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Case Note

EXIT, STAGE 2, FOR THE PLAINTIFF IN SERVICE OUT OF JURISDICTION?

Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV
[2020] 1 SLR 226

In *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226, the Singapore Court of Appeal in an observation cast doubt on the legal possibility of the plaintiff obtaining leave for service out of jurisdiction where Singapore is not the natural forum but substantial injustice would result from trial in the clearly more appropriate foreign court. This is part of Stage 2 of the traditional test in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 that has informed the exercise of jurisdiction of the Singapore court for many years. This note argues that the doubt is unfounded.

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I. Introduction

1 It is trite law that, absent any applicable jurisdiction agreement, the doctrine of natural forum governs the exercise of *in personam* jurisdiction in Singapore. The principles as expounded in the leading case of *Spiliada Maritime Corp v Cansulex Ltd*[1] ("*Spiliada*") were accepted in *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia*[2] and remain relevant today.[3] The basic principle is that the dispute should be tried in the natural forum, *ie*, where, taking into account all the

1 [1987] AC 460.
2 [1992] 2 SLR(R) 345.
3 *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391; *Rappo Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [123]; *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327.

circumstances of the case, the case may be tried more suitably for the interests of all parties and the ends of justice.[4] The inquiry proceeds in two stages: first, the *prima facie* natural forum is located, focusing on the connections of the case and the parties, the factors of convenience and expense, and the overall shape of the litigation ("Stage 1"); and second, whether there are nevertheless reasons of justice why the case should not be tried in that forum ("Stage 2"). Conventional wisdom has accepted two implications from this. First, when the defendant is served within jurisdiction, the Singapore court will ordinarily hear the case unless the defendant can demonstrate that there is an available and more appropriate forum elsewhere. If the defendant succeeds, then the court will ordinarily stay proceedings unless the plaintiff can show that substantial injustice will result from trial abroad.[5] Conversely, when the plaintiff is seeking leave for service out of jurisdiction, the plaintiff must demonstrate that Singapore is the more appropriate forum, failing which he may still obtain leave for service out of jurisdiction if it can be demonstrated that substantial injustice will result if the dispute is not tried in Singapore.[6]

2 The Singapore Court of Appeal judgment in *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*[7] ("*Oro Negro*") is important in several respects, but this note will focus only on its observation casting doubt on the legal possibility of the Singapore court granting leave for service out of jurisdiction where Singapore is not the natural forum in Stage 1 but substantial injustice would result if the case were to be tried in the clearly more appropriate forum elsewhere.

3 The court observed:[8]

> In the event that Singapore was not the more appropriate forum, it was an open question whether the second stage of the *Spiliada* test was applicable in the context of leave applications for service outside jurisdiction (*ie*, whether the Singapore court can nevertheless grant leave for service out if the plaintiff can show that substantial justice cannot be done in the otherwise appropriate forum). There appeared to be authorities pointing both ways (see *Lewis v King* [2005] ILPr 16; *Metall und Rohstoff AG v Donal[d]son Lufkin & Jenrette Inc* [1990] 1 QB 391 at 488 which considered the second stage of the *Spiliada* inquiry; *cf Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 ('*Konamaneni*') at [175]–[176]; *Fentiman* at paras 12.27–12.28

4 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 474, 476 and 482.
5 This note does not address the important question of what amounts to substantial injustice for this purpose. See further, Adrian Briggs, *Civil Jurisdiction and Judgments* (Routledge, 6th Ed, 2015) at para 4.91.
6 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [251].
7 [2020] 1 SLR 226.
8 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80(d)].

> which suggest that the plaintiff has no cause to complain that it would be a denial of justice to refuse permission to serve out). However, given our determination that Singapore was clearly the more appropriate forum in this case, and since this point was not argued before us, it was not necessary for us to express any views on it.

4 The issue, while not live, was significant enough for the court to invite future challenges by counsel to the conventional wisdom on the applicability of Stage 2 of the *Spiliada* test to the plaintiff when Singapore is not the more appropriate forum under Stage 1. Notably, it leaves unchallenged the proposition that, in the event that Singapore is the natural forum at Stage 1, a defendant can invoke Stage 2 to argue denial of substantial justice if the trial should proceed in Singapore.

5 This doubt made an encore appearance in the Court of Appeal decision in *MAN Diesel & Turbo SE v IM Skaugen SE*,[9] and has since been highlighted in several High Court decisions.[10] The stage has thus been set for Stage 2 of the *Spiliada* test to be expurgated from the law as far as the plaintiff is concerned in a service out of jurisdiction situation. The objective of this note is to argue that there is no legal or policy basis for this development.

II. Revisiting *Spiliada*

6 The leading authority in favour of allowing the plaintiff to invoke Stage 2 in a service out of jurisdiction case when a foreign court is *prima facie* the more appropriate forum in Stage 1 is *Spiliada* itself. Lord Templeman said:[11]

> Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of *forum non conveniens* will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of *forum conveniens* will only grant leave if the plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere.

9 [2020] 1 SLR 327 at [31].

10 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [78]; *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [155]–[159].

11 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 464–465 (Lord Griffiths and Lord Mackay agreeing).

7 The last sentence is of particular significance as it clearly qualified both scenarios of service in and out of jurisdiction. The reference to the court having jurisdiction in respect of service out of jurisdiction is not circular, because under English law at that time, the court had jurisdiction if the overall conclusion was that a head of jurisdiction was satisfied and the *case* was a *proper* one for service out of jurisdiction.[12] Whether the case was a proper one in turn depended on the satisfaction of (both stages of) the *Spiliada* test. There is no logical difficulty fitting both stages of the *Spiliada* test as part of the package of a proper case for service out of jurisdiction.

8 Lord Goff's approach[13] is more nuanced. There was no doubt in his mind that the same principles applied in both service within and service out of jurisdiction.[14] Having set out the two-stage approach for service within jurisdiction cases, he pointed out three aspects where the service out of jurisdiction situation is different:[15] (1) the plaintiff bears the burden of showing that the forum is the natural forum for service out of jurisdiction; (2) the principles operate within a judicial discretion bounded by the statutory language of a "proper" case for service out of jurisdiction;[16] and (3) service out of jurisdiction may be "exorbitant" in some cases.

9 The first is uncontroversial.[17] On the second, the relationship between the proper case and the *Spiliada* test has been explained above.[18] On the third, Lord Goff pointed out that it simply means that the discretion to grant leave should be exercised with caution when there is an available alternative forum, because the degree of connections with the forum can vary considerably depending on the factual circumstances of individual cases.[19]

10 Turning his mind to the facts of the case, which involved service out of jurisdiction, Lord Goff stated that, if he had not found England to be the natural forum (Stage 1), the fact that the plaintiff was time barred

12 Rules of the Supreme Court (UK) O 11 r 4(2). In Singapore, see O 11 r 2(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
13 Lord Keith, Lord Griffiths and Lord Mackay agreeing.
14 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 480.
15 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 480–481.
16 Rules of the Supreme Court (UK) O 11 r 4(2). In Singapore, see O 11 r 2(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).
17 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [71]–[77].
18 See para 7 above.
19 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 481–482, referring to Lord Diplock's observations in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 at 65.

in the foreign (natural) forum would have been a relevant factor on the basis that it was reasonable in the circumstances that the plaintiff had not taken out a protective writ in that foreign jurisdiction. He considered that, in such a case where the invocation of the limitation period depended on the defendant, the appropriate order as a matter of practical justice would have been to disallow leave for service out of jurisdiction on the condition that the defendant undertook not to plead the time bar in the foreign jurisdiction.[20] This order logically presupposes that there was a legal basis to grant leave for service out of jurisdiction in the first place, because if the defendant refuses or fails to make, or breaches, that undertaking, the consequence is that leave will indeed be granted.

11 The speeches in *Spiliada* unanimously support the proposition that Stage 2 is applicable to the plaintiff in a service out of jurisdiction case when the forum is not the *prima facie* natural forum in Stage 1. It was thus not surprising to see lower courts taking the same approach subsequently. For example, in *Metall und Rohstoff GmbH v Donaldson Lufkin & Jenrette*,[21] the Court of Appeal accepted that it was correct in principle that leave could be granted for service out of jurisdiction even if England was not the natural forum if it was necessary for the purpose of doing substantial justice between the parties.[22]

III. The turn in English law

12 When the Civil Procedure Rules 1998[23] ("CPR") came into effect in England on 26 April 1999, the test for granting leave for service out of jurisdiction changed from a proper case to be heard in the English court[24] to England being the "proper place" for the trial.[25] The assessment turned its focus on the forum as a proper *place* for the trial, and away from whether the *case* as a whole is one that it would be proper to hear in the forum. At first blush this appears to confine the inquiry effectively to Stage 1 on the location of the *prima facie* natural forum. However, the *Spiliada* two-stage test[26] has remained intact, though recast in slightly different language at least for the purpose of service out of jurisdiction.

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20 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 487–488.

21 [1990] 1 QB 391 at 488.

22 *Metall und Rohstoff GmbH v Donaldson Lufkin & Jenrette* [1990] 1 QB 391 at 488.

23 SI 1998 No 3132.

24 Rules of the Supreme Court (UK) O 11 r 4(2). In Singapore, see O 11 r 2(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

25 Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) r 6.21(2A). Now r 6.37(3).

26 There is some controversy in English law whether the test is properly expressed in one or two stages: see *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 at [131] and [164]; and *Fan Heli v Zhang Shujing* [2016] 1 SLR 1457 at [21]. In substance it should not make any difference; it is a matter of how judges decide

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13 In *Konamaneni v Rolls Royce Industrial Power (India) Ltd*[27] ("*Konamaneni*"), Lawrence Collins J said:

> 175 In a case involving service out of the jurisdiction under CPR r 6.20 the burden is on the claimants to show that England is clearly the more appropriate forum, and if they do not discharge that burden, that is the end of the matter and there is no room (as there is in the case of staying of actions) for the English court to retain jurisdiction if the claimant shows that it would be unjust for him to be deprived of a remedy on the ground that, in the words of Lord Goff in *Connelly v RTZ Corpn plc* [1998] AC 854, 873 'substantial justice cannot be done in the appropriate forum'.
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> 176 … in the context of service out of the jurisdiction there is room only for such an argument if the injustice in what would otherwise be the appropriate forum is such that it cannot be regarded as an 'available forum'. In such a case it might be argued that England is clearly the more appropriate forum, because there is no effective alternative. …

14 By relying on the idea of unavailability of the foreign court, the court provided a means to reach the conclusion that England was the *proper place* for the trial, where the same destination could not have been reached on the language of the traditional two-stage approach. This proceeds on two premises: (1) the proper place for the trial must be the more appropriate forum; and (2) the traditional understanding of the function of Stage 2 to allow a court other than the more appropriate court to exercise jurisdiction.

15 There has been controversy over the meaning of availability of a forum under the *Spiliada* test.[28] Is the inability to obtain practical justice from a foreign jurisdiction an issue of availability of the forum[29] under Stage 1 or should it properly be considered under Stage 2?[30] The Singapore Court of Appeal has endorsed the latter view.[31] Thus, in Singapore law at least, the availability requirement in Stage 1 should focus on the technical availability of the foreign forum, and questions of substantial justice should be considered in the round in Stage 2. Given the

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to organise the materials in reaching the decision whether to grant leave: Adrian Briggs, *Civil Jurisdiction and Judgments* (Routledge, 6th Ed, 2015) at para 4.92. In Singapore law, the test is clearly divided into two stages: *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377.

27 [2002] 1 WLR 1269.

28 See, *eg*, Adrian Briggs, "*Forum Non Conveniens* and Unavailable Courts" (1996) 67 BYBIL 587; Adrian Briggs, "The Availability of the Courts of the Natural Forum, and the Definition of the Issues" (1999) 70 BYBIL 319 and L Merrett, "The Meaning of an 'Available' Forum" (2004) 63(2) CLJ 309.

29 *Mohammed v Bank of Kuwait* [1996] 1 WLR 1483 at 1490.

30 *Askin v ABSA Bank Ltd* [1999] ILPr 471 at [28]–[29].

31 *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR(R) 711 at [29]–[31]. See also *TGT v TGU* [2015] SGHCF 10 at [28].

shift in the statutory language in the test for service out of jurisdiction, the English court unsurprisingly revisited the concept of availability to re-accommodate the common law principles in *Spiliada*.

16 *Lewis v King*,[32] cited in *Oro Negro* as a case applying Stage 2 in a service out of jurisdiction case, was decided under the CPR. The Court of Appeal in *Lewis v King* accepted[33] as correct and applicable to the CPR context the pre-CPR observation in *Metall und Rohstoff GmbH v Donaldson Lufkin & Jenrette* cited above.[34] The Court of Appeal approached the matter, consistently with the language of the CPR, on the basis that the exercise of discretion turned on whether England was the appropriate forum.[35] While accepting *Spiliada* as binding English law, the court found it "rather difficult" to accept an approach that requires it to ascertain the *appropriate* forum, and then allow the plaintiff to proceed in an *inappropriate* forum because he had acted reasonably to let time lapse in the appropriate foreign jurisdiction.[36] This could be read as a specific criticism of the reliance on the time-bar factor to demonstrate substantial injustice of trial abroad under Stage 2. However, in line with the court's search for the appropriate forum, it could also be interpreted more broadly as a criticism of an approach that seeks to determine the appropriate forum but which departs from that same principle of the determination of the appropriate forum. While the former is a valid criticism, the latter assumes that "appropriate forum" bears the specific meaning of the *prima facie* natural forum in Stage 1 of the test in *Spiliada*.

17 Clarification soon arrived in a more explicit recast of the *Spiliada* test in English law in *Deripaska v Cherney*.[37] The traditional understanding of the *Spiliada* test is that Stage 1 is focused on locating the natural forum for the trial, while Stage 2 is about exceptional reasons of substantive justice why the case should not be heard in the natural forum.[38] There is latent ambiguity in the phrases "more appropriate forum" or "appropriate forum" or "natural forum". They could reflect either the determination at the conclusion of the Stage 1 inquiry or the overall conclusion after applying both stages.[39] This is why the reference to the natural forum or

32 [2005] ILPr 16.
33 *Lewis v King* [2005] ILPr 16 at [37]–[39].
34 See para 11 above.
35 *Lewis v King* [2005] ILPr 16 at [20].
36 *Lewis v King* [2005] ILPr 16 at [38].
37 [2009] EWCA Civ 849.
38 *Dicey, Morris and Collins: The Conflict of Laws* (Lord Collins gen ed) (Thomson Reuters, 15th Ed, 2012) r 38(2); *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [38].
39 Compare *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80(c)] with *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [70].

more appropriate forum in Stage 1 is often qualified by "*prima facie*". As framed in *Deripaska v Cherney*, even though the foreign court in question may be the *natural forum* in Stage 1, for reasons that substantial justice could not be obtained in the foreign court, England was the *appropriate forum* in the case (as the overall conclusion after applying both stages).[40]

18 Thus, when substantial injustice would result from trial in the foreign natural forum as determined under Stage 1, the English court becomes the only *available* forum (in the *Konamaneni* formulation)[41] or the *appropriate* forum (in the *Deripaska v Cherney* formulation),[42] and therefore the *proper place* for the trial. There is a conceptual difference between the two formulations. In the former, unavailability of a foreign forum is a decisive factor at Stage 1 that disapplies the rest of the *Spiliada* test entirely,[43] while the second formulation weighs the question whether the substantial injustice factor is sufficient to justify having the case heard outside the natural forum in Stage 2. Although the second is conceptually neater,[44] there is unlikely to be any practical difference. If there is cogent evidence supporting the argument of substantial injustice were the trial not to be held in the forum, then the English court, even when it is not the natural forum under Stage 1 of the traditional *Spiliada* test, will almost inevitably be the *proper place* for trial under the CPR on either view. The difference really goes to how the materials considered by the court are organised in order to reach the final conclusion.[45] Nothing of substance has changed in English law; only shifts in linguistic emphasis in response to the change in the statutory test for service out of jurisdiction.

19 Of course, positive and cogent evidence will always be needed to support any allegation of substantial injustice,[46] and the threshold should

40 *Deripaska v Cherney* [2009] EWCA Civ 849 at [20]–[21], [67] and [68].

41 See paras 13–14 above.

42 See para 17 above.

43 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80(a)].

44 See para 15 above.

45 See, in an analogous context, Adrian Briggs, *Civil Jurisdiction and Judgments* (Routledge, 6th Ed, 2015) at para 4.92.

46 In the case of systemic failures, it is enough to show a real and substantial risk of injustice in the foreign court: *Rotary Engineering Ltd v Kioumji & Eslim Law Firm* [2017] 1 SLR 907 at [15]; *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [95]–[97]. The criticisms in Adrian Briggs, "*Forum Non Satis: Spiliada* and an Inconvenient Truth" [2011] LMCLQ 329 and Adrian Briggs, "Russian Oligarchs and the Conflict of Laws" (2008) BYBIL 543 at 546–547 appear to be directed at outer limits of what could count as substantial injustice rather than the relevance of substantial injustice within Stage 2 in the *Spiliada* test. See also Adrian Briggs, *Civil Jurisdiction and Judgments* (Routledge, 6th Ed, 2015) at para 4.91. *Cf* Ardavan Arzandeh, *Forum (Non) Conveniens in England: Past, Present, and Future* (Hart, 2018) at pp 79–83.

be high enough so that the inquiry does not creep into a comparison of relative merits of different legal systems. But within these parameters, there is no need for Singapore law to change the formal way in which the *Spiliada* formulation has been traditionally expressed, given that the statutory hurdle is that the *case* is a *proper* one for leave to be granted.

IV. Legal and normative arguments

20 Central to supporting the proposition in *Oro Negro* casting doubt on the applicability of Stage 2 to the plaintiff in a service out of jurisdiction case are passages from Richard Fentiman, *International Commercial Litigation*.[47] The key argument cited from the book is that unlike the case where the defendant has been served as of right and is applying for stay of proceedings (where jurisdiction has already been established), in a situation for service out of jurisdiction, "a claimant has no cause to complain … that it would be a denial of justice to refuse permission to serve out".[48] It is argued that denial of substantial justice in the foreign natural forum does not aid the plaintiff's case because jurisdiction has yet to be established.

21 This argument presupposes that the finding of the forum being the appropriate forum is *sine qua non* for service out of jurisdiction. This is undoubtedly correct in the context of the book discussing the CPR that requires the forum to be the *proper place* for the trial. It is, however, not the logical conclusion where the test is, as in the case of Singapore law at present, a *proper case* for service out of jurisdiction.[49] In any event, the author also recognised the analytical shift in English law to the "available" forum,[50] and further argued that the English law approach is consistent with the European Convention on Human Rights that guarantees the right to a fair trial.[51]

47 Oxford University Press, 2010.

48 Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) at para 12.27; *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80].

49 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 11 r 2(2).

50 Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) at para 12.30.

51 Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) at para 12.29. It has been argued that this Convention should be the only basis for not having the trial heard in the natural forum, but this is an argument to depart from the existing principles of *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 as applied in English law, and without the safeguard at treaty level, it is much more difficult to justify abolishing the second stage altogether: Ardavan Arzandeh, *Forum (Non) Conveniens in England: Past, Present, and Future* (Hart, 2018) ch 5.

22 There has been further academic support for the argument that there is no room for Stage 2 in service out of jurisdiction cases where Singapore is not the natural forum under Stage 1:[52]

> 11.106 … the position should be that if the plaintiff cannot show that Singapore is the natural forum in stage one, the inquiry stops there. In other words, stage two *cannot* even be engaged if stage one is not even satisfied. It is only if stage one is satisfied that the inquiry moves to stage two where the possible injustice that the defendant may suffer as a result of being served outside Singapore might be considered. …
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> 11.107 … it mirrors how the application of the test is seen in *Spiliada* … in the context of an application for a stay. In that context, the defendant bears the burden of showing that there is a more appropriate forum (than Singapore) elsewhere and, if it cannot, the inquiry stops there.
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> [emphasis in original]

23 There are two parts to this critique. The authors first propose an asymmetric approach: Stage 2 only applies to the defendant if Singapore is the natural forum at Stage 1; it does not apply to the plaintiff if Singapore is not the natural forum. The second is that this approach "mirrors" the test for stay, where they argue that there is no Stage 2 if the defendant cannot demonstrate that there is a clearly more appropriate forum elsewhere.

24 The second part of the critique appears to stem from an overly restrictive reading of *Spiliada*. Lord Goff clearly contemplated the possibility of stay, though it may be rare:[53]

> If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will *ordinarily* refuse a stay … It is difficult to imagine circumstances where, in such a case, a stay may be granted. [emphasis added]

25 The judgment of the Court of Appeal delivered by Chao Hick Tin JA in *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd*[54] is cited by the authors for the proposition that Stage 2 cannot apply in a stay application after the defendant has failed to show a clearly more appropriate forum elsewhere at Stage 1.[55] But Chao JA only went as far as to endorse the language of Lord Goff in *Spiliada* that a stay will "ordinarily" be refused. Indeed, in *Ivanishvili, Bidzina v Credit Suisse*

52 Joel Lee Tye Beng & Joel Leow Wei Xiang, "Conflict of Laws" (2019) 20 SAL Ann Rev 251 at paras 11.106–11.107.
53 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478.
54 [2001] 1 SLR(R) 104 at [16].
55 Joel Lee Tye Beng & Joel Leow Wei Xiang, "Conflict of Laws" (2019) 20 SAL Ann Rev 251 at para 11.107, fn 188.

Trust Ltd,[56] Chao Hick Tin SJ (dissenting on the assessment of the facts) would have stayed the Singapore proceedings under Stage 2 even if Singapore was the clearly more appropriate forum in Stage 1. Moreover, remoteness of the possibility is not a good justification for a *rule* to exclude the possibility altogether, when access to justice is at stake. The authors accepted that a defendant in a service out of jurisdiction case *can* invoke the substantial injustice argument in Stage 2 if Singapore is the natural forum in Stage 1.[57] This is an equally remote possibility.

26 In any event, caution needs to be exercised in discussing mirror images when applying *Spiliada*. The starting point in *Spiliada* as accepted in Singapore law[58] is that the same substantive principles apply whether service is within or outside Singapore. The burden is, however, in the obverse. Where the defendant has been served within jurisdiction,[59] jurisdiction is already established and the defendant has to apply to court to stay the proceedings. Thus, he bears the burden of convincing the court not to exercise jurisdiction. Where the defendant is served out of jurisdiction, the plaintiff is applying to the court for service out of jurisdiction at the first instance. Although the substantive arguments are heard only at the point when the defendant is applying to set aside the service out of jurisdiction, the question even at that point is whether leave should have been granted at all,[60] and so the burden remains on the plaintiff, at both *ex parte* and *inter parte* stages, to convince the court to exercise jurisdiction.[61] There is a good and logical reason for this obversion, reflecting a fundamental principle of civil procedure in common law systems that the party making an application should generally carry the burden of convincing the court that it should succeed. Nevertheless, the difference in the burden has been observed to have little practical significance.[62]

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56 [2020] 2 SLR 638 at [147] and [154].

57 Joel Lee Tye Beng & Joel Leow Wei Xiang, "Conflict of Laws" (2019) 20 SAL Ann Rev 251 at para 11.108. See also *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [250].

58 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [77]; *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [31]; *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1997] 3 SLR(R) 363 at [22].

59 Joel Lee Tye Beng & Joel Leow Wei Xiang, "Conflict of Laws" (2019) 20 SAL Ann Rev 251 at para 11.106.

60 Though not necessarily at the point in time of the *ex parte* application, as subsequent events may be considered: *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [47]–[55].

61 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [71]–[75].

62 *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [19]; *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2020] 1 SLR 327 at [80].

27 The question posed appears to be the obverse as well. In the former, the inquiry is whether there is a clearly more appropriate forum elsewhere. In the latter, the inquiry is whether Singapore is the clearly more appropriate forum. The practical difference is minimal, because of the relativity of the natural forum,[63] and within an adversarial system the court only considers fora that have been raised by the parties. In both cases the defendant bears at least the evidential burden of demonstrating that there is a clearly more appropriate forum elsewhere. There may be marginal cases where the legal burden might make a difference but they are probably rare.[64] There is also a good reason for this difference. The starting point in *Spiliada* is that the case should be tried in the natural forum. To demonstrate that this principle is being complied with, the defendant applying for stay of proceedings needs to argue that the natural forum is elsewhere, and the plaintiff applying for leave for service out needs to argue that the natural forum is Singapore. Thus, this obversion also follows from the same principle of civil procedure in the previous paragraph.

28 Subject to these procedural constraints, in principle *Spiliada* should apply in the same way in both situations. The rationale for applying the same principles to both service within and service outside jurisdiction is that the distinction between the two is technical. In both situations, the defendant, the cause of action and the subject matter of the suit can have vastly varying degrees of connection with the forum. This is especially so given the increasing pace of globalisation and cross-border mobility of transactions, accelerated by technological developments. The modern global trend in common law systems is to enlarge the scope of extraterritorial jurisdiction, subject to control by the natural forum doctrine.[65] Beyond procedural constraints, there is no reason to complicate the discourse with mirror images, whether in reverse or obverse. The mirror analogy may be useful to the extent that the same principles should be *reflected* in both contexts while accommodating the procedural differences.[66] Any asymmetry should require justification.

29 Access to justice has been an important consideration in determining whether there is a proper case for service out of jurisdiction,

63 *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [53] and [111].

64 *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [19]; *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2020] 1 SLR 327 at [80].

65 Most evident in the proposals of the Ministry of Law at <https://www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system> (accessed 1 April 2021).

66 This is the sense of "mirror" used in *IM Skaugen SE v MAN Diesel Turbo SE* [2018] SGHC 123 at [250].

even before *Spiliada*.[67] If there could be situations where it is justified for the Singapore court to try a case even if it is not the *prima facie* natural forum if substantial justice would otherwise be denied,[68] then such situations could equally arise in service within or service outside Singapore cases. There is nothing in the current legal framework that requires a different approach to be taken in service out of jurisdiction cases. There is also no reason of policy to take a more restrictive approach for service out of jurisdiction.

30 Further, one of the underlying themes in *Spiliada* is the even-handed treatment of the plaintiff and the defendant. If Stage 2 is accepted as part of Singapore law, then there is no justification for differentiating the plaintiff and the defendant as a matter of law, though in practice it will probably be more difficult for the defendant to show that substantial injustice will result from trial in Singapore than for the plaintiff to show that substantial injustice will result from trial abroad.[69]

V. Conclusion

31 The principles of natural forum in *Spiliada* perform a very important function in the private international law of Singapore in regulating *in personam* jurisdiction in cross-border cases when there are no operative jurisdiction agreements. As long as these principles remain relevant, they should apply whether service is effected within or outside jurisdiction, subject to differences resulting from the procedural contexts.

32 The English courts have had to adapt the formulation of the *Spiliada* principles to accommodate the change in the statutory language of the test for service out of jurisdiction from a proper case to the proper place, but without changing the substantive principles in the two stages of the *Spiliada* test. As long as the test in Singapore law remains that of a *proper case* for service out of jurisdiction, there is no reason in law or policy to doubt the continuing relevance and applicability of both stages of the *Spiliada* test even in its current formulation in the context of service out of jurisdiction to the plaintiff or the defendant. However, the proper case test is slated to be replaced very soon[70] by new Rules of

67 *Oppenheimer v Louis Rosenthal & Co AG* [1937] 1 All ER 23; *Aaronson Bros, Ltd v Maderera Del Tropico SA* [1967] 2 Lloyd's Rep 159 at 162.

68 See, *eg*, *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814 at [102].

69 *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457 at [62]. But *cf* para 25 above.

70 By the end of 2021: <https://www.mlaw.gov.sg/news/public-consultations/response-to-public-feedback-on-the-civil-justice-reforms> (accessed 6 July 2021).

Court that eliminate the distinctive heads of O 11 r 1, and require only that the Singapore court has jurisdiction[71] or is the appropriate court.[72] The *Spiliada* test will only be triggered by the second basis of jurisdiction (the appropriate court), under which cases outside of the Choice of Court Agreements Act[73] will generally fall. Once the proposed reforms take effect, the English cases will become much more relevant to Singapore, and the *Spiliada* test will need similar linguistic recasting to continue functioning properly.

33 Indeed, the revamped language of the *Spiliada* test in English law has already seeped into Singapore jurisprudence. In *Allenger, Shiona v Pelletier, Olga*,[74] in the context of refusing an application for leave for service out of Singapore where the plaintiff had conceded that Singapore was not the natural forum for the substantive dispute,[75] Andrew Ang SJ endorsed the *Konamaneni* approach,[76] but concluded in language that is also consistent with *Deripaska v Cherney*:[77]

> It would be difficult to see how the court can have such broad discretion to allow a party to litigate in Singapore when its jurisdiction has yet to be established. That is why an argument on injustice still has to be targeted towards the issue as to where the appropriate forum lies.

With respect, however, insofar as the exercise of the discretion of the Singapore court is premised on a *proper case* for service out of

71 This appears circular at first blush because under s 16(1)(*a*)(ii) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), jurisdiction is established by service authorised by the Rules of Court (Cap 322, R 5, 2014 Rev Ed). The "jurisdiction" in the proposed rule must refer to jurisdiction conferred by a statutory source external to O 11 and s 16(1)(*a*). One example is the Choice of Court Agreements Act (Cap 39A, 2017 Rev Ed).

72 Civil Justice Commission Report (Supreme Court, 29 December 2017) at p 16 and Annex, ch 6 <https://www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system> (accessed 1 April 2021).

73 Cap 39A, 2017 Rev Ed.

74 [2020] SGHC 279.

75 The plaintiff had not argued that substantial justice would be denied if jurisdiction was not exercised: *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [159]. This case raises additional complications of whether leave can be granted for the purpose of sustaining a *Mareva* injunction from the Singapore court when the natural forum for the trial is abroad, which are beyond the scope of this note, and now substantially resolved by cl 11 of the Courts (Civil and Criminal Justice) Reform Bill (Bill 18 of 2021). The Bill was passed in Parliament on 14 September 2021. It suffices to observe that there might well be a difference in the outcome depending on whether the test is proper place or appropriate forum for the substantive trial on the one hand, or proper case for service out (depending further on whether appropriate forum for the trial is read as a necessary requirement) on the other.

76 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [157]–[158].

77 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [159].

jurisdiction under existing law, there is room for *Spiliada* to operate to establish jurisdiction even if Singapore is not the appropriate forum (in the narrow sense of the *prima facie* natural forum in Stage 1) if there are nevertheless reasons of substantial justice for the Singapore court to exercise jurisdiction. However, once the test for granting leave for service out of jurisdiction in Singapore has been replaced by the requirement of Singapore being the appropriate court, these words will prove prophetic.
