

UPDATE ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS IN CANADA

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1. Introduction

Litigation of limitation of liability issues is historically rare in Canada; however two important cases have reached our courts in the past two years – one decided by the Supreme Court of Canada and the other presently under appeal to the Federal Court of Appeal. Additionally there have been, relatively recently, international decisions with potential impact on procedure and on substantive rights in Canada. The time seems right for an update on all these subjects from a Canadian perspective.

Note that this paper is concerned only with “general” limitation of liability under Part 3 of the *Marine Liability Act*¹ (“*MLA*”) and under the 1976 Convention on Limitation of Liability for Maritime Claims as amended by its 1996 Protocol (“*LLMC '96*”), enacted as Schedule 1 of the *MLA*. Subject-specific limitations of liability for cargo damage, for certain kinds of pollution damage and for most passenger injury or death claims are not addressed, although the conventions under which these other limitation rights arise may engage certain of the same conceptual and interpretive issues as are discussed below.

Limitation of liability is among the subject-matters on which desired international substantive uniformity of maritime law remains elusive. As will be seen Canada is a State party to *LLMC '96* as amended by International Maritime Organization (“*IMO*”) Resolution of April 19 2012. According to a March 8, 2016 update posted on *IMO*’s website², there are 21 contracting States to the 1976 Convention, 17 contracting States to the 1996 Protocol, and an additional 33 States which are said to be parties to both. Together these represent 71 States – the math would indicate that 100 of *IMO*’s 171 member States have not adopted either version of this Convention – presumably either continuing to apply the former 1957 limitation convention³ or making some other provision (or no provision at all) in their laws for limitation of liability. The multi-jurisdictional context of maritime law and of the shipping industry may be especially problematic in cases in which limitation of liability issues arise.

2. Amended Limitation Amounts

IMO by Resolution adopted April 19, 2012 engaged the tacit amendment procedure under the 1996 Protocol so as to increase by 51% the tonnage limitation amounts originally stipulated in that Protocol. Those amendments entered into force internationally on June 8, 2015. Canada, as authorized by the regulation-making power contained in *MLA* s. 31(1), adopted on May 20, 2015 regulations⁴ which amended for purposes of Canadian law limitation amounts so as to

¹ SC 2001 c. 6, as amended by SC 2009 c. 21

² <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>

³ International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, Brussels, October 10, 1957

⁴ SOR/2015-98

correspond with the new international limits, also effective June 8, 2015. Accordingly the amended tonnage limitation amounts in Canada are:

- in respect of claims for personal injury or death: for a ship with GRT between 300 and 2,000, 3.02 million SDRs, plus 1,208 SDRs per GRT between 2001 and 30,000, plus 906 SDRs per GRT between 30,001 and 70,000, plus 604 SDRs per GRT in excess of 70,000⁵; and
- in respect of all other claims for which limitation is available: for a ship with GRT between 300 and 2,000, 1.51 million SDRs, plus 604 SDRs per GRT between 2001 and 30,000, plus 453 SDRs per GRT between 30,001 and 70,000, plus 302 SDRs per GRT in excess of 70,000⁶.

Note that these amended amounts are now set out in the version of LLMC '96 attached as Schedule 1 to the *MLA* as found on-line at the Department of Justice website⁷. Although it is yet to be judicially considered which limitation amounts apply in Canada in respect of damage suffered earlier in time than June 8, 2015, if the amendments are determined to have only prospective effect then in respect of such earlier-occurring damage reference will still need to be made to the prior, unamended amounts set out in that Schedule.

It is also to be noted that despite regulation-making power set out in *MLA* s. 31(2), Canada has not yet amended any of the limitation amounts contained in *MLA* s. 28 (injury or death of passengers or certain others carried on board a ship of less than 300 GRT) or in *MLA* s. 29 (other claims involving ships less than 300 GRT).

3. Special Case – Small Ship Limitation Amounts for Personal Injury or Death

For purposes of *MLA* Part 3 and in cases of injury or death involving ships less than 300 GRT, a special and somewhat complex limitation regime is prescribed by *MLA* ss. 24, 28 and 29. “Passenger” is the subject of extended, but each very specific, definitions in s. 24, and by s. 28(1) liability for injury or death of a “passenger” of a ship less than 300 GRT is limited to the greater of 2 million SDRs or 175,000 SDRs times the number of “passengers” that the ship is certified to carry or, if not certified, the number in fact on board. Section 28(2) stipulates the same alternate limits of liability for injury or death on a ship less than 300 GRT of any other person carried “otherwise than under a contract of passenger carriage”, but from which kinds of persons are excluded by s. 28(3) persons employed on the ship, a person carried on board a ship “other a ship operated for a commercial or public purpose”, a shipwrecked or distressed person, a stowaway, or a person prescribed by regulation (of which none have been made). If one of these latter classes of person is injured or killed, then the limit of liability is the C\$1 million for which *MLA* s. 29(1) provides.

The expanded definition of “passenger” now in s. 24, and the extended identification of circumstances in which s. 28(3) excludes the availability of relatively higher limits of liability, were enacted by SC 2009 c. 21 s. 1, in force September 21, 2009. The corresponding, and somewhat less extensive, definition and exclusionary provision had been (respectively) in prior s. 29(4) and s. 29(3). Those earlier provisions were considered in *Buckley v. Buhlman*⁸, a case

⁵ LLMC '96 Art 6(1)(a)

⁶ LLMC '96 Art 6(1)(b)

⁷ <http://laws-lois.justice.gc.ca/eng/acts/M-0.7/index.html>

⁸ 2012 FCA 9, aff'g 2011 FC 73

in which two small motorboats owned by a fishing lodge collided with each other, one boat being operated by an owner of the lodge (and of the boats) and the injured guests being on board the other of the two boats. The Court held liability was limited to C\$1 million by what is now s. 29(1), by reason that the injured plaintiffs were not on board “the” ship operated by the lodge owners and alleged to be at fault, such that the higher limits available under what is now s. 28(1) and (2) to “passengers of” or “persons on board” the ship seeking to limit its liability did not apply regardless of whether the ship was or was not being operated “for a commercial or public purpose”. Although greater precision, and therefore greater clarity, are now provided as to what persons are included in “passenger” (s. 24) and what are excluded from the carriage “otherwise than under a contract of passenger carriage” (s. 28(3)) it does appear that the *Buckley* decision would still apply to make relatively higher limits available only to persons who were on board “the” ship the liability of the owner or operator of which is sought to be limited.

Other complex issues arising under these sections – including meaning and scope of application of the “adventure tourism” exceptions⁹, criteria which determine whether a person is being carried “otherwise than under a contract of passenger carriage”¹⁰ or whether a ship is or is not “operated for a commercial or public purpose” – remain to be addressed in Canadian jurisprudence.

4. Loss of the Right to Limit Liability

Article 4 of LLMC '96 provides:

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.

This language is substantially similar, but not identical, to that in other maritime Conventions¹¹ which provide for exclusion of the rights of limitation for which those Conventions provide.

As a matter of general overview, it is beyond question in Canada that this Art. 4, first introduced in the 1976 version of LLMC, is intended to “establish a virtually unbreakable limit on liability”¹².

This provision engages several discrete issues, each discussed below.

(a) Burden of Proof

The burden of proof is upon the party – typically the plaintiff damages claimant – who seeks to avoid limitation of the defendant’s liability¹³. If the burden is not met, then the right of limitation survives.

⁹ See *MLA* s. 37.1, also enacted by SC 2009 c. 21

¹⁰ See *Gunderson v. Finn Marine* 2008 BCSC 1665. Under the legislation as it was prior to the 2009 amendments the higher limitation amounts were applied in the case of a non-paying guest of owner/operator of a water taxi apparently without these definitional points being controversial.

¹¹ For example, liability for cargo damage under the Hague-Visby Rules Art. IV(5)(e), liability for passenger injury under Art. 13 of the various iterations of the Athens Convention, and liability for pollution by persistent oil under the Civil Liability Convention 1992/2000 Art. V(2). LLMC '96 Art. 4 is also similar, but not identical, to Art. 25 of the Warsaw Convention which applies to air passengers.

¹² *Peracomo Inc. v. TELUS Communications Company et al* 2014 SCC 29 at paras 23, 25, 49. See to the same effect *CPR v. SHEENA M (The)* 2000 CanLII 17117 (FC), at para 8.

(b) Personal Act or Omission of the Defendant

Proof must be made that the act which excludes limitation is the “personal act” of the party seeking to limit its liability. As this party is normally the owner or charterer of a ship and is normally a corporation, it is said to be required that the act is that of the (or a) human being who is the “alter ego” of the corporation¹⁴.

(c) Deliberate Act Committed with the Intent to Cause Such Loss

The facts of *Peracomo*, very briefly, were that a fishing boat was owned by a corporation of which the master was sole shareholder and director. The boat’s gear became fouled in a submarine cable which the master mistakenly believed to be out-of-service. To free his gear, the master deliberately cut the live cable, causing its owner TELUS to incur substantial repair costs and to suffer economic losses. At trial and on initial appeal, the Courts held that because the cutting of the cable was a deliberate act, the corporation’s (and the master’s personal) right to limit liability was excluded by Art. 4. This result was overturned on further appeal to the Supreme Court of Canada.

As a general matter, the Supreme Court held that Art. 4 requires a “high degree of subjective blameworthiness”¹⁵. Specifically, the Court held that the party seeking to avoid limitation must prove the defendant’s actual subjective intent to cause the damage which in fact occurred, or actual subjective knowledge of the probability of that damage, regardless of whether the defendant’s erroneous belief in the absence of danger was itself reckless¹⁶. “Recklessness”, the Court held, requires actual knowledge of the risk and the decision to run that risk anyway¹⁷.

(d) Reckless Act Committed with Knowledge that Such Loss Would Probably Result

It is far more usual for damage giving rise to limitation issues to have been caused accidentally than deliberately. The Federal Court had occasion to consider application of Art. 4 to an accidental loss in *JD Irving Limited v. Siemens Canada Limited*¹⁸. Very briefly, two specialized road transport vehicles were each loaded with one rotor, each said to weigh 115 tons, intended for use in a nuclear power plant. The transporters were being loaded on a barge in anticipation of towage of the laden barge to the power plant site. During loading the barge tipped and the two rotors fell into the harbour were damaged. Rotor owners Siemens asserted claim at \$40 million; because the barge was less than 300 GRT JD Irving, as its demise charterer, sought to limit its liability to \$500,000. The reported decision followed trial of the issue whether JD Irving was disentitled to do so by virtue of Art. 4 of LLMC ’96. Siemens’ position is said to have “boiled

¹³ *Société Telus Communications v. Peracomo Inc.*, 2011 FC 494 at para 58, aff’d on this point *Peracomo Inc. v. Société Telus Communications*, 2012 FCA 199 at para 55.

¹⁴ *Société Telus Communications v. Peracomo Inc.*, 2011 FC 494 at para 77, aff’d on this point *Peracomo Inc. v. Société Telus Communications*, 2012 FCA 199 at para 43. This point was not addressed by the Supreme Court in its decision in the *Peracomo* litigation nor, as will be seen below, did the trial court find it necessary to decide the point in the context of project-responsible but overall subordinate corporate managers in *JD Irving Limited v. Siemens Canada Limited* 2016 FC 69

¹⁵ *Peracomo Inc. v. TELUS Communications Company et al* 2014 SCC 29 at para 24

¹⁶ *Ibid.*, at para 32

¹⁷ *Ibid.*, at para 52

¹⁸ 2016 FC 69. Note that this decision presently under appeal – see Court File A-58-16, Notice of Appeal filed February 22, 2016.

down to the assertion that JD Irving knew that the [barge] was too small and was unsuitable for the intended move”¹⁹ – though the evidence, all of which was reviewed by the trial judge in great detail, was argued to support also allegations of operational faults in way of preparation of the transporters for the movement and of planning and execution of their loading on board the barge.

The trial judge found that multiple factors combined to cause the list of the otherwise-suitable barge – including principally cargo load somewhat offset from the barge centreline, free surface effect of water within an unsealed lateral ballast tank, and centre of gravity shift resulting from manipulation of the bed of one of the transporters²⁰.

Concerning the meaning of “reckless”, the trial judge referred to many authorities, including the trial decision in *Peracomo*, and held²¹ that “Recklessness is more than mere negligence or inadvertence and, while it is not necessarily a criminal or even a morally culpable matter, it does mean the deliberate running of an unjustified risk”. Recklessness is addressed on a subjective standard – the person challenging the right to limit must establish both reckless conduct and knowledge that the relevant loss would probably result²². On all of the evidence before her, the trial judge concluded that Siemens had failed to establish that any of the JD Irving personnel had subjective knowledge that the loss of the cargo would probably result from their acts or omissions, either in the selection of the barge or at any point during the loadout prior to the loss²³. In light of these conclusions the trial judge found it unnecessary to consider whether the alleged acts or omissions of JD Irving’s on-site personnel – identified as project manager responsible for the cargo movement and the senior rigging engineer²⁴ – constituted the “personal acts” of JD Irving Limited.²⁵

5. Persons Entitled to Limit Liability

Article 1 of LLMC '96 identifies persons entitled to limit liability – including a shipowner, defined to mean the owner, charterer²⁶, manager and operator of the ship²⁷ and a salvor, defined to mean “any person rendering services in direct connexion with salvage operations”²⁸. Art. 1(4) then provides:

If any claims ... are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.

¹⁹ *Ibid.*, at para 65

²⁰ *Ibid.*, at para 248

²¹ *Ibid.*, at para 25

²² *Ibid.*, at para 267

²³ *Ibid.*, at paras 316, 326

²⁴ *Ibid.*, at para 19

²⁵ *Ibid.*, at para 327

²⁶ Apparently meaning a charterer of any kind – see *Metvale Ltd v Monsanto International (The MSC NAPOLI)* [2008] EWHC 3002 (Admlty); [2009] 1 Lloyd’s LR 246

²⁷ LLMC '96 Art 1(2)

²⁸ LLMC '96 Art. 1(3)

At the least this Art. 1(4) appears, and in the published literature is generally acknowledged, to be intended to protect by limitation the employees of the corporate “owner” or “salvor”, such as, typically, the master or crew of the ship alleged to be at fault²⁹.

In the *JD Irving v. Siemens* litigation, discussed above in other contexts, the cargo owner had sued as additional defendants Maritime Marine Consultants (2003) Inc. (“MMC”), the consulting firm engaged by JD Irving to prepare stability calculations in respect of the barge and, personally, a Mr. Bremner, the naval architect who was principal of that firm and by whom the calculations were actually performed. In supplementary reasons later issued³⁰ the trial judge addressed the question whether this firm and/or human being were entitled to limit liability. The trial judge decided that neither the firm nor the naval architect were so entitled³¹.

Finding that the shipowner is not normally vicariously liable for the acts or neglect of independent contractors, and the meaning of the word “responsible” used in Art. 1(4) is unclear based on a review of the literature, the trial judge referred to the *travaux préparatoires* generated in connection with adoption of the 1976 LLMC Convention and ultimately concluded that neither MMC nor Bremner were entitled to limit liability, both because JD Irving has no vicarious liability for its independent contractors and because the language of the Convention “does not appear to have been intended to extend” to independent contractors.³²

6. Forum Shopping?

In *The HERCEG NOVI*³³ there was a collision in Singaporean territorial waters between Maltese-flagged HERCEG NOVI and Taiwanese-flagged MING GALAXY, the former of which sank. MING GALAXY owners sued for collision damages and commenced separate limitation proceedings in Singapore, which was (and still is) a party to the former 1957 limitation convention³⁴ with its substantially lower limitation amounts. HERCEG NOVI owners only days later sued for collision damages in England (at the time a party to LLMC 1976), in which, if English law applied, their recovery as against MING GALAXY owners, even if limited, would be in a greater amount. MING GALAXY owners sought, and in the Court of Appeal obtained, an order unconditionally staying the English damages proceeding, substantially on *forum non conveniens* grounds. The Court, specifically, declined to find that application of Singaporean law despite its lower limitation amount would deprive HERCEG NOVI of any juridical advantage. The Court concluded at p. 460 its judgment

The 1976 Convention has not received universal acceptance, or anything like it. It is not an “internationally sanctioned and objective view of where substantial justice is now viewed as lying”. It is simply the view of some 30 States. ...

²⁹ Reynold & Tsimplis, *Shipowners’ Limitation of Liability* (Frederick MD: Aspen, 2012) at p. 35. Griggs *et al*, *Limitation of Liability for Maritime Claims 4th Ed* (London: Lloyd’s Press, 2005) at p. 13, while not assertively saying so, implies that master or crew members acting within the scope of their employment continue under LLMC ‘76/96 to be entitled to limit their liability as they were expressly entitled to do under the former 1957 Convention. See for comments concerning employees *JD Irving Limited v. Siemens Canada Limited* supplementary reasons 2016 FC 287, discussed immediately below, at paras 12-17

³⁰ 2016 FC 287

³¹ It is not clear whether this supplementary decision is challenged in the pending appeal A-56-16

³² 2016 FC 287, at paras 30, 31

³³ [1998] 2 Lloyd’s LR 454 (CA)

³⁴ Above, footnote 3

The preference for the 1976 Convention has no greater justification than for the 1957 regime. The 1976 Convention provides a greater degree of certainty, which they will perhaps welcome. But in terms of abstract justice, neither Convention is objectively more just than the other. Substantial justice will be done in Singapore.

One might update these remarks by noting, as stated at the outset of this paper, that between them the 1976 and 1996 versions of LLMC represent the laws of some 71 States – albeit that those include most (but not all) of the world’s important flag states. Many jurisdictions exist in which a plaintiff might initiate its damages action seeking, through the application of local substantive law, higher limitation amounts or perhaps no limitation of liability at all.

Alternatively, and perhaps more probably, there may be incentive for a defendant which considers itself entitled to limit liability to initiate assertive limitation proceedings, if necessary constituting a limitation fund, in a jurisdiction in which favourable (to that defendant) limitation of liability laws exist – subject always to the jurisdiction of the Court in which the attempt is made over the subject-matter of the claim and/or over the person(s) of the potential damages claimant(s) and, as will be seen, subject also to *forum non conveniens* considerations. Canada, as a LLMC '96 jurisdiction, may be in terms of amount a less favourable jurisdiction than one in which the lower 1976 amounts continue to apply, but still a jurisdiction in which the “virtually unbreakable” right of limitation (relative to that under the 1957 Convention) may be attractive.

The English caselaw is unsettled on the question of whether under the 1976 and 1996 versions of LLMC the person entitled to limitation has the right to pre-emptively initiate limitation proceedings in the jurisdiction of its choice. LLMC (both '76 and '96 texts) deals somewhat differently with situations in which a limitation fund is (Art. 11) or is not (Art. 10) constituted by the party claiming entitlement to limit liability.

Article 11(1) of LLMC '96, which provides for the constitution of a limitation fund, reads as follows:

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. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked. (underlinings added)

The interpretive issue is whether the assertive limitation proceeding in which the fund is proposed to be constituted is itself a sufficient “legal proceeding ... in respect of claims subject to limitation”, or whether such proceedings must be liability claims initiated by a plaintiff in the court of the appropriate State Party. If the latter is the correct interpretation, then it appears that the person asserting the right to limit liability must await to see in what (if any) State Party court it is sued before it may initiate its own assertive limitation proceeding, and constitute the limitation fund, in the court of that same State Party. There are, as noted, conflicting international decisions on this point.

One of the earliest English law cases to consider the point under the 1976 version of LLMC was *Caspian Basin v. Bouygues Offshore (No. 4)*³⁵. A barge owned by Bouygues, a French firm,

³⁵ [1997] 2 Lloyd’s LR 507 (QB Adm)

had been lost off Cape Town, South Africa while under tow by a tug owned by Caspian Basin, an Azerbaijani firm and chartered to Ultison Transport Contractors, a Bermudian firm. The TOWCON contract between Bouygues and Ultison provided for exclusive jurisdiction of English courts. Damages actions were commenced by barge owners in both South Africa and in England (the latter a precautionary measure because of a jurisdictional challenge to the South African litigation); in England tug charterers Ultison had initiated a limitation proceeding and constituted a limitation fund and also in England tug owners Caspian initiated a separate limitation proceeding. It is to be noted that service in England of the limitation actions was made on Bouygues by consent (thus apparently excluding any argument of lack of jurisdiction of the English court over that French party). The reported decision (one of many interlocutory contests in the various English proceedings) concerned barge owners' application to stay the English limitation proceedings, essentially on *forum non conveniens* grounds. At the time, English law included the 1976 version of LLMC; South African law included the 1957 limitation convention under which the limitation amount was substantially lower but the ability to avoid limitation, particularly on the facts of the case, was apparently considered more probable than in England. In the course of his lengthy decision Rix J (as he then was) said at p. 526:

The choice of forum for a limitation action belongs in principle to the party seeking to limit, not to the claimant³⁶

and further at p. 530

The Volvox Hollandia stands as a firm reminder ... that it is not for the liability claimant to choose the forum for limitation, but for the shipowner who seeks to limit.

On the merits of the *forum conveniens* issues in *Bouygues Offshore*, Rix J. noted that England was a "convenient and appropriate forum" because the barge owner had commenced its own damages litigation there; the barge owner had consented to be served in England with the limitation proceedings; and the tug owner was able to take advantage of the limitation fund that had been constituted in England by the barge charterer.

It must be noted that in *Bouygues Offshore* the barge owner had commenced its "precautionary" damages action in England, and thus no issue arose in that case whether Art. 11(1) of LLMC requires the prior commencement of other legal proceedings against the shipowner in the jurisdiction in which constitution of the limitation fund is sought. That issue has been addressed, albeit (it is submitted) inconclusively, in later English decisions.

In *ICL Shipping Limited v. Chin Tai Steel Enterprise Co Ltd (The "ICL VIKRAMAN")*³⁷, Colman J said at para 46:

Under Article 11 the entitlement of a shipowner to constitute a limitation fund is conditional upon "legal proceedings" having already been instituted against that person in the State Party in which he is to constitute the fund.

³⁶ Rix J had introduced these comments at p. 525 as reference to "basic facts and principles", and had referred as authority to *The Volvox Hollandia* [1988] 2 Lloyd's LR 361, a decision based on English law as it stood under the former 1957 Convention

³⁷ [2003] EWHC 2320 (Comm)

However on the facts of that case arbitration had been commenced in England and the Court concluded (para 56) that “legal proceedings” in Art. 11(1) included arbitration, and so the objection to the English limitation proceedings was unfounded.

In *Seismic Shipping Inc. v. Total E&P UK PLC*³⁸ the streamers of a seismic ship became entangled with a marker buoy on Total’s wellhead in the North Sea, displacing the buoy and damaging the wellhead. The shipowners initiated a limitation proceeding in England and constituted a fund by payment into court. A limitation decree was granted from which Total appealed, on grounds that Art. 11 permits assertive limitation of liability proceedings to be commenced only in a jurisdiction in which underlying legal proceedings (that is, the injured party’s claim for damages) have already been commenced. Although it is not clear which was first filed, Total had commenced damages proceedings in Texas arising out of this accident.

On the facts of the case, the Court of Appeal found in LLMC no restriction on a party’s right to initiate limitation proceedings in a court having personal jurisdiction over the damages claimant (here, Total, a UK corporation) against which limitation is sought and thus the limitation proceeding in England was permitted³⁹. On the wider question of whether “legal proceedings ... in respect of claims subject to limitation” means proceedings other than the assertive limitation proceeding itself, both Clarke LJ (para 20) and Rix LJ (para 63) found it unnecessary to make any decision.

Article 10(1), which permits reliance on the right of limitation without need to constitute a limitation fund, does not appear to engage this interpretive issue. That Article provides:

Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. However, a State Party may provide in its national law that, where an action is brought in its Courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or is constituted when the right to limit liability is invoked.

No judicial decision in any jurisdiction was found which considers the meaning of “invoke” in this context. Does it mean, pleaded by way of defense to an existing action or, asserted in a stand-alone legal proceeding, or both? Although Canada appears to have provided its own practical answer to this issue in *MLA* ss. 32 and 33, discussed immediately below, it is not known whether other State Party jurisdictions have similar legislation. In any event, and in any jurisdiction, a pre-emptive attempt to assert limitation rights will most probably be accompanied by constitution of a fund in the chosen jurisdiction. If the limitation proceeding is initiated in one of the places enumerated in the sub-clauses of Art. 13(2) and that place is within a State party, then release from arrest of ships or security is mandatory only if additionally the limitation fund is constituted. In other places, although the constitution of the fund *per se* does not necessarily disentitle damages claimants from proceeding with their claims in other jurisdictions, it is the constitution of the fund that empowers the court of a State party with discretion to order release of ships arrested or security given in that State party⁴⁰.

³⁸ [2005] EWCA 985

³⁹ *Ibid.*, at paras 15, 23

⁴⁰ LLMC '96 Art. 13(2). Note on this point that the Court of Appeal in *Seismic Shipping Inc. v. Total E&P PLC*, *supra*, suggests at para 14 that constitution of a fund “applies to bar actions” in the courts of other contracting States.

It is submitted that whatever residual uncertainty may continue in other jurisdictions under LLMC Art. 11(1) (for that matter also under LLMC Art 10(1)) Canada by its own statute has resolved those uncertainties in favour of the limitation claimant's right of choice. *MLA* s. 32(1) provides:

Where a claim is made or apprehended against a person in respect of liability that is limited by section 28, 29 or 30 or paragraph 1 of Article 6 or 7 of the Convention, that person may assert the right to limitation of liability in a defence filed, or by way of action or counterclaim for declaratory relief, in any court of competent jurisdiction in Canada. (underlinings added)

It is submitted that use of the word “apprehended” makes clear the intent of the Canadian Parliament that the claimant to the right of limitation need not await to be sued, in Canada or anywhere else, before its right to initiate a limitation action in Canada matures. It is submitted that this conclusion is reinforced by use of the same words “made or apprehended” in *MLA* s. 33(1), in the preamble text of which subsection it is clear that the powers of the Canadian Admiralty court there prescribed may be exercised notwithstanding the existence of proceedings “in relation to the same subject-matter” before some other court.

These provisions in the *MLA* were considered by Nadon JA in earlier interlocutory proceedings in the *Siemens Canada v. JD Irving* litigation:

On the one hand, section 2 of the *MLA* defines the “Admiralty Court” as being the Federal Court and confers upon that Court exclusive jurisdiction with respect to any matter pertaining to the constitution and distribution of a limitation fund under Articles 11 to 13 of the Convention (see: subsection 32(1) of the *MLA*). On the other hand, subsection 32(2) of the *MLA* provides that where a person may limit his liability pursuant to sections 28, 29 and 30 of the *MLA* or paragraph 1 of Articles 6 or 7 of the Convention, that person may assert his right to limit either by way of a defence filed to an action or by way of an action or counterclaim for declaratory relief in any court of competent jurisdiction in Canada. In other words, the *MLA* gives a shipowner the right to choose the forum in which he will assert his right to limit, irrespective of the forum in which the claimant has filed or may file his or her action for damages. In the present instance, both *Irving* and *MMC* are seeking to assert their right to limit their liability by way of an action for declaratory relief filed in the Federal Court.⁴¹ (underlining added)

Although the entitlement of a claimant to the right of limitation to initiate proceedings in Canada under *MLA* s. 32(2) does not appear to require that that claimant constitute a limitation fund (in other words, the right to initiate Canadian proceedings appears to apply to limitation proceedings brought under LLMC '96 Art. 10(1) as well as to those brought under LLMC '96 Art. 11(1)) there may well be practical advantages to the constitution of a fund in Canada, including engagement of the exclusive (as among Canadian courts) jurisdiction of the Federal Court under *MLA* s. 32(1), and the clear application of the broad powers of that Court assigned to that Court by *MLA* s. 33(1). Additionally, as noted above, constitution of the fund may somewhat enhance the ability of the shipowner to seek release from arrest in another jurisdiction.

Potentially practically restricting the limitation claimant's right to choose any forum it desires are the lettered sub-clauses of LLMC '96 Art. 13(2), which require release of an arrested ship or of security only if the fund has been constituted in one of the places there mentioned – and it

⁴¹ *Siemens Canada Limited v. J.D. Irving Limited*, 2012 FCA 225 at para 50. On its merits this decision dismissed an appeal from 2011 FC 791

appears that a fund constituted in one of those places only would be effective to achieve mandatory release only if that place is itself within the territory of a State party. In other places within the territory of a State party the local court has discretion, but apparently is not required, to release arrested ships or security. For Canadian supplementary provisions on these points see *MLA* s. 34.

7. Contractual Modification of Limitation Rights?

In *The CAPE BARI (Owners) v. Bahamas Oil Refining Company International Limited*⁴² a tanker entering a refinery facility struck and damaged a portion of the terminal. The master, prior to coming into the terminal, had executed a document titled “Conditions of Use” which included the agreement of the shipowner that if any damage is caused to the terminal facilities the vessel and the owner “shall hold [the refinery] harmless from and indemnified against any and all loss, damages, costs and expenses incurred by [the refinery] in connection therewith”. Bahamas law incorporated the 1976 version of LLMC – substantively the same as LLMC ’96 except for the lower amounts to which liability is limited. The Bahamian trial court disallowed the shipowner to limit its liability, deciding as a matter of freedom of contract that the shipowner could waive its limitation right and in this contract had done so. The Bahamas Court of Appeal overturned, holding that under the LLMC Convention the right of limitation was lost only as provided in Art. 4: that is, by the owners’ deliberate or reckless act. As there was in this case no allegation of such acts on the owners’ part, the owners remained entitled to limit their liability.

The decision of the Bahamas Court of Appeal has gone on further appeal to the Judicial Committee of the Privy Council, where the appeal was heard on February 23, 2016⁴³. One should watch to see what effect this decision, when issued, may have on maritime parties’ ability to waive limitation rights and perhaps, more broadly, to contractually allocate risks.

⁴² See <http://www.courtofappeal.org.bs/download/022038900.pdf>, Bahamas Court of Appeal May 22, 2014

⁴³ See www.jcpc.uk/cases/jcpc-2014-0114.html