

The ISM Code and tonnage limitation

Ignacio de Ros (left) and Philip Carney (right) of Spanish law firm Ignacio de Ros Maritime Advocates, trace the development of the shipowner's right to limit, and examine how this right may be affected by the ISM Code in the light of a recent decision in the French Courts

When the ISM Code was promulgated, one of the questions that was raised was how non-compliance with the Code might affect a shipowner's right to limit liability. This question has recently been addressed in the French case of the Multitank Arcadia.

The origins of limitation

Generally, a judgment debtor will respond with all his present and future assets. However, this is not the case as far as maritime law is concerned. Owing to the particular risks associated with the maritime adventure, the idea arose back in the Middle Ages of limiting the liability of the shipowner to the value of the ship itself. When the law of continental countries was codified, the codes all recognised a right of limitation for shipowners. This right was 'imported' by common-law countries. In the 1863 case of *The Amalia*, Dr Lushington described its origin as "political", meaning that it was a doctrine that, although unknown to the common law of England, had been recognised in order to assist and facilitate international commerce.

Being an internationally recognised concept, limitation was very quick to come to the attention of the CMI as an area in which international maritime law might be unified. It was debated several times at the CMI's earliest conferences, and in 1924 an International Convention on the Limitation of Liability of the Owners of Sea-going Vessels was promulgated. The 1924 Convention entered into force on June 2, 1931, but was not a roaring success. At its peak it had fifteen contracting states. It now has nine, of which only three have not ratified or acceded to one or other of the later Limitation Conventions.

The 1957 Limitation Convention

The lack of success of the 1924 Convention caused the CMI to try again in the 1950s, and on October 10, 1957, it promulgated a new International Convention relating to the Limitation of Liability of Owners of Sea-going Ships. This Convention had far more ratifications and adhesions than its predecessor and still has some 29 Contracting States.

Article 1 of the 1957 Limitation Convention provides that the Owner shall have a right to limit his liability in respect of the claims listed in that article, unless the occurrence giving rise to the claim resulted from his "actual fault or privity". Under English law, the onus of proof was on the person claiming the right to limit to prove that right, therefore the Owner would have to demonstrate that the incident did not result from his "actual fault or privity".

The 1976 Limitation Convention

Within 20 years of the promulgation of the 1957 Convention, it was felt that its rules required updating. In particular, the following changes were proposed:

- Higher limits
- A mechanism to cope with worldwide inflation
- A review of the circumstances in which the right to limit would be lost

The result was the Convention on Limitation of Liability for Maritime Claims, done in London on November 19, 1976. The 1976 Convention imposed much higher limits, but at the same time gave the shipowner what was considered to be a "virtually unbreakable" right to limit liability. Thus article 4 of the 1976 Convention provides that a person shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Under the 1976 regime, the right to limit applies automatically unless evidence is produced that proves that the party claiming the right to limit is guilty of the conduct that will bar that right pursuant to article 4.

The ISM Code

At the same time as the debates on limitation of liability were going on, a series of high-profile incidents gave rise to an intensive effort to improve safety on board vessels. As part of this movement, the International Management Code for the Safe Operation of Ships and for Pollution Prevention (the ISM Code) was promulgated by an IMO resolution in November 1993. At the 1994 SOLAS conference, the ISM Code was incorporated into SOLAS as Chapter IX, making compliance with the Code mandatory in all State parties to SOLAS.

The ISM Code attempts to minimise human errors by establishing a management system, and specifically aims to improve communication between the people onboard and those on land. To this end, the Code requires that a shore-side person, known as a "designated person", act as a liaison between shipboard management and the highest level of management.

Management procedures and responsibility must be documented in the company's safety management system, known as the "SMS". Pursuant to the company's SMS, it will have to produce and maintain a series of documents to accredit the following:

- The reporting of accidents
- Procedures for implementing remedial action
- Records of inspections
- Procedures for managing documents
- Internal safety audits
- Periodic inspections by the flag state

When the Code was promulgated, its wider legal implications were widely discussed. For example, incompliance with the Code might affect the Owner's right to claim under his hull and machinery policy, or that it might render the vessel unseaworthy pursuant to the Hague or Hague-Visby Rules, or that it might make Owners more vulnerable to claims by Charterers.

An issue that attracted a particularly high degree of speculation was the likely effect of the ISM Code on tonnage limitation. It was generally considered that the right to limit under the 1957 Convention would be more easily breakable, as the Owner would be subjected to the burden of demonstrating ISM compliance in order to prove the absence of fault or privity. A more complicated question was the effect of the ISM Code on the right to limit provided by the 1976 Convention, and in particular, whether it would cause the supposedly "virtually unbreakable" right to limit provided for by that convention to turn out to be breakable after all.

The Multitank Arcadia

The French case of the Multitank Arcadia has addressed this issue. On the night of December 14, 1993, the chemical tanker Multitank Arcadia collided with the petrochemical installations in Lavéra. A limitation fund was constituted. The right to limit was denied at first instance. The Owner appealed to the Court of Appeal of Aix-en-Provence, both against his liability and against the denial of his right to limit any liability.

The Court of Appeal gave its decision on October 10, 2001. The cause of the incident was traced to a dirty fuel filter, which slowed down the number one generator set, which in turn caused the electrical system to overload. Although the chief engineer had testified that the fuel filter had been periodically replaced, there was no record of this. Further, it was found that the shipowner had failed to give the crew instructions to adopt security measures when performing mooring operations that were appropriate to the dangerous cargo being carried on board. In particular, the shipowner should have issued instructions to the effect that the three generator sets should have been used while the vessel was manoeuvring, which would have reduced the risk of a collision in the event that one generator failed. Under the circumstances, not only were the Owners liable for the damage caused, but they were also denied the right to limit their liability pursuant to the 1976 Convention, as they had committed a personal fault in not adequately controlling safety onboard and should have realised that their omissions would render probable the occurrence of damage.

Comment

The Court of Appeal's decision did not expressly mention the ISM Code, but it appears to have been heavily influenced by it. In relation to the impact of the Code on the right to limit, the following two points are particularly relevant:

1. The right to limit provided by the 1976 Convention can only be broken if it is proved that there was a "personal" act or omission of the party seeking to limit. There has been some speculation as to whether acts or omissions of the "Designated Person" required by the ISM Code would be considered to be acts or omissions of the shipowning company. The decision of the Court of Appeal suggests that this question will be answered in the affirmative.
2. A more controversial question is whether the acts and omissions identified by the Court of Appeal were committed with the intent to cause the loss, or recklessly with the knowledge that the loss would probably result. A shipowner might argue that, even in the absence of the SMS, or in circumstances in which the SMS is sloppily implemented, it is simply going too far to accuse the shipowner of intent to cause the loss, or of having acted recklessly with the knowledge that the loss would probably result, as he is entitled to assume that the presence of qualified officers and crew should be sufficient to avoid such damage occurring.

The Court of Appeal's decision has been appealed to the Cour de Cassation, and therefore the issue is far from settled. However, it should still come as a warning to Owners about the possible consequences of incompliance with the ISM Code. In other countries, such as Spain, the Courts tend to be even more reluctant to allow Owners to limit their liability than in France, and any and all shortcomings in an SMS are likely to be seized upon by claimants in order to try to break the right to limit.

Based in Barcelona, Ignacio de Ros Maritime Advocates provides maritime law services all over peninsular Spain and in the Canary Islands. Specialist practice areas include collisions, salvage, port state control issues, ship arrest, enforcement of maritime claims, carriage of goods and both marine and non-marine insurance. Languages spoken include Spanish, English, French, German, Portuguese, Danish and Catalan. To find out more, visit www.ignacioderos.com, or contact us by telephone: 34 932 050 265, fax: 34 932 046 896, or e-mail: office@ignacioderos.com.