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To: Transport Industry Operators

Security for costs

On 19/4/2007, Judge Lok of the Hong Kong District Court ordered a Japanese shipper and a Chinese consignee to put up security for costs in the amount of HK\$180,000 before they were allowed to sue a shipping company in a cargo damage claim case.

The shipper and consignee claimed against the shipping company in the sum of Japanese Yen 3,826,500 for damage to the cargo, which was shipped on board the vessel "TS OSAKA" from Moji of Japan to Yantian of the Mainland under a bill of lading issued by the shipping company dated 22/7/2004. The shipping company denied liability on the ground that any alleged loss or damage was caused by the defective packing of the cargo or perils of the sea, for which the shipping company was not responsible.

Both the shipper and consignee were corporations which carried on their businesses outside Hong Kong. The address of the shipper was in Izumo-city in Japan, whereas the address of the consignee was in Huiyang County in Guangdong of the Mainland. The shipping company applied to the Court for security for costs pursuant to O. 23 r. 1 of the Rules of the District Court, Cap. 336.

The shipper's and consignee's ground of opposition was quite a novel one. They were relying on the provisions in the Hong Kong Bill of Rights Ordinance, Cap. 383 ("the HKBRO") and argued that it was discriminatory for the Court to treat foreign plaintiffs in a way different from local ones, and the fact that both the shipper and consignee were foreign corporations, by itself, was not a sufficient reason for the Court to order them to provide security for costs. The shipper and consignee relied on the following articles in the HKBRO:

Article 1

Entitlement to rights without distinction

- (1) The rights recognized in this Bills of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 10

Equality before courts and right to fair and public hearing

All persons shall be equal before the courts and tribunals.

Articles 22

Equality before and equal protection of law

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status."

The only fact put forward in support of the application for security for costs was that both the shipper and consignee were foreign corporations. If the Court were to order security based on such limited fact, the Court's decision was discriminatory as it was made simply because the shipper and consignee were foreign corporations. In order to construe O. 23 in a way which was not discriminatory, the shipping company should put forward more reasons to justify the protection given to it in respect of the enforcement of costs order. The shipper and consignee were, in fact, urging the Court to adopt the approach as laid down in the English Court of Appeal's decision in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868. *Nasser* supports the proposition that, if there are considerable obstacles in enforcing a judgment on costs against a particular foreign plaintiff or appellant, ordering such party to provide security for costs would not be discriminatory and is therefore justified. The focus is therefore on the difficulty in enforcing judgment in a foreign jurisdiction and not on the status of a particular plaintiff or appellant.

In Hong Kong, it is trite law that the court is required to consider all the circumstances of each case to decide whether to order security for costs against a foreign plaintiff, and it is not an inflexible or rigid rule that such

kind of plaintiff must provide security. In view of the development of the English jurisprudence on the exercise of the discretion in a manner which is compatible with the human rights legislations, the Hong Kong courts, in deciding whether to order a foreign plaintiff to provide security for costs, should now focus on the difficulties faced by the defendant in enforcing the judgment rather than on the status of a particular plaintiff. *Nasser* should now reflect the modern approach, and the Judge was prepared to accept the shipper's and consignee's submission to such extent.

The next question was, therefore, whether the only fact that the plaintiff was a foreign corporation was, by itself, sufficient for the Court to conclude that it would be more difficult and costly for the defendant to enforce a judgment on costs. This was particularly crucial as the Court knew nothing about the shipper and consignee except that they were corporations in Japan and the Mainland respectively. In determining such question, the Court was entitled to make certain obvious inferences without formal evidence. The Court was entitled to make use of the limited information to infer that it would be more difficult and costly for the shipping company to enforce any costs order in its favour against the shipper and consignee in the Mainland or Japan. Such inference was made based on the following considerations:

- (a) the legal systems in the Mainland and Japan are based on the civil law system which is quite different to the common law system;
- (b) both the Mainland and Japan have no reciprocal arrangement with Hong Kong in respect of the enforcement of foreign judgments;
- (c) there bound to be extra costs and delay caused by the enforcement of judgment in the Mainland and Japan, including the engagement of foreign lawyers;
- (d) the shipping company might have difficulty in locating the assets of the shipper and consignee in the Mainland and Japan, in particular the shipping company knew very little about the backgrounds of the shipper and consignee;
- (e) the shipping company would encounter difficulties arising out of the differences in culture and language barrier, in particular about the enforcement of judgment in Japan; and
- (f) there is foreign exchange control in the Mainland.

In Hong Kong, the statutory regime only divides the plaintiffs into two categories: local residents and foreign residents. As the obstacles in enforcing judgment in a foreign jurisdiction are obvious in most cases, the Hong Kong courts may be more readily to accept the difficulties faced by a defendant if he has to enforce a judgment on costs in a foreign jurisdiction. However in future applications, if the plaintiff is a resident in a jurisdiction which has a common law system similar to that in Hong Kong, and there is reciprocal arrangement for enforcing foreign judgments in the country concerned, more evidence about the difficulties in enforcing a judgment may be required before the court would exercise the discretion to order security for costs.

In conclusion, the Judge accepted that, in the event the shipper and consignee failed in their claim, there were considerable obstacles to the shipping company in enforcing any judgment on costs against the shipper and consignee either in the Mainland or in Japan. In such circumstances, the Judge exercised the discretion in favour of the shipping company by ordering the shipper and consignee to provide security for costs in the amount of HK\$180,000. As costs should follow the event, the Judge also ordered the shipper and consignee to pay for the costs of the shipping company's application for security for costs with certificate for counsel.

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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Multi-modal transportation involves far more complicated liability regime than port-to-port or airport-to-airport carriage. Pure international sea or air transport often affords better protection by international conventions. Conversely, multi-modal transport entails a variety of operational risk elements on top when the cargo is in-transit warehouse and during overland delivery. Fortunately, these risks are controllable but not without deliberate efforts. Sun-Mobility is the popular risk managers of many multi-modal operators providing professional assistance in liability insurance, contract advice, claims handling, and as a matter of fact risk consultant for their staff around-the-clock.