

29

ARBITRATION
IN HONG KONG :
A
PRACTICAL
GUIDE

Volume 1

Owners of Cargo Lately Laden on Board the Ship or Vessel "Adhiguna Meranti" v. Owners of the Ships or Vessels "Adhiguna Harapan" & Others:¹⁹

1. Is it shown that Hong Kong is not only not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong? The evidential burden is here upon the applicant. The emphasis is upon "appropriate" rather than "convenient" because this is not simply a matter of practical convenience. The purpose is to identify the forum "with which the action has the most real and substantial connection" per Lord Keith in *Owners of the Las Mercedes v Owners of the Abidin Daver (The Abidin Daver)*.²⁰ Failure by the applicant at this stage is normally fatal.
2. If the answer to question one is yes, will a trial in the other forum deprive the plaintiff of any "legitimate personal or juridical advantages"? The evidential burden here lies upon the plaintiff.
3. If the answer to question two is yes, a court has to balance the advantages of question one against the disadvantages of question two. Deprivation of one or more personal or juridical advantages will not necessarily be fatal to the applicant, provided that the court is satisfied that notwithstanding such loss, substantive justice will be done in the available appropriate forum. The court must try to be objective. Proof of this, which can fairly be called the ultimate burden of persuasion, rests upon the applicant for the stay. By these means he establishes that on balance, the other forum is more suitable "for the interests of all the parties and the ends of justice". This may be another way of saying that the plaintiff's choice of forum has been shown to be so inappropriate as to deserve the pejorative description of "forum shopping" and to be restrained accordingly.

(d) Anti-suit Injunctions

7-38 The Hong Kong courts may, in appropriate circumstances, enjoin parties over whom they have jurisdiction from commencing or continuing with proceedings in a foreign court.²¹ This can be on either an interlocutory or final basis.²²

¹⁹ [1987] HKLR 904, [1988] 1 Lloyd's Rep 384. See also *Owners of the Ship or Vessel "Lanka Athula" v. Owners of Cargo Lately Laden on Board the Ship or Vessel "Lanka Muditha"* [1991] 1 HKLR 741, [1991] 1 HKC 101; *The Kapitan Shvetsov* [1997] 1 HKC 485; *Rambas Marketing v. Chow* [2001] 3 HKC 250.

²⁰ [1984] AC 398, [1984] 2 WLR 196, [1984] 1 All ER 470, [1984] 1 Lloyd's Rep 339, (1984) 134 NLJ 235, (1984) 128 SJ 99; see also *Linfield v. Taoho Design* [2002] 2 HKC 204.

²¹ *Castanho v. Brown & Root (UK) Ltd.* [1981] AC 557, [1980] 3 WLR 991, [1981] 1 All ER 143, [1981] 1 Lloyd's Rep 113, (1980) 124 SJ 375; *Societe Nationale Industrielle Aerospatiale (SNIA) v. Lee Kui Jak* [1987] AC 871, [1987] 3 WLR 59, [1987] 3 All ER 510, (1987) 84 LSG 2048 (PC); *Airbus Industrie GIE v. Patel* [1999] 1 AC 119, [1998] 2 WLR 686, [1998] 2 All ER 257, [1998] 1 Lloyd's Rep 631, [1998] CLC 702, [1999] IL Pr 238, (1998) 95(18)LSG 32, (1998) 148 NLJ 551, (1998) 142 SJLB 139, (1998) *The Times*, 6 April.

²² *Banque Cantonale Vaudoise v. Waterlily Maritime Inc.* [1997] 2 Lloyd's Rep 347.

An injunction of this kind is intended, of course, to reserve a particular dispute to the Hong Kong courts, and to prevent a foreign court exercising jurisdiction over it. From the standpoint of judicial comity it is, therefore, a drastic remedy, and one which the courts do not grant lightly. It will only be granted if the court takes the view that Hong Kong is the natural forum for the action.

7-39

An injunction may be granted if the proceedings in the foreign court are vexatious or oppressive. More is required than just a view on the part of the Hong Kong court that Hong Kong is the natural forum. Examples where an injunction might be appropriate include the situation where foreign proceedings are being used as a means of oppressing one of the parties,²³ or have been brought in bad faith,²⁴ or if there is a multiplicity of actions,²⁵ or if the foreign proceedings are being used as a means to prejudice creditors in Hong Kong.²⁶ See also paragraphs 8-131-8-132, 11-01-11-118, 12-32-12-41, 13-198-13-202, 14-76-14-79 and 21-140-21-157.

7-40

3. CHOICE OF LAW

(a) The Approach to Choice of Law of Questions - Characterisation

Assuming that the Hong Kong courts are seised of an issue concerning an arbitration agreement, and assuming also that it has been decided or accepted that Hong Kong is the proper forum for that issue to be decided, how does Hong Kong law approach conflict of laws issues such as those identified at paragraph 7-06?

7-41

The technique of Hong Kong law is to categorise the legal nature of the issue which has to be determined, and to formulate rules as to which legal system should be applied to resolve that issue. This process is described as "characterisation". In general, the underlying rationale of these rules is to fulfil the parties' likely expectations when they enter into the transactions giving rise to the dispute.

7-42

The rules are often expressed in a shorthand which uses Latin tags for the various possible legal systems connected with a particular problem. These include *lex fori* (the domestic law of the forum); *lex loci contractus* (the law of the country where the contract was made); *lex loci solutionis* (the law of the country where the contract was to be performed) etc.

7-43

Many, if not all, legal systems approach conflict of laws questions using characterisation, *i.e.* by linking a particular facet of a problem to a particular legal system.

7-44

²³ *A / S D / S Svendborg v. Wansa (t / a Melbourne Enterprises)* [1996] 2 Lloyd's Rep 559.

²⁴ *Re Connolly Bros. Ltd. (No. 1)* [1911] 1 Ch 731; *British Airways Board v. Laker Airways Ltd.* [1985] AC 58, [1984] 3 WLR 413, [1984] 3 All ER 39, [1985] ECC 49, (1984) 81 LSG 2849, (1984) 134 NLJ 746, (1984) 128 SJ 531.

²⁵ *Australian Commercial Research & Development Ltd. v. ANZ McCaughan Merchant Bank Ltd.* [1989] 3 All ER 65.

²⁶ *Re Vocalion (Foreign) Ltd.* [1932] 2 Ch 196.