IN THE COURT OF APPEAL OF MALAYSIA

Coram: Rohana Yusuf, JCA; Harmindar Singh Dhaliwal, JCA; Rhodzariah Bujang, JCA

World Triathlon Corporation v SRS Sports Centre Sdn Bhd

Citation: [2018] MYCA 248 **Suit Number:** Civil Appeal No. W-02(IM)(NCVC)-2281-11/2017

Date of Judgment: 02 July 2018

International law – Foreign Exclusive jurisdiction clause – Forum non conveniens – Application for a stay of proceedings under Order 12 rule 10(2) of the Rules of Court 2012 – Whether Malaysia the proper forum to determine the dispute and/or the subject matter of the claim – Whether Malaysia the forum which has the most real and substantial connection with the cause of action

Contracts & commercial – Exclusive jurisdiction clause – Whether stay should be granted to give effect to an exclusive jurisdiction clause – Whether stay could be refused in exceptional circumstances – Burden of proof – Whether practical inconvenience a determinative factor – Whether the considerations accepted by the trial court in the instant case sufficient to override the exclusive jurisdiction clause

JUDGMENT

[1] This appeal emanates from the Kuala Lumpur High Court Order dated 3 November 2017. The learned High Court Judge had dismissed the appellant's application pursuant to Order 12 rule 10(2) of the **Rules of Court 2012 ("ROC 2012")** for a stay of proceedings in the High Court which application was premised on the ground of *forum non conveniens*. The appellant's position was that the *forum conveniens* to hear the dispute was the Courts of Florida, in the United States of America. The High Court, however, dismissed the appellant's application and found that Malaysia is the most convenient forum to hear the dispute.

[2] Aggrieved with this decision, the appellants appealed to this Court. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the orders of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

Salient Facts

[3] The salient facts giving rise to the civil suit appear in the grounds of judgment and in the submissions of the parties. The facts can be restated as follows. The appellant is a company established in Florida, USA. The appellant is the registered owner of several marks and trademarks for Ironman Triathlon ("IRONMAN trademark"). The respondent is a company registered in Malaysia.

[4] The parties had entered into two Event License Agreements dated 15 February 2000 and 20 October 2003 whereby the respondent obtained from the appellant the right, license and/or authority to organize and/or host triathlon events in Malaysia under the IRONMAN trademark.

[5] The Event License Agreement dated 20 October 2003 was amended pursuant to the Settlement Agreement and Mutual General Releases dated 24 May 2006 and further amended pursuant to the First Addendum to License Agreement dated 11 December 2008 ("Amended 2003 Agreement") (collectively referred to as the "Event License Agreements").

[6] The said agreements contained an exclusive jurisdiction clause in the form of Clause 20 as follows:

> *"This Agreement constitutes the entire understanding and agreement between the parties with respect to the subject matter hereof and supersedes any and all prior negotiations, understandings or agreements in regard thereto. This Agreement will be deemed to have been executed and delivered in the State of Florida, and will be construed and interpreted according to the laws of that State and of the United States of America. This Agreement may be amended only by written instrument signed by the parties hereto. In any litigation arising out of or relating to this Agreement, the parties agree that venue shall be in the United States District Court, Middle District of Florida, Tampa Division or the Circuit Court located in Pinellas County, Florida."*

[7] On 3 September 2009, the appellant issued a notice of default to the respondent outlining the respondent's various defaults under the Amended 2003 Agreement and demanded that those defaults be cured by 18 September 2009. Not receiving a response, the appellant by letter dated 23 October 2009 terminated the Amended 2003 Agreement.

[8] The respondent later discovered that the license and consent to organize the Triathlon event was given to one of the respondent's directors. The respondent then commenced legal action against the appellant by filing the present suit here instead of Florida seeking essentially for a declaration that the termination of the Event License Agreements was unlawful.

[9] On 19 May 2017, the appellant files an application in the High Court ("Enclosure 47") to stay the proceedings on the basis that Malaysia is not the proper forum pursuant to the exclusive jurisdiction clause.

Decision of the High Court

[10] As mention earlier, the Enclosure 47 application was filed pursuant to Order 12 rule 10(2) **ROC**

2012 seeking for the declaration that Malaysia is not the proper forum to determine the dispute and/or the subject matter of the claim and for the proceedings against the defendant be stayed on the basis.

[11] On 3 November 2017, the High Court dismissed the application in Enclosure 47 and decided that Malaysia is the most convenient forum for the Kuala Lumpur Suit. The High Court also decided that the governing law of the Event License Agreements is the laws of Malaysia.

[12] In essence, the reason given by the learned Judge in dismissing the application was that the witnesses to determine the dispute were all in Malaysia. The plaintiff (respondent here) will then have to bear substantial expense and inconvenience to bring all these witnesses to Florida, United States. The learned Judge also took into account that the plaintiff's incorporation and place of business is in Malaysia and evidence relating to matters involving the Event License Agreement and triathlon has to be given by the plaintiff's representatives who reside in Malaysia.

[13] The learned Judge then concluded that since "the evidence on issues of fact is situated or more readily available in Malaysia", the plaintiff had shown a strong case to override the forum selection clause and to have the suit tried in Malaysia.

Our Decision

[14] Before us, it was submitted by the appellant that the learned Judge had erred in law and in fact in-

(a) Failing to give due recognition and weight to the exclusive jurisdiction clause contained in the Event License Agreements;

(b) Deciding that the cause of action arose in Malaysia;

(c) Failing to hold the parties to their contractual bargain in respect of the exclusive jurisdiction and governing law clause;

(d) Failing to given recognition to the appellant's place of business which is in Florida;

(e) Failing the appreciate that the respondent had, during the hearing of the appellant's application, acknowledged that the issue of fraud and conspiracy is not relevant in determining the *forum conveniens* of the dispute; and

(f) Deciding that the governing law of the Event License Agreements is the law of Malaysia.

[15] In our assessment, these criticisms of the High Court decision all flow from the fundamental question of whether Malaysia was the proper forum to hear the dispute. The matters raised are relevant questions in determining this fundamental issue. Even so, we do not propose to deal with the issues as raised but in a fashion which is more convenient for the just disposal of this appeal.

[16] At the outset, we observe that there seemed to be no dispute as to the jurisdiction of either the

courts of Florida or the Malaysian courts to hear this dispute. However, even when there is jurisdiction, a Malaysian court will nevertheless have the discretion based on the doctrine of forum non conveniens not to hear the dispute against a foreign defendant (see **American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor** [1995] 1 MLJ 160 ("**American Express**")). In the event, the application in Enclosure 47 turned solely on the merits of the question of forum non conveniens.

[17] The starting point in any discussion of forum non conveniens is invariably the House of Lords decision in **Spiliada Maritime Corp v Consulex Ltd ("The Spiliada")** [1986] 3 All ER 843. It was there held that the fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the more appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. Lord Goff, in that case, also noted that the Latin tag "forum non conveniens" does not mean the question is one of convenience but of the suitability or appropriateness of the relevant jurisdiction. In doing so, the court would look to the forum which has "the most real and substantial connection" with the action. The then Supreme Court in **American Express**, supra, agreed with this principle as expressed and also noted with approval Lord Goff's observation on the meaning of forum non conveniens.

[18] In establishing the forum which has the most real and substantial connection with the cause of action, Lord Goff observed that the court will look to several factors including convenience and expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business.

[19] In the present appeal, just like the **American Express** case, the parties here had agreed to a foreign jurisdiction clause as well as to be governed not by the laws of Malaysia but by the laws of Florida/ USA. Now, the law in relation to the exclusive jurisdiction or forum selection clause is not controversial. Although generally a forum selection clause does not oust the jurisdiction of the court, the court is nevertheless obliged to give effect to it as that is what the parties had agreed (see **Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad** [1976] 2 MLJ 154). Disregarding such a clause would effectively mean the courts condoning a breach of the agreement.

[20] On the question of how such discretion is to be exercised when confronted with a foreign jurisdiction clause, the then Federal Court in **Globus Shipping** accepted the approach as summarised by Brandon J in **The Eleftheria** [1969] 2 All ER 641 as follows:

> "The principles established by the authorities can, I think, be summarised as follows: (I) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English 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. (II) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded:

(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 English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and 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 that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

[21] So, to surmise, where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction (see also **The "Asian Plutus"** [1990] 2 MLJ 449; **The "Vishva Apurva"** [1992] SGCA 32; **Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong** [1995] 1 MLJ 322; **Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd** [1994] 2 MLJ 97 and **Nutri Mills Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd & Anor** [2013] 8 MLJ 377).

[22] Now, although the learned Judge had appreciated the correct principles when he held that "the burden is on the plaintiff to show a strong case to override the agreement in the forum selection clause", the learned Judge, however, had erred in his finding that the respondent had discharged this burden. In the judgment, the learned Judge found:-

"[13] Here, I find that witnesses to the triathlon events organised by plaintiff, financing of the events including online payments of participants fees, the fraud and conspiracy by one of the plaintiff's director are all in Malaysia. This includes Dato Sri Ram who liaised with defendant vide email to explained the defaults complained by the defendant. Certainly, the plaintiff will have a bear substantial expense and inconvenience to bring all these witnesses to Florida, United States.

[14] The Plaintiff also is a Malaysian incorporated company and has its place of business in Malaysia. Evidence including documents relating to the Event License Agreement and matters related to the triathlon event has to be given by the plaintiff's representatives who reside in Malaysia.

[15] Therefore the evidence on issues of fact is situated or more readily available in Malaysia.

[16] In the circumstances, I find that the plaintiff has shown a strong case to override the forum selection clause and to have the suit to be tried in Malaysia."

[23] In our view, these considerations accepted by the learned Judge are insufficient to override the exclusive jurisdiction clause. More is required as the parties had willingly and contractually agreed to

the exclusive jurisdiction clause as well as the laws of Florida/ USA as the law of choice for the litigation. The respondent must show more than just inconvenience to witnesses and cost of litigation. Practical inconvenience is not a determinative factor. What matters most is the suitability of the forum which will meet the ends of justice.

[24] In this context, the learned Judge erred when holding that witnessed in Malaysia would be required to give evidence on the allegations of fraud and conspiracy. The learned Judge had failed to appreciate that no issues of fraud or conspiracy were pleaded in the present suit. Before the High Court, the counsel for the respondent had also conceded that issue of fraud and conspiracy was not relevant to the determination of the application.

[25] In any case, having agreed to submit to the jurisdiction of the Courts of Florida/ USA, it is not open to the respondent to now complain about inconvenience and cost as these were also matters which could have been foreseen at the time of entering into the agreement (see **Ace Insurance SA-NV v Zurich Insurance Company and another** [2001] EWCA Civ 173; **British Aerospace plc v Dee Howard Co** [1993] 1 Lloyd's Rep 368). Inconvenience also works both ways as the appellant will also be put to expense if the matter is heard in Malaysia. In any event, it is plain that it is the place of business of the defendant (in this case the appellant) which should be considered and not the place of business of the respondent who is the plaintiff in the action.

[26] Be that as it may, the reliance on the fact that the triathlon events were to be held and organized in Malaysia and that the material evidence was more readily available in Malaysia is, with respect, misplaced as the location of the triathlon events is immaterial to the issue of termination of the Event License Agreements. The act of termination, which is the subject matter of this dispute, took place in Florida and the issues of fact and the evidence and the witnesses would be more readily available in Florida. We do not see how the respondent would be prejudiced by having to sue in the courts of Florida/ USA.

[27] What appears to have been overlooked is that the Event License Agreements are to be governed by the laws of Florida/ USA which laws may differ substantially from the laws of Malaysia. It will be costly and time consuming for expert witnesses to be called to give evidence on the laws of Florida/ USA. For this reason, it is far more satisfactory for issues concerning the law of a foreign country to be decided by the courts of that country (see **The Eleftheria**, supra; **The Vishva Apurva**, supra; **Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd** [2012] 2 CLJ 361).

[28] The learned Judge was plainly in error when deciding that the governing law will be that of Malaysia which was not what the parties had agreed pursuant to Clause 20 of the Events License Agreements. In the **American Express** case, a case with similar facts, the then Supreme Court accepted that the parties in the case had submitted to the jurisdiction of the chosen Singapore courts as well as the chosen Singapore law as their choice for the litigation and that this fact would "militate against any argument for the bank customers, ie the plaintiffs, that the Malaysia court was the most appropriate forum". Another reason why we think the learned Judge was in error was that the issue of the governing law to be applied was never raised or contested by the respondent.

Conclusion

[29] For all these reasons, we were persuaded that it is the courts of Florida/ USA which has the most real and substantial connection to the respondent's cause of action, namely for the alleged wrongful termination of the Event Licence Agreements. We were therefore constrained to hold that the learned judge was plainly wrong in dismissing the appellant's application in Enclosure 47.

[30] In the premises, the appeal was allowed and the order of the High Court was set aside. As a consequence, order in terms of the application in Enclosure 47 was allowed. The respondent was also ordered to pay costs of RM10,000.00 here and below subject to payment on the allocator. Deposit to be refunded.

Dated: 02 July 2018

Signed

HARMINDAR SINGH DHALIWAL
Judge
Court of Appeal
Malaysia

COUNSEL

For the Appellant: Nimalan Devaraja (with him Ms Joyce Lim), (M/s Skrine)

For the Respondent: Ranjan Chandran (with him Ganesh Magenthiran, Ms Nandhini Devi Nagaindren and Ms Chandni Anantha Krishnan), (M/s Hakem Arabi & Associates)

LEGISLATION REFERRED TO:

Rules of Court 2012, Order 12 Rule 10(2)

JUDGMENTS REFERRED TO:

Ace Insurance SA-NV v Zurich Insurance Company and Another [2001] EWCA Civ 173

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160

British Aerospace plc v Dee Howard Co [1993] 1 Lloyd's Rep 368

Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad [1976] 2 MLJ 154

Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322

Nutri Mills Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd & Anor [2013] 8 MLJ 377

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97

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

Spiliada Maritime Corp v Consulex Ltd ("The Spiliada") [1986] 3 All ER 843

The "Asian Plutus" [1990] 2 MLJ 449

The "Vishva Apurva" [1992] SGCA 32

The Eleftheria [1969] 2 All ER 641