Baiduri Bank Bhd v Dong Sui Hung and Another
[2000] SGHC 118

Case Number : Suit 1495/1999

Decision Date : 28 June 2000

Tribunal/Court : High Court

Coram : Chan Seng Onn JC

Counsel Name(s) : Leslie Chew SC (Khattar Wong & Partners) for the plaintiffs; Ng Siew Hoong (Peter Moe & Partners) for the defendants

Parties : Baiduri Bank Bhd — Dong Sui Hung; Another

Conflict of Laws – Jurisdiction – Foreign jurisdiction clause not exclusive – Bank commencing action against guarantors in Singapore – Bank having option to enforce guarantee in any court of competent jurisdiction – Guarantors saying proper forum is Brunei – Whether action should be stayed

: ***Background***

The plaintiff bank is incorporated in Negara Brunei Darussalam (`Brunei`) where it has its principal place of business. The defendants are Singapore businessmen having their principal place of business in Brunei.

Briefly, the bank`s claim is against the two defendants as guarantors of Borneo Builders Sdn Bhd (the `company`). By virtue of the company being placed under provisional liquidation on 21 July 1999, an event of default has occurred, thereby rendering all the outstandings due and owing by the company to become immediately due and payable. The two defendants together with one Pg Rosli bin Pg Hj Sabli have jointly and severally guaranteed to pay the bank on demand all sums of moneys which shall from time to time be due and owing to the bank by the company up to the limit of BND9,283,900 plus accrued interest. Under the guarantee, the defendants` liability is that of primary debtors and will not be affected, discharged or diminished by reason of, inter alia, any present or future lien or other security. There is no obligation on the part of the bank under the guarantee to first proceed against or to establish liability against the company whose debts are guaranteed. The guarantee is in addition to and will not merge with or otherwise prejudice or affect any other security and may be enforced notwithstanding such security then or thereafter be held by or be available to the bank. It is further provided that the bank`s right to recover from the defendants to the full extent of the guarantee is not prejudiced or affected by reason of any security being given or made.

The defendants applied to stay the bank`s action in Singapore on the basis that the proper forum should be Brunei. The stay application was refused by the learned assistant registrar, Ms Sia Aik Kor. The defendants appealed. I dismissed their appeal. I now give my reasons.

Defendants` case

In his arguments based on the ***forum non conveniens*** principle, counsel for the defendants set out the following as the real and substantial connecting factors showing that the more appropriate forum for the action is the courts in Brunei:

> *a the principal debtor under the banking facility offered by the plaintiffs is a Brunei construction company;*

b the banking facility granted by the plaintiffs is in Brunei and all accounts are operated upon in Brunei;

c the guarantee was executed in Brunei;

d funds were disbursed by the plaintiffs to the company in Brunei;

e the underlying loan transaction and the subsequent default, which triggered the recalling of the guarantee arose in Brunei;

f witnesses and supporting documents are readily available in Brunei;

g government officials in Brunei have to be subpoenaed to testify;

h it is inconvenient and costly for these witnesses to fly from Brunei to testify in Singapore;

i it is also inconvenient and costly to obtain all the relevant documents of the company which are now with the provisional liquidators in Brunei;

j defendants` only place of business is in Brunei and they have resided there until the company went into provisional liquidation;

k the defendants further allege they do not `own` the assets listed by the plaintiffs. However, counsel for the defendants said that he did not have instructions whether they do have beneficial ownership of those assets;

l the plaintiffs` place of business is in Brunei and they have no presence in Singapore;

m no cogent evidence has been produced to show that the plaintiffs` action cannot be fairly tried in Brunei;

n a judgment obtained in Brunei, once registered, is readily enforceable in Singapore;

o the letter of offer for the facilities states that the terms and conditions are to be construed and governed in accordance with the laws of Brunei;

p in a contractual dispute where the law governing the contract is Brunei law, it is more appropriate for the action to be tried by the Brunei courts. A question of foreign law decided by the foreign court is appealable as such to the appellate court in that foreign country. However, a question of foreign law decided by the trial court in Singapore based on expert evidence is treated as a question of fact for purposes of an appeal, which thus substantially limits the scope of the appeal on that finding of fact on foreign law by the trial court;

q the defendants have to labour under legitimate personal and juridical disadvantages in having to litigate in Singapore. Amongst them is the need to join the Brunei Government, because of the assignment of proceeds from construction projects with the Brunei Government under the banking facilities

granted by the plaintiffs. Leave of court is also needed to proceed against third parties in Brunei who are out of jurisdiction. The defendants considered these to be onerous;

r as the defendants have commenced an injunction action in Brunei against the plaintiffs to restrain them from continuing with their action in Singapore, and as an appeal to the Court of Appeal in Brunei is pending, there is the inherent prejudice to the parties having to contend with the possibility of conflicting judgments arising out of the multiple proceedings in two different jurisdictions.

Counsel submitted that the case would be more suitably tried in Brunei in the interests of all parties and the ends of justice.

Plaintiffs` response

If indeed this case is to be decided on the basis of ***forum non conveniens*** , I would accept the submissions of counsel for the bank that the connecting factors cited by defendants` counsel do not point clearly nor distinctly to Brunei as the more appropriate forum for the following reasons:

a The defendants are both Singapore citizens and residents in Singapore. As they have been properly served in Singapore with the writ, the courts in Singapore have the jurisdiction to hear and try the matter. Being Singaporeans who are resident in Singapore, it is thus very convenient for them to attend the trial in Singapore.

b The defendants own real estate property in Singapore. (See pp 23 and 30 of the first affidavit of Luc Rousselet). The defendants have not shown that they have assets in Brunei.

c The bank`s action is on a demand guarantee. Letter of demand was issued in Singapore. The debt arose in Singapore pursuant to the demand guarantee. Therefore, the cause of action against the defendants arose in Singapore when they, as guarantors, defaulted in Singapore.

d The plaintiff bank is more than willing to bring the documents and witnesses from Brunei to Singapore for the trial.

e Brunei is geographically not that distant from Singapore. Basically, it is not expensive nor inconvenient for the defendants to bring any documents and witnesses from Brunei to Singapore.

f The defendants have not shown any material differences in the laws of the two countries that will have a bearing on the enforcement of the guarantee, and how these differences, if any, will affect the determination of the dispute at the trial.

g The Brunei officials whom the defendants wish to call may be relevant to establish the liability of the company. But liability under the guarantee is not

conditional upon establishing primary liability. As such, the testimonies of these defendants` witnesses are inconsequential.

My analysis

In my opinion, it is necessary to establish the proper basis to decide the question of stay because different factual circumstances may call for an application of different principles and approaches. In my comparative analysis, I will set out four possible scenarios. Hopefully it will be clearer which scenario best fits the factual circumstances of this case and the correct test to apply will then be apparent. The starting point is to determine whether in the written guarantee there is any exclusive foreign jurisdiction clause.

A Where a foreign jurisdiction clause does not exist

When parties have not in their agreement provided for any jurisdiction clause, then staying an action will be decided on the typical forum non conveniens principles as set out in the well known case of **The Spiliada; Spiliada Maritime Corp v Cansulex Ltd** [1987] AC 460[1987] 1 Lloyd`s Rep 1, which principles the Court of Appeal in Singapore had adopted in **Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia and another appeal** [1992] 2 SLR 776 . LP Thean JA, delivering the judgment of the Court of Appeal in **Eng Liat Kiang v Eng Bak Hern** [1995] 3 SLR 97 , succinctly summarised those principles set out by Lord Goff of Chieveley in ***The Spiliada*** and modified them to the Singapore context as follows:

> *A stay will only be granted on the ground of **forum non conveniens**, where the court is satisfied that there is some other available and appropriate forum for the trial of the action. The burden of proof rests on the defendant, and the burden is not just to show that Singapore is not the natural or appropriate forum but to establish that there is another available forum which is clearly or distinctly more appropriate than the Singapore forum. The natural forum is that with which the action has the most real and substantial connection, and the court will consider what factors there are which point in that direction. If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. The court in this respect will consider all the circumstances of the case.*

Where there is no foreign jurisdiction clause, a balancing exercise is thus necessary to ascertain the forum coveniens, and in doing this, the following guiding principle stated by Lord Goff has to be followed:

> *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.*

B Where an exclusive foreign jurisdiction clause exists to limit jurisdiction to one foreign country A

Consider now the case where a plaintiff commences action in Singapore in complete disregard of his prior agreement with the defendant to refer disputes only to the courts in foreign country A.

Where there is such an exclusive foreign jurisdiction clause, an important contractual principle comes into play that the parties should normally be made to abide by their agreement unless the vitiating factors recognized in contract law are proved to be present eg fraud, undue influence, overwhelming bargaining power etc. Thus, parties generally cannot be heard to complain of the inconvenience, the expense, the difficulties and disadvantages in having the action tried abroad since they themselves have chosen the foreign jurisdiction. Hence, prima facie a stay should be granted in favour of the foreign court specified to have the exclusive jurisdiction as provided in the agreement because of `the presumption that contracts freely entered into must be upheld and given full effect unless their enforcement would be unreasonable and unjust`: See the decision of Yong Pung How J (as he then was) in **The Asian Plutus** [1990] SLR 543 [1990] 2 MLJ 449 . The burden is cast on the plaintiff to show why the foreign jurisdiction clause should not be given effect to and why a stay of the action in Singapore should not be granted. Whereas in the absence of such a clause as in the forum non conveniens cases, an action properly commenced in Singapore should normally be allowed to continue, and a stay will only be granted where the court is satisfied that there is some other available competent forum where the action may be more appropriately and suitably tried in the interests of all the parties and to meet the ends of justice. The burden of proof rests instead on the defendant.

The Court of Appeal in **Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd** SLR 258 [1977] 2 MLJ 18 set out the law concerning an application for stay where an exclusive foreign jurisdiction clause exists. Kulasekaram J (delivering the judgment of the court) said:

> *Where a plaintiff sues in Singapore in **breach of an agreement to submit their disputes to a foreign court**, and the defendant applies to a stay, the Singapore court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless **strong cause** is shown by the plaintiff for not doing so. To put it in other words, the plaintiff must show **exceptional circumstances amounting to strong cause** for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should **take into account all the circumstances of the particular case**. **In particular**, the court may have regard to the following matters where they arise:*
>
> *(a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.*
>
> *(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.*
>
> *(c) With what country either party is connected and, if so, how closely.*
>
> *(d) Whether the defendants genuinely desire trial in the foreign country, or are*

only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable here; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial. [Emphasis is mine.]

The Court of Appeal adopted the test laid down by Brandon J in **The Eleftheria** [1970] P 94[1969] 2 All ER 641 and elaborated that `exceptional circumstances` amounting to a `strong cause` must be shown by the plaintiff. Otherwise, the plaintiff`s action will be stayed.

The Court of Appeal reaffirmed these principles in **The Vishva Apurva** [1992] 2 SLR 175 . In delivering the judgment of the court, Chan Sek Keong J (as he then was) explained at pp 181 and 182 that:

*After the decision of the Court of Appeal in **Amerco Timbers** [1977] 2 MLJ 181 , the law in Singapore in this type of case is that the judge has a discretion whether or not to grant the application for a stay, notwithstanding the exclusive jurisdiction clause. ... In a case involving an exclusive jurisdiction clause, the discretion of the court should not be exercised just by balancing the conveniences. In this application, the court was not being asked to decide whether Singapore or India was the more convenient forum, but why the plaintiffs should be allowed to be relieved of their contractual obligation to bring their actions in India. The burden is on the plaintiffs to show they have strong grounds, by which we mean that the circumstances must be exceptional. Notwithstanding that a number of recent English authorities have moved towards an assimilation of the two tests, we do not think that as far as Singapore is concerned the two tests should be assimilated.*

The Court of Appeal in ***The Vishva Apurva*** granted a stay as the respondents there `failed to discharge the burden of showing that it was unfair, unjust or unreasonable for the court to hold them to their obligations under the relevant bills of lading.`

After analysing the above cases, Lai Kew Chai J in **The Eastern Trust** [1994] 2 SLR 526 said:

*It is clear from the cases that the court has a discretion whether to stay proceedings or not where there is an exclusive jurisdiction clause. ... However, in deciding whether to grant a stay or not, the court should take into account **all** relevant circumstances of each case. The discretion would not be properly exercised unless this had first been done. The circumstances considered should not be limited to those factors which were listed for special mention by Brandon J (as he then was) in **The Eleftheria**, which are merely examples of some of the circumstances which should be taken into account. Further, when referring to decided cases on the granting of a stay, it must not be forgotten that the*

decision in each case was arrived at after such a consideration. Failure to appreciate this will result in an erroneous understanding of the law.

I most respectfully agree with the above conclusions of the learned judge. The contractual principle that parties must generally be made to abide by their own agreement, and the nature and scope of the actual foreign jurisdiction clause are not the only factors influencing the whole equation. Where an action has been properly brought before the Singapore court, the plaintiff will also have established as of right in accordance with the law of Singapore that the Singapore court has jurisdiction to hear and try the matter. That is another part of the equation. Thus, when deciding the question whether to decline jurisdiction in favour of a foreign jurisdiction because of the exclusive foreign jurisdiction clause, the pure contractual principle must necessarily be balanced against the plaintiff`s right to have the matter heard and tried in Singapore, which he has established under the law here. This probably explains why the burden on the plaintiff to resist a stay application in the face of an exclusive foreign jurisdiction clause as set out in ***Amerco Timbers*** and ***The Eleftheria*** is not as onerous as otherwise would have been under the usual contractual principles to avoid a contractual clause. For instance, a serious and exceptional inconvenience has never been a ground to avoid a contract or a contractual clause, though it may be a ground allowing a party to escape from an exclusive foreign jurisdiction clause if that inconvenience is so great that it would seriously affect his ability to litigate effectively in that chosen foreign court. The need to ensure that the parties will have a chance to litigate effectively by mustering all the available evidence and witnesses before the foreign court within the financial resources available to them, including the prejudice to the plaintiff in having to sue abroad balanced against the prejudice to the defendants if the action is not brought in the foreign jurisdiction as agreed, no doubt must be important considerations. That explains the enumeration of certain comparative factors (not an exhaustive list) by the Court of Appeal in ***Amerco Timbers*** , when considering if in totality the relevant factors in all the circumstances of a particular case point towards a sufficiently `exceptional circumstance` amounting to a `strong cause` to justify granting a stay in spite of the foreign jurisdiction clause.

Therefore, I entirely agree with Lai Kew Chai J when he said at p 534 that:

... How exceptional the circumstances must be in each particular case will turn on the facts of that case. It is always a question of fact and degree.

The court will consider all relevant circumstances of each particular case before deciding whether a strong cause for a stay exists. In coming to a decision, the court will take a cumulative approach and give each circumstance due weight. A single circumstance may not by itself be sufficient to justify refusing a stay. However, taken together, the circumstances may be found to be sufficiently exceptional. Conversely, a single circumstance which by itself would be sufficient to warrant refusing a stay may be off-set by another circumstance to such an extent that on balance, a stay should be granted.

In ***The Eastern Trust*** , before the learned judge exercised his discretion and decided against a stay despite the exclusive foreign jurisdiction clause, he considered whether a clause governing the contractual forum was an essential term of a freely negotiated contract. He said at p 538:

Once a jurisdiction clause is incorporated into an agreement, the burden is on the plaintiff to show a strong cause founded on exceptional circumstances why a stay should not be granted. ***However, the granting of a stay is***

> ***nonetheless discretionary and it is legitimate when exercising this discretion to consider the facts underlying the jurisdiction clause****. In the present case, the jurisdiction clause provided that disputes should be resolved by the courts of the country where the carrier has its principal place of business. The vessel concerned was a Liberian registered vessel owned by a Liberian company. The plaintiffs had no means of discovering until a dispute actually arose that the Liberian company, Petersham Ltd, actually carried on its business from Taiwan. In such circumstances the burden on the plaintiffs should not be as great as compared to a case where the jurisdiction clause clearly points to an express forum such as India (as in* ***The Vishva Apurva****) or Japan (as in* ***The Asian Plutus****), or where the principal place of business of the carrier is easily ascertainable, as, for example, in* ***The Eleftheria****, where the principal place of business and the registered office coincided. A distinction should be drawn between those cases where the plaintiff knew or should have known at the time of contracting that he was agreeing to litigate disputes in a particular forum, and those similar to the present case where the plaintiff could not easily have known in advance what a contractual forum was. In the former situation the rule should apply with full vigour. In the latter, the burden on the plaintiffs* ***should be less onerous****. [Emphasis is mine.]*

Thus the severity of the burden cast on the plaintiff when resisting a stay application is not necessarily the same under all factual circumstances where an exclusive foreign jurisdiction clause is present. In my judgment, the burden imposed on the plaintiff to establish `exceptional circumstances` will also depend on the nature and scope of the exclusive foreign jurisdiction clause. Where the jurisdiction clause provides for many foreign countries to have `exclusive` jurisdiction, then the circumstances to establish a strong cause to resist a stay application action will be less stringent than if the exclusive jurisdiction is limited to only one country. For argument sake, if the jurisdiction clause provides that 20 foreign countries in the world may have jurisdiction, then the court in Singapore obviously will not view the `exclusivity` of these 20 foreign jurisdictions with as much importance to the parties as opposed to that where the parties have chosen only one foreign country to have exclusive jurisdiction. The plaintiff will not have as onerous a burden to discharge when resisting a stay application in the face of a `not-so-exclusive` foreign jurisdiction clause.

In instant case before me, it seems that the jurisdiction clause provides that any competent court in any country in the world (including Brunei) will have jurisdiction at the election of the bank, and the defendants irrevocably submit to the jurisdiction selected by the bank to enforce its guarantee.

C Jurisdiction clause limits jurisdiction to a few countries (eg A, B or C). But no special or specific right of election or option is given to either party to select which of those countries to proceed in.

Where no right of election is given to either party in what I may term as a `semi-exclusive` jurisdiction clause for ease of description (ie one where a few countries are specified to have jurisdiction), and the plaintiff chooses to proceed in Singapore which is one of the several countries specified as having jurisdiction, how onerous should the `exceptional circumstances` be for the plaintiff to succeed in resisting a stay application by the defendant to have the action tried in one of the several other countries specified in the jurisdiction clause? Here, there is no question of any breach of any agreement by either party since no party has the right to choose which of the several agreed jurisdictions is to try the action anyway. The plaintiff may prefer Singapore and thus he institutes his action in Singapore. He has not acted in breach of the semi-exclusive jurisdiction clause. However, the defendant instead may prefer one of the other foreign countries stipulated in the semi-exclusive jurisdiction clause.

In my analysis, the test set out in ***Amerco Timbers*** is probably inappropriate in such a situation. I think it will be more correct to apply the forum non conveniens principles to determine whether a stay should be granted. For this, I will adopt the test set out by the Court of Appeal in ***Eng Liat Kiang v Eng Bak Hern*** with certain modifications. The defendant will have the burden to establish that the particular foreign forum selected by him from those specified in the semi-exclusive jurisdiction clause is clearly or distinctly more appropriate than the Singapore forum. If the court concludes that the foreign forum is not clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, however, the court concludes that the foreign forum selected by the defendant is prima facie clearly more appropriate for the trial of the action it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. The court in this respect will consider all the circumstances of the case.

D Jurisdiction clause limits jurisdiction to a few countries (eg A, B or C). But a special or specific right is conferred on the plaintiff but not on the defendant to select anyone of these specified countries to institute his action.

In this last scenario, a special or specific right is conferred on the plaintiff but not on the defendant to select any of the countries including Singapore as specified in the semi-exclusive jurisdiction clause, and the plaintiff exercises his option and initiates his action in Singapore. But the defendant wants to stay the action in Singapore in favour of the jurisdiction of a foreign country specified in the semi-exclusive jurisdiction clause. Is the burden on the plaintiff to show why the stay should not be granted? I think it is the contrary. The plaintiff is in fact acting fully within his rights under the jurisdiction clause. It is the defendant who is attempting to resile from what he has agreed to.

In my judgment, it is therefore the defendant who must have the burden of showing a `strong cause`, or `exceptional circumstances` amounting to a `strong cause`, why the action brought by the plaintiff in Singapore should be stayed. This test will be similar to the test laid down by the Court of Appeal in ***Amerco Timbers*** , except that the burden is not on the plaintiff but on the defendant to establish why there should be a stay.

With the above analysis completed, I will now turn to the case before me to determine which of the 4 scenarios best fits the facts.

Clause 18 of the guarantee

Clause 18 provides as follows:

> *This guarantee and all rights, obligations and liabilities arising hereunder shall be governed construed and determined in accordance with the laws of Negara Brunei Darussalam and we hereby* ***irrevocably submit*** *to the jurisdiction of the Courts of Negara Brunei Darussalam* ***but it shall be opened to you to enforce this guarantee in any other Court of competent jurisdiction****. [Emphasis is mine.]*

Since the clause provides that the guarantee shall be construed in accordance with the laws of Brunei, the construction of that whole clause must be determined in accordance with the laws of Brunei. In fact, I am greatly assisted by the judgment dated 24 April 2000 of Dato Sir Denys Roberts CJ in the High Court of Brunei Darussalam in OS 70/99. The defendants here (who are the plaintiffs in

the Brunei action) commenced an OS action in Brunei to try and restrain the bank from continuing proceedings with this suit here in Singapore.

Dato Sir Denys Roberts CJ decided that cl 18 does not confer exclusive jurisdiction only to Brunei but to other courts of competent jurisdiction as well, so that the bank will be able to enforce the guarantee in any court and the guarantors will not be able to withdraw their irrevocable submission to the jurisdiction not only to the courts of Brunei but to all other courts of competent jurisdiction as well, which is provided for in Clause 18.

The defendants say that they have appealed the decision of Dato Sir Denys Roberts CJ, but I am not aware of the outcome of the appeal. Until then, I will say that the learned Chief Justice of Brunei has authoritatively determined the construction of cl 18 under Brunei law. The defendants here are estopped from re-arguing the construction of cl 18 before me. There can be issue estoppel based on this foreign judgment, which I regard as `final` in the light of the stay in Brunei because no further proceedings may be continued in Brunei so long as the stay remains in force. As the learned judge had fully considered arguments on the construction of cl 18, I regard that as a final decision reached on the merits after both parties have had the opportunity of ventilating all their arguments. In this case, I am satisfied that the necessary ingredients for such an estoppel have been satisfied. For this, I have previously examined at some length this question of issue estoppel based on a foreign judgment in **Arul Chandran v Chew Chin Aik Victor** (Unreported) from [para] 278 of my judgment. Suffice to say that the defendants cannot be permitted to relitigate the issue of the construction of cl 18 before the courts here.

Even if they could, I would have arrived at exactly the same construction of cl 18 as that found by Dato Sir Denys Roberts CJ for the reasons stated by him. The learned Chief Justice refused the application by the defendants to restrain the bank from continuing with these proceedings in Singapore for payment of money alleged to be due to the bank under the guarantee. He accepted that as a general rule, it is the policy of the courts in Brunei to hold parties to bargains which they have made. He referred to **Commercial Bank of the Near East plc v ABC and D** [1989] 2 Lloyd`s Rep 319 (`the CB case`) where there was a similar clause in the guarantee as follows:

> *This guarantee shall be governed and interpreted in all respects in accordance with English law and the undersigned hereby accordingly submits to the jurisdiction of the English courts but it shall be open to the Bank to enforce this guarantee in the courts of any other competent jurisdiction.*

The trial judge, Mr Justice Saville, in the CB case held at p 321 that:

> *If a party enters into an agreement containing a jurisdiction clause such as the one in this case then in the ordinary way and in the absence of strong reasons to the contrary, the court will hold the parties to their bargain with regard to jurisdiction. The rule is not wholly inflexible, however, because there may be facts and circumstances which lead the court to a conclusion that proceedings should be stayed or set aside. In the present case,* ***the jurisdiction clause in the guarantee did not****, unlike* ***The Chaparral*** *[1968] 2 Lloyd`s Rep 158* ***provide for the exclusive jurisdiction of the English courts because it gave the bank the right to enforce the guarantee in any other competent jurisdiction****. To my mind, however, this makes little difference to the principle, that* ***the court will hold the parties to their bargain in the absence of strong reasons to the contrary****. [Emphasis is mine.]*

After citing with approval the above portion of Mr Justice Saville`s judgment, Dato Sir Denys Roberts CJ then said:

> *I should make it clear that I have the highest regard for the courts of Singapore and that I do not think that there are any special circumstances to lead me to the conclusion that proceedings there should be stayed or set aside [or any injunction granted, though different principles may apply to the latter form of relief].*
>
> *I accept the general principle that, if the parties have decided which courts shall have jurisdiction, this shall prevail, even if the jurisdiction selected by them is not the natural forum for the hearing. It will therefore not be necessary for me to determine what the natural forum is, if I come to the conclusion that the parties have agreed on a jurisdiction.*
>
> *...*
>
> *I do not construe cl 18 of the guarantee as restricting the Bank to enforcing only a Brunei `judgment` in any other court of competent jurisdiction. The word `judgment` does not appear in the clause. This talks of enforcement of `this guarantee` which is used in various places to denote the contract of guarantee as a whole, and individual clauses of it.*
>
> *I therefore have no difficulty in construing cl 18 as allowing enforcement of the guarantee itself, and not only a judgment obtained in accordance with its terms, in another court of competent jurisdiction.*
>
> *The interpretation of cl 18 is complicated by the addition of the word `irrevocably`. It is said that the presence of this word must mean that only the courts of Brunei have jurisdiction over the guarantee.*
>
> *If this had been the intention, there would have been no point in adding the provision for the enforcement of the guarantee in another jurisdiction.*
>
> *I must construe `irrevocably` as applying not only to the courts of Brunei but to other courts as well, so that the bank will be able to enforce the guarantee in any court and the guarantors will not able to withdraw their submission.*
>
> *...*
>
> *In spite of the somewhat unhappy wording of the clause, I think that it is clear that both parties intended the large amount granted by the bank by way of facilities to be recoverable either in Brunei or elsewhere.*

Proper test to be applied

I will now examine the nature of cl 18 as construed by the High Court in Brunei. Besides stipulating

the law governing the guarantee, this clause is also a non-exclusive jurisdiction clause from the bank`s perspective. It does not in any way bind the bank to the exclusive jurisdiction of the courts in Brunei. In fact, it expressly provides that jurisdiction is not limited to Brunei as the guarantee may be enforced by the bank in any court in the world having competent jurisdiction. More importantly, by that clause the defendants have agreed irrevocably to give the bank the option to enforce that guarantee in any court with competent jurisdiction. Obviously, the clause is intended for the benefit of the bank to enable it to institute action on the guarantee in any country in the world where the bank may discover the guarantors` assets to be located. The defendants have expressly agreed to confer that advantage to the bank, regardless whether the matter at hand has any real connecting factors with the place of jurisdiction selected by the bank to commence its action. So if the bank finds that the defendants have assets in Singapore, the bank is entitled under cl 18 to sue in Singapore even if the dispute may have no real connection with Singapore. By way of contrast, it is not open to the defendants to bring any action under the guarantee in any other court of competent jurisdiction except in Brunei. Clause 18 essentially provides that the bank`s right to choose a jurisdiction to enforce the guarantee is unrestricted whereas the defendants can only sue in Brunei.

When Mr Justice Saville was considering a similar jurisdiction clause in the CB case, he said that the court will hold the parties to their bargain with regard to jurisdiction in the absence of `strong reasons to the contrary`. However, he said that the rule is not wholly inflexible because there may be facts and circumstances which lead the court to a conclusion that proceedings should be stayed or set aside.

Accordingly, the test to be applied to decide on a question of stay is that which I have alluded to in the last scenario. In my judgment, it is the defendants, as guarantors, who must bear the burden of showing a `strong cause`, or `exceptional circumstances` amounting to a `strong cause`, why the action brought by the bank in Singapore on the guarantee should be stayed. This test will be similar to the test laid down by the Court of Appeal in ***Amerco Timbers*** , except that the burden is not on the bank but on both defendants to establish why their application for a stay should be granted.

Conclusion

After considering all the circumstances of the case and the reasons (see [para] 4 and 6 above) presented by both counsel, I cannot find any exceptional circumstances amounting to a strong cause to stay the action of the bank in Singapore. In my opinion, the defendants have failed to discharge their burden to establish a strong cause to stay the action. Accordingly I see no reason to allow the defendants to escape from their agreement in cl 18, where they have given the bank the right to choose any competent court in the world to enforce the guarantee.

Further, since the Brunei High Court has refused the defendants` application to restrain the bank from continuing with their action in Singapore, there is all the more reason in the light of judicial comity for the courts in Singapore to continue to hear the action brought by a Brunei bank against Singaporean defendants, who have allegedly defaulted on their guarantee.

Outcome:

Appeal dismissed.