CHARTERERS’ RIGHT TO LIMIT LIABILITY

Introduction

1976 Limitation Convention

Article 1(1) provides that “Shipowners … may limit their liability in accordance with the rules… set out in Article 2.”

Article 1(2) provides that “The term “Shipowner” shall mean the owner, charterer, manager and operator of a seagoing ship.”

Article 2 lists the claims which are subject to limitation.

The extent of the right of a charterer to limit liability was examined in the High Court in London in the case of the “Aegean Sea” (1998) 2 Lloyd’s Rep.39.

This case concerned a vessel which had loaded a cargo of crude oil at Sullom Voe pursuant to a voyage charter on the Asbatankvoy form for discharge at La Coruna in Spain. Whilst entering the port the vessel grounded, subsequently exploded and became a total loss losing much of her crude oil cargo into the sea.

The owners claimed that the vessel had been sent to an unsafe port and sought damages from charterers in London arbitration for the loss of the ship, the loss of the bunkers and unpaid freight. They further sought an indemnity in respect of their liability pursuant to the Civil Liability Convention for property damage, clean up expenses and the costs of preventative measures arising out of the oil spill. Further they sought an indemnity in respect of their potential liability to Cristal and the reimbursement of special compensation paid to the salvors pursuant to a Lloyd’s Open Form Salvage Agreement which had been entered into. The total claims against charterers came to US$65 million. The vessel’s limitation fund was approximately US$12 million. Whilst the scope of the various claims were wide ranging there was a common factor in that the owner would not have been able to limit his liability under the 1976 Convention for any of these claims. The first three claims represented the Owners own losses and were therefore claims over which the owner had no opportunity to raise a limitation defence. The next two claims (the claim in relation to CLC and Cristal) were excepted from limitation under the 1976 Convention (Article 3) but the owner now sought to recover these items from the charterers by way of damages.

The issue for the Court was whether a charterer could exercise a right to limit under the 1976 Convention in circumstances where an owner could not. The decision of the High Court was that a charterer was not entitled to limit in such circumstances. Mr Justice Thomas felt that it had never been the intention of the Convention that the amount set up in a limitation fund could be reduced by direct claims by owners against charterers, as the result of such a finding would be to diminish the fund for those truly entitled to claim. In his view the reference to “charterer” in the Convention referred to the situation where a charterer was “standing in the shoes of an owner” and facing claims as such. In other words that a charterer could only limit his liability in circumstances where the charterer was sued by a third party as if he was the owner.

In the “CMA Djakarta” the facts were as follows:

In July 1999, “CMA Djakarta” was a few hundred miles off the coast of Cyprus when there was an explosion on deck followed by a fire. Despite significant efforts, the
crew could not control the fire, and further explosions took place. The vessel was abandoned and subsequently grounded off the coast of Egypt where salvors took over. The fire was eventually put out and the vessel was towed to Malta as a port refuge and subsequently to Croatia for repairs.

There were detailed investigations into the cause of the casualty, followed by a London arbitration between owners and charterers that held that the fire and explosion on deck had been caused by a cargo of bleaching powder (a form of calcium hypochlorite), which had self-combusted, possibly as a result of impurities in the cargo, either caused during the manufacturing process or as a result of contamination during transport.

It was held in the arbitration that this amounted to a breach of the Charterparty by charterers and the owners were awarded the cost of repairs to the “CMA Djakarta”, together with all ancillary losses, such as costs of salvage and an indemnity for cargo claims.

The arbitrators found themselves bound by the decision of Mr Justice Thomas in the “Aegean Sea” with the result that the charterers had no right to limit. The charterers appealed this one aspect of the London Arbitration Award, the appeal was heard in the High Court before Mr Justice Steel. He agreed with the decision of Mr Justice Thomas in the “Aegean Sea”. The person entitled to limit under the Convention was the “Shipowner” and although the “Shipowner” was defined as meaning “the owner, charterer, manager or operator of a sea-going ship”, under the 1976 Limitation Convention, a charterer only had the right to limit as against third parties when acting in the capacity of an owner.

The decision of Mr Justice Steel was then taken to the Court of Appeal. The Court held that, in theory, a time-charterer could limit as against an owner under the Convention. The Court found that the rationale applied by Steel and Thomas J was misfounded in law, and that the charterer’s right to limit does not arise because he stands in the shoes of the Shipowner, but as of right by application of the Convention.

Essentially, the Court found that the person seeking to limit can limit in respect of all the claims mentioned in Article 2. Additionally, it noted that Article 2(2) provides that most of the claims set out in Article 2(1) are subject to limitation even if brought by way of recourse or for an indemnity under a contract or otherwise.

Accordingly, in deciding whether a charterer can limit his liability, it is first necessary to ascertain whether the claims against a charterer by an owner fall within Article 2. The main claim that was brought in the “CMA Djakarta” was for the cost of repairs to the ship. The Court held that the words in Article 2(1)(a) did not include loss of or damage to the ship itself. The Court also held that the amount that the owners had to pay by way of salvage did not fall within Article 2 and equally that the owners’ claim to be indemnified against their liability to contribute in general average would not fall within Article 2. It followed that the charterer could not limit in respect of any of these heads of claim.

In practice, therefore, the Court’s decision that a charterer could limit against an owner, has little effect when considering many of the most common claims an owner is likely to make, following a casualty, against a charterer. Although not considered in the case, pollution claims also fall under a separate convention and therefore are outside Article 2.
The Court of Appeal, however, highlighted one type of claim which did fall within Article 2, namely an indemnity for any cargo claim that an owner has had to pay, since such a claim falls within “claims in respect of ...loss of or damage to property ...occurring on board...”. Of course, if a charterer was sued by cargo interests direct, they would no doubt seek to limit their liability to those cargo interests under the Convention in any event.

Accordingly, it is possible that an owner, whilst he may be able to establish a breach of the charterparty by the charterer, might not be able to recover from the charterer the full amount that he has had to pay to a cargo interest in another jurisdiction.

From an examination of the Travaux Préparatoires to the LLMC ’76, it is evident that the issues raised by the “Aegean Sea” and the “CMA Djakarta” were never considered by those who drafted the Convention.

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**Questionnaire**

1. Have the Court and arbitrators in your jurisdiction considered whether a charterer has a right to limit liability when faced by an indemnity claim? If so, with what result? Have any of these decisions been at Appellate level?
2. Have there been any local regulations, amendments, enacting statues or other forms of direct or delegated legislation which have addressed the issue of a charterers’ right to limit?
3. Is it desirable that a charterer should be permitted to limit when faced with an indemnity claim and if so, should his right be restricted to certain types of claim only? In particular, should a charterer have the right to limit liability in relation to claims brought by the owner?
4. In your view, bearing in mind the historical background which gave rise to an owners’ right to limit, should such a right now be extended to charterers in order to reflect modern trade usage and the increasingly important role played by charterers and liner operators?
5. In your view does what appears to be the current uncertainty in the law create an uneven playing field as between an owner and a charterer and further does the current position expose a charterer to the potential of bearing an uninsurable risk or at least one that can only be covered at an extremely high and prejudicial cost?
6. Do your answers to the questions above relate solely to time charterers or should additional protection also be available for slot charterers and other types of sub-charterer?
7. Depending on your answers to the questions above, should the LLMC ’76 be amended to reflect that position or should there potentially be a new convention giving the right to a charterer to limit liability?

* * *
Responses received as at 31st August 2008 from the following countries, arranged under each question

ARGENTINA, AUSTRALIA AND NEW ZEALAND, BELGIUM, CANADA, CHILE, CHINA, FINLAND, GERMANY, IRELAND, ITALY, JAPAN, KOREA, MEXICO, NIGERIA, NORWAY, SOUTH AFRICA, SPAIN, SWEDEN, UNITED KINGDOM, UNITED STATES

General comments

UNITED KINGDOM

The British Maritime Law Association established a sub-committee to respond to the questionnaire sent by the President of the CMI to the President of the member Maritime Law Associations on 5 March 2007 relating to the right of Charterers to limit their liability under The Convention on Limitation of Liability for Maritime Claims 1976 (“LLMC 1976”).

At the international level, it has become increasingly difficult to defend the right to limit, except where strict liability is created or where the liability insurers can make a case about market capacity. The BMLA is aware that the LLMC 1976 may continue to be controversial in so far as it provides limits not only for property claims but also for injury and death. Any suggestion of amending limitation law raises the very real possibility that the whole concept could be challenged by States. The subcommittee felt that it was beyond its remit to consider the question of the desirability of limitation, which is not in any event the focus of the questionnaire.

However, when answering the questions raised in the questionnaire it was felt that it would be helpful to briefly consider the nature of the justification for limitation before considering the specific questions and arriving at the answers and the sub-committee therefore considered a variety of possible justifications for the right to limit liability. Our conclusion was that there were a number of potential justifications.

First, the sub-committee were agreed that an important justification for the shipowners’ right to limit was that carriers by sea need to be encouraged to take the risk of trading because trade benefits all economies worldwide. In the modern economic climate shipowners have to invest very significant sums in new vessels, the training of crews and associated operations. In order to encourage owners to make this investment owners must be protected from the consequences of huge losses. Secondly, and in addition to this, as was clearly intended at the time the LLMC 1976 was conceived, the amount of the limitation fund should reflect the amount of insurance reasonably available to shipowners. Thirdly, the existence of the right to limit liability sometimes assists in the early settlement of claims.

In talking of “owners” in the context of limitation, a broad definition is required; one that includes “charterers”. In the last 30 years owners and charterers have come to be more closely associated with the operation of ships. Many owners in practice arrange for their vessels to be “chartered” out to associated companies or companies linked to banks who have lent them money to build and operate the vessels. In effect the owners and charterers will often be found to be operating the ship together as if they were parties to a joint venture.
Ships and other craft often constitute much larger investments than ever before. It is said that the “Emma Maersk” is capable of carrying 13,000 TEU; no carrier, on its own, can fill a ship of this size. The carrier needs to share the space with other carriers who, themselves, have contracts of affreightment covering many tens or hundreds of thousands of units of cargo to be carried each year. These carriers may often be slot charterers.

Similar developments have been seen in other areas of shipping such as chemical carriers, bulk vegetable oil carriers etc. To encourage owners, charterers and commercial lenders to develop shipping in this way, catastrophic losses must be avoided and limitation is seen as having an important role to play in achieving this. Because these ventures often involve investment, not only by owners but also charterers, it is felt that there is a strong argument for allowing charterers a right to limit in addition to owners.

The developments in the shipping market outlined above have largely occurred since the LLMC 1976 was conceived and it is felt that the law must follow and adapt to such commercial developments.

**SOUTH AFRICA**

We refer to your letters of 5th March and 30th July 2007 to which were attached a questionnaire regarding the charterers’ right to limit liability.

South Africa is not a party to the 1976 Limitation Convention.

The limitation regime is contained in domestic legislation set out in sections 261 through to 263 of the Merchant Shipping Act, No. 57 of 1951.

The question of limitation is currently the subject of revision with a strong possibility that, despite its perceived shortcomings, the provisions of the 1976 Limitation Convention will be adopted and incorporated into domestic legislation.

Much of what is set out below is subject to possible changes.

**Responses to the individual questions**

1. **Have the Court and arbitrators in your jurisdiction considered whether a charterer has a right to limit liability when faced by an indemnity claim? If so, with what result? Have any of these decisions been at Appellate level?**

**ARGENTINA**

This issue has not been considered by our Federal Courts nor are we aware of any decision having been made in arbitrations in our jurisdiction. This is so mainly because most of time-chartered vessels calling Argentinean ports are under charter parties which include arbitration and jurisdiction clauses whereby any dispute is normally referred to either London or New York jurisdiction.

**AUSTRALIA AND NEW ZEALAND**

Not to our knowledge.
**BELGIUM**

In a Judgement of 7th September 2004 in re ms “Independent Spirit” the Antwerp Commercial Court has decided that “it is possible that one of the LLMC-debtors (f.i. the Shipowner) can limit his liability and that another LLMC-debtor (f.i. the Time-charterer) cannot, if the loss results 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.”

By Judgement of 5th March 2007 the Antwerp Appeal Court has judged that as the limitation fund constituted by the Shipowner is considered to be constituted in the name and for account of all persons named in al. 1, A of article 9 of the LLMC-Convention (referring to article 1.2 of the LLMC-Conven tion) these articles apply to the Time-charterer and that the limitation fund constituted by the Shipowner is considered to be constituted also on behalf of the Charterer.

**CANADA**

There is no Canadian case law which has considered the charterer's right to limit liability in the context of an indemnity claim.

**CHILE**

Assuming the question refers to limitation of liability on the claims mentioned in Article 2 of the LLMC 1976, it is necessary to clarify that Chile has not ratified said Convention, but has incorporated in the Code of Commerce, part of their principles and rules. Based upon the domestic law contained in that Code, Charterers have successfully claimed the right to limit their liabilities, in respect of a casualty consisting in damages to a Wharf, and the other one in respect of substantial damages to cargo as a result of a fire which took place during the navigation of the vessel. In this last case, the Court’s decision admitting the limitation of the charterers was questioned before the Supreme Court, under the arguments that the limitation breaches rights of private property granted by the Constitution. In the proceeding before the Supreme Court, the Official Prosecutor of this tribunal had expressed his opinion against the plaintiff, whose claim had been included in the list of creditors in the limitation proceeding. However, there was no final judgment from the Supreme Court, because the recourse was desisted from by the claimant.

**CHINA**

We have not known or advised if the charterer could limit their liability in China Jurisdiction.

**FINLAND**

To our knowledge, there are no court decisions in Finland in this particular matter. It is more difficult to verify the situation as far as arbitration awards are concerned, but, presumably no awards dealing with this particular matter exist.

**GERMANY**

As far as we are aware, no judgement or awards have been rendered which directly or indirectly deal with the charterers’ right to limit liability vis-à-vis the owner.
IRELAND
The question as to whether a charterer has the right to limit liability does not appear to have come before the Irish courts either directly or in a reference from arbitration. The Court of Appeal judgment in *CMA Djakarta* [2003] 2 *Lloyd’s Rep.* 50, although not binding, would be of persuasive value in the Irish Courts and is likely to be followed.

ITALY
Italy is not a party to the LLMC Convention. The Italian limitation system differs significantly from that of both the 1957 and the 1976 Conventions and grants the benefit of limitation only to the operator (*armatore*) of the ship. However it is worth mentioning that whilst Italian Courts would apply Italian law as to issues of procedure, the substantial issues would be governed by the law of the ship’s flag. Italian Courts would therefore apply the LLMC Convention if the ship flies the flag of a State party and the accident subject to limitation has occurred in the Italian jurisdiction. To our knowledge the Italian Courts have applied the 1976 LLMC Convention in one occasion (Tribunal of Sassari 22 April 2004, The “Panam Serena”, *Diritto dei Trasporti* 2006, 559) where limitation of liability was invoked by the owner of a ship flying the Bahamas flag. In the matter of the “Panam Serena” it was not considered whether a charterer has a right to limit liability as indemnity claims were brought only against the owner of the ship.

JAPAN
There has been no case so far.

KOREA
No precedents yet.

MEXICO
Yes, we are aware of two cases were the Court has permitted the charterer to limit liability. These cases have not been appealed as the parties accepted the Court ruling.

NIGERIA
The question of the charterers right to limit liability when faced with an indemnity claim from the shipowner, has not arisen before Nigerian Courts.

NORWAY
No.

SOUTH AFRICA
No.

SPAIN
Negative up to date.
SWEDEN

Under Swedish law a limitation fund may be constituted if suit has been brought or legal proceedings instituted on account of “a claim subject to limitation”. Accordingly, when the courts consider an application for the constitution of a limitation fund the court will have to determine whether the claim relied on by the applicant for the constitution of a fund is subject to limitation or not. In two cases, one of the Courts of Appeal (the courts below the Swedish Supreme Court) has allowed the constitution of a limitation fund on the basis of an indemnity claim by the owners against the charterers. However, the Svea Appeal Court has remarked that the determination in connection with the constitution of a limitation fund is not final and that the question whether a specific claim is subject to limitation must be determined in limitation proceedings (that is, legal proceedings before the court where the fund is constituted in which in questions of liability and limitation are decided and the fund is distributed, see Chapter 12, Section 10 of the Swedish Maritime Code). As the court’s determination of the claim in connection with the constitution of a limitation fund (which is made ex partes, that is without hearing the claimants) is summary in nature it is fair to say that it is sufficient for the constitution of a limitation fund that the claim is prima facie limitable. In conclusion, although the question of whether a charterer is entitled to limit his liability with respect to an indemnity claim from owners is not finally resolved in Swedish law such claims have at least been considered to be prima facie limitable.

UNITED KINGDOM

Answer: The English Courts have considered whether a Charterer has a right to limit when faced with an indemnity claim in the following cases:

The Court in the “Aegean Sea” found that a charterer could limit his liability, but only when acting “qua shipowner”. This more limited approach was however rejected by the Court of Appeal in the “CMA Djakarta” whose judgment was followed in the “Darfur”. In the “CMA Djakarta” the Court of Appeal held that the correct approach was simply to look at the type of claim that was being made (whether directly or by way of indemnity), to ascertain whether it fits into the categories of claim described in Article 2 of the LLMC 1976; if it did, the charterer was entitled to limit and if it did not, he was not. Thus in the “CMA Djakarta” the charterer could not limit in relation to damage to the chartered vessel itself since this did not fall within Article 2.1(a) of the LLMC 1976. Nor could the charterer claim for loss consequential on damage to the vessel, which would therefore disentitle the charterer from limiting in relation to claims by the owner seeking an indemnity in respect of the ship’s proportion of salvage remuneration or contribution to general average.
However the Court of Appeal held that a charterer could limit where an owner sought an indemnity in respect of cargo claims. It was conceded in the “CMA Djakarta” that charterers could limit their liability in any suit brought against the charterers by cargo owners. Accordingly the Court felt that it would be anomalous if charterers could be exposed to a greater liability for the same claim merely because it was routed through the shipowners.

**Comment:** This could have important consequences if, as was the case in the “CMA Djakarta”, one or more claims are bought in a country which is not a party to the LLMC 1976 Convention such as the United States of America with the result that no limit, or at the very least a higher limit, applied. To the extent that the shipowners’ liability in respect of that cargo claim was greater than it would have been under the LLMC 1976 that loss would have to be borne by the shipowner as the Charterer could limit in respect of it. The practical result of these judgments is that the most important area in which a charterer can limit in respect of an indemnity claim is where an Owner seeks an indemnity in respect of cargo claims. However, whilst there are some other possible claims in respect of which limitation might be sought by Charterers, most of the claims which are likely to arise as between Owners and Charterers (including indemnity claims) are not limitable.

**UNITED STATES**

No. The United States is not a party to the LLC and it is highly unlikely ever to become a party. The U.S. Limitation of Liability Act differs in many respects from the LLC. Under U.S. law, only bareboat charterers may limit liability because they are considered to be owners pro hac vice. Therefore our law is in harmony with Justice Thomas’ finding that charterers can only limit to the extent that they are held liable as owners in the first place. It should be noted that just because one has the right to seek limitation under the U.S. Limitation Act, does not mean that an owner or bareboat charterer will be permitted by the Court to limit its liability. The burden is on the party seeking limitation to prove that the cause of the accident was not within his privity or knowledge, which has become a rather steep burden.

2. **Have there been any local regulations, amendments, enacting statues or other forms of direct or delegated legislation which have addressed the issue of a charterers’ right to limit?**

**ARGENTINA**

The charterer’s right to limit is granted by the Navigation Law in so far as the charterer is considered to be a carrier. Pursuant to Section 175 this right is granted to the registered owner (*propietario*) and the beneficial owner (*armador*), whilst Section 181 extends this right to the carrier (*transportador*) or his servants, the servants of the beneficial owner (*armador*), and the master or the crewmembers. In this regard, it should be noted that under Section 267 the “carrier” is the person who contracts with the shipper for the carriage of goods, whether the registered owner (*propietario*), the beneficial owner (*armador*), the charterer (*fletador*), or whoever has the ship at his disposal.
The right to limit does not depend on the person who claims (the owner or a third party), nor on the way the claim is brought (recourse action, indemnity action or under a contract), but on the type of claim.

As per Section 177 the following claims are subject to limitation:

(a) loss of life, or personal injury to, any person,
(b) loss of, or damage to, property or rights, and
(c) liability out of wreck removal, refloating of vessels sunk or grounded, or damage to berths or port facilities.

Pursuant to Section 178 the right to limit liability cannot be invoked, though, in connection with

(a) claims out of salvage awards,
(b) contributions in general average, and
(c) claims of the master and crewmembers, or their dependents, arising out of their services on board.

AUSTRALIA AND NEW ZEALAND

Not in Australia. In New Zealand s84(b) of the Maritime Transport Act 1994 expressly includes the “charterer” within the definition of owner and it has been held, in *Tasman Orient Line CV v Alliance Group Ltd* [2003] 2 Lloyd's Rep 713; [2004] 1 NZLR 650, that this provision is wide enough to include time-charterers and sub-time-charterers at least in relation to cargo claims brought by cargo owners against the sub-time-charterer as carrier. The issue of whether, and to what extent, a charterer has the right to limit liability in respect of claims brought by the shipowner was left open in *Tasman Orient Line CV v Alliance Group Ltd*.

BELGIUM

The LLMC-Convention has been ratified in Belgium and incorporated into Belgian law by the law of 11th April 1989.

The issue of Charterers’ rights to limit has not been addressed separately. Under Belgian law Belgian judges are bound to consider – on the basis that an international convention should be applied as such without interference of national law and bearing in mind the purpose of the convention – that in order to find out whether a claim falls within the limitation one needs to check whether:

(a) the person claiming the protection of limitation is one of those mentioned in the LLMC-Convention and that a Charterer (Bareboat-, Time- and Slot-charterer) certainly is;

(b) that limitation applies to all claims mentioned in the Convention unless the LLMC-Convention has allowed the contracting states to exclude certain types of claim.

In re “Tricolor” v/ “Kariba” the Antwerp Arrest Judge has in a Judgement of 10th January 2003 judged i.r.o. a collision that took place in the French exclusive economic

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1 Section 84 defines “owner” as follows:

“Owner, in relation to a ship:

(a) Means every person who owns the ship or has any interest in the ownership of the ship;
(b) In any case where the ship has been chartered, means the charterer;
(c) In any case where the owner or charterer is not responsible for the navigation and management of the ship, includes every person who is responsible for the navigation and management of the ship”.
zone that given that the aforementioned law of 11\textsuperscript{th} April 1989 has excluded claims meant by article 2.1 (d) and (e), i.e. removal and rendering harmless of ships’ wrecks and their cargo, are not subject to limitation in our country because Belgium has per article 18.1 of the LLMC-Convention excluded the application of art. 2 §1 (d) and (e).

The Judgement is made on the basis that the wording of the limitation convention in this respect is clear and therefore not subject to interpretation. In fact the Belgian approach corresponds to what the Court of Appeal decided in its Judgement in re ms “CMA Jakarta”: “As I read these provisions, the duty of a Court is to ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the convention.”

**Canada**

The LLMC 1976 allows the shipowner, salvor, insurer, and "any person for whose act, neglect or default the shipowner or salvor is responsible" to limit liability. The Canadian Marine Liability Act, S.C. 2001, c. 6, a Federal statute, expands the category of those eligible to limit liability, providing at section 25(1)(b) that:

25. (1) For the purposes of this Part and Articles 1 to 15 of the Convention, .......
   (b) the definition "shipowner" in paragraph 2 of Article 1 of the Convention shall
   be read ... as including any person who has an interest in or possession of a ship
   from and including its launching;

Thus, in Canada, section 25(1) of the Marine Liability Act explicitly extends the meaning of the term "shipowner" as referred to in the LLMC 1976.

**Chile**

This question has been in part answered in N\textsuperscript{o} 1 above, but we can add that the basic rule giving right to limit liability to the “Shipowner”, who is defined as the person who whether owning or not the vessel, sails and exploits her, acting on her own name (article 882 of Commercial Code), is complemented by article 902, which expressly extends the right to limitation of liability to: the registered owner of the ship, her operator, the carrier or by the lessor, when he is a different person than the shipowner, and also for his servants or for the master and members of the crew in the actions against these others.

When the shipowner, as above defined is a person different than the registered owner, either because she is a bareboat charterer or a time charterer of the vessel, in these cases she is a charterer, so the answer to this question is that in Chile, the charterer has the right to limit liability.

**China**

Pursuant to Chinese Maritime Code, the charterer is entitled limit the liability for maritime claim stated in the Maritime Code.

**Finland**

When the Nordic countries of Denmark, Finland, Norway and Sweden implemented the LLMC 76 in their national legislation, there were some clarifying remarks made in the legislative preparatory material, but some uncertainties continue to exist. The remarks were not included in connection with preparing the present Nordic Maritime Codes of
1994, but were made before that. There is no reason to believe that the present text in these Maritime Codes would be intended to be interpreted in another way than what the situation was before introducing those Codes. The transformation from LLMC 76 into the Nordic Maritime Codes is not a word by word method. However, some differences between the Nordic countries may exist, at least judging by the wording in the respective Codes. The general provision in Chapter 9 section 1 of the Finnish and Swedish Maritime Codes dealing with persons entitled to limit refers not only to a charterer of a ship, but also to a shipper of goods. The latter reference means the person that has concluded a contract of carriage with the carrier (cf the Finnish and Swedish Maritime Codes Chapter 13 section 1 on definitions, even of no explicit reference in Chapter 9 has been made to Chapter 13). This reference was added in 1994 with the new Codes for the sake of clarity as, for example, stated in the Finnish Government Bill 62/1994 under Chapter 9 section 1. Such a specification can hardly mean any other possibility, but understanding the reference to a charterer of a ship to mean any charterer. Otherwise, e.g. slot charterers for liner trade purposes or other purposes would be excluded, but shippers included. Whether this provision corresponds with the intention of the LLMC 76 or not, is another matter. On the other hand, section 171 of the Norwegian Maritime Code refers to a charterer, but does not include a reference to a shipper of goods. Then it is quite another matter that it in view of Norwegian law has been debated whether "charterer" does include "shipper". When it comes to particular matters under the hypothesis of the charterer being entitled to limit, one of them is the situation where the owner directs a claim against a charterer (could be in chains of contracts) due to damage caused to the ship. It seems that such a claim would fall under limitation rights as long as the claim otherwise falls into one of the enumerated categories.

**GERMANY**
There are no relations of any kind in German law which directly or indirectly address the charterers’ right to limit liability.

**IRELAND**
No.

**ITALY**
No. In any event this would be a matter for the legislator only

**JAPAN**
Article 3(1)(iii) of the Law of Liability Limitation of Shipowners\(^2\) excludes “any claim arising out or the loss of or damage to the ship” from the scope of liability limitation. This exclusion seems to be based on the interpretation of LLMC as follows. First, like “Aegean Sea”, when charterer damaged the ship, a charterer should not be entitled to the limitation for liability against the shipowner. On the other hand, it does not mean that a charterer is always unable to limit the liability against the ship owner. Rather, like

\(^2\) The domestic legislation which implements 1996 LLMC in Japan.
“CMA Djakarta”, the law will allow limitation for the charterer for such claims as “claims arising out of the loss of or damage to the property on board”.

KOREA
Not yet.

MEXICO
There are no local regulations, amendments, enacting statutes or other legislation that address charterer’s liability. Mexico strictly applies the text of the London 1976 Convention.

NIGERIA
There is no direct local legislation which has addressed the issue of the charterer’s right to limit liability.
However under S. 9 of the Admiralty Jurisdiction Act 1991, a Charterer who apprehends that a claim for compensation under a law that gives effect to a liability convention, may be made against him by a shipowner, may apply to the Federal High Court to determine whether the liability of the shipowner in respect of the claim may be limited.

NORWAY
It is clearly presumed in the Preparatory documents to the rules in the Scandinavian Maritime Code including the Convention that the charterer should have this right. Cf. the enclosed article for further details.

SOUTH AFRICA
Section 263(2) of the South African Merchant Shipping Act was amended by Section 8 of Act No. 3 of 1981 and states as follows:
“For the purposes of Section 261 the word “owner” in relation to a ship shall include any charterers …”
Section 261 states, where relevant, as follows:
“The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity …”
There follows thereafter a formulation of the interpretation based on whether these are claims for damages in respect of loss of or damage to property and/or in respect of loss of life or personal injury.

SPAIN
Negative. Spain follows strictly the LLMC Protocol 1996 and have denounced the Convention 1976. The Charterer, under the draft of Navigation Act (not in force yet), will be able to limit where he is a B.B. Charterer or a Time Charterer acting as Carrier of goods by sea under the specific conditions set out for the legal regime applicable (Hague-Visby Rules).
SWEDEN
Pursuant to Chapter 9, Section 1 of the Swedish Maritime Code the right to limit extends to the operator of a vessel and “an owner of the vessel who does not operate the vessel and to a person who manages the vessel and to a person who manages the vessel in the owner’s place, and also to a charterer, shipper and to any one performing services directly connecting with salvage”. Accordingly, it is expressly provided that a charterer is entitled to limit. There is no express provision in the Swedish Maritime Code or elsewhere in Swedish law dealing with the charterer’s right to limit by a claim from owners nor is there any express exception for such claims. It may be noted that the leading Swedish commentary on the rules of the Swedish Maritime Code implementing the 1976 LLMC takes the view that a charterer is entitled to limit its liability with respect to a claim by the owner (even for claims relating to damage to the vessel itself). The commentary has been prepared by the Swedish judge who chaired the 1976 London Diplomatic Conference leading up to the 1976 LLMC.

UNITED KINGDOM
Historically demise charterers were granted the right to limit their liability under the Merchant Shipping Act 1894 as amended by the Merchant Shipping Act 1906 – section 71. The justification for this was that it was thought they deserved the same protection as shipowners when sued by third party claimants. The 1957 Limitation Convention went further: In Article 6(ii), the right to limit was extended to the “Charterer, Manager and Operator” of the ship, “as they apply to the owner himself”. In other words, if the shipowner would be entitled to limit his liability, e.g. to the cargo owners, then a time charterer should also be entitled to limit in circumstances where, for example, the Charterer was the contracting carrier. The 1957 Limitation Convention was enacted into UK law by the Merchant Shipping (Liability of Shipowners and Others) Act 1958 and in doing this the Convention wording was altered so as to omit the reference to “as they apply to an owner himself”. The LLMC 1976 is enacted into English law by the Merchant Shipping Act 1995 and applies to incidents occurring after 1 December 1986. The Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 (“the 1996 Protocol”) applies to incidents occurring after 13 May 2004. As noted above, the LLMC 1976 has been held to give a charterer the right to limit. It is anticipated that the position of a slot charterer (widely believed to be able to limit liability) will be addressed later this year (see 6 below). These are the only local regulations, amendments or enacting statutes or other forms of direct or delegated legislation which have addressed the issue of a charterers’ right to limit.

UNITED STATES
Yes, the U.S. Limitation Act permits limitation by owners and owners pro hac vice, which by definition are demise or bareboat charterers. Time and voyage charterers have no right to limitation.
3. **Is it desirable that a charterer should be permitted to limit when faced with an indemnity claim and if so, should his right be restricted to certain types of claim only? In particular, should a charterer have the right to limit liability in relation to claims brought by the owner?**

**Argentina**

In our opinion, it is desirable that a charterer should be permitted to limit when faced with an indemnity claim in respect of the same list of claims which are subject to limitation. However, it should be also desirable that the owner and the charterer are put on an equal footing with regard to any indemnity claim brought by one of them against the other.

**Australia and New Zealand**

A charterer should be able to limit his liability in respect of an owner’s claim to be indemnified against his liability only if (a) the loss or damage is to property and (b) occurring in direct connection with the operation of the ship.

**Belgium**

It is believed that a Charterer should be permitted to limit when faced with an indemnity claim if that claim falls within those listed in the LLMC-Convention and which are not excluded by national law pursuant to an exception admitted by the Convention. In this respect it should be born in mind that Charterers (whether they are Bareboat-, Time- or Slot-charterers) can only invoke the tonnage limitation calculated by reference to the whole tonnage of the vessel and not just the tonnage available to the Charterer on board of the vessel. I mean by this that even if the Charterer is not “acting qua Owner or as if he were Owner” he can be exposed to such huge responsibilities that tonnage limitation brings relief. The fact that the claim is brought against him by the Owner does not seem to be relevant in that respect.

**Canada**

It is the considered view of the CMLA Board of Directors and the CMLA Committee on Limitation of Liability that expanding the rights of charterers in the Convention to claim limitation should not be supported at this time. No persistent or great inequity has been identified to justify the effort that would be required to amend the Convention in this regard.

**Chile**

We answer only to the last question of this Point, because the other questions have been answered above. In our opinion, the charterer should be allowed to limit against the same claims the other persons are entitled to limit, whether the claimant is an owner or a third party. In fact, the Chilean Code of Commerce makes no discrimination as to the category of the claimant. The right to limit should be conditioned only upon the nature of the claim and not on the role of the claimant.
However, if the matter only refers to the relationship between the Owners and the Charterers, we think that if there are claims for other damages than those which give rise to limitation under law, they should be considered in the relevant contract (Charter Party), as is the case under Chilean Law.

Actually, Article 888 of the Commercial Code states that the Shipowner (under the meaning of the definition of Article 882), may contractually limit his liability, except when the law forbids him to do so. For instance, there are not express provisions in the law forbidding do so for vessel’s repairs or loss of hire against the charterers or damages to the ship stranded as a result of the use of an unsafe berth. There is no jurisprudences on these specific points, but, as the drafters of the new Book III of the Chilean Commercial Code, in this particular topic, had a broader mind in favour of shipping business, their idea was to open the system of limitation fund, so we consider that those cases also give rise to limitation in favor of the charterer.

**CHINA**

We think charterer should be permitted to limit their liability when faced with maritime claim, even if the claim is filed by owner.

**FINLAND**

There is no clear-cut answer to such de lege ferenda questions. Some academic research and some commercial opinions have placed the whole system of the global limitation rights under question saying that no serious policy reasons exist to maintain such a system. On the other hand, many commercial sources find it absolutely necessary to continue with the system, particularly insurance sources. It must also be remembered that present regulation provides more flexibility than before, not only within the LLMC 76 itself, especially in view of death and personal injury situations, but also by the introduction of particular limitation systems, for example, due to oil pollution. In addition, another tier of coverage exists in cases of oil pollution (Fund).

In the bigger picture the debate runs on somewhat other lines than on the particular question concerning the charterer’s right to limit his liability.

We believe that debating policy matters, which are in the end for the legislator to decide upon, does not run by drawing lines between different national views. Rather, it is a question of different views represented by different interest groups. There are other aspects here as well, but there is no possibility to dwell upon them in further detail in this connection. The conclusion is that for a National Association it is not necessarily appropriate to express one single opinion, as it is probable that views on this delicate matter vary within the membership.

The comments under 2. above indicate problems of interpretation de lege lata. Providing that global limitation provisions are upheld, which many sources think they must, there seems to be indications in a Finnish perspective that as a matter de lege ferenda the charterer of a whole ship should have the right to limit, even if a view also has been expressed that the Aegean Sea approach should suffice. The latter is, judging by the comments received, the minimum common denominator. As there is no unanimous explicit consensus on this point concerning de lege ferenda, it becomes clear that limitation rights beyond this and beyond the charterer cannot be verified on a consensus basis by our Association as a policy matter.
GERMANY
This question really is divided into two sub-questions. As is indicated by sub-question 2, sub-question 1 concerns (indemnity) claims brought against the charterer by third parties. In so far, the position already has been clarified in the LLMC ‘76. Firstly, Article 1.2 expressly grants the right to limit to, inter alia, the charterer. Secondly, according to Article 2.2, the charterer is also protected if claims which fall under Article 2.1 are brought as recourse or indemnity claims, be it under contract or otherwise. A charterer may limit liability only in relation to claims as per Article 2.1. In so far, the charterers’ right to limit today is already restricted to certain types of claims. There does not seem to be a particular reason to either restrict or extend the claims listed in Article 2.1 in any way in respect of the charterer. In our view, charterers and owners, for the purpose of the right to limit liability, should be treated equally.

Sub-question 2 covers what we feel is the main issue in relation to the charterers’ right to limit liability, i.e. whether he should be entitled to limit vis-à-vis claims brought by the owner. In our view, this question cannot be separated from the perhaps more theoretical issue of whether the owner would be entitled to limit liability vis-à-vis contractual claims brought by the charterer or, more generally, whether the parties listed in Article 1.2 and thus entitled to limit liability, may do so in relation to claims amongst themselves. It is our considered opinion that the right to limit liability should generally only be afforded in relation to third party claims and not to claims brought by any other party entitled to limit. The parties listed in Article 1.2 are bound by a number of different contracts and thus able to enter into agreements concerning their mutual liability, also in respect of claims enumerated in Article 2.1. It is correct that Article 2.2 clarifies that the right to limit is also extended to contractual claims. To us, it is a matter of principle that the parties named in Article 1.2 are considered a privileged group vis-à-vis other parties, but not in respect of their mutual liability. This accords with the original idea and justification of the limitation of liability, i.e. the protection of the ship owner accepting the more-than-ordinary business risk of operating an ocean going ship.

IRELAND
The public policy justification for the right to limit liability is that it affects the price of goods in their ultimate marketplace. It is desirable that everyone involved in carrying the goods to market should have the same right to limit liability in relation to claims brought by third parties or in relation to a claim brought for an indemnity for claims brought by third parties. The question as to whether the shipowner or the charterer ought to bear a loss, which one or the other of them most bear in any case, is the fundamental question of this questionnaire. Clearly, it is a question which will be answered differently by shipowners on the one hand and charterers on the other; it follows that there can be no definitive answer to this question as there is no public policy reason as to why the law should devour shipowners or charterers or vice versa.

ITALY
If our understanding is correct, this question and the subsequent ones are not related to the LLMC Convention but are de iure condendo. By “indemnity claim” (or recourse action) we assume is meant a claim of e.g. the owner against the charterer in respect of
the settlement by the owner of claims brought against him by third parties, such as the first three claims brought by the owners of the “Aegean Sea” against the charterers. This is actually the more specific question that has been asked in the second sentence. The answer to this question presupposes an affirmative answer to Question 4. Since we believe that this should be the case, we shall attempt to answer this question 3, which indeed has raised differing views in our Association. The prevailing view is that limitation in respect of an indemnity claim is not justified because, a) if the claim against the owner was subject to limitation, then the indemnity claim would be brought in respect of the limitation fund; and, b) if the claim against the owner was not subject to limitation, there is no reason why the charterer should enjoy a benefit the owner did not have.

**JAPAN**
As is indicated in the response to question 2, charterer’s liability against the owner regarding the damage to the ship should not be subject to the liability limitation.

**KOREA**
Only indemnity claim from the owner against the charterer should be subject to the limitation of liability. Restriction to LLMC Art 2(1) claims is right approach like in the case of *CMA Djakarta*.

**MEXICO**
No, in our opinion, the charterer’s right to limit liability should be equal to that of the owner and we do not consider that should be conditioned, in particular to claims brought by owners.

**NIGERIA**
A Charterer should be permitted to limit liability when faced with an indemnity claim. However his right should be restricted to claims for oil pollution damage where the shipowner cannot get relief under the CLC.

**NORWAY**
The Scandinavian legislator has clearly wanted this result. The charterer is presumed to have a right of limitation also in relation to a claim from the owner for damage to the ship. The result may be discussed, but then it will be in a de lege ferenda perspective, cf. again the enclosed article.

**SOUTH AFRICA**
It is probable that the charterer will be permitted to limit when faced with a claim for an indemnity arising out of the claims referred to in Section 261, i.e. where there has been loss or damage to property and loss of life or personal injury. With regard to the charterer having the right to limit liability in relation to claims brought by the owner, this particular issue has not yet been canvassed.
**Spain**

Negative. I do not think that it would be desirable unless such Charterer had acted as Owner (i.e., as Disponent Owner or Carrier). The right to limitation is grounded upon the entrepreneurial risks and running costs afforded by the Owner or the operator of the ship toward third party claims and toward Authorities.

**Sweden**

We believe that the same policy reasons that apply with respect to the owners’ right to limit also apply to the charterers’ right of limitation and that the charterers accordingly should be given the right to limit. As to claims between owners and charterers the limitation regime should ensure that the liability is adequately distributed to the party that ultimately bears the risk of the event that give rise to the claim.

**United Kingdom**

**Answer:** A charterer should be permitted to limit when faced with an indemnity claim if the claim in respect of which indemnity is sought falls within Article 2(i) of the 1976. The effect of this is that the charterer will only be able to limit in relation to indemnities for cargo claims but not in relation to the types of claim which fall outside Article 2(i) such as salvage, general average and oil pollution under the CLC. To this extent only, a charterer should have the right to limit in relation to claims brought by the owner.

**Comment:** The time or voyage charterer who does not man the vessel will frequently be liable for things which happen which are not his fault but either stem from a provision in the charterparty or the fault of some third party. This might apply for example to:

- Stevedore damage to the ship (unless the stevedores are employed as opposed to sub-contracted by the charterers);
- Cranes collapsing on ships;
- Pollution damage;
- Misplaced lights, buoys and other navigational aids causing damage to the ship;
- Pilot error;
- Explosions caused by undeclared, unsafe cargo;
- Off-spec/contaminated bunkers provided by a time charterer’s sub-contractor or supplier.

It could be argued that it would be reasonable to allow the charterer to limit his liability in respect of the above types of claim as a way of allocating the loss in accordance with fault. On the other hand it could equally be argued that as the loss in some of the above cases has nothing to do with the shipowners’ fault either but is due to the fault of some third party independent of the charterer or the shipowner it would be unfair to permit any party to limit its liability. In any event whoever is liable as between the charterer and the shipowner can usually seek a recovery from the party who is actually at fault. Moreover if fault is to be used as the criterion for deciding whether or not a party is allowed to limit then the whole basis of the law governing a shipowners’ right to limit would be undermined.

In these circumstances the BMLA’s charterers’ right to limit sub-committee’s view was that a pragmatic approach should be adopted. Owners and charterers are more often than not in a cooperative venture and while charterers should be entitled to limit as
against cargo claimants there should only be one limitation fund against which all claims are brought and one limit. Thus where an owner seeks an indemnity from charterers in respect of amounts paid out to cargo claimants in excess of his limit (perhaps because he had to pay more in another jurisdiction such as the United States) it would be fair that the charterer should be able to limit to that proportion of the fund which the sum paid by the shipowner bears to the claims against the fund as a whole but he should not be liable for the excess amount paid.

As we have noted, however, most often the largest item covered by an indemnity claim made by the owner against a charterer is in respect of damage to the hull of the chartered vessel. This is however not an indemnity claim. We believe therefore that it falls outside the ambit of this question. If it is relevant, then we have already noted that the Courts in this jurisdiction have held that such a claim clearly falls outside Clause 2(i) of the LLMC 1976. The Courts have thus held that the Owner should be able to pass this loss on in full to the charterer if that is what the charterparty allows him to do. Of course, it is theoretically possible for a charterer to negotiate the terms of his charter so that losses of this kind may not be passed on in certain circumstances.

**United States**
The answer depends on the point of view of the responder. Plaintiffs’ personal injury lawyers tend to believe that limitation should no longer be available to owners, and would certainly not be in favor of extending the right to seek limitation to charterers. At least one P&I Club attorney feels that charterers should have the same right to limit as the owner, but notes that if the owners have limited liability in the first place, the charterer’s indemnity exposure will in any event be limited to what the owner’s have paid first. Vessel owners would likely be in favor of leaving the U.S statutory scheme untouched, thereby allowing only owners and bareboat charterers to limit their liability. Time and voyage charterers would obviously like to be able to limit their liability for cargo damage. One final note is that under U.S. law, owners cannot limit claims arising under a personal contract.

4. *In your view, bearing in mind the historical background which gave rise to an owners’ right to limit, should such a right now be extended to charterers in order to reflect modern trade usage and the increasingly important role played by charterers and liner operators?*

**Argentina**
Yes, in our view the right to limit should be extended to time-charterers and liner operators.

**Australia and New Zealand**
Yes.

**Belgium**
In the light of the answer given hereabove to question 3 Charterers and Liner-operators do have and should have the right to limit because they fall within the definitions of the
LLMC-Convention which indeed – even if it was not meant by those drafting the LLMC-Convention – corresponds to modern trade usage.

**Canada**

It is the considered view of the CMLA Board of Directors and the CMLA Committee on Limitation of Liability that expanding the rights of charterers in the Convention to claim limitation should not be supported at this time. No persistent or great inequity has been identified to justify the effort that would be required to amend the Convention in this regard.

**Chile**

Our new law extended the right of limitation explicitly to many other persons who in most of the cases, may be the charterer of the vessel. The same argument of this question was in the mind of the drafters of the New Book III of Commerce Code, to extend the system as it is expressed in article 902 above mentioned.

**China**

Now, more and more line operator charter the vessel for the operation. So we think the extension of the limit of liability reflect the modern trade, especially for the container business.

**Finland**

See the de lege ferenda comments under 3. above. We do see that the shipping world today is something quite different to the historical starting points and background, with many more active players than before. The picture concerning “operators” is fragmented.

**Germany**

In our view, it would seem that the question whether the right to limit liability should also be extended to charterers already has been dealt with in LLMC ‘76. Article 1.2 expressly refers to the charterer and thus affords the right to limit as specified in the convention to him.

**Ireland**

On the view expressed above, following the decision of the Court of Appeal in *CMA Djakarta*, charterers have the right to limit liability though this right is subject to the same exceptions as shipowners.

**Italy**

Since the 1924 Limitation Convention the charterer has enjoyed the benefit of limitation. In the 1924 Convention reference was made to “armateur non propriétaire” and to the “affréteur principal” (article 10); in the 1957 Limitation Convention (article 6(2)) and in the 1976 LLMC Convention (article 1(2) reference is made to the “charterer, manager and operator”. In view of this, we assume that this question aims at seeking an opinion on whether the charterer should enjoy the benefit of limitation in respect of claims brought by the owner, as in the case of the “*Aegean Sea*” in respect of
the first three claims and in that of the “CMA Djakarta”. As said in the reply to question 1), Italian law grants the benefit of limitation only to the operator of the ship. Pursuant to art. 275 code of navigation the operator of a ship is entitled to limit his liability in respect of obligations assumed in the occasion and for the needs of a voyage and of the obligations arisen out of facts occurred or acts performed during the voyage, provided the operator did not act with gross negligence or wilful misconduct. Italian law further provides that in order to limit liability the operator of a ship must establish a limitation fund by way of actual payment of a sum into Court. The amount of the limitation fund is equal to two-fifths of the sound value of the ship together with the ship’s earnings at the end of the voyage. If the value of the ship at the time when the limitation is applied for is lower than one-fifth of the sound value, then the limitation fund is equal to one-fifth. The sound value is, pursuant to art. 622 code of navigation, the insured value. If the actual value of the ship at the end of the voyage is above two-fifths of the insured value the limit is two-fifths of such insured value. Bearing in mind the historical background which gave rise to the owner’s right to limit, and also having in mind that the Italian limitation system existing so far is still strictly linked to the ships’ value and therefore to the ancient system of the “abandonment”, we believe that the Italian approach should be rather conservative for the time being, although times are changing and the role of charterers and liner operators cannot be denied or undervalued. We therefore are of the view that justice and fairness should require an affirmative answer to the question, but within the limits of similar claims: for example, while the owner can enjoy limitation in respect of claims for loss or damage caused by unseaworthiness, the charterer should enjoy limitation in respect of claims for loss or damage caused by dangerous goods. The charterer instead should not be able to enjoy limitation in respect of claims for freight and demurrage.

**JAPAN**
Yes. The Law of Liability Limitation of Shipowners provides for that effect.

**KOREA**
Yes, the right to limit liability is desirable to be extended to the charterers.

**MEXICO**
We do agree for such right to be extended to charterers.

**NIGERIA**
Yes, it is important for charterers to be able to limit their liability the way shipowners have been able to do so.

**NORWAY**
My personal opinion is that the limitation is outdated and against economic efficiency considerations, but as mentioned the legislators view in Scandinavia is different.

**SOUTH AFRICA**
This issue has not yet been debated.
Spain
Always in my view, the Owners' right of limitation should be extended to all Charterers who undertake owners-like or shipmanagement/operating functions only, but not to voyage and slot Charterers.

Sweden
See paragraph 3 above.

United Kingdom
Yes – in England this has been the case for many years already (see 2 above).

United States
The Committee is aware of no impetus to change the U.S. Limitation of Liability Act to permit time or voyage charterers to limit liability. We expect it would be difficult to develop a consensus in favor of such a proposal.

5. In your view does what appears to be the current uncertainty in the law create an uneven playing field as between an owner and a charterer and further does the current position expose a charterer to the potential of bearing an uninsurable risk or at least one that can only be covered at an extremely high and prejudicial cost?

Argentina
In view of the uncertainty in the law created by the two decisions quoted in the questionnaire, it would be convenient to try and solve it by way of an appropriate amendment to the LLMC’ 76 even though we fail to grasp that there may arise the risk of the playing field being uneven as described above.

Australia and New Zealand
Yes.

Belgium
I believe that there is no uncertainty in the law if one correctly applies the LLMC-Convention as it was ratified in our country and that indeed Owners, Charterers and operators should be in a position to limit their liability and that they should not be exposed to an uninsurable risk.

Canada
It is the considered view of the CMLA Board of Directors and the CMLA Committee on Limitation of Liability that expanding the rights of charterers in the Convention to claim limitation should not be supported at this time. No persistent or great inequity has been identified to justify the effort that would be required to amend the Convention in this regard.

Chile
We see that article one of the Convention and our law includes the charterer between the persons who have rights to limit liabilities. So the uncertainty may be in those cases
occurred in Countries which have not ratified the Convention 1976 or in cases where the Chilean law is not be applicable.

**CHINA**
We think the current uncertainty in the law is unfair for charterer. And it is difficult for charterer to evaluate the liability to expose. Although some commercial insurer and P&I suffer some cover for charter, it is more expensive than owner’s cover. We believe that the uncertainty of the risk is one of the causes.

**FINLAND**
As the basic starting point is the LLMC 76, it is quite natural to expect that national legislation based on this Convention would be interpreted in a unified or harmonized way. This is the aim of any convention. As seen above, a particular matter might be that the Convention is, by some Governments and states, considered to be silent on some particular points, leaving room for national supplements, without the state in question having breached its international obligations deriving from the LLMC 76.

To what extent there is an uneven playing field between the owner and some type of charterer is also a matter of policy and something that different interest groups might answer in different ways. One idea would be to delete global limitation rights altogether and thus achieve an even playing field. Another would be to maintain a global limitation system, but to explicitly extend this right to other operators as well, not only to owners proper, see previous answer. Where the exact line should be drawn is a matter for further discussions.

We have no absolute figures on the calculation of costs of insurance nor of general insurability of the charterer’s liability if and when no limitation right for the charterer exists.

**GERMANY**
The legal situation as created by the *CMA Jakarta* decision indeed does not seem to be well balanced. In particular, the claims in respect of which Article 2.1 allow a limitation of liability more often than not will originally be owners’ claims. However, it would not seem that the position as outlined in the *CMA Jakarta* decision added risks to the charterers’ scope of liability. As far as we are aware, it has not been assumed within the insurance industry that the charterer was at all entitled to limit vis-à-vis claims brought by the owner. The fact that he now, in accordance with the *CMA Jakarta* decision, may do so in particular circumstances really does not increase existing risks or add new risks, but merely reduces the charterers’ potential liability in relation to particular claims.

**IRELAND**
If the law is perceived to be uncertain then it should be made certain so as not to expose a charterer to greater liabilities than a shipowner. However, following the decision of the Court of Appeal in *CMA Djakarta*, the law, though complex, does not appear to be uncertain.
ITALY
The Italian Market provides very few Charterers Liability coverage (that are actually transferred “in fronting” to the London Market) and, to our knowledge, coverage never gave rise to unsolvable problems. That said, we believe that the solution, whatever it may be, should be in principle the same with respect to any kind of charter.

JAPAN
Nothing in particular.

KOREA
Yes.

MEXICO
We consider that there owners and charterers should have exactly the same right to limit their liability.

NIGERIA
The present uncertainty in the law certainly creates an uneven playing field for the charterer who might be faced with an insurable risk.

NORWAY
The present uncertainty in the law certainly creates an uneven playing field for the charterer who might be faced with an insurable risk.

SOUTH AFRICA
This issue has not yet been debated.

SPAIN
Negative, in my view. The Charterer should be exposed to no lesser extent of liability than the Owner is and to similar extent where he acts as an Owner. His risks are perfectly insurable. If ever the door is opened to enable the shipper to limit his liability under the contract of carriage, then new basis for resuming the discussion would be at hand.

SWEDEN
We have no practical experience of any particular problems in this field.

UNited Kingdom
Answer: Clearly there is an uneven playing field as between owners and charterers as things currently stand. For example charterers cannot limit in respect of nearly every single type of claim an owner can bring against the charterer (the only notable exception being the case of an indemnity in respect of cargo claims) but owners can limit in respect of almost every sort of a claim a charterer can bring against him. However, the BMLA is not aware that charterers are finding that this is an uninsurable risk or one that can only be covered at an extremely high and prejudicial cost.
Comment: The main issue that needs considering is whether the charterer should be entitled to limit in respect of claims by the owner for damage to the hull of the chartered vessel. Such a right would almost certainly result in the diminution of the limitation fund available to other claimants. On behalf of those interested in ships it has been argued that the benefits of the current system even out in the long term but this is hard to demonstrate. It is however fair to point out that if such a right were allowed, hull and machinery underwriters would be adversely affected.

**UNITED STATES**
There is no uncertainty on this point in U.S. law.

6. **Do your answers to the questions above relate solely to time charterers or should additional protection also be available for slot charterers and other types of sub-charterer?**

**ARGENTINA**
In principle, the benefit of the limitation should be extended to time charterers only.

**AUSTRALIA AND NEW ZEALAND**
It is likely that the present regime in fact includes other types of charterer in any event and so the comments are apposite to them as well.

**BELGIUM**
Again under Belgian law the word “Charterer” includes all Charterers it being understood – as explained hereabove – that the protection of the LLMC-Convention is available for Slot-charterers and other types of Sub-charterers only if the total amount of their liabilities exceeds the limitation amount calculated on basis of the whole tonnage of the vessel as per the LLMC-Convention.

**CANADA**
It is the considered view of the CMLA Board of Directors and the CMLA Committee on Limitation of Liability that expanding the rights of charterers in the Convention to claim limitation should not be supported at this time. No persistent or great inequity has been identified to justify the effort that would be required to amend the Convention in this regard.

**CHILE**
They mainly refers to bareboat and time charterers, and under Chilean law the right to limit also include the “carriers”, as explained above, but those concepts do not necessarily include the voyage/slot/space charterer. But, as shipping business develops extremely fast, it would not be wise to restrict the concept to a specific type of charterer, to leave it open so as to include the new charterer types that might appear.

**CHINA**
Apply to Time charter, slot charterers and other sub-charter.
FINLAND
The replies above show that the status of all groups of charterers (shippers) should be discussed, but whether the solution for each group is the same is another matter.

GERMANY
Article 1.2 extends the right to limit liability to “... the ... charterer ...”. Taken expresses verbis, this should include all types of charterers such as time and voyage charterers, part charterers, slot charterers and all types of sub-charterers. As a matter of German law, a charterer is distinguished from a shipper who enters into a contract of carriage with a carrier. The LLMC ‘76 protection would not be afforded to that party, even if the amount of cargo would reach or be close to the vessel’s full capacity. In our view, considering that the other parties listed in Article 1.2, i.e. the owner, manager and the operator are related to the vessel as a whole, this should apply also to the charterer. It would follow that the protection afforded by the LLMC ‘76 should not be extended to part charterers including slot charterers. As you will know, there is some dispute among writers whether these type of charterers are included. We believe that charterers including sub-charterers but not part charterers of any kind should be treated equal to the other parties listed in Article 1.2.

IRELAND
The answers above relate to time charterers, voyage charterers and slot charterers (by which is understood voyage charterers of part of a ship). As LLMC’76 refers only to “charterers”, and not time charterers alone, it seems likely that the Irish courts would, in line with the English Court of Appeal, apply the Convention to all charterers.

ITALY
We believe that a difference should be drawn between global limitation and limitation in respect of carriage of goods and passengers. The dividing line between charter parties and contracts of carriage is very thin, since actually many types of charter parties (e.g. the voyage charters) are actually contracts of carriage. But this does not entail that the principle of justice and fairness should not apply also in respect of contracts of carriage. Reference may be made in this respect to the present UNCTRAL Draft Convention, in which it has been accepted that if liability for delay is governed by the Convention and liability of the carrier is limited, liability of the shipper should equally be limited.

JAPAN
Our answer also applies slot charters etc. It is established that the term “charterer” in Law of Liability Limitation of Shipowners includes slot charters etc.

KOREA
Revision of the LLMC 76 rather than new convention is desirable.

MEXICO
Above answers should only apply to bareboat charterers and time charterers, and not to other type of charterers.
NIGERIA
Time Charterers are more exposed as demised charterers are sometimes classified as owners. Therefore additional protection should be made available for slot charterers and other types of sub-charterers.

NORWAY
The Norwegian/Scandinavian position is that all charterers, including slot charterers and even shippers (stykkgodsbefrakter) are provided with the right of limitation.

SOUTH AFRICA
The general view is that reference to charterers is a reference to all types of charter and is not restricted to time charterers.

SPAIN
The above answers do not relate to voyage, slot and sub-charterers, who in my view do not need additional protection as yet.

SWEDEN
We believe that the right to limit should also extend to slot charterers and other types of sub-charterers (which is indeed the position under Swedish law). For instance, if we assume that charterers would be entitled to limit their liability for an indemnity claim from owners for damage to third parties caused by the charterers’ cargo, the same policy reasons for allowing the charterers to limit their liability in such situation also apply to a slot charterer or a shipper.

UNITED KINGDOM
Answer: Yes, additional protection should be given to slot charterers and other types of charterer.
Comment: The right to limit under the LLMC 1976 probably extends in English law to slot charterers already – see the “TYCHY I” [1999] LL Rep 11 and the “CMA Djakarta” [Supra]. In the latter case, Longmore LJ said:
“I would therefore not give any gloss to the word “Charterer” in Art. 1(ii) and give what seems to me its ordinary meaning. There was some discussion whether the word included a part charterer or a slot charterer; it was said for the shipowners that the framers of the Convention could not have intended that a slot charterer could limit his liability to the Owner particularly since it would be absurd that his limit would have to be calculated by reference to the whole tonnage of the vessel when he had never contracted to have that tonnage available to him. I am content to leave to another day the question whether “Charterer” means the charterer of the ship as a whole or charterer of part of the ship, merely observing that this Court has already held in the (not entirely dissimilar) context of the Arrest of Seagoing Ships Convention 1952 that the word “Charterer” does indeed include a slot charterer, the “TYCHY” [1999] 2 LL Rep 11”
However, this point has not been finally decided in the English Courts yet, although it is due to be decided in the near future.
It is worth trying to define what we mean by a slot charterer; it very probably should cover a charter of part of a ship but should it cover consortium agreements for the use of a ship where perhaps slots get traded as “swap slots”? The current wording of the LLMC 1976 leaves the definition of charterer unexplored and there is little or no authority on how the English Courts would view a party to a consortium agreement in this context. It would be helpful if the Convention was clarified in this respect. Indeed, we take the view that it would be helpful if some clarification could be given in general terms as to which types of charterer are entitled to the benefits of limitation. There is an argument to the effect that a voyage charterer who has no right of control over the vessel and is not a “joint venturer” with the owner should have no right to limit (even though at the moment under the LLMC 1976 he does). To afford a voyage charterer such a right runs contrary to the philosophy behind allowing a charterer to limit his liability described in the introduction to this paper. The purpose of affording a charterer the right to limit is to encourage the carriage of goods by sea, whereas in many cases voyage charterers are not carriers of goods but owners of goods. However, on balance we feel that the complexity of depriving voyage charterers of the right to limit makes this proposal impracticable. First of all because of the difficulties of definition and secondly because the practical effect of depriving them of the right to limit is almost negligible.

**UNITED STATES**
The response applies to other charterers as well.

7. **Depending on your answers to the questions above, should the LLMC ’76 be amended to reflect that position or should there potentially be a new convention giving the right to a charterer to limit liability?**

**ARGENTINA**
We are of the opinion that if the LLMC’76 could be properly amended there should be no need for a new convention.

**AUSTRALIA AND NEW ZEALAND**
The LLMC ’76 could be amended to clarify the position. A new convention is not required.

**BELGIUM**
As obviously the LLMC-Convention gives rise to conflicting case law and to different interpretations it should certainly be clarified i.r.o. the Charterer’s right to limit liability for those who cannot simply agree with the principle that:

- an international convention should be applied as such without interference of national law;
- it should be applied to all “Charterers” and to all claims listed in the convention (if no exceptions by national law are admitted by the LLMC-Convention and made by the national law of a contracting state).
CANADA
It is the considered view of the CMLA Board of Directors and the CMLA Committee on Limitation of Liability that expanding the rights of charterers in the Convention to claim limitation should not be supported at this time. No persistent or great inequity has been identified to justify the effort that would be required to amend the Convention in this regard.

CHILE
The text of the Convention is ample and comprehensive enough, it states “charterer” without any further qualification, so we consider it would be unnecessary to start with amendments.

CHINA
LLMC’76 should define the charterer’s position when they encounter a claim against them. It should stipulate what circumstance the charterer will be entitled to limit liability and what situation their limitation may be disrupted.

FINLAND
We believe that this might rather be a practical-technical problem. It depends on, for example, whether it is generally considered that the LLMC 76 is in need of substantial reforms or not. If not, it might be preferable to modify the present Convention and clarify the position of different groups of charterers (and also to discuss the position of shippers, as mentioned above). We also believe that it is not desirable to let English Court practice alone decide the interpretation of the Convention. Already now, as said, it seems that Nordic law de lege lata does not follow those, in themselves somewhat unclear, outlines. There are also some problems concerning terminology. Further, even if a charterer might be covered, there is still the question of how to approach the area of global limitation rights. For example, damage to the ship seems to be a contentious issue when the owner makes a claim against the charterer. It seems that this type of problem (and other problems) is part of the question of the charterer’s legal status.
To the extent changes are going to be discussed, we see that there are at least three major questions concerning the topic that need clarification:
1) What is meant by the term charterer (shipper)?
2) Does and should damage to the owner’s ship caused by a charterer fall under global limitation rights or not, even if all groups of charterers or the respective group of charterers would fall under the LLMC 76, considering that this particular matter is also contractual and thus steerable by contract? Another matter is to what extent these aspects would be thought of in a contracting situation.
3) Does and should other damage than that mentioned under 2) to the shipowner caused by the charterer fall under global limitation rights or not?
We maintain that these difficult matters are not easily covered by answering certain preset questions.
GERMANY
As explained above, in our opinion there should be no right to limit liability in relation to claims brought by other parties entitled to limit under Article 1.2. In particular, this would apply to claims among charterers and owners. This position could be clarified in an amendment to the existing LLMC ‘76 convention, which apparently would require another protocol. Unfortunately, it would not seem possible to proceed as per Article 21, as it only relates to an amendment of the liability amounts. In our view, there should not be a separate convention dealing only with the charterers’ right to limit.

IRELAND
No. We do not feel that there is any need for a new convention or for any amendment to LLMC’76.

ITALY
Charterers have already the right to limit liability. The question, therefore, is to make sure that they have a right to limit liability in respect of claims brought against them by the owner. We believe that first a careful analysis should be made of the LLMC Convention, in order to establish whether or not such right already exists. With all due respect, we believe that the facts that there have been conflicting views in the English Courts does not justify a decision to amend an existing Convention or to prepare a new convention.

JAPAN
We do not believe that a new convention or an amendment to the existing conventions is necessary.

KOREA
Revision of the LLMC 76 rather than new convention is desirable.

MEXICO
We consider that the LLMC ’76 should be amended to reflect our position and we do not consider convenient a new convention for charterers.

NIGERIA
LLMC 76 should remain as it is. A new convention giving the charterer the right to limit his liability should be enacted.

NORWAY
No amendments are necessary in relation to the Norwegian/Scandinavian legal position, but an amendment may be necessary to obtain international harmonization.

SOUTH AFRICA
Although this issue has not been debated the general view would be to amend existing conventions appropriately rather than to create new conventions dealing with specific issues.
The queries raised above will form the subject of discussions, debates and workshops relevant to the development of an amended limitation regime. In the interim should the relevant CMI committees or any members of the CMI have any queries we look forward to receiving them.

SPAIN
In my view the LLMC 76 should be amended to qualify the term "Charterer" in the definition of "owner" under Article 1.2. There should be NO Convention giving the voyage, slot and types of sub-charterers a right of limitation.

SWEDEN
If the study should find that there is a need to regulate the charterers’ right to limit we would favour a revision of the LLMC 1976 instead of drafting a new convention.

UNITED KINGDOM
Answer: We think that the answer to this issue will depend on which form of instrument would attract the greatest support so as to ensure, as far as possible, the greatest degree of uniformity.
In addition, we take the view that other issues also deserve to be addressed which could be dealt with by way of protocol or convention or indeed by the promulgation by the CMI of a set of Uniform or Model Rules.
Other practical issues
There are a number of practical issues in the operation of the LLMC 1976 insofar as it relates to the right of charterers to limit their liability which can cause problems. We set out some of these issues below:

(i) It is unclear from the wording of the LLMC 1976 whether there should be more than one fund where both owners and charterers are limiting in respect of the same incident; as a matter of English law we know that only one fund can be constituted because that was what was decided in the “Aegean Sea” [supra] and this supports the wording in Article 11(iii) of the LLMC 1976 but nowhere in the Convention’s text is it completely clear.

(ii) Assuming there should be only one fund it is unclear what rights the owners/charterers and others entitled to limit have between themselves where the fund constituted by one party meets claims against another party entitled to limit. Thomas J., in the “Aegean Sea” (supra at page 50) took the view that recourse claims between owners and charterers should not be dealt with so as to diminish the fund despite Article 12(ii) but the wording of LLMC 1976 is silent on the point.

(iii) It is at present unclear procedurally how parties entitled to limit should claim the right to limit once a fund has been established by another limiting party; in England the procedure probably is that an application has to be made in the existing limitation proceedings that the subsequent limiting party or parties should be entitled to avail themselves of the right to limit by virtue of the fund already established but this is currently being tested in the Admiralty Court in the “MSC Napoli” and there is therefore no decision on point that we are aware of.

(iv) Orders for administering the fund:
(a) Claims are often ordered to be filed against the limitation fund before the bill of lading and other applicable time limits expire; this has the effect of simultaneously disentitling such claimants from being able to claim against the owner or carrier after the time for filing claims against the fund has expired or obtaining any other security for their claims. The effect of such orders is to greatly diminish the rights of claimants by reducing the time limit. This can be particularly harsh in circumstances where claimants receive no actual (as opposed to constructive) notice of the constitution of the fund.

(b) Claims for contribution or indemnity are time barred as a matter of English law two years from the date on which the right accrued (Section 10 Limitation Act 1980). This will normally be the date of a judgment or award or the date for payment under a settlement agreement. This means that in most cases no claim can be filed against the fund in respect of indemnity claims as usually no cause of action accrues until a date after which the claims are required to be filed. Any claim which is filed before a judgment, award or settlement, can be struck out because the cause of action has not yet accrued. Further, potential indemnity claimants cannot even raise the issue with the Admiralty Registrar because they have no locus standi. Article 12(4) of the LLMC 1976 allows the Court to provisionally set aside an appropriate sum to allow such a person to enforce his claim against the fund at a later date. But this can only be invoked on an application by an indemnity claimant with locus standi and is therefore ineffective to deal with this problem.

(v) Bar to other actions - there is considerable doubt whether, and in what circumstances, persons entitled to limit can claim to take the benefit of the Bar to other actions provisions in Article 13 when a Fund has been established by a third party but in a State which has ratified or acceded to the 1996 Protocol where his assets are in a LLMC 1976 (non-1996 Protocol) State.

*United States*
As the United States has not ratified and is not likely to ratify the 1976 Convention, we have not responded to this question. Nevertheless, we can foresee instances in which some of our clients would benefit from the amendment.