

## **The Limitations of the Limitation Convention**

The ability to limit liability for major maritime claims has long been a key concept in international maritime law. Like many other maritime jurisdictions, New Zealand has acceded to the Convention on Limitation of Liability for Maritime Claims 1976, and has given domestic effect to the Convention in Part VII of the Maritime Transport Act (MTA).

In doing so, however, the New Zealand Parliament significantly paraphrased and redrafted the Convention text in the MTA, rather than simply enacting the original Convention text as a Schedule to the MTA, as is the more usual practice. This drafting technique, which has aptly been characterised by a leading New Zealand maritime lawyer as ‘peculiar and unsatisfactory’, has resulted in significant inconsistencies between the New Zealand domestic legislation and the Convention text.

Some of these inconsistencies were highlighted in the recent case of *Tasman Orient Line v Alliance Group Ltd*, which followed the grounding of the *Tasman Pioneer* off the Japanese coast on what the court described as ‘a dark and stormy night’ in 2001. At the time of the grounding, the *Tasman Pioneer* was sub-chartered by Tasman Orient on an NYPE form from Tasman Orient Line (Cyprus) Ltd, which in turn had chartered the vessel from its owner, Rimba Shipping Co Ltd. As a result of the casualty, Tasman Orient faced cargo claims of over NZ\$21m. It sought a decree from the High Court limiting its total liability under the MTA to the New Zealand currency equivalent of 2,880,416 SDRs (approximately NZ\$7m).

The first issue was whether Tasman Orient, as a time sub-charterer, was entitled to limit its liability. Article 1 of the Convention provides that ‘shipowners’ and salvors are entitled to limitation of liability. ‘Shipowner’ is further defined as ‘the owner, charterer, manager and operator of a seagoing ship’. The Convention text therefore plainly extends the right to limit liability to time and voyage charterers.

The position under the MTA is less clear. The definition of ‘owner’ in Section 84 of the MTA does refer to ‘the charterer’, but unfortunate redrafting of the Convention text makes it arguable that this reference is restricted to the charterer ‘responsible for the navigation and management of the ship’, i.e. to demise charterers only, and not to time or voyage charterers.

The court refused to adopt a restrictive interpretation of ‘owner’ in Section 84 of the MTA, however, and held that the definition was capable of including a time sub-charterer. It concluded that, as Tasman Orient came within the definition of an ‘owner’ in Section 84 and had incurred liability as the carrier

under the relevant bills of lading, it was entitled to limit its liability for cargo claims brought against it. Whether Tasman Orient was also entitled to limit its liability in respect of any claims brought by Rimba did not arise for consideration, and this question was expressly left open by the court.

The second issue was whether Tasman Orient’s conduct had disentitled it from limiting its liability. Article 4 of the Convention, enacted in New Zealand as Section 85(2) of the MTA, provides that limitation is not available if the cargo claimant proves that the loss resulted from the liable party’s ‘personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result’. The court’s view was that the cargo claimant’s task in proving conduct barring limitation is an onerous one, and that the higher limits established by the 1976 Limitation Convention will normally be unbreakable.

The relevant maritime accident investigation report concluded that the casualty was caused by the master’s negligent navigation. The question was whether the master’s conduct could be attributed to Tasman Orient. The master and crew were not employed by Tasman Orient. Although Tasman Orient gave the master broad directions about ports of call and routes to be followed, the details of navigation and management of the ship were left to the master, who was directly responsible to, and sought instructions from, Rimba rather than Tasman Orient.

The court held that, in these circumstances, any conduct by the master that might have caused the casualty could not be described as Tasman Orient’s ‘personal act or omission’. It therefore could not amount to conduct barring the limitation decree sought by Tasman Orient. In an earlier New Zealand case, *The Pembroke*, it had been suggested that a master’s reckless re-stowing of machinery on deck could be attributed to the carrier under the Hague and Hague-Visby Rules. The court declined to follow the reasoning of *The Pembroke* on this point.

Tasman Orient was therefore entitled to a decree limiting its liability as sub-charterer for loss or damage to cargo, containers and other property on board.

The final issue, which followed from the court’s decision to make the limitation decree, was whether Tasman Orient should therefore be required to establish a limitation fund. The defendants, Alliance Group Ltd and Comalco New Zealand Ltd, argued that this was the case. The defendants applied for an order under Section 89 of the MTA requiring Tasman Orient to provide security by paying the limitation amount into court.

Tasman Orient challenged the court’s jurisdiction to order the constitution of a limitation fund. It also argued that the court should accept a P&I club letter

of undertaking in lieu of payment of the limitation amount to the court. The court accepted that a club letter would be an appropriate form of security. However, the more difficult question was whether there was jurisdiction to constitute a limitation fund in the first place.

New Zealand has not enacted Article 11 of the Convention regarding the constitution of a limitation fund. Instead, Section 89 of the MTA provides that the court can, on application, consolidate limitation claims, determine the amount of the applicant’s liability and distribute this amount rateably amongst all claimants. Section 89 also gives the court broad procedural powers to stay other proceedings in relation to the same matter, and to make orders in respect of joinder or exclusion of parties, the giving of security or payment of costs.

At first glance, the Section 89 process seems broadly comparable to the constitution of a limitation fund under the Convention. However, the catch is that Section 89 of the MTA only refers to the consolidation of claims that are *excepted from* limitation of liability, i.e. claims for salvage, general average contributions, oil pollution damage and nuclear damage etc. On its terms, Section 89 does not allow for consolidation of any claims which are *subject to* limitation!

The court carefully examined the legislative history of Section 89. Although it was not clear why Parliament would thus restrict the consolidation of limitation claims, there was no evidence suggesting that this was the result of a legislative error. Accordingly, the court held that it had no jurisdiction under Section 89 of the MTA to order Tasman Orient to constitute a limitation fund.

This surprising and unsatisfactory outcome may partly be explained by the narrow statutory focus of the arguments on this point. Section 88 of the MTA, which was not referred to in the judgment, provides that Convention SDR limits may be converted to New Zealand currency ‘at the date on which the limitation fund is constituted’. Unless this provision is redundant, Parliament clearly envisaged the constitution of limitation funds in New Zealand. Further, given that New Zealand is a party to the Limitation Convention, Section 89 should arguably be interpreted in a way that does not preclude the court from exercising an inherent jurisdiction to order the constitution of a limitation fund.

To some extent, the result in *Tasman Orient Line v Alliance Group Ltd* merely illustrates the limitations of the Limitation Convention itself. The Convention does not constitute a perfectly uniform international legal regime. The constitution and distribution of the limitation fund (indeed, in most Common Law jurisdictions, the right to limit liability itself) is characterised as procedural rather than substantive. It is, therefore, governed by the *lex fori*, i.e. the domestic law of the relevant jurisdiction, and is inevitably subject to differing

domestic legal standards. Where countries depart significantly from the Convention text when framing their domestic legislation, as New Zealand has done, this lack of uniformity is exacerbated, resulting in unnecessary uncertainty for claimants, and encouraging forum shopping by liable parties.