

**LIMITATION OF LIABILITY  
BY STATUTE, CONVENTION AND CONTRACT**

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**Introduction**

Limitation of liability is a technique used by parties, by industries and even by states to control liability exposure and serves the economic purpose of encouraging risk taking in various industrial sectors, particularly in marine adventures, and of creating certainty of liability exposure to ensure the availability of insurance coverage.

In Canada, there are various statutes enacting limitation of liability regimes for various activities. For example, recently, railway companies in Canada were granted the right to limit their liability and to constitute a Fund<sup>2</sup>; dock, canal and port owners are given the right to limit<sup>3</sup>; the airline industry has the right to limit liability for cargo lost or damaged, personal injury and death, but it has no right to limit all claims on a global basis<sup>4</sup>; pipeline operators, under certain conditions, are subject to absolute liability for spills, but, if they are without fault, may limit liability up to \$1 billion<sup>5</sup>. The federal Crown cannot limit liability unless there is an express and specific provision by statute in its favour.<sup>6</sup>

For the purpose of this paper, the focus<sup>7</sup> will be on limitation of liability for certain designated claims for property damage and personal injury or death that arise from the use of a ship. Then there is the role of the Federal Court in Canada with respect to the constitution of a Fund, the adjudication of claims and the distribution of the Fund. There are other limitation of liability

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<sup>1</sup> The purpose of this paper is to provide a survey of this subject matter as part of a presentation to be given at the Marine & Energy Symposium of the Americas 2018, held on April 18-20, 2018 in Toronto, Ontario, and any opinions expressed are personal to the authors and are not binding.

<sup>2</sup> *Canada Transportation Act*, S.C. 1996, c.10 as amended, sections 152.5 and following and especially s.152.7 "liability limited up to an amount of the minimum liability insurance coverage required under paragraph 93 1(1)(b)"

<sup>3</sup> *Marine Liability Act*, S.C. 2001, c.6, s.30

<sup>4</sup> *Carriage by Air Act*, R.S.C. 1985, C-26 as amended

<sup>5</sup> *Pipeline Safety Act*, S.C. 2015, c.21

<sup>6</sup> *Nord-Deutsche Versicherungs-Gesellschaft v R.* [1969] 1 Ex.Cr 117, var'd [1971] SCR 849

<sup>7</sup> We are grateful to William Moreira of Stewart McKelvey, Halifax, the author of Chapter 22 "Limitation of Liability for Maritime Claims" in *Canadian Maritime Law*, ed. A. Chircop, W. Moreira, H. Kindred and E. Gold, Irwin Press, 2<sup>nd</sup> edition, Toronto, Ontario, 2016 and his paper "Update on Limitation of Liability for Maritime Claims in Canada" given at the CMLA Annual Seminar in Halifax on June 17, 2016, available at [www.cmla.org](http://www.cmla.org), for general reference material.

conventions in maritime law which follow the same structure<sup>8</sup>. Brief consideration will be given to contractual remedies.

## **History**

Limitation of liability is permitted, because it is an instrument of public policy.<sup>9</sup> During the 19<sup>th</sup> century, in contract law, the Industrial Revolution inspired Courts toward permitting freedom of contract and enforcing contracts as a manifestation of the wills of the parties in accordance with their terms, unless there was a term that was illegal or that was contrary to public policy.

The concept and morality of ship owners limiting their liability for all marine claims has been debated and there were early attempts by the English Parliament to formulate a regime, whether based on the value of the ship, or the values of the ship and cargo, or an amount of currency per ton. This eventually led to the *Merchant Shipping Act, 1894*<sup>10</sup> which provided a formula based on the ship's tonnage and an enumeration of the claims for which limitation can be claimed, provided that the ship owner was not in actual fault or privity to that fault in causing the loss.<sup>11</sup> The last qualification gave rise to considerable litigation where the courts tended to trace the fault committed by a mariner or by the ship's physical state back to something that the ship owner could have done to prevent the accident from happening. The Supreme Court of Canada criticized any tendency of the courts to avoid limitation:<sup>12</sup>

“As has often been observed, the origin of these limitation provisions rests with the desire to promote commerce and international trade by affording shipowners protection from the full impact and perhaps ruinous pecuniary liability arising from acts of navigation over which they have no personal control.”

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<sup>8</sup> Covering damage from oil pollution, bunker pollution, noxious hazardous goods (not in force)

<sup>9</sup> The Bramley Moore [1963] 2 Lloyd's Rep. 429 at p.439 per Denning, M.R. “...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.” Cited with approval in The Rhone v The Peter AB Widener [1993] 1 SCR 497 at 532

<sup>10</sup> *Merchant Shipping Act, 1894* (UK) 57 & 58 Vict. c.60 which governed Canadian shipping until Canada passed the *Canada Shipping Act* in 1934 essentially adopting the same approach.

<sup>11</sup> Lennard's Carrying Co. v Asiatic Petroleum Co. Ltd. [1913] AC 703 (owner failing to ensure that ship's boilers were properly maintained) The Lady Gwendolen [1965] 1 Lloyd's Rep. 335 (owner failing to check logs where it could have seen that Master was speeding from time to time on previous voyages) Saint Lawrence Construction v Federal Commerce & Navigation 1982 CarswellNat 1182 upheld on this point 1985 CarswellNat 626, [1985] 1 FC767 (Senior Vice-President failed to have someone with towing experience plan and supervise a tow of a massive barge loaded with construction equipment on a river in the Quebec North without an assist tug)

<sup>12</sup> The Rhone v The Peter AB Widener [1993] 1 SCR 497 at 531 where the court criticized the holding of the lower courts that the negligence of the Master who was a fleet manager and in charge of a flotilla was deemed, because of his position, to be the negligence of the owner.

Nonetheless, this decision did not relieve the anxiety of insurance underwriters who wanted certainty even at the cost of higher limits on liability.

A conference was held in London which produced the Convention on Limitation of Liability for Maritime Claims introducing higher limits, but also set a higher bar against breaking limitation. This convention found few adherents because the compensation payable was still perceived as too low. In the 1996 Protocol (referred to as the “LLMC”), limits were raised together with a tacit acceptance procedure for further increases in liability limits. Canada ratified the 1996 Protocol together with the 1976 Convention only in 2009.<sup>13</sup> It also exercised the tacit acceptance procedure by adopting a regulation incorporating the 51% increase in limitation amounts adopted by the IMO Resolution of April 19, 2012.<sup>14</sup>

### **The 1996 Protocol amending Convention on Limitation of Liability for Maritime Claims 1976<sup>15</sup>**

What was maintained from the 1976 effort was the very high bar for breaking limitation, which will be explored later. Even the Supreme Court of Canada noted:

“I turn first to the *Convention’s* purpose. The contracting states to the *Convention* intended the fault requirement to be a high one — the limitation on liability was designed to be difficult to break.... The *Convention* has been described as a “trade-off”: “As a *quid pro quo* for the increase of the [limitation] fund, the article providing for the breaking of limitation became tighter, so that it is almost impossible for the claimants to break the right to limit”... Meeting the threshold fault requirement requires a high degree of subjective blameworthiness: The fault standard set by art. 4 has been described as “a virtually unbreakable right to limit liability” .... and as “an almost indisputable right to limit . . . liability”: ....It is worth noting that the contracting states considered, but expressly rejected, the inclusion of “gross negligence” as a sufficient level of fault to break the liability limit:....”<sup>16</sup> (citations removed)

### **What claims are the subjects of the Convention?**

Article 2 covers a broad spectrum including personal injury and death, property lost or damaged, delay losses, infringement of rights losses (apart from contractual rights), claims in connection with wreck or abandoned ship removal and third party claims involving measures taken to minimize or avert losses.

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<sup>13</sup> 2009 S.C. 21 amending an earlier Canadian adapted version of LLMC 1976 passed in 2001.

<sup>14</sup> SOR/2015-98

<sup>15</sup> The Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996 – the consolidated text can be found in Schedule 1 to the *Marine Liability Act*, S.C. 2001 as amended, (“MLA”) in the attached Appendix

<sup>16</sup> *Peracomo v Telus Communications*, [2014] 1 SCR 621, 2014 SCC 29 at paragraph 24

The most common cases arise out of Article 2(1)(a):

Article 2

Claims subject to limitation

**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. (underlining ours)

The words underlined qualify the claims admissible to a limitation of liability action – the claim must arise from a “maritime activity” or while the ship is engaged in a maritime activity.<sup>17</sup>

Article 3 contains exceptions which may be covered by other conventions – claims for salvage, oil pollution damage, nuclear damage, claims of a shipowner of a nuclear ship for nuclear damage and claims of servants involved in salvage operations.

### **Who can claim?**

According to Article 1, ship owners and salvors may claim for claims listed under Article 2. “Shipowner” is defined as “owner, charterer, manager and operator of a ship”. A “charterer” apparently could mean a charterer of any kind – demise, time, voyage or slot.<sup>18</sup> In the container line trade, this qualification is very important because many share space on container ships with other container line carriers under an arrangement called a “slot charter” whereby the slot charterer issues its own bills of lading to the shippers whose boxes are loaded on what appears to be a competing container line’s ship.<sup>19</sup>

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<sup>17</sup> Isen v Simms 2006 SCC 41; [2006] 2 S.C.R. 349 – the owner of a motor boat who while tying down the top of the engine after pulling the boat out of the water struck the claimant in the eye was denied the right to limit his liability as he was not engaged in a maritime activity, but was preparing his boat for land transport. The injured party was a medical doctor whose claim which included lost earnings might have had his claim limited to \$1 million had the limitation action succeeded.

<sup>18</sup> Metvale Ltd. v Monsanto International (The “MSC NAPOLI”) [2008] EWHC 3002; [200] 1 Lloyd’s Rep. 246

<sup>19</sup> The MV “MOL COMFORT” was a container ship, valued at \$66 million, which split in half while traversing the Arabian Sea carrying 4,382 boxes, covered by bills of lading issued by MOL for about 40%, and three or four other slot charterers for the balance. The ship and its cargo sank and limitation proceedings were commenced and a Fund constituted in the home port of the ship, Tokyo, Japan. Estimates of claims against the Fund were in the vicinity of \$500 million <https://theloadstar.co.uk/mol-comfort-court-case/>

Article 1 (4) poses a conundrum – does it cover independent contractors hired by the ship owner to perform certain functions on its behalf which lead to the ship owner's liability? Article 1(4) reads as follows:

Article 1

Persons entitled to limit liability

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.

In the Siemens Canada case<sup>20</sup>, two specialized road transport vehicles were loaded onto a barge. During loading, the barge tipped and the vehicles fell into the harbor and were damaged. Irving, the demise charterer in possession of the barge, which weighed less than 300 GRT, commenced a limitation action to limit its liability for a claim of \$40 million to \$500,000. Siemens Canada resisted the claim defending that Irving's employees were grossly negligent in their planning and supervision of the loading of these vehicles. Concurrently a claim had been made against the naval architect and surveying firm which were hired by Irving to plan and supervise the load operation. In a judgment on the merits, it was found that Irving was entitled to limit its liability to \$500,000 and that any negligence of its employees was not sufficiently serious to bar it from obtaining a decree limiting their liability.<sup>21</sup> However, the Court also found that the naval architect and surveying firm were also negligent (but not reckless) in their planning and supervision and they also applied for limitation under this Article.

The Court interpreted this provision as extending the benefit of the limitation only to those persons, normally servants and agents, for whom the ship owner was vicariously liable. In law, Irving was not responsible for the fault or neglect of its independent contractors. Rather, Irving's liability flowed from its contractual relationship with Siemens "to load the cargo safely and with care". Therefore, the independent contractors could not limit their liability.

### **How is the Convention applied by Canada?**

Canada has incorporated the LLMC into Canadian law through the *Marine Liability Act* ("MLA"), appending the text as amended from time to time as schedule one and applies the Convention, with all the necessary changes as to amounts and conditions, to vessels under 300 GRT.<sup>22</sup>

### **Technical Issues**

Various international conventions including the LLMC provide a formula for determining the amount of the limitation. An important component is called "unit of account" which is a special drawing right as valued by the International Monetary Fund. The special drawing right ("SDR")

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<sup>20</sup> J.D. Irving Limited v Siemens Canada et al 2016 FC 287

<sup>21</sup> J.D. Irving Limited v Siemens Canada et al. 2016 FC 69

<sup>22</sup> MLA, sections 24-29.1

is the daily average of a basket of ten of the world's most valuable currencies which can be valued according to the currency of any member state in the IMF. To determine the values of a SDR on any particular date, one can consult [www.imf.org/en/data/](http://www.imf.org/en/data/) under "SDRs per currency unit". The value of the SDR during the week of March 26, 2018 in Canadian dollars is equivalent to Cdn\$1.88.

### **Smaller Vessels**

Under the Convention, it was agreed that party states would regulate limitation rights for vessels under 300 gross registered tonnage ("GRT") and set the appropriate amounts and conditions. These would include fishing vessels, vessels used for a commercial purpose (for example, tour boats, small cruisers, tugs, barges, catamaran, scows, etc) and vessels used for recreational or pleasure purposes (e.g. motor boats, yachts, jet-skis, canoes, dinghy, sailboats).

Marine adventures involving the carriage of passengers and those on board a vessel, not as passengers under a contract of passenger carriage, are treated differently for limitation purposes and is the subject of rather technical discussion. The limitations available are higher than the general limitation for ships under 300 GRT and litigation arises over which category a particular injured party falls into.<sup>23</sup> For example, buying a passenger ticket on tour boat of less than 300 GRT and authorized to carry 25 passengers from Toronto mainland to the Toronto Island is covered by MLA s.28(1) as follows:

Limitation of Owner's liability towards passengers:

The greater of:

2,000,000 units x \$1.88 = \$3,460,000

and

175,000 units x \$1.88 x 25 passengers = \$8,225,000

Therefore, the tour boat owner's limitation is capped at \$8,225, 000.

Suppose the same tour boat is hired by a wedding party to take their 25 guests out from Toronto mainland to the Toronto Island for the big party:

Again, although the guests are not being carried as "passengers" i.e., pursuant to a contract of passenger carriage, MLA s.28 (2) applies because "the ship is being operated for a commercial or public purpose" and under s.28(2) the limitation would be the same as under s.28(1).

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<sup>23</sup> Gunderson v Finn Maritime Ltd. 2008 BCSC1663; see especially Buhlman v Buckley 2011 FC73 upheld 2012 FCA9 for discussion about "for a commercial purpose"

However, suppose the tour boat owner is a relative of the wedding party and allows the tour boat to be used free of charge to convey the 25 guests to the big party as a gift – the ship is not being operated for a commercial or public purpose, nor are there any carriage of passenger contracts. Arguably<sup>24</sup>, MLA section 28 does not apply at all, and the ship owner's limitation would fall under the general limitation of section 29, i.e., \$1,000,000.<sup>25</sup>

In MLA s.29, there is the residual limitation covering all other claims, where no contract of passenger carriage is involved, even indirectly. This provision is the most commonly seen application of the concept of limitation of liability of all claims<sup>26</sup>:

#### **Other claims**

**29** The maximum liability for maritime claims that arise on any distinct occasion involving a ship of less than 300 gross tonnage, other than claims referred to in section 28, is

**(a)** \$1,000,000 in respect of claims for loss of life or personal injury; and

**(b)** \$500,000 in respect of any other claims.

#### **Vessels larger than 300 GRT**

As an example, and with reference to Article 6<sup>27</sup>, to determine the limitation amount of a general bulk carrier, Seaway size, commonly seen in Eastern Canada, having a gross registered tonnage of 20,000, the limitation works out as follows:

a) For life and personal injury claims

For up to the first 2000 tons

3.02 million SDRs x 1.88 = \$ 5,677,600

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<sup>24</sup> The example given is illustrative only. The provision of s.28 (3) says that s.28 does not apply to (b) "a person carried on board a ship other than a ship operated for a commercial or public purpose." Since each case will be fact specific, the case law will have to develop further criteria on how to apply this exception. The example given is of a tour boat which is ordinarily used for a commercial purpose, but is exceptionally used on one occasion for a "non-commercial" purpose. Of course, proponents who want the higher limitation of s.28 will try to show that however familial the owner's intention was to give a gift to the wedding party, it is relevant that use of the tour boat may have had promotional value and thus the boat was being operated for a commercial purpose?

<sup>25</sup> For a more technical discussion see Chapter 14 by W. Moreira and S. Campbell and Chapter 22 by W. Moreira in *Canadian Maritime Law*, cited above – beware that the limits used in the text have been increased since the book's publication!

<sup>26</sup> For example, J.D. Irving, Peracomo, Isen, Bulhman decisions cited elsewhere in this paper

<sup>27</sup> MLA, Schedule 1, Article 6

Plus	
1,208 SDRs x 1.88 x 18,000 tons =	<u>\$40,878,720</u>
Total	\$46,556.320

b) For physical damage claims

For up to the first 2000 tons

1.51 million SDRs x 1.88 =	\$ 2,838,800
Plus	
604 SDRs x 1.88 c 18,000 tons =	\$20,439,360

Note: Where the amount calculated for the life and personal injury claims is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with the physical damage claims shall be available for payment of the unpaid balance of claims for life and personal injury and such unpaid balance shall rank rateably with claims mentioned under the physical damage claims.

To illustrate, suppose this vessel of 20,000 GRT was involved in an accident which gave rise to total of \$50,000,000 in life and personal injury claims and \$30,000,000 in physical damage claims, then the adjustment would be as follows:

For life & personal injury claims:

Limitation	\$40,878,720 (as above)
Claims	\$50,000,000
Deficit	\$ 9,121,280

For physical damage claims:

Limitation	\$20,439,360 (as above)
Claims	\$30,000,000

Payment of the limitation amount of \$20,439,360 would be as follows:

Deficit of life and physical injury claims \$ 9,121,280 (23.3%) x \$20,439,360 = \$ 4,762,370

Physical damage claims \$30,000,000 (76.7%) x \$20,439,360 = \$15,676,990

Total participating claims                      \$39,121,280 (100%)

Therefore, the life and personal injury claimants would share rateably among themselves a fund composed of:

\$ 40,878,720 plus \$ 4,762,379 =                      \$45,641,090

Total claims    \$50,000,000

Deficit    \$ 4,358,910

The physical damage claimants would share rateably among themselves a fund composed of:

\$15,676,990

Total claims    \$30,000,000

Deficit    \$14,323,010

Issues such as what is a “ship”, the appropriate unit of limitation (particularly in tug and tow arrangements), the measurement of weight, the calculation of different formulae of different limitations, are beyond the scope of this paper and reference is made W. Moreira’s chapter in Canadian Maritime Law.<sup>28</sup>

### **Where limitation might be asserted?**

First of all, it is not necessary to admit liability before commencing a limitation action or raising the right of limitation in a defence. What is required under the Convention is an allegation of liability:

#### Article 11

#### Constitution of the fund

**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.

Where such allegation may be made is subject to the rules of private international law – the place where the cause of action arose, the place of the residence of the alleged wrongdoer or the place where the damage is suffered. Also what is important is the court in which the allegation of liability is made.

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<sup>28</sup> See footnote seven above

The proceedings that took place in the Siemens Canada case are instructive. Siemens Canada, the owner of the two highly specialized vehicles that fell off the barge into the water, sued J.D. Irving Limited, the barge owner, in the Ontario Superior Court for \$40 million claiming that Irving's employees were grossly negligent and reckless in their planning and supervision of the loading operation. The defendant commenced a limitation action in the Federal Court claiming its right to limit its liability, if any, to \$500,000 due to the barge having less than 300 GRT. Siemens Canada sought to have the limitation action stayed claiming it was more appropriately tried in the Ontario court. Justice Heneghan not only dismissed Siemens' motion, but exercised the Court's power under the MLA s.33, to enjoin Siemens "and any other party" from commencing or continuing any action that may be the subject of the limitation action and directed that any action that could be asserted that may be the subject of a limitation action be asserted only in the Federal Court. The Federal Court effectively stayed the Ontario action! Her judgment was upheld in appeal as per Justice Nadon:

"The MLA gives a ship owner the right to choose the forum in which he will assert his right to limit, irrespective of the forum in which the claimant has filed or may file or her action for damages."<sup>29</sup>

### **Conduct Barring Recovery under the LLMC**

Our Supreme Court of Canada was the first to examine the scope of conduct that barred recovery under the LLMC, article 4 which reads:

#### Article 4

#### Conduct barring limitation

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

In Peracomo v Telus Communications<sup>30</sup>, a crab fisherman cut a wire that was interfering with his traps, causing a major telecommunications blackout on Quebec's south shore. He was sued for over a million dollars for repair costs. The fisherman claimed that he thought the wire had been abandoned because of a marine map he once saw in a local marine museum. He did not have any marine charts on his small vessel. Nonetheless, he counterclaimed for limitation of his liability based on the weight of his vessel for \$500,000 and claimed over against his marine insurer who denied coverage based on his willful misconduct. The trial judge, Justice Harrington, said that "Réal Vallée is a good man; a decent man; an honest man – a fisherman. However, he did a very stupid thing"<sup>31</sup> and condemned him for the full amount denying the

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<sup>29</sup> Siemens Canada Limited v J.D. Irving Limited 2012 FCA 225 at paragraph 50

<sup>30</sup> [2014] 1 SCR 621, 2014 SCC 29

<sup>31</sup> 2011FC494 at paragraph one.

limitation action and dismissing his claim over against the insurer. The Federal Court of Appeal agreed with him because the cutting of the wire was a deliberate act.

The Supreme Court held that the intent required to bar recovery was subjective because the purpose of the LLMC was to set an “unbreakable” limitation with limited exceptions and granted the limitation action. This meant that the fisherman had to have the intention of cutting a “live” wire, and also to cause the telecommunications blackout – both conditions were not met. On the other hand, it held that the LLMC and the *Marine Insurance Act* were two different schemes serving different purposes and upheld the dismissal of the claim over by the fisherman against his insurer. The final result was that the ship and Mr. Vallée were condemned jointly and severally to pay \$500,000 plus interest and costs.

In The Atlantic Confidence<sup>32</sup>, the English court heard an action to limit liability brought by a ship owner whose ship sank following a fire. The action was contested by the underwriters of the steel cargo in the holds. After a 31-day trial, Justice Teare rendered a decision which takes up 56 double column pages of Lloyds Law Reports to conclude that the sea valves were opened and the fire was started deliberately by the Master and Chief Engineer on the instructions of the ship owner who wanted to scuttle the ship in order to pay down his bank loans with the hull insurance proceeds. The ship owner’s limitation action was dismissed.

### **A Global Limitation on top of other Limitations of Liability**

In the *Marine Liability Act*, there are at least six limitation regimes:

- a) The Limitation of Liability for all Maritime Claims (property damage and personal injury or death (the “LLMC”));
- b) A limitation regime for passenger claims<sup>33</sup>;
- c) A limitation regime for cargo damage claims<sup>34</sup>;
- d) A limitation regime for oil pollution claims<sup>35</sup>; (not eligible to claim under LLMC)
- e) A limitation regime for bunker pollution claims<sup>36</sup>;
- f) A limitation regime for hazardous or noxious substances claims<sup>37</sup> (not yet in force and not eligible to claim under LLMC)

One can imagine casualty scenarios where passengers on a cruise ship suffer harm, containerized cargo on a container line ship suffers damage, there is a pollution involving bunker oil, and / or where under various contracts liability for each claimant’s claim is subject to a limitation of damages, yet the ship owner may have the benefit of further limiting its

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<sup>32</sup> [2016] 2 Lloyd’s Rep 525 [2016] EWHC 2412 (Teare, J.)

<sup>33</sup> MLA, sections 35 to 40, Schedule 2 (“the Athens Convention”)

<sup>34</sup> MLA, sections 41 to 46, Schedule 3 (“the Hague-Visby Rules”)

<sup>35</sup> MLA, sections 47 to 68, Schedule 5, 6 and 7

<sup>36</sup> MLA, sections 69 to 74, Schedule 8

<sup>37</sup> MLA, sections 74.01 and following, Schedule 9 all of which are not yet in force

exposure when the total of the various claims for damages, as limited, can be further limited under the LLMC.

### **The Process**

There are two phases for asserting limitation of liability. Limitation may be asserted by action, as a defence, or as a counterclaim, on the merits of whether there is any liability at all. Then there is the constitution of the Fund, where it is necessary<sup>38</sup>.

### **The Federal Court in Canada**

In Canada, the Federal Court exercises concurrently with the courts of the Provinces the admiralty jurisdiction and the administration of Canadian Maritime Law. The Federal Court has personnel on its judiciary who have experience from their maritime law practice and a wealth of case law dating back to the days of the British Vice-Admiralty Courts. When a major casualty occurs, parties, and particularly a claimant for limitation of liability, can request immediate case management and the appointment of a judge who will commence the organization necessary to call in all potential claimants, provide a procedure and set directives with respect to such matters as the provision of the security or constitution of the Fund, and the release of the ship from arrest.

The Federal Court has exclusive jurisdiction over the constitution of the Fund<sup>39</sup>, the adjudication of claims against the Fund and its eventual distribution. In exercise of this jurisdiction, the Federal Court has the power to direct the form of security that a ship owner must provide, and even to enjoin any claimant, known or unknown anywhere in the world, from commencing proceedings in any other court but the Federal Court. When the LLMC is involved, there is an international component as the Federal Court must coordinate its efforts with any other admiralty court of a Party State that may have already constituted a Fund.

### **Constitution of the Fund**

The Fund may be constituted by a payment of cash into court, bond, bank guarantee, and even by a letter of undertaking from a P+I Club.<sup>40</sup> The form of security is subject to the approval of the court. Usually, the amount of the security is the amount of the limitation, or, if conduct barring limitation is alleged, the value of the ship on the date of the incident.<sup>41</sup>

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<sup>38</sup> Article 10

<sup>39</sup> Siemens Canada Limited v J.D. Irving Limited 2012 FCA 225 upholding 2011FC791 (Heneghan, J.!)

<sup>40</sup> Article 11, Federal Court Rules of Practice

<sup>41</sup> Note in Canada, an action in rem can be exercised against either the offending ship or a sister ship, but only against one ship, not the fleet. Westshore Terminals Limited Partnership v Leo Ocean S.A. [2015] F.C.R. 712, 2014 FCA 231; see also Scindia Steam Navigation v Canada 1985 CarswellNat1685 when Canada was following the earlier 1957 Convention when limitation was only available when the owner was not at fault or privity.

Interest is payable from the date of the accident until the date of the Constitution of the Fund,<sup>42</sup> at the rate prescribed under the *Canadian Income Tax Act* “for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.”<sup>43</sup>

### **Adjudication of Claims**

Under s.33 of the MLA, the Court has the full power to determine how claims can be asserted and adjudicated upon whether by a full trial or summarily by way of affidavit of claim, whichever procedure is appropriate.

### **Distribution of the Fund**

Once the claims have been finally adjudicated upon, then the Fund is distributed pro-rata among the various claimants, without any regard for any lien or special rights that any claim holder may have.<sup>44</sup>

### **The Federal Court and Private International Law**

Issues often arise when a ship comes to Canada following an incident and claimants arrest the ship for security of their claims against the ship owner. If the ship owner has already commenced limitation proceedings and constituted a Fund in another jurisdiction, then the Court is faced with the issue whether to recognize the foreign jurisdiction’s assertion of jurisdiction and release the ship, or to deny it recognition.

Under Article 13 of the LLMC, there is an absolute bar against any party commencing legal proceedings anywhere other than the court where the Fund has been constituted. The Federal Court “may” order the release of the ship except where the LLMC requires that it order the release if the limitation fund under the LLMC has already 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.

Unfortunately, at last count<sup>45</sup>, there are some 55 states of the approximately 171 member states at the International Maritime Organization who have adopted the LLMC, and there are

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<sup>42</sup> Article 11(1)

<sup>43</sup> MLA, s.33(5) currently at about 4%.

<sup>44</sup> MLA, s.33(3) and Article 12

some notable holdouts – mainland China, Vietnam, Singapore, Philippines, the two Koreas, Brazil, Chile, Argentina, and the United States. Among the holdouts, some may have adhered to older conventions or their own form of ship owners' limitation, both of which maintain lower limits and fault and privity conditions, their own systems for constituting a fund, or perhaps nothing at law, except some form of insolvency scheme.

In other areas, for example, where the Court is asked to recognize the process undertaken by a court exercising its admiralty jurisdiction in a non-party state, the Court follows long established rules<sup>46</sup> governing the recognition of foreign judgments and enforcement of those foreign judgments and forum conveniens issues – for example, the issuance by a foreign court of a world-wide stay of proceedings or of a constitution of a fund – particularly when a claimant arrests a ship in Canada because it fears it won't receive satisfaction in the foreign court or the cause of action arose in Canadian territory.

### **Contracts**

It is trite law in Canada that limitation and exclusion clauses are fully enforceable in accordance with their terms subject to the rules of interpretation and public policy.<sup>47</sup>

Categorizing a contract breach as “fundamental” or “immense” or “colossal” is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties.

The Privy Council,<sup>48</sup> on an appeal from Barbados, in a case involving a tanker vessel destroying a terminal held that an agreement whereby the ship owner waives its right to limit its liability is legal so long as the wording expressly covers not only other contractual rights to limit liability, but also the right to limit liability for all claims. In this case the indemnity clause covered “damages” and the Court held that the clause only covered those damages “as limited” by the Convention. The Court pointed out that the Convention does not provide any prohibition to

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<sup>45</sup> IMO Status of IMO Treaties

<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf> at pages 379 and following accessed on March 26, 2018 see extract in Appendix

<sup>46</sup> Sean Harrington (as he then was), *Shipowners' Limitation of Liability and the Canadian Conflict of Laws*, New Directions in Maritime Law 1984, ed D.J. Sharpe and W.W. Spicer, Carswell, Toronto, 1085; Johanne Gauthier (as she was) “Conflict of Laws: Old Rules and Modern Problems”, Meredith Memorial Lectures, 1986, Faculty of Law, McGill University, “Current Problems in Maritime Law – Canada/United States/International, DeBoo, Toronto, 1987; W. Tetley, *International Conflict of Laws*, Common, Civil and Maritime, Yvon Blais, 1994, Chapter 16

<sup>47</sup> *Tercon Contractors Ltd. v B.C.* [2010] 1 S.C.R. 69 at paragraph 82 per Binnie J.

<sup>48</sup> *Bahamas Oil Refining Company International Limited v The Owners of the “Cape Bari”* [2016] 2 Lloyd's Rep. 375 (PC), [2016] UKPC 20

such contractual waivers so long as they meet the usual conditions of interpretation of contracts and expressly waive the extraordinary right to claim limitation of liability of all maritime claims.

The decision in this case is the flip side of the decision in “Siemens no.2”<sup>49</sup> where it was held that under art.4 of the Convention, independent contractors of the ship owner cannot benefit from the provisions of the Convention. Ship suppliers of goods, services and facilities will review their standard form contracts and will be tempted to ensure that the beneficiaries of their services not only waive their rights to global limitation of liability but also will undertake to hold them harmless from third party claims!

These decisions raise a red flag – at the beginning of this paper it was mentioned that one of principle purposes for the Convention was to ensure that a fund was made available through insurance proceeds under a policy and that insurers support the Convention because it offers certainty in risk exposure. Then would not such waiver clauses be counter-productive? What does a supplier of goods, services and facilities achieve by causing its customers to waive their right to limitation of all claims thereby, possibly, jeopardizing their insurance coverage<sup>50</sup> and the availability of a fund, albeit limited, to provide compensation?

Thus is the conflict between two state policies – freedom of contract and the desirability for certainty through the Convention on Limitation of Liability for all Maritime Claims – which should prevail?

Ottawa, April 1, 2018

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<sup>49</sup> J.D. Irving Limited v Siemens Canada et al 2016 FC 287

<sup>50</sup> For example, under the UK Club Rules 2018: **SB Limitation of the Association’s liability**

**i) General**

*Subject to these Rules and to any special terms and conditions upon which a ship may be entered, the Association insures the liability of the Owner in respect of an entered ship as this liability may be determined and fixed by law including any laws pertaining to limitation of liability. The Association shall in no circumstances be liable for any sum in excess of such legal liability.*