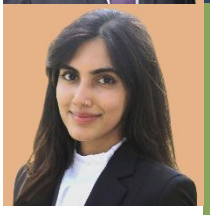
Exclusivity In Non-Exclusive Jurisdiction Clause



By Andrew Chiew Ean Vooi and Ashreyna Kaur Bhatia

In **Ng Kam Seng & Anor v Heng Peng Kai @ Jeff Heng Peng Kai and United Overseas Bank Limited,** the Court of Appeal in an unreported decision recently held that the bank's customers are bound to bring their claims in Singapore under a non-exclusive foreign jurisdiction clause, although their claims concern the purported breach of Malaysian laws.[1]

The Suit

The plaintiffs, who were customers of the Singaporean bank, brought an action against the Singaporean bank and its officer in Ipoh High Court for a declaration that the contract relating to the purchase of bonds was void because it contravened ss 58(1) and 258(1) of the Capital Markets and Services Act 2007 (**CMSA 2007**). The contract, subject to the laws of Singapore, contained an agreement by the customers to irrevocably submit their claims to the non-exclusive jurisdiction of the courts of Singapore. The defendant, relying on the non-exclusive jurisdiction clause applied to set aside the writ on grounds of *forum non conveniens*.

The customers opposed the application on amongst others, that the Malaysian courts were best suited to hear the matter as the claim concerns the breach of Malaysian laws. It was further argued *forum conveniens* weighs in favour of Malaysia because the customers and the cause of action occurred in Malaysia and the choice of law clause was non-determinant.

The High Court set aside the writ.[2] Abdul Wahab Mohamed, J., in coming to his decision, noted that whilst the Court seizes jurisdiction over an action properly brought in Malaysia, there is a rebuttable presumption that the domestic court is *forum conveniens.*[3] The High Court also noted the factors which determine *"what would constitute the element of the most real and substantial connection is not exhaustive".*[4]

His Lordship also found Singapore as the proper forum on the facts. The factors, which the High Court found, were that the bonds were purchased in Singapore for the customers' account in Singapore. Moreover, the customers' accounts were in Singapore and were therefore subject to the laws of Singapore. Likewise, the witnesses involved in the transaction are in Singapore and the customers had previously sought recourse through

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1 Civil Appeal No.: A-02(IM)(NCC)-1693-09/2021, unreported decision on 24.6.2022

2 *Ng Kam Seng & Anor v Heng Peng Kai @ Jeff Heng Peng Kai & Anor* [2021] MLJU 2252

3 *BSNC Leasing Sdn Bhd v Sabah Shipyward Sdn Bhd & Ors* [2000] 2 CLJ. 197, COA at para [35]

4 *Yee Chee Ming v Teo Ah Khing @ Teo Cho Teck & Anor* [2005] 5 MLJ 354. *See Harrah' s Operating Co Inc (trading as Harrah' s Casino Hotel Lake Tahoe & Bill' s Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal* [2008] 4 MLJ 63

adjudication in Singapore. His Lordship also noted there was nothing to suggest that the Singapore Courts will ignore the customers' claim of illegality.

The customers appealed.

Non-exclusive Jurisdiction

The key issue on appeal was whether the Malaysian Court is the proper forum to hear the matter since it concerns the breach of Malaysian laws, notwithstanding the non-exclusive jurisdiction clause.

The arguments in the Court of Appeal centered on the effect on non-exclusive jurisdiction clause.

On this issue, the Court of Appeal in **United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors**[5] found no difference between a non-exclusive jurisdiction clause and an exclusive jurisdiction clause. In the former, the party who had agreed to submit to the foreign jurisdiction is bound by it, unless strong reasons can be shown as to why he should not be bound by his bargain. In the latter, both parties are bound by the foreign jurisdiction clause. The usual principles in ***The Spliliada*** on *forum non conveniens* do not apply.

See Mee Chun, JCA said –

"[20] …We were in agreement with the rationale behind a non-exclusive jurisdiction clause as explained by Richard Fentiman in When Non-Exclusive Means Exclusive, The Cambridge Law Journal, Jul, 1992, Vol 51, No 2 at pp 234–235 as follows:

In loan agreements, to take one example, jurisdiction clauses are drafted, from the lender's viewpoint, with two main aims in mind: first, to ensure that the borrower cannot challenge the jurisdiction of the lender's preferred forum; and secondly, to give the lender the maximum freedom to sue elsewhere as well, normally in pursuit of the borrower's assets … An express submission to the non-exclusive jurisdiction of the English courts was usually adequate … to secure English jurisdiction.

…

Secondly, as long as the parties agree to English jurisdiction the language in which they express themselves is irrelevant. A non-exclusive jurisdiction agreement is still a jurisdiction agreement.

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5 *United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors* [2021] SGCA 78

…

If an agreement to English jurisdiction exists, it should not matter whether it is exclusive or non-exclusive in form, or simply undesignated.

[21] Case law too supports such an understanding. In JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd [2001] 2 Lloyd's Rep 41 it was held at p 45 as follows:

43. For the present purposes I see no difference between an exclusive and a non-exclusive jurisdiction clause. The difference between the two in principle is that, in the former case both parties are contractually bound to the chosen forum whereas in the latter case it is only the defendant who is so bound."

The effect of a non-exclusive jurisdiction clause was considered in ***Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd.***[6] Mah Weng Kwai, JC (as he then was) said –

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o) *The principal purpose of the non-exclusive jurisdiction clause is to determine the primary place of jurisdiction. By cl. 13, the parties had selected England to be the primary place of jurisdiction. The plaintiff by filing the suit in Malaysia had wantonly disregarded the non-exclusive jurisdiction clause. The burden is on the plaintiff to show why the suit should proceed in Malaysia since the parties had agreed to submit to the jurisdiction of the English courts. The agreement creates a strong prima facie case that the English jurisdiction is the appropriate forum.*

p) *In the House of Lords case of Spiliada Maritime Corporation v. Cansulex Ltd [1987] 1 AC 460 Lord Goff held that "the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*

q) *In the case of S & W Berisford Plc v. New Hampshire Insurance Co [1990] 1 Lloyd's Rep 454 Hobhouse J held –*

… The fact that the parties have agreed in their contract that the English Court shall have jurisdiction (albeit non-exclusive jurisdiction) creates a strong prima facie case that the 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."

The rationale in S&W Berisford was considered In ***Antec International Ltd v Biosafety USA.***[7] Gloster J held at para [7] –

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i. *The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the Claimant has founded jurisdiction here as of right, even though the clause is non-exclusive; see eg per Hobhouse J in S & W Berisford plc v New Hampshire Insurance Co [1990] 1 Lloyd's Rep. 454, at 463; per Waller J in British Aerospace Plc v Dee Howard Co [1993] 1 Lloyd's Rep. 368; per Moore-Bick J in Mercury Communications Ltd v Communication Telesystems International [1999] 2 All ER 33.*

ii. *Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties*

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6 *United Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd* [2012] 2 CLJ 361

7 *Antec International Ltd v Biosafety USA* [2006] EWHC 47 (Comm)

will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule…"

iii. *Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The Defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain; see cases cited supra. In particular, the fact that the Defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a non-exclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction."*

Lee Swee Seng, JCA., in delivering the oral grounds for the Court of Appeal in ***Ng Kam Seng***, found the customers have submitted to the non-exclusive jurisdiction of the Singapore Courts and the Court *"must give due credit to the terms agreed between the parties".*

Strong reasons

In ***United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors***, the Court of Appeal held the burden was on the party bound by the non-exclusive jurisdiction clause "*to show strong reasons why it ought to be allowed to continue with the USSB suit. There is no necessity to go the route of Spiliada on forum conveniens*."

On this issue, the Court of Appeal in ***Ng Kam Seng*** did not think the nature of the customers' claim, which concerns a breach of Malaysian law, was a special reason. In the High Court, Abdul Wahab Mohamed, J. did not think so.

The learned Judge said –
"[29] It is in this court's further observation that the Plaintiffs would suffer no prejudice in having their claim prosecuted in Singapore. There is nothing to suggest that the Singapore Courts will ignore the issue of misrepresentation and illegality as claimed by the Plaintiffs in the present case."

Specifically, in the Court of Appeal, it was held the customers were "*not barred from raising and/or pursuing the defence of illegality by Malaysian law, in Singapore courts*." This follows the Singapore Court of Appeal's decision in ***Peh Teck Quee v Bayerische Landesbank Girozentrale***, where Yong Pung How, CJ. Said:

"an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void".[8]

Conclusion

The Court of Appeal's recent decision clarifies a number of things –

1. There is no difference between a non-exclusive jurisdiction clause and an exclusive jurisdiction clause.

2. The party bound by the non-exclusive jurisdiction has the burden of establishing strong reasons to be released from his contractual bargain.

8 *Peh Teck Quee v Bayerische Landesbank Gironzentrale* [2000] 1 SLR 148 at para [45]

3. Unless it can be shown that the party would be barred from raising and/or pursuing the defence of illegality, it is not a special reason to be released from the non-exclusive jurisdiction clause.

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