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Contractual and procedural effects of non-exclusive jurisdiction agreements

***Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] SGCA 16**

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In *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala*,[1] a respondent's attempt to stay Singaporean proceedings on *forum non conveniens* grounds in favour of a non-exclusive jurisdiction (Hong Kong) was denied. In doing so, the Singapore Court of Appeal set out important principles concerning the legal effects of a non-exclusive jurisdiction agreement. This note makes a comparative analysis of the decision with English case law. It will be seen that the decision has taken a bold and firm step in a direction where English case law had previously tiptoed but still not fully embarked.

Background

The respondent was a Singaporean Permanent Resident of Indian nationality. He manufactured and traded refractories. He entered into various agreements with the appellant, which was a special purpose vehicle used to effect financial investments in another company. The respondent allegedly failed to meet his obligations under those agreements. Consequently, a settlement agreement was drawn up, with clause 23 of the agreement providing as follows:

> 23 Governing Law
>
> This Agreement is governed by and construed in accordance with the laws of Hong Kong, SAR. The Parties submit to the non-exclusive jurisdiction of the courts of Hong Kong, SAR. The parties hereby knowingly, voluntarily and intentionally waive to the fullest extent permitted by law any rights they may have to trial by jury in respect of any litigation based hereon, or arising out of, under or in connection with this Agreement.

The appellant commenced Singaporean proceedings following the respondent's alleged breach of the settlement agreement. The respondent applied to stay those proceedings on the

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[1] [2012] SGCA 16 *per* Andrew Phang JA.

ground of *forum non conveniens*. The application was dismissed by an Assistant Registrar whose decision was overturned by the Singapore High Court. On appeal, the Singapore Court of Appeal reinstated the Assistant Registrar's decision not to grant the stay.

Reasoning

In analysing the effect of a non-exclusive jurisdiction agreement, the Singapore Court of Appeal observed that there were two possible themes of analysis: (a) a contractual one; and (b) a general procedural one.[2]

The former focuses on the *parties*. It turns on a proper construction of the precise rights and obligations created by the non-exclusive jurisdiction agreement at hand. The effect of the non-exclusive jurisdiction agreement flows from that construction. On the other hand, the latter focuses on the *court's* prerogative to adjudicate and allocate international disputes. It deems non-exclusive jurisdiction agreements in all cases as one factor to consider within the orthodox *forum non conveniens* analysis, with its weight depending on the precise circumstances of each case.

The Singapore Court of Appeal then addressed each theme *seriatim*. With a contractual lens, the Court examined all the provisions as a whole, and opined that the settlement agreement was intended to ensure that the respondent would discharge his obligations. The non-exclusive jurisdiction agreement was to be construed in a manner consistent with an approach that benefited the appellant. Further, each of the original agreements contained an exclusive jurisdiction agreement (relating to Hong Kong) and the inclusion of a non-exclusive jurisdiction agreement in the settlement agreement suggested that the appellant desired more flexibility in enforcing the settlement agreement. The Court also noted that the respondent proffered no evidence suggesting that the parties intended the non-exclusive jurisdiction agreement to have an effect akin to an exclusive jurisdiction agreement.

The Court then addressed the procedural effect of the non-exclusive jurisdiction agreement. The Court applied the conventional *Spiliada* analysis and asked whether the respondent has discharged its burden of demonstrating that Hong Kong was a clearly or distinctly more appropriate forum. The Court found that the only positive factor the respondent could invoke was the non-exclusive jurisdiction agreement. Against this factor was the fact that the respondent was resident in Singapore and that Singapore and Hong Kong law are broadly similar. Relying on its preceding contractual analysis, the Court refused to grant the non-exclusive jurisdiction agreement any more qualitative strength other than treating it as but one factor to consider.

Consequently, the Court held that the respondent could not demonstrate that Hong Kong was a clearly or distinctly more appropriate forum. It therefore allowed the appeal.

Comment

The starting point for considering the effect of a non-exclusive jurisdiction agreement must be a proper construction of the clause itself. As the Singapore Court of Appeal's reasoning now shows, the procedural effect of a non-exclusive jurisdiction agreement is influenced to a large extent by the contractual effect of the agreement. More precisely, the qualitative strength given to the non-exclusive jurisdiction agreement in a *Spiliada* analysis is influenced by the contractual effect of that agreement.

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[2] The Singapore Court of Appeal cited and commended Yeo Tiong Min, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306 ("Yeo").

This should not be remarkable on first principles. Leaving the precise mechanics aside, the overarching objective of the doctrine of *forum non conveniens* is to find that forum where the case may most suitably be tried for the interests of all parties and the ends of justice. The ends of justice would, it is suggested, include *both* weighty considerations of upholding a parties' bargain, tempered by judicial prerogative to determine the exercise of the court's jurisdiction.[3]

If the present case had been heard in England, the Singapore High Court's holding may well have prevailed. A series of English case law suggests that, when there is a non-exclusive choice of a foreign court coupled with the choice of foreign law (as in the present case), the case for a stay under *Spiliada* may be almost as strong as if the agreement had conferred exclusive jurisdiction on that foreign court.[4] In fact, it has even been held that a non-exclusive choice of a foreign court coupled with the choice of foreign law created a "*strong prima facie case*" that that jurisdiction is an appropriate one.[5]

However, the problem with this approach is – as Prof Yeo observed – that it does not articulate why the contractual effect of the non-exclusive jurisdiction agreement would warrant a "*strong prima facie case*" in the *Spiliada* analysis.[6] Put another way, the cases do not explore with precision the content of the parties' jurisdiction agreement.

At its core, a non-exclusive jurisdiction agreement permits a party to be sued in one or more identified courts without creating any positive obligation to bring proceedings in that forum. Subject to the proper construction of each particular agreement, there is generally no binding contractual obligation on either party to bring proceedings or have the dispute heard in the non-exclusively chosen jurisdiction. Consequently, there is no legitimate contractual basis why a party who wants the dispute heard elsewhere should have to face a "*strong prima facie case*".

Contemporary English case law fares somewhat better in articulating the precise contractual content of non-exclusive jurisdiction agreements. The English Court of Appeal views the general contractual effect of non-exclusive jurisdiction agreements in a light resembling the Singapore Court of Appeal:[7]

> "It stands to reason that by agreeing to submit to the non-exclusive jurisdiction of State X the parties implicitly agree that X is an appropriate jurisdiction, and therefore either party should have to show a strong reason for later arguing that it is not an appropriate jurisdiction. … On the other hand, a non-exclusive jurisdiction clause self evidently leaves open the possibility that there may be another appropriate

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[3] *See* Yeo, at para. 28.

[4] *See* A. Briggs & P. Rees, *Civil Jurisdiction and Judgments*, 5th ed. (Informa, 2009) at p. 477, citing *inter alia Standard Steamship Owners' P & I Association (Bermuda) Ltd v. Gann* [1992] 2 Lloyd's Rep. 528; *ED & F Man (Sugar) Ltd v Kvaerner Gibraltar Ltd (The Rothnie)* [1996] 2 Lloyd's Rep. 206.

[5] *See* A. Briggs & P. Rees, *Civil Jurisdiction and Judgments*, 5th ed. (Informa, 2009) at p. 477, citing *inter alia Winnetka Trading Corp v. Julius Baer International Ltd* [2008] EWHC 3146 (Ch) at para. 18 ("The present rules appear to be that the fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of a particular court creates a strong *prima facie* case that that court is the correct one in which to conduct disputes."); *see* D. Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement*, 2nd ed. (Sweet & Maxwell, 2010) at para. 10.36 ("A non-exclusive jurisdiction agreement creates a strong prima facie case that the identified forum is the *forum conveniens*."), citing *Standard Steamship Owners' P & I Association (Bermuda) Ltd v. Gann* [1992] 2 Lloyd's Rep. 528 at 533; *ED & F Man (Sugar) Ltd v Kvaerner Gibraltar Ltd (The Rothnie)* [1996] 2 Lloyd's Rep. 206, *British Aerospace v Dee Howard* [1993] 1 Lloyd's Rep. 368 at 375-376; *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep. 767 at 781; *Sinochem International Oil (London) Co Ltd v. Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep. 670; *Bas Capital Funding Corp v. Medfinco Ltd* [2004] 1 Lloyd's Rep. 678.

[6] *See* Yeo, at para. 65 ("However, the rhetoric of the enforcement of a contractual bargain has not been matched by substantive explanation of the content of the agreement that is being enforced.")

[7] *Highland Crusader Offshore Partners LP and ors v Deutsche Bank AG and anor* [2009] EWCA Civ 725 at paras. 64, 108 *per* Toulson LJ.

jurisdiction. The ***degree of appropriateness of an alternative jurisdiction must depend on all the circumstances of the case.*** In addition to the usual factors, the wording of the non-exclusive jurisdiction clause may be relevant, because of the light which it may throw on the parties' intentions. Another possibly relevant factor (to which Waller J drew attention in Dee Howard) may be whether the choice of non-exclusive jurisdiction was specially negotiated or was contained in a standard form of contract.

…

I see no cogent reason why it should automatically be assumed that nomination of a non-exclusive forum should give priority or dominance to that forum over any other. It ignores all variables. The non-exclusive jurisdiction clause may in one case represent the result of specific negotiations; in another it may result from the use of a standard form of contract. In one case there may be another forum which is obviously appropriate applying the normal factors; in another case there may not be."

However, the same judgment by the English Court of Appeal also stated as follows:[8]

> "A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. ***For that reason an application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement.*** It does not follow that an alternative forum is necessarily inappropriate or inferior."

This has led a commentator to opine that:[9]

> "Therefore, whilst great care needs to be paid to the specific terms of the jurisdiction clause, it can be stated as a matter of ***general principle*** that in the ordinary run of cases, unless strong cause is shown, no stay will be granted with respect to proceedings brought in England and Wales pursuant to an non-exclusive jurisdiction agreement in favour of England on the grounds that England is not the appropriate forum."

This also appears to be the view of the Hong Kong Court of Appeal which the Singapore Court of Appeal cited.[10] This view is predicated on the notion that a party who has submitted to the non-exclusive choice of English jurisdiction cannot be heard to argue that England is *forum non conveniens.*[11] It may well be that in the presence of a non-exclusive forum jurisdiction agreement, a respondent may find it difficult in practice to argue that another forum could be clearly or distinctly more appropriate than the forum. But it is difficult to understand why that would be so as a matter of *principle*. This is where one should go behind the convenient label of "*forum non conveniens*" and understand the precise mechanics of that doctrine. In a *forum non conveniens* challenge, the respondent is asserting

[8] *Ibid.*, at para. 50.

[9] D. Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement*, 2nd ed. (Sweet & Maxwell, 2010) at para. 10.36.

[10] *See Noble Power Investments Ltd v. Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 632 at para. 33.

[11] *See* D. Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement*, 2nd ed. (Sweet & Maxwell, 2010) at para. 10.36, citing *inter alia Ace v Zurich Insurance Co Ltd* [2001] 1 Lloyd's Rep. 618 at para. 62 *per* Rix LJ ("If a party agrees to submit to the jurisdiction of the Courts of a state, it does not easily lie in its mouth to complain that it is inconvenient to conduct its litigation there (i.e. to assert that the agreed forum is a forum non conveniens)".)

that another jurisdiction is a clearly or distinctly *more* appropriate forum; the respondent does not dispute that the non-exclusively chosen forum is *an* appropriate forum.

This nuanced distinction had been picked up by the Singapore High Court in *OCBC Capital Investment Asia Ltd v Wong Hua Choon*.[12] The learned Andrew Ang J held that where parties have agreed to the non-exclusive jurisdiction of a particular forum they cannot argue that that forum in inappropriate. In that case, there was no dispute that the Malaysian courts would be appropriate, the issue was simply whether they would be clearly or distinctly more appropriate than the Singapore courts. Submitting to the non-exclusive jurisdiction of the Malaysian courts simply meant that they were an appropriate forum, but not the only one.[13]

Similarly, this distinction had been foreshadowed by the English High Court in a 2005 decision:[14]

> There can be no doubt that it is implicit in a non-exclusive jurisdiction clause that both parties accept when they agree to it that it will be appropriate for that court in the interests of justice, as distinct from obligatory to exercise jurisdiction over all disputes which may reasonably be envisaged as arising in relation to their agreement. ***That, however, does not go as far as saying that it is agreed that in all circumstances that may in future arise the designated court will necessarily be the court where the case may most suitably be tried for the interests of all parties and the ends of justice.*** If that were so, the effect of such a clause would be indistinguishable from that of an exclusive jurisdiction clause. The forum non conveniens test would be deployed not as a flexible comparative exercise but so as to impose an inflexible constraint analogous to that imposed by a contract.

From a contractual perspective, the English tendency to deny a *forum non conveniens* challenge in the face of a non-exclusive forum jurisdiction agreement would be sound if, upon a proper construction of the agreement, it could be said (non-exhaustively) that:[15]

(a) the parties have expressly or impliedly agreed to waive jurisdictional objections;

(b) the parties have expressly or impliedly agreed that the chosen forum is the *most* appropriate forum; or

(c) the parties have expressly or implied agreed not to have the suit heard elsewhere (which effectively makes it an exclusive jurisdiction clause).

Conclusion

[12] [2010] SGHC 219, citing *inter alia Bambang Sutrisno v. Bali International Finance Ltd* [1999] 2 SLR(R) 632 and *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285. It is noted that the non-exclusive jurisdiction agreement in that case included an express agreement for one party to commence proceedings in any other jurisdiction other than the nominated court.

[13] It is noted that both *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] SGCA 16 and *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2010] SGHC 219 do not involve a non-exclusive choice of Singapore jurisdiction agreement, although that should not *ipso facto* affect the proper reasoning suggested here.

[14] *BP Plc v AON Limited and anor* [2005] EWHC 2554 (Comm) at para. 23 *per* Colman J. It was held that there was no breach involved in applying to serve out where there was a non-exclusive jurisdiction agreement for Illinois, for there were at the date of the application no proceedings pending in the Illinois court; but that in all the circumstances it was not possible to show that England was clearly the more appropriate forum for the trial of the issues. Colman J did not explain with clarity why it would a breach of the non-exclusive jurisdiction agreement for a party to commence proceedings in England if the opposing party has already commenced proceedings in Illinois.

[15] *See* Yeo, at section VI.

In sum, this decision is a celebrated step towards a precise calibration of the parties' contractual rights and obligations in the court's overall assessment of where an international dispute ought to be adjudicated. The careful practitioner must no longer hold the assumption, based on mixed English case law or otherwise, that the presence of a non-exclusive jurisdiction agreement would *ipso facto* create a strong *prima facie* case that the nominated court would be clearly or distinctly more appropriate than another forum.