IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 285

Suit 395/1996

Between

P T Jaya Putra Kundur Indah
Ang & Sons Investment Pte
Ltd

… *Plaintiff*

And

Guthrie Overseas Investments
Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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P T Jaya Putra Kundur Indah and Another v Guthrie Overseas Investments Pte Ltd

[1996] SGHC 285

Suit 395/1996
Lai Siu Chiu J
07 December 1996

Judgment:

GROUNDS OF DECISION

The background 1. The principal players involved in this suit may be briefly described in the following manner. The first plaintiff is a company organised and existing under the laws of Indonesia. The President Director and beneficial owner of all the shares in the first plaintiff is one Johanis Se Nga ('Se Nga'). The second plaintiff is a company incorporated in Singapore carrying on the business of a housing and commercial developer. The managing director of the second plaintiff is one Ang Yee Lim ('AYL'), also referred to as Lawrence Ang in the affidavits. The defendant is a company incorporated in Singapore. It is a wholly-owned subsidiary of Guthrie GTS Limited, a company listed on the Stock Exchange of Singapore.

2. Sometime in 1988, PT Jaya Putra Kundur ('JPK'), an Indonesian company wholly-owned by Se Nga, acquired a piece of land, comprising approximately 90 hectares, situated at Kampong Patam on the island of Batam, Indonesia. Se

Nga approached the second plaintiff in 1989 to discuss the possibility of a joint venture using the land. Based on market sentiment prevailing at that time, Se Nga and AYL decided to develop that piece of land in Batam into a holiday resort. They then started to look for another partner to invest in and jointly develop this project. When these plans became known in the market, Guthrie GTS Limited showed a keen interest in investing in and participating in the development. Two directors of Guthrie GTS Limited, Ben Yeo ('BY') and James Lim ('JL') met up with AYL and heard his proposals on the project. Subsequently, BY and JL were introduced to Se Nga. Discussions between the parties followed and agreement was reached.

3. By a joint venture agreement dated 4 May 1990 made in Singapore between the defendant, the first plaintiff and the second plaintiff ('the 1st JVA'), the parties entered into a joint venture to develop on the land in Batam a holiday resort known as the Indah Puri Resort. This resort was to consist of:

a) a hotel;

b) a golf club;

c) a condominium complex;

d) a marina;

e) holiday chalets; and

f) a jetty with immigration and customs clearance facilities.

As at the time I heard this application, only the golf course and the condominium complex had been completed. The main reasons why the rest of the resort project had not been completed were because of disagreements between the plaintiffs and the defendant on, amongst other things, the size, concept, aesthetics of the various parts of the project, the lack of funds and the plaintiffs' refusal to assist in the financial difficulties faced by the joint venture vehicle.

4. Pursuant to the 1st JVA, the joint venture vehicle through which the resort was to be developed was to be a joint venture company called PT Guthrie Jaya Indah Island Resort ('PTG'). All three parties were to be the shareholders of PTG. The initial shareholding of PTG was set out in Section 2 of the 1st JVA which provided that the defendant would hold 51% of the shares in PTG while the plaintiffs would each hold 24.5% of the shares. The 1st JVA also provided that the defendant could appoint up to five directors to sit on the board of PTG while the plaintiffs could appoint up to two directors each. Under the terms of the 1st JVA, Se Nga and AYL were deemed to be directors of PTG as representatives of the first and second plaintiffs respectively.

BY, JL and one Low Hua Kin were deemed to be the directors of PTG as representatives of the defendant. It was also agreed that JPK was to transfer its interest in the land in Batam to PTG. However, it was not in dispute that, as at the time I heard this application, the process of incorporation for PTG had not been completed. PTG hence remained unincorporated under Indonesian law.

5. Section 6 of the 1st JVA provided that the defendant would undertake to provide all technical, management and marketing services to PTG for the project, in return for which the defendant would be paid management fees by PTG. Section 12 contained detailed provisions as to the quorum and voting

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requirements of directors' and company meetings with respect to resolutions concerning certain specified matters, such as the sale of golf club memberships, execution of agreements for the construction of any part of the project, termination of the management agreement relating to the project, alterations to the capital structure of PTG, selection of corporate officers and changes to the overall financial policy of PTG. Section 14 provided that the defendant bore the general responsibility for procuring the financing for the project.

6. Guthrie Batam Resort Marketing Services Pte Ltd ('GBRMS') was incorporated in Singapore to manage and carry out the marketing of the project in Singapore. The shareholding of GBRMS was in the same proportions as that of PTG. GBRMS started marketing the resort sometime in September 1990.

7. Although it was agreed in the 1st JVA that the defendant would take charge of the management of the project, no formal management agreement was drawn up. It was not disputed, however, that a wholly-owned subsidiary of Guthrie GTS Ltd, called Guthrie PMS (S) Pte Ltd ('GPMS'), undertook the duties of project manager and were paid management fees for their services. GPMS's duties included calling for tenders for the construction of the resort, recommending suitable contractors and administering the award of the projects' contracts to the best tender in terms of costs and quality.

8. Initially, things went smoothly. In September 1990, the first sale of the golf memberships was launched. As of May 1996, approximately 1,500 golf memberships had been sold. The early preliminary works on the resort commenced sometime in late 1990. Actual construction started in or around mid-1991. GPMS proceeded to award contracts for building the golf course, the golf club house and the social facilities. In 1991, the parties set up a company,

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PT Guthrie Jayakundur Construction, to undertake the construction of the condominium complex. By October 1991, GPMS was in the process of finalising the design layout of the marina. In January 1992, the sale of marina memberships was launched. About 180 memberships were sold at $180,000 per membership.

9. Tenders for the construction of the marina were invited in March 1992. In July 1992, a letter of intent was offered to PT Ballast Indonesia Construction, but for reasons that were unclear, the contract was never signed. In September 1993, a contract was awarded to Hai Sheng Construction Pte Ltd, but the marina it built sank within a few months of its completion. In May 1994, PT Marina City submitted a proposed offer to build the marina, but nothing came out of this. In September 1994, Easteel Construction Services Pte Ltd was awarded the contract; however, it had to withdraw because certain technical assumptions based on which it had taken on the contract were found to be inaccurate.

In May 1995, a letter of intent was awarded to Yean Tong Construction Pte Ltd, but this soon fell through because the necessary corporate guarantee from Guthrie GTS Ltd could not be obtained.

10. In 1993, Batam became less popular as an investment opportunity and a holiday destination. Sales of golf memberships, marina memberships, condominium units as well as public interest in the project generally declined. The decreased revenue affected the Company's cash flow and financial ability to complete the project. To alleviate the financial problems, the defendant injected funds into the project by buying some of the unsold condominium units for itself. In accordance with its obligations under the 1st JVA, the defendant

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also secured bank loans for the Company approximating $3.5m. In 1995, the defendant took up the majority of the unsold condominium units.

But PTG's financial problems still persisted -- it could not pay its suppliers and the staff salaries. There were also problems with staff performance and morale. To make matters worse, in late 1994, the apartment owners began to complain that the facilities that had been promised, such as the marina, had not been completed. Many marina membership owners threatened to withdraw their memberships.

11. The working relationship between the parties deteriorated as a result of all these problems. The plaintiffs blamed the defendant for failing to keep to its end of the bargain by providing adequate financing for the project with the result that both the plaintiffs had to procure and provide personal guarantees for overdraft facilities granted to PTG. In this respect, the main disagreement between the parties was as to who was responsible for the provision of finance necessary for the building of the various parts of the resort, particularly the marina. The plaintiffs also alleged that the defendant had failed to live up to its obligation under the 1st JVA in that GPMS had not performed its function as the project manager satisfactorily.

12. The defendant, on the other hand, blamed the plaintiffs for being uncooperative, difficult and indecisive when it came to making decisions regarding the various parts of the project. This was particularly so when it came to the construction of the marina. AYL and Se Nga unrealistically expected the construction of the marina to be financed primarily by the sale of the marina memberships, and when the launch of the marina memberships did not live up to expectations, they lost interest in the viability of constructing the marina. As

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a result, AYL and Se Nga were reluctant to inject any capital to finance the marina's construction. They would repeatedly make excuses to avoid committing themselves to awarding the contract for building the marina to any contractor. The lack of commitment on the part of the plaintiffs paralysed the resort project in respect of the marina.

13. In reply to the plaintiffs' contention that it was the defendant who bore the financial burden of injecting more capital into the project, the defendant insisted that its responsibility under the 1st JVA was only to procure financing for the project and not to directly finance its construction without the co- operation of all parties. The defendant tried on numerous occasions to obtain financing in order to rescue PTG from financial crisis but these attempts came to nought because Se Nga had failed to take the necessary steps to properly incorporate PTG, a responsibility that he had volunteered to undertake.

14. The defendant also alleged that the plaintiffs would often withhold their authorisation for the payment of salaries and fees owed to contractors, suppliers and employees of PTG. The plaintiffs also unreasonably refused to accede to engaging professional resort managers to run the resort. They reneged on an agreement with the defendant to take up some condominium units in order to temporarily alleviate the cash flow problem experienced by PTG.

15. Matters came to a head at an extraordinary general meeting held in Singapore on 30 August 1995. At this meeting, Se Nga and AYL were asked to execute certain documents that purportedly had the effect of declaring the 1st JVA null and void, increasing PTG's share capital and replacing BY and JL as two of the directors of PTG with three others; Se Nga and AYL refused.

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16. On 10 January 1996, a shareholders' meeting of PTG was held in Batam where resolutions were passed appointing new directors and increasing the share capital of PTG. This was purportedly in breach of the voting requirements as well as the provision in the 1st JVA that stipulated how many directors each party to the JVA was entitled to appoint to be on the board of directors. Se Nga and AYL were not present at this meeting.

17. On 31 January 1996, a directors' meeting was held in Batam where Se Nga and AYL were not present. At this meeting, several resolutions were passed including those opening bank accounts in Singapore and Batam, approving the budget and approving the plan for the construction of the marina. On 2 February 1996, the total sum of $197,380.00 was transferred from PTG's three bank accounts with ABN AMRO Bank Singapore Branch to a bank account known as 'BCA, JKT FVG PT Guthrie Jaya Indah Island Resort'. The plaintiffs' contention was that neither the transfer of the money nor the opening of this 'BCA JKT' account was with the authorisation of the plaintiffs or their representatives, and was thus in breach of the provisions of the 1st JVA. To compound matters, receipts for PTG including green fees, maintenance fees, food and beverage revenue, apartment rentals and membership subscriptions and instalment payments had not been paid into PTG's designated bank account for such receipts, which had been approved and opened in accordance with the 1st JVA.

18. On 1 March 1996, the plaintiffs commenced this suit against the defendant seeking, inter alia, damages, declaratory and injunctive relief, of a mandatory and restrictive nature, in respect of a wide variety of matters. The plaintiffs' claims against the defendant can be summarised as follows:

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(1) In breach of the provisions of the 1st JVA and/or PTG's Deed of Establishment,

(a) on 9 January 1996, at the shareholders' meeting of PTG held at Batam, the defendant's appointees caused to be passed certain shareholders' resolutions to appoint a board of directors and to increase the authorised share capital of PTG;

(b) on 31 January 1996, at the directors' meeting of PTG held at Batam, the defendant's appointees caused to be passed certain board resolutions to open bank accounts for PTG, to approve the budget, to approve the plan of the marina project and to appoint a new resort manager and a corporate lawyer;

(c) on or about 2 February 1996, the defendant's appointees transferred the total sum of $197,380.00 from PTG's bank accounts at ABN AMRO Bank Singapore Branch to another account under the name of BCA, JKT FVG PT Guthrie Jaya Indah Island Resort. Neither of the plaintiffs authorised this transfer or the opening of the account to which the monies were transferred.

(2) In breach of the provisions of the 1st JVA, (a) the defendant failed to provide all technical and management services for the joint venture project as well as marketing services for the project, the sale memberships in the golf club, the marina and the social club and the sale of the condominium units and/or failed to provide such services adequately or properly;

(b) the defendant failed to procure all such loans and advances as required by PTG to complete the joint venture project;

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(c) the defendant failed to proceed with the construction and development of the marina diligently and expeditiously and to complete the holiday chalets and resort hotel within the agreed time frame of 4 years;

(d) the defendant failed to use its best endeavours to procure and ensure that the holiday resort would be a commercial success.

19. By way of a Notice of Motion entered as No 49 of 1996 filed on the same day, the plaintiffs applied for interlocutory relief in respect of the restrictive and mandatory injunctions prayed for in their Statement of Claim.

20. By way of Summons-in-Chambers No 1905 of 1996 filed on 22 March, the defendant applied for a stay of all proceedings in the action. The grounds of the application were that the court in Singapore was not the appropriate forum for the trial of the action and that the action would more suitably be heard in the Indonesian courts or, alternatively, that the parties ought to enter into arbitration in Indonesia.

21. The defendant's position in reply to the allegations raised by the plaintiffs in the statement of claim was set out in the first affidavit of Low Check Kwang, a director of the defendant, filed on behalf of the defendant in support of the stay application. It appeared that subsequent to the signing of the 1st JVA on 4 May 1990, the parties concerned had executed two other agreements on 15 August 1990. One was a 2nd JVA in the form common for an Indonesian Approved Foreign Investment Company. The plaintiffs did not deny the existence or authenticity of these two documents. It was clear that the 2nd JVA was executed for the purpose of submission to the relevant Indonesian authorities for approval in respect of the proposed foreign investment project and for the incorporation

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of PTG. Its terms were materially different from those of the 1st JVA. The second was an agreement intended to be supplemental to the 1st and 2nd JVAs. The purpose of this supplemental agreement was to provide that in the event of inconsistency between the 1st JVA and the 2nd JVA, the parties would abide by and observe the terms of the 1st JVA.

22. Since the project in Batam concerned the incorporation of an Indonesian company with foreign shareholders, it was necessary under Indonesian law for investment applications to be processed through the Batam Industrial Development Authority ('the Batam Authority') as well as the Investment Coordinating Board of Indonesia ('BKPM'). In addition, Presidential approval must also be obtained for the joint venture. In the application for approval sent to the relevant authorities, it was the 2nd JVA that was submitted for approval instead of the 1st JVA.

Approvals of the President and the other relevant authorities were obtained in December 1990. In these circumstances, the defendant adopted the position that, under Indonesian law, the 2nd JVA was the only agreement that would be recognised by the Indonesian Courts as the valid and binding agreement between the parties. It was unlikely that the Indonesian Courts would recognise the 1st JVA and the supplemental agreement since these two agreements had not been submitted to the authorities for approval.

23. The defendant also pointed out, and this was not disputed by the plaintiffs, that PTG had yet to be incorporated under Indonesian law because its Deed of Establishment had not received the approval of the Indonesian Ministry of Justice. As a result of this, the plaintiffs' allegations that the defendant had acted in breach of the PTG's Deed of Establishment were misconceived. The

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defendant further alleged that the delay in the incorporation of PTG was due to the failure of Se Nga to act expeditiously in obtaining the approval of its Deed of Establishment from the Ministry of Justice.

24. The parties agreed to have the Notice of Motion seeking an interlocutory injunction heard together with the Summons-in- Chambers seeking a stay of all proceedings. The two applications were fixed before me on 16 and 17 May 1996. I naturally heard arguments on the stay application first. After hearing arguments by both counsel, I granted the defendant's application for a stay of all further proceedings in the action. The plaintiffs have now appealed against my decision (Civil Appeal No 92 of 1996).

The law 25. It is settled law in England and in Singapore that the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e., in which the case may be tried more suitably for the interests of all the parties and the ends of justice - per Lord Goff at p 476 in Spiliada Maritime Corporation v Cansulex Ltd < 1987 > 1 AC 460, first accepted as part of the law in Singapore by the High Court in J H Rayner (Mincing Lane) Ltd v Teck Hock & Co (Pte) Ltd < 1990 > 2 MLJ 142 (a case concerning service outside jurisdiction under Order 11 of the Rules of the Supreme Court) and by the Court of Appeal in Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia < 1992 > 2 SLR 776. The principle in Spiliada was recently reaffirmed by the Court of Appeal in Eng Liat Kiang v Eng Bak Hern < 1995 > 3 SLR 97.

26. How is this basic principle applied? Generally, in the case when the plaintiffs have commenced an action by service of process in Singapore and the

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court's jurisdiction is hence founded as of right, the legal burden rests on the defendant to persuade the court to exercise its discretion to grant a stay. It is for the defendant to show not only that Singapore is not the appropriate or natural forum, but that there is another available forum which is clearly or distinctly more appropriate than the Singapore forum.

27. In ascertaining whether there is a clearly more appropriate forum abroad, the search is for the country with which the action has the most real and substantial connection. The court will look at all the relevant connecting factors, and these will include not only factors affecting convenience or expense, such as the availability of witnesses, but other factors such as the law governing the relevant transaction and the place where the parties reside or carry on business.

28. In cases, where the court finds that there is no clearly more appropriate forum, i.e., where either there is no country which is the natural forum or Singapore is the natural forum, it will ordinarily refuse a stay of proceedings.

29. If, however, the court finds that there is some other available forum which is clearly and distinctly more appropriate for the trial of the action, it will ordinarily grant a stay of the proceedings unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. The burden then shifts to the plaintiff to show that there are reasons of justice that would urge the court not to grant a stay of proceedings but rather to hear the case in Singapore. At this stage, the court will consider all the circumstances of the case, including circumstances that go beyond those taken into account when considering connecting factors with other jurisdictions. In this context, the fact that the plaintiff will obtain a legitimate personal or juridical advantage

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from suing in Singapore is not decisive but is merely a factor to be taken into consideration.

30. In De Dampierre v De Dampierre < 1988 > 1 AC 92, the House of Lords held that the principles enunciated in Spiliada in relation to the grant of a stay of proceedings on the doctrine of forum non conveniens are equally applicable when there was a lis alibi pendens, i.e., where litigation involving the same parties and the same issues is continuing simultaneously in two different countries. In other words, the fact that a refusal of a stay of proceedings will lead to a multiplicity of proceedings in Singapore and abroad is a relevant and important factor to be considered under the doctrine of forum non conveniens.

31. I realised, however, that the question has not been fully addressed by the authorities as to at what stage of the enquiry does the court take into account the fact that there is a lis alibi pendens -- whether it is at the stage of deciding whether there is a clearly appropriate forum abroad or whether it is at the stage of deciding whether there are reasons of justice upon which a stay of proceedings should be refused. Nevertheless, without the benefit of detailed argument, I am tentatively willing to take the view that, conceptually, the factor of lis alibi pendens may be considered at both stages of the enquiry.

32. The first policy reason why it is undesirable to have concurrent actions in Singapore and abroad is because it involves more expense and inconvenience to the parties than if trial was held in merely one country (The Abidin Daver < 1984 > 1 AC 398 at pp 411-2). Hence, the factor of lis alibi pendens may be considered at the stage of determining whether there is a clearly more appropriate forum for the trial of the action together with the other factors considered at this stage which also seek to avoid unnecessary expense and

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inconvenience such as the location of the evidence, the residence of the parties, the choice of law, etc.

33. The other main reason why a lis alibi pendens should be avoided is that it can lead to two conflicting judgments, with an unseemly race by the parties to be first to obtain judgment and to subsequent problems of estoppel; this is a recipe for confusion and injustice (see The Abidin Daver (supra) at pp 412, 423-4). As such, in my view, a lis alibi pendens may also be taken into account as a factor in the second stage of the enquiry when determining whether there are reasons of justice why the trial should or should not take place in Singapore. It is at this stage that concerns similar to lis alibi pendens, such as those factors which demonstrate why it may lead to injustice to have trial in a forum abroad, eg. excessive delay in the foreign forum, will be deliberated upon by the court.

The decision 34. I first considered whether the defendant had shown that there was clearly a more appropriate forum abroad which would be more suitable for the trial of the action. The thrust of the defendant's argument was that Indonesia was the forum with which the action had the most real and substantial connection.

35. Counsel for the defendant first argued that, irrespective of whichever forum would try the action, there was an essential preliminary issue that had to be decided - whether it was the 1st or the 2nd JVA that was the operative agreement between the parties. It was not disputed by the plaintiffs that the 2nd JVA was executed by them.

36. For a foreign direct investment company, such as PTG, to be incorporated in Indonesia for the purpose of carrying out foreign investment, one of the

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required procedures under Indonesian law is for the parties to apply for investment approval through the Batam Authority to BKPM, otherwise known as the Investment Coordinating Board. BKPM is a government agency directly responsible to the President of the Republic of Indonesia. The functions of BKPM include assisting the President in formulating government policies with regard to investment, processing investment approvals and licenses, and conducting supervision of the investment implementation. To obtain the approval of BKPM, several documents have to be submitted to them including the joint venture agreement between the parties. The application and its supporting documents will be evaluated by BKPM. If all goes well, BKPM will send the appropriate recommendation to the President for his approval. Upon the President's approval, BKPM will issue to the investors a Notification of Presidential Approval.

37. In this case, the defendant alleged that the agreement that was submitted to the Batam Authority and BKPM was the 2nd JVA and not the 1st. It was on the basis of the 2nd JVA that the Batam Authority's approval, BKPM's recommendation and the Presidential approval were obtained. The defendant's Indonesian lawyers rendered their legal opinion that, under Indonesian law, it appeared that the 2nd JVA was the only agreement that would be recognised by the Indonesian courts to be valid and binding between the plaintiffs and the defendant. It was unlikely that the Indonesian courts will recognise the validity of the 1st JVA as to do so would be contrary to Indonesian public policy. Thus, there was an issue as to which agreement would prevail as between the parties. This issue of which agreement will be recognised to be the operative agreement between the parties was to be determined in accordance with Indonesian law and Indonesian public policy. Counsel for the defendant argued that this is something that would be more appropriately determined by an Indonesian court.

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38. As for the claims made by the plaintiffs with respect to the breaches of the 1st JVA, counsel for the defendant pointed out that they raise issues of Indonesian law relating to,

(i) the rules and regulations governing investment in Indonesia by foreign shareholders;

(ii) the incorporation of companies in Indonesia;

(iii) the substantive rights and obligations of shareholders of an Indonesian company prior to incorporation and the law governing their relationship;

(iv) the procedural requirements under Indonesian law as to how meetings of 'shareholders' of an Indonesian company which had yet to be incorporated were to be held.

Counsel for the defendant pointed out that Indonesian law on these issues would have to be proved as a matter of fact if litigated in Singapore. But if the action was tried in Indonesia, the courts there could deal with the issues straight- away, thus saving time and costs.

39. In reply, counsel for the plaintiffs argued that the submission of an agreement to the authorities for approval is a matter that relates to procedure or formality and not substance. Counsel cited me authority, which I find it unnecessary to repeat here, that a contract will be regarded as being formally valid if it satisfies either the requirements of the place in which it was made or its proper law. In this case, the 1st JVA was executed by the parties in Singapore. Under Singapore law, the 1st JVA was formally valid and Indonesian law as to formalities was thus irrelevant. Hence, there was really no issue as to which

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agreement was the one that would be recognised as the one governing the relationship between the parties. It was clear that it was the 1st JVA that was relevant. Alternatively, counsel for the plaintiffs argued that even if the issue before the court concerned one of Indonesian public policy, courts in Singapore are competent to decide on questions of foreign public policy based on affidavit evidence on foreign law.

40. As regards Indonesian law governing the claims arising out of the alleged breaches of the 1st JVA, counsel for the plaintiffs pointed out that the defendant had not adduced any evidence to show that there was any distinction between the Indonesian and Singapore law of contract. Hence, I was entitled to assume that Indonesian law in this particular respect was the same as Singapore law and that there was no advantage to have the matter heard before an Indonesian court.

41. I was unable to accept counsel for the plaintiffs' arguments. In the first place, putting aside any question of which JVA would prevail, the plaintiffs' claims against the defendant were grounded almost entirely on breaches of the 1st JVA. There was no dispute that the proper law of the 1st JVA is Indonesian law. In fact, there was an express choice of law clause (Section 24) in the 1st JVA choosing Indonesian law as the proper law of the agreement. Hence, the trial of the action with respect to the breaches of the 1st JVA would be governed by Indonesian law.

42. Secondly, and more importantly, I accepted that there was, in fact, a preliminary question of which would be the prevailing agreement to be decided by the court which tries the action. I also accepted that it was a question of Indonesian law and Indonesian public policy whether or not the court would accept that the 1st JVA would be the contract which governed the relationship

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between the plaintiffs and the defendant, bearing in mind the important fact that it was with reference to the 2nd JVA that the Indonesian authorities actually granted their approval for the building of the holiday resort in Batam. It was artificial for counsel for the plaintiffs to characterise the issue of the non-submission of the 1st JVA to the relevant Indonesian authorities as a question of formalities of the agreement that could be determined by the law of Singapore.

Rather, the issue was one of whether the 1st JVA was effective and valid as between the parties when it had not been approved by BKPM and the President of Indonesia. The validity of this agreement must be determined in accordance with its proper law -- Indonesian law. Since the issue also involved the question of whether an investment agreement not submitted to the Indonesian authorities for approval would nevertheless be recognised under Indonesian law, this also attracted the application of Indonesian public policy. Questions of Indonesian public policy are best determined by Indonesian courts rather than the courts in Singapore. As authority, I could do no better than to refer to the recent decision of Eng Liat Kiang v Eng Bak Hern (supra) where the Court of Appeal ordered a stay of proceedings in Singapore on the ground of forum non conveniens. Thean JA, giving the judgment of the Court of Appeal, said (at pp 106-7):

The respondent has in his defence, stated that should the appellant's claim in respect of the EHSB and SHC (Malaya) shares be true, the appellant would have committed a breach of Malaysian company law and also a breach of the listing requirements of The Kuala Lumpur Stock Exchange (KLSE) ... Both these breaches involve a question of public policy in Malaysia. If the appellant's claim is true, then he would have committed some offences or breaches of the listing

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requirements and the Malaysian courts would have to decide as a matter of public policy whether to enforce the appellant's claim.

An issue of Malaysian public policy is best left to be determined by the Malaysian court.

43. Thirdly, I also rejected the plaintiffs' argument that I should assume that Indonesian law was no different from Singapore law when the defendant has adduced no evidence to show that Indonesian law was materially different and that, hence, there would be no advantage in an Indonesian court hearing the case. In The Hooghly Mills Co Ltd v Seltron Pte Ltd < 1995 > 1 SLR 773 Judith Prakash JC (as she then was) said (at p 778):

As regards the claim governed by Indian law, there was no evidence before me that the Indian law as to the sale of goods and the obligations of the seller to deliver goods meeting the contractual specifications was any different from Singapore law on the subject. In this connection, the following words of Lai Kew Chai J in The Eastern Trust at p 535 were apposite:

It is clearly advantageous for questions of foreign law to be decided by the courts of that country, and this advantage has been recognized and given due weight in numerous cases.

However, the importance of this factor will depend to a large extent on the difference between the applicable law and Singapore law. There will be no real prejudice to either party if the law of the foreign court does not differ significantly from the relevant law of Singapore.

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With respect, I agree with that observation. It appeared to me that in this case the governing law issue was a neutral one. On the one hand, Singapore law governed a substantial portion of the case. On the other hand, since no significant difference had been shown by the defendants to exist between Indian law and Singapore law on the sale of goods, no real advantage would be gained by the defendants in having the action heard in India simply because the Indian sale of goods law had to be applied.

While I accepted that this passage represents the true legal position, the facts of this case were such that an issue attracting the application of Indonesian public policy, not just Indonesian law, would be presented to the court for decision. The defendant had, in fact, adduced some evidence, via a legal opinion exhibited in Low Check Kwang's first affidavit, that the fact of the 1st JVA not having been submitted to the authorities for approval might very well lead to its non-recognition as a valid agreement under Indonesian law and public policy. As I have sought to explain earlier, such an issue would be better determined by an Indonesian court. It would be impossible to assume that Indonesian public policy and Singapore public policy were identical in this regard.

44. Additionally, I would also say that the issues thrown up for dispute by the plaintiffs' claims go further than simply encompassing the Indonesian law of contract. The weight to be attributed to this factor of the law governing the action, which is essentially a question of evidential efficiency in proving foreign law, depends greatly on whether complex issues of law are involved as opposed to straightforward legal issues or matters of construction. I accepted that, in this case, counsel for the defendant had demonstrated that there were numerous difficult questions of Indonesian law and public policy involved in resolving the dispute between the parties. As pointed out by counsel for the defendant, the

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spectrum of Indonesian law raised by the issues would cover contract law, company law, partnership law, the procedural rules and regulations governing foreign investment, the specific legal rules governing the relationship between shareholders of yet-to-be-incorporated foreign investment companies and the relevant law governing the conduct of meetings. Although the defendant did not adduce any evidence to show specifically the difference between Singapore and Indonesian law in these various areas, it would have been impetuous and intractable for me to insist that unless there was clear evidence before me of the material differences between the two systems of law, I would refuse to recognise that the Indonesian court would clearly be at an advantage, as compared to a Singapore court, in more effectively dealing with the issues of Indonesian law that would arise in the course of the trial of the action. To do so would be to shut my eyes to the obvious.

45. Counsel for the defendant next argued that the preponderance of the evidence on this issue of whether it was the 1st JVA that was valid and binding is located in Indonesia rather than Singapore -- evidence needed to be given of the nature of the documents that were submitted to the Batam Authority, BKPM and the Indonesian Ministry of Justice for approval and the respective views of these authorities on the validity of the documents submitted. As such, witnesses from these Indonesian authorities would have to be called. The documentary evidence in this regard would naturally be located in Indonesia.

46. Counsel for the plaintiffs did not make a substantive reply to this argument because she maintained the view that there was really no issue of the 1st JVA being not recognised under Indonesian law as the binding agreement between the parties. As for the plaintiffs' claims relating to the breaches of the 1st JVA, counsel for the plaintiffs argued that there were many witnesses as well as

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extensive documentary evidence located in Singapore. One of the claims concerned the defendant's alleged failure to build the marina. In order for this claim to be resolved, recourse must be had to the many Singapore contractors' tenders to undertake the construction of the marina, that were rejected. The witnesses and the documentary evidence in this respect were located in Singapore. Also, to determine whether the defendant was liable for the acts and defaults of GPMS, the activities carried out by GPMS concerning the project must be scrutinised. All meetings of GPMS were held in Singapore and all agreements entered into by GPMS were executed in Singapore. The evidence in this regard would be found in Singapore. Counsel for the plaintiffs also argued that the cost, delay and inconvenience involved in translating all the documentary evidence in Singapore to Bahasa Indonesia if the trial of the action took place in Indonesia should urge me that Singapore was a more natural forum for the trial of the action.

47. I did not accept the submission of counsel for the plaintiffs. Rather, I was persuaded by her opponent's arguments that substantively almost all of the evidence relating to the question of what documents were actually submitted to the various Indonesian authorities for approval would be located in Indonesia. I took the view that the evidence in this respect was absolutely crucial because they would resolve the preliminary issue of which JVA would be the one that would be recognised under Indonesian law. As mentioned, against this argument, counsel for the plaintiffs did not, and I think could not, give any real reply.

48. However I was also not entirely unmoved by the arguments of counsel for the plaintiffs that the witnesses and the documentary evidence with respect to many of the issues raised by the plaintiffs' claims were to be found in Singapore.

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I would make the comment, however, with respect to both the plaintiffs' and the defendant's contentions in this regard, that the location of witnesses and documentary evidence in any particular country with the consequent need to transport witnesses and translate documents is an almost unavoidable and inevitable problem which will arise in modern commercial litigation which often involves transnational cross-border elements. With the geographical proximity between Singapore and Indonesia and with the easy means of travel between the two countries, I did not consider the movement of witnesses and evidence to be an insuperable difficulty for any of the parties to the litigation. Similarly, I did not regard the need to translate documents either from English to Bahasa Indonesia or vice versa to be a factor that weighed heavily in favour of any party. In the result, I found that the location of the evidence in the circumstances of this case to be neutral.

49. Similarly, I found that the place where the parties carried on business to be a neutral factor. The second plaintiff and the defendant were companies incorporated in Singapore whereas the first plaintiff was a company incorporated under Indonesian law.

50. Counsel for the defendant next referred me to the fact that there were pending proceedings in Indonesia; the defendant commenced those proceedings, known under Indonesian law as the complaint, in May 1995 against both plaintiffs, AYL and Se Nga for a declaration that the 1st JVA was void and claiming the sum of $8m as damages. The Indonesian proceedings were commenced before the defendant had taken its Indonesian lawyers' advice on the issue of the validity of the 1st JVA in the light of the existence of the 2nd JVA. In view of this advice, the defendant's Indonesian counsel had applied to

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have the complaint amended to ask the Indonesian court to make a determination on the validity of the 1st JVA vis a vis the 2nd JVA.

51. Counsel for the plaintiffs, in reply, contended that the proceedings commenced by the defendant in Indonesia were not genuine but started only for defensive purposes, to preclude any action from later being brought in Singapore. The defendant had no sincere desire to litigate in Indonesia and this was evidenced by the fact that, although the Indonesian action was commenced almost a year before the hearing of this application, the defendant had taken no positive steps to pursue the Indonesian action; it remained at the infant stage. Furthermore, notice of the proceedings in Indonesia was only given to the plaintiffs in March 1996, almost 10 months after it was commenced.

52. In de Dampierre v De Dampierre < 1988 > 1 AC 92, Lord Goff made the following remarks (at p 108) about the relevance of a lis alibi pendens when considering whether or not to order a stay of proceedings:

However, the existence of such proceedings may, depending on the circumstances, be relevant to the inquiry. Sometimes they may be of no relevance at all, for example, if one party has commenced the proceedings for the purpose of demonstrating the existence of a competing jurisdiction, or the proceedings have not passed beyond the stage of the initiating process. But if, for example, genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties.

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53. While I agreed with counsel for the plaintiffs' suggestion that there had been considerable delay in service of the Indonesian proceedings, I could not accept counsel's contention that the inescapable conclusion from the passive conduct of the defendant subsequent to the commencement of the Indonesian proceedings was that it had no genuine intention to pursue the proceedings in Indonesia. I did not think that the Indonesian proceedings were purely tactical in nature. Counsel for the defendant's explanation was that the delay in the service of process of the Indonesian proceedings was because service of process under Indonesian law had to be effected through official channels. I accepted that this must have partly contributed to the delay in the service of process.

54. But what was more crucial, I thought, was the fact that it was not disputed that the Indonesian action had not proceeded beyond the initiating stages. Other than the action being commenced and service effected on the plaintiffs, as of May 1996, nothing else had been done as yet. I found that the Indonesian action had not developed to a stage where it would impact upon the dispute between the parties in the sense of extra inconvenience or expense by having the Singapore action continue in Singapore because the same issues would have already been litigated in Indonesia. Therefore, I was of the view that the lis alibi pendens in this case did not decisively point to Indonesia being a clearly and distinctly more appropriate forum for the trial of the action; it was at most a neutral factor.

55. To show that Indonesia could not be the natural or clearly more appropriate forum for the trial of the action, counsel for the plaintiffs relied heavily on the fact that there were proceedings that had been commenced in Singapore that were directly related and relevant to the action in this suit. These proceedings counsel argued, were genuine and had proceeded beyond the preliminary stages

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such that there would be a significant and lasting impact on this action. Effectively, counsel was suggesting that these proceedings had developed to such a degree that they had made Singapore the natural forum for the trial of this action. While I realised that it was the defendant who bore the legal burden throughout the first stage of the inquiry under the Spiliada guidelines to show that Indonesia was clearly and distinctly a more appropriate forum, the evidential burden was on the plaintiffs, in this particular respect, to establish that Singapore had become the natural forum because of the concurrent proceedings within jurisdiction.

56. In my view, there were two ways in which concurrent proceedings in Singapore may be relevant in the exercise of the discretion whether to order a stay of proceedings under the Spiliada principles. First, the concurrent proceedings in Singapore may amount to what is now commonly known as a Cambridgeshire factor. If the requirements to demonstrate a Cambridgeshire factor is established, then, in all likelihood, the court will exercise its discretion to refuse a stay of the subject action. As will be explained below, the existence of a Cambridgeshire factor is an exceptional occurrence. Secondly, concurrent proceedings in Singapore, which are related to the subject action, may be relevant to show that Singapore is a more natural forum for the trial of the action in the same manner that a lis alibi pendens in a foreign jurisdiction may be relevant to show that the forum abroad is clearly and distinctly a more appropriate forum for the trial of the action. Subject to the caveat stated immediately below, generally, the same considerations set out in the speech of Lord Goff in de Dampierre v de Dampierre (supra) quoted above, on the relevance of lis alibi pendens in a foreign forum are equally applicable to the concurrent proceedings in Singapore. However, for obvious reasons, there will hardly ever be cases of a true lis alibi pendens within the same jurisdiction. The

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concurrent proceedings within jurisdiction will almost always be related proceedings in terms of common or similar issues of law and fact rather than proceedings involving exactly the same parties and exactly the same issues of law and fact, arising from the same or related causes of action. Related proceedings within jurisdiction may be defined as those which, although not arising from the same cause of action, are so closely connected that it is expedient to hear them together to avoid irreconciliable judgments from separate proceedings and unnecessary costs and inconvenience. In such cases, although the concurrent proceedings are relevant, I think it is clear that the policy reasons with respect to the undesirability of lis alibi pendens do not apply with as much force.

57. There were three sets of related proceedings that had, at the time of this hearing, been commenced in Singapore. First, there was Suit No 947 of 1995 ('the defamation action'). The second plaintiff commenced this action against the defendant and Guthrie GTS Ltd claiming damages for allegedly defamatory statements in interviews given by one the defendant's representatives, Peter McMillan, to the media in March 1995 concerning the second plaintiff's responsibility in the failure to complete the resort. Secondly, there were also 14 separate suits started by apartment owners of the resort against PTG, Guthrie GTS Ltd, the defendant and both plaintiffs alleging, inter alia, that the defendant and both plaintiffs had misrepresented and/or conspired to injure the apartment owners as to the following matters - that the defendant had control over the development of the resort and that the parties had no intention to complete the resort, including the building of the marina, by June 1993 ('the apartment owners' suits'). Thirdly, there was Suit No 1708 of 1993. In this suit, a firm of architects was suing PTG, GPMS, the defendant and both plaintiffs, in several alternative claims, for its fees for work done in the resort ('the architects'

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action'). All three sets of proceedings in Singapore had yet to proceed to trial as at the time of the hearing of this application for a stay. 58. In Spiliada, the House of Lords expressly acknowledged that a relevant factor when applying the principle of forum non conveniens is the fact that there are concurrent proceedings within the same jurisdiction which are related to the action sought to be stayed and which have proceeded to such an advanced stage of litigation that considerations of expense, convenience and the expeditious dispatch of justice would require the court to refuse a stay of proceedings. This factor was referred to in the judgment as the Cambridgeshire factor, named after the concurrent action which was proceeding in England in Spiliada.

In the subsequent case of Societe Aerospatiale v Lee Kui Jak < 1987 > 1 AC 871, a case dealing with restraint of foreign proceedings, the House of Lords clarified that the Cambridgeshire factor could not be applied broadly in all situations, but was only of relevance in the exceptional circumstance when the concurrent proceedings within jurisdiction had proceeded to such an advanced stage that the build-up of expertise in the concurrent proceedings practically made it a complete waste of resources and time if a stay was ordered. At p 898 of the report of Lee Kui Jak, Lord Goff said:

In Spiliada's case the question at issue was the effect of wet sulphur upon the holds of ships. This question was of profound importance, not only to the shipping industry, but to the whole sulphur exporting industry in British Columbia. The first case in which the question was investigated in depth was concerned with a ship called the Cambridgeshire, and was plainly recognised as in the nature of a test case.

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Armies of lawyers and experts were engaged. An enormous amount of preparatory work was undertaken; the documentation was voluminous in the extreme. The scientific investigation was of a most fundamental kind, and indeed approached the limits of scientific knowledge. The trial of the Cambridgeshire action was begun and had proceeded for about a month when the application was made for a stay of proceedings in Spiliada's case, a parallel case raising the same profound scientific questions as those which had arisen in the Cambridgeshire. The application came on for hearing before Staughton J., the trial judge in the Cambridgeshire action. In these somewhat unusual circumstances, it is scarcely surprising that he regarded the building up of expertise and understanding among the teams of lawyers and experts in England as a relevant factor to be taken into account when deciding whether or not to order a stay of the English proceedings in Spiliada's case; this view was shared by the House of Lords, where it was pointed out that, in addition, the parties in both actions were substantially the same -- Cansulex Ltd. being defendants in both actions, and the plaintiff shipowners in both actions being insured by the same P. and I. club who were financing and controlling both sets of proceedings, and instructing the same lawyers in both .

59. As can be seen from the quoted remarks of Lord Goff, the Cambridgeshire factor is only relevant in unusual and exceptional circumstances. It is not a factor of broad application whenever the doctrine of forum non coveniens is applied. I did not find that the other three sets of proceedings being carried on in Singapore were of such a nature or had proceeded to such a degree that they could qualify as Cambridgeshire factors. With respect to the defamation action commenced by the second plaintiff, the nature of the issues and question of liability raised were fundamentally different from those in these proceedings. Counsel for the plaintiffs could not persuade me otherwise. As for the architects'

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action, again the issues raised were completely different from those in this action. There was clearly insufficient connection with this action. Finally, in terms of the issues raised, although the apartments' owners suits bore some similarity with those raised in this case, counsel for the plaintiffs failed to establish any build-up of any form of expertise or complexity of the issues involved which even came close to resembling the situation in Spiliada. I would also add that an important factor in my consideration was the fact that none of the three actions had proceeded to trial at the hearing of this application for a stay. Clearly then, I found, without any hesitation, that counsel for the plaintiffs had not satisfied me that the three sets of proceedings within jurisdiction were Cambridgeshire factors that had made Singapore the natural forum for the hearing of this action.

60. For generally the same reasons stated in the preceding paragraph, I also found that these local proceedings, although clearly genuine in nature, were not of such relevance to the subject action that they could show that Singapore was a more appropriate forum for the trial of the action. The local proceedings did not deal with the same issues and they had not advanced to a stage that would significantly impact upon this case. Foremost in my mind also was the fact these local proceedings were not true lis alibi pendens, that is, they were not concurrent proceedings involving the same parties to the subject action and they did not involve the same issues of fact and law, arising from the same or related causes of action. The rationale for the relevance of lis alibi pendens as a factor in applying the Spiliada principles thus did not apply with very much force in this case. There would be no true danger of estoppel as the parties and issues were different. There would also be no true consequential savings of time and costs for the parties to this action even if a stay was refused, because the concurrent local actions would proceed regardless of the result of this

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application for a stay, unlike in the classic case of a true lis alibi pendens, eg. The Abidin Daver, where the grant of a stay would result in only one set of proceedings being carried on. Hence, the existence of the local proceedings could not persuade me that Singapore was a more natural forum for the trial.

61. In my opinion, there was another relevant factor that pointed towards Indonesia as a clearly and distinctly more appropriate forum for the trial of the action which had not been given enough attention by counsel for the defendant. Section 24 of the 1st JVA set out the parties' choice of law and jurisdiction as follows:

24.1 This Agreement shall be governed by and construed in accordance with the laws of the Country < Indonesia > .

24.2 Each of the parties to this Agreement hereby irrevocably and unconditionally submits to the exclusive jurisdiction of the District Courts of Central Jakarta but without prejudice to the right of any thereof to commence action or bring suit against each and every other party in any Court having jurisdiction but for this Section 24.2 In relation to any proceedings in Singapore, an appeal from a decision of the appellate court in Singapore in such proceedings may be brought by any party before the Judicial Committee of the Privy Council and the parties further irrevocably agree to be bound by an appeal to, and a decision of, the Judicial Committee of the Privy Council in such proceedings....

Section 24.2 was an unusually worded clause. It started off by providing that the parties would submit to the exclusive jurisdiction of the District Courts of Central Jakarta. But it ended by providing that, notwithstanding the parties'

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submission to the District Courts' exclusive jurisdiction, each party would retain the right to commence action in any other country which had jurisdiction to hear the action, and this would include, of course, Singapore. The first question that came to mind was whether section 24.2 was an exclusive jurisdiction clause which attracted the application of the well-known principles set out by Brandon J in The Eleftheria < 1970 > P 94 (later repeated by the same judge in The El Amria < 1981 > 2 Lloyd's Rep 119) which was applied in Singapore by the Court of Appeal in Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd < 1977 > 2 MLJ 181.

62. It is a question of construction whether a jurisdiction clause in a contract is an exclusive or a non-exclusive one (see Sohio Supply Co v Gatoil (USA) Inc < 1989 > 1 Lloyd's Rep 588 at p 591; British Aerospace v Dee Howard < 1993 > 1 Lloyd's Rep 368 at p 373). It is settled law that it is for the proper law of the contract to determine questions of construction of the terms of the contract. It seemed to me, therefore, that whether section 24.2 of the 1st JVA would be construed as an exclusive jurisdiction clause was a question of construction that had to be determined by the proper law governing the 1st JVA, Indonesian law. The only evidence of Indonesian law on this point that I had before me was a legal opinion rendered by the plaintiffs' Indonesian counsel exhibited in AYL's first affidavit. The relevant portion of the legal opinion reads:

The text of Section 24.2 of the JVA seems ambiguous. On the one hand, the first part of the first sentence mentions exclusive jurisdiction of the District Courts of Central Jakarta, while on the other hand the second part of the first sentence states that the parties to the JVA have the right to commence action in any Court having jurisdiction. Furthermore, the second sentence of this Section 24.2 explicitly refers to proceedings in Singapore.

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According to Indonesian law, the interpretation of a clause in an agreement may not only depend on the text of such (sic) clause, but also on the intention of the parties at the time of the conclusion of the Agreement. Relevant in this respect is the meaning which the parties, based on their declarations and acts, (i) could reasonably attribute to such clause and (ii) could reasonably expect from each other.

The intention of the parties can, for example, be derived from negotiations and discussions parties had on the JVA and in particular this Section. Such information is, at this moment, not available to us.

As it may be obvious, I did not find this opinion to be particularly helpful in determining the nature of the Section 24.2. There was no evidence of the parties' reasonable expectations of each other with respect to the clause or the meaning they attributed to it. Consequently, I took the view that there was effectively no evidence of whether this section would be regarded as an exclusive jurisdiction clause under Indonesian law.

63. Therefore, with respect to this specific question of construction and nothing more, I regarded Indonesian law to be the same as Singapore law. On normal principles of construction under our law, section 24.2 appeared to me to be a non-exclusive jurisdiction clause choosing the District Courts of Central Jakarta as the choice of forum. The natural reading of section 24.2 was as follows: the parties agreed to submit exclusively to the jurisdiction of the District Courts of Central Jakarta; however, each party retained the right to commence a suit elsewhere as if they had never agreed to submit exclusively to the District Courts of Central Jakarta. Thus, the principles in The Eleftheria (supra) did not apply. The doctrine of forum non conveniens applied.

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64. Nevertheless, in 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 1st 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 1st 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. Authority for this proposition may be found in S & W Berisford plc v New Hampshire Insurance Co < 1990 > 3 WLR 688 where, Hobhouse J, after concluding that a clause in an insurance policy was a non-exclusive jurisdiction clause and not an exclusive jurisdiction clause, went on to say (at p 694):

Such a clause, even though creating no obligation to sue only in England is a contractual acknowledgement of the jurisdiction of the English courts and a contractual agreement to the invocation of that jurisdiction ... Therefore I conclude that this clause is not an exclusive jurisdiction clause. As I pointed out in Cannon Screen Entertainment Ltd. v Handmade Films (Distributors) Ltd. such a conclusion does not mean that the clause ceases to be relevant in relation to an application such as that which is being made by the defendants on this summons. If the contract says that the assured is entitled to sue the underwriter in the English courts, then it requires a strong case for the courts of this jurisdiction to say that that right shall not be recognised and that he must sue elsewhere.

And at p 702 of the report, Hobhouse J added:

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< T > he fact that the parties have agreed in their contract that the English courts shall have jurisdiction (albeit a non- exclusive jurisdiction) creates a strong prima facie case that that jurisdiction is an appropriate one; it should in principle be a jurisdiction to which neither party to the contract can object as inappropriate; they have both implicitly agreed that it is appropriate.

65. Having said that, I would add a note of caution to my comments above. I would not go so far as Waller J in British Aerospace v Dee Howard < 1993 > 1 Lloyd's Rep 368 (at pp 375-377) who advocated a novel approach to cases where the parties have freely agreed to a non-exclusive jurisdiction clause choosing a particular jurisdiction for litigation. Waller J suggested that in such cases, the parties should be precluded from raising, in an application for a stay, any factor that would have been eminently foreseeable at the time they entered into the contact.

Factors such as the inconvenience of witnesses, the location of documents and the timing of trial cannot be raised by a party seeking a stay of action in favour of another jurisdiction. Waller J's approach is both distinct from the doctrine of forum non conveniens as set out in Spiliada as well as the principles of stay in the light of an exclusive jurisdiction clause in The Eleftheria, and I would suggest appears to be a hybrid of the two latter approaches. I preferred, instead, the approach of Hobhouse J in Berisford who considered that a non-exclusive jurisdiction clause would be considered merely as one of the factors, albeit a strong one, which went to determining the appropriateness or otherwise of a particular jurisdiction. In this case, the parties have chosen Indonesia as their choice of jurisdiction for the settlement of disputes. This is one very relevant factor that pointed towards Indonesia as an appropriate forum for the trial of this action.

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66. There were several other factors referred to by counsel for the defendant that indicated to me clearly that Indonesia was a distinctly more appropriate forum for the trial of the action. I shall list them out accordingly:

(1) The central subject of the 1st or 2nd JVA is the construction of the Indah Puri Resort, and this project was to be carried out entirely in Indonesia.

(2) PTG, the joint venture vehicle, was to be a corporate entity created and governed by Indonesian law.

(3) The relationship between the parties, whether contractually or pre-contractually, was governed by Indonesian law. (4) The alleged breaches relating to the meetings of 9 January and 31 January 1996 occurred in Indonesia.

67. In the light of the foregoing considerations, I was of the view that, at the conclusion of the first stage of enquiry under the approach in Spiliada towards the application of the doctrine of forum non conveniens, the defendant had shown that Indonesia was clearly and distinctly a more appropriate forum for the trial of this action. The onus then shifted to the plaintiffs to show that there were reasons of justice for a stay of action to be refused and proceedings in this action be allowed to carry on in Singapore.

68. Counsel for the plaintiffs sought to impress upon me that the plaintiffs would be deprived of a substantial juridical advantage if a stay of action was granted, in that interim relief in the form of an interlocutory injunction pending the trial of the dispute would be available in Singapore but not in Indonesia. Although counsel was unable to cite any case authority in support of her proposition that the availability of interim relief would be regarded as a legitimate juridical advantage, I was, nevertheless, willing to accept that being able to restrain the

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defendant from acting on purported breaches of the 1st JVA before trial would doubtless be an advantage to the plaintiffs.

69. However, it is clear from the speech of Lord Goff in Spiliada that the fact that a party may be deprived of a legitimate personal or juridical advantage does not ipso facto mean that a stay of action will be ordered, provided that substantial justice can still be achieved by trial in the competing jurisdiction. Further elaborating on this in de Dampierre v de Dampierre (supra) Lord Goff said (at p 110 of the report) in the context of the proper treatment by the courts of a legitimate personal or juridical advantage,

The weight to be given to what has been called a 'legitimate personal or juridical advantage' was considered by your Lordships' House in the Spiliada case < 1987 > AC 460, 484-484. The conclusion there reached was that, having regard to the underlying principle, the court should not, as a general rule, be deterred from granting a stay of proceedings simply because the plaintiff in this country will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the appropriate forum overseas. Reference was made, in particular, to cases concerning discovery where, as is well known, there is a spectrum of systems of discovery applicable in various jurisdictions; and the opinion was expressed that, generally speaking, injustice cannot be said to be done if a party is compelled to accept one of these well recognised systems of discovery in another forum.

Lord Templeman added the following pertinent comments at p 101 of the report:

The court must consider whether in all the circumstances it is just that the plaintiff should be allowed to exploit and enforce his English advantage and

should only refuse a stay if it would be unjust to confine the plaintiffs to his remedies elsewhere.

70. In this case, I was less than satisfied that, in the circumstances of the case, the plaintiffs would be deprived of substantial justice in Indonesia, if indeed their allegations against the defendant were well-founded. Counsel failed to discharge her onus of demonstrating to me how it would be unjust if the plaintiffs were made to litigate in Indonesia other than merely establishing the unavailability of interim relief there. Consequently, while I accepted that the plaintiffs would suffer from this juridical disadvantage if the action was stayed in Singapore, this, in my judgment, fell far short of establishing that the plaintiffs would be deprived of substantial justice if the action was heard in Indonesia. In this regard, I also had in mind the observations of Lord Diplock in The Abidin Daver (supra) where his Lordship warned (at p 410) against courts engaging in the invidious task of comparing the quality of justice obtainable under a common law system of procedure, like ours, and that obtainable under a civil law system, as in Indonesia. In this day and age, judicial chauvinism must bow to international comity.

71. Counsel for the plaintiffs then canvassed the argument that there would be excessive delay if trial were to take place in Indonesia. According to the advice of the plaintiffs' Indonesian lawyers, in the form of an opinion exhibited in the first affidavit of AYL, proceedings in the District Court at Central Jakarta may take between six months to two years to complete. However, there were many ways to delay proceedings in Indonesia and the Indonesian lawyers knew of three instances where cases have taken more than ten years to reach trial.

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72. I was unable to accept counsel's contention. I was not satisfied that the plaintiffs had sufficiently established with cogent evidence that there would be excessive delay if the trial took place in Indonesia. With all due respect to counsel, evidence of a mere three cases which have taken more than ten years to reach trial without providing me with any other details of the court system in the District Court of Central Jakarta, such as the mean length of time which a case would take to reach trial or the timetable for the steps to be taken before the matter is set down for trial, was woefully insufficient to establish delay of such magnitude that would deny the plaintiffs substantial justice if a stay of action was granted. The case of The Vishva Ajay < 1989 > 2 Lloyd's Rep 558 cited to me by counsel for the plaintiffs was clearly distinguishable on the ground that, in that case, there was a substantial body of evidence placed before Sheen J that many actions begun in Bombay did not reach trial in less than ten years and that it would be wholly exceptional for an action to come on for trial in less than six years. In such circumstances, Sheen J was prepared to hold that there would be a denial of justice if trial took place in Bombay. Quite clearly, the situation before me was far removed from that before Sheen J, and I respectfully declined to find that the plaintiffs in this case would be deprived of justice if trial took place in Indonesia because of delay.

73. Furthermore, I was of the view that the implicit allegation by counsel that the defendant would take all steps to deliberately delay proceedings in Indonesia was unwarranted, to say the least, in the absence of any evidence that the defendant had previously been guilty of such tactics vis- -vis the plaintiffs in this action or in any other connected proceedings. In any event, any such conduct on the part of the defendant could be easily be circumvented by an appropriate order that a stay of action should be granted subject to the proviso that the defendant would take all necessary steps to expedite the Indonesian

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action against the plaintiffs and granting the parties full liberty to apply in the event that the defendant breaches the proviso.

74. I would also add that, since the parties had agreed in the 1st JVA on the non-exclusive choice of an Indonesian forum, they had agreed that Indonesia prima facie would be an appropriate forum for the settlement of their disputes. Consequently, it was difficult for me to accept how the plaintiffs could now legitimately complain that it would be unjust for them to litigate with the defendant in Indonesia especially with regard to a factor such as delay in proceedings in Indonesia which surely would have been known to the parties at the time of contracting.

75. Finally, as for the lis alibi pendens in Indonesia, for the same reasons mentioned earlier that I found this factor to be a neutral one in the first stage of the Spiliada enquiry, I also found it to be a neutral factor at this second stage of the Spiliada enquiry. In other words, the pending Indonesian action, due to its infancy, was not a factor that could be taken into account against the plaintiffs in the sense of showing that the defendant had a corresponding personal advantage in litigating in Indonesia.

Conclusion 76. Indonesia being clearly and distinctly the more appropriate forum for the trial of the action than in Singapore, I found that the plaintiffs had not satisfied me that there were reasons of justice for me not to order a stay of these proceedings in Singapore. I, therefore, granted the defendant's application in Summons-in-Chamber 1905 of 1996 for a stay of all further proceedings in this action adding at the same time, the proviso that the defendant should take all necessary steps to expedite the proceedings in Case No 252/Pdt/G/1995/PN.JKT.PST filed in the Central District Court of Jakarta on

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22 May 1995. In the premises, it became unnecessary for me to hear arguments on the plaintiffs' application by way of Notice of Motion No. 49 of 1996 for interim relief, and I dismissed that application accordingly.

Lai Siu Chiu

Judge

Lai Siu Chiu J

Josephine Chong (David Lim & Partners) for the plaintiffs
Indranee Rajah and Joseph Kan (Drew & Napier) for the defendant

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