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To: Transport Industry Operators

Security for costs

The High Court of Hong Kong issued a Judgment on 1/11/2012 ordering the USA/Canada owners of a cargo (a yacht) to put up HK\$250,000 as further security for costs in their legal action against the ship owners. [HCAJ 177/2009]

This was an application by the ship owners under Order 23 for further security for costs in sum of over HK\$600,000.

The claim was for loss and damage as a result of damage to a yacht which was shipped on board the vessel M/V Cosco Tianjin on or about 2/8/2008 and arrived in a damaged condition. The ship owners denied liability. A prior order for security in the sum of HK\$150,000 had been made in July 2010 as security up to and including PTR (pre trial review). The trial was due to be set down, estimated to last for 3 days.

The cargo owners had no presence in Hong Kong, they being entities in the USA or Canada. They had no assets within the jurisdiction. Any cost award that might be made against the cargo owners might be difficult to enforce.

The only issue was one of merits. Usually in an Order 23 context, the court does not go into the merits unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure: *Hong Kong Civil Procedure 2012, Vol 1, para 23/3/3, at page 507.*

The cargo owners said that they had an overwhelming case on the merits so that the court should exercise its discretion not to order further security.

The ship owners said that they had been informed of the claim about a year after the event. They had a good arguable case. The ship owners identified 4 issues:

- (i) While the cargo owners sought to advance a claim under contract in the capacity of the consignee under a bill of lading, the bill of lading relied on by the cargo owners was issued by a Global Cargo Logistics, Inc ("the GCL bill of lading") and not the ship owners ("the COSCO bill of lading").
- (ii) While the cargo owners sought to advance a claim in tort, the cargo owners failed to establish that they were the owner and/or person entitled to immediate possession of the yacht at the time of loss or damage.
- (iii) The cargo owners' claim was time barred under the GCL bill of lading, which provided for a 9-month limitation.
- (iv) The ship owners' position was further strengthened by the existence of exclusion of liability clauses and limitation of liability clauses in the relevant contracts of carriage.

With regard to (i), the cargo owners submitted that that was a red-herring. The fact that the charterer issued its own bill of lading was irrelevant. The cargo owners were named on the GCL bill of lading and were entitled to rely on it to launch this claim. The Judge had not been shown the COSCO bill of lading which could assist the Judge in making a finding one way or another.

With regard to (ii), the cargo owners asserted that there was a contract, payment of purchase price and a subrogation receipt in proof. However, despite the ship owners' request, these documents in support had not been produced. One could not say that the cargo owners had a cast-iron case.

With regard to (iii), the ship owners argued that the Hague Visby Rules (“the Rules”) should not apply because the bill of lading relied on by the cargo owners was issued by China, which was not a contracting state. The cargo owners, however, had shown that the GCL bill of lading contained an express provision stating Hong Kong law, which incorporates the Rules, shall apply. According to Article III (8), any attempt to circumvent the Rules will be null and void. The Rules provide for a 12 month limitation period. Therefore, any provision that limits the limitation period to 9 months will be null and void. This point might be ruled in favour of the cargo owners.

With regard to (iv), there was argument as to whether the customary freight unit applicable to the contract of carriage was the gross weight of the yacht (23,000 kg) or the unit of goods shipped (1 unit). That was a matter of law and construction for which the parties had not shown the Judge authoritative definitions. That aside, there was certainly a dispute over quantum of damages. Although there might be a receipt on subrogation, there was no *contemporaneous* record of proof of the alleged damage together with breakdown of the value of each head of damages. The ship owners were entitled to question the damage and the quantum claimed.

The Judge did not agree that the cargo owners had an overwhelming case on the merits. The points raised by the ship owners (especially (ii) and (iv)) were not entirely unarguable.

The Judge had also taken into account other matters raised by cargo owners. The ship owners had been obstructive in the sense of failing to put up security at the commencement of the legal action, until proceedings for arrest of the vessel was taken out. The Judge did not think this was enough to tip the scale in favour of the cargo owners. After all, the ship owners had provided security.

The cargo owners said that an order for security would stifle their claim. There was no evidence on this.

In summary, the Judge was of the view that it was appropriate to order security for costs.

The ship owners claimed that they had spent about HK\$1.2 million on costs already. However, the damages claimed were only in the region of CAD210,000 or HK\$1.68m. Additional security of HK\$654,000 together with the HK\$150,000 already ordered would clearly be excessive for a claim of this amount. In the prior application for security in the amount of HK\$737,700, the ship owners could only obtain an order for HK\$150,000. The Judge bore in mind that the court needed only order security, and not indemnity, which was supposed to cover the post-PTR costs. The Judge therefore ordered HK\$250,000 as security.

The Judge ordered that the cargo owners did pay HK\$250,000 into court within 28 days as security for the legal action up to the end of trial, failing which the legal action should be stayed.

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

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