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LAW ON THE LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 2021

A Legislation Drafting Project submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) in International Maritime Law at the IMO International Maritime Law Institute

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EXPLANATORY NOTE

1. Introduction

Limitation of Liability is a centuries old legal concept which permits defined categories of persons to limit their financial exposure for specific classes of maritime claims. The concept is now deeply entrenched in the maritime industry and may be found in many liability conventions ranging from conventions on carriage of goods by sea, conventions on the carriage of passengers and their luggage by sea, conventions on the liability and compensation for pollution damage, to the convention on the liability for the removal of wrecks.¹

The concept stems from the desire to stimulate shipping for the benefit of international trade.² If the liability of a ship owner was not curtailed by this concept, many ship owners may have been exposed to unlimited financial claims and possibly would have become bankrupt in a case where the value of maritime claims exceeded the assets of the ship owner.

Equally, to avert bankruptcy, a ship owner would take out a risk insurance cover at a high premium to mitigate against eventual excessive claims. This would have made international shipping a very expensive venture since the cost of insurance will eventually be transferred to the end user.

¹ Norman Martinez Gutiérrez, 'New Global Limits for Maritime Claims' (Martinus Nijhoff Publishers, 2013) 341.

² John Hare, *Shipping Law and Admiralty Law in South Africa* (2nd edn, Juta & Co, Kenwyn) 515.

2. Brief History

The limitation of liability, although being part of the maritime industry for centuries, ‘there is controversy as to the specific time when it first appeared’.³ Martinez Gutiérrez opined that, it seems that the first real recognition of the limitation of liability was found in the *Tavole Amalfitane*.⁴

Notwithstanding the long history, the many claims for exceptionally high cost of compensation for loss of life, loss of or damage to property, and personal injuries emanating from the tragedy of the *RMS Titanic* in 1912 appears to have prompted the maritime industry to seriously consider the concept of limitation of liability.⁵

In 1913, barely a year after the *RMS Titanic* tragedy, ‘a committee established by the Comité Maritime International (CMI), to review the law on the limitation of liability came up with draft convention aimed at bringing about harmonization of the law in the field of limitation of liability’.⁶

The convention was adopted in 1924, 11 years after the committee was established at the Diplomatic Conference in Brussels at the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability for Shipowners of Seagoing Vessels.⁷

³ Attard and Others, *The IMLI Manual On International Maritime Law: Shipping Law, Volume II* (Oxford Press, 2016) 551.

⁴ The Tables of Amalfi date back to the eleventh century (see Martinez Gutiérrez (n1)) 551.

⁵ Attard and Others (n3) 553.

⁶ Ibid 552.

⁷ Ibid.

The 1924 Convention, however, received very little support from the international shipping community.⁸ Hence, CMI revisited the concept in 1950s which gave birth to the 1957 Convention. Although the 1957 Convention was accepted by the international community, the international development in the shipping industry during the 1960s, led to further revision of the concept of limitation of liability.⁹ This revision work between Inter-Governmental Maritime Consultative Organization (IMCO) and CMI gave birth to the adoption of the new Convention on the Limitation of Liability for Maritime Claims, 1976 (LLMC Convention).¹⁰

3. The Convention on Limitation of Liability for Maritime Claims¹¹

3.1. The 1976 LLMC Convention

As stated above, 1976 LLMC was introduced to address the inadequacy in the 1924 and 1957 Conventions to provide the needs of the shipping industry during those periods. Under the 1924 and 1957 Conventions, a successful claimant of maritime claim, was entitled to full reimbursement of his or her claim unless the defendant ship owner was able to prove its right to limit liability by satisfying the court that there was no causative actual fault or privity on its part.¹²

The 1976 LLMC on the other hand, provides for a ship owner's right to limit liability and such right can only be lost 'if it is proved that the claim resulted from the ship owner's personal act or omission, committed with the intent to cause such loss, or

⁸ Ibid.

⁹ Martinez Gutierrez (n1).

¹⁰ Attard and Others 553.

¹¹ 1456 UNTS 221, 16 ILM 606 (1977), adopted 19 Nov 1976 and entered into force 1 Dec 1986.

¹² John Hare (n2) 531.

reckless and with knowledge that such loss would probably result'.¹³ Thus, with the 1976 Convention, the burden of proof shifted from the ship owner in the 1924 and 1957 Convention to the claimant. Thus, under the 1976 LLMC, breaking limitation is almost impossible task, reserved for extreme situations, of a ship owner recklessness or intent.¹⁴

As an example, the Court in the *Herceg Novi* case¹⁵, Staughton LJ, summarized the LLMC as follow:

The 1976 Convention was a packaged deal, whereby the limits were raised considerably but in return the ship owner received the benefit of a limit which was thought to be virtually unbreakable. It was largely the work of the Comité Maritime International, a non-governmental organization body representing the interest of all those involved in sea transport...

Therefore, besides the burden of proof which shifted, the LLMC also introduced new limits of liability for maritime claims.

3.2 The 1996 Protocol to Amend the 1976 Convention on Limitation of Liability for Maritime Claims¹⁶

The 1996 LLMC Protocol amended the 1976 LLMC and was adopted 2 May 1996 and entered into force 13 May 2004. It increased the 1976 Convention liability limits in respect of claims for loss of life or personal injury and other claims which were

¹³ Ibid.

¹⁴ John Hare (n2) 531.

¹⁵ *The Herceg Novi* and *The Ming Galaxy* [1998] Lloyd's Rep. 457 (cited by John Hare above).

¹⁶ 35 ILM 1433 (1996), adopted on 05 May 1996 and entered into force 13 May 2004.

overtaken by inflation, the formula for calculating the limits and also introduced an efficient system of updating the limits or the tacit acceptance procedure in the Protocol.¹⁷ The Protocol appears to be fairly well received by the international shipping community because 61 States, representing 69.45% of the world maritime fleet had ratified the Protocol.¹⁸

3.2. The 2012 Tacit Acceptance Amendment

The recent amendment to increase the global limitation of liability regime was made to the 1996 LLMC Protocol in April 2012 and entered into force on 8 June 2015 by way of the tacit acceptance procedure. These increases were proposed by Australia as a result of the *Pacific Adventurer* incident of the coast of Queensland, Australia in 2009.¹⁹

The cost of claims in this incident were significantly higher than the limits provided for in the 1996 LLMC Protocol, thus the proposal by Australia was accepted albeit with some adjustments²⁰. Therefore, the IMO Legal Committee by virtue of Article 8 of the 1996 Protocol accepted to increase the limits of liability in 1996 Protocol through Resolution LEG. 5(99) adopted on 12 April 2012.

¹⁷ Provides that an amendment shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of Parties. Available at: <<https://www.imo.org/en/About/Conventions>> accessed 12 February 2021.

¹⁸ Available at: <<https://www.imo.org/eng/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>> accessed 13 February 2021.

¹⁹ Attard and Others (n3).

²⁰ Ibid.

4. The 1976 LLMC Convention and its Protocol (1996 LLMC Convention)

The objectives of the LLMC Convention, carried through to the 1996 LLMC Protocol, were to enable shipowners and others, including insurers, to limit their liability in a way which would allow legitimate claims to be satisfied, having regard to the availability of effective insurance cover or other financial guarantees.²¹

The two instruments are to be read together as envisaged in Article 1 (1) of the 1996 Protocol which makes reference to the “Convention” as meaning the 1976 LLMC Convention with subsequent amendments brought by the IMO Legal Committee through Resolution (LEG. 5(99)).

Therefore, for the purpose of convenience in the discussion below, the consolidated texts of the 1976 LLMC, 1996 Protocol and Resolution LEG. 5(99) would be collectively referred to as the “1996 LLMC Convention” or simply the “Convention”.

5. The 1996 LLMC Convention (Convention)

5.1. Article 1: Persons entitled to limit liability

In this Article, the persons entitled to limit liability are categorized as follows –

- (a) shipowner - inclusive the owner, charterer, manager, and operator of a seagoing ship)²² and ‘shipowner’ was recognised to encompass both ‘registered and beneficial’ owners²³;

²¹ Francesco Berlingieri (ed), *The Travaux Préparatoires of the LLMC Convention 1976 and of the Protocol of 1996*, (CMI, 2000) IX.

²² Article 1(2).

²³ Attard and Others (n3) 556.

- (b) salvors – inclusive any person rendering services in direct connection with salvage operations (including wreck removal operations), and also operations referred to in Article 2, paragraphs 1(d), (e) and (f))²⁴ – the limit of liability is not extended to independent contractors²⁵
- (c) any person for whose act, neglect or default the shipowner, or salvor is responsible; and
- (d) insurers of liability to the same extent as the insured.

5.2. Article 2: Claims for which limitation is available

Except as provided for in Articles 3 and 4, the Convention provides that the following claims may be subjected to limits 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;
or
- (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 (claims in delict or tort)²⁶ ;

²⁴ Article 1(3).

²⁵ John Hare (n2) 533.

²⁶ John Hare (n2) 534.

- (d) claims in respect of 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 claims for wreck removal;
- (e) claims in respect of the removal, destruction, or the rendering harmless of the cargo of the ship; and
- (f) claims for a person other than the person liable in respect of the measures taken in order to avert or minimise loss for which the person liable may limit liability in accordance with this Act and further loss caused by such measures.

Article 2 further provides that, 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, a claim set out under paragraph 1(d), (e), and (f) shall not be subject to limitation of liability to the extent that it relates to remuneration under a contract with the person liable²⁷.

5.3. Article 3: Claims excepted from limitation

Article 3 of the Convention (as amended by the Protocol), lists claims which are excluded from the realm of the Convention and include salvage (Article 3(a) 1996 Protocol amendment), general average, oil pollution, and nuclear accidents²⁸ and claims by servants of the shipowner or salvor whose duties are connected with the ship, including claims of their heirs, dependants, or any other person entitled to make such claims.²⁹

²⁷ Article 2(2).

²⁸ John Hare (n1) 534.

²⁹ Article 3(e).

However, Article 3(e) does not codify an automatic exclusion from the right to limitation³⁰. As an example, if the law of contract does not include any provision preventing, limitation of liability, or prescribing higher limits than those prescribed by the Convention, the provisions of the Convention would apply to such claims³¹.

5.4. Article 4: Conduct barring limitation

In terms of Article 4, the Convention bars limitation of liability if evidence can be adduced that the loss resulted from the shipowner's personal act or omission committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result. As indicated above, breaking the limitation is almost impossible task, reserved for extreme situations, of a ship owner recklessness or intent. Therefore, the elements required for burden of proof will include personal conduct or omission, intent, loss, recklessness, and with such knowledge.

5.5. Article 5: Counterclaims

Article 5 provides that, where persons are entitled to limit liability in terms of the Convention against claims arising out of the same occurrence against each other, their respective claims shall be set off against each other and the claim shall only apply to the balance, if any. This provision may well be useful in cases of collision between two vessels when they are both to blame.³²

³⁰ Attard and Others (n3) 563.

³¹ Ibid.

³² Attard and Others (n3) 567.

5.6. Article 6: Limits of Liability

The provision relating to limits of liability are provided for in Chapter II of the LLMC Convention, in Articles 6-10. Article 6 provides ‘the general limits’ respect of claims for loss of life or personal injury and in respect of any other claims as they may arise on any distinct occasion. The Article further provides for the formula how the claims are to be calculated. The formula calculates ‘the limits of liability in a sliding scale under which the amount per ton decreases in stages as the tonnage increases.’³³ The amounts in the Convention are 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 2000 tons; and
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i) for each ton from:
 - 2001 to 30 000 tons, 1208 Units of Account;
 - 30 001 to 70 000 tons, 906 Units of Account; and
 - in excess thereof, 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 2000 tons; and
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i) for each ton from:
 - 2001 to 30 000 tons, 604 Units of Account;

³³ Attard and Others (n3) 567.

- 30 001 to 70 000 tons, 453 Units of Account; and
- in excess of 70 000 tons, 302 Units of Account.

Article 6 further provides that, 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).³⁴

The Article also provides that, a country may provide in its national laws that 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), but that such national law must not prejudice the right of claims for loss of life or personal injury.³⁵ Presently, Namibia does not have such law in place, thus, such provision has been inserted in the draft law on limitation of liability.

In case of the limits of liability for any salvor not operating from any ship or any salvor operating solely on the ship to or in respect of which he or she is rendering salvage services, such limits shall be calculated according to a tonnage of 1,500 tons.³⁶

With regard to a case of the limit of liability for ships not exceeding 300 gross tonnage, the Convention permits States to prescribe in their own legislation those limits. Namibia, has provided in its law that the formula for calculating the limits of liability for ships not exceeding 300 gross tonnage would be in accordance with paragraph 1 of Article 6, which

³⁴ Article 6(2).

³⁵ Article 6(3).

³⁶ Article 6(4).

shall be one half of the limits of liability applicable to a ship not exceeding 2000 gross tonnage.

The ship's tonnage is the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.³⁷ Namibia is a State Party to the International Convention on Tonnage Measurement of Ships of 1969.

5.7. Article 7: Limits for passengers claims

Article 7 of the Convention establishes a category of limits of liability designated for claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship. The limits of liability for this category is an amount of 175 000 units of account multiplied by the number of passengers which the ship is authorised to carry.³⁸ The claim for loss of life or personal injury to passengers of a ship may be brought by or on behalf of any person carried in the ship.³⁹

However, the new Article 15(3)*bis* encourages State parties to the Convention to regulate by specific provisions in their 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 amount to limit liability shall not be lower than the prescribed amount in Article 7(1). Namibia has made use of this provision to increase the limit to 250 000 units of account as explained in the note under Article 15(3)*bis* explanation.

³⁷ Article 6(6).

³⁸ Article (1).

³⁹ Article 7(2)

5.8. Article 8: Units of Account

The Units of Account referred to in Articles 6 and 7 is the Special Drawing Rights (SDRs) as defined by the International Monetary Fund.⁴⁰ The SDRs amount are to be converted into national currency, in this case to Namibia Dollar using the exchange rate of that particular day. State Parties who are not member to the International Monetary Fund (IMF) must calculate the SDRs value amounts in accordance with Article 7(2). Namibia is a State Party to the IMF instrument. The Article requires that manner of calculating units of account must be communicated to the Secretary General of the International Maritime Organization at the time when depositing the instrument of accession⁴¹ in the case of Namibia.

5.9. Article 9: Aggregation of Claims

For the purpose of interpretation of Article 9, aggregation of claim happens, “where a multiple of claims arise from accidents or occurrences that are linked to each other in such a way that the second (and subsequent) can be shown to be the natural consequence of the first. In such a case, the LLMC treats all claims as arising ‘on a distinct occasion’ and aggregate all claims to against the limitation fund”.⁴²

As an example, in the cases of *The Rajah*⁴³, *The Credon*⁴⁴, *The Harlow*⁴⁵ and *The Ant*⁴⁶ the courts held that, since the two damages in each of those incidences were

⁴⁰ Article 8(1).

⁴¹ Article 8(4).

⁴² John Hare (n2) 535.

⁴³ 1 Asp MLC 403 (1872).

⁴⁴ 5 Asp MLC (585 (1886).

⁴⁵ (1922) 13 LIL Rep 311.

⁴⁶ (1924) 19 LIL Rep 211.

caused by the same act of negligence, the occasions were not distinct.⁴⁷ The actual test to determine whether two damages occurred in one distinct occasion or not, is whether the second damage was caused by a separate and distinct act of negligence from that which caused the first; or, in other words, whether the second damage was a necessary consequence of the negligent act which produced the first⁴⁸.

5.10. Article 10: Limitation of Liability without Constitution of the Fund

The persons permitted in terms of Article 1 may in terms of Article 10 invoke limitation of liability without constitution of the fund referred in Article 11. If the party elects to limit their liability without the constitution of the fund, such party must comply with the provisions of Article 12 regarding the distribution of the fund.

In such case, the questions of procedure, the Convention provides that such procedure must be determined in accordance with the national law⁴⁹. Namibia has excluded this provision from the national law.

6. The Limitation Fund

6.1. Articles 11, and 12: Constitution of the Fund

Article 11 provides that where an action is brought in the Court or any competent authority in any State Party to enforce a claim subject to limitation of liability, the

⁴⁷ Attard and Others (n3) 572.

⁴⁸ Ibid.

⁴⁹ Article 10(4).

person liable may only invoke the right to limit liability if a limitation fund has been constituted. The fund may be constituted by depositing the sum or producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered adequate in the amounts provided for in Article 6 and 7 of the Convention.⁵⁰

Namibia has in the implementation legislation provided for the establishment of the fund, and rules of procedure connected therewith, including the right of subrogation in case where the liable person has paid an amount before the constitution of the fund.⁵¹ Any fund so constituted shall be distributed amongst the claimants in proportion to their established claims against the fund.⁵²

6.2. Article 13: Bar to other actions

Article 13 provides that where a limitation fund has been constituted, any person having made a claim against the fund shall be barred from exercising any right in respect of same claim against any other assets of a person by or on behalf of whom the fund was constituted.⁵³

Further, after the limitation fund has been constituted, any ship or any other property of the person whom or on behalf whom the fund has been constituted, which was arrested or attached must be released by an order of Court or competent authority.⁵⁴

⁵⁰ Article 11(1).

⁵¹ As example, see Article 10.

⁵² Article 12 (1).

⁵³ Article 13(1).

⁵⁴ Article 13(2).

6.3. Article 14: Governing Law

This Article provides that the forum for the constitution of the fund, distribution of the fund and such rules of procedure shall be governed by the law of the State Party in which the fund is constituted. Namibia has provided the same in its legislation.

7. Article 15: The scope of Application

7.1. The Convention provides that it will apply to any person referred to in Article 1 who seeks to limit his or her 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.⁵⁵

7.2. However, a State Party may exclude wholly or partially from the application of the Convention any person referred in Article 1 who at the time:

- when the rules of the Convention are invoked in the State concerned, does not have his or her habitual place of residence in the State Party; or
- does not have his or her place of business in the 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.⁵⁶

7.3. Namibia has in its implementation legislation empowered the Minister responsible for Transport to exclude any person or persons whom may be excluded from the application of Act.

⁵⁵ Article 15(1).

⁵⁶ Ibid.

7.4. A State Party has an option in terms of Article 15(2) to regulate in its law, the system of limitation of liability to be applied to ships intended for navigation on inland waterways. The national legislation has provided for this in Article 8. If a State Party exercises this option, it must inform the Secretary General of the International Maritime Organisation.⁵⁷

7.5. The Courts of a State Party are prohibited from applying the provisions of the Convention to ships constructed for or adapted to, and engaged in drilling –

- (a) when the State has established under its national law a higher limit of liability than that provided for in Article 6; or
- (b) when the State has become a party to an international convention regulating the system of liability in respect of such ship.⁵⁸ The State Party must in case of subparagraph (a) inform the depository of such higher limits adopted. Namibia has excluded the application in its national law the provisions of Article 15(4) of the Convention.

7.6. Under Article 15(3)*bis*, State Parties are permitted to regulate by specific provisions in national law, the system of liability to be applied for claims for loss of life or personal injury to passengers of a ship, but such limit shall not be lower than what is provided for under the amended LLMC Convention. If such option is exercised, notice must be submitted to the Secretary General. Namibia has provided for a higher limit than what is provided for under para 1 of Article 7, that is, from

⁵⁷ Article 15(2).

⁵⁸ Article 15(4).

175 000 units of account multiplied by the number of passengers the ship is authorised to carry in the 1996 LLMC to amount of 250 000 units of account per passenger per distinct occasion.

This amount of 250 000 units of account is with strict liability and is the lower threshold permitted under the 2002 Athens Protocol⁵⁹ for loss as a result of death of or personal injury to a passenger of a shipping incident. The carrier under the 2002 Athens Protocol is required to have a compulsory insurance to that amount. The carrier may however pay more up to 400 000 units of account (which can be considered the global cap for ship passenger claims) per passenger per incident if it can be proven that the incident happened as result of his/her fault or neglect⁶⁰. The amount does however not cover war and terrorism. Thus, in accordance with the International Maritime Organisation's Guidelines⁶¹ for implementation of the 2002 Athens Protocol, State Parties have the option to make a reservation to limit the carrier's liability for risk of war and terrorism to 250 000 units of account per passenger per incident or an amount of 340 million units of account per ship per incident.

7.7. Namibia is not a State Party to the 2002 Protocol, thus in the national legislation, it was provided that the carrier has strict liability for the amount of 250 000 units of account per passenger per incident and 250 000 units of account per passenger

⁵⁹ Protocol of 2002 relating to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 (1463 UNTS 19), adopted on 1 Nov 2002 and entered into force 23 April 2014.

⁶⁰ See Articles 3 and 7 of the 2002 Athens Protocol.

⁶¹ IMO Circular Letter No. 2758, Ref.A1/P/50.1. Available at:

<<http://www.imo.org/OurWork/Conferences/Pages/Documents.aspx>> Accessed 6 February 2021.

per incident or 340 million units of account per ship per incident for war and terrorism risk until such accession to the 2002 Athens Protocol.

Namibia is a developing state, prescribing the upper threshold amount of 400 000SDRs or any amount more than 250 000 SDRs may discourage the development of the country's cruise vessel industry.

7.8. Further, the Convention provides that it does not apply to (a) air-cushion vehicles; and (b) floating platforms constructed for the purpose of exploring or exploiting natural resources of the sea-bed or the subsoil thereof. The same was provided for in the Namibian implementing legislation.

8. Reservation

8.1. States are permitted to make reservations in terms of Article 18 of the Convention.

The State which intends to make a reservation is entitled to do so at signature, ratification, acceptance, approval or during accession or any time thereafter.

8.2. Namibia will make use of that right in terms of Article 18 to exclude –

- (a) the application of Article 2, paragraphs 1(d) and (e);
- (b) claims for damage within the meaning of the International on the Liability and Compensation for Compensation Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or any amendment or protocol thereto.⁶²; and that

⁶² Article 18(3).

(c) the limit of liability for ships not exceeding 300 gross tonnage in the Republic of Namibia, shall be calculated in accordance with paragraph 1(a) and (b) of Article 6 of the Convention, which shall be one half of the limit of liability applicable to a ship not exceeding 2000 gross tonnage;

(d) the Republic of Namibia has provided a higher limit of liability in respect of claims arising from the loss of life or personal injury to passengers of a ship, namely 250 000 Units of Account per passenger incident and 250 000 units of account per passenger per incident or 340 million units of account per ship per incident whichever amount is lowest for war and terrorism irrespective of whether they claim directly from the insurer or not.

(e) the Republic of Namibia has without prejudice to claims for loss of life or personal injury prioritised claims in respect of damage to harbour works, basins, and waterways and aids to navigation over other claims.

8.3. No other reservations are permitted to the substantive provisions of the Convention.

9. Why Namibia must accede to the 1996 LLMC Convention

The limitation of liability in terms of Article 2(1) of the Convention as discussed above enable the shipowner to limit his or her liability to a maximum amount depending on the limits authorized by the Convention. The world of maritime commerce has embraced the concept and recognized that there is a certain element of joint venture in the carriage of goods by sea by spreading the risk.⁶³ This sharing of risk has contributed to the known fact that international shipping is generally considered the cheapest mode of international transport, thereby enhancing inter-trade between nations.

Namibia has positioned itself in the Namibia Development Plan 5 of 2019 – 2024 (NDP5), to develop the Port of Walvisbay as Transport Logistic Hub for Southern Africa. To achieve this objective, the shipping industry must *inter alia* develop in terms of efficiency, infrastructure and regulation to attract the necessary shipping lines to the country. Thus, attracting international shipping operators involve creating an enabling and attractive operating environment where their risk appetite is lower than the benefits they will accrue.

Incorporating the provision of the Limitation of Liability regulatory regime into the laws of Namibia is pertinent. This is so because one of the risk areas shipping lines will consider to come Namibia, is the legislation which will protect their interests.

Namibia has not yet ratified both the 1976 Convention (1976 LLMC) and the 1996 Protocol as amended by the subsequent tacit acceptance procedure by Resolution Leg. 5(99).

⁶³ (n2) 515.

The Merchant Shipping Act, 1951 (Act, 57 of 1951) does not have provisions specifically dealing with limitation of liability for maritime claims. Equally, the Act does not specify the persons authorized to limit their liability. Part IV of Chapter V⁶⁴ under the heading Collisions, Accident at Sea, and Limitation of liability, only provides for the following sections: division of loss in case of collision, damages for personal injury, right of contribution, report to proper officer in case of accidents to ships, when owner is not liable for whole damage, how tonnage is calculated, and application of the part to persons other than the owner.

In terms of Article 256⁶⁵, damages for loss of life or personal injury may be recovered in contract or delict/tort. However, in terms of section 256(2) a person against whom an action is brought is authorized to limit his liability for any action for loss of life or personal injury “in a manner provided by the law”. Strangely, no such provision was specified in subsequent provisions or any part of the 1951 Act.

Sections 307 to 311⁶⁶ dealing with loss of or damage to goods were deleted from the Merchant Shipping Act and incorporated in the Carriage of Goods Act, 1986 (Act No.1 of 1986). Article IV*bis* of the Schedule incorporating The Hague Rules as amended by the Brussels Protocol of 1968 provides for limitation of liability for loss of or damage of goods “whether the action be founded in contract or tort”.⁶⁷

Thus, the Carriage of Goods by Sea Act, 1986 too does not make any reference to the applicable limitation of liability regime.

⁶⁴ Act, 57 of 1951.

⁶⁵ Ibid.

⁶⁶ Act 57 of 1951.

⁶⁷ Article IV*bis* (1).

The dilemma has caused considerable problems for the Courts in Namibia with repeated requests for the Law Reform and Development Commission and the Ministry of Works and Transport to reform the law.⁶⁸ Acceding to the 1996 LLMC as amended, and drafting an implementation instrument will therefore be beneficial for the country.

10.Procedure to Incorporate and Implement 1996 LLMC into the Legal System

10.1. As stated above, Namibia is not a State Party to 1976 LLMC, nor to the 1996 LLMC Protocol as amended by the tacit procedure. To become State Party, Namibia must now accede to the 1996 LLMC Protocol as amended (1996 LLMC Convention).

10.2. The 1996 LLMC Convention is a comprehensive instrument containing all amendments up to the IMO Legal Committee Resolution LEG. 5(99) with the new updated limitation of liability amounts.

10.3. To domesticate the instrument, after Parliamentary approval the President signs the instrument which become part of the Namibian law by virtue of Article 144 of the Namibian Constitution after publication of such instrument in the Official Government Gazette.

10.4. After publication of the instrument in the Official Gazette, the municipal courts can apply the provisions of the instrument directly. However, because of the generality of the text of the convention, an instrument of implementation is required to operationalize the convention.

⁶⁸ Discussions in Meetings attended by the author.

- 10.5.** With the publication in the Government Gazette, an Instrument of Accession together with the Reservation and Declaration, if necessary is prepared by the Office of the Attorney General for signature by the Minister responsible for International Relations and Cooperation, and subsequently deposited with the International Maritime Organisation (IMO) Secretary General.
- 10.6.** In Namibia, an instrument of implementation can be in the form of an Act of Parliament, Regulations or a Schedule to an existing Act (direct incorporation of the Convention) or an amendment to any of the aforementioned laws depending where the instrument will fit in the existing laws of Namibia. Therefore, the implementation instrument in this case, would be an Act of Parliament called the “Limitation of Liability for Maritime Claims Act, 2021.
- 10.7.** This Act will amend the Merchant Shipping Act, 57 of 1951 by inserting a new “subsection 3” under section 256. Although in the new Act, the Articles will be different from those listed in the Convention, the language has not changed, save were it was modified to suit the Namibian position as permitted by the Convention.
- 10.8.** Apart from what is excluded from limitation in terms of Article 3 of the Convention, Namibia will make a Reservation in terms of Article 18 as provided for in paragraph 8.2 above.



**TO BE DEPOSITED WITH THE SECRETARY GENERAL
OF THE INTERNATIONAL MARITIME ORGANISATION
(IMO), LONDON**

INSTRUMENT OF ACCESSION

WHEREAS the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 (hereinafter referred to as the “Protocol”) was adopted on 2nd May 1996 by the IMO International Conference on Hazardous and Noxious Substances and Limitation of Liability LEG/CONF.10/8,

AND WHEREAS Namibia, being a State entitled to become a party to the said Protocol by virtue of Article 16 thereof,

NOW THEREFORE the Government of the Republic of Namibia, having considered and approved the said Protocol, hereby formally declares its Accession to the Protocol of 1996 to amend the Convention on the Limitation of Liability for Maritime Claims, 1976 [as amended], subject to the following Reservations and Declarations.

1. In accordance with Article 18 paragraph 1 of the Convention on the Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, the Republic of Namibia hereby:
 - (a) excludes the application of Article 2 paragraph 1(d) and (e); and
 - (b) excludes 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 any amendment or Protocol thereto, arising from occurrences which take place after the coming into force of that Convention as part of laws of the Republic of Namibia.
2. In accordance with Article 15(2) (b) of the Convention on the Limitation of Liability for Maritime Claims, as amended by the Protocol of 1996, the limit of liability for ships not exceeding 300 gross tonnage in the Republic of Namibia, shall be calculated in accordance with paragraph 1(a) and (b) of Article 6 of the Convention, which shall be one half of the limit of liability applicable to a ship not exceeding 2000 gross tonnage.
3. In accordance with Article 15(3)(*bis*) of the Convention on the Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, the Republic of Namibia has provided a higher limit of liability in respect of claims arising from the loss of

life or personal injury to passengers of a ship, namely 250 000 Units of Account per passenger incident and 250 000 units of account per passenger per incident or 340 million units of account per ship per incident whichever amount is lowest for war and terrorism irrespective of whether they claim directly from the insurer or not.

4. In accordance with Article 6(1)(b), the Republic of Namibia has without prejudice to claims for loss of life or personal injury prioritised claims in respect of damage to harbour works, basins, and waterways and aids to navigation over other claims.

IN WITNESS WHEREOF, I, NETUMBO NANDI NAITWAH, MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION OF THE REPUBLIC OF NAMIBIA have signed this Instrument of Accession and affixed the official seal of the Government of the Republic of Namibia.

Done at Windhoek, this 31th day of April Two Thousand and Twenty One.

(Seal)

Signature



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

LIMITATION OF LIABILITY FOR MARITIME CLAIMS BILL,

2021

BILL

To provide for the limitation of liability for maritime claims, and to amend certain provisions of the Merchant Shipping Act, 1951, and to further provide for matters incidental thereto.

(To be signed as Law by the President of the Republic)

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SCHEDULE

LAW AMENDED

BE IT ACTED by the Parliament of the Republic of Namibia, and assented to by the President, of the Republic as follows: -

ARRANGEMENT OF SECTIONS

PART I

INTRODUCTORY PROVISIONS

Definitions and Interpretation

1. In this Act, unless the context otherwise requires –

- (a) “shipowner” means the owner, charterer, manager and the operator of a seagoing ship;

- (b) “salvor” means any person rendering services in direct connection with salvage operations, which shall include operations referred to in Article 4, paragraph (1)(f), and Article 5, paragraph (e) and (f);
- (c) “Court” means the High of Court of Namibia or any competent court authorized to hear maritime claims;
- (d) “Fund” means a fund constituted in accordance with section 14 of this Act;

Scope of Application

- 2. (1) This Act applies whenever any person referred to in Article 3 seeks to limit his or her liability before Court or seeks to procure the release of a ship or other property or the discharge of any security or to any matter consistent with the provisions of the Convention or any subsequent amendment as may be determined by the Minister responsible for Transport within the jurisdiction of the Republic of Namibia.
- (2) The provisions of this Act shall not apply to –
 - (a) air-cushion vehicles;
 - (b) floating platforms constructed for the purpose of exploring or exploiting natural resources of the sea-bed or the subsoil thereof; and
 - (c) any other matter expressly excluded by the provisions of this Act or as may be determined by the Minister responsible for Transport by publication of a Notice in the Government Gazette.

PART II
THE RIGHT OF LIMITATION

Person entitled to limit liability

3. (1) Shipowners and salvors, as defined in Article 1, may limit their liability in accordance with the rules of this Act for claims set out in Article 4;
- (2) If any claims set out in Article 4 are made against any person for whose act, neglect or default the ship-owner or salvor is responsible, such person shall be entitled to avail himself or herself of the limitation of liability provided for in this Act;
- (3) In this Act, the liability of a ship-owner shall include liability in an action brought against the ship;
- (4) An insurer of liability for claims subject to limitation of liability 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 or herself;
- (5) The act of invoking limitation of liability shall not constitute an admission of liability.

Claims subject to limitation

4. (1) Subject to Article 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 for a person other than the person liable in respect of the measures taken in order to avert or minimize loss for which the person liable may limit liability in accordance with this Act 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.
- (3) Claims set out under paragraph 1(d) shall not be subject to limitation of liability to the extent that it relate to remuneration under a contract with the person liable.

Claims excluded from limitation

5. The provisions of this Act 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 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, dependents, or other person entitled to make such claims, if under the legislation governing the contract of services between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his or her liability in respect of such claims, or if he or she by such legislation only permitted to limit his or liability to an amount greater than that provided for in Article 8;
- (f) 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;
- (g) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
- (h) claims for damage within the meaning of the International Convention on the Liability, and Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substance by Sea, 1996 or of any amendment or protocol thereto, which arise from occurrences which take place after the coming into force of that Convention as part of the Namibian legislation.

Conduct barring limitation

6. A person liable shall not be entitled to limit his or her 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

7. Where a person entitled to limit liability in this Act 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 this Act shall only apply to the balance, if any.

PART III

LIMITS OF LIABILITY

The general limits

8. (1) The limits of liability for claims other than those mentioned in Article 5, 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 2000 tons; and
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i) for each ton:-
 - (aa) from 2001 to 30 000 tons, 1208 Units of Account;
 - (bb) from 30 001 to 70 000 tons, 906 Units of Account;

(cc) in excess thereof, 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 2000 tons; and

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

(aa) from 2001 to 30 000 tons, 604 Units of Account;

(bb) from 30 001 to 70 000 tons, 453 Units of Account;

and

(cc) 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) 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 any salvor operating solely on the ship to or in respect of which he or she is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons.

- (5) The limit of liability for ships not exceeding 300 gross tonnage, calculated in accordance with paragraph 1 of this Article, shall be half of the limit of liability applicable to a ship not exceeding 2000 gross tonnage.
- (6) In 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.

The limit for passenger claims

9. (1) Any claim arising on any distinct occasion for the loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 250 000 units of account per passenger per incident irrespective of whether incidents was as result of fault or neglect by the shipowner.
- (2) The amount of 250 000 units of account referred in paragraph (1) shall not be affected if the claimant institutes proceedings against the insurer directly.
- (3) In 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) a person 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.

Units of Account

- 10.** (1) The Units of Account referred to in Articles 8 and 9 is the Special Drawing Rights as defined by the International Monetary Fund.
- (2) The amounts mentioned in Article 8 and 9 shall be converted into Namibia Dollar, according to the value of that currency at the date the limitation fund shall be constituted, payment is made, or bank guarantee is given equivalent to such payment.
- (3) The value of the Namibia Dollar 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.

Aggregation of claims

- 11.** (1) The limits of liability determined in accordance with Article 8 shall apply to the aggregate of the claims which arise on any distinct occasion against the –
- (a) shipowner, as defined in this Act, and any person for whose act, neglect or default he or she or they are responsible; or
- (b) owner 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 she 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

- (d) any person for who act, neglect or default he or she or they are responsible.
- (2) The limits of liability determined in accordance with Article 8 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against–
- (c) the person or persons mentioned in Article 4(1)(a);
 - (d) in respect of the ship referred to in Article 9; and
 - (e) any person for whose act, neglect or default he or she or they are responsible.

PART IV

THE LIMITATION FUND

Constitution of a Fund

- 12.** (1) Where an action is brought in Court 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 section or constituted when the right to limit is invoked.
- (2) The fund shall be constituted in the sum of such amounts set out in Article 8 and 9 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.
- (3) Any fund constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.
- (4) A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under Namibian laws.

- (5) A fund constituted by one of the persons mentioned in paragraph 4(a), (b) or (c) or paragraph 2 of Article 9 or his or her insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b), or (c), or paragraph 2, respectively.

Distribution of the fund

- 13.** (1) Subject to the provisions of paragraphs 1, 2 and 3 and of paragraph 5 of Article 8 and Article 9, 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 or her insurer, has settled a claim against the fund such person shall, up to the amount 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.
- (4) Where a person liable or any other person establishes that he or she may be compelled to pay, at a later date, in whole or in part any amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraph 2 and 3 had the compensation been paid before the fund was distributed, the court 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

14. (1) Where a limitation fund has been constituted in accordance with Article 12, any such 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 Namibia, in accordance with Article 12 hereto, 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 Namibia for a claim which may have been raised against the fund, or any security given, may be released by order of the Court.
- (3) Any such release in terms of paragraph (2), 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;
 - (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 Namibia.
- (4) The provisions of paragraph 1 and 2 shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and is actually available and freely transferable in respect of that claim.

PART V

JURISDICTION AND FINAL PROVISIONS

Jurisdiction and Procedure

- 15.** (1) The High Court of Namibia shall have jurisdiction to hear and determine any limitation of liability for maritime claims.
- (2) The procedure of invoking limitation of liability, constitution and distribution of a Fund shall be initiated and held before the Court in accordance with Civil Procedure and rules of the High Court relating to constitution of funds or such rules as may be determined and approved by the Judge President of the High Court of Namibia.

Administration

- 16.** (1) The Minister responsible for Transport may make regulations consistent with this Act for ease of implementation of the Act.
- (2) The Minister responsible for Transport may by a Notice in the Government Gazette, exempt a party permitted to be excluded from the provisions of domestic legislation by the Convention.
- (3) After such exemption, a Notice shall be transmitted to the Secretary General of IMO by the Minister of International Relations and Corporation.
- (4) The Minister responsible for Transport shall domesticate any subsequent amendment to the limitation of liability amounts in terms of the Limitation of Liability for Maritime Claims Convention, by means of a publication of a Schedule with the amounts and any such details in the Government Gazette.

(5) The content of the Schedule shall become effective on the date of publication in the Gazette.

Amendments

17. The Merchant Shipping Act, 1951 (Act 57 of 1951) is amended to the extent indicated in the third column of the Schedule.

Short Title and Commencement

18. This Act shall be called the Limitation of Liability for Maritime Claims Act, 2021, and will come into operation on the date of publication of a notice in the Government *Gazette*.

SCHEDULE

(Section 20)

LAW AMENDED

No. and Year of Law	Short Title of Law	Extent of Amendment
1. Act No. 57 of 1951	Merchant Shipping Act, 1951	1. The amendment of section 257 – by inserting after subsection (2) the following subsection:- “(3) Any limitation of liability for maritime claims referred to in this Act or any Act within the Republic of Namibia shall be determined in accordance with the Limitation of Liability for Maritime Claims, 2021”.