(2004) 8 SYBIL 235–241

PRIVATE INTERNATIONAL LAW IN THE SINGAPORE COURTS

by JOEL LEE*

This is the first annual survey of conflict of laws cases in this inaugural issue of *Singapore Year Book of International Law*. Seven cases will be considered in this year's survey.[1] Before looking at these cases, it is useful to make two preliminary comments. First, generally, only cases in from the High Court and Court of Appeal will be considered. In exceptional situations, cases from the Subordinate Courts will be considered. Secondly, conflict of laws cases often relate to other areas of law. In these situations, this survey will only consider those parts of the case that relate to conflict of laws.

I. ANTI-SUIT INJUNCTIONS, AMENABILITY TO JURISDICTION AND THE MEANING OF VEXATIOUS AND OPPRESSIVE: *EVERGREEN INTERNATIONAL S. A. V. VOLKSWAGEN GROUP SINGAPORE PTE. LTD.*[2]

This case involved a collision between the container vessel *Ever Glory* and the car carrier *Hual Trinita*. The plaintiffs were the registered owners of the *Ever Glory* and the defendants were the owners and insurers of the cargo on the *Hual Trinita*. As part of the legal proceedings arising from the collision, the plaintiffs commenced a limitation action in Singapore against all persons having potential claims arising out of the collision. A decree of limitation was granted and a declaration that limited liability to $2,411,227.56 plus interest was made. The plaintiffs paid the limitation fund sum into the court.

Throughout, the defendants were informed of the limitation proceedings but did not participate in the action, challenge the decree or prove their claims against the limitation fund. The defendants went on to arrest the sister ship of *Ever Glory*, the *Ever Reach*, in Belgium. They then commenced proceedings in the Belgian courts where the plaintiffs would face a higher limit of liability. The Belgian courts also did not recognise the Singapore decree limiting liability and the limitation fund.

The plaintiffs applied in Belgium to set aside the arrest of the *Ever Reach*. They also applied to the Singapore courts for an anti-suit injunction to stop the defendants continuing their action in Belgium. Concurrently, the 4th to 74th defendants applied to have the order for service out of jurisdiction (of the application for the anti-suit injunction) set aside.

Belinda Ang J. first considered the broad principles involved in an application for the grant of an anti-suit injunction. She opined that an anti-suit injunction would be granted only when the ends of justice require it. The granting forum must be the natural forum for the dispute and the foreign proceedings must qualify as being vexatious and oppressive. The court went on to consider 4 issues in disposing of this case.

* LL.B. (Hons) (Wellington); LL.M. (Harv.); D.C.H. (AIH); Barrister & Solicitor (NZ); Advocate & Solicitor (Singapore); Associate Professor, Faculty of Law, the National University of Singapore.

1 Some of these cases have been previously considered in the "Conflict of Laws" section of *Annual Review of Singapore Cases 2003* (Singapore: Singapore Academy of Law, 2004).

2 [2004] 2 Sing.L.R. 457 (H.C.) Belinda Ang Saw Ean J.

The first issue was whether the court had jurisdiction over the defendants to grant an injunction. In addition to arguing whether the defendants had been properly served, counsel for the defendants further argued that in the exercise of its jurisdiction to grant the anti-suit injunction, the court needed to consider whether the injunction could be enforced. The implication was that the court should not exercise jurisdiction if the injunction would prove ineffective. The court rightly drew the distinction between amenability to jurisdiction and the power to grant an injunction. Just because an injunction might be ineffective did not deprive the court of jurisdiction to grant that injunction. Further, the court should not be deterred from granting an injunction even though there was a possibility that it might be disobeyed. Ang J. concluded that jurisdiction had been properly established over the defendants.

The second issue was whether Singapore was the natural forum for the resolution of the dispute between the parties.[3] On this issue, Ang J. opined that there was an overwhelming case in favour of Singapore being the natural forum.

The third issue was whether the Belgian proceedings were vexatious and oppressive to the plaintiffs. Concurrently, the court considered the fourth issue of whether granting an anti-suit injunction would cause untoward injustice to the defendants. Ang J. considered the circumstances and concluded that the defendants' actions were indeed vexatious and oppressive. Specifically, the defendants had unlawfully challenged the plaintiffs' right to choose the limitation forum and the plaintiffs' legal rights conferred by the limitation decree and limitation fund. The defendants' actions in Belgium had the effect of coercing the plaintiffs to set up another limitation fund when there was an existing and properly constituted limitation fund in Singapore. It also indicated the defendants' unwillingness to share rateably with other claimants in the limitation fund. Ang J. also opined that the Belgian proceedings interfered with the judicial process of the Singapore court and that it is appropriate for a court to grant an anti-suit injunction to protect its own jurisdiction or to prevent evasion of its public policy. Further, the granting of the anti-suit injunction would not cause untoward injustice to the defendants.

In the result, the plaintiffs' application for an anti-suit injunction was granted and the defendants' application to set aside service was dismissed.

II. Jurisdiction Agreement, Interpretation, Stay and Time Bar: *Golden Shore Transportation Pte. Ltd. v. UCO Bank*[4]

This case was an appeal from two cases which raised substantially identical issues.[5] The respondents were an Indian bank carrying on business in Singapore. One of its customers was S, a Singapore incorporated company. S arranged for cargo to be shipped from various ports in East Malaysia to Kandla in India. One set of cargo was loaded on board the *Asean Pioneer* which was owned by the appellants. Bills of lading were issued with the respondents as the consignee. Letters of credit were issued to the sellers of the cargo and the respondents came into possession of the bills of lading.

At about the same time, S obtained the issuance of a second set of bills of lading by promising the appellants that the originals would be returned to them. On this second set, S was named as the shipper, instead of S's suppliers. The original bills, which were held by the respondents, were never returned to the appellants as promised by S. S never paid the respondents to obtain the original bills.

[3] As a general rule, Singapore must be the natural forum before being granting an anti-suit injunction. See *Airbus Industrie G.I.E. v. Patel & Ors.* [1999] 1 A.C. 119 at 138.

[4] [2004] 1 Sing.L.R. 6 (C.A.) Chao Hick Tin J.A. and Tan Lee Meng J.

[5] *UCO Bank v. Golden Shore Transportation Pte. Ltd.* [2003] SGHC 137 and *UCO Bank v. Golden Orient Maritime Pte. Ltd.* [2003] SGHC 138.

S transferred the second set of bills of lading to buyers in India. The *Asean Pioneer* arrived at its destination and upon presentation of the second set of bills of lading, the cargo was delivered. The appellants asked the respondents for the return of the original bills of lading. The respondents refused and after repeated attempts at asking S for repayment, the respondents commenced proceedings against the appellants for wrongful delivery of cargo.

The appellants applied to have the action stayed on the ground that clause 17 of the bill of lading was an exclusive jurisdiction clause and required that any dispute between the parties be adjudicated upon at the port of delivery. At first instance, the assistant registrar ordered a stay. On appeal to the High Court, Woo Bih Li J. reversed the decision and refused a stay. The High Court found that clause 17 was an exclusive jurisdiction clause and that the respondents had shown strong cause why the stay should be set aside. An appeal to the Court of Appeal was dismissed.

In the appeal, the Court of Appeal was faced with 2 issues. The first related to whether clause 17 was an exclusive jurisdiction clause. This interpretative exercise was complicated because clause 17 did not resemble more commonly worded exclusive jurisdiction clauses and the question was whether the word "claim" in the first sentence of clause 17 encompassed the idea of "suits" and "disputes". The court opined that it was necessary to consider the clause in its entirety to determine its effect. After considering counsels' submissions and relevant cases,[6] the court concluded that clause 17 was an exclusive jurisdiction clause.

The second issue was whether a stay should be ordered. The court took as a starting point the position that where a party seeks to bring an action in a Singapore court in breach of an exclusive jurisdiction clause, a stay would ordinarily be ordered. The party seeking to breach the clause must show exceptional circumstances amounting to "strong cause" why the stay should not be ordered. This is more than simply proving that Singapore is the natural forum for the dispute. That party must do more to justify why he should not, *prima facie*, be held to his contractual commitment.

The court went on to list the 5 factors that the High Court had considered in coming to its decision. Firstly, that both parties were more closely connected with Singapore. Secondly, that Singapore law was the governing law under the bill of lading. Thirdly, that in respect of the main issue of consent or acquiescence on the part of UCO Bank, the evidence was primarily to be found in Singapore. Fourthly, that Golden Shore did not genuinely desire trial in India and finally, that the fact that the action had become time-barred in India was neutral.

The court explicitly recognised that the first 3 of these factors, while important in an application for *forum non conveniens*, were unexceptional in the context of a stay application based on an exclusive jurisdiction clause.[7] The court agreed with the High Court that the fourth factor, that the appellants did not genuinely desire trial in India, was key. After considering submissions, the court concluded that the appellants' proposed defence of consent or acquiescence on the part of the respondents was speculative and that the appellants did not genuinely desire trial in India.

By way of dicta, the court pointed out that, in deciding to refuse the stay, the judge in the High Court was exercising a discretion and even if the Court of Appeal had disagreed with the judge's conclusions, the Court of Appeal would not be able to overturn that decision unless it could be shown that the judge had erred on principles of law or that the conclusion was plainly wrong.

[6] The Court of Appeal was aided in its construction by the cases of *Maharani Woollen Mills Co. v. Anchor Line* (1927) 29 Lloyd's L.R. 169 and *The Media* (1931) 41 Lloyd's L.R. 80. Both these cases had exclusive jurisdiction clauses which were significantly similar to clause 17.

[7] By doing so, the court was continuing the trend set by *The Asian Plutus* [1990] Sing.L.R. 543 and the cases following it, which held that more than lip service had to be paid to the notion of "strong cause" and that mere convenience should not be allowed to tip the balance.

The court also went on to make some observations on the fifth factor, the time-bar. In this case, the respondents were time-barred in India and the High Court had concluded that they had acted unreasonably in failing to issue a protective writ in India. However, this was considered a neutral factor and the appellants argued that it should be considered a factor in the appellants' favour instead.

The Court of Appeal opined that where a party had acted reasonably in failing to issue a protective writ and was subsequently time-barred, the fact of the time bar would be a factor towards showing strong cause. Where a party had acted unreasonably, it could not rely on the fact of the action being time barred. However, it could still rely on other factors to show strong cause as was the situation in this case. However, the defendant cannot use it as a way to "punish" the plaintiff. That the plaintiff cannot rely on it is sufficient.

III. Relevant Factors In *Forum Non Conveniens*: *Kaki Bukit Industries Park Pte. Ltd. v. Ng Man Heng and Others*[8]

The plaintiff is a Singapore company in compulsory liquidation. For a period, it was under judicial management until a winding up order was made in January 2002. In reviewing the accounts, the liquidator discovered that, prior to the order for liquidation, payments were made out of the plaintiff's bank account by the defendant to various third parties between the period December 1997 and July 1999. The liquidator considered these payments to be in breach of trust and fiduciary duties to the plaintiff. The plaintiff commenced proceedings for breach of fiduciary duty, conspiracy and knowing receipt. The defendants applied for a stay on the basis that Malaysia was the more appropriate forum. At first instance, the application was refused and the defendants appealed. The appeal was dismissed.

In coming to its decision on the appeal, the court reviewed the principles in governing the application for a stay of proceedings. Essentially, a stay will be granted if the defendant can show to the court that there is another available forum which is clearly more appropriate for the trial of the action. It is interesting to note that, in reviewing these principles, the court cited from *Dicey & Morris on the Conflict of Laws—Third Cumulative Supplement to the Eleventh Edition*[9] which stated, *inter alia*, that the defendant had to show *both* that Singapore was not the natural or appropriate forum, *and also* that there is another available forum which is clearly or distinctly more appropriate than Singapore. This is a departure from the usual position where the burden on the defendant was to show there was an available forum that was more appropriate than Singapore.

The court went on to consider the factors brought up by the parties and concluded that most of the factors pointed to Singapore and that the defendant had not discharged its burden of showing that Malaysia was the more appropriate forum.

IV. Choice of Law for Intestate Succession and Presumption of Similarity in Foreign Law: *Ong Jane Rebecca v. Lim Lie Hoa*[10]

This was a factually complex case relating to intestate succession. The plaintiff is the wife of the second defendant. The father of the second defendant was a wealthy Indonesian businessman with assets in a number of jurisdictions. He was resident in Singapore but domiciled in Indonesia when he died intestate in Indonesia.

In 1989, the second defendant executed a deed of release in which he purported to acknowledge receiving from the administrators of his father's estate certain sums in full

8 [2004] SGHC 60 MPH Rubin J.

9 Lawrence Collins (ed.), *Dicey & Morris on the Conflict of Laws—Third Cumulative Supplement to the Eleventh Edition* (London: Sweet & Maxwell, 1990) at paras. 393–395.

10 [2003] SGHC 126 (H.C. (Registry)) Phang Hsiao Chung A.R.

and final settlement of his interest in the estate, and purported to discharge and release the administrators of the estate of their duties and obligations. Further, in 1991, under a deed of assignment, the second defendant assigned to the plaintiff "one-half of all his entitlement to the distributive share of the residuary estate of the deceased and all other rights (if any) in or to the said Estate".

The plaintiff subsequently commenced proceedings asking for, *inter alia*, the deed of release to be set aside or declared unenforceable, and a determination of the deceased's assets and the amounts due to the plaintiff under the deed of assignment. The plaintiff's claim was allowed.

As part of this query, the court had to resolve the preliminary question of the law governing the distribution of the estate. The court had to consider how the provisions of the *Intestate Succession Act*[11] modified the common law choice of law rules on intestate succession. The court made a number of observations. Firstly, immoveable property located in Singapore would be distributed according to the distribution rules in section 7 of the *Intestate Succession Act*. Secondly, moveable property located in Singapore would be distributed according to the distribution rules in section 7 of the *Intestate Succession Act* if the deceased was domiciled in Singapore. Thirdly, immoveable and moveable property located outside Singapore would be distributed according to the common law choice of law rules on intestate succession. Finally, that moveable property located in Singapore would be distributed according to the common law choice of law rules on intestate succession if the deceased was not domiciled in Singapore. In this case, the immoveable assets in the deceased's estate in Singapore would be distributed according to the distribution rules in section 7 of the *Intestate Succession Act*.

With regard to the distribution of the deceased's estate in Hong Kong, the parties had agreed that the laws governing the distribution of intestate estates in Hong Kong and Singapore would be treated as identical. Hence, the deceased's estate in Hong Kong would also be distributed according to the distribution rules in section 7 of the *Intestate Succession Act*.

With regard to the distribution of the deceased's estate in Indonesia (and movables elsewhere), these would be distributed according to Indonesian domestic law. However, since the defendant had not met the burden of proving Indonesian law, the presumption that Indonesian law was the same as Singapore law applied and the deceased's estates in Indonesia would also be distributed according to the distribution rules in section 7 of the *Intestate Succession Act*.

As an aside, the court also considered the ways in which the common law position on proof of foreign law had been modified by provisions of the *Evidence Act*.[12]

V. Non-Exclusive Forum Jurisdiction Agreement and Stay of Proceedings: *Societe Generale v. Tai Kee Sing @ Tai Hean Sing*[13]

The plaintiff was a foreign bank operating in Singapore. It granted to the defendant three credit facilities for the purpose of purchasing securities. The defendant made huge losses on the Malaysian stock market and the bank demanded the payment of over US$5 m. When payment was not forthcoming, the bank sold the securities deposited by the defendant and applied the proceeds to the sum owing. The bank commenced proceedings in June 2002 for the remainder owing. Leave to serve out of the jurisdiction was obtained and the defendants were duly served. In December 2002, the defendant commenced proceedings against the bank in Malaysia alleging illegality, misrepresentation, negligence and breach of fiduciary

[11] *Intestate Succession Act* (Cap. 146, 1985 Rev. Ed. Sing.)
[12] *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.)
[13] [2003] SGHC 139 Tan Lee Meng J.

duty. The defendant then applied for a stay of proceedings in the Singapore courts. At first instance, the application was dismissed. The defendants appealed.

This case involved a non-exclusive jurisdiction clause. However, the approach taken by the court in deciding whether to grant a stay was curious. The court began first by stating the legal position with regards to whether an action should be stayed on the grounds of *forum non conveniens*. To be fair, perhaps this was because the defendant had argued that Malaysia was the more appropriate forum to resolve this dispute. Further, where there is a non-exclusive jurisdiction clause, it is an accepted approach to consider that clause as a factor in determining whether a particular forum is appropriate for resolving a dispute.[14]

However, the court went on to state that in order for the defendant to show that Malaysia was the more appropriate forum, he had to show "exceptional circumstances amounting to a strong cause for him to succeed in support of the application for a stay". This is unusual in that this is traditionally the test applied where an application for a stay was based on an exclusive jurisdiction clause.[15] The court went on to say that because the parties had agreed in their contract to submit to the non-exclusive jurisdiction of the Singapore courts, the defendant was, in principle, not in a position to object to legal proceedings being instituted in Singapore.[16] The court went on to conclude that the defendant had not shown "good grounds" and the defendant's appeal was dismissed.

This case is troubling because in making its determination, the court refers to approaches for exclusive jurisdiction clauses, non-exclusive jurisdiction clauses and *forum non conveniens* and it is not clear which of these tests the court intended to apply or indeed did apply. It is hoped that that this will be clarified by the courts in some future case.

VI. *Forum Non Conveniens*: *Swiss Singapore Overseas Enterprises Pte. Ltd. v. Navalmar UK Ltd.*[17]

The plaintiffs sued the defendants in breach of contract for failing to issue switch bills of lading. An order was made directing the defendants to issue the bills and the defendants applied for stay of execution which was refused. The defendants' appeal against refusal of the stay as well as the order was dismissed by the Court of Appeal. Pleadings were filed and the defendants applied for a stay on the basis that India was the more appropriate forum. At first instance, the application was refused. The defendants appealed.

The defendants' appeal was dismissed. In a short judgement, the court considered the factors submitted by counsel and concluded that the defendants had not discharged their burden in showing the availability of a more appropriate forum.

VII. Claiming the Benefit of an Exclusive Jurisdiction Agreement and the Relevance of a Real Question of Liability to Strong Cause: *The "Hyundai Fortune"*[18]

The plaintiff shipped from China to Singapore a consignment of melons on board the "Hyundai Fortune". On arrival in Singapore, the consignment was found to be badly damaged. The plaintiff sued the defendants, owners of the "Hyundai Fortune", for the damaged

[14] This was the position taken by *PT Jaya Putra Kundur Indah v. Guthrie Overseas Investments Pte. Ltd.* [1996] SGHC 285.

[15] The test of "strong cause" has been applied in situations when the clause in question was a non-exclusive *forum* jurisdiction clause. See *Bayerische Landesbank Girozentrale v. Kong Kok Keong* [2002] 4 Sing.L.R. 283. However, this case was not referred to in the judgement.

[16] Taking the position stated in *S & W Berisford plc. v. New Hampshire Insurance Co.* [1990] 2 All E.R. 321.

[17] [2003] SGHC 196 Choo Hon Teck J.

[18] [2004] 2 Sing.L.R. 213 (H.C.) Belinda Ang Saw Ean J.

goods. The contract of carriage contained an exclusive jurisdiction clause in favour of Korea where the action was time-barred. The defendants applied for a stay and at first instance, the application was granted. The plaintiff appealed.

The court began by considering whether the defendants were entitled to the benefit of the exclusive jurisdiction clause. As mentioned, the defendants were the owners of the "Hyundai Fortune" and not the contracting carriers. As such, they were not a party to the bill of lading and were technically not entitled to the benefit of the jurisdiction clause. As this point was not brought up by counsel, the court proceeded as if they were parties to the contract.

The court went on to state that where an exclusive jurisdiction clause exists, the court would grant a stay of the action unless the plaintiff is able to establish that exceptional circumstance amounting to strong cause exists to warrant a refusal to stay the proceedings. How exceptional the circumstances must be in each particular case is always a question of fact and degree. The court will take a cumulative approach and give each circumstance due weight. In determining whether strong cause exists, the court can examine whether there is a real question of liability to refer to the agreed forum and this includes whether a valid defence exists.[19] After reviewing counsels' submissions, the court concluded that there was no real question of liability to be tried in the contractually agreed forum.

The defendants had sought to argue that the time-bar in Korea was the result of the plaintiff failing to protect time and that this should not deprive the defendants of their defence. The court considered this argument and opined that even though the plaintiff had failed to provide a satisfactory explanation for failing to protect time, they could rely on other factors to show strong cause.[20]

The court concluded that the plaintiff had shown strong cause and the plaintiff's appeal was allowed. The decision has since been appealed.

[19] *The Hung Vuong-2* [2001] 3 Sing.L.R. 146.

[20] Relying on the approach of the Court of Appeal in *Golden Shore Transportation Pte. Ltd. v. UCO Bank* [2004] 1 Sing.L.R. 6. See *supra* note 4.