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Limitation of liability for wreck removal expenses

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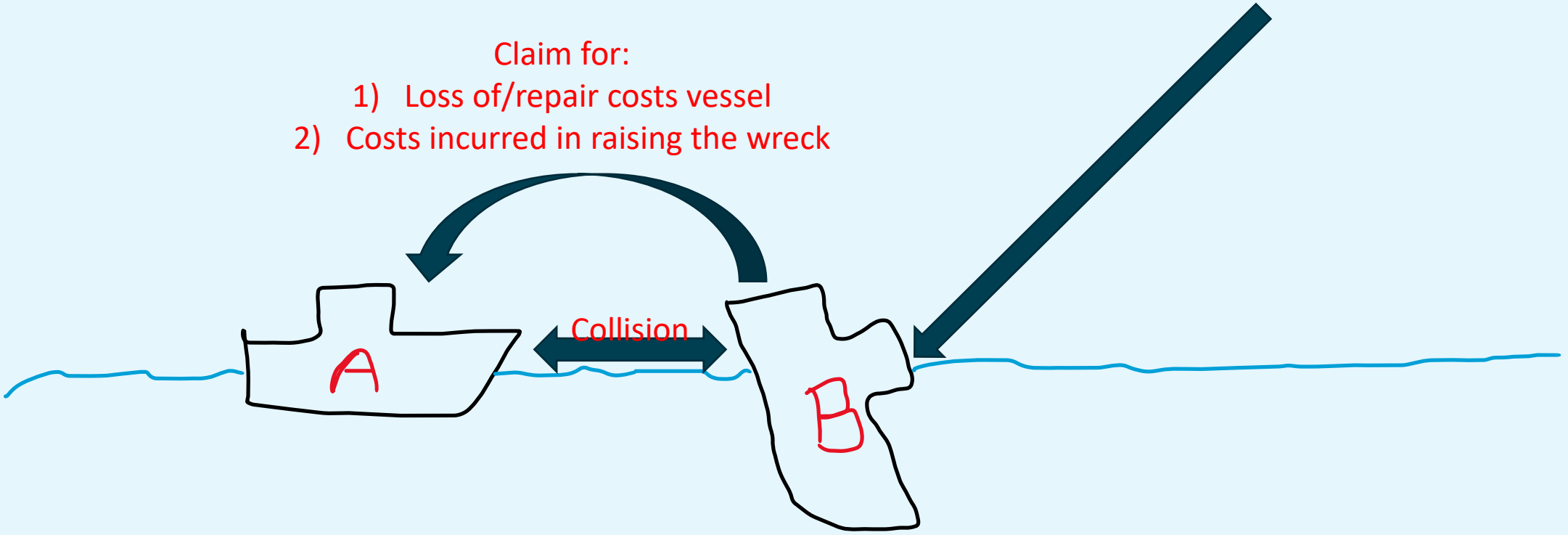
Wreck removal order from public authorities

Claim for:

1) Loss of/repair costs vessel
2) Costs incurred in raising the wreck



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Commentary

"(…) *Indeed, seeing that a ship at the bottom of a harbour cannot very well be repaired in situ, it would seem to be absurd, on the face of it, that the cost of repairs should be recoverable and should be the subject of limitation, whereas the cost of restoring the vessel to the surface where she would be capable of being repaired should be admittedly recoverable, but should not be the subject of limitation. Yet that in substance is the argument put forward on behalf of the defendants to the limitation action, who were, as already stated, the plaintiffs in the collision action*"

Lord Merriman, *The Arabert* No. 2 (1962)

Convention on Limitation of Liability for Maritime Claims

- "Replaced" 1957 convention
- Updated in 1996 with higher limits of liability
- Provides for limitation of liability for enumerated categories of claims
- Allows contracting states to *inter alia* exclude the application of Art II d/e
- Norway among the states having lodged such reservations

LLMC Article II

1. **Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:**

(a) **claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;**

(b) **claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;**

(c) **claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;**

(d) ~~**claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;**~~

(e) ~~**claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;**~~

(f) **claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.**

2. **Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.**

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LLMC Article 18

1. Any State may, at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter, reserve the right:

(a) to exclude the application of Article 2, paragraphs 1(d) and (e);

(b) to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or of any amendment or protocol thereto.

(…)

Jurisdictions with reservations on wreck removal

- Australia (Tiruna)
- Belgium
- Canada
- Croatia
- Cyprus
- Estonia
- France (legislation)
- Germany
- Iceland
- Iran
- Japan (Legal theory)
- Lithuania
- Malta
- Netherlands (Amasus)
- New Zealand
- Norway
- Poland
- Russia
- Singapore
- Spain
- South Korea (Alexandria)
- Turkey
- UK (Arabert)
- Hong Kong (Star Centurion)

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The NMC Sections 172 and 172a

S. 172

The right to limitation of liability pursuant to Section 175 applies, regardless of the basis of the liability, to claims in respect of:

1) loss of life or injury to persons (personal injury) or loss of or damage to property (property damage), if the injury or damage arose on board or in direct connection with the operation of the ship or with salvage;

2) damage resulting from delay in the carriage by sea of goods, passengers, or their luggage;

3) other damage if it was caused by infringement of a non-contractual right and arose in direct connection with the operation of the ship or with salvage;

4) measures taken to avert or minimize losses for which liability would be limited, including losses caused by such measures.

(…)

S. 172a

When the ship's tonnage exceeds 300 tons, the right to limitation pursuant to Section 175a, regardless of the basis of the claim, applies to claims in respect of:

1) raising, removal, destruction or rendering harmless a ship which is sunk, stranded, abandoned or wrecked, as well as everything that is or has been on board the ship;

2) removal, destruction or rendering harmless the ship's cargo;

3) measures taken to avert or minimize losses for which liability would be limited under this Section, including losses caused by such measures.

(…)

Some starting points

- The claim from ship B towards ship A is one "in respect of (...) loss of or damage to property (...) and consequential loss resulting therefrom" (letter a)
- It is also one "*in respect of* (...) *raising* (...*) of a ship which is sunk" (letter d)*
- *"Whatever the basis of liability may be ..." (first para)*
- *"... Shall be subject to limitation even if brought by way of recourse or for indemnity ..." (second para)*
- *How do we "solve" the apparent overlap?*

2. Claims set out in the preceding paragraph shall be subject to limitation of liability even if brought in an action for contribution or indemnity under a contract or otherwise.

This provision may not be necessary, but it was felt that it should be expressly stated that a limitable claim does not change its nature when brought as a « recourse claim ». Example : Two tortfeasors are jointly liable for the damage, but only one of them can limit his liability to the claimant who, therefore, proceeds against the other and gets satisfaction in full. The one who has paid seeks contribution from his co-tortfeasor who, as between them, is liable in principle for one half of the damage, but subject to limitation of liability. (THE TRAVAUX PRÉPARATOIRES OF THE LLMC 1976 p. 85)

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Lex specialis

- Appears natural on the face of it – HK and Dutch courts agree
- Some counters:
  - The list of limitable claims is drafted as a list of limitable claims
  - Construing letter d as "supplementary" does not make a reservation without substance
  - The Travaux Preparatoires suggest a supplementary reading

For illustration:

53. The Tiruna was cited to the judge, who noted that notwithstanding the majority decision was obiter , he found the reasoning of the majority persuasive [36] . I am inclined to think likewise. I do not agree with Macrossan J that the heads of claims are not “completely mutually exclusive”. I note that in rejecting the opposite contention, he mentioned that “if a reading were suggested which gave no effect to one of the clauses beyond what flowed from the others, that would be a different matter altogether and would constitute sound reason for rejecting the suggestion” (at 677 col 1).

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From the Travaux Preparatoires

(…) Subparagraphs (c), (d), (d) and (e), corresponding to § 10 c) of Article 1 of the Convention, are not on the same level as the two previous ones. They are necessary insofar as they define limitable claims which are not covered by (a) and (b), such as wreck removal and the rendering harmless of the cargo, but may be misleading insofar as they provide for limitation of liability for claims which are limitable under (a) or (b), for instance, damage caused to harbour works. (*LIMIT-19 II-74 – Second report of the Chairman of the International Subcommittee*)

Under sub-paragraph (a) the liability is limitable whether it is based on tort only (liability for collision damage) or "capable of being built on contract" such as cargo liability under a charter party or bill of lading, always provided that the loss arises from concrete damage. Abstract damage other than consequential loss is governed by the two following sub-paragraphs. (*PART I – THE TRAVAUX PRÉPARATOIRES OF THE LLMC 1976 p. 63*)

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Why does the LLMC allow reservations for wreck removal?

- My assertion: To ensure that public authorities are not left footing the bill
  - Some support in the Travaux Preparatoires
  - Norwegian preparatory works are clear
  - It is what makes sense
  - Safety/public policy concerns?
- Other exceptions from limitation:
  - Motivating salvage
  - High risk endeavours
  - Specific group of claimants

Excluded claims (Art III)

a. claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average;

b. claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force;

c. claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;

d. claims against the shipowner of a nuclear ship for nuclear damage;

e. claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6.

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The Hordaland District Court's Assessment

- Based on an objective construction the provisions are overlapping
- System of the LLMC (and the Preparatory works) does not support the *lex specialis* intepretation
- Emphasised the statement in the Norwegian preparatory works (2002) that the relocation from s. 172 to s. 172a does not affect the construction
- Emphasised that the higher limitation amounts for wreck removal was intended to safeguard public interests
- Fairness-argument not accorded any weight – "Limitation of liability is not a matter of justice"
- Decisions from Dutch Supreme Court offers little guidance for interpretation of Norwegian legislation
- The court disagrees with the premise for Professor Solvang's view – specifically that the preparatory works from 2002 amends the guidance on the interpretation given in 1980

Where are we?

- Dutch SC and HK AC → No limitation
- Older English case law → In favor of limitation rights
- Legal literature → Slight bias towards limitation rights
- Policy considerations → Right to limit
- Nevertheless: Most likely no right to limit if HK decision stands

"… lndeed it appears that as a result of the wording in the introductory paragraph to Article 2, to the effect that the listed claims are to be the subject of limitation "whatever the basis of liability", the reservation exercised by the United Kingdom may have inadvertently taken out of limitation in the United Kingdom any claims (whether statutory or otherwise) relating to wreck removal, including claims for recourse, provided that the liability does not relate to remuneration under a contract with the person liable. …" (Gutierez – my underlining)

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