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To: Transport Industry Operators

**Lifting corporate veil**

In our last issue of Chans advice/253, the Hong Kong District Court's judgment dated 26 April 2022 mentioned a case authority of *China Ocean v Mitrans Shipping*. We would like to discuss this judgment dated 11 July 1995 of the Hong Kong Court of Appeal in our Chans advice this month. [1995 No. 71 Civil]

This was an appeal by the defendant Mitrans Shipping, which asked the Court of Appeal to reverse an Order of Leong J made on 13 February 1995 refusing to strike out the plaintiff's Statement of Claim and dismiss the action.

Two charterparties made in Hong Kong, one dated 18 September 1990, and the other dated 10 October 1990, were involved. Under each charterparty, the plaintiff China Ocean, a Chinese company, chartered its vessel the *Gao Yang* for the carriage of bulk cargo from China to North Korea. A Panamanian company Mitrans Panama was named in each charterparty as the charterers. Each charterparty contained an arbitration clause providing that any dispute be referred to arbitration in Hong Kong. The arbitrators awarded that Mitrans Panama pay China Ocean: US\$126,556.58; two lots of interest totalling US\$28,660.03; and HK\$24,050.70 costs. Mitrans Panama failed to pay anything.

Paragraph 8 of China Ocean's Statement of Claim contained the basis on which payment was sought from Mitrans Shipping, a Hong Kong company. Paragraph 8 read as follows:-

"The Defendants are liable to satisfy the Award as they are in fact and in law the true entity with which the rights and obligations of Mitrans Panama rest in particular those under the charterparties and the Award. The veil of incorporation between Mitrans Panama and its controllers, the Defendants ought to be lifted in particular since at all material times Mitrans Panama acted as a facade for the Defendants so as to enable the Defendants to evade their legal obligations to the Plaintiffs.

- a) Mitrans Panama is a company incorporated in Panama of which nothing is known save that it has an office at the Defendants' place of business in Hong Kong and that Mitrans Panama's President, Joseph Cheung Ming Kwan is a director and shareholder of the Defendants.
- b) Further, the Treasurer of Mitrans Panama, Nelson Mak Ying Kit is the secretary of the Defendants and the Secretary of Mitrans Panama, Adih Wong Wing Cheung is an employee of the Defendants.
- c) Mitrans Panama is not registered with the Registry of Companies and Businesses in Hong Kong as a foreign company.
- d) All correspondence addressed to Mitrans Panama in this matter have been replied to without qualification, by the Defendants.
- e) The Defendants have, in a previous charterparty, admitted that they were the charterers even though the named charterers in the charterparty were Mitrans Panama.
- f) All fixtures made by Mitrans Panama have accrued for the benefit of the Defendants. The Defendants have been using Mitrans Panama as a nominal vehicle in an effort to evade their legal obligations."

China Ocean claimed against Mitrans Shipping the sums of US\$155,216.10 and HK\$24,050.70.

One of China Ocean's arguments was that Mitrans Shipping treated itself and Mitrans Panama as a single economic unit with interchangeable names. However, as was said by Robert Goff LJ in *Bank of Tokyo Ltd v. Karoon* (Note) [1987] AC 45 at p.64 and adopted in the judgment of the Court of Appeal in England delivered by Slade LJ in *Adams v. Cape Industries Plc.* [1990]1 Ch. 433 at p.538G-H:-

"[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged."

Later on in the judgment in *Admas v. Cape Industries Plc.* (supra) this was said (at p.544D-F):-

"... we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law."

Was that not the situation here? According to paragraph 8 of the Statement of Claim, the pleaded reason why Mitrans Panama was used as a facade for Mitrans Shipping was to enable Mitrans Shipping to evade its legal obligations to China Ocean.

"What legal obligations?" asked Mitrans Shipping. As the Court of Appeal saw it, no liability or obligation had to be *evaded* since no liability or obligation had arisen. By not entering into the charterparties, Mitrans Shipping had *avoided* any liability or obligation thereunder. There was no evasion of any obligation or liability by Mitrans Shipping. There was no liability or obligation on Mitrans Shipping's part to evade. No liability or obligation on anybody's part existed until the charterparties were entered into. And it was Mitrans Panama which entered into the charterparties and which assumed liabilities or obligations to China Ocean thereunder. China Ocean chose to deal with Mitrans Panama without insisting on a guarantee.

Using a corporate structure to *evade* legal obligations is objectionable. The courts' power to lift the corporate veil may be exercised to overcome such evasion so as to preserve legal obligations. But using a corporate structure to *avoid* the incurring of any legal obligation in the first place is not objectionable. And the courts' power to lift the corporate veil does not exist for the purpose of reversing such avoidance so as to create legal obligations.

The appeal must, in the Court of Appeal's judgment, be allowed on the basis relied upon by Mitrans Shipping, namely that China Ocean's Statement of Claim disclosed no reasonable cause of action. The Court of Appeal allowed the appeal so as to order the striking out of the Statement of Claim and the dismissal of the action.

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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