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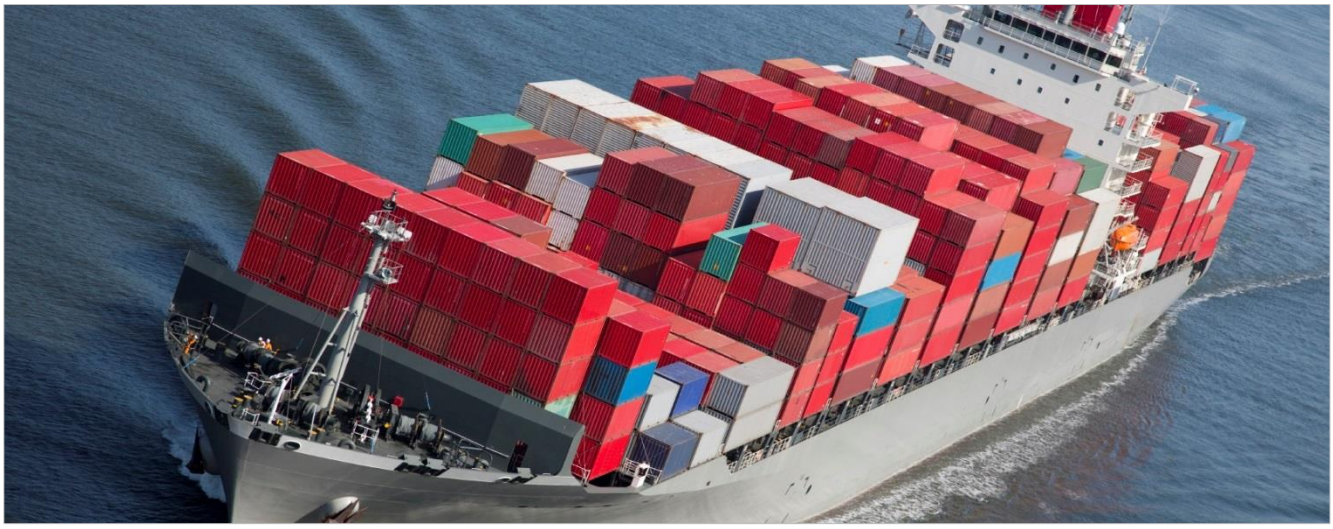


Cover Story

Heavy Burden on Claimants to Set Aside Limitation Decree

Introduction

In admiralty proceedings, shipowners are often entitled to limit their liability in respect of certain types of maritime claims for reasons of public policy. In order to obtain the fullest protection against potential claims, it is necessary for the shipowners who seek to rely upon limitation of liability to obtain under the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap. 434) (the "**MSLSLO**") a decree of limitation. However, there are circumstances in which such decree of limitation will be set aside. In the recent Hong Kong case of *Floata Consolidation Ltd v Man Lee Hing (Hong Kong) Vehicles Ltd and others* HCAJ 178/2014, the Court revisited the law on setting aside a decree of limitation by claimants in maritime claims.

Background

The relevant background of the case can be briefly set out as follows. In the early morning on 23 March 2014, a barge "FLOATA 97" (the "**Barge**") owned by the Plaintiff was carrying out mid-stream operations, which literally means loading and unloading containers, beside the vessel "Heung-A Singapore" (the "**Vessel**") at the North Lamma Anchorage. During the course of the said operation, an incident took place when some containers fell onto the Vessel while some others fell into the sea (the "**Incident**").

On 11 March, upon the application by the Plaintiff, the Court of First Instance granted a decree of limitation to the Plaintiff in relation to the Incident (the "**Decree**"). Subsequently, one of the claimants, Mr. Cheung, who claimed to be the owner of a cargo stored in a container which fell into the sea in the Incident, applied for an order to set aside the Decree.

Principles governing setting aside of decree of limitation

The legal basis for setting aside a decree of limitation can be found in the Convention on Limitation of Liability for Maritime Claims 1976 (the "**1976 Convention**") which has the force of law in Hong Kong pursuant to section 12 of the MSLSLO. Articles 1 and 2 of the 1976 Convention provide that certain claims against shipowners and salvors shall be subject to limitation of liability. However, Article 4 of the 1976 Convention goes on to provide that "*a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result*".

After considering the case law, the Court found that a claimant seeking to set aside a decree of limitation had the burden to establish sufficient prima facie grounds that the loss (i) resulted from the personal act or omission on the part of shipowner; and (ii) the shipowner had intent to cause such loss in question or was reckless with actual knowledge that such loss would probably result. However, the Court noted from case law that such burden is a "very heavy" burden on a claimant seeking to set aside a decree of limitation.

(1) Personal act or omission

In order to set aside a decree of limitation, the claimant should first establish that the loss resulted from a personal act or omission of the shipowner (the "**1st Requirement**"). However, this issue might not be so straight forward when the ship in question is owned by a corporation, which is invariably the case in practice very often. In that case, the identification of the act or omission of the shipowner often presents particular difficulty.

In *The Lady Gwendolen* [1965] P 294, the question arose as to whether a collision, caused principally by the fault of the master of a vessel traveling at excessive speed in very thick fog, occurred without the "actual fault or privity" of the company which owned the vessel (the "**Company**"). In holding the Company guilty of "actual fault", the Court found that there were certain failures on the part of the Company's management at board level which contributed to the collision. The Court further held that the head of the Company's traffic department with responsibility for running its ships, although not a director, could also be regarded as someone whose action was the very action of the Company itself. However, the Court did observe that the fault of the master traveling at excessive speed could not regarded as the very action of the Company.

In another case of *Meridian Global Fund Management Asia Ltd v Securities Commission* [1995] 2 AC 500, the Court elaborated the decision of *The Lady Gwendolen* and held that, for a company to be liable for somebody's act which was to be regarded as the very act of the company itself, that somebody had to be the "directing mind and will" of the company. It is therefore clear from this line of cases that the wrongs of servants or agents of a company in themselves would not constitute personal act or omission of the company for the purpose of setting aside a decree of limitation.

(2) Reckless conduct and knowledge

The second requirement a claimant needs to establish is that the shipowner was reckless and it had actual knowledge that the very loss would probably result (the "**2nd Requirement**"). As case law suggests, this requirement contains two separate and cumulative elements: recklessness and knowledge. Thus, a challenge to the decree of limitation will fail if only recklessness but not knowledge is established.

Furthermore, the wording of Article 4 of the 1976 Convention has made it more difficult to satisfy the element of knowledge. Under Article 4 of the 1976 Convention, the relevant knowledge is that "such loss" would probably result. It has been

suggested by case law that this requires foresight of the very loss that actually occurs, not merely of the type of loss that occurs. In this connection, the right of shipowners to limit their liability under the 1976 Convention has been described as an "almost indisputable right".

Application

Applying the law to the facts of this case, the Court found that the act or omission that Mr. Cheung primarily relied on to set aside the Decree was that of the person-in-charge of the Barge and/or other crew members on board the Barge. Thus, the Court considered the critical question was whether the crew members' act or omission can be regarded as the Plaintiff's "personal act or omission" within the meaning of Article 4 of the 1976 Convention.

In answering the question, the Court found that neither the person-in-charge of the Barge nor other crew members were servants or agents of the Plaintiff as such, since they were all employed by an independent labour contractor. The Court went further to comment that, even if they were servants or agents of the Plaintiff, their act or omission was not to be regarded as the "personal act or omission" of the Plaintiff for the purpose of Article 4 of the 1976 Convention. It was because, firstly, the person-in-charge of the Barge was not a director of the Plaintiff or part of its senior management. As illustrated by *The Lady Gwendolen*, simply being the master of a vessel would not make one's act or omission that of the company which owns the vessel. Secondly, there was no evidence of the functions and responsibilities of any particular individual within the senior management of the Plaintiff whose act or omission may potentially be regarded as the act or omission of the Plaintiff. Therefore, the Court held that Mr. Cheung had failed to identify and establish any causative personal act or omission of the Plaintiff under the 1st Requirement, let alone that such act or omission was caused by the Plaintiff's recklessness under the 2nd Requirement. This spelt the end of his application and the Decree was not set aside.

Implications

This case illustrates the heavy burden on claimants to set aside a decree of limitation. In essence, the Court will not consider setting aside a decree of limitation unless the claimants can provide evidence which may show (i) the loss was caused by the act or omission of a person, either a director or at least someone sufficiently senior within the shipowner's management, which can be regarded as the "directing mind and will" of the shipowner; and (ii) the shipowner was recklessness and has knowledge that such loss would result. Therefore, a claimant who wishes to set aside a decree of limitation must consider carefully and obtain sufficient evidence before such an application should be made.

Industry confidence sinks to all-time low

The latest statistics revealed that shipping industry confidence levels has fallen to a record low. In particular, the shipping companies expressed unwillingness in undertaking investments in the coming 12 months. An average of 5 out of 10 is recorded as the confidence level. Among all, the charterers are the most pessimistic, with the confidence level dropped to 3.9 only.

Concern for the level of overtonnaging and the state of the dry bulk market is also expressed. Demand trends, competition and tonnage supply are cited by the respondents to the survey as the top 3 factors influencing their performance.

Xiamen Port Holding to sell two gantry cranes to container terminal operator unit

In order to improve operational efficiency at its container terminal business, Xiamen Port Holding, the major shareholder of HONG Kong-listed Xiamen International Port, will sell 2 rubber-tyred gantry cranes to subsidiary Xiamen Container Terminal Group. Xiamen Port Holding originally bought the cranes at RMB 17 million and now sold at RMB 10.2 million. RMB 3 million was already paid by Xiamen Container Terminal Group as a security deposit after the public tender which determined the consideration price. The balance will be paid within 30 working days after the signing of the asset transfer agreement.

Yangzijiang secures orders for six VLOCs worth $510m from ICBC Leasing

Singapore-listed Yangzijiang Shipbuilding has won shipbuilding orders to construct six 400,000 dwt very large ore carriers (VLOC) for the leasing arm of China's biggest state-owned bank, ICBC. The orders worth a total of US$510 million and the ships are expected to be delivered in 2018 and 2019. The six vessels were among the 30 VLOC ships ordered by Chinese shipowners ICBC Leasing, China Merchants Energy Shipping and China Cosco Shipping.

Yangzijiang Shipbuilding is the only private yard in China that received this batch of valemax orders. The other parties to manufacture the rest of the vessels are all subsidiaries of state-owned companies such as Shanghai Waigaoqiao Shipbuilding, Qingdao Beihai Shipbuilding Heavy Industry and China Merchants Heavy Industry (Jiangsu).

Maersk Line says fire on Safmarine Meru under control

The Maersk Line-owned 4,650 teu vessel Safmarine Meru collided with Norddeutsche Reederei H Schuldt's Northern Jasper on 7 May 2016. The collision occurred at around 120 nautical miles east of Ningbo. Severe damage was caused to Safmarine Meru, which was built in 2006 and sails under the Hong Kong flag. A fire had broken out as a result and the 22 crew members hence abandoned the ship. Representatives from Maersk had announced that the fire was under control and external firefighting had concluded. A team of Chinese authority officials had boarded the ship and planned for moving the ship to shore.

Glory Wealth Shipping Pte Ltd v Flame SA

[2016] EWHC 293 (Comm), Queen's Bench Division, Commercial Court, Mr Justice Teare, 23 February 2016

Arbitration arose out of a Contract of Affreightment made in 2008 between Glory Wealth as owners and Flame as charterers. Glory Wealth provided shipments of bulk commodities for Flame in 2009, 2010 and 2011. Flame was in breach of the Contract of Affreightment for the shipments in 2009 and 2010, resulting in Glory Wealth suffered from financial difficulties. This had led to substantial claims against Glory Wealth and risk to Glory Wealth's assets. To protect its assets, Glory Wealth used two companies which were owned by two directors of Glory Wealth to receive all inward freight earned under the Contract of Affreightment. The current proceeding concerns the shipment in 2011. The tribunal decided that Glory Wealth had not suffered any loss in view of their arrangement. Glory Wealth appealed.

The tribunal's award was set aside. The court held that the freight would not worth any less because Glory Wealth had decided that it should be paid to another company and hence would never have been transferred to it. It was Glory Wealth who had the rights to make the decision that the freight should be paid to the payees. The payees only became the beneficial owners of the freight because they had been given it by Glory Wealth. Whilst one limb of the right was the right to receive freight, another limb was the right to give it away. The fact that Glory Wealth intended to conceal the funds was immaterial to the conclusion.

The "Bunga Melati 5"

[2016] SGCA 20, Singapore Court of Appeal, Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang Boon Leong JA, 29 March 2016

Equatorial Marine Fuel Management Services Pte Ltd ("**EMF**") sued for non-payment of bunker fuel that had been delivered to vessels owned or operated by the respondent, MISC Berhad ("**MISC**"), under three bunker contracts. The three contracts were concluded with Market Asia Link Sdn Bhd ("**MAL**") but EMF argued that MISC is in fact the counterparty instead as MAL was acting as MISC's agent at all material times. Further, it is argued that MISC was estopped from denying MAL's authority to transact on its behalf as its agent because MISC knew that MAL was conducting all its transactions with all its bunker suppliers on the basis that it was MISC's agent, yet it stood idly by and did not correct EMF's mistaken belief that MISC was the true contracting party to the three contracts.

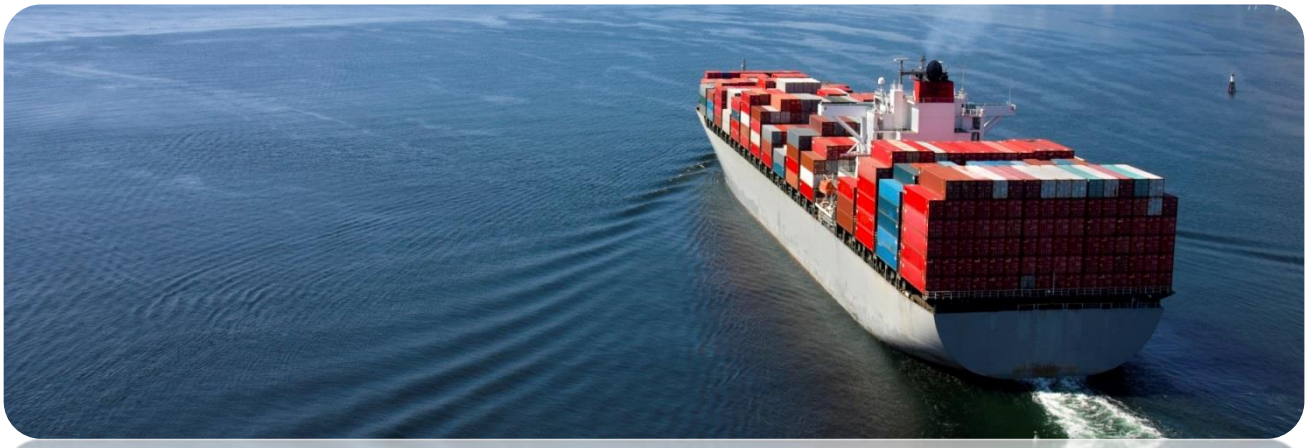
The Court held that silence or inaction will count as a representation where there is a legal (and not merely moral) duty owed by the silent party to make a disclosure to the other party. Such duty would arise when a reasonable man would expect the other party to correct the other party who he knew that he was mistaken. The conclusion will depend on the precise circumstances of the case and it is not appropriate for the Court to draw a general principle. However, to find such duty, the silent party must be shown to have known that the other party was in fact acting or proceeding with its course of conduct on the basis of the mistaken belief which the former is said to have acquiesced in. The appeal was dismissed as EMF failed to prove that MISC knew that MAL was conducting business on the basis as its agent.

NewOcean Petroleum Co Ltd v OW Bunker China Ltd and Another

[2016] HKCFI 492; HCA 381/2015, Court of First Instance, Deputy High Court Judge Le Pichon, 18 March 2016

NewOcean Petroleum Company Ltd ("**NewOcean**") entered into a contract with OW Bunker China Ltd ("**OW Bunker**"), the first defendant, for delivery of bunker fuel. OW Bunker went into liquidation and hence NewOcean sought payment for bunkers delivered to vessels belonging to COSCO Petroleum Pte Limited ("**COSCO**"), the second defendant, based on contract and tort of conversion. COSCO applied to set aside the leave granted to NewOcean to serve the writ of summons on COSCO out of the jurisdiction.

COSCO argued that there was no contractual relationship between NewOcean and COSCO. COSCO also argued that NewOcean's own evidence shows that it consented to the consumption of the bunkers and therefore COSCO was not involved in the act of conversion. But the Court held that an expectation of immediate consumption was not the same as unambiguous consent to immediate consumption without resulting liability. Further, the Court held that it was not unarguable that an agency relationship arise between OW Bunker and COSCO, hence COSCO could be liable under the contract between NewOcean and OW Bunker, therefore the Hong Kong Court has jurisdiction to determine the matter and the Court dismissed the application.



Yemgas Fzco and Others v Superior Pescadores SA

[2016] EWCA Civ 101, Court of Appeal (Civil Division), Lord Justice Longmore, Lord Justice Tomlinson and Lord Justice McCombe, 24 February 2016

On 11 January 2008, the owners issued six bills of lading acknowledging shipment of the cargo on board the vessel in apparent good order and condition for carriage from Antwerp to Balhaf in Yemen. Each bill contained a "Paramount Clause" providing: "*The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25 August 1924 as enacted in the country of shipment shall apply to this contract. …*". While the vessel was crossing the Bay of Biscay, the cargo shifted, causing significant damage to part of the cargo.

The claimant argued that through the "Paramount Clause" above, the bill of lading incorporated the Hague Rules (1924) but not the Hague-Visby Rules (1968). In the current case, Hague Rules would result in a higher package limitation amount than the compulsorily applicable Hague-Visby Rules.

The Court of Appeal found that the words of the "Paramount Clause" had incorporated the Hague-Visby Rules. The Hague-Visby Rules are widely applied all over the world and have been enacted by legislation in many countries. In this case, the bill of lading incorporating the Hague Rules is enacted in the country of shipment, Belgium, which has enacted the Hague-Visby Rules. In the absence of contrary indication in the clause (such as a distinction drawn elsewhere in the clause between the Hague and Hague-Visby Rules), the Hague-Visby Rules should apply rather than the Hague Rules.

Ship Mortgage Registration at the Company Registry – When and How?

We have previously discussed on when and how to register a ship mortgage at the Marine Department. What about the Company Registry?

When to register?

As previously mentioned, if the mortgagor is a company incorporated in Hong Kong or a non-Hong Kong company registered under Part 16 of the Companies Ordinance (Cap. 622), the mortgagee should register the mortgage against the mortgagor as a charge at the Companies Registry. This is because pursuant to section 334 of the Companies Ordinance, a charge on a ship or any share in a ship is a "specified charge" and companies must register a "specified charge" created by it.

Generally, the registration has to be done within one month after the date on which the specified charge is created. However, if the specified charge is created outside Hong Kong and comprising property situate outside Hong Kong, the registration period is one month after the date on which a certified copy of the instrument creating or evidencing that charge could, if dispatched with due diligence, have been received in Hong Kong in due course of post. Charge documents delivered outside the prescribed time period will not be accepted unless the Court grants an order extending the time for registration.

How to register?

Under section 335 of the Companies Ordinance, the companies must file a properly completed and signed specified Form NM1 "Statement of Particulars of Charge" together with a certified copy of the instrument (if any) creating or evidencing the charge (e.g. Deed of Covenant and General Assignment) to the Companies Registry at the 14th floor of the Queensway Government Offices.

One should note that the filing of the Form NM1 must be accompanied by the prescribed fee. Other than delivering hard copies, the documents can be delivered electronically through the 24-hour portal of the Companies Registry. After the registration, a certificate of registration can be obtained. If the documents are delivered electronically, the Certificate of Registration will be delivered in electronic form as well. It usually takes around 8 working days for such to be issued.

What are the effects of registration?

Registration of the ship mortgages governs the priorities among registered mortgages. That is, even if mortgage A is created before mortgage B, but mortgage B is registered before mortgage A, mortgage B will take priority over mortgage A.

If the company fails to register and file the Form NM1, the specified charge will become void against any liquidator and creditor of the company or registered non-Hong Kong company so far as any security on its undertaking or property is conferred by the charge. Further, the company and their responsible person (e.g. directors) have committed an offence under section 337 of the Companies Ordinance. They are liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

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