

Insights

HONG KONG COURT PROVIDED GUIDANCE ON THE APPROACH TO GRANTING MAREVA INJUNCTIONS IN SUPPORT OF ENFORCEMENT PROCEEDINGS FOR ARBITRAL AWARDS

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SUMMARY

Hong Kong court continued the validity of a Mareva injunction granted in connection with the enforcement proceedings of a CIETAC award, and dismissed an application for security or fortification in support of the cross-undertaking as to damages.

1. This case confirms the Hong Kong courts' pro-arbitration and pro-enforcement approach.
2. *G v X* highlights that Hong Kong courts generally are more prepared to grant Mareva injunctions and other relevant orders in aid of enforcement proceedings of arbitral awards, in comparison with similar applications made at the interlocutory stage in court litigation. The judgment also illustrates how Hong Kong courts will apply the usual tests, and exercise its discretions, in respect of the grant of Mareva injunctions in the context of enforcement proceedings.
3. The confirmation that parties may seek simultaneous enforcement in both the Mainland and Hong Kong under the Supplemental Arrangement is welcomed as a recognition of the continuous development of judicial cooperation and mutual legal assistance between Hong Kong and Mainland China, an important factor contributing to Hong Kong's rightful place as an attractive seat of arbitration, particularly for cross-border disputes with elements relating to Mainland China.

Background

This judgment concerned court proceedings in Hong Kong to enforce an arbitral award made on 20 April 2021 in favour of the anonymised applicant "G" in a CIETAC arbitration against the anonymised respondent "X" for an amount of about RMB 660 million in damages and RMB 6 million in arbitration fees (Award). After X made an application to the Beijing court as supervisory

court to set aside the Award (Mainland Setting Aside Application), G applied in Beijing to enforce the Award (Mainland Enforcement Application). The Mainland Enforcement Application was stayed by the Beijing court in June 2021.

On 5 July 2021, on G's *ex parte* application, a Hong Kong court granted a Mareva injunction on an interim basis restraining X from disposing of his Hong Kong and worldwide assets up to the amount of the Award, and a disclosure order requiring X to disclose his assets whether held in his name or not. The Mareva injunction and disclosure order covered two other parties "GMCI" and "GMCC" who were affiliated to X but were not parties to the arbitration. Pursuant to the court's order requiring the enforcement proceedings to proceed on an *inter partes* basis (i.e. with the involvement of all parties), G commenced the court proceedings on the next day by originating summons.

On 9 July 2021, on G's further application, the court continued the Mareva injunction on an interim basis until substantive argument (Continuation Application).

On 20 September 2021, X made a payment into court, resulting in the discharge of the Mareva injunction. Shortly after, on 15 October, X made an application for the payment out of the sum that had been paid into court (Payment Out Application), and alternatively, for the fortification of the undertaking as to damages provided by G in respect of the loss X may suffer as a result of the grant of the Mareva injunction (Fortification Application), on the grounds that the Mareva injunction and the disclosure order should not have been made, and that there was material non-disclosure by G in making the *ex parte* application.

The court's approach to applications for Mareva injunctions in aid of enforcement of arbitral awards

The court placed great emphasis on the fact that the Mareva injunction was made in aid of the enforcement of a final and binding arbitral award, rather than at the interlocutory stage before the merits of the parties' claims were determined. In particular, under Hong Kong law, the courts generally are more prepared to grant Mareva injunctions in aid of execution, including in the courts' assessments as to the risk of dissipation of assets, and as to the likelihood of loss to warrant a requirement for fortification to be provided in support of the undertaking as to damages.

In the context of enforcement proceedings of an arbitral award, the court pointed out that the award can be enforced by the Hong Kong courts as the court of enforcement, and that this provides the underlying good arguable case to support the grant of the Mareva injunction.

On the facts of this present case, the court was not satisfied that there was reasonable prospect of success by X in the Mainland Setting Aside Application, and added that the court has a residual discretion to permit enforcement of the Award even if the Award was to be set aside in the Mainland courts. Accordingly, the court found that there were good merits in G's application to enforce the Award in Hong Kong.

After considering evidence of X's control over GMCI and GMCC and X's beneficial interest in their general assets, the court held that there was a good arguable case that an enforcement process is available to make the assets held by GMCI and GMCC available to satisfy the Award and that there was a real risk of dissipation of the assets if no Mareva injunction was granted. Therefore, it was just and convenient to extend the Mareva injunction to restrain GMCI and GMCC from disposing their general assets, up to the amount of the Award.

As for the Fortification Application, the court did not consider it just and proper to order the fortification sought, reasoning as follows:

- There had been delay in X's application, casting doubt on X's case that the grant of the Mareva injunction likely would result in significant loss by way of lost investment opportunities.
- In its assessment of the likelihood of loss, the court pointed out that X was under an existing liability to satisfy the Award and X's claim that he would lose the opportunity to invest the money that should have been used to satisfy the Award would not be looked upon well by the court. In the judge's words, "*investment opportunities were mere possibilities, where the judgment debtor's liability to pay the judgment sum was a certainty*".
- The court further criticised X's failure to make frank disclosure of his assets and investments to comply with the disclosure order, and X's inconsistency in treating the assets of GMCI and GMCC as distinct from his own assets when making disclosure but as part of his investments in the Fortification Application for the purpose of establishing his loss.
- Having considered the evidence put forward by X, the court was not satisfied that G did not have the financial means or assets (elsewhere) to honour the undertaking as to damages.
- As for X's submission that G has no assets in Hong Kong, the court recognised that it is common for a judgment creditor to pursue a judgment debtor in a jurisdiction where the judgment debtor has assets, notwithstanding the fact that the judgment creditor might not himself have connections to or assets in the jurisdiction. It would be harsh, the court concluded, to order security or fortification to be given merely because of the judgment creditor's lack of connection to or asset in Hong Kong.
- Again emphasising the post-award nature of the Mareva injunction sought, the court did not consider it just and proper to order fortification to protect a debtor who refused to honour an award.

Whether there had been material non-disclosure

The court also held that there was no material non-disclosure on G's part, shortly, as follows:

- The court was not satisfied that G knew or should have known of X's disposal of the shares in the subject company before the application for the Mareva injunction was made, and accordingly dismissed X's claim that G failed to disclose the lack of urgency in the application.
- There was no obligation for G to disclose its own financial means, and the burden was on X to establish in the Fortification Application G's inability to honour the undertaking as to damages.
- The court accepted G's evidence that the Beijing court granted an asset preservation order against X (Mainland APO) on its own volition, without G's involvement or knowledge. The court further commented that the making of the Mainland Enforcement Application and the Mainland APO were not material to the issues of whether the Award should be enforced in Hong Kong or whether the Mareva injunction should be granted.

Regarding X's submission that the grant of the APO in the Mainland and the Mareva injunction in Hong Kong would afford "double protection" to G, the court made the following clarifications:

- Following the Supplemental Arrangement Concerning the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong S.A.R. (Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong, there no longer is a restriction prohibiting the simultaneous enforcement of an arbitral award in both Mainland and Hong Kong. Read our article ['Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong'](#) for a detailed discussion. Therefore, G was free to seek enforcement in the Mainland, Hong Kong or both, including to apply for a Mareva injunction in Hong Kong that would give G wider protection than an asset preservation order in the Mainland.
- Mareva injunctions operate *in personam* and do not create any charges over any assets. Therefore, there was no issue of over-protection because any proceeds obtained under the Mainland APO would be deducted from recovery under the Mareva injunction in Hong Kong.
- There was no evidence that G sufficiently was secured by the Mainland APO.

Ruling

The court dismissed both the Payment Out Application and the Fortification Application, and added that the Continuation Application would have been allowed but for the payment into court. Accordingly, the court ordered X to pay the costs of the applications.

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