JONES DAY

DECEMBER 2013

AUSTRALIAN COURT ISSUES FREEZING ORDER IN AID OF FOREIGN PROCEEDINGS–WHAT'S GOOD FOR THE GOOSE WILL BE GOOD FOR THE GANDER

A Swiss incorporated subsidiary of Severstal, a Russian steel manufacturer, and Bhushan, an Indian company, are in dispute about shipments of steel by Severstal from Russia to Bhushan's Indian plant. Proceedings in relation to this dispute have been determined in Switzerland and are also ongoing in Delhi. At the time the Swiss proceedings were determined, Severstal had no assets in Australia. Bhushan, however, is the shareholder of Bhushan Australia, which holds a majority interest in mining tenements in Queensland.

In a remarkable example of the internationalisation of the law and the opportunities available to tenacious litigants, this dispute resulted in not one but two proceedings in the courts of New South Wales, Australia, reaching the level of Australia's final court of appeal, the High Court[1]. The proceedings serve as an informative case study of the ways in which the jurisdiction of foreign courts might be called into aid disputes with no obvious or relevant connection to that jurisdiction. They also highlight some of the pitfalls that are associated with implementing such a strategy.

THE FOREIGN PROCEEDINGS

The substantive dispute between Severstal and Bhushan has been determined in Geneva, whereby Severstal succeeded and obtained a judgment for breach of contract for approximately $2 million in relation to unpaid deliveries of steel. In ongoing

1 *Severstal Export GmbH v Bhushan Steel Limited*, [2011] NSWSC 1063; *Bhushan Steel Ltd v Severstal Export GmbH* [2012] NSWSC 583; *Severstal Export GmbH v Bhushan Steel Ltd* [2013] NSWCA 102; High Court, special leave to appeal refused 8 November 2013.

proceedings in Delhi, Bhushan alleges steel delivered by Severstal was defective and seeks damages exceeding $3 million. Severstal has never sought to enforce the Geneva judgment in India; rather, it tried initially to enforce the judgment in the Netherlands. This was not successful as Bhushan had no assets in that jurisdiction.

THE AUSTRALIAN COMMON LAW PROCEEDINGS

Having failed to achieve satisfaction for the Swiss judgment in the Netherlands and electing not to enforce in India (presumably because Severstal took the view that an Indian court would not enforce such a judgment while the Delhi proceedings remained ongoing), Severstal then sought to register the Swiss judgment in Australia, presumably for the purpose of then enforcing that judgment against Bhushan's Australian asset. In support of these proceedings, Severstal obtained a freezing order in respect of Bhushans' shareholding in Bhushan Australia.

Bhushan sought a stay of the common law proceedings and a discharge of the freezing order. The basis for the stay included that any enforcement should wait until the court in Delhi has finally determined Bhushan's proceedings against Severstal. Bhushan's application was unsuccessful, with the result that unless it paid the Swiss judgment now registered in Australia, it risked enforcement action against its shareholding in Bhushan Australia. Accordingly, it paid the judgment. End of story? Not by a long shot.

THE AUSTRALIAN EQUITY PROCEEDINGS

In a classic case of tit-for-tat, Bhushan paid the Swiss judgment by having its Australian solicitors tender a bank cheque to Severstal's Australian solicitors. At the same time, Bhushan sought an undertaking from Severstal that it would not remove this asset from the Australian jurisdiction pending resolution of the Delhi proceedings.

When the undertaking was not given within the time frame provided, Bhushan applied for and obtained an ex parte freezing order enjoining Severstal from removing the cheque, or the proceeds of the cheque, from Australia. This ex parte order was extended at the conclusion of a contested hearing before Sackar J until after judgment is delivered in the Delhi proceedings. The basis for this freezing order was that the relevant procedural rules (which exist both at state and federal level) permit the court to make a freezing order in aid of foreign proceedings if there is a danger that the prospective judgment in the foreign court will be unsatisfied because the judgment debtor may remove assets from Australia. This was the first reported judgment of the use of this rule in New South Wales. Severstal appealed Sackar J's decision to the New South Wales Court of Appeal, but the appeal failed. Severstal then sought special leave to appeal to Australia's final court of appeal, the High Court. This application also failed.

FREEZING ORDERS AGAINST LARGE PECUNIOUS MULTINATIONAL CORPORATIONS

Like many common law jurisdictions, Australian courts recognise that a freezing order is an exceptional remedy and one that should not be granted lightly. One of the main grounds for appeal by Severstal was the insufficiency of material before the trial judge to support the conclusion that there was a danger that the prospective judgment in Delhi would be unsatisfied. The Court of Appeal found that Severstal is a "company of some substance", with net assets of approximately CHF400 million and annual turnover of CHF2.5 billion. The leading authorities in the United Kingdom and in the Federal Court of Australia[2] suggest that freezing orders should not be granted in such circumstances.

2 Chandris, QB669; All ER 985 per Lord Denning; *Reches Pty Ltd v Tadiran Pty Ltd* (1998) 85 FCR 514.

However, the key factor in determining the danger of a prospective judgment going unsatisfied was not Severstal's ability to pay any such judgment. Instead, the concern was that if Bhushan sought to enforce any judgment in India, there was a danger that Severstal might rely on a provision of the Swiss Code on Private International Law that prohibits enforcement of a judgment if the sought-for judgment involves the same parties and the same subject matter and was first brought or adjudicated in Switzerland. The trial judge inferred from evidence before him that there was sufficient grounds to believe that Severstal would invoke this provision and, therefore, sufficient basis to find that there was a danger that Bhushan's Indian judgment would be unsatisfied if it is unable to enforce any such judgment against Severstal's Australian asset—i.e., the funds received by Severstal in Australia in payment of the Swiss judgment.

LESSONS TO BE LEARNT

First, the danger of a judgment going unanswered is not determined simply by reference to the judgment debtor's ability to pay. Here, the operation of Swiss private international law, which provided a basis to oppose enforcement based upon the peculiar facts of this matter, gave rise to the requisite danger.

Second, litigants in proceedings that apprehend a risk that any judgment will be unable to be enforced in either the country where proceedings are taking place or in the potential judgment debtor's country of domicile should give consideration to the ability of foreign courts to effectively ring fence a pool of assets against which any judgment may be enforced.

Finally, if a foreign party invokes the assistance of another jurisdiction, it should do so with a full understanding of how submitting to that jurisdiction might enliven laws and procedures that might ultimately prove to be counterproductive.

Jones Day acted for Bhushan in the Equity Proceedings.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Steven W. Fleming
Sydney
+61.2.8272.0538
sfleming@jonesday.com

Tony J. Wassaf
Sydney
+61.2.8272.0527
twassaf@jonesday.com