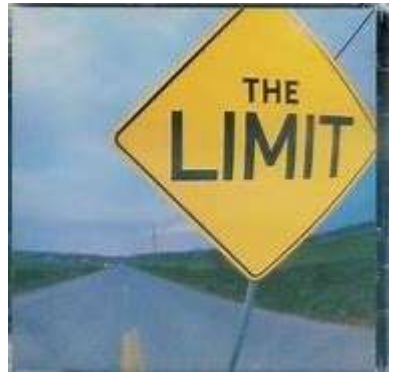
Limitation claims

What is realistic and achievable when handling limitation claims with *Maersk Honam*, *MSC Flaminia* and *Ever Given* in court?

Sean O’Sullivan KC

Introduction



- Brief introduction to the LLMC 1976 and limitation claims
- Jurisdiction: when can a party choose England for its limitation claim?
- What types of claims are subject to limitation?
  - *MSC Flaminia* (No.2) [2022] EWHC 2746 (Admlty)

Convention on Limitation of Liability for Maritime Claims (LLMC) 1976

- International convention incorporated into English law (in amended form) by the Merchant Shipping Act 1995
- About matching extent of exposure to size of vessel: "*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*" (Lord Denning MR in The *Bramley Moore* [1963] 2 Lloyd's Rep. 429).
- Limits in England increased by 1996 protocol and again by later amendment in 2016 (IMO Res LEG.5(99))
- Art 1: shipowners (and salvors) can limit their total liability for the specific types of claims set out in Art 2 to that calculated figure.
- Esp. important (for P&I clubs) when potential exposure to huge number of claims… e.g. container ship casualty.

Recent examples of limitation claims brought in the English Courts

M/V Ever Given (2021)

M/V Maersk Honam (2018)

M/V X-Press Pearl (2021)

M/V Ever Given in Suez Canal
M/V Maesk Honam in Arabian Sea
M/V X-Press Pearl off Sri Lanka

Limitation claims – jurisdiction (1)

- Limitation can be raised as a defence to an action (or arbitration), or a limitation claim can be commenced in the Admiralty Court for a limitation decree which is intended to be valid against all claims
- No express provision in LLMC 1976 identifying the jurisdiction in which a limitation claim can be brought (although seems to be envisaged that will be invoked **in response to claims**)
- No requirement for limitation and liability to be determined in the same jurisdiction: see Caspian Basin v Bouygues (No.4) [1997] 2 Lloyd's Rep 507
- In England, right to limit is procedural not substantive (so does not depend on law governing the claim): see Caltex Singapore v. BP Shipping [1996] 1 Lloyd's Rep. 286

Jurisdiction (2)

- Very accommodating approach in England (esp. post-Brexit). Section 20(3)(c) Senior Courts Act 1981: Admiralty jurisdiction of the High Court includes "*any action by shipowners or other persons under the [Merchant Shipping Act 1995] for the limitation of the amount of their liability in connection with a ship or other property*"
- Article 11(1) LLMC 1976: "*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*". But that is not a jurisdictional provision (under English law): The *Western Regent* [2005] 2 Lloyd's Rep 359
- Still need to be able to serve at least one named defendant and scope for stay on "forum non conveniens" grounds
- What is the practical effect of a limitation decree being granted in England on claims brought elsewhere? Article 13 is intended to bar other claims, but what if claim in a jurisdiction which not a signatory to 1976 Convention…?

Who can limit?

- Article 1(2): "*The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship*"
- Previously thought that time charterers could not limit save when acting *qua* shipowner: The *Aegean Sea* [1998] 2 Lloyd's Rep 39
- Now settled that charterers fall within the definition of "shipowner": CMA CGM SA v Classica Shipping Co Ltd [2004] 1 Lloyd's Rep 460, approved by the Supreme Court in The *Ocean Victory* [2017] UKSC 35
- Even slot charterer can limit: The *MSC Napoli* [2009] 1 Lloyd's Rep. 246
- But just providing personnel to operate machinery on a dumb barge does not make you an "operator": The *Stema Barge II* [2021] EWCA Civ 1880

Claims subject to limitation

Article 2 LLMC 1976

*1. Subject to Articles 3 and 4 the following claims, **whatever the basis of liability may be**, shall be subject to limitation of liability:*

(a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

(b) Claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) Claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;

(d) ~~Claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship~~;

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

(f) Claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

Article 2(1)(d) probably does not apply under English law: paragraph 3(1), Part II, Schedule 7, Merchant Shipping Act 1995

LLMC 1976 does not apply to claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage (i.e. ships carrying oil as cargo) – but it can apply to bunker pollution

MSC Flaminia

Recent consideration of the types of claims falling within Article 2(1) LLMC 1976 by Andrew Baker J in The *MSC Flaminia* (No.2) [2022] EWHC 2746 (Admlty)

MSC Flaminia (No.2) – the facts (1)

- Explosion in cargo hold during voyage led to fire which caused damage to the ship and cargo. Three of crew lost lives.
- Auto-polymerisation of DVB led to build up of heat and pressure in tank containers being carried in hold. Part of the cargo vented. Aerosol formed by the vented DVB was accidentally ignited in the hold, causing an explosion
- Vessel could not complete voyage and required substantial repairs
- Time-charterer (MSC) found liable to owner (Conti) in underlying arbitration
- Conti awarded damages of approx $200 million
- MSC brought a limitation claim in England. Decided at first stage that Conti had no Article 4 defence: it had been decided in the arbitration that MSC not even negligent.

MSC Flaminia (No.2) – the facts (2)

Conti's claim against MSC included claims for:

- Costs of payment to public authorities in Belgium, France, the UK and the Netherlands in relation to passage of the ship to the port of refuge
- Costs of discharging and salvaging or destroying the cargo
- Costs of disposing of contaminated firefighting water and waste material (solid cargo and steel scrap from containers) left on the ship
- Costs of repairing the ship

Application of LLMC 1976 Art 2(1)(a)

Art 2(1)(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***

- No right to limit in a claim for damage to the vessel whose tonnage is used to calculate the limitation amount. In other words, "property" in Art 2(1)(a) cannot include the ship herself: CMA CGM SA v Classica Shipping
- Common ground that the auto-polymerisation and explosion constituted loss of or damage to cargo, which was property for purposes of Art 2(1)(a)
- MSC's argument = Conti's claims were within Art 2(1)(a) because:
  - these losses were caused by the loss of or damage to cargo which led to the explosion; and
  - therefore the claims are for "consequential loss" resulting from damage to property (i.e. the cargo).

Claim characterisation vs causation

- Andrew Baker J rejected MSC's argument
- Held that:
  - Conti's claim was in respect of damage to the ship, not in respect of damage to the cargo.
  - The fact that ship damage **results** from cargo damage or loss does not turn a claim for damage to the ship into a claim in respect of damage to cargo
  - Art 2(1) is concerned with **claim characterisation**, not **factual causation**
  - Therefore, MSC could not limit

A series of claims?

- MSC also attempted to rely on Art 2(1)(e) (cargo removal) and (f) (mitigation of limitable losses)
- MSC tried to treat Conti as making series of claims, and analysed each claim separately
- That argument failed:
  - In each case, cost was in fact necessary in order to repair the ship
  - Therefore the appropriate claim characterisation was that there was a singular claim for damage to the ship
  - Irrelevant that some of those costs (e.g. removal of firefighting water) might have been incurred even if the ship had not been repaired – that was just speculation given what had happened
- Further:
  - the cost of handling the cargo - as between Owner and Charterer - is not cargo “removal”
  - Art 2(1)(f) only applies if loss which seeking to mitigate would have been subject to tonnage limitation (and cost incurred for that purpose alone)

Pollution damage

*(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**;*

- With container ships, often the biggest exposure after a casualty is to "clean up" costs: e.g. bunker fuel escaping or cargo washing up on beaches.
- Is that "damage to property" on basis that beach belongs to someone?
- Or is it a loss consequential upon loss or damage to property: i.e. the loss of the bunker fuel or the cargo?
- The *MSC Flamenia* (No.2) suggests that the former argument might work, but the latter will not

Article 2(2)

"Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1 (d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable."

- Prevents a party from relying on limitation against its own contractors e.g. a shipowner cannot invoke limitation against a contractor who the shipowner has engaged under a contract (e.g.) to remove cargo from a ship in the aftermath of a casualty
- If an owner seeks to recover that sum against a charterer under a charterparty, can the charterer invoke limitation as a defence to a claim by the owner?
- Who is "the person liable"?
- Isn't there intended to be a single "fund"?

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