

Anti-Suit Injunctions – Novel Singapore Judgment on Third Party Reliance on Exclusive Forum Clauses

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Introduction

In the course of a commercial dispute, there are often issues regarding the proper forum for dispute resolution. Parties may disagree over which court has jurisdiction over the dispute, or whether the dispute should be submitted to arbitration or litigation. Anti-suit injunctions are thus vital to prevent concurrent proceedings in multiple forums.

In *Hai Jiang 1401 Pte. Ltd. v Singapore Technologies Marine Ltd. ("The Seven Champion")* [2020] SGHC 20, the Singapore High Court had to consider an application for an anti-suit injunction against a contractual claim initiated by the Defendant in the United Arab Emirates ("**UAE**"), by way of arresting the Plaintiff's vessel, the MV "Seven Champion". Notably and as will be explained below, the Plaintiff relied on an arbitration clause in the contract which the Defendant based its claims on, despite the Plaintiff claiming not to be a party to that contract.

In a novel decision, the Court endorsed the line of cases emanating from *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd* [2001] EWHC 540 (Admlty) ("**The Sea Premium**"), holding that an anti-suit injunction may be granted against foreign proceedings in breach of an arbitration or exclusive jurisdiction clause in the

underlying contract, even if the anti-suit injunction applicant was not a contractual party to the arbitration or exclusive jurisdiction clause, but an assignee of the arbitration or exclusive jurisdiction clause.

The Court granted a permanent anti-suit injunction, and restrained the Defendant from proceeding with their claim in the UAE. The Plaintiff was successfully represented by Toh Kian Sing SC, V. Bala and Wu Junneng of Rajah & Tann Singapore LLP.

Brief Facts

The Plaintiff was the owner of the vessel MV "Seven Champion" ("**Vessel**"). The Vessel was bareboat chartered ("**BBC**") to Lewek Champion Shipping Pte Ltd ("**LCS**"), which sub-bareboat chartered the Vessel to EMAS-AMC Pte Ltd ("**EMAC**") ("**sub-BBC**"). The Plaintiff, LCS and EMAC then entered into a General Assignment ("**GA**") under which LCS assigned its various rights and interests to the Plaintiff.

Under the BBC and sub-BBC, LCS undertook to remove an old crane on the Vessel. In that connection, LCS entered into a Crane Upgrade Agreement ("**CUA**") with the Defendant for the installation of a new crane on the Vessel. The CUA was governed by Singapore law and provided for all disputes arising from it to be settled by arbitration in Singapore under the Rules of the Singapore Chambers of Maritime Arbitration ("**SCMA**").

Due to numerous defaults by LCS, the Plaintiff terminated the BBC and demanded payment of more than US\$194 million. LCS failed to make payment and was wound up. In the meantime, the Defendant had issued an *in rem* writ against LCS in Singapore for a claim of S\$5.8 million being the outstanding sums due under the CUA. The Defendant then filed a proof of debt in the liquidation of LCS for the same amount.

Importantly, and concurrently with the above actions, the Defendant applied for and obtained a precautionary attachment from the Court of Sharjah, UAE, against the Vessel. As a result of this, the Vessel was arrested and detained from leaving Port Khalid, Sharjah, UAE. Despite the Plaintiff's multiple offers to provide security, the Defendant refused to agree.

Additionally, the Defendant also commenced a substantive suit in the Sharjah Court, claiming that there was an outstanding debt under the CUA owed by both LCS *and the Plaintiff*, despite the Plaintiff not being a party to the CUA and despite the prior termination of the BBC between the Plaintiff and LCS. According to UAE law, the Plaintiff would be answerable for all liabilities of LCS if such liabilities related to the Vessel and were incurred during the BBC, even if the Sharjah action was only commenced after the termination of the BBC.

In the circumstances, the Plaintiff brought the present application in the Singapore Court, applying for an anti-suit injunction against the Defendant restraining it from maintaining the arrest of the Vessel through the Sharjah proceedings on two alternative grounds:

- (a) The Defendant's commencement and conduct of the Sharjah proceedings was oppressive and/or vexatious; and
- (b) By way of the GA, the Plaintiff was entitled to rely on the arbitration clause in the CUA, and on that basis the Defendant must refer any dispute arising out of the CUA with the Plaintiff to arbitration in Singapore.

Holding of the High Court

The Singapore High Court found in favour of the Plaintiff, granting the anti-suit injunction.

Anti-suit injunctions

The Court assessed the law of anti-suit injunctions in Singapore, reiterating the relevant factors for granting an anti-suit injunction:

- (a) Whether the defendant is amenable to the jurisdiction of the Singapore court;
- (b) Whether Singapore is the natural forum for the resolution of the dispute;
- (c) Whether the foreign proceedings are vexatious or oppressive to the plaintiff;
- (d) Whether an injunction would cause any injustice to the defendant by depriving it of legitimate juridical advantages in the foreign proceedings; and
- (e) Whether the commencement of the foreign proceedings is in breach of any agreement between the parties.

Application

On the facts, the Court found that:

- (a) Singapore was clearly the natural and most appropriate forum for the dispute;
- (b) There was oppressive and vexatious conduct on the part of the Defendant; and
- (c) On a *prima facie* basis, there was a valid and binding arbitration clause covering the claim.
 - a. The arbitration agreement in the CUA had been assigned by LCS to the Plaintiff under the GA.
 - b. Alternatively, the Plaintiff could avail itself of and bind the Defendant to comply with the arbitration agreement in the CUA on the basis of the principle in *The Sea Premium* line of cases.

Therefore, the Court granted the Plaintiff's application for an anti-suit injunction.

Standard of proof

The Court examined the applicable test for determining the existence of an arbitration agreement for an anti-suit injunction. Notably, there had not been a case in Singapore clarifying the applicable standard of proof for anti-suit injunction applications.

It is settled law that the standard of a *prima facie* case has been adopted in the context of stay applications under section 6 of the International Arbitration Act, in particular when determining whether there is a valid arbitration agreement between the parties (*Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373).

Here, the Court held that the same standard was to be adopted in the context of an application for an anti-suit injunction. The *prima facie* test should be applied to determine whether there is a valid and binding arbitration agreement, as it would be incongruous for the courts to adopt different tests in the context of an anti-suit injunction and a stay application.

Assignability of the arbitration agreement

The Plaintiff submitted that, under the GA, LCS had assigned all its rights and interests, including those arising at any later time, in or in connection with "the Charterer's Assigned Property" to the Plaintiff. The Charterer's Assigned Property included, *inter alia*, the "Charterer's Assigned Contract Rights" which, in turn, included, *inter alia*, all rights to commence, conduct, defend, compromise or abandon any legal or arbitration proceedings relating to any matter arising out of or in connection with the sub-BBC. The Plaintiff submitted that this included the right to arbitrate under the arbitration agreement in the CUA.

However, the Defendant argued that the CUA contained a non-assignment clause which prohibited the assignment of rights under the CUA to any third-party to the agreement. To counter this argument, the Plaintiff submitted that the Defendant had constructive notice of the GA when they entered into the CUA, and that this included the fact that under the GA, LCS had assigned not only all present rights and interests but also those that might accrue to LCS in the future.

In order to resolve the conflict between the assignment of rights in the GA and the non-assignment clause in the CUA, which had been entered into almost one year and nine months after the GA, the Court considered the case of *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] BCC 221 ("**Foamcrete**").

The Plaintiff relied on *Foamcrete* for its proposition that if the agreement to assign predates the clause prohibiting assignment, then the prohibition does not operate. The Court noted that the reasoning in *Foamcrete* has been implicitly endorsed in Singapore, and that the reasoning in the decision was compelling. In that case, the assignee was found to have acquired a beneficial interest in a floating charge lawfully created before the prohibition against assignment. The security rights over the debt due thus did not derive from any assignment made in breach of the prohibition clause, but from the antecedent floating charge, as to hold otherwise would allow the removal of assets entirely from the reach of an existing floating charge by an agreement that property subsequently created would be subject to the prohibition.

In any event, the Court found that there was enough in the Plaintiff's submission to raise a *prima facie* case that the right to arbitrate under the arbitration agreement in the CUA had been assigned to the Plaintiff. The Court thus declined to hold conclusively on whether the prohibition against assignment would prevent the assignment under the GA.

The Sea Premium

Notably, this is also the first Singapore decision which has endorsed the principle in *The Sea Premium*. The team from Rajah & Tann submitted that the principle should be adopted as part of Singapore law, and the Court found the line of cases presented by the team to be persuasive.

The principle originated from the UK Court of Appeal decision in *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87 ("**The Angelic Grace**"). The decision established that an anti-suit

injunction should be granted to enforce an exclusive forum clause in a contract unless there are strong reasons to the contrary. This is provided that:

- (a) The foreign proceedings are in breach of the exclusive forum clause;
- (b) The anti-suit injunction applicant is entitled to enforce the clause;
- (c) The clause is binding and valid; and
- (d) The claim in the foreign proceedings falls within the terms of the clause.

The Sea Premium and its subsequent line of cases extended the principle in *The Angelic Grace* a step further. The cases demonstrated the approach of the UK and Hong Kong courts, that a third party that wished to take the benefit of the contract would be bound by the burden of any exclusive forum clause therein. The cases include:

- (a) *Jewel Owner Ltd and another v Sagaan Developments Trading Ltd (the "MD Gemini")* [2012] EWHC 2850 (Comm);
- (b) *Shipowner's Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS ("The Yusuf Cepnioglu")* [2016] 1 Lloyd's Rep 641;
- (c) *Dell Emerging Markets (EMEA) Ltd and another v IB Maroc.com SA* [2017] EWHC 2397 (Comm);
- (d) *Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Ltd* [2018] EWHC 3009 (Comm);
- (e) *Clearlake Shipping Pte Ltd and another v Xiang Da Marine Pte Ltd* [2019] EWHC 2284; and
- (f) *Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian* [2019] HKCFI 482.

Here, the Court found the above line of cases persuasive and applicable as part of Singapore law. The principle was articulated as enabling an applicant for an anti-suit injunction, although claiming not to be a party to the contract which the respondent sues upon in a foreign jurisdiction, to be granted an injunction based on an exclusive forum clause (or arbitration agreement) in that contract. As in *The Angelic Grace*, this is provided that the foreign proceedings are in breach of the clause, and the respondent's claim in the foreign proceedings falls within the terms of the clause.

The Court noted that this is a complex area of law that is developing and that the growing number of cases show that the boundaries of the effect of exclusive forum clauses (whether exclusive jurisdiction or arbitration clauses) on third parties are being tested. Typically, a non-party to an arbitration or jurisdiction clause cannot take advantage or be bound by it. However, *The Sea Premium* line of cases demonstrates that there can be exceptions to this position.

The Court observed that there are several questions to be considered in this area:

- (a) Whether a non-party can enforce the exclusive forum/arbitration clause;
- (b) When a non-party can be bound by the exclusive forum/arbitration clause; and

- (c) When the contractual effect of the clause covers litigation with respect to non-parties.

In this regard, it was noted that the juridical underpinnings of this jurisdiction are underdeveloped, and that there could be several grounds:

- (a) Is the anti-suit injunction respondent estopped from denying the existence of the contract under which his substantive claims are made, even though the claimant denies the existence of the contract?
- (b) Is there an equitable obligation on the anti-suit injunction respondent not to bring a claim in a forum inconsistent with that agreed under the contract which he alleges exists, or which is the necessary condition of his claims?
- (c) Is it vexatious and oppressive to bring an internally inconsistent claim which does not respect the exclusive forum clause which would be the condition of any coherent claim?

These issues remain to be considered by the courts, and will require further development and consideration in future decisions.

Concluding Remarks

The High Court's decision is significant as a landmark development in the law of anti-suit injunctions. It clarifies the suitability of anti-suit injunctions to prevent the breach of exclusive forum clauses and arbitration agreements and, importantly, extends the reliance on such clauses to third parties to the contract.

The decision brings the position in Singapore in line with that in the UK and Hong Kong. It should be noted that this is a complex area of law that is still under development, and there is a growing number of cases that show the boundaries of the effect of exclusive forum clauses on third parties. We will continue to keep you updated of new developments and decisions in this field.

Parties encountering similar situations involving anti-suit injunctions and the interaction between non-parties and exclusive forum/arbitration clauses may find the position in law less than certain. In light of this case, the team from Rajah & Tann is well-positioned to assess the circumstances in relevant matters.

For further queries, please feel free to contact our team below.

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Contacts



Toh Kian Sing SC
Partner, Singapore

T +65 6232 0614
kian.sing.toh@rajahtann.com



V Bala
Partner, Singapore

T +65 6232 0383
bala@rajahtann.com



Yu Zheng
Partner (Foreign Lawyer),
Singapore

T +65 6232 0613
yu.zheng@rajahtann.com



Wu Junneng
Associate, Singapore

T +65 6232 0677
junneng.wu@rajahtann.com

Please feel free to contact the editorial team of *Arbitration Asia* at arbitrationasia@rajahtannasia.com.

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