

27 January 2014  
Ref : Chans advice/157

To: Transport Industry Operators

### Ship sinking - security for costs

The Hong Kong High Court issued a Judgment on 23/12/2013 dealing with an application for security for costs in relation to a ship sinking case. [HCAJ 213/2009]

This was the application by Sinokor for security for costs from both plaintiffs, Arko Ship and Yinggao Shipping. These proceedings have arisen out of the sinking of the vessel Ying Gao 306 in Hong Kong on 30/4/2009.

Arko Ship is a company incorporated in the British Virgin Islands. Having regard to the decision of the Court of Final Appeal in *Akai Holdings Ltd v Ernst & Young* (2009) 12 HKCFAR 376, there is no dispute that s 357 of the Companies Ordinance does not apply to it and that the only possible basis for obtaining an order for security for costs against it is Order 23 rule 1(1)(a), on the ground that it is "ordinarily resident out of the jurisdiction".

The question whether a company is ordinarily resident outside Hong Kong in the context of Order 23 has come before the courts many times. The principles are well established. They are referred to, for example, in the Court of Appeal's decision in *Hui Yin Sang v Tsoi Ping Kwan* [2012] 2 HKLRD 1085. In essence, one has to look at the nature of the activities of the company, and on that basis determine where the company's central management and control is located. The burden lies on a defendant to show that the plaintiff is ordinarily resident out of the jurisdiction.

Arko Ship is a company engaged in the business of providing carriage service for containers between Hong Kong and ports in Mainland China. Its sole director, Mr Fu, is a Hong Kong permanent resident and stationed in Hong Kong all the time. Its general manager, Mr Leung, is also a Hong Kong resident. They regularly make business decisions for Arko Ship in Hong Kong. Arko ship has a business address in Metroplaza in Kwai Fong, New Territories, which it apparently shares with Yinggao Shipping. Arko Ship's correspondence in 2008 and the shipping order relating to the voyage in question show that Arko Ship had an address in Wan Chai at the time as well as Hong Kong telephone and fax numbers. Arko Ship employs nine employees in Hong Kong (and ten in Guangzhou). Two-thirds of its business comes from customers from Hong Kong. There are documents suggesting Arko Ship dealt with Hong Kong-based companies as its customers.

Against this, there was virtually nothing adduced by Sinokor to show that Arko Ship is resident out of the jurisdiction, apart from the fact that it is a British Virgin Islands company. But as Fok JA (as he then was) said in *Hui Yin Sang* at §44, the concept of residence of a company is entirely different from that of domicile.

Sinokor placed reliance on the fact that Arko Ship is not registered under Part XI of the Companies Ordinance. However it seemed to the Judge while it is true that s 333 requires a non-Hong Kong company that establishes a place of business in Hong Kong to apply for registration, it does not follow from the absence of registration that Arko Ship has no management or control in Hong Kong. Whether or not Arko Ship is ordinarily resident outside Hong Kong is a question of fact to be determined on the evidence, not an issue that turns upon compliance with s 333. The potential consequence of failure to comply with s 333 lies in the liability of the officers for penalty under s 340 of the Companies Ordinance.

In the Judge's judgment the available evidence led to the conclusion that Sinokor had failed to show that Arko Ship is ordinarily resident out of the jurisdiction for the purpose of Order 23 rule 1(1)(a). The summons therefore failed as against Arko Ship. Insofar as there is a lacuna in the law that such a company is immune from liability to give security for costs whether under Order 23 or s 357, it is a matter to be addressed by legislation.

In addition, even if the Judge had found Arko Ship to be resident outside the jurisdiction, the Judge would have accepted Arko Ship's alternative argument that no security should be ordered against it in favour of Sinokor on the ground that Sinokor is making a cross-claim that raises essentially the same issues as Arko Ship's claim.

The Judge turned to the application for security to be given by Yinggao Shipping which is a company incorporated in Hong Kong. Security for costs was sought against it by Sinokor under s 357 of the Companies Ordinance. The power to order security under that section arises "if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence".

There was the argument that Yinggao Shipping should not be required to pay security because Sinokor, who is a foreign corporation, has a counterclaim against both plaintiffs which constitutes not merely a defence of the action but a separate cross-claim.

Having reviewed the pleadings, it seemed to the Judge there is some force in this point. On the broadest level, in this action which has arisen from the sinking of the vessel, the plaintiffs represent the shipowners' interests while the defendants the cargo interests. The plaintiffs say that the vessel sank because it was overloaded as a result of misleading information about the cargo weight given by the defendants, whereas the defendants allege it sank because of the master's and crew's negligence.

The plaintiffs claim damages for the loss of the vessel and consequential loss of income, whereas the defendants claim damages for loss of the containers and indemnity for liability to the actual owners of the cargo.

In the Judge's view, both Yinggao Shipping and Sinokor may be said to be "attackers" against each other.

The main issue of why the vessel sank is central to both the action and the counterclaims. Even if the action is stayed, it seems to the Judge clear from the plaintiffs' Reply and Defence to the Counterclaim of Sinokor that the same principal factual issues will have to be determined on the counterclaims as to whether the sinking was caused by negligence on the part of the master and crew or overloading as a result of misleading information provided by the defendants.

The quantum of the plaintiffs' claim for the loss of the vessel is RMB 3,660,000. There is a claim for lost income. The plaintiffs' claim in aggregate amounted to about HK\$10 million. Sinokor claims damages for lost or damaged containers and for compensation paid to actual cargo owners in the total sum of US\$294,858.85, and also the costs and expenses (as yet unquantified) incurred in defending and settling a separate action (HCAJ No 252 of 2009) brought by the cargo owners in which Sinokor herein was the third party. In the light of this although it seems that Sinokor's claim will be unlikely to exceed Yinggao Shipping's claim, there is no such disparity in the amounts as to suggest that Sinokor is not properly regarded as an attacker in its own right. Even if the plaintiffs had not brought the action, Sinokor would have made a claim against them. There is no suggestion, as there was in *Winghing Investments Ltd v Lee Hoi Wing*, CACV 378/2995, 28/2/2006, §22, that the counterclaim would not be proceeded with if the plaintiffs' claim was dismissed.

In these circumstances, it seemed to the Judge that the costs incurred by Sinokor in defending the action might equally be regarded as costs which it had to incur to prosecute its counterclaim. It would not be just to order security for costs in favour of Sinokor against Yinggao Shipping: *BJ Crabtree (Insulation) Ltd v CPT Communication Systems Ltd* (1993) 59 BLR 43, 53; *Ai Zhong v Metrofond Ltd* [2010] 1 HKLRD 213 §22; *E-Global Ltd v Trendera Ltd* [2012] 2 HKLRD 1211 §35.

It followed that the application also failed as against Yinggao Shipping.

The summons must therefore be dismissed.

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

Simon Chan  
Director  
E-mail: [simonchan@smicsl.com](mailto:simonchan@smicsl.com)

Richard Chan  
Director  
E-mail: [richardchan@smicsl.com](mailto:richardchan@smicsl.com)

