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COLLISION CASE HANDLING - PAPER 4
PHASE 2: FORUM
Part 2: Limitation

Introduction

In our previous paper on collision claims handling[1] we started to look at the second phase of every collision case, forum; that is, the determination of the law and jurisdiction for the claims. In that paper we focused upon the available jurisdictions for our claim and the factors to be considered when weighing up these different jurisdictions. As we noted in that paper, limitation can be one of the factors for consideration and we are going to look at limitation in this paper.

By way of recap, limitation will only be a factor for consideration if the owner of one of the ships in collision can invoke a right to limit his liability and so prevent the owner of the other ship (and any other claimants) from making a full recovery. It is also important to remember that as between the owners of the two ships in collision, limitation operates on the single liability sum; that is, the amount Own Ship can expect to recover after applying liability and setting off the claim of the Other Ship.[2]

Limitation can be invoked by a ship owner in his defence to a particular claim as could happen in a minor collision where there is only one claim against the ship owner, being that of the owner of the other ship in the collision. The ship owner can then plead limitation in his defence to that claim. As we have noted however, limitation is unlikely to be a factor for consideration in a minor collision[3]. With a major collision however, there is always more than one claim and the total value of all of the claims can be substantial. A ship owner wishing to limit his liability following a major collision will want to do so for all of the claims and not just for the claim of the owner of the other ship in the collision. That is, he will want the financial limit of his liability - his “limitation fund” - to be the only monies available to settle all of the the claims; and for this to be so, he must commence a limitation action.

Limitation is a wide and complex topic which requires detailed study of both the texts of the applicable international conventions (see below) and the local regulations by which these conventions are given force of law in the relevant jurisdictions. What follows is by way only of a general overview, and to simplify matters was much as possible, we will assume that all

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[1] see Paper 3

[2] see Paper 1

[3] see Paper 3

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of the claims arising from the collision are property damage claims; that the collision did not cause any loss of life or personal injuries.

Choice of Forum

It used to be thought that a ship owner could only commence a limitation action in a jurisdiction where one or more of the claimants had already commenced an action against him. As a matter of English law however, a ship owner can commence a limitation action pre-emptively and before constituting his limitation fund.[4] Where limitation is a factor for consideration therefore, the paying party's choice of forum will not be focused upon those jurisdictions in which he can arrest the Other Ship or one of her legal sister ships in order to obtain security for his claim[5], but upon those jurisdictions where he can pre-emptively commence a limitation action in the expectation of being able to limit his overall financial liability for all of the claims to the minimum possible.

When evaluating these jurisdictions in order to determine which is the best one for commencing a limitation action he will need again, to consider all of the same factors affecting the choice of forum generally[6], and additionally:

Certainty

1. What is the limit of liability?

The limit of liability will vary depending upon which limitation regime applies in the jurisdiction under consideration as unfortunately, there is no single, universally applicable limitation regime.

2. What is the test for limiting liability?

Different limitation regimes have different tests which the ship owner must satisfy in order to be entitled to limit his liability, and the burden of proof can also vary. With some limitation regimes the burden is upon the ship owner to prove he is entitled to limit his liability, and with others the burden is upon the claimant to prove the ship owner is not so entitled. When the burden is upon the ship owner, this will also add to his costs.

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[4] *The Western Regent* [2005] EWHC 460

[5] see Paper 3

[6] *ibid*

Cost

1. Will the limitation fund have to be constituted in cash?

In some jurisdictions a limitation fund can only be constituted by way of a cash payment into court; in others, it is possible to constitute the fund by way of a guarantee[7].

2. What protection from arrest will the constitution of the limitation fund provide?

There is little point in constituting a limitation fund if the claimants, including the owner of the Other Ship, can arrest Own Ship in other jurisdictions to obtain and thereafter retain separate security for their claims.

Limitation Regimes

There are two types of limitation regime: value limit; and tonnage limit.

Value Limit

In a value limit regime a ship owner can limit his liability to the value of his ship in the collision plus any pending freight[8]. The limitation fund is usually the value of the ship in damaged condition following the collision (not her pre-collision sound value) plus any pending freight. Invariably the ship owner has the option of setting up a limitation fund in this financial amount, or alternatively, he can elect to 'abandon' the ship and pending freight to the claimants. This 'abandonment' can happen after one of the claimants arrests the ship and the owner refuses to provide security. That claimant will then take steps to have the ship sold by the court; and the proceeds of this judicial sale - the realised value of the ship - will then be distributed by the court to the claimant who applied for the arrest and sale and to any other claimants who have filed notice of their collision claims with the court. It is rare today however, for an owner to abandon his ship in this way.

Tonnage Limit

In a tonnage limit regime a ship owner can limit his liability to a financial amount calculated by reference to the ship's tonnage, and today there are essentially 3 tonnage limitation regimes in operation:

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[7] It is now possible to constitute a limitation fund in England by way of a letter of guarantee: *The Atlantik Confidence* [2014] EWCA Civ 217

[8] This was the original and only basis upon which ship owners could limit their liability until the 19th Century when the UK introduced an alternative, tonnage based limit.

(1) *The 1957 Brussels Limitation Convention* ("1957 BLC")[9]

Under the 1957 BLC the limitation fund is calculated by reference to the ship's net tonnage plus the amount deducted from her gross tonnage on account of the engine room space; and this tonnage figure is then multiplied by 1,000 gold francs[10] to obtain the financial value of the limitation fund. In jurisdictions where the 1957 BLC still applies today however, the local law will often stipulate an amount in local currency in place of the 1,000 gold francs.

(2) *The 1976 London Limitation Convention* ("1976 LLC")[11]

Under the 1976 LLC the limitation fund is calculated by reference to the ship's gross tonnage multiplied by the designated monetary unit of account to obtain the financial value of the limitation fund. The multiplication is based upon tonnage bands and a sliding scale, and the designated monetary unit of account is the Special Drawing Right ("SDR"). In jurisdictions where the 1976 LLC applies, the limitation fund has to be paid into court in the local currency equivalent of the fund's SDR value. The tonnage bands and sliding scale are as follows:

Tonnage Band	Sliding Scale[12]
0 - 500	333,000 SDR
501 - 3,000	500 SDR / tonne
3,001 - 30,000	333 SDR / tonne
30,001 - 70,000	250 SDR / tonne
Over 70,000	167 SDR / tonne

(3) *The 1996 Protocol to the 1976 LLC* ("1996 LLC")

The 1996 LLC changed the tonnage bands and increased the sliding scale as set out below. It has been adopted by many of the countries who earlier adopted the 1976 LLC, and on adopting this Protocol most of these countries then denounced the 1976 LLC. In doing so these countries became a "State Party" to the 1996 LLC and ceased to be a "State

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[9] The International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957

[10] For property damage claims. A higher figure applies for loss of life and personal injury claims.

[11] The Convention on Limitation of Liability for Maritime Claims, 1976

[12] For property damage claims. Higher figures apply for loss of life and personal injury claims

Party" to the 1976 LLC so that the 1996 LLC is essentially a separate and distinct tonnage limit regime to that of the 1976 LLC.

Tonnage Band	Sliding Scale
0 - 2000	1,000,000 SDR
2001 - 30,000	400 SDR / tonne
30,001 - 70,000	300 SDR / tonne
Over 70,000	200 SDR / tonne

The 1996 LLC contained a "tacit acceptance procedure" by which these tonnage limits could be automatically increased, and on 8 June, 2015 the sliding scale was further increased as follows:

Tonnage Band	Sliding Scale
0 - 2000	1,510,000 SDR
2001 - 30,000	604 SDR / tonne
30,001 - 70,000	453 SDR / tonne
Over 70,000	302 SDR / tonne

These new tonnage limits (the "2015 Amended" limits) should now apply in all of the countries who are a "State Party" to the 1996 LLC.

The 1996 LLC with the 2015 Amended limits applies in England as a matter of English law.

Relevance

Consider a bulk carrier with a gross tonnage of 31,300 and net tonnage of 18,300, with a current market value of US$12,000,000 which has suffered US$2,000,000 damage in the collision; and assume a gold franc value of US$0.16 and SDR value of US$1.3329. Her limitation funds under the various limitation regimes would then be as follows:

Value Limit	US$10,000,000	(US$10.00 million)
1957 BLC limit	US$ 3,200,000	(US$ 3.20 million)
1976 LLC limit	US$14,527,277	(US$14.53 million)
1996 LLC limit	US$16,781,211	(US$16.78 million)
2015 Amended	US$25,339,629	(US$25.34 million)

If the owner's overall financial liability for the collision damage claims is, say, US$15 million, then clearly he will want to consider commencing a limitation action firstly, in a jurisdiction where the 1957 BLC applies; and if there are none suitable, where a value limit regime applies; and failing that, where the 1976 LLC applies.

Tests for Limiting Liability

There are essentially two different tests for limiting liability: the test which applies in a value limit regime and in the 1957 BLC tonnage limit regime (the "privity test") ; and the test which applies under the other tonnage limit regimes i.e. the 1976 LLC and the 1996 LLC with the 2015 Amended limits (the "LLC test").

The Privity Test

With the privity test the burden is upon the ship owner[13] to prove the collision did not occur because of his actual (i.e. personal) fault, or where caused by the fault of his servants (i.e. the master and crew, as will invariably be the case), that he had no prior knowledge (privity) thereof.

The leading English law case on the 1957 BLC is the *Lady Gwendolen*[14]. In that case the collision was caused by the fault of the master who navigated his ship at an excessive speed in thick fog whilst not making proper use of the radar. He was shown to have habitually navigated his ship in this way and to the knowledge of the owners. The owners were unable to prove therefore, that the collision occurred without their actual fault or privity and were not allowed to limit their liability.

The LLC test

In return for accepting the higher limits of the 1976 LLC ship owners were given an *"almost unbreakable"* right to limit liability[15] and it is the claimants now, who have the burden of proving the ship owner should not be allowed to limit his liability. Article 4 of the 1976 LLC sets out the test and provides as follows:

"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."

Relevance

Where the LLC test applies it is very difficult as a matter of English law for a claimant to be able to prove the ship owner should not be entitled to limit his liability for claims arising from

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[13] Under Article 1(6) of 1957 BLC the burden of proof is a matter for the *lex fori* which invariably means it is upon the ship owner, as the party seeking to limit his liability.

[14] [1965] P.294 (Court of Appeal)

[15] per Sheen J in *The Bowbelle* [1990] 1 Lloyd's Rep.532

a collision between two ships.[16] Where the privity test applies there are greater risks and costs involved for a ship owner to establish the right to limit his liability and these increased risks and costs need to be carefully weighed against benefits of the associated lower limits.

As noted[17], many ships today are owned by companies set up specifically for that purpose so that the owning company has one single asset, the ship. If such an owner is unable to limit his liability under any of the tonnage limit regimes, then his liability is effectively capped at the value of his ship. In this event, he may also be in breach of his contracts of insurance when he will no longer be covered for the claims.

Constitution of the Fund

As the figures above show, the limitation fund can be a substantial amount of money and most ship owners (and their insurers) would prefer, where possible, to constitute the fund by way of a guarantee rather than in cash. Where this is possible the guarantee may have to be provided by a local insurance company, bank, or other court approved surety but in some jurisdictions a guarantee from one of ship's insurers, like the P&I Club, may be acceptable[18].

To protect the claimants, interest accrues on the amount of the limitation fund from the date of the collision until the date when the fund is constituted. The rate of this 'pre-constitution' interest tends to be notably higher than the market rate and is usually specified in the local laws for limitation actions by ship owners. Similarly, interest will continue to accrue on the fund after it has been constituted. In most jurisdictions the local laws will specify the rate of this 'post-constitution' interest where the fund is constituted by way of a cash payment into the court, but in jurisdictions where the fund can be constituted by way of guarantee this rate may have to be first determined by the local court.

Protection from Arrest

The aim of the ship owner when pre-emptively commencing a limitation action is to have his limitation fund stand as security for all of the claims; that is, to effectively provide one single security in the amount of his limitation fund for all of the claims instead of separate securities for each of the claims, when the total value of these separate securities could add

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[16] In *The Atlantik Confidence* [2016] EWHC 2412, the owner was found unable to limit his liability for cargo claims but these claims did not arise from a collision but the deliberate scuttling of the ship.

[17] See Paper 3

[18] England is now one of them

up and exceed the amount of his limitation fund and also the value of his ship in collision. In order to achieve this aim, the ship owner needs to be comfortable that the constitution of his limitation fund will prevent the claimants from obtaining and retaining separate security for their individual claims by arresting his ship in the same or a different jurisdiction.

The constitution of a limitation fund in a jurisdiction where the value limit regime applies does not provide any such comfort, but it does where the limitation fund is constituted in a jurisdiction where any of the tonnage limit regimes apply although to differing extents[19]. The comfort is limited to actions by the claimants to arrest his ship in the jurisdiction in which the limitation fund has been constituted, and in other jurisdictions where the same tonnage limit regime applies, namely those countries which are also a signatory - "State Party"[20] - to the same tonnage limitation convention. Today, the 1996 LLC applies in over 50 countries but there are still a number of countries in which the 1976 LLC applies and a few still in which the 1957 BLC applies. There are also several countries who are not a State Party to any of these tonnage limitation conventions[21]. In some, the value limit regime still applies; in others, there are local laws governing the rights of a ship owner to limit liability[22]. Often these local laws incorporate provisions from or closely based upon those of one of the tonnage limitation conventions[23] but even so, that country does not qualify as a State Party.

Where there is no such comfort the owner must rely instead, on his ability to successfully challenge the jurisdiction of the local courts in other countries to hear the claims[24], so as to be able to force the claimants to bring their claims in the jurisdiction he has chosen to start a limitation action.

Conclusion

Pre-emptively commencing a limitation action involves risks and costs which need to be carefully considered and evaluated. As we have noted[25], it is in the interests of both ship owners to always settle forum by agreement and this is so even when limitation is a factor

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[19] See Article 5 of the 1957 BLC; Article 13 of the 1976 LLC

[20] "Contracting State" is used in the 1957 BLC

[21] For example, the USA, and countries in South America and West Africa

[22] For example, China and South Korea.

[23] *ibid*

[24] On grounds of *forum non conveniens*

[25] See Paper 3

for consideration and there are many other claimants. Under English law the ship owners are at liberty to agree what the value of the limitation fund of the paying party should be, and accordingly it should be possible for them to settle forum by way of an agreement to English law and jurisdiction with a compromised value for this fund. This type of collision jurisdiction agreement is also likely to be attractive to the other claimants, especially if there is little or no scope for them to arrest the paying party's ship in a jurisdiction where his limitation fund will be higher than its compromised value in England; or if there is, where he is likely to be able to successfully challenge their right to bring their claims in that jurisdiction.

We will look at collision jurisdiction agreements in our next paper.

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