

ANTI-SUIT INJUNCTIONS AND ARBITRATION AGREEMENTS: THE POSITION UNDER HONG KONG LAW



In the landmark decision of Mr Justice Godfrey Lam in *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi*¹, the Hong Kong High Court sets out the principles that apply to anti-suit injunctions in the context of arbitration agreements.

Summary of facts

The plaintiffs, Ever Judger Holding Company Limited (the **owners**) (represented by Holman Fenwick Willan) were the owners of the Panamax bulk carrier *EVER JUDGER*. The defendants (the **buyers**) were the receivers of a cargo of steel wire rods, which was loaded at Zhangjiagang for carriage to Kroman. The cargo was shipped under bills of lading that incorporated an arbitration clause providing for English law and arbitration in Hong Kong. When the ship arrived in Turkey, a dispute arose in relation to the condition of the cargo.

The buyers arrested the vessel in Turkey and security was provided by the owners. Subsequently, and in breach of the arbitration clause, the buyers commenced a substantive action against the owners before the Turkish Courts and filed points of claim. The buyers alleged in the Turkish proceedings that the cargo had been damaged as a result of 'irregularities' during loading, carriage and/or stowage of the cargo while the responsibility of the carrier.

Relying on the Hong Kong arbitration clause, the owners applied for, and obtained *ex parte* an anti-suit injunction in Hong Kong, restraining further conduct of the Turkish proceedings. Mr. Justice Godfrey Lam heard the owners' *inter partes* application, which sought the continuation of the *ex parte* injunction.

1 (HCCT 6/2015)
2 [1995] 1 Lloyd's Rep 87
3 [2002] 1 All ER 749



Legal arguments

The Court considered *Aggeliki Charis Cia Maritime SA v Pagnan SpA*, *The Angelic Grace*², *Donohue v Armco Inc*³ and other authorities and concluded that as a matter of Hong Kong law unless the defendants can show strong reasons to the contrary, the court should ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of a Hong Kong arbitration agreement where:

- The injunction has been sought without delay.
- The foreign proceedings are not too far advanced.

The buyers opposed the owners' application.

First, the buyers argued that the owners had not come to Court with 'clean hands'. Specifically, the owners alleged that with the knowledge that the goods had been damaged, the Master fraudulently issued clean bills of lading. However, the Judge ruled that the finding of fraud could not be established on the basis of contested affidavit evidence. Where serious allegations of wrongdoing are involved, they must be proved by

evidence of commensurate cogency. Fraud or serious misconduct can only be inferred where such inferences are compelling.

The buyers' second argument was that related proceedings were already on foot in Turkey between the buyers and their cargo insurers. The buyers had issued proceedings against their cargo insurers after they refused cover on the grounds that there was evidence of pre-voyage damage. The Judge rejected this argument on the basis that the refusal of the anti-suit injunction would not result in a single composite trial involving the parties and the insurers in Turkey: there would still be two sets of proceedings between different courts in Turkey. Further, it would not remove the risk of inconsistent decisions between the Hong Kong arbitration and the insurance litigation. Mere inconvenience to the buyers of having to fight both in Turkey and in Hong Kong was not a sufficient ground for refusing the injunction.

The buyers' third argument was that the owners obtained the *ex parte* anti-suit injunction in Hong Kong after they had filed their points of defence in the Turkish proceedings and their challenge to the jurisdiction of the Turkish court. The buyers argued that the Turkish court should decide first whether to decline jurisdiction. However, the Judge accepted the owners' explanation that they had to

file their points of defence under the Turkish rules of procedure, and had they done so without filing a jurisdictional challenge at the same time, the owners could have been taken to have submitted to Turkish jurisdiction.

Finally, the buyers argued that the owners had delayed in applying for the injunction. This argument was rejected given that the owners had promptly asked the buyers to withdraw the Turkish proceedings and had applied for the injunction soon after the buyers filed their points of claim in the Turkish proceedings. The fact that the buyers commenced arrest proceedings in Turkey some time before was not relevant because the arrest proceedings could fairly be regarded as proceedings to obtain security for their claim rather than proceedings to pursue the substantive claim.

The owners' injunction to restrain the Turkish proceedings was therefore continued.

Conclusion

This comprehensive decision clarifies the approach of the Hong Kong Courts to anti-suit injunctions in the context of arbitration agreements. The decision is in line with the principle that parties should generally be held to what they agreed in their contract, and therefore a party must demonstrate a strong reason before the court will refuse an anti-suit injunction where an arbitration clause or agreement exists.



This comprehensive decision clarifies the approach of the Hong Kong Courts to anti-suit injunctions in the context of arbitration agreements.

JULIAN DAVIES, PARTNER



The decision is in line with the principle that parties should generally be held to what they agreed in their contract, and therefore a party must demonstrate a strong reason before the court will refuse an anti-suit injunction where an arbitration clause or agreement exists.

HAO-LING YAU, ASSOCIATE

Related article

In February this year, in the case of *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS*, Paul Dean and Richard Strub in our London office obtained an anti-suit injunction from the English High Court restraining charterers from prosecuting a direct claim in Turkey against the shipowners' P&I Club. Our briefing on this case can be found at <http://www.hfw.com/Direct-rights-of-action-against-P-and-I-clubs-February-2015>.

For more information, please contact the authors of this Briefing:

George Lamplough

Partner, Hong Kong
T: +852 3983 7776
E: george.lamplough@hfw.com

Julian Davies

Partner, Shanghai
T: +86 21 2080 1188
E: julian.davies@hfw.com

Hao-Ling Yau

Associate, Hong Kong
T: +852 3983 7769
E: hao-ling.yau@hfw.com

Trevor Fox

Senior Associate, Shanghai
T: +86 21 2080 1199
E: trevor.fox@hfw.com

HFW's Hong Kong and Shanghai offices are part of an international network of 13 offices in 11 countries. For further information about shipping related issues in other jurisdictions, please contact:

Paul Hatzer

Partner, Hong Kong
T: +852 3983 7666
E: paul.hatzer@hfw.com

Paul Dean

Partner, London
T: +44 (0)20 7264 8363
E: paul.dean@hfw.com

Nick Poynder

Partner, Shanghai
T: +86 21 2080 1001
E: nicholas.poynder@hfw.com

Guillaume Brajeux

Partner, Paris
T: +33 1 44 94 40 50
E: guillaume.brajeux@hfw.com

Paul Apostolis

Partner, Singapore
T: +65 6411 5343
E: paul.apostolis@hfw.com

Jeremy Davies

Partner, Geneva
T: +41 (0)22 322 4810
E: jeremy.davies@hfw.com

Robert Springall

Partner, Melbourne
T: +61 (0)3 8601 4515
E: robert.springall@hfw.com

Dimitri Vassos

Partner, Piraeus
T: +30 210 429 3978
E: dimitri.vassos@hfw.com

Nic van der Reyden

Partner, Sydney
T: +61 (0)2 9320 4618
E: nic.vanderreyden@hfw.com

Simon Cartwright

Partner, Dubai
T: 971 4 423 0520
E: simon.cartwright@hfw.com

Hazel Brewer

Partner, Perth
T: +61 (0)8 9422 4702
E: hazel.brewer@hfw.com

Jeremy Shebson

Partner, São Paulo
T: +55 (11) 3179 2903
E: jeremy.shebson@hfw.com

Lawyers for international commerce

hfw.com

© 2015 Holman Fenwick Willan. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth