

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE *COURTS
OF JUSTICE ACT*, R.S.O. c. C.43 (as amended)

AND IN THE MATTER OF HANFENG EVERGREEN INC.

FACTUM
OF HARBIN PENGCHENG FERTILIZER CO. LTD.
(to amend Receivership Order, returnable February 22, 2018)

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FACTUM OF THE MOVING PARTY

PART I – OVERVIEW

1. This is a motion by Harbin Pengcheng Fertilizer Co. Ltd. (“Harbin Pengcheng”) for an order amending the order dated August 20, 2014 (the “Receivership Order”) appointing Ernst & Young Inc. (the “Receiver”) as receiver of Hanfeng Evergreen Inc. (“Hanfeng”). Specifically, Harbin Pengcheng requests that the Receivership Order be amended to state that certain funds advanced by Harbin Pengcheng to the Receiver (the “Deposit”) will not be considered “Property” as defined by the Receivership Order until it is finally determined in China that the Deposit is the property of Hanfeng Evergreen Inc. (“Hanfeng”). Further, Harbin Pengcheng seeks to add a paragraph to the Receivership Order which clarifies that the Deposit shall not be used to pay the fees of the Receiver or its legal counsel until it is finally determined that the Deposit is the property of Hanfeng.

2. Alternatively, if the Receiver is permitted to disburse the Deposit, Harbin Pengcheng moves for an order requiring the Receiver to pay funds in the amount of the Deposit back to Harbin Pengcheng if it is finally determined in China that the Deposit is the property of Harbin Pengcheng.

PART II – BACKGROUND

The Share Transfer Agreement

3. This motion arises from an agreement (the “Share Transfer Agreement”) dated August 8, 2014 entered into by Harbin Pengcheng, a Chinese company, and Hanfeng, an Ontario corporation. The agreement was for the purchase by Harbin Pengcheng of certain shares held by Hanfeng in Hanfeng Slow-Release Fertilizer Co., Ltd.¹ Shortly after the agreement was entered into, on August 20, 2014, Ernst & Young Inc. was appointed receiver of Hanfeng.² At paragraph 3(a), the Receivership Order authorized the Receiver to “take such additional steps and execute such additional documents as may be necessary or desirable” for the completion of the Share Transfer Agreement.

4. As contemplated by the Share Transfer Agreement, Harbin Pengcheng made a deposit in the amount of RMB 12.4 million.³ This is approximately \$2.48 million CAD.

5. Unfortunately, the Share Transfer Agreement was never completed,⁴ and Harbin Pengcheng is now attempting to recover its Deposit. This has led to ongoing litigation in China to determine whether the Deposit ought to be returned to Harbin Pengcheng.

The Chinese Litigation

6. As noted in the Affidavit of Dazhi “David” Liu (“David Liu”), who is counsel for Harbin Pengcheng in China, Harbin Pengcheng brought an action in China against Hanfeng, the Receiver, and other entities on or about August 3, 2015.⁵ This action sought the return of the Deposit paid under the Share Transfer Agreement. On or about February 15, 2017, the City of

¹ The Share Transfer Agreement is Appendix “E” of the Second Report of the Receiver.

² Affidavit of David Liu, para 6. Motion Record of Harbin Pengcheng Fertilizer Co. Ltd. (“Harbin Record”), Tab 2, p 5.

³ Affidavit of David Liu, para 7. Harbin Record, Tab 2, p 5.

⁴ Affidavit of David Liu, para 8. Harbin Record, Tab 2, p 6.

⁵ Affidavit of David Liu, para 9. Harbin Record, Tab 2, p 6.

Harbin Intermediate People's Court released its decision holding that the Share Transfer Agreement had been terminated and that Harbin Pengcheng was entitled to the return of the Deposit.⁶

7. The Receiver appealed this decision to the Heilongjiang Provincial People's High Court, a court of second instance, which granted the appeal on or about September 18, 2017.⁷

8. As it was entitled to do, Harbin Pengcheng applied to the Supreme People's Court for a new trial.⁸ The Supreme People's Court accepted Harbin Pengcheng's materials by way of an "Acceptance Notice" dated November 10, 2017.⁹ The Supreme People's Court refused to grant Harbin Pengcheng's request.¹⁰

9. The consequences of this decision have been the subject of some misunderstanding in Canada. Although a decision by the Supreme Court of Canada would mark the end of the road for the parties in Canada, the Chinese legal system works differently. Unlike Canada, after a decision by the Supreme People's Court has been issued, there remains an option to apply to the Supreme People's Procuratorate for a 'protest'.¹¹ This is part of the 'Trial Supervision Legal System' in China.¹² The application for this 'protest' is called a 'request for protest'. If the 'request for protest' is granted, and the Supreme People's Procuratorate protests the decision of the Supreme People's Court, a court receiving the protest must set the case down for re-trial within thirty days.¹³

⁶ Affidavit of David Liu, paras 9-10. Harbin Record, Tab 2, p 6

⁷ Affidavit of David Liu, para 11. Harbin Record, Tab 2, p 6

⁸ Affidavit of David Liu, para 12. Harbin Record, Tab 2, p 6

⁹ Tab E in Affidavit of Monica Palko.

¹⁰ Supreme People's Court Decision, Ex 2 of Affidavit of David Liu. Harbin Record, Tab 4, pp 14-17.

¹¹ Affidavit of David Liu, para 13. Harbin Record, Tab 2, p 6.

¹² Affidavit of David Liu, para 20. Harbin Record, Tab 2, p 7.

¹³ Affidavit of David Liu, para 16. Harbin Record, Tab 2, pp 6-7.

10. David Liu has advised subsequent to filing his affidavit that the ‘request for protest’ has been filed with the Supreme People’s Procuratorate. The Supreme People’s Procuratorate now has three months to decide whether to grant the ‘request for protest’.¹⁴

11. In his affidavit, David Liu describes a ‘request for protest’ as, in essence, “another form of appeal.”¹⁵

PART IV – LAW & ARGUMENT

1. Request for Order Amending the Receivership Order

The Proposed Amendments

12. Paragraph 27 of the Receivership Order states:

THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days’ notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

13. Harbin Pengcheng is clearly an interested party, having engaged with the Receiver to complete the transaction contemplated in paragraph 3(a) of the Receivership Order. Although paragraph 3(a) states that the Share Transfer Agreement was with “Heilongjiang Pengcheng Fertilizer Co., Ltd.”, the Share Transfer Agreement ultimately executed was with Harbin Pengcheng.

14. Harbin Pengcheng seeks to protect the Deposit it made to the Receiver while litigation in China relating to the Deposit is ongoing. It therefore moves before this Court to amend paragraph 2 of the Receivership Order, which currently states:

THIS COURT ORDERS that pursuant to section 101 of the CJA, E&Y is hereby appointed Receiver, without security, of all assets, undertakings and properties of the Applicant required for, or used in relation to a business carried on by the Applicant, including all proceeds thereof (the “Property”).

15. Harbin Pengcheng requests that paragraph 2 being amended as follows:

¹⁴ Affidavit of David Liu, para 16. Harbin Record, Tab 2, pp 6-7.

¹⁵ Affidavit of David Liu, para 15. Harbin Record, Tab 2, p 6.

THIS COURT ORDERS that pursuant to section 101 of the CJA, E&Y is hereby appointed Receiver, without security, of all assets, undertakings and properties of the Applicant required for, or used in relation to a business carried on by the Applicant, including all proceeds thereof (the "Property"). For clarity, no funds received pursuant to the share transfer agreement with Harbin Pengcheng Fertilizer Co., Ltd dated August 8, 2014 will be considered "Property" for the purposes of the receivership until the legal ownership of those funds is finally determined in China.

16. Further, Harbin Pengcheng asks that this Court add a paragraph after paragraph 18 of the Receivership Order which states:

THIS COURT ORDERS that the Receiver shall not disburse or apply any funds received pursuant to the share transfer agreement with Harbin Pengcheng Fertilizer Co., Ltd dated August 8, 2014 to pay its fees or the fees of its legal counsel until the legal ownership of those funds is finally determined in China.

Why Should This Court Amend the Order?

17. Pursuant to subsection 101(1) of the *Courts of Justice Act*, RSO c C.43 ("CJA"), this Court may order the appointment of a receiver "where it appears to a judge of the court to be just or convenient to do so."¹⁶ Subsection 101(2) empowers the court to include such terms in the order as "are considered just."¹⁷ Harbin Pengcheng respectfully submits that its proposed amendments are convenient and just.

18. First, there is a possibility that Harbin Pengcheng will be successful in its ongoing litigation in China. As noted above, Harbin Pengcheng is pursuing the 'request for protest' procedure available in Chinese law. David Liu has attested to his belief that Harbin Pengcheng's 'request for protest' may be successful.¹⁸ This would result in a new trial.

¹⁶ *Courts of Justice Act*, RSO c C.43, s 101.

¹⁷ *Courts of Justice Act*, RSO c C.43, s 101.

¹⁸ Affidavit of David Liu, para 17. Harbin Record, Tab 2, p 7.

19. Further, at least one of the three courts which have adjudicated on the matter in China has found in favour of Harbin Pengcheng.¹⁹ Thus, there is evidently an issue in the Chinese litigation which has divided the courts, indicating that the probability of success is not low.

20. The Receiver has not adduced evidence which disputes that an error exists within the Chinese judgments. Further, this Court should not guess at the likelihood of success in China given the lack of evidence concerning a) the application of Chinese contract law to this case, and b) the application of complicated Chinese procedural law to this case.

21. Second, permitting the Receiver to dispose of the Deposit would effectively render the Chinese litigation a nullity. This Court should strive to avoid this outcome because it undermines the principle of comity between nations. The Supreme Court of Canada recently summed up the concept of comity in *Chevron Corp. v Yajjuaje*, 2015 SCC 42:

The Court's formulation of the notion of comity in *Morguard* was quoted with approval in *Beals*: para. 20. In *Hunt*, the Court observed that "ideas of 'comity' are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions": p. 325. In *Tolofson v. Jensen*, 1994 CanLII 44 (SCC), [1994] 3 S.C.R. 1022, the Court again referred to the notion of comity, stating that it entails respect for the authority of each state "to make and apply law within its territorial limit", and that "to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, [states] will in great measure recognize the determination of legal issues in other states": p. 1047. In *Pro Swing*, the Court described comity as a "balancing exercise" between "respect for a nation's acts, international duty, convenience and protection of a nation's citizens": para. 27. Finally, in *Van Breda*, LeBel J. emphasized that the goal of modern conflicts systems rests on the principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity: para. 74. This is true of all areas of private international law, including that of the recognition and enforcement of foreign judgments.

As this review of the Court's statements on comity shows, the need to acknowledge and show respect for the legal acts of other states has consistently remained one of the principle's core components... Legitimate judicial acts should be respected and enforced, not sidetracked or ignored.²⁰

¹⁹ Affidavit of David Liu, paras 9-12. Harbin Record, Tab 2, p 6.

²⁰ *Chevron Corp. v Yajjuaje*, 2015 SCC 42 at paras 52-53.

22. Although the principle of comity is generally raised in the context of enforcing foreign judgments, the concepts of “order and fairness in which comity is grounded”²¹ militate towards granting Harbin Pengcheng’s motion. It would be unfair to Harbin Pengcheng, and the Chinese legal system, to destroy the object over which much time, effort, and public money has been (and continues to be) expended. Moreover, it would signal that Canadian courts are willing to disrespect the procedures of foreign states when it is convenient to do so.

23. Comity also undergirds the doctrine of *forum non conveniens*. That doctrine is available to stay domestic proceedings while foreign proceedings are ongoing. Although not directly applicable to this case, many of the factors to be considered when applying the doctrine illustrate the dangers of domestic courts making decisions which overlap or conflict with foreign litigation. These include, *inter alia*, the desirability of avoiding multiplicity of legal proceedings, and the related desirability of avoiding conflicting decisions in different courts.²² Ultimately, the doctrine’s goal is promote efficiency in proceedings across multiple jurisdictions.

24. Permitting the Receiver to pay its accounts and those of its legal counsel with the Deposit would not be efficient. Because there is a chance of success in the Chinese litigation, there is an attendant chance that Harbin Pengcheng would be forced to return to the Ontario courts to try to recover the now-disbursed deposit from the Receiver. Aside from wasting judicial resources, this will be more complicated and expensive for Harbin Pengcheng (and the Receiver) than it would have been if this Court had granted this motion.

25. Third, and relatedly, the Receiver appears to have attorned to the jurisdiction of the Chinese courts. The decision of the Supreme People’s Court notes that the Receiver’s “Representative” in that litigation was Murray A. McDonald, and its “Commissioned Agents”

²¹ *Chevron Corp. v Yaiguaje*, 2015 SCC 42 at para 53.

²² *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 at para 105; *2249659 Ontario Ltd. et al. v Sparkasse Siegen et al.*, 2012 ONSC 3128 at para 23.

were Guan Liu and Jiao Kaijun, both of whom are lawyers.²³ It would be unfair to permit the Receiver to use the Deposit to pay its fees in Canada when it has already submitted to the jurisdiction of a court system which is now deciding that Deposit's fate.

26. Fourth, neither the Receiver nor its legal counsel will suffer any prejudice if this Court grants Harbin Pengcheng's motion. Neither are known to be suffering from financial problems. A delay of payment of approximately \$2.48 million is unlikely to have any material impact on them. Conversely, if the Deposit is permitted to be disbursed, the money spent by Harbin Pengcheng on its litigation in China may be wasted, or else it may become difficult and expensive to recover the Deposit should the Chinese litigation return a favourable result to Harbin Pengcheng.

2. Order Requiring Repayment to Harbin Pengcheng

27. Alternatively, should this Honourable Court permit the Receiver to apply the Deposit to its fees and the fees of its legal counsel, Harbin Pengcheng respectfully submits that, for the reasons stated above, it would be just and convenient for this Court to make an order requiring the Receiver to pay back to Harbin Pengcheng an amount equivalent to the Deposit if it is finally determined in China that the Deposit is the property of Harbin Pengcheng.

PART V – ORDER SOUGHT

28. Harbin Pengcheng requests an order:

a. Amending paragraph 2 of the Receivership Order as follows:

THIS COURT ORDERS that pursuant to section 101 of the CJA, E&Y is hereby appointed Receiver, without security, of all assets, undertakings and properties of the Applicant required for, or used in relation to a business carried on by the Applicant, including all proceeds thereof (the "Property"). For clarity, no funds received pursuant to the share transfer

²³ Supreme People's Court Decision, Ex 2 of Affidavit of David Liu. Harbin Record, Tab 4, pp 14-17.

agreement with Harbin Pengcheng Fertilizer Co., Ltd dated August 8, 2014 will be considered "Property" for the purposes of the receivership until the legal ownership of those funds is finally determined in China.

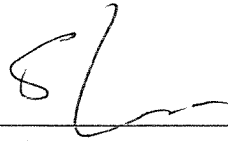
- b. Adding a paragraph after paragraph 18 of the Receivership Order which states:

THIS COURT ORDERS that the Receiver shall not disburse or apply any funds received pursuant to the share transfer agreement with Harbin Pengcheng Fertilizer Co., Ltd dated August 8, 2014 to pay its fees or the fees of its legal counsel until the legal ownership of those funds is finally determined in China.

- c. Alternatively, directing that the Receiver pay an amount equivalent to the Deposit back to Harbin Pengcheng if it is finally determined in China that the Deposit is the property of Harbin Pengcheng; and
- d. Granting the costs of this motion.

February 13, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Paul J. Pape



Evan Rankin

SCHEDULE "A"

<i>Chevron Corp. v Yaijuaje</i> , 2015 SCC 42
<i>Club Resorts Ltd. v Van Breda</i> , 2012 SCC 17
<i>2249659 Ontario Ltd. et al. v Sparkasse Siegen et al.</i> , 2012 ONSC 3128

SCHEDULE "B"

INTERLOCUTORY ORDERS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).