Abdul Rashid bin Abdul Manaf *v* Hii Yii Ann
[2014] SGHC 194

Case Number	: Suit No 197 of 2014 (Registrar's Appeal No 202 of 2014 and Summons No 3268 of 2014)
Decision Date	: 03 October 2014
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Francis Xavier, SC and Ang Tze Phern (Rajah & Tann LLP) for the plaintiff; Tan Tee Jim, SC (Instructed Counsel), Sharon Chong and Devi Haridas (Sim Law Practice LLC) for the defendant.
Parties	: Abdul Rashid bin Abdul Manaf — Hii Yii Ann

Conflict of Laws – Choice of jurisdiction – Non-exclusive

Civil Procedure – Stay of proceedings

3 October 2014

Woo Bih Li J:

Introduction

1 In this action, the plaintiff, Abdul Rashid bin Abdul Manaf ("Rashid"), is suing the defendant, Hii Yii Ann ("Hii"), for breach of a settlement agreement dated 24 May 2012 ("the 2012 SA") between the parties. Hii then applied to stay this action on the ground of *forum non conveniens*. His application was dismissed by an Assistant Registrar. He appealed against the decision of the Assistant Registrar, and I dismissed his appeal. Hii has filed an appeal against my decision. I state below my reasons.

2 The principles governing a stay application are not in dispute. However, because cl 6.2 of the 2012 SA stipulated that "the Parties hereby irrevocably submit to the non-exclusive jurisdiction of the courts of the State of Queensland, Australia" and because cl 6.1 of the 2012 SA provided that the 2012 SA was "governed by and… to be construed in accordance with the laws of England", Mr Tan Tee Jim, SC ("Mr Tan"), counsel for Hii, submitted that this court should apply English law for the stay application and that under English law, the burden was on Rashid to show a strong case why a stay should not be granted in favour of Australia in view of the fact that the non-exclusive jurisdiction ("NEJ") clause points to Queensland, Australia.

3 Mr Francis Xavier, SC ("Mr Xavier"), counsel for Rashid, disagreed and submitted that the court should simply apply the principles in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") as Singapore courts have often done as in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519 ("*Orchard Capital*") at [12] and [32]. Under those principles, it was for the applicant to show that another jurisdiction was clearly the more appropriate forum for the action by establishing, through various factors, that the other jurisdiction had a more real and substantial connection with the dispute to be heard.

The issues

4 Therefore, Hii's stay application raised the following issues:

(a) What was the correct approach to be adopted for a stay application of a Singapore action in the face of an NEJ clause that pointed to a foreign country, and a governing law clause that pointed to the law of another foreign country?

(b) If the foreign governing law was relevant, how was it to be proved in a Singapore court and what was the correct construction of cl 6.2?

(c) Depending on the correct construction of cl 6.2, how were the *Spiliada* principles to be applied?

The correct approach

5 Mr Xavier proceeded on the basis that although English law was the governing law, it was irrelevant to the stay application and a Singapore court would simply apply domestic Singapore law to determine the stay application. Hence, he did not cite English cases to construe cl 6.2. Instead, he appeared content to rely on the decision of the Singapore Court of Appeal in *Orchard Capital* to construe cl 6.2 and to resist Hii's appeal.

6 In *Orchard Capital*, cl 23 of the settlement agreement was the relevant provision. It provided for the agreement to be "governed by and construed in accordance with the laws of Hong Kong, SAR" and that "[t]he Parties submit to the non-exclusive jurisdiction of the courts of Hong Kong, SAR". There was also a waiver by the parties to a trial by jury, but that is not relevant for present purposes.

7 Notwithstanding cl 23, the plaintiff commenced an action against the defendant in Singapore for an alleged failure by the defendant to pay a certain sum by a certain date. The defendant then applied to stay the Singapore action in favour of Hong Kong.

8 The Court of Appeal therefore had to construe the legal effect of an NEJ clause, in particular, cl 23. In so doing, the Court of Appeal appeared to apply Singapore domestic law to construe cl 23 (see *Orchard Capital* at [27]–[29]). However, there was no suggestion in that case that Hong Kong law was different from Singapore law on the construction of an NEJ clause. In fact, the Court of Appeal in *Orchard Capital* stated, at [27], that the law of the forum would generally apply to questions of interpretation by default, because of the presumption of similarity. Hence, I was of the view that *Orchard Capital* did not stand for the proposition that a Singapore court would disregard the foreign governing law in construing an NEJ clause and apply Singapore domestic law only.

9 I refer to an article by Yeo Tiong Min, SC, "*The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*" (2005) 17 SAcLJ 306 ("Yeo's article").

10 Para 17 of Yeo's article states:

> … The common law draws a distinction between the jurisdiction agreement as a contract, which is a matter of substance, and the effect of the contract on the jurisdiction of the forum, which is a matter of procedure. Thus, questions relating to the validity and interpretation of the jurisdiction agreement are subject to choice of law rules governing contracts. …

11 Para 19 of Yeo's article states:

> The effect of a jurisdiction agreement on the jurisdiction of the forum is a matter of procedure,[34] and is purely within the control of the law of the forum. Effectively, this means that the forum determines for itself how to give effect to the agreement of the parties (as interpreted in accordance with its governing law) in the light of its own rules of jurisdiction and judicial policies.

12 I was of the view that a stay application on the ground of *forum non conveniens* was an application to ask the court not to exercise its jurisdiction and was an issue of procedure and not substantive law. Hence the correct approach was that Singapore law, as the law of the forum, applied. However, this did not mean that English law was irrelevant. Under Singapore law, the *Spiliada* principles were applicable and under such principles, the governing law of the agreement in question would be applied to construe the agreement or clause in question.

13 As English law was the governing law of the 2012 SA, it was English law that determined how cl 6.2 was to be construed, *eg*, whether cl 6.2 was in substance an NEJ clause, an exclusive jurisdiction ("EJ") clause, or something in between which I will refer to more conveniently as a most appropriate jurisdiction ("MAJ") clause. After the construction was determined, Singapore law would determine the effect of the construction, for example, who should bear the burden of proving the appropriate jurisdiction.

How foreign law was to be proved in a Singapore court and how cl 6.2 was to be construed

14 Mr Tan did not produce an opinion of an English law expert to establish English law on the construction of cl 6.2. Instead, Mr Tan simply referred to a few English cases from English law reports to establish such English law. I need mention only the following English cases:

(a) *S & W Berisford Plc and NGI International Precious Metals Inc v New Hamphire Insurance Co* [1990] 2 QB 631 ("*Berisford*");

(b) *British Aerospace Plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368 ("*British Aerospace*") at p 376;

(c) *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm) ("*Antec*");

(d) *Qioptiq Ltd v Teledyne Scientific & Imaging LLC* [2011] EWHC 229 (Ch) ("*Qioptiq*") at [38] and also at [41] and [42]; and

(e) *E D & F Man Ship Ltd v Kvaerner Gibraltar Ltd (The Rothnie)* [1996] 2 Lloyd's Rep 206.

15 In *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*"), the Court of Appeal addressed the question as to how foreign law was to be proved at [54]–[60]. The Court of Appeal observed that foreign law was an issue of fact which must be proved. Such proof could be adduced in two ways:

(a) by directly adducing raw sources of foreign law as evidence; or

(b) by adducing the opinion of an expert in foreign law.

16 In England, raw sources of foreign law can generally be adduced only as part of an expert's evidence and not on their own. However, the position in Singapore, Malaysia and India is very different because in these jurisdictions, certain raw sources of foreign law can be adduced despite not being part of a foreign law expert's evidence. Such raw sources include "any report of a ruling of

the courts of the [foreign] country contained in a book purporting to be a report of the rulings …" (see s 40 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act")). The Court of Appeal also referred to other provisions in the Evidence Act, including s 86. However, the Court of Appeal cautioned, at [60], that even if raw sources of foreign law are admissible without the need for an expert opinion, it does not mean that our courts are obliged to accord such sources any evidentiary weight. Therefore, it is preferable that expert opinions on foreign law are provided whenever possible.

17 In *Swiss Singapore Overseas Enterprises Pte Ltd v Navalmar UK Ltd* [2003] 1 SLR(R) 688, the High Court was of the view (at [6]) that where it came to English law (European Union law excepted) it was unnecessary to require evidence from an expert. Nevertheless, my view was that the caution administered in *Pacific Recreation* should not be forgotten.

18 I will now elaborate on the English cases. In *Berisford*, Hobhouse J was of the view, at p 638, that even though the contractual jurisdiction of English law was non-exclusive, "it requires a strong case for the Courts of this country to say that that right shall not be recognised and that he must sue elsewhere". At p 646, Hobhouse J said that "the fact that the parties have agreed in their contract that the English courts shall have jurisdiction (albeit a non-exclusive jurisdiction) creates a strong prima facie case that that jurisdiction is an appropriate one; it should in principle be a jurisdiction to which neither party to the contract can object as inappropriate; they have both implicitly agreed that it is appropriate".

19 In *British Aerospace*, Waller J noted that the NEJ clause in question had been freely negotiated. It was not a standard term. The learned judge was of the view that the factors relied on by the parties to make their arguments in respect of a stay application would have been "eminently foreseeable" at the time they entered into the contract. Therefore, it was not open to the defendants to resist the English action where England was the choice of jurisdiction (see *British Aerospace* at p 376). Mr Tan said that this approach had been referred to as the modified *Spiliada* approach.

20 In *Antec*, the court cited three cases, two of which were *Berisford* and *British Aerospace*, for the principle that where parties had freely negotiated a contract providing for the NEJ of English courts and choice of English law, that created a strong *prima facie* position that the English courts had jurisdiction to deal with the matter. A second principle was that parties would be held to their contractual choice of English jurisdiction, unless there were very strong reasons for departing from this principle. A third principle was that such reasons did not include factors of convenience that were foreseeable at the time the contract was entered into (save in exceptional circumstances involving the interests of justice) and it was not appropriate to embark upon a standard *Spiliada*-type balancing exercise.

21 In *Qioptiq*, the court cited the *Antec* principles with approval.

22 In *The Rothnie*, Cresswell J was of the view that the NEJ clause (which pointed to the courts of Gibraltar) meant that, *prima facie*, the contractual NEJ was "the" appropriate forum for the trial of the action, and that the parties' choice of NEJ created a strong *prima facie* case that that jurisdiction was "an" appropriate one (at p 211).

23 It appeared from the modified *Spiliada* approach in *British Aerospace*, *Antec* and *Qioptiq* that the English courts were prepared to construe an NEJ clause to amount to an MAJ clause where the clause or the contract had been freely negotiated. The parties would have chosen the NEJ as the most appropriate jurisdiction based on factors that they would have foreseen.

24 However, it is important to bear in mind that in each of the first four of the English cases listed above at [14], England was the contractual NEJ or considered to be the contractual NEJ. The action was commenced in the contractual NEJ and it was the defendant who was arguing that a foreign jurisdiction was clearly more appropriate.

25 The approach of the English courts is not necessarily the same when the contractual NEJ is a foreign jurisdiction. Although one may well think that in principle there should be no distinction in the applicable legal principles between the two situations, that is not necessarily the case.

26 Indeed, in *Orchard Capital*, the Singapore Court of Appeal cited with approval, at [16], the Hong Kong case of *Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 631 ("*Noble*") on the effect of a NEJ clause. In *Noble*, the Hong Kong Court of Appeal was of the view that there was a distinction in the application of legal principles in the two situations mentioned above. Indeed, as regards the first and the third illustrations given by the court (see *Noble* at [33]), the court was of the view that the burden was still on the defendant, and not on the plaintiff, to show a more appropriate jurisdiction than the one in which the action was brought except that the defendant's burden was less heavy where the action was commenced in a jurisdiction which was not the contractual NEJ.

27 Bearing in mind that on the facts before me, Singapore was not the contractual NEJ, did the modified *Spiliada* approach still apply as a matter of English law so that cl 6.2 would be construed as not only an NEJ clause but an MAJ clause? This was not clear to me. Mr Tan appeared to have assumed that it would be so construed but that was because he did not draw a distinction between the different factual situations.

28 It is true that in *The Rothnie*, Gibraltar was the contractual NEJ. Yet, Cresswell J was of the opinion that in view of the NEJ clause, the burden had shifted to the plaintiff to show special circumstances that the action should not be stayed. However, Mr Tan did not cite *The Rothnie* to establish that the modified *Spiliada* approach still applied even in a different factual situation. As mentioned above, Mr Tan appeared to assume that there was no distinction on the application of legal principles between different factual situations. Furthermore, Cresswell J did not appear to have considered whether the NEJ clause was a negotiated one or not.

29 In addition, in *British Aerospace*, Waller J was mindful that he might have gone too far in the modified *Spiliada* approach and he went on also to apply the usual *Spiliada* principles (see *British Aerospace* at p 377). Likewise, in *The Rothnie*, Cresswell J was mindful that he might have been wrong in his approach when he considered the NEJ as the most appropriate jurisdiction without more. He also went on to consider whether Gibraltar had the most real and substantial connection with the dispute in accordance with the usual *Spiliada* principles (see *The Rothnie* at p 211).

30 Notwithstanding Waller J's caution whether he might have gone too far with the modified *Spiliada* approach, that approach appears to be good law in England where England is the contractual NEJ and the NEJ clause was a negotiated one. However, it was not clear to me whether *The Rothnie* represented English law or was not considered to be good law. This was the difficulty which Mr Tan faced as the burden was on him to establish English law to the court's satisfaction. As he proceeded without the benefit of an opinion from an expert in English law, he was therefore handicapped. I would add that the benefit of such an opinion would have depended on how comprehensive it was.

31 Even though Mr Xavier did not make opposing arguments as to what English law was, the court was not obliged to accept without question that the modified *Spiliada* approach applied on the facts before it.

32 I was of the view that Mr Tan had not established that under English law the modified *Spiliada* approach applied even where Singapore was not the contractual NEJ.

33 Even if the modified *Spiliada* approach applied where Singapore was not the contractual NEJ, there was yet another obstacle in its application to the facts before me.

34 Under English law, the modified *Spiliada* approach applied where the clause was negotiated, according to Waller J in *British Aerospace*, although the court in *Antec* referred to the fact that the parties had freely negotiated a contract (instead of the clause in question).

35 A contract may be freely negotiated but not all clauses are necessarily negotiated. Commercial men do sometimes pay more attention to commercial terms than to legal ones. Although Mr Tan did not draw a distinction between a contract that is negotiated and a clause that is negotiated, there is, in principle, a difference between the two. In any event, the rationale behind the modified *Spiliada* approach was that the parties would have foreseen the relevant factors when they chose the NEJ, and as such, their choice of the NEJ amounted to their signifying that that jurisdiction was the most appropriate jurisdiction to hear their contractual disputes.

36 However, on the facts before me, the evidence showed, first, that cl 6.2 was not negotiated between the parties. Secondly, Australia was chosen not because it was the most appropriate jurisdiction to hear any contractual disputes but because Hii had assets in Australia.

37 In the present case, Rashid gave evidence through an affidavit that it was he who chose Australia as the NEJ. Apparently Hii did not object. So there was no negotiation as such on cl 6.2.

38 Furthermore, Rashid's evidence was that he chose Australia as the NEJ for the 2012 SA because Hii had assets in Australia. [note: 1] In other words, Australia was chosen not so much to resolve any dispute between the parties as to enforce a judgment. Furthermore, the purpose was not so much to enforce a judgment which either side might obtain as to enforce a judgment which only Rashid might obtain against Hii, as the terms of the 2012 SA required Hii to pay Rashid various sums of money at stipulated times.

39 This was telling from the fact that Hii did not dispute Rashid's explanation that Australia was chosen to facilitate enforcement of any judgment he may have obtained against Hii. On the contrary, Hii tacitly admitted that this was the reason. Hii admitted, in para 19 of his affidavit of 14 April 2014, that he had "plenty of assets in Australia" and that that was most probably the reason why Rashid chose Queensland, Australia, as the NEJ in respect of their transactions "which had nothing to do with Australia".

40 I would add that previously Rashid had commenced action in Queensland to enforce an earlier settlement agreement made in 2007. The 2012 SA was to resolve that action. Indeed, Rashid said that in the 2007 settlement agreement there was also a similar provision choosing Queensland, Australia as the NEJ for the same reason as for the 2012 SA. His reason for commencing the present action in Singapore on the 2012 SA was that he had been told by Hii that Hii's Australian assets were frozen because of Hii's dispute with the Australian tax authorities. [note: 2] Furthermore, Hii has assets in Singapore as I will elaborate on later. On the other hand, Hii disputed that he had told Rashid that his Australian assets were frozen. Hii also disputed that such assets had been in fact frozen. However, this dispute was not material to me because Hii did not dispute Rashid's reason for choosing Australia as the contractual NEJ.

41 Therefore, the fact that most of the other agreements between the parties, including the 2007

settlement agreement, identified Australia as the NEJ was of no assistance to Hii. It was not the number of times that Australia was chosen but the reason for the choice that was important.

42 Most importantly, both Rashid and Hii accepted that Australia had nothing to do with the underlying transactions which gave rise to various agreements leading to the 2007 settlement agreement and then to the 2012 SA.

43 In these circumstances, I was of the view that English law would not have construed cl 6.2 as an MAJ clause and would have construed it as an NEJ clause and no more.

44 If Mr Tan had failed to establish what English law was and I had to apply Singapore law on the construction of cl 6.2, the result would have been the same.

45 I started off with what I considered to be basic principles of construction without regard to case law. In so doing, I was of the view that it was important to bear in mind the ordinary meaning of the words "exclusive" and "non-exclusive", although the context in which each word was used and the rest of the terms in the clause would also have to be considered.

46 In the context of a jurisdiction clause, the word "exclusive" ordinarily means that the contractual jurisdiction is the only jurisdiction to which the parties have agreed to submit their contractual disputes. If either party chooses to submit the contractual dispute to a jurisdiction other than the contractual exclusive jurisdiction, that party is acting in breach of contract.

47 On the other hand, the word "non-exclusive", in the context of a jurisdiction clause, ordinarily means what it says. Parties may submit the contractual dispute to that jurisdiction, but are not obliged to do so. This means that the parties have agreed that the contractual jurisdiction has jurisdiction to hear their contractual disputes but it does not mean that they must submit every contractual dispute to that contractual jurisdiction. Therefore, if a party were to commence action on a contractual dispute in a jurisdiction which is not the contractual NEJ, that party is not in breach of contract. Likewise, if a party were to argue that proceedings commenced in the contractual NEJ should be stayed in favour of another jurisdiction, that party is also not in breach of contract.

48 Therefore, although the NEJ may be considered as "an" appropriate jurisdiction, it is, in my view, erroneous to suggest, without more, that it is also "the" appropriate jurisdiction (*ie*, the MAJ) to hear a contractual dispute.

49 A few English cases have observed that if a defendant were to argue for a stay of an English action in favour of a foreign jurisdiction where England is the contractual NEJ, the defendant is saying that England is not an appropriate jurisdiction and that the foreign jurisdiction is appropriate. Therefore, the defendant is acting contrary to his agreement that England is an appropriate jurisdiction. I did not find such an observation persuasive. In a similar situation in the Singapore context, all that a defendant is saying is that although Singapore, as the contractual NEJ, is an appropriate jurisdiction, there is a foreign jurisdiction which is clearly more appropriate. Therefore, when a defendant has made a stay application, the defendant is not acting contrary to his agreement that Singapore is an appropriate jurisdiction where Singapore is the contractual NEJ.

50 I did not accept that the ordinary meaning of an NEJ clause is that parties have agreed that the contractual jurisdiction is the MAJ to hear their contractual disputes.

51 Furthermore, I was of the view that the construction of an NEJ clause does not vary depending on whether it is a negotiated clause or a standard clause. If the ordinary meaning of an NEJ clause is

what I have said it means, then there is no reason that the meaning of the same clause should morph into an MAJ clause when it is a negotiated clause. Yeo's article at para 83 observes that, "[i]t is not possible to draw a bright-line between freely negotiated jurisdiction agreements and jurisdiction agreements found in contracts of adhesion".

52 Waller J had suggested that the factors which the parties were relying on to argue which jurisdiction was more appropriate to hear a contractual dispute would have been eminently foreseeable at the time that they negotiated the clause in question (see *British Aerospace* at p 376). With respect, I was of the view that this was not the point. Even if the factors were foreseeable, which was not necessarily always the case, the fact was that if parties wanted an MAJ clause in substance, it would be a simple matter for them to insert the appropriate words in the clause to express this choice. The fact that they did not do so must mean something. It meant that they wanted simply an NEJ clause with its ordinary meaning and not an MAJ clause.

53 In my view, it was confusing to equate "an" appropriate jurisdiction with "the" appropriate jurisdiction. However, I accepted that the word "non-exclusive" did not always mean the former and not the latter. Depending on the context and the rest of the terms in an NEJ clause, the clause could mean something more than was apparent from its literal phrasing, and amount to an MAJ clause. That was quite different from saying that because the clause had been freely negotiated, it was *prima facie* an MAJ clause.

54 One must also bear in mind that if a negotiated NEJ clause amounts to an MAJ clause in substance so that the evidential burden shifts to a plaintiff suing in the non-contractual jurisdiction to show strong cause as to why he should be permitted to do so, this will bring the negotiated NEJ clause very close to an EJ clause. Indeed, one may even ask whether there is then any practical difference between a negotiated NEJ clause and an EJ clause because even for an EJ clause, a plaintiff may still show strong cause why he should be permitted to bring an action in a jurisdiction which is not the contractual one. I was of the view that parties who had negotiated for an NEJ clause would be very surprised to discover that they had instead obtained an MAJ clause which operated like an EJ clause.

55 I now come to a few Singapore cases. Yeo's Article at para 81states:

> In *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd*, the Singapore High Court inferred from a non-exclusive choice of foreign (Indonesian) court clause that the parties had agreed that it was an appropriate forum, and it was held that the claimants should not be heard to argue that Indonesia was not an appropriate forum. But the party seeking to have the case heard in Singapore was not put to argue on the basis of strong cause why the action should continue. If the agreement, though promissory, only related to *an* appropriate forum, it would not be a breach of contract for the claimants to argue that Singapore was the *more* appropriate forum. Thus, it was not surprising that the court considered that the jurisdiction clause was only one of the factors going to the question of appropriateness in determining the natural forum for the dispute; it had no further effect. Thus far, no case in Singapore has gone so far as to infer from the non-exclusive selection of a court that the parties have agreed that it is the most appropriate forum so that it would be a breach of contract to argue that any other court than the chosen court should adjudicate any substantive issues falling within the dispute resolution clause. Arguably, however, some English cases have taken that step, although the authorities often do not make it clear which of the possible contractual inferences discussed in this article is being drawn.

56 I would add that the case of *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte*

Ltd [1996] SGHC 285, cited in the above passage, was cited with approval by the Court of Appeal in *Bambang Sutrisno v Bali International Finance Ltd and others* [1999] 2 SLR(R) 632 ("*Bambang*") at [11]. In *Bambang*, the clause in question was not just an NEJ clause. The clause in *Bambang*, Article 23.02 of the personal guarantee, stipulated that the defendant "submits himself to the non-exclusive jurisdiction of the District Court of Central Jakarta". However, the clause also stipulated that the plaintiff "shall have the right to proceed against [the defendant] in any other competent court in any other jurisdiction so chosen by [the plaintiff]", and that the defendant agreed to "waive any objections on the ground of venue or forum non conveniens or any similar grounds" (see *Bambang* at [6]). The Court of Appeal was of the view that when the defendant sought to stay the plaintiff's Singapore action, it was for the defendant to show strong cause for the stay to be granted (see *Bambang* at [9]). There was no suggestion that it was for the plaintiff to show strong cause for the stay application to be dismissed. Perhaps that was because of the specific terms in Article 23.02. However, the point is that *Bambang* was also not authority for the proposition that the modified *Spiliada* approach would apply where the NEJ clause was a negotiated one.

57 In *Orchard Capital*, the Court of Appeal also had to consider the legal effect of an NEJ clause. The Court of Appeal did not suggest that the modified *Spiliada* approach would apply if the NEJ clause was a negotiated one. Although the High Court in that case apparently applied the modified *Spiliada* approach (see *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2011] SGHC 185 at [5]), the plaintiff's appeal to the Court of Appeal against the stay order was allowed.

58 Therefore, my initial view about the ordinary meaning of the word "non-exclusive" was not varied by the Singapore cases. Was there, then, anything in cl 6.2 of the 2012 SA to suggest a different meaning? I have set out the material terms of cl 6.2 in [2] above.

59 For example, did the words "irrevocably submit" add anything to or vary the ordinary meaning of "non-exclusive"? Interestingly, Mr Tan had accepted that cl 6.2 was in substance an NEJ clause although, relying on English cases, he also said that it meant that Australia was the most appropriate jurisdiction and it was for Rashid to show strong cause for why he should not be held to the NEJ clause.

60 I was of the view that in the context of cl 6.2, the adverb "irrevocably" applied to the verb "submit". The adverb did not qualify the adjective "non-exclusive". The adverb did not mean that cl 6.2 was in substance an MAJ clause. In other words, it was clear that the parties had accepted that Australia was an appropriate jurisdiction but they did not agree that it was the most appropriate jurisdiction.

61 Accordingly, under Singapore law, cl 6.2 would also be construed as an NEJ clause only.

How were the *Spiliada* principles to be applied?

62 Under Singapore law, the burden remained on Hii to show that Australia was clearly the more appropriate jurisdiction than Singapore to hear Rashid's claim, according to the usual *Spiliada* principles.

63 I add that Hii did not state clearly why he was disputing Rashid's claim. Hii suggested that Rashid had assured him orally that Rashid would not insist on Hii's strict compliance with the payment dates in the 2012 SA but Hii did not say whether this meant that he could delay payment indefinitely. Also, Hii said that he had trusted a mutual friend, Alvin John, the lawyer who drafted the 2012 SA for the parties, but he did not specify clearly how this was relevant. For example, Hii did not claim that he had told Alvin John about the oral assurance from Rashid.

64 In applying the usual *Spiliada* principles, I considered the following factors to be relevant:

(a) Hii had said that Australia had nothing to do with the underlying transactions which led to disputes and to the 2007 settlement agreement and the 2012 SA. [note: 3]

(b) Australia had nothing to do with the 2012 SA except for the fact that Australia was the contractual NEJ and the 2012 SA was entered into to resolve disputes arising from a 2007 settlement agreement for which Rashid had commenced action in Queensland, Australia pursuant to a similar NEJ clause.

(c) Australia was chosen as the NEJ for the 2007 settlement agreement and the 2012 SA by Rashid. Australia was chosen only because Hii had assets there and Rashid wanted to be able to enforce any judgment he obtained against those assets. [note: 4]

(d) Hii had companies and assets in Singapore. Indeed, it was because he had assets in Singapore, such as a property in Ocean Drive and a Rolls Royce car, that Rashid commenced action in Singapore. [note: 5] Apparently Rashid also obtained a mareva injunction (in Summons No 1634 of 2014) to restrain Hii from disposing his Singapore assets.

(e) Hii is a Malaysian citizen. He said he was frequently travelling for business. His family resided in Australia. Rashid contended that Hii resided mainly in Singapore and the Philippines, [note: 6] although Hii stated in para 98 of his affidavit of 14 May 2014 that, "Singapore is where I spend the least time" as his business operations were largely in other countries such as Papua New Guinea and the Philippines. In other words, Hii did not appear to dispute that he did reside in Singapore although he resided elsewhere too.

(f) Rashid is a Malaysian citizen who resided in Malaysia.

(g) Alvin John, who drafted the 2012 SA, practised law in Malaysia. [note: 7] Any relevant discussion on the terms of the 2012 SA, before it was executed, appeared to have occurred mainly in Malaysia.

(h) The 2012 SA stipulated that communication to Hii was to be sent to an address of a Singapore company of his at 101 Cecil Street, #20-06, Tong Eng Building, Singapore 069533 or to a fax number in Singapore. [note: 8] This was a requirement found in other agreements between the parties. The Cecil Street address was also the address which Hii used in his affidavits to support his stay application. Although Hii stated that he used a Singapore address and fax number because of an excellent communication infrastructure in Singapore, it still did not aid him in establishing that Australia was clearly the more appropriate jurisdiction.

(i) Under the 2012 SA, Hii was to make various payments to Rashid. As Rashid resided in Malaysia, any payment would have to reach Rashid in Malaysia. Any failure to pay would be *prima facie* a breach occurring in Malaysia.

(j) The fact that English law was the governing law of the 2012 SA was neutral even if there was a substantive dispute.

65 In *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] SGCA 44 ("*Zoom*"), the Court of Appeal was of the view that the place where the breach of the agreements occurred was Singapore because the appellant was to make payment to the respondent in Singapore (at [86]). The

Court of Appeal accordingly found that the place of the breach being Singapore tilted the balance towards Singapore as the proper forum for the trial of the dispute (at [86]).

66 I would take this opportunity to mention that where non-payment is not disputed, the place of the failure to pay does not always carry much weight. Although the failure to pay may constitute the breach of the defendant and the cause of action of the plaintiff, the real dispute may not centre on the failure to pay but the reasons for not paying. Such reasons may in turn determine whether there was a breach arising from the non-payment in the first place. Where the evidence for the reasons for not paying lie in a different jurisdiction, that jurisdiction may be the more appropriate jurisdiction to hear the dispute, depending on the other connecting factors. On the other hand, if the alleged non-performance of a contract is itself in dispute then the place of performance may carry more weight.

67 As I have stated above (at [63]), it was unclear why Hii was disputing his alleged breaches. If the reason had something to do with what was represented to him in Malaysia, then that reason still did not point to Australia as being clearly the more appropriate jurisdiction.

68 I add that if there was no genuine substantive dispute, then even if cl 6.2 was an MAJ clause in substance, that might not assist Hii's stay application (see *The Jian He* [1999] 3 SLR(R) 432 at [53]–[63]). *A fortiori*, when it was an NEJ clause in substance. However, as Mr Xavier did not rely on the absence of a genuine dispute, I will say no more on it.

69 In the circumstances, it was obvious that Hii could not discharge his burden to show that Australia was clearly the more appropriate forum than Singapore. Indeed it was telling that Mr Tan did not attempt to establish that Australia was clearly the more appropriate jurisdiction if the usual *Spiliada* principles applied.

70 Accordingly, I dismissed Hii's appeal with costs.

[note: 1] Rashid's 2nd affidavit dated 25 April 2014 para 36.

[note: 2] Rashid's 2nd affidavit dated 25 April 2014 para 22.

[note: 3] Hii's affidavit dated 14 April 2014 para 19.

[note: 4] Hii's affidavit dated 14 April 2014 para 19.

[note: 5] Rashid's 2nd affidavit dated 25 April 2014 para 43.

[note: 6] Rashid's 2nd affidavit dated 25 April 2014 para 44.

[note: 7] Hii's affidavit dated 14 April 2014 para 14.

[note: 8] Rashid's 2nd affidavit dated 25 April 2014 paras 38 and 40.