

EXPLANATORY NOTE

1. Introduction

Limitation of liability for maritime claims is a broad, complex area of law and is often referred to as limitation of shipowners' liability. Although it was originally designed for the benefit of shipowners, the group of persons protected by the system has not been limited to shipowners. Under various legal regimes around the world, the right to limitation has been granted to persons other than shipowners, such as charterers, master and crew members, salvors and insurers. But, not all parties engaged in maritime activities are entitled to limitation of liability. In addition, vessels involved must be within the protective scope of the system. When it comes to determination of whether a particular piece of water-borne craft is a vessel for purposes of limitation of liability the answer can be very complex.¹

In the case of *The Bramley Moore*², Lord Denning making a very blunt statement in respect of categorizing the regime of limitation of liability, said that limitation of liability “is not a matter of justice, it is a rule of public policy which has its origin in history and its justification in convenience.”³ The same conclusion was reached by Dr. Lushington, who, in the case of *The Amalia*⁴, held that “the principle of limited liability is that full indemnity, the natural rights of justice, shall be abridged for political reasons.”⁵

¹ Chen Xia; *Limitation of Liability for Maritime Claims – A Study of U.S. Law, Chinese Law and International Conventions*, 2001 Kluwer Law International, p. 1.

² *The Bramley Moore*, (1963) 2 Lloyd's Rep. 429.

³ *Ibid.* at 437.

⁴ *The Amalia* (1863) Br. & L. 151.

⁵ 1 Moo. P.C. (N.S.) 471 at 473.

2. Historical overview on Limitation of Liability

2.1 Limitation – universal concept

Limitation of shipowners' liability is a universal concept amongst shipping nations and recognizes the perilous nature of maritime transport, particularly as it was in the past. Limitation permits a shipowner, whether with respect to liability arising from collision, allision, grounding, cargo damage, death or personal injuries, to claim a limit upon his damages. It was originally devised to promote shipping⁶. "The limitation of liability provisions .. are expressly designed for the purpose of encouraging shipping and affording protection to shipowners against bearing the full impact of heavy and perhaps crippling pecuniary damage sustained by reason of the negligent navigation of their ships on the part of their servants or agents."⁷ Nevertheless, common law jurisdictions and civil law jurisdictions had different concepts of shipowners' limitation. The Limitation Convention 1924 provided a compromise between the civil law and common law concepts. The Limitation Convention of 1957 and 1976, on the other hand, enshrined the common law concept.⁸

2. 2 Limitation – two different concepts

2.2.1 The Common law – limitation by tonnage

William Tetley pointed out that in "In common law countries limitation is exclusively the product of *statute*. Under English common law, and English maritime law, for example, there was no limitation on shipowners' liability, just as there was no such limitation for other transport operators." The beginning of limitation in England can be traced to 1734 (An Act to settle how far owners of ships shall be answerable for the acts of the masters or mariners). The limitation of £8 per registered ton in the case of property damage only and £15 per registered ton in the case of

⁶ Tetley, William; International Maritime and Admiralty Law, International Shipping Publications, 2002, p. 272.

⁷ British Columbia Telephone Co. v. Marpole Towing Ltd., (1971) S.C.R. 321 p. 338 (per Ritchie, J.).

⁸ Tetley, William; International Maritime and Admiralty Law, International Shipping Publications, 2002, p. 273.

personal injury or loss of life, whether or not accompanied by property damage, was introduced into English law by the Merchant Shipping Act Amendment Act, 1862, U.K. 25 & 26 Vict., c. 63, sect. 54. These provisions were subsequently incorporated into the Merchant Shipping Act, 1894, U.K. 57 & 58 Vict., c.60, sect. 503. Common law systems, with the exception of that of the U.S.A., are characterized by a limit based upon the tonnage of the ship before the liability – producing event occurred.

2.2.2 The Civil law – limitation by value

In civil law jurisdictions, by contrast, limitation is an ancient concept, with roots stretching as far back as the eleventh century⁹. The limitation fund was based on the value of the ship after the incident which brought about liability. In the civil law, there were two theories of limitation: abandonment, best associated with France, and execution, applied in Germany and Scandinavia. The shipowner was considered to be “personally liable”, but was entitled to limit his liability by abandoning his ship (or what was left of it), together with any pending freight, to the claimants. Unlike the marine insurance “abandonment”, limitation of liability by abandonment did not entail an automatic transfer of property of the ship to the creditors. In these circumstances, the ship’s abandonment entitled the creditors to subject the ship to judicial sale and to satisfy their claims from the proceeds of the sale.¹⁰ Under the execution approach, the shipowner was not personally liable; instead *in rem* claims were launched against the ship and pending freight and these claimants received priority by virtue of maritime liens. As the actions were *in rem* and thus, based on personification of the ship, in cases where the ship was lost, liability was extinguished.¹¹

⁹ The earliest recorded example of limitation of shipowners’ liability is to be found in the Amalphitan Table, from the Republic of Amalphia, circa 11th. century.

¹⁰ Martinez, Norman – Limitation of Liability for Maritime Claims: The Relationship between Global Limitation Conventions and Particular Liability Regimes, Ph.D. 2010, IMO International Maritime Law Institute, January 2010, p. 22.

¹¹ Gabaldón Garcia, José Luis y Ruiz Soroa, José María; Manual de Derecho de la Navegación Marítima, Tercera Edición. Marcial Pons Ediciones Jurídicas y Sociales, Madrid, 2006, p. 804.

2.3 Limitation under Limitation Conventions 1924 and 1957

2.3.1 Limitation Convention 1924

The 1924 Limitation Convention attempted a compromise between the civil law concept of abandonment and the common law guarantee of a maximum responsibility based upon tonnage. The shipowner could limit his liability to the value of the ship and freight (after the event) or to a sum equal to £8 sterling per ton (Arts. 1, 3), plus an additional £8 sterling in cases of personal injury or wrongful death (Art. 7). The 1924 Convention proved rather unsuccessful, however, and therefore is of relatively marginal significance today.¹² The 1924 Limitation Convention was ratified by France on August 23, 1935 and came into force on February 23, 1936. Although it was implemented in about fifteen countries, it never achieved its objectives, largely because the United Kingdom never became a party to it.

2.3.2 Limitation Convention 1957

The 1957 Limitation Convention on the other hand, achieved widespread acceptance among maritime nations, including France, the United Kingdom and Canada, among many others. It provided one limit for property damage and another for personal injuries and death, with both limits based upon tonnage.¹³ The Convention established separate funds for personal and property claims. To prevent claimants from trying to avoid the limits by bringing separate actions against different persons, e.g. the shipowner and the Master, the Convention provides that the total limits of liability of all persons arising out of a single occasion may not exceed the limits provided in Article 3.¹⁴ It is important to note that the Convention left the question of who bears the burden of

¹² Tetley, William; *International Maritime and Admiralty Law*, International Shipping Publications, 2002, p. 274.

¹³ Tetley, William; *International Maritime and Admiralty Law*, International Shipping Publications, 2002, p. 275.

¹⁴ 3. (1) The amounts to which the owner of a ship may limit his liability under Article 1 shall be:

(a) where the occurrence has only given rise to property claims an aggregate amount of 1,000 francs for each ton of the ship's tonnage;

(b) where the occurrence has only given rise to personal claims an aggregate amount of 3,100 francs for each ton of the ship's tonnage;

(c) where the occurrence has given rise both to personal claims and property claims an aggregate amount of 3,100 francs for each ton of the ship's tonnage, of which a first portion amounting to 2,100 francs for each ton of the ship's

proving the actual fault or privity of the owner to the *lex fori*, whereas the rules relating to the constitution of the fund and all rules of procedure were left to the national law of the State in which the fund is constituted.¹⁵ The 1957 Limitation Convention was adopted at Brussels, October 10, 1957, and entered into force as of May 31, 1968. In all, forty-six States ratified or acceded to the 1957 Limitation Convention.

2.4 Overview of the 1976 Limitation Convention and its Protocol of 1996

The International Conference on the Limitation of Liability for Maritime Claims took place in London between 1 and 19 November 1976 under the auspices of the International Maritime Organization (IMO).

Parties attending the Conference generally agreed that:

1. the rules relating to the limitation of liability for maritime claims enshrined in the 1924 and 1957 Limitation Conventions required updating,
2. the limitation figures consisted in the 1957 Convention needed to be increased,
3. the new limitation figures should be accompanied by a mechanism to accommodate problems of inflation and,
4. the circumstances in which the right to limit should be forfeit needed reviewing¹⁶.

The Parties recognised that the previous system of limitation had given rise to too much litigation and there is a desire that this should be avoided in future. The main purpose was that a balance needed to be struck between the desire to ensure on the one hand that a successful claimant

tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to 1,000 francs for each ton of the ship's tonnage shall be appropriated to the payment of property claims: Provided however that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the second portion of the fund.

¹⁵Martinez, Norman; Limitation of liability for maritime claims (The relationship between Global Limitation Conventions and Particular Liability Regimes, Ph.D. 2010, IMO International Maritime Law Institute, January 2010, p. 30.

¹⁶ Patrick Griggs, Richard Williams and Jeremy Farr; Limitation on Liability for Maritime Claims Fourth edition, LLP, London Singapore, 2005, p. 3.

should be suitably compensated for any loss or injury which he had suffered and the need on the other hand to allow shipowners, for public policy reasons to limit their liability to an amount which was readily insurable at a reasonable premium.¹⁷

The solution finally adopted at the Conference to resolve the competing requirements of claimant and defendant was

(a) the establishment of a limitation fund which is as high as a shipowner could cover by insurance at a reasonable cost, and

(b) the creation of a virtually unbreakable right to limit liability.¹⁸

The text of the 1976 Convention finally by the Conference therefore represents a compromise. In exchange for the establishment of a much higher limitation fund claimants would have to accept the extremely limited opportunities to break the right to limit liability.¹⁹ An important feature of the said Convention is that liability limits were set at appropriate levels, or on a scaled approach, based on tonnage. Under the 1976 Limitation Convention the right to limit liability is lost only when the claimant can prove wilful intent or recklessness and knowledge on the part of the person seeking to limit (Art.4).

Twenty years later at a Diplomatic Conference held at the IMO Headquarters in London (April/May 1996) the text of a Protocol to the 1976 Limitation Convention was agreed. This Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976 entered into force internationally on 13 May 2004. This Protocol makes a radical difference to the amount to which owners (shipowners, charterer, operator or their insurer) of small tonnage can limit, increasing the potential exposure of some owners by several –fold.²⁰

2.4.1 Right to limit liability. Who may limit? Excluded persons/Excluded vessels

Art. 1 (1), (2), (3), (4) and (6) of the 1976 Limitation Convention provides that:

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Patrick Griggs, Richard Williams, Jeremy Farr; *Limitation on Liability for Maritime Claims*. Fourth edition, LLP, London Singapore, 2005, pp. 3-4.

- “1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.
2. The term “shipowner” shall mean the owner, charterer, manager and operator of a seagoing ship.
3. Salvor shall mean any person rendering services in direct connexion with salvage operations. Salvage operations shall also include operations referred to in Article 2, paragraph 1(d), (e) and (f).
4. 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.
6. An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.”

To summarize according to 1976 Limitation Convention the persons entitled to limit their liability are:

- 2.3.3 shipowners of a seagoing ship,
- 2.3.4 charterers of a seagoing ship (but not against shipowners),
- 2.3.5 managers of a seagoing ship,
- 2.3.6 operators of a seagoing ship,
- 2.3.7 salvors,
- 2.3.8 any person for whose act, neglect or default the shipowner or salvor is responsible,
- 2.3.9 and insurers of a seagoing ship.

Under the 1976 Limitation Convention, Art 1(2), the right to limit exists in respect of claims relating to seagoing ships. However, State Parties may, under Art. 15(2) make specific provisions of national law regulating the system of limitation to be applied to vessels which, according to the law of that State, are ships intended for navigation on inland waterways²¹.

On the other hand the provisions of Art. 15 (1) clearly state that the State Parties have the right to exclude wholly or partially from the application of the Convention any person referred to in

²¹ Tetley, William; International Maritime and Admiralty Law, International Shipping Publications. 2002, p. 281.

Art. 1 who does not, at the time when the rules of the Convention are invoked, habitually reside in nor have his principal place of business in a State Party and any ship which does not fly the flag of a State Party.

As regards excluded vessels, art. 15 (5) provides that:

“the Convention shall not apply to:

- (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.”

The list of persons entitled to limit liability does not include harbour authorities, conservancy authorities, and owners of docks or canals.

2.4.2 Claims subject to limitation

Article 2 of the 1976 Limitation Convention provides that:

“2.1. Subject to Articles 3 and 4 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 connexion 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 connexion with the operation of the ship or salvage operations;
- (d) 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;
- (e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) 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 Convention, and further 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), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.”

The scope of claims subject to limitation is much more extensive than the ones in the 1924 and 1957 Limitation Conventions.

Under Article 2, the right to limitation is no longer restricted, as in the past, to claims sounding in damages: it is now possible to plead limitation of liability “whatever the basis of claim may be” and even if brought “by way of recourse or for indemnity under a contract or otherwise”²². The 1976 Limitation Convention has opened its door to the claims listed in Article 2 irrespective of their basis of liability. As a consequence, claims in the nature of a debt arising from liability under statute and claims in the nature of indemnity under contract are now subject to limitation of liability²³.

2.4.3 Claims excepted from limitation

Article 3 of the 1976 Limitation Convention provides that:

“The rules of this Convention shall not apply to:
(a) claims for salvage 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, dated 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;

²² Hodges, Susan and Hill, Christopher; Principles of Maritime Law, LLP, Informa Professional , London, Hong Kong, 2001, p. 542.

²³ Ibid.

(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 or 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 provided for in Article 6.”

Under Article 3 (a) the use of word “for” instead of “in respect to” is significant, for it narrows considerably the ambit of the provision so as to cover only claims made directly by a salvor for a salvage award or a party claiming general average contribution²⁴. The latter must be the person who had incurred the general average sacrifice or expenditure and not a person claiming reimbursement in respect of a contribution he had made towards general average²⁵.

Following Article 3 (b) is a carefully worded provision. It implicitly draws a distinction between claims for oil pollution damage “within the meaning” of the Civil Liability Conventions²⁶ and claims for oil pollution damage outside the meaning of these conventions²⁷. The exclusion contained in Article 3 (b) is not concerned with who is being sued for the oil pollution damage²⁸.

The next provision Article 3 (c) aims to exclude the application of the 1976 Limitation Convention for claims falling within the scope of any international convention or national legislation which makes provision with respect to limitation of liability for nuclear damage²⁹. The

²⁴ Hodges, Susan and Hill, Christopher; Principles of Maritime Law, LLP, Informa Professional , London, Hong Kong, 2001, p. 555.

²⁵ Ibid.

²⁶ Namely the Civil Liability Conventions 1969 and 1992.

²⁷ Hodges, Susan and Hill, Christopher; Principles of Maritime Law, LLP, Informa Professional , London, Hong Kong, 2001, p. 557.

²⁸ Ibid.

²⁹ Hodges, Susan and Hill, Christopher; Principles of Maritime Law, LLP, Informa Professional , London, Hong Kong, 2001, p. 559.

corollary of this is that claims for nuclear damage that are not subject to such international or domestic legislation will be governed by the 1976 Limitation Convention. The objective of Article 3 (c) is to prevent the application of more than one system of limitation to claims for nuclear damage.³⁰

Another innovation of the 1976 Limitation Convention is stipulated in Article 3 (e). The latter expressly extends the exclusion of the right to limit to claims by or on behalf of the servants of salvors under a contract of service between them and the salvors. This express exclusion is necessary as a result of the inclusion of salvors as “persons entitled to limit liability” in Article 1 of the 1976 Convention.³¹

2.4.4 Conduct barring limitation

The provision of Article 4 is extremely important because it reflects one of the major changes from the 1957 to the 1976 Limitation Convention.

Article 4: “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.”

Under the 1957 Convention, limitation was available except where “the occurrence giving rise to the claim resulted from the actual fault or privity of the owner”. If the owner was privy to the negligence that gave rise to the incident, he would not be able to limit liability. The “fault or privities” have been the subject of much litigation. The basic problem was found by the fact that most ships are actually owned by companies. The solution found was by the adoption of the doctrine of the “alter-ego”. This concept was first enunciated in *Lennard’s Carrying Co. v. Asiatic Petroleum Co. Ltd.*³². In that case court held that “the fault or privity” must be the fault or

³⁰ Ibid.

³¹ Patrick Griggs, Richard Williams, Jeremy Farr; *Limitation on Liability for Maritime Claims* Fourth edition, LLP, London Singapore, 2005, p. 23.

³² (1915) A.C. 705.

privity of somebody who is not merely a servant or agent for whom the company is liable but somebody for whom the company is liable because his action is the very action of the company itself³³. In *The Lady Gwendolen*³⁴ case one would speak of an omission by the company itself where the company was held responsible. It followed that, the collision, which resulted from the vessel's excessive speed in fog, did not take place without the actual fault or privities of the owner and that the owning company was barred from limiting its liability³⁵.

Now under the 1976 Limitation Convention, the fault or privities test has been left behind. The test is much stricter now. The right to limit liability is almost an unbreakable.

When examining Article 4 in details one could focus on four main points:

1. Personal act or omission – The question is whose personal act or omission? That is, the alter-ego of the company. Who is the person liable? These are those persons listed in Article 1 – shipowner, salvors, charterer, manager, operator of the ship, and under Article 1(4) “all persons for whom the shipowner and salvor are responsible”. So, in this case it will be the personal act or omission of the person liable that would need to break the right to limit.
2. When one refers to the wording “intent”, the person liable would be entitled to limit liability unless he has the subjective element, or mens rea, to cause the loss.
3. Another important feature consists of the term “loss” - Throughout the Convention it is spoken of loss of life, personal injury and loss of/damage to property. In Article 4, the word used is “loss” – so every claim which is subject to limitation of liability will be encompassed by the word “loss”. The problem arises “with the intent to cause such loss”. In the event of a person intending to cause “loss A” and as a result of which causes “Loss B”, the latter still be entitled to limit liability.
4. The term “recklessly” as Griggs, Williams and Farr argued “connotes either carelessness or utter heedlessness of consequence with the result that the perpetrator is deemed to have

³³ Patrick Griggs, Richard Williams, Jeremy Farr; *Limitation on Liability for Maritime Claims* Fourth edition, LLP, London Singapore, 2005, p. 25.

³⁴ (1965) 1 Lloyd's Rep. 335.

³⁵ Patrick Griggs, Richard Williams, Jeremy Farr; *Limitation on Liability for Maritime Claims* Fourth edition, LLP, London Singapore, 2005, p. 25.

considered neither the probability nor even the possibility of a likely result”³⁶ – where you give complete disregard to the consequences that may happen.

Another question which deserves consideration relates to the Burden of Proof?

Article 2(1) stipulates that: “Subject to Article 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability”. According to Article 2(1) of the Convention, unless Articles 3 and 4 are proved, the shipowner is entitled to limit his liability. Once the shipowner proves that the claim falls under Article 2, he will automatically be entitled to limit his liability unless the claim is excluded by Article 3 or his conduct falls under Article 4. In the case of *The Capitan San Luis*³⁷ the Court held that “the shipowner merely has to establish that the claim falls within Article 2 of the Convention. Once he establishes that, he is entitled to a decree limiting his liability, unless the claimant proves the facts required by Article 4.”

The burden of proof is on the claimant. All the shipowner has to prove is that it is a type of claim covered by Article 2. It is up to the claimant to prove that the shipowner’s conduct falls under Article 4 – and only then the shipowner would be prevented from limiting his liability.

2.4.5 Counterclaims

Article 5 of the 1976 Limitation Convention provides that:

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

This Article is very similar in terms and effect to the equivalent provision of the 1957 Convention (Article 1(5)). Thus it remains the case that claims and counterclaims arising out of the same occurrence must be set off against each other and limitation is to be applied only to the balance, if any, payable.

³⁶ Patrick Griggs, Richard Williams, Jeremy Farr; *Limitation on Liability for Maritime Claims* Fourth edition, LLP, London Singapore, 2005, p. 37.

³⁷ (1994) 1 All ER 1016.

2.4.6 The General Limits

Article 6 provides the general limits as follows:

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

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

(i) 333,000 Units of Account for a ship with a tonnage not exceeding 500 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 501 to 3,000 tons, 500 Units of Account;

for each ton from 3,001 to 30,000 tons, 333 Units of Account;

for each ton from 30,001 to 70,000 tons, 250 Units of Account;

and for each ton in excess of 70,000 tons, 167 Units of Account,

(b) in respect of any other claims,

(i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 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 501 to 30,000 tons, 167 Units of Account;

for each ton from 30,001 to 70,000 tons, 125 Units of Account;
and

for each ton in excess of 70,000 tons, 83 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, a State Party may provide in its national law that claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have such priority over other claims under paragraph 1(b) as is provided by that law.

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 Convention the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.”

The actual amount of limitation of liability is calculated by assessing all the stages mentioned in Article 6. Primarily monitor the Special Drawing Rights, then calculate the fund and convert the figures of the Convention to actual currency.

In the case that a claim gives rise to loss of life/personal injury and property damage, separate limitations funds are provided for them. However if the fund for loss of life and personal injury does not satisfy all claims in full, then they may be transferred against the second fund established for property claims, however they then rank rateably with other claims. Of course “the transfer of claims” against the other fund applies only if both types of claim arisen out of the incident. Only the loss of life / personal injury claims can compete with the property claims and not vice-versa.

2.4.7 Limit of liability for passenger claims

Article 7 of the 1976 Limitation Convention stipulates that:

“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 46,666 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate, but not exceeding 25 million Units of Account.

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.”

The 1976 Limitation Convention introduces a completely separate limitation fund for claims for loss of life or personal injury to passengers as defined in article 7(2). This limitation fund is not calculated by reference to vessels' tonnage but is set by multiplying 46,666 SDR by the number of passengers the ship is certified to carry.

Article 7 is interlinked with the International Convention on Carriage of Passengers and their Luggage 1974 as amended by the 2002 Protocol, also known as the Athens Convention to which Republic of Bulgaria is not a Party.

The Athens Convention contains the basis for liability and particular limits of liability. The 1976 Limitation Convention provides global limits of liability.

2.4.8 Unit of Account

Only the first two sentences of paragraph 1 of Article 8 have meaning for Republic of Bulgaria, since it is a member of EMU and of IMF and the matter regulated here only refers to method of calculating limitations as set forward in article 6 and 7.

2.4.9 Aggregation of claims

Article 9 provides that:

- “1. The limits of liability determined in accordance with Article 6 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 1 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 7 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 1 in respect of the ship referred to in Article 7 and any person for whose act, neglect or default he or they are responsible.”

As Griggs, Williams and Farr argued “whilst the provisions for aggregation of claims in the 1976 Limitation Convention are lengthy by reason of need to incorporate special rules to govern claims

against salvors and by passengers they in fact introduce no changes in substances”.³⁸ The meaning of “distinct occasion” has often been the subject of litigation in United Kingdom.³⁹

2.4.10 Limitation of liability without constitution of a limitation fund

Article 10 provides that:

“Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted.

However, a State Party may provide in its national law that, where an action is brought in its courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or is constituted when the right to limit liability is invoked.”

The Convention allows the limit of liability to be invoked without the constitution of a fund. But the Convention also provides an option to the State Parties to the 1976 Limitation Convention to make the constitution of the fund mandatory to invoke the right to limit.

Article 10 (2) “If limitation is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.”

Article 10 (3) “Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.”

Procedural rules are always dealt with by provisions of national law. Paragraph (2) of Article 10 says that if limitation of liability is invoked without the fund, Article 12 applies. Article 12 deals with the distribution of the fund, then “How the fund can be distributed if it is non-existent?” When the right to limit is invoked, the Court will issue a decree stating that the limit of liability is X. Once an amount of liability is fixed, distribution will be made accordingly, with due regard to

³⁸ Patrick Griggs, Richard Williams, Jeremy Farr; *Limitation on Liability for Maritime Claims* Fourth edition, LLP, London Singapore, 2005, p. 45.

³⁹ The “Lucullite” (1929) 33 Ll. L. Rep. 186, The “Harlow” (1922) 10 Ll. L. Rep. 66.

the established claims of the plaintiff. It is thus settled “How much each claimant is going to receive”. The decree marks a maximum liability of \$2 million dollars. Since payment is confirmed the claim can be calculated. The fund will be constituted at a later stage and the distribution will be the same. The disadvantage of this scenario is the knowledge of how many people will be paid because of the decree. In case that the money disappeared and there is no guarantee or the ship had sunk, had been stolen or sold, can the claimants make sure that the limits are secured? The latter can proceed with the arrest of the ship and that action will constitute a rightful arrest. Then it is more worth while for the shipowner to constitute a fund at the outset so that he will not cause the vessel to be arrested.

2.4.11 Constitution of the Fund

Article 11 provides that:

“1. Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party 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 6 and 7 as are applicable to claims for which that person may be liable, together with interest 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 the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.

3. A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.”

The rate of interest payable is set out by domestic law of each State Party. Once the insurer constitutes the fund you cannot oblige the shipowner to constitute a fund. The Law of Amendment to the Bulgarian Merchant Shipping Code relating to the implementation of the

International Convention on Limitation of Liability for Maritime Claims (LLMC, 1976) as amended by the Protocol of 1996 provide for constitution of a fund.

2.4.12 Distribution of the fund

Article 12 stipulates that:

“1. Subject to the provisions of paragraphs 1, 2 and 3 of Article 6 and of Article 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.”

It is irrelevant how much a person, as a claimant, asks for – it is the Court who says what the amount of the claim is to be.

“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 Convention.

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 Court or other competent authority of the State where the fund has been constituted 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.”

2.4.13 Bar to other actions

Article 13 provides that

“1. Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.” This simply means that once the fund constituted we cannot arrest shipowner’s ship.

“2. After a limitation fund has been constituted in accordance with Article 11, 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 a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. 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.

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.”

When a person entitled to limit his liability constitutes the fund, the claimant is prevented from carrying out further actions. If a vessel had been arrested for these claims, as soon as the fund is constituted this vessel will be released.

2.4.14 Governing law

Article 14 provides that:

“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 connexion therewith, shall be governed by the law of the State Party in which the fund is constituted.”

The 1976 Limitation Convention does not provide for rules of procedure. Those are regulated exclusively by domestic law. Because of this there are problems in the unification/harmonisation of interpretation of the Convention.

2.4.15 Costs

The 1976 Limitation Convention is silent on the question of legal costs incurred (i) in establishing the claim in respect of which a plea of limitation is made; and (ii) in contesting the right to limit.⁴⁰

2.4.16 The Scope of Application provision

Article 15 provides that:

“1. This Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State. Nevertheless, each State Party may exclude wholly or partially from the application of this Convention any person referred to in Article 1 who at the time when the rules of this Convention are invoked before the Courts of that State does not have his habitual residence in a State Party or does not have his principal place of business in a State Party or any ship in relation to which the right of limitation is invoked or whose release is sought and which does not at the time specified above fly the flag of a State Party.

2. A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are:

- (a) according to the law of that State, ships intended for navigation on inland waterways;
- (b) ships of less than 300 tons.

A State Party which makes use of the option provided for in this paragraph shall inform the depositary of the limits of liability adopted in its national legislation or of the fact that there are none.

3. A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to claims arising in cases in which interests of persons who are nationals of other States Parties are in no way involved.

3bis. Notwithstanding the limit of liability prescribed in paragraph 1 of Article 7, a State Party may regulate by specific provisions of national law the system of liability to be applied

⁴⁰ Patrick Griggs, Richard Williams, Jeremy Farr; Limitation on Liability for Maritime Claims Fourth edition, LLP, London Singapore, 2005, p. 54.

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

4. The Courts of a State Party shall not apply this Convention to ships constructed for, or adapted to, and engaged in, drilling:
(a) when that State has established under its national legislation a higher limit of liability than that otherwise provided for in Article 6; or

(b) when that State has become party to an international convention regulating the system of liability in respect of such ships.

In a case to which sub-paragraph (a) applies that State Party shall inform the depositary accordingly.

5. This Convention shall not apply to:

(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.”

Article 15 (2) provides for the application of the 1976 Limitation Convention to ships of less than 300 tons; however, States have the right to say that they will provide separate limits for them in national legislation – in fact many do so. Although the Convention generally addresses sea-going ships, Article 15 (2) provides the opportunity for the application of the Convention to non-seagoing ships. The Republic of Bulgaria will use the opportunity and amend the Merchant Shipping Code in a way that the scope of application will also extend to inland water ships.

The difference between paragraph 1 and paragraph 3 is that the exclusion in the former applies to cases with international element, meaning foreign ships but of non State Parties, whereas the latter applies exclusion for strictly domestic cases.

It is important to note that paragraphs 1-4 are optional for State Parties- they may take up the exclusions or not, whereas paragraph 5 is “binding” exclusion provided by the Convention.

2.4.17 Reservations

Article 18 provides that:

- “1. Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right to exclude the application of Article 2 paragraph 1(d) and (e). No other reservations shall be admissible to the substantive provisions of this Convention.
2. Reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.
3. Any State which has made a reservation to this Convention may withdraw it at any time by means of a notification addressed to the Secretary-General. Such withdrawal shall take effect on the date the notification is received. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date the notification is received by the Secretary-General, the withdrawal shall take effect on such later date. ”

Reservations can be made to the provision relating to wreck and cargo removal expenses. Consequently if a State Party makes a reservation to Article 2(1) (d) and (e), liability for wreck removal expenses is unlimited. The Republic of Bulgaria made no reservation on ratifying the 1976 Limitation Convention.

2.4.18 The 1976 Limitation Convention as amended by the 1996 Protocol

Article 2 of the Protocol replaces Article 3(a) of the 1976 Limitation Convention with the following wording:

- (a) “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;”

Salvage reward is based on the value of the property a person salvages. In case of a failure, the salvor is not entitled to a salvage award. However, if a person prevents pollution and damage to the environment, even though he has not salvaged anything, the Convention provides for a special compensation to the salvor. That will also be excluded from limitation of liability.

Article 3 of the Protocol replaces Article 6 of the 1976 Convention. Now there is a 4 stage approach instead of 5 stage one and the sums have been increased dramatically:

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

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

Article 4 of the Protocol replaces Article 7, paragraph 1 of the Convention:

“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.”

There are two major amendments from the 1976 Limitation Convention.

The first one is that from 46,666 SDR, the limit of liability was raised to 175,000. In 1990 there was a Protocol to the Athens Convention (which never came into force), but its limit was also changed from 46,666 SDR to 175,000 SDR so they wanted to achieve some sort of harmony. Obviously, The 1976 Limitation Convention is per the number of passengers the vessel is authorised to carry, while the Athens Convention is per passenger. The maximum limit of 25 million was removed!

Article 5 replaces Article 8, paragraph 2 of the Convention:

“2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 may, at the time of signature without reservation as to ratification, acceptance or approval or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as follows:

- (a) in respect of Article 6, paragraph 1(a), at an amount of
 - (i) 30 million monetary units 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, 12,000 monetary units;
 - for each ton from 30,001 to 70,000 tons, 9,000 monetary units;
 - and
 - for each ton in excess of 70,000 tons, 6,000 monetary units;
 - and
 - (b) in respect of Article 6, paragraph 1(b), at an amount of:
 - (i) 15 million monetary units 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, 6,000 monetary units;
 - for each ton from 30,001 to 70,000 tons, 4,500 monetary units;
 - and
 - for each ton in excess of 70,000 tons, 3,000 monetary units;
 - and
 - (c) in respect of Article 7, paragraph 1, at an amount of 2,625,000 monetary units multiplied by the number of passengers which the ship is authorized to carry according to its certificate.
- Paragraphs 2 and 3 of Article 6 apply correspondingly to subparagraphs (a) and (b) of this paragraph.”

Article 6 of the Protocol adds a new paragraph 3bis in Article 15

“Notwithstanding the limit of liability prescribed in paragraph 1 of Article 7, a State Party may regulate by specific provisions of national law the system of liability to be applied to claims for

loss of life or personal injury to passengers of a ship, provided that the limit of liability is not lower than that prescribed in paragraph 1 of Article 7. A State Party which makes use of the option provided for in this paragraph shall inform the Secretary-General of the limits of liability adopted or of the fact that there are none.”

This provision gives a possibility to a State Party to put unlimited liability for passengers which leads to problems when it comes to harmonization.

Article 7 amends Article 18 of the Convention Article 18, paragraph 1 of the Convention is replaced by the following text:

“1. Any State may, at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter, reserve the right:

(a) to exclude the application of Article 2, paragraphs 1(d) and (e);

(b) to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or of any amendment or protocol thereto.

No other reservations shall be admissible to the substantive provisions of this Convention.”

Article 9

“1. The Convention and this Protocol shall, as between the Parties to this Protocol, be read and interpreted together as one single instrument.

2. A State which is Party to this Protocol but not a Party to the Convention shall be bound by the provisions of the Convention as amended by this Protocol in relation to other States Parties hereto, but shall not be bound by the provisions of the Convention in relation to States Parties only to the Convention.

3. The Convention as amended by this Protocol shall apply only to claims arising out of occurrences which take place after the entry into force for each State of this Protocol.

4. Nothing in this Protocol shall affect the obligations of a State which is a Party both to the Convention and to this Protocol with respect to a State which is a Party to the Convention but not a Party to this Protocol.”

2.5 THE CMI GUIDELINES 2008

The Comité Maritime International (CMI) adopted at its 39th Conference, held in Athens between 12th and 17th October 2008, Guidelines in respect of Procedural Rules relating to Limitation of Liability in Maritime Law.⁴¹

One of the purposes of CMI is to contribute by appropriate means and activities to the unification of the maritime law in all its aspects.⁴² This has been done very successfully by preparation of a number of important conventions in the past. Nowadays, the work of CMI is focused on co-operation with international organisations, particularly IMO. It carries out surveys of national legislation, prepares reports and draft instruments. Its work includes monitoring implementation of different international maritime conventions and their use in practice with the purpose of striving for more harmonized understanding, interpretation and application thereof.

In the context of its activities, the CMI has noted that “although limitation of liability in maritime law is regulated by International Conventions, the procedural rules of various States relating to limitation have similarities, but also differences which justify an effort of harmonization.”

For this reason, the CMI prepared Guidelines on Procedural Rules relating to Limitation of Liability in Maritime Law. The Guidelines took under consideration the following Conventions:

1. “Bunker Convention” - the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;
2. The International Convention on Limitation of Liability for Maritime Claims, London 1976;
3. The International Convention on Civil Liability for Oil Pollution Damage 1969 and that Convention as amended by the 1992 Protocol thereto (CLC 1969 and 1992).
4. The International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious substance by Sea 1996 (HNS).

⁴¹ Resolution adopted by the 39th CMI conference on Limitation of liability in Maritime law in Athens 17 october 2008, CMI Yearbook 2009, p. 241.

⁴² CMI Yearbook 2009, CMI publication, p. 126.

The Republic of Bulgaria is already a party to the CLC and Bunker Convention. The main reason for incorporation of the Guidelines and the need for unification of procedural rules as such, lies in economic interest; unification of such issues has a positive effect on business relations as the parties know what to expect in case the question of the limitation of liability arises. This gives them the judicial certainty and the possibility to make informed decisions.

2.5.1 REMARKS ON THE GUIDELINES

The four specific conventions mentioned above, were taken for a reference and as a background for a better understanding of the relevant Guidelines. The Guidelines are general/abstract so as to be applicable to any other past or future convention concerning the limitation of liability. Consequently due to their nature, they may not apply to all the conventions in the same way or may even not be applicable at all. Further, the Guidelines apply only as regards the global limitation of liability is concerned and they do not refer to the international funds established by certain conventions, i.e. HNS Convention. Additionally, they do not impose the solutions suggested; although the solutions offered are the preferred ones. Last but not least, the Guidelines are meant to remind the States of what is necessary to be dealt with as far as procedural questions are concerned, as what is obvious for some States is not obvious for the others⁴³.

The CMI GUIDELINES:

1. RELATIONSHIP OF GUIDELINES TO MARITIME CONVENTIONS
2. INTERPRETATION
3. JURISDICTION
4. LIMITATION OF LIABILITY WITHOUT THE CONSTITUTION OF A FUND
5. TIME LIMIT FOR STARTING LIMITATION PROCEEDING
6. PROCEDURE OF ESTABLISHMENT OF THE FUND AND EVIDENCE
7. CHALLENGING THE RIGHT OF LIMITATION
8. CONSEQUENCES OF LIMITATION
9. LOSS OF RIGHT TO LIMITATION OF LIABILITY

⁴³ CMI Yearbook 2007-2008, CMI Publication, pp. 188-189.

10. INFORMATION AND DOCUMENTS TO BE PROVIDED BY THE PERSON INVOKING THE BENEFIT OF LIMITATION
11. ISSUES RELATING TO THE FUND
12. TIME LIMITS IN THE LIMITATION PROCEEDINGS
13. CONSEQUENCE OF LATE PARTICIPATION
14. VERIFICATION OF CLAIMS
15. CHALLENGE OF CLAIMANTS' CLAIMS
16. RELATION BETWEEN THE LIMITATION PROCEEDINGS AND PROCEEDINGS ON THE MERITS OF THE CLAIMS
17. MORE THAN ONE PERSON LIABLE
18. MORE THAN ONE SHIP LIABLE
19. SUBROGATION
20. SETTING OFF OF COUNTERCLAIMS
21. PARTLY PAID CLAIMS

The existing provisions of the Bulgarian Civil Procedure Code are in tune with the proposed CMI guidelines. Therefore it can be concluded that in this respect Republic of Bulgaria has a very up to date modern maritime legislation in this respect.

2.6 The 1976 Limitation Convention as Amended 1996 and the European Union Law

2.6.1 Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims

2.6.1.1 Main objectives of the Directive and brief overview of its provisions

On 9 October 2008, the Member States of the European Community adopted a statement in which they unanimously recognised the importance of the application of the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims by all Member States.

As a result of more than three years of hard work and negotiations⁴⁴ the legislative dossiers that constitute the Third EU Maritime Safety Package were published in the *Official Journal of the European Union* (OJ) on 28 May 2009 and entered into force on 17 June 2009. However, the legislative acts will not have effect in EU member States until they have either been implemented into the domestic law of member States (where the legislation has been agreed in the form of a Directive) or their agreed application date has passed (where the legislation has been agreed in the form of a Regulation).

The Directive lays down rules applicable to certain aspects of the obligations on shipowners as regards their insurance for maritime claims (Article 1).

Article 2 provides the scope of application:

- “1. This Directive shall apply to ships of 300 gross tonnage or more.
2. This Directive shall not apply to warships, auxiliary warships or other State owned or operated ships used for a non commercial public service.
3. This Directive shall be without prejudice to the regimes established by the instruments in force in the Member State concerned and listed in the Annex hereto.”

The Insurance Directive requires shipowners of ships with a gross tonnage (gt) of 300 or more to maintain insurance cover of the type provided by the International Group clubs up to the limits of the Protocol of 1996 to Amend the International Convention on Limitation of Liability for Maritime Claims, that this cover is evidenced by a certificate or certificates of insurance when entering an EU port and that this insurance covers maritime claims subject to limitation under The 1976 Limitation Convention⁴⁵. The Insurance Directive states that ships which do not

⁴⁴ The ERIKA III Safety Package was first introduced on 25 November 2005 by the European Commission.

⁴⁵ *Article 4*

Insurance for maritime claims

1. Each Member State shall require that shipowners of ships flying its flag have insurance covering such ships.
2. Each Member State shall require shipowners of ships flying a flag other than its own to have insurance in place when such ships enter a port under the Member State's jurisdiction. This shall not prevent Member States, if in conformity with

provide sufficient proof of insurance are to be denied entry into any EU port until the situation is rectified (Article 5). The penalties for any potential breach will be determined by national legislation (Article 7). The Commission is required to present a report to the Parliament and Council every three years on the application of the Directive (Article 8). Republic of Bulgaria being a Member State of the European Community is obliged to adjust its laws to comply with the Directive before January 1, 2012 (Chapter X (Contract of Marine Insurance) of the Bulgarian Merchant Shipping Code).

2.7 The existing provisions of the Bulgarian Merchant Shipping Code in relation to Limitation of liability

Chapter XV of the Bulgarian Merchant Shipping Code provides the regime of limited liability of the shipowner. Articles 338-346 consist of the following provisions:

Article 338 Claims subject to limitation

Article 339 Claims excepted from limitation

Article 340 Boundaries of the Limited Liability

Article 341 Limits of Limited Liability

Article 342 Determining the Value of the Ship

Article 343 Abandonment of a Ship

Article 344 Effect of the Abandonment

international law, from requiring compliance with that obligation when such ships are operating in their territorial waters.
3. The insurance referred to in paragraphs 1 and 2 shall cover maritime claims subject to limitation under the 1996 Convention. The amount of the insurance for each and every ship per incident shall be equal to the relevant maximum amount for the limitation of liability as laid down in the 1996 Convention.

Article 6

Insurance certificates

1. The existence of the insurance referred to in Article 4 shall be proved by one or more certificates issued by its provider and carried on board the ship.
2. The certificates issued by the insurance provider shall include the following information:
 - (a) name of ship, its IMO number, and port of registry;
 - (b) shipowner's name and principal place of business;
 - (c) type and duration of the insurance;
 - (d) name and principal place of business of the provider of the insurance and, where appropriate, the place of business where the insurance is established.
3. If the language used in the certificates is neither English nor French nor Spanish, the text shall include a translation into one of these languages.

Article 345 Effect of the Warranties

Article 346 Other Persons Equal to the Liability of the Shipowner

2.7.1 Law for ratification of the International Convention on Limitation of Liability for Maritime Claims as amended by the Protocol of 1996

International Conventions have no independent life of their own. They require adoption as part of the national law of participating countries before they become effective.

As an objective to become a State Party to the international regime of limitation of liability for maritime claims, The Republic of Bulgaria has ratified the Convention on Limitation of Liability for Maritime Claims and the Protocol of 1996 by Law on 11 May 2005. The 1976 Convention has entered into force on 1 November 2005.

2.7.2 Need for Amendment of the Bulgarian Merchant Shipping Code

At present all the provisions stipulated in the Bulgarian Merchant Shipping Code (Chapter XV) “Limited liability of the shipowner” are not up to date and are not in conformity with the ones stated in the 1976 Limitation Convention as amended by the Protocol of 1996. Therefore a Law of Amendment in the Bulgarian Merchant Shipping Code relating to the implementation of the 1976 Limitation Convention as amended is needed.

2.8. Bulgarian Drafting Technique

The Proposed Law of Amendment of the Bulgarian Merchant Shipping Code has been drafted in accordance with the Bulgarian Law of Normative Acts. According to this Act (the word Act is always used as a common word describing any kind of a legislative instrument, and follows the proper wording of the Law mentioned above) each Code or Law shall be amended by a Law of Amendment. A Law of Amendment has the following structure. An amendment is made through

a paragraph, followed by the structure of the act subject of amendment. In the case of Merchant Shipping Code the structure is chapter, section, article, and sub-article.

**Law of Amendment in the Bulgarian Merchant Shipping Code relating to the
implementation of the International Convention on Limitation of Liability for Maritime
Claims (LLMC, 1976) as amended by the Protocol of 1996**

Paragraph 1

Chapter XV, Limited liability of the shipowner of the Bulgarian Merchant Shipping Code (title amend. - SG 113/02) is hereby replaced by the following:

Chapter XV

Limitation of liability for maritime claims

Persons entitled to limit liability

Art. 338. 1. Shipowners and salvors may limit their liability in accordance with the provisions of this Chapter.

2. If any claims set out in Article 339 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 Chapter.

3. The liability of a shipowner shall include liability in an action brought against the vessel itself.

4. An insurer of liability for claims subject to limitation in accordance with the rules of this Chapter shall be entitled to the benefits of the 1976 Limitation Convention as amended by the Protocol of 1996 to the same extent as the assured himself.

5. The act of invoking limitation of liability shall not constitute an admission of liability.

Claims subject to limitation

Art. 339. 1. Subject to Articles 339a and 340 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 connexion 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 connexion with the operation of the ship or salvage operations;

(d) 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;

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) 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 Convention, and further 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), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

Claims excepted from limitation

Art. 339a The provisions of this Chapter shall not apply to:

(a) 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;

(b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 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 or 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 provided for in Article 342.

Conduct barring limitation

Art. 340 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.

Counterclaims

Art. 341 Where a person entitled to limitation of liability under the rules of this Chapter has a claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of the Convention shall only apply to the balance, if any.

Limits of liability

Art 342. 1. 1. The limits of liability for claims other than those mentioned in Article 342a, arising on any distinct occasion, shall be calculated as follows:

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

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

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

for each ton from 2,001 to 30,000 tons, 800 Units of Account;

for each ton from 30,001 to 70,000 tons, 600 Units of Account; and

for each ton in excess of 70,000 tons, 400 Units of Account,

(b) in respect of any other claims,

(i) 1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,

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

for each ton from 2,001 to 30,000 tons, 400 Units of Account;

for each ton from 30,001 to 70,000 tons, 300 Units of Account; and

for each ton in excess of 70,000 tons, 200 Units of Account.

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. Claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have such 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 Chapter the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.

The limit for passenger claims

Art. 342a 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.

Unit of Account

342b. 1. The Unit of Account referred to in Articles 342 and 342a is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Articles 342 and 342a shall be converted into the Bulgarian lev according to its value at the date the limitation fund shall have been constituted.

Aggregation of claims

Art. 342c. 1. The limits of liability determined in accordance with Article 342 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 338 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 342a 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 338 in respect of the ship referred to in Article 342a and any person for whose act, neglect or default he or they are responsible.

Constitution of the fund

Art. 343. 1. Any person alleged to be liable shall constitute a fund with the Court or other competent authority 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 342 and 342a as are applicable to claims for which that person may be liable, together with interest 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 Bulgarian legislation. When the fund is constituted it is considered to be adequate by the Court or other competent authority.

3. A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 342c or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.

Distribution of the fund

Art. 344. 1. Subject to the provisions of paragraphs 1, 2 and 3 of Article 342 and of Article 342a, 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 Chapter.

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 Bulgarian Court or other competent authority where the fund has been constituted 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.

Bar to other actions

Art. 345. 1. Where a limitation fund has been constituted in accordance with Article 343, any person having made a claim against the fund shall be barred from exercising any right in respect of such 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 343, 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 the Republic of Bulgaria for a claim which may be

raised against the fund, or any security given, may be released by order of the Bulgarian Court or other competent authority. 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 Republic of Bulgaria 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.

Scope of application

Art. 346. 1. This Chapter shall apply whenever any person referred to in Article 338 seeks to limit his liability before the Bulgarian Courts or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of Republic of Bulgaria.

2. This Chapter applies also to ships intended for navigation on inland waterways

3. This Chapter shall not apply to:

- (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.

Paragraph 2. In Paragraph 1a of the Additional Provisions the following new definitions shall be added:

35. “1976 Limitation Convention as amended by the Protocol of 1996” for the purposes of Chapter XV shall mean the International Convention on Limitation of Liability for Maritime Claims (LLMC, 1976) as amended by the Protocol of 1996.

35. “Shipowner” for the purposes of Chapter XV shall mean the owner, charterer, manager and operator of a seagoing ship.

36. “Salvor” for the purposes of Chapter XV shall mean any person rendering services in direct connexion with salvage operations. Salvage operations shall also include operations referred to in Article 339, paragraph 1(d), (e) and (f).

37. “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.

Transitional and concluding provisions

to the Law of amendment in the Bulgarian Merchant Shipping Code relating to the implementation of the International Convention on Limitation of Liability for Maritime Claims (LLMC, 1976) as amended by the Protocol of 1996

Paragraph 3 This Law shall enter into force from the date of promulgation in the State Gazette.