IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(CIVIL DIVISION)

[CIVIL SUIT NO: WA-22NCVC-11-01/2017]

BETWEEN

RINTIS MALAY MOTORS SDN. BHD.
(Company No. 120864-P) **... PLAINTIFF**

AND

AGASTA CO. LTD
(Company Registration No. in Japan: 0110-01-072500)
... DEFENDANT

JUDGMENT

INTRODUCTION

[1] This is the Defendant's application (Enclosure 6) for an order and/or declaration under O. 12 r. 10 and O. 18 r. 19(1)(b) and (d) of the Rules of Court 2012 ("**ROC**") *inter alia* for:

(a) the Writ of Summons and the Statement of Claim be set aside;

(b) a declaration that the Writ of Summons dated 11.01.2017 and the Statement of Claim was not properly served on the Defendant;

(c) a declaration that this Court does not have jurisdiction on the Defendant in relation to the claim or the relief/remedy claim in this Suit;

(d) the Writ of Summons and the Statement of Claim be struck out;

(e) if the Defendant's application is dismissed, the Defendant is given 21 days to file its Defence.

FACTS

[2] The Plaintiff is a private limited company incorporated under the Companies Act 1965 and at all material times, carries on the business of importing reconditioned cars from outside Malaysia for sale in Malaysia. The Defendant is a private limited company incorporated in Japan and at all material times, carries on the business of sales, distribution and export of used and reconditioned cars.

[3] In January 2017, the Plaintiff filed the Writ of Summons and the Statement of Claim against the Defendant in this Court for the following prayers for among others:

(a) A declaration that all the agreements between the Plaintiff and the Defendant are void *ab initio*;

(b) A mandatory order that all the cars which are yet to be sold and/or are in the Plaintiff's possession be returned to the Defendant and all the transportation costs are the Defendant's cost; and

(c) An order that all payments by the Plaintiff to the Defendant for cars which were sold to be fixed at an average Japanese Yen/ Ringgit Malaysia from 25.05.2016 – 31.05.2016 at the rate of 0.03707 i.e. the time that the cars should have arrived in Malaysia;

(d) Special damages of RM3,585,000.00;

(e) Aggravated damages of RM500,000.00; and

(f) General damages.

[4] The Plaintiff posted a copy the Writ of Summons and the Statement of Claim together with a cover letter via international A.R. Registered to the Defendant's business address and to Miyakezaka Sogo Law Offices, the Defendant's solicitors in Japan. A copy of the Writ of Summons and the Statement of Claim, was also emailed by the Plaintiff to the Miyakezaka Sogo Law Offices.

[5] Upon receipt of the Writ of Summons and the Statement of Claim, the Defendant appointed a Malaysian law firm, Messrs. Josephine L.K. Chow & Co to represent them. The firm filed a Memorandum of Appearance in this Court 24.01.2017 on behalf of the Defendant and served the same on the Plaintiff.

THE DEFENDANT'S CASE

[6] The Defendant contends that Writ of Summons and the Statement of Claim should be set-aside and/or struck-out for the following reasons:

(a) the Plaintiff's service of the Writ of Summons and the Statement of Claim on 11.01.2017 is defective and irregular as it did not comply with O. 11 of the ROC;

- The Plaintiff must comply with the mandatory procedural requirements in O. 11.r. 3 and O. 11 r. 4 of the ROC for service and cause papers.

- The defects and irregularities is fatal and not curable.

- The Defendant cites the High Court cases of *Ferco Seating Systems (M) Sdn. Bhd. v. Product People PTY Ltd* [2008] 10 CLJ 210, [2009] 6 MLJ 874, [2007] 1 LNS 679 and *Kirupanandan E Murugesu v. The Association of Chartered Certified Accountants* [2003] 5 CLJ 526, [2002] MLJU 508 to support their contention that failure to comply with the procedures in O. 11 of the ROC for service of writ is bad in law and liable to be set aside.

- The Defendant also cites the High Court case of *Fiden Electrical Engineering Sdn. Bhd. v. Nippon Seiko KK & Ors* [2004] 7 CLJ 12, [2004] 7 MLJ 231, where Abdul Malik Ishak J. held that:

> "Now, since the procedure for services was on the first defendant in Japan conflict with the law of Japan, O. 11 r. 6(2)(b) of the RHC and O. 11 r. 5(2) of the RHC have not been complied with. Consequently, in my judgment, the service of process on the first defendant has not complied with the law regulating service in Japan and Malaysia and. Accordingly, I must set it aside."

(b) the Plaintiff did not comply with O. 12 r. 4(c) of the ROC read together with O. 11 r. 4(3) of the ROC, in that the writ of summons issued by the Plaintiff only provided 14 days for the Defendant to enter appearance and not 21 days for writs served out of jurisdiction as stipulated in O. 12 r. 4(c). The failure to comply with the procedural requirement is a fatal irregularity which cannot be cured;

(c) this Court does not have jurisdiction to hear and decide on this matter. *Forum non conveniens* renders the Plaintiff's claim scandalous, frivolous and vexatious and is an abuse of the process of this Court. The Defendant counsel submits that this Court is an inappropriate forum to try this matter since it must be in accordance with the laws of Japan. The Defendant also argues that since the Plaintiff is seeking for a declaratory relief to void/invalidate all the agreements between the parties in the Statement of Claim, the proper and appropriate forum to decide on the matter is the Tokyo District Court in accordance to the laws of Japan.

- The 58 vehicles which is the subject-matter of this Suit is subject to the Sales Contracts in Exhibit KT-4 and KT-5 of the Defendant's Affidavit in Support affirmed by Kazuya Tanai affirmed on 16.02.2017. Both the Sales Contract are subject to the laws of Japan and the exclusive jurisdiction of the Tokyo District Court.

- The Defendant cites the Supreme Court case of *American Express Bank Ltd. v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273, [1995] 1 MLJ 160 to support their contention.

(d) The Defendant also reminds this Court that courts cannot rewrite contracts. It cites the cases of *Dato' Shazryl Eskay bin Abdullah v. MerongMahawangsa Sdn. Bhd. v. Anor* [2014] 3 MLJ 892, [2014] 5 CLJ 265, [2013] 1 LNS 1324 and *Cergas Tegas Sdn. Bhd. (In Liquidation) v. Sap Holdings Bhd. & Anor* [2013] 8 CLJ 745 as authorities for this reminder.

THE PLAINTIFF'S CASE

[7] The Plaintiff submits that the Defendant's application to set aside and strike out the Writ of Summons and the Statement of Claim should be dismissed for the following reasons:

(a) the Plaintiff's failure to comply with O. 11 of the ROC is a mere irregularity that is curable;

(b) the service was caused successfully to the Defendant and its lawyers in Japan as evidenced by the fact that it had Messrs. Josephine L.K. Chow & Co to represent it and enter appearance in this Court on 24.01.2017;

(c) the Defendant had actual knowledge of the Suit; and

(d) the High Court of Malaya has civil jurisdiction under s. 23(1) of the Courts of Judicature Act 1964 as the cause of action arose in Malaysia, the subject matter of the contract between the parties i.e. the 58 cars are in Malaysia and the facts on which the proceedings are based or are alleged to have occurred in Malaysia.

LAW

[8] In the recent Federal Court decision in the case of *Goodness For Import And Export v. Phillip Morris Brands SARL* [2016] 7 CLJ 303, their Lordships addressed the questions relating to service out of jurisdiction and *forum conveniens*.

[9] Similar to the present case, the first defendant in **Goodness For Import And Export** argued, *inter alia*, that the court could only obtain jurisdiction if leave to serve the writ outside jurisdiction had been granted by the court under O. 11 r. 1 of the ROC.

Since no leave was obtained, the first defendant argued that the court did not have jurisdiction to deal with the action. The learned judge in the High Court held that the plaintiff did not apply for leave to serve notice of the writ out of jurisdiction under O. 11 r. 1 of the RHC. She held that the non-compliance was fatal to the plaintiff's case because the first defendant was a foreign entity and that the High Court had no jurisdiction over the first defendant unless leave of court had been applied for and granted, or the first defendant had submitted to the High Court's jurisdiction. The Federal Court disagreed with her and held that O. 11 of the RHC (which is *in pari materia* with O. 11 of the ROC) is not the only source which confers jurisdiction on the High Court. It is settled law that, independently of O. 11, s. 23(1) of the Courts of Judicature Act ("**CJA**") also confers extra territorial jurisdiction on the High Court.

[10] In cases where s. 23 (1) of the CJA applies, the Federal Court held that O. 11 r. 1 becomes a mere procedural formality to enable the plaintiff to effect service abroad. Once the court is seized of extraterritorial jurisdiction by virtue of s. 23(1) of the CJA, O. 11 r. 1 ceases to be of jurisdictional relevance. The Federal Court held that the High Court judge had erred in failing to consider whether s.23(1) of the CJA conferred jurisdiction on the High Court to deal with the action filed by the Plaintiff. Ahmad Maarop FCJ (as he then was) in delivering the judgment of the Federal Court said the following at [2016] 7 CLJ at pp. 319 and 320:

> [28] It is not disputed that O. 11 of the RHC does confer jurisdiction on the High Court and that the conferment of such jurisdiction is implicit in connection with the granting of leave by the High Court for service out of jurisdiction (*American Express Bank Ltd (supra)*).

However, O. 11 of the RHC is not the only source which confers jurisdiction on the High Court. It is settled law that s. 23(1) of the CJA also confers extra territorial jurisdiction on the High Court, independently of O. 11 of the RHC. **Indeed, in cases where s. 23 of the CJA applies, O. 11 r. 1 of the RHC becomes a mere procedural formality to enable the plaintiff to effect service abroad**. The position of s. 23(1) of the CJA and O. 11 of the RHC in the context of conferment of extra territorial jurisdiction of the High Court was explained in the recent judgment of the Federal Court in *Petrodar Operating Co. Ltd. v. Nam Fatt Corporation Bhd. & Anor* [2014] 1 CLJ 18, where Raus Sharif PCA delivering the judgment of the court said at 35-36:

> "We have anxiously deliberated on this issue and with respect we find that the first defendant's submission on this point is misconceived. The then Supreme Court case of *Malayan Banking Bhd. v. The International Tin Council & Anor & Another Case* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 in considering whether s. 23 of the CJA confers extra-territorial jurisdiction had clearly highlighted that O. 11 of the RHC is clothed with the same powers."

[Emphasis added]

[11] S. 23(1) of the CJA reads as follows:

23(1) Subject to the limitation contained in art.128 of the Constitution every High Court shall have jurisdiction to try all civil proceedings where:

(a) the cause of action arose, or

(b) the defendant or one of several defendants resides or has his place of business, or

(c) the facts on which the proceedings are based exists or are alleged to have occurred, or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court .....

[12] The Court of Appeal in *Matchplan (Malaysia) Sdn. Bhd. & Anor v. William D. Sinrich & Anor* [2004] 1 CLJ 810, [2004] 2 MLJ 424 restated the principles governing the High Court's jurisdiction in the field of private international law. This decision was cited with approval by the Federal Court in **Goodness For Import And Export** and *Petrodar Operating Co. Ltd. v. Nam Fatt Corporation Bhd. & Anor* [2014] 1 CLJ 18, [2014] 6 MLJ 189. The Court of Appeal in **Matchplan** held that as a matter of private international law, the High Court in Malaya and the High Court in Sabah and Sarawak may entertain an action *in personam* only if it has jurisdiction to do so. Gopal Sri Ram JCA (as he then was) in delivering the decision of the Court of Appeal said that It is to be emphasised that the expression "jurisdiction" is one that may be used in a variety of senses and therefore takes its colour from the context of its use: *Lipohar v. The Queen* [1999] 200 CLR 485, at 516 517. In the present context it refers to the authority of the High Court in three senses, namely, jurisdiction over the parties; jurisdiction over the subject matter of the action; and jurisdiction over the cause of action.

First, jurisdiction over parties. The jurisdiction of the High Court is available to any plaintiff, Malaysian or foreign, save an enemy alien in time of war. See, *Porter v. Freudenberg* [1915] 1

KB 857. Next, any defendant, save those immune from suit, for example, foreign sovereigns, diplomats and other consular officers protected by written law, may be impleaded as a defendant to an action governed by principles of private international law.

Second, jurisdiction over the subject matter of the action. Here, it is settled by what has come to be known as the rule in the *Mocambique (British South Africa Company v. Companhia de Moçambique* [1893] AC 602) that the High Court has no jurisdiction to adjudicate upon rights of property in or the possession of foreign immovable property even though the parties to the dispute are domiciled or resident in Malaysia. See *Potter v. Broken Hill Pty Co Ltd* [1906] 3 CLR 479; *Hesperides Hotels Ltd v. Muftizade* [1979] AC 508. The rule in the *Mocambique* may apply to foreign movable property as well. See, *Tyburn Productions Ltd v. Conan Doyle* [1991] Ch 75; *Pearce v. Ove Arup Partnership* [1997] Ch 293. However, *in personam* relief may be decreed in an action relating to foreign property if the defendant is resident within the jurisdiction of the High Court. See *Penn v. Lord Baltimore* [1750] 27 ER 1132; *Richard West & Partners (Inverness) Ltd. v. Dick* [1969] 2 Ch 424.

Third, jurisdiction over the cause of action. The jurisdiction of the High Court over a cause of action rests on the twin pillars of effectiveness and submission. Effectiveness means that any judgment of the court in the given dispute can be enforced. Submission refers to a defendant submitting to the jurisdiction of the court. Absent either of these, the court cannot seise itself of the cause of action. **In Malaysia, the High Court is seised of jurisdiction over a dispute in any of the following three cases:**

(i) where the defendant is served with the writ or other originating process within the jurisdiction; or

(ii) where any of the conditions set out in s. 23 of the Courts of Judicature Act 1964 are satisfied; or

(iii) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court pursuant to RHC O. 11.

At common law, jurisdiction is founded on personal service on a defendant present within the jurisdiction. It is of no moment that the defendant's presence is transient: *Carrick v. Hancock* [1895] 12 TLR 59; *Razelos v. Razelos* (No. 2) [1970] 1 WLR 392. Personal service here refers to one or more of the methods of service specified by RHC O. 10 read with O. 62.

It is now settled by binding authority that the High Court may exercise jurisdiction over a non-resident defendant pursuant to s. 23(1) of the Courts of Judicature Act 1964: *Malayan Banking Bhd v. International Tin Council* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87.

In *Malayan Banking Bhd v. International Tin Council*, it was held (per Mohd Azmi SCJ) that in Malaysia service is not solely the foundation of jurisdiction of the High Court and that apart from O. 11 r. 1, s. 23(1)(b) of the Courts of Judicature Act 1964 confers extra-territorial jurisdiction on the High Court in cases falling within the section. In that case, the facts fell within s. 23(1)(b). In the present case, the relevant provisions are both paras. (b) and (c) of s. 23(1). In other words, for the appellants to succeed in the instant appeal they must show one of two things. Either that the tort of libel of which they complain was committed within the jurisdiction. Or,

that the facts on which their action in tort is based are alleged to have occurred within the High Court's jurisdiction. If they demonstrate either of these things, then they would *ex debito justitae* entitled to have their writ served pursuant to RHC O. 11 r. 1. **Once the court is seised of extra territorial jurisdiction by virtue of s. 23(1), O. 11 r. 1 ceases to be of jurisdictional relevance. The decision in *Malayan Banking Bhd v. International Tin Council* makes it plain that O. 11 r. 1 assumes jurisdictional importance only in cases falling outside the scope of s. 23(1). Accordingly, in cases where s. 23(1) applies, O. 11 r. 1 becomes a mere procedural formality to enable a plaintiff to effect service abroad**.

[Emphasis added]

[13] It is unfortunate that both counsels for the Plaintiff and the Defendant did not bring to this Court's attention the Federal Court's decision in **Goodness For Import and Export**: a decision, which under the principle of *stare decisis,* this Court is bound to follow. Counsel for Defendant says he knows about the case but chose not to bring it to this Court's attention and counsel for Plaintiff referred to the High Court decision which was reversed by the Court of Appeal, which reversal was affirmed by the Federal Court. Counsels also did not bring this Court's attention to the Court of Appeal's decision in **Matchplan** which sets-out the principles governing this Court's jurisdiction in the field of private international law. I would like to remind counsels that they are under a duty to assist this Court and this includes bringing to this Court's attention the relevant cases in relation to the matter in dispute.

Does the High Court of Malaya have jurisdiction to try this case?

[14] It is therefore, settled law that based on the Federal Court's decision in **Goodness For Import And Export**, the Supreme Court's decision in *Malayan Banking Bhd v. International Tin Council* [1989] 3 MLJ 286, [1989] 2 CLJ 961 and the Court of Appeal decision in **Matchplan,** this Court in determining whether it has jurisdiction over the cause of action in this suit has to determine the following questions:

(i) whether the Defendant was served with the writ within Malaysia; or

(ii) whether the Plaintiff obtained leave of court to serve the Defendant who is in Japan pursuant to O. 11 of the ROC; or

(iii) whether any of the conditions set out in s. 23(1) of the CJA are met.

As the answers for both questions (i) and (ii) above are in the negative, this Court must then ask whether s. 23(1) of the CJA applies to this case.

Does s. 23(1) of the CJA apply to this case?

[15] In determining whether s. 23(1) of the CJA applies to a case, the Federal Court in **Goodness For Import And Export** approved the decision of the Court of Appeal in **Matchplan** and held that in determining the question whether the High Court has jurisdiction under s. 23(1) of the CJA, the allegations of the plaintiff in a statement of claim must be assumed to be true. Gopal Sri Ram JCA in **Matchplan** explained why it is so:

It is elementary law that for the purpose of determining whether the High Court at Kuala Lumpur has jurisdiction over the defendants, the allegations made by the plaintiffs in their statement of claim must be assumed to be true. Thus, in *Vanity Fair Mills Inc v. T Eaton Co. Ltd* [1956] 25 CPR 6 Waterman J observed as follows:

> Although the parties presented many affidavits, depositions, and exhibits for the consideration of the district court, there has been no trial of facts, and the complaint is unanswered. **On an appeal from a judgment granting a motion to dismiss a complaint for lack of federal jurisdiction, we must assume the truth of the facts stated in the complaint.** (emphasis added).

See also *Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136 per Lord Diplock.

So too here. The merits of the plaintiffs' claim that there was publication are yet to be tried. The mere *ipse dixit* of the defendant that there was no publication cannot be determinative of the matter. At the risk of repetition, it needs to be said that at the point of determining whether the tort of defamation was committed within the jurisdiction, all the allegations in the statement of claim must be presumed to be true. At that stage there is no preliminary inquiry through a trial on affidavits as to whether the defamatory material was indeed published within the jurisdiction. **Were it otherwise, there is a risk that applications to discharge an order granting leave**

under O. 11 r. 1 may turn out to be mini trials without determining the suit on its merits.

[Emphasis added]

[16] The Federal Court in **Goodness For Import And Export** approved the Court of Appeal's *ratio decidendi* in **Matchplan** that under s. 23(1) of the CJA, there is no burden on the plaintiff to prove to a conviction that the facts on which their action is based exist within the jurisdiction of the High Court.

[17] In this present case, the Plaintiff's case as pleaded in the Statement of Claim discloses that:

(i) the Plaintiff's cause of action is for a declaration that the Sales Contracts between the parties are *void ab initio* on the basis that the Plaintiff signed the contracts under duress and/or coercion. The Plaintiff's claim that the duress/coercion took place in Malaysia and that the Sales Contracts were signed and accepted in Malaysia;

(ii) the subject matter of the Sales Contracts namely, the 58 cars, are in the Plaintiff's possession in Malaysia; and

(iii) the facts involved the Defendant's conduct in Malaysia i.e. the complaint lodged by the Defendant to the Chairman of Persatuan Pengimpot dan Perniagaan Kenderaan Melayu Malaysia (PERKEMA).

[18] On the assumption that the allegations in the Plaintiff's Statement of Claim are true, the causes of action and the alleged facts of duress and/or coercion and the Defendant's conduct in lodging the complaint to PERKEMA all arose in Malaysia.

[19] Based on the reasons discussed above, I find that *prima facie* the facts of the present case comes within the ambit of s. 23(1)(a) and (c) of the CJA. Accordingly, I find that the High Court of Malaya has jurisdiction to try the proceedings in this case.

Is the High Court of Malaya a *forum conveniens* to try this case?

[20] The Defendant submits that Malaysia and this Court are *forum non conveniens* to try this case because the jurisdiction clause in the Sales Contracts gives exclusive jurisdiction to the Tokyo District Court. The choice of law and jurisdiction clauses are in the Sales Contract in Exhibit KT-4 of the Plaintiff's Affidavit in Support but not in the Sales Contracts in Exhibit KT-5. The Defendant submits that the Sales Contract in Exhibit KT-5 co-exists with the Sales Contract in Exhibit KT-4, therefore the choice of law and jurisdiction clauses apply to the Sales Contract in KT-5. The Plaintiff argues against the application of the jurisdiction clause because the clause is in one of the Sales Contracts that the Plaintiff claims is voidable because of duress/coercion.

[21] The principle governing the doctrine of *forum non conveniens* was restated in by the Federal Court in *Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor* [2014] 1 CLJ 18, [2014] 6 MLJ 189, where Raus Sharif PCA (as he then was) in delivering the decision of the Federal Court said the following:

> [21] Next we move on to the issue of *forum non conveniens*. In discussing the issue of *forum non conveniens* one cannot escape from the reasoning's postulated in the case of *American Express*, wherein the then Supreme Court was of the view that *forum non conveniens* refers to the suitability or appropriateness and

not convenience itself. **The fundamental principle governing this maxim is that whether there is some other tribunal, having competent jurisdiction, in which the case can be tried more suitably for the interest of all parties to meet the ends of justice**. A good guide for court in deliberating on the issue of *forum non conveniens* was well set out in the foregoing passage of His Lordship Peh Swee Chin's judgment which is reproduced herein below as follows:

> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the Court that "some other forum is more appropriate" per Lord Templeman in the *Spiliada*. Where on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O. 11 r. 1 of the RHC is involved then according to the reasoning of Lord Templeman, **the plaintiff, (not the defendant, be it noted) would have to satisfy a Malaysian Court that, by comparison, that Malaysian Court is the most appropriate forum to try the action.** Thus, it will be seen that in the instant case the burden lay on the bank customers, the plaintiffs to satisfy the High Court below that Malaysia was the most appropriate forum.
>
> Having regard to the reasoning of the learned Law Lords in the *Spiliada* and the learned joint article aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O. 11 r. 1 of RHC, or

> for setting aside such leave, **it will be obligatory for a Malaysian Court to consider in any event, a most important factor i.e., whether "it would be unjust to the plaintiff to confine him to remedies elsewhere". It is indispensable when a Malaysian Court considers all cases in connection with *forum non conveniens*.**
>
> **The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection**. One can easily visualize a large number of factors which overlap with one another.

[22] In *American Express* there was an express clause in the agreement that parties chose the Singapore Courts for litigation. This is a point of considerable significance which His Lordship Peh Swee Chin took cognizance of and later held that: (emphasis added)

> We considered the relevant factors in this instant appeal. A very glaring factor in the instant appeal was the foreign jurisdiction clauses in both the said agreements as set out above by which the bank customers had chosen Singapore Courts for the litigation ie., expressly, in other words, the bank customers had submitted to the jurisdiction of the chosen Singapore Courts; and further both parties had chosen Singapore law as the law of their choice for the litigation, prospective or otherwise.

> **It would be clear that, notwithstanding such clauses, a Malaysian Court i.e, High Court below, could not be precluded *simpliciter* thereby from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not**, please see Federal Court's case of *Globus Shipping & Trading Co (Pte) v. Taiping Textile Bhd.* [1976] 1 LNS 31; [1976] 2 MLJ 154.

[23] From the plain reading of His Lordship Peh Swee Chin's reasoning on the existence of such jurisdictional clause which sets out the manner in which parties would litigate in case of any dispute, we can safely conclude that notwithstanding the presence of such a clause the Malaysian court ie, the High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not. In *American Express* based on the facts and circumstances it was held that:

... except for the fact that the alleged fraudulent and misleading information or instructions from the foreign bank to the bank customers were received by the bank customers in Kuala Lumpur, all 127 foreign exchange transactions had taken place, outside Malaysia, in London, New York and Singapore and all the securities of the customers were deposited with the foreign bank in Singapore and London. The bank customers who were husband and wife, were residents in Malaysia; but the main protagonists from the foreign bank's camp were residents outside Malaysia, either in London, or Singapore. There were no peculiar difficulties which the bank customers

would face apart from the inconvenience and expenses in crossing the causeway to Singapore which was more suitable as a forum. The bank customers, as plaintiffs, had plainly failed to satisfy the Court that the Malaysian Court was the most appropriate forum to try the action which they launched.

[24] It is clear from the above, the Supreme Court in *American Express* was satisfied based on the facts and circumstances which is peculiar to that case that it was much suitable for the case to be adjudicated in Singapore.

[Emphasis added]

[22] The Federal Court in **Goodness For Import And Export** in following its decision in **Petrodar** held that in determining which is the *forum conveniens*, the fundamental question which the court must consider is whether there is some other tribunal, having competent jurisdiction in which the case can be tried more suitably for the interest of all parties to the ends of justice: *per* Ahmad Maarop FCJ at [2016] 7 CLJ p.332 para 56

[23] After the considering the facts and circumstances of the case, the Federal Court concluded in **Goodness For Import And Export** that Malaysia is the appropriate forum to adjudicate the case.

[24] To paraphrase his Lordship Raus Sharif PCA (as he then was) in **Petrodar**, this Court cannot not be precluded *simpliciter* by the presence of the jurisdiction clause in the contract between the parties from exercising its discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case. In this present case, both the Sales Contracts were signed by the parties in Malaysia; the alleged duress and/coercion took place

in Malaysia; the 58 cars which is the subject-matter of the dispute between the parties are currently in the Plaintiff's possession in Malaysia and the Defendant's alleged action of complaining to the Chairman of PERKEMA took place in Malaysia. Moreover, most of the witnesses who will be able to provide the evidence on the facts which are central to the allegations in this case, including the Plaintiff's directors and representatives and the Chairman of PERKEMA are in Malaysia.

[25] Upon careful consideration of the facts and circumstances of this case, this Court finds that the High Court of Malaya is the most appropriate forum to try this action for the interest of all parties to meet the ends of justice.

DECISION

[26] For the reasons articulated above, this Court finds that it has jurisdiction over this matter and that it is the most appropriate forum to try this matter. This Court also finds that the Writ and the Statement of Claim is neither scandalous, frivolous or vexatious nor is it an abuse of the process of this Court.

[27] Accordingly, the Defendant's application in Enclosure 6 is dismissed. The Defendant is given leave to file their Defence within 21 days from the date of this judgment. Cost of the Defendant's application shall be cost in the cause.

ORDER

[28] So ordered accordingly.

Dated: 5 JUNE 2017

(FAIZAH JAMALUDIN)
Judicial Commissioner
High Court Kuala Lumpur

COUNSEL:

For the plaintiff - Christopher Yeo; M/s David Gurupatham & Koay

For the defendants - Cindy LK Chow & EJ Lim; M/s Josephine, LK Chow & Co

Case(s) referred to:

Goodness For Import And Export v. Phillip Morris Brands SARL [2016] 7 CLJ 303

Matchplan (Malaysia) Sdn. Bhd. & Anor v. William D. Sinrich & Anor [2004] 1 CLJ 810, [2004] 2 MLJ 424

Malayan Banking Bhd v. International Tin Council [1989] 3 MLJ 286, [1989] 2 CLJ 961

Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor [2014] 1 CLJ 18, [2014] 6 MLJ 189

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a) and (c)

Rules of Court 2012, O. 11 r. 1, O. 12 r. 10, O. 18 r. 19(1)(b) and (d)

Rules of the High Court 1980, O. 11 r. 1