Limitation of Liability: Is it needed any more and, if so, for what reasons?

Contents

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1. Introduction

A recent Court of Appeal case, The Kapitan Petko Vovoida[1], lead to an article in Lloyds List titled:

"Hague Rules clause ruling could cut $800,000 claim for cargo to £1.70"[2]

The background to the case was that the Bulgarian vessel Kapitan Petko Vovoida was carrying 26 excavators on deck, in breach of contract, from Korea to Turkey between September and November 2000. Eight of the excavators were lost overboard during a storm and the rest suffered minor damage.

The Hague rules, which were incorporated into the contract of carriage by the bill of lading, meant that the ship owner and the charterer could limit their liability to either 100,000 Turkish Lira (5p) or alternatively £100 per lost or damaged excavator. Either of which would be greatly below the true value of the cargo.

Few people would, on the face of this result, suggest that it was a just or fair result for cargo interests (the cargo owners or receivers). It certainly does not sit well with the principle of restitutio in integrum (i.e. once the damage has been assessed it must be paid in full by the wrong doer.) Particularly considering that the cargo was being carried on deck in breach of the contract.

Often when discussing whether a concept or system is still necessary in the modern world (as suggested by the title), whether it be limitation of liability, the House of Lords or Grammar schools, the question ends up being an emotive one based on concepts of equality and fairness. (I.e. is it fair or just to the wider community that grammar schools exist to the benefit of only a few. Or, in the marine industry, that limitation of liability unfairly or unjustly benefits ship owners – as in the example of Kapitan Petko Vovoida.) As with all such discussions there is no simple answer.

[1] [2003] 2 Lloyd's Rep. 1
[2] Pearson, R 8th April 03

1.1 Rules, Regulations & Conventions

As such in the maritime industry there are numerous different regulations, rules, national statutes and international conventions that allow a ship owner to limit his liability in different circumstances and depending on the type of vessel. (E.g. oil pollution incidents are covered by Civil Liability Convention 1969 and Fund Convention 1971 and their respective 1992 Protocols while Passenger Ships are covered by the Athens Convention and also the 1957, 1976 & 1996 Limitation Conventions.) Hague, Hague-Visby or Hamburg Rules as well as the Limitation Conventions cover cargo claims.

However in order to answer the question whether limitation of liability is still needed this paper will only be concerned with limitation of liability with regards claims made by cargo interests against ship owners.

1.2 General Law

In English law there is a principal of freedom of contract[3], which means that any company in England can attempt to limit or exclude its liability in anyway it chooses. However, all such terms are construed in line with the contra proferentem rule,[4] in other words they are construed narrowly against the party putting it forward. Also the more onerous the clause the more obvious the clause has to be.[5]

1.3 Marine Law

The difference between the marine industry and other industries is that the right to limit liability, is often incorporated by a simple reference to the various rules with no mention of the actual limits, or if there is mention, it is often in very small print together with 30 or more other clauses. National statutes based on International Conventions also incorporate liability limitations into contracts and bills of lading automatically.

[3] Photo Production Ltd v Securicor Transport Ltd [1980] A. C. 827, p. 848
[4] Houghton v Trafalgar Insurance Co Ltd [1954] 1 QB 247
[5] See example of: Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1988] 1 All ER 348

1.4 Two Fundamental Questions

This leads to two questions:

1) How do ship owners limit their liability?
2) Why are ship owners able to limit their liability?

2. How do ship owners limit their liability?

In the U.K. the ship owner and certain other parties[6] are able to avail themselves of the Hague-Visby Rules and the Convention on Limitation of Liability for Maritime Claims 1976 (hereafter referred to as the 1976 Limitation Convention) in order to limit their liability to cargo interests.

The 1976 Limitation Convention (a tonnage limitation) came into force in England through the Merchant Shipping Act 1979. This has been amended by the 1996 Protocol on 13th May 2004. This Protocol was introduced in England through the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) Amendment Order 1998. It has increased a ship owners liability limits considerably (average 250% increase)[7], although it has not radically altered the 1976 Limitation Convention rules. (Therefore the Convention and the 1996 Protocol will be considered together and referred to as the 1976 Limitation Convention.)

The Hague-Visby Rules (package limitation and exclusions) came into force through the Carriage of Goods by Sea Act 1971. Since 1971 there has been some minor tinkering at the edges[8] but the act has not been radically altered. The Hague-Visby Rules are themselves based on amendments made to Hague Rules by the Brussels Protocol 1968.

[6] Hague-Visby Rules these are the owner or the charterer.
1976 Limitation Convention it is the owner, charterer, manager, or operator of a sea-going ship.
[7] Soyer B (2000) p.158
[8] Merchant Shipping Act 1981 (SDR Protocol)

2.1 Tonnage Limitation

At the moment there are basically three international tonnage limitation conventions in use in the world today, these are the 1976, 1957 and 1924 Limitation Conventions, there is also limitation based on the value of the ship post accident plus pending freight (also known as the Abandonment principle.) However, with the introduction of the 1996 Protocol there are effectively five different maximum liability limits, since only ten nations have so far ratified this Protocol.

The 1976 Limitation Convention sets out a mathematical formula based on the tonnage of the vessel multiplied by a unit of account (Special Drawing Rights) to set a maximum global fund from which all claimants (cargo interests, environmental interests, other vessels, property owners etc ranking pari passu with each other) would draw against.

As such, the 1976 Convention increased the maximum limits per ton of vessel from the 1957 Convention levels, but in a trade off with ship owners it became harder for claimants to breach the limit. This was achieved through Article 4, which states:

> "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 the knowledge that such loss would probably result."

This introduces two major differences from the earlier Limitation Conventions:

1) The burden of proof lies with the claimant who has to prove that the ship owner's conduct does not entitle him to limit his liability. (This is opposite to the general law for limitation clauses in contract and tort.)

2) It must be a personal act or omission committed by a person who is in charge of the ship owning company (the alter ego of the company) whose acts are the acts of the

company. Hence if the Master or crew of a vessel acts negligently it is not enough to breach the limit[9] (unless the Master or crew are also the owners of the ship.)

This made a ship owners right to limit an "almost indisputable right to limit."[10] Lord Philips reiterated this judicial attitude in The Leerort[11] case, in which he stated that in certain circumstances:

"…. it is virtually axiomatic that the defendant ship owner will be entitled to limit his liability."

Therefore the main problem for a claimant challenging the right to limit, assuming that there is no intention to cause the loss, is that he has to prove both:

"reckless conduct and knowledge that the relevant loss would probably result."[12]

Reckless in this context is similar to that of the criminal law concept of Cunningham reckless[13], (i.e. the individual foresaw the risk of damage/injury that would arise from his act but went on and did it nevertheless). However, the difference arises in that it must be construed in conjunction with the words "and knowledge that the relevant loss would probably result."[14]

So far in English Law no claimant has managed to breach a ship owners right to limit under the 1976 Convention. However, a recent case, The Saint Jacques II and Gudermeres[15], has been granted permission to go to trial in order to see whether a claimant can breach a ship owner's limitation level. Justice Gross MR likened "the navigation of St Jacques II… [to] the nautical equivalent of a motorist proceeding the wrong way along a motorway.[16]"

[9] The Marion [1984] 2 Lloyds Rep 1
[10] The Bowbelle [1990] 1 Lloyd's Rep. 532 p. 535
[11] [2001] 2 Lloyd's Rep 291 p. 295
[12] MSC Rosa M [2000] 2 Lloyd's Rep 399 p.401
[13] R v Cunningham [1957] 2 All ER 412
[14] Goldman v Thai Airways [1983] 3 All E.R. 693 p. 700.
[15] [2003] 1 Lloyd's Rep. 203
[16] Ibid p. 205

Interestingly this difficulty in breaching the limit under the 1976 convention is not universal. In France for instance the owners of the Joanna Hendrika[17] and Stella Prima[18] had their request to limit refused. However, in the Multitank Arcadia[19] initially the right to limit was refused, although the French Supreme Court eventually overturned this.

2.2 Package Limitation

As previously mentioned, within England the Hague-Visby Rules prevail, however, other nations are using either the Hague Rules (e.g. Turkey and Indonesia), or the Hamburg Rules (e.g. Kenya and Romania) or their own variation (e.g. U.S.A.'s Carriage of Goods by Sea Act 1936.) These Rules specifically deal with cargo damage and each has its own level of limitation per package or unit. The maximum value of the limitation per package has increased over time from the Hague Rules in 1924 through to the Hamburg Rules in 1992.

Under Article X of the Hague-Visby Rules the rules automatically apply to all goods carried from a contracting state, when a bill of lading is either issued in a contracting state or the bill of lading states these rules are to apply. This means that it will even cover instances when cargo is transhipped.[20]

Package limitation under Article IV, Rule 5 (a), of the Hague-Visby Rules is 666.67 units of account[21] or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is higher.

Once again, just as with the 1976 Convention these limits are very difficult to breach even when the contract of carriage is breached, as can be seen by the case of Kapitan Petko Vovoida (Hague Rules), and when the vessel is unseaworthy, The Happy Ranger[22] (Hague-Visby Rules).

[17] Cour d' Appel de Caen, chambres réunies, 2nd October 2001 : DMF 2002.460
[18] Cour de Cassation, Chambre Commerciale, 3rd Avril 2002 : DMF 2001.81
[19] Cass. Com. 8 October 2003 : DMF 2003.1057
[20] The Morviken [1983] 1 Lloyd's Rep. 1
[21] 1 unit of account equals 1 Special Drawing Right

This is due to the interpretation of Article IV rule 5 (of both Hague and Hague-Visby Rules) by the court, which states:

> "Unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading, neither the carrier nor the ship shall *in any event*[23] be liable for any loss or damage to or in connection with the goods in an amount exceeding…."

The important phrase in this clause is "in any event" and as per Tuckey L.J. "the words …. mean what they say [and] are unlimited in scope.[24]"

However, in a trade off to cargo interests Article IV, Rule 5(e), does seemingly give some possibility of breaking these package limits.

> "that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."

This is very similar to the 1976 Convention and once again it is necessary for the claimant trying to breach the limit to show that it is actually the carrier (not the crew or other servants[25]) who had intention or acted recklessly and with knowledge of probable damage[26].

There is of course also the fairly simple, although rarely used, method of breaking these limits mentioned in defence of the limitation provisions by Longmore L.J. in the Kapitan Petko Vovoida. This is that: "Cargo owners can …. declare the value of their goods and cause that value to be inserted into the bill of lading. They would then be able to recover the value of their goods."[27]

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[22] [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep. 357
[23] Emphasis added
[24] The Happy Ranger [2002] 2 Lloyd's Rep. 357 p. 364
[25] The European Enterprise [1989] 2 Lloyd's Rep. 185
[26] [1989] 2 Lloyd's Rep. 185
[27] [2003] 2 Lloyd's Rep. 1 p.15

2.3 Tonnage Limitation & Package Limitation

The rights available to a ship owner through either tonnage limitation or package limitation are not mutually exclusive. It is possible for a ship owner, under Article VIII of the Hague-Visby Rules, to limit his liability under Hague-Visby and then to reduce this further by relying on the tonnage limitation.

3. Why are ship owners able to limit their liability?

As can be seen from the above analysis the ship owners (and certain other parties) have a very strong right to limit their liability. However, to answer the question whether this right is still needed it is necessary to understand why the ship owners are able to limit.

3.1 Judicial Comments

Lord Denning in The Bramley Moore[28] stated that the ship owner's right to limit liability:

"is not a matter of justice[, i]t is a rule of public policy which has its origin in history and its justification in history."

While Griffiths L.J., in The Garden City No. 2[29] said that:

"[Limitation of liability] … is a right given to promote the general health of trade and in truth is no more than a way of distributing the insurance risk."

Both quotes hint at least to some of the explanations for why limitation is available to ship owners.

[28] [1963] 2 Lloyd's Rep. 429 p. 437
[29] [1984] 2 Lloyd's Rep. 37 p.44

3. 2 Six Explanations for the rights of a ship owner

3.2.1 Historical reasons

England first adopted a statute that limited liability for ship owners, in 1733 with the Responsibilities of Shipowners Act. This Act limited a ship owner's liability in certain very limited circumstances only, and was brought in as a response to the case of Boucher v Lawson[30].

In Boucher v Lawson the ship owner was found to be liable, without limit (i.e. for considerably more than the value of his investment – the ship), for the loss of a cargo of gold bullion that was stolen by the master without the owner's knowledge or acquiescence (privity). Hence to quote Lord Mustill, "The ship owner might, so to speak, be prepared to lose his shirt, but not his entire wardrobe."[31]

However, it was noted at the time that if the ship owner had been European, where limitation had been widely available since the 17th Century[32] (in certain regions since 11th Century[33]), he would have been able to limit his liability to the value of the ship plus the freight pending. A considerably smaller quantum.

Hence in the preamble of The Responsibilities of Shipowners Act 1733 it justifies the act through the following text:

> "it is of greatest consequences and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being concerned therein….. [if no investment it] will necessarily tend to the prejudice of the trade and navigation of this kingdom."

Therefore the whole reason for the introduction of limitation, or exclusion, of liability statutes was solely, at least initially, to:

[30] (1733) Cas. t. Hard 53; 95 E.R. 116
[31] Lord Mustill (1993) p. 492
[32] Statutes of Hamburg 1603, Hanseatic Ordinances of 1603 and 1644, Maritime Code of Sweden 1667, Marine Ordinances of Louis XIV 1681.
[33] Soyer B (2000) p.153

a) promote the investment in ships and ship owning, which was (and arguably still is) a risky business,
b) promote trade,
c) protect England's merchant marine,
d) create a level playing field on which England's merchant marine could compete with other nations who already had limitation provisions.

3.2.2 Level playing field

It could be expected that these openly protectionist reasons for the level playing field argument and hence the actual argument itself would have diminished in importance over time.

However there still exists a desire for harmonisation or uniformity in international conventions and rules. This is because:

a) The maritime industry is international and "by reason of the trading movement of the ships he [the ship owner] may well find himself subject to the jurisdiction of almost any maritime nation."[34] Therefore it is important to have an international set of rules that everyone knows.
b) Ship owners and cargo interests know their potential risks when trading.
c) Because the potential risks are known it is easier to insure for them.

However, as has already been mentioned there is no uniform worldwide international maritime convention either for tonnage limitation, or package limitation.

There are not only different conventions across the globe but also different judicial attitudes and interpretations to them. Hence in the U.S.A., which has The Limitation of Liability Act 1851 (based on abandonment), the right to limit has been increasingly withdrawn and attacked by the judiciary.[35] There has also at the same time been an increase in the use of punitive damages.

[34] Seward R. C. (1986) p. 166
[35] Maryland Casualty Co. vs Cushing, 347 U.S. 409, 437, 1954 A.M.C. 837, 859 (1954), Baldassano vs. Larson, 580 F. Supp. 415, 1985 A.M.C. 2527 (D. Minn. 1984)

In France, a signatory to the 1976 Convention, the courts interpret the Convention differently to the English courts. While in Yemen, another signatory to the 1976 Convention, has translated "recklessly" into "carelessly" in Yemeni, which gives the statue a completely different meaning!

This variety both in law and interpretation is also repeated in package limitation.

However, is it enough to say that because there is no uniformity the maritime industry should not be allowed limitation statutes? Certainly Gothard Gauci[36] argues that instead of trying to create an international standard of limited liability there should be an international standard of unlimited liability. However, this could be seen as being a naïve hope since basic economic game theory would suggest that no one nation is going to suddenly prevent their maritime industry from relying on a limitation convention that all other nations utilise. Hence it would require an international convention to make unlimited liability standard, and this will never be easy!

However it is often argued that a potential benefit of an unlimited liability regime would be that a ship owner would be more focused on maintaining the quality of his ships and crew. However, with the opaque owning structures of many ship owning companies (e.g. Prestige and Torrey Canyon[37]), this effect is likely to be limited and could even make it harder to ascertain who is the real owner and so where liability lies.

3.2.3 Unlimited liability equals uncoverable

This argument is summed up in the following quote "without the right to limit both for ship owners and in turn their P&I Clubs [ship indemnity insurers] could lead to a busting of the insurance market."[38]

[36] Gauci G (1995) p. 67
[37] Ibid p. 68.
[38] Coghlin [1996] p. 140

Certainly if there were no international conventions or statutory limitations it would lead to even greater uncertainty and risk for ship owners and also their insurers (normally P&I Clubs – insurers to over 90% of the world's blue-water tonnage[39]) than at present with the multiple conventions. In a worst-case scenario it could be argued that either no insurance cover would be provided or only a minimal limited cover. Unlimited liability, it is argued by Anthony Evans QC,[40] would lead to increased insurance costs, which because "95% of world trade goes in whole or in part by sea,"[41] will lead to increased costs to shippers, cargo interests, manufacturers and in turn consumers.

This is obviously a powerful argument, although one that has been questioned by Professor Wetterstein[42] and Gothard Gauci.[43] Indeed it is difficult to foresee, considering the capacity of Lloyd's insurance market (£14.4 billion[44]), that no insurance would be available, the questions, however, would be at what price and on what terms? If too high or onerous a ship owner is either likely to under insure or not insure at all.

Gauci argues that there is no reason why an underwriter cannot protect himself by placing a limit beyond which a claim cannot proceed. This however, would appear to move the limitation of liability from a statute and international convention based system to one of individual companies or (as in the case of the International Group of P&I Clubs) groups of companies setting the limits. Indeed, in this scenario it would not be hard to imagine a ship owner setting, by contract or bill of lading, the limit of his liabilities at a level lower than those afforded through the Conventions or Rules at present. Therefore leading to considerably less equitable results than are presently achieved, as was the case prior to the U.S.A's Harter Act 1893 and Hague Rules of 1924. As stated by Anthony Diamond QC "[Hague-Visby Rules] reject 'freedom of contract' in favour of imposing minimum standards of liability on shipowners."[45]

[39] Watkins D. (2000) p.2
[40] Evans A (1986) p. 128
[41] Farthing B & Brownrigg M (1997) p.12
[42] Wettrestein (1990) p. 102-103
[43] Ibid 36
[44] Cave A (16th September 2003) p. 34
[45] Diamond A (1986) p. 110

Running parallel to these arguments is the fact that many shipping incidents are very complicated with the involvement of many different parties across multiple jurisdictions. Obviously in order to provide a prompt system of payments without years of litigation the international conventions are invaluable and ensure everyone gets something.

3.2.4 Deep pocket[46] argument

This argument is based around the fact that "the shipowner is peculiarly exposed in that he owns or controls a highly visible and valuable asset, which is notoriously easy to arrest.[47]" It suggests that cargo interests and in turn courts are likely to view a ship as a readily available asset of quite considerable value that can be used to force a ship owner to pay.

There is some truth to this argument, certainly there would be a great deal of anecdotal evidence readily available from most P&I Clubs of delays caused to vessels by cargo interests (in certain ports) until payment is made or a guarantee provided whether the claim is justified or not.

3.2.5 Limitation is not exclusive to ship owners

This argument in its simplest form suggests that because ship owners are not the only ones able to limit their liability (e.g. airlines through the Warsaw Convention) it is therefore fine for them to maintain their limits. Indeed, within the U.K. David Steel QC documents that there has already been a movement amongst professionals to try and create a "statutory scheme for limitation of liability incurred in connection with professional protection[48]" although this eventually failed. However, it can be counter argued, that just because ship owners are not the only ones able to limit and that others have attempted it, does that make it any more right, fair, or just?

[46] Ibid 36 p. 68
[47] Ibid 34 p. 166
[48] Steel D. (1995) p. 86

3.2.6 We're all grown-ups[49]

This is probably the widest justification for the ship owner's right to limit, or exclude, liability. The fact of the matter is that all parties involved are business people and are "grown-ups."

As a business person the cargo interest should be aware of the risks involved in shipping goods and products internationally either by sea, air or land. It would therefore be normal for the cargo interest to insure his property properly for this journey. This therefore introduces a fourth player to shipping:

1. Ship Owner
2. Ship's insurer (P&I Club and Hull & Machinery Insurer)
3. Cargo interest
4. Cargo's insurer

As such the cargo insurer will (presumably) have years of experience of the risks involved in carrying of the cargo, knowledge of the likelihood that things could go wrong, and understanding of the limitation (and exclusion) provisions in at least some of the possible jurisdictions. On this basis he will have set the premiums that the cargo interest has to pay and, as long as the cargo interest pays these, will hold the cargo covered.

Hence it is rarely, if ever, the cargo interest that actually suffers a loss or makes a direct claim against a ship owner or a ship's insurer instead it is the insurers of the cargo.

What therefore the ship owners right to limit liabilities does is to ensure "the proper identification and allocation of risks."[50] Hence, Anthony Evan QC said "Limitation of liability … [is] one aspect of an equitable bargain"[51]

[49] Hill M (2004) p. 11
[50] Evans A, p. 129
[51] Ibid 50 p. 128

David Steel QC also adds another aspect to this argument, in that "it is better for the victim to have a limited claim which he can be certain that he can be paid than to have an unlimited claim against an insolvent party."[52]

4. Conclusion – is Limitation of Liability still needed?

This paper started with the example of Kapitan Petko Vovoida, and then went on to look at how and why ship owners are able to limit their liabilities and discussed the competing arguments for both the repealing of the Limitation Conventions and Hague-Visby Rules and for their maintenance.

Certainly if the whole question of whether limitation of liability was still needed was based simply on equality between ship owners and cargo interests only then it would be fairly easy to argue that the system is so unfair that there is no justification for it remaining. However, as previously suggested at the start of this paper and repeated in the various arguments, nothing is ever as simple as it first seems.

Overall, it would appear that the strongest argument with regards cargo claims is for the maintenance of limitation of liability because:

1) Cargo interests can and do insure themselves against the risks involved in shipping goods internationally.
2) Cargo interests can easily ensure that they receive a full refund by having the value of the goods placed on the bills of lading and accordingly pay higher freight.
3) Carriage of goods at sea has always been considered a joint adventure and has been understood to involve the sharing of risks between the ship owner, cargo interests and their respective insurers.
4) The provisions provide a relatively simple method of assessing the risks and costs for the various parties involved.
5) The removal of the right to limit liability is likely to have a profound effect not just on ship owners, cargo interests and their insurers but also is likely to affect the global economy and environment as well as the general insurance market.

[52] Ibid 48 p. 87

This does not mean, however, that the limitation provisions available to ship owners should never be reviewed.

4.1 Final Word

To some extent, if there is a problem with limitation of liability, it is not that it exists but is the fact that there are a multitude of different regimes being interpreted differently from country to country. This makes the transportation of goods a gamble for ship owners, cargo interests and their respective insurers.

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