China - The Right to Limit

Seikwang, a South Korean company, were the owners of the South Korean flagged chemical tanker, "Dae Myong", which collided with another vessel off the Chinese coast near Shanghai. The "Dae Myong"s cargo of styrene monomer spilled into the sea resulting, it was alleged, in contamination of the sea and marine environment. After negotiations, Seikwang provided a cash surety of US$900,000 and a bank guarantee of US$3.5 million to the Shanghai Maritime Bureau ("SMB") for prevention and clean-up expenses and for claims for damage and loss of fishing resources.

The owners subsequently applied to the Shanghai Maritime Court for establishment of a Limitation Fund. While China is not a signatory to the 1976 Convention on Limitation of Liability for Maritime Claims, the basic provisions of that Convention are part of Chinese domestic law (Articles 204-215 of the Maritime Code). If allowed to limit, owners' exposure would have been capped at around US$520,000 plus interest, substantially less than the claims and the securities which had been posted.

Various government agencies, including the SMB, objected to limitation on the basis that (a) the owners and master were in breach of the STCW Convention; (b) environmental and fishery protection laws were separate and distinct from ordinary laws of maritime commerce and breaches should therefore not be subject to the Maritime Code; (c) expenditure on clean-up and prevention involved an administrative act; and (d) damage to fishing resources was caused by pollution to the environment, not the collision. It was also suggested by the parties objecting that the owner's right to have security returned on constitution of a limitation fund may lead to a refusal by government agencies to accept security of any kind in future incidents.

Both the Shanghai Maritime Court and the Shanghai Supreme People's Court (on appeal) upheld the shipowners' application to constitute a fund. The "Dae Myong" was involved in a collision which caused pollution (non-oil) and demands for compensation arising from this fell within the class of claims for which limitation was available under the Maritime Code (Article 207). The fact that government agencies may have claims against the vessel does not necessarily make them claims of an administrative nature; the claims here were to be characterised as ordinary civil claims and, therefore, subject to the provisions of the Code.

The Court also held that a fund could be established prior to any final decision being made about whether particular heads of claim fell within the class of claimable claims or whether limitation could be broken (Article 209 of the Code - equivalent to Article 4 of the 1976 Convention). As a result, the claimants' security would be limited to the amount of the fund until such time, if any, that a final decision was made denying limitation. If such a decision was made, the claimants would then need to obtain fresh security to cover the full value of their claims.

The Chinese commentator on the case notes that it was by no means obvious that the types of claims brought here would fall within the class of claims for which limitation was allowed. So the fact that the Court adopted a wide interpretation of the Code to find in favour of a foreign shipowner (with foreign insurers), who was lined up against government agencies marks a positive development for the rule of law in China. The procedural aspect of establishing a Limitation Fund is also noteworthy. It seems an owner only has to demonstrate something like a prima facie case to limit in order to be able to constitute a fund and have securities returned (although the right to limit may be subject to more detailed scrutiny as the case progresses). An exception to this appears to remain in the context of penalties imposed by government agencies: such penalties fall outside the ambit of the Maritime Code and, therefore, security posted for these penalties need not be returned even if a limitation fund has been established.

The case is an important one for the international shipping community: the Shanghai Maritime Court is one of the more respected courts in China and its decisions should carry some weight throughout the country. It is to be hoped that the Chinese courts continue to recognise rights of limitation in accordance with the Maritime Code provisions.