

## Limitation Of Liability In England And France

It may seem strange in these litigious times that carriers of people and goods continue to enjoy the right in certain circumstances to limit liability to the modest levels that can be readily insured. Nevertheless, most countries have adopted some form of limitation based on the idea that an owner should not be liable for more than the value of his trading asset, his ship. In most countries (excluding the US), liability is calculated by reference to a notional value based on the tonnage of the ship.

There are two conventions commonly in use, the 1957 and 1976 Conventions. Limits under the 1957 Limitation Convention rapidly became too low, resulting in a number of claimants repeatedly contesting owners' right to limit.

To curb this trend, the 1976 Limitation Convention was brought into force with much higher limits and when, in turn, these were considered too low a 1996 Protocol was introduced to double the limits. This will come into force 90 days after it is accepted by 10 states. As at 31.10.03 it had only been accepted by nine: Australia, Denmark, Finland, Germany, Norway, Russian Federation, Sierra Leone, Tonga, and the UK. The UK has implemented the protocol in domestic law through the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 – SI 1998/1258, which will come into force on the date when the Protocol enters into force in the UK.

Under US law, the shipowner can limit liability provided he can prove that the fault causing the loss occurred without his privity or knowledge. Under the 1957 Convention, shipowners are not liable for death, injury, loss or damage occurring *“without their actual fault or privity”*. The burden of proof in both cases lies with the owner.

The test under the 1976 Convention is very different. Article 4 sets out the way in which it is applied. A person will not be allowed 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 with knowledge that such loss would probably result”*.

In return for higher limits, the 1976 Convention was intended to provide for the shipowner's benefit *“an almost indisputable right to limit”*. This view was recently reinforced in [The Leerort \[2001\] 2 Lloyd's Rep 291](#) where Lord Phillips MR said, *“when a claim is made for damage resulting from a collision, it is virtually axiomatic that the defendant shipowners will be entitled to limit his liability”*.

The 1976 Convention therefore reversed the burden of proof, with the claimant having to demonstrate one or other of the two legs of the test.

Some differences of interpretation on the rights to limit may, however, be beginning to emerge between 1976 Convention states. Certainly, the position adopted by the English and French jurisdictions show that they take very different views of a shipowner's right to limit.

### England

Richards Butler recently contested an owner's right to limit under article 4 of the convention in the case of the [Margolle v Delta Maritime \(The Gudermes\) \[2003\] 1 All ER \(Comm\) 102](#). The *Gudermes* was involved in a collision with a fishing trawler *St Jacques II* that had proceeded the wrong way up a traffic separation lane, as she had done on at least five previously recorded occasions. The *St Jacques II* established a limitation fund in England and applied to the court for summary judgment for its entitlement to limit. The application was rejected and an appeal was lodged.

The owners of the trawler conceded that they had been reckless within the meaning of Article 4. No deliberate intention to collide having been suggested, they relied on the strict words of the second leg

of article 4, which requires, in addition to recklessness, knowledge that such loss should probably result. This aspect of the test raises two vital questions: (1) what is meant by "knowledge"? and (2) what is meant by "such loss"? As a matter of law, "knowledge" means actual knowledge rather than constructive or inferred knowledge. The test is thus subjective. The more obvious the risk and the more blatant the recklessness, however, the more the court will be prepared to infer knowledge, since if the test were absolute an assertion of subjective knowledge could otherwise always be defeated by a simple denial.

As far as "such loss" was concerned, the *St Jacques II* started this argument with an advantage. Lord Phillips in *The Leerort* had suggested it meant the actual and precise circumstances that eventuated. However he expressly left open as 'arguable' that it could mean loss of the kind that occurred, here a collision with an on-coming vessel, not necessarily the *Gudermes*. This finding lends some support to the argument that "such loss" in Article 4 refers back not only to "the loss" in the first line of that Article but beyond that, to the categories of "loss", claims and other damage set out in more detail in Article 2(1), a line of reasoning tentatively rejected in *The Leerort*.

It is important to note that the Article 4 test applies to the person entitled to limit, usually the shipowner. Liability is not vicarious, so the reckless conduct of the ship's crew will not be sufficient to satisfy Article 4. Where the owner and master are the same person, however, (as they were in this incident) then the prospects of breaking limit are much higher. In the present case the fault of the skipper was not just that of the man acting solely in the capacity of seaman. The collision arose from the policy of the owner to set a reckless course contrary to the traffic separation scheme, which course was followed illegally on several occasions, for commercial advantage.

The case is only at the preliminary stage and a trial on the merits has yet to be heard. It does, however, have all the ingredients for success in breaking the limit.

## France

In France, the question with which we are concerned is the degree of knowledge required that "such loss would probably result" under French law/1976 Convention.

Is the degree of knowledge required?

- a) subjective, i.e. did the person actually know? This is suggested by the text of the Convention, but as pointed out above, is difficult to prove when faced with a denial of actual knowledge, or;
- b) objective, i.e. should a person have known that loss would result, or;
- c) inferred subjective, i.e. a person with the proper qualification should have known that such loss would probably result?

When considering the French case law relating to these issues, it is important to remember that legal reasoning in respect of French cases is a little different from English law. Decisions of the higher courts in civil cases, such as the *Cour de Cassation*, are not binding on each other or on the lower courts such as the *Tribunal de Grande Instance* or the *Tribunal de Commerce*.

The reasoning in French judgments does not usually refer to previous cases or set out an analysis to arrive at relatively constant principles. Cases are decided individually according to the facts and subject to the discretion of the court. It has happened that different courts have decided cases identical on the facts differently. Analysing French cases is therefore directed at considering various cases decided in the past and seeking to evaluate the probability of a future case being decided one way or another.

Typically, a case will start before the *Tribunal de Commerce*, an appeal lies to the regional Court of Appeal and then to the *Cour de Cassation*. If the *Cour de Cassation* upholds the Court of Appeal decision that is the end of the matter. If the *Cour de Cassation* overturns the Court of Appeal decision, the case is remitted back to a different Court of Appeal to be determined again.

In respect of the issues stated above, the cases decided by the *Cour de Cassation*, the French supreme court, favour the inferred subjective approach, whilst the *Cour d'Appel d'Aix-en-Provence* arguably favours a more subjective approach, though not exclusively, and some other courts have favoured the objective test. A review of the limitation breaking cases, working down from the higher courts illustrates the current position: -

1. *Cour de Cassation, Chambre Commerciale, 20<sup>th</sup> May 1997, the "Johanna-Hendrika"*

This decision overturned the Court of Appeal judgment, the reason being that the former found "*la faute inexcusable*" to have been committed by the ship owner "*sans dire en quoi la faute commise par le capitaine de la drague pouvait aussi constituer une faute personnelle et intentionnelle ou inexcusable de l'armateur*" ("without indicating in what way the wrong committed by the captain of the dredger could also constitute a personal and intentional or inexcusable wrong by the ship owner").

On the question of whether the wrong should be analysed *in concreto* (subjectively) or *in abstracto* (objectively), the *Cour de Cassation* considered that "*la Cour d'Appel a pu en déduire que, telle qu'elle ressortait de ses constatations, la conduite du capitaine, qui devait, en professionnel, avoir conscience de la probabilité du dommage, était téméraire*" ("from what emerged from its findings, the Court of Appeal was able to deduce that the conduct of the captain, who must, as a professional, have had awareness of the probability of such damage, was reckless").

The use of the words "as a professional" suggests this is an analysis of the fault according to the inferred subjective test by the *Cour de Cassation*.

As the Court of Appeal was overruled on the point of why the conduct of the master should involve a fault of the owners, however, this is not strictly the issue decided by the *Cour de Cassation*.

The Court of Appeal having been overruled, the case was remitted to a different court of appeal for further determination, that of Caen.

2. *Cour d'Appel de Caen, chambres réunies, 2<sup>nd</sup> October 2001, the "Johanna-Hendrika"*

This court also confirms the analysis of the fault of the shipowner according to the inferred subjective test in judging that "*celui ci, par ces propres manquements, est à l'origine des dommages résultant d'un abordage dont il avait nécessairement la conscience de sa probable survenue*" ("by his own default, he was the cause of the damage which resulted from a collision of whose probable occurrence he necessarily had awareness").

This court also stated "*Or, le déroulement des faits et les pièces versées aux débats démontrent que le propriétaire du navire a, en l'espèce, commis une faute personnelle inexcusable*" (The facts and the documents disclosed demonstrate the owner of the vessel has, in this case, committed an inexcusable personal fault).

The notion of inexcusable fault has been described as an act, which if committed by a lay person would not constitute a fault but if committed by a professional would constitute a fault. It appears to be implied that this goes to the issue of awareness, though the issues are strictly separate.

It appears the inferred subjective test has been applied to the issue of awareness.

3. Cour de Cassation, Chambre Commerciale, 20<sup>th</sup> February 2001, the "Moheli"

This decision is based on the French law of 1967, but the definitions of the fault that breaks the right to limit liability in the French law and in the 1976 Convention are identical for these purposes.

As in the previous decision of the *Cour de Cassation*, the fault is considered according to the inferred subjective test "*qu'en se prononçant ainsi, sans rechercher si, en sa qualité de professionnel du nautisme, le capitaine du Moheli devait avoir conscience qu'un dommage résulterait probablement d'un tel comportement*" ("in making such a finding, without trying to discover whether, in his position as a shipping professional, the captain of the Moheli must have been aware that damage would probably result from such conduct").

These two reported decisions of the *Cour de Cassation* on the question of the fault which breaks the right to limit liability involved an inferred subjective analysis of the wrong.

4. Cour d'Appel d'Aix-en-Provence, 10<sup>th</sup> October 2001, the "Multitank Arcadia"

This decision held that the fault had been committed by the ship owner as "*l'armement et le bord avaient nécessairement conscience que l'accomplissement de la manœuvre avec deux groupes rendait probable la survenue d'un dommage en cas de défaillance prévisible de l'un des deux groupes*" ("the ship owner and the crew necessarily had awareness that the completion of the manœuvre with two generators (instead of three) would make the occurrence of damage in the event of mechanical breakdown of one of the two generators foreseeable").

It is not clear from the language whether this involves an objective or inferred subjective analysis.

This decision has just been overturned by the *Cour de Cassation* on purely procedural grounds and remitted back to the Court of Appeal of Montpellier for a complete rehearing. It is not clear what the outcome will be.

5. Cour de Cassation, Chambre Commerciale, 3<sup>rd</sup> April 2002, the "Stella Prima"

This decision confirmed the reasoning of the Court of Appeal of Montpellier which had held in its decision of 7<sup>th</sup> December 1999 that the fault had been committed by the ship owner, who "*en ayant nécessairement conscience de la probabilité du dommage...a fait preuve de carence et de négligence présentant l'apparence d'une faute inexcusable, et faisant obstacle à ce qu'il soit autorisée à constituer un fonds de limitation*" ("necessarily had awareness of the probability of such damage taking place...and so proved the deficiency and negligence which demonstrated the appearance of *la faute inexcusable*, and deprived him of his right to constitute a limitation fund").

Again it is not clear whether an objective or inferred subjective test has been applied.

6. Tribunal de Commerce de Bordeaux, 23<sup>rd</sup> September 1993, the "Heidelberg"

This judgment states that "*attendu que les armateurs ne pouvaient ignorer en constituant ainsi l'équipage du Heidelberg qu'ils prenaient un risque lequel s'il n'était pas certain était probable...ce qui constitue de leur part une faute*" ("whereas the shipowners could not have been unaware in making up the crew of the *Heidelberg* in the way it did that they were taking a risk, the consequences of which if not certain were probable...this constitutes a wrong on their part").

This appears to be an objective analysis, but of the decisions included here, we consider this one should be given the least weight.

There is now an appeal pending before the *Cour d'Appel de Bordeaux*.

7. *Tribunal de Grande Instance de Cherbourg*, 3<sup>rd</sup> September 1990, the "Kini-Karsten"

This was one of the first decisions under French law to give a ruling on the question of the limitation of liability of the shipowner, finding "*la faute inexcusable*" of the latter, which deprived him of his right to limit liability. It analysed whether the party should have been aware if they had acted as proper professionals.

*"La faute inexcusable doit être recherchée comme faute des organes de direction de l'armement ; ces organes dirigeants, quand bien même ils n'auraient pas eu en l'espèce pleinement conscience que leur négligence ou imprudence pouvait entraîner un dommage, auraient dû l'avoir s'ils avaient agi en bons professionnels"* ("*la faute inexcusable*" must be sought in terms of a wrong by the management of the shipowner; these managers, although not fully aware in this case that their negligence or carelessness could cause any damage, should have been if they had acted as proper professionals").

To summarise, the reasoning often given by the French courts in cases where the limitation has been broken seems to be closer to the "inferred subjective test" because they state some objective facts and then deduce from them that the shipowner or captain must have had awareness or should have been aware.

Conversely, we have only found two decisions in which it was held that the shipowner had not committed the fault that deprived it of the right to limit liability.

These two decisions seem to suggest some resistance of the *Cour d'Appel d'Aix-en-Provence* to the position (although see the "Multitank Arcadia" above where limitation was broken) in other decisions and a stricter adherence to the letter of the 1976 Convention, in other words, a more subjective analysis of the shipowner's awareness of the probability of damage :

1. *Cour d'Appel d'Aix-en-Provence*, 8<sup>th</sup> June 2000, the "Moldavia"

*"La constatation de manœuvres, à les supposer fautives, ne démontre pas que leurs auteurs avaient nécessairement conscience qu'un dommage s'en suivrait probablement"* ("The findings regarding the manœuvres, assuming they were blameworthy, do not reveal that those responsible for the manœuvres were necessarily aware that damage would probably result").

This is an inferred subjective analysis, although this is not entirely clear in the context of this case.

2. *Cour d'Appel d'Aix-en-Provence*, 5<sup>th</sup> November 1998, the "Zulu Seal"

*"Que la conjonction de dysfonctionnements mise en évidence ne peut conduire à considérer que le propriétaire téméraire avait conscience qu'un dommage en résulterait probablement"* ("the combination of malfunctions as described did not lead one to consider that the reckless shipowner was aware that damage would probably result").

This appears to be a subjective test but arguably the reference to the combination of malfunctions suggests an inferred subjective test. These cases are earlier than the case of the "Multitank Arcadia" (see above –limitation broken).

Finally, no material distinction appears to have been drawn in these cases between "the damage" and "such damage" as referred to in the English context earlier.

It is clear that it is usually more difficult to limit under French law than under English law, subject of course to a detailed analysis of the facts of each case.

### **Salvage and wreck removal**

Another limitation issue under the 1976 Convention is that of salvage and wreck removal.

Richards Butler has recently been involved in the collision between the *Tricolor* and the *Kariba*, acting for the *Kariba*. A limitation fund was set up in Belgium to protect the ship from cargo and collision claims. An anticipated claim was by the *Tricolor* for a partial indemnity for the cost of removing the wreck of the *Tricolor*. Since the wreck removal contract price exceeded \$30m and the limitation fund of *Kariba* is around \$5m, the issue is plainly one of importance.

There are notable differences in the way the 1976 Convention countries approach the issue of wreck removal.

Belgium excludes from the right to limit the cost of wreck removal. English law is to the same effect. In contrast, Holland wreck removal is subject to a separate limitation fund. The question that remains to be answered is whether a claim for an indemnity for wreck removal retains its character as a claim of an excluded type, or whether, when brought by way of indemnity it becomes a claim falling under Article 2.1(a) and is therefore capable of being limited.

Under English law a similar situation has arisen in connection with salvage in the case of the *Breydon Merchant* [1992] 1 Lloyd's LR 373. Cargo interests, who had been compelled after a casualty to pay a salvage award, sought to recover it from the shipowner in full. The shipowner applied to limit his liability, action that was resisted by the cargo interests on the grounds that salvage was a type of claim excluded from the right to limit by Article 3(a) of the Convention. The admiralty judge found that a claim for an indemnity lost its character as salvage and fell to be categorised under Article 2.1(a) and was thus subject to the right to limit. This first instance judgment has remained uncontested for 11 years. It is submitted that a claim for an indemnity for wreck removal following a collision would be treated in the same way albeit that it would be a claim in tort, not contract.

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