H&J FOCUS

HIGGS & JOHNSON COUNSEL & ATTORNEYS-AT-LAW VOLUME 60, ISSUE 3/2016

CONTRACTING OUT OF THE RIGHT TO LIMIT LIABILITY IN MARITIME CONTRACTS

Audley D. Hanna, Jr.

It has, for some time, been considered appropriate to provide those engaged in maritime operations with specific protection in relation to the risks of claims arising from maritime accidents. The general rationale behind this protection is that, as a matter of public policy, it is important to ensure that maritime trade can be facilitated without undue impediment. Accordingly, one of the rather unique aspects of maritime law is the statutory right provided to ship owners to limit their liability for damage arising from, most usually, collisions (that is accidents involving two or more ships) and allisions (accidents involving a ship and a structure). Within The Bahamas, this statutory protection is provided by virtue of the Merchant Shipping (Maritime Claims Limitation of Liability) Act 1989 (the "Act").

"Reliance upon the Act has been invoked on a number of occasions within this jurisdiction but has now been highlighted by a case which has been recently decided by the Privy Council."

The Act provides a formula, based upon the size of the ship which occasioned the damage, which sets out a limit of the amount which can be recovered against that ship within a proceeding arising from an incident. Further, this limit is cumulative in that no matter how many claimants may be involved, the total amount which all claimants can recover is limited to the amount ascertained by this formula. In order to rely upon the right to limit the liability, ship owners must commence independent proceedings whereby they essentially request of the Court the right to establish a limitation fund and a declaration that any recovery in relation to a relevant incident be limited to the sum contained within the said limitation fund.

Reliance upon the Act has been invoked on a number of occasions within this jurisdiction but has now been highlighted by a case which has been recently decided by the Privy Council. This case is of particular importance as it addresses an aspect of the limitation of liability which does not appear to have been previously determined judicially, at least not definitively; namely whether parties to commercial maritime contracts can expressly contract out of the right to limit liability under the Act.

In brief, the relevant factual legal background arose in 2012, when an oil tanker struck a docking facility on the island of Grand Bahama causing significant damage. Subsequent to proceedings being commenced against the oil tanker for damages, the owners of the oil tanker commenced a limitation action seeking to limit their liability in accordance with the Act and to establish a limitation fund from which any recovery arising from the allision would be paid.

There was a contract between the oil tanker and the owner of the docking facility which contained a provision whereby the oil tanker would be responsible for any and all damage to property belonging to the owner of the

For additional copies of FOCUS, please contact Antonia Burrows at ***242 502 5200*** *or at* ***aburrows@higgsjohnson.com.***

docking facility. In reliance upon this provision, the owner of the docking facility, within the limitation action, challenged the right to rely upon the Act and to, thereby, set up a limitation fund.

"...the Privy Council confirmed that it was, in fact, possible for parties to expressly exclude the operation of the Act and the right to limit liability provided that the exclusionary language was sufficiently clear."

Arguments in relation to whether the application of the Act could be avoided by virtue of a contractual provision were initially made before the Supreme Court of The Bahamas. In considering the matter, the Judge determined that it was, in fact, permissible to exclude the operation of the Act and to exclude the right to limit liability. The Judge also held that the operative contractual provision was sufficient for this purpose.

The decision of the Judge at first instance was appealed by the owners of the oil tanker to the Court of Appeal on the basis that the clause in question was insufficient for the purpose of excluding the operation of the Act and the right to establish a limitation fund. Within its ultimate ruling the Court of Appeal overturned the decision at first instance and determined that it was not in fact possible to exclude the operation of the Act and the statutory right to limit liability.

Having regard to the impact of the Court of Appeal's ruling, as well as the public policy and commercial implications arising from the determination that it was not possible to exclude the operation of the Act, the ruling of the Court of Appeal was appealed to the Privy Council. The Privy Council considered the respective arguments of the parties on 23 February, 2016, and, thereafter, issued its Judgment on 19 July, 2016.

Within its judgment, the Privy Council confirmed that it was, in fact, possible for parties to expressly exclude the operation of the Act and the right to limit liability, provided that the exclusionary language was sufficiently clear. While, in this case, the Privy Council was not convinced that the operative contractual provision was sufficiently clear to exclude the applicability of the Act. The judgment provides clarity to the extent that the principle of freedom of contract shall be operative in the context of the right to limit liability in commercial maritime agreements.

Audley D. Hanna, Jr., Associate, specialises in various areas of Civil and Commercial Litigation, with a particular focus on employment law, admiralty law, insurance law, intellectual property litigation, and personal injury litigation.