

To: Transport Industry Operators

Ship release's security (II)

Remember Chans advice/89 that the Hong Kong High Court ordering the "Hua Tian Long"'s shipowner to provide security of US\$65 million? On 30/5/2008, the Hong Kong Court of Appeal ordered the ship release's security be increased to US\$122,412,000.

On 9/5/2008 the High Court made an order that the shipowner should provide security in a manner acceptable to the charterer, alternatively in a manner to be decided by the Registrar of the High Court, in the sum of US\$65 million. The purpose of that order was that the *Hua Tian Long* ("the vessel") could be released. The charterer filed a notice of appeal.

The basis of the charterer's appeal was that in the original figures given to the High Court, the charterer had omitted one particularly important item namely:

"Costs incurred on non major equipment for example transportation barges, marine gas oil, divers costs, budget management team costs, materials, tools, pipe coating costs."

These items totalled US\$69,300,000 according to the affirmation of the charterer filed on 16/5/2008. Such costs would be claimable and that therefore they would come within the category of what would constitute the charterer's reasonably arguable best case.

The shipowner argued that there was nothing to substantiate that claim, and criticised the quality of the charterer's evidence. It was also argued that the charterer's claim was not sustainable under the Admiralty jurisdiction.

Whilst the charterer's claim was not supported by significant amounts of documentation, at this early stage that could not be expected. What was clear was that, the charterer was engaged in a considerable undertaking. Moreover, the vessel in question was a very specialised vessel which had quite exceptional capabilities. The hire charges under the charter party would appear to reflect that. Given the size of the projects which the charterer had undertaken it could not be supposed that the documentation to support the charterer's claim of this size would be other than voluminous and far greater than anything which could conceivably be filed at this stage. It was in those circumstances that, based on evidence which was not before the High Court, the Court of Appeal considered it right to increase the amount of security. Because that increase was based on new material, the Court of Appeal considered it appropriate to make an order nisi that the costs before the Court of Appeal should be to the shipowner.

It might be appropriate that the charterer should give an undertaking to reimburse the shipowner the costs incurred in respect of providing security for amounts in excess of that which the court, when it had the full matter before it, considered appropriate. After hearing argument, the Court of Appeal concluded that it was inappropriate to require the charterer to give any undertaking. The reason quite simply was that as a matter of principle the charterer was entitled to the security in the shape of the arrest of the vessel. The provision of security by a shipowner as a requirement imposed by the court when it exercises the jurisdiction to release a vessel from arrest constitutes, in effect, the provision of a substitute security which is treated, in some respects, as the vessel. It is for those reasons that when the court considers whether the plaintiff is acting in an oppressive manner and thus abusing the process of the court, the yardstick by which it assesses that is that of the reasonably arguable best case. Were it otherwise, the court might well use a different standard for assessing the appropriate amount. It was for those reasons that the Court of Appeal did not require the charterer to give an undertaking to reimburse any costs of the shipowner.

The Court of Appeal ordered that the vessel be released from arrest upon the provision by the shipowner of security in the sum of US\$122,412,000.

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@sun-mobility.com

Richard Chan
Director
E-mail: richardchan@sun-mobility.com

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@sun-mobility.com Website: www.sun-mobility.com
CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

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.