LIMITATION OF LIABILITY FOR MARITIME CLAIMS: THE 'APL SYDNEY' CASE – A DISTINCT OCCASION

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On 18 March 2010, the Federal Court of Australia delivered a judgment in the matter of *Strong WisE Limited v Esso Australia Resources Pty Ltd* [2010] FCA 240 (APL Sydney) which raised eyebrows of many individuals engaged in international maritime commerce.

The court's interpretation on the meaning of 'a distinct occasion' which is the language used in the International Convention on Limitation of Liability for Maritime Claims, 1976 (1976 Convention), as amended by the 1996 Protocol which is given the force of law in Australia by the Limitation of Liability for Maritime Claims Act 1989 (collectively referred to as the LLMC) shall expose members, P&I clubs and other insurance underwriters to increased liability risks.

The effect on shipowners, charterers and ship-mangers is that they no longer have a definable limit of liability for maritime claims under the LLMC in Australia because those limits can now be circumvented.

FACTS

On 13 December 2008, the ship *APL Sydney* arrived at Port Phillip Bay, Melbourne, Australia on a voyage from Hong Kong and proceeded to drop anchor. The weather at the time was gale to gale force winds (34 to 47 knots) with seas of 2 to 2.5 metres. The ship's anchor dragged in the rough weather and fouled a charted pipeline jointly owned by Esso and BHP Billiton. For a period of about 35 minutes, the ship yawed from side to side in the wind. After receiving advice from the pilot to put the engine dead slow ahead, the master ordered a series of engine movements before stopping the engine. As a result of these movements the pipeline ruptured and gas was seen to bubble to the surface of the bay, about 50 metres from the starboard bow of the ship.

The owner of the *APL Sydney* commenced proceedings in the Federal Court claiming that it was entitled to limit its liability pursuant to the LLMC. They argued that the incident amounted to one 'distinct occasion' within the meaning of the LLMC and they were therefore entitled to establish a single limitation fund to meet all claims for loss and/or damage arising from the incident. The Judge held that whether one occasion was distinct from another would depend upon whether the causes of the claims that arise from each act, neglect or default are sufficiently discrete that, as a matter of common sense, they can be said to be distinct from one another.

The court decided that there were two separate distinct occasions within the meaning of the LLMC and that the shipowner must therefore establish two separate limitation funds; one for the occasion when the anchor fouled the pipeline and one for the occasion where the pipeline was ruptured. In other words, the total limited liability exposure of the shipowner was twice the amount prescribed under the LLMC.

ISSUES WITH INTERPRETATION OF THE LLMC

Two decisions of the court were influential on the reasons given for the judgment delivered in the case:

1. the decision that the right to limit under the LLMC was not intended to have an unlimited ambit; and
2. the decision that the LLMC requires a separate fund (valued by the relevant limitation calculation) for each distinct occasion.

Significantly, these decisions were not considered by the court with regard to the rules of interpretation of conventions as required by the Vienna Convention. As a result, the reasons of the judgment delivered indicate that the court construed the overall purpose of the LLMC to be about how to value the limit of liability instead of its actual purpose, which is to confer a right to limit.

Consequently, this distortion caused the court to focus the meaning of 'a distinct occasion' based on legal concepts related to causes of legal actions which give rise to a claim that could be limited, instead of the principles used to draft the LLMC.

CONVENTION PRINCIPLES

The three main principles which are referred to throughout the development of the LLMC in the *Travaux Préparatoires* (which are the preparatory works produced during the drafting of the convention) are:

(a) limits set by the LLMC should not be easily broken;
(b) the limits of liability set by the LLMC should be based on insurability at reasonable costs and be within the available commercial limits of insurability; and
(c) the limits set are a global limitation amount.

UNBREAKABLE LIMITS OF LIABILITY

The concept of unbreakable liability limits was created in the LLMC by the addition of Article 4 in the 1976 Convention.

Commentary in the *Travaux Préparatoires* state that its introduction was intended to ensure that 'the right to limitation shall not be lost unless the person liable has acted with intent or with certain recklessness'.

In keeping with the principles of the convention, Article 4 emphasises that:

1. due account should be had to the availability of insurance cover for the limits foreseen under the convention in Article 6; and
2. those limits should not easily be 'broken'.

These convention principles emphasise the importance of the unbreakable limit concept, which is integral to the limits of liability set out under the LLMC.

Unfortunately, the court's view in the *APL Sydney* case was that the *'Convention could not have been intended to have an unbreakable ambit'*. As a result, the court appears to have misdirected its analysis of the convention in a manner which is contrary to the view taken by the convention drafters who *'...felt that it is sufficient as inducement to adequate insurance cover that there is a limit to the total exposure to maritime claims... this [marine liability insurance – Protection and Indemnity insurance] could hardly have been done but for global limitation of liability for maritime claims.'*

THE LIMIT OF LIMITATION

At the time of drafting the 1976 Convention, the maximum marine insurable limit available in the market was identified to be in the order of $100m per ship per incident.

This amount is referred to as the global limitation and reflects the total coverage limit because according to the *Travaux Préparatoires*, 'insurers would never provide unlimited coverage and there was, therefore, no point in creating additional exceptions to the general limitation'. Importantly, the drafters of the convention determined that the maximum liability amount should be calculated in accordance with the limit per ship per incident and not per claim or type of loss.

MEANING OF 'DISTINCT OCCASION'

Commentary in the *Travaux Préparatoires* is helpful in understanding the construction of the 1976 Convention in order to determine the meaning of 'distinct occasion'. This commentary indicates that the LLMC does not intend to prescribe individual claims which can be limited by a separate limitation fund for each claim. Instead, it prescribes the groups of liability claim types that will be limited by establishment of a single limitation fund.

A clear understanding of this subtle distinction in the LLMC is seen if the phrase 'a distinct occasion' is construed to mean the 'right to limit'.

In light of this, the *APL Sydney* case appears to have incorrectly determined the intended ordinary meaning of a 'distinct occasion', artificially inflated the recognition of an individual claim over other losses that are recoverable from the same fund and incorrectly valued the liability exposure which the shipowner ought to have had under the LLMC.

ONE FUND OR TWO?

The *APL Sydney* judgment now enables a court to permit one fund (for the value established by the relevant limit calculation) for each separate claim.

However, courts that follow the case could be establishing limitations of liability that are contrary to the principles of the LLMC because the convention only permits a single fund for all claims arising from each incident (for which the right to limit is exercised), regardless of the number of claims which arise from that incident.

Arguably the *APL Sydney* case did not find more than one incident because the judgment of the court was based on there being two distinct occasions which gave rise to separate claims, not two separate incidents.

Considering the parties have settled the *APL Sydney* case and all appeals have been discontinued, the judgement will remain an uncharted rock which should be navigated with caution until the matter has been reconsidered in another court, or the International Maritime Organisation amends the LLMC.