SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Barge tonnage limitation

The Hong Kong High Court issued a Judgment on 25/11/2009 holding a barge owner entitled to enjoy the tonnage limitation despite its entering into an Indemnity Agreement with a charterer to fully indemnify the charterer against all losses. (HCAJ 134/2009)

The barge owner chartered the barge "Wang Fat No. 3" to the charterer under a Hire Agreement dated 18/4/2009. In addition, on the same date, the barge owner entered into an Indemnity Agreement with the charterer. By that Indemnity Agreement, the barge owner contracted to indemnify the charterer against "all action, liability, loss suits, claims, demands, proceedings, costs, charges, or expenses whatsoever" and "[t]o pay [the charterer] on demand the full amount of any loss or damage whatsoever which [the charterer] may incur as a result of, in connection with or in any way related to the performance of the services".

On 26/4/2009, as the barge was being towed outside Basalt Island, it rolled violently to about 45 degrees for about 2 minutes. Some containers fell off the barge into the sea and some containers remaining on the barge sustained loss and damage.

The barge owner sought a limitation decree under the 1976 Convention on Limitation of Liability for Maritime Claims. The Convention has force of law in Hong Kong by s.12 of the Merchant Shipping (Limitation of Shipowners' Liability) Ordinance (Cap.343).

Apart from the charterer, no one objected to the barge owner being granted a limitation decree.

The charterer itself faced claims from parties whose cargo was lost or damaged as a result of the incident off Basalt Island. It was the charterer's case that, under the Indemnity Agreement, the barge owner was obliged to indemnify the charterer against the full amount of claims for which the charterer might be held liable to third party cargo interests. Accordingly, the charterer contended that the barge owner should not be allowed to limit that full liability by being granted a limitation decree under the Convention.

The charterer submitted that, by entering into the Indemnity Agreement, the barge owner waived any benefit to which it might be entitled under the Convention. Article 1 of the Convention only says that shipowners "may" limit their liability for claims. Nothing prevents a shipowner from accepting a fuller liability than that provided for in the Convention.

In support of its contention, the charterer cited THE 'SATANITA' [1897] AC 59 (HL). There yacht-owners agreed to be liable for "all damages" arising from disobeying the rules of a club race. Yacht A sank Yacht B as a result of improper navigation not due to the fault or privity of the owner of Yacht A. The House of Lords held that, as matter of construction of the relevant agreements, the obligation to compensate for "all damages" meant that the owner of Yacht A was not entitled to limitation under the Merchant Shipping Amendment Act 1862. Lord Macnaghten stated (at 67): "[T]he expression 'all damages arising therefrom' means what it says, and ... the generality of this expression is not to be cut down or restricted by anything outside the rules". Similarly, absent express words to such effect, there was no scope (the charterer stressed) of reading the Indemnity Agreement as somehow "subject to the 1976 Convention".

The Judge was not persuaded by the charterer's argument.

The barge owner noted that, since THE 'SATANITA' was decided, limitation legislation has changed. For instance, in 1897 the relevant legislation required that claims sound in damages in order to qualify for limitation. Claims for an indemnity pursuant to a contract to indemnify would not have qualified for limitation. Now, however, by Art.2(2) of the Convention, except for certain specific types of claims identified in Arts. 2(1)(d)-(f), claims "shall be subject to limitation of liability even if brought ... for indemnity under a contract".

Thus, the Judge should construe the Indemnity Agreement in the context of Art.2(2) of the Convention. The existence of the Convention was part of the factual matrix. There was no evidence that the barge owner or the charterer (both experienced in the business of carrying goods by sea) would have been unaware of the provisions of the Convention.

When the parties entered into the Indemnity Agreement, they must be taken to have done so in the context of a shipowner (such as the barge owner) being able to apply for limitation under the Convention even in respect of a liability to indemnify. In the absence of clear words to the contrary, the Judge did not think that he could read the references to full indemnification in the Indemnity Agreement as meaning other than a full indemnity within the terms of what the Convention permitted.

The Judge added that such a conclusion did not operate unfairly against the charterer.

The charterer was itself entitled to apply for a limitation decree. Its liability (if any) to third parties would thereby be limited to the extent allowed by the Convention. Such limitation under the Convention would not exceed the barge owner's liability under a limitation decree. There could then be no possibility of the quantum of the charterer's liability to third parties being greater than the amount of the barge owner's limited liability. There would be no "excess" which the charterer might have to bear on its own.

There was a further consideration. Any claim by the charterer against the barge owner for indemnification under the Indemnity Agreement would be subject to an obligation on the charterer's part to take reasonable steps to mitigate loss. It seemed to the Judge that the charterer would thus be under an obligation to limit potential loss by itself seeking a limitation decree. Otherwise, its claims against the barge owner might be characterised as unreasonably greater than what they should otherwise have been.

For the above reasons, the Judge thought that the barge owner was entitled to a limitation decree.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

The robust freight industry in 2009 did not sustain well to the last quarter of 2010 as worldwide governments were not in unison in their fiscal policies. The worldwide government interference in 2011, such as the U.S. QEII, is likely to impact the worldwide movement of freight even more.

As uncertain as it was the economy in 2010, we believe the number of E&O, uncollected cargo and completion of carriage claims will continue the major concerns for transport operators in 2011. If you need a cost effective professional solution to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.