LIMITATION OF LIABILITY FOR MARITIME CLAIMS IN MALAYSIA

The Limitation Convention

Malaysia currently adopts the 1957 Limitation Convention which is brought into force, under section 360 of the Merchant Shipping Ordinance, 1952. This section provides that the owner of a ship whether Malaysian or foreign ship shall not be liable for the following occurrences which take place without his actual fault or privity, namely:-

(a) where any loss of life or personal injury is caused to any person being carried in the ship;

(b) where any damages or loss is caused to any goods, merchandise or other things whatsoever on board the ship;

(c) where any loss of life or personal injury is caused to any person not carried in the ship through the act of any person whether on board the ship or not, in the navigation or management of the ship or in the loading, carriage or discharge of her cargo or in the embarkation carriage or disembarkation of her passengers or through any other act of any person on board the ship;

(d) where any loss or damage is caused to any property other than any property mentioned in paragraph (b) above or any rights are infringed through the act of any person whether on board the ship or not in the navigation or management of the ship or in the loading carriage or discharge of her cargo or in the embarkation carriage or disembarkation of her passengers or through any other act of any person on board the ship

in excess of the following amount:-

(1) in respect of loss of life or personal injury, either alone or together with such loss damage or infringement as is mentioned in paragraphs (b) and (d) above, an aggregate amount not exceeding an amount equivalent to 3,100 gold francs for each ton of the ship's tonnage;

(2) in respect of such loss damage of infringement as is mentioned in paragraphs (b) and (d) whether there is in addition loss of life or personal injury or not, an aggregate amount not exceeding 1,000 gold francs for each ton of the ship's tonnage.

Under the Merchant Shipping (Limitation of Liability) (Malaysia Ringgit Equivalent) Order 1993, the Minister has fixed RM629.50 as the equivalent of 3,100 gold francs and RM203.70 as equivalent of 1,000 gold francs.

Further under section 360(2)(c) of the Merchant Shipping Ordinance, 1952, the tonnage of a Malaysian ship other than a sailing ship shall be her registered tonnage with the addition of any engine room space deducted.

For a Malaysian sailing ship, her tonnage shall be her registered or licensed tonnage.

In the case of a foreign ship, if the same can be or has been measured according to Malaysian law, her tonnage thus ascertained by that measurement shall be deemed to be her tonnage. If is has not been or could not be measured according to Malaysian law, the certificate given by the Surveyor General upon the direction from the court shall be deemed to be her tonnage.

When Claims May Be Limited

"actual fault or privity"

The shipowner is only entitled to limit his liability if the damage was caused without his "actual fault or privity".

The words "actual fault or privity" are not defined by the Statute. However, the words have been defined by cases to mean some fault which is personal to the shipowner in contrast to fault on the part of his agents or servants. The onus is on the party seeking to limit his liability to show that the occurrence giving rise to liability must be without his actual fault or privity. The words "without his actual fault or privity" imply something personal, that he is personally blameworthy as distinct from constructive fault or privity such as the fault of his agents or servants where he may be held to be at fault under the principle of respondent superior : HMS Truculent – The Admiralty v The Divina (Owners) & Ors [1951] 2 AER 968

Thus, where the shipowner is a corporation, the fault and privity is that of the person in the corporation who is its directing mind and will : Lennard's Carrying Co Ltd v Asiatic Petroleum Co. Ltd

To limit liability, it need not be shown that the occurrence giving rise to liability was due to the negligence of any person.

Liong Ung Kwong v Kee Hin (M) Sdn Bhd & Anor [1998] 1 AMR 368

In this case, the Malaysian High Court adopted with approval the definition of "without his actual fraud or privity" in the case of The Admiralty v The Divina (Owner) & Ors [1951] 2 AER 968 and Lennard's Carrying Co Ltd v Asiatic Petroleum Co. Ltd [1915] AC 705.

The plaintif is the owner of the ship MT Hua Leong which capsized and sank at Port Klang on September 28, 1988 resulting in loss and damage to her cargo and all other property on board. Several actions were commenced thereafter, by the owners and persons entitled to possession of the cargo, claiming compensation for loss and damage suffered by them as a result of the breach of contract and/or negligence of the plaintiff, their servants or agents.

The plaintiff had delegated the day to day management of the ship to Hock Leong Shipping Sdn Bhd, which acted as the managers of the vessel. It was therefore, the plaintiff's contention that having delegated his duties to some other party, he is afforded the protection of s 360 of the Merchant Shipping Ordinance 1952 (the Ordinance).

This is the plaintiff's action for a declaration that his liability be limited, and for relief under the Ordinance.

Issue

Whether the plaintiff, shipowner is protected from liability under s 360 of the Ordinance 1952.

The Court held as follows:-

(a) It is inherent in s 360 of the Ordinance, that to entitle the plaintiff to limit his liability, the occurrence giving rise to liability must be without his actual fault or privity. The onus is on him. The words "without his actual fault or privity" in s 360 of the Ordinance implies something personal, that is personally blameworthy as distinct from constructive fault or privity such as the fault of his agents or servants where he may be held to be at fault under the principle or respondeat superior. It is therefore not enough to show that the occurrence is the fault of his servants or employees, but it must be shown to be not his fault also.

(b) The fault of the shipowner can take two forms:-

(i) as to seaworthiness as in the failure by the shipowner to provide safe equipment, qualified personnel and safe systems of work; and

(ii) failing to instruct those who have to use the equipment or system, or to see that they are instructed in the proper methods.

(c) The vessel here was, on the face of it in physically seaworthy condition. The vessel had remained properly classed and properly maintained at all times. There was no evidence that the vessel was in any manner un-seaworthy. The absence of an echo sounder did not make the ship improperly equipped as to be unseaworthy.

(d) A shipowner is not entitled to protection if he appointed an incompetent master. Incompetence suggests the quality of not being qualified, inadequate for, or unsuited to, a particular purpose or application, or devoid of those qualities requisite for effective conduct or action. In this case, the master has carried out his duties as master on the MT Hua Leong for a number of years without any evidence of this being incompetent. In the absence of any evidence that he has become incompetent because of any intervening event, one can only say that the master's actions on that day were, if at all, negligent. Mere negligence on the part of the master, without a record that he is known to be negligent and without the ship owner's knowledge of such negligence would not disentitle the shipowner from the protection afforded by s 360 of the Ordinance 1952.

The Limits Of Liability – The Life and Damage Funds

Where there is loss of life or personal injury and/or property damage at the same time, the shipowner is not liable for damages beyond an aggregate amount not exceeding, in the currency of Ringgit Malaysia, the equivalent of 3,100 gold francs for each ton of the ship's tonnage.

For property damage only, the shipowner is not liable for damages beyond an aggregate amount not exceeding in the currency of Ringgit Malaysia the equivalent of 1,000 gold francs for each ton of the ship's tonnage.

Thus, where there is both loss of life or personal injury and/or property damage, there will be 2 funds:-

(1) There will be a life fund of 3,100 gold francs multiplied by the ship's tonnage reserved for personal injury claims.

(2) There will be a damage fund of 1,000 gold francs multiplied by the ship's tonnage for property damage claims.

Where the life fund is insufficient to cover the life claims, the life claims will rank pari passu with the property damage claims against the damage fund.

Claims Excluded From Limitation

Certain claims are not subject of limitation. These are:-

(i) Claims under Contract of Employment

Liability in respect of loss of life or personal injury caused to or loss of or damage to any property or infringement of any right of a person on board or employed in connection with the ship under a contract of service with all or any persons whose liabilities are limited by this section if that contract is governed by the law of any country outside

Malaysia and that law either does not set any limit to that liability or sets a limit exceeding that set to it by this section.

(ii) Costs incurred by receiver for removal of wreck

Section 381 of the Ordinance provides:-

(1) Where any ship is sunk, stranded or abandoned in any port, navigable river, tidal waters or in any place within Malaysian waters in such manner as, in the opinion of the receiver, to be likely to become an obstruction or danger to navigation or a public nuisance or to cause inconvenience, the receiver may either:-

(a) take possession of, and raise, remove or destroy, the whole or any part of the ship;

(b) light or buoy any such ship or part until the raising, removal or destruction thereof;

(c) sell, in such manger as he thinks fit, any ship or part so raised or removed and also any other property recovered in the exercise of his powers under this section, and, out of the proceeds of the sale, reimburse himself for the expenses incurred by him in relation thereto under this section, and the receiver shall hold the surplus, if any, of the proceeds in trust for the persons entitled thereto; and

(d) take all necessary measures to prevent pollution from the ship; or alternatively

(e) consent to the owner or master of the ship taking such action under paragraphs (a) to (d) as the receiver thinks fit; and

(f) require the owner or master to furnish security in such reasonable amount as the receiver may consider necessary for the purpose of ensuring the performance of all actions which the owner or master has agreed to undertake.

(2) Apart from the proceeds of any sale carried out by the receiver pursuant to paragraph (c) of subsection (1), the receiver may also resort to the security furnished under paragraph (f) to reimburse himself and if the proceeds of sale together with any security are insufficient to cover the costs incurred by the receiver when acting under paragraphs (a) to (d) of subsection (1), he may recover the difference from the owner or master of the ship concerned.

Section 382 of the Ordinance states that the provisions on the removal of the wrecks shall apply also to tackle, equipments, cargo, stores or ballasts of a vessel.

(iii) Merchant Shipping (Oil Pollution) Act 1994

The Merchant Shipping (Oil Pollution) Act provides for limitation of liability for oil pollution by a ship.

Section 2 of the Act stipulates that where, as a result of an incident taking place, any oil discharged or escapes from a ship, the owner of the ship shall, except as otherwise provided, be liable for any pollution damage caused by such discharge or escape in any area of Malaysia.

Section 6 of the Act provides that:-

(1) Where the owner of a ship incurs a liability under section 3 in respect of any one incident:-

(a) the provision relating to the limitation of the liability of the owner of a ship in certain cases of loss or damage under any other written law relating to merchant shipping shall not apply to that liability; but

(b) he may limit that liability in accordance with the Act, and if he does so his liability (that is to say, the aggregate of his liabilities under section 3 in respect of any one incident) shall not exceed one hundred and thirty three special drawing rights for each ton of the ship's tonnage, provided that this aggregate amount shall not in any event exceed fourteen million special drawing rights.

(2) If the incident occurred as a result of the actual fault or privity of the owner of the ship, he shall not be entitled to avail himself of the limitation in paragraph (1)(b).

(3) For the purposes of the Act the ship's tonnage shall be the net registered tonnage and shall be ascertained as follows:-

(a) if a deduction has been made for engine room space in arriving at its net registered tonnage, its tonnage shall be its net registered tonnage increased by the amount of that deduction;

(b) if the net registered tonnage of the ship cannot be measured in accordance with the normal rules of tonnage measurement, its net registered tonnage shall be taken to be forty percent of the weight of (expressed in tons of 1016 kilograms) oil which the ship is capable of carrying; or

(c) if the net registered tonnage of the ship cannot be ascertained in accordance with the preceding paragraphs, the Surveyor of Ships shall, if so directed by the Court, certify what. On the evidence specified in the direction, would in his opinion be the net registered tonnage of the ship if ascertained in accordance with those paragraphs, and the net registered tonnage stated in his certificate shall be taken to be the net registered tonnage of the ship.

(d) <u>The liability to be limited must be liability for damages</u>

In order to limit liability, the shipowner's liability must be to pay damages. Thus, where the shipowner is liable to pay remuneration for services performed or where the shipowner has agreed to indemnify a party, the shipowner is not entitled to limit his liability. Similarly, where the shipowner is under a statutory duty to incur an expense, such as wreck removal, he cannot limit his liability to do so.

(iv) Liability for damages to Ports Property

Pursuant to section 8 of the Port Swettenham Authority By Laws 1965, it is expressly stipulated that "any damage done to the wharf or to anything belonging to the Authority by a ship whether by reason of the incompetency or carelessness of the pilot or officer in charge or by any other reason shall be made good by the master and owners of the ship causing it and the Authority may detain the ship until security has been given for the amount of damage caused or the amount paid ..."

The Existence of Cross-Claims

Assume that 2 ships, A and B are involved in a collision. Both ships are at fault. However, the damage to ship A and to cargo on board ship A is greater than that to ship B. Ship B limits liability.

In this situation, the amount payable by ship B's owners is the difference between the 2 sets of damage up to the amount of the statutory limits under the statute. The owners of ship B recover nothing.

Package Limitation

In addition to tonnage limitation under the Merchant Shipping Ordinance, 1952, the Malaysian Carriage of Goods By Sea Ordinance, 1950 give effect to the Hague Rules 1924.

By section 2 of the 1950 Ordinance, the Rules "shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any part of the Federation to any other part whether in or outside the Federation".

Under Article IV Rule 5 of the Hague Rules, the carrier's liability is also limited to 100 pounds per package or unit in cases of loss or damage to the cargo on board unless the nature and value of the goods had been declared by the shipper prior to loading and inserted in the Bill of Lading.

Art. IV Rule 5 states:-

"Neither the carrier not the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit of the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

There is no reported decision in Malaysia on the perplexing definition of "package" or "unit". A plain and ordinary interpretation would include a box, case, carton, container, skid, pallet or other form of preparation for carriage designed to assist the cargo handlers. The question whether a container is a package or the same refers to the individual packages inside the has not been answered by the courts.

To avoid the uncertainty, the shipper should make a declaration as to the nature and value of the goods before shipment and inserts in the bill of lading.

There is also no reported decision in Malaysia on the computation of "100 pound sterling per package". Should it be the present value of £100 in gold in 1924 or should it be interpreted literally as £100.

In the "THE THOMASEVERETT", the Singapore High Court held that where the Hague Rules under the UK Carriage of Goods By Sea Act 1924 apply, the 100 pounds is 100 pounds gold value in 1924 measured at the date of breach.

Limitation Excluded

(1) Where a higher limits of liability have been agreed upon between the contacting parties, such higher limits will prevail over Art, IV Rule 5. This is provided under Article IV Rule 5(g).

(2) Where the damage resulted from an act or omission of the Carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result. This is provided under Article IV Rule 5(e).

Athen's Convention Relating To The Carriage of Passengers And Their Luggage By Sea 1974

This Convention and or the Protocol of 1976 have not been adopted by Malaysia.

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ONG CHEE KWAN