Inconsistent Foreign Judgments on Exclusivity of Jurisdiction: Comity and Judicial Deference

Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd
[2016] HKCFA 79 (Hong Kong Court of Final Appeal)

Corresponding author:
Felix W.H. Chan, Faculty of Law, University of Hong Kong.
Email: fwhchan@hku.hk

Suggested citation:
Felix W.H. Chan, Inconsistent Foreign Judgments on Exclusivity of Jurisdiction: Comity and Judicial Deference. (2017) Journal of International Maritime Law, Vol.23(2), p.91-95.

Introduction

A domestic common law court is faced with an application to enforce a judgment issued by foreign court X. However, the judgment issued by court X is apparently inconsistent with another judgment previously rendered by foreign court Y. In addition, the action of court X in issuing the judgment may involve a breach of comity towards court Y. What should the domestic enforcing court do? What factors should the enforcing court consider when deciding whether the enforcement of the judgment rendered by court X is contrary to public policy on grounds of comity? In *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd*,[1] Lord Phillips of Worth Matravers sitting in the Hong Kong Court of Final Appeal articulated important principles and guidelines in these areas of private international law and the doctrine of comity. He identified the key factors the enforcing court should consider when evaluating whether the enforcement of a judgment rendered by foreign court X is contrary to public policy on grounds of comity, and whether the judgment of court X conflicts with another judgment previously issued by foreign court Y on the same issue. Several aspects of Lord Phillips' reasoning warrant further discussion and elucidation.

Facts and Issues

Placing these hypothetical issues into their actual context, the enforcing court is the Hong Kong court. Foreign court X is the English court, and foreign court Y is the Chinese court. In this case, a carrier (the claimant Compania Sud Americana de Vapores SA (CSAV)) issued a series of bills of lading to a Hong Kong company (Hin-Pro) covering the carriage of cargo from various mainland Chinese ports (including Ningbo and Nanjing) to Venezuela. Hin-Pro suffered huge losses when CSAV allegedly delivered the consignments to the wrong parties without presenting the bills of lading. The bills of lading provided:

> Clause 23: Law and jurisdiction
> This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceeding shall be referred to ordinary courts of law …

A key issue in the case was whether Clause 23 conferred exclusive jurisdiction on the English court. Hin-Pro took the view that the second sentence divested the English court of exclusive jurisdiction, and it commenced proceedings in various Chinese Maritime Courts. Upon appeal from the first instance decision made by the Ningbo Maritime Court,[2]

[1] [2016] HKCFA 79.

[2] *Hin-Pro International Logistics Ltd v Compania Sud Americana de Vapores SA* (2013) YHFSCZ no 523 dated 16 October 2013 (Ningbo Maritime Court, China). The relevant paragraphs of the English translation of this judgment were cited by Lord Phillips of the Hong Kong Court of Final Appeal (note 1 at [10]).

in December 2013[3] the Higher People's Court of Zhejiang delivered a final and conclusive judgment concerning jurisdiction. It affirmed the first instance decision of the Ningbo Maritime Court by holding that the lower court had jurisdiction over bill of lading disputes under Clause 23. Although Clause 23 included a choice of English law and English jurisdiction, the Zhejiang Court ruled that the English court's jurisdiction was non-exclusive.[4]

The Hong Kong Court of Final Appeal summarised the relevant factors[5] considered by the Ningbo Maritime Court. Specifically, the place where CSAV was domiciled, the place where the bill of lading was entered into and performed, and the place where the subject matter was located were all outside the United Kingdom. Furthermore, the cargo was loaded in the port of Ningbo, China. Forming the view that the English jurisdiction clause did not have any actual connection with the cargo claims, the Chinese court held that it had jurisdiction to hear the case. It appears that in deciding which forum had the most substantial nexus with the disputed bill of lading, the Chinese court considered an array of connecting factors that were similar to the principles of English private international law as stated by Lord Goff in *Spiliada Maritime Corporation v Cansulex*: [6]

> … Lord Keith in *The Abidin Daver* … referred to the 'natural forum' as being 'that with which the action has the most real and substantial connection'. So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction … and the places where the parties respectively reside or carry on business (see *The Abidin Daver*[7]).

Ten months after the final decision on jurisdiction was made by the Higher People's Court of Zhejiang, in October 2014 the English Commercial Court[8] ruled on jurisdiction over the same parties (CSAV and Hin-Pro) with respect to the same bill of lading dispute. This ruling appeared to be in conflict with the previous Chinese judgments.[9] The English Commercial Court construed the jurisdiction clause as being 'exclusive' in the context of

---

[3] *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* (2013) ZXZZ no 144 dated 20 December 2013 (Higher People's Court of Zhejiang). The judgment was delivered by Justice Zhang, Justice Lin and Justice Cai. It is available on Westlaw China. Lord Phillips referred only to the first instance decision on jurisdiction made by the Ningbo Maritime Court (see n 2).

[4] See the fifth paragraph of the judgment of the Higher People's Court of Zhejiang (n 3). It is noteworthy that after CSAV's unsuccessful challenge of the jurisdiction of Ningbo Maritime Court, CSAV fully defended the substantive cargo claims in both Ningbo Maritime Court (first instance, in May 2014) and the Higher People's Court of Zhejiang (on appeal, in October 2015), and successfully obtained the final judgment against Hin-Pro from the Higher People's Court of Zhejiang (see note 1 above at [13] and [29]). The substantive cargo claims were never tried before the English court.

[5] Note 2.

[6] [1986] 3 WLR 972, 987.

[7] [1984] AC 398, 415.

[8] *Hin-Pro International Logistics Ltd v Compania Sud Americana de Vapores SA* [2014] EWHC 3632 (Comm).

[9] Notes 2 and 3.

the 'contractual background', even though the word 'exclusive' did not appear in the clause and the first sentence was immediately followed by a second one ostensibly allowing proceedings to be commenced in another jurisdiction. The English Commercial Court took the view that foreign proceedings could only be commenced if they were mandatory under an international convention (the Hamburg Rules), which might have been applicable under some circumstances to other shipments handled by the same carrier (CSAV), albeit unrelated to the present disputes involving Hin-Pro.

Cooke J of the English Commercial Court awarded damages to CSAV for Hin-Pro's breach of the English jurisdiction clause which, according to his interpretation of the bill of lading, vested exclusive jurisdiction in the English court. Moreover, in furtherance of enforcing the award of damages, he granted a final anti-suit injunction and a Mareva freezing order by affirming the interim anti-suit injunction[10] and an *ex parte* Mareva freezing order[11] covering Hin-Pro's worldwide assets. Cooke J appeared to disagree with the approach adopted by the Chinese court, positing that '… Chinese courts apparently disregard agreed jurisdiction clauses where the circumstances of the case have little or nothing to do with the agreed jurisdiction'.[12] The decision of the English Commercial Court was affirmed by the English Court of Appeal in February 2015.[13]

Foreign Judgments and Comity

Having obtained the award of damages and the Mareva freezing order granted by the English Commercial Court in October 2014, CSAV sought to enforce the freezing order in Hong Kong, where Hin-Pro had substantial assets. Lord Phillips, sitting in the Hong Kong Court of Final Appeal, identified the key issues concerned with recognising two inconsistent judgments. The Hong Kong court had the power to grant relief in support of proceedings commenced outside of its jurisdiction under s 21M of the High Court Ordinance, which is the Hong Kong equivalent of s 25 of the Civil Jurisdiction and Judgments Act of 1982, applicable in England. Section 25(b) provides:

> On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.

[10] The *ex parte* injunction was granted by Burton J, whereas the *inter parte* injunction was granted by Andrew Smith J in the interlocutory proceedings in November 2012. See n 8 at [8].
[11] It was granted by Walker J in June 2014. See n 8 at [13].
[12] See n 8 at [9].
[13] *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401; [2015] 2 Lloyd's Rep 1.

As a precondition, the Hong Kong court needed to consider whether the foreign proceedings could result in a judgment and whether that judgment was one the Hong Kong court may enforce.[14] In this respect, Lord Phillips averred:[15]

> The Hong Kong Court has not been asked to assist the English Court to enforce an exclusive jurisdiction clause. It has been asked to assist in enforcing an award of damages by the English Court for breach of such a clause. If the action of the English Court in awarding such damages involved a breach of comity towards the PRC Courts, then I accept that to assist in enforcing those damages might also involve a breach of comity. In that case enforcement of any judgment would seem open to objection on grounds of public policy and the Mareva should have been refused for that reason.

To summarise the tests formulated by Lord Phillips, if foreign court X has rendered a judgment that may arguably involve a breach of comity towards foreign court Y, then the enforcing court must independently make an assessment of whether or not it does so. If the enforcing court finds that a breach of comity has occurred, then it should not enforce the judgment rendered by court X because, from the domestic court's perspective, doing so would be repugnant to the public policy at common law on grounds of comity.

The tests laid down by Lord Phillips are undoubtedly reasonable and convincing. Furthermore, they are premised on the well-established English common law principles of private international law. Professor Richard Fentiman has pointed out that:

> [e]nforcement will be denied if the consequences of enforcing the judgment would be contrary to public policy. In principle, an English court will deny enforcement to a foreign judgment on public policy grounds … [if] to enforce the judgment would be contrary to international comity. [16]

Although the tests laid down by Lord Phillips are reasonable and supported by the current common law principles of private international law, an important gap remains in applying the tests: knowing the exact principles that should guide the enforcing court's determination of whether the action of court X constitutes a breach of comity towards court Y.

In the present dispute, Lord Phillips opined that the action of the English court involved no such breach of comity towards the Chinese court.[17] He stated the general principles that an anti-suit injunction issued in furtherance of enforcing an exclusive jurisdiction clause did not infringe judicial comity, even though it constituted an indirect interference with the process of a foreign court. In support of his reasoning, he cited *The Angelic Grace*,[18] in which a foreign court action was initiated by a charterer against a shipowner in

[14] Note 1 at [47].
[15] Note 1 at [59].
[16] R Fentiman, *International Commercial Litigation* (OUP 2010), 706-707.
[17] Note 1 at [55]–[58].
[18] [1995] 1 Lloyd's Rep 87.

contravention of a London arbitration clause contained in the charterparty. Millett LJ held:[19]

> … there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them. … I cannot accept the proposition that any court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke …

With all due respect, the facts and decision in *The Angelic Grace* can be distinguished from the present case. In this case, the jurisdiction clause involving CSAV and Hin-Pro was far from 'clear and simple'. It is questionable whether Hin-Pro had indeed 'promised not to invoke' jurisdiction in a forum other than the English court, given that the jurisdiction clause was both uncertain and ambiguous in its meaning. An unrelated dispute involving the same carrier CSAV helps to illustrate how ambiguous the jurisdiction clause was. In *Import Export Metro Ltd v Compania Sud Americana de Vapores S.A.*,[20] CSAV issued bills of lading to a Hong Kong company to carry goods from Hong Kong (and other Chinese ports) to Chile. The bills contained a jurisdiction clause identical to the clause set out previously. The Hong Kong bill of lading holder commenced legal proceedings in the English court against CSAV for wrongful delivery of the cargo. CSAV vigorously argued that the jurisdiction clause was non-exclusive, and that the commencement of proceedings by the bill of lading holder in a non-exclusive English jurisdiction should be stayed on the ground of forum non conveniens. CSAV submitted that: 'Chile is clearly and distinctly the most appropriate forum for the resolution of the dispute, and that in the interests of justice it should be determined there'. The court held that, although the jurisdiction clause was non-exclusive, it would not stay the English proceedings as pleaded by CSAV because CSAV had failed to satisfy the English court that it was a forum non conveniens.

Comment

In light of the preceding analysis, it is submitted that the enforcing court should apply a new approach for evaluating whether the enforcement of a judgment rendered by court X constitutes a breach of comity towards court Y. This new approach consists of two components.

First, the judicial process through which court Y rendered its judgment must be compatible with the enforcing court's views of natural justice.[21] The principles of natural justice involve the opportunity for a full trial before a court of competent jurisdiction acting through a fair process; due service of process on the parties to the proceedings; the opportunity to present the case and address the factual and legal issues before the court;

---

[19] Ibid at 96.
[20] [2003] EWHC 11 (Comm); [2003] 1 Lloyd's Rep 11.
[21] *Adams v Cape Industries Plc* [1900] Ch 433; Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet and Maxwell 2012), Rule 52 at [14-163]; P Rogerson, *Collier's Conflict of Laws* (Cambridge University Press 2013), 256-257.

and the impartial administration of justice without prejudice, fraud or corruption in procuring the judgment.[22]

Second, the action of court Y must not be regarded as patently discreditable by the enforcing court. Examples of patently discreditable actions on the part of court Y include arbitrary denials of evidently valid exclusive jurisdiction clauses or arbitration agreements between the contractual parties. Illustrations of evidently valid exclusive jurisdiction or arbitration clauses can be found in *Donohue v Armco Inc. and Others*[23] ('the parties hereby irrevocably submit themselves to the exclusive jurisdiction of the English courts to settle any dispute which may arise out of or in connection with this Agreement') and *The Angelic Grace*[24] ('all disputes from time to time arising out of this contract shall … be referred to the arbitrament of two arbitrators carrying on business in London').

If the action of court Y is not considered by the enforcing court to be patently discreditable, and if the proceedings conducted in court Y do not offend the enforcing court's views of natural justice, it is submitted that in enforcing a judgment rendered by court X, it will become impossible for the enforcing court to achieve a proper level of deference to *both* court X *and* court Y. This is especially true when the judgment of court Y is the one that first existed in time.[25] The impossibility of demonstrating deference to both foreign courts should be a good reason to justify abstention on the part of the enforcing court. The enforcing court should, as far as possible, restrain from exercising its own authority to inquire into the relative merits of the differing conclusions arrived at by two foreign courts. The focus should instead fall on the need to accord judicial deference to the different rulings legitimately reached by the two foreign courts. The enforcing court should, with all due respect, remain impartial and abstain from enforcing the judgment rendered by court X if non-interference or restraint is the only justifiable solution in light of the inevitable and legitimate conflicts between courts X and Y. After all, for reasons of comity, the enforcing court does not have any role in mediating the clashes between two foreign courts operating under different legal systems with disparate legal traditions and policy orientations.

[22] See *Hilton v Guyot*, 159 US 113 (1895) (Supreme Court of the United States); *Beals v Saldanha* [2003] 3 SCR 416 (Supreme Court of Canada)).
[23] [2001] UKHL 64.
[24] Note 21.
[25] *Showlag v Mansour* [1995] 1 AC 431 (PC), cited and analysed in P Rogerson, *Collier's Conflict of Laws* (Cambridge University Press 2013), 260.