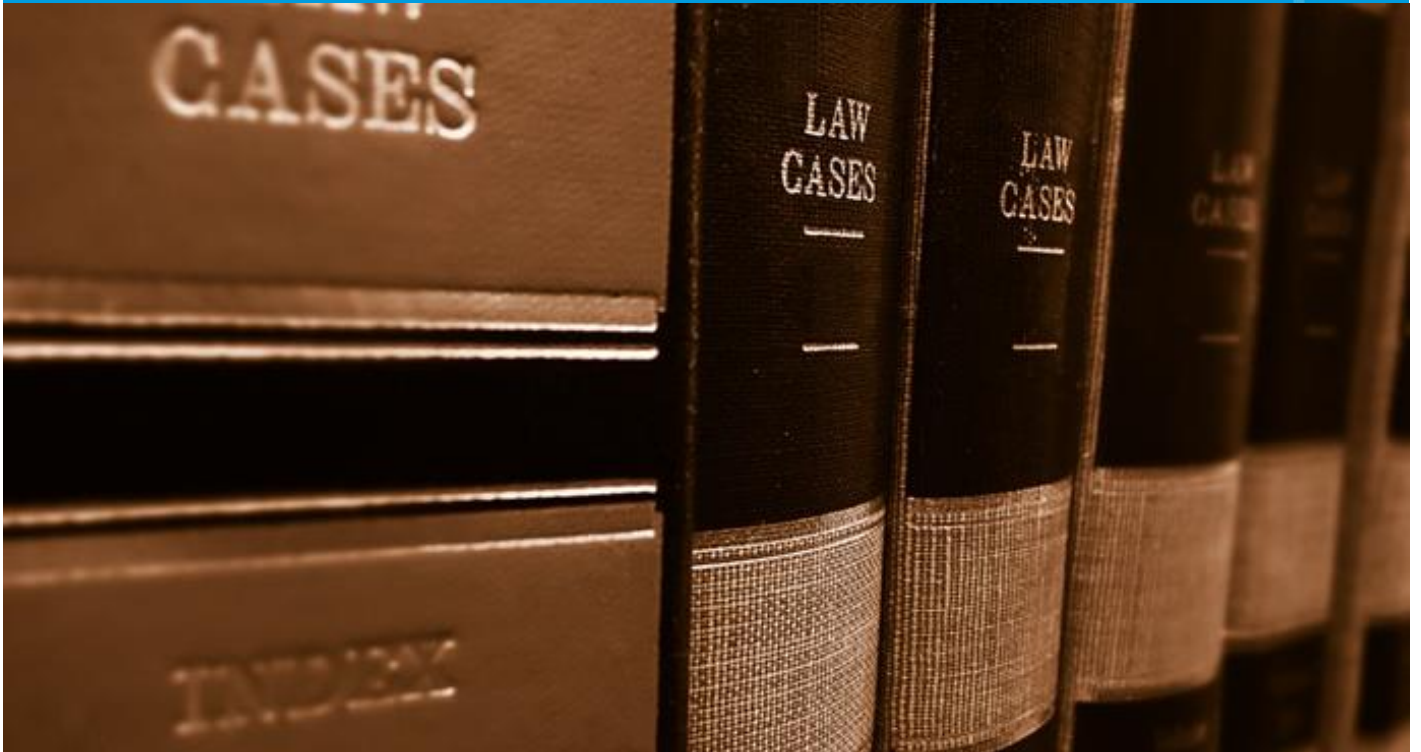


August 2023

Why choose arbitration?

The Hong Kong Court discharges service out of the jurisdiction of a tort claim

ALTRANS FAST CARGO v LIU YUGANG



Summary

This case concerned service out of the jurisdiction of a writ based on a tort claim. The leave to serve out of the jurisdiction was overturned and the court was therefore not required to stay the proceedings in favour of arbitration.

The judge provided a helpful summary and guidance on the general principles for obtaining leave to serve out of the jurisdiction and the principles related to the "tort" gateway. On reflection this may have been a claim better suited to arbitration.

ALTRANS FAST CARGO LIMITED (AS ASSIGNEE OF LIFESTYLE LOGISTICS LIMITED) and Another v LIU YUGANG (刘宇刚) and Others — [2023] HKCU 2611

Practical implications

The court has provided a clear overview in terms of the well-established general principles of serving out of proceedings, namely a good arguable case, a serious issue to be tried, *forum conveniens* and the principles specifically related to the "tort" gateway: the requirements that the damage sustained or the act committed is within the jurisdiction and double actionability.

This case also illustrates the importance of carefully considering the appropriate forum for a cross border dispute. The temptation may be to resort to High Court litigation which may have jurisdictional limitations. However, a claimant may be better served if there is an opportunity to arbitrate as an alternative. At various points, the court pointed out that this case is mostly related to parties of and matters happened in mainland China, and it had little to do with Hong Kong. The labour contracts of the relevant directors and employees contained arbitration clauses. In the circumstances, it would appear that a reference to arbitration may have overcome the jurisdictional shortcomings of the court and allowed the plaintiffs to bring their claim against the defendants.

Background

The 1st plaintiff is a Hong Kong company which wholly owned the 2nd plaintiff, a PRC company situated in Shanghai whose primary business was providing cargo warehousing and logistics services within mainland China. The plaintiffs claimed that the defendants, their directors and employees wrongfully diverted the 2nd plaintiff's business and assets to another company.

In 2021, the plaintiffs were granted an *ex parte* order granting them leave to issue and serve the Concurrent Writ of Summons on the defendants out of the jurisdiction. During the application, the plaintiffs relied upon the jurisdictional gateway in Order 11, rule 1(1)(f) of the Rules of the High Court ("RHC") that in a claim founded on tort permission to serve out of the jurisdiction will be granted where the damage was sustained within Hong Kong. The judge noted that the plaintiffs did not explain how the alleged damage was sustained within Hong Kong or how the plaintiffs' claim resulted from any act of the defendants committed within Hong Kong, and commented that the plaintiffs' affirmation was "extremely light on the relevant factual background".

The defendants submitted that the alleged damage was wholly sustained within mainland China, and that there was no justification for the plaintiffs to invoke Order 11. In any event, since all material occurred within mainland China, Hong Kong was not the appropriate forum to resolve this claim.

As an alternative the defendants argued that given that all of their employment contracts were subject to arbitration agreements the proceedings should be stayed in favour of arbitration.

The Court's decision

The judge began by outlining the general legal principles for obtaining service out of the jurisdiction set out in *Dynasty Line Ltd v Sukanto Sia* [2009] 4 HKC 184: i) there is a good arguable case; ii) there is serious issue to be tried; iii) Hong Kong is a convenient forum, in addition to meeting the Order 11 gateway.

The judge first considered whether there was any damage sustained or any act committed in Hong Kong and found that neither could be established, as the 2nd plaintiff was a PRC company whose principal office, warehouses and area of core business were all within mainland China, and the alleged theft by the defendants also took place in mainland China. The court also rejected the plaintiffs' argument that further evidence against the defendants (who were the directors and senior employees of the plaintiffs) would be discovered during the intended liquidation examination of the 1st plaintiff.

Secondly, the court held that the plaintiffs failed to meet the requirement of double actionability as one of their claims. In particular the tort of "conspiracy" by the defendants was not recognised by the mainland courts (*Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* [2020] 6 HKC 451 at §72).

More fundamentally, the judge held that there was no serious issue to be tried as regard to the 1st plaintiff since it only suffered the diminution of value of its shareholdings in the 2nd defendant, which is caught by the reflective loss principle.

As to whether Hong Kong was a convenient forum, the court referred to the three principles listed in *Dynasty Line*, namely i) the plaintiff must show that Hong Kong is clearly the appropriate forum; ii) the forum has the most real and substantial connection with the action; iii) the forum is most suitable for trial for the interests of all the parties and the ends of justice. The court found that Hong Kong was not a convenient forum, as i)

all defendants lived in mainland China, ii) the alleged theft of business happened in mainland China, iii) the alleged wrongful acts or loss were unrelated to Hong Kong, and iv) the defendants' labour contracts (including the arbitration clauses) were expressly governed by PRC law.

The court referred to the general rule regarding the discharged of *ex parte* orders due to material non-disclosure (*Excel Courage Holdings Limited v Wong Sin Lai* [2014] HKCU 1305) and set aside the *ex parte* order obtained by the plaintiffs due to their material non-disclosures of various factual and legal issues.

Given that the defendants arguments regarding the arbitration agreements in their employment contracts was pleaded in the alternative and the judge had already set aside the order to serve out of the jurisdiction he made no order as to the arguments regarding the arbitration agreements.

Case detail

- Court: Court of First Instance
- Judge: Hon Wilson Chan J in Chambers
- Date of Judgment: 15/06/2023

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