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Ref : Chans advice/259

To: Transport Industry Operators

**Aircraft on fire**

The Hong Kong High Court issued a Decision on 21 July 2023 in relation to a case that an aircraft (worth at least USD 80 million) and its cargoes were destroyed by a fire caused by the goods of chlorine dioxide disinfection tablets. [HCA 837/2022] [2023 HKCFI 1896]

The facts

On 22 July 2020, a fire erupted in the main deck cargo compartment of Ethiopian Airlines' Boeing B777-200F aircraft ("the Aircraft") during loading at Shanghai Pudong International Airport, China, resulting in constructive total loss to the Aircraft, significant cargo damage and consequential commercial losses to Ethiopian Airlines ("the Incident").

A final Aircraft Accident Investigation Report dated 30 December 2021 ("CAAC Report") was prepared by the Civil Aviation Administration of China. According to the CAAC Report:

- (a) Jietong Overseas Trade (incorporated in Hong Kong) was the named shipper of the shipment consigned under the Air Waybill 071-3769 6046 ("the AWB") issued on behalf of Ethiopian Airlines.
- (b) Zhejiang Jietong Freight Forwarding (with principal place of business in Mainland China) was the freight forwarding company engaged by Jietong Overseas Trade to handle customs declaration and air transportation of the shipment under the AWB.
- (c) Lishui Youfu Knitting (with address in Mainland China) was the company responsible for packing the shipment under the AWB.
- (d) Jietong Overseas Trade and Zhejiang Jietong Freight Forwarding appeared to be related.
- (e) There were 96 pieces of goods shipped under the AWB, within which were 83 cartons containing 498 sets of disinfection machines, 1 chlorine dioxide detector and 7 cartons of mixed packaging containing, inter alia, 100 bags of chlorine dioxide disinfection tablets.
- (f) The most likely cause of the fire was the spontaneous combustion of the chlorine dioxide disinfection tablets.
- (g) Jietong Overseas Trade had a duty to properly pack the cargo and check and ensure accurate declaration of the cargo.
- (h) Jietong Overseas Trade was aware of the nature of the cargo and should have declared the cargo as "dangerous goods".
- (i) Lishui Youfu Knitting packed part of the shipment.
- (j) The airport authorities carried out a very thorough assessment but ruled out the involvement of third parties at the airport.

As a result of the Incident, Ethiopian Airlines suffered constructive total loss to the Aircraft amounting to at least USD 80 million, loss to cargo resulting in ongoing cargo claims settlements of over USD 500,000, together with consequential losses including storage fees of the Aircraft and cargo wreckage. Accordingly, Ethiopian Airlines commenced legal proceedings in Hong Kong against Jietong Overseas Trade, Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting for compensation.

According to Ethiopian Airlines, the reasons in support of Hong Kong being the appropriate forum for the determination of Ethiopian Airlines' claim were as follows:

- (1) Jietong Overseas Trade was responsible for the Incident and liable to Ethiopian Airlines. The jurisdiction of the Hong Kong Court over Jietong Overseas Trade was assured.
- (2) Ethiopian Airlines wished to proceed against all the defendants on one action, and to have one judgment against all the defendants for the purpose of execution. Order 11 rule 1(1)(c) under the Rules of the High Court exists for this purpose.
- (3) There was no other suitable jurisdiction. Ethiopian Airlines did not wish to sue in Ethiopia. Mainland Chinese Court does not generally exercise jurisdiction over parties out of the jurisdiction.
- (4) If the defendants wished to seek contributions from one another, this could be done in Hong Kong.
- (5) There were not any foreign proceedings in place.
- (6) Ethiopian Airlines' claim against Jietong Overseas Trade, Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting arised out of the same Incident.
- (7) If liability was contested by the defendants, the evidence in the case was likely to consist of simply (a) the CAAC Report, (b) business records concerning the shipment, (c) aircraft maintenance and other records in Ethiopian Airlines' possession, records created in connection with the Incident, and (d) expert evidence. Regarding expert evidence, chemical sample testing had already been done, and the test results were contained in the CAAC Report. All the documents in this case were in English and/or Chinese. If necessary, Ethiopian Airlines' staff in Ethiopia could readily travel to Hong Kong to give evidence in English.
- (8) Ethiopian Airlines' claim against Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting lay in negligence and/or breach of statutory duty. According to the expert opinion from Ethiopian Airlines' expert on Mainland Chinese law, if Zhejiang Jietong Freight Forwarding's and Lishui Youfu Knitting's liability was governed by Mainland Chinese law, Ethiopian Airlines had straightforward causes of action against Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting under the relevant statute in Mainland Chinese law. While Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting might seek to raise factual disputes, it was very unlikely that there would be dispute on any legal issue concerning Mainland Chinese law.
- (9) Ethiopian Airlines intended to enforce the judgment obtained in the Hong Kong Court against Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting in the Mainland. For this purpose, Ethiopian Airlines had in mind that the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region signed between the HKSAR Government and the Supreme People's Court on 18 January 2019 ("the REJ Arrangement"). Unlike the existing arrangement, the REJ Arrangement is not confined to judgments arising from jurisdiction clauses in contracts. The REJ Arrangement may well be in force by the time any judgment is handed down after trial in this action.

By a letter to the Court dated 15 July 2023 ("Lishui Youfu Knitting's Letter"), Lishui Youfu Knitting expressed their view that the High Court should have no jurisdiction over the Ethiopian Airlines' claim against Lishui Youfu Knitting. The reasons given in support of the objection were as follows:

- (1) There was no contract between Ethiopian Airlines and Lishui Youfu Knitting.
- (2) The Incident occurred in Shanghai.
- (3) Lishui Youfu Knitting had not agreed that the dispute between Ethiopian Airlines and Lishui Youfu Knitting be tried in English. The dispute should be tried in Chinese.
- (4) The law governing the dispute between Ethiopian Airlines and Lishui Youfu Knitting should be Mainland Chinese law.

### Master's Decision

On 6 June 2023, the Master Phoebe Man made a Decision, and dismissed Ethiopian Airlines' *ex parte* application ("the Application") for leave to serve the Concurrent Writ of Summons ("the Writ") out of the jurisdiction on the 2<sup>nd</sup> Defendant Zhejiang Jietong Freight Forwarding and the 3<sup>rd</sup> Defendant Lishui Youfu Knitting. The Master was of the view that the requirement that Hong Kong was the *forum conveniens* was not satisfied.

- (1) The Incident occurred in Shanghai, and thus the loss was incurred in the Mainland.
- (2) The CAAC Report was prepared by an authority in the Mainland.
- (3) According to the expert opinion on Mainland Chinese law obtained by Ethiopian Airlines, the liability of Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting was governed by Mainland Chinese law, and the liability of Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting seemed to be straightforward.
- (4) Ethiopian Airlines had admitted that any enforcement against Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting would be likely to be carried out in the Mainland.
- (5) Lishui Youfu Knitting had already indicated that it would challenge the jurisdiction of the Hong Kong Court.

### Appeal

By a Notice of Appeal filed on 19 June 2023, Ethiopian Airlines lodged an appeal against the *ex parte* decision made by Master on 6 June 2023 ("the Master's Decision").

### Discussion

The Judge MK Liu was of the view that the Application should be allowed.

The 1<sup>st</sup> Defendant Jietong Overseas Trade was the anchor defendant. Being a company incorporated in Hong Kong and having a registered office in Hong Kong, Ethiopian Airlines might sue Jietong Overseas Trade in Hong Kong as of right. Ethiopian Airlines' case against Jietong Overseas Trade was that the AWB was a contract between them. By failing to comply with certain terms and conditions of the AWB, Jietong Overseas Trade was liable to Ethiopian Airlines in respect of the loss and damage suffered by Ethiopian Airlines in the Incident. The Judge was of the view that there was a real issue between Ethiopian Airlines and Jietong Overseas Trade, which Ethiopian Airlines might reasonably ask the Hong Kong Court to try.

According to Ethiopian Airlines' case, all the defendants should be held responsible for the Incident, and their respective roles in the Incident were closely connected with each other. The defendants might be jointly and/or severally liable to Ethiopian Airlines. That being the case, it would be desirable to try Ethiopian Airlines' claim against all the defendants in one action. In the circumstances, the Judge was satisfied that for the purpose of Order 11 rule 1(1)(c) under the Rules of the High Court, Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting were necessary or proper parties to the claim against Jietong Overseas Trade. Order 11 rule 1(1)(c) provides that with the leave of the court, a writ may be served out of the jurisdiction if in the action:

' the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto.'

Turning to forum, based upon the evidence available, the Judge was satisfied that Ethiopian Airlines had shown that Hong Kong was clearly the appropriate forum.

- (1) Ethiopian Airlines was entitled to sue Jietong Overseas Trade in Hong Kong as of right. Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting were necessary or proper parties to the claim against Jietong Overseas Trade. Pursuant to Order 11 rule 1(1)(c), it would be possible for Ethiopian Airlines to sue all the defendants in the Hong Kong Court.
- (2) According to the expert evidence on Mainland Chinese law adduced by Ethiopian Airlines, a plaintiff is not allowed to pursue a contractual claim against one defendant and a tortious

claim against the other two defendants in a single lawsuit. Thus, it would not be possible for Ethiopian Airlines to sue all the defendants in the Mainland Court.

- (3) That the CAAC Report was prepared by an authority in the Mainland was neither here nor there. In the Judge's view, this was not a relevant factor in considering *forum conveniens*.
- (4) While the alleged wrongful conducts of Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting might be governed by Mainland Chinese law, the expert evidence on Mainland Chinese law adduced by Ethiopian Airlines showed that those wrongful acts would be actionable wrongs under Mainland Chinese law, and the legal issues under Mainland Chinese law are straightforward. It was unlikely that there would be any substantial arguments on Mainland Chinese law.
- (5) If this case was tried in Hong Kong, the Hong Kong Court would need to consider some expert evidence on Mainland Chinese law. However, the evidence on Mainland Chinese law to be considered by the Hong Kong Court would not be voluminous or complicated.
- (6) In respect of enforcing the judgment obtained in Hong Kong against Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting in the Mainland, Ethiopian Airlines said that it would rely upon the REJ Arrangement. Although the REJ Arrangement is not yet in place, since this is an arrangement which has been officially announced in early 2019, there was a reasonable basis upon which Ethiopian Airlines might have a legitimate expectation that the REJ Arrangement would already be in place when Ethiopian Airlines obtains judgment in this action.
- (7) There was no substance in the challenges raised by Lishui Youfu Knitting's Letter. Under Order 11 rule 1(1)(c), it is permissible for Ethiopian Airlines to sue all the defendants in this action. Regarding the language issue, both Chinese and English are the official languages in Hong Kong. Any party may conduct litigation in Hong Kong by using Chinese and/or English as of right. Further, the Hong Kong Court often reads and examines documents in Chinese or in English without translation.

#### Disposition

The Judge allowed Ethiopian Airlines' appeal and set aside the Master's Decision. The Judge allowed the Application and granted leave to Ethiopian Airlines to serve the Writ out of the jurisdiction on Zhejiang Jietong Freight Forwarding and Lishui Youfu Knitting.

Please feel free to contact us if you have any questions or if you would like to have a copy of the Decision.

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