SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

Maritime Transport Act 1994 Amendment

Recent attempts by the New Zealand Branch of MLAANZ to have the Maritime Transport Act 1994 (MTA) amended to properly give effect to the 1992 Civil Liability Convention (CLC) were unsuccessful. This means that contrary to the convention requirements, international insurers for oil tanker pollution liabilities have no clear right to limit liability under New Zealand domestic law in circumstances where the owner loses that right. It also risks New Zealand being in breach of its obligations at international law to properly implement the obligations under an international convention it is a party to. In the event of a pollution incident from an oil tanker, it has the potential to create problems for the effective operation of the compensation regimes as intended, potentially excluding access to compensation from the Fund Convention regimes, with the corresponding problem of enforcing liability against an insurer beyond the CLC limits.

Introduction

New Zealand, like Australia, is a party to the CLC and Fund Conventions that set out the regime for liability and compensation for oil pollution events from ships carrying oil as cargo – oil tankers. As most members will know, together the CLC and Fund Conventions set up a regime that imposes strict liability on a ship owner for pollution liabilities, requires them to have financial security to pay for those liabilities (evidenced by a Certificate of Insurance), and provides for a direct right of action against the party providing the financial security. The first tier of compensation is paid by the ship owner/their insurer to a specified limit, with a second and third tier of compensation available through the 1992 Fund and Supplementary Fund, created by the levy on importers of oil in member states. The CLC provisions provide a clear and express protection for insurers to have their liability limited to the amount of financial security they have provided, irrespective of the liability of the ship owner at Article VII (8):

> Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, irrespective of the actual fault or privity of the owner, avail himself of the limits of liability prescribed in Article V ...

Amendment Bill

Recent amendments to the MTA were directed at providing certainty in relation to the liability of insurers – or, in the case of financial security, the persons providing the financial security – to the Crown and to other third parties who are affected by the pollution from an offshore pollution event.

In New Zealand, prior to recent amendments, the Civil Liability and Compensation regimes for oil pollution damage were largely the same for ships and offshore installations. What is now Part 26A MTA dealing with pollution liabilities for offshore installation, was originally enacted in the same Part 25 MTA that implements the CLC, setting out liability for ships carrying oil as cargo (tankers) that most members will be familiar with. This meant that the civil liability and compensation regimes for tankers and offshore installations under New Zealand law had:

- the same strict liability for clean up cost and pollution damage as defined in the legislation
- the same definition of pollution damage
- the same requirement to have financial security for all pollution liabilities, evidenced by the issue of a Certificate of Insurance

- the same direct right of action provisions against insurers for persons who had a claim for pollution damage under the MTA, with limited defences available
- the minimum amount of insurance to be provided by offshore operators is specified in the Marine Protection Rules

Although the requirements to obtain a Certificate of Insurance are set by the marine protection rules, including the minimum amount of financial security, the direct right of action provisions sit under the MTA. The primary legislation did not provide any protection to those providing the financial security that their liability would be limited to the amount of financial security they had agreed to provide in circumstances where the owner lost the right to limit.

MLAANZ Submission

In relation to the offshore proposals for insurers, MLAANZ supported the general policy objective of providing certainty to insurers on the limit of their liability where they are subject to direct claims for pollution damage under the MTA. However, MLAANZ also recommended an amendment to the equivalent provision for insurers of oil tankers under Part 25 (Section 366 MTA), noting the current legislation did not properly implement the CLC and the protection afforded to insurers. A similar submission on Section 366 was made by the International Group of P&I Clubs.

Ministry Response

The Ministry of Transport declined to make the change MLAANZ requested to Section 366 MTA (dealing with insurers for oil tankers) on the basis: "The proposed change is not directly related to the policy in the Bill (which relates to offshore installations)."

That conclusion was surprising. The amendments were being made to corresponding parts of the MTA dealing with the liability of insurers in a pollution event. The policy problem identified for insurers of offshore pollution liabilities is the same for insurers of oil tankers subject to the CLC regime. The rules specify a minimum amount of financial security to be provided, but if the direct right of action under the primary legislation does not limit the liability of insurers, it potentially exposes them to a liability beyond the scope of the amount of cover they have agreed to provide for the purpose meeting the regulatory requirements.

The departmental report commented: "The issue with Section 366 is more a case of the legislation being not as clear as it could be, rather than potentially compromising its purpose."

The Problem

When implementing international conventions into domestic law, New Zealand has a mixed approach. Where conventions are given force of law the wording of the treaty itself is reflected. However, in other cases, like the CLC, domestic law rewords the convention text, which can create inconsistencies. Any lack of clarity is unhelpful when the overall objective is the uniform and consistent application of international conventions between member states. To the extent the CLC provisions are implemented into New Zealand domestic law, Section 366 MTA provides:

> (1) if the owner of any ship is alleged to have incurred liability under any or all of Sections 344, 345 and 346, proceedings to enforce a claim in respect of that liability may be brought against the insurer
>
> (2) …
>
> (3) the liability of the insurer in proceedings under this section against the **owner of a regulated ship** (irrespective of the actual fault or privity of that owner) is limited in like manner and to the same extent as the liability of that owner is limited under Section 347 [emphasis added]

The problem arises because of the definition of "regulated ship". Under Part 25 "regulated ship" means "a New Zealand or foreign ship of 400 gross tonnage or more **other than a regulated oil tanker**" [emphasis added]. In turn "a regulated oil tanker" means "an oil tanker, wherever registered and of

whatever nationality, carrying a quantity of oil in bulk in excess of 2000 tonnes or such other quantity as may be fixed for the purpose from time to time by the Governor-General by Order in Council".

A claim against insurers can only be brought in respect of the ship owner's liability. The amount of a ship owner's liability turns on their right to limit. In circumstances where a ship owner loses the right to limit, by virtue of its definition of "regulated ship", Section 366 of the MTA expressly excludes insurers of oil tankers subject to the CLC regime (except those carrying less than 2000 tonnes) from the protection of limitation.

To avoid this, the words "regulated ship" need to be read as meaning something other than as that term is expressly defined in the legislation. Relying on arguments of interpretation instead of properly implementing the convention text is messy, particularly when, as here, the consequences can be serious.

If a significant pollution incident from a tanker were to occur, it would be hoped that the circumstances provide for the ship owner to exercise the usual right of limitation, with the International Oil Pollution Compensation (IOPC) Funds stepping in to provide the second and third tiers of compensation. However, if that proves not to be the case, the intended operation of the compensation regimes could be interrupted.

One of the circumstances where the funds will pay compensation is where the ship owner is financially incapable of meeting their obligations under the 1992 CLC in full and their insurance is insufficient to satisfy the claims for compensation for pollution damage.

As drafted, the New Zealand legislation risks an insurer losing the right to limit where the ship owner can't. To the extent any judgment may be rendered against an insurer in excess of the CLC limits, the practical question of enforceability follows.

Comment

The uniform application of international conventions is not just a theoretical problem, but one the international community has been wrestling with following the *Prestige*. In that case, the Spanish Supreme Court held the insurer of the *Prestige* liable up to the full indemnity under the policy of US$1 billion dollars, not the CLC limitation, leading to criticism and complaints that a lack of certainty on the operation of the regime would have risks on the availability of insurance for long-tail pollution liabilities. From a practical perspective, instead of achieving the objective of prompt compensation, there have been years of cross-border litigation with the liable P&I Club seeking (and obtaining) arbitration awards in England to prevent enforcement by the Spanish Government.

Following this, the effective implementation by states of these CLC provisions is very much on the radar of the international maritime community.

In a joint submission to the meetings of the IOPC Funds in 2017, the International Group and the International Chamber of Shipping commented: "The uniform interpretation and application of the 1992 CLC and Fund Conventions is, after all, of fundamental importance for the proper functioning of the international regime and equal treatment of claimants in all states parties."

The Ministry of Transport said that there may be some merit to making the amendment at some future date, which is positive. But given the limited legislative opportunities for maritime legislation, this was a missed opportunity to tidy up the legislation and align New Zealand with international efforts to ensure the uniform implementation and application of international conventions.

An article on the changes to the financial security and compensation regime for pollution damage from an offshore installation is expected to be published in the next edition of Semaphore*.*

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July 2020