

30 January 2015
Ref : Chans advice/169

To: Transport Industry Operators

Anti-suit injunction

The Hong Kong Court of Appeal issued a Judgment on 18/12/2014 in connection with a cargo misdelivery claim of US\$27,835,000 involving also anti-suit injunction and worldwide freezing order issued by the English Court. [CACV 243/2014 & HCMP 1449/2014]

Dispute arose between Compania Sud Americana De Vapores S.A. (“CSAV”) and Hin-Pro International Logistics Limited (“Hin-Pro”), in which Hin-Pro alleged that CSAV mis-delivered cargo in Venezuela without production of the original bills of lading (“BL”). Hin-Pro’s complaint was that CSAV delivered the cargoes to the Venezuelan port authorities without having sight of the original bills of lading.

All the BLs between CSAV and Hin-Pro contained the jurisdiction clause (“JC”). That jurisdiction clause reads as follows:

“LAW AND JURISDICTION This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceedings shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such disputes and proceedings shall be referred to the Chilean Ordinary Courts.”

It was CSAV’s contention that this jurisdiction clause was exclusive, in favour of the English courts. Thus, Hin-Pro should have commenced proceedings (if any) in England only and not in any other forum.

However, in alleged breach of the JC, Hin-Pro commenced legal proceedings against CSAV in Wuhan, the PRC.

In response, CSAV commenced an action against Hin-Pro in England in November 2012 (the “1st English Action”). Under the 1st English Action, CSAV sought a declaration that the JC required Hin-Pro to litigate all disputes in relation to the first 5 mis-delivered cargoes (ie those which already were the subject of the proceedings in Wuhan) in “*the High Court of Justice in England and Wales and in no other forum*” plus a permanent anti-suit injunction to restrain Hin-Pro from further pursuing the Wuhan proceedings. An interim anti-suit injunction (“ASI”) was obtained against Hin-Pro on 22/11/2012 which was continued thereafter. Following advice from its PRC lawyers, Hin-Pro (which had no connection with the United Kingdom) failed to engage in the 1st English Action. In defiance of the ASI, Hin-Pro proceeded with the Wuhan proceedings. That resulted in Hin-Pro and its sole director and shareholder, Ms Su, being held in contempt of the English court on 21/3/2013. The court sentenced Ms Su to imprisonment *in absentia* for three months and permitted the issue of writs of sequestration against Hin-Pro.

Hin-Pro persisted in ignoring the contempt proceedings and order in the 1st English Action. Between May and July 2013, Hin-Pro commenced many more proceedings against CSAV in various cities in the PRC, namely, Guangzhou, Qingdao, Tianjin, Ningbo and Shanghai in respect of some further 70 BLs containing the same jurisdiction clause.

CSAV commenced another action in November 2013 for further breaches of the jurisdiction clause (the “2nd English Action”). A similar interim ASI was obtained against Hin-Pro on 29/11/2013. That second ASI was similarly ignored and breached by Hin-Pro, in the sense that Hin-Pro continued to progress the claims in the PRC in respect of the 70 BLs. In order to protect CSAV’s position, CSAV applied *ex parte* for and was granted in the English Actions a worldwide freezing order (“WWFO”) on 13/6/2014, freezing Hin-Pro’s assets in the amount of US\$27,835,000. That sum was roughly the total amount claimed by Hin-Pro against CSAV in the proceedings in the PRC, which CSAV said represented the amount of damages suffered as a result of the breach of the JC.

On 16/6/2014, an *ex parte* Mareva injunction application was made in Hong Kong against Hin-Pro, pursuant to section 21M of the High Court Ordinance, Cap 4, to freeze Hin-Pro’s assets in Hong Kong (ie the Hin-Pro Mareva). The application was made in aid of the English Actions, and to give effect to the WWFO. Deputy High Court Judge Saunders granted the injunction. The Hin-Pro Mareva also contained an ancillary disclosure order, which required Hin-Pro to disclose its assets in Hong Kong above the value of HK\$78,000.

Hin-Pro failed to comply with the disclosure order in both the English WWFO and the Hin-Pro Mareva by their respective deadlines. It was not until 5/8/2014 that Ms Su filed her 2nd Affirmation to disclose Hin-Pro's and Soar's assets.

On 14/7/2014, CSAV issued a summons for the appointment of receivers against Hin-Pro, in support of the WWFO and the Hin-Pro Mareva. The application was made on the grounds that Hin-Pro had failed to comply with the Hong Kong Mareva injunction and both English ASIs, and that the appointment of receivers was necessary for the preservation of Hin-Pro's assets in Hong Kong (and elsewhere pursuant to the WWFO). The summons was heard by DHCJ Saunders on 17/7/2014. DHCJ Saunders appointed practitioners from Deloitte as receivers and managers of Hin-Pro (ie the Hin-Pro Receivership Order).

On 18/7/2014, another *ex parte* application was made by CSAV to vary the Hin-Pro Mareva, so that in addition to Hin-Pro's assets, the assets of Soar International Logistics Limited ("Soar") were also frozen. That application was made pursuant to the court's jurisdiction under *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231, and on the ground that Soar was the *alter ego* of Hin-Pro, holding assets for and on behalf of Hin-Pro or as Hin-Pro's nominee. DHCJ Saunders acceded to that application and granted the Soar Mareva. The Soar Mareva also contained a disclosure order against Soar, requiring it to disclose all its assets in Hong Kong above the value of HK\$78,000. The deadline for Soar to comply with the disclosure order in the Soar Mareva expired on 28/7/2014. Soar failed to comply with that order (it was not until 5 August 2014 that Ms Su made her 2nd Affirmation in purported compliance).

On 30/7/2014, another *ex parte* application was made against Soar for the appointment of receivers and managers over Soar. The grounds for that application were similar to those for the receivership application against Hin-Pro. DHCJ Saunders granted CSAV's application and made the Soar Receivership Order. The return date of the Soar Receivership Order was 8/8/2014.

On 15/10/2014, Deputy High Court Judge Wilson Chan discharged the Mareva Injunctions and the receivership orders granted by DHCJ Saunders against Hin-Pro and Soar. DHCJ Wilson Chan discharged the orders of DHCJ Saunders primarily on the ground that in view of the judicial conflict between the English court and the PRC courts, courts in Hong Kong should not exercise s 21M jurisdiction in favour of one side, citing *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023 in support of this approach. DHCJ Wilson Chan was of the further view that the undertaking offered by Hin-Pro not to take any step to enforce any PRC judgment against CSAV without first obtaining the prior consent of CSAV or the leave of the Hong Kong court and the English court provided sufficient protection to CSAV in the circumstances of the case in question.

CSAV sought to appeal against DHCJ Wilson Chan's decision. Leave to appeal was granted by DHCJ Wilson Chan on 26/11/2014. However, DHCJ Wilson Chan refused to stay his decision pending the appeal. Instead, he granted a short stay (extended by the Court of Appeal) to preserve the position pending a stay application made to the Court of Appeal.

On 14/10/2014 the English court granted judgment in favour of CSAV, declaring the relevant clause to be an exclusive jurisdiction clause, and that the PRC actions were in breach of that clause, giving judgment to CSAV against Hin-Pro for the breach of that clause and costs in the sum of GBP 286,036.50. The English court also gave a post-judgment world-wide freezing order against Hin-Pro. Hin-Pro had obtained permission to appeal against the judgment of Cooke J on 25/11/2014. There was an extant application by CSAV to set aside such permission.

At the application for leave to appeal before DHCJ Wilson Chan on 26 November, Hin-Pro further undertook before DHCJ Wilson Chan to pay into court the sum of \$2,916,522.80 and to abide by further orders of the court as to its disposal as protection for the interests of CSAV. DHCJ Wilson Chan held that this, together with the undertaking offered earlier as to the withholding of enforcement of PRC judgment by Hin-Pro, steered a course which seemed likely to cause the least irremediable prejudice to one party or the other. Thus, the application for stay was refused.

The relevant principles governing the exercise of discretion as to stay are set out in *Star Play Development Ltd v Bess Fashion Management Ltd* [2007] 5 HKC 84. As observed by Ma J (as he then was), ultimately the court embarks on a balancing exercise.

At the forefront of its submissions, CSAV said it had a strong prospect of success in the appeal. CSAV also contended that in view of the past record of Hin-Pro and its sole director and shareholder in failing to comply with court orders, the undertakings now given by Hin-Pro did not give sufficient protection to CSAV.

Having reviewed the cases cited and the arguments of CSAV and Hin-Pro, whilst the Court of Appeal accepted that the appeal was arguable, the Court of Appeal did not think it was so strong that a stay should be granted on the basis of strong prospects of success alone.

CSAV's alternative basis for seeking a stay was its argument that without a stay the appeal would be rendered nugatory. CSAV invited the Court of Appeal to draw the inference that Hin-Pro intended to dissipate all its assets in Hong Kong at the earliest possible opportunity in light of,

- (a) The continuation of the English world-wide freezing order: thus there was no legitimate reason for Hin-Pro to seek to lift the Hong Kong Mareva;
- (b) Ms Su (the director and shareholder of Hin-Pro)'s evasive attitude to legal proceedings and flagrant breaches of the orders made by the English court;
- (c) PRC claims being advanced on fraudulent basis. In that connection, the Court of Appeal referred to the master sale agreement relied upon by Hin-Pro which was purportedly signed by Mr Salazar and his denial of signing the same;
- (d) There had not been a full disclosure of the assets of Hin-Pro and Soar as ordered by the Court of Appeal;
- (e) The receiver had not obtained full information as to the assets of Hin-Pro and Soar.

CSAV further said that there was a risk of books and records of Hin-Pro being destroyed if the appointment of the receivers was discharged in the meantime.

However, these allegations were subject to dispute by Hin-Pro. Hin-Pro submitted that it was the party seeking to be compensated rather than CSAV. As such, Hin-Pro never had any incentive to dissipate assets.

In the Court of Appeal's view, that submission did not address sufficiently the proposition of CSAV that the claims of Hin-Pro had been advanced on the basis of forged documents. Cooke J was rather critical of Hin-Pro in that respect in his judgment of 14 October.

Hin-Pro then said that its shunning of the English court on the advice of its PRC lawyers was not evidence of propensity to dissipate or to disobey the orders of (or breach an undertaking given to) the courts in Hong Kong. The Court of Appeal saw some force in that submission bearing in mind that Hin-Pro and its director and shareholder were present in Hong Kong and, unlike the position in England, they had assets in Hong Kong. Ms Su gave a residential address in Hong Kong and the Court of Appeal were told that it was a property owned by her.

More fundamentally, as submitted by Hin-Pro, the claim of CSAV was a pre-emptive one. Apart from the anti-suit injunction and the order for costs, the judgment obtained in the English proceedings for damages was a form of reflective damages in the amount of any sums awarded in China. If the PRC judgments were not enforced or not enforceable, CSAV would suffer no loss (apart from costs incurred). This was the context in which the Court of Appeal should consider the significance of the undertakings given by Hin-Pro. If Hin-Pro did not or could not enforce the PRC judgments, CSAV would not be entitled to any substantial damages.

CSAV submitted that the undertakings did not provide sufficient protection as CSAV had no confidence that Hin-Pro would abide by its undertaking in light of the history. CSAV suggested that there was a risk that Hin-Pro might arrest one of CSAV's vessels outside Hong Kong.

There was no evidence of such risk. As far as the Court of Appeal knew, there had not been any incidence of such arrest. Further, as pointed out by Hin-Pro, it was a Hong Kong company and its director and shareholder a Hong Kong resident. They were amenable to the jurisdiction of the Hong Kong court. Any breach of the undertakings would immediately be known to CSAV and Hin-Pro and its director would face the prospect of committal in Hong Kong. It is true that Ms Su was subject to contempt proceedings in England and she was committed in her absence. But since she was not resident in England, the impact of such an order on her was quite different from a committal by the court in Hong Kong. Actually, it was difficult to see why Hin-Pro would take such a risk in the circumstances of the case in question. There was every reason to believe that if Hin-Pro did act in breach of its undertakings, it would do itself more harm than good as whatever benefit it might obtain from such a course would probably be reversed by remedies granted by the court in Hong Kong.

CSAV also suggested that a stay would not cause any prejudice to Hin-Pro and Soar. The Court of Appeal was not accept this suggestion. The appointment of a receiver is a highly intrusive measure, particularly when the receiver could conduct business in the name of Hin-Pro or Soar.

In the Court of Appeal's judgment, having regard to all the relevant circumstances, the balance pointed towards the refusal of a stay pending the appeal. However, the Court of Appeal were prepared to direct that the appeal be expedited. The Court of Appeal directed that the appeal should be heard on 21/1/2015.

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

