MLAUS Response

18 June 2021

I. PRELIMINARY QUESTIONS

1. Has your jurisdiction ratified the following conventions (the 'Conventions'):

a. International Convention on Civil Liability for Oil Pollution Damage 1969 ('CLC 1969')

RESPONSE: No.

b. 1992 Protocol to the CLC 1969 ('CLC 1992')

RESPONSE: No.

c. Convention on Limitation of Liability for Maritime Claims 1976 ('LLMC 1976')

RESPONSE: No.

d. 1996 Protocol to the LLMC 1976 ('LLMC 1996') (references to 'LLMC' shall be understood as references to either LLMC 1976 or, where applicable, to LLMC 1976 as amended by LLMC 1996)

RESPONSE: No.

e. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 ('HNS 1996')

RESPONSE: No.

f. 2010 Protocol to the HNS 1996 ('HNS 2010') (references to 'HNS' shall be understood as references to either HNS 1996 or, where applicable, to HNS 1996 as amended by HNS 2010)

RESPONSE: No.

g. International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 ('Bunkers Convention')

RESPONSE: No.

h. Nairobi International Convention on the Removal of Wrecks 2007 ('WRC')

RESPONSE: No.

2. Please indicate whether the a.m. Conventions apply directly in your jurisdiction or whether the stipulations have been translated and incorporated into domestic legislation.

RESPONSE: Not Applicable.

3. Is the wording of domestic provisions incorporating art. V(2) CLC 1969/art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS/art. 6 Bunkers Convention/art.10(2) WRC into domestic legislation different to the original text of the Conventions?

RESPONSE: Not Applicable.

4. If your jurisdiction has not ratified the Conventions, does your jurisdiction recognize a right of limitation of liability for claims that would otherwise fall under the Conventions (the 'Equivalent Claims')?

RESPONSE: Yes.

4a. If the answer to the previous question is in the affirmative, what are the requirements for breaking the right to limitation for Equivalent Claims?

RESPONSE: In the United States, a shipowner's right to limitation of liability is governed by the Limitation of Vessel Owner's Liability Act of 1851. 46 U.S.C. §§ 30501-30512 (2006). The Limitation of Liability Act permits a shipowner to limit its liability following a maritime casualty to the value of the owner's interest in its vessel and pending freight, provided that the casualty occurred without the privity or knowledge of the owner. Although "privity or knowledge" is not defined in the Act, "[i]n a limitation proceeding . . . the federal district court, sitting in admiralty … engages in a two-step inquiry." *In re Bridge Constr. Servs. Of Fla.*, 39 F. Supp. 3d at 381 (citing *In re Dammers*, 836 F.2d 750, 755 (2d Cir. 1988)). "First, the Court must determine 'what acts of negligence or unseaworthiness caused the casualty.'" 39 F. Supp. 3d at 381 (quoting *In re Moran Towing Corp.*, 984 F. Supp. 2d 150, 180 (S.D.N.Y. 2013)). "Second, if the Court finds that an act of negligence or unseaworthiness caused the casualty, the Court must determine 'whether the shipowner had knowledge or privity of these acts.'" 39 F. Supp. 3d at 381 (quoting *In re Moran Towing*, 984 F. Supp. 2d at 180 (internal citations omitted)). "The claimants bear the initial burden of establishing liability, after which the vessel owner bears the burden of establishing the lack of privity or knowledge." 39 F. Supp. 3d at 382 (citing *Otal Invs. Ltd. v. M/V CLARY*, 673 F.3d 108, 115 (2d Cir. 2012) (citations omitted)); *accord Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1036

(11th Cir. 1996). "The phrase 'privity or knowledge' is a 'term of art meaning complicity in the fault that caused the accident.'" *Messina v. White (In re Messina)*, 574 F.3d 119, 126 (2d Cir. 2009) (quoting *Blackler v. F. Jacobus Transp. Co.*, 243 F.2d 733, 735 (2d Cir. 1957)). "'Privity or knowledge' can be actual or constructive. Either way, the term usually implies some degree of culpable participation or neglected duty on the shipowner's part; that for example, it committed a negligent act . . . or through the exercise of reasonable diligence could have prevented the commission of the act . . . '" *Otal Invs.*, 673 F.3d at 115 (quoting *Carr v. PMS Fishing Corp.*, 191 F.3d 1, 4 (1st Cir. 1999) (internal citation omitted)).

The Limitation Act applies to "all seagoing vessels" as well as "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." 46 U.S.C. § 30502 (2006). Most courts have held that the Act is applicable to pleasure crafts, including personal watercraft, as well as commercial vessels. *In re Young*, 872 F.2d 176 (6th Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975); *In re Guglielmo*, 897 F.2d 58 (2d Cir. 1990); *In re Hechinger*, 890 F.2d 202 (9th Cir. 1989), *cert. denied*, 498 U.S. 848 (1990).

ADDITIONAL RESPONSE (environmental regimes that recognize a right of limitation):

OPA 90

The Oil Pollution Act of 1990 ("OPA 90") (33 U.S.C. §§ 2701–2761 (2006)) creates comprehensive strict liability for discharge of oil in navigable waters. OPA 90 initially imposes strict liability on responsible parties for "removal costs" and "damages" caused by the discharge. The liability of a responsible party under Section 2702 of OPA is limited by statute. For vessels, the limits are based upon gross tonnage. OPA statutory limits of liability do not apply if the incident in question was caused by the responsible party's gross negligence, willful misconduct, or violation of an applicable federal safety, construction, or operating regulation. In addition, liability cannot be limited if the responsible party fails to report the oil spill or fails to cooperate or comply with a government removal order. The statutory limits of liability are only applicable to OPA damages. The OPA limits do not apply to limit liability under the general maritime law and state law; such claims, however, may be subject to the Limitation Act.

CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") applies to discharges of hazardous substances other than petroleum, natural gas, and related products. 42 U.S.C. §§ 9601 to 9675. CERCLA imposes strict and joint and several liability on the owner or operator of a vessel or facility as well as on a wide range of other "potentially responsible parties." 42 U.S.C. § 9607(a). Recoverable damages include removal costs, natural resource damages, and economic losses without regard to physical damage to a proprietary interest. CERCLA excludes application of the Limitation Act (42 U.S.C. § 9607(h). CERCLA statutory limits of liability do not apply for willful misconduct or willful negligence within the "privity or knowledge" of the owner or operator, or where the primary cause of the release was a breach of applicable standards or regulations. 42 U.S.C. § 9607(c).

5. Are there any general principles of law in your jurisdiction that may serve to break the right to limitation otherwise than through the specific provisions contained in the Conventions (e.g. abuse of right)?

RESPONSE: See above discussion of "privity or knowledge" of the owner in Response to 4a.

II. "PERSONAL ACT OR OMISSION" -Attribution to the person liable

6. How is the requirement for a "personal act or omission" in art. V(2) CLC 1992, art. 4 LLMC, and arts. 7(5) and 9(2) HNS interpreted in your jurisdiction?

RESPONSE: Not Applicable.

7. Where the party entitled to limitation is an entity, what are the requirements for attributing an act or omission to the party entitled to limitation?

RESPONSE: See above discussion of "privity or knowledge" of the owner in Response to 4a.

8. Are there court decisions or legal texts in your jurisdiction where the right to limitation under the Conventions or equivalent domestic legislation has been broken (or where it has been submitted that such right should be broken), respectively confirmed (or where it has been submitted that such right should be confirmed), for acts/omissions of:

8a. The Master?

RESPONSE: Yes. *See, e.g., Broussard v. Stolt Offshore, Inc.*, 467 F. Supp. 2d 668, 676 (E.D. La. 2006) ("… the exercise of reasonable diligence would have caused [vessel owner] to discover the unsafe manner in which [the vessel was operating]. . . . [Vessel owner] is therefore not entitled to limit its liability to the value of the [vessel]."). In *Broussard*, the court found (1) that the owner was vicariously liable for the chief engineer's negligence in using an unsafe procedure to lift the vessel's fuel transfer hose to the main deck (a procedure known by the master of the vessel), (2) that the vessel was unseaworthy because of this unsafe procedure, (3) that the seaman was assigned 40 percent contributory negligence, and (4) that the owner was not entitled to limit its liability to the value of the vessel.

Further, in cases involving loss of life or bodily injury, the privity or knowledge of the master of a vessel shall be deemed conclusively the privity or knowledge of the owner of such vessel. *See* 46 U.S.C. § 30506(e) ("In a claim for personal injury or death, the privity or knowledge of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner."); *Broussard*, 467 F. Supp. 2d 668 (In a limitation action involving bodily injury, evidence that the master was familiar with the unsafe procedure was conclusively deemed to be that of the vessel owner.). Additionally, a corporate shipowner "may be deemed to have constructive knowledge if the unseaworthy or negligent condition could have been discovered through the exercise of reasonable diligence." *Brister v. A.W.I., Inc.*, 946 F.2d 350 (5th Cir. 1991).

8b. Crew Members?

RESPONSE: Yes. *See, e.g., Hercules Carriers Inc. v. Claimant State of Fla. Dept. of Transp.*, 768 F.2d at 1577 (quoting *In re Ta Chi Navigation (Panama) Corp., S.A.*, 513 F. Supp. 148, 158 (E.D. La. 1981), *aff'd*, 728 F.2d 699 (5th Cir. 1984)) ("'The fact that the unseaworthiness can be labeled as an error in navigation does not magically protect the shipowner from liability. At some point along the spectrum of performance competency, an error in navigation is attributable to incompetence on the part of the crew.'"). "Because the shipowner has a non-delegable duty to provide a competent master and crew, unseaworthiness can be caused by insufficient manning of the vessel or an incompetent crew." *Hercules Carriers*, 768 F.2d at 1565-66 (citing *Tug Ocean Prince*, 584 F.2d 1151, 1155

(2d Cir. 1978)). In this regard, "a navigational error may be so gross that it becomes attributable to a master's or crew's general incompetence." *In re W. Pioneer, Inc.*, 2002 WL 31262108, *4 (W.D. Wash. April 11, 2002) (citing *In re Ocean Foods Boat Co.*, 692 F.Supp. 1253, 1258-59 (D. Ore. 1988) (vessel unseaworthy when crewmember appointed as lookout failed to understand basic navigational rules or constant bearing rule); *accord Hercules Carriers*, 768 F.2d at 1577.

8c. The Designated Person Ashore/Company Security Officer?

RESPONSE: Yes. U.S. courts have long recognized that, "'[t]he more restricted the operation in which a vessel is engaged, the greater will be the degree of control which the corporate owner will be required to exercise over master [and] crew . . . . The duty to control increases along with the possibility of control . . . .'" *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 734 (9th Cir. 1969) (quoting *Avera*, 322 F.2d at 165) (quoting Gilmore & Black, Admiralty 704 (2nd ed. 1957)). In recognition of the correlation between the ability to control and the duty to control, "[t]he great majority of the cases denying limitation of liability have involved old barges, tugs, and other vessels obviously more capable of control by the home office than a freighter thousands of miles away. Most of these cases involved either a long-standing practice of failing adequately to inspect the vessel, or to otherwise exercise control over activities in the "home port.'" *Waterman S.S. Corp.*, 414 F.2d at 733.

8d. Other Individuals within the entity entitled to limitation?

RESPONSE: The owner or bareboat charterer of any vessel may petition for limitation of liability under the Limitation of Vessel Owner's Liability Act. 46 U.S.C. § 30501, 30505 (2006). Conversely, a time charterer may not apply for limitation under the Act. The United States may apply for limitation of liability under the Act when a vessel owned by the government is involved in a marine casualty. *Dick v. United States*, 671 F.2d 724 (2d Cir. 1982). A vessel owner's insurer is not authorized to limit liability under the Act. *Maryland Cas. Co. v. Cushing*, 347 U.S. 409 (1954).

8e. Third Party Contractors (e.g. agents of the vessel)?

RESPONSE: No. However, third parties (including insurers) may contract with vessel owners to limit their liability to that which a vessel owner may be liable under the Limitation Act.

If your answer is in the affirmative in any of the above questions, please briefly describe (a) the relevant facts; and (b) the rationale for the attribution of the relevant act or omission to the party entitled to limitation.

III. "WITH THE INTENT"/"RECKLESSLY" - Degree of fault

9. How is "intent" in art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS or relevant implementing domestic legislation interpreted in your jurisdiction?

RESPONSE: Not Applicable.

10. How is recklessness under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS or relevant implementing domestic legislation interpreted in your jurisdiction? Does negligence qualify as recklessness ('Qualifying Negligence') under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS in your jurisdiction?

RESPONSE: Not Applicable.

10a. If the answer to the previous question is in the affirmative, what are the elements of Qualifying Negligence under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

11. What is the standard for recklessness under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

RESPONSE: Not Applicable.

12. How is "actual fault" in art. V(2) CLC 1969 interpreted in your jurisdiction?

RESPONSE: Not Applicable.

13. How is "privity" in art. V(2) CLC 1969 interpreted in your jurisdiction?

RESPONSE: Not Applicable.

IV. KNOWLEDGE OF THE LIKELIHOOD OF THE HARMFUL RESULT

14. How is the requirement for knowledge in art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS interpreted in your jurisdiction?

RESPONSE: Not Applicable.

15. Does imputed or background knowledge suffice for the purposes of art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

RESPONSE: Not Applicable.

15a. If the answer to the previous question is in the affirmative, what are the relevant requirements?

16. Does failure to obtain the necessary information suffice for the purposes of art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS?

RESPONSE: Not Applicable.

16a. If the answer to the previous question is in the affirmative, what are the relevant requirements?

RESPONSE: Not Applicable.

V. "SUCH DAMAGE"/"SUCH LOSS"

17. How has the term "such loss"/"such damage" (art. 4 LLMC - art. V(2) CLC 1996/arts. 7(5) and 9(2) HNS 1996, respectively) been interpreted in your jurisdiction?

RESPONSE: Not Applicable.

VI. BURDEN OF PROOF

18. Who bears the burden of proof to show that the requirements for breaking the right to limit are fulfilled?

RESPONSE: In the United States, "[t]he claimants bear the initial burden of establishing liability, after which the vessel owner bears the burden of establishing the lack of privity or knowledge." *In re Bridge Constr. Servs. Of Fla.*, 39 F. Supp. 3d at 382 (citing *Otal Invs. Ltd. v. M/V CLARY*, 673 F.3d 108, 115 (2d Cir. 2012) (citations omitted)); *accord Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1036 (11th Cir. 1996).

19. Is it possible under the procedural rules of your jurisdiction that the burden of proof may shift to the person liable under certain conditions?

RESPONSE: Yes. Burden shifting rules applicable under general maritime law may shift the initial burden of proof from the claimant to the owner in a Limitation Act case. For example, the "Pennsylvania Rule" comes into play when a vessel is in violation of a safety standard established by statute or regulation. Under the Pennsylvania Rule, a vessel that violates a statute or regulation must show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" the cause of the casualty. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873). Therefore, for a casualty involving violation of a safety statute or regulation, the burden shifts from claimant to the owner under the Limitation Act, and requires the owner to show that its violation of the statute could not have caused the accident.

VII. INDICATIVE REFERENCE TO OTHER CONVENTIONS

20. What is the wording used to implement art. 6 (2) WRC and art. 10(2) Bunkers Convention in your jurisdiction?

RESPONSE: Not Applicable.

21. How have art. 10(2) WRC and art. 6 (2) Bunkers Convention been interpreted in your jurisdiction in the context of breaking the right to limitation?

RESPONSE: Not Applicable.

VIII. EQUIVALENT PROVISIONS

22. The same language for the test for breaking the liability limits is used in art IV (5)(e) of the Hague Rules as amended by the Visby Protocol:

22a. Has your country ratified the Hague-Visby Rules or enacted these rules into their domestic legislation?

RESPONSE: No.

22b. If the answer to the previous question is in the affirmative, how are the relevant criteria as listed above (11-V) interpreted in the context of the respective provision incorporating art. IV (5)(e) of the Hague-Visby Rules?

RESPONSE: Not Applicable.