# WHY IS A REVIEW OF THE 1976 CONVENTION ON LIMITATION OF LIABILITY DESIRABLE?

Dr.sc. Branimir Lukšić,
Full professor
Faculty of Economy, University of Split

UDK 347.792:347.51
Original scientific paper
Received: February, 1996

*Problems about the circle of persons who can limit their liability. Should the mortgagee in possession of a ship be allowed to limit? What about claims for the raising and removal of sunken vessels oredered by the harbour authority? Ambiguities in the wording of the conduct barring limitation. Burden of proof and set-off of claim and counterclaim. Reconciling passenger claims of the 1976 Limitation Convention and the 1974 Passenger Convention.*

Generally speaking, it is characteristic of modern man that he wants to limit liability for his actions and, if possible, even to disclaim his responsibility for them by blaming somebody else like society, the genetic code, education or the political system. Such a desire is especially present in our technological society where even a seemingly insignificant act or omission is frequently fraught with unforeseeable consequences. While this phenomenon of a deep anxiety of modern freedom could profitably be investigated by sociologists and philosophers, lawyers look at it usually from a more pragmatic point of view and try to make it dovetail with the prevailing economic trends. The case in point is the shipowner's limitation of liability. The basic idea behind the right to limit their liability was to encourage shipowners to carry on their business in the adventurous pursuit of seafaring. It could, however, be asked, whether nowadays, with such a widely branched out system of insurance, limitation of liability is still needed. Although the argument against limitation carries considerable theoretical weight, one must admit that in the present circumstances of maritime trade it would be self- defeating in practice to saddle shipowners with unlimited liability which they would try to circumvent by forming one-ship companies or by throwing the increase of their insurance costs

on the end-users of their services. These pragmatic grounds, however, do not deprive ethical questions about the admissibility of an entrepreneur's limitation of liability for his acts or omissions, and for those of his employees acting within the scope of their employment, of serious weight and significance.

The latest international instrument to regulate liability for maritime claims is the Convention on Limitation of Liability for Maritime Claims drawn up in London in 1976. It introduced some radical changes in the concept and scope of limitation. After the Convention was concluded some alterations of other instruments of international maritime law have taken place which must be harmonized with the provision of the 1976 Limitation Convention. Its revision is, therefore, necessary, especially in order to reconcile its enactments in respect of passenger claims for loss of life and personal injury with the provisions of the Convention on the Carriage of Passengers and Their Luggage by Sea concluded in Athens in 1974 and amended by a Protocol in 1990. But there are also some other ambiguities in the 1976 Limitation Convention which should be reviewed and then differently worded or even modified in substance. In this paper I shall indicate some of these unclarities which would require a reconsideration.

## WHO CAN LIMIT?

Under the 1976 Convention any person for whose act, neglect or default the shipowner or salvor is responsible can avail himself of the limitation of liability. Some questions could arise regarding the circle of persons who can limit their liability. If the word "responsible" is widely interpreted, independent contractors, such as stevedores, are included, which they would not be if the term "responsible" is given a restricted interpretation, because it is obvious that the stevedore is not a "servant" of the shipowner. The wording of article 1 of the Convention has in some respect even reduced the circle of persons who are entitled to limit their liability. While it is apparently wide enough to include even agents if the shipowner is responsible for their actions, it certainly excludes the mortgagee in possession, because the mortgagee who has the possession of a ship does not normally "operate" her, and hence cannot be subsumed under article 1(2) of the Convention. It is also evident that the shipowner cannot be said to be "responsible" for the mortgagee in possession. And yet the mortgagee in possession should have the right to limit his liability for maritime claims.

It must be mentioned in this connection that the position of a master-owner seeking to limit his liability has been improved by this Convention in relation to the provisions of the 1957 Limitation Convention, because it is no longer required that he commit the act, neglect or default in his capacity as master, the only bar to limitation being now his intent

to cause loss or his recklessness and knowledge that such loss would probably result from his personal act or omission (article 4). A welcome innovation of the 1976 Convention is also the right of the liability insurer to benefit from it regarding claims subject to limitation "to the same extent as the assured himself". This wording obviously does not denote that if the assured cannot limit his liability and must pay in full to a third party claimant, his liability insurer also couldn't limit his liability to such third party when, according to the insurance contract, the assured has lost his insurance cover because of his privity in causing the loss or damage.

## CLAIMS SUBJECT TO LIMITATION

Under article 2(1)(d) and 2(2) of the convention claims in respect of the raising, removal, destruction or the rendering harmless of a sunken, wrecked, stranded or abandoned ship are subject to limitation regardless of the basis of liability, even if brought by way of recourse or indemnity under a contract or otherwise, with certain exclusions. Accordingly, liability for claims regarding the expenses of wreck removal could be limited, even if such a removal was performed pursuant to an order by the harbour authority. Some countries, among them Croatia, have not included the claims enuerated in article 2(1)(d) of the 1976 Convention in the list of claims subject to limitation see article 408 of the Croatian Maritime Code). Although according to article 811 of the quoted Code remuneration for the raising of a sunken vessel cannot exceed the value of the raised ship, the raising or removal of vessels pursuant to statutory powers of the harbour authority is not subject to this limitation. It could be argued that claims for the raising and removal of wrecked, sunken, stranded or abandoned vessels, performed following an order of a competent administrative authority, should be excluded from limitation, because removal expenses in such cases are either defrayed by a special state or government fund which then should be able to recover them in full, or - where such funds do not exist - unlimited liability of the owner of the sunken vessel is the most powerful incentive to the specialised firm for performing the task of the raising or removal. Article 18 of the 1976 Convention gives any state party to the Convention the right to exclude from the application of the convention claims in respect of the raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on her board.

It is interesting to observe that article 2(1)(a) of the Convention could introduce a change in the regime of the limitation of liability of tug and tow towards third vessels. As the law now stands, this regime is not a paragon of justice and fairness, because a small tug of comparatively insignificant value towing a big vessel can cause great damage and pay

for it very little. The present position is, namely, that since the negligence which caused the damage, say thorugh a collision, must be in the navigation or management of the vessel at fault in order for that vessel to be able to limit her liability, the limitation fund should be restricted only to the tonnage of that vessel in the towing unit which caused the damage to a third ship through navigational negligence. If, however, the 1976 Convention applies, the party wishing to limit liability has only to show that the damage arose "in direct connection with the operation of the ship". So if we take a case where only the tug is to blame for a collision with a third vessel, there appears now to be less reason to restrict the fund to the usually insignificant tonnage of the tug alone, because there is no danger any more in the 1976 Convention that in such a case the tow, if also held responsible, would be subject to unlimited liability. In order to limit her liability the tow has now only to show that the liability arose in direct connection with the operation of the ship, and not, as earlier, in connection with the navigation or management of the ship[1].

## CLAIMS EXCEPTED FROM LIMITATION

The Convention provides in article 3(e) that its rules shall not apply, among others, to claims put forward by servants of the shipowner or salvor whose duties are connected with the ship or salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in the Convention. It is, therefore, clear, that the exception applies only if the law governing the contract of service prohibits this limitation or sets a higher limit, and not merely because the contract itself provides for a higher limit or excludes it altogether. Yet it could be asked, why is the will of the parties expressed in the contract of service not sufficient to have this effect, especially since it is not a question of lowering the limit prescribed by the Convention but of making it higher or totally abolishing it? It should be mentioned here, that according to Croatian law such claims are excepted from limitation[2]. Perhaps in a future revision of the 1976 Limitation Convention article 3(e) could be rephrased to except from limitation claims by servants of the shipowner or salvor whose duties are connected with the ship or salvage operations, including

1 CF. Branimir Lukšić, Collision liability of tug and tow in maritime law, in "Comparative Maritime Law", Zagreb 1991, No. 3-4, p. 239.

2 Article 409 of the Croatian Maritime Code which came into force on 22nd of March 1994.

claims of their heirs, dependants or other persons entitled to make such claims, if under the contract of service between the shipowner or salvor and such servants, or the law governing such contract of service, the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is only permitted to limit his liability to an amount greater than that provided for by the Convention.

## CONDUCT BARRING LIMITATION

The limitation regime of the 1976 Convention is an ingenious combination of the establishment of a very high limitation fund, perhaps as high as a shipowner can cover by liability insurance at an acceptable cost, and of the creation of a practically unbreakable right of the shipowner to limit his liability. The conduct barring limitation adopted by the 1976 Convention was adopted earlier by a number of other international instruments, among them by the Hague-Visby Rules of 1968, by the 1974 Athens Convention on the Carriage of Passengers and their Luggage by Sea and by the 1978 Hamburg Convention on the Carriage of Goods by Sea. Yet there are certain differences among these conventions regarding the conduct which would prevent limitation of liability. Whereas the Hague-Visby Rules and the Athens Convention speak of the damage resulting from an act or omission of the carrier, the 1976 Convention speaks of "a person liable". This liable person could be the shipowner, the charterer, manager, operator, salvor or liability insurer of the vessel, or anyone of the class described as persons for whose act, neglect or default the shipowner or salvor is responsible. A personal act of any of the above mentioned persons will prevent him from limiting his own liability if a claim is lodged against him, but the liability insurer of the vessel will presumably be prevented to do so not so much by his personal misconduct as by that of his assured. Furthermore, the 1976 Convention provides in article 4 that the person liable shall not be entitled to limit his liability if it is proved that he acted either intentionally or recklessly and with knowledge to cause "such loss". It could be argued that the term "such loss" prevents the person liable from limiting his liability only if he intended or anticipated the actual loss suffered by the claimant, in other words, only if he intended or anticipated that loss which is known to be the probable result of his misconduct. Of the above mentioned conventions the Hague-Visby Rules in article IV, rule 5(e) provide that the right of limitation is lost only if the carrier acted with knowledge that "damage would probably result", the 1974 Athens Convention makes the loss of the carrier's right to limit liability dependent on his intent to cause "such damage" or on his knowledge that "such damage would probably result" (article 13(1)), while the Hamburg

Rules have similar wording to the 1976 Limitation Convention and mention intent to cause "such loss, damage or delay" and knowledge that "such loss, damage or delay would probably result" (article 8, rule 1). It is submitted that the wording of the 1976 Convention unnecessarily restricts the scope of the liable person's unlimited liability and that the Convention should refer simply to "loss" or "damage". By such a revision the shipowner's or salvor's right to limit liability would be lost if he intended to cause any loss, or if he acted recklessly and with knowledge that any loss would probably result, regardless of the fact that the actually inflicted loss was not the same as the intended or foreseen one.

There is antother problem which must be considered in connection with article 4 of the 1976 Limitation Convention. The word "reckless" means lacking in caution, foolhardy, rash, careless, heedless or irresponsibly wild[3]. But over and above these connotations it has something more, a specifically English tang, a faint suggestion of something outrageous which is untranslatable in most other languages. An instance of this is the Croatian Maritime Code which translates "recklessness" as "gross negligence"[4]. Consequently, according to Croatian law a shipowner could not limit his liability if he was guilty of a grossly negligent act or omission, while according to, say, English law as contained in the Merchant Shipping Act 1979 which adopted en bloc the 1976 Limitation Convention, such shipowner could limit his liability, because in order that his misconduct be considered reckless something more is needed than mere negligence, namely an element of heedlessness which puts a reckless act halfway between intent and negligence[5]. On the other side of the liabiliy spectrum, the word "recklessness" is not synonymous with "wilful misconduct" because it lacks the element of the full cognition of the harmfulness of the act and the element of clear intentionality[6]. This linguistic difficulty will plague all countries whose legal terminology is based on civil law tradition when they try to translate the terms used by the 1976 Limitation Convention in article 4.

But in view of the present predominant standing of the common law countries within the arena of international maritime law, it is hardly realistic to expect that in the near future the IMO and other international bodies will temper the wind to those other shorn lambs.

3 Webster's Third New International Dictionary.

4 Article 410.

5 Cf. Velimir Filipović, What is new in the Maritime Code in relation to the global limitation of the operator's liability, "Comparative Maritime Law", Zagreb 1994, No. 1-4, p. 98-99.

6 For a more detailed analysis of these terms see Branimir Lukšić, Limitation of liability for the raising and removal of ships and wrecks, in "Journal of Maritime Law and Commerce", Washington D. C. 1980, Vol. 12, No. 1.

## THE BURDEN OF PROOF

The 1976 Convention places in the same article 4 the onus of proof of the shipowner's or salvor's subjective intent or of his subjective knowledge that loss would probaby result on the person who challenges the right to limit. This construction gives at the outset the challenger very poor chance of succeeding, since it is extremely difficult with circumstantial evidence to convince the court that one knows the tortfeasor's subjective reasoning and his intent. This difficulty must be added to the even greater one of actually knowing what goes on in the mind of another person, expecially if that person was miles away from the shore when the act or omission which caused damage took place. This is a complete reversal of the provisions of the 1957 Limitation Convention according to which the shipowner has to satisfy the court that there was no fault or privity on his part in order to be entitled to limit his liability. The knowledge must be actual and not constructive or merely possible in view of the surrounding circumstances, because only subjective guilt bars limitation and the so-called objectivised guilt is not enough[7].

## SET-OFF

It seems that the set-off provision in article 5 of the Convention has not the most felicitous wording, and if compared to the analogous provision of the 1957 Convention (article 1(5)) it could have certain undesired effects. When the 1957 Convention speaks of claims and counterclaims arising out of the same occurrence and being able to be set-off against each other so that limitation applies only to the balance, if any, it applies this provision to the shipowner. In the 1976 Convention the provision applies to "a person entitled to limitation of liability", which means not only the shipowner, but also the charterer, manager, operator and salvor. With this widening of the circle of persons, the words "arising out of the same occurrence" could actually hinder some of them from setting-off claim and counterclaim. Take, for example, the case where a shipowner has a counterclaim against a salvor for negligence in the performance of salvage. If the 1976 Convention should apply the salvor could set-off his claim for remuneration for salvage services against the shipowner's counterclaim for negligence and then he would be able to limit his liability to the balance of damages, if any, which he owes to the shipowner. But he would very probably be deprived of this right because it could be hardly said that his claim for salvage remuneration arises out of the same occurrence as the shipowner's claim for negligence. The salvor's claim arises out of a

7 Cf. Branimir Lukšić, Limitation of liability for maritime claims, in "Privreda i Pravo", Zagreb 1988, No. 9-10, p. 760.

contract of salvage and the shipowner's out of the salvor's negligent act. Therefore, limitation would probably have to be appliefd before set-off, because the claim and counterclaim did not arise out of "the same occurrence"[8] Or if these two grounds of obligation ought to be taken as arising out of the same occurrence, then the article would gain from a clearer wording, perhaps by the words "arising out of or in connection with the same occurrence".

## THE LIMITS OF LIABILITY

The 1976 Limitation Convention chose a sliding scale with various layers of limit depending on the vessel's tonnage, and did not accept a flat rate for eache ton. It also provides that the unit of account shall be the special drawing right (SDR) the value of which is to be determined by the value of the applied currency at the date the limitation fund shall have been constituted, or at the date when payment is made or when security is given which under the law of that state is equvalent to such payment (article 8). Separate limitation funds are provided in respect of claims for loss of life or personal injury and in respect of "any other claims". Where the amount calculated for loss of life or personal injury is insufficient to cover the claims in full, the unpaid balance ranks rateably with the other claims when the fund for these other claims is being distributed. But if the occurrence did not give rise to these "other claims" and if there is a balance of personal injury claims left unsatisfied, this balance remains unpaid, because its rateable ranking with "other claims" applies only if there are "other claims". The linguistic construction of article 6(2) is not in this respect very clear and a revision of the wording would be desirable.

Since the Convention gives a fixed calculation of the limit of liability for "any" salvor not operating from a ship, it may be sometimes disputable in practice when a salvor is operating from a ship and when not, whether he can be at one time operating from a ship and at another not, and how to consider a salvor who operates as a frogman although he came to the site as a member of the salvage team on a ship[9].

More important is the problem of harmonizing the provision of this Convention regarding the liability for passenger claims with that of the 1974 Athens Passenger Convention. The Athens Convention had the same limit of 46,666 units of account per passenger before the limit was raised to 175,000 units of account by the 1990 Protocol of that Convention. The

8 Cf. Patric Griggs & Richard Williams, Limitation of liability for maritime claims, Lloyd's of London Press 1986, p. 36/37.

9 Cf. Christopher Hill, Maritime law, Lloyd's of London Press 1985, p. 208.

problem is that the limit of the Athens Convention is to apply to each passenger who claims damages, which means that it will be elastic and flexible and will vary in accordance with the number of passengers who claim damages, while the limit of the 1976 Limitation Convention is fixed in advance at an amount obtained by multiplying the prescribed number of units of account by an abstract number of passengers, i.e. by the number of passengers which the ship is authorised to carry in accordance with her certificate. Furthermore, the limit of the Athens Convention applies "per carriage" (this is reproduced also in the 1990 Protocol to that convention), which means the whole period during which a passenger is being transported, while the limit of the 1976 Limitation Convention applies to "any distinct occasion" and there may be more such distinct occasions on one voyage. In practice this means the following: if the limit of the 1976 Convention is more favourable to the shipowner it would probably apply by virtue of article 19 of the Athens Convention which provides that the Athens Convention shall not modify the rights or duties of the carrier under the international convention relating to the limitation of liability of owners of seagoing ships. But if according to the 1976 Limitation Convention the limit of liability would be higher the provisions of the 1974 Athens Convention shall not override the application of that higher limit and of the 1976 Convention. There is, therefore, an urgent need to harmonize in these points the two mentioned conventions not only by raising the limit per passenger in the 1976 Limitation Convention to correspond to the altered limit of the Athens Convention, but also in regard to the calculation of the maximum amount of passenger claims. In such a revision of the 1976 Convention the 25 million limit in article 7 would also need to be abolished.

## THE LIMITATION FUND

It is foreseen in the 1976 Convention that the limitation of liability may be invoked notwithstanding that a limitation fund has not been constituted. Croatian law has availed itself of this possibility and has enacted such a provision in article 415 of its Maritime Code. It has been correctly and pertinently pointed out that such a provision is not in the interest of the Republic of Croatia and its ecological policy, for in the case of the pollution of the Croatian territorial sea by foreign vessels the foreign shipowner could limit his liability without having to set up the limitation fund for the clean-up costs and expenses, and this would essentially jeopardize the possibility of enforcing a decision on damages[10].

10 Cf. Velimir Filipović, What is new in the Maritime Code in relation to the global limitation of the operator's liability, in "Comparative Maritime Law", Zagreb 1994, No. 1-4, p. 100.

If, before the fund is distributed, the person liable or his insurer, has settled a claim against the fund, he acyuires by subrogation the right of the person whose claim bas been settled. The Convention provides that even other persons, and not only the person liable or his insurer, may exercise the right of subrogation in respect of the claims which they may have paid, this, however, only to the extent that such subrogation is permitted under the applicable national law (article 12(3)). This innovation introduced by the 1976 Convention does not apply to volunteers who pay a claim, only to those who have some legal ground to pay it, yet who are not "liable" for it in the strict sense of the term. However, the Convention does not make it clear whether the "applicable national law" is a reference to the law of the country where the fund is constituted or of the country which has jurisdiction over the transaction giving rise to the right of subrogation. According to article 3(3) of the 1957 Convention it was the national law of the state where the fund has been constituted. Article 417 of the Croatian Maritime Code is also hazy on this point and provides that the right of subrogation for other persons shall exist only "insofar as such a subrogation is allowed", from which wording it cannot be conclusively deduced which law is applicable. Since the 1976 Limitation Convention has a slightly different wording from the 1957 Limitation Convention, it is submitted that it refers to the law of the country which has jurisdiction over the transaction which gave rise to the subrogation. In a revision of the 1976 Convention this doubt could be dispelled by a more precise formulation.

*Sažetak*

*ZAŠTO JE POTREBNO REVIDIRATI KONVENCIJU O OGRANIČENJU ODGOVORNOSTI ZA POMORSKE TRAŽBINE IZ 1976?*

*Konvenciju o ograničenju odgovornosti za pomorske tražbine iz 1976. potrebno je revidirati kako zbog njenog usklađivanja sa Konvencijom o prijevozu putnika i njihove prtljage morem iz 1974. i njenim Protokolom iz 1990., tako i zbog nekih nedorečenosti same Konvencije iz 1976. Te se nedorečenosti poglavito tiču nekih pitanja glede kruga osoba koje smiju ograničiti odgovornost te glede stanovitih tražbina koje su podložne ograničenju i izuzete od njega. Autor nadalje ukazuje na stanovite načelne poteškoće kod konvencijskih odredaba o gubitku prava na ograničenje odgovornosti i na netočnost recepcije tih odredaba u hrvatski Pomorski zakonik. On upozorava na potrebu veće jasnoće u formulaciji odredaba o prebijanju tražbina i protutražbina, o fondu za ograničenje odgovornosti te na nužnost revizije odredaba konvencije glede potraživanja za smrt i tjelesne ozljede putnika.*