# Asia-Pacific Ventures II Ltd and Others v PT Intimutiara Gasindo and Others [2001] SGHC 144

**Case Number** : Suit 312/2001, RA 81/2001

**Decision Date** : 22 June 2001

**Tribunal/Court** : High Court

**Coram** : Lee Seiu Kin JC

**Counsel Name(s)** : Molly Lim SC and Roland Tong (Wong Tan & Molly Lim ) for the appellants/defendants; Chong Boon Leong and Edric Pan (Rajah & Tann ) for the respondents/plaintiffs

**Parties** : Asia-Pacific Ventures II Ltd — PT Intimutiara Gasindo

*Conflict of Laws – Natural forum – Stay of proceedings – Dispute pertaining to agreement governed by Singapore law and providing for non-exclusive jurisdiction of Singapore courts – Contracting parties having no connection with Singapore – Defendants Indonesian companies or citizens – Concurrent proceedings in Indonesia – Whether Singapore more appropriate forum than Indonesia – Relevant consideration in granting stay – Whether justice requires that plaintiffs be permitted to proceed with action in Singapore*

: In SIC 815/2001, the defendants applied for the following substantive orders:

(1) the service of the writ of summons on the defendants be set aside;

(2) further and/or in the alternative, the proceedings in this matter be stayed.

In the affidavit supporting the application, the defendants made the following assertions:

(1) the plaintiffs had served the writ on the wrong service address; and

(2) the proceedings ought to be stayed on two grounds, viz:
(a) there was an arbitration clause; and
(b) forum non conveniens.

On 30 April 2001 the senior assistant registrar heard the application and dismissed it with costs.

The defendants appealed against the whole of that decision and the matter was fixed before me on 14 June 2001. At the outset counsel for the defendants, Ms Lim, abandoned the appeal in respect of the first prayer, ie the setting aside of the service of the writ. In respect of the second prayer for the stay, she abandoned one of the grounds, ie that there was an arbitration agreement. Ms Lim proceeded only on the remaining ground, ie forum non conveniens. I dismissed the appeal with costs. Ms Lim asked for a stay of proceedings pending appeal to the Court of Appeal. The plaintiffs objected because an O 14 application had already been fixed for hearing on 22 June 2001 and they were concerned that a stay would delay the progress of the action and thereby prejudice their ability to enforce a judgment. I was of the view that whatever the merits may be for a stay of execution of judgment, the hearing of the O 14 application should not be delayed. I therefore refused a stay but it was to be without prejudice to any application by the defendants to apply for a stay of judgment if that was given at the hearing of the O 14 application. In the circumstances, I granted an order for an expedited appeal with the skeletal arguments tendered to stand as the parties` cases in the appeal. I now give my written grounds of decision.

This matter concerns a bond issue by the first defendants (`the company`), an Indonesian company carrying on the business of operating a chemical plant in Indonesia. On 3 September 1997 the company entered into a bond subscription agreement (`the agreement`) with the nine plaintiffs and two other parties (`the bondholders`). The second defendants, also an Indonesian company, were a major shareholder of the company. The third, fourth and fifth defendants are the shareholders of the

second defendants.

The terms and conditions of the bonds (`the bond conditions`) are set out in Sch 4 of the agreement. Condition 5.2.1 provides that if the net profit after tax (`NPAT`) of the company for 1998 or 1999 should be less than 90% of the projected net profit after tax (`PNPAT`) for those years, then any bondholder shall have the option of redeeming part or all the bonds held by him. Condition 5.2.1 states as follows:

> *In the event that any of the NPAT for 1998 or 1999 is less than 90% of the respective PNPAT for 1998 or 1999, the Company will, at the option of any Bondholder, such option to be exercised by such Bondholder sending the Redemption Notice to the Company, redeem all or part of the Bonds held by such Bondholder as may be notified by such Bondholder at the applicable Redemption Amount for the Bonds together with all unpaid interest accrued thereon.*

The plaintiffs claim that for 1998, the PNPAT was Rp25bn whereas the estimated NPAT was a negative figure, ie a loss was incurred. As a percentage, the NPAT was -125% of the PNPAT. As for 1999, the plaintiffs claim that the PNPAT was Rp39bn whereas the estimated NPAT was Rp26.9bn, or 69% in percentage terms. Pursuant to cl 5.2.1, the plaintiffs issued the requisite redemption notices and claim against the company various redemption amounts totalling US$21m.

The plaintiffs filed the writ of summons in this action on 16 March 2001. The claim against the company is that they had failed to pay on the due date in respect of the redemption of those bonds. The plaintiffs therefore seek to recover that sum plus contractual interest from the company. As against the second to fifth defendants, the plaintiffs rely on a shareholders` undertaking agreement (`the undertaking`) entered into between the plaintiffs and the second to fifth defendants. Clause 8.2.3 of the undertaking provides that, should the company fail to redeem the bonds, those defendants shall purchase the bonds from the plaintiffs in accordance with a pre-determined formula. In the alternative, the plaintiffs claim against the second to fifth defendants under cl 8.3.1 of the undertaking which is essentially a guarantee by those defendants of the company`s payment obligations under the agreement.

On behalf of the defendants, the fourth defendant filed two affidavits. He did not challenge the basic facts asserted by the plaintiffs. However, he claimed that there was some collateral agreement or implied term in the agreement that the company would be relieved of their obligation if there were circumstances beyond their control. This is what he said in paras 22 to 26 of his affidavit of 6 April 2001:

> *22 Briefly, the entire transaction between the Plaintiffs and the Defendants was based on the understanding and intention that the 1st Defendant would be listed on the Stock Exchange of Jakarta. However, due to circumstances which were beyond the Defendants` control, namely the political turmoil and economic downturn in Indonesia, the 1st Defendant company was unable to proceed towards the intended initial public offering.*
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> *23 The Plaintiffs had subscribed to bonds issued by the 1st Defendant with the intention that the 1st Defendant would be listed on the Stock Exchange of Jakarta.*
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> *24 On the 1st Defendant company being listed, the understanding and agreement was that the Plaintiffs would convert the bonds held by them to shares in the 1st Defendant company.*
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> *25 However, due to the economic downturn in Indonesia, the weakened*

> *Indonesian currency and the recent political instability, the 1st Defendant was unable to meet certain requirements for the initial public offering and its profitability was also substantially affected. These intervening events were totally beyond the control of the Defendants and constitutes a "force majeure".*
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> *26 Based on the above, I am advised by my solicitors and verily believe that the Plaintiffs should have proceeded by way of arbitration instead of litigation. The Court should thus grant a stay of this action in favour of arbitration.*

The defendants do not deny that there is no express provision in the agreement that would deprive the plaintiffs of their rights under cl 5.2.1 in the circumstances described by the fourth defendant in his affidavit. They would have to rely on some collateral agreement or implied term.

The governing law of the agreement is Singapore law and it specifies that Singapore courts have non-exclusive jurisdiction. This is provided in cl 21.1(a) which states as follows:

> *This Agreement, as to which time shall be of the essence, shall be governed by and construed in accordance with the laws of Singapore and the parties hereto hereby irrevocably submit to the non-exclusive jurisdiction of the courts in the Republic of Singapore. For the avoidance of doubt, the parties hereby acknowledge and agree that any party may bring an action in the courts of a jurisdiction other than the Republic of Singapore and the parties hereto submit to the jurisdiction of such courts.*

The governing law of the undertaking and the bond conditions is also Singapore law and they contain similar submissions to the non-exclusive jurisdictions of Singapore courts.

In his second affidavit, the fourth defendant stated that an action had been taken out in the District Court of Central Jakarta by an entity called Future Fast Securities Ltd (`FFSL`) against all five defendants in which FFSL is claiming payment under the agreement on a similar basis as the plaintiffs` claim. He exhibited a translation of a document which appears to show that FFSL, as one of the bondholders, had commenced the action in Central Jakarta on or about 14 May 2001. It should be noted that this is almost two months after the plaintiffs had commenced this action in Singapore.

The fourth defendant further deposed that the company had commenced an action against the nine plaintiffs and FFSL in the District Court of Central Jakarta to restrain them from demanding payment under the agreement. From the documents exhibited it appears that this action was commenced on or about 25 May 2001.

On behalf of the defendants, Ms Lim submitted that Indonesia, more particularly the District Court of Central Jakarta, is the more convenient and appropriate forum. She listed 11 factors in para 15 of her skeletal, which goes as follows:

> *The Indonesian Court is a more convenient and appropriate forum because of the following factors:*
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> > *(a) no connecting factors with Singapore - none of the parties has any connection with Singapore;*

*(b) there are Connecting factors with Indonesia - Defendants are Indonesian, the transactions under the 2 Agreements arose in Indonesia - the investments were made in Indonesia, payment obligations are in Indonesia, conversion of the bonds are to be made in Indonesia;*

*(c) if the proceedings are in Indonesia, the Defendants would be able to rely on various defences to challenge the Plaintiffs` right to call for payment of the Bond prior to 9 October 2002 since:*

*(i) the 1st Defendant was not in default of any of its payment obligations;*

*(ii) clause 5.2 should be read subject to the implied term that if the inability to achieve the profitability level was due to the 1st Defendants` default or neglect and does not apply in a situation where it was due to factors beyond the 1st Defendants` control;*

*(iii) in this case, the inability to achieve the profitability level or to go public was due to the economic and political situation an event beyond the Defendants` control and therefore falls within the "force majeure" situation;*

*(d) for question of implied term, the background matrix of facts leading to the two agreements would be relevant and all the Defendants` witnesses for this are all in Indonesia;*

*(e) danger of the Indonesia and Singapore Courts reaching conflicting and inconsistent conclusions on the same issues raised in Singapore and in the Indonesian action by Future Fast Securities Limited - because of availability of defences of force majeure and others in Indonesia;*

*(f) the possibility of conflicting decisions on same issues is one strong factor why the stay should be granted for the reasons given in the Court of Appeal`s decision in* ***PT Hutan*** *`s case (tab 3 of DBA) which affirmed the Appeal Judge`s decision;*

*(g) no finality if action is tried in Singapore - any judgment of Singapore Court will have to be enforced by way of fresh proceedings in Indonesia because there is no agreement for reciprocal enforcement of judgments between the 2 countries; in the action the same issues will be raised whether the Defendants could plead force majeure;*

*(h) the effect is that both the Plaintiffs and the Defendants will go through 2 sets of similar proceedings - at great expense of costs and time whereas a stay would achieve the opposite effect ie all issues be tried between the parties once and for all in Indonesia and there will be some finality in the matter;*

*(i) Defendants have filed a suit against Plaintiffs and the remaining investor in Indonesia for a declaration that payments on the Bonds are not due till 9 October 2002;*

*(j) if no stay is granted, there will be multiplicity of proceedings:*

*(i) in Singapore where Defendants have to defend against Plaintiffs` action;*

*(ii) in Indonesia, where Plaintiffs and the other Investor have to defend against the Defendants` claims;*

*(iii) in Indonesia, where the Defendants have to defend against Future Fast Securities Limited`s claims;*

*(k) in the proceedings in Indonesia, the Defendants would be able to effectively counterclaim against Future Fast`s action but in Singapore, it would not.*

In respect of factor (a), certainly the fact that none of the parties has any connection with Singapore is something that will have to be considered. But the contracts between the parties are very much connected with Singapore. The agreement, bond conditions and undertaking are governed by Singapore law. Also the defendants have submitted to the jurisdiction of the Singapore courts. It is true that the jurisdiction is non-exclusive, but this fact cannot weaken the link but merely opens the possibility that another jurisdiction could be the more convenient and appropriate one. Indeed if jurisdiction were exclusive, this application would not be available to the defendants at all. In **Bambang Sutrisno v Bali International Finance** [1999] 3 SLR 140 , the Court of Appeal said (at [para ]11):

> *Next, the personal guarantee itself. It was executed in Singapore by the appellant, who is an Indonesian citizen and a Singapore permanent resident. It is expressly provided in art 23 of the personal guarantee that, inter alia, `the validity, interpretation and enforcement` of that instrument `shall be governed by laws of the Republic of Indonesia` and that the appellant would submit to the `non-exclusive jurisdiction of the District Court of Central Jakarta` or other court in Indonesia as may be determined by the BIF. This jurisdiction clause by its express terms is non-exclusive and gives a right to the respondents to institute proceedings in any jurisdiction they may deem fit. Nonetheless, some weight should be accorded to the selection of the Indonesian court as the forum for the determination of the dispute relating to the personal guarantee. In **PT Jaya Putra Kundur Indah & Anor v Guthrie Overseas Investments Pte Ltd** (Unreported) the clause in question was construed by Lai Siu Chiu J as non-exclusive jurisdiction clause and the learned judge had this to say with reference to such clause at [para ]64 of her grounds of judgment:*
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> *`[I]n my opinion, the presence of a non-exclusive jurisdiction clause specifically choosing Indonesia as the forum for trial of the action showed that, prima facie, the parties had agreed that Indonesia would be an appropriate forum for the trial of the action than elsewhere. Jurisdiction agreements, though they may be non-exclusive in nature, should be respected and, when possible, upheld. Of course, there may be other fori in which an action concerning a breach of the first JVA may be brought, but Indonesia would clearly be an appropriate forum for the trial of an action arising out of a breach of the first JVA. So the parties have agreed. The plaintiffs should not be heard to argue that Indonesia would not be appropriate forum for the trial of this action.`*
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> *We respectfully agree.*

Factor (b), combined with factor (d), is the defendants` strongest point. The witnesses are all not from Singapore but from either Indonesia or Japan. While it would not materially increase the inconvenience to the Japanese witnesses to have the hearing in Indonesia rather than Singapore, it would probably be more convenient for the Indonesian witnesses to have the trial in their country.

Factor (c) is not tenable, in my view. I am unable to see any reason why the defendants would not be able to rely on the defences described if the proceedings are conducted in Singapore. Indeed, as will be discussed below, a Singapore court would be in a better position to apply Singapore law to the facts that the defendants claim relieve them of the liability that the plaintiffs seek to saddle on them.

Factors (e) and (f) are the same. The point that the defence of force majeure is available in

Indonesia but not in Singapore is puzzling in view of the fact that the agreement and undertaking are governed by Singapore law. If the objective were to reduce the chances of conflicting judgments in respect of a matter governed by Singapore law, it would be more logical for the trial to take place in Singapore.

Factors (g) and (h) are also the same. It is one of the matters that have to be considered in deciding on the appropriate forum. However, I note that if there is a problem of enforcement of a Singapore judgment in Indonesia, it is only to the detriment of the plaintiffs, the party electing to prosecute their claims in Singapore.

Factors (i) and (j) are related. In respect of the action in Indonesia by the defendants against the bondholders, it was commenced more than two months after the plaintiffs had taken out this action and is clearly to bolster the defendants` position in this stay application. Even if that were not the case, it does not behove them to complain about something of their own doing. Therefore little weight can be given to it in the consideration of the stay application. In respect of the action taken out by FFSL, that would be a factor to be considered.

As for factor (k), it is not clear how the defendants would be unable to effectively make a counterclaim in this action. In any case, success in their defence would be adequate for their purpose.

The plaintiffs have fired the first shot in this matter and commenced this action in Singapore in respect of contracts in which the governing law is Singapore law with Singapore courts having non-exclusive jurisdiction. The burden lies with the defendants to satisfy the court that a stay ought to be granted on the ground of forum non conveniens: see **Eng Liat Kiang v Eng Bak Hern** [1995] 3 SLR 97 where the Court of Appeal said (at p 103E):

> *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 and appropriate forum but to establish there is another available forum which is clearly or distinctly more appropriate than the Singapore forum.*

In the present case, the main factors favouring a stay are:

(1) it would be more convenient for the Indonesian witnesses (but would make no difference to the Japanese witnesses) for the trial to be held in Indonesia;

(2) enforcement would be simpler with an Indonesian judgment; and

(3) the plaintiffs` claims can be consolidated with that of FFSL in Indonesia.

Against that is the fact that the governing law is Singapore law and the parties have agreed to submit to the non-exclusive jurisdiction of the Singapore courts. In the present case, the defence appears to be based on issues of collateral contract or implied term and it would be convenient for a Singapore court to determine these issues rather than have an Indonesian court applying Singapore law under a very different legal system. Furthermore, if the trial were held in Indonesia, foreign law would be a matter of fact (as there is no evidence before me to the contrary, I assume that it would be dealt with in the same manner as a Singapore court would). Therefore there would be no appeal in Indonesia on a finding of Singapore law. This is clearly to the disadvantage of both the plaintiffs and defendants.

The editors of ***Dicey and Morris on The Conflict of Laws*** (13th Ed, 2000) had this to say in relation to this issue (at p 397):

> ***Identification of the natural forum****. It has been seen that in* ***Spiliada*** *Lord Goff of Chieveley indicated that the English court should look for the forum with which the dispute had the most real and substantive connection, and he referred in particular to factors affecting convenience or expense (such as availability of witnesses) and other factors including the law governing the relevant transaction. If the legal issues are straightforward, or of the competing fora have domestic laws which are substantially similar, the governing law will be a factor of little significance. But if the legal issues are complex, or the legal systems are very different, the general principle that a court applies its own laws more reliably than does a foreign court will point to the more appropriate forum, whether English or foreign ...*

There is no doubt that the two systems of law are very different. And the issues of law here are quite complex. In respect of an agreement that a particular court has non-exclusive jurisdiction, the editors said as follows (at p 427):

> *Where the court finds that the agreement is for the non-exclusive jurisdiction of a designated court (whether English or a foreign court), it cannot be argued that institution of proceedings is a breach of contract; and any application for a stay of proceedings in favour of that foreign court will be determined on the basis of* ***Spiliada Maritime Corp. v Cansulex Ltd****. But the fact that a court was contractually chosen by the parties will be taken as clear evidence that it is an available forum, and that, in principle at least, it is not open to either party to object to the exercise of its jurisdiction at least on grounds which should have been foreseeable when the agreement was made.*

The Court of Appeal in **PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings)** [2001] 2 SLR 49 summarised the principles governing the grant of a stay in the following manner (at [para ]16 and 17):

> *16* ***The Spiliada*** *was a case concerning the granting of leave under O 11 r 1(1) of the Rules of the Supreme Court to serve proceedings out of the jurisdiction. But the House of Lords held that the principles governing the grant of such leave were the same as those applicable to a stay of English proceedings. The main judgment there was delivered by Lord Goff. The correct approach which a court should take in such a case is as follows. The first stage is for the court to determine whether, prima facie, there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action. The legal burden of showing that rests on the defendant. In determining that issue the court will look to see what factors there are which point in the direction of another forum as being the forum with which the action has the most real and substantial connection, eg availability of witnesses, the convenience or expenses of having a trial in a particular forum, the law governing the transaction and the places where the parties reside or carry on business. Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of Lord Goff, `there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other*

> *jurisdictions` (hereinafter referred to as `the unless question` or `unless proviso` as may be appropriate in the context). One such factor which would warrant a refusal of stay would be if it can be established by objective cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in Singapore is not decisive; regard must be had to the interests of all the parties and the ends of justice. We would emphasise that in determining the `unless question` all circumstances must be taken into account, including those taken into account in determining the question of the more appropriate forum. However, in this stage of the inquiry the burden shifts to the plaintiff.*
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> *17 Whether we consider the process contemplated by Lord Goff in* ***The Spiliada*** *to be a two-stage process or a one-stage process, telescoping two into one, as was suggested in the case* ***Charm Maritime Inc v Kyriakou*** *[1987] 1 Lloyd`s Rep 433 at 447, does not really matter. The ultimate question remains the same: where should the case be suitably tried having regard to the interest of the parties and the ends of justice.*

Applying the test laid out by the Court of Appeal, the defendants` application for stay fails to clear the first hurdle. This is because in my opinion, on balance Singapore is the more appropriate forum in view of the fact that the matter turns on a determination of the law based on facts that either jurisdiction can determine with equal competence. The defendants have not discharged their burden of showing that Indonesia is clearly the more appropriate forum.

The defendants have cited to me a number of authorities in which the Singapore courts had granted stays on the grounds of forum non conveniens. I need only say that each case rests on its own facts and note that none of those matters concerned an agreement stipulating Singapore law as the governing law.

There is also the broader picture that I have to consider. In entering into the agreement, although the subject matter has no connection with Singapore, the parties had chosen to structure this multi-million dollar deal under Singapore law. They have elected to submit to the jurisdiction of the Singapore courts, albeit non-exclusively. I also note that under the agreement, bond conditions and undertaking, the plaintiffs are given the option of referring any dispute to arbitration in Singapore, under the Arbitration Rules of the Singapore International Arbitration Centre and subject to the International Arbitration Act (Cap 143A, 1995 Ed). This is provided in cl 22.1 of the agreement which states as follows:

> *Arbitration*
>
> *The Company hereby agrees that, at the option of any Investor, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, may be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre, for the time being in force, which Rules are deemed to be incorporated by reference into this Clause. The law of the arbitration shall be the International Arbitration Act (Cap. 143A). The Tribunal shall consist of a single arbitrator to be appointed by the Chairman of the Singapore International Arbitration Centre and such appointment shall be binding on the parties. The language of the arbitration shall be the English Language.*

This provision is mirrored in the bond conditions and undertaking. It can therefore be seen that the parties have evinced an intention to utilise the legal infrastructure in Singapore. The plaintiffs commenced the action here as they are entitled to do under the agreement, bond conditions and undertaking and the defendants have agreed to submit to the jurisdiction.

In ***Eng Liat Kiang v Eng Bak Hern*** (supra), the Court of Appeal held that even if the other forum is clearly the more appropriate one, the court still has a residual discretion to refuse the stay. The court said (at p 103G):

> *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. [Emphasis is added.]*

In the circumstances of the present case, justice clearly requires that the plaintiffs be permitted to proceed with the action in Singapore as the defendants had agreed that they are entitled so to do.

## Outcome:

Appeal dismissed.