

INTERNATIONAL SUB-COMMITTEE ON LIMITATION OF LIABILITY IN MARITIME LAW
- CMI COMMENTARY AND LIST OF ISSUES FOR CONSIDERATION OF FUTURE WORK

1. The background and work of the International Sub-Committee on Limitation of Liability in Maritime Law to date

In 2004 a questionnaire was prepared and distributed to the NMLA's with a view to finding out what rules of procedure had been enacted in the States parties to the Convention on Limitation of Maritime Claims (LLMC) and to the Conventions on Civil Liability for Oil Pollution Damage 1969 and 1992 in order to implement the provisions of these conventions. The questionnaire was prepared by Professor F. Berlingieri (Italy) with the assistance of Dr. G Timagenis (Greece).

The responses were digested and analysed and the findings presented at the colloquium held in Cape Town in February 2006 and published in the Yearbook 2005-2006.

In November 2006, the Executive Council of the CMI decided to establish an International Sub-Committee to cover the three conventions relating to limitation of liability, namely LLMC, CLC and the HNS Convention. The mandate of the International Sub-Committee was to prepare draft guidelines relating to procedural rules in maritime law.

The first meeting of the International Sub-Committee was held in Dubrovnik during the joint symposium of the CMI and the Croatian Maritime Law Association on Saturday 12 May 2007 under the chairmanship of Professor F. Berlingieri (Italy) and Dr G. Timagenis (Greece) as Co-chairman and Rapporteur.

A second meeting of the International Sub-Committee was held in Paris on 13-14 September 2007 under the chair of Dr Timagenis. Draft guidelines were prepared and considered. Mrs Helen Noble (Ireland) was subsequently appointed as Rapporteur of the International Sub-Committee.

Following the meeting of the International Sub-Committee in Paris considerable work was undertaken drafting guidelines at the 39th CMI conference in Athens in October 2008 and the "Guidelines in respect of Procedural Rules Relating to Limitation of Liability in Maritime Law" being adopted at the Plenary Session in Athens in October 2008.

The International Sub-Committee met in London on 25-26 March 2010. A report of that meeting and a list of further questions/issues for consideration was circulated to the NMLA's.

This material was also circulated with the papers for the assembly in Buenos Aires in October 2010.

Although the subject matter was not included in the business for the Buenos Aires colloquium, the International Sub-Committee held a brief informal meeting in Buenos Aires. It was decided to undertake some further editing on the list of questions and issues and to update the Commentary on the "Procedural Rules relating to Limitation of Liability in Maritime Law" adopted at the Athens Conference.

The editing and update to the commentary was completed and prepared for circulation at the Assembly in Oslo September 2011. A further brief report on the work of the International Sub-Committee following the Athens conference and a list of substantive issues relating to Limitation of Liability In Maritime Law was circulated on 13 February 2012 to all NMLAs and to members of the International Sub-Committee.

2. Introductory Notes and Commentary on the Guidelines in Respect of Procedural Rules Relating to Limitation of Liability in Maritime Law

At the Athens conference final guidelines were adopted at the Assembly. During the process of drafting guidelines the International Sub-Committee had prepared Introductory Notes and commentary on each of the proposed guidelines. These introductory notes and the commentary were not circulated at the Athens conference in advance of the Guidelines being adopted at the Assembly.

Following adoption of the Guidelines at the Assembly, the introductory notes and commentary were adjusted so as to be in line with the final version of the Guidelines and were circulated amongst the International Sub-Committee for final agreement in July 2012. On receipt of all comments from the International Sub-Committee, in particular from Måns Jacobsson and Tomotaka Fujita, the introductory notes and commentary were finalised in August/September 2012

The final version of the Guidelines together with introductory notes and commentary are available on the CMI website. A copy is also available on the symposium website under the section "Presentations".

3. Substantive issues

The purpose behind circulating the list of substantive issues to the NMLA's on 13 February 2012 was not to invite comment on the substantive issues or to obtain replies to the questions posed but for the International Sub-Committee to finalise its list of further

questions the NMLA's and the International Sub-Committee might consider in undertaking further work in the future on this area.

Replies were received from Denmark, Turkey, China, Norway, Argentina and Belgium. Belgium posed additional questions it believes should be considered by the NMLA's. These additional questions have been incorporated into an updated list of issues which is as follows:

1. *What are the Consequences of non participation to the Limitation Fund? Can the claims be exercised against other assets of the owner? What is the purpose/value of limitation of liability by the shipowner (or any other person entitled to limit its liability) in circumstances where participation in the fund is optional and/or there is non-participation and claims can be exercised against other assets?*
2. *What time limits should apply for Filing Claims with the Limitation Fund? Is it appropriate to co-ordinate the time limit for filing claims with the applicable time bar of the claims subject to limitation or may/should the time limit for participation in the limitation proceedings be shorter?*
3. *What are the effects of a declaration of bankruptcy on limitation of liability, if bankruptcy is declared [a] after the limitation or [b] before the limitation? Does the bankruptcy of one of the persons entitled to limitation for a particular incident affect the position of the others? If the shipowner becomes bankrupt, is its liability insurer (e.g. P&I Club, especially if it becomes directly liable) entitled to limit liability? Is a claimant entitled to participate in both the limitation fund and bankruptcy proceedings or not?*
4. *Do maritime liens survive after limitation? Do actions in rem, i.e. against the vessel, fall under Art. 1 and 2 of LLMC? Is there a possibility of maritime liens in relation to pollution damage claims and, if so, do such liens survive limitation of liability?*
5. *Should interim payments out of the limitation fund be permitted? if so, against a security or without security?.*
6. *How do you resolve the conflicts between Article XII and XII of the CLC, Art. 42 HNSC and Art. 6 Bunker Convention?*

7. *How do you resolve conflict of law issues between Arts. 14 and 15 of the LLMC and Art. 15 of Rome II?*
8. *How do you resolve the jurisdiction, recognition and enforcement issues raised by the ECJ decision Maersk Olje)?*
9. *What rate of interest on the limitation amount should accrue before and/or after the fund is established?*
10. *Which court is entitled to hear and decide on challenges to the validity of a limitation fund? Is it the country where the limitation fund is constituted or can claimants filing suit in other countries raise objections to the validity of the fund in the courts where they have filed suit?*
11. *How do you deal with limitation in relation to ships not measured under the 1969 Tonnage Convention?*
12. *What is the ship owner's right to limit liability vis-à-vis other persons (in particular charterers)?*
13. *When and where can limitation proceedings be initiated and the fund established under the LLMC?*
14. *How is the LLMC applied to ships with dual passenger capacity?*
15. *Can Claimants challenge (in the context of limitation proceedings) claims of other claimants adjudicated in proceedings in which the challenging claimants did not participate under the CLC and / or HNSC?*
16. *What procedure applies in your country for invoking limitation? Is there a specific method for filing an application to invoke limitation of liability? How long does this procedural step take?*
17. *What is the nature of a recourse claim in your country? For example, if there is a collision between Vessel A and Vessel B. Two crew members on board Vessel B*

die. The claims of the relatives of the crew members against the shipowner of Vessel B are claims for loss of life. If shipowner B then files a recourse claim still a claim in respect of loss of life (which could require a separate fund) or is it a claim for consequential loss under Article 2.19a) of the LLMC?

A copy of this updated outstanding list of issues is contained in the conference papers and is available on the symposium website.

Helpfully as it transpired, substantive replies to the list of questions were in fact received from the NMLA's of Denmark, Turkey, China, Norway and Argentina. The responses from these NMLA's are to be found again on the conference website. I have taken the liberty of collating these into one document in an accessible format to make the responses easier for review and to compare. The responses demonstrate that the issues raised are problematic and that the issues are treated differently (as anticipated) in different jurisdictions and/or their national laws do not deal at all with the issues raised. There appears to be no uniform approach to the issues raised. There may therefore be potentially a gap for further assistance at the international level in the form of additional guidelines.

4. The effects of a declaration of bankruptcy on limitation of liability, if the bankruptcy is declared before or after the limitation, and other issues. Consideration of future work on this topic for the CMI and linkage to cross border insolvencies

One of the questions posed was what are the effects of a declaration of bankruptcy on limitation of liability, if the bankruptcy is declared [a] after the limitation or [b] before the limitation?¹

The preliminary view of the International Sub-committee was that (a) if bankruptcy becomes effective prior to limitation, there should be no entitlement to limit liability and (b) if the bankruptcy became effective after the limitation, the limitation fund should not be affected.

The replies from China, Argentina, Turkey, Denmark and Norway demonstrate that this may well not be the case in all jurisdictions.

In accordance with the view of the International Sub-Committee, the Chinese NMLA, noted that in China, if a debtor has been declared bankrupt, a debtor would not be permitted

¹ In this regard after or before limitation means after or before the establishment of the fund under Guideline 6 (c) which provides that the Limitation of Liability becomes provisionally effective at the time of the establishment of the Fund.

subsequently to apply to the maritime courts to constitute a limitation fund as a debtor is not permitted to constitute special security for only some of its creditors.

However in China where the fund is constituted before a debtor is declared bankrupt, it appears the limitation fund, if constituted by the debtor's own capital, should be treated as part of the debtor's property and should be distributed amongst all creditors.

In Argentina the position is prescribed under section 5577 of the Navigation Act which provide that where a bankruptcy becomes effective after the commencement of limitation proceedings, the limitation fund continues even if the ship owner is declared bankrupt, provided the owners right to limit has not been challenged or declared to have lapsed. There is no provision dealing with the situation where the bankruptcy becomes effective prior to the commencement of limitation proceedings but it is assumed the same solution applies. Preferential creditors will be entitled to pursue their claims against the vessel and the ship owner will still be able to limit its liability.

Under Turkish law it appears the ship owner would still have the benefit of limitation even in the case of bankruptcy and would be entitled to limitation upon the arrest of his vessel. In accordance with the list of priorities set out in Article 1390 – 1397 of the New Turkish Commercial Code ("N. TCC" – in effect from 1 July 2012), all creditors that remain unsatisfied after distribution of the ship's judicial same may participate in bankruptcy proceedings. However, a maritime claimant who has received its pro rata share form the limitation fund is not permitted to apply to the bankruptcy proceedings for any shortfall.

In Denmark it appears the position is that there are no rules which specifically govern the situation. It is not clear exactly therefore what the consequences of bankruptcy are when declared after a limitation fund has been established. There is a suggestion that the fund may not be amalgamated into the bankruptcy estate for distribution to all creditors on equal terms - the argument being that limitation funds are set up to cover claims for damage and should only be available for payment of claims subject to the limitation of the ship owner's liability.

Where the bankruptcy is declared before the establishment of the limitation fund, the Danish NMLA point out that an issue is only likely to arise if the claims against the ship owner are not covered by his P&I Club. Ordinarily, bankruptcy means that the claimants will instead raise their claim directly against the P&I Club who may then in turn invoke limitation and establish a limitation fund with the same rights at the ship owner. Such limitation fund established by the P&I Club (albeit in the name of the ship owner) after bankruptcy would in their view be dealt with independently and separately from the bankruptcy.

The Danish NMLA add, that in their opinion, a bankruptcy estate is strictly speaking not precluded from establishing a limitation fund itself if it considers this to be to the advantage of the creditors. However, since the liquidator/trustee of the bankruptcy estate could be held liable for such a decision if it turns out to be to the detriment of the other creditors, it is difficult to envisage a situation in which this would occur.

In Norway, in accordance with article 177 sub-paragraph 3 of the Maritime Code it appears the limitation fund established is regarded as constituted only for the benefit of and payment of all claims subject to such limit of liability. The fund has the character of a special security for the payment of the limitable claims, and the court shall distribute the fund and effect payments of the amount allocated to the particular established claims even if the person having established the limitation fund is subsequently declared bankrupt.

If the person liable has been declared bankrupt before a limitation fund has been established, in Norway any claim has to be submitted in the bankruptcy proceedings. However, the amount of each of the limitable claims to be taken into account as a debt in the bankruptcy proceeding is equivalent to the actual liability of the debtor i.e. proportionate to the limitation amount.

As pointed out by the Norwegian NMLA, questions relating to the effect of the person liable being declared bankrupt before a limitation fund has been established are not likely to arise in cases where the person liable has adequate liability insurance. According to the CLC and Bunkers Conventions (and corresponding provisions of the Norwegian Maritime Code) the rules on compulsory liability insurance and the rules on the claimants' right to direct action against the liability insurers mean that in such a case a limitation fund to cover the limitable claims will have to be established by the liability insurer. According to the Norwegian Insurance Contract Act 1989 claimants generally are granted a direct action against the liability insurer if the person liable has become insolvent. This provision will be applicable in cases where the person liable has been declared bankrupt before a limitation fund has been established according to the 1976/1996 Convention. However, a liability insurer being held liable for claims subject to limitation according to the 1976/1996 Convention is entitled to limit his liability e.g. by establishing a limitation fund on behalf of the assured.

Following on from this first question on the effect of bankruptcy, the International Sub-Committee queried whether the bankruptcy of one of the persons entitled to limitation for a particular incident affects the position of the others. The answers to this question suggest that there may be more uniformity in approach. In China it appears if others are involved in

the same accident, and they bear respective liabilities with the bankrupt, the bankruptcy does not affect the position of them. In Argentina, the bankruptcy of one of the persons entitled to limitation, does not affect the position of the others. In Denmark the position is that it does not directly affect the position of others. However, if the parties are jointly liable, the bankruptcy of one party could mean that the claims against other the party will increase. Finally In Norway, according to Article 171 of the Maritime Code, which is based on 1976/1996 Convention article 1, a number of persons are granted the right to invoke limitation of liability. Any of these persons being liable for limitable claims is entitled to invoke limitation of liability, regardless of whether one or more of the other persons mentioned is without liability for such claims or does not invoke limitation. The fact that one or more of such persons has been declared bankrupt does not affect the right to limitation of liability of the others.

China, Argentina, Denmark and Norway are also harmonised in their approach that when an owner becomes bankrupt, its liability insurer (e.g. the P&I Club, especially if it becomes directly liable) is entitled to limit liability.

Finally a question that appears to have largely not be considered is whether a claimant is entitled to participate in both the limitation fund and bankruptcy proceedings? In China although there is no decided case, the answer seems to lie in the timing of the bankruptcy proceedings. In Argentina it appears a claimant can participate in both proceedings if necessary. In Denmark again timing is possibly where the answer lies. The Danish NMLA have pointed out in their replies that it is not exactly clear what the consequences of bankruptcy are when declared after a limitation fund has been established. If the claimant has filed his claim in the limitation fund, and the claim is subject to limitation and the limitation fund is upheld irrespective of the bankruptcy, then it would seem to follow that the claimant has no grounds to claim anything further against the bankruptcy estate because the claimant is then already fully secured for his (limited) claim.

In Norway a claimant is entitled to submit his claim both in the limitation proceedings and the bankruptcy proceedings. However, if the claim as subject to limitation is paid out of the fund, the liability of the debtor is extinguished, and claimant may not also receive a dividend from the bankruptcy proceedings. If the limitation fund has been established by an insurer, the insurer may be entitled by way of subrogation to enforce the claim made in the bankruptcy proceedings.

5. Summary

The answers to the questions relating to the bankruptcy certainly suggest there may be scope to consider whether further procedural rules might assist in a uniform approach to implementation of the limitation conventions, particularly given certain issues do not seem to have been considered in the implementing legislation in individual jurisdictions.

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