

ADVISOR

LIMITING SHIPOWNERS' LIABILITY AND THE ATLANTIK CONFIDENCE

The recent legal case of *The Atlantik Confidence* [2016] EWHC 2412 (Admiralty) demonstrates that, in particular circumstances, a shipowner can forfeit their right to limit liability. This advisor examines the implications of this case for shipowners' liability.

The ability to limit, or indeed exclude, liability to a third party in the event of loss or damage caused by the negligent navigation or management of a vessel is a longstanding tradition, born of the days when shipping was a riskier affair. Without this, shipping interests would be subject to unlimited and costly exposures.

In the UK and many other countries around the world, shipping interests rely upon the limitations of liability set by the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) and the 1996 Protocol to the 1976 Convention. Under the 2012 Protocol to the 1976 Convention, these limits were increased on November 30, 2016 in signatory countries.

Despite these increases, the limits of liability can be broken under Article 4 of the LLMC if a claimant proves their loss resulted from the shipowner's/shipping company's personal act or omission, committed with the intent to cause such a loss, or recklessly and with the knowledge that such a loss would result. The test, however, is stringent and difficult to satisfy.

For insurers of shipowners' liability, this has significant implications. If these limits are broken by a third-party claimant, a shipowner's liability can become unlimited. In such situations, insurers may be able to limit the compensation they will give to the insured to the limitation amount that would have applied had the insured been allowed to limit liabilities. Insurers may not be obliged to compensate any liabilities above this amount. This could leave the shipowner with a possibly sizeable amount, in excess of that limitation amount, to cover themselves.

THE CASE

In the case of *The Atlantik Confidence* [2016] EWHC 2412 (Admiralty), a fire broke out in the engine room of the vessel, *Atlantik Confidence*, causing it to sink. The owners alleged that the accidental spread of fire had resulted in the flooding of the engine room and water ballast tanks. Claimants representing the cargo interests of the voyage said that the fire had been started deliberately by ship-owning interests, and that the vessel was scuttled by opening the sea chests and ballast valves. The Admiralty Court ruled that it was more likely that the latter cause had occurred. Shipowners were denied their request to limit their liability as a result. In any event, the insurers were unlikely to indemnify beyond the limitation amounts, as they are bound by the policy limits.

This decision notwithstanding, the right to limit liability is rarely tested in English law. Indeed, this is the first case to break the limitations successfully in many decades. The results of this case will not likely have an effect on the interpretation and application of Article 4, nor the test required to break the limitations of liability successfully.

MANAGING THE RISK OF FORFEITING LIMITING LIABILITY

Taking this case into account, shipowners should consider the following recommendations:

- Continue to exercise proper due diligence in the management and operation of vessels. Failure to do so could prejudice their insurance coverage, as well as their rights to limit liability, particularly if the proximate cause of a loss insured against was as a result of an Institute Time Clauses Hulls 1/10/83 Clause 6.2 peril or other "Inchmaree"-type risks held covered under alternative marine hull insurance coverages.
- Regularly review procedures for adherence to any necessary and appropriate regulations, such as the International Convention for the Safety of Life at Sea (SOLAS), International Safety Management (ISM) Code, and maintenance of class.
- Make sure stringent documentation and record keeping is administered correctly, to avoid potential limitation of liability defence problems and insurance coverage issues.
- Keep updated and well versed on the limitation of liability amounts. Special attention should also be given to the varying amounts assigned to vessels of differing tonnage and those calculated for personal injury/loss of life and property claims.

It is incumbent on the shipowner to make sure, at all times, that any of their actions or inactions in no way affect their ability, or their underwriter's ability, to limit liability in the event that a claim results from an act of negligence on their part.

For more information, please contact your Marsh client representative or:

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