

# Cordells Rompotis

Case Note – August 2015

## **An Anti Suit Injunction Should Be Granted To Protect The Parties' Bargain Under An Arbitration Clause: Ever Judger Holding Company Limited v Kroman Celik Sanayii Anonim Sirketi (HCCT 6/2015, Hong Kong High Court of First Instance, 17<sup>th</sup> April 2015)**

### **Executive Summary**

The Plaintiff sought an anti-suit injunction on the ground that proceedings in Turkey had been brought in breach of an exclusive jurisdiction clause providing for arbitration in Hong Kong.

The Court granted the injunction in order to protect the parties' bargain under the arbitration clause. The Court held that there was no reason why its discretion should not be exercised in such a way, provided that the relief is sought promptly; before the foreign proceedings are too far advanced.

### **Facts**

The Plaintiff was a BVI-registered company and owner of a Panamax bulk carrier, the MV Ever Judger (the "Ship"). The Defendant was a Turkish-registered company and a producer of semi-finished and finished iron and steel goods.

The Defendant transported steel wire rods in the Ship. Upon arrival in Turkey, there was a dispute over the condition of the cargo, and on 8th January 2015 the Defendant brought proceedings in Turkey claiming damages of US\$3.93m due to 50% of the cargo being damaged due to the poor loading/stowage.

The bills of lading provided, inter alia, for the Charter to be under English law with arbitration in Hong Kong in accordance with the Hong Kong Arbitration Ordinance. There was subsequently two sub-charters. Both sub-charters included English law as the governing law and Hong Kong arbitration clauses.

On 30th January (served 3 February) 2015, the Plaintiff wrote to the Defendant providing notice of the commencement of arbitration in Hong Kong pursuant to the governing law clause of the bills of lading. The Defendant contended that there was no valid arbitration

agreement, that the Plaintiff had submitted to Turkish jurisdiction and that the notice of arbitration had been defective.

On 27 February 2015, the Plaintiff applied for an ex parte anti-suit injunction in Hong Kong, which was granted. This was followed, on 2 March 2015, by an application by the Plaintiff in the Turkish action together with objection to jurisdiction and in Hong Kong filed an inter partes summons to continue the ex parte injunction.

### **Held:**

- The injunction was continued until further order of the court;
- The key principle in relation to anti-suit injunctions is that an injunction should be granted to protect the parties' bargain under an arbitration clause provided that the relief is sought promptly, before the foreign proceedings are too far advanced, and where there are no good reasons as to why the Court's discretion should not be exercised in such a way. In addition, the defence of unclean hands on the part of the applicant may be raised.
- On the facts, there was no good reason why the courts discretion should not be exercised, there had been no delay and the Court could not find that the Plaintiff had come to equity with unclean hands

### **Analysis**

#### **1. PRINCIPLES GOVERNING THE EXERCISE OF POWER**

It has been held in various cases that an anti-suit injunction should not be granted where strong reasons are shown by the opposite party: *Donohue v Armco Inc* [2002] CLC 440 and *Aggeliki Charis Cia Maritime SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep

87. It was held in the *Angelic Grace* that the English Court should feel no diffidence in granting an injunction to restrain a party from proceeding in a foreign court in breach of an arbitration agreement governed by English law, provided that the relief is sought promptly, before the foreign proceedings are too far advanced, and where there are no good reasons as to why the Court's discretion should not be exercised in such a way.

Importantly, it was held by Lord Millett in *The Angelic Grace* that there is no difference between injunctions to restrain proceedings for breach of an exclusive jurisdiction clause and one to restrain a breach of an arbitration clause.

In *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* (CACV 243/2014; 11 March 2015), the principles in *The Angelic Grace* were noted, though an application for an anti-suit injunction in Hong Kong to stop proceedings in China to enforce an exclusive jurisdiction agreement in favour of the English Courts was refused.

As such, Lam J held that the Court should ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement for Hong Kong arbitration where the injunction has been sought without delay and the foreign proceedings are not too advanced, unless the defendant can demonstrate strong reason to the contrary (at §45).

## **2. DEFENDANT'S REASONS AGAINST GRANT OF INJUNCTION**

### **Existence of other proceedings**

The Defendant argued that a strong reason not to grant an injunction was because of related proceedings in Turkey between the Defendant and their insurers out of the refusal to provide cover due to pre-voyage damage. There was also the main case against the Plaintiff in a different Turkish Court.

It was argued by the Defendant that the issues would overlap and that the grant of the injunction would cause the dispute to fragment and be duplicative at vast cost.

Justice Lam held that as the two sets of proceedings in Turkey were in entirely different courts in different provinces of Turkey, with no suggestion that the two cases could be consolidated and tried before a single court in Turkey, the case differs from the three that D relied on. In those cases (above), there was the opportunity for a "single

composite trial", a chance for the cases to be "tried together" or a "composite trial".

In any event, Lam J held that even if there were no injunction granted, that would not stop the Plaintiff pursuing the arbitration in Hong Kong.

### **Jurisdictional challenge in Turkey**

The Defendant argued that as the Plaintiff had already issued a challenge to jurisdiction of the Turkish courts in Turkey, the Hong Kong courts should not determine whether the anti-suit injunction should continue, i.e. the Turkish courts should be left to decide whether to decline jurisdiction.

Lam J refused to follow this argument on the ground that the anti-suit injunction acts only to uphold the contractual bargain made between the parties to litigate in a chosen jurisdiction: *The Angelic Grace* and *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530. The purpose of the anti-suit injunction was not to assert that Hong Kong was a superior or better forum.

### **Delay**

The Defendant argued that the Plaintiff had delayed in their application for the injunction.

Lam J held that the initial arrest proceedings in Turkey did not constitute the date of the breach of arbitration agreement, as they constituted proceedings for security. The breach of the arbitration agreement was in filing the main Turkish action on 8th January. The ex parte application for the injunction was on 27th February. As such, there was no delay.

## **3. UNCLEAN HANDS**

The Defendant argued that the Plaintiff had come to equity with unclean hand on the basis that the Master had issued clean bills of lading fraudulently, as he must have known (based on the mate's receipts) that the goods had been damaged when they were loaded on board the ship. The Defendant argued that there was a fraudulent misrepresentation by the Plaintiff through issuing the clean bills of lading and that they were colluding with the seller (the supplier of the steel).

This equitable maxim hinges on the notion that impropriety or misconduct of the party

seeking relief "must have an immediate and necessary relation to the equity sued for".

Justice Lam held that P had come to equity with clean hands on the basis that:

- (i) it was for the Master to form an honest and reasonable non-expert opinion on the apparent condition of the cargo from his own observations. This is a matter of his own judgment and the obligation imposes "a duty of a relatively low order but capable of objective evaluation": The David Agmashenebeli [2003] 1 Lloyd's Rep 92;
- (ii) the mate's receipts evidenced only minor superficial problems with the goods and the evidence suggested that such conditions are not uncommon with steel cargo. In addition, the sales contract allowed for bills of sale with remarks such as "atmospherically rusty";
- (iii) fraud could not be inferred simply on the basis that the remarks on the receipts did not make their way to the bills of lading;
- (iv) there can be other, honest, explanations for the discrepancy between the mate's receipts and the bills of lading. Some consequences may be serious, whilst others may be not so serious, and a mate's receipt may be erroneous;
- (v) there was no contractual obligation, unlike in other cases raised by the Defendant, for the bills of lading to correspond with the notes on the mate's receipts; and
- (vi) the ship's own P&I club had not refused to cover the ship because clean bills of lading were issued - it had in fact only reserved its position.

## Conclusion

This decision solidifies the approach in Hong Kong to anti-suit injunctions in the context of arbitration agreements. In short, that parties should be held to what they agreed in their contract, and that a party must demonstrate, where an arbitration clause of agreement exists, sufficient reasons before the court will refuse an anti-suit injunction.

### **Legal Notices**

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