

# QUESTIONNAIRE

## Charterers' Right To Limit Liability

### **Introduction**

#### 1976 Limitation Convention

Article 1(1) provides that "Shipowners...may limit their liability in accordance with the rules...set out in Article 2."

Article 1(2) provides that "The term "Shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship."

Article 2 lists the claims which are subject to limitation.

The extent of the right of a charterer to limit liability was examined in the High Court in London in the case of the "*Aegean Sea*" (1998) 2 Lloyd's Rep.39.

This case concerned a vessel which had loaded a cargo of crude oil at Sullom Voe pursuant to a voyage charter on the Asbatankvoy form for discharge at La Coruna in Spain. Whilst entering the port the vessel grounded, subsequently exploded and became a total loss losing much of her crude oil cargo into the sea.

The owners claimed that the vessel had been sent to an unsafe port and sought damages from charterers in London arbitration for the loss of the ship, the loss of the bunkers and unpaid freight. They further sought an indemnity in respect of their liability pursuant to the Civil Liability Convention for property damage, clean up expenses and the costs of preventative

measures arising out of the oil spill. Further they sought an indemnity in respect of their potential liability to Cristal and the reimbursement of special compensation paid to the salvors pursuant to a Lloyd's Open Form Salvage Agreement which had been entered into. The total claims against charterers came to US\$65 million. The vessel's limitation fund was approximately US\$12 million. Whilst the scope of the various claims were wide ranging there was a common factor in that the owner would not have been able to limit his liability under the 1976 Convention for any of these claims. The first three claims represented the Owners own losses and were therefore claims over which the owner had no opportunity to raise a limitation defence. The next two claims (the claim in relation to CLC and Cristal) were excepted from limitation under the 1976 Convention (Article 3) but the owner now sought to recover these items from the charterers by way of damages.

The issue for the Court was whether a charterer could exercise a right to limit under the 1976 Convention in circumstances where an owner could not. The decision of the High Court was that a charterer was not entitled to limit in such circumstances. Mr Justice Thomas felt that it had never been the intention of the Convention that the amount set up in a limitation fund could be reduced by direct claims by owners against charterers, as the result of such a finding would be to diminish the fund for those truly entitled to claim. In his view the reference to "charterer" in the Convention referred to the situation where a charterer was "standing in the shoes of an owner" and facing claims as such. In other words that a charterer could only limit his liability in circumstances where the charterer was sued by a third party as if he was the owner.

In the "*CMA Djakarta*" the facts were as follows:

In July 1999, "*CMA Djakarta*" was a few hundred miles off the coast of Cyprus when there was an explosion on deck followed by a fire. Despite significant efforts, the crew could not control the fire, and further explosions took place. The vessel was abandoned and subsequently grounded off the coast of Egypt where salvors took over. The fire was eventually put out and the vessel was towed to Malta as a port refuge and subsequently to Croatia for repairs.

There were detailed investigations into the cause of the casualty, followed by a London arbitration between owners and charterers that held that the fire and explosion on deck had been caused by a cargo of bleaching powder (a form of calcium hypochlorite), which had self-combusted, possibly as a result of impurities in the cargo, either caused during the manufacturing process or as a result of contamination during transport.

It was held in the arbitration that this amounted to a breach of the Charterparty by charterers and the owners were awarded the cost of repairs to the "*CMA Djakarta*", together with all ancillary losses, such as costs of salvage and an indemnity for cargo claims.

The arbitrators found themselves bound by the decision of Mr Justice Thomas in the "*Aegean Sea*" with the result that the charterers had no right to limit. The charterers appealed this one aspect of the London Arbitration Award, the appeal was heard in the High Court before Mr Justice Steel. He agreed with the decision of Mr Justice Thomas in the "*Aegean Sea*". The person entitled to limit under the Convention was the "Shipowner" and although the "Shipowner" was defined as meaning "the owner, charterer, manager or operator of a sea-going ship", under the 1976 Limitation Convention, a charterer only had the right to limit as against third parties when acting in the capacity of an owner.

The decision of Mr Justice Steel was then taken to the Court of Appeal. The Court held that, in theory, a time-charterer could limit as against an owner under the Convention. The Court found that the rationale applied by Steel and Thomas J was misfounded in law, and that the charterer's right to limit does not arise because he stands in the shoes of the Shipowner, but as of right by application of the Convention.

Essentially, the Court found that the person seeking to limit can limit in respect of all the claims mentioned in Article 2. Additionally, it noted that Article 2(2) provides that most of the claims set out in Article 2(1) are subject to limitation even if brought by way of recourse or for an indemnity under a contract or otherwise.

Accordingly, in deciding whether a charterer can limit his liability, it is first necessary to ascertain whether the claims against a charterer by an owner fall within Article 2. The main claim that was brought in the "*CMA Djakarta*" was for the cost of repairs to the ship. The Court held that the words in Article 2(1)(a) did not include loss of or damage to the ship itself. The Court also held that the amount that the owners had to pay by way of salvage did not fall within Article 2 and equally that the owners' claim to be indemnified against their liability to contribute in general average would not fall within Article 2. It followed that the charterer could not limit in respect of any of these heads of claim.

In practice, therefore, the Court's decision that a charterer could limit against an owner, has little effect when considering many of the most common claims an owner is likely to make, following a casualty, against a charterer. Although not considered in the case, pollution claims also fall under a separate convention and therefore are outside Article 2.

The Court of Appeal, however, highlighted one type of claim which did fall within Article 2, namely an indemnity for any cargo claim that an owner has had to pay, since such a claim falls within “claims in respect of ...loss of or damage to property ...occurring on board...”. Of course, if a charterer was sued by cargo interests direct, they would no doubt seek to limit their liability to those cargo interests under the Convention in any event.

Accordingly, it is possible that an owner, whilst he may be able to establish a breach of the charterparty by the charterer, might not be able to recover from the charterer the full amount that he has had to pay to a cargo interest in another jurisdiction.

From an examination of the Travaux Préparatoires to the LLMC '76, it is evident that the issues raised by the “*Aegean Sea*” and the “*CMA Djakarta*” were never considered by those who drafted the Convention.

Questions:

1. Have the Court and arbitrators in your jurisdiction considered whether a charterer has a right to limit liability when faced by an indemnity claim? If so, with what result? Have any of these decisions been at Appellate level?

***A: According to available information there have not been cases in front of Slovenian Courts or arbitration regarding the right of the charterer to limit his liability and furthermore involving an indemnity claim.***

Have there been any local regulations, amendments, enacting statutes or other forms of direct or delegated legislation which have addressed the issue of a charterers’ right to limit?

*A: The Republic of Slovenia has not ratified LLMC '76 yet, nor the 1996 Protocol. The issue whether a charterer has the right to limit liability (also in case of an indemnity claim) is however addressed by the 2001 Slovene Maritime Code, Part 5, in Chapter 1 regulating "Carrier's liability" and Chapter 2 regulating the "Procedure for the limitation of carrier's liability". It is due mentioning that the provisions embodied in the 2001 Maritime Code are based and reflects in great part the corresponding provisions of LLMC '76 though there are some differences. It is particularly interesting that the Maritime Code does not use, and this is true also when it comes to provisions regulating limitation of liability, the expression "shipowner" but instead the expression "carrier of the ship", although unless proved otherwise the "carrier" is deemed to be the registered owner of the ship. Art. 383 expressly provides that both the charterer and operator of the ship may be treated as "carriers" and therefore entitled to limit liability if certain requirements are met. Particularly in the light of the provision of the Maritime Code according to which a "charterer" in order to be qualified as a "carrier" must have "possession" of the ship, it would seem that the right to limit liability applies only to the demise and time charterer, and not for ex. to the voyage charterer. As there are no relevant provisions it would also seem that the right to limitation applies also in cases of an indemnity claim. The Maritime Code is the only Slovenian enactment regulating the right of the carrier (including the charterer) to limit its liability.*

2. Is it desirable that a charterer should be permitted to limit when faced with an indemnity claim and if so, should his right be restricted to certain types of claim only?

In particular, should a charterer have the right to limit liability in relation to claims brought by the owner?

*A: As per answer on question 2, the charterer right to limit liability (also) for indemnity claims is according to Slovenian legislation restricted only to certain claims (as per LLMC '76). It would be beneficial that all parties who can be held liable for some kind of claim have the same rights – if the owner can limit his liability towards claimant, also the charterer should have the same right towards owner. This is also implied in the definition of the "carrier" contained in the Slovenian Maritime who puts as one of the main criteria the "possession" and impliedly therefore at least the commercial control of the ship. Particularly in the case of the demise charterer, and to a certain extent in the case of the time charterer, the charterer steps into the shoes of the shipowner with all the risk and benefits and therefore it should be granted the same protection as the shipowner. This in turn means that the list of (indemnity) claims for which the charterer is able to limit his liability should be brought beyond the provision of the 1976 LLMC in order to include all cases where the shipowner is entitled to limit its liability (ex. CLC, Bunker, HNS in the future), subject of course to the appropriate conduct of the charterer.*

3. In your view, bearing in mind the historical background which gave rise to an owners' right to limit, should such a right now be extended to charterers in order to reflect modern trade usage and the increasingly important role played by charterers and liner operators?

*A: Yes, as implied in previous answers we share the opinion that charterers and (liner) operators should generally have a right to limit their liability.*

4. In your view does what appears to be the current uncertainty in the law create an uneven playing field as between an owner and a charterer and further does the current position expose a charterer to the potential of bearing an uninsurable risk or at least one that can only be covered at an extremely high and prejudicial cost?

*A: According to Slovenian legislation (at least) the demise and time charterer have the same status as ship owners in cases when they qualify as “carriers of the ship” (also when it comes to indemnity claims). On the other hand, it would seem that the provisions of the 1976 Convention does not provide a clear answer to this question which can in turn lead to a situation of uncertainty for charterers and to the subsequent economic risk. The later may be overridden by proper insurance, if available, although that is likely to increase charterer’s operating costs. It seems therefore that there is a need to provide a level playing field for both the “charterer” and the “shipowner” when it comes to limitation of liability.*

5. Do your answers to the questions above relate solely to time charterers or should additional protection also be available for slot charterers and other types of sub-charterer.

*A: For previously mentioned reasons it is our opinion that the protection should apply particularly to time charterers.*

6. Depending on your answers to the questions above, should the LLMC '76 be amended to reflect that position or should there potentially be a new convention giving the right to a charterer to limit liability?

*A: An appropriate way would be amend the existing Convention, particularly in a case of a more general revision. We do not share the opinion that a separate convention is necessary. The problem may be also solved with the (co-ordinated) amendment of various national legislation and/or with the inclusion of particular clauses into standard charterparties agreements.*

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