



## Probing the limits of the maritime regime

At the Lloyd's Maritime Academy seminar it was suggested that advances in maritime technologies and communications have laid bare the weakness in the existing set-up, writes Sandra Speares

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ADVANCES in maritime technologies and in communications "have exposed the limitation of the existing liability regime that is based on the notions of due diligence and privity", according to Haris Zografakis of law firm Middleton Potts.

"Are we reaching the limits of the existing maritime liability regime?" Mr Zografakis asked at a maritime law seminar organised by Lloyd's Maritime Academy in London last week.

He added that it was tempting to remark that "the letter and the spirit of the ISM Code bear more than a passing resemblance to another United Nations document, the Hamburg Rules".

Under article 5 of the Hamburg Rules "the carrier is liable for loss resulting from loss of or damage to the goods ... unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

In considering shipowners' civil liability, Philip Roche of Norton Rose told delegates: "The current limitation regime is in something of a state of flux." The revised Athens Convention covering passenger liability has been much debated over the last few years and "the appearance of the revised convention has done nothing to quell the discussion".

Concerns by P&I Clubs have centred on whether owners of cargoships would want to face the huge claims that the clubs might face if a large cruiseship was lost under the new Athens limits.

Mr Roche said that the move towards strict liability up to certain limits and the idea of compulsory insurance with direct access to insurers for claims were not new developments, having been incorporated in the 1969 Civil Liability Convention and others like the Hazardous and Noxious Substances Convention.

"That this should be extended to the Athens Convention is an interesting development as many national law associations believed the fault-based system was working well.

"However, for pollution and passengers at least, it seems that the cost of the shipowner's continued right to limit his liability will be the imposition of strict liability regimes."

According to Colin de la Rue of Ince & Co, while the Bunker Pollution Convention has similarity with the Civil Liability Convention, there are some important differences.

One of these is that, unlike the CLC convention, the bunker convention does not contain channelling provisions which exclude claims against parties other than the owner.

Also the bunker convention does not have its own limitation regime but "cross-refers to existing laws governing limitation of liability for maritime claims which in most jurisdictions are based on the 1976 London Limitation Convention".

Mr de la Rue said that two issues had been raised by the convention. Firstly, the bunker convention did not provide for a fund dedicated to pollution claims so claims would have to come from the same pot as non-pollution ones. States have been urged to ratify the 1996 protocol to the 1976 Convention for Limitation of Liability for Maritime Claims.

The second point, Mr de la Rue said, "is that this arrangement does not make the shipowner's right of limitation for bunker spills as clear as the conference evidently intended. The convention does stipulate that the insurer's direct liability is always capped at the LLMC limit, but it does not confer any right on the shipowner to limit liability in the same way."

The convention, Mr de la Rue explained, simply said that if the owner was entitled to limit liability under any applicable national or international laws, that right would be unaffected.

"Unfortunately, a complication lies in the fact that the 1976 convention does not expressly grant a right of limitation for pollution claims."

While typical claims for pollution, such as for property damage, fell within the 1976 convention, Mr de la Rue said, others, like claims for eco-nomic loss by fishermen or hoteliers, were less clear cut.

He urged national administrations to consider important points like responder immunity and limitation while enacting the bunker convention in their domestic legislation.

A proposal has been put forward that shipowners be denied the right to limit liability in a wider range of cases involving negligence or gross negligence, Mr de la Rue continued.

He said: "It would be rare for a denial of limitation to bring any financial advantage to the claimants unless, perhaps, the shipowner is the sole source of compensation." He recommended ratifying existing conventions and the new supplementary fund protocol as the best means of claimants getting compensation.

Mr de la Rue said that as far as oil spills from ships were concerned "there is a risk of two problems coming together". The first was that the "notion of gross negligence is imprecise and subjective". The second problem is the climate of opinion after a spill.

Major transport accidents more commonly resulted from a combination of causes rather than from the actions of one person or entity, he said. "However the complexities of shipping are not well known to the man on the street. Public outrage at the effect of oil spills, whilst perfectly understandable in itself, tends to breed false notions of commensurate culpability on the part of those identified with the ship. This tends to result in demands for retribution, and pressure on courts to convict, which is out of proportion to any wrongdoing."

The effect of both these problems, he said, was that "the test of liability can be circular and misleading.

"The question of whether the defendant is punished is said to depend on whether he has been grossly negligent but this itself depends on whether it is felt that he ought to be punished."

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