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Cover Story

Can a term be implied into a charterparty guarantee limiting the shipowner's right to seek security?

Introduction

In the recent English case *CVLC Three Carrier Corp and another v Arab Maritime Petroleum Transport Company* [2021] EWHC 551 (Comm), the English High Court (Commercial Court) (the "**Court**") emphasized that a term can only be implied into a contract if it is of commercial necessity.

Background

On 15 March 2019, CVLC Three Carrier Corp (CVLC3) and CVLC Four Carrier Corp (CVLC4) ("**Owners**") chartered their respective vessels to Al-Iraqia Shipping Services and Oil Trading ("**Charterer**"). Arab Maritime Petroleum Transport Company ("**AMPTC**") guaranteed the punctual performance of the Charterer's obligations. Two identical guarantees ("**Guarantees**") were given as consideration by AMPTC to the Owners for entering into the respective charterparties with the Charterer ("**Charterparties**"). The Guarantees were not drafted in standard forms, but their terms were such as would be familiar to anyone with a working knowledge of guarantees and their drafting was largely composed of "boilerplate" text. The terms of Guarantees include, among other things, the following:

> "*In the event that [Charterer] default in their hire payment obligations in respect of hire which is from time to time due and payable to [Owners] by reference to the respective charterparty terms and conditions and provided [Charterer]'s default in such payment obligations continues for a period of no less than 30 calendar days, [Owners] has the right to call upon this*

guarantee by notifying [AMPTC] of [Charterer]'s default and request payment of outstanding hire which has accrued and is due and payable to [Owners], payment of such hire to be made immediately by [AMPTC] to the bank account stipulated in Box 26 of the foregoing charterparty. …

[AMPTC] also irrevocably, absolutely, and unconditionally guarantee, as primary obligor and not merely as surety, the due and punctual performance of any and all other obligations of the bareboat charterer under the said charterparty. …"

On 24 December 2019 the Owners served notice on the Charterer terminating the Charterparties due to alleged breaches of Charterparties by the Charterer. Subsequently, the Owners served notices of arbitration on AMPTC, alleging that they had suffered loss and damage because of the Charterer's breaches of the Charterparties, and that AMPTC was liable under the associated Guarantees. A sole arbitrator ("**Arbitrator**") was appointed for the Owners' claims.

On 31 July 2020 the Owners filed an application in the Provincial Court of Luanda, Angola, seeking the arrest of AMPTC's vessel as security for their claims under the Guarantees. The Angolan court then issued an interim order for the detention of the vessel, and handed down a judgment ordering the arrest of the vessel.

In the meantime, AMPTC applied to the Arbitrator for a declaration that "*It is an implied term of the [Guarantees] dated 15 March 2019 between AMPTC and the [Owners] that the Owners would not seek additional security in respect of the matters covered by the [Guarantees]*". The Arbitrator then issued an award making a declaration in the terms sought by AMPTC and awarding interest and costs in favour of AMPTC. Subsequently, the Arbitrator issued a second award declaring that the Owners had acted in breach of the implied terms and that their liability to AMPTC for damages to be further assessed ("**Awards**").

Pursuant to s. 69 of the Arbitration Act 1996, the Owners appealed against the Awards to the Court.

Decision

In allowing the appeal, the Court stated that a high legal hurdle has to be met for a term to be implied and the correct test applicable is the test of necessity. A term will not be implied for the plain reason that it appears to be fair or because the parties would have agreed to such an implied term if it had been put forward to them. Rather, as in the cases of *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 and *Ali v Petroleum Company of Trinidad and Tobago* [2017] UK PC 2, a term can only be implied if, without the term, the contract would lack practical coherence and business efficacy.

On the application of the above test, the Court did not consider that the nature of the contract and the surrounding circumstances

warranted a term, which limits the Owners' right to seek additional security, to be implied into the Guarantees. In view that the Guarantees were on "boilerplate" terms, the Arbitrator's decision to impose an implied term into the Guarantees would suggest that the same term should also be implied into all other similarly worded guarantee agreements.

Further, the Court noted that in normal circumstances, a party to a contract is not restricted to obtaining security in the event of an arguable default. The implied term barring the additional security is thus akin to an exclusion clause in which it is well established that clear wording is generally required for courts to conclude that the parties had the intention for the contract to take away their common law rights or remedies. However, in this present case, such an intention was not observed in view of the wordings used in the Guarantees.

In relation to the Arbitrator's view that adequate security has already been provided pursuant to the Guarantees since the parties would not have otherwise entered into the Charterparties, the Court held that the arrest of the AMPTC's vessel would not amount to "double security" as the Guarantees create a separate contractual relationship between the Owners and AMPTC. While the Owners may seek recourse against AMPTC pursuant to the Guarantees where there is an arguable breach of the Charterparties by the Charterer, such a situation does not call for a right for the Owners to seek security against AMPTC. Such a right to seek security against AMPTC only arise when AMPTC acts in breach of its own obligation under the Guarantees and not when the Charterers acted in breach of the Charterparties. For this reason, whilst the Guarantees were sufficient security in respect of the Charterer's obligations under the Charterparties, they do not provide adequate security in relation to the breaches committed by AMPTC under the Guarantees, as its obligation as the guarantor is independent and separate.

The Court also added that it would be against "commercial common sense" if the Owners would be able to seek security, e.g. by way of arrest of vessel, for the Charterers' breach of its obligations under the Charterparties, but unable to seek similar security against AMPTC for its breach of its primary obligations under the Guarantees.

Takeaways

In view of *CVLC Three Carrier Corp*, a term will not be implied into a contract unless it is of commercial necessity. If parties wish to exclude certain rights in the contract (e.g. the right to seek additional security), it must be expressly stated in the contract in order to be enforceable.

The Court also underlined the independency of obligations imposed under the charterparties and guarantee agreements in which obligations of the primary obligor and the guarantor are completely separate. The provision of security in the event of a breach of a charterer's obligation under the charterparty would not limit the owner's right to seek security against the guarantor in relation to the guarantor's breach of its obligation under the guarantee.

Chinese crew invokes contract clause after order to call at India

In fear of the prevalent outbreak of COVID-19 in India, seafarers are becoming increasingly resistant to the use of Indian ports. A petition letter circulated on social media exposed that some seafarers are seeking to back out from offloading in Indian ports.

The ship involved was not identified but *Top Elegance* was the only ship which matched with the profile. The ship involved was originally on fixed service between China and West Africa, but the crew was recently ordered by their employer to offload cargo at 4 different ports in India. The crew argued that under the employment contracts, they are allowed to return to China in case the ship is going to be dispatched to an "epidemic area" such as India. It is said that due to the recent outbreak of COVID-19 in India, many ships refused to go into India and the freight rates are high.

Currently, the Crew Regulations and the Collective Bargaining Agreement for Chinese Crew contain clauses that allow the crew to refuse to sail into "war zone" and "epidemic area" and the shipowners have to bear the cost of repatriation. However, it is expected that disputes will arise on the definition of "epidemic area" when there is a lack of an official definition from Chinese or other international rules. In the end, the crew may need to negotiate a settlement with the shipowner. It is also suggested that shipowners who wanted to send their ships to India should provide the crew with a complete set of protective equipment and clothes and establish protocols to minimize their contact with local port staff.

Dry bulk optimism likely to sail on into next year

Due to strong commodity demand and inflation, the Baltic Dry Index, which is the barometer for dry bulk shipping markets, has been rising continuously in recent weeks. Since the beginning of the year, prices for raw materials such as metals, cement and glass which are carried by dry bulk ships has increased substantially. For example, the price of iron ore in West Australia has reached US$226 per tonne. Similarly, Brazilian iron ore exports has also increased year-by-year.

The rise in demand for commodities has led to shortages which should eventually normalize when the production catches up to the demand. It is expected that the demand for dry bulk ships could be up 5% for this year and next year before the supply catches up. Taking into account the rise in commodities prices, the cost of freight has remained comparatively low despite the recent increase. It is said that the freight rates would need to rise to more than 7 times before the economics are destroyed by freight costs.

The orderbook to fleet ratio is currently at 5.6% which has reached its lowest since early 2002. With no decrease in commodity demand, the need for dry bulk shipping is going to outstrip supply resulting in higher day rates. It is expected that demand will exceed supply by about 2% in 2021 and 2022 and with limited supply growth in 2023.

Trade spat threatens Australia-China gas shipments

According to data from Lloyd's List Intelligence, Australia is currently the biggest supplier of LNG to China while China is the world's second-largest LNG consumer. Shipping of liquefied natural gas ("**LNG**") between Australia and China has been threatened by an increasing political dispute between the two countries. While shipment of LNG had been uninterrupted over last year, it is reported that two small importers have been told verbally by Chinese government officials to stop buying further cargoes from Australia.

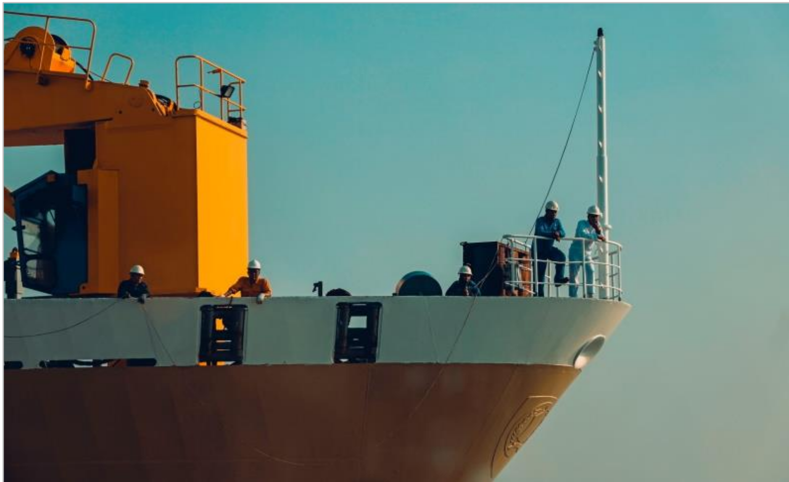
Back in the third quarter of 2020, the coal ban imposed by Chinese government began with verbal request without formal statements. Based on a research by Panama's flag authority, more than 74 bulk carriers laden with Australian coal with 1,500 seafarers on board were stranded for months at anchor off Chinese coal terminals at the height of the ban. China's previous decision to end imports of Australian coal reshaped coal flows for months and increased commodities prices for coal.

Some suggested that banning the import of LNG from Australia would not be as easy as banning coal and other commodities as LNG import was backed by long-off take contracts. It is expected that cutting Australian LNG imports will lead to an increase in LNG imports from the United States.

Shipping condemns travel bans for undermining seafarers' rights

Shipping groups criticized governments for blocking crew changes despite claiming to uphold seafarers' rights under the Maritime Labour Convention ("**MLC**"). Many jurisdictions were reintroducing travel curbs. For example, Singapore, Hong Kong and the United Arab Emirates have barred crew from India as the spread of COVID-19 pandemic has worsen in India. In view of that, representatives of shipowners, unions and governments were negotiating over the wording of resolutions to support seafarers at MLC's government committee.

It was said that governments had tried to water down the language to avoid binding commitments to treat seafarers as key workers. The Chief Executive of the International Maritime Employers' Council insisted that the MLC should be applied by countries in all circumstances and the crew change protocols and key worker status should remain. In the draft submissions to the MLC committee, shipowner and seafarer groups warned that the non-observance of fundamental rights may render the MLC meaningless.



Singapore introduced restrictions on crew changes to prevent local outbreaks of COVID-19 variants. Currently, the United Kingdom has banned travel from India, but it is said that the UK would continue to allow crew changes under its key worker exemptions.

Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd

[2021] HKCFI 396

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On 13 January 2019, the Plaintiff's vessel, "Antea" collided with the Defendant's vessel "Star Centurion" (the "**Collision**"). As a result, Star Centurion sank. On 14 January 2019, the Defendant commenced *in personam* proceedings against the Plaintiff. Shortly after the Collison, salvors were engaged to remove pollutants and dispose of Star Centurion in compliance with a wreck removal order.

On 10 October 2019, the Plaintiff commenced the present action against the Defendants to limit their liability in respect of the Collision. On 28 April 2020, the Plaintiff and the Defendant entered into a settlement agreement whereby it was agreed, among other things, that Antea was to blame entirely for the Collision. Subsequently, the Defendant sought a declaration that part of the claim against the Plaintiff in respect of the raising, removal, destruction or the rendering harmless of Star Centurion (the "**Removal Claim**") shall not be subject to limitation under the Article 2 of the Convention on Limitation of Liability for Maritime Claims 1976 (the "**Convention**") and/or the Limitation Fund constituted by the Plaintiff (the "**Declaration**").

The relevant legislation in the present context is the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap 434 (the "**Ordinance**"), which was enacted in 1993 to give domestic effect to the Convention. In particular, Article 2 of the Convention stipulates various heads of claims that are subject to limitation of liability. Under section 15 of the Ordinance however, the application of para 1(d) of Article 2 of the Convention, being "*Claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship*" ("**Para 1(d)**") was put in suspension. The determination of the present case therefore turned upon whether the scope of the Removal Claim fell within Para 1(d) and thus, was excluded from the limitation regime under the Ordinance.

The Defendant submitted that for a claim to be subject to limitation of liability, it must fall within the scope of art 2 of the LLMC 1976. Section 15(3) of the Ordinance, when read together with section 12, specifically suspends the operation of Para 1(d) from having the force of law in Hong Kong, until such

time as the Chief Executive makes an order under s 15(1) of the Ordinance, which has yet to emerge as of today. In this regard, the clear intention of the legislature is that any claim within the scope of Para 1(d) is at present specifically excluded as a limitable claim under the Ordinance.

On the other hand, the Plaintiff argued that the Removal Claim fell within para 1(a) or 1(c) of Article 2 ("**Para 1(a)**" and "**Para 1(c)**" respectively), which read as:

"*…whatever the basis of liability may be, shall be subject to limitation of liability* –

(a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom) …

(c) Claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations."

In such circumstances, the liability in relation to the Removal Claim was limitable.

The Court of First Instance ("**Court**") took the view that the interpretation of international Conventions must not be controlled by domestic principles, but by reference to "broad and general principles of construction". On the face of the provisions, it can be seen that the various heads under paragraph 1 of Article 2 may overlap in their scope. When claims for wreck removal were specifically provided for under a separate sub-paragraph, the maxim of *generalia specialibus non derogant* naturally applied, meaning that the more general terms of Para 1(a) (or 1(c)) should give way to the specific terms of Para 1(d) when the claim was one for wreck removal.

The Court also opined that the matter should also be considered in light of the provisions of Article 8 of the Convention. Article 8 allowed the State Parties to opt out of limiting the claims under paragraphs 1(d) and 1(e) of Article 2 but not the claims under the other subparagraphs. Hong Kong had indeed opted out of Para 1(d) until an order of the Chief Executive has been made. In this premises, the Court held that according to the ordinary meaning of the relevant provisions, and construed in their context and purpose, the Removal Claim fell within Para 1(d) exclusively, and was therefore not subject to limitation under Article 2.

Accordingly, the Court granted the Declaration in favour of the Defendant.

Regal Seas Maritime SA v Oldendorff Carriers GmbH (New Hydra)

[2021] EWHC 566 (Comm)

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By a time charter dated 22 November 2013 (the "**Charterparty**"), the Owners' vessel mv NEW HYDRA (the "**Vessel**"), being a Cape size bulk carrier of 179,258 tonnes, was chartered on an amended NYPE form for a period of 3 years with the options for the Charterers to extend the Charterparty by two additional years. Such options were subsequently exercised by the Charterers.

The hire clause provides that "*hire payable every 15 days in advance including overtime. The gross daily hire to be calculated basis the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days plus 4% for size adjustment.*"

Cape size rates known as the Baltic Capesize Index ("**BCI**") were published daily by the Baltic, and the hire was calculated by reference to the Baltic Cape Size Time Charter routes or the BCI with a size adjustment of 4%. At the time when the Charterparty was entered, the benchmark ship for the Cape size sector was a 172,000 tonnes ship. However, in December 2013, the Baltic announced that the benchmark ship would be increased to 180,000 tonnes, and new arrangements as to the calculation of BCI were imposed as follows:-

1. From 31 July 2015, daily rates were assessed solely on the basis of the new benchmark 180,000 tonnes ship and four time charter (4TC) routes (180 4TC). Individual rates for the 172,000 tonnes ship (172 4TC) were no longer assessed.

2. Although rates for 172,000 tonnes ship were still published during the period between 3 August 2015 to 23 December 2016, such rates were derived from the 180 4TC rate with a constant dollar differential, and from 2 January 2017, the 180 5TC rate (i.e. adding a fifth time charter route to the assessment).

3. From December 2017 onwards, the 172 4TC rate was no longer published even though the rates were still calculated by applying the said constant dollar differential to the 180 5TC rate.

In July 2018, the Owners alleged that the manner in which the hire rate was calculated was incorrect since August 2015 when the Baltic stopped publishing the 172 4TC rates which resulted in the Owners being substantially underpaid. It was the Owners' case that hire should be calculated at the 180 4TC rate plus 4%, or alternatively, with no adjustment as the vessel tonnage was almost that of the benchmark vessel. On the other hand, the Charterers argued that the hire had been correctly assessed and applied by the parties with reference to the 172 4TC rate up to December 2017, and applying the fixed dollar differential to the 180 tonnes rate thereafter.

The Owners commenced arbitration against the Charterers, and the Charterers' construction on the

hire provision was accepted by the arbitral tribunal. On appeal, the Owners continued to rely on their second argument that the 180 4TC rate should be applied with zero adjustment as there was no provision present in the Charterparty to alter such an intention. Conversely, the Charterers claimed that the parties intended the hire base rate to be calculated by reference to the 172 4TC rate throughout the life of the Charterparty, with the intention to apply the 4% size adjustment being fixed and unalterable.

Since the hire clause did not expressly deal with the calculation of hire in the event that the size of the benchmark ship used by Baltic has changed, the issue before the Court was whether the construction of the hire clause encompassed the change of calculation imposed by Baltic when the deadweight tonnage of the benchmark Cape size ship has changed.

In construing the hire clause, the Court considered what a reasonable person would, with all the background knowledge reasonably available to the parties at the time when the Charterparty was entered into, have understood the language of the hire clause to mean.

As the parties had contemplated for the Charterparty to last 3 to 5 years, the Court held that, if the hire clause is to be construed as suggested by the Charterers, it would have to be rewritten when no daily rates were published for 172,000 tonnes ship in which it would be against commercial common sense.

Separately, with reference to the Owners' interpretation of the hire clause, the Court found that the agreed 4% size adjustment was negotiated to reflect the difference in earning capacity between the Vessel and the benchmark ship at the date of the Charterparty, namely, 172,000 tonnes. That did not mean that the parties could not have intended for a new reasonable adjustment in the calculation of hire in the event of a change in the benchmark ship size. Having so construed, there is scope for a term to be implied into the Charterparty for adjustment in the calculation of hire in the event of a change to the size of the benchmark vessel. Such an implied term would also be necessary to make the Charterparty work for the full duration notwithstanding the change of benchmark vessel announced by the Baltic. The Owners' interpretation was thus preferred by the Court and accordingly, the appeal was allowed.

Noble Chartering Inc. v Priminds Shipping Hong Kong Co. Ltd.

[2021] EWCA Civ 87

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Priminds Shipping Hong Kong Co. Ltd. ("**Charterer**") chartered the vessel "TAI PRIZE" (the "**Vessel**") under a voyage charterparty entered with Noble Chartering Inc. dated 29 June 2012 to transport soya beans from Brazil to China. Noble Chartering Inc. was the disponent owner ("**Disponent Owner**") who chartered the Vessel from her headowners under a time charterer dated 8 September 2011.

After the shipper, who acted as the Charterer's agent, loaded the cargo on the Vessel, a bill of lading on a Congenbill 1994 form ("**Bill of Lading**") was issued and signed on behalf of the master by agents of the headowners. The Bill of Lading which incorporated Hague Rules was drafted by the shipper. In the heading, the goods were described as "CLEAN ON BOARD". The Bill of Lading also stated the following:

> "*SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge or so near thereto as she may safely get the goods specified above.*
>
> *Weight, measure, quality, quantity, condition, contents and value unknown.*"

On discharge, part of the cargo was found to have suffered heat and mould damage. The cargo receivers commenced proceedings against the headowners. The headowners were ordered to pay the cargo receiver around US$1 million. The Disponent Owner agreed to pay a 50% contribution to the headowners under the Inter-Club Agreement. The Disponent Owner then commenced arbitration against the Charterers to recover the payment made to the headowners.

The Arbitrator found that the cargo was loaded with pre-existing heat damage which the shipper would have been able to discover the damage by reasonable means before they were loaded. As there is an implied warranty as to the accuracy of any statement contained in the Bill of Lading, the Arbitrator held that the Charterers were liable to the Disponent Owner. The Charterers then appealed to the English Commercial Court. The Commercial Court disagreed with the rulings of the Arbitrator and held that by presenting the Bill of Lading to the master for his signature, the shipper was doing no more than inviting the master to make a representation.

The Disponent Owner appealed to the Court of Appeal. The Court of Appeal mainly considered 3 questions of law as follows:

1. Did the words “clean on board” and “Shipped... in apparent good order and condition...” in the draft Bill of Lading presented to the master amount to a representation by the shippers and/or Charterers as to the apparent condition of the cargo or were they instead an invitation to the master to make a representation of fact in accordance with his own assessment?
2. In light of the answer to question (1), on the findings of fact made by the arbitrator, was any statement in the Bill of Lading inaccurate as a matter of law?
3. If so, were Charterers obliged to indemnify owners against any consequences of that statement being inaccurate?

The Court of Appeal agreed with the Commercial Court that the statement made by the shipper was merely an invitation to the master to make a representation of fact as to the apparent order and condition of the cargo. A statement in a bill of lading regarding the apparent order and condition of the cargo was based upon the reasonable examination of the external condition of the cargo which the master had (or should have) undertaken. A reasonable examination depended on the actual circumstances. The master was responsible for taking reasonable steps to examine the cargo, but he was not required to disrupt normal loading procedures. What mattered was what was reasonably apparent to the master or other servants of the carrier but not anyone else, including the shipper. The statement related to the apparent order and condition of the cargo at the time of shipment, but not at any earlier time.

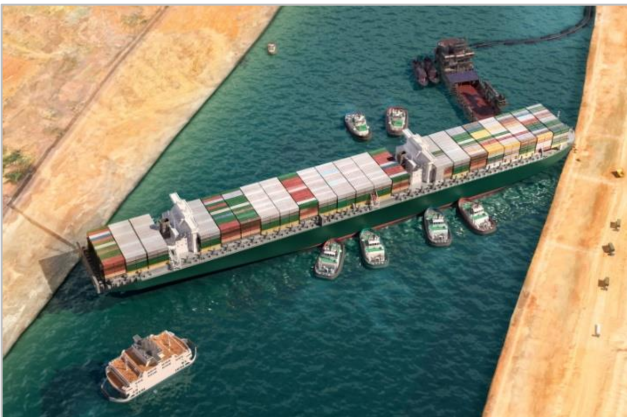
In the present case, the Arbitrator’s finding was that the damage was not reasonably visible to the master or crew at and during loading. Therefore, the Bill of Lading was accurate since the statement only needed to account for what appeared on reasonable examination by the master in the circumstances at the port.

As there were no inaccurate statements in the Bill of Lading, the issue of indemnity did not arise. Thus, the appeal was dismissed and the Charterer was not liable to Disponent Owner.

What is LLMC and how does it work in Hong Kong?

Introduction

The Suez Canal blockage was undoubtedly 2021's hottest topic in the global shipping industry. The six-days obstruction, caused by a TEU container ship Ever Given, has led to at least 369 ships unable to pass through the canal, preventing around US$9.6 billion worth of trade. The Suez Canal Authority ("**SCA**") has estimated a loss of US$15 million per day in transit fee. As a result, the SCA arrested Ever Given on 13 April 2021 and lodged a US$916 million claim against Ever Given's owner, Shoei Kisen. In response, Shoe Kisen lodged proceedings to cap the limitable claims at just US$115 million pursuant to the Convention on Limitation of Liability for Maritime Claims ("**LLMC**").



What is the LLMC?

The LLMC was first signed in 1976 ("**LLMC 1976**") with a view to formulating a uniform regime for the limitation of liability. The LLMC sets out specific tonnage-based figures which provides for the maximum monetary liability of shipowners (including the charterer, manager and operator of the vessel and salvors) in respect of claims arising out of maritime incidents, covering claims for loss of life, personal injury, property damage as well as salvage and wreck removal. The unit for measuring the monetary liability is the Special Drawing Right (SDR), an interest-bearing international reserve asset created by the International Monetary Fund (IMF) in 1969. As at 1 June 2021, 1 SDR equivalent to approximately US$1.445.

The LLMC was subsequently updated by the 1996 Protocol to the 1976 Convention on LLMC ("**1996 Protocol**"), followed by further amendments made to the 1996 Protocol by the International Maritime Organization in April 2012 ("**Amendments**"). The Amendments were necessary to make the existing limitation thresholds in line with the increasing cost of claims, particularly on clean-up costs arising from pollution incidents. For instance, in March 2009, the bunker tanks of *Pacific Adventurer* ruptured in the Australian waters, leading to a clean-up costs of US$27.6 million. However, the shipowners were able to limit their liability to US$15.5 million pursuant to the 1996 Protocol. This was one of the most notable incidents that prompted the Amendments, after which the liability limits have significantly increased, with some class of claims increased by 51%.

After the Amendments, the limit of liability for claims for loss of life or personal injury on ships not exceeding 2,000 gross tonnage is 3.02 million SDR (compared with 2 million SDR prior to the Amendments). The following additional amounts are used in calculating the limitation amount for bigger vessels:

- From 2,001 to 30,000 tons, 1,208 SDR per ton (800 SDR prior to the Amendments)
- From 30,001 to 70,000 tons, 906 SDR per ton (600 SDR prior to the Amendments)
- > 70,000 tons, 604 SDR per ton (400 SDR prior to the Amendments).

The limit of liability for property claims for ships not exceeding 2,000 gross tonnage is 1.51 million SDR (compared with 1 million SDR prior to the Amendments). The following additional amounts are used in calculating the limitation amount for bigger vessels:

- From 2,001 to 30,000 tons, 604 SDR per ton (400 SDR prior to the Amendments)
- From 30,001 to 70,000 tons, 453 SDR per ton (300 SDR prior to the Amendments)
- > 70,000 tons, 302 SDR per ton (200 SDR prior to the Amendments).

What are the benefits of LLMC?

The LLMC is a strict regime and provides an almost unbreakable system to limit shipowners' liability. There have been various high-profile ship accidents over the years, calling for astronomical amount of compensations, even in cases where the accident is not exactly a result of human fault. The LLMC can therefore effectively protect shipowners from excessive monetary liability, except in cases where it can be proved that "*the loss resulted from his personal act or omission, committed with the intent to cause such a loss or recklessly and with knowledge that such loss would probably result*", as per Article 4 of the LLMC.

Moreover, the LLMC provides a clear and proven system which is uniformly adopted by many states. It benefits not only the shipowners but also the insurers and victims, with the former knowing for sure that they are only paying up to the liability insured and the latter having the security of the availability of funds to satisfy their claims.

The LLMC is an important tool for promoting merchant shipping trade. The statutory right given to shipowners to limit their liability provides strong protection to the industry. Moreover, a shipowner who is presumably a "wrongdoer" in the accident is nevertheless entitled to commence a tonnage limitation action as a Plaintiff and pre-empt claims from the "Defendants", to whom he is potentially liable. This also motivates shipowners to proceed with handling compensation claims as soon as possible, in turn allowing victims to receive compensation within shorter period of time and avoid the need of going through unduly long legal proceedings, saving both costs and time for the parties.

Is the LLMC applicable in Hong Kong?

The 1996 Protocol is currently in force in 50 states, with the exception of certain notable maritime states such as China and USA, who are not parties to any versions of the LLMC. On the other hand, Hong Kong adopted the LLMC 1976 in 1993 by the enactment of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap. 434). The 1996 Protocol was subsequently enacted as part of the Hong

Kong law in 2005 but was not formally brought into operation until 3 May 2015. By 8 June 2015, the Amendments were already in force in the other LLMC contracting states. Yet, it was not until 4 December 2017 that the Amendments were applied in Hong Kong, finally bring Hong Kong in line with the other contracting states.

What was the significance of Hong Kong increasing the limits by adopting the Amendments?

As the Amendments significantly increased the limits of liability under the original 1996 Protocol, the adoption of the Amendments have equally raised Hong Kong's liability limits on claims arising after 4 December 2017.

Prior to the belated adoption of the Amendments, there was a time where Hong Kong had a significantly lower liability limits than other contracting states to the 1996 Protocol, amounting to a major attraction to shipowners and their shipping lawyers who were looking for a suitable jurisdiction to commence a tonnage limitation action. Claims prior to the application of the Amendments would have enjoyed a much lower liability limitation if the action is proceeded in Hong Kong. The adoption of the Amendments essentially removed such jurisdictional advantage vis-à-vis shipowners.

This change is likely to result in "forum shopping", particularly in cases where large casualties or damages are involved. While shipowners may prefer establishing their claims in other jurisdictions with lower limits (such as mainland China who is not a party to the LLMC but nevertheless incorporated the LLMC 1976 limits into its domestic law), Hong Kong may now become a jurisdiction favourable to claimants, who will now be entitled to higher amount of compensation under Hong Kong's increased limit.

For enquiries, please feel free to contact us at:

E: shipping@onc.hk
W: www.onc.hk
T: (852) 2810 1212
F: (852) 2804 6311

19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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