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Settlement Agreement and anti-suit injunction against the third party

In the case of *Qingdao Huiquan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd – QBD (Comm Ct) (Bryan J) [2018] EWHC 3009 (Comm)* - 25 September 2018, the claimant owners concluded a settlement agreement with cargo receivers Emori (China) Co Ltd (Emori) settling certain disputes between them in relation to the delivery of a cargo of nickel ore pursuant to the Settlement Agreement. The Settlement Agreement was governed by English law and contained a London arbitration clause. This agreement involved the payment of sums by Emori to lift a lien over the cargo exercised by the owners following the default of the time charterers in paying hire.

It was a term of the Settlement Agreement that Emori would procure payment of the agreed sums to the owners by the defendant (SDHX) as Emori's "authorised agent" but SDHX itself was not a party to the Settlement Agreement.

In April 2017, over three years after the Settlement Agreement, SDHX commenced proceedings in the Qingdao Shinan District Court seeking repayment of the sum it had transferred to the owners under the Settlement Agreement. In those proceedings, SDHX pleaded, inter alia, that it did not dispute that it was not a party to that agreement, but it asserted that there was an oral agreement between SDHX and the owners.

The owners objected to the jurisdiction of the Qingdao Shinan District Court to hear SDHX's claim on the grounds: (1) that the claim was a maritime dispute, and therefore, the Shinan District Court had no jurisdiction to hear it and the claim had to be heard by the Qingdao Maritime Court; and (2) in reliance on the arbitration agreement in the Settlement Agreement, SDHX's claim was one that had to be brought in London arbitration.

In a ruling dated 5 December 2017 the Qingdao Shinan District Court determined that SDHX paid the payment to owners on behalf of Emori under the Settlement Agreement; that the dispute constituted a maritime dispute, and that the matter should be transferred to the Qingdao Maritime Court to decide on the validity of the London arbitration clause. An appeal by SDHX to Qingdao Intermediate People's Court was dismissed. During its judgment, the appellate court said that:

"... one of the foundations for [SDHX's] recovery claim before the first instance court was the [Settlement Agreement] signed between [the owners] and Emori ..."

It was not until 1 August 2018 that the owners issued the application in the Commercial Court for an **interim anti-suit injunction**. In the event, SDHX did not attend and was not represented at the hearing.

The Commercial Court held the normal situation between two parties to an arbitration agreement; the courts would ordinarily restrain proceedings commenced abroad in breach of a London arbitration agreement, unless there was “a good reason” or “strong reason” not to do so (*The Angelic Grace* [1995] 1 Lloyd’s Rep 87 and *Donohue v Armco Inc* [2002] 1 Lloyd’s Rep 42. However, an injunction claimant had to act “promptly and before the foreign proceedings are too far advanced” (*The Angelic Grace*). In appropriate cases, it was possible to obtain an anti-suit injunction against a party which was not a party to the contract itself (*The Yusuf Cepnioglu* [2016] 1 Lloyd’s Rep 641 and *Dell Emerging Markets (EMEA) Ltd v IB Maroc.com SA* [2017] EWHC 2397 (Comm)). The present was such an appropriate case. It was clear that SDHX was seeking to rely upon the terms of the Settlement Agreement in advancing its claims in the Chinese proceedings. In doing so; therefore, it had to take the burden of the arbitration clause.

Accordingly, an interim anti-suit injunction would be granted in favor of the owners.

ALCO’s FDD department’s suggestions to the clients of Andrew Liu are as follows:

- a) Settlement agreement should be drafted carefully.
- b) Any anti-suit injunction in English Court should be taken immediately, if any party to the agreement or any third party attempts to bypass English Jurisdiction and start proceeding in foreign court.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk