

Supreme Court rules on determination of LLMC claims

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Introduction

The Supreme Court recently ruled on how to determine which claims under the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) – as amended by its protocol of 1996 – are paid out of the property fund and which are paid out of the wreck fund if a party has chosen to constitute both funds. The judgment is particularly relevant because the Netherlands recently issued a legislative proposal which aims to abolish the wreck fund and introduced unlimited liability for wreck and cargo removal claims.

Limitation of liability principle

The LLMC allows shipowners and certain other parties to limit their liability for particular claims by constituting a limitation fund. The size of the fund depends on the type of claim and the tonnage of the ship. Articles 2(1)(a) to (f) of the LLMC list the types of claim that may be subject to limitation, while Article 3 determines which claims are excluded.

Under Article 18 of the LLMC, states can reserve the right to exclude the application of Articles 2(1)(d) and (e) to wreck and cargo removal claims. This means that if a state has made a reservation on the basis of Article 18, it is impossible to limit liability for these claims unless limitation of liability is provided for through other mechanisms.

The Netherlands has made a reservation under Article 18 of the LLMC and established in national law that limitation of liability for wreck and cargo removal claims can be effected by constituting a separate wreck fund, to be distinguished from the property and personal claim funds. The amount of a wreck fund equals that of the property fund so that, in the event of an incident which involves wreck and/or cargo removal, these claims do not have to compete with other claims in the property fund.

Classification of claims

The fact that multiple funds may be constituted has led to the question of how to classify claims in accordance with Article 2(1) of the LLMC in order to determine which fund is available for the payment of each separate claim.

The description of claims subject to limitation of liability set out in Article 2(1)(a) of the LLMC (ie, "claims in respect of loss of life or personal injury or loss of or damage to property and consequential loss resulting therefrom") is broad. As a result, certain claims can be classified as claims set out in Article 2(1)(a) and 2(1)(d) or (e).

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Decision

The dispute recently before the Supreme Court had its origins in an October 2008 collision between Dutch inland waterways vessel the Riad and Dutch seagoing vessel the Wisdom on the Oude Maas, which resulted in the Riad's sinking. The owner of the Wisdom had limited liability by establishing both a property and a wreck fund. The Dutch state initially ordered the wreck's removal.

Cargo interests of the Riad provided security of €600,000 for the costs which might be incurred in the wreck and cargo removal operation. The Dutch state eventually took matters into its own hands and paid for the wreck and cargo removal operation, following which it obtained payment under the guarantee of €560,790.72, which the cargo interests of the Riad sought to recover from the wreck fund.

Meanwhile, the owner of the Wisdom argued that the claim of the cargo interests should instead be paid out of the property fund. It maintained that the claim of the cargo interests was a recourse claim and therefore, strictly speaking, not a claim for the raising, removal, destruction or rendering harmless of a ship which had been wrecked or whose cargo had been lost.

The Supreme Court ruled that the subject of each claim, and not its legal basis, is the decisive factor in determining which fund is made available for its payment. Thus, limitation of liability for wreck and cargo removal claims can be achieved only by constituting a separate wreck fund, including by way of a recourse claim.

The Supreme Court considered that the wording and context of Article 2 of the LLMC should be interpreted in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties, even though the wreck fund as such is a rule of Dutch law. Article 2 of the LLMC refers to the specific subjects of claims and includes the text "whatever the basis of liability may be" and "even if brought by way of recourse or for indemnity under a contract or otherwise". In addition, the Supreme Court considered that a special regime created pursuant to a reservation in accordance with Article 18 of the LLMC takes precedence over Article 2(1)(a), as this regime is to be regarded as law governing a specific subject matter.

The Supreme Court further considered that, due to the nature and objectives of Article 18(1) of the LLMC, the ability to claim against the wreck fund is not limited to official waterway authorities.

Legislative proposal

The idea behind the new Netherlands legislative proposal appears to be that the Dutch state will no longer be confronted with limitation of liability in case of claims for wreck or cargo removal operations. However, this recent Supreme Court judgment shows that the wreck fund is also available for recourse claims from the other parties involved, offering the possibility to resolve and settle disputes quickly. Abolishing the wreck fund may have an impact on the approach taken by parties, including owners and underwriters, following an incident and could lead to a less favourable position for the Dutch shipping industry. At the time when the Netherlands made the reservation under Article 18 of the LLMC and the wreck fund was introduced, this was considered a decisive argument.

It remains to be seen whether, failing a special regime for wreck and cargo removal claims, such claims will still be classified in the same manner or regarded as property claims, with the result that more claims will have to share in a single fund.

Comment

The Dutch special regime for limitation of liability for wreck and cargo removal claims offers parties an efficient way to settle their claims. It provides for multiple funds, meaning that property and wreck and cargo removal claims are paid out of separate funds even if instituted through a recourse claim and independent of the claim's legal basis. From a maritime industry point of view, this regime is to be preferred over unlimited liability. This should also be preferable from a government point of view, as unlimited liability may lead to more insecurity in respect of recourse possibilities, especially

since some countries have not implemented the reservation under Article 18 of the LLMC.

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