

22

LIMITATION OF LIABILITY FOR MARITIME CLAIMS

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22.1 Introduction

Limitation of liability for maritime claims is a legal concept which allows the shipowner to limit his financial exposure for maritime claims up to a maximum sum regardless of the actual amount of the claims being brought against him. The concept has a long history¹ and, although there is controversy as to the specific time when it first appeared, it seems that the first real recognition of a shipowner's right of limitation of liability is found in the *Tavole Amalfitane*,² wherefrom it later spread to continental Europe. Originally in continental Europe, limitation of liability was by 'abandonment', i.e. the shipowner was considered to be 'personally' liable for the claims, but he was allowed to limit his liability by abandoning his ship (or what was left of it), together with any pending freight, to the claimants.

On the other hand, the statutory recognition of the shipowner's right of limitation of liability in the United Kingdom dates back only to 1734. This has made multiple jurists assert that this enactment actually 'gave birth' to the concept of limitation of liability in the United Kingdom. Nonetheless, it seems possible to recognize an earlier form of limitation of liability in the United Kingdom by studying a possible link between the right to limit liability and the action *in rem*.³ In this respect, it must be recalled that, even before 1734, where a plaintiff brought an action *in rem* before the court, his remedy was restricted to the *res* itself. Hence, the defendant shipowner was actually able to limit his liability since he was not 'personally' liable

¹ For an analysis of the historical development of limitation of liability for maritime claims, see NA Martínez Gutiérrez, *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes* (Routledge, 2011) 5–21 and JJ Donovan, 'The Origins and Development of Limitation of Shipowners' Liability' (1979) 53(4) *Tulane LR* 999.

² The Tables of Amalfi date around the eleventh century.

³ For a full discussion on this point, see Martínez Gutiérrez (n 1) 8–10.

Norman A Martínez Gutiérrez

for the claims after the vessel had been sold.⁴ Accordingly, as Lord Steyn explained, in these cases '[t]he ship was regarded as both the source and *limit of liability*'.⁵ It would therefore seem that, in relation to actions *in rem*, if the right to limit was recognized, it was one by abandonment similar to the continental approach. However, when the right to limit liability was specifically recognized under statute, the liability of the shipowner was established in accordance to the size of the ship, i.e. limitation of liability was determined by reference to the ship's tonnage.⁶

The concept of global limitation of liability for maritime claims then slowly spread throughout the world where it was frequently adopted by national enactments until there was a need to adopt this concept under an international convention. It may be said that the wake-up call for international regulation was the sinking of the *RMS Titanic* in 1912. This tragedy gave rise to many claims for loss of life and personal injuries, as well as claims for loss of property, which were tried in different countries. Accordingly, this led to a myriad of judgments, all different from one another as they were determined according to the prevailing law in each jurisdiction.⁷ In fact, as Justice Holmes of the US Supreme Court stated in the case of *Ocean Steam Navigation Co. v Mellor (The Titanic)*,⁸ the Court saw 'no absurdity in supposing that if the owner of the Titanic were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case'.⁹

In 1913, a year after the sinking of the *RMS Titanic*, a committee established by the Comité Maritime International (CMI) to review the law on limitation of liability came up with a draft convention aimed at bringing about harmonization of the law in the field of limitation of liability. The draft convention was adopted by a Diplomatic Conference in Brussels in 1924 as the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea-Going Vessels. Perhaps the most interesting feature of the 1924 Convention was that it sought to achieve a compromise between the different systems of limitation of liability—it took into account both 'limitation by abandonment' and 'limitation based on tonnage'.

⁴ The Black Book of Admiralty provided that "The ship has to pay" when arrested, not the shipowner'. It also provided that no other property of the defendant (besides the ship) could be subject to arrest. See FL Wiswall Jr, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press, 1970) 160–2.

⁵ *The Indian Grace (No. 2)* [1998] 1 Lloyd's Rep 1, 6 (emphasis added). However, in the light of the House of Lords' decision in this case, it seems that nowadays under English law, although the claim begins as an action *in rem*, once the shipowner appears in court the action continues *in rem* as well as *in personam*. On this point, see SC Derrington and JM Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, 2007) 12.

⁶ As from the Merchant Shipping (Amendment) Act 1862 (25 & 26 Vict., c. 63), the limits of liability were set at £8 for property claims and £15 for claims for loss of life or personal injury.

⁷ See Martínez Gutiérrez (n 1) 17.

⁸ 233 US 718 (1914), repr. 1998 AMC 2699.

⁹ 233 US 718, 734 (1914), 1998 AMC 2699, 2703.

Limitation of Liability for Maritime Claims

The 1924 Convention, however, received very little support from the international community.¹⁰ Therefore the CMI revisited the issue in the 1950s. The CMI work led to the adoption of the International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships, 1957.

The 1957 Convention completely abandoned the system of the calculation of limitation by reference to the residual value of the ship and exclusively adopted the system of calculation of limitation by reference to its tonnage. The Convention used the Poincare gold franc¹¹ to calculate the limits of liability (which were increased in relation to those under the 1924 Convention), and established separate funds for personal and property claims.

The 1957 Convention received wider acceptance by the international community than its predecessor.¹² However, international developments in the shipping world during the 1960s, together with the recognition of the need to extend the right to limit to persons other than those covered by the 1957 Convention, made the Inter-Governmental Maritime Consultative Organization (IMCO) realize that there was an urgent need to revise the 1957 Convention. IMCO worked closely with the CMI in this revision project which eventually led to the adoption of a completely new convention—the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC Convention).¹³

The LLMC Convention is currently the most widely accepted treaty on global limitation of liability having, as at 22 September 2015, been ratified or acceded to by fifty-four States with 54.80 per cent of the total world tonnage. Nevertheless, the Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, 1976 (1996 LLMC Protocol)¹⁴ is constantly gaining ground on the LLMC Convention and, as at 22 September 2015, it has been ratified or acceded to by fifty-two States which constitute 53.58 per cent of the total world tonnage. This Protocol was adopted, inter alia, to increase the LLMC Convention's limits of liability which had been eroded by inflation and were no longer adequate to satisfy possible claims. The Protocol also provided for a simplified revision and

¹⁰ The 1924 Convention was only ratified, or acceded to, by fifteen States. Seven of these States later denounced the Convention. See CMI, *CMI Yearbook 2013* (CMI, 2013) 598.

¹¹ The Protocol Amending the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957 was adopted on 21 December 1979. The purpose of this Protocol was to discontinue the use of the Poincare franc and substitute it by the Special Drawing Right (SDR).

¹² The 1957 Convention was ratified, or acceded to, by forty-seven States and later denounced by twelve of its parties (CMI, *CMI Yearbook 2013* (CMI, 2013) 625–6). Thus, some States still apply the 1957 Convention.

¹³ The Convention was adopted on 19 November 1976 and entered into force on 1 December 1986.

¹⁴ The Protocol was adopted by a Diplomatic Conference held at the International Maritime Organization (IMO) between 15 April and 3 May 1996; the same Conference which adopted the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention).

Norman A Martínez Gutiérrez

amendment procedure modelled on previous particular liability regimes,¹⁵ and pursuant to this amendment procedure the IMO Legal Committee increased the 1996 LLMC Protocol's limits of liability through Resolution LEG.5(99) adopted on 19 April 2012.¹⁶

In the light of the foregoing and aiming to address the latest international developments in the field of global limitation of liability, this Chapter focuses on an analysis of the main provisions of the LLMC Convention as amended by the 1996 LLMC Protocol and the actions being taken to improve the system built upon the 1996 LLMC Protocol.

22.2 Persons Entitled to Limit Liability

Article 1 of the LLMC Convention recognizes the right of limitation of liability for shipowners (which term is interpreted as including the owner, charterer, manager, and operator of a seagoing ship), salvors (which includes any person rendering services in direct connection with salvage operations),¹⁷ any person for whose act, neglect, or default the shipowner or salvor is responsible, and insurers of liability (to the same extent as the assured himself).¹⁸

22.2.1 Shipowners

The LLMC Convention, as did its predecessors, recognizes the right to limit of the shipowner. The Convention, however, does not specifically clarify what type of shipowner it refers to, leaving national courts with the task of interpreting the precise meaning of this term. In this respect, the term 'shipowner' has been recognized as encompassing both 'registered' and 'beneficial' owners,¹⁹ and may be wide enough to include part-owners of a ship.²⁰ Furthermore, considering the lack of clarity of the Convention on this point, States tend to add their own understanding of the term when incorporating the Convention into their domestic law,²¹ and in some cases, although the Convention specifically refers to the shipowner of 'a seagoing ship', several countries take

¹⁵ Including but not limited to the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (CLC 1992).

¹⁶ For a full discussion on the newly adopted limits, see NA Martínez Gutiérrez, 'New Global Limits of Liability for Maritime Claims' (2013) 15(3) *International Community Law Review* 341–57.

¹⁷ In accordance with the LLMC Convention, Art. 1(3), salvage operations shall also include operations referred to in Art. 2, para 1(d), (e), and (f) of the Convention.

¹⁸ The 1996 LLMC Protocol did not amend the list of persons entitled to limit liability.

¹⁹ For examples, see the decision of the UK Court of Appeal in *The Evpo Agnic* [1988] 2 Lloyd's Rep 411, the decision of the Federal Court of Australia in *The Cape Moreton* [2005] FCAFC 68, and the decision of the Singapore Court of Appeal in *The Ohm Mariana* [1993] 2 SLR 698.

²⁰ See Martínez Gutiérrez (n 1) 23.

²¹ See, for examples, s. 84 of the New Zealand Maritime Transport Act, 1994, Public Act 1994, No. 104 and s. 25(1)(b) of the Canadian Marine Liability Act, S.C. 2001, c. 6.

Limitation of Liability for Maritime Claims

the opportunity to extend the provisions of the Convention to shipowners of non-seagoing ships.²²

22.2.1.1 Charterers

When including the ‘charterer’ in the definition of shipowner, the Convention does not qualify which type of charterer may limit his liability. Is the term confined to demise charterers²³ or is it wide enough to include all charterers? The general perception is that it includes all charterers including demise, time, and voyage charterers,²⁴ as well as sub-charterers.²⁵ Nevertheless, it has been questioned whether slot charterers are entitled to limit liability under the LLMC Convention. In this respect, it is noteworthy that recently, sitting in the Queen’s Bench Division, Mr Justice Teare held that ‘... in accordance with the ordinary meaning of the word charterer and in the light of the evident object and purpose of the convention, a slot charterer is within the definition of shipowner and therefore entitled to limit his liability’.²⁶

This decision seems to reflect the current position in the United Kingdom. However, there are States which at one point in time expressed their objection to slot charterers enjoying such a right to limit liability, for example Argentina, Germany, Mexico, and Spain.²⁷ Neither the text of the LLMC Convention nor its *travaux préparatoires* offer any guidance on this issue, leaving the courts of different States with a decision on which position to adopt. In so deciding, courts should bear in mind that the recognition of the slot charterer’s right to limit liability may open the door to further requests for extension of this right to other persons entering into contracts similar to slot charters, for example volume contracts.²⁸

22.2.1.2 Managers and operators

The Convention’s definition of shipowner extends the right to limit liability to the ship’s ‘manager’ and ‘operator’. Once again, the LLMC Convention does not define these terms and, by failing to do so, the Convention has left ample room for litigation. In particular, there have been two categories of persons that have been

²² This approach has been followed by several countries including Canada, Malta, New Zealand, Singapore, and the United Kingdom. See Martínez Gutiérrez (n 1) 38.

²³ See *The MSC Rosa M* [2000] 2 Lloyd’s Rep 399.

²⁴ In this respect, see *The Permina 108* [1978] 1 Lloyd’s Rep 311; *The Span Terza* [1982] 1 Lloyd’s Rep 225; *The Sextum* [1982] 2 Lloyd’s Rep 532; *The Djatianom* [1982] 2 HKLR 427; *Reef Shipping Co. Ltd v The Ship ‘Fua Kavenga’* [1987] 1 NZLR 550; and *The Laemthong Pride* [1997] 149 ALR 675.

²⁵ See the decision of the New Zealand High Court in *The Tasman Pioneer* [2003] 2 Lloyd’s Rep 713.

²⁶ *The MSC Napoli* [2009] 1 Lloyd’s Rep 246, 250 (emphasis added). It is noteworthy that a similar interpretation is given under French law: see Award 1069 of 20 October 2002 of the Chambre Arbitrale Maritime de Paris, DMF 2003, 385, 388.

²⁷ See P Griggs, ‘Charterers’ Right to Limit Liability’, paper delivered at the 39th Conference of the CMI (Athens, 12–17 October 2008) in *CMI Yearbook 2009* (CMI, 2009) 358, 361, 390–3.

²⁸ For a further discussion on the slot charterer’s right to limit liability, see Martínez Gutiérrez (n 1) 25–9, 203

Norman A Martínez Gutiérrez

questioned as to whether they may fall within the definition of the terms ‘manager’ or ‘operator’, namely crewing agents and mortgagees who have taken possession of the ship.

In relation to the former, there is no consensus as to whether crewing agents are covered by the terms ‘manager’ and ‘operator’. Some authors suggest that the terms may not be wide enough to include crewing agents, as these are independent contractors not falling under the scope of Article 1(4).²⁹ Other authors prefer the view that the terms lend themselves to include crewing agents depending on the facts of each case, i.e. depending on the relationship between the said agent and the ship itself.³⁰

In relation to the latter, it has been generally accepted that mortgagees who have taken possession of the ship may fall in the LLMC Convention’s definition of ‘manager’ or ‘operator’.³¹ It must be borne in mind, though, that the mortgagee’s right to limit his liability is not automatic and only arises after he has repossessed the ship. In fact, it is the act of repossessing the ship that allows him to be considered to be an ‘operator’ of the ship.³²

22.2.2 Salvors

Article 1(1) of the LLMC Convention recognizes the salvors’ right of limitation of liability. The origin of this independent right of limitation of liability on salvors may be found in the House of Lords’ decision in the case of the *Tojo Maru*.³³

The case of the *Tojo Maru* addressed the issue of the salvor’s possible right to limit liability (as shipowner) in relation to damage caused to the vessel being salvaged by a diver who was participating in a salvage operation but who was, at the time of the accident, performing the salvage work in the water away from the salvor’s tug. In deciding the case under the 1957 Convention, the House of Lords did not recognize the salvors’ right to limit their liability by reference to the tonnage of the salvage tug, particularly since the damage was caused neither ‘in the navigation or management’ of the salvor’s tug nor by a person ‘on board’ the tug as required by the 1957 Convention.

²⁹ P Griggs, R Williams, and J Farr, *Limitation of Liability for Maritime Claims* (4th edn, LLP, 2005) 9. See also A Mandaraka-Sheppard, *Modern Maritime Law* (3rd edn, Informa Law from Routledge, 2013), vol. 2, 746.

³⁰ In this respect, see Derrington and Turner who refer to the decision of the Full Federal Court of Australia in *ASP Ship Management Pty Ltd v Administrative Appeals Tribunal* [2006] FCAFC 23 where the court held that the term ‘operated by’ as used in s. 10 of the Navigation Act 1912, Act No. 4, 1913 encompasses ‘notions of a real, substantial, and direct role in the management and control of the commercial, technical and *crewing operations of the ship*’ (emphasis added); Derrington and Turner (n 5) 243.

³¹ See Martínez Gutiérrez (n 1) 31–2.

³² *Ibid.*

³³ [1971] 1 Lloyd’s Rep 341, [1971] 1 All ER 1110.

Limitation of Liability for Maritime Claims

Due to the aftermath of this case and the ensuing lobby by the international salvage community, the LLMC Convention now protects the salvors' interests and recognizes that the right to limit should be granted to salvors even when there was no salvage tug involved.³⁴

22.2.3 Any person for whose act the shipowner or salvor is responsible

Article 1(4) of the LLMC Convention provides that '[i]f any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention'. The purpose of this provision is to thwart attempts by claimants to prevent limitation of liability under the Convention by bringing claims against the shipowner's servants rather than against the shipowner himself.³⁵

Unfortunately, by using the word 'responsible', the LLMC Convention does not define the extent of the class of persons that may be covered under this provision and it has been argued that this provision may have extended the right to limit beyond the servants or agents of the shipowner to include independent contractors provided that the shipowner is responsible for their actions; such may be the case of stevedores,³⁶ ship repairers,³⁷ and pilots.³⁸

22.2.4 Liability insurers

Article 1(6) of the LLMC Convention extends the right to limit liability to the insurer of liability. The insurer of liability is, thus, entitled to the benefits of the Convention 'to the same extent as the assured himself'. Consequently, if the assured is denied the right to limit in accordance with Article 4, then the insurer will also be prevented from limiting his liability.

22.3 Claims Subject to Limitation

Article 2 of the LLMC Convention specifies the types of claims in respect of which the right of limitation of liability is available. It is important to mention that once it is determined that the claims fall within those listed in the aforesaid Article, the right to limit would be available—subject to Articles 3

³⁴ See Martínez Gutiérrez (n 1) 32–3.

³⁵ Ibid, 33–4.

³⁶ In this respect, see *The White Rose* [1969] 1 Lloyd's Rep 52, 58 and 60 where the court held that the shipowner cannot avoid liability, for damage caused whilst loading/unloading cargo, by employing an independent contractor, thus making the shipowner responsible in law for the acts of the stevedores.

³⁷ In this respect, see *The Muncaster Castle* [1961] 1 Lloyd's Rep 57.

³⁸ See Martínez Gutiérrez (n 1) 33–4.

and 4—regardless of the basis of liability.³⁹ This remains the case even if the claim is brought by way of recourse or for indemnity under a contract or otherwise,⁴⁰ though the right to limit will not be available in respect of the claims listed in Article 2(1)(d), (e), and (f) ‘to the extent that they relate to remuneration under a contract with the person liable’.⁴¹

22.3.1 Claims in respect of loss of life or personal injury or loss of or damage to property

Article 2(1)(a) of the LLMC Convention extends the right to limit to claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways, and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom. This provision covers all personal and property claims, provided they occur ‘on board or in direct connection with the operation of the ship or with salvage operations’.⁴² Accordingly, the most important issue to determine here is the meaning of the phrase ‘in direct connection with the operation of the ship’. In this respect, it is noteworthy that this phrase was given a wide interpretation by Rix J who, in *Caspian Basin v Bouygues (No. 4)*,⁴³ held that ‘[i]n direct connection with the operation the ship’ is the way in which the Convention expresses the necessary linkage between loss of or damage to property on the one hand and the ship in respect of which the claim to limit is made on the other’.⁴⁴

Furthermore, Thomas J emphasized in *The Aegean Sea*⁴⁵ that to confine the phrase to a narrow interpretation would significantly limit the protection that should be available under the Convention and ‘be contrary to the broad policy of construction that should be applied’.⁴⁶

22.3.2 Claims resulting from delay

Article 2(1)(b) provides that the right to limit liability is available in respect of claims for loss resulting from delay in the carriage by sea of cargo, passengers, or their luggage. The inclusion of this provision was questioned during the drafting of the LLMC Convention because it was believed that loss arising from delay was

³⁹ See *ibid*, 40–1; Griggs, Williams, and Farr (n 29) 18; Derrington and Turner (n 5) 248; and Mandaraka-Sheppard (n 29) 752.

⁴⁰ See P Griggs and NA Martínez Gutiérrez, ‘Indemnity Clauses and Limitation of Liability’ (2010) 8(1) *Shipping and Transport International* 18.

⁴¹ Art. 2(2).

⁴² See Martínez Gutiérrez (n 1) 41–3; Griggs, Williams, and Farr (n 29) 18–21.

⁴³ [1997] 2 Lloyd’s Rep 507.

⁴⁴ *Ibid*, 522. This conclusion was later upheld by the Court of Appeal (see [1998] 2 Lloyd’s Rep 461, 473).

⁴⁵ [1998] 2 Lloyd’s Rep 39.

⁴⁶ *Ibid*, 51–2.

Limitation of Liability for Maritime Claims

already covered by Article 2(1)(a). However, as explained hereunder, it is now clear that Article 2(1)(a) and Article 2(1)(b) refer to different kinds of losses.⁴⁷

The right to limit liability can be invoked under Article 2(1)(a) where the occurrence gives rise to loss or damage to property—i.e. ‘concrete’ damage—as in the case of perishable cargo lost as a result of the delay (in this case delay would be the cause of the ‘concrete’ damage). Likewise, pure economic loss—i.e. ‘abstract’ loss—caused by late delivery of the goods may also fall under Article 2(1)(a) if it is proved that such loss is a ‘consequential loss’ resulting from any ‘loss of life or personal injury or loss of or damage to property’, for example where the delay is caused by the grounding of the vessel. In this case, to be able to limit liability under Article 2(1)(a) the ‘abstract’ loss must inevitably be linked to ‘concrete’ damage.⁴⁸

On the other hand, the importance of Article 2(1)(b) is evident in cases where there is no link between an ‘abstract’ loss and ‘concrete’ damage. An example of this would be where delay is caused by congestion at the port of transshipment, away from the carrying ship, and not as a result of any ‘concrete’ damage. In this case the right to limit liability may only be invoked under Article 2(1)(b).⁴⁹

22.3.3 Claims for infringement of rights

Article 2(1)(c) recognizes the right to limit liability in respect of claims for loss resulting from the infringement of rights other than contractual rights, which occur in direct connection with the operation of the ship or salvage operations. This may include, inter alia, infringement of rights such as a railroad company’s right of passage over a bridge spanning a river, the right of access into a port by other ships, or claims in tort for pure economic loss.⁵⁰ However, since Article 2(1)(c) aims to deal with the infringement of rights ‘other than contractual rights’, claims made by shipowners under a charterparty for loss of the right to earn freight, cannot fall under this Article as such claims would be claims for the infringement of ‘contractual rights’.⁵¹

22.3.4 Claims for wreck and cargo removal

Claims for wreck and cargo removal are subject to limitation under Article 2(1)(d) and (e). Article 2(1)(d) allows the right to limit in respect of claims for the raising, removal, destruction, or the rendering harmless of a ship which is sunk, wrecked,

⁴⁷ See Martínez Gutiérrez (n 1) 43–4.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ See *ibid.*, 44–5; Griggs, Williams, and Farr (n 29) 22; Mandaraka-Sheppard (n 29) 758; P Griggs and NA Martínez Gutiérrez, ‘Pure Economic Loss and Limitation of Liability’ (2011) 8(3) *Shipping and Transport International* 22; and JL Gabaldón García and JM Ruiz Soroa, *Manual de Derecho de la Navegación Marítima* (3rd edn, Marcial Pons Ediciones Jurídicas y Sociales, 2006) 833.

⁵¹ See Martínez Gutiérrez (n 1) 44–5 and Griggs, Williams, and Farr (n 29) 22.

Norman A Martínez Gutiérrez

stranded, or abandoned, including anything that is or has been on board such ship. Article 2(1)(e), in turn, allows the right to limit in respect of claims for the removal, destruction, or the rendering harmless of the cargo of the ship.⁵²

Both sub-paragraphs (d) and (e) were drafted to cater for claims brought by harbour or conservancy authorities or other public entities, since claims brought by salvors are excluded from limitation under Article 3(a),⁵³ and the right to limit under these sub-paragraphs is available only to the extent that the relevant claims do not relate to remuneration under a contract with the person liable.⁵⁴

Regarding the ship, the only applicable provision is Article 2(1)(d). Therefore, if the relevant ship is sunk, wrecked, stranded, or abandoned and steps are taken to raise it, remove it, destroy it, or render it harmless, any claim for the expenses incurred is subject to limitation under this provision. Nonetheless, the extension to ‘anything that is or has been on board such ship’ may appear to overlap and give rise to potential conflict with Article 2(1)(e). Thus, in case of a claim for the recovery of cargo from a sunken ship, not only would the claim seem to be subject to limitation under Article 2(1)(e) but it could also be subject to limitation under Article 2(1)(d) under the extension ‘anything that is or has been on board such ship’.⁵⁵

The need for a distinction between these two provisions becomes a matter of great importance in States which have made a reservation—as allowed by Article 18—in relation to Article 2(1)(d) and not 2(1)(e). It is therefore necessary to clarify that Article 2(1)(e) was originally devised to cover claims for the removal, destruction, or the rendering harmless of the cargo of a ship which is not sunk, wrecked, stranded, or abandoned, i.e. a floating ship. Accordingly, claims for the raising, removal, destruction, or rendering harmless of the cargo of a ship which is sunk, wrecked, stranded, or abandoned should be dealt with exclusively under Article 2(1)(d).⁵⁶

It is noteworthy that with the adoption of the Nairobi International Convention on the Removal of Wrecks, 2007, wreck removal claims will now need to be considered not only under the LLMC Convention but in the light of both conventions.⁵⁷

⁵² See Martínez Gutiérrez (n 1) 45–6; Griggs, Williams, and Farr (n 29) 22–4; Mandaraka-Sheppard (n 29) 758–60.

⁵³ See Section 22.4.1.

⁵⁴ Art. 2(2). See S Hodges and C Hill, *Principles of Maritime Law* (LLP, 2001) 546–7.

⁵⁵ In *The Aegean Sea* [1998] 2 Lloyd’s Rep 39 (at 52) it was held that claims for pollution caused by the bunkers and by the cargo fell within Art. 2(1)(d) and (e) respectively insofar as they related to clean-up or pollution prevention costs.

⁵⁶ Martínez Gutiérrez (n 1) 45–6, 91–5.

⁵⁷ For an analysis of the Wreck Removal Convention 2007, see Chapter 19 of this Volume. See also P Griggs, ‘Wreck Removal Convention 2007’ (2008) 7(1) *Shipping and Transport International* 20; C Forrest, ‘At Last a New Convention on the Removal of Wrecks’ (2008) 14 *J Int Maritime Law* 394 and G Gauci, ‘Legislative Comment: The International Convention on the Removal of Wrecks 2007—A Flawed Instrument?’ (2009) 2 *JBL* 203. For a discussion of the relationship between the Wreck Removal Convention 2007 and the LLMC Convention, see Martínez Gutiérrez (n 1) ch. 7.

Limitation of Liability for Maritime Claims

22.3.5 Claims in respect of measures taken in order to avert or minimize loss

Article 2(1)(f) provides that claims of a person ‘other than the person liable’ in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with the Convention are subject to limitation. Furthermore, this right is also extended to claims in relation to further loss caused by such measures.

Examples of claims which may fall under Article 2(1)(f) include claims by a third party, in relation to a stranded ship carrying chemicals which may threaten a chemical pollution, for any measures such third party may have taken to prevent or minimize loss or damage,⁵⁸ as well as claims by a cargo owner—against the shipowner—for the recovery of moneys paid to a salvor for measures taken by the latter to minimize the loss of the cargo in peril, since the shipowner would be entitled to limit his liability for the loss of the cargo resulting from his negligence.⁵⁹ Conversely, if—in the aforesaid circumstances—the shipowner would have paid the salvors on behalf of the cargo owners, his claim for reimbursement against the cargo owners would not fall under Article 2(1)(f) because it would be a claim brought by the person liable himself.⁶⁰

Significantly, as Article 2(1)(d) and (e), sub-paragraph (f) must be read together with Article 2(2). Consequently, the claims listed therein will not be subject to limitation to the extent that they relate to remuneration under a contract with the person liable.⁶¹

22.4 Claims Excepted from Limitation

Article 3 of the LLMC Convention lists the types of claims in respect of which the rules of the Convention shall not be applicable.⁶²

22.4.1 Salvage and general average

Article 3(a) of the LLMC Convention, as amended by the 1996 LLMC Protocol, provides that the rules of the Convention do not apply to ‘claims for salvage, including, if applicable, any claim for special compensation under Article 14 of

⁵⁸ See Griggs, Williams, and Farr (n 29) 24; Hodges and Hill (n 54) 550.

⁵⁹ *The Breydon Merchant* [1992] 1 Lloyd’s Rep 373. See Griggs, Williams, and Farr (n 29) 25; Mandaraka-Sheppard (n 29) 761.

⁶⁰ Hodges and Hill (n 54) 552.

⁶¹ Art. 2(2). Martínez Gutiérrez (n 1) 46–7.

⁶² For a detailed discussion of Art. 3, see Martínez Gutiérrez (n 1) 47–50; Griggs, Williams, and Farr (n 29) 26–31 and Mandaraka-Sheppard (n 29) 761–3.

Norman A Martínez Gutiérrez

the International Convention on Salvage 1989, as amended, or contribution in general average'. This exclusion only applies to direct claims by salvors or parties who have suffered a general average loss or sacrifice.⁶³ Therefore, if a party has paid its proportion of salvage or general average, his claim for recovery of such amount against the shipowner would be subject to limitation, provided that the shipowner proves that the claim is one which falls under Article 2.⁶⁴

The exclusion also extends to any claim for special compensation under Article 14 of the Salvage Convention, if applicable.⁶⁵ The referred Article provides that if the salvor has carried out salvage operations in respect of a vessel which has threatened damage to the environment and has failed to earn a reward under Article 13, he is entitled to special compensation from the owner of that vessel. This special compensation is primarily equivalent to the salvor's expenses. However, Article 14 of the Salvage Convention provides a formula whereby such compensation can be increased beyond such expenses.⁶⁶

22.4.2 Claims for oil pollution damage

Article 3(b) excludes claims for oil pollution damage 'within the meaning of' the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC),⁶⁷ as amended, from the application of the Convention. What may have been a simple provision aimed to exclude from the application of the LLMC Convention only those claims actually brought under the CLC,⁶⁸ because of the introduction of the words 'within the meaning of' became a much wider provision. It actually excludes from the ambit of the LLMC Convention any claim within the meaning of the CLC whether this is applicable or not.⁶⁹

It must also be noted that not all claims relating to oil pollution damage are excluded from the Convention. For example, claims for pollution damage caused by bunker oil spills will continue, *prima facie*, to be subject to limitation under the LLMC Convention as these do not fall within the meaning of pollution damage under the CLC (unless they relate to bunker spills of a tanker). It is noteworthy that these claims are now primarily regulated by the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.⁷⁰

⁶³ See *The Aegean Sea* [1998] 2 Lloyd's Rep 39, 55.

⁶⁴ See further Martínez Gutiérrez (n 1) 47–8, 104–5 and Griggs, Williams, and Farr (n 29) 26–7.

⁶⁵ It would seem to follow that if the relevant State is not a party to the Salvage Convention and thus unable to apply its provisions, a claim for special compensation, where the salvage attempts have been unsuccessful, would be subject to limitation. See Martínez Gutiérrez (n 1) 104.

⁶⁶ For a discussion on the Salvage Convention, see Chapter 18 of this Volume.

⁶⁷ For a discussion on the CLC, see Chapter 9 of Volume III of this Manual.

⁶⁸ See Griggs, Williams, and Farr (n 29) 27–8.

⁶⁹ *Ibid.* See Martínez Gutiérrez (n 1) 48–9.

⁷⁰ For a discussion on the Bunkers Convention, see Chapter 9 of Volume III of this Manual and for an analysis of its relationship with the LLMC Convention, see Martínez Gutiérrez (n 1) ch. 7.

Limitation of Liability for Maritime Claims

22.4.3 Nuclear damage claims

The LLMC Convention does not apply to claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage.⁷¹ The use of the words ‘subject to’ limits this exclusion to those claims which are governed by an international convention or national legislation. Consequently, if the relevant State is not a party to an international convention in this field and it does not have domestic legislation prescribing separate limits of liability or preventing limitation, claims for nuclear damage would remain subject to the provisions of the LLMC Convention.⁷²

Claims against the shipowner of a nuclear ship for nuclear damage are also excluded from the application of the Convention.⁷³

22.4.4 Claims by servants of the shipowner or salvor

Article 3(e) provides that claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations (including claims of the servant’s heirs, dependants, or any other person entitled to make such claims) are excluded from limitation of liability if the law governing the relevant contract of service provides for unlimited liability in respect of such claims, or such law only entitles the shipowner or salvor to limit his liability to an amount greater than that prescribed by the Convention. It is noteworthy that Article 3(e) does not codify an automatic exclusion from the right of limitation. If, for example, the law of the contract does not include any provision preventing limitation of liability or prescribing higher limits than those prescribed by the Convention, the provisions of the Convention would apply to such claims.⁷⁴

22.4.5 Claims excluded by reservations

In accordance with Article 18 of the amended LLMC Convention States are allowed, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, to reserve the right:

- (a) to exclude the application of Article 2, paragraphs 1(d) and (e);
- (b) to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or of any amendment or protocol thereto.

The Convention does not allow any other reservations to the substantive provisions of this Convention.⁷⁵

⁷¹ Art. 3(c).

⁷² See Martínez Gutiérrez (n 1) 49 and Griggs, Williams, and Farr (n 29) 29.

⁷³ Art. 3(d).

⁷⁴ See further Martínez Gutiérrez (n 1) 50 and Griggs, Williams, and Farr (n 29) 29–30.

⁷⁵ For a detailed discussion on this point, see Martínez Gutiérrez (n 1) 91–102 and 105–6.

Norman A Martínez Gutiérrez

22.5 Conduct Barring Limitation

Article 4 of the LLMC Convention provides that ‘A person liable 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’.

It is important to note that, for the shipowner to lose his right of limitation, the person challenging the right to limit must prove that the shipowner’s conduct falls within the conduct prescribed in Article 4. Thus, to be able to understand the full ramifications of this Article, it is necessary to break it down and understand the meaning of several of the terms used therein.

22.5.1 Personal act or omission

Article 4 speaks of the personal act or omission of the ‘person liable’, which necessarily refers to one of the persons listed in Article 1. What is important to understand here is that, to defeat the right to limit, it is necessary to establish that the act or omission that caused the loss was on the part of the person invoking the right to limit,⁷⁶ and that such person is one of those mentioned in Article 1.⁷⁷ An exception to this is found in relation to the liability insurer, since he is only entitled to the benefits of the Convention ‘to the same extent as the assured himself’.⁷⁸ Consequently, the personal act of the shipowner would not only prevent him from limiting his liability but also his insurer.

22.5.2 Intent

The first hurdle to clear under Article 4 is to prove whether the person liable acted with intent or *mens rea* to cause the loss. To succeed under this heading it must be proved, not only that the defendant knowingly and intentionally committed the wrongful act in question, but also that, when he did so, he was at all times aware that it was wrong.⁷⁹ This would require something in the line of attempted suicide,⁸⁰ scuttling, or deliberately colliding with another vessel or object.⁸¹

⁷⁶ For a discussion on the attribution of the acts of others as the ‘personal act’ of the person liable, see Martínez Gutiérrez (n 1) 57–61; Griggs, Williams, and Farr (n 29) 31–4; and Mandaraka-Sheppard (n 29) 768–74.

⁷⁷ *The Leerort* [2001] 2 Lloyd’s Rep 291, 294.

⁷⁸ Art. 1(6).

⁷⁹ *Horabin v British Overseas Airways Corp.* [1952] 2 Lloyd’s Rep 450, 459.

⁸⁰ See *Gurtner v Beaton* [1993] 2 Lloyd’s Rep 369, 387.

⁸¹ *Derrington and Turner* (n 5) 259.

Limitation of Liability for Maritime Claims

22.5.3 ‘Recklessness’ and ‘with knowledge’

If unable to prove intent, a person challenging the right to limit might still succeed if able to establish both a reckless conduct and knowledge that the relevant loss would probably result.⁸²

Courts in many countries have devoted ample time to identify what would amount to a reckless conduct.⁸³ In fact, at risk of oversimplifying this delicate head of liability, it may be suggested that, in general, a conduct may be considered reckless when a person acts in a manner which indicates a decision to run the relevant risk despite the probability of the occurrence or a mental attitude of indifference to the existence of such risk. However, it seems that in implementing Article 4 of the LLMC Convention a more extreme form of recklessness would be required.⁸⁴ It would thus not suffice to prove that the conduct could ‘possibly’ lead to the loss, but that it would ‘probably’ lead to it.⁸⁵

Regarding ‘knowledge’, it must be noted that the term, as used in Article 4, is intended to mean ‘actual knowledge’, i.e. something the relevant person actually knew,⁸⁶ and not ‘constructive knowledge’, i.e. something the relevant person ought to have known. Furthermore, actual knowledge is to be used here ‘in the sense of appreciation or awareness at the time of the conduct in question, that it will probably result in the type of damage caused. Nothing less will do.’⁸⁷ In this respect, the LLMC Convention calls for the application of a subjective test, i.e. proof of the actual state of mind of the person liable.⁸⁸ Otherwise, the Convention could have used the well-known phrase ‘when he knew or ought to have known’ instead of ‘with knowledge’.⁸⁹

⁸² *The MSC Rosa M* [2000] 2 Lloyd’s Rep 399, 401.

⁸³ See *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693, 699; *R v Caldwell* [1981] 1 All ER 961, 967; *Nugent and Killick v Michael Goss Aviation Ltd and Others* [2000] 2 Lloyd’s Rep 222, 227; and *The Pembroke* [1995] 2 Lloyd’s Rep 290, 297. For decisions of Dutch courts on this point, see Hoge Raad, 5 January 2001, S&S 2001, 61 and 62; Hoge Raad, 22 February 2002, S&S 2002, 94; Hoge Raad, 11 October 2002, S&S 2003, 61; Gerechtshof’s-Gravenhage, *The Pioneer Onegi*, 22 February 2002, S&S 2002, 60; and Rechtbank Amsterdam, *The Arcturus*, 12 May 2004, S&S 2004, 88 (cited in T van der Valk, ‘The Netherlands’ in Griggs, Williams, and Farr (n 29) 317, 319). For examples of US courts’ interpretation of what constitutes ‘reckless’ conduct under the Warsaw Convention, see *KLM v Tuller*, 292 F2d 775 (DC Cir. 1961) and *Butler v Aeromexico*, 774 F2d 429 (11th Cir. 1985).

⁸⁴ Perhaps in the traditional use of the term—as expressed by Lord Hailsham LC in *R v Lawrence* [1981] 1 All ER 974, 978—which applies ‘to a person or conduct evincing a state of mind stopping short of deliberate intention, and going beyond mere inadvertence ...’.

⁸⁵ See Eveleigh LJ’s interpretation of Art. 25 of the Warsaw Convention in *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693, 700.

⁸⁶ *The MSC Rosa M* [2000] 2 Lloyd’s Rep 399, 401; *Morrison v Peacock & Roslyndale Shipping Co. Pty Limited* (2000) 50 NSWLR 178; *The Saint Jacques II* [2003] 1 Lloyd’s Rep 203, 207.

⁸⁷ *Nugent and Killick v Michael Goss Aviation Ltd. and Others* [2000] 2 Lloyd’s Rep 222, 229.

⁸⁸ For a discussion on how the courts will determine that actual knowledge (i.e. what was the actual state of mind of the person liable), see Martínez Gutiérrez (n 1) 65–7.

⁸⁹ *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693, 699.

Norman A Martínez Gutiérrez

At this point it must be emphasized that ‘recklessness’ and ‘knowledge’ are separate but cumulative requirements, i.e. both need to be proved.⁹⁰ Thus, as Auld LJ explained ‘[a]s a matter of proof the two will often stand or fall together ...’.⁹¹

22.5.4 Loss

The term ‘loss’, as used in Article 4, is intended to cover all the claims for which the right of limitation of liability is available. Therefore, it must include claims for loss of life or personal injury, loss of or damage to property, consequential loss, or any other claim listed in Article 2.

22.5.5 Such loss

The inclusion of the words ‘such loss’ in Article 4 intends to confine the loss of right to limit liability to a very restricted number of cases. Liability conventions which refer to ‘damage’ as opposed to ‘such damage’ have been interpreted as requiring proof that the damage complained of is of the kind of damage known to be the probable result of the conduct of the person liable.⁹² However, considering that the LLMC Convention uses the words ‘such loss’ (as opposed to ‘damage’) it is suggested that a stricter interpretation should be adopted. As Lord Phillips MR explained, Article 4 ‘requires foresight of the very loss that actually occurs, not merely of the type of loss that occurs’.⁹³

22.5.6 The burden of proof

The burden of invoking and proving Article 4 lies upon the person challenging the right to limit liability.⁹⁴ Indeed, it may be argued that once it is established that the claim falls under Article 2 ‘it is virtually axiomatic that the defendant shipowner will be entitled to limit his liability’,⁹⁵ and that unless there is ‘any allegation of intent, *the person challenging the right to limit* must establish both reckless conduct and knowledge that the relevant loss would probably result’.⁹⁶ As explained by Clarke J, ‘[t]he shipowner merely has to establish that the claim falls within art 2 of the convention. Once he establishes that, he is entitled to a decree limiting his liability, *unless the claimant proves* the facts required by Article 4’.⁹⁷

⁹⁰ *The Saint Jacques II* [2003] 1 Lloyd’s Rep 203, 208.

⁹¹ *Nugent and Killick v Michael Goss Aviation Ltd and Others* [2000] 2 Lloyd’s Rep 222, 227.

⁹² See *Goldman v Thai Airways International Ltd.* [1983] 3 All ER 693, 698; *Singapore Airlines Ltd & Anor v Fujitsu Microelectronics (Malaysia) Sdn Bhd & Ors* [2001] 1 SLR 241; *Nugent and Killick v Michael Goss Aviation Ltd and Others* [2000] 2 Lloyd’s Rep 222, 229; and *Sellers Fabrics Pty Limited and Anor v Hapag-Lloyd AG* [1998] NSWSC 646.

⁹³ *The Leerort* [2001] 2 Lloyd’s Rep 291, 294–5. On this point, see also *The Saint Jacques II* [2003] 1 Lloyd’s Rep 203, 210.

⁹⁴ *The Bowbelle* [1990] 1 Lloyd’s Rep 532, 535.

⁹⁵ *The Leerort* [2001] 2 Lloyd’s Rep 291, 295.

⁹⁶ *The MSC Rosa M* [2000] 2 Lloyd’s Rep 399, 401 (emphasis added).

⁹⁷ *The Capitan San Luis* [1994] 1 All ER 1016, 1023 (emphasis added).

Limitation of Liability for Maritime Claims

In the light of the foregoing discussion on the different elements of the conduct prescribed by Article 4, it may be asserted that it is only in exceptional cases that the claimant has a real prospect of defeating the shipowner's right of limitation.⁹⁸ However, although it may be very difficult to prove the conduct prescribed by Article 4, unlike what was thought back in 1976 when the LLMC Convention was adopted, the right to limit liability is not an 'unbreakable right' and there have been several occasions in which claimants have been successful in preventing the person liable from limiting his liability.⁹⁹

22.6 Counterclaims

Article 5 of the LLMC Convention deals with counterclaims by providing that:

Where a person entitled to limitation of liability under the rules of this Convention has a claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Convention shall only apply to the balance, if any.

To be able to implement this provision, it is necessary first to establish that the parties involved are persons entitled to limitation of liability under the Convention and that their claims arose out of the same occurrence. Once this is established, the claims must be set off against each other and if, after deducting the smaller claim from the larger claim there is a balance, the right of limitation of liability shall only apply to that balance. This provision may very well be useful in cases of a collision between two vessels when they are both to blame.¹⁰⁰

22.7 The Limits of Liability

The limits of liability are set out in Article 6–8 of the LLMC Convention. While Article 6 lays down the general limits of liability, Article 7 prescribes separately the limits of liability for passenger claims. Article 8 then complements these two Articles by specifying the unit of account with which the relevant limits of liability are to be calculated.¹⁰¹

⁹⁸ *The Saint Jacques II* [2003] 1 Lloyd's Rep 203, 209.

⁹⁹ For a discussion on this point, see Martínez Gutiérrez (n 1) 73–5.

¹⁰⁰ The question of whether this provision may apply to counterclaims between a shipowner and a salvor for damage caused during a salvage service has been interestingly discussed in Griggs, Williams, and Farr (n 29) 41–3; Mandaraka-Sheppard (n 29) 785; and Derrington and Turner (n 5) 267.

¹⁰¹ The unit of account referred to in Art. 8 is the SDR as defined by the International Monetary Fund (IMF). Art. 8 also provides separate limits of liability for States which are not members of the IMF and whose law does not permit the use of the SDR.

22.7.1 General limits of liability

Article 6 of the LLMC Convention sets out the limits of liability in a sliding scale under which the amount per ton decreases in stages as the tonnage increases (thus recognizing that small ships can cause major damage).¹⁰² These limits of liability are to be calculated based on the tonnage of the relevant ship,¹⁰³ i.e. the ship in relation to which the causative negligence is proved.¹⁰⁴

As mentioned earlier,¹⁰⁵ the limits of liability included in Article 6 of the LLMC Convention were modified by Article 3 of the 1996 LLMC Protocol and a further increase to these limits was agreed by the IMO Legal Committee in 2012. Therefore this section will discuss the limits of liability as amended by the 1996 LLMC Protocol and will include the latest 2012 limits of liability.

Article 6 of the amended LLMC Convention envisages the calculation of two limitation amounts—one for claims for loss of life or personal injuries, or ‘personal claims’, and another for any other claims. Article 6(1) of the amended Convention provides as follows:

The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:

- (a) in respect of claims for loss of life or personal injury,
 - (i) 2 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each ton from 2,001 to 30,000 tons, 800 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 600 Units of Account; and
 - for each ton in excess of 70,000 tons, 400 Units of Account,
- (b) in respect of any other claims,
 - (i) 1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
 - (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):
 - for each ton from 2,001 to 30,000 tons, 400 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 300 Units of Account; and
 - for each ton in excess of 70,000 tons, 200 Units of Account.

Although Article 6(1) provides for the calculation of two separate limitation amounts (one for personal claims and one for any other claims), Article 6(2)

¹⁰² See I Arroyo Martínez, *Curso de Derecho Marítimo* (2nd edn, Thomson—Civitas, 2005) 299.

¹⁰³ For this purpose, Art. 6(5) provides that ‘the ship’s tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex 1 of the International Convention on Tonnage Measurement of Ships, 1969’.

¹⁰⁴ For a discussion on the calculation of the relevant tonnage for limitation purposes in towage or salvage situations, see Martínez Gutiérrez (n 1) 76–9 and NA Martínez Gutiérrez, ‘The Tug and Tow “Flotilla” and Limitation of Liability’ (2010) 8(2) *Benedict’s Maritime Bulletin* 130.

¹⁰⁵ See Section 22.1.

Limitation of Liability for Maritime Claims

includes what is known as the ‘overspill provision’. In accordance with Article 6(2), if the amount calculated in accordance with Article 6(1)(a) is insufficient to pay the personal claims in full, the unpaid balance may be claimed against the amount calculated under Article 6(1)(b) which is originally intended for ‘other claims’. In so doing, the unpaid balance of the personal claims will rank rateably with all other claims.

Several authors have devoted time to addressing the question of whether the overspill provision only applies when the incident has given rise to both types of claims or whether the fund for other claims can be established even if there are no property claims and have reached diverging conclusions.¹⁰⁶ The text of the Convention itself is not very clear on this point, but from a study of the *travaux préparatoires* of the Convention,¹⁰⁷ it can be seen that during the Conference’s twenty-seventh meeting of the Committee of the Whole it was made clear that the consensus reached was that personal claims not met in full from the limitation amount calculated for such claims would be met from the limitation amount calculated for any other claims ‘even if there were no property claims, or the total amount of the property claims did not exceed the limit for such claims’.¹⁰⁸ It may therefore be suggested that where an incident gives rise to claims for loss of life only, and the said claims cannot be paid out in full from the limitation amount for ‘personal claims’, the amount reserved for ‘any other claims’ is also available for the satisfaction of the unpaid balance. Where, on the other hand, the incident has given rise to both personal and property claims, the limitation amount reserved for ‘any other claims’ is available for the satisfaction of the unpaid balance of the personal claims, but, in accordance with Article 6(2), such unpaid balance will rank rateably with all other claims.¹⁰⁹

Although from the preceding discussion on Article 6(2) it would seem that the unpaid balance of personal claims has no priority whatsoever over ‘other claims’ when competing in the amount calculated under Article 6(1)(b), there may be cases where these claims would indeed enjoy preferential treatment. Under Article 6(3), States Parties may provide in their national law that, without prejudice to the right of claims for loss of life or personal injury according to Article 6(2), claims in respect of damage to harbour works, basins and waterways,

¹⁰⁶ See Griggs, Williams, and Farr (n 29) 49–50; C Hill, *Maritime Law* (6th edn, Informa Professional, 2003) 411–12; W Tetley, *International Maritime and Admiralty Law* (Editions Yvon Blais, 2002) 293–4; NJJ Gaskell, C Debatista, and RJ Swatton, *Chorley and Giles’ Shipping Law* (8th edn, Pitman, 1987) 413; and Gabaldón García and Ruiz Soroa (n 50) 841.

¹⁰⁷ See F Berlingieri, *The Travaux Préparatoires of the LLMC Convention 1976 and of the Protocol of 1996* (CMI, 2000) 151–202.

¹⁰⁸ See LEG/CONF.5/C.1/SR.27 of 18 November 1976 in International Maritime Organization, *Official Records of the International Conference on the Limitation of Liability for Maritime Claims, 1976* (IMO, 1983) 411–12.

¹⁰⁹ See Martínez Gutiérrez (n 1) 80–3.

Norman A Martínez Gutiérrez

and aids to navigation shall have such priority over other claims under Article 6(1) (b) as is provided by that law. Therefore, a State taking advantage of the option given by Article 6(3), will actually not only be giving priority to personal claims, but will be relegating ‘other claims’, to a third hierarchical level, which would only be satisfied after the claims for harbour works, basins and waterways, and aids to navigation have been settled.¹¹⁰

A discussion on the general limits of liability cannot be complete without mentioning that on 19 April 2012 the IMO Legal Committee adopted Resolution LEG.5(99) on the Adoption of Amendments of the Limitation Amounts in the Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims, 1976.¹¹¹ In accordance with this Resolution, the new limits of liability of Article 6(1) of the amended LLMC Convention are as follows:

- (a) in respect of claims for loss of life or personal injury,
 - (i) 3.02 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each ton from 2,001 to 30,000 tons, 1,208 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 906 Units of Account; and
 - for each ton in excess of 70,000 tons, 604 Units of Account,
- (b) in respect of any other claims,
 - (i) 1.51 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
 - (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):
 - for each ton from 2,001 to 30,000 tons, 604 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 453 Units of Account; and
 - for each ton in excess of 70,000 tons, 302 Units of Account.

This amendment to the Protocol’s limits of liability was notified by the IMO to all States Parties in June 2012 and, in accordance with Article 8 of the 1996 LLMC Protocol (under the tacit acceptance procedure), the new limits of liability became applicable thirty-six months after the date of their notification, i.e. on 8 June 2015.¹¹²

22.7.2 Limitation of liability for passenger claims

Article 7 of the amended LLMC Convention establishes a global limit of liability specifically designated to cover claims arising on any distinct occasion for loss of

¹¹⁰ Ibid, 83–4.

¹¹¹ The adopted text of the Resolution, originally contained in LEG 99/WP.8, is found as Annex 2 to LEG 99/14 of 24 April 2012.

¹¹² See Martínez Gutiérrez (n 16).

Limitation of Liability for Maritime Claims

life or personal injury to passengers.¹¹³ This limit of liability is completely separate and distinct from that established under Article 6(1)(a).¹¹⁴

To be able to benefit from this fund, the claimant must fall within the definition of passenger under Article 7(2). The claim must, thus, be made by, or on behalf of, a person carried in the relevant ship either ‘under a contract of passenger carriage’¹¹⁵ or ‘who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.’¹¹⁶

It is noteworthy that, unlike Article 6 where the limitation amounts are calculated by reference to the ship’s tonnage, the amount prescribed by Article 7 is calculated by reference to the number of passengers the ship is authorized to carry. Article 7 of the amended LLMC Convention provides that:

In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship’s certificate.¹¹⁷

Notwithstanding the increase in the limits brought about by the 1996 LLMC Protocol, there were States which retained a policy of unlimited liability for passenger claims and pressed for the inclusion of an opt-out provision in the Protocol. In this respect, as a result of arduous negotiations, Article 6 of the 1996 LLMC Protocol introduced a new paragraph *3bis* in Article 15 of the Convention, which provides that:

Notwithstanding the limit of liability prescribed in paragraph 1 of Article 7, a State Party may regulate by specific provisions of national law the system of liability to be applied to claims for loss of life or personal injury to passengers of a ship, provided that the limit of liability is not lower than that prescribed in paragraph 1 of Article 7. A State Party which makes use of the option provided for in this paragraph shall inform the Secretary-General of the limits of liability adopted or of the fact that there are none.

The effect of this provision is significant. By allowing States to impose higher limits of liability, the 1996 LLMC Protocol moves away from the aim of the international unification of the law relating to limitation of liability.¹¹⁸ This Article has also

¹¹³ The particular liability regime governing passenger claims is codified in the Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (Athens Convention) (see Chapter 14 in this Volume).

¹¹⁴ With the creation of a separate limitation amount, the LLMC Convention seeks to avoid any prejudice which passenger claims may have suffered if they were to compete with other claims under the limits prescribed in Art. 6.

¹¹⁵ Art. 7(2)(a).

¹¹⁶ Art. 7(2)(b).

¹¹⁷ See the 1996 LLMC Protocol, Art. 4.

¹¹⁸ See Martínez Gutiérrez (n 1) 110.

Norman A Martínez Gutiérrez

contributed to the controversy in the implementation of the 2002 Protocol to the Athens Convention.¹¹⁹

22.8 Aggregation of Claims

Article 9 of the LLMC Convention makes it clear that the persons listed in Article 1 are entitled to limit their liability in accordance with Articles 6 and 7 in respect of the aggregate of all claims which arise on any distinct occasion.¹²⁰ Furthermore, it is the intention of this Article to ensure that the limits of liability calculated in accordance with Articles 6 and 7 shall apply to the aggregate liability of all the persons listed in Article 1 for claims which arise on any distinct occasion.

The most important issue in relation to this Article is therefore to determine what constitutes a ‘distinct occasion’, which is particularly difficult when two incidents occur almost simultaneously. Ultimately, this is a question of fact¹²¹ to be approached afresh in each case and courts have identified cases which fall on both sides of the fence. For example, in the cases of *The Rajah*,¹²² *The Creadon*,¹²³ *The Harlow*,¹²⁴ and *The Ant*¹²⁵ the courts held that, since the two damages were caused by the same act of negligence, the occasions were not distinct. On the other hand, in the cases of the *Schwan*,¹²⁶ *WH Tucker & Co., Ltd (‘Fastnet’) v Longney Lass’ and Others*,¹²⁷ *The Lucullite*,¹²⁸ and *The APL Sydney*¹²⁹ the courts found that, since there had been an intervening act of negligence between the two damages, the occasions were distinct.

A detailed study of the mentioned cases may lead to the conclusion that lapse of time is not the test of whether two damages occurred in one or more distinct occasions. The actual test to determine whether two damages occurred in one distinct occasion or not, is whether the second damage was caused by a separate and distinct act of negligence from that which caused the first; or, in other words, whether the second damage was a necessary consequence of the negligent act which produced the first. As explained by Lord Anderson in *The Lucullite*:

... the tests which show that in a case like the present the occasions were distinct seem to me to be these: (a) that there were distinct acts of negligence whereby the

¹¹⁹ For a detailed study on the relationship between the LLMC Convention and the Athens Convention, see Martínez Gutiérrez (n 1) ch. 7.

¹²⁰ For a detailed discussion on aggregation of claims, see Berlingieri (n 107) 273–9.

¹²¹ See *The Schwan*, 7 Asp MLC 347, 352 (1892).

¹²² 1 Asp MLC 403 (1872).

¹²³ 5 Asp MLC 585 (1886).

¹²⁴ (1922) 13 LIL Rep 311.

¹²⁵ (1924) 19 LIL Rep 211.

¹²⁶ 7 Asp MLC 347 (1892).

¹²⁷ (1922) 10 LIL Rep 816.

¹²⁸ (1929) 33 LIL Rep 186.

¹²⁹ [2010] FCA 240.

Limitation of Liability for Maritime Claims

two ships were respectively injured; and (b) that the later act or acts of negligence whereby the second vessel was injured were not necessitated or rendered inevitable by the earlier. These seem to me to be the tests of whether or not the occasions were distinct.¹³⁰

22.9 The Limitation Fund

Unlike some liability conventions which require the constitution of a limitation fund,¹³¹ the LLMC Convention provides that limitation of liability may be invoked even without the constitution of a limitation fund.¹³² However, the Convention allows States Parties to provide in their national law that limitation of liability in respect of actions brought in their respective courts to enforce a claim subject to limitation shall be subject to the establishment of a limitation fund.¹³³

22.9.1 Constitution and distribution of the fund

The specific rules relating to the constitution and distribution of the fund, and all rules of procedure in connection therewith, are to be governed by the law of the State Party in which the fund is constituted.¹³⁴ However, the text of the Convention makes it possible to make the following broad statements on this point which will apply across the board.

A limitation fund, equivalent to the amounts prescribed in Articles 6 and 7 (as may be applicable),¹³⁵ may be constituted by any person alleged to be liable¹³⁶ with the court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation.¹³⁷ The fund may be constituted either by depositing the aforesaid sum or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted,¹³⁸ and

¹³⁰ (1929) 33 LIL Rep 186, 189.

¹³¹ See e.g. the CLC (as amended), Art. V(3) and the HNS Convention (as amended), Art. 9(3).

¹³² Art. 10(1).

¹³³ *Ibid.*

¹³⁴ Art. 14.

¹³⁵ The fund shall in addition include any interest due from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. However, the LLMC Convention does not stipulate the rate at which interest is to be paid, leaving this to be determined by the national legislation of the relevant State Party. See Griggs, Williams, and Farr (n 29) 68.

¹³⁶ It is important to note that, in accordance with Art. 11(3), a fund constituted by one of the persons mentioned in Art. 9(1)(a), (b), or (c) or Art. 9(2) or his insurer will be deemed constituted by all persons mentioned in the said Article.

¹³⁷ Art. 11(1). This Article has been interpreted as allowing the person seeking to limit his liability to choose a court in a State Party and invoke the right of limitation by a limitation action before the actual action for liability is brought. See Griggs, Williams, and Farr (n 29) 66 and Mandaraka-Sheppard (n 29) 782–3, 786.

¹³⁸ Art. 11(2). It is curious that, although numerous countries throughout the world, including States which are parties to the LLMC Convention, and States which are not, readily accept Letters of Undertaking (LOUs) by P&I Clubs as an acceptable method of constituting limitation funds,

Norman A Martínez Gutiérrez

will be available exclusively for the payment of claims in respect of which limitation of liability can be invoked.¹³⁹

Any constituted fund will be distributed among the claimants in proportion to their established claims against the fund.¹⁴⁰ In this respect, it must be noted that if the person liable (or his insurer) has settled a claim against the fund before the fund is distributed, such person acquires by subrogation, up to the amount he has paid, the rights which the person so compensated would have enjoyed under the Convention.¹⁴¹ On the other hand, if the person liable establishes that he may be compelled to pay, at a later date, compensation in relation to a claim arising out of the same occasion in respect of which the fund was constituted, the court with which the fund was constituted may order that a sufficient sum be provisionally set aside to enable payment of compensation for that claim to be made from the constituted fund at a later date.¹⁴²

22.9.2 Bar to other actions

When a fund has been constituted in accordance with the Convention, any person having made a claim against the fund cannot exercise any right in respect of such claim against any other assets of a person by or on behalf of whom the fund was constituted.¹⁴³ Moreover, Article 13(2) stipulates that once a limitation fund has been constituted, the competent court *may* order the release of any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of such State (provided it is a State Party) in relation to a claim which may be raised against the fund. However, the competent court shall always order such release if the limitation fund has been constituted:

- (a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
- (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or

until recently the position in the United Kingdom was that a fund had to be constituted by means of a cash deposit (see Griggs, Williams, and Farr (n 29) 69). In fact, in *Cosmotrade SA and Kairos Shipping Ltd & Others* [2013] EWHC 1904 (Comm) the judge rejected an LoU given by the shipowner's P&I Club as an acceptable guarantee to constitute a limitation fund and held that 'without a specific statutory provision that a guarantee is acceptable [in the UK] the rule remains that a fund may only be constituted by making a payment in court'. However, in *Kairos Shipping Ltd and another v Enka & Co. LLC and Others* [2014] EWCA Civ 217, the Court of Appeal reversed this decision and declared that 'as a matter of law, Owners are entitled to constitute a limitation fund under the 1976 [LLMC] Convention, by means of the production of a guarantee'.

¹³⁹ Art. 11(1). This would not seem to include claims for legal costs: see *Thompson and Another v Masterton and Another* [2004] 1 Lloyd's Rep 304, 307 and *The Robert Whitmore* [2004] 2 Lloyd's Rep 47, 53. See also Martínez Gutiérrez (n 1) 52–4 and Griggs, Williams, and Farr (n 29) 72–3.

¹⁴⁰ Art. 12(1).

¹⁴¹ Art. 12(2).

¹⁴² Art. 12(4).

¹⁴³ Art. 13(1).

Limitation of Liability for Maritime Claims

- (c) at the port of discharge in respect of damage to cargo; or
- (d) in the State where the arrest is made.¹⁴⁴

It is noteworthy that the rules laid down in Article 13 are only applicable if the claimant may bring a claim against the limitation fund before the court administering that fund and the fund is actually available and freely transferable in respect of that claim.¹⁴⁵

22.10 The Current State of the Amended LLMC Convention

The original LLMC Convention envisaged that the IMO may convene a diplomatic conference to revise or amend the Convention.¹⁴⁶ However, to avoid the painstaking and expensive task of convening such conference, in circumstances where only the limits of liability are to be increased, the 1996 LLMC Protocol introduced a more expeditious way to do this through the IMO Legal Committee.¹⁴⁷

Notwithstanding the fact that several issues have been identified as being in need of revision,¹⁴⁸ the international community considered that for now it was only necessary to increase the limits of liability. In fact, as already mentioned, the 1996 limits of liability were increased through an IMO Legal Committee Resolution in 2012. Unfortunately, this Resolution left some loose ends. For example, the Resolution does not amend the limits of liability for States which are not Members of the IMF and which laws prevent them from using the SDR as a monetary unit.¹⁴⁹ Also, the Resolution does not deal with an increase to the limit of liability for passenger claims to bring it in line with the 2002 Protocol to the Athens Convention.¹⁵⁰ It is therefore hoped that the IMO Legal Committee will continue its work on this field of law to deal with the outstanding issues and to guarantee the stability of the concept of global limitation of liability for maritime claims. However, we may still be a long way from seeing an overhaul of the LLMC Convention to cater for the other issues found wanting.

¹⁴⁴ Art. 13(2).

¹⁴⁵ Art. 13(3). See Griggs, Williams, and Farr (n 29) 78 and Mandaraka-Sheppard (n 29) 783–4.

¹⁴⁶ Art. 20.

¹⁴⁷ 1996 LLMC Protocol, Art. 8.

¹⁴⁸ See Martínez Gutiérrez (n 1) 201–26.

¹⁴⁹ See Martínez Gutiérrez (n 16) 355–6.

¹⁵⁰ *Ibid.*, 352–5.