Maritime Injunction: a proper weapon against the anti-suit injunction?

"Huatai P&C Insurance Co., Ltd Shenzhen Branch v. Clipper Chartering SA"
Wuhan Maritime Court 21st July 2017

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Introduction

1. Very recently, Wuhan Maritime Court issued a maritime injunction by which a foreign shipowner was ordered to apply to withdraw an anti-suit injunction issued by the Hong Kong High Court against a Chinese insurer. This case seems to be the first published case that reveals the Chinese court's attitude towards the anti-suit injunction issued by a "foreign" court.

The Facts

2. Huatai P&C Insurance Co., Ltd Shenzhen Branch (the "insurer") applied to Wuhan Maritime Court to arrest MV "Ken Sirius" owned by Clipper Chartering SA (the "shipowner") on 2 June 2017 in order to secure a cargo claim under a bill of lading. On the same day, the Chinese court granted the application.

3. About a week later, on 8 June 2017, the insurer issued substantive proceedings against the shipowner for compensation and legal costs. On 9 June 2017, the Chinese court accepted the case and served the court documents on the shipowner. It was subsequently decided by the Chinese court that it had jurisdiction over the shipowner under Chinese procedural law.

4. Almost parallel, and to avoid the proceedings in China, the shipowner applied to the Hong Kong High Court for an anti-suit injunction on the ground that there is an arbitration clause being incorporated into the bill of lading in question and that clause was binding on the subrogated insurer and the shipowner. The Hong Kong High Court issued an anti-suit injunction for the shipowner and ordered the insurer to withdraw the legal proceedings commenced before the Chinese court.

5. On 21 July 2017, Wuhan Maritime Court issued a maritime injunction against the shipowner upon the insurer's application which ordered them to withdraw the proceedings before the Hong Kong High Court (this is essentially what a Hong Kong or English court would describe as being an anti-anti-suit injunction).

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The Hong Kong Anti-Suit Injunction

6. From a Hong Kong (and English) law perspective, the Hong Kong court's decision to grant the initial anti-suit injunction is not difficult to understand.

7. The anti-suit injunction is an order by one court (in this case, the Hong Kong court) requiring the respondent to withdraw legal proceedings in another court (in this case, the Chinese court). These orders are usually granted either if (a) the foreign proceedings are in breach of a jurisdiction or arbitration clause or (b) they are vexatious or oppressive. In cases where it is alleged that a party is breaching a jurisdiction or arbitration clause, an anti-suit injunction is essentially ordering specific performance against a party to comply with their contractual obligation not to sue in any forum other than before the court or arbitral tribunal agreed in the parties' contract.

8. In this case, before the Hong Kong court, the most obvious ground for the shipowner to rely on was the first ground, that the Chinese proceedings were in breach of the arbitration agreement between the parties. The insurer was making a claim under the bill of lading, the bill of lading contained an arbitration clause, and therefore the insurer should be ordered to comply with their contractual duty not to sue in the Chinese court.

9. The potential counterargument by the insurer, before the Hong Kong court, is that the shipowner submitted to the Chinese court's jurisdiction (and therefore waived its right to arbitration). This argument would be correct if the Chinese procedural law is applied, as under Chinese law the shipowner is regarded as having submitted to the Chinese court's jurisdiction. However, this argument would not be correct if Hong Kong procedural law is applied, as a shipowner is only regarded as having submitted to the jurisdiction if it voluntarily appears in court to defend the case on the merits.

10. The Hong Kong court would have applied Hong Kong law, decided that the shipowner did not submit to the Chinese court's jurisdiction, and concluded that the insurer's claim in the Chinese court is in breach of the arbitration clause. Therefore, the appropriate remedy is to order the insurer to withdraw proceedings in the Chinese court.

The Chinese Maritime Injunction (Anti-Anti-Suit Injunction)

11. Article 51 of *the Special Maritime Procedure Law of the PRC* (the "SMPL") defines the maritime injunction. It means the compulsory measures taken by a maritime court to compel the respondent to do or not to do certain things so as to protect the applicant's rights and interests in connection with certain maritime claim.

12. Article 56 of the SMPL further provides that the conditions for granting a maritime injunction: first, there is a specific maritime claim; secondly, there is a necessity to rectify the action or inaction of the respondent; and thirdly there is an urgent situation and without the injunction the loss and/or damage will be irreparable.

13. The application for a maritime injunction to the Chinese maritime court is not restricted by the agreement, if any, for the dispute resolution under the underlying relationship between the parties. Therefore, an application for a maritime injunction can be applied to any maritime court where the maritime dispute (i.e. maritime claim) arose.

A Proper Remedy for Anti-Suit Injunction?

14. There are several arguments on whether the insurer is entitled to the maritime injunction if the tests indicated above are stringently applied. The most basic one is whether or not to withdraw foreign court proceedings is a "*maritime claim*". The Chinese law does not define what can constitute a maritime claim, but the Article 21 of the SMPL, which is relating to the grounds of vessel arrest, can provide referential value in this regard in our view. The Article 21 originates from the Arrest Convention 1952 and lists 22 specific maritime claims upon which a vessel can be arrested for security. We cannot say that this article is as exhaustive as regards providing the scope of the maritime, but notably the insurer's current claim can hardly fall within it.

15. The other arguments are around whether there are statutory or contractual rights are infringed and whether there is an emergency caused by the Hong Kong High Court order issued for protecting the arbitration. Given that whether or not an arbitration clause can be validly incorporated into a bill of lading is highly controversial under the Chinese law, and there are numerous cases aroused thereby, it does not seem straightforward that the arbitration argument (and the anti-suit injunction issued therefor) would necessarily be groundless / illegitimate and consequently the insurer's position would be irreparably damaged if they do attend the arbitration. In particular, it should be noted that the SMPL supports the vessel arrest to secure a foreign arbitration, so sufficient and powerful evidence needs to be adduced to demonstrate that the insurer's rights would be irreparably prejudiced by submitting claim to arbitration.

The Chinese and English Anti-Anti-Suit Injunction Compared

16. It may be of interest to consider how the Chinese and English approaches to the anti-anti-suit injunction compare with each other.

17. Under Chinese law, there is no such concept as an anti-suit injunction. The Chinese court does not grant orders interfering with foreign legal proceedings, and equally it appears to regard any interference by foreign courts with Chinese

proceedings as illegitimate and therefore to be restrained by an anti-anti-suit injunction (or to be ignored completely).

18. In contrast, under English law, the anti-suit injunction is well established. The English court will grant such orders which have the effect of interfering with foreign proceedings, and so it must accept it is sometimes legitimate for foreign courts to grant similar orders that interfere with English proceedings.

19. We therefore think that the English court would have been much less willing to grant the anti-anti-suit injunction than the Chinese court in this case. An English court would probably distinguish between having jurisdiction over a party who had simply failed to object to the court's jurisdiction, and having jurisdiction over a party who had contractually agreed to the court's jurisdiction. This case falls within the former category, and we think that an English court would have been very reluctant about granting an anti-anti-suit injunction. The Chinese court however concluded it had jurisdiction under Chinese procedural law, and that was sufficient for it to grant the anti-anti-suit injunction.

20. But we also think the Wuhan case may not be widely applied. On one side, the legal thresholds for the Chinese court to grant such anti-anti-suit injunction are hardly to meet; on the other side, with the promotion of the "one way one belt" policy many Chinese companies have established closer relationship with western countries and they have to consider the legal / commercial risks if they resist/ ignore the common law anti-suit injunction. Against this background, we suggest a Chinese company should carefully assess their case and explore the opportunity to overrule the anti-suit injunction in the proper jurisdiction, rather than considering the Chinese anti-anti-suit injunction as their first option.