Jessica Teng: The MSC Flaminia (No. 2) – A charterer's right to limit liability against claim by shipowner

In the recent decision of the *MSC Flaminia (No.2) [2023]* EWCA Civ 1007, the English Court of Appeal provided helpful insight on whether a charterer *is* entitled to limit liability to a shipowner in respect of loss or damage to the vessel itself, including consequential loss resulting from the vessel being lost or damaged.

1. Background Facts

In July 2012, the container ship the *MSC Flaminia* ("Vessel") was operating under a period time charter between the Mediterranean Shipping Company (MSC) as the charterer and Conti as the owners. On 14 July 2012, when the Vessel was in the middle of the Atlantic Ocean en route from Charleston, South Carolina, to Antwerp, the Vessel experienced a large-scale casualty following an explosion which occurred in her no. 4 cargo hold. The explosion was attributed to the "auto-polymerisation" of the contents of one or more of three tank containers carrying 80% divinylbenzene (DVB), which caused a build-up of heat and pressure inside the relevant tank or tanks. The explosion and subsequent fire caused significant damage to the Vessel and her voyage to Antwerp was abandoned as a result. Further, many containers and cargo stowed on board the Vessel were either burnt, damaged or contaminated. Conti had to incur substantial costs to salvage the cargo and the Vessel, handle the contaminated cargo, remove the fire-fighting water and waste on board the Vessel, and repair the Vessel. In the meantime, MSC had placed the Vessel on off-hire.

Pursuant to the arbitration clause in the time charterparty, Conti commenced arbitration proceedings against MSC in London to recover the hire for the period the Vessel was out of service under the charter and other losses arising from the casualty ("Conti's claims"). The arbitrators determined all liability issues in favour of Conti and awarded damages of approximately US$ 200 million against MSC ("Award").

2. Limitation Action Filed by MSC at the English High Court

Subsequent to the Award, in a claim filed in the Admiralty Division of the English High Court, MSC sought to limit their liability for the damages payable to Conti based on the Vessel's tonnage under the 1976 Convention on Limitation of Liability for Maritime Claims, as amended by the 1996 Protocol ("1976 LLMC"), aiming to cap their liability at about GBP 28.2 million. MSC's argument to justify the limitation of liability was that Conti's claims fall within article 2.1 (a) of the 1976 LLMC i.e. "*claims in respect of…* ***loss of or damage to property****…occurring on board or in direct connection with the operation of the ship or with salvage operations, and* ***consequential loss resulting therefrom****",* which are claims which MSC could limit their liability

for.

In the previous case of *The CMA Djakarta [2004] EWCA Civ 14*, the English Court of appeal ruled that article 2.1 (a) covers only claims in respect of loss of or damage to property other than the ship, and consequential loss resulting from the loss of or damage to such property.

MSC contended that their liability for the damage caused to the *MSC Flaminia* can be limited under article 2.1 (a), on the basis that it was caused by the loss of or damage to the DVB that exploded, hence a claim in respect of consequential loss resulting from (non-ship) property damage. MSC's counsel argued that *The CMA Djakarta* is not an authority that goes against MSC's proposition, because the charterers in that case did not run an equivalent argument (viz that the explosion that damaged the ship was itself, or was caused by, damage to the bleaching powder).

The Admiralty Judge in the English High Court, Justice Andrew Baker, rejected MSC's argument and held that Conti's claims as owners against MSC in respect of the loss or damage to the ship, including consequential loss resulting therefrom, were not limitable under article 2.1 (a) of the 1976 LLMC or otherwise. The explanation given by Justice Andrew Baker was that the causal contribution of cargo damage in the damage to the ship does not turn a claim for damaging the ship into a cargo claim, the focus is on the nature of the claim brought and not on the mechanisms of causation. As the claims brought by Conti could be characterised as a single claim for damage to the ship, they were not in respect of loss of or damage to cargo, article 2.1 (a) of the 1976 LLMC therefore does not apply.

Justice Andrew Baker also held that the meaning of "consequential loss" in article 2.1 (a) of the 1976 LLMC turned on the classification of the claim being made. If it was one for property damage, then economic loss consequential upon property damage would fall within article 2.1 (a).

3. MSC's appeal

MSC appealed against the High Court's decision to the English Court of Appeal.

Conti, by a respondent's notice, raised a new ground upon which Justice Andrew Baker's decision should be upheld. Conti asserted that a charterer could limit its liability in respect of, and only in respect of, liabilities that originated outside the group of entities defined as "shipowners" for the purposes of limitation, identified in article 1.2 of the 1976 LLMC. Therefore, a charterer could not limit its liability in relation to claims brought by the owner of the ship in respect of losses suffered only by the owner. The claims for which a charterer could limit required an underlying original loss or expense to have been suffered or incurred by an "outsider" i.e. a party that falls outside the definition of "shipowners" in article 1.2 of the 1976 LLMC.

The Court of Appeal found credence in the ground raised by Conti in its respondent's notice and ruled the appeal in favour of Conti. In the Judgment by the Court of Appeal, Males L J gave the following reasoning:

"If a charterer is entitled to limit its liability for a claim made by an owner to recover losses which the owner itself has suffered, as distinct from the owner passing on to the charterer a liability incurred to a third party, the consequences would be remarkable. It would mean that an owner's own claim may have to be paid out of a fund constituted by the owner itself. That would by itself be a surprising result, but it would also mean that the fund would be diminished to the prejudice of third-party claimants ("outsiders") for whose benefit the fund is primarily constituted. This cannot be what was intended by the parties to the Convention."

4. Notes

The Court of Appeal's decision in the *MSC Flaminia (No.2) EWCA Civ 1007* gives clarity to the point that an owner's claim against a charterer to recover losses suffered by the owner itself falls outside the ambit of article 2.1 (a) of the 1976 LLMC unless the claim is brought by way of recourse or for indemnity against the charterer and the underlying claim itself was limitable.

The ruling in the Court of Appeal should serve as an important lesson to tank container operators to exercise caution when they are carrying hazardous cargoes as they may potentially be exposed to huge liability to the owner for ship damage and consequential losses arising therefrom, which is not limitable under the 1976 LLMC.