Kluwer Arbitration Blog

Hong Kong Court Issues First Anti-suit Injunction in Restraint of Foreign Court Proceedings

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Introduction

In *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 3 HKC 246, Hong Kong's Court of First Instance (CFI) restrained a party from pursuing Turkish court proceedings in breach of an arbitration clause. This is reportedly the first time such an anti-suit injunction has been granted in Hong Kong to restrain foreign proceedings.

Legal background

Section 45(2) of the Arbitration Ordinance (Cap 609) (the Ordinance) empowers a court to grant an interim measure in relation to any arbitral proceedings, whether in or outside of Hong Kong, which have been or are to be commenced. This provision confers power on the Hong Kong courts to grant orders in aid of arbitrations, including restraining parties from pursuing court proceedings.

Despite their, somewhat misleading, name, such 'anti-suit' injunctions are not addressed to or binding upon the foreign court. Rather, they are directed at a party, who must comply with the terms of such an injunction or face sanctions under Hong Kong law.

The discretion under section 45(2) of the Ordinance applies in relation to proceedings both in Hong Kong or abroad. To the authors' knowledge, however, it has never been used to restrain a foreign action. In *Lucky Sun Development Ltd v Gainsmate International Ltd* [2007] HKCFI 1011 (which was decided under section 2GC of the previous Arbitration Ordinance (Cap 341)), the CFI granted an *ex parte* application to restrain a party from pursuing court proceedings in Mainland China. The anti-suit portion of the relief was, however, subsequently discharged on the basis that the appropriate test for granting such an injunction had not been satisfied (or even considered) in the *ex parte* application.

It should be noted that section 21L of the High Court Ordinance (Cap 4) similarly empowers a court to grant equitable relief, such as an injunction (whether interlocutory or final), if it finds that it is just or convenient to do so.

The facts

By a charterparty dated 6 October 2014, the defendant, a Turkish company (the 'Buyer'), and the

plaintiff, the owners of a vessel, the 'Ever Judger' (the 'Shipowner'), agreed upon the carriage of a cargo of steel wire rods from China to Turkey via the Panama Canal.

The charterparty was governed by English law and provided that any dispute shall be referred to "arbitration in Hong Kong in accordance with the Hong Kong Arbitration Ordinance".

A dispute arose relating to the condition of the cargo upon discharge at the Turkish port. The Buyer alleged that the steel rods arrived at the port severely rusted, deformed, or otherwise damaged due to improper storage on the ship. The Shipowner contended that the damage occurred upon unloading at the ship's destination.

On 8 January 2015, the Buyer initiated legal proceedings in Turkey before the Gebze Civil Court of First Instance. On 5 February 2015, the Shipowner sought an anti-suit injunction from the Hong Kong CFI to restrain further conduct of the proceedings in Turkey.

The decision

The judge, Lam J, first considered the statutory basis of his legal powers to issue such an injunction under, alternatively, section 45(2) of the Arbitration Ordinance or section 21L of the High Court Ordinance. Whilst he expressed scepticism that the court's jurisdiction was founded exclusively, or at all, on section 45(2) (rather than section 21L), he noted that the parties were agreed upon its application, so that "the point must be left to another occasion" (at [35]).

Next, Lam J set out the legal rationale for granting such an injunction. A Hong Kong court would ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an arbitration agreement, at least where the injunction has been sought without delay and the foreign proceedings are not too far advanced, unless the defendant can show strong reasons to the contrary (at [45]).

Such an order would not ordinarily be granted on the basis that the foreign proceedings are "vexatious or oppressive". Rather, the party in question would be prevented from breaching the contractual promise represented by the arbitration clause in their agreement – that they will arbitrate such disputes (at [38]).

Lam J commented that it seemed to him that the availability of such an anti-suit injunction "does not depend upon the existence or prospect of arbitral proceedings" (at [32]). This line of reasoning was not, however, developed further.

As an equitable remedy, anti-suit injunctions may be opposed on the basis of the usual equitable defences, including that the applicant has not come to the court "with clean hands" (although this defence could not be sustained in the present case) (at [54]).

One reason for not granting an injunction might be the risk of parallel proceedings. In the present case, however, the risk of parallel proceedings itself was not a determining factor. Indeed, such risk would not be reduced if the injunction were refused. The Buyer had made no cross-application for the dismissal of the Hong Kong proceedings, meaning that if the order were refused, both the Turkish litigation and the Hong Kong arbitration would potentially continue in parallel (at [72]).

Accordingly, the parties' agreement was to be upheld and an order rendered enjoining the Buyer from pursuing the Turkish proceedings was granted.

Comment

The *Ever Judger* decision is a useful confirmation of the rationale for awarding anti-suit injunctions in favour of arbitration. It also marks a significant watershed, being the first time such an order has been definitively rendered to restrain proceedings commenced outside of the PRC.

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