SUN MOBILITY
Insurance and Claims Services Limited

30 December 2016
Ref : Chans advice/192

To: Transport Industry Operators

Anti-suit injunction (VI)

Remember our Chans advice/171 of 31/3/2015 reporting that the Hong Kong Court of Appeal discharged the Mareva injunctions against Hin-Pro? The Hong Kong Court of Final Appeal issued a Judgment on 14/11/2016 reversing the Court of Appeal's Judgment of 11/3/2015. [FACA No. 1 of 2016]

Introduction

CSAV was a Chilean shipping corporation. Hin-Pro was a company incorporated in Hong Kong that carried on business as a freight forwarder. Hin-Pro had brought proceedings against CSAV in various courts in the People's Republic of China ("PRC") under bills of lading issued by CSAV that contained exclusive English jurisdiction clauses. Hin-Pro had done so in disregard of anti-suit injunctions issued by the Commercial Court in England restraining Hin-Pro from suing CSAV in any jurisdiction other than the High Court of England and Wales.

In the English actions CSAV had sought damages for Hin-Pro's breaches of contract in disregarding the exclusive jurisdiction clauses. In support of the claim for damages CSAV had sought, in the legal proceedings in Hong Kong, a Mareva injunction over Hin-Pro's assets in Hong Kong and the appointment of a receiver, pursuant to the Court's powers under section 21M of the High Court Ordinance ("section 21M"). The Hong Kong Court of Appeal, upholding the decision of the Hong Kong High Court, had ruled that the Mareva injunction should not be granted as to grant it would be to intervene in a conflict between the English Court and the Courts of the PRC. CSAV appealed against the Hong Kong Court of Appeal's ruling.

The appeal to the Hong Kong Court of Final Appeal required consideration of the correct approach to an application for relief under section 21M, which provides:

(1) Without prejudice to section 21L(1), 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 these 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.

…

(7) In this section "interim relief" includes an interlocutory injunction referred to in section 21L(3)

Section 21L provides:

(1) The Court of First Instance may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court of First Instance to be just or convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks just.

(3) The power of the Court of First Instance under subsection (1) or section 21M to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the Court of First Instance, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled or resident or present within that jurisdiction.

…

The First Question

The first question raised by the appeal to the Court of Final Appeal was what were the legal principles applicable on this section 21M application and whether the Court of Appeal was right to apply the first stage test in *Refco* and, if so, whether it applied that test correctly. The starting point was to consider the origin and object of section 21M.

In *Mareva Compania Naviera S.A. v International Bulk Carriers SA* Lord Denning MR identified a novel form of injunctive relief, which became known as a Mareva. It prohibited a defendant from disposing of his assets. Its object was to ensure that if judgment was given against him the judgment could be enforced. The Mareva injunction was welcomed by the commercial world and was recognized by the English Parliament in section 37(3) of the Supreme Court Act 1981 and also adopted in Hong Kong.

In Hong Kong section 21M was introduced, pursuant to the recommendations of the Final Report of the Chief Justice's Working Party on Civil Justice Reform. That Report endorsed a proposal that:

> "Interim relief by way of Mareva injunctions and/or Anton Piller orders should be available in relation to proceedings which are taking place, or will take place, outside the jurisdiction (and where no such substantive proceedings are contemplated in Hong Kong)."

In endorsing this proposal, the Working Party observed that interim relief would only make sense where the foreign proceedings in question would lead to a judgment, which, in the ordinary course of events, could be enforced in Hong Kong. Thus relief would not be available where a foreign court had made an exorbitant assumption of jurisdiction or made an order which would be contrary to public policy to enforce. Such foreign judgments would be impeachable and would therefore not found either enforcement or the interim jurisdiction.

The Working Party considered that it was not necessary for the legislature and the rules to go much further in providing guidance in relation to the exercise of the court's discretion in as much as the courts here would no doubt have regard to the relevant English case law and decide on the extent to which it should be applied in Hong Kong.

The correct approach to the first stage

The starting point is to consider whether, if the proceedings that have been or are to be commenced in the foreign court result in a judgment, that judgment is one that the Hong Kong court may enforce. This is a precondition to the exercise of the jurisdiction and is underlined by section 21N of the High Court Ordinance, which provides:

> " (1) In exercising the power under section 21M(1), the Court of First Instance shall have regard to the fact that the power is-
>
> (a) ancillary to proceedings that have been or are to be commenced in a place outside Hong Kong; and
>
> (b) for the purpose of facilitating the process of a court outside Hong Kong that has primary jurisdiction over such proceedings."

If the nature of the foreign proceedings is such that the Hong Kong court will not enforce any judgment to which they give rise – eg because the exercise of the foreign jurisdiction is exorbitant or for some other reason of public policy, then there can be no question of granting relief under section 21M.

Next the court should ask itself the same questions as it would if a Mareva were sought in support of an action proceeding in the Hong Kong court, namely (i) has the plaintiff a good arguable case and (ii) is there a real risk that the defendant will dissipate his assets if the Mareva is not granted?

The Court of Appeal in para 32 of its judgment misinterpreted Morritt LJ's judgment in *Refco* in postulating that it was necessary to consider the strength of the substantive claim under the law of Hong Kong. As Lord Nicholls observed in *Mercedes Benz v Leiduck* the underlying cause of action has little significance. Foreign judgments will be enforced in Hong Kong even though the claim is one that would not have succeeded under the law of Hong Kong. There is no reason in principle why the prospect of such a judgment should not receive the protection of a Mareva injunction.

Before considering *Refco*, the Court of Appeal had observed that in exercising the power under section 21M the court was required to abide by the general principles governing interim relief, including, where a Mareva was sought, the need for the plaintiff to show a good arguable case.

A Mareva injunction can have serious consequences for a defendant. It is a remedy that is open to abuse. A court must always exercise caution before granting this relief. But as section 21N(1)(b) states, the object of the exercise is to facilitate the process of the foreign court that has primary jurisdiction. The question that the Hong Kong Court has to consider is whether the plaintiff has a good arguable case in the foreign court. Section 21M relief can be sought in a wide variety of circumstances – sometimes before proceedings have even been commenced in the primary jurisdiction, often when they have been commenced but where that court has not considered the strength of the plaintiff's case. Where the court of primary jurisdiction has carried out that exercise, however, its conclusions will normally carry weight with the Hong Kong court.

In summary, in section 21M proceedings the court has first to consider whether, if the plaintiff succeeds in the primary jurisdiction the resultant judgment is one that the Hong Kong court will enforce. If the answer to that is yes, the court has to form a view, on all the available material, including any findings of the foreign court itself, whether the plaintiff has a good arguable case before the foreign court and whether there is a real risk that the defendant will dissipate his assets if the Mareva is not granted.

The second stage

The second stage of consideration of a section 21M application requires the court to consider whether "*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." Mareva relief is discretionary in any event, but this provision in section 21M(4) underlines the fact that the court has a wide discretion to refuse to make the order sought if the fact that the substantive claim

is being litigated in a foreign court has consequences that make the grant of a Mareva "unjust" or "inconvenient". It did not seem to the Court of Final Appeal to be very helpful to try to formulate a list of circumstances where it would be unjust or inconvenient to grant the Mareva sought.

The second and third questions

The 'second' and 'third' questions related to the relevance of the English cases dealing with anti-suit injunctions considered by the Court of Appeal in relation to judicial comity. This was a matter that properly fell to be taken into account in the second stage of the Court of Appeal's consideration of whether a Mareva should have been granted.

There was a time when it was considered to infringe judicial comity for the court of one country to enforce an exclusive jurisdiction clause in a contract by issuing an injunction restraining a defendant from proceeding in the court of another country.

More recently it has been recognized that an anti-suit injunction in support of an exclusive jurisdiction clause, while constituting an indirect interference with the process of a foreign court, does not thereby infringe judicial comity. This is because the relief is directed not against the foreign court but against the individual defendant who is disregarding his contractual obligations. The following observations of Millett LJ in *The Angelic Grace* in relation to anti-suit injunctions are now generally recognized as stating the true position:

> "In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether the proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant as promised not to bring them …
>
> I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was [his] own duty to decline."

In the case in question it was this approach that led the Court of Appeal to hold that no breach of comity was involved in the English Court issuing an anti-suit injunction to restrain a defendant from breaching an English exclusive jurisdiction clause. It followed from this that the Court of Appeal accepted that there had been no breach of comity in the English Court issuing an anti-suit injunction in the case in question. At this point, however, the reasoning of the Court of Appeal went awry. First it treated the application for a Mareva to provide protection in relation to an award of damages by the English Court as being equivalent to asking "the court in Hong Kong to enforce an exclusive jurisdiction clause in favour of an English Court." Secondly it treated proceedings aimed at assisting the enforcement of the English court's judgment as being an intervention in a conflict as to jurisdiction between the English and the PRC Courts that involved a breach of comity.

The Hong Kong Court had not been asked to assist the English Court to enforce an exclusive jurisdiction clause. It had been asked to assist in enforcing an award of damages by the English Court for breach of such a clause. If the action of the English Court in awarding such damages involved a breach of comity towards the PRC courts, then the Court of Final Appeal accepted that to assist in enforcing those damages might also involve a breach of comity. In that case enforcement of any judgment would seem open to objection on grounds of public policy and the Mareva should have been refused for that reason. But for reasons already explored, the action of the English Court

involved no such breach of comity. There was no bar on the ground of public policy to enforcing an award of damages made by the English Court nor to the grant of a Mareva injunction in support of the judgment of the English Court.

For these reasons the primary ground on which the Court of Appeal upheld the decision of the High Court to refuse the injunction was unsound. CSAV had established that it had a good arguable case in the English proceedings. The nature of those proceedings did not make it "unjust" or "inconvenient" to grant the relief sought.

Discretion and the risk of dissipation of assets

The Court of Appeal held that Hin Pro's undertaking not to enforce any judgment obtained from the PRC Courts without the consent of CSAV or the Courts of Hong Kong and England provided CSAV with adequate security so that there was no justification for the grant of a Mareva injunction. The Court of Final Appeal considered that this was an undertaking that the Court of Appeal should have viewed with reservation. It was CSAV's case that not merely had Hin-Pro brought the initial PRC proceedings in breach of contract, not merely had Hin-Pro brought the subsequent PRC proceedings in contempt of the order of the English Court, but that the PRC proceedings were fraudulent and based on forged documents. In the second English action Cooke J had found that there were good grounds for believing the claims to be fraudulent. At no stage had Hin-Pro condescended to offer an explanation for the anomalies that led Cooke J to express this view.

Furthermore, CSAV had incurred no doubt substantial costs in defending proceedings brought in a number of different courts in the PRC. The Court of Appeal declined to grant Mareva protection in respect of these "in view of our earlier conclusion on judicial conflicts". While the Court of Appeal might well have been justified in reviewing the amount secured by the Mareva injunction, the Court of Final Appeal considered that it erred in principle in ruling out any relief at all as a matter of discretion.

Disposal

For the reasons that the Court of Final Appeal had given, the Court of Final Appeal would allow CSAV's appeal. Much water had, however, flown under the bridge since the Court of Appeal gave judgment. Final judgment had been given in the English Commercial Court and confirmed on appeal. Most of the decisions of the PRC Courts had been reversed on appeal and it seemed unlikely that, at the end of the day, there would be any judgment adverse to CSAV outstanding in the PRC. As the Court of Final Appeal understood it damages remained to be assessed in the English Court but might well relate largely to costs incurred by CSAV. Hin-Pro's overall behaviour had, however, been so unsatisfactory that the Court of Final Appeal would reinstate Mareva relief in the much more modest amount that was in play. The Court of Final Appeal would remit the case to the High Court to assess that amount.

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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