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To: Transport Industry Operators

Mareva injunction – cargo misdelivery

The Hong Kong High Court issued a Judgment on 21/7/2014 discharging a Mareva injunction in relation to a cargo misdelivery claim of about US$12 million. [HCA 2368/2012]

The plaintiff ("**IRISL**"), an Iranian corporation, sued the six defendants for loss and damage arising out of the latter's alleged fraudulent obtaining of the release of the cargo shipped on board IRISL's vessel to Mainland China in 2008-2009. IRISL had obtained a Mareva injunction *ex parte* against all the defendants. IRISL was seeking to continue the injunction. The 4th defendant ("**Lafir**"), the 5th defendant ("**Frever**") and the 6th defendant ("**Corera**") contested the application; and sought for the discharge of the *ex parte* injunction. The 1st defendant ("**Phiniqia**") the 2nd defendant ("**Tradeline**") refused to accept service; and together with the 3rd defendant ("**Ghurair**"), they did not enter appearance. Phiniqia and Tradeline were companies incorporated in Dubai. Tradeline carried on business of trading in, amongst other things, minerals and petrochemicals. Phiniqia was the chartering arm for the trading business of Tradeline. Ghurair was a national of the United Arab Emirates and was at all material times the majority shareholder of both Phiniqia and Tradeline. Lafir was an Indian national. He was at the material times a shareholder of Phiniqia and Tradeline; and the managing director of Tradeline. Frever was a Hong Kong company and was the agent nominated by Phiniqia in respect of the custody of the cargo in question at the ports of discharge. Corera was the sole shareholder and director of Frever. He lived and worked in Hong Kong. Corera was also the company secretary of another Hong Kong company, **DBL**, of which Lafir was the sole shareholder. DBL owned the vessel *Emerald Star*, the asset so far specifically identified to be subject to the injunction.

The cargo in question formed part of the iron ore concentrates sold by **GEG**, an Iranian company, to Tradeline pursuant to a sale and purchase contract dated 6/7/2008. Payment for the goods was by way of letter of credit, which Tradeline obtained in favour of GEG on 20/8/2008 ("**the L/C**"). Pursuant to the above contract, Tradeline as the buyer had to nominate the vessel for the carriage. It did so through Phiniqia. On 29/7/2008, Phiniqia obtained a fixture recap ("**the Fixture Recap**") for chartering the vessel *MV Iran Bam* for the carriage of the cargo from Bandar Abbas, Iran, to Mainland China. A voyage charter was issued at the same time ("**the Charter Party**"). IRISL was named the owner of the vessel. On 20/8/2008, the cargo was loaded on board the vessel for shipment; and an original bill of lading was issued and signed by IRISL on behalf of the master ("**the Original B/L**") on the same date. GEG was the shipper. The consignee was "*to the order of Commercial Bank of Dubai*". The notify address was "*to order*". Pursuant to the Charter Party, and as nominated by Phiniqia, IRISL appointed Frever as the agent at the ports of discharge; and Corera as the person in charge. Frever was in turn represented by its local sub-agents at the ports of discharge. The cargo arrived at the ports of Beilun and Zhenjiang in the Mainland in early September 2008, when GEG was still holding onto the Original B/L. On 7/9/2008, Phiniqia requested for the discharge of the cargo from the vessel at the ports of discharge in the absence of the Original B/L. In return, Phiniqia gave IRISL its letter of indemnity ("**the LOI**"). Physical delivery of the cargo would take place only upon the receipt of the Original B/L. IRISL also gave the instruction to Frever that the cargo should not be released without specific written instruction. Apparently GEG could not get the L/C honoured for payment due to discrepancy between the documents presented and the terms of the L/C. Therefore the Original B/L remained with GEG; and the cargo remained at the ports of discharge.

In late 2008, Tradeline started re-negotiating the sale price with GEG on the grounds of quality and the substantial drop in the market price of iron ore concentrates since the shipment of the cargo. Meanwhile Tradeline started negotiation with its own intended buyer, **CNMC** for onward sale of the cargo. In February 2009, Tradeline reached agreement with CNMC whereby CNMC agreed to buy the cargo. On the other hand, the negotiation with GEG led to no agreement. In early March 2009, while GEG demanded payment for the cargo by Tradeline, Phiniqia/Tradeline gave instructions for the release the cargo to CNMC at the ports of discharge.

The release of the cargo was made possible by the tendering of another bill of lading. This bill of lading bore the same number and date as those of the Original B/L. But the shipper of the cargo was stated to be Tradeline; and the consignee and notify address was "*to order*". It was signed by Phiniqia purportedly on behalf of the master of

the vessel. Phiniqia and Tradeline described that as a switch bill of lading. IRISL soon became aware of the release of the cargo; but it claimed no knowledge about the issuance of this second bill of lading ("**the Second B/L**").

Tradeline continued the negotiation with GEG after the release of the cargo; and apparently made some preliminary payment. Nevertheless it became clear by mid-2009 that no settlement could be reached between them. GEG commenced action against IRISL in the court of Tehran, Iran, for the loss of the cargo and compensation. On 21/12/2010, the Tehran court entered judgment in favour of GEG against IRISL with costs. In May 2011, GEG obtained an executive order from the Tehran court to enforce the Iranian judgment.

Legal proceedings were threatened in 2009; and eventually commenced against Phiniqia, Tradeline, Ghurair and Lafir in London in January 2010. IRISL became a plaintiff in the English action in April 2011. On 14/5/2012, default judgment was entered in the English Action against the first 4 defendants herein in default of defence. These defendants are liable for the sum of £107,040.80 and US$11.85 million ("**the English Judgment**"). The English Judgment was yet to be served on these defendants.

On 21/12/2012, IRISL applied *ex parte* and obtained from the Hong Kong High Court a Mareva injunction against the defendants restraining each of them from removing from Hong Kong or disposing of assets here up to the value of US$12.1 million. As mentioned, Lafir's share in DBL, the major asset of which was the vessel "*Emerald Star*", was specifically identified in the injunction. An ancillary order for disclosure of the defendants' assets in Hong Kong was also made.

The following pre-requisites for the grant the injunction are accepted as a matter of principle:
(1) There is a good arguable case.
(2) There are assets within the jurisdiction.
(3) There is a real risk of dissipation of assets from the jurisdiction that would render the plaintiff's judgment unsatisfied.
(4) The balance of convenience tilts in favour of the grant of the injunction.

IRISL set out its following case against the defendants:
(1) The primary cause of action was enforcement of the English Judgment against the first 4 defendants as a debt in common law. The injunction was sought primarily in aid of that.
(2) This was also a claim against all the defendants for fraud and conspiracy by the issuance of the Second B/L to enable the release of the cargo unpaid for and the sale of the same to CNMC.
(3) Against Frever and Corera, the claim was also for their breach of fiduciary duty as IRISL's agents by flouting the express instructions of IRISL not to release the cargo in the absence of the presentation of the Original B/L and IRISL's express instruction.

On the other hand, Lafir, Frever and Corera argued that the injunction against them should be discharged on the following grounds:
(1) IRISL did not have a good arguable case in seeking to enforce the English Judgment at common law against Lafir. Nor did it have a good arguable case in the tort of conspiracy against the defendants.
(2) If IRISL did not have a good arguable case in respect of the conspiracy claim, the basis for inferring a real risk of dissipation of assets fell away. There was no evidence of such real risk.
(3) The balance of convenience tilted in favour of discharging the Injunction.

ACTION TO ENFORCE THE ENGLISH JUDGMENT

For the enforcement of a foreign judgment at common law in Hong Kong, there is no dispute that the applicant must establish: (i) that the foreign judgment is final and conclusive in the merits; (ii) that the foreign court has competent jurisdiction over the matter; and (iii) that the parties are the same and issues identical. As far as Lafir was concerned, the parties differed mainly in respect of the second pre-requisite.

A foreign court has jurisdiction to give a judgment *in personam* capable of enforcement where the person against whom the judgment was given was present in the foreign jurisdiction at the time of commencement of proceedings or the person conducted himself as being taken to have submitted to the foreign jurisdiction: see Dicey, Morris & Collins, *Conflict of Laws* (15th ed) at 14R-054.

IRISL accepted that Lafir was neither present nor submitted to the English jurisdiction at all. IRISL too accepted that the order of the English court for service of proceedings out of jurisdiction on Lafir *per se* did not suffice to give the English court jurisdiction over him for the purpose of the intended enforcement of the English Judgment in Hong Kong. What IRISL relied on was what was said in *Beals v Saldanha* [2003] 3 SCR 416, a decision of the Supreme Court of Canada. In *Beals*, the vendor from Ontario sold land in Florida to the purchaser. Dispute arose. The purchaser sued the vendor in Florida. The vendor filed a defence but did not respond to the subsequent amendments to the claim. The purchaser managed to obtain from the court in Florida judgment on the basis of the

deemed admissions of the amended claim by the vendor. Further notices to the vendor were likewise disregarded. The purchaser commenced an action in Ontario seeking to enforce the judgment obtained in Florida. The Supreme Court of Canada, by majority, held (at §§17-29; 32) that the well established approach (mentioned above) in this respect should give way to the test of whether a real and substantial connection existed between the subject matter of the action and the foreign jurisdiction. Justification by reference to comity and reciprocity was also discussed. IRISL acknowledged that the English approach was the norm. But IRISL argued that there was no binding authority in Hong Kong (at least since 1997) on whether the Canadian approach should be preferred where the foreign court decided to seize jurisdiction by ordering service out of jurisdiction. This, IRISL submitted, was a moot point and more than merely arguable.

Lafir disagreed. He pointed out the following considerations against even the embarkation of considering the adoption of the Canadian approach:

(1) Attempts to extend, broaden or replace the well-established approach in this respect on the basis of comity or reciprocity between jurisdictions have been consistently rejected in common law courts around the world: see Dicey (above)(§14-087 to 14-090); Nygh, *Conflict of Laws in Australia* (8th ed) (at §§40.21 to 40.22).
(2) The Canadian approach was recently considered by the Supreme Court of UK in *Rubin v Eurofinance SA* [2013] 1 AC 236 in the context of enforcement of foreign judgments in insolvency proceedings. Lord Collins (at §§106-130) advised against preferring this apparently more liberal approach to the well-established one in the absence of legislative intervention. The Canadian approach, it was submitted, would only introduce uncertainty and unduly onerous burden on an overseas defendant.
(3) *Beal* has its peculiar factual background. It would appear that by filing a defence, the vendor had submitted to the jurisdiction of the court in Florida. Further the cross-border jurisdiction comity that might exist between the United States and Canada could well be attributed to the historical background of the 2 adjoining countries.
(4) Even if the Canadian approach is adopted, there is hardly any real and substantial connection between the dispute (or Lafir) and the English court. The cause of conspiracy did not arise in England. Lafir was not privy to the Charter Party that required reference of dispute to England. Whilst Phiniqia was said to have submitted to the English jurisdiction by virtue of the terms of the LOI, Lafir was not a party to such contractual indemnity.

Lafir submitted that in the absence of exceptional justification, the Hong Kong court should and would not see fit to even start considering the application of the Canadian approach in place of the well-established approach.

Lafir's argument was forceful; and the Judge preferred his to that of IRISL.

The present application on the basis of the English Judgment against Phiniqia, Tradeline and Ghurair was strictly unopposed. In their affirmations (in support of the opposing defendants), the managers of the Phiniqia and Tradeline explained that they decided not to contest the English proceedings upon the belief that the claim had no merits and defence of that might be prejudicial to their interests.

As to Frever and Corera, who were not parties to the English Judgment, the application on this ground did not concern them.

CONSPIRACY CLAIM

There is no dispute that a claim for conspiracy to injure comprises these pre-requisites: (i) a combination or agreement between two or more individuals; (ii) an intent to injure; (iii) carrying out of acts pursuant to such combination or agreement with such intent; and (iv) loss and damage thus caused to the plaintiff.

To continue the injunction against any of the defendants, the Judge had to be satisfied that there was a good arguable case in respect of the alleged conspiracy. This was IRISL's burden, notwithstanding the non-appearance of Phiniqia, Tradeline and Ghurair.

It was said to be a conspiracy of the defendants to issue the Second B/L and/or to use the same to obtain the release of the cargo without the Original B/L or payment by Tradeline.

The defendants described the Second B/L as a switch bill of lading, which they claimed Phiniqia was entitled to issue in line with common international trade practice and pursuant to the Fixture Recap. Evidence was adduced to show that Tradeline invariably required the liberty to issue switch bill of lading in its previous instructions to Phiniqia to arrange carriage. Lafir also explained that the shipper GEG was an Iranian company subject to sanctions imposed by the United Nations Security Council; and therefore Tradeline would have difficulty negotiating the shipping documents through banks if the Original B/L was not switched.

As to the contractual terms between IRISL and Phiniqia, there was dispute as to whether they were contained in the Fixture Recap or the Charter Party. Phiniqia relied on the fact that it had not signed and returned the Charter Party. In the Judge's view, that *per se* could not be the complete answer. In any event, both the Fixture Recap and the Charter Party contained similar term in respect of switch bill of lading in that switch bill could be issued upon the

pre-conditions of the surrender of the first set of the original bill and a letter of indemnity for the switch bill as per the owner's P&I wordings. On behalf of the defendants, it was suggested that the requirements of vessel owners varied. Some would insist on either or both of these pre-conditions or none of them at all. That in the Judge's view was irrelevant. There was in fact never such surrender of the Original B/L or letter of indemnity for Phiniqia's issue of the Second B/L (as a switch bill). There was no suggestion or evidence that Phiniqia had ever communicated to IRISL (or its agent or representative) the intention to issue the Second B/L so as to trigger the switch bill of lading mechanism. Nor was there suggestion or evidence that IRISL (or its agent or representative) had ever waived such pre-conditions in the previous course of dealings, if any.

It was seriously arguable that the Second B/L was unauthorised and contrary to the contract between IRISL and Phiniqia.

In any event, the fact was that when GEG threatened to cease negotiation in early March 2009, Phiniqia and Tradeline directed the release of the cargo by tendering the Second B/L as the "original bill of lading". The Second B/L was issued contrary to the contract between Phiniqia and IRISL while the original document of title to the cargo remained with GEG, which was unpaid, the consequential detriment to the interest of GEG and IRISL by the release of the cargo must have been obvious to Phiniqia and Tradeline. Against this background, whether it was a so-called commercial decision as alleged was hardly justification for the wrongful act. Nor was the subjective intent of Tradeline to negotiate with GEG after the release of the cargo.

There was at least a good arguable case on the alleged conspiracy by knowingly causing the release of the cargo (which was unpaid for) to CNMC in the absence of the Original B/L or authorised switch bill of lading, and thus causing loss of the same to IRISL and GEG.

The court needed to ask whether a person was sufficiently a party to the alleged combination and common design, having regard to his knowledge of the facts on the basis of which the conspiracy was unlawful, utterance and actions: see *Clerk & Lindsell on Torts* (20th ed) at §§24-92; 24-94.

In the context of a director of a company, Lafir pointed out that the fact that a person was a director did not by itself render him personally liable for the torts committed by the company during the period of his directorship. Mere management of the company that resulted in the tortuous act was not sufficient. Nor was the director's execution of his constitutional role in governing the company and not beyond. To be personally liable, the evidence must be such that the director knowingly procured or directed the commission of the tort by his company. The Judge agreed as a matter of principle.

As far as the issuance of the Second B/L was concerned, the own case of Phiniqia/Tradeline was that the Second B/L was issued by Sakib Elahi, who oversaw Phiniqia's chartering business and was in charge of the day to day management under the order of Ghurair. Lafir was a silent shareholder of Phiniqia and was not involved in its daily management. As the managing director of Tradeline, Lafir's main role was evaluation and approval of business opportunities, not execution or implementation. Nor was he involved in the negotiation with GEG for the sale and purchase of the iron ore concentrates, the Charter Party, the decision to issue the Second B/L.

However, alleged conspiracy was not only about the issuance of the Second B/L but also the use of it to obtain the release of the cargo in early 2009. Lafir argued that IRISL was essentially asking the court to infer knowledge, intent and conduct of conspiracy on the part of Lafir from his mere position in Tradeline. On the contrary, IRISL described Lafir as someone close to the entire transaction.

The Judge could see why IRISL submitted as mentioned above. The contemporaneous correspondence showed that Lafir was involved in the negotiation with GEG. He was seen involved in the negotiation after the cargo had been released until the end of April 2009. Such aftermath arguably cast no light on Lafir's role in procuring the release of the cargo. But the correspondence showed that Lafir was involved in the negotiation with GEG even prior to the release of the cargo. In January 2009, he had meetings with GEG; and GEG also addressed its letter of complaint to Lafir. Even without such evidence, Lafir could hardly deny knowledge that GEG was not paid for the cargo. Lafir also admitted that he knew about the use of the Second B/L to obtain the release of the cargo, in the absence of payment or settlement with GEG. There might be no direct evidence that Lafir personally directed the release of the cargo to CNMC. It was however difficult to accept that the decision to do so was the mere initiative of the management or staff and about which Lafir was somehow kept in the dark, notwithstanding his involvement in the negotiation with GEG prior to that. After all, what happened and the monetary amount involved, even without further evidence, were by no means insignificant in the ordinary business of Tradeline.

The dispute as to whether Lafir was liable as a party to the alleged conspiracy was obvious. Nevertheless, the Judge was impressed that this might not be merely a case involving a director doing nothing more than his constitutional duty. There could be basis for the court to find against Lafir, considering all the circumstances.

Whilst Frever was nominated by Phiniqia, it was apparently IRISL which appointed it as the port agent in respect of the cargo. Frever and Corera acknowledged the instruction of IRISL in early September 2008 that the cargo, though discharged at the ports, were not to be released without specific instructions. Frever further nominated local sub-agents at the ports respectively to deal with the port formalities. Both had been advised of the instruction not to release the cargo at the ports until further instructions. According to Corera, he heard nothing from the parties until early 2009 when Tradeline gave instructions for the release of the cargo to its buyer. Frever acted upon the understanding that agreement had been reached between Tradeline with its buyer. Corera emphasized that it was not the duty of Frever as the port agent to find out what led to the delay in the release of the cargo. He had no exact knowledge about the underlying dispute. He had heard nothing from IRISL for over months. When the instruction came from Tradeline, he was given to understand that everything had been sorted out; and he assumed that it was proper to give instructions to the sub-agents to release the cargo. So he did. As to the Second B/L, Corera claimed no involvement in its issue as the same was beyond Frever's scope of duty in any event. The documents indeed show that it was forwarded by Tradeline through the banking channel without going through Frever.

That Frever appointed and delegated to its sub-agents to act on its behalf at the ports of discharge was neither here nor there; as Frever could not delegate its duty of care owed to IRISL. That Frever and Corera admittedly chose to act on multiple assumptions about the propriety of release of the cargo without confirmation from their principal, IRISL, gave rise to seriously arguable case on whether they were in breach of their duty to their principal. But in the Judge's view, the evidence fell short of a good arguable case against Frever and Corera as alleged parties to the conspiracy of the other defendants to issue the Second B/L or to obtain the release of the cargo by the use of it.

ASSETS IN HONG KONG

Subject to the ancillary disclosure, IRISL was targeting the vessel *Emerald Star*, which was owned by DBL and of which Lafir was the sole shareholder. There was basis for suspecting that such asset was being held by Lafir on trust for Phiniqia or Tradeline.

RISK OF DISSIPATION

Whilst the Judge did not rule out a good arguable case in respect of the conspiracy claim against Phiniqia, Tradeline, Ghurair and Lafir, what bothered the Judge was whether IRISL managed to establish a real risk of dissipation of assets on the part of any of them.

The case of IRISL in respect of the risk of dissipation against Lafir, and in fact other defendants as well, was based primarily, if not solely, on the inference of dishonesty and low commercial morality arising out of the conspiracy claim. But that *per se* could not be the answer in the circumstances of the case in question. The Judge said this because of the substantial lapse of time prior to the *ex parte* application for the injunction.

The conspiracy claim was threatened and the draft particulars of claim communicated to the defendants in as early as August 2009. The English proceedings were served on the defendants in December 2010. The English Judgment was obtained in May 2012. It was explained that time had been taken since then to obtain clearance from the European Union to enable the solicitors acting IRISL, being an Iranian corporation, to receive payment of legal fees and expenses before further steps could be taken. In July 2012, IRISL changed to its present solicitors. The application for the *ex parte* injunction was not taken out until December 2012.

The lapse of time prior to the *ex parte* application, counting from whichever point of time mentioned above, was substantial. Yet not the entire period of delay has been explained. There was no evidence in respect of when IRISL came to know that the defendants have asset in Hong Kong. The vessel *Emerald Star* was registered in Hong Kong in January 2011. No application was taken out since then. Further months had passed after the present solicitors were instructed before they took out the *ex parte* application for the injunction.

Irrespective of whether the explanation so far given for the delay was accepted, the lack of application until December 2012 must have been relevant to the consideration of how real the risk of dissipation of assets on the part of the defendant had been and was. The fact had been and still was that IRISL merely relied on the inference from the nature and particulars of its conspiracy claim. Whilst the court accepted as a matter of principle that inference of such risk could be drawn, there was no suggestion or evidence that it was due to any change in circumstances since the time when such inference might first be drawn until the time of the application that prompted the application.

As to Frever and Corera, it was concluded that the case of fraud and conspiracy against Frever and Corera did not amount to a good arguable case. The sole basis for drawing inference of low commercial morality and thus risk of dissipation on their parts fell away. Frever had been carrying on business in Hong Kong for over 30 years; and there was no other evidence to suggest any change of that or circumstances suggesting a real risk of dissipation of the assets by Frever or Corera. Whilst Corera was the company secretary of DBL and Frever was the representative,

there was no evidence suggesting his ability and the likelihood of dissipating the asset of DBL including the vessel *Emerald Star* since the English action.

OTHER ARGUMENTS

No loss

It was argued that IRISL had not suffered loss and damage as at the commencement of this action because the Iranian Judgment had not been satisfied. The Judge was not impressed by this argument, if one considered the adjudged liability against IRISL, albeit yet to be satisfied.

Material non-disclosure

There was alleged material non-disclosure when the *ex parte* injunction was obtained. They were: (i) that the Iranian Judgment was yet to be satisfied; and (ii) that GEG was not paid because of its own fault in presenting documents discrepant from the terms of the L/C.

As discussed, whether the Iranian Judgment was satisfied, the liability of IRISL under the judgment should have already accrued.

That GEG had failed to secure the honouring of the L/C, and thus payment thereunder, no longer mattered. As the buyer, Tradeline was in a position to waive discrepancy or in any event to pay before obtaining release of the cargo. The fact was that it chose not to do so.

Neither matter allegedly withheld from the *ex parte* judge would have been material.

Locus standi

The locus standi of IRISL to bring this action was under challenge. Essentially it was said that IRISL was not the owner of the vessel *MV Iran Bam* but one Ashstead Shipping.

Ashstead Shipping was wholly owned by IRISL, which gave Ashstead's bank account for the purpose of the Fixture Recap. The Charter Party referred to IRISL as the owner and shipper. The Charter Party was sent to and received by Phiniqia. Whether the same was signed and returned by Phiniqia did not change the fact that it was IRISL which entered into the Charter Party. IRISL was indeed one of the plaintiffs entitled under the English Judgment, which it sought to enforce.

CONCLUSION

Whilst the Judge did not rule out a good arguable case against Lafir on the conspiracy claim, the Judge was not satisfied that IRISL had established a real risk of dissipation of his asset at the time of the *ex parte* application or the present application to warrant the injunction. Of course, nothing would prevent IRISL from applying on the basis of change in circumstances at any point in future.

In view of the commonality in the case of IRISL against Phiniqia, Tradeline, Ghurair and Lafir for the present purpose, it would be inherently inconsistent for the Judge to maintain the injunction against the first 3 of them merely on the basis that the present application against them was strictly speaking unopposed whilst at the same time discharging the injunction against Lafir. The injunction against all 4 of them should be discharged.

The injunction against Frever and Corera should be discharged.

The application against all the defendants was thus dismissed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com