Salvage Law  Limitation of Shipowner’s Liability

By Jim Shirley

In the wake of the Deepwater Horizon casualty there have been a number of proposals put before Congress for new legislation or amendments to existing legislation affecting vessel owners and operators. Many of these relate to liability for damages sustained as a result of the casualty or the oil spill that followed. Perhaps the oldest legislation to which amendment and / or appeal is being sought is a statute passed in 1851 to provide vessel owners with limited liability in respect claims brought against them in certain circumstances involving, amongst other things, marine casualties. This statute is unique to the United States, but the concept of allowing shipowners the right to limit their liability in casualty matters is not. Many countries, but not the U.S., are parties to an international convention that allows for such limitation, though on terms quite different from those in the U.S. statute. Indeed, according to its legislative history, the U.S. limitation act was enacted to encourage investment in U.S. shipping by putting the United States on a par with other countries that already had such legislation.

U.S. courts have held that limitation of a shipowner’s liability is a procedural issue, and therefore the law of the forum governs. That is, if the matter is brought before a U.S. court, that court will apply U.S. law, i.e. the 1851 statute, to the issue of limitation. There may at the same time be legal issues in the case that the courts have held to be substantive rather than procedural, and to those the court hearing the case may apply the law of some other nation, e.g. the law of the nation where the casualty occurred or that of the flag(s) of the vessel(s) involved in the casualty. Therefore, for the purposes of this article, only the U.S. statute and the applicable civil procedural rules will be discussed. Even so, limitation of shipowners’ liability is a complex and heavily nuanced subject. Space constraints allow no more than a brief overview of the subject in this column.

Under U.S. law, there are two ways in which a shipowner involved in a marine casualty may raise the limitation issue. It may raise limitation as a defense in a case brought against it for damages arising out of the casualty, or it may initiate a limitation action on its own. If there will likely be more than a single claimant, especially if those claimants might bring suit in different venues, then it will usually be to the advantage of the vessel owner to initiate a limitation proceeding. This may be commenced any time after the casualty up to six months from the date of receipt of the first written claim. The vessel owner may be encouraged to file early in order to exercise its choice of the several venues permitted by the rules where the matter may be heard. Once the limitation complaint has been filed, all claims against the vessel or its owner arising out of that casualty must be filed in or transferred to that action, creating what is called a concursus of the claims. The court will in fact enjoin claims from being filed elsewhere.

A limitation action differs from a typical legal action in several respects in addition to the injunction and concursus. It involves more documents being filed along with the complaint, a posting of security in the amount of the limitation fund, notice being given to all prospective claimants, and the “plaintiff” being the party who will defend against the claims asserted. The limitation fund is comprised of the owner’s interest in the vessel at the end of the casualty voyage plus freight (or charter hire) earned. The vessel itself may be deposited with the court, but the owner will more likely post a bond or a P&I Club letter for its value. Its value will be assessed according to expert appraisers, reduced by the amount it will cost to repair the vessel. Insurance proceeds received by the owner, either for repair of the vessel or for its loss, are not included in the limitation fund. If the vessel is a total loss, the limitation fund may consist only of the freight earned plus net scrap value, if any. An exception applies in cases involving personal injury or death arising out of casualties on seagoing vessels. For those claims, if the limitation fund of the vessel will be insufficient to pay all losses in full, then the portion applicable to personal injury or death claims will be increased to an amount equal to $420 per gross ton of the vessel.

Once the complaint has been filed, prospective claimants will be allowed an amount of time set by the court to file their claims, following which they will have to make a more rigorous showing to be allowed to file, including a showing that their late-filed claims will not prejudice the timely filed claims. After all the claimants have answered, the matter will proceed in many respects like other litigated matters. That is, the parties will engage in evidentiary disclosure and discovery practice, motion practice seeking to limit the issues or for other purposes, engagement and discovery of expert witnesses, and then on through the trial itself, and perhaps on to appeal(s) in whole or in part of the trial court’s decision. However, there are some differences. The limitation complaint will in fact be entitled a Complaint for Exoneration From or Limitation of Liability. That is because the initial trial burden will be on the claimants to prove there was either an unseaworthy condition or negligence on the part of the shipowner’s vessel that caused the losses for which compensation is being sought. If that is not proved, then the shipowner will be exonerated from liability. If, on the other hand, the claimants meet that burden, the burden shifts to the shipowner to prove it lacked “privity or knowledge” in respect of the
unseaworthy condition or the negligence of the vessel. In the case of a corporate owner, except for liability for personal injury or death, that privity or knowledge must exist at a high enough level in the organization to reach firm management. In the case of liability for personal injury or death on a seagoing vessel, the privity or knowledge of the Master of the vessel or the superintendent or managing agent at or prior to the commencement of the voyage will suffice.

If the vessel owner is found entitled to limit his liability, the limitation fund will be apportioned amongst the claimants proportionately to their claims, with the proportion due personal injury and/or death claimants, if any, being increased as described above from other resources of the owner. If the vessel owner is found not entitled to limitation, it will be required to pay the proved damages as awarded by the court.

In the U.S. the only parties that may be entitled to limit their liability pursuant to the limitation statute are the owner or bareboat charterer (owner pro hac vice) of the vessel. Also, not all claims are subject to limitation. The personal contract doctrine excludes from limitation claims arising under contracts in which the vessel owner has undertaken a personal commitment, e.g. most charter parties. That is why one will often see in towing contracts a disclaimer that the contract is a charter of the towing vessel or a personal contract. Also, pollution claims under the Oil Pollution Act of 1990 are not subject to the limitation statute, but rather to the separate limitation provisions set out in OPA 90 itself.

If the 1851 statute were to be repealed, many maritime law practitioners would be in favor of the U.S. ratifying the 1976 Limitation Convention to which most modern seafaring nations subscribe. That would provide for broader limitation coverage, while at the same time establishing substantial limitation funds based on the vessel's tonnage that is not dependent on its post-casualty value. That would put the U.S. back on a par with other modern maritime nations.

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