Limitation of liability in India

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India is a signatory to the Convention on Limitation of Liability for Maritime Claims 1976 (the 1976 Convention) and the Protocol of 1996 to amend the 1976 Convention (the 1996 Protocol). India's Merchant Shipping Act 1958 (the Act), which governs the right of shipowners to limit liability in respect of maritime claims, is not completely aligned with the 1976 Convention and the 1996 Protocol, which gives rise to legal uncertainties. The High Court of Bombay's recent decision in *Murmansk Shipping Company v Adani Power Rajasthan Ltd.& Ors*[1] clarifies the Indian position as regards the rights of shipowners to limit liability.

Legislative background

In 2002, the Act was overhauled to align Indian law with the 1976 Convention. Pursuant to the 2002 amendments to the Act, persons allowed to limit liability in respect of prescribed maritime claims include:

- an owner of a vessel
- a charterer/manager/ operator of the vessel
- master/crew/other servants of the owner, manager, operator of the vessel acting in the course of their employment
- a salvor, for any act, neglect or default of persons he is responsible for
- an insurer of liability to limit his liability to the same extent as his assured.

Additionally, under Indian law, in order to limit liability, the vessel must at the material time be flagged with a contracting state of the 1976 Convention[2].

The 2002 amendments to the Act, however, departed in significant respects from the 1976 Convention. As a consequence, shipowners seeking to limit liability in India have encountered legal uncertainties and obscurities. The language employed in some sections of the Act is at odds with the words used in the 1976 Convention. There are significant gaps in the legislation, with the most startling illustration being the complete omission in the Act of Article 4 (Conduct barring limitation) and Article 10 (Limitation of liability without constituting a limitation fund) of the Convention. In addition, although India signed up to the 1996 Protocol in 2011, no corresponding amendments were made to the Act to give domestic effect by statute to the enhanced limits of liability contemplated by the 1996 Protocol.

It is against this legislative background that the Bombay High Court was called upon by a Russian shipowner to consider (amongst other things) whether it was entitled to constitute a limitation fund and, if so, whether the enhanced limits of the 1996 Protocol would be applicable.

Case study

The case of *Murmansk Shipping Company v Adani Power Rajasthan Ltd* concerned the Russian-flagged vessel, the *MV Yuriy Arshenevsky* which was carrying project cargo in 2011 from Tianjin to Mundra and Mumbai when she encountered a typhoon leading to the partial loss and damage to the cargo. Upon discharge of the cargo at Mundra, the vessel was arrested by multiple claimants and security was posted for her release. The shipowner, anticipating the arrest of its ship by cargo claimants, promptly applied to the Bombay High Court on the same day that the first order of arrest was obtained to constitute a limitation

1 Murmansk Shipping Co v Adani Power Rajasthan Ltd and Others (The Yuri Arshenevskiy) – High Court of Bombay (Admlty), Mr Justice S C Gupte delivered judgment on 8 January 2016 (2016) 946 LMLN 2

2 Section 352E(1) Merchant Shipping Act 1958

Limitation of liability in India continued

fund in accordance with the limits prescribed by the 1976 Convention.

Legal analysis

Despite strident objections from cargo claimants, the owner argued that its right to limit was absolute and unconditional as all it needed to demonstrate was that the claim was capable of limitation under Section 352 A of the Act. Section 352 A of the Act corresponds broadly to Article 2 of the 1976 Convention. As it was undisputed that the claim was one for loss/damage to property, ie it was a claim capable of limitation, it was submitted that the court's scrutiny was limited to determining whether there was any statutory exception to limitation such as conduct barring limitation as envisaged by Article 4 of the 1976 Convention. The court, after carefully considering the statutory provisions of the Act, concluded that Article 4 was wholly absent from the Act and that there was no equivalent statutory provision in the Act excluding or suggesting any exception to limitation.

The court therefore rejected the cargo claimant's argument to read into or add Article 4 of the 1976 Convention to the Act as it would be tantamount to judicial legislation. The court held that the object of the 1976 Convention was to make limitation virtually 'unbreakable'. The omission of Article 4 of the 1976 Convention from Part XA of the Act would not therefore make any meaningful difference in practice as was contended by the liability claimants[3].

In respect of the issue as to whether the figures of limitation are to be calculated on the basis of the 1976 Convention or the 1996 Protocol, the court rejected the shipowner's argument that the lower limits of the 1976 Convention should apply, which the owners contended was based upon a lack of any domestic legislation or amendment to the Act giving effect to the increased limits of the 1996 Protocol. The court held that the expression 'Convention' as defined by the Act expressly included amendments made to it from time to time. In the result, the Court had no hesitation in finding that the 1996 Protocol was, in fact, an amendment to the Convention which was already embraced by the Act.

The limitation action was accordingly decreed and the owner permitted to set up a limitation fund. Security posted by the owner was ordered to be returned to it upon deposit of the higher amounts contemplated by the 1996 Protocol.

Comment

The judgment is groundbreaking considering that the Indian courts have for the first time endorsed the right of a shipowner to limit liability by constituting a limitation fund, albeit at the higher limits stipulated in the 1996 Protocol. It provides much needed clarity on this branch of the law, which is welcome news for the shipping industry and all participants in international trade. As a result, one hopes that the expensive and time-consuming litigation of challenging the owner's conduct with the objective of seeking higher limits of liability will be a thing of the past in the Indian context.

The co-author, Zarir Bharucha, and his team successfully represented the plaintiff shipowner.

3 Since '*...persons seeking to limit liability are given what is described by the Courts as a virtually unbreakable right to limit...*': at para.37 of the grounds of judgment. '*...If nearly 40 years...of the regime of the 1976 Convention has not thrown up a single instance throughout the world of successful breaking of limitation, it would not be unwise for the Indian Parliament to do away completely with the very concept of breaking of limitation...*': at para.39 of the grounds of judgment