Maritime Law Association of the United States

Report of the Advisory Committee on the Limitation of Liability Act

September 25, 2010

Following and in response to the Deepwater Horizon oil spill, the United States Congress quickly introduced legislation which would modify various components of United States maritime law. A number of the bills introduced included proposals to repeal or significantly modify the Shipowner's Limitation of Liability Act, 46 U.S. Code §§ 30501 – 30512.[1]

On August 25, 2010, Patrick J. Bonner of New York, President of the Maritime Law Association of the United States ("MLA"), appointed an Advisory Committee on the Limitation of Liability Act. The purpose of the Committee is to examine pending legislative proposals and to make recommendations to the MLA Board of Directors as to what position or positions the MLA should take with respect to proposed changes to the Shipowner's Limitation of Liability Act (referred to herein as the "Limitation Act" or "the Act"). The appointments by President Bonner, which include two past presidents of the MLA, were oriented to have balanced representation from client constituencies regularly represented by members of the MLA. The members of the Advisory Committee, and the client constituencies they regularly represent are:

Cargo Plaintiff	Raymond P. Hayden (New York)
Cargo Defendant	Chester D. Hooper (Boston)
Personal Injury Plaintiff	Paul M. Sterbcow (New Orleans)
Personal Injury Defendant	Gordon D. Schreck (Charleston)

President Bonner also appointed an academic member to the Committee, Professor Thomas J. Schoenbaum, Research Professor of Law, George Washington University, and author of the treatise, *Admiralty and Maritime Law* (West Group, 4th Ed. 2004). C. Kent Roberts (Portland OR) was appointed as Facilitator/Recorder to the Committee.

[1] See, Fairness in Maritime Liability Act R.5503 Securing Protections for the Injured from Limitations on Liability Act (SPILL Act), passed in the U.S. House in early July. Other bills that have been introduced addressing or potentially impacting Limitation of Liability include the Clean Energy Jobs and Oil Company Accountability Act of 2010, S.3663 introduced in the U. S. Senate in July, 2010 and includes provisions previously proposed in 12 other bills: H.R.5019, H.R.5716, S.3466, S.3472, S.3495, S.3509, S.3511, S.3515, S.3516, S.3597, S.3600, S.3643. See also S.3516 (Report 111-236) Outer Continental Shelf Reform Act of 2010, S.3516 Environmental Crimes Enforcement Act of 2010, S.3466 Fairness in Admiralty and Maritime Law Act. The legislation pending in the U.S. Senate which is the focus of discussion in this report is S.3755 Fairness in Admiralty and Maritime Law Act introduced by Senator John Rockefeller (D-WV) on August 5, 2010. See also S.3600 Fairness in Maritime Liability Act.

The Committee held a series of conference calls to discuss the Limitation Act, the need to update that Act, and the various proposals for changes or repeal. While there was some discussion of proposals calling for outright repeal of the Limitation Act, the Committee's discussion focused on S.3755, a portion of which proposes to modify the Act. Other portions of S.3755 propose amendments to maritime law respecting punitive damages, amendments to the Death on High Seas Act, 46 U.S.C. Chapter 303, and amendments to the Jones Act, at 46 U.S.C. § 30104, respecting measure of damages in personal injury or death cases. These legislative proposals were not considered by the Committee; rather, the Committee limited its deliberations to the portion of S.3755 that would modify the Limitation Act.

S.3755 would exclude from the scope of the Limitation Act claims for wages[2] , personal injury and wrongful death, and also claims relating to oil drilling or exploration or the discharge of oil from a vessel or offshore facility. This component of S.3755 has been described as the present position of the plaintiff's personal injury bar, as represented by the American Attorneys for Justice ("AAJ") on the Limitation Act. It is this proposal that was the primary point of contention in discussions of the Committee. S.3755 also provides that fishing vessels are an exception to this exclusion, meaning that charter fishing vessels, commercial fishing vessels and commercial fishing support vessels such as tenders and processing vessels, will still be covered by the Limitation Act. This exception was not requested by the AAJ. After considerable deliberation, the Committee was unable to reach a consensus position over the issue of inclusion or exclusion of claims for wages, personal injury or wrongful death from the scope of the Limitation Act. Accordingly, the Committee issues a majority report and a minority report.

Majority Report

Congress enacted the Limitation Act in 1851 in response to the case of *The Lexington*, 47 U.S.(6-HOW.) 344 (1848), in which the Supreme Court held a shipowner fully liable for the loss of a shipment of money in specie, despite a contractual provision limiting liability. Congress passed the Limitation Act with a primary purpose to protect American shipowners against losing competitive advantage to foreign shipping, since at that time, most shipping nations provided a legal mechanism whereby shipowners could limit their liability. The majority of the Committee feels that this purpose of providing the global economic competitiveness of America's maritime industry remains a valid policy supporting the Limitation Act. Almost all of the important shipping nations in the world are parties to international conventions providing for limitation of shipowner liability, primarily the International Convention on Limitation of Liability for Maritime Claims (1976), which is discussed below. Notwithstanding criticism of the Limitation Act, limitation of shipowner liability remains a standard and accepted principle in world shipping

The Committee majority felt that outright repeal of the entire Limitation Act would be an unnecessary over-reaction to the Deepwater Horizon catastrophe. There was little criticism within the Committee for application of the Limitation Act to claims involving cargo damage or collision. As for cargo damage, the Limitation Act fits within domestic and international regimes dealing with limitation of liability respecting cargo damage and loss, such as the

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[2] Claims for wages already appear to be excluded from the Limitation Act, 46 U.S. Code §§ 30505(c).

Carriage of Goods by Sea Act applicable to bill of lading cargo shipments to and from the United States. Shipowners, their insurers and their customers are aware of limitations of liability applicable to cargo service, including the overriding, potential limitation of a shipowner's liability under the Limitation Act. Prices for shipowners' services and the insurance rates they pay factor these liability regimes, including the Limitation Act, into the equation.

For all types of maritime liability claims, cargo, collision and also personal injury, a majority of the Committee felt that the Limitation Act's provision for concursus was a crucial benefit which should be preserved. The concursus provisions of the Limitation Act require all claims arising from a maritime casualty to be brought in a single admiralty forum for adjudication. Consolidation of claims in a single judicial venue through the concursus procedural device benefits both claimants and responsible parties by facilitating more timely resolution of claims and avoiding inequitable treatment between claimants.

The criticism of the Limitation Act discussed within the Committee focused on the Act's application to claims for personal injury and wrongful death. Critics of limitation complain that the Act is outmoded. Yet the legislative proposal, S.3755, does not update the Limitation Act, it simply removes classes of claims from its application. Simply removing personal injury and wrongful death from the scope of the Limitation Act does not change the availability to shipowners of enterprise liability limitation through incorporation or similar enterprise limited liability structures. Instead, this treatment puts domestic, U.S. vessel operators, with fleets and facilities held in a domestic operating corporation, at a distinct disadvantage to the vessel calling in the United States that is owned by a single purpose, offshore corporation. Excluding personal injury and death from the Limitation Act may encourage domestic operators to increase reliance on enterprise liability protection, such as single ship corporations. This encouragement to rely on enterprise liability protection promotes inefficiency without providing increased protection or remedies for injured or decedent claimants.[3] Nor does eliminating limitation for personal injury and death claims solve the problem of a vessel owner who is found liable having inadequate assets or insurance to pay the judgments obtained by claimants. Purchasing liability insurance, particularly by operators of smaller and lower value vessels, is frequently an exercise in balancing the magnitude of risks being insured against and the cost of that insurance. Increasing risk of unlimited liability does nothing to change the economics of the vessel operator's operation in a way that permits the vessel operator to purchase more insurance within existing and often tight operating budgets and revenues.[4]

The loss of concursus as to personal injury and death claims has the potential for disparate impact on domestic vessel operators who conduct business in multiple states, when

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[3] See, Graydon S. Staring, *The Roots and False Aspirations of Ship Owners Limitation of Liability*, Journal of Maritime Law & Commerce, Vol. 37, No. 3, p. 315, 329-330, July, 2008.

[4] Following the 1998 sinking in Oregon of a charter fishing boat resulting in four deaths and several injuries, limitation of liability was filed to obtain concursus, and the insurer tendered the liability insurance proceeds, $100,000, to the court for equitable division. The case prompted the Oregon legislature to examine minimum insurance that a charter fishing boat operator should carry against liability to passengers. After examining the impact of insurance cost on the charter fishing industry, costs to the public and protection of passengers, the Oregon legislature set the minimum liability insurance requirement for ocean charter vessels licensed by the state at $300,000. O.R.S. 830.440.

compared to a foreign vessel operator making a single call at a U.S. port. In multiple claimant cases, the domestic operator could be forced to litigate competing claims in multiple jurisdictions, while the claims against a foreign operator would more typically be limited to the place where the casualty occurred or where the foreign vessel is found.

Absence of concursus and the risk of multi-jurisdiction litigation arising from a marine casualty raises the potential for inconsistent application of law between those jurisdictions. Likewise, judicial hostility to some of the antiquated features of the Limitation Act has resulted in strained interpretation of the Act or its jurisdictional underpinnings, with inconsistent legal interpretations and results. Both of these phenomena are anathema to a core principle of the MLA, the promotion of uniformity in the maritime law of the United States.

For the majority of the Committee, it was felt that the Limitation Act could be improved through updating, but simply eliminating personal injury and wrongful death from coverage within the Act highlighted the disparate treatment that this would impose on domestic vessel operators compared to foreign vessels calling on U.S. ports. The difficulty in reaching consensus on treatment of personal injury and wrongful death claims in the context of limitation caused the majority of the Committee to revisit the 1976 Convention on Limitation of Liability for Maritime Claims (the "Convention")[5] as adopted by the majority of the maritime shipping world, and consider how this Convention (with 1996 Protocol amendments) [6] would work if adopted by the United States.

The Convention provides for limitation of shipowner liability but based only on the establishment by the shipowner of a guaranteed fund in amounts that are much larger than might result under the Limitation Act following a casualty that left little vessel value. Under the Convention, funding the liability cap is a condition to granting limitation. Since the Convention has been adopted by most of the rest of the world's shipping nations, the Committee majority questioned if it is economically viable and advisable to remove such major claim components from limitation in the U.S., and to expose U.S. shipping to unlimited liabilities, putting U.S. shipping at a disadvantage in the international shipping world. Excluding personal injury and death claims from the Limitation Act might also have impacts in insurance markets, again with a competitive disadvantage in the potential for added costs to U.S. vessel owners.

Given the issue of competitiveness for U.S. shipping interests, the Committee majority recommends that the MLA ask Congress to examine and consider adopting the Convention, with the 1996 amending Protocols Such a move would reduce uncertainty in application of limitation of liability, make larger, guaranteed limitation funds available for the benefit of deserving claimants, and promote uniform application of law.

At this juncture, to the Committee's knowledge no interest group has asked Congress to step back and consider the Limitation Act in the context of international limitation conventions and compare what benefits could flow from adopting the approach taken by the rest of the maritime trading world, rather than fundamentally changing the existing Limitation Act in the

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[5] See Convention text at http://www.admiraltylawguide.com/conven/limitation1976.html.
[6] See 1996 Protocols text at http://www.admiraltylawguide.com/conven/protolimitation1996.html.

United States. There are multiple features of the Convention that are distinct from the U.S. Limitation Act:

- The Convention is a means to force a limitation fund even where there is no post casualty value to the vessel. As a condition to right of limitation, the shipowner must actually be in a position to fund the limitation pool up to the amount of the cap, even though the remaining vessel value may be zero.

- Right to limitation under the Limitation Act turns on privity and knowledge of the owner in the faults that gave rise to the accident. This concept has been eliminated from the Convention. Limitation under the Convention can only be broken upon proof of intent to cause the loss or reckless conduct with actual knowledge that the event that occurred would probably be caused by the reckless conduct. This change would eliminate the need to prove owner privity in the vast majority of cases, allowing claimants to focus on establishing ordinary fault and valuation of damages.

- Because of the requirement to meet a specific fund as a condition of limitation, the Convention discourages shipowners from attempting to avoid all liability with a one-ship company.

- Because the Convention eliminates the legal battle over the owner's privity or fault in the casualty in order to "break limitation," vessel owners have a greater incentive to insure against liabilities at least to the amount of the proscribed limitation fund, thus potentially increasing the amount of compensation available to deserving claimants as well as assuring that the compensation awarded will actually be paid.

- Under the Convention and Article 3 of the 1996 Protocols, personal injury and death claims are treated as a separate fund so that the fund available to personal injury/death claimants is not diluted by claims relating to collision or cargo damage arising out of a casualty.

- The Convention preserves concursus for the timely presentation of claims and equitable treatment of claimants in a multiple claim case. The concursus process prevents competing rushes to obtain a court judgment by multiple claimants, which can lead to inequitable results.

- The limitation fund under the Convention and Protocols is set by reference to Units of Account, which tie to Special Drawing Rights, an international monetary unit that varies with monetary exchanges of the dollar and other currencies as periodically set by the International Monetary Fund.

- The Convention and Protocol would not limit the liability of the owners of floating drilling rigs such as the DEEPWATER HORIZON.

- Limitations amounts for personal injury and death claims are scheduled by reference to gross international tonnage of vessels. Based on the Protocols schedule of liability

limits, the following are examples of limitation funds under the ' Convention and Protocols, if the Convention applied:

1. DEEPWATER HORIZON –If the Convention did apply to floating drilling rigs, which it does not, the Special Drawing Rights ("SDR") rate at the time of the casualty was $1.47. Based on the reported gross tonnage of the DEEPWATER HORIZON, 32,588 gt, the total limitation fund for personal injury and death based on the schedule calculations in the Protocols would be $38,000,218.

2. For small ships, work boats and other vessels less than 2,000 gt (which would necessarily include recreational vessels and personal watercraft), the limitation fund for death and personal injury is 2,000,000 SDR. Using the SDR rate at September 8, 2010 of $1.51, this would result in a limitation fund for small vessels of $3,020,000.

3. For a 70,000 ton cargo vessel, the limitation fund at the SDR rate of $1.51 is $64,024,000:

First 2,000 tons = 2,000,000 SDR
2,001 to 30,000 tons, 800 SDR per ton = 22,400,000
30,001 to 70,000 tons, 600 SDR per ton = 18,000,000
Total 42,400,000 SDR x $1.51 = $64,024,000.

4. For a 140,000 ton tank ship or container ship, the limitation fund for personal injury and death using a SDR rate of $1.51 is $106,304,000:

First 2,000 tons = 2,000,000 SDR
2,001 to 30,000 tons, 800 SDR per ton = 22,400,000
30,001 to 70,000 tons, 600 SDR per ton = 18,000,000
excess of 70,000 tons @ 400 SDR per ton: 70,000 tons x 400 SDR) = 28,000,000
Total 70,400,000 SDR x $1.51 = $106, 304,000.

5. Passenger vessels – Article 4 of the 1996 Protocols provides a separate calculation for loss of life or personal injury to passengers at 175,000 SDR multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate. Accordingly, using the September 8, 2010 SDR rate for purposes of example:

a) Fishing charter vessel certificated for 12 passengers: 12 x 175,000 SDR = 2,100,000 SDR x $1.51 = $3,171,000 limitation fund;

b) Harbor cruise passenger ship certificated to 149 passengers: 149 x 175,000 SDR = 26,075,000 SDR x $1.51 = $39,373,250 limitation fund;

c) Large passenger vessel certificated to 3,100 passengers: 3,100 x 175,000 SDR = 542,500,000 SDR x $1.51 = $819,175,000 limitation fund.

The majority of the world's shipping nations have rejected the concept embedded in the U.S. Limitation Act of allowing limitation of liability to the value of the vessel after the casualty, which could be zero, plus the freight earned on the casualty voyage. Instead, the world's shipping nations have adopted the policy of allowing limitation of liability but only if a claims fund up to scheduled limits is made available to claimants.

According to Article 15 of the Convention, the Convention does not apply to floating platforms constructed for the purpose of exploring or extracting natural resources of the sea bed or the sea bed subsoil, i.e., floating oil drilling platforms. Article 15, Part 4 also permits a signatory state to exclude drilling ships from the Convention by adopting domestic legislation setting a higher limit of liability than that provided for in the Convention.

Article 15 permits a State Party to the Convention to provide a different system of limitation of liability for vessels intended for navigation only on inland waters, and for vessels less than 300 gross tons. While this provision would give the United States the option of giving inland and smaller sized vessels, which could include many fishing vessels and recreational vessels, different treatment than larger vessels covered by the Convention, for purposes of uniform application of the law, as well as simplicity in its application, the majority of the Committee felt that these classes of vessels should be given the same treatment as other vessels covered by the Convention in accordance with their tonnage size.

Finally, under Article 15, Part 3, a State Party may also apply by domestic legislation a different system of limitation of liability for claims arising in cases in which only citizens of that State Party are involved. The majority of the Committee felt, however, that this provision should not be used to set different or higher limits of liability in domestic casualties in a way that would provide specific advantages to the liability exposure of non-U.S. citizens operating vessels calling in U.S. waters.

Conclusion and Recommendation of the Committee Majority

A majority of the Committee recommends that the MLA ask Congress to consider the adoption of the Convention with 1996 Protocols in a manner that will have consistent application for both domestic and non-domestic vessels operating in U.S. waters. The goal of this examination and potential adoption of the Convention should be to maintain consistent treatment of limitation of liability across different sectors of the vessel operating community. In addition to considerations of international comity, and the benefits of extrajurisdictional application, adoption of the Convention would promote uniformity of the maritime law in future limitation of liability situations, avoid disparate treatment of claimants, simplify procedural aspects of limitation, and minimize the possibility of inconsistent and conflicting court rulings and application of a limitation regime under the Convention.

Minority Report

The position of the Committee minority can be very simply summarized, as it is consistent with and is reflected in the key components on limitation as stated in S.3755. As applied to claims for personal injury and death, the Limitation Act is outdated and no longer necessary. The original motivations for the Limitation Act have been rendered obsolete with the availability of incorporation, insurance and other devices to protect shipowners against major disasters. Given modern communications and management involvement in the day-to-day operations of vessels, vessel owners can rarely demonstrate absence of privity, making limitation an unnecessary roadblock to compensation victims of maritime casualties. Vessel owners should not have a right to limit their exposure to the full measure of damages caused in a marine casualty any more than other business owners. There is no principled reason why the owner of the Deepwater Horizon, or any other modern vessel owner/operator, operating with constant realtime communication with shoreside personnel, should be allowed the opportunity to limit its liability to dead and injured seamen. Technology mitigates against this. Management retains control over vessel operations except in the rarest of cases.

While the Limitation Act has a low minimum fund for personal injury and death claims at $420 per gross ton, 46 U.S. Code §§ 30506(b), this fund amount is woefully inadequate in many cases and by terms of the Limitation Act is inconsistent in its application. See 46 U.S. Code §§ 30506(a). There is no rationale tied to modern vessel operations and management which supports the concept of a damage cap in maritime casualties.

The Committee minority opposes the concept of concursus remaining in place for personal injury and death claims. Victims of maritime casualties should have their choice of courts in which to seek compensation, and should not be compelled into federal court where a state court with proper jurisdiction is the forum preferred by the claimant.

The Committee minority has taken no position on consideration of the Convention for limitation of liability because the position of the maritime personal injury and death claimants is clearly stated in the amendments to the Limitation Act proposed in S.3755. The Committee minority would oppose consideration of the Convention if that consideration were to substitute for passage and adoption of S.3755 calling for exclusion of personal injury and death cases from the Limitation Act.

Minority Conclusion and Recommendation

The Committee minority recommends that the Maritime Law Association state its support for S.3755 so as to exclude wages, personal injury and death claims from the Limitation Act, while leaving other claims for cargo loss, collision damage and the like subject to the Limitation Act.

For the Majority Report:

Raymond P. Hayden (New York)
Chester D. Hooper (Boston)
Gordon D. Schreck (Charleston)
Professor Thomas J. Schoenbaum, (Washington DC)

For the Minority Report:

Paul M. Sterbcow (New Orleans)

Respectfully submitted September 25, 2010

By: C. Kent Roberts (Portland OR)
Facilitator/Reporter