

Limitation of Liability Convention for Maritime Claims

THE ISLE OF MAN PERSPECTIVE

ONCE AN INCIDENT HAS BEEN DEALT WITH BY THE MASTER AND crew of a yacht, matters immediately turn to the recovery of any losses. When dealing with such losses it has long been a unique feature of shipping law that shipowners (and also charterers, managers and operators of a sea-going ship) are entitled, subject to certain conditions, to limit the extent of their liability in the event of a claim being made against them.

The limit of their liability is based on the tonnage (size) of the ship involved in the incident giving rise to the claim and the type of claim being made. The limit is much higher for personal injury or loss of life.

Examples of limiting liability can be found in many charter agreements. However, where third parties are affected such as in collisions, fires etc the owner will rely on the 1976 Convention on Limitation of Liability for Maritime Claims and the 1996 Protocol to the 1976 Convention (the LLMC) to limit their liability.

The LLMC is a strict regime which provides for a virtually unbreakable system of limiting liability. The only situation where a shipowner will not be able to limit their liability is when: *“It is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss or recklessly and with knowledge that such loss would probably result.”* (Article 4 of the LLMC).

Although such limitation appears quite harsh the rationale behind the concept is that most ships and yachts are (usually) insured against losses and so insurers are able to cap the provisions they have to make in the event of an accident.

An example of how the LLMC works in practice can be seen in a recent case before the High Court of the Isle of Man Dominator (Yacht *XTC of London*) v Others CLA 2008/12 (available at www.judgments.im). The Yacht *XTC of London* caught fire in the Marina Port Vell, Barcelona, Spain (below) in February 2008. The fire destroyed the *XTC*, and three other vessels were damaged and sank and at least five other yachts were badly damaged in the incident. The value of the losses amounted to well over €6 million and wreck recovery costs were estimated at approximately €500,000.



The owner of the *XTC*, a company with registered offices in the Isle of Man, was able to limit its liability to a sum in the region of £500,000 (around €564,000) for the whole incident by bringing a pre-emptive limitation action under Article 10 of the LLMC, before the High Court in the Isle of Man. This figure is lower than one, which might have been decided upon by the Courts in England or Spain because of how the Isle of Man has enacted the LLMC into its national law. Whilst the Isle of Man is not a signatory to the convention, the UK is and the Isle of Man has enacted the relevant UK law giving effect to the LLMC into Manx Law by virtue of the Merchant Shipping Act 1995 application order and the Merchant Shipping (Convention on the Limitation of Liability for Maritime Claims) (Application) Order 2000.

The unique advantage the Isle of Man offered in respect of the *XTC* claim was:

- Firstly, that whilst other countries have reserved the right to exclude wreck recovery from the limitation of liability the Isle of Man has not, and;
- Secondly the Isle of Man has taken advantage of the measures allowed under the LLMC and made its own provisions for ships less than 300 tons. This has set a limit of 500,000SDR* in respect of a claim not involving personal injury or loss of life; considerably less than the LLMC standard limit of 2,000,000SDR.

Although actions under the LLMC are commonplace in other larger jurisdictions the *XTC* case is the first such reported action in the Isle of Man. The judgment clearly shows that the Isle of Man is a suitable jurisdiction to bring such claims and adds to the Isle of Man's growing reputation as a 'Shipping Centre of Excellence', being home to international companies offering specialist maritime services in both ship and yacht management, finance, maritime insurance, maritime law and company formation. * *Special Drawing Rights – A figure produced by the International Monetary fund which converts the SDR to the currency of the Court or Country where the limitation is established, that is 1SDR = \$US1.5.*

Peter Taylor
Simcocks Advocates



Before joining Simcocks Peter was a surveyor for the Isle of Man Ship Registry. Before moving to the Island he served as an engineer officer in the British Merchant Navy and worked as a Hull and Machinery Surveyor for Lloyd's Register.

Insurers' views – Editor's Note:

While it seems this limitation is quite common we felt many masters and owners may not be familiar with the concept and its implications – accordingly we contacted a variety of Insurers for comment on the case above and three questions; these are their responses.

1) Does this mean that in a similar case to that of *XTC*, that when *XTC*'s insurers limit or cap their payout the insurers of the other damaged yacht(s) would have to settle the difference up to the total claim by their insured's?

Yes, but subject to limits, deductibles and conditions of insurance policy. What one must remember is that an insurer would normally deal with his insured's claim first and then subrogate against the third party who in turn may have a limitation fund in place to limit the sum of any successful recovery.

2) Would this affect the record of the insured, that is load their policy in view of this claim even though they were in no way to blame?

Not necessarily. It could be the anomalous situation where the insurer may wish to increase the premium in order to recover in time some of the loss but by doing this he may risk losing the business to another insurer and hence recover nothing. Regrettably also premium may be affected due to the loss of no claim bonus or premium rebate, because it is a no claim and not a no-blame situation.

3) In any case should discussing an insurer's attitude to such a 'what if' scenario comprise an important part of negotiating and choosing an insurer, and be specifically mentioned in the insurance policy?

It would have to be declared when seeking an insurance elsewhere as otherwise, if he had another claim, his new insurers could decline to pay for reason of non-disclosure of what could be perceived as material information. I do not see how an insurer's attitude can be written into a policy. All claims can be different with all sorts of different factors being taken into account. One can never be sure what attitude an insurer will take until he has been presented with all the facts. It is known, however, that some insurers can take a more proactive and less harsh view than others and this largely depends on the experience and expertise of the insurance broker. Cheapest is not necessarily best and a client should listen to his broker's advice.

Nick Sturge
Sturge Taylor & Associates Ltd

From the point of view of the insured person the advantage of the limitation is clearly that otherwise he or she would be liable for unlimited damages even when caused by a smaller pleasure craft.

The Convention on the Limitation of Liability for Maritime Claims, 1976 as amended by the 1996 Protocol regulates the limitation of liability of shipowners, charterers, managers and operators of seagoing ships, salvors and insurers. Signed by many countries so far, some of these however have different limitation levels. The possibility of limitation does not occur in each and every claim situation. For example, the vessel must be in operation in order to limit liability. Therefore, limitation of claims arising out of the transport of the vessel or while being on the hard have already been rejected. From the point of view of the insured person the advantage of the limitation is clearly that otherwise he or she would be liable for unlimited damages even when caused by a smaller pleasure craft. Claims could be brought with extremely high amounts, especially when damaging commercial vessels or causing personal injury or even death of passengers. To purchase insurance to cover this completely would be extremely expensive since it would be calculated without a limit. The Convention provides the opportunity for owners or insurers to limit the liability in similar cases to the one mentioned. This can then lead to lengthy litigation. In practice what happens is that the owner is compensated by his hull insurer who pays for all damages and then claims against the owner or insurer of the other vessel. If this then has an effect on the claims record or increases the premium will depend on the individual insurer concerned. Quite obviously cases like the fire in Barcelona show how important it is to have a quality insurance policy. *Pantaenius* clauses have no deductible on claims caused by fire so the damages of the vessel would be paid in full without any deductions even new for old. The client must always be sure that his insurance policy covers all of these scenarios including damage caused by a third party. It is therefore important to choose a specialist insurer who can provide expert advice and bespoke policies suited to these situations.

Michael Kurtz
Pantaenius

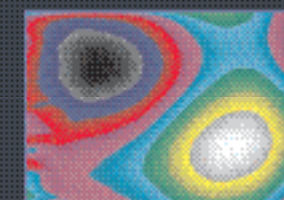
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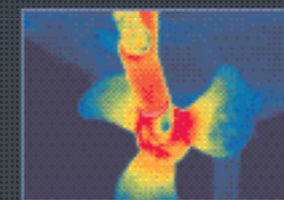
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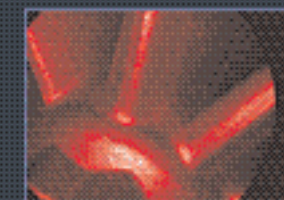
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