

**IN THE HIGH COURT**  
**OF SOLOMON ISLANDS**  
 (Civil Jurisdiction)

Civil Case No. 322 of 2012

<b>Austree Enterprise Pty Ltd</b>	First Claimant
And	
<b>Zong Wu Zhou</b>	Second Claimant
And	
<b>Ling Yun Zhou</b>	Third Claimant

-v-

<b>Shiyao Guo</b>	First Defendant
And	
<b>China United (SI) Corporation Ltd</b>	Second Defendant
And	
<b>Ray Chu</b>	Third Defendant
And	
<b>Junbin Guo</b>	Fourth Defendant
And	
<b>Junzong Guo</b>	Fifth Defendant

<b>Hearing:</b>	20 <sup>th</sup> March 2015
<b>Judgement:</b>	31 <sup>st</sup> March 2015

For the Claimants:	<i>J. Sullivan Q.C. and J. Finau</i>
For the First Defendant:	<i>J. Keniapisia</i>
For the 2 <sup>nd</sup> Defendant:	<i>G. Suri.</i>
For the 3 <sup>rd</sup> , 4 <sup>th</sup> and 5 <sup>th</sup> Defendants	<i>A. Rose</i>

Palmer CJ:

1. This is an application filed by leave on 11 December 2014 for a stay of proceedings on choice of forum , being *forum non conveniens* grounds, so that a foreign court, being the Chongqing People's Court of China ("the China People's Court"), can determine three preliminary issues of fact and two preliminary issues of law. These are more fully set out in the further amended application for stay of proceedings filed 10 February 2015 as follows:

A. (Factual Issues):

- (i) Whether the persons and business entities named in the Deloitte Report did receive the amounts of monies alleged by the Claimants on behalf of or for the first Defendant? And if so, whether the monies were spent on the Town Ground building, the subject of the proceedings?
- (ii) Whether the banks in China did transact the monies alleged to be transmitted by banks in China and who were the beneficiaries of those monies transmitted?
- (iii) Which building materials, if any, shipped to Honiara for the Town Ground project were paid for by the Claimants?

B. (Legal Issues):

- (i) Whether the Agreement dated 30<sup>th</sup> August 2007 is valid and enforceable against the Second Defendant under Chinese Law?
  - (ii) Whether the letter dated 21<sup>st</sup> November 2007 is valid and enforceable against the Second Defendant under Chinese Law?
2. There are two issues for determination before this court. The first one is whether the agreement<sup>1</sup> dated 30 August 2007 between the parties in this dispute expressly vests exclusive jurisdiction upon the People's Court of Chongqing. The second issue raises the question over the appropriate forum or jurisdiction for this dispute to be dealt with; question of *forum non conveniens*, whether the subject-matters raised in the application can or should be better disposed of in a more appropriate foreign forum than this court?
  3. I will deal with that second issue first. In Australia, the *forum non conveniens* doctrine can be traced back to the statement of Deane J in *Oceanic Sun Line Special Shipping Co Inc Fay*<sup>2</sup> in which he states:
 

*"A party who has regularly invoked the jurisdiction of a competent court has a prima facie right to insist upon its exercise and to have his claim heard and determined."* This proposition was derived from the unanimous decision of the High Court of Australia in 1908 in the case *Maritime Insurance Co Ltd v. Geelong Harbour Trust Commrs*<sup>3</sup> where it was held that a stay of proceedings should only be granted in cases where *"the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious"*.
  4. In England the doctrine was refined in the case of *Spiliada Maritime Corp v. Cansulex Ltd*<sup>4</sup> to the point where a stay of the proceedings will be granted *"...where the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice."*<sup>5</sup> The first stage in the Spiliada test requires the court to determine whether there is another, more appropriate, forum. And Lord Goff described a 'more appropriate forum' as being one 'with which the action had the most real and substantial connection' to be determined not only by reference to factors such as the availability of witnesses, but also by reference to other factors, such as law governing the relevant transaction and the places where the parties respectively reside or carry on business.
  5. In Australia however the development of the *forum non conveniens* doctrine rejected the broad *forum non conveniens* test and applied a more restrictive test as authoritatively restated in the case of *Voth v. Manildra Flour Mills Pty Ltd*<sup>6</sup>. In essence the test of "clearly inappropriate" forum focuses on the original jurisdiction and required Australian courts to exercise jurisdiction at the demand of the plaintiff unless the selected forum was a clearly inappropriate one. The principles underlying this test were quoted with approval from the judgement of Deane J in *Oceanic Sun Line Special Shipping Co Inc v. Fay*<sup>7</sup>:

*"The power is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgement and, to a significant extent, matters of*

<sup>1</sup> Copy of the agreement is annexed to the sworn statement of Leong Ko filed 28<sup>th</sup> February 2014 as Annexure "C"

<sup>2</sup> (1988) 165 CLR 197 at 241; 79 ALR 9 at 40

<sup>3</sup> (1908) 6 CLR 194 at 198-9 per Griffith CJ (with whom Barton, O'Connor and Higgins JJ agreed).

<sup>4</sup> [1987] 1 AC 460.

<sup>5</sup> Per Lord Goff of Chieveley at [1987] 1 AC 460 at 476.

<sup>6</sup> (1990) 171 CLR 538; 97 ALR 124

<sup>7</sup> (1988) 165 CLR 197 at 247; 79 ALR 9 at 45.

*impression. The power should only be exercised in a clear case and the onus lies on the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him. Ordinarily, a defendant will be unable to discharge that onus unless he can identify some appropriate foreign tribunal to whose jurisdiction the defendant is amenable and which would entertain the particular proceedings at the suit of the plaintiff. Otherwise, that onus will ordinarily be discharged by a defendant who applies promptly for a stay or dismissal if he persuades the local court that, having regard to the circumstance of the particular case and the availability of the foreign tribunal, it is a clearly inappropriate forum for the determination of the dispute between the parties."*

The majority decision in the Voth Case<sup>8</sup> went on to point out that the 'relevant connecting factors' and 'a legitimate personal or juridical advantage' referred to by Lord Goff in the Spiliada Case<sup>9</sup>, would be of valuable assistance.

6. There are three main factors which are relevant in considering whether the forum is clearly inappropriate.
  - (i) The first one is whether there is any significant connection between the forum selected and the subject matter of the action and/or the parties, such as the domiciles of the parties, their places of business and the place where the relevant transaction occurred or the subject matter of the suit is situated, and other factors affecting convenience or expense, such as the availability of witnesses.
7. In applying this consideration, I note that there is a demonstrably recognizable and significant connection between the forum selected by the Claimant being Solomon Islands and the subject matter of the action being the cost of the construction of the Town Ground complex, who paid for it and issues of shareholding in the second defendant (China United (SI) Corporation Ltd) a company incorporated in Solomon Islands. These demonstrate that ultimately all, if not the majority of transactions were in relation to those two crucial issues, both of which are situated in Solomon Islands. As well, all but one of the defendants is a resident here. In any event it is manifestly clear that the primary purpose and objective of the business transactions and dealings in this suit relate to the construction of the Town Ground complex.
8. While the majority of purchases and transactions may have originated in China, the subject matter of the litigation is inextricably connected to Solomon Islands as the country where the project or business is situated and being the ultimate destination of all transactions. I am more than satisfied that much of the monies sourced in China ended up being disbursed or applied to the disputed work/project in Solomon Islands. I am also satisfied the issue of breach of agreement arises in this jurisdiction.
9. On the issue of witness availability, as pointed out by learned Counsel Mr. Sullivan QC, the issue of availability of witnesses will be determined by the list of witnesses to be finalized by the parties and intended to be called. There is no evidence to suggest that this is going to be an issue or an impediment to the smooth progression of the trial.
10. On the issue of having a Chinese Law Expert being required to attend court and provide assistance on the interpretation and the application of Chinese Law, including the application of the Company Law of the People's Republic of China, I find to be reasonable in the circumstances. After some discussions a middle ground appears to have been reached with a court appointed expert being considered. In any event there is nothing to stop either party from providing any expert on Chinese Law if they so desire on notice.

<sup>8</sup> Voth v. Manildra Flour Mills Pty Ltd, (1990) 171 CLR 538; 97 ALR 124

<sup>9</sup> [1987] 1 AC 460

11. This issue is directly connected to the issue of *lex fori*, which provides apart from the Agreement itself, in the Preamble, that *the Company Law of the People's Republic of China, the Company Law of Australia* and the *Articles of Association* of the proprietary limited company, and *the Company Law of Solomon Islands* and the *Articles of Association* of the proprietary limited company to be applied. In the event of conflict the law to take precedence is also as prioritized in the agreement. The fact however there may be three sets of law to be applied is no bar or hindrance to the courts in this country from continuing to take carriage of this dispute thereon. So far I am not satisfied it has been established on the balance of probabilities that this court is *clearly unsuitable* or unable to adjudicate over any legal issues that may arise including issues of conflict of laws involving Chinese Law or Australian Law. In relation to Chinese Law the major obstacle would be the language barrier but if that can be overcome as has been submitted by Counsel Sullivan in this case then I find no substance in the argument that this Court is *clearly inappropriate* or unsuitable to deal with the interpretation of any of those laws as they may apply to this dispute. And considering the fact that the issues raised relate for instance to the setup of companies in Australia and Solomon Islands, it is only logical that much of the laws that will apply from the outset will be confined to the Company Law in Australia and the Solomon Islands.
12. Similar considerations will apply obviously to any interpreter that may be engaged to assist with interpretation in court on Chinese law and so there does not seem to be any impediment on having Chinese witnesses whose statements have been provided to be required for cross examination as demanded.
13. On the issue of convenience and expenses, the fact the defendants have submitted to the jurisdiction of this court from the outset have resulted in great expense and cost being expended to date, with a total of about 3½ years to date. I note that if commenced in a foreign forum not only will there be further delay but is bound to entail more costs. As also pointed out by Mr. Sullivan QC, the defendants have not shown how soon such matter will be taken carriage of by that foreign court and for the matter to be disposed of. I am satisfied these provide all the more stronger reasons for the matter to remain and be heard in this jurisdiction.
14. For stronger reasons, the application does not completely seek to divest the jurisdiction of this court other than seek to have some issues only being considered by the foreign court. I am not satisfied it has been shown on the balance of probabilities that the matters raised could not equally be satisfactorily disposed of in this jurisdiction and more importantly, that it is *clearly inappropriate* for those matters to be heard and disposed of in this jurisdiction. Directions concluded to date demonstrate that the matter is well on its way to being ready for hearing before this court, at the earliest in July/August 2015 with a time estimate of three months hearing time. This court has sought to engage a Commissioner to have the matter tried as a priority with the support of this Government. An order for stay will simply delay matters further and cannot guarantee trial of this case for this year at the earliest for it will then be subject to the matter to be satisfactorily disposed of by the foreign court which even at this point of time is not clear and uncertain. Both parties appreciate the importance of having the dispute in this subject matter disposed of quickly and with respect to submissions for another alternative forum I am not satisfied that will serve any useful purpose other than more costs and delays for the parties in this case.
15. Equally it has not been shown on the balance of probabilities that the *People's Court of Chongqing* is a *more appropriate forum* than having the matter dealt with here. The fact that the subject matter of the dispute and much of the issues raised in the claim relate to issues in this jurisdiction is all the more reason that the matter be tried here.
16. In addition, I accept submissions of learned Counsel Mr. Sullivan QC on the issue of a time limitation applying to the dispute in the foreign court and that the Claimants stand the risk of being prejudiced by that fact if a stay is imposed by this court.

17. The second factor to be considered in assessing whether the forum is *clearly inappropriate* is whether there is any legitimate and substantial juridical advantage to the plaintiff/claimant such as greater recovery, more favorable limitation period, better ancillary procedures, or assets within the jurisdiction against which any judgement can be enforced.
18. On this issue, the answer is quite favourable to the claim of the Claimant being pursued in this jurisdiction. The bulk of the assets are in this jurisdiction and so in terms of recovery, enforcement and process all favour having the matter tried in this jurisdiction.
19. Finally on the question whether the *lex fori* will supply the substantive law to be applied in the resolution of the subject case or whether the matter is governed by foreign law, I am not satisfied as pointed out earlier in this judgement that foreign law is the substantive or primary law to be applied when the subject matter is in this jurisdiction and all or most of the related issues raised in this claim pertain to matters within this jurisdiction. And even where foreign law may be considered there is no impediment for that to be considered in this jurisdiction by the courts of this country as explained in this judgement.

#### The Town Ground Agreement.

20. The Defendant relies on this agreement as expressly confining jurisdiction to any disputes between the parties to be resolved by *the People's Court of Chongqing*. The crucial words sought to be relied on in that agreement dated 30 October 2013 are set out in Clause V as follows:

*"Both Parties shall fully fulfill the terms of the Agreement. If there are any matters not mentioned herein or any disputes, they shall be resolved through negotiation. If negotiation fails, they can be submitted to the People's Court of Chongqing for mediation."*

21. This clause assumes that in the event of a dispute the parties will try to have the matter resolved amongst themselves. Where they fail to do so, they can have it submitted to the People's Court of Chongqing for mediation. The word 'can' in common parlance is discretionary or optional. It gives the parties first option to refer it for mediation. I am not satisfied the word 'can' should be construed as obligatory, that is imposing a mandatory requirement on the parties. Any other construction would be erroneous for a fundamental requirement in any mediation is voluntariness or willingness to submit to mediation in the first place, that is, the parties agree to go to mediation in the first place. Where one of the parties decline or refuse to go to mediation then normally it is not considered. In this case too it appears that mediation has been bypassed as an option and the litigation commenced instead. It would be improper therefore for any court to try and impose mediation in the circumstances of this case at this point of time. That however does not rule out mediation as an alternative dispute resolution option, later or at any time hereafter *if the parties agree*.

#### Conclusion.

22. The application of the clearly inappropriate forum test as against the more appropriate forum test, is more a balancing exercise for I might add the two tests can also be viewed as the opposite sides of the same coin, that is, if the alternative forum court is more appropriate then alternatively it is because the local forum is clearly inappropriate in the circumstances and vice versa.
23. The application for stay is dismissed with costs certification for Queen's Counsel and overseas junior counsel. I also make an order that Professor Bing to be confirmed as the Court appointed Chinese Law Expert. This matter to be listed for further mention/directions, in which I will then be in a better position to provide further update to having a judge being available to hear this case.

#### **Orders of the Court:**

1. Dismiss application for stay.
2. Award costs against the Defendants with certification for Queen's Counsel and overseas junior counsel.
3. Appoint Professor Bing as the Court appointed Chinese Law Expert.
4. Adjourn for further mention/directions to 30<sup>th</sup> April 2015 at 1:30 pm.

**SIR ALBERT R. PALMER CBE**

**The Court.**