



**IMO**  
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**AN ACT TO INCORPORATE THE PROTOCOL  
OF 1996 TO AMEND THE CONVENTION ON  
LIMITATION OF LIABILITY FOR MARITIME  
CLAIMS, 1976 AS AMENDED BY RESOLUTION  
LEG.5 (99)**

**A Legislation Drafting Project submitted in partial fulfillment of the  
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## EXPLANATORY NOTE

### 1. THE CONCEPT OF LIMITATION OF LIABILITY FOR MARITIME CLAIMS

In light of the risks of navigation and carriage services, a shipowner might be liable for any losses and damage which may easily exceed his financial capacity. The possible consequences of an example of a collision between a cruise ship and a tanker in Malacca Straits was raised in the 80<sup>th</sup> Session of the Legal Committee at IMO to illustrate damages and claims against the shipowners, such as;

- Claims for death of or injury to passengers;
- Claims for death of or injury to crew (of the cruise ship and the tanker);
- Claims for pollution from bunkers;
- Claims for wreck removal;
- Liability for the consequences of the collision, possibly including consequential oil pollution liability or loss of use of a berth or port; and
- Damage to other fixed or floating structures.<sup>1</sup>

The abovementioned liability may lead to the bankruptcy of the shipowner. ‘Considering the perilous nature of the shipping industry with its possible catastrophic consequences, and on the other hand the importance of the industry for international trade, a means had to be found to encourage shipowners to continue with their business and develop shipping in general’.<sup>2</sup>

‘Limitation of liability for maritime claims is a legal concept which allows the shipowner to limit his financial exposure for maritime claims up to a maximum sum regardless of the actual amount of the claims being brought against him’.<sup>3</sup> It began in continental Europe where the shipowner was considered to be personally liable for the claims, but he was allowed to limit his liability by abandoning his ship, together with any pending freight, to the claimants.<sup>4</sup>

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<sup>1</sup> International Maritime Organization (ed), ‘LEG 80/3/3’ (1999).

<sup>2</sup> Norman A Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes* (Routledge, London 2012) 1–2.

<sup>3</sup> Norman A Martinez Gutierrez, ‘Limitation of Liability for Maritime Claims’ in David J Attard and others (eds), *The IMLI Manual on International Maritime Law: Vol 2: Shipping Law* (Oxford University Press, Oxford 2014-2016) 551.

<sup>4</sup> Ibid.

On early stage, nonetheless, the concept of limitation of liability of the shipowners to the value of the ship he abandoned was against the principle of *'restitutio in integrum'* which aims to put the injured party in the same position he would have been before the event causing injury occurred. Such concept of limitation of liability had been accepted by many jurisdictions in Europe, e.g. France, Germany, the Netherland, Spain, and Sweden. The codification of the concept into French legislation, the French Code of Commerce of 1807, was widely recognized and used as a model for the maritime law of several European and Latin American countries.<sup>5</sup>

## **2. HISTORY OF THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976<sup>6</sup> (LLMC 1976), ITS 1996 PROTOCOL<sup>7</sup> AND ITS AMENDMENT ADOPTED BY THE 99TH SESSION OF LEGAL COMMITTEE OF IMO**

The sinking of the *RMS Titanic* in April 1912 gave rise to many claims for loss of life and personal injury that were tried in several countries and resulted in different outcomes. Following the incident, the Comité Maritime International – CMI – aimed to establish an international system for the limitation of liability and proposed a draft convention which was adopted in 1924.<sup>8</sup> The convention was called the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1924. The Convention was later superseded by the 1957 Convention.

It was later realized that the 1957 Limitation of Liability Convention needed to be updated in order to increase the limitation figures and to set out mechanism to accommodate problems of inflation, as well as to review the situation when the right to limit should be forfeited. For this purpose the IMO held the International Conference on the Limitation of Liability for Maritime Claims in November 1976 and the text of the 1976 Convention was adopted.<sup>9</sup> The Convention came into force on 1 December 1986.

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<sup>5</sup> Martinez Gutierrez (n 2) 6-7.

<sup>6</sup> *Convention on Limitation of Liability for Maritime Claims, 1976* ((signed on 1976, entered into force on 1986) 1456 UNTS 24635).

<sup>7</sup> *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976* (signed on 1996, entered into force on 2004).

<sup>8</sup> Martinez Gutierrez (n 2) p.17-18.

<sup>9</sup> Patrick Griggs, Richard Williams and Jeremy Farr (eds), *Limitation of liability for maritime claims* (4th ed. / by Patrick Griggs, Richard Williams and Jeremy Farr LLP, London 2005) 3.

The Protocol of 1996 to amend LLMC 1976 (1996 LLMC Protocol) was adopted at the International Conference on Hazardous and Noxious Substances and Limitation of Liability held in London from 15 April to 3 May 1996. The Draft Protocol contained two main proposals to amend LLMC 1976: Firstly, the draft text proposed to increase the limits of liability to satisfy claims. The second proposal was to simplify the amendment procedure by authorizing the Legal Committee of IMO to review and adopt the proposed amendment to the limits of liability by means of tacit acceptance procedure. The Protocol was adopted at the conference and entered into force on 13 May 2004.<sup>10</sup>

An amendment to increase the limits of liability in the 1996 LLMC Protocol was adopted by the Legal Committee during its 99<sup>th</sup> session. The amendment was provided in resolution LEG.5(99) and entered into force on 8 June 2015.<sup>11</sup>

As of December 2017, there are 53 Contracting States to the 1976 LLMC Convention and 54 Contracting States to the 1996 Protocol which represent 55.83% and 59.88% of the world's merchant fleet gross tonnage respectively.<sup>12</sup>

In light of the provisions of the limits of liability and the contemporary legal procedures provided in the 1996 LLMC Protocol, the consideration to adopt the regime of limitation of liability for maritime claims should be in favour of becoming party to the 1996 LLMC Protocol as amended. The implication of Article 9(2), in conjunction with Article 9(1), of the 1996 LLMC Protocol, a State Party to the Protocol but not a Party to the 1976 LLMC Convention shall be bound by the provisions of the Convention as amended by the 1996 LLMC Protocol (only in relation to State Parties to the Protocol). Therefore, in this document the 1976 Convention as amended by the 1996 Protocol hereafter will be referred to as the “*1996 LLMC Convention*” for the ease of reference.

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<sup>10</sup> *Limitation of liability for maritime claims: Convention on limitation of liability for maritime claims, 1976 (LLMC 1976), LLMC protocol 1996 as amended by resolution LEG. 5(99), consolidated text of substantive provisions of LLMC 1976 as amended by the LLMC Protocol 1996 and including its amended limits of liability* (IMO publication, 2016 edition; Third edition IMO, London, London 2016).

<sup>11</sup> *Ibid.*

<sup>12</sup> International Maritime Organization, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions*, 8 December 2017.

### 3. FEATURES OF THE 1996 LLMC CONVENTION

#### 3.1 Claims Subject to Limitation

Article 2 of the 1996 LLMC Convention provides for a list of maritime claims which are subject to limitation. With the exception of the claims stipulated in Article 3, the persons entitled to limit liability in accordance with the Convention will be able to do so irrespective of the basis of liability. ‘The right to limit will thus be available, inter alia, for claims in contract, tort, breach of statutory duty, even for misrepresentation’.<sup>13</sup>

##### 3.1.1 Claims in Respect of Loss of Life or Personal Injury or Loss of or Damage to Property

Article 2(1)(a) provides that:

[c]laims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbor works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom

This provision covers all personal and property claims, provided they occur on board or in direct connection with the operation with the operation of the ship or with salvage operation.<sup>14</sup> Accordingly, at this stage, it is necessary to deliberate the meaning of the phrase ‘in direct connection with the operation of the ship’. The court, in *Caspian Basin v. Bouygues (No.4)*, explained that ‘ “[i]n direct connection which the operation of the ship” is the way in which the Convention expresses the necessary linkage between loss of or damage to property on the one hand and the ship in respect of which the claim to limit is made on the other’.<sup>15</sup> Furthermore, in *The Aegean Sea*<sup>16</sup>, the judge reiterated that to confine the phrase to a narrow interpretation would significantly limit the protection that should be available under the Convention and be contrary to the broad policy of construction that should be applied.<sup>17</sup>

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<sup>13</sup> Martinez Gutierrez (n 2) 40.

<sup>14</sup> Ibid.

<sup>15</sup> *Caspian Basin v. Bouygues (No.4)* [1997] 2 Lloyd’s Rep 507, 522

<sup>16</sup> *Aegean Sea Trader Corporation v. Repsol Petroleo S.A. and Another (The "Aegean Sea")* [1998] 2 Lloyd’s Rep. 39.

<sup>17</sup> Ibid 51–52.

### 3.1.2 Claims Resulting from Delay

Article 2(1)(b) provides that the right to limit liability is available in respect of claims for loss resulting from delay in the carriage by sea of cargo, passengers, or their luggage. The right to limit liability can be invoked under Article 2(1)(a) where the occurrence gives rise to loss or damage to property – i.e. ‘concrete’ damage – as in the case of perishable cargo lost as a result of the delay (in this case delay would be the cause of the ‘concrete’ damage). Likewise, pure economic loss – i.e. ‘abstract’ loss – caused by late delivery of the goods may also fall under Article 2(1)(a) if it is proved that such loss is a ‘consequential loss’ resulting from any ‘loss of life or personal injury or loss of or damage to property’, for example where the delay is caused by the grounding of the vessel. In this case, to be able to limit liability under Article 2(1)(a) the ‘abstract’ loss must inevitably be linked to ‘concrete’ damage. On the other hand, Article 2(1)(b) will be invoked in case where there is no link between an ‘abstract’ loss and ‘concrete’ damage. An example of this would be where delay is caused by congestion at the port of transshipment, away from the carrying ship, and not as a result of any ‘concrete’ damage.<sup>18</sup>

### 3.1.3 Claims for Infringement of Rights

Article 2(1)(c) recognizes the right to limit liability in respect of claims for the loss resulting from the infringement of rights other than contractual rights, which occurred in direct connection with the operation of the ship or salvage operations. This may include, inter alia, infringement of right such as a railroad company’s right of passage over a bridge spanning a river, the right of access into a port by other ship, or claims in tort for pure economic loss. However, since Article 2(1)(c) aims to deal with the infringement of rights ‘other than contractual rights’, claims made by shipowners under a charterparty for loss of right to earn freight, cannot fall under this article as such claims would be claims for the infringement of ‘contractual right’.<sup>19</sup>

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<sup>18</sup> Martinez Gutierrez (n 3) 559.

<sup>19</sup> Ibid.

### **3.1.4 Claims for Wreck and Cargo Removal**

Article 2(1)(d) and (e) provide the right to limit liability from claims arising from wreck and cargo removal. Article 2(1)(d) recognizes the right to limit liability for the claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship. The right to limit liability for claims in respect of removal, destruction or the rendering harmless of the cargo of the ship is provided by Article 2(1)(e). It is important to note that the claims for the raising, removal, destruction, or rendering harmless of the cargo of the ship which is sunk, wrecked, stranded, or abandoned should fall under Article 2(1)(d). On the other hand, in the case of the ship which is not sunk, wrecked, stranded, or abandoned, the claims for removal, destruction or the rendering harmless of the cargo of the ship should be dealt with Article 2(1)(e).<sup>20</sup>

It is necessary to clarify that the claims which are subject to limitation of liability under sub-paragraphs (d) and (e) are the ‘claims brought by harbour or conservancy authority or other public entities, since claims brought by salvors are excluded from limitation under Article 3(a), and the right to limit under these sub-paragraphs is available only to the extent that the relevant claims do not relate to remuneration under a contract with the person liable’.<sup>21</sup>

### **3.1.5 Claims in Respect of Measures Taken in Order to Avert or Minimize Loss**

Article 2(1)(f) provides that claims of a person ‘other than the person liable’ in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with the Convention are subject to limitation, and further loss caused by such measures. ‘Example of claims which may fall under Article 2(1)(f) include claims by a third party, in relation to a stranded ship carrying chemicals which may threaten a chemical pollution, for any measures such third party may have taken to prevent or minimize loss or damage, as well as claims by a cargo owner – against the shipowner – for the recovery of moneys paid to a salvor for measures taken by the latter to minimize the loss of cargo in peril, since the shipowner would be entitled to limit his liability for the loss of the cargo resulting from his negligence. Conversely, if

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<sup>20</sup> Martinez Gutierrez (n 2) 45-46.

<sup>21</sup> Martinez Gutierrez (n 3) 560.



– in the aforesaid circumstances – the shipowner would have paid the salvors on behalf of the cargo owners, his claim for reimbursement against the cargo owner would not fall under Article 2(1)(f) because it would be a claim brought by the person liable himself.<sup>22</sup>

### **3.2 Persons Entitled to Limit Liability**

Article 1 of the 1996 LLMC Convention provides a list of persons who are entitled to limit their liability from maritime claims set out in Article 2, namely:

#### **3.2.1 Shipowners**

The term “shipowner” as defined in Article 1(2) of the 1996 LLMC Convention means the owner, including charterer, manager and operator, of a seagoing ship. In considering the implementation of the 1996 LLMC Convention, a special care has to be taken when defining the term “seagoing ship” since the Navigation in Thai Waters Act B.E. 2456 (1913), Section 3,<sup>23</sup> also provides the definition of “seagoing vessel” by referring to the definition given by the Ship Survey Regulations which was promulgated in series and defined “seagoing vessel” in various meanings depend on the scope of application of each Regulations. Therefore, under Article 15(2)(a) of the 1996 LLMC Convention, the draft text to incorporate the Convention should provide the definition of “seagoing ship” by taking into account the nature of navigation of ships between sea and river port within the Thai jurisdiction.

#### **3.2.2 Salvors**

Article 1(1) of the 1996 LLMC Convention recognizes the salvors’ right to limit their liability arising from salvage operations. Under the provision of Article 1(3), a salvor can be any person rendering services in direct connection with salvage operations which also include operations referred to in Article 2, paragraph 1(d), (e) and (f). It is important to note that the limits of liability for salvors will fall under the provision of Article 6(4) which provides limits of liability

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<sup>22</sup> Ibid 561.

<sup>23</sup> “seagoing vessel” or “sea vessel” means a vessel with a feature being used at sea under the Ship Survey Regulation.

for any salvor carrying out salvor operations away or on board the salvor's ship. The limits of liability for salvors has been provided in section 4.2 of this document.

### **3.2.3 Any Person for Whose Act the Shipowner or Salvor is Responsible**

Article 1(4) of the 1996 LLMC Convention provides that 'if any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention'. The latter provision has its purpose to prevent claimants in bringing claims against the shipowner's servants instead of the shipowner himself. However, it is necessary to clarify the word "responsible" in order to avoid misinterpretation in future. By considering the text of Article 1(4) one can understand that the Convention intends to provide the right to limit liability to a person other than a direct-employee or an agent of the shipowner or salvor, providing that the liability of that person must arise from the activity that was a non-delegable duty of the shipowner or salvor. An analogy of the aforementioned interpretation could be the case of stevedores who cause damages to third parties while performing cargo operations under the responsibility of the shipowner or charterer. Such stevedores can invoke the provision of Article 1(4) to limit their liability.<sup>24</sup>

### **3.2.4 Liability Insurers**

Article 1(6) of the 1996 LLMC Convention provides the right to limit liability to the insurer of liability for the claims subject to limitation in accordance with the rules of the Convention. Therefore, the insurer of liability is entitled to the benefits of the Convention to the same extent as the assured himself. Nevertheless, the insurer would lose his right to limit liability, if the insured was barred from the right to limit in accordance with Article 4.<sup>25</sup>

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<sup>24</sup> Martinez Gutierrez (n 2) 33.

<sup>25</sup> Ibid 35.

### 3.3 Loss of Right to Limit

Article 4 of the 1996 LLMC Convention provides that ‘a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result’.

It is important to note that *a person liable* means the person who entitled to limit his/her liability as stipulated in Article 1 of the Convention and this person will lose his/her right to limit liability if it is proved that the person in question acted:

- intentionally to cause the loss or damage; or
- recklessly and knowingly that the loss would cause the loss or damage.

The burden of proof, therefore, belongs to the claimant or the person challenging the right to limit.<sup>26</sup>

### 3.4 Claims Excepted from Limitation

The claims which the rules of the 1996 LLMC Convention shall not be applicable are provided in Article 3 as follow:

#### 3.4.1 Salvage and General Average

Article 3(a) of the 1996 LLMC Convention provides that the rules of the Convention do not apply to ‘claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average’. It is important to take note the interpretation of the court regarding the application of this exclusion term in *The Aegean Sea* that the term “for salvage and for contribution in general average” only excludes claim against the shipowner for his contribution in general average and claims against the shipowner for salvage.<sup>27</sup> In other words, it could be interpreted that Article 3(a)

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<sup>26</sup> Ibid 62–69.

<sup>27</sup> *Aegean Sea Trader Corporation v. Repsol Petroleo S.A. and Another (The "Aegean Sea")* [1998] 2 Lloyd’s Rep. 39 (n 16) 55.

excludes only the direct claims by salvors or parties who have suffered a general average loss or sacrifice. However, if a cargo interest pays his salvage or general average contribution he is entitled to claim such contribution from the shipowner by way of damages if it is proved that the causes of damages are from breaching the carriage contract by the shipowner. In such case the shipowner has the right to limit his liability under Article 2.<sup>28</sup>

### **3.4.2 Claims for Oil Pollution Damage**

Article 3(b) excludes claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969, as amended, or its Protocol from the application of the 1996 LLMC Convention. It is important to emphasise that not all claims related to oil pollution damage are excluded. Only the claims that fall under the CLC 1969 or the Protocol of 1992 to amend CLC 1969 are excepted from liability limitation under the 1996 LLMC Convention. Other claims for oil pollution damages, e.g. bunker spill, will be subject to limit liability under Article 2 of the 1996 LLMC Convention.<sup>29</sup>

As a State Party to the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (1992 CLC Protocol), Thailand promulgates the Civil Liability for Oil Pollution Damage Act B.E. 2560 (2017). Thus, any person against whom claims arising from oil pollution damage within the scope of the Act have been brought, he will be liable under the national law and cannot invoke the provisions of the 1996 LLMC Convention to limit his liability.

### **3.4.3 Nuclear Damage Claims**

Article 3(c) stipulates that the Convention shall not apply to ‘claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage’. Therefore, the limitation of liability for nuclear damage is provided by the 1996 LLMC Convention – unless Thailand is a party to any international convention or promulgates national legislation which govern liability for nuclear damage.

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<sup>28</sup> Patrick Griggs, Richard Williams and Jeremy Farr (eds), *Limitation of Liability for Maritime Claims* (4th ed. / by Patrick Griggs, Richard Williams and Jeremy Farr LLP, London 2005) 26.

<sup>29</sup> Martinez Gutierrez (n 2) 48.

Article 3(d) excludes any claims against the shipowner of a nuclear ship for nuclear damage. Even though the 1996 LLMC Convention does not allow a limitation of liability relating to nuclear damage of a nuclear ship, the Convention on the Liability of Operators of Nuclear Ships 1962 has provisions allowing limitation for this kind of damage.<sup>30</sup>

#### **3.4.4 Claims by Servants of the Shipowner or Salvor**

Article 3(e) provides that the Convention does not apply to claims which are brought against the shipowner or salvor by his servants whose duties are connected with the ship or the salvage operations, provided that under the law governing the contract of service between the shipowner or salvor and such servants, the shipowner or salvor is not entitled to limit his liability, or if by such law the shipowner or salvor is permitted to limit his liability to an amount greater than the limits prescribed by the Convention. The exclusion also extends to claims of the servants' heirs, dependants or other person entitled to make such claims.

#### **3.4.5 Claims Excluded by Reservation**

Article 18 allows any State Party to make reservations in order to exclude particular claims from the provisions of the 1996 LLMC Convention. The discussion on reservation of Thailand to the Convention will be provided in section 7 of this document.

### **3.5 Scope of Application**

Article 15 regulates the scope of application of the Convention and provides options for State Parties on implementing rules of the Convention in various subjects.

Article 15 (1) emphasises that a person, who is entitled to limit liability under the LLMC Convention, at any time, can seek to limit his liability before a court of a State Party, or seek to release his ship or other property from arrest or the discharge of security within the jurisdiction of a State Party. However, a State Party (e.g. Thailand) has an option to exclude either wholly or partly from the application of the Convention any person who does not have his habitual residence

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<sup>30</sup> Griggs, Williams and Farr (eds) (n 28) 29.

or does not have his principal place of business in a State Party. Furthermore, any State Party (Thailand) may not apply the Convention to a ship which does not fly the flag of a State Party at the time when the right of limitation is invoked or its release from arrest is sought.<sup>31</sup> In consideration of exercising this option, it has to take into account of the implications of reciprocal and unfavourable treatment. In the light of the effectiveness of judicial proceedings and law enforcement, the option to limit the scope of application of the Convention to only the persons who have habitual residence or principle place of business in a State Party would be more appropriate.

Article 15(2) entitles a State Party to make specific regulations in its national law in relation to the limit of liability of (a) non-sea-going ships and (b) ships of less than 300 tons. The deliberation of extending the right to limit liability to non-sea-going ships (inland-waterway transport) should take into account the nature of navigation to enter Bangkok port and regional inland waterway transport in the northern part of Thailand, i.e. Lanchang-Mekhong River. Therefore, this document suggests to extend the right to limit liability to stakeholders in inland waterway transport in order to promote trading and navigation in the region through inland waterways.

#### **4. LIMITS OF LIABILITY**

The main reason that prompted the amendment to the 1976 LLMC Convention was the low limits of liability introduced by the Convention. The 1996 Protocol increased substantially the limits which however in 21<sup>st</sup> Century were considered still on the low side in light of the claims brought against persons entitled to limit liability. In 2012, the Legal Committee of IMO at its 99<sup>th</sup> session adopted an amendment to increase the limits of liability as provided in resolution LEG.5 (99).

##### **4.1 Unit of Account and the Special Drawing Right**

The limits of liability under the 1996 LLMC Convention are stated in units of account which is the Special Drawing Right (SDR) as defined by the International Monetary Fund (IMF).

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<sup>31</sup> Ibid 87.

These limits shall be converted into the national currency of the State in which limitation is sought, according to the value at the date the limitation fund shall be constituted, payment is made, or security is given which under the law of that State is equivalent to such payment.<sup>32</sup>

As Thailand is a member of the IMF, the value of the limits shall be calculated in accordance with the method of valuation applied by the IMF in effect at the date in question for its operations and transaction.<sup>33</sup> As of 3<sup>rd</sup> January 2018, 1 SDR is equal to 46.261 Baht.<sup>34</sup>

#### 4.2 The General Limits

The limits of liability in respect of claims for loss of life or personal injury and any claims other than claims for loss of life or personal injury to passengers of a ship, arising on any distinct occasion, shall be calculated as follows:

<b>Loss of life/Personal injury claims only (Article 6(1)(a))</b>		
<b>Tonnage</b>	<b>SDR</b>	<b>Thai Baht</b>
< 2,000	3,020,000	139,708,220.00
2,001 – 30,000	+1,208/ton	+55,883.30 Baht/ton
30,001 – 70,000	+906/ton	+41,912.50 Baht/ton
> 70,000	+604/ton	+27,941.60 Baht/ton
Salvor not operation from any ship or operating solely on ship being salvaged (fixed tonnage of 1,500)	3,020,000	139,708,220.00

<sup>32</sup> Article 8(1) of the Convention on Limitation of Liability for Maritime Claims, 1976.

<sup>33</sup> Ibid.

<sup>34</sup> International Monetary Fund, <[http://www.imf.org/external/np/fin/data/rms\\_sdrv.aspx](http://www.imf.org/external/np/fin/data/rms_sdrv.aspx)> accessed 10 January 2018

<b>Other claims</b>		
<b>Tonnage</b>	<b>SDR</b>	<b>Thai Baht</b>
< 2,000	1,510,000	69,854,110.00
2,001 – 30,000	+604/ton	+27,941.60 Baht/ton
30,001 – 70,000	+453/ton	+20,956.20 Baht/ton
> 70,000	+302/ton	+13,970.80 Baht/ton
Salvor not operation from any ship or operating solely on ship being salvaged (fixed tonnage of 1,500)	1,510,000	69,854,110.00

<b>Total potential exposure considering Article 6(1)(a) and (b)</b>		
<b>Tonnage</b>	<b>SDR</b>	<b>Thai Baht</b>
< 2,000	4,530,000	209,562,330.00
2,001 – 30,000	+1,812/ton	+83,824.90 Baht/ton
30,001 – 70,000	+1,359/ton	+62,868.70 Baht/ton
> 70,000	+906/ton	+41,912.50 Baht/ton
Salvor not operation from any ship or operating solely on ship being salvaged (fixed tonnage of 1,500)	4,530,000	209,562,330.00

### 4.3 The Limit of Liability for Passenger Claims

<b>Passenger Claims</b>		
	<b>SDR</b>	<b>Thai Baht</b>
Certificated No. of passengers x	175,000 (no max.)	8,095,675 (no max.)

## 5. CONSTITUTION OF FUND

Under the provisions of Article 11, a limitation fund to compensate for the claims brought against the person alleged to be liable may be constituted with the court or other competent authority of a State Party in which legal proceeding are instituted in respect of claims subject to limitation. The fund can be constituted in the form of cash or by a guarantee acceptable under legislation of the State Party where the fund is constituted and considered to be adequate by the



court or other competent authority. The limitation fund can be established by any person who is entitled to limit his liability, including the insurer of such person.

However, Article 10 of the Convention provides that the limitation of liability may be invoked even without the constitution of a limitation fund. This will allow the person liable to settle his/her liability with the claimant(s) sooner and at lower cost.<sup>35</sup>

## **6. THE BENEFITS FOR THE KINGDOM OF THAILAND ON BECOMING A STATE PARTY TO THE 1996 LLMC CONVENTION**

Without limitation of liability for maritime claims regime, the major stakeholders in the maritime industry – e.g. shipowners, charterers, ship operators – are providing their services while exposed to the risk of facing unlimited liability. Frequently, the claims brought against these stakeholders could bring them to face serious financial difficulties or, in the worst case, lead to bankruptcy. In order to mitigate the risks, shipowners and other players in the maritime industry rely on marine insurance and the right to limit liability as provided for in international conventions.

The Kingdom of Thailand first adopted the limitation of liability in maritime sector by promulgating the Carriage of Goods by Sea Act, B.E. 2534 (1991) which provides for limitation of liability for sea carriers. In 2017, Thailand became a party to the CLC Protocol 1992 and the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (FUND Protocol 1992) whereby is provided for compensation for claims arising from oil pollution at sea caused by marine transport.

To supplement the marine insurance regime and to promote maritime transport sector of the country, it would be necessary to adopt the international limitation of liability in maritime claims regime in order to establish a strong foundation for legal proceedings in case of maritime claims and ensure sustainable growth of the maritime industry.

The majority of maritime nations – over 50 countries which represent more than 55 per cent of the world's gross tonnage – are the parties to the 1976 LLMC Convention and the 1996 Protocol. By becoming a Contracting State to the 1996 LLMC Convention, any person, referred

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<sup>35</sup> Norman A Martínez Gutiérrez, 'Limitation of Liability for Maritime Claims and Its Place in Today's Shipping World' in A. N Yiannopoulos and Pinar Akan (eds), *Current problems in international maritime law* (Birinci baskı Adalet Yayinevi, Ankara 2017).

to in Article 1, can seek the right to limit his liability before the court of Thailand and a State Party or can seek to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State.

The Twelfth National Economic and Social Development Plan (2017-2021) was developed and set out the Development Targets together with Development Strategies to be implemented. By implementing the 1996 LLMC Convention will allow the main players in the maritime sector the possibility to foresee their maximum liability and take out insurance to protect their interests accordingly. The aforesaid circumstances will create confidence in trade and investment in the shipping industry of Thailand. Eventually, it will lead to accomplishment of the Target 4 of Strategy 5<sup>36</sup> and the Target 3 of the Strategy 10<sup>37</sup> of the Plan.

## **7. RESERVATION TO BE MADE**

Article 18, paragraph 1(a), of the 1996 LLMC Convention allows any State, at the time of signature, ratification, acceptance, approval or accession, or any time thereafter, to reserve the right to exclude limitation of liability for the claims arising from operations rendered, inter alia, to ship sunk and cargo removal as stipulated in Article 2, paragraph 1(d) and (e) respectively. Such reservations are subject to confirmation and can be revoked at any time by submitting a notification addressed to the Secretary General of IMO.

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<sup>36</sup> Strategy 5 : Strategy for reinforcing national security for the country's progress towards prosperity and sustainability  
Target 4: Thailand will collaborate and cooperate on security issues with ASEAN member countries, allied countries, and various other countries in preventing threats of various forms, together with maintaining the national interest:

Indicator 4.3 Reduction in the number of incidents related to maritime laws offenses.

In order to achieve the target, the Plan has instructed relevant authorities to establish, inter alia, measures to promote investment in the merchant navy and proposed a flagship project on development of systems and mechanism to manage maritime security and national maritime interests, including revising related laws and regulations to be up-to-date and cosmopolitan.

<sup>37</sup> Strategy 10 Strategy for international cooperation for development

Target 3 Thailand to become a major economic, trade, and investment base in the sub-region, region, ASEAN, and Asia, and expand sub-regional economic corridors to cover ASEAN, East Asia, and South Asia:

Indicator 3.3 Increased investment value of Thai entrepreneurs in the region.

Indicator 3.4 Revised laws and regulations to support Thailand as a production, investment, and services hub.

This strategy has its objective to expand cross-border trade and investment opportunities and emerge as an attractive and productive investment and production base. To achieve its target, the Plan instructs to advancing efficient and internationally standardized transportation and logistics system and services.

The existing provision of the Navigation in Thai Waters Act B.E. 2456 (1913) regulates the obligations and liability of the shipowner and his agent in the case of ship or other thing, e.g. cargo, sunk in Thai waters in Section 121 stipulates that:

When a Thai or foreign vessel or any other thing has sunk or been in the condition that may cause danger to the navigation in the Thai waters, the owner or agent of the owner of such vessel or any other thing shall promptly make a warning mark as the Harbour Master or competent official deems appropriate so that it can be noticed both at daytime and night time until the owner or agent of the owner of the vessel or any other thing has salvaged, removed, moved, destroyed or acted in any way to properly take the vessel or any other thing that has sunk or been in the condition that may cause danger to the navigation from that place, which shall be completed within the time-limit prescribed by the Harbour Master.

If the warning mark has not been made or the vessel or any other thing has not been salvaged, removed, moved, destroyed or acted upon in any way within the time-limit prescribed by the Harbour Master under paragraph one, the Harbour Master or competent official shall have the power to make the warning mark or salvage, remove, move, destroy or act in any way to the vessel or any other object and property on the vessel or any other object to render them out of the condition dangerous to the navigation *at the expenses of the owner or the agent of the owner* of such vessel or any other thing.

If a Thai or foreign vessel or any other thing under paragraph one has anything that causes or may cause pollution to the environment, the owner or agent of the owner of such vessel or any other thing shall dispose of or prevent the pollution within the time-limit prescribed by the Harbour Master. If it is not completed within such time-limit, the Harbour Master or competent official shall act in any way to dispose of or prevent such pollution at the expenses of the owner of such vessel or thing or his or her agent.

Where the owner or agent of the owner of such vessel or any other thing has failed to make compensation for the expenses under paragraph two or paragraph three within the time-limit prescribed by the Harbour Master which he or she deems appropriate to the case or the owner or agent of the owner of such vessel or any other thing is unknown, the Harbour Master shall, with the approval of the Minister of Transport, *bring the vessel or any other thing and the property on board or any other thing to be on sale by auction or other method.*

*If the money obtained from the auction or other method is insufficient for the expenses, the owner or agent of the owner of such vessel or any other thing shall reimburse the insufficient amount. But if the money obtained from the auction or other method, after the deduction for the expense, remains, it shall be returned to the owner or agent of the owner of such vessel or any other thing,*

except that where the owner or agent of the owner of such vessel or any other thing is unknown, it shall become the property of the State.<sup>38</sup>

The latter provision has set out mechanisms and procedures to sell the vessel and property on board in order to obtain money to compensate the incurred expenses of necessary operations. However, if the money is insufficient for the expenses, the shipowner or his agent still liable and must reimburse the remaining balance. It could be interpreted that the liability incurred from salvage or removal of sunken ship and cargo is unlimited.

To avoid any possible conflict between the two Acts, it is necessary to make reservations to exclude the claims relating to Article 2(1)(d) and (e) of the Convention at the time of accession by including a reservation clause in the instrument of accession.

## **8. STRUCTURE OF DOMESTIC LEGISLATION TO INCORPORATE 1996 LLMC PROTOCOL AS AMENDED**

The limitation of liability for maritime claims regime is a new approach in providing rights to stakeholders in maritime industry to limit their liability as provided by the 1996 LLMC Protocol. In becoming party to the 1996 LLMC Protocol, the Kingdom of Thailand needs to promulgate an Act to incorporate the rules of the Protocol.

This document has provided a draft text of an Act to implement the 1996 LLMC Protocol in section nine. The draft text comprises of five chapters, namely:

Chapter one: Preliminary (Article 1-3);

Chapter two: Application and the right of limitation (Article 4-10);

Chapter three: Limits of liability (Article 11-15); and

Chapter four: The limitation fund (Article 16-19).

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<sup>38</sup> Emphasis added.

## **9. DRAFT LEGISLATION**

### **DRAFT**

#### **LIMITATION OF LIABILITY FOR MARITIME CLAIMS ACT B.E. ...**

##### **CHAPTER ONE**

##### **PRELIMINARY**

**Article 1.** This Act shall be cited as the Limitation of Liability for Maritime Claims Act B.E. ...

**Article 2.** This Act shall come into force after the expiration of ninety days from the date of its publication in the Government Gazette.

**Article 3.** Any provision of any other law, rule or regulation which contravenes this Act is void and non-enforceable.

##### **CHAPTER TWO**

#### **APPLICATION AND THE RIGHT OF LIMITATION**

##### **Article 4. Application**

(1) This Act shall apply to all ships flying Thai flag or the flag of a State Party the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 as amended, except:

- (a) air-cushion vehicles;
- (b) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof;
- (c) other ships as stipulated in the Ministerial Regulations.

(2) This Act shall apply whenever any person referred to in Article 6 seeks to limit his liability before the Court or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of the Kingdom of Thailand. Any person who at the time when the rules of this Act are invoked before the Court does not have his habitual residence or principal place of business in the Kingdom of Thailand shall not avail of his right to invoke the rules of this Act before the Court.

**Article 5. Power of the Minister in Charge**

- (1) The Minister of Transport shall have be responsible for the execution of this Act, and shall have the power to issue the Ministerial Regulations as set out in this Act.
- (2) The Ministerial Regulations shall enter into force after publication in the Government Gazette.

**Article 6. Persons Entitled to Limit Liability**

- (1) Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Act for claims set out in Article 7.
- (2) The term "shipowner" shall mean the owner, charterer, manager and operator of a ship, whether seagoing or not.
- (3) Salvor shall mean any person rendering services in direct connection with salvage operations. Salvage operations shall also include operations referred to in Article 7, paragraph 1(d).
- (4) If any claims set out in Article 7 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Act.
- (5) In this Act the liability of a shipowner shall include liability in an action brought against the vessel herself.
- (6) An insurer of liability for claims subject to limitation in accordance with the rules of this Act shall be entitled to the benefits of this Act to the same extent as the assured himself.
- (7) The act of invoking limitation of liability shall not constitute an admission of liability.

**Article 7. Claims Subject to Limitation**

- (1) Subject to Articles 8 and 9, the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:
  - (a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation),

- occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- (b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
  - (c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
  - (d) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Act, and future loss caused by such measures.
- (2) Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1(d) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

#### **Article 8. Claims Excepted from Limitation**

This Act shall not apply to:

- (a) claims for salvage, including any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average;
- (b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, date 29 November 1969 or of any amendment or Protocol thereto which is in force;
- (c) claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;
- (d) claims against the shipowner of a nuclear ship for nuclear damage;
- (e) claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between

the shipowner or salvor and such servants, the shipowner and salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that for in Article 11.

#### **Article 9. Conduct Barring Limitation**

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

#### **Article 10. Counterclaims**

Where a person entitled to limit his liability in accordance with this Act has a claim against the claimant arising out of the same occurrence, their respective claims shall set off against each other and the provisions of this Act shall only apply to the balance, if any.

### **CHAPTER THREE**

#### **LIMITS OF LIABILITY**

#### **Article 11. The General Limits**

(1) The limits of liability for claims other than those mentioned in Article 12, arising on any distinct occasion, shall be calculated as follows:

(a) in respect of claims for loss of life or personal injury,

(i) 3.02 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,

(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i) :

for each ton from 2,001 to 30,000 tons, 1,208 Units of Account;

for each ton from 30,001 to 70,000 tons, 906 Units of Account; and

for each ton in excess of 70,000 tons, 604 Units of Account,

(b) in respect of any other claims,

(i) 1.51 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,



(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each ton from 2,001 to 30,000 tons, 604 Units of Account;

for each ton from 30,001 to 70,000 tons, 453 Units of Account; and

for each ton in excess of 70,000 tons, 302 Units of Account.

(2) Where the amount calculated in accordance with paragraph 1(a) is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with paragraph 1(b) shall be available for payment of the unpaid balance of claims under paragraph 1(a) and such unpaid balance shall rank rateably with claims mentioned under paragraph 1(b).

(3) However, without prejudice to the right of claims for loss of life or personal injury according to paragraph (2), claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have priority over other claims under paragraph 1(b).

(4) The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons.

(5) For the purpose of this Act the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex 1 of the International Convention on Tonnage Measurement of Ships, 1969.

## **Article 12. The Limit for Passenger Claims**

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

(2) For the purpose of this Article "claims for loss of life or personal injury to passengers of a ship" shall mean any such claims brought by or on behalf of any person carried in that ship:

(a) under a contract of passenger carriage, or

(b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.

### **Article 13. Unit of Account**

The Unit of Account referred to in Articles 11 and 12 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Article 11 and 12 shall be converted into Thai Baht, according to the value of the currency at the date the limitation fund shall have been constituted, payment is made, a security is given which under the law of Thailand is equivalent to such payment. The value of Thai Baht in terms of the Special Drawing Right shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions.

### **Article 14. Aggregation of Claims**

(1) The limits of liability determined in accordance with Article 11 shall apply to the aggregate of all claims which arise on any distinct occasion:

(a) against the person or persons mentioned in paragraph 2 of Article 6 and any person for whose act, neglect or default he or they are responsible; or

(b) against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or

(c) against the salvor or salvors who are not operating from a ship or who are operating solely on the ship to, or in respect of which, the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.

(2) The limits of liability determined in accordance with Article 12 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against the person or persons mentioned in paragraph 2 of Article 6 in respect of the ship referred to in Article 12 and any person for whose act, neglect or default he or they are responsible.

**Article 15. Limitation of Liability without Constitution of a Limitation Fund**

- (1) Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 16 has not been constituted.
- (2) If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 17 shall apply correspondingly.
- (3) Questions of procedure arising under the rules of this Article shall be decided in accordance with the Civil Procedure Code.

**CHAPTER FOUR****THE LIMITATION FUND****Article 16. Constitution of the Fund**

- (1) Any person alleged to be liable may constitute a fund with the Intellectual Property and International Trade Court in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 11 and 12 as are applicable to claims for which that person may be liable, together with interest rate of 7.5 per cent per annum thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.
- (2) A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of Thailand and considered to be adequate by the Intellectual Property and International Trade Court.
- (3) A fund constituted by one of the persons mentioned in paragraph (1)(a), (b) or (c) or paragraph (2) of Article 14 or his insurer shall be deemed constituted by all persons mentioned in paragraph (1)(a), (b) or (c) or paragraph (2), respectively.

**Article 17. Distribution of the Fund**

- (1) Subject to the provisions of paragraphs (1) and (2) of Article 11 and of Article 12, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

(2) If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Act.

(3) The right of subrogation provided for in paragraph (2) may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

(4) Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs (2) and (3) had the compensation been paid before the fund was distributed, the Intellectual Property and International Trade Court may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

#### **Article 18. Bar to Other Actions**

(1) Where a limitation fund has been constituted in accordance with Article 16, any person having made a claim against the fund shall be barred from exercising any right in respect of such a claim against any other assets of a person by or on behalf of whom the fund has been constituted.

(2) After a limitation fund has been constituted in accordance with Article 16, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of Thailand for a claim which may be raised against the fund, or any security given, may be released by order of the Intellectual Property and International Trade Court. However, such release shall always be ordered if the limitation fund has been constituted:

(a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or

(b) at the port of disembarkation in respect of claims for loss of life or personal injury; or

(c) at the port of discharge in respect of damage to cargo; or

(d) in the State where the arrest is made.

(3) The rules of paragraphs (1) and (2) shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and the fund is actually available and freely transferable in respect of that claim.

#### **Article 19. Governing Law**

Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the Civil Procedure Code of Thailand, the rules of the Intellectual Property and International Trade Court.

*To be deposited with the Secretary-General of IMO, London*

**INSTRUMENT OF ACCESSION**  
**BY THE KINGDOM OF THAILAND**  
**TO THE PROTOCOL OF 1996 TO AMEND THE CONVENTION**  
**ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976**  
**AS AMENDED**

WHEREAS the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 was adopted at the International Maritime Organization, London, on 2 May 1996 by the International Conference on Hazardous and Noxious Substances and Limitation of Liability.

WHEREAS the Kingdom of Thailand, being a State entitled to become a party to the said Protocol by virtue of Article 10 thereof.

Pursuant to the provision of Article 18, paragraph 1, of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by Article 7 of the Protocol, the Kingdom of Thailand hereby excludes the application of subparagraph d) and e) of paragraph 1 of Article 2 of the Convention on Limitation of Liability for Maritime Claims, 1976.

NOW THEREFORE the Government of the Kingdom of Thailand having considered and approved the said Protocol, hereby formally declares its accession to the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

IN WITNESS WHEREOF I, ....., Minister for Foreign Affairs of the Kingdom of Thailand have signed this Instrument of Accession and affixed the official seal.

DONE at ....., this..... day of ..... two thousand and.....

(Seal)

(Signature)

Minister for Foreign Affairs