SEPTEMBER 2016

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UPDATE

Court of Appeal upholds decision of BVI Commercial Court - SFC Swiss Forfaiting Company Ltd v Swiss Forfaiting Ltd

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Swiss Forfaiting Limited (the Fund) is an investment company incorporated and domiciled in the BVI. It issued Swiss proceedings against a forfaiting service provider based in Switzerland, SFC Swiss Forfaiting Company Ltd (SFC), (the Swiss Proceedings), alleging that SFC held monies on trust for it and sought to recover those monies.

Background

Swiss Forfaiting Limited (the **Fund**) is an investment company incorporated and domiciled in the BVI. It issued Swiss proceedings against a forfaiting service provider based in Switzerland, SFC Swiss Forfaiting Company Ltd (**SFC**), (the **Swiss Proceedings**), alleging that SFC held monies on trust for it and sought to recover those monies.

The Swiss Proceedings reached an advanced stage, before SFC served a statutory demand against the Fund and also commenced a claim against the Fund in the BVI, seeking payment of monies allegedly owed to it under a Services Agreement (the **BVI Proceedings**).

There was an overlap of the sums claimed in the BVI Proceedings and in the Swiss Proceedings, as well as a number of connecting factors between the two claims. The Fund applied for an order staying the BVI Proceedings on the basis of *forum non conveniens*. That application was heard in the BVI Commercial Court by Leon J who was persuaded by the Fund's arguments and, in an *ex tempore* oral judgment, granted the stay.

SFC then appealed to the Court of Appeal. The appeal[1] was heard by Blenman JA., Michel, JA. and Webster JA. [Ag.] who handed down a written judgment in July 2016 (a link to which can be found here).

SFC's Appeal

SFC appealed on the grounds that Leon J:

- applied the wrong test for determining whether to grant a stay;
- failed to give reasons for rejecting SFC's argument that the Fund was party to the Services Agreements, which contained a BVI jurisdiction clause. Or, if the Judge had accepted that the Fund was a party to that agreement, he had failed to give reasons for rejecting the proposition that effect should ordinarily be given to that obligation in the absence of 'strong reasons' for departing from it;
- erred in failing to apply the 'domiciliary presumption' (ie the fact the Fund was domiciled in the BVI gave rise to a heavy burden of proof on the Fund to show why the BVI court should refuse to exercise jurisdiction to determine that dispute);

[1] *SFC Swiss Forfaiting Company Ltd v Swiss Forfaiting Ltd* MVIHCMAP 2015/0012.

- in seeking to identify the 'natural forum', erred by giving improper weight to the fact that the BVI Proceedings and the Swiss Proceedings arose out of the same business relationship; and
- in seeking to identify the 'natural forum', failed to give sufficient weight to the fact that the BVI claim was governed by BVI law.

The Court of Appeal dismissed SFC's appeal and upheld the Commercial Court's decision on the grounds that:

- there was, in fact, no written agreement between the two parties and therefore the Commercial Court had been correct to not apply the 'strong reasons' test;
- when an appellant argues (whether in whole or in part) that the first instance court failed to provide adequate reasons for its decision, the appellate court must review the judgment in the context of all of the evidence and submissions before the first instance court to determine whether the reasons for its decision are apparent. In this case, the Court of Appeal held that the transcript made it clear that the Commercial Court did not consider the 'strong reasons' test to be applicable because there was no written agreement between the parties. As such, it could not be said that SFC was genuinely unaware of the Commercial Court's reasons for rejecting its argument;
- there is no domiciliary presumption in private international law in relation to commercial law matters and domicile is only one of the many factors to be considered by the court in determining which is clearly or distinctly the appropriate forum for the trial;
- the Commercial Court attached the appropriate weight to the relevant factors when it exercised its discretion not to hear SFC's claim, holding that SFC's claim had the most real and substantial connection with Switzerland; and
- an appellate court should only interfere with a judge's exercise of discretion where it is clear that an error of principle has been made, the decision is perverse or the decision falls outside the range of possibly correct conclusions.

Conclusion

This decision provides a helpful reminder of the limited basis upon which the Court of Appeal will interfere with the decision of the first instance court, as well as the principles upon which *forum non conveniens* challenges will be determined. Those issues are, of course, key issues in the BVI given the volume of international disputes which are litigated before the Commercial Court.

It is also a reminder that parties should exercise caution when considering whether or not to appeal an ex tempore judgment due to inadequacy of reasons and should only do so where they are genuinely unable to understand why it is that the first instance court has reached a decision that is adverse to them.

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