SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Anti-suit injunction (III)

In this issue, we would like to continue with the case (CSAV v Hin-Pro) mentioned in our monthly newsletter of Chans advice/169 two months ago. The Hong Kong Court of Appeal issued its Judgment on 11/3/2015 discharging the Mareva Injunctions and the receivership orders granted by DHCJ Saunders against Hin-Pro and Soar. [CACV 243/2014]

Dispute arose between CSAV and Hin-Pro, in which Hin-Pro alleged that CSAV mis-delivered cargo in Venezuela without production of the original bills of lading ("**BL**"). 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.

However, 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. 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.

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.

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. 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). 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 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. 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.

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.

In the appeal, CSAV accepted that judicial conflicts was a relevant consideration when a Hong Kong court exercised the power under section 21M. CSAV however submitted there was no real conflict in the case in question because:

(a) The PRC judgments did not enter on the basis that the relevant clause was not an exclusive jurisdiction clause.
(b) Enforcement of an exclusive jurisdiction clause was not to be regarded as a breach of international judicial comity.

Section 21M of the High Court Ordinance, Cap 4 provides as follow:

"(1) Without prejudice to section 21L(l), the Court of First Instance may by order appoint a receiver or grant other interim relief in relation to proceedings which-
  (a) have been or are to be commenced in a place outside Hong Kong; and
  (b) are capable of giving rise to a judgment which may be enforced in Hong Kong under any Ordinance or at common law.
(2) An order under subsection (1) may be made either unconditionally or on such terms and conditions as the Court of First Instance thinks just.
(3) Subsection (1) applies notwithstanding that-
  (a) the subject matter of those proceedings would not, apart from this section, give rise to a cause of action over which the Court of First Instance would have jurisdiction; or
  (b) the appointment of the receiver or the interim relief sought is not ancillary or incidental to any proceedings in Hong Kong.
(4) The Court of First Instance may refuse an application for appointment of a receiver or interim relief under subsection (1) if, in the opinion of the Court, the fact that the Court has no jurisdiction apart from this section in relation to the subject matter of the proceedings concerned makes it unjust or inconvenient for the Court to grant the application.
(5) The power to make rules of court under section 54 includes power to make rules of court for-
  (a) the making of an application for appointment of a receiver or interim relief under subsection (1); and
  (b) the service out of the jurisdiction of an application or order for the appointment of a receiver or for interim relief.
(6) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the Rules Committee considers necessary or expedient.
(7) In this section, 'interim relief' includes an interlocutory injunction referred to in section 21L(3)."

In the recent judgment in *Pacific King Shipping Holdings Pte Ltd v Huang Ziqiang* CACV 94 of 2014, it was held that in exercising the power under section 21M, the court is required to abide by the general principles governing interim relief. In the context of Mareva type of relief, a plaintiff must show a good arguable case.

In that connection, Hin-Pro and Soar drew the Court of Appeal's attention to the judgment of the court in *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113 at para 102, which concerned an application under s 25 of the Civil Jurisdiction and Judgments Act 1982, the English equivalence of our section 21M:

> "Mr Leggatt argues that, in the context of proceedings under section 25 of the 1982 Act, where (as here) the foreign court in interlocutory proceedings has itself determined that a good arguable case exists against the defendants, that is, or falls to be treated as, a final decision upon that issue for the purposes of the section 25 jurisdiction of this court. We do not think that is correct. The requirement that the claimant must establish that *Mareva*-type relief would be granted if the substantive proceedings were brought in England requires a decision of the judge based on English procedures and the approach of the English court to the nature and sufficiency of the evidence in a situation where the claimant has come to England to obtain a remedy unavailable to him in the substantive foreign proceedings. It is frequently, indeed usually, the position that section 25 proceedings are brought following issue and service of the foreign proceedings but before there has been any decision of the foreign court which examines the strength or arguability of the claimant's substantive case. However, whether or not that is the position, in our view the English court is required, once issue is joined in the section 25 proceedings, to make a separate exercise of judgment rather than a simple acceptance of the decision of the foreign court in interlocutory proceedings decided on the principles applicable, the evidence then available, and the levels of proof required in that jurisdiction."

In *Refco Inc v Eastern Trading Co* [1999] 1 Ll Rep 159, Morritt LJ said at p.170-171:

> "For present purposes it is sufficient to point out that it was implicit in all the judgments that the approach of the Court in this country to an application for interim relief under s. 25 is to consider first if the facts would warrant the relief sought if the substantive proceedings were brought in England. If the answer to that question is in the affirmative then the second question arises, whether, in the terms of s. 25(2), the fact that the Court has no jurisdiction apart from the section makes it inexpedient to grant the interim relief sought."

Thus, even before one comes to the second stage in terms of consideration under section 21M(4), the court must ask itself whether the facts of the case warrants the grant of interim relief if substantive proceedings were brought in Hong Kong. This entails the judge hearing the application to examine the strength and arguability of an applicant's claim in the context of Hong Kong law rather than simply accepting a decision of the foreign court.

For the case in question, the substantive proceedings were the proceedings in England though there were other proceedings dealing with the claims on the bills of lading in the PRC courts. The cause of action in the English proceedings was based on a clause in the bills of lading which the English courts held to be an exclusive jurisdiction clause. The primary relief sought was anti-suit injunction. The courts in Hong Kong must examine CSAV's claim independently. The anti-suit nature of the English proceedings presented a special problem because if the substantive anti-suit proceedings were brought in Hong Kong, the Court of Appeal had to be cautious in light of the requirement of judicial comity and the lack of primary jurisdiction over the subject matter in the Hong Kong courts. In *Airbus Industrie GIE v Patel* [1999] 1 AC 119, Lord Goff formulated this principle at p.138G to H:

> "As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails."

His Lordship also endorsed the stricter approach in the American courts encapsulated in the judgment of Judge Wilkey in *Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F2d 909 at p.926-7, that anti-suit injunctions are most often necessary (a) to protect the jurisdiction of the enjoining court, or (b) to prevent the litigant's evasion of the important public policies of the forum.

At p.138B to D, Lord Goff alluded to a hypothetical scenario where the English court were asked by an Indian bank to grant an anti-suit injunction to restrain a defendant from proceedings in the United States against the bank in respect of a transaction in India on the basis that the defendant was amenable to be sued in England due to its presence there. His Lordship said his immediate reaction was that it would be surprising if the English court would grant such injunction.

At the same time, Lord Goff emphasised that this is only a general rule and it must not be interpreted too rigidly. At p.140D, His Lordship made provision for exceptional cases:

> "Indeed there may be extreme cases, for example where the conduct of the foreign state exercising jurisdiction is such as to deprive it of the respect normally required by comity, where no such limit is required to the exercise of the jurisdiction to grant an anti-suit injunction."

In *Airbus Industrie GIE v Patel*, supra, the English courts were asked to grant an anti-suit injunction to restrain proceedings in Texas by English residents in respect of aircraft crash in India. Texas did not recognise the principle of forum non conveniens. There were parallel proceedings in India, the natural forum for the dispute, and the Indian court had granted injunction to restrain the defendants from pursuing their claims except in the courts of India. That injunction was ineffective against Mr Patel. Airbus therefore issued proceedings in England (where Mr Patel resided) to prevent Mr Patel to pursue his claims in Texas. The House of Lords held that an anti-suit injunction should not be granted in England as the English court had no interest in the matter and the grant of such injunction would be inconsistent with comity. Neither the fact that Mr Patel was resident in England (thus an English anti-suit injunction would be more effective than the Indian judgment) nor non-recognition of Texan court to the doctrine of forum non conveniens was sufficient to persuade the House of Lords that English court should intervene in that case.

That was not a case on the equivalent English provision of section 21M. Lord Goff also highlighted that in that case the jurisdiction of the English court was not invoked in terms of assistance being provided to enforce the Indian judgment, see p.140H. Yet, since the Court of Appeal had to consider whether the relief would be granted if the substantive proceedings were brought in Hong Kong, the Court of Appeal could not disregard the general rule in *Airbus Industrie GIE v Patel*, supra.

In respect of judicial comity, Millett LJ made the following observations in *Refco Inc v Eastern Trading Co*, supra, at p.175:

> "… judicial comity requires restraint, based on mutual respect not only for the integrity of one another's process, but also for one another's procedural and substantive laws. The test is an objective one. It does not depend upon the personal attitude of the judge of the foreign court or on whether the individual judge would find our assistance objectionable. Comity involves respect for the foreign Court's jurisdiction and process, not respect for the foreign judge's feelings."

Lord Goff had this to say in *Airbus Industrie GIE v Patel*, supra, at p.141B:

> "In a world which consists of independent jurisdictions, interference, even indirect interference, by the courts of one jurisdiction with the exercise of the jurisdiction of a foreign court cannot in my opinion be justified by the fact that a third jurisdiction is affected but is powerless to intervene. The basic principle is that only the courts of an interested jurisdiction can act in the matter; and if they are powerless to do so, that will not of itself be enough to justify the courts of another jurisdiction to act in their place."

Having regard to the principle of judicial comity, had CSAV commenced a claim for anti-suit injunction in Hong Kong, it was doubtful whether the Hong Kong court would grant such injunction to prohibit proceedings in another jurisdiction when it did not have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court. In the case in question, the court in Hong Kong was not a natural forum for the disputes in relation to the bills of lading. Nor was it designated as a forum for the disputes in the bills of lading. Neither had the parties come to Hong Kong to litigate on such disputes.

Lord Goff referred to the extreme case when the conduct of the foreign state exercising jurisdiction is such as to deprive it of the respect normally required by comity. CSAV did not suggest (nor did the Court of Appeal see any basis for CSAV to suggest) that the PRC courts had conducted the cases in such a manner. As far as the Court of Appeal could see, those courts only applied the conflicts of law rules in the PRC in holding that the clause relied upon by CSAV did not oust the jurisdiction of the PRC courts.

In *Masri v Consolidated Contractors (No 3)* [2009] 2 WLR 669, Lawrence Collins LJ (as he then was) accepted that international comity is an important consideration at para 81:

> "… In modern times the courts have often emphasised the importance of comity in the exercise of the discretion to grant anti-suit injunctions. Although the injunction is directed to the parties it involves an indirect interference with the foreign court, and caution is required before the injunction is granted … Comity may be decisive where the English court is asked to grant an anti-suit injunction when the case has no relevant connection with England, since to grant an injunction in such a case may be a breach of international law: Airbus Industrie GIE v Patel [1999] 1 AC 119."

As in the case of *Airbus Industrie GIE v Patel*, supra, the following facts could not be sufficient ground for intervention by Hong Kong court:

(a) anti-suit injunctions granted in the English courts could not effectively prevent Hin-Pro from pursuing the actions in the PRC; and

(b) as Hin-Pro was a Hong Kong company, orders made by a Hong Kong court were more effective.

Though CSAV sought relief under section 21M instead of making a substantive claim for anti-suit injunction in Hong Kong, the Court of Appeal did not think it made any difference in view of the first stage of inquiry under the test laid down in *Refco Inc v Eastern Trading Co*, supra. An English anti-suit injunction with respect of legal proceedings in another jurisdiction cannot be enforced in Hong Kong.

In the case in question, CSAV did not ask for section 21M relief in the form of an interim anti-suit injunction. Instead, it sought a Mareva injunction (and receivership order based on it) to protect its claim for reflective damages based on the clause in the bills of lading. The damages claimed by CSAV (by reference to which the limit of the Mareva injunction was set in England as well as the ex parte orders granted by DHCJ Saunders) were not confined to costs incurred by CSAV in the PRC proceedings, but also extended to the potential amount of judgments that could be entered in favour of Hin-Pro in the PRC cases. The anti-suit nature (and thus the indirect interference with proceedings in the PRC courts) was manifested in the claim that the damages was sought to reverse the effect of whatever judgments which might be issued by the courts in the PRC instead of an investigation of the underlying claims on the bills of lading (which the English proceedings were not concerned with). Whilst there are authorities supporting award of damages for breach of exclusive jurisdiction clause or arbitration clause in respect of costs incurred in foreign proceedings and judgments in the same amount as the foreign judgments when they had actually been paid by a plaintiff suing for such breach, the grant of a pre-emptive Mareva injunction based on such a claim when the foreign judgments have not been satisfied went beyond any cases that the Court of Appeal were aware of (except the decision of Cooke J in the case in question). Though the calculation of the limit for the Mareva injunction in the case in question did include a sum representing the amount paid by CSAV to satisfy a Ningbo judgment and another sum representing costs incurred by CSAV, it could not be disputed that it went far beyond the total of those two sums. The pre-emptive nature of the pre-trial Mareva injunction granted in the English proceedings was beyond dispute.

Further, based on the English Mareva injunction, CSAV obtained the Hin-Pro Mareva and Hin-Pro Receivership Order in Hong Kong. Then, based on such receivership order, the receivers attempted to stop the proceedings in the mainland courts. Viewed in this light, these orders had been obtained by CSAV for the purpose of implementing the anti-suit injunctions granted in England though they had not (and could not have) applied for such injunctions in Hong Kong. The Court of Appeal did not think one could side-step the requirement to have regard to judicial comity in this way.

CSAV submitted that there was no conflict between the proceedings in the PRC and the proceedings in England. The cause of action in the English proceedings was the breach of the exclusive jurisdiction clause whilst the cause of action in the PRC proceedings was the breach of the contract of carriage. Given the Court of Appeal's analysis as to the effect of these orders, the Court of Appeal could not accept this submission. In assessing whether there was any conflict, it would not be right to narrowly focus on whether the PRC court had decided on the exclusive nature of the clause in question. In terms of international comity, both the PRC courts and the English courts are entitled to apply their respective conflicts of law rules in resolving dispute on jurisdiction in their own courts. From the perspective of comity, the conflicts stemming from such rules are conflicts even though it does not involve a disagreement over the construction of the clause in question. Hong Kong court cannot decide which set of rules on conflicts should prevail.

CSAV further contended that the enforcement of an exclusive jurisdiction clause was not breach of judicial comity, citing *The Angelic Grace* [1995] 1 Ll Rep 87 in support. See also *Deutsche Bank AG v Highland Crusader Partners LP* [2010] 1 WLR at para 51 where Toulson LJ observed:

> "An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract."

The Court of Appeal accepted this proposition as far as an English court enforcing an exclusive jurisdiction clause in favour of the English court went. The same can be said for a case where Hong Kong court enforces an exclusive jurisdiction clause in favour of the Hong Kong forum. But this was not situation before the Court of Appeal. CSAV asked the court in Hong Kong to enforce an exclusive jurisdiction clause in favour of English court. In such context, by reason of the indirect interference with proceedings in the PRC courts, the Court of Appeal had to pay regard to the principle in *Airbus Industrie GIE v Patel*, supra.

The Court of Appeal had to bear in mind that different jurisdictions could legitimately have different rules on

enforceability of exclusive jurisdiction clauses and the Court of Appeal were back to the conundrum of mutual respect for differences in conflicts of law rules in different regions. First of all, the approach to construction of a clause may differ according to the laws of different countries. Secondly, there are legitimate differences in terms of the extent to which the law may recognise an exclusive jurisdiction clause. Thirdly, given that CSAV had participated fully in the PRC proceedings, there could be submission to jurisdiction implications even though unsuccessful challenge to jurisdiction had been made. Again different jurisdictions may have different rules to deal with such question. CSAV did not contend that there is a set of uniform rules in customary international law in these regards.

In any event, whatever construction the Court of Appeal placed on such a jurisdiction clause was not important because the Court of Appeal's view on construction could not remove the conflicts between the PRC law and English law on the effectiveness of such clause. Given the rationale behind the principle of international comity, there was no justification for the Court of Appeal to proceed on the basis that, as between PRC law and English law, whichever regime yielding a result closer to one prescribed by the application of Hong Kong law should prevail.

At the court below, DHCJ Chan reached the same conclusion by reference to section 21M(4). Hin-Pro referred to the following observation of the English Court of Appeal in *Motorola Credit Corporation v Uzan (No 2)*, supra, at para 115 to support this conclusion:

> "As the authorities show, there are five particular considerations which the court should bear in mind, when considering the question whether it is inexpedient to make an order. First, whether the making of the order will interfere with the management of the case in the primary court e.g. where the order is inconsistent with an order in the primary court or overlaps with it. That consideration does not arise in the present case. Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction render inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce."

Hin-Pro placed emphasis on the third and fourth propositions. As the Court of Appeal saw it, the third proposition was not germane since the Court of Appeal was dealing with Hin-Pro, a company registered in Hong Kong and Hong Kong court certainly had *in personam* jurisdiction over it and it had assets in Hong Kong. But the fourth proposition was engaged. The conflict as to jurisdiction was between the outcome of the PRC courts' application of the PRC law on the effect of the jurisdiction clause in the bills of lading and the outcome of the English courts' application of English law on the same.

The Court of Appeal was therefore in agreement with the DHCJ Chan that Hong Kong court should not exercise its section 21M jurisdiction in the case in question. The Court of Appeal's views were broadly in line with the views expressed by *Thomas Raphael* in his book on *The Anti-Suit Injunction* (2008), at paras 7.29 to 7.33 and 13.13 and *Briggs & Rees, Civil Jurisdiction and Judgments* 5th Edn, para 5.41.

Further, even assuming the courts in Hong Kong could exercise their section 21M jurisdiction despite the judicial conflicts in the case in question, the Court of Appeal did not think it warranted the grant of the Hin-Pro Mareva in terms of the order of DHCJ Saunders or the Hin-Pro Receivership Order. As the Court of Appeal observed, the extent of the Hin-Pro Mareva went beyond the actual damages suffered by CSAV and the monetary limit was set partly by reference to the total claims advanced by Hin-Pro in the mainland proceedings. Many of those claims had yet to result in any judgments and CSAV was participating in those actions. As far as proceedings in Hong Kong were concerned, subject to costs already incurred in the mainland proceedings and judgments already satisfied, the Court of Appeal did not see why an interim injunction restraining Hin-Pro from proceeding further with the mainland litigations and from enforcing the mainland judgments could not give CSAV all the protection it needed. For the reasons given by the Court of Appeal's in the judgment of 18/12/2014, the undertakings offered by Hin-Pro to the Court of Appeal effectively provided similar protection.

CSAV obtained the Hin-Pro Receivership Order for the purpose of preserving and locating assets and meeting the disclosure requirements under the Hin-Pro Mareva. At para 20 of the decision of DHCJ Saunders of 17/7/2014, the learned judge said the following when he granted the Hin-Pro Receivership Order:

"Receivers will be in a position to effectively locate and preserve Hin-Pro's assets for the purpose of complying with the *Mareva* injunction and the world wide freezing order, and to ensure that Hin-Pro properly complies with the disclosure orders made in the English and Hong Kong courts."

However, the order as granted also contained the following empowering provisions:

"(c) intervene and take any necessary steps on behalf of the defendant in the PRC legal actions … and if thought fit, withdraw and discontinue the said legal actions".

Such order went beyond the scope of the intended purpose for which the order was made. It was more draconian than an anti-suit injunction and CSAV had not shown the Court of Appeal any authority where such an order had been made in the context of a section 21M application. There was no consideration by DCHJ Saunders of the implications on comity and judicial conflicts stemming from the grant of such a power.

In any event, as the Court of Appeal observed, apart from the question of costs already incurred, the undertakings offered by Hin-Pro had sufficiently addressed the concerns of CSAV. CSAV basically repeated the submissions it had advanced before that the undertakings could not to be relied upon. In addition, CSAV referred the Court of Appeal to the history of service by CSAV's solicitors on Hin-Pro. The Court of Appeal had considered the matter in that light but the Court of Appeal was not persuaded that DHCJ Chan had made any error which warranted the Court of Appeal's intervention of his conclusion that, quite apart from the consideration as to judicial conflicts, on such undertakings the orders made by DHCJ Saunders should be discharged.

DHCJ Saunders granted the Soar Mareva and Soar Receivership Order on what the learned judge referred to as the *Chabra* jurisdiction. By reference to the discussion in *Gee, Commercial Injunctions* 5th Edn, para 13.007, the judge identified at para 3 of his Reasons for Decision of 21/7/2014 the basis on which CSAV sought the Soar Mareva before him as the third limb discussed in that paragraph:

"Although the defendant to the substantive claim has no legal or equitable rights to the assets in question, the defendant has some right in respect of, control over, or other right of access to the assets. If a defendant has set up a network of trusts and companies to hold assets over which he has control, and he has apparently done this to make himself judgment-proof, this would be an appropriate case for the granting of Mareva relief against the relevant non-party. If the defendant is a shareholder in a private company and was left free to deprive the company of assets to which it may be entitled, this could affect the value of his shareholding and so an injunction can be granted against non-parties to preserve those assets."

The crux of DHCJ Saunders' findings upon which the Soar Mareva was grounded were set out at para 14:

"Mr Scott submits, and I am satisfied, that there are good reasons to suppose that Hin-Pro has some right in respect of, control over, or other right of access to assets which apparently belong to Soar. The evidence establishes that Ms Su Wei is the sole director and shareholder of both Hin-Pro and Soar, and that she and the two companies are involved in the scheme which leads to Hin-Pro's multiple legal proceedings … in which Hin-Pro falsely alleges that it was the seller of cargoes. The involvement of Soar in the shipment from Hin-Pro to Raselca is commercially unusual giving rise to a strong inference that Soar was inserted m the shipping chain in order to collect payments which should have accrued to Hill-Pro."

DHCJ Chan discharged the Soar Mareva and Soar Receivership Order on the basis that as the *Chabra* jurisdiction was founded upon the Hin-Pro Mareva, these orders should also be discharged upon the discharge of the latter. CSAV had not advanced any submissions against that analysis. Therefore, it followed from the Court of Appeal's upholding DHCJ Chan's decision to discharge the Hin-Pro Mareva that the Court of Appeal should uphold the discharge of the Soar Mareva and Soar Receivership Order.

The Court of Appeal should dismiss the appeal and order CSAV to pay the costs of Hin-Pro and Soar. Such costs were to be taxed with certificate for two counsel.

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

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