

## ITALIAN MARITIME LAW ASSOCIATION

### Responses to the Questionnaire on Charterers Right to Limit Liability

Questions:

1. Have the Court and arbitrators in your jurisdiction considered whether a charterer has a right to limit liability when faced by an indemnity claim? If so, with what result? Have any of these decisions been at Appellate level?

*Italy is not a party to the LLMC Convention. The Italian limitation system differs significantly from that of both the 1957 and the 1976 Conventions and grants the benefit of limitation only to the operator (armatore) of the ship. However it is worth mentioning that whilst Italian Courts would apply Italian law as to issues of procedure, the substantial issues would be governed by the law of the ship's flag. Italian Courts would therefore apply the LLMC Convention if the ship flies the flag of a State party and the accident subject to limitation has occurred in the Italian jurisdiction. To our knowledge the Italian Courts have applied the 1976 LLMC Convention in one occasion (Tribunal of Sassari 22 April 2004, The "Panam Serena", Diritto dei Trasporti 2006, 559) where limitation of liability was invoked by the owner of a ship flying the Bahamas flag. In the matter of the "Panam Serena" it was not considered whether a charterer has a right to limit liability as indemnity claims were brought only against the owner of the ship.*

2. Have there been any local regulations, amendments, enacting statues or other forms of direct or delegated legislation which have addressed the issue of a charterers' right to limit?

*No. In any event this would be a matter for the legislator only*

3. Is it desirable that a charterer should be permitted to limit when faced with an indemnity claim and if so, should his right be restricted to certain types of claim only? In particular, should a charterer have the right to limit liability in relation to claims brought by the owner?

*If our understanding is correct, this question and the subsequent ones are not related to the LLMC Convention but are de iure condendo. By "indemnity claim" (or recourse action) we assume is meant a claim of e.g. the owner against the charterer in respect of the settlement by the owner of claims brought against him by third parties, such as the first three claims brought by the owners of the "Aegean Sea" against the charterers.*

*This is actually the more specific question that has been asked in the second sentence. The answer to this question presupposes an affirmative answer to Question 4. Since we believe that this should be the case, we shall attempt to answer this question 3, which indeed has raised differing views in our Association. The prevailing view is that limitation in respect of an indemnity claim is not justified because, a) if the claim against the owner was subject to limitation, then the indemnity claim would be brought in respect of the limitation fund; and, b) if the claim against the owner was not subject to limitation, there is no reason why the charterer should enjoy a benefit the owner did not have.*

4. In your view, bearing in mind the historical background which gave rise to an owners' right to limit, should such a right now be extended to charterers in order to reflect modern trade usage and the increasingly important role played by charterers and liner operators?

*Since the 1924 Limitation Convention the charterer has enjoyed the benefit of limitation. In the 1924 Convention reference was made to "armateur non propriétaire" and to the "affrèteur principal"(article 10); in the 1957 Limitation Convention (article 6(2)) and in the 1976 LLMC Convention (article 1 (2) reference is made to the "charterer, manager and operator". In view of this, we assume that this question aims at seeking an opinion on whether the charterer should enjoy the benefit of limitation in respect of claims brought by the owner, as in the case of the "Aegean Sea" in respect of the first three claims and in that of the "CMA Djakarta". As said in the reply to question 1), Italian law grants the benefit of limitation only to the operator of the ship. Pursuant to art. 275 code of navigation the operator of a ship is entitled to limit his liability in respect of obligations assumed in the occasion and for the needs of a voyage and of the obligations arisen out of facts occurred or acts performed during the voyage, provided the operator did not act with gross negligence or wilful misconduct. Italian law further provides that in order to limit liability the operator of a ship must establish a limitation fund by way of actual payment of a sum into Court. The amount of the limitation fund is equal to two-fifths of the sound value of the ship together with the ship's earnings at the end of the voyage. If the value of the ship at the time when the limitation is applied for is lower than one-fifth of the sound value, then the limitation fund is equal to one-fifth. The sound value is, pursuant to art. 622 code of navigation, the insured value. If the actual value of the ship at the end of the voyage is above two-fifths of the insured value the limit is two-fifths of such insured value. Bearing in mind the historical background which gave rise to the owner's right to limit, and also having*

*in mind that the Italian limitation system existing so far is still strictly linked to the ships' value and therefore to the ancient system of the "abandonment", we believe that the Italian approach should be rather conservative for the time being, although times are changing and the role of charterers and liner operators can not be denied or undervalued. We therefore are of the view that justice and fairness should require an affirmative answer to the question, but within the limits of similar claims: for example, while the owner can enjoy limitation in respect of claims for loss or damage caused by unseaworthiness, the charterer should enjoy limitation in respect of claims for loss or damage caused by dangerous goods. The charterer instead should not be able to enjoy limitation in respect of claims for freight and demurrage.*

5. In your view does what appears to be the current uncertainty in the law create an uneven playing field as between an owner and a charterer and further does the current position expose a charterer to the potential of bearing an uninsurable risk or at least one that can only be covered at an extremely high and prejudicial cost?

*The Italian Market provides very few Charterers Liability coverage (that are actually transferred "in fronting" to the London Market) and, to our knowledge, coverage never gave rise to unsolvable problems. That said, we believe that the solution, whatever it may be, should be in principle the same with respect to any kind of charter.*

6. Do your answers to the questions above relate solely to time charterers or should additional protection also be available for slot charterers and other types of sub-charterer.

*We believe that a difference should be drawn between global limitation and limitation in respect of carriage of goods and passengers. The dividing line between charter parties and contracts of carriage is very thin, since actually many types of charter parties (e.g. the voyage charters) are actually contracts of carriage. But this does not entail that the principle of justice and fairness should not apply also in respect of contracts of carriage. Reference may be made in this respect to the present UNCITRAL Draft Convention, in which it has been accepted that if liability for delay is governed by the Convention and liability of the carrier is limited, liability of the shipper should equally be limited.*

7. Depending on your answers to the questions above, should the LLMC '76 be amended to reflect that position or should there potentially be a new convention giving the right to a charterer to limit liability?

*Charterers have already the right to limit liability. The question, therefore, is to make sure that they have a right to limit liability in respect of claims brought against them by the owner. We believe that first a careful analysis should be made of the LLMC Convention, in order to establish whether or not such right already exists. With all due respect, we believe that the facts that there have been conflicting views in the English Courts does not justify a decision to amend an existing Convention or to prepare a new convention.*