exclusive jurisdiction clause.

7 *Asia-Pacific Ventures*, *supra* note 1.

Both agreements expressly provided for Singapore law to govern and for the non-exclusive jurisdiction of the Singapore courts. Under the agreements, the plaintiffs also had the option of referring the matter to arbitration. In two separate affidavits, the defendants applied for a stay of proceedings based on the arbitration clause and natural forum respectively.

With respect to the application for a stay based on arbitration, Lee Seiu Kin J.C., as he then was, did not deal with this in detail save for the statement that reference to arbitration was the plaintiffs' option and that they had chosen to litigate in Singapore as entitled to under the agreements.

With respect to the application for a stay based on natural forum, the defendants made a number of submissions in favour of Indonesia as the natural forum. First, it was submitted that the connecting factors pointed to Indonesia. The defendants were Indonesian and many of their witnesses were in Indonesia. The court accepted this but also considered that the agreements were governed by Singapore law and that the parties had submitted to the non-exclusive jurisdiction of the Singapore courts.

Secondly, the defendants submitted that the matter should be heard in Indonesia so that they could rely on their defences. The court considered this submission untenable as the defences could also be relied on in Singapore. Indeed, the Singapore courts were better suited to apply Singapore law. It is submitted that this view is correct unless the defendants were seeking to rely upon a defence provided for by some mandatory statute of Indonesia. However, there is no mention of this in the judgment and it must be assumed that the defences relied upon are also available under Singapore law.

Thirdly, the defendants submitted that the matter in Singapore should be stayed because other and closely-related proceedings were pending in Indonesia. The defendants had commenced action against the plaintiffs in Indonesia. Further, an action had been filed against the defendants by another company, Future Fast Securities Ltd, claiming payments under similar circumstances as the plaintiffs. The matter should therefore be heard in Indonesia. They also submitted that the multiplicity of proceedings might also lead to conflicting judgments of the Singapore and Indonesian courts. The court rightly considered the point of multiplicity of proceedings as one relevant factor in *The Spiliada* approach. However, it tempered this factor by observing that the action commenced by the defendants in Indonesia occurred more than two months after the plaintiffs commenced proceedings in Singapore. The learned judge saw this as a spurious attempt to bolster their stay application. The writer submits that this is correct. It should never be sufficient for parties to begin actions in other jurisdictions simply to bolster their stay applications by being able to point to the factor of "multiplicity of proceedings". Of course, the difficulty is to distinguish between proceedings which were spurious and those which have been "appropriately" commenced. This must be done on a case by case basis by the court, much as the learned judge had done in this case.

Fourthly, the defendants submitted that if the action proceeded in Singapore and the plaintiffs obtained judgement, the plaintiffs would have to commence fresh proceedings in Indonesia as there was not an agreement for the reciprocal enforcement of judgements between the two countries. The court considered this a relevant factor but pointed out that this would be a detriment to the plaintiffs, who have elected to proceed in Singapore. It is odd for the defendants to have made a submission which should properly have been made by the plaintiffs and the writer submits that it was generous for the learned judge to not have dismissed this submission outright.

Finally, the defendants submitted that in Indonesia, they would be able to counterclaim against Future Fast Securities Ltd's action, whereas in Singapore, they could not. The court disposed of this point by stating that it could not see how a counterclaim would not be available to the defendants as against Future Fast Securities Ltd. This must be correct. The defendants are seeking a stay as against the plaintiffs' action in Singapore. This does not affect the action in Indonesia by Future Fast Securities Ltd. Presumably, the defendants' ability to counterclaim against Future Fast Securities Ltd would depend on the rules of the Indonesia court and not whether the Singapore proceedings are stayed.[8]

Be that as it may, the court found that the defendants had not satisfied stage one of the test in *The Spiliada* by showing that Indonesia was clearly the more appropriate forum.[9]

Four points may be made about Lee J.C.'s judgment. First, the decision is correct. On the balance, the writer agrees with the finding that the defendants had not discharged their burden at stage one of the test in *The Spiliada*. While the multiplicity point was relevant, Singapore law governed and where the systems of law are different, Lee J.C. took the view, agreeing with the editors of *Dicey & Morris on the Conflict of Laws*, that the Singapore courts were better suited to apply Singapore law.

Secondly, it seems clear from the judgment that where there was a non-exclusive jurisdiction clause, the test from *The Spiliada* applied. The court cited decisions of the Court of Appeal *Eng Liat Kiang v. Eng Bak Hern*[10] and *P.T. Hutan Domas Raya v. Yue Xiu Enterprises (Holdings)*,[11] both dealing with *forum non conveniens*, as authorities. So far, this is entirely consistent with the approach to non-exclusive jurisdiction clauses in *P.T. Jaya Putra*.[12]

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8 This, however, is a curious point. Perhaps the defendants meant to argue that because of Future Fast Securities Ltd's action in Indonesia, it would be inconvenient, if not unjust, to expect the defendants to defend the actions in two different countries especially since the basis of both actions were similar.

9 *Asia-Pacific Ventures*, *supra* note 1 at para. 24.

10 [1995] 3 S.L.R. 97 [*Eng Liat Kiang*].

11 [2001] 2 S.L.R. 49.

12 *Supra* note 4.

What is not clear is whether the test *simpliciter* or the modified test from *The Spiliada* was applied. Lee J.C. had cited without comment the editors of *Dicey & Morris on the Conflict of Laws* on non-exclusive jurisdiction clauses. In particular:

> [. . .] the fact that a court was contractually chosen by the parties will be taken as clear evidence that it is an available forum, and that, in principle at least, *it is not open to either party to object to the exercise of its jurisdiction at least on grounds which should have been foreseeable when the agreement was made*".[13]

Can it be inferred from this that the court applied the modified *Spiliada* approach? It would appear from the extract that Lee J.C. did not take issue with the modified *Spiliada* approach as set out in *Dicey & Morris on the Conflict of Laws*. However, in application, the court did not seem to exclude factors relating to convenience of the trial, which should have been foreseeable when the agreement was made. So, it remains unclear whether the test applied was the modified *Spiliada* or the test *simpliciter*.

Thirdly, the case made no mention at all of the approach from *Bambang Sutrisno*. Perhaps the court did not see it as applying to a situation where the non-exclusive jurisdiction clause was not coupled with an obligation to waive objections on the basis of *forum non conveniens*. If this is correct, then this strengthens the view that the approach to apply where a non-exclusive jurisdiction clause exists would be the test from *The Spiliada* or its variant.

The final point that may be made about the court's judgment relates to the court's residual discretion to refuse a stay even if the defendants successfully show the existence of a clearly more appropriate forum. Presumably, this must refer to stage two of the test where the court can nevertheless refuse a stay if circumstances of justice require it. So far, this is not out of the ordinary. However, Lee J.C. concludes his judgement by stating: "In the circumstances of the present case, justice clearly requires that the plaintiffs be permitted to proceed with the action in Singapore *as the defendants had agreed that they are entitled to do so*."[14]

This seems to suggest that even had the defendants satisfied the court as to the existence of a clearly more appropriate forum, the fact that the defendants had agreed to the non-exclusion jurisdiction of the Singapore courts is sufficient to justify, in the interests of justice, a refusal of a stay. This is an extraordinary statement. If the non-exclusive jurisdiction clause is to be taken a pointer to the natural forum in stage one of the test, what role does it play in stage two? What circumstances would ever justify a court staying proceedings where a non-exclusive jurisdiction clause pointed

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[13] *Asia-Pacific Ventures*, *supra* note 1 at para. 22 [emphasis added].

[14] *Ibid.* at para. 27 [emphasis added].

to Singapore? Would showing "strong cause", the standard required for refusing a stay for an *exclusive* jurisdiction clause, be sufficient? Whatever the answer, this would mean that the standard that might exist here could be set as high, or even higher, than that required for exclusive jurisdiction clauses.

Of course, perhaps this is not what the court had intended and that the court meant that in the overall scheme of things, even the interests of justice supported his decision to refuse the stay.

Alone, the result in this case can be regarded as being consistent with a straightforward application of the test from *The Spiliada*.

III. *Bayerische Landesbank Girozentrale v. Kong Kok Keong*[15]

This was another judgment of Lee J.C. and also involved a non-exclusive jurisdiction clause. In this case, the defendant entered into a credit facility arrangement with the plaintiff bank. The facility was subsequently terminated and the plaintiff demanded repayment. The defendant failed to pay and the plaintiff commenced action in Singapore. The agreement provided for the governing law of the contract to be Singapore law. It also provided for the non-exclusive jurisdiction of the Singapore courts. The defendant applied for a stay on the basis that Malaysia was the natural forum.

In a relatively short judgment, Lee J.C. began by stating that the law in respect of an application to stay proceedings in breach of a non-exclusive jurisdiction clause in favour of Singapore was set out in the Court of Appeal decision of *Bambang Sutrisno* and proceeded to apply the test of "strong cause" to the facts of the present case. Submissions from counsel for the defendant to support the application for a stay were considered and the court determined that it had not been shown that Malaysia was clearly and distinctly the more appropriate forum. As such, the application was dismissed.

Four points can be made about this case. First, it is extraordinary that the court chose to apply the test of "strong cause" in this case. As mentioned earlier, the test of "strong cause" is typically applied in cases relating to exclusive jurisdiction clauses. That the court has applied that test in a case relating to a non-exclusive jurisdiction clause may indicate a change in the court's approach to non-exclusive jurisdiction clauses. If this is the case, then that must mean that there would be no real distinction between parties agreeing to exclusive and non-exclusive jurisdiction clauses.

Secondly, the court seems to have relied heavily and without question on the approach in *Bambang Sutrisno*. As mentioned, that case involved a coupling of a non-exclusive jurisdiction clause and an obligation to waive objections on grounds of *forum non conveniens*. It seems odd that the

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[15] *Bayerische*, *supra* note 1.

learned judge had applied the approach from *Bambang Sutrisno* here when *Bayerische* did not involve an obligation to waive objections on the grounds of *forum non conveniens*. Could this indicate the court's intention to apply "strong cause" to situations revealing only a non-exclusive jurisdiction clause?[16] If this was not the court's intention, then with respect, the writer submits that it may not have been appropriate for the court to have used the "strong cause" test in this case.[17]

The third point is this. It is curious that this judgment ends with almost the same paragraph[18] as that in *Asia-Pacific Ventures*.[19] If the court had applied the test of "strong cause", where, then, does this discretion to refuse the stay come in? Is the court suggesting here that even if the test of strong cause had been satisfied, there might be even stronger reasons for refusing the stay?

The final point here relates to the final point made about *Asia-Pacific Ventures*. If the court had applied the test, or some version of the test, from *The Spiliada*, the final paragraph in *Bayerische* again, seems to suggest that because parties had agreed to the non-exclusive jurisdiction of the Singapore courts, this might itself justify the refusal of a stay at stage two.

IV. Conclusion

Where in the past, a clear distinction in approaches between exclusive and non-exclusive jurisdiction clauses could be drawn, the cases of *Asia-Pacific Ventures* and *Bayerische* seem to have muddied the waters somewhat. While *Asia-Pacific Ventures* was itself inconclusive, *Bayerische* seems quite clear about the application of the "strong cause" test, normally applied in exclusive jurisdiction clause cases, to a case relating to the non-exclusive jurisdiction clause.

This would mean that at this point in Singapore, there are two possible scenarios. The first is that the strong cause test applies in all cases regardless of whether a jurisdiction clause is exclusive or not. Intuitively, this scenario does not sit well. This would mean a radical change in approach through this merger of what were till now fairly distinct categories. Further, there would no longer be any legal consequence of the distinction between a non-exclusive and exclusive jurisdiction clause. This not only has implications for applications to stay proceedings in the forum but also affects whether and

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[16] It is also odd that the same judge had adopted such a different approach to non-exclusive jurisdiction clauses less than a year from *Asia-Pacific Ventures*.

[17] Having said this, the writer submits that, on the facts, even if the court had applied the test *simpliciter* from *The Spiliada*, the result in this case would have been the same. The result arrived was correct.

[18] The two paragraphs are identical save for the phrase "[Emphasis is added]" and the italicization of certain words in the quoted extract from *Eng Liat Kiang*.

[19] *Bayerische*, *supra* note 1 at para. 15.

when a court would be inclined to grant an injunction restraining foreign proceedings. A breach of an exclusive jurisdiction clause is sufficient to support the granting of an injunction.[20] Would a breach of a non-exclusive jurisdiction clause now be similarly sufficient?

The analysis in *Sabah Shipyard (Pakistan) Ltd v. The Islamic Republic of Pakistan*[21] seems to suggest that jurisdictional obligations similar to the kind in *Bambang Sutrisno* were sufficient in the circumstances to justify the granting of an injunction restraining proceedings in Pakistan, even though the court had found that these jurisdictional obligations did not combine to create an exclusive jurisdiction clause. Does *Bayerische* now take this further and imply that a simple non-exclusive jurisdiction clause may be sufficient to base an injunction restraining foreign proceedings?

The second possible scenario is perhaps more acceptable. Both the cases discussed dealt with non-exclusive *forum* jurisdiction clauses. Perhaps Lee J.C. is suggesting the use of the "strong cause" test in all cases involving a non-exclusive *forum* jurisdiction clause. This would also mean that where the case involves a non-exclusive *foreign* jurisdiction clause, then the approach in *P.T. Jaya Putra* still applies. While this scenario is more acceptable than the first, it raises concerns about judicial chauvinism. Why should a *forum* jurisdiction clause be treated any differently from a *foreign* one? Further, the suggestion in both cases that a choice of Singapore law and non-exclusive choice of the Singapore jurisdiction is sufficient to trigger the discretion in stage two lends to this concern. Of course, choice of Singapore law is a valid factor to be considered and weighed but by itself should not be determinative, even if the competing legal systems do not have similar origins. Finally, this scenario still raises the problem of whether a non-exclusive forum jurisdiction clause is sufficient to base an injunction restraining foreign proceedings.

It is hoped that clarification can be provided by the Court of Appeal in a future case. Specifically, clear distinctions in the approaches to exclusive and non-exclusive jurisdiction clauses, both forum and foreign, need to be made.[22] With the increasing ingenuity of commercial and legal documentation giving birth to clauses like the one in *Bambang Sutrisno* or multi-jurisdictional clauses in *Baiduri Bank Bhd v. Dong Sui Hung & Anor*,[23] it is essential that the basics are clear before having to deal with variations on a theme.

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[20] *Continental Bank N.A. v. Aeakos Cia Naviera S.A.* [1994] 1 W.L.R. 588; *Sohio Supply Co. v. Gatoil U.S.A. Inc.* [1989] 1 Lloyd's Rep. 588.

[21] [2002] E.W.C.A. Civ. 1643.

[22] In *Baiduri Bank Bhd v. Dong Sui Hung & Anor* [2000] 4 S.L.R. 212, the court had attempted a clarification of approaches between situations with no jurisdiction agreements, exclusive agreements, semi-exclusive agreements and multi-jurisdictional agreements. Unfortunately, the clarification did not directly extend to approaches dealing with non-exclusive jurisdiction clauses.

[23] *Supra* note 22.