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Treatment of Multi-Courts Jurisdiction Agreements

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TREATMENT OF MULTI-COURTS JURISDICTION AGREEMENTS

An increasingly popular manner of drafting jurisdiction clauses in cross-border contracts involves, the selection of the courts of more than one jurisdiction. Traditionally, parties would submit all disputes to the courts of a particular country under an exclusive jurisdiction agreement, or agree that the transaction is subject to a particular jurisdiction[1] without intending to create an obligation to proceed there and nowhere else. Of late, the Singapore courts have encountered litigation over multi-courts jurisdiction agreements.[2] A common form involves the naming of a particular court with one of the parties being given the option to proceed anywhere else.

The Spectrum of Cases from Spiliada *to* The Eastern Trust

The most recent of these cases, *Baiduri Bank Bhd v. Dong Sui Hung*,[3] is of particular interest because the learned judge attempted to present a summary of the approach towards the exercise of jurisdiction in a spectrum of cases.[4] On the one end were the cases involving no prior jurisdiction agreement (the first scenario) in which the *forum non conveniens* principles set out in *Spiliada Maritime Corporation v. Cansulex Ltd*[5] would apply; on the other were the cases dealing with exclusive jurisdiction agreements (the second scenario) in which the Singapore

1 This may in some circumstances be found to be merely declaratory but not have the effect of obliging the parties to litigate in that jurisdiction and nowhere else: See, for example, *S&W Berisford v. New Hampshire Insurance* [1990] 1 Lloyd's Rep 454.

2 *PT Jaya Putra Kundur Indah v. Ang & Sons Investment Pte Ltd* (Unreported, Suit No. 395 of 1996); *Bambang Sutrisno v. Bali International Finance Ltd* [1999] 3 SLR 140; *Baiduri Bank Bhd v. Dong Sui Hung* [2000] 4 SLR 212.

3 [2000] 4 SLR 212.

4 *Baiduri*, at 216–222.

5 [1987] AC 460.
Where stay of an action is sought, the defendant, in establishing a *prima facie* case for stay, must show that there is some other available forum having competent jurisdiction in which the case may be more suitably tried for the interests of the parties and the ends of justice. The plaintiff must then show that substantial justice will not be done unless the application for stay is denied.
Where leave is sought by the plaintiff to serve out of jurisdiction, the plaintiff has to show it is a 'proper case' for service out of jurisdiction under Order 11 rule 2(2), Rules of Court (Cap 322), and it is a proper case when the forum is the natural forum. The burden being the obverse of that in stay cases, where the plaintiff establishes a *prima facie* case for leave, the court will ask if justice demands that leave be denied.

Court of Appeal in *The Eastern Trust*[6] clearly enunciated the differences in the approach, as compared with *forum non conveniens* cases. Perhaps most significantly for our purposes, the Singapore Court of Appeal in *The Eastern Trust* held that a distinction should be drawn between those cases in which the parties knew or should have known at the time of contract that they were agreeing to litigate disputes in a particular forum, and those in which they could not easily have known. In the former cases, the requirement that the party in breach of the jurisdiction agreement show strong cause why the agreement should not be upheld should apply with full rigour; in the latter, the burden on the party was less onerous.

Two main reasons are usually offered by the courts to justify the different approach in cases involving jurisdiction agreements, as the Court in *Baiduri Bank* suggested. One reason is contractual: Parties must generally abide by their own agreement, and the focus of the courts is on the construction of the nature and scope of the jurisdiction agreement. If, as a matter of contractual interpretation, the parties have conceded to certain disadvantages and inconveniences of proceeding in the contractual forum, strong reasons are required by the party seeking to resist the proceedings in a contractual forum when the party proceeding there is merely invoking his contractual right. In the case in which the contractual forum is a foreign court, jurisdictional considerations (the second reason) influence the equation. As the Court noted in *Baiduri Bank*, the plaintiff (who was the party in breach locally) would have, apart from the jurisdiction agreement, established the jurisdiction of the local court. The contractual

6 [1994] 2 SLR 526.
The existence of an exclusive foreign jurisdiction agreement in this case was said to create a strong *prima facie* case for granting the defendant's application for a stay of the proceedings in Singapore. The plaintiff must show strong cause to persuade the court to refuse to grant a stay. Regard may be had to the factors in the test laid down by Brandon J in *The Eleftheria* [1969] 2 All ER 641, and first adopted in *Amerco Timbers* [1977] 2 MLJ 181: The situation of the evidence on the issues of facts and the effect of that on the relative convenience and expense of trial as between Singapore and other courts; whether foreign law applied and whether it differed significantly from Singapore law; the connections of the parties; whether the defendants genuinely desired trial in the foreign country or were merely seeking procedural advantages; whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim or be unable to enforce any judgment obtained or be faced with a lime bar not applicable in Singapore or for political, racial, religious or other reasons be unlikely to get a fair trial.
In *The Eastern Trust*, it was further said that where the jurisdiction agreement is an essential term of a freely negotiated contract, exceptional circumstances have to be shown before the plaintiff is allowed to proceed in breach of the agreement. The plaintiff must be taken to have conceded the inconvenience and disadvantages in choosing the contractual forum and cannot easily be allowed to rely on those to make his case for the refusal of a stay.

principle (in favour of the defendant) had to be balanced against the right of the plaintiff to proceed locally, which he had established under the *lex fori*. This, the Court noted, explained why the burden on the plaintiff to resist a stay application in the face of an exclusive foreign jurisdiction agreement was not as onerous as would have been under usual contractual principles to avoid a contractual clause.[7]

It may be noted that the question could also arise when the local forum is the contractual forum. The plaintiff who proceeds in the local forum is merely invoking his contractual right, and should be allowed to do so. On a contractual analysis, if the jurisdiction agreement in favour of the local forum is interpreted as a designation of the local forum as the most appropriate forum and a promise on the part of the defendant not to object to the local forum's jurisdiction, then strong reasons are required from the defendant when he seeks to stay the action in the local forum. While the Court did not deal with the cases involving exclusive forum jurisdiction agreements, it is submitted that jurisdictional considerations should likewise influence the equation. On the one hand, it may be argued that in addition to his contractual right to proceed locally, the contract involves submission of the defendant to the jurisdiction of the local court. The jurisdictional consideration would thus strengthen the plaintiff's case for proceeding locally. However, it must not be forgotten that the defendant may, under foreign jurisdictional law, have the right to proceed in what would, apart from the jurisdiction agreement, be the natural forum for the dispute. While technically the jurisdiction of the foreign court is irrelevant to the assumption of jurisdiction by the local court, the right of the defendant, which he has under the foreign procedural law, to proceed in the foreign court should, by parity of reasoning, be borne in mind. If the Court protects its own jurisdiction despite the contractual agreement in favour of foreign courts, it should also accord some weight to the otherwise legitimate jurisdiction of the foreign courts despite a contractual agreement in favour of the local court.

Thus, whether the agreement is in favour of the local or a foreign court, the following considerations are relevant: First, strong reasons are required when a party seeks to act in breach of the contract which is interpreted to amount to the designation of the appropriateness of the contractual forum and a waiver of the objection to the jurisdiction of the contractual forum on such ground; second, the strength of the case required to persuade the Court to sanction the breach of the contract is mitigated by jurisdictional considerations which may be in favour of a non-contractual forum.

7 *Baiduri*, at 219, para 17.

At this juncture, it may be queried whether the courts in *The Eastern Trust* and other cases dealing with exclusive foreign jurisdiction agreements (many of which also involved a foreign proper law) were really employing the contractual analysis (the effect of which was to be mitigated by the jurisdictional analysis) as the Court in *Baiduri Bank* claimed. If the contractual analysis was the first consideration of these courts, it may be asked why the scope, nature, and effect of the jurisdiction agreements were not overtly tested by reference to the proper law of the contract, which should govern issues of interpretation of contract and contractual obligations. That the Court in *Baiduri Bank* would not dispute that contractual interpretation was governed by the proper law may be seen from its judgment.[8] One possible reason why there was no lengthy discussion of the proper law of the contract in these cases is that in the absence of the proof of foreign law, foreign law was assumed to be the same as local law. But if so, perhaps such reasoning could be more clearly indicated in future cases. Similarly, if the strength of the "cause" required is mitigated (or reinforced, depending on the situation) by jurisdictional considerations, the fact that this is determined by the *lex fori* could also be more clearly indicated.

Jurisdiction Clauses in Favour of Courts A, B and C

One category in the spectrum between *forum non conveniens* cases and exclusive jurisdiction agreement cases was that involving "semi-exclusive jurisdiction clauses" (the third scenario). These involved a submission to the jurisdiction of several countries (assume one of these is Singapore), without any specific right of election or option to either of the parties to select which of those countries to proceed in. The Court held that the *Amerco Timbers* test[9] was inappropriate in such a situation and it was more correct to apply the *forum non conveniens* principles. Neither party would be in breach in choosing to proceed in one of the contractual fora, but the defendant who wishes to proceed in one of the contractual fora other than Singapore has to show that the other forum is clearly and distinctly more appropriate than Singapore in his application for a stay. Several comments may be made.

It is not immediately apparent why the *Amerco Timbers/(Eastern Trust)* analysis is deemed inapplicable. One possibility is that such agreements are in reality not better than ordinary non-exclusive jurisdiction agreements in favour of one forum. Possibly, when parties state that they submit to the jurisdiction of courts A, B and C, they are doing no more

8 *Baiduri*, at 222, para 28.

9 *Amerco Timbers v Chataworth* [1977] 2 MLJ 181. The test is adopted in *The Eastern Trust*.

than in the case when they non-exclusively submit to court A (being one of the many courts in the world).

It was probably not the Court's intention to treat the third scenario of cases as being similar to cases involving non-exclusive jurisdiction agreements. If indeed the Court was of the view that the clause was similar to a non-exclusive jurisdiction clause, the Court presumably would not have held that the *forum non conveniens* analysis applied because the Singapore Court has held that the *S&W Berisford* "strong case" approach applied for non-exclusive jurisdiction agreements.[10] A party desiring to stay an action in a contractual forum in the case where there was a non-exclusive jurisdiction agreement had to show a strong case why the contractual right to sue in the contractual forum should not be recognised and the plaintiff had to sue elsewhere. The contractual designation, albeit non-exclusive, created a "strong *prima facie* case" that the jurisdiction was an appropriate one to which neither party to the contract could object as inappropriate as they had both implicitly agreed it was appropriate.[11]

This, however, brings us to the next question. If indeed the Singapore Court's approach to a non-exclusive jurisdiction agreement in favour of court A is to require "strong reasons" from the party desiring to proceed in a non-contractual forum, it may be questioned why semi-exclusive jurisdiction agreements do not call for the same kind of analysis. Insofar as semi-exclusive jurisdiction agreements designate for the exclusive jurisdiction of courts A, B or C, as and when one court is selected by one party, it would seem that the *forum non conveniens* analysis is inappropriate. It must be noted that for non-exclusive jurisdiction agreements, the courts have required "strong reasons" despite what ought to be treated as the implicit option of the parties to proceed anywhere

10 Although these two cases, *PT Jaya* and *Bambang* (cited at footnote 2), involved multi-court clauses, the Singapore Court treated the clauses in question (or part of the clause in *Bambang's* case as the Court apparently broke the clause up into two parts for the purpose of analysis) as non-exclusive, and thus the proposition is stated as such in the text accompanying this footnote.
It is also submitted that the *S&W Berisford* approach technically does not fall within the rubric of the *Spiliada forum non conveniens* analysis, as a strong case needs to be shown when a party seeks to stay the action in a contractual (albeit non-exclusive) forum, and this is closer to the approach towards exclusive jurisdiction clauses. In this regard, this approach may be contrasted with the approach of the Singapore High Court in *Lehman Brothers Special Financing Inc v. Hartadi Angkosubroto* [1999] 2 SLR 427, which is probably the best example of a straightforward application of the *Spiliada* approach in the context of a non-exclusive jurisdiction clause. There, the High Court did not attach any special weight to a non-exclusive jurisdiction clause in favour of the courts of New York but allowed a stay on the grounds of *forum non conveniens* nonetheless as Singapore had little connection with the dispute.

11 *Supra*, footnote 1, at 463. Such a decision for a non-exclusive jurisdiction agreement is queried. See, *infra*, footnote 27.

else in the world. The analysis should apply *a fortiori* to semi-exclusive jurisdiction agreements (whatever they are called) when the parties at most only have the option to proceed in one of the other named courts, in the case where the party selects one of the contractual fora. In contrast, when the stay application is heard before a non-contractual forum, the agreement should be treated as if it were exclusively in favor of courts A, B and C: Exceptional circumstances amounting to strong cause should still be shown, even though the burden imposed may not be as high as in a case where the agreement was exclusively in favour of one court. It is acknowledged that this approach in such a multi-courts jurisdiction agreement case when the party is proceeding before the non-contractual Singapore forum is indeed suggested by the Court in an earlier part of the judgment.[12] In holding the *forum non conveniens* approach to be applicable to the third scenario, the Court was not dealing with cases involving a breach of contract. The criticism remains, however, that if the courts have required a strong case to be shown why the party should not be allowed to proceed in a contractual forum in a case involving a non-exclusive jurisdiction agreement, then it is hard to see why the Court in *Baiduri Bank* should require that the party selecting one of three contractual fora show that the selected forum is clearly and distinctly more appropriate than the other two. For consistency with the cases involving non-exclusive jurisdiction agreements, if indeed the mere naming of a contractual forum may be taken to be a designation of it as more appropriate than other fora (and presumably an agreement not to object to the jurisdiction of the contractual forum), the party resisting the action in a contractual forum should not, in the absence of strong reasons, be heard to object that it is less appropriate than the other two contractual fora.

That said, this writer has criticised elsewhere the approach that treats the mere naming, without more, of a contractual forum as the designation of that forum as appropriate.[13] If, indeed, the Court in *Baiduri Bank* had

12 *Baiduri*, at 220:
"Thus the severity of the burden cast on the plaintiff when resisting a stay application is not necessarily the same under all factual circumstances. 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."

13 See text accompanying footnotes 28 and 29.

required the party seeking action in one contractual forum to show that it was more appropriate than the other contractual fora because the naming of a forum could not, without more, be taken as the designation of that forum as more appropriate, then its decision is to be praised. Perhaps this could also have been stated more expressly so that these principles would serve as a better guide for future cases.

Jurisdiction Clauses in Favour of Courts A, B and C, with a Specific Right of One Party to Select Any of these Fora

The final scenario involved semi-exclusive jurisdiction agreements in which there was an express submission to the courts of several countries (including Singapore), but with a special or specific right given to the plaintiff, but not the defendant, to select any one of these specified countries in which to institute proceedings. The Court held that in such cases, when the plaintiff invoked what was merely his contractual right to proceed in Singapore, the burden must be on the defendant to show strong cause or exceptional circumstances amounting to strong cause. This involved the adoption of the *Amerco Timbers* test but with the burden of proof reversed (since it involved a contractual choice of the local, and not foreign, forum).

The approach toward the last scenario puts the agreements on the same footing as exclusive jurisdiction agreements. This may be explained based on the maxim of *expressio unius est exclusio alterius*: The express right of the plaintiff to select any one of the specified countries to institute proceedings would mean that the defendant neither has the right to select,[14] nor perhaps,[15] in the absence of strong reasons, to object to the plaintiff's chosen forum.

In such a case where, say, three courts are specified, it should probably not be argued that *The Eastern Trust* caution against applying its principles with full rigour in cases where the contractual forum was not and could not easily have been known in advance is applicable. The reason for the cautious attitude is probably to guard against the situation where the parties could not be said to have genuinely conceded to the inconvenience and disadvantages of suing in the contractual forum, thus making it rather too harsh to apply the principles with full rigour. In a case in which three courts are specified, while the defendant may not have known in advance which of the three courts would be chosen by the plaintiff, he could be taken to have conceded to the inconvenience and disadvantages

14 This is the conclusion of the English Court of Appeal when dealing with a similar clause in *Continental Bank N.A.* v. *Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505 at 509.

15 This is elaborated upon and qualified later. See text accompanying footnote 21.

in proceeding in all of the three fora. However, it is theoretically possible to specify a larger number of courts with the same express right given to the plaintiff to select any of these courts. If this is done, then while the *Amerco Timbers/(Eastern Trust)* test may apply, bearing in mind this Court's earlier remark on the comparative exclusivity (or lack thereof) of an agreement in favour of 20 countries, the burden imposed should be different. This would be so even in the case when the plaintiff merely acts within his contractual right by suing in a contractual forum. On a contractual analysis, while in theory the counter-argument could be made that the parties could be taken to have conceded to the inconvenience and disadvantages of proceedings in any of these countries, it must be borne in mind that the upholding of jurisdiction agreements through insisting on a proceeding in the contractual forum is not a purely contractual matter. That the concerns go beyond contract law to the court's discretion in the exercise of the jurisdiction is well-accepted, and explains why the factors pointing to strong cause, as enunciated in the line of cases up to *The Eastern Trust*, are factors pertaining to the appropriateness and justice of the forum.

The argument applies *a fortiori* when it concerns a non-exclusive jurisdiction agreement that allows one party to proceed in any forum in the world. Obviously, the choice of the party would in practice be limited to a number of unnamed fora: Even forum shopping is undertaken with a view to choosing a forum that is favourable in terms of its application of substantive law or procedural and other advantages or in which the defendant has assets. But that the party would in practice only want to proceed in a limited number of unnamed fora should not make a significant difference to the analysis.

Application of the Analysis in Baiduri Bank

The comparative analysis of the four scenarios was embarked upon by the Court with the hope that "it will be clearer which scenario best fits the factual circumstances of this case and the correct test to apply will then be apparent".[16] The test in the final scenario was found to be applicable to the clause in question in *Baiduri Bank*.[17]

Before moving on to the test, it may be noted that the Singapore Court held that the relevant clause must be construed in accordance with the express choice of law, which was the law of Brunei. It would thus seem that the Singapore Court treated the construction of the clause as a

16 *Baiduri*, at 216.

17 *Baiduri*, at 224. The Court said: "Accordingly, the test to be applied to decide on a question of stay is that which I have alluded to in the last scenario."

question of interpretation of contract, governed by the proper law of the contract (which in this case was the law of Brunei). The Singapore Court then said that the clause had been construed by the High Court of Brunei which found that it did not confer exclusive jurisdiction but gave the Bank a right to proceed in all other courts of competent jurisdiction. The Singapore Court held that issue estoppel arose on the point of construction of the jurisdiction clause. Even if issue estoppel did not arise, the Singapore Court held that it would decide similarly on the question of construction.[18] However, that the bank was not in breach of contract in suing in Singapore does not necessarily mean, on a contractual analysis, that the guarantors acted in breach in seeking a stay in Singapore. The guarantors would only be acting in breach in seeking a stay in Singapore if the contract could be interpreted as a waiver of any objection on the ground of *forum non conveniens* to the forum selected by the bank. Further, it may be noted that the Singapore Court need not necessarily have proceeded with the contractual analysis alone. Jurisdictional considerations should always be relevant. The question should be asked whether the Court of Brunei had jurisdiction according to Bruneian procedural law, whether by virtue of submission, or otherwise. If so, the right of the guarantors, under Bruneian procedural law, to proceed in the Court of Brunei should be borne in mind.[19]

The clause stated that the (Singaporean) guarantors irrevocably submitted to the jurisdiction of the courts of Brunei but that it was open to the bank to enforce the guarantee in any other court of competent jurisdiction. When the bank sought to enforce the guarantee in Singapore, the guarantors applied, *inter alia*, for a stay of the proceedings in Singapore. Judicial Commissioner Chan Seng Onn held that the clause in question was a non-exclusive jurisdiction clause from the bank's perspective. Its purpose was not to limit the bank to instituting proceedings in Brunei, but indeed gave the bank a specific right to sue anywhere else in the world. Such a clause, the Court held, was obviously to facilitate the bank's proceedings in any jurisdiction in which the guarantors were found to have assets, regardless of the connecting factors that may link the dispute to the jurisdiction.[20] As the guarantors had irrevocably given the bank the option to sue anywhere else, regardless of whether the matter at hand had connecting factors with the chosen jurisdiction, they had to show strong cause why the bank should not proceed in Singapore.

Several questions arise.

While the Court did not expressly say that the fourth scenario provided the best fit, it referred to the test in the fourth scenario as being applicable.

18 *Baiduri*, at 222.
19 See text of paragraph immediately after footnote 7.
20 *Baiduri*, at 224.

It may be asked whether this clause is analogous to the clause in the fourth scenario. First, it is clearly less exclusive than a clause in favour of named countries A, B and C in any of which the plaintiff but not the defendant is given a specific right to choose to proceed. In such a case, it may be said that the defendant should not be allowed to object when the plaintiff selects any of the named countries in which to proceed, presumably because there was an agreement not to object. The argument should apply with less force in the case in which the plaintiff is allowed to proceed anywhere in the world. It would seem to go rather too far (though it is theoretically possible) to view the clause in favour of unnamed courts of the world as an agreement to waive any objection to the exercise of jurisdiction of any of the courts in the world that was subsequently selected. Even if it does amount to such a waiver, jurisdictional considerations may impinge on the equation. And if the clause did not amount to a waiver of the objection to jurisdiction, then it would seem that the defendant was not acting in breach of contract in seeking a stay. If strong cause is required, it is not because there is a breach of contract. If it is required because jurisdictional considerations in that selected forum somehow strengthen the plaintiff's contractual right to proceed in any forum in the world, this should be explained.

Second, while it is plausible that if the plaintiff selected Brunei, the defendants should be made to show strong cause if the defendants desired a stay in Brunei,[21] it does not necessarily follow from the right of the plaintiff to proceed anywhere else that the defendants should be made to show strong cause when the plaintiff proceeds anywhere else. If the clause evinced the contractual intention of the defendants to be bound in the absence of strong cause wherever sued, it would have been better to express the clause simply as one in which the defendants irrevocably submitted to the jurisdiction of any court in the world in which the plaintiffs elected to proceed in. Had it been so phrased, the Court may have been more reluctant to apply the *Amerco Timbers/(Eastern Trust)* approach. Yet the very holding of the Court could reasonably be said to be based on an inference of such a concession on the part of the defendants.

It may be noted that the clause in *Baiduri Bank* is similar to that considered in several English cases. Of these, the Court had referred to Justice Saville's judgment in *Commercial Bank of the Near East plc v. A, B, C and D.*[22] The clause in *Commercial Bank* stated that the guarantor submitted to the jurisdiction of the English courts but that it was open to

21 Perhaps because the defendants should be taken to have clearly conceded, as a matter of contract, to the inconvenience and disadvantages of being sued there.

22 [1989] 2 Lloyd's Rep 319.

the bank to enforce the guarantee in any court of competent jurisdiction. The bank proceeded in England. Justice Saville found the clause to be a non-exclusive jurisdiction clause[23] but said that it made little difference to the principle that the court would hold the parties to their bargain in the absence of strong reasons to the contrary.[24] If this part of the judgment is applied, it may be noted that there is a factual distinction in *Baiduri Bank's* case. In *Commercial Bank*, the bank proceeded in the named forum, and as argued,[25] strong reasons must be shown why it should not be allowed to do so. In *Baiduri Bank*, the bank proceeded in a forum that was selected from all the possible fora in the world, and it may be that *Commercial Bank's* principle is not directly applicable.

Another comment is that *Baiduri Bank's* holding, at first blush, goes further than the Singapore Court of Appeal's holding in the earlier case of *Bambang Sutrisno v. Bali International Finance Ltd*.[26] In *Bambang*, there was a non-exclusive jurisdiction clause in favour of the Indonesian courts, coupled with a contractual right of the respondent to proceed in any competent court and an agreement by the appellant to waive any objection on the ground of *forum non conveniens*. The Court of Appeal held that where the post-contract selection of Singapore as the forum was concerned, the situation was analogous to that of an exclusive jurisdiction clause in favour of the forum such that the *Amerco Timbers/Eastern Trust* test was applicable. A crucial difference between the clause in *Bambang* and that in *Baiduri Bank* is the appellant's express waiver in *Bambang* of any objection to the post-contract selection on the ground of *forum non conveniens*. While some comment[27] may be made as to the desirability of the approach in *Bambang*, the further agreement of the appellant makes the application of the *Amerco Timbers/Eastern Trust* test apparently more justifiable in *Bambang* than in *Baiduri Bank*. As the appellant in *Bambang* had expressly agreed to waive any objection as a matter of contract, strong cause must be shown why the appellant should nonetheless be allowed to object. The waiver of any objection on the

23 This classification is questionable, but perhaps it is not fruitful to focus on this alone, but rather, one should focus on the substantive holding of the court. It may be noted that the English Court of Appeal in *Continental Bank N.A. v. Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505, faced with a similar clause, chose not to classify it as exclusive or non-exclusive. However, the Court did say that the borrowers in that case were unilaterally bound and could not complain when the bank proceeded in England (at 509).

24 *Supra*, footnote 22 at 321.

25 See text accompanying footnote 21. Similarly, in *Continental Bank N.A. v. Aeakos Compania Naviera SA* [1994] 1 Lloyd's Rep 505, the bank selected the named contractual forum.

26 [1999] 3 SLR 140.

27 The writer has dealt with this elsewhere. See Tan Seow Hon, "A New-Found Significance for Non-exclusive Jurisdiction Agreements?" [2000] SJLS 298–326 at 315–318.

ground of *forum non conveniens* could suggest a contractual intention to designate any chosen forum as the natural forum. There was no such contractual waiver in *Baiduri Bank*. In defence of *Baiduri Bank*, it may be argued that the implicit denial of any right of the defendants to proceed anywhere else necessarily means that the defendants could not object to the plaintiff's selected forum, otherwise the clause is meaningless. The counter-argument is: it may simply mean that in the limited number of cases where the defendants are the ones instituting a proceeding, the defendants have no choice but to institute it in Brunei. But the defendants would not be barred from objecting to the comparative appropriateness *over Brunei* of the plaintiff's selected forum in cases in which the plaintiff begins the proceeding.

The Approach towards Multi-Courts Jurisdiction Agreements?

All that said, it is nonetheless noteworthy that the Court in *Baiduri Bank* focused on the commercial purpose of such a jurisdiction agreement in coming to the decision as to its effect. This writer has submitted elsewhere that in considering the effect that should be accorded to jurisdiction agreements, the courts in employing the contractual analysis should be astute to the intentions of the parties in entering into such agreements.[28]

28 The writer has argued elsewhere in relation to the approach towards non-exclusive jurisdiction agreements that this should turn on what the court deemed to be the intention of the parties, as inferred from the facts. See Tan Seow Hon, "A New-Found Significance for Non-exclusive Jurisdiction Agreements?" [2000] SJLS 298–326.

Briefly, the writer argued that only such a focus on the inferred intention would justify the finding that a non-exclusive choice of a jurisdiction would result in the party desiring to proceed in a non-contractual forum having to show strong reasons why he should be allowed to do so. Under the *Spiliada* analysis, leave is granted when the forum is the natural forum, and stay granted when the defendant shows that some other forum is clearly and distinctly *more* appropriate. That the party desiring to proceed in a non-contractual forum in a non-exclusive jurisdiction agreement case has to show strong reasons, means that the courts have implicitly found that the non-exclusive jurisdiction agreement amounted to a designation of the contractual forum as the natural forum, rather than merely an appropriate forum amongst several possibly appropriate fora. If the chosen local forum was merely an appropriate forum amongst several possibly appropriate fora, then surely it would be sufficient in a stay case that the defendant showed that there was a clearly and distinctly more appropriate forum by the *Spiliada* analysis, rather than the 'strong reasons' analysis traditionally required for exclusive jurisdiction agreements. Similarly, in a leave case, the non-exclusive jurisdiction agreement in favor of the local forum - if that was merely a designation of the local forum as an appropriate forum, rather than *the* natural forum - would not create a strong prima facie case for leave such that the defendant would have to show strong reasons why leave should not be given. This was because under the *Spiliada* analysis, that the court is a natural forum is not enough for leave to be granted. The court has to be the natural forum. It makes sense that if strong reasons are needed, it was because the court inferred from the circumstances that the parties intended to designate

Briefly, this writer suggested that the courts should ask if the parties intended merely to submit to a particular jurisdiction so that the court could find jurisdiction to exist based on contractual submission, or whether they intended to do more. In cases in which jurisdiction exists at the outset[29] apart from the contractual submission, it may be that the parties in further adopting a jurisdiction agreement in favour of that court could be taken to have designated the contractual forum as the natural forum such that neither party could object to the exercise of jurisdiction by the contractual forum. In such cases, the party desiring to proceed in a non-contractual forum may have to show strong reasons why such proceeding should be allowed. In cases where the agreement merely established the existence of the jurisdiction of a particular court (as opposed to designating it as the natural forum), it may be more desirable to employ the *forum non conveniens* approach which allows one to consider all the usual factors in deciding the comparative appropriateness of the various contending fora.

Further, the principles for requiring strong reasons - whether they are based on a contractual analysis which focused on upholding the parties' contractual designation of particular fora as appropriate, and how the jurisdictional considerations apart from contract influence the equation - could be made more express in future cases. This would also clarify the question of the governing law. If the analysis is contractual, the proper law should govern the interpretation of the agreement and its effect. If the analysis is jurisdictional, as long as the proper law deems that jurisdiction agreement to be valid and to cover the substantive dispute in question, the effect of the jurisdiction agreement in tilting the balance in favour of particular fora is a question for the *lex fori*.

The approach toward multi-courts jurisdiction agreements should be along similar lines. To an extent, the preceding comments on the judgment in *Baiduri Bank* were made in view of the existing regime, which the Court in *Baiduri Bank* faced, which classified agreements as exclusive or non-exclusive. To take the criticisms further, it is submitted that such classification may actually confuse more than help, especially if the

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the contractual forum as the most appropriate, or the natural, forum.
Such an inference of intention was justified if there was no need for the parties to submit to the jurisdiction of the court through an agreement (because jurisdiction already clearly existed apart from the agreement), such that the agreement must mean something more. In these cases, it could mean that the agreement amounted to a designation of the contractual forum as the natural forum.

29 For example, by virtue of the contract being made as a result of an essential step taken in Singapore, or governed by Singapore law, if the forum in question is Singapore. These are some of the grounds of discretionary jurisdiction under Order 11 rule 1(d) of the Rules of Court.

agreements could be exclusive from the point of view of one party and non-exclusive from the point of view of the other party. Indeed, in *Continental Bank v. Aeakos*,[30] the English Court of Appeal, faced with a clause similar to that in *Balduri Bank*, declined to embark on such a classification. Rather, considering that the borrowers in that case had irrevocably submitted to the jurisdiction of the English courts, they were unilaterally bound to proceed in the English courts, and could not object when sued in England by the bank. As argued, the applicable principles may possibly be different if the bank had chosen to proceed anywhere else, even though they had an option to do so.

In any event, if strong reasons must always be shown by the party proceeding in a non-contractual forum even in the case of simple non-exclusive jurisdiction agreements in favour of one court, classification of agreements as exclusive or non-exclusive may not serve any useful purpose today. Further, the difference in the burden to show strong reasons may not be significantly different in the two cases. Even if the burden ought in principle to be different, to say that there is a difference in burden, when the same factors[31] in the line of cases leading up to *The Eastern Trust* are considered, is somewhat abstract and would not be determinative of the factual holding in the varied cases that are heard. If so, the burden to show strong reasons in a multi-courts jurisdiction agreement case should simply be expressed as a question of degree, depending on various factors. The Court in *Baiditri* took a laudable step in isolating some of these factors in its categorisation within its spectrum of cases.

It is submitted that factors of especial relevance in a multi-courts jurisdiction agreement case are:

(*a*) the number of courts specified in the jurisdiction agreement;

(*b*) whether a specific right is accorded one party to proceed in any forum, and whether the right is accorded to choose amongst the named fora, or additionally, to choose amongst any other court in the world;

(*c*) if one party is given a specific right to choose any other forum, whether the party had selected the named forum or an unnamed forum;

(*d*) the true implication of the right to proceed in a particular forum — whether it amounts only to submission to the forum, or additionally may be taken to be a waiver of the objection to the exercise of jurisdiction by that forum;

30 *Supra*, footnotes 23 and 25.

31 This refers to the factors in *The Eleftheria*. *Supra*, footnote 6.

(*e*) the forum (or fora) to which, apart from the contract, jurisdictional considerations point, and how, if at all, such considerations affect the strength of the case that must be shown by the party seeking to proceed in a non-contractual forum or to stay the action in a contractual forum.

Note for Practitioners?

It may be asked whether the suggestion for courts to infer or even deem the parties' intended effect of jurisdiction agreements according to the circumstances of the case is naïve. Often, the jurisdiction clause is just one of the many terms in the contract, and, (with respect) in many contracts, possibly inserted by following precedents in the law firm's database, without meticulous thought as to whether jurisdiction existed apart from the contract.

It is submitted, nonetheless, that it is desirable for the courts to infer or deem the intention of the parties based on the choice of wording and the circumstances of the case. Based on such inferred or deemed intention, the courts could then proceed to determine the effect of the agreement in view of the various factors suggested in relation to multi-courts jurisdiction agreements.

As for the practitioner drafting the agreement for clients, there is no reason why the practitioner should not clarify the intention of the parties by expressly stating that the party or parties are conceding to the inconvenience and disadvantages of suing in particular fora in a multi-courts jurisdiction agreement case, or that they are agreeing to waive any objection to the exercise of jurisdiction by any of the fora.

Some uncertainty presently surrounds even the relatively common non-exclusive jurisdiction agreements, and the uncertainty is only compounded by the increased use of a variety of multi-courts agreements. The courts could develop the jurisprudence in this area by enunciating the effect of the use of such agreements in view of the factors suggested. The Court in *Baiduri Bank* took a first step towards this by attempting to categorise the possible agreements in a spectrum. It is suggested that an analysis focusing on the various factors to be considered in what is ultimately a question of degree may be more fruitful than any categorisation which, in view of limited human foresight, would be non-exhaustive anyway. With time, the parties would know with some certainty the effect of incorporation of such agreements.

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