Fraud, Asset Recovery and Investigations

Freezing Injunction in Aid of Foreign Court Proceedings: How Does Singapore's Approach Fare?

Introduction

Over a decade ago, the Honourable Justice Chan Seng Onn remarked in *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 ("***Multi-Code***") that the need for a Court to be able to grant freezing injunctions in aid of foreign proceedings was particularly significant in the context of "*today's interconnected and 'borderless' world*", having regard to "*the realities of the modern world today (including the rising incidents of fraudulent cross-border activities)*". These remarks are more relevant today than ever before, as new payment technologies and the increased adoption of internet and mobile banking have made it easier and faster for ill-gotten gains to be dissipated across jurisdictions.

This article examines Singapore's approach to the grant of freezing injunctions in aid of foreign proceedings, as situated against the range of solutions which other commonwealth jurisdictions have developed to keep pace with the rise in transnational fraud.

Legislative Solutions in Foreign Jurisdictions - BVI Joins the Fray

In 2021, the British Virgin Islands became the latest jurisdiction to enact legislation empowering its courts to grant freezing injunctions in support of foreign proceedings. Section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act was enacted to legislatively override a May 2020 decision of the Eastern Caribbean Court of Appeal, *Broad Idea International Limited v Convoy Collateral Limited No 2* (BVICMAP 2019/0026) ("***Broad Idea***"). There, it was held that BVI Courts had no jurisdiction to grant a freezing injunction against an overseas defendant in aid of foreign proceedings. In so holding, the Eastern Caribbean Court of Appeal had overruled the earlier landmark 2010 decision of *Black Swan Investments ISA v Harvest View Limited* ("***Black Swan***") which had set the precedent for the eponymous "Black Swan Injunction", a freestanding injunction which could be obtained in the BVI in support of foreign proceedings without the claimant bringing a substantive claim in the BVI courts. Having overruled *Black Swan*, the Court in *Broad Idea* went on to note that the BVI legislature should consider enacting legislation to confer the Court with the necessary jurisdiction to grant interlocutory injunctions in support of foreign proceedings. The call for legislative action was answered swiftly.

Contribution Note: *This Client Update was written with contributions from Stanley Tan, Practice Trainee.*

The BVI joins at least three other common law jurisdictions - the United Kingdom (the "**UK**"), Hong Kong, and New Zealand - which have similarly developed statutory solutions to empower their Courts to grant freezing relief in aid of foreign proceedings. In the UK, section 25 of the *Civil Jurisdiction and Judgement Act 1982* read with Practice Direction 6B paragraph 3.1(5) allows the UK Courts to grant freezing injunctions in support of foreign proceedings without the need for *in personam* jurisdiction over the defendant. Hong Kong's parliament has enacted similar legislation in the form of section 21M *High Court Ordinance* (Cap 4, 2009). Rule 32.5 of the New Zealand High Court Rules provides that the New Zealand courts may grant freezing orders where an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in an overseas court, if certain conditions are met.

In contrast to the legislative solutions employed in the BVI, UK, Hong Kong and New Zealand, the Australian approach has been to recognize, as a matter of common law, that the court has an inherent jurisdiction to grant freezing injunctions as part its power to prevent the frustration of its own processes. Where freezing injunctions are sought in aid of foreign proceedings particularly, the Australian court's jurisdiction to grant supportive freezing relief is said to arise from the court's power to protect the "prospective enforcement process" in which the foreign court's judgment will be registered and enforced in the Australian Courts. This reasoning was recently applied in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd and Others* [2015] HCA 36, where the High Court of Australia upheld the grant of a freezing order against an Indonesian company for proceedings that were taking place in Singapore in respect of shares in an Australian company.

The Singapore Approach

Under the *Reciprocal Enforcement of Foreign Judgements Act* (Cap 265, 2001), the Singapore Court can grant freezing injunctions in aid of foreign court proceedings. Under the Act, a freezing injunction granted by an overseas court can be registered and enforced in Singapore, provided that the foreign jurisdiction is a gazetted territory. Presently, however, Hong Kong is the only gazetted territory.

This has resulted in the situation where a freezing injunction granted by a Singapore Court may be enforced in the BVI, UK or New Zealand on a standalone basis, whereas freezing injunctions granted by those foreign courts may not, as the law now stands, be enforced on that basis in Singapore.

While there have been cases in which Singapore Courts have granted what in effect were freezing injunctions in aid of foreign proceedings (see, for e.g. *Multi-Code* and *Bi Xiaoqiong (in her personal capacity and as trustee of the Xiao Qiong Bi Trust and the Alisa Wu Irrevocable Trust) v China Medical Technologies, Inc (in liquidation) and another* [2019] 2 SLR 595 ("***Bi Xiaqiong***")), the power to grant such a freezing injunction was ultimately founded on, and in support of proceedings in Singapore. Thus, in *Bi Xiaoqiong*. the Court of Appeal held that the power to grant such injunctions are subject to the usual requirements for the grant of any freezing injunction under common law, including:

(i) that the plaintiff must have an accrued cause of action against the defendant that is justiciable in a **Singapore** Court (the "**Cause of Action Requirement**"); and

(ii) that the Singapore Court must have *in personam* jurisdiction over the defendant in respect of the **Singapore** action (the "**Jurisdiction Requirement**").

While such an approach is consistent with the weight of precedent, it also raises difficulties.

The Cause of Action Requirement usually poses no difficulties in the context of a transnational fraud claim, even if the substantive dispute is being litigated in a foreign jurisdiction. The range of claims that can be tried by the Singapore Courts appears to be wide: the Singapore Courts have unlimited subject-matter jurisdiction unless or until prohibited either by statute or a rule of common law: *Allenger, Shiona (Trustee-in-bankruptcy of the Estate of Pelletier, Richard Paul Joseph) v Pelletier Olga and another* [2020] SGHC 279 ("***Shiona Allenger***").

However, difficulty arises with regard to the Jurisdiction Requirement when the substantive dispute is being pursued in a foreign jurisdiction. Under Singapore law, *in personam* jurisdiction is established over a foreign defendant only if service out of the jurisdiction has been effected on him. Such service out of the jurisdiction requires leave of Court and is traditionally only granted if the claimant first satisfies the Court that Singapore is *forum conveniens* for the dispute to be tried (the "***Forum Conveniens Requirement***").

This places a claimant who wishes to obtain a Singapore freezing injunction over a foreign defendant in aid of foreign proceedings in somewhat of a quandary. On the one hand, he must show that Singapore is *forum conveniens* if he is to obtain the freezing relief which he seeks in support of the foreign proceedings. Yet on the other hand, by bringing those foreign proceedings in another jurisdiction, he has essentially conceded that the overseas court, and not Singapore, is *forum conveniens.* This difficulty was recognised in the 2018 decision of *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] SGHC 64, where the Singapore High Court refused to grant a freezing injunction against an overseas defendant because the Forum Conveniens Requirement had not been met.

The difficulties arising from the Forum Conveniens Requirement were recently revisited by the Singapore High Court in *Shiona Allenger*, where the Honourable Senior Judge, Justice Andrew Ang recognised that the current state of the law was "*untenable*" and "*may be allowing more instances of cross-border fraud and easy dissipation of assets to occur today*". Nevertheless, Ang SJ ultimately held that any departure from the Forum Conveniens Requirement can come about only "*by amendment to legislation…or by the Court of Appeal if it deems fit*".

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Concluding Words

Technological advances and increasingly sophisticated payment and financial services bring with them an inevitable rise in incidents of transnational fraud. The call for Courts to be empowered with the ability to respond effectively is not new. It has been nearly 30 years since Lord Nicholls of Birkenhead remarked in the 1996 decision of *Mercedes Benz v Leiduck* [1996] 1 AC 284 that for a Court to be unable to grant freezing relief in aid of foreign proceedings "*would be deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country*". As more jurisdictions adapt their laws to meet these challenges, it is hoped that Singapore will not lag behind.

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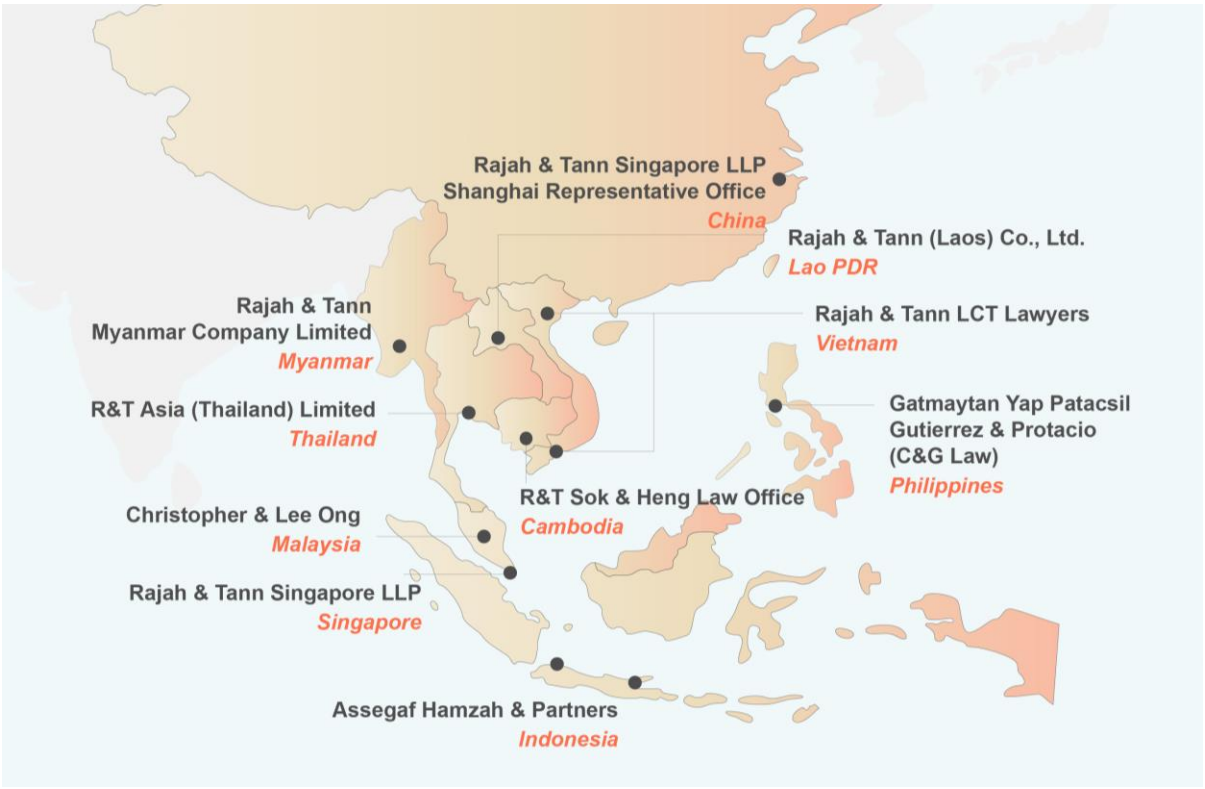

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