# The Limitation Regimes for Maritime Claims

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# Contents

# 1 Global Limitation of Liability for Maritime Claims

## 1.1 The limitation regimes of international conventions

The Norwegian law on limitation of liability of owners and operators of ships, which is set out in chapters 9, 10 and 12 of the MC 1994 (as amended in 2005), is a rather voluminous piece of legislation. Large parts of it, however, are "imported law", being modelled on the provisions of several internationally elaborated conventions. The purpose of these conventions is to establish and maintain international uniformity in important areas of shipping law when being adhered to by a number of states and, subsequent to ratification, implemented through their national maritime laws. By the ratification of a particular convention as a treaty, each state party assumes vis-à-vis the other state parties *an obligation according to public international treaty law* to maintain and apply the rules therein to cases within the scope of application of the particular convention. This also includes, generally, a duty to interpret the implementing national legislation in a manner consistent with the provisions of the convention. **(1)**

In order to promote international uniformity of the law relating to limitation of maritime claims for damage attributable to ships, Norway and the other Nordic states – as well as a number of other European and foreign states – have ratified and implemented the international liability regimes, as developed and amended over the years. At present, the Maritime Code (*MC*) chapters 9, 10 and 12 mainly reflect the international limitation regimes set out in three separate conventions:

- The 1996 Convention on the limitation of liability for maritime claims, being in fact a copy of the earlier 1976 London Convention with a few amendments contained in the 1996 IMO Protocol.

The 1996 Convention does not contain any rules relating to the basis for liability for maritime claims.

- The 1992 Convention on civil liability for oil pollution damage, which applies to pollution damage caused by the escape of oil (including bunker oil) from tankers laden with crude oil. This convention provides that tanker owners shall have strict liability for such oil pollution damage, and contains in addition its own regime for the limitation of such liability. Supplementing this convention, the 1992 Convention on an international fund for compensation for oil pollution damage allows for additional compensation.
- The 2001 Convention on liability for pollution damage caused by bunker oil, which is applicable only to ships other than laden crude oil tankers. According to this convention, the owner of the ship shall have strict liability for such pollution damage, but this liability may be subject to limitation according to national or international law, such as the 1976 London Convention as amended by the 1996 IMO Protocol.

As a matter of international public law, each of these conventions contains a separate regime for limitation of the particular maritime claims falling within its scope of application. The effect of this is essentially a restructuring of the international law on limitation of maritime claims by which *the traditional global limitation regime be replaced by several separate treaty-based limitation regimes* (*infra* 1.3). National limitation regimes, established by state parties when implementing the 1996 Convention, contribute significantly to the scope of this restructuring (*infra* 1.4).

These three conventions pursue different, but interrelated objectives. Despite some differences in particular as to substance, however, the form, structure and elements of each of the limitation regimes established thereby are generally the same. Clearly, the legal limits of liability provided in each are different, being adapted to the types of maritime claims subject to limitation according to each of the new limitation regimes (*infra*

1.4). However, there is *no direct legal link* between the three regimes. A common denominator for the three treaty-based limitation regimes is that *the particular limit of liability provided applies to the total of the defined types of claims* having arisen out of a particular maritime casualty. All three also apply *a specific limitation fund procedure* to achieve actual limitation of each of the limitable claims (MC § 232, cf. §§ 175 and 178, 185 and 195-196). This means – in brief – that the new limitation regimes are, to this extent, also *variants* of the traditional global limitation system for maritime claims.

Accordingly, the basic idea of each of the new limitation regimes is that the legal limit provided therein shall constitute a limit for *the sum* of all of the claims subject to this limit arising out of a particular casualty occurring in direct connection with the operation of a ship. This presupposes, *first*, that the limit applies to the *aggregated amount* of maritime claims (MC §§ 175, 175a and 195) and, *second*, that the limitation of particular claims is a result of proportionate distribution of the limitation amount among the claimants (MC § 244). In practice, however, such a system for limitation of the particular claims is operational only if – after a casualty – the shipowner actually establishes a *limitation fund* subject to proportionate distribution among the established claims and, in addition, the fund so established has the effect of *barring claimants from separate actions* against the shipowner (MC §§ 178, 178a and 196). Consequently, all the new limitation regimes include a system for enforcing limitation of the particular claims, based on *some of the key principles of global limitation*, viz. the principles of limitation after aggregation of claims and the use of a limitation fund as the vehicle for enforcing limitation of the particular claims.

## 1.2 Existing variants of global limitation

The origin of the traditional global limitation system is the 1957 Brussels Convention on the limitation of the liability of owners of seagoing ships and the subsequently adjusted redraft thereof in the 1976 London Convention on limitation of liability for maritime claims. At present,

this treaty-based system also remains – at least in form – embodied in an amended and modernized, but restricted, version in the 1996 Convention, often termed – misleadingly – a regime for global limitation of maritime claims. The 1976 Convention also served as model, both for the structure of the limitation regimes of the two other above-mentioned conventions, adopted in 1992 and 2001 and also, in particular, for the *specific limitation fund procedure* for enforcing limitation of particular claims contained therein (*supra* 1.1).

Norway and the other Nordic states have regularly adhered to and thus implemented the various conventions on limitation of shipowner liabilities as elaborated, adopted, amended and replaced in international cooperation over the years. Consequently, international developments have recurrently entailed substantial changes to the national maritime codes and, in particular, to the parts of the MC implementing treaty-based legal regimes. As a matter of treaty law, however, none of the existing conventions provides an in all respects complete or self-contained limitation regime, thus leaving it to *national legislation* of state parties to provide both supplementary rules and other rules on related matters not regulated in the particular convention. When transposing the conventions to national law, Norway and the other Nordic states have done so, in recent years particularly in order to ensure adequate implementation of the 1996 Convention, the 1992 Liability Convention and the 2001 Bunker Convention.

The result of this approach is that, at present, the MC chapters 9, 10 and 12 on limitation of liability constitute a comprehensive and diversified piece of legislation. In addition to the provisions needed to implement fully the treaty-regulated limitation regimes actually in force, these chapters of the MC also contain a number of national legal provisions needed to cover appropriately any exemptions or actual lacunas in the international regimes, particularly by common provisions on limitation funds set out in MC chapter 12. Clearly, all the provisions of the MC are part of the national law. Nevertheless, there remains an important difference in legal character between the treaty-based provisions and the national additions contained in the MC. The reason is that the national

courts generally have a duty to interpret and apply the treaty-based provisions consistent with the international treaty obligations of Norway in relation to other state parties (*supra* 1.1 note 1).

## 1.3 The scope of the 1996 Convention

The purpose of the 1996 Convention – consistent with the idea of global limitation of maritime claims – was apparently to define as a matter of international law a generally applicable regime for limitation of liability for maritime claims. The new convention constitutes a copy of the 1976 London Convention, as amended by the 1996 IMO Protocol providing higher and internationally uniform limits of liability. Actually, the *global limitation* objective of the 1957 and 1976 conventions also served as the basis for drafting the 1996 Convention. (**2)** Nevertheless, the 1996 treaty-based regime specifically allows any state party a quite wide opt-out option for important groups of maritime claims, cf. in particular the 1996 Protocol Article 9 on the scope of the treaty obligations imposed on state parties to the Protocol (*infra* 2.1).

The limitation regimes of the 1957, 1976 and 1996 conventions generally distinguish between personal injury claims and all other maritime claims occurring in direct connection with the operation of a ship, cf. Articles 2, 6 and 7. They provide separate limits for personal claims, and another limit for the sum of all other types of claims arising out of the same accident or event. The latter group included all kinds of claims based on damage to property (including damage to harbour works and waterways), as well as claims by public authorities in respect of the raising, removal and cleaning-up work, required because the ship is sunk, wrecked or stranded, including anything that is or has been on board such ship. Nevertheless, the 1996 convention Articles 3 and 18 also contained some exceptions and, as a matter of international law, important groups of maritime claims actually fall outside its scope of application, being subject to other separate international or national limitations regimes.

*First*, claims in respect of oil pollution damage resulting from the escape of crude oil (including bunker oil) from laden tankers, exclud-

ed from the 1996 Convention, are subject to the special and separate limitation regime provided for in the 1992 Liability Convention. The MC chapter 10, part II implements this limitation regime, but with supplementing national rules on limitation fund modelled on provisions applicable to the limitation regime of the 1976/1996 conventions (MC §§ 195 and 196, cf. MC chapter 12). This liability regime also includes claims in respect of raising, removal and clean-up operations to avoid or limit pollution damage arising out of casualties involving laden tankers (MC § 191, paragraph 2). However, other types of maritime claims in respect of damage caused in direct connection with the operation of laden tankers remain within the scope of the limitation regime of the 1996 Convention, as implemented in MC chapters 9 and 12.

*Second,* 1996 Convention Article 18 allows state parties a wide option to opt-out of the limitation regime of the convention by excluding and exempting any claims in respect of removal and clean-up operations relating to a ship sunk, wrecked or stranded, cf. Article 7 of the 1996 IMO Protocol. A number of state parties, including Norway and the other Nordic states, have done so. Consequently, the *treaty-based* limitation regime of the 1996 Convention, as implemented in the Norwegian MC chapters 9 and 12, is now a separate regime applicable only to the claims remaining within the scope of the 1996 Convention, mainly claims in respect of property damage. Conversely, the exempted claims are subject to *a* new *national limitation regime*, established by national statutory law as a *separate* variant of a "global limitation" system, but based on substantially higher limits of liability than in the 1996 Convention. **(3)** Accordingly, MC chapters 9 and 12 also contain particular provisions defining the key elements of this national limitation regime (MC §§ 172a, 175a, 178a and 179, cf. § 232).

*Third*, claims in respect of oil pollution damage resulting from bunker oil of ships other than laden tankers, are subject to the strict liability regime provided for in the 2001 Bunker Convention, as implemented in MC chapter 10, part I. This liability regime also includes claims in respect of raising, removal and clean-up operations to avoid or limit pollution damage arising out of casualties involving laden tankers. However,

the Bunker Convention expressly provides in Article 6 that it does not affect any right to limitation of such liability according to national or international law, such as the 1976 London Convention as amended e.g. by the 1996 IMO Protocol (MC § 185, paragraph 3). According to MC chapter 10, part I, such pollution claims consequently in fact fall within the scope of the new separate national limitation regime based on the opt-out exemption of Article 18 of the 1996 Convention and the substantially higher limits of liability for such claims specifically provided in MC §§ 172a, 175a, 178a and 179, cf. § 232. **(4)** However, other types of maritime claims in respect of damage caused in direct connection with the operation of ships other than laden tankers remain within the scope of the treaty-based limitation regime of the 1996 Convention, as implemented in MC chapters 9 and 12, cf. MC §§ 172, 175 and 178, cf. § 232.

The restructuring of the treaty-based and national limitation regimes following from the implementation of the 1996 Convention in the MC chapters 9, 10 and 12, consequently means *an actual replacement of the traditional global limitation regime by several separate treaty-based and national limitation regimes.* Each of these regimes has a defined scope and different limits of liability (MC §§ 172 and 175, 172a and 175a, 185 and 195). However, MC chapter 12 on limitation funds applies to all of these regimes, cf. also MC §§ 176, 177 and 195.

## 1.4 Erosion of the global limitation system

The traditional global regime for legal limitation of shipowner liabilities, as contained in the 1957 Convention, was originally relevant primarily for claims in respect of damage caused to ships, cargoes and other marine property. These claims usually related to damage already covered against marine risks by direct insurance contracted by the property owners. Accordingly, the original legal limits of liability only reflected a level of third party liability generally expected to be insurable by shipowners at reasonable cost. Obviously, the purpose of any of the international limitations regimes has never been, and even at present is not,

generally, to provide – consistent with the general principles of the law of torts – full compensation to injured parties.

International developments over the years, however, created a new and quite different situation. This explains why international limitation conventions adopted during the last 30-40 years actually initiated a gradual erosion of the original global limitation system for maritime claims. It became obvious that international shipping also presented substantial risks of serious damage to other – and largely uninsured – interests in society, particularly in coastal states. Accordingly, the view emerged – and prevailed – that the costs of such damage resulting from risks of international shipping were expenses generally to be attributable to and covered by the shipping industry itself. The obvious key to achieving this was to combine substantial changes to the existing legal limitation regime(s) with a new important role for the insurance of the legal liabilities by shipowners. Essentially, this meant that the liability insurance contracted by shipowners would also serve as the vehicle for payments of appropriate compensation to third parties for the various claims for damage resulting from risks attributable to the shipping industry. **(5)** In hindsight, the conclusion is that the "global limitation" approach reflected in the 1957, 1976 and 1996 Conventions – even after substantial increase of the limits – actually proved to be too ambitious to address adequately the challenges emanating from internationalized or globalized shipping and trade.

(1) One reason for this was that the substantial increases of the monetary limits of liability provided for in the 1957, 1976 or 1996 conventions proved soon to be outdated in real terms. One reason was the unavoidable effect of inflation. Already in 2012, it was necessary to increase the general 1996 limits by ca. 50 %. In addition, a view widely held in many countries was that the internationally agreed limits proved to be by far too low to provide acceptable compensations to injured parties in cases of serious damage and loss resulting from international shipping. This became particularly apparent as structural changes to the shipping industry gradually entailed both substantial increase of risks and sizable losses for other private and public sectors of modern societies. In general, most

losses suffered by such parties were not covered – or coverable – by direct insurance.

Internationally, the resulting concerns initially provoked recurrent, prolonged and controversial discussions of new substantial increases to the monetary values of the limits of liability, designed primarily to counter the effects of significant inflation over the years. However, although substantial – limited – increases of the limitation amounts followed after the 1976 and the 1996 conventions, this was not sufficient to meet the demands for significantly better protection against *particular types of costly damage caused by ships to uninsured non-shipping interests in coastal areas*. In principle, such losses ought to be recoverable under the legal regimes applicable to the shipping industries, and not – after heavy limitation – to remain in general with the injured parties within society. The major driving forces were strong private and in particular public proponents of the need for adequate protection against damage to the environment and other interests of coastal states.

The remedy eventually agreed was to *exempt these types of claims from the traditional and treaty-based "global limitation" system*. This would allow for such claims instead to be subject to separate international or national limitation regimes with limits of liability ordinarily sufficient to *generally provide full compensation to most of the exempted claims*. **(6)** Furthermore, such restrictions on the applicable limitation regimes would also provide a new and firm basis for substantially extending the liability insurance of shipowners in order to ensure – indirectly – an appropriate insurance coverage for the sizeable losses covered by the claims so exempted (*infra* 1.7).

The result of this approach is that the limitation regime of the 1996 Convention – as a matter of international treaty law – is binding and applicable only for limitation of claims in respect of damage to property such as ships, cargoes and harbours, traditionally exposed to marine risks insurable by direct insurance. In many 1996 states, therefore, claims in respect of pollution and environment damage and the cost of clean-up operations resulting from marine casualties are now subject to limitation according to internationally and nationally established limitation regimes,

ordinarily based on limits of a size largely adequate to cover most of such claims. (7)

(2) The first important exception to the "global limitation" system came in the early 1970s, with the adoption of a new international liability regime for oil pollution damage resulting from casualties to laden crude oil tankers, later redrafted in 1992. Internationally, such pollution claims, including removal and clean-up costs, are now subject to the particular limitation regime contained in the dual 1992 civil liability and international fund conventions. Consequently, these pollution claims fall outside the scope of the "global limitation" regimes of the 1976/1996 conventions. The 1992 liability regime is now included in the MC chapter 10, part II and exempted from the general limitation regime contained in MC chapter 9 (MC § 173), cf. 1996 Convention Article 3 and MC §§ 191 and 183 paragraph 10. Nevertheless, when implementing the limitation regime for oil pollution damage contained in the 1992 Conventions, the provisions of the 1976 Convention served as a model for the particular provisions on limitation fund for oil pollution claims against laden tankers as now set out in MC §§ 194-196. This also explains why the particular provisions in MC chapter 12 are generally applicable to such limitation funds (MC § 231).

(3) Another, most important exemption to the global limitation principle subsequently appeared in the 1976 and – later – the 1996 Conventions. By Article 18 No.1 of both conventions, state parties are allowed to "reserve the right to exclude the application of Article 2, paragraphs 1(d) and 1(e)" from these conventions (*infra* 2.1). A great number of state parties, including the Nordic and most European states, have actually adhered to the 1996 Convention subject to this reservation, thereby delimiting their treaty obligations under the Convention so as to relate solely to the remaining types of claims listed in Article 2, paragraphs 1 (a)-(c) and (f), cf. MC § 172. Essentially, this reservation to the 1996 Convention provides a national basis for exempting all claims against the owner of a ship sunk, wrecked or stranded in respect of the raising, removal and other cleaning up work relating to such ship, including anything that is or has been on board the ship. Generally, state parties

to the 1996 Convention thereby retain the right to determine through national law to what extent such types of claims by public authorities and other third parties shall be subject to limitation. This is particularly important in relation to casualties suffered in coastal waters by ships other than laden crude oil carriers (MC §§ 183 and 185). A significant number of state parties, including Norway, have adopted such national legislation (MC §§ 172a, 175a and 179).

Norway ratified the 1996 Convention subject to the reservation permitted by its Article 18 No. 1 and the 1996 IMO Protocol Article 7. For Norway as a shipping state it was important to become a party to the 1996 Convention while, at the same time, safeguarding as a costal state the right to establish nationally acceptable alternative limits for the liabilities imposed particularly by the national Pollution Act (1981) §§ 7, 28 and 74-76. The latter was particularly important for liabilities for bunker-oil pollution in coastal waters resulting from casualties to ships other than laden crude oil carriers (MC § 183), but it also allows generally for the recovery of the cost of removing such ships and other clean-up operations. **(8)** For laden tankers, even claims in respect of bunker-oil pollution were already subject to the liability regime for oil pollution damage of the 1992 Liability Convention (MC chapter 10, part II), cf. MC § 191, paragraph 2. Accordingly, MC chapter 10, part I, implementing the 2001 Bunker convention, is not applicable to bunker-oil pollution caused by laden tankers, cf. MC § 183, paragraph 10.

(4) The implementation of the 1996 Convention, as delimited by the reservation permitted by its Article 18, paragraph 1, obviously required comprehensive redrafting of the 1976 regime for limitation of maritime claims then contained in the Maritime Code. In brief, the amendments to the MC, adopted in 2005, provided that the sum of claims listed in Article 2, no. 1 (a)-(c) and (f) of the 1996 Convention remained subject to the treaty-based limitation regime, and that another new national limitation regime applied to the sum of the claims listed in Article 2, no. 1 (d) and (e). **(9)** However, the new limitation regime – while providing for substantially higher limits than the 1996 Convention – was in most other respects modelled on the principles of the "global limitation" system of the

1976/1996 Conventions (*infra* 2.3.2). As a matter of treaty law, however, the legal character of the two limitation regimes is different. In principle, the provisions of the MC defining the national limitation regime are subject to ordinary national interpretation practices, while Norway – a state party to the 1996 Convention – generally has a paramount duty to treaty conform application and interpretation of the provisions of the MC implementing the 1996 treaty-based limitation regime (*supra* 1.1).

## 1.5 The effects of the shipowner's limitation fund

### 1.5.1 An option for the shipowner

The provisions on limitation funds in the 1996 Convention Articles 11 to 14 are implemented in Norwegian law by MC §§ 176-178, 232-234 and 244-245 as supplemented by MC §§ 235-243. Notwithstanding the restructuring of the limitation regimes for maritime claims, the basis for all the new regimes is still *the principle of aggregation of claims*. Each of the new legal limits applies to the sum of all claims subject thereto, arising from damage caused by the ship in any one event. Hence, the vehicle for enforcing each limit by actual limitation of the various limitable claims continues to be a *limitation fund* established by or on behalf on the shipowner (*infra* 1.1), having the effect of *barring separate legal actions from claimants* (1996 Convention Article 13, MC §§ 178, 178a, 189 and 196). As a matter of substantive law, *claimants may, subsequent to the establishment of the limitation fund by the shipowner, only enforce limitable claims by submission to the limitation fund and subject to the rather time-consuming fund procedure* (*infra* 4.2). This follows from MC §§ 177 to 178a

If, after a casualty, a particular action brought against the shipowner relates to a limitable claim, the shipowner has the option to invoke limitation of liability in that action (1996 Convention Article 10, MC § 180) or to request that a limitation fund be established (1996 Convention Article 11, MC § 177, paragraph 1). This option is important in the context of limitation of liability. When deciding the particular action

to be brought, the court shall ordinarily apply the rules on limitation of liability invoked only in relation to the claims actually included in that action. The resulting judgment, however, is of no consequence for the extent of limitation of any other claims arising out of the same casualty, and the shipowner still has a risk that enforcement of such other claims may entail that the total liability for all the claims from the casualty exceeds the applicable legal limit. The shipowner, however, may eliminate this risk if instead he reacts to the action brought, by invoking limitation with a request for establishment of a limitation fund. The fund covers all the claims arising out of the casualty (1996 Convention Articles 11 and 12, MC §§ 176 and 244), preventing all claimants from pursuing their claims by separate legal actions (1996 Convention Article 13, MC § 177, paragraphs 1 and 3).

For the claimants, however, the establishment of a limitation fund is, as a matter of law, not equivalent to actual payment of the limitable claims. The immediate effect is postponement of all payments of compensation to injured parties. The overall purpose of the limitation fund and the fund procedures is to safeguard the legal right of the shipowner to limitation of the total liability for all claims arising out a particular casualty. This limitation model requires that the claims subject to limitation only receive payments in the form of proportionate dividends from the limitation fund, subsequent to the completion of a comprehensive fund procedure to determine the distribution of the fund. Accordingly, there is also a need for statutory requirements ensuring that limitations funds be established and distributed in an orderly manner.

A key element of the statutory requirement is that the limitation fund be established by a decision of the court (MC § 234) which also determines, according to MC § 232, the actual amount in national currency to be paid into the limitation fund. Second, the amounts paid into the limitation fund must be exclusively applied to payment of compensation to the limitable claims (MC § 177, paragraph 2). Third, distribution of the amount of the limitation fund is the subject of a "limitation action" brought before the court by the shipowner against all claimants and determined as and when the court decides this action by the judgment

(MC §§ 177, paragraph 3, and 240). The effect of this judgment is to terminate the fund procedure, to authorize the payment of dividends to established claims, and, ulitimately, to relieve the shipowner of any further liability in respect of the casualty (MC §§ 244 and 245).

### 1.5.2 The legal effect of «global» limitation

The "global" limitation model means that actual legal effects of each of the limitation regimes are determined within the framework of rules generally applicable to all limitation funds set out in MC chapters 9 and 12 (MC § 231-232, cf. §§ 177, 185, 194-196 and 505). Ordinarily, the fund procedure set out in MC §§ 177 and 232 – 245 entails considerable, often yearlong delays in settlement and payment of compensation to limitable claims (*infra* 4.2). In most cases, the effects thereof are to the advantage of the shipowner and his liability insurer having the option of requesting the limitation fund be established (MC § 177). While the limit of liability is expressed in SDRs, the amount of the limitation fund in national currency is determined by the rate of exchange for SDR when established (MC § 232-234 and 505). Hence, the fund expressed in national currency usually proves to decline in real value during the lengthy delay caused by the fund procedure, particularly due to continuous inflation. Benefits may also follow from the mere postponement of payment of claims until the closing of the fund procedure, also including a possible decline in monetary value.

For the claimants, however, the delay resulting from the fund procedure is also likely to cause additional losses, particularly for parties having suffered damage not covered by their own direct insurance. Such claims are not subject to limitation (MC § 173, paragraph 3) as claims against the limitation funds. One part thereof – loss due to change of exchange rates or decline in monetary value during the period from the casualty to the establishment of the fund – is compensated by a specific addition to the amount of the limitation fund when established, calculated at a normal interest rate (1996 Convention Article 11, paragraph 1 and MC § 232). In addition, the court may, when establishing the limitation

fund, also order the shipowner to provide a separate security to cover interest for delayed payment and other financial loss subsequent to the establishment of the fund and until final payment by the distribution of the limitation fund (MC § 234, paragraph 2).

The background is that claims for interest for late payment of dividends on claims, accrued from the establishment of the fund and to actual payment of dividends by the fund when closed, are not subject to limitation (MC § 173 no. 6) and, consequently, are not enforceable against the limitation fund. Generally, any calculation of interest on the amount of dividend payable from the limitation fund or of other financial loss is not possible prior to the judgment of the Court determining the distribution of the fund among the claimants. In any event, claimants awaiting payments, particularly uninsured parties, have to remedy the damage caused at own costs, which – whether financed by own means or by loans – also represents an additional financial loss. All this means that, in general, claims for interest for late payment of dividends to claimants is enforceable only as a separate claim against the shipowner itself subsequent to the closing of the fund procedures (MC § 234, paragraph 2 second sentence). Even when, according to MC § 234, paragraph 2, the Court has ordered the shipowner to provide specific security, claims for interest tend to be left out of any final settlement or determination of the liabilities of the shipowner made several years after the casualty and establishment of the limitation fund, cf. LB-2017-59152 and LB-2019-122748.

In any event, these decisions, and in particular HR-2018-1260-A (*Full City*), suggest that this pattern of interconnected provisions on the establishment of limitation funds and fund procedures contained in the 1996 Convention and MC Chapters 9 and 12, appears to be too complicated to be readily understood and applied by parties and by courts. **(10)**

## 1.6 International effects of limitation fund

The establishment of a limitation fund in one of the state parties to the 1996 Convention does not necessarily bar claimants from enforcing lim-

itable claims by separate legal action brought against the shipowner in other state parties. Ordinarily, however, international conventions designed to create internationally uniform limitation regimes also contain provisions on the reciprocal recognition by state parties of limitation funds established in other state parties. The 1992 Liability Convention and 2001 Bunker Convention provide for such mutual recognition, implemented by MC §§ 189, 196, 203 and 205. However, the rules on mutual recognition in Article 13 of the 1976 and 1976/1996 global limitation conventions are different and are kept in rather flexible language, cf. MC § 178. This is of importance because worldwide and even in the EU/EEA area a large group of states remain state parties to the 1976 Convention, while another large group, including the Nordic and most European states, are state parties only to the amended 1976/1996 Convention.

According to the 1996 Convention Article 13 and MC § 178, the rules on mutual recognition only apply to limitation funds established according to the 1996 Convention, and only if actually established in a 1996 state party where the casualty or the arrest of the ship took place, except if recognition is granted merely on a discretionary basis. However, MC § 178 is not applicable to limitation funds established according to the un-amended 1976 Convention (ND 2007 p. 370 NSC).

In the EU/EEA area, however, decisions by courts on establishment or other matters relating to limitation of liability and limitation funds in another member state are subject to the Brussels I Regulation (EC) No. 44/2001 and the Lugano Convention 2007 Articles 27 and 33, containing uniform rules on jurisdiction of courts, lis pendens and recognition of judgments. Consequently, legal actions and decisions relating to limitation of liability in the courts of an EU/EEA state are ordinarily subject to recognition in the other EU/EEA states. In this context, however, it is not relevant whether or not such EU/EEA state is party to the 1996 or the 1976 convention, or whether or not the conditions are met for mutual recognition of limitation funds in 1996 Convention Article 13 and MC § 178 (ND 2007 p. 370 NSC and ND 2005 p. 631 DSC). **(11)**

## 1.7 Global limitation and P&I insurance

Shipping companies regularly cover the risk of claims in respect of damage resulting from the operation of ships by liability insurance, ordinarily P&I insurance. Traditionally, P&I insurance provides liability insurance for each specified ship, covering the various risks of claims related to the particular properties and operations of the named ship. In general, however, P&I contracts do not specify the insured amount. In most cases, consequently, even the liability of the P&I insurer is subject to the limit of the applicable limitation regime – international or national – as applied to the actual tonnage of the insured ship. This link means that the restructuring of the international and national limitation regimes – establishing new regimes each applicable to different types of claims subject to different limits of liability – also entailed substantial changes to P&I liability insurance practices in international shipping.

The major impact on P&I liability insurance, however, does not follow from this restructuring as such. Its primary objective was to amend the limitation regimes in order that, in practice, the role of the liability insurance of shipowners would be extended to also serve as a vehicle for the provision of adequate compensation for damage caused by ships to uninsured non-shipping interests in coastal areas (*supra* 1.4). This presupposed, however, that the new limitation regimes be supplemented by schemes for *obligatory liability insurance* of each of the groups of maritime claims subject to limitation, containing also *minimum requirements to the insurance cover* to be provided. These schemes proved to have substantial consequences quite foreign to traditional P&I business. Nevertheless, P&I insurers readily provided the new liability covers needed by shipowners, in fact also assuming the administrative tasks required by insurance contracts protecting not only the insured shipowner, but also various groups of third parties.

The principle of obligatory liability insurance was first recognized by the 1974/1992 Liability Convention and, subsequently, by the 2001 Bunker Convention. Both conventions apply to oil pollution damage attributable to ships, and require the registered owner of the ship to provide full

liability insurance cover up to the applicable legal limits for oil pollution damage claims (MC §§ 197 and 186). The ship must carry an insurance certificate confirming such insurance cover. In addition, both conventions expressly provide that injured parties may enforce their claims by *direct action against the P&I liability insurer* (MC §§ 200 and 188).

In addition, the EU directive 2009/20/EU now provides a general regime for obligatory liability insurance, requiring that ships be fully insured against all liabilities for claims limitable under the 1976 Convention as amended by the IMO 1996-Protocol (MC §§ 182a-182c). According to MC § 182a, however, it is a duty of the actual operator, as either the owner or the bareboat charterer of the ship (the "reder"), to obtain such liability insurance, evidenced by an insurance certificate. Another difference is that the EU directive itself does not contain provisions on the right of injured parties to enforce their claims by direct action against the liability insurer, thereby leaving this to be determined by national law, such as NFAL §§ 7-6 to 7-8 and the DFAL § 95. This, however, is likely to cause important uncertainties as to the interaction between P&I insurance and the limitation regimes.

## 1.8 The links between the limitation regimes and P&I insurance

The restructuring of the international and national limitation regimes, combined with specific requirements relating to obligatory insurance of the liabilities subject to limitation, strengthened and broadened the traditional links between the limitation regimes and P&I insurance. In any event, however, this link already was – and still is – a direct consequence of the actual limitation procedures applied by the several limitation regimes. The key element is the establishment of a limitation fund by or on behalf of the shipowner with the court receiving an action against the shipowner (MC § 177). In most cases, nevertheless, the limitation fund actually consists of payment or guarantee provided by the P&I insurer of the ship involved. Moreover, MC § 171, paragraph 3 also gives the P&I

insurer his own right to limit his liability for insured claims, according to the applicable limitation regime, cf. also MC § 177, paragraph 3.

This means that the P&I insurer actually holds the real interest – at least indirectly – as party to the disputes on claims and distribution of the limitation fund subsequently arising during the limitation process. In fact, the P&I insurer generally has a key role in the limitation procedure, even in cases where the required liability insurance does not give claimants an express right to direct action against the P&I insurer. Moreover, in view of recurrent crises and extensive forum shopping in international shipping, P&I insurers increasingly appear to be the favoured targets for direct actions as a vehicle when seeking to enforce maritime claims against the insured shipowner.

The countermeasure of international P&I insurers is P&I-contract terms, including a preferred jurisdiction and choice of law clause, purporting to prevent such "third party" actions from injured parties. Internationally, however, there is no uniform response to these hurdles from legislators or courts. In an EU/EEA context, the issues raised in such actions against P&I insurers primarily relate to the initial, but important, questions of applicable jurisdiction and choice of law, rather than the actual liability for the particular claims, cf. ND 2017 p. 445, at p. 460-61 DSC (*Assens Havn*), and HR-2018-869-A and HR-2020-1328-A NSC (*Gard I and II*). **(12)** These decisions held that, according to the applicable national rules of choice of law, the particular dispute between the injured party and the P&I insurer was governed by the national tort law. In the cases at hand, the national law on insurance contracts also permitted the claim of the injured party to be brought by direct action against the P&I insurer (Dfal § 95 and NFAL §§ 7-6 to 7-8).

Nevertheless, the Danish and Norwegian approach to the issues of substantive insurance law on direct claims against the P&I insurer is somewhat different. According to Dfal. § 95, paragraph 2, the rule is that a direct claim against the P&I insurer will succeed only in cases where the insured shipowner is actually subject to insolvency proceedings. In ND 2017 pp. 445 DSC (Assens Havn) the court held that the direct action, based on a claim according to applicable Danish tort law, was subject to

Danish jurisdiction and properly brought for subsequent final decision by Danish courts, even if the P&I contract provided for English law and jurisdiction, see my Comments in ND 2017 pp. lxx-lxxiii. Norwegian law, however, applies a clear-cut distinction between the initial issues and rules on jurisdiction and procedural law applicable to direct actions, and the issues and rules of substantive law relevant applicable when, in the main proceedings of the direct action, to determine whether the P&I insurer is actually liable for the claim brought.

In *HR-2020-1328-A*, the Supreme Court (Gard II) held that, as a matter of procedural law, a direct claim based on liability insurance governed by NFAL §§ 7-6 to 7-8 may *generally* be the subject of a direct action against the P&I insurer having Lugano-jurisdiction in Norway. Thus, the main issue is whether there is a Norwegian forum available for the legal action brought against the P&I insurer, and this issue is generally independent of any assessment of the likely result in the main proceedings, as eventually decided by the court. In Norwegian law, consequently, questions such as the legal effect of the P&I-contract terms for the liability for the particular direct claims, are a matter of substantive insurance contract law *to be decided in the main proceedings of the direct action* according to the relevant facts, cf. ND 2008 p. 267 NSC (*supra* note 12). In any event, the overriding principle in NFAL § 7-6, paragraph 4 is that the P&I insurer may generally invoke the same objections against the direct claim as the insured party, provided, however, that P&I contract terms allowing any additional objections to the liability of the insurer are invalidated if the insured party is insolvent (NFAL § 7-8). Although the Danish and Norwegian procedural approach to direct actions seems to be different, in most cases, the *substantive insurance law* in sum will be the same.

# 2 A two-tracks model for treaty-based and national limitation

## 2.1 The impact of international developments

The origin of the existing regimes for limitation of maritime claims is the 1957 Brussels Convention. The convention objective was to promote international uniformity by defining the maritime claims subject to limitation (Article 1) and by specifying limits for the total of all limitable claims arising against the ship at any distinct event (Article3), enforceable by means of limitation funds legally established by the shipowner (Article 2). This regime, implemented in the Maritime Code in 1964 **(13)**, later became – in a modernized and redrafted version – incorporated in the 1976 London Convention, providing a substantial increase of the 1957 limits and new, specific requirements as to the establishment, effect and distribution of limitation funds (Article 11-14). After denunciation of the 1957 Convention, the Nordic states in 1983 implemented the 1976 London regime in the Maritime Code (*MC*). An important part of the implementing legislation was a new chapter of the MC, structured in accordance with the provisions on limitation funds in Articles 11-14. Included in this chapter were also supplementing national rules on the limitation fund procedures and on limitations actions against all claimants, to determine the amount of the fund as well as the distribution of the fund among the established claims against the shipowner. **(14)**

The 1996 IMO Protocol brought a few, but important, amendments to the 1976 Convention. **(15)** A *first objective* was to provide another major increase to the limits of liability. Without awaiting the entry into force of the IMO Protocol, Norway in 2002 implemented the new limits in the Maritime Code without, at the same time, denouncing the 1976 Convention. As a matter of public international law, consequently, it was also necessary to add an exception whereby shipowners from state parties to the 1976 Convention would remain entitled to limitation according to the original limits of the 1976 regime. **(16)**

The *second, but overriding objective* of the 1996 Protocol, however, was to *re-establish* internationally uniform limits of liability fully based on the 1976 Convention, as amended by the 1996 IMO Protocol. In fact, the result of the Protocol was a *new* 1996 Convention designed to replace the 1976 Convention. To achieve this, it was necessary to terminate the international role of the 1976 Convention and its limits, and to restrict the mutual recognition of the limitation regimes in other states to the limitation regimes based on the limits in the new 1996 Convention (*supra* 1.5, cf. ND 2007 p. 370 NSC). At the same time, however, it was also important not to impair the international uniformity of the limitation system as such, as already established by the 1976 Convention. The mechanism to implement these principles is set out in Article 9 of the Protocol.

The basic idea inherent in Article 9 is that the state parties to the 1976 Convention, by denunciation of the 1976 Convention and simultaneous ratification of the 1996 IMO Protocol, would be *state parties only to the 1996 Convention*. Except for new limits and rules on periodic updating of limits, the 1996 Convention was almost identical with the original 1976 Convention, thus preserving generally the uniformity of the existing systems for limitation of maritime claims. As between state parties to the 1996 Protocol, consequently, the 1976 Convention, as amended by the Protocol, formally constituted in its entirety a *new treaty* – the 1996 Convention – which was to be read and interpreted as one single instrument, cf. the Protocol Article 9, nos. 1 and 2.

This procedure substantially reduced the number of state parties to the original 1976 Convention. At present, more than 60 states, including the Nordic and most European states, are parties to the 1996 Protocol and 1996 Convention. Nevertheless, there are still a number of other states remaining parties to the 1976 London Convention un-amended without ratifying the 1996 Protocol. The effect of the mechanism in the 1996 IMO Protocol Article 9 is, however, that 1996-states, having denounced the 1976 Convention, no longer have any treaty obligations vis-a-vis such states (Article 9, no. 4). In 1996-states, consequently, the limitation regime based on the 1996 Convention, and even an alternative national

limitation regime for claims excluded by a reservation according to Article 18 thereof, is also applicable to ships from such 1976-states (ND 2007 p. 370 NSC) and to ships from states not party to any of the conventions.

*The third objective* of the 1996 IMO Protocol was to solve a problem arising because the mechanism set out in the Protocol Article 9 generally meant that the list of maritime claims subject to limitation contained in the 1996 Convention Article 2 actually remained the same as in the 1976 Convention Article 2. However, the recurrent controversies as to whether the international limitation regime should even extend to cover claims in respect of removal of the ship, cargo and other clean-up operations relating to a ship sunk, wrecked or stranded, actually constituted a serious threat to the extent of international acceptance of the 1996 Protocol and 1996 Convention. In particular, there still was strong opposition from most coastal states. The solution agreed, in order to avoid delay in the entry into force of the 1996 Convention, was to allow each state party to reserve the right "to exclude the application of article 2, paragraphs 1 (d) and (e)". According to the 1996 IMO Protocol Article 7, amending the 1976 Convention Article 18, paragraph 1, any state party could do so not only when adhering to the 1996 Convention, but also at any time thereafter (*supra* 1.4).

This compromise meant that the 1996 Convention could not serve as a vehicle for re-establishing an internationally uniform limitation regime for maritime claims. At any point in time, there now exists two groups of state parties to the Convention. One group has a treaty obligation to implement and apply the uniform limitation regime of the 1996 Convention to all maritime claims listed in Article 2. The other group consists of state parties having limited their treaty obligation to the application of the uniform limitation regime of the Convention only to the maritime claims not excluded by an Article-18 reservation. At present this group includes one third of the more than 60 state parties to the Convention, including the Nordic and most European states, all retaining an option to establish at any time an alternative national limitation system for the excluded maritime claims. Many of these state parties have also done so.

Consequently, in the two groups of state parties, the defined scope of *the treaty-based* limitation regime will be different and, accordingly, the effects of limitation will differ. Moreover, the particular provisions of the 1996 Convention, designed for its limitation regime as a whole, cannot be readily applicable on face value and without adjustment to the limitation regime as delimited in scope by the Article-18 exclusion. The Convention itself, however, does not address the resulting problems, and the solutions provided by the different states vary a great deal.

## 2.2 Treaty-law effects of the reservation in Article 18 of the Convention

### 2.2.1 The role of national legislation

According to international law, the effect of a reservation made by one state party to a convention is generally that the provisions of the convention covered by the reservation are not applicable in the relationship between such state and the other state parties to the convention. This applies regardless of whether or not the other state party concerned has given its consent or made an equivalent reservation, cf. the Vienna Convention (1969) Article 21. These principles also apply to multilateral conventions, such as the 1996 Convention.

The 1996 Convention Article 18, paragraph 1 (as amended by the IMO 1996 Protocol Article 7) generally allows that a state party to the Convention reserves at any time "the right … to exclude the application of article 2, paragraphs 1 (d) and (e)". Accordingly, in the relationship between the state party making such reservation and all the other state parties to the Convention, the obvious treaty-law effect of this reservation is that the Convention is not binding and applicable to questions of limitation relating to the claims thereby excluded from the Convention.

This means that a state party making the Article-18 reservation continues to have an obligation under treaty-law to apply the limitation regime of the Convention, if a ship and its owner or actual operator from other state parties invokes limitation of liability in respect of the

remaining claims in Article 2, paragraphs 1 (a)-(c) and (f). Such state party, however, has no obligation to apply the treaty-based limitation regime to limitation in respect of the excluded claims listed in Article 2, paragraphs 1 (d) or (e), invoked before a national court by a ship from another state party. Nor does the national court have any obligation according to the Convention Article 13 to recognize any limitation funds in respect of excluded claims established according to the Convention in other state parties. The consequence of the exclusion by the Article-18 reservation is that, according to international law, the state party itself may generally determine by national legislation *if, and to which extent the excluded claims shall be subject to limitation* (*supra* 1.5).

As a matter of public international law, it is the text of Article 18, paragraph 1 of the Convention itself, interpreted according to the Vienna Convention (1969) Article 31, which defines and delimits the actual room for adoption of such national legislation by a state party. The Article-18 reservation, however, does not affect the obligation of the state party relating to the application of the limitation regime of the Convention with respect to the claims listed in Article 2, paragraphs (a)-(c) and (f) as interpreted according to the Vienna Convention Article 31 and, consequently, independent of national law in the state party concerned. To this extent, the state party remains bound as state party to the Convention. Thus, if adopting or applying national rules so as to infringe this treaty-based right to limitation of ships from other state parties , the state party would in fact be in breach of its treaty obligation vis-à-vis the other state parties (cf. *supra* note 1).

According to the treaty law, consequently, a state party having reserved the right "to exclude the application of Article 2, paragraphs 1 (d) and (e)" may adopt national law providing either that the excluded claims shall not be subject to limitation, or that a quite different and/or separate national limitation regime for such claims shall apply. Article 18, paragraph 1 leaves the choice to the state party concerned. This is the basis for the two-track model implemented by the Norwegian MC Chapter 9, being applicable as lex fori by Norwegian courts, cf. MC § 182, paragraph 1 (*infra* 2.3.1). **(17)** A consequence of the Article-18 model is, however, that

the national solutions actually preferred or adopted by the different state parties vary a great deal. There are also many state parties, e.g. Denmark, having refrained from adopting particular national legislation, thus preferring – *notwithstanding their Article-18 reservation* – that the entire limitation regime of the Convention as implemented in their national law shall apply in all cases where limitation be invoked.

### 2.2.2 The effect of the reservation on the application of the 1996 Convention

The over-all effect of reservations according to Article 18 of the 1996 Convention actually is to restrict the scope of application of the Convention as a whole. Accordingly, the provisions of the Convention must be read and interpreted as *an entire convention setting out only a treaty-based limitation regime for the remaining claims* defined by the Convention Article 2, paragraphs 1 (a)-(c) and (f). Subject to this restriction on its scope, the Convention as a whole *remains binding as treaty law between all state parties*, not to be departed from by national law or interpretation with respect to limitation of such claims (*infra* 2.3 at notes 19-21). This means that the treaty-law effects of the reservation and the exclusion of the claims in Article 2, paragraphs (d) and (e) is not merely a deletion of the two provisions specifically mentioned in Article 18, paragraph 1 of the Convention. This deletion or exclusion is also – directly or indirectly – of consequence for the actual content or interpretation of several other provisions of the Convention.

*First*, there are provisions in the Convention specifically referring to Article 2 as a whole or to Article 2, paragraphs 1 (d) and (e), such as the definitions of persons entitled to limitation in Article 1, paragraphs 1) and 3). If, according to its reservation, a state party has excluded the application of Article 2, paragraphs 1 (d) and (e), the limitation regime of the Convention does not apply at all to limitation of liability in respect of such claims in cases where invoked by ships, shipowners or operators. Moreover, the definition of salvage operation in the Convention Article 1 paragraph 3 does not include removal and clean-up operations, such

as are mentioned in Article 2, paragraphs 1 (d) and (e) or in Article 2, paragraph 2 (*infra* 2.4.3).

*Second*, many of the provisions of the Convention apply only to claims "subject to limitation according to the Convention". Consequently, these provisions do not govern limitation of the excluded claims. This is the case as regards e.g. Article 2, paragraphs 1 (f) on loss-prevention measures (*infra* 3.2), Article 2, paragraph 2 and Article 12 , paragraph 2 on claims brought by way of subrogation, and Article 5 on limitation of counterclaims (*infra* 3.4.6). More important is that the limits of liability provided for in Article 6, paragraph 1 (b) and the rules on aggregation of claims in Article 9, paragraph 1 only apply to the four types of claims listed in Article 2, paragraph 1 not actually excluded from the Convention as limitable claims. This also means that the Convention's Articles 11 to 14 on limitation funds only apply as matter of treaty law to claims subject to limitation according to the Convention.

Although the provisions of the Convention referred to above do not apply as treaty law, it follows from the implementation of the Norwegian two-track model in the Maritime Code that these provisions may nonetheless be applicable as national law (*infra* 2.3). This means that the provisions is a part of the new separate national limitation regime for the claims excluded by the Article-18 reservation, cf. e.g. MC §§ 231-232. Moreover, with the exception of the key provisions for the national regime relating to limitable claim, limits of liability and aggregation of claims (MC §§ 172a, 175a, 178a and 179), most of the provisions in MC Chapters 9 and 12 are actually provisions common for the treaty-based and the national limitation regimes (*infra* 2.3.2 at notes 23-24). Even the general scope of application of the two regimes is on the whole determined by provisions common to the treaty-based and the national limitation regimes (*infra* 2.4).

## 2.3 The Implementation of the two-tracks model in the Maritime Code

### 2.3.1 Two new separate limitation regimes

Norway and the other Nordic states ratified the 1996 IMO Protocol and the 1996 Convention with the reservation permitted by Article 18 "to exclude the application of article 2, paragraphs 1 (d) and (e)", i.e. claims in respect of the removal of ship, cargo and other clean-up operations relating to a ship sunk, wrecked, stranded or abandoned. The Norwegian ratification in 2002, prior to the entry into force of the 1996 Protocol and Convention on May 13, 2004, contained this reservation. For Norway it was important to become a state party to the new 1996 Convention while, at the same time, also safeguarding the right under treaty law to adopt national legislation with a higher limit of liability for the excluded types of claims, in particular claims by public authorities according to existing environment and pollution legislation. **(18)** A treaty-law effect of this reservation, however, was also that the 1996 Convention would not govern the right of Norwegian ships to limitation of any liability for the excluded claims incurred in other 1996-states (*supra* 2.2.1). This, however, was a rather limited problem, arising only in a 1996-state actually ratifying the Convention with an Article-18 reservation and – in addition to its reservation – subsequently adopting national legislation providing an express exemption or a specific limitation regime for such claims. If not, the entire limitation regime of the 1996 Convention, as implemented in the national law of that state party, would be applicable even to ships from other 1996-states (*supra* 2.2.1).

The denunciation of the 1976 Convention by the Nordic states and the ratification of the 1996 Convention with a reservation according to its Article 18, entailed a substantial change in the position of these states, as a matter of public international law, leaving a new and wide room for national legislation on limitation of the excluded maritime claims (*supra* 2.2.1). Subsequent to the entry into force of the 1996 Convention in 2004, this opened for a thorough redrafting of MC Chapter 9, originally

modelled on the global limitation system of the 1976 Convention. The redraft, adopted in Norway by an amendment to the MC by an Act of June 17, 2005 No. 88, actually replaced the limitation regime of the 1976 Convention by a two-track model, consisting of *two separate limitation regimes* for different groups of claims other than personal injury claims. **(19)**

One limitation regime had, of course, to be *convention-based*, implementing the 1996 Convention and the limits therein as applicable *exclusively* to the aggregated sum of the claims listed in the Convention Article 2, paragraphs 1 (a) to (c) and (f), cf. MC §§ 172, 175, paragraphs 3 and 4, and 178. The other limitation regime was *a new nationally established limitation regime*, with substantially higher limits of liability, applicable *exclusively* to the aggregated sum of the claims listed in the Convention Article 2, paragraphs (d) and (e), excluded from the treaty-based regime by the Article-18 reservation, cf. MC §§ 172a, 175a, 178a and 179.

The provisions of the redraft of MC Chapter 9 specify the key elements inherent in each of the new convention-based and nationally established limitation regimes. Except for the differences relating to the limitable claims and the limits of liability, the structure of the two regimes and the actual wording of the particular provisions are nearly the same. An important exception, however, is that MC §§ 172a, paragraph 1 (3) and 179, deviates from Article 2, paragraph 1 (f) of the Convention, by providing that even loss prevention cost incurred by the shipowner in respect of the claims listed in § 172a is recoverable in the national limitation fund. (**20)**

### 2.3.2 The redrafting of the Maritime Code Chapter 9.

The effect of the 2005 MC amendments is that, in principle, the convention-based limitation regime and the nationally established limitation regime each constitute *a separate and legally independent limitation regime*. In MC Chapter 9, this is denoted by the new headings respectively to MC §§ 172, 175 and 178, and to MC §§ 172a, 175a, 178a and 179. According to the Government Bill, the purpose of the new headings is to

have specifically clarified, both that the redrafted § 172 only includes the claims subject to limitation according to the rules of the 1996 Convention, and also that the new § 172a only governs limitation of the claims excluded and exempted from the treaty effects of the Convention. **(21)** Accordingly, the claims listed in the existing MC (1983) § 172, paragraphs 1 (d) and (e) – the claims in respect of removal and clean-op operations – were actually deleted from § 172 and instead inserted in the new MC § 172a. The purpose of this change was to denote both the exclusion of these claims from the 1996 Convention and, in addition, that specific rules on limitation of liability rules applied to the § 172a-claims. **(22)** This difference between the treaty-based and national limitation regimes is also denoted expressly by equivalent changes made to the headings of MC (1983) §§ 175 and 178 and in the new headings to §§ 175a, 178a and 179.

The redraft of MC Chapter 9 itself, however, specifically regulates only the matters characteristic of each of two new limitation regimes, such as the limitable claims (MC §§ 172 and 172a), the limits of liability and aggregation of claims (MC §§ 175 and 175a), and the bar-to-other-action effect of a limitation fund (MC §§ 178 and 178a). The approach of the redraft is that, in addition, the numerous other provisions already contained in MC Chapters 9 and 12 – actually based on provisions in the 1976/1996 conventions – would serve as *rules common for each of the two new regimes.* **(23)** Consequently, the preparatory works relating to the legislation implementing the 1976 Convention – and its predecessor the 1957 Convention (*supra* at note 14), still provides guidance to the interpretation of the actual wording of particular provisions of the legislation presently in force.

This approach was a pragmatic and convenient solution, taken in order generally to meet the need for adequate regulation, even of the matters relating to the new national limitation regime not already addressed by specific provisions. This applies to MC §§ 171 and 182 defining the general scope of application of both limitation regimes, MC §§ 173 and 174 on exceptions to limitation, MC §§ 176, 177 and 180 on implementation of the limitation of claims, MC § 181 on warships, and MC §§ 182a to 182c

on obligatory insurance of claims subject to limitation. However, the provisions of the Maritime Code Chapters 9 and 12 designed to serve as "common" for the treaty-based and the national limitation regime, are "common provisions" only in the sense that they actually constitute *a part of each of the two limitation regimes as a whole,* supplementing the particular provisions specific to each of the regimes mentioned above.

### 2.3.3 Two different limitation funds

A particularly important consequence of this drafting approach is that *the existing limitation fund system* for enforcing the actual limitation of particular claims, defined primarily by the provisions in MC §§ 176, 177 and §§ 231 to 245, will continue to apply as *a system common for both limitation regimes.* **(24)** This explains why the definition of "global fund" includes both type of limitation funds. The apparent implication is that the rules on the establishment, administration and distribution of the limitation fund are equally applicable, both to limitation funds established according to MC § 175 to ensure limitation of claims listed in MC § 172, and to limitation funds established according to MC § 175a to ensure limitation of claims listed in MC § 172a. As a matter of law, however, it is nevertheless necessary – when applying the "common" provisions – to distinguish between the two types of limitation funds:

- Each of the limitation funds is legally a separate fund to be established at a Norwegian court according to MC § 177, paragraph 1, in order to cover solely either the claims listed in § 172, or the claim listed in § 172a, as determined specifically by a decision of the court according to MC § 234,
- a limitation fund established according to § 175 may be used only to make payments of claims subject to the limit contained in § 175, and a § 175a fund may only be used to make payments of claims subject to the limit contained in § 175a, cf. MC § 177, paragraph 2.

- the amount of each of the limitation funds – although both calculated according to MC § 232 – will be quite different, because §§ 175 and 175a both referred to in § 232, provide different limits of liability,
- the claims against each of the funds are exclusively determined either by § 172 or by §§ 172a and 179,
- any limitation fund is established for the benefit of all persons entitled to invoke the same limitation of liability, cf. MC § 177, paragraph 2,
- the scope and effect of a subsequent limitation action against all claimants according to the rules in §§ 177, paragraph 3 and 240, as applied to each of the two funds, will be different,
- the effect of each of the funds as a bar to other actions by claimants relating to claims subject to limitation is different, cf. §§ 178 and 178a,
- the effect of procedural rules such as §§ 235, 237, 238 and 241 as applied to each of the funds, will vary with the particular claimants in each fund,
- the effect of § 244 for the distribution of each of the funds among the established claims will depend on the effect of the particular rules in §§ 176 and 177 as applied to each of the funds.

The key rules on limitation funds contained in MC §§ 176, 177 and 231 to 245 are based on the internationally uniform principles for limitation funds set out in the 1976/1996 Convention Articles 11 to 13. The provisions of MC §§ 177 and 232-234 implement the main rules on the constitution of the fund (Article 11), while the main rule on distribution of the established fund (Article 12), and on the effect as bar to other actions (Article 13) are implemented by MC § 176, cf. § 244, and § 178. It follows from Article 14 of the Convention that – *subject to Articles 11-13* – a state party may only provide by national law *supplementary* rules on such matters. Article 14 is the basis for the provisions in MC Chapter 12 other than those implementing Articles 11 and 12 of the Convention, but not – as held in HR-2018–1260-A (*Full City*) para. 56-57 – a basis

for providing or interpreting national rules amounting to a derogation of any provision in Articles 11 to 13 of the Convention.

As a matter of international treaty law, Articles 11-14 of the Convention are subject to treaty conform interpretation. Consequently, the provisions of Articles 11 and 12, as implemented in the MC §§ 176, 177, 232, 234, 240 and 244, should be interpreted and applied consistent therewith, in matters related to the treaty-based limitation regime (*supra* 2.2.1). While the Convention does not apply to the national limitation regime, the provisions of the Maritime Code on limitation fund – and other provisions "common" for the two limitation regimes (*supra* 2.3.2) – are nonetheless also applicable as national law to limitations funds established as part of the national limitation regime. This is relevant for MC §§ 176 and 177 and the entire MC Chapter 12. Consequently, in the absence of specific rules, the interpretation of these provisions as applied to the treaty-based and the national limitation regime should generally be the same (*infra* at notes 38-39). This is also the approach applied in HR-2018–1260-A (*Full City*), however, with the surprising and regrettable result of an interpretation freely detached from the ordinary reading of the wording of the equivalent provisions contained in both the Convention and the Maritime Code (see my Comments in ND 2017 pp. xxxv-xlviii). Quite another matter – as pointed out above – is that the effect of a particular provision as applied to either of the two limitation regimes may be different.

## 2.4 Common provisions on the scope of the two limitation regimes

General provisions on the scope of the two new limitation regimes, modelled on the 1996 Convention Article 1, are set out in MC § 171. As mentioned *supra* 2.3.2, these provisions are part of the redrafted MC Chapter 9 designed to serve as rules common for the two regimes.

### 2.4.1 Persons entitled to limitation

In general, shipowners and salvors, as defined in MC § 171 (Article 1, paragraph (1) to (3) of the Convention), may invoke each or both of the new limitation regimes in order to "*limit their liability*" for the maritime claims brought by legal actions or arrest of a ship before a Norwegian court (MC § 182). Consistent with Article 1, paragraph 2 of the Convention, MC § 171 provides that the term *shipowner* – as the person entitled to limitation of liability – means "the owner, charterer, manager and operator" of the ship. The liability of the owner also includes the liability in an action brought against the ship itself.

The problem with this definition is that the owner of a ship is not generally liable for any damage occurring in connection with the operation of the ship. The general rule set out in MC § 151 is that the person liable for such damage, is the "reder" – *the actual operator of the ship*. Generally, MC § 151 does not apply to a shipowner not being also the actual operator of the ship, but § 151 is without prejudice to special rules imposing personal liability for particular types of claims on the owner of the ship. This difference between the personal liability of the shipowner and the actual operator of the ship may be important because, at present, the shipowner is quite often not the actual operator of the ship. In the context of the limitation regimes, however, this is rather insignificant.

While in MC § 171 "rederen" – the actual operator – appears as the person primarily entitled to limitation of liability, this provision also lists the shipowner as such as being entitled to limitation of any personal liability for maritime claims. This means that MC § 171, by including the "charterer" of the ship, also caters for problems arising for ships on bare boat charter parties. Ordinarily, the bare boat charterer assumes a general responsibility for providing a crew, as well as the technical and commercial operation of the ship, and, consequently, assumes the role as the actual operator – the "reder" or "chartered owner" – of the ship. **(25)**

Other types of charterers of the ship, e.g. time charterers, rarely assume such wide responsibilities as a bare boat charterer. Even if MC § 171 also includes the "charterer", the extent to which a charterer, not

being the actual operator, is nonetheless entitled to limitation, is a much debated question. **(26)**. In any event, a "manager" of the ship is not entitled to limitation unless he, by the management agreement, assumes tasks equivalent to those of an actual operator of the ship. **(27)** Accordingly, the terms "charterer" and "manager" in MC § 171 are likely to be subject to rather restrictive interpretation in the context of the limitation regimes.

### 2.4.2 Salvage operations

According to Article 1, paragraph (1) "salvors, as hereinafter defined, may *limit their liability in accordance with the rules of this Convention for claims set out in Article 2*", viz. any liability for limitable claims. The term "salvor", as defined in Article 1, paragraph (3), means "any person rendering services in direct connection with salvage operations", including removal and clean-up "operations referred to in Article 2, paragraph 1 (d), (e) and (f)". Although providers of salvage services to a ship in distress may also be entitled to limitation of liability for limitable claims in respect of damage caused during salvage operations, different limits of liability apply to "salvors" operating from their own ship, compared to other providers of salvage services, cf. the Convention Article 9, paragraph 1. These provisions are likely to cause difficulties.

A "salvor" operating from his own ship is, according to the Convention Article 2, paragraph 1, entitled to limit his liability for claims in respect of damage arising in direct connection with the salvage services rendered. **(28)** Thus, any liability in tort incurred by the provider of salvage services for claims in respect of damage actually caused to a third party in direct connection with the salvage operation carried out, is covered by the express provision in Article 2, paragraphs 1 (a) and (c) and MC § 172, paragraphs 1 (a) and (c). Quite another matter is whether the operator of the ship receiving the salvage services rendered may also be liable and entitled to limit such liability for the damage caused during salvage operations, cf. the Convention Article 9, paragraphs 1 (a) and (b). This presupposes that there is a basis for also holding the owner

or operator of this ship liable for such claims. If not, only the rules on limitation and limits applicable to "salvors" will apply.

Ordinarily, a salvor or provider of salvage service acquires a right to salvage reward or other remuneration for the salvage services rendered according to a request by the owner or operator of the ship. The prevailing view is that such claims against the owner or operator of a ship in distress have a contractual or quasi-contractual basis. Accordingly the exemptions from limitation in the Convention Article 3, paragraph 1 and Article 2, paragraph 2, second sentence include all claims in respect of salvage operations or services. Thus, MC § 173, paragraph 1 expressly provides that this includes both salvage awards and remunerations according to the contract for services rendered in direct connection with salvage operations. **(29)**

Consistent with this provision, according to the Convention Article 2, paragraph 1 (f) the owner or operator of the ship may not limit the liability for claims in respect of the cost of loss-prevention measures purporting to limit the extent of liability for other claims against the owner or operator, unless the claim is actually brought by a third party. However, a salvor and other service provider is not such a third party when he carries out work for or on behalf of the shipowner or operator having requested or been contracted for the services rendered. **(30)** At present, however, MC § 172 paragraph 1 (4) is relevant only for treaty-based limitation, cf. MC §§ 172a, paragraph 3 and 179 (*infra* note 33).

### 2.4.3 1996 Convention and salvage operations

The provisions on salvors and salvage operations in the 1976 Convention Article 1, paragraphs (1) and (3) were implemented by MC (1983) § 171. The 1996 Convention Article 1 contains the same provisions. Nevertheless, MC § 171 needed redrafting when the Convention was ratified with the reservation allowed for by its Article 18, because the Convention Article 1, paragraph (3) contains a specific reference to Article 2, paragraphs 1 (d), (e) and (f). The Article 18 reservation, excluding the claims in Article 2, paragraphs 1 (d) and (e) from the treaty-based limitation

regime, meant that these claims became subject to the new national limitation regime. This change clearly had an impact on the definitions of "salvors" and "salvage operation" in Article 1 and MC § 171. In addition, this exclusion also meant that Article 2, paragraph 1 (f) would no longer apply to the cost of the typical loss-prevention operation referred to in Article 2, paragraphs 1 (d) and (e). **(31)** Accordingly, when implementing the 1996 Convention in 2005, the drafting of both MC (1983) §§ 171 and 172, paragraph 1 (f) had to be reconsidered.

The result thereof was that the provision in Article 2, paragraph (f) should apply only in connection with claims subject to treaty-based limitation according to MC § 172. This is now expressly stated in MC § 172, paragraph 1 (4). In the context of the national limitation regime, however, an equivalent rule covering the cost of loss-prevention measures, such as that set out in Article 2, paragraph 1 (d) and (e), only where carried out by third parties, **(32)** was likely to discourage shipowners from carrying out their own loss-prevention measures. For a shipowner, the own cost of such measures constitutes merely a part of the claims in respect of the removal and cleanup operations for which the shipowner is liable subject to a limit substantially higher than in the treaty-based regime, cf. MC § 175a. **(33)** Consequently, MC § 172a, paragraph (3) now covers all loss-prevention cost in respect of claims covered by MC § 172a, whether incurred by third parties or by the shipowner, cf. MC § 179.

The new provisions in MC §§ 172, paragraph 1 (4) and 172a, paragraph (3), however, required a redraft of MC (1983) § 171, defining the right to limitation of "salvors" and persons rendering "services in direct connection with salvage operations". In order to avoid any restriction of MC § 171, the reference in MC (1983) § 171 to § 172 paragraphs 1 (d), (e) and (f) was consequently replaced in MC (2005) § 171, paragraph 1, second sentence, by express reference both to MC § 172, paragraph 1 (4) and to MC § 172a paragraph 3. **(34)** This entailed a similar amendment to MC § 173, paragraph 1.

# 3 Two separate limitation regimes

## 3.1 The two groups of limitable claims

Article 1 of the 1996-Convention provides that "shipowners", as defined therein, may limit "their personal liability" for all types of claims listed in Article 2, paragraph 1. According to the Maritime Code §- 172 however, the treaty-based limitation regime of the Convention only applies to the group of claims listed in Article 2, paragraph 1 (a)-(c) and (f), while MC § 172a and the national limitation regime governs limitation in respect of the claims listed in Article 2, paragraphs 1 (d) and (e) excluded from the Convention. This is explained *supra* 2.2 and 2.3, also pointing out that the difference between the two limitation regimes is clearly and specifically denoted by different rules determining the limit of liability, the aggregation of claims, and the effect of the limitation fund as a bar to other action (*supra* 2.3.2).

The criteria applied by Article 2, paragraph 1 to distinguish between the various types of claims subject to limitation addresses two different aspects. Generally, MC §§ 172 and 172a applies the same criteria when distinguishing between the two limitation regimes. One of the criteria relates to *the types of damage* being the basis for the claim(s). The other defines the actual *causal connections* required between the particular damage or claim(s) and the particular ship, determining the limit of liability applicable according to either MC § 175 or MC § 175a. Thus, these links between the damage/claim(s) and the ship are significant when it comes to the actual limitation of the personal liability of its owner or actual operator.

MC § 172, paragraph 1 on treaty-based limitation only covers claims in respect of damage to property and certain other types of damage *if occurring on board or in direct connection [with the operation] of the ship* **(35)** *or with salvage operations* as defined in § 171 paragraph 1 to include loss-prevention measures relating to such claims (*supra* 2.4.3). Claims in respect of such damage are subject to the limits of liability contained in

MC § 175, paragraph 3, calculated on the tonnage of the ship having the required causal connection to the relevant damage/claim.

On the other hand, MC § 172a only covers claims in respect of the raising, removal, destruction or rendering harmless of a particular ship, including anything that is or has been on board this ship, *provided in addition that the ship is sunk, wrecked, stranded or abandoned*. **(36)** Thus, MC § 172a generally covers all claims in respect of removal and clean-up operations after a casualty to a ship with the result that the ship is sunk, wrecked, stranded or abandoned. These claims are subject to the limit of liability set out in MC § 175a, calculated on the tonnage of the ship so sunk, wrecked, stranded or abandoned, to determine the personal liability of its owner or actual operator. **(37)**

According to the Maritime Code, the actual *extent of limitation of the personal liability* of the owner or the actual operator of the relevant ship is consequently clearly different for the two groups of limitable claims. Each of the two new limitation regimes is applicable and may be invoked only for limitation of any personal liability for the particular claim(s) *actually falling within the particular group of exhaustively listed limitable claims* as set out either in MC § 172 or in MC § 172a, thereby also defining the scope of each limitation regime (*supra* 2.3.3)

This is particularly important for claims listed in MC § 172, which implements the Convention Article 2, paragraphs 1 (a)-(c) and (f). These provisions are subject to treaty-conform interpretation in compliance with the Norwegian treaty obligations towards other state parties to the 1996 Convention (*supra* 2.2.2) Consequently, MC § 172 implementing these provisions is subject to interpretation consistent therewith (*supra* note 1). The scope of the new national limitation regime, on the other hand, is entirely a matter determined by national law within and subject to the limits set by the Article-18 reservation (*supra* 2.2.1). Accordingly, MC § 172a, even if modelled on the Convention Article 2, paragraphs 1 (d) and (e), is generally subject to ordinary national interpretation, **(38)** provided, however, that the scope of § 172a is not thereby extended so as to include any claim subject to treaty-based limitation according to MC § 172 (ND 2007 p. 110 NSC and ND 2007 p. 370 NSC). **(39)**

This means that *the two new limitations regimes are mutually exclusive*. This is important if the claims arising out of the same maritime incident are different in kind and, accordingly, are subject to different liability regimes and limits of liability. **(40)** Furthermore, there is no legal link between the limits of liability of the two limitation regimes, cf. MC § 175 paragraphs (3) and (4) and § 175a, providing different limits and rules for aggregation of claims. In addition, this is also specifically stated in MC § 177, paragraph 2, implementing Article 11, paragraph 1, 3rd sentence, and paragraph 3 (*supra* 2.3.3). Accordingly, no cumulative or "spill over" rule applies between the two different limits if the total loss of a claimant in a particular case consists of claims subject to limitation according to both limitation regimes. Moreover, in a specific case involving more than one ship, questions relating to the required causal connection between the claim(s) and each of the ships, as discussed above, consequently determine the extent to which the owner or operator of each ship may be personal liable and also entitled to invoke limitation of liability for particular claims asserted (*infra* 3.4.6).

## 3.2 Limitation and the basis of liability

MC §§ 172 and 172a only defines and delimits the groups of claims which are subject to limitation according to each of the two limitation regimes. These provisions are subject to the general rule that "shipowners", as defined in MC § 171 (Article 1, paragraph (1) to (3) of the Convention), are entitled to "*limit their liability*" for maritime claims (*supra* 2.4.1). However, neither MC §§ 172 or 172a, nor the legal framework of the two limitation regimes, determines whether one or more of the persons entitled to invoke limitation, actually has personal liability for the particular limitable claims asserted. In general, the answers to such questions depend on the applicable rules of the law of damages. Both MC §§ 172 and 172a provide – consistent with the Convention Article 2 paragraph 1 – that the types of claims listed are subject to limitation, *whatever the basis of liability may be*. Even if invoking limitation does not mean admission of liability (Article 1, paragraph 7 of the Conven-

tion), there is a remaining problem that the actual basis of liability may differ both with the particular claim(s) asserted and with the person actually invoking limitation.

The "basis" for personal liability of the owner and/or the operator of a ship, however, may be different and vary with the particular claim(s) subject to limitation. The actual operator of the ship is generally liable according to MC § 151 for damage linked to the operation of the ship, while the removal and cleanup operations after a casualty to the ship is generally a strict liability imposed on the owner of the ship (*infra* 3.4.3). Hence, by determining whether or not the owner or the actual operator may be held personally liable for the particular claim asserted, the actual "basis of liability" may also be of consequence for the scope of application of either of the treaty-based or the national limitation regimes, as defined in MC §§ 172 and 172a. Thus, a shipowner, being not also the operator of the ship, may not be held liable according to MC § 151 for a claim covered by MC § 172, while an operator not being the shipowner, may not be liable for claims listed in MC § 172a (*infra* 3.4.3). If, in a particular case, the same person may be held personally liable both for § 172-claim(s) and for § 172a-claim(s), in the context of limitation it is nevertheless necessary to keep the two groups of claim(s) separate, because one group is subject to the limit in MC § 175, paragraph (3) and the other subject to the limit in MC § 175a. Additional questions relating to the basis of liability for particular claims are likely to arise if a casualty involves more than one ship (*infra* 3.4.6).

Accordingly, a maritime claim listed in MC § 172 or MC § 172a is not subject to limitation unless – according to applicable rules relating to the basis of liability – the shipowner or the operator of the ship actually invoking limitation is or may ultimately be held personally liable for the claim(s) asserted. In general, however, limitation of liability for claims covered either by MC § 172 or by MC § 172a may be invoked by the shipowner or the actual operator, if alleged by legal action to be liable for any limitable claim(s), cf. the rules on aggregation of claims in MC § 175, paragraph (4) and § 175a, second paragraph. The direct link between personal liability and the right to limitation is particularly apparent in

Article 1, paragraph 1 of the Convention and in MC § 171 first paragraph. This also explains why § 171 first paragraph expressly refers to both of the two different rules relating to liability for claims in respect of the cost of loss-prevention measures now set out in § 172 first paragraph (4) and in § 172a, first paragraph (3) supplemented by § 179 (*supra* 2.4.3 at note 34).

## 3.3 Claims subject to treaty based limitation

The purpose of MC § 172 is to implement the Convention Article 2, paragraph 1 (a)-(c) and (f) and to enumerate exhaustively the types of claims subject to limitation, according to the limitation regime of the 1996 Convention (*supra* 3.1). No doubt, the most important of these types of claims is claims in respect of *damage to property* as defined in Article 2, paragraph 1 (a):

> "Claims in respect of … loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection [with the operation] of the ship or with salvage operations, and consequential loss resulting therefrom" (*supra* note 35).

In addition, Article 2, paragraphs 1 (c) and (f) cover claims for loss resulting from infringement of non-contractual rights occurring in direct connection with the operation of the ship or salvage operation, and claims for measures taken by third parties in order to avert or minimize claims subject to treaty-based limitation (*supra* 2.4.3 at note 34).

By using the generic term "property damage", however, MC § 172, paragraph 1 (1) is an abbreviated and more concise version of the enumerating provisions in Article 2, paragraph 1 (a) of the Convention. This simplified version already appeared in MC (1983) § 172, drafted to implement the equivalent and detailed provision in the original 1976 Convention, and this text remains unchanged in MC (2005) § 172, implementing the treaty-based regime of the 1996 Convention. **(41)** The only change then made in MC (1983) § 172, paragraph 1 was the deletion of paragraphs 1 (4) and (5), relating to the claims of the Convention Article 2, paragraphs 1

(d) and (e), subsequently to be inserted in the new MC § 172a (*supra* 2.3.1). Consequently, the claims listed in the Convention Article 2, paragraphs 1 (a)-(c) and (f), are binding as a matter of public international law and are subject to treaty-conform interpretation according to the Vienna Convention (1969) Article 31. This means that, generally, MC § 172, as an implementation of these provisions, is subject to an interpretation consistent with the Norwegian treaty obligations towards other state parties to the 1996 Convention (*supra* 3.1).

*First*, when drafting MC (1983) § 172, paragraph 1, the Ministry deleted as superfluous the particular references to damage to harbour works, basins, waterways and aids to navigation. The prevailing view was that such damage is simply examples of "damage to property" and, consequently, thereby already covered by this term in § 172.

*Second,* the Ministry felt that there was no need to provide specifically in MC § 172 that, in the context of limitation of liability, claims in respect of damage to property also included liability for "consequential loss resulting therefrom". It is common ground – and still consistent with the law of damages – that "claims in respect of" all the types of property damage listed in MC § 172 also includes liability for consequential losses of damage to property. **(42)** Consequently, the collision liability of a ship according to MC § 161 includes not merely the actual collision damage to the other ship, but in addition also the other economic losses and additional costs suffered by its owner or operator as a result of the collision damage inflicted on his ship. One item of consequential loss is the cost of removal and clean-up operation subsequently carried out by the owner or operator of the damaged ship, in order to avoid, limit or remedy the pollution damage attributable to the ship, including remuneration to providers of salvage services requested by the ship (*supra* 2.4.2 at note 29). Consequently, the total of the damages claimed by the owner/operator of the ship damaged by the collision is subject to treaty-based limitation according to MC §§ 172 and 175. **(43)**

According to the comments in the Government Bill, the provision in MC § 172 on "consequential loss resulting therefrom" is subject to treaty-conform interpretation. Consequently, MC § 172 may not be

interpreted so as to extend further to independent claims for *the cost of removal and cleanup operations as such*, not asserted by the claimant as a part of the entire claim and liability for property damage. The cause of action and the subject of such independent claim is different from a claim for such cost asserted as a consequential loss of "property damage", such as damage to a ship caused by collision (*infra* 3.4.6). Consequently, a claim merely for cost of removal and cleanup operations is only subject to limitation according to the national limitation regime, cf. MC § 172a, 175a and 179. **(44)** In the context of limitation, the scope of MC § 172 and of § 172a are reciprocally exclusive (*supra* 3.1).

## 3.4 Claims subject to the national limitation regime

### 3.4.1 The general and the statutory basis for liability

The national limitation regime determines the right of owners and operators of a ship to limit their liability for claims in respect of wreck removal and related cleanup operations subsequent to a maritime casualty to the ship, cf. MC §§ 172a, 175a and 179. Ordinarily, such claims cover the own cost or other loss incurred by public authorities or other third parties after the casualty, from operations intended to prevent or limit pollution or other damage to coastal areas, including ports and navigable waterways. In general, this is third parties having no direct interest attached to the ship or other property actually damaged by the casualty, and the cost or loss so incurred is merely indirect consequences of the property damage caused by the marine casualty. Consequently, in such cases, the basis for any third party claim for damages is not any property damage inflicted, but rather that the casualty to the ship or other property *indirectly* also has detrimental economic effects for such third party. Hence, the legal character of particular claims for cost and other loss of third parties is in principle different from that of claims in respect of the property damage as such, generally enforceable by the actual owner of the property damaged. The liability of the owner and operator of the

ship for such claims in respect of property damage is subject to the treaty-based limitation regime (*supra* 3.3).

According to general principles of the law on damages, a third party without any direct property interest in the property damaged, has in general no right to claim damages for property damage or indirect consequences thereof directly from the person actually liable for property damage caused. This also applies to damage linked to the operation of ships. Exceptionally, the law on damages may nevertheless provide legal protection of such indirect third-party interests, but only if considered as warranted because the actual interest invoked has a particularly close or attached link to the property damaged. Available case law on property damage, however, reflects an obvious and definite reluctance to accept any claims by third parties not having suffered any direct property damage. **(45)**

In general, consequently, the law of torts as such provides no legal basis for claims by a public authority or other third party for the recovery of the cost incurred by own removal and cleanup operations in a direct action against the owner or operator of the ship subject to the marine casualty. However, the comprehensive regulatory regimes contained in the Pollution Act of March 13, 1981 No. 6 (*PA*) and the Ports and Navigable Waters Act of June 21, 2019 No. 70 (*PNWA*) now provide a *statutory and strict liability basis* for such third-party claims against the owner or operator of the particular ship subjected to the removal and related cleanup operations. In addition, the combined effect of the Article-18 reservation to the 1996 Convention and the new national limitation regime is actually that these statutory liabilities now are subject only to nationally determined limits of liability, cf. MC §§ 172a and § 175a (*supra* 1.4 and 2.3.1). The actual limit of liability contained in § 175a, calculated on the tonnage of the ship hit by the casualty (MC § 232), increases quite substantially with the size of the ship involved (*supra* 2.3.3).

According to these Acts, the owner/operator of the ship hit by a casualty consequently has a strict statutory but limited liability for the cost of the subsequent removal and related operations carried out by public authorities. The owner or operator of the ship, however, may recover the

resulting cost provided the ship is sunk, wrecked, stranded or otherwise damaged and the cause thereof is due to conduct attributable to another ship. Any liability for the property damage thus caused by this ship may also include the cost payable to the public authority (*infra* 3.4.6).

### 3.4.2 The statutory remedies

The *Pollution Act* contains a legal framework generally setting out both wide regulatory powers designed to avoid and contain pollution damage detrimental to the coastal environment, and also provisions on strict liability for the recovery by public authorities and other third parties of the cost incurred by operations purporting to combat such pollution damage. This Act applies also to pollution damage resulting from casualties to ships and, in addition, provides important supplements to the liability systems for oil pollution damage from ships set out in MC Chapter 10, Part I and II (*supra* 1.3). Moreover, the *Ports and Navigable Waters Act* provides an almost equivalent regulatory and liability system for the removal and related operations in respect of ships likely to represent risks or effects detrimental to the sea traffic or safe use of ports or navigable waters.

In cases of casualties to ships, the point of departure for the provisions in PA §§ 7, 28 and 37 is that the shipowner or actual operator has a statutory duty generally to avoid, prevent and limit pollution damage attributable to his ship, by adopting the measures required to achieve this (*infra* 3.4.3). These duties include the removal of the ship or other waste, as well as the cleanup measures at the place of the casualty. Likewise, according to PNWA § 17, the rule is that the owner, operator or other user of a ship shall not leave his ship in a position likely to cause risks or detriments to ports or navigable waters, and has, in any event, a duty to ensure that such risks or detriments be removed. The provisions of these Acts also presuppose that, in any event, it is for the owner or operator of the ship concerned to cover all own cost incurred by the preventive measures carried out. However, MC § 179 allows proportionate recovery of such cost as a claim within the limit of liability for the ship concerned, cf. MC §§ 172a and 175a.

In cases of non-compliance with these statutory duties, public authorities may order the owner or operator responsible for the ship to carry out the preventive and remedial activities required to combat and limit pollution damage (PA §§ 7, paragraph 4, 28, 37 and 74). Likewise, the owner or operator of the ship may be ordered to remove risks and any detriment to ports or navigable waters (PNWA § 17, paragraphs 2 and 4). It is for the owner or actual operator of the ship so ordered to cover the cost incurred when carrying out the removal and cleanup operations proved to be necessary; subject, however, to proportionate recovery within the limit of liability for the ship concerned, cf. MC §§ 175a and 179. **(46)**

Alternatively, however, the public authority may decide that it shall be the task of the authority itself to carry out of the operations ordered (PA § 74 and PNWA § 18), employing as needed professional suppliers of salvage services to participate in its operations. In urgent cases, the authority may so decide even before issuing any order to the ship or its owner or operator. **(47)** In any event, the owner or operator of the ship has strict liability for the cost and loss so incurred by the public authority, including any remuneration payable to the suppliers of salvage services employed to carry out the operations (PA § 76 and PNWA §§ 17, paragraph 4 and 18, paragraph 4). However, the liability for such claims by the public authority is subject to limitation according to MC §§ 172a and 175a, cf. § 179 (*supra* 2.4.3).

### 3.4.3 The subjects of the statutory remedies

The provisions of PA §§ 7, 37, 74 and 76 as well as PNWA §§ 17 and 18 generally designate "the responsible person" as the subject or addressee of the duties, orders and claims based on these provisions. In a maritime context, nevertheless, the proper addressee for orders and claims ordinarily is, for all practical purposes, the shipowner or alternatively the actual operator of the ship involved. PA §§ 37 and 74, cf. § 55, denote that removal of the ship and waist after a casualty is a responsibility of the owner or the operator of the ship. On the whole, PNWA § 17, paragraph 4, and § 18, contain equivalent provisions.

The liability regimes for oil pollution damage contained in MC Chapter 10, Part I and II, however, contain own specific rules, matching with the rules on the duty to contract obligatory insurance for such liabilities (*supra* 1.8). Consequently, the subjects liable for pollution damage caused by bunker oil from ships other than laden crude oil tankers are the owner of the ship, as well as the bare boat charterer or other actual operator "responsible for the key functions related to the operations of the ship" (MC § 183, paragraphs 5 and 10). **(48)** According to MC § 185, paragraph 2, such liability for pollution damage is subject to limitation according to the provisions contained in MC Chapter 9 and is – irrespective of the subject responsible (*supra* 2.4.1) – limited as claims governed by the national limitation regime, cf. MC §§ 172a, 175a and 179. **(49)** On the other hand, claims in respect of oil pollution damage caused by a laden crude oil tanker are enforceable only against the owner of the ship (MC §§ 191 and 193), and these claims are also subject to the special limitation regime defined by MC §§ 194 and 195, cf. MC §§ 173 and 183, paragraph 10.

### 3.4.4 The scope of regulatory powers

The regulatory powers contained in the Pollution Act and the Act on Ports and Navigable Waters are very wide. According to PA §§ 7, paragraph 4, 28, 37 or 74, the public authorities may order "the person responsible" (*supra* 3.4.3) to implement the measures necessary to prevent pollution likely to cause damage or be detrimental to the coastal environment. PA §§ 28 and 37 generally apply to the removal of ship and other waste likely to impair, damage or otherwise be detrimental to the environment. These provisions are also applicable to ships causing oil pollution damage covered by MC Chapter 10, Part I and II.

Generally, these regulatory powers leave the public authority with a rather large amount of room for administrative discretion when determining if and how to apply these powers in particular cases. Consequently, before issuing an order to "the person responsible", the regulatory authority has to assess whether the consequences of the casualty to the

ship are likely to meet the statutory criteria and, in addition, what would be the appropriate measures for avoiding or containing any such pollution. In cases of a serious casualty to a ship, this is often a difficult task. At the casualty, relevant facts may not be readily available and further developments hardly predictable. Risks and uncertainties are inherent in most decisions on actions needed at the time of the casualty or fairly soon thereafter. The experience recurrently is that the regulatory decision-making often turns into an evolving and time-consuming process, also subject to subsequent adjustments. In spite of continuous dialogues between the regulatory authority and the owner and/or operator of the ship concerned (and their insurers), disputes on facts and law often arise between the parties, particularly when relevant for cost and liabilities, substantially delaying any final settlement.

The remedy available to challenge decisions by the regulatory authority is primarily an administrative complaint, requesting a general review and reconsideration of the decision by a superior administrative authority, usually the relevant government agency or ministry. Subsequently, according to settled principles of administrative law, the legality and validity of any regulatory order may also be subject to judicial review. In general, however, the courts limit their review to legal issues relating to the scope of regulatory power granted by the relevant Act or to the proper application of the rules for administrative procedures. It is common ground that the courts will only quite exceptionally reconsider or intervene in the actual assessments made by the regulatory authority when applying their statutory power. The role of judicial review, as a safeguard, is nevertheless important and not to be underestimated.

In *ND 2017 p. 63 NSC* ("*Server*"), relating to removal of a submersed ship according to PA § 37, cf. § 28, the Supreme Court pointed out that PA §§ 28 and 37 leave it to the regulatory authority itself to assess whether an order for the removal of the ship "may" be issued. The court held that, ordinarily, the discretion actually exercised according to such a "may-rule" as § 37 is not a subject for judicial review. In general, it is not a task for the courts to assume the role of a regulatory authority by exercising

the assessment contemplated by the statutory provision. Nevertheless, the court concluded that the order for the removal of the ship was invalid.

The basis for the regulatory order to remove the wreck of "Server" was only the one of two particular criteria set out in § 37, viz. that the ship after the casualty appeared to be "impairing" the environment. The court, however, held that a submersed ship which was not at all visible at the scene of casualty, did not meet the condition set out in the statutory provision relied upon. Further, it was held as irrelevant whether the removal order might alternatively be warranted if based on the other criteria in PA § 37, covering ships "causing damage or other detriments" to the environment. This part of § 37 cf. § 28, however, required another and somewhat different assessment, not actually made by the authority. Nor could any order be issued according to PA § 7, since this provision only covered "damage or detriment" to the environment resulting from pollution caused. In any event, the judicial review of a regulatory order did not ordinarily extend beyond the proper interpretation and application of the statutory basis actually invoked for the removal order issued. Consequently, the removal order issued, since not warranted by the statutory authority invoked, was set aside as invalid.

In *ND 2017 p. 63 NSC* (*"Server"*) the Supreme Court also has to clarify the relationship between *the regulatory powers granted by PA § 37, cf. § 28 and the national limitation regime,* limiting the liability of the owner and operator for cost or loss resulting from removal of a ship sunk, wrecked, stranded or abandoned, cf. MC §§ 172a, 175a and 179. The shipowner challenged the removal order issued, essentially alleging that the regulatory powers were subject to limitation, and that the removal order was invalid because the shipowner, by complying therewith, would entail cost and liabilities exceeding the statutory limit of liability.

It was common ground that according to PA § 53, paragraph 1, any liability according to the Pollution Act was subject to special provisions on liability contained in other legislation, and that this exception covered the limitation regimes contained in the Maritime Code. Consequently, the liability of the owner or operator of the ship would be subject to limitation if the regulatory authority, according to PA § 74, decided to

carry out the removal operations itself and, subsequently, wanted to recover the resulting own cost or loss incurred by a claim according to PA § 76, against the owner or operator of the ship. In the "Server" case, however, the regulatory authority did not follow this course of action, relying instead on its alternative power according to PA § 37, paragraph 2, by issuing a direct order to the owner/operator of the ship for the removal of the wreck and related cleanup operations. Accordingly, the shipowner asserted that he had no legal duty to comply with this removal order, because his cost in doing so would exceed the statutory limits of liability and amount of the limitation fund established by the shipowner according to the rules in MC Chapter 9 and12 (§ 232).

In *ND 2017 p. 63 NSC* (*"Server"*) paragraphs 120-132, the Supreme Court rejected this objection by the shipowner. The court held that the removal duties of the Pollution Act, having the character of public law, was not subject to the limitation regimes of the Maritime Code. Accordingly, the cost incurred by the shipowner himself when complying with such duties was not subject to limitation. Such claims were not included in the list of claims of § 172a, and had to be covered by the shipowner in addition to claims by third parties resulting from the casualty. **(50)** Moreover, in 2005 these principles also served as the basis for a compromise, with the adoption of both a new and higher limit of liability in § 175a and a new § 179 entitling the shipowner to proportionate recovery of own removal cost from the limitation fund when distributed among the claimants. This means, essentially, that any excess liability of the shipowner resulting from carrying out the removal order issued, is confined to the amount of own cost not recovered from the limitation fund according to § 179. **(51)**

### 3.4.5 Limitation of statutory liabilities

The most important groups of claims subject to the national limitation regime and MC §§ 172, 175a and 179 are the various statutory claims by public authorities and other third parties for own cost resulting from removal and/or clean-up operations, according to the Pollution Act or the Act on Ports and Navigable Waters (PA §§ 55 and 76, and PNWA

§ 18). **(52)** These provisions define the liability of the owner or operator of the ship hit by the casualty to which the pollution damage to the environment or detriments to navigable waters are attributable (*supra* 3.4.1 and 3.4.2). The provisions of the Pollution Act also apply as supplement to MC Chapter 10, Part I and II, on the liability for oil pollution damage caused.by ships, including the cost removal and cleanup operations needed after the casualty to the ship (MC §§ 172a, 179 and 191, paragraph 2). This is particularly important for the claims for bunker oil pollution in coastal areas.

Subject to specific rules on limitation for laden crude oil tankers (MC §§ 193 to 196), these statutory liabilities of the owner or any actual operator of the ship are subject to the national limitation regime and the limit in MC § 175a (*supra* 3.4.3 at notes 48-49). This limit covers claims in respect of removal and cleanup operations carried out after the casualty by public authorities and other third parties (MC § 172a, paragraph 1) as well as by the responsible shipowner or actual operator of the ship (MC § 179). The limit in MC § 175a, calculated on the tonnage of the ship hit by the casualty, applies to all such claims arising out of the same occurrence against the owner or other actual operator of the ship (MC 175a, paragraph 2, cf. § 175, paragraph 4). Moreover, the limitation fund established by any of these persons has effect for and may be invoked by all the other persons liable for the claims listed in MC § 172a (MC § 177, paragraph 2). As a bar to independent actions by claimants, however, the effect of a limitation fund based on the § 175a-limit established at a Norwegian court according to MC § 232, generally relates only to actions brought in Norway to enforce claims listed in § 172a (MC § 178a), cf. *supra* 2.3.2 and 2.3.3.

The provisions in MC § 172a appear as a Norwegian version of the provisions of the 1996 Convention Article 2, paragraphs 1 (d) and (e). In general, this provides the point of departure for the interpretation of the provisions in § 172a. **(53)** The national limitation regime generally applies to claims in respect of removal and cleanup cost in cases where *the ship concerned is sunk, wrecked, stranded or abandoned*, cf. MC § 172a, but there are also other – less serious – incidents of damage to the ship not

meeting these criteria. **(54)** If, after the casualty, the ship is removed by salvage operations within a reasonable time, the remuneration for salvage services is generally not subject to limitation (MC § 173, paragraph 1). However, there may nevertheless remain a need for cleanup operations after the casualty, and MC § 172a, paragraph 1 (3) also includes claim for cost incurred thereby (*supra* 2.4.3). Claims unrelated to a casualty to the ship referred to in § 172a, e.g. resulting from an event referred to in NPWA§§ 17 and 18, may be subject to limitation as a liability for claims in respect of infringement of a non-contractual right, cf. MC § 172, paragraph 1 (3).

### 3.4.6 The treaty-based and the national limitation regimes distinguished

When interpreting MC 172a, however, it is also relevant that the paramount purpose of § 172a is to define the scope of the national limitation regime for statutory liabilities for claims by public authorities and third parties based on the Pollution Act and Act on Ports and Navigable Waters. The objective was to provide appropriate limits for such claims, replacing the far too low limit of the 1996 Convention that would otherwise apply. **(55)** However, the new limitation regime and § 172a were not to affect or contain the scope of MC § 172 as defining the claims which have to remain subject to the treaty-based limitation regime consistent with the treaty-law obligations of Norway as a party to the 1996 Convention, subject to the reservation according to its Article 18 (*supra* 1.4 and 2.2). This means that the provisions of MC § 172a may not be subject to any extensive interpretation in order to include also claims which are within the scope of MC § 172, paragraph 1, because this would actually entail an equivalent exception from § 172 inconsistent with a treaty-based interpretation of the Convention Article 2, paragraph 1(1) as implemented by § 172. **(56)**

According to MC § 172, paragraph 1, the shipowner/operator of a ship may generally limit his liability towards third parties for claims in respect of property damage and its consequences occurring in connection

with operations of his ship. If the property damage is caused to another ship, any claim for damages of its owner also includes, in addition to the damage inflicted on his ship, the consequences thereof such as the resulting own cost for subsequent removal and cleanup operations relating to this ship (*supra* 3.3 at notes 42 to 44). The own cost of the owner/operator of the damaged ship also includes any liability for the cost of public authorities and other third parties according to the Pollution Act § 76 or MC § 183 for bunker oil pollution (*supra* 3.4.3). Quite another matter is that, in any event, such liability, *incurred by the public authorities* having carried out such removal operations (PA §§ 74 or 76), is subject to limitation according to MC § 172a and the national limitation regime. However, this does not provide any basis for any restrictive interpretation of MC § 172, paragraph 1 or an extensive interpretation of § 172a, with the result that even the liability of the ship responsible for the casualty and its consequences is subject to MC § 172a and the higher limit in MC 175a. Such an interpretation would deprive the ship responsible for the casualty of the right to treaty-based limitation according to §§ 172 and 175 of any liability for property damage and the consequences thereof (*supra* 3.1 at notes 38-40). In addition, the question of limitation relates to two different claims and different liabilities. One claim is a claim by the public authority *against the owner/operator of the damaged ship* for the recovery of the cost of removal and cleanup operations. Such liability is subject to the national limitation regime. The other is a claim by the owner/operator of the damaged ship *against the owner/operator of the ship responsible for the casualty,* for recovery of damages for the property damage inflicted and consequential loss thereof. Such liability is subject to the treaty-based limitation regime. If the ship sunk, wrecked, stranded or abandoned is solely responsible for the casualty, the question of limitation of liability consequently only relates to the claim by the public authorities subject to the national limitation regime.

Conversely, difficult problems may arise if the casualty is due to a "both-to blame" collision, initiating removal and cleanup operations at the site of the casualty. *First*, each ship has a statutory strict liability towards the public authority according to PA § 76 for 100% of the cost

of the part of removal operations attributable to each of the ships. The resulting liability for each of the ships is subject to limitation according to MC §§ 172a, 175a and 179, as applied to the tonnage of each ship. *Second,* each of the ships is liable for collision damage caused to the other ship, viz. the property damage inflicted and the consequential loss thereof, determined according to the extent that faults on its part has contributed to the collision. The claim for collision damages by each ship also includes, as consequential loss, its statutory liability for the cost due to the public authority. *Third,* the claim for collision damages of each ship against the other ship is a claim for property damage covered by MC § 172, paragraph 1 (1). However, when applying the treaty-based rules of limitation of liability to such liabilities, these claims are set off against each other (the single liability principle), and only the remaining balance is subject to treaty-based limitation, cf. the Convention Article 5 and MC § 172, paragraph 2. **(57)**

The 1996 Convention Article 2, paragraph 2 states that a "claim 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." This provision is not implemented in MC § 172 because the right to limitation of liability of the listed claims applies "whatever the basis of liability may be". **(58)** The question may nevertheless arise as to whether the shipowner/operator of the ship hit by the casualty, by covering the claim incurred by the public authority according to the Pollution Act § 76, may by way of subrogation acquire this claim against the ship responsible for the casualty and damage caused thereby. In such a case, however, there is no claim to acquire by way of subrogation.

The claim by the public authority according to PA § 76 is a statutory strict liability imposed only on the owner/operator of the ship subject to the removal and cleanup operations (*supra* 3.4.3). There is no basis for extending this liability to any other ship, since each of several ships involved in the same casualty is liable towards the public authority according to PA § 76 only for the removal and cleanup operation related to that ship. Moreover, the public authority itself, having no direct property interest in the ship actually damaged, does not ordinarily – according to

general principles of the law of damages – have any claim for damages for property damage against another ship, even if this ship is solely responsible for the casualty and the damage caused thereby (*supra* 3.4.1 at note 45). Hence, the cost for removal and cleanup operations due to the public authority according to PA § 76 may only be included as an item of the damages due to the owner of the ship for the damage inflicted on his ship hit by the casualty, subject to limitation according to MC § 172 (*Supra* 3.3 at note 40 and 44).

# 4 Global Limitation enforced by limitation funds

## 4.1 The limitation fund model of the limitation regimes

The limitation regimes of the international conventions implemented by the Maritime Code all provide that the shipowner/operator of the ship may enforce limitation of maritime claims by establishing a limitation fund at the court receiving a legal action in respect of limitable claims (*supra* 1.2). The limits of liability provided therein are limits for *the total of all limitable claims* arising out of a particular maritime casualty, viz. the aggregate sum of the particular claims. This limitation model presupposes that the actual limitation of the particular claims be carried out by proportionate distribution of the limitation amount among the aggregated claims. The mechanism to achieve this is the establishment of a limitation fund, as requested by or on behalf of the shipowner/operator, having the legal effect that limitable claims may be enforced only as claims against the limitation fund (*supra* 1.5).

The provisions on limitation funds contained in the Maritime Code chapters 9, 10 and 12 generally appear as rules common for limitation funds established according to each of the different limitation regimes (cf. MC § 177 and 231). In general, these provision are modelled on and in conformity with the requirement and principles for treaty-based lim-

itation funds set out in Articles 11-14 of both the 1976 and the 1976/1996 Conventions, including certain national supplements allowed by Article 14 (MC §§ 176 to 179 and 231 to 245). This legal framework originally addressed only limitation funds related to the treaty-based limitation regime (MC §§ 172, 175 and 178). However, its scope of application is by national law generally extended to include any limitation fund established according to either the particular limitation regime for crude oil pollution (MC §§ 194-195) or the new national limitation regime (MC §§ 172a, 175a 1n 178a) and, cf. MC § 231. It is important, nevertheless, that, as a matter of law, each of the three limitation regimes is legally a separate regime and, consequently, that the application thereto of any one of the common provisions may entail somewhat different legal effects (*supra* 2.3.3).

## 4.2 The limitation fund procedures

### 4.2.1 Establishment of limitation funds

Accordingly, the legal framework for limitation funds contained in the Maritime Code is set out in provisions generally applicable as an important part of each of the limitations regimes, even if the specific provisions on limitable claims and limits of liability thereof are different, cf. in particular MC §§ 176-179 and §§ 231-245. These provisions first define:

- when and how the shipowner may request that a limitation fund according to MC §§ 175, 175a or 195 be established,
- the requirements as to the amount of each of the limitation funds (MC §§ 177 and 232-234).

According to the Convention Article 11 and MC § 177, any person alleged to be liable for a claim subject to limitation may request that a limitation fund be established with a court where an action is brought or an arrest of the ship requested. Ordinarily, the shipowner submits his request for establishment of the fund immediately or fairly soon after the casualty, in order to clarify the likely extent of total liability for the casualty and to prevent any of the claimants from initiating independent

actions for claims subject to limitation (MC §§ 178 and 178a). Nevertheless, the establishment of the limitation fund at such an early stage is hardly possible unless the questions related to the establishment of the limitation fund as requested generally are detached from possible disputes related to questions of liability, amounts and other matters when determining the particular claims.

The approach of the Convention Article 11 and MC §§ 232-234 is that, at the establishment of a limitation fund, the court will primarily have to determine the amount of the specific limitation fund to be established. This presupposes a calculation of the amount mainly based on the relevant statutory limit and the tonnage of the ship and on certain other facts readily available at the time of the request by the shipowner. Accordingly, when converting the limit expressed in Special Drawing Rights to national currency, the court applies the rate of exchange at the date of the establishment of the fund (Convention Article 8, paragraph 1, MC § 501). Likewise, the Convention Article 11 and MC § 232 provides a standardized basis and period for the calculation of the particular amount added to the fund as required by the Convention Article 11, paragraph 1, and MC § 232 paragraph 1, expressed in terms of interest for the period from the casualty to the date of the establishment of the fund. The court may at its discretion determine that the shipowner shall provide additional security for costs related to the limitation fund procedure and any subsequent liability for delay-interest not subject to limitation (MC § 234, paragraph 2.

### 4.2.2 Limitation actions and procedures

After the establishment of the limitation fund, only the shipowner or his insurer or a claimant in the fund may bring a "*limitation action*" against all known and unknown claimants of limitable claims (MC §§ 177, paragraph 3 and 240). The purpose of the limitation action is to have all questions relating to liability for the particular claims, the right to limitation of liability for the claims, and the distribution of the limitation fund, decided ultimately by judgment. Consequently, the limitation action is the initial stage of an – ordinarily – comprehensive and most time-con-

suming limitation fund procedure. The objective is to ensure that all the – known and unknown – claims subject to the same limit of liability arising out of any one casualty, be limited to the extent required, in order that the total liability of the shipowner/actual operator shall not exceed the amount of the limitation fund. This requires statutory provisions on:

- submission of claims against the fund,
- the settlements of or decisions on disputes relating to liabilities and the extent of particular claims required to ascertain the key to proportionate distribution of the amount of the limitation fund among the claimants (MC § 235-243, cf. §§ 176-177),
- the judgment of the court deciding the proportionate distribution of the limitation fund with binding effects for all established claims and relieving the shipowner of any further liability towards known or unknown claimants (MC §§ 244-245), and finally
- payment by the limitation fund of the amount of dividends allocated to each of the established claims.

The model for this comprehensive legal framework of the Maritime Code is the key principles set out in Articles 11 to 13 of the 1996 Convention, but is, without prejudice to the provisions of these Articles, also supplemented as contemplated by Article 14 by certain national procedural rules appropriate to general rules on civil litigation in the particular state party. According to both the 1996 Convention and the Maritime Code, consequently, *the limitation fund ordinarily holds the key role as the vehicle to ensure efficient "global limitation" of the shipowners' liability according to each of the several limitation regimes* (*supra* 1.5).

The "global" limitation model of the limitation regimes would hardly function unless the shipowner/operator in particular cases is able to invoke limitation, by requesting the establishment of a limitation fund as the basis for a coherent and coordinated final settlement of all limitable claims arising out of a particular casualty. The result thereof is a proportionate distribution of the limitation fund (Convention Article 12 and MC § 244), in order that the total liabilities shall not exceed the amount of the

limitation fund. However, the quite time-consuming limitation procedure also means that the shipowner/operator, by requesting a limitation fund, also derives benefits of resulting postponement and delay of payment of compensation to injured parties. Accordingly, additional disputes frequently arise on questions relating to interest on claims and other loss during the period from the casualty to the establishment of the limitation fund and subsequently to the final payment of dividends to claimants (*supra* 1.5.2). **(59)**

## 4.3 Treaty conform or national interpretation

The legal framework for global limitation based on limitation funds is, in general, apparently not easily accessible, even if the limitation regime of the 1976 and 1976/1996 Convention is clearly structured. **(60)** One reason is that the system of global limitation directly based on a limitation fund is an imported specialty of international maritime law, rather foreign to domestic law. Another reason is that the international conventions applying to this model of limitation of liability only set out the main principles thereof, leaving it to national law or courts to fill the lacunas. In state parties having ratified and implemented these conventions, however, the duty to treaty conform application of the imported provisions is often of consequence for the national supplements to, or the interpretation of, particular provisions of the implementing domestic legislation (*supra* note 1and 2.3.3), cf. the Convention Article 14.

A further reason is that the redrafting of the Maritime Code on the implementation of the 1976 and 1976/1996 Conventions is not entirely clear in all respects (*supra* 2.3.2 and 2.3.3). Thus, the lack of a clear distinction between the application of limitation of liability in separate actions related to particular limitable claims and the regimes for global limitation by means of limitation funds has actually proved to create unfortunate uncertainties and misunderstandings, particularly as to key issues relating to global limitation, cf. HR-2018-1260-A (*Full City*). This decision does not recognize that the paramount task of the 1976 and 1976/1996 Convention is to provide an internationally uniform global

limitation regime based on limitation funds. In My Comments in ND 2017 pp. xxxv-lxv, I have already discussed the various problems arising from the *Full City* decision.

# Notes

1. ND 2007 p. 110 SCN an 2007 p. 370 SCN, cf. my Comments in ND 2008 pp. xiv-xvi and ND 2017 pp. xvi-xix, but see HR-2018-1260-A Full City and the discussion thereof in my Comments in ND 2017 pp. xlii-xlv and lxiii-lxv.
2. The texts of the 1996 Convention and the IMO 1996 Protocol are set out in the Government Bill Ot.prp. nr. 90 (1998-99) pp. 50-63 and pp. 42-49.
3. Cf. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 14-15, 23 and 41-43.
4. Cf. Government Bill Ot.prp. nr. 77 (2006-2007) pp. 9 and 11.
5. Cf. Government Bill Ot.prp. nr. 79(2004-2005) pp.15 and 18.
6. Cf. Government Bill Ot.prp. nr. 79(2004-2005) pp. 23-26.
7. Cf. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 14-15, 23 and 41-43. The level of removal and clean-up costs incurred by the State in ND 2017 p. 63 SCN "*Server*" (HR-2017-331-A) in effect led to a nearly 100 % general increase in the original Norwegian limits in MC 175a for claims in respect of pollution and environment damage applicable to ships of more than 2000 tons, cf. Government Bill Ot.prp. nr. 16 (2008-2009) pp. 7-8.
8. Government Bill Ot.prp. nr. 77 (2006-2007) pp. 9 and 11, and Government Bill Ot.prp. nr. 16 (2008-2009) pp. 7-8, entailing – as a consequence of ND 2017 p. 63 NSC "*Server*" (HR-2017-331-A) – a nearly 100 % general increase of the original limits in MC 175a for ships of more than 2000 tons, cf. *supra* note 7.
9. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 15, 17, 19, 23 and 41-43.
10. See my Comments in ND 2017 pp. xxxv-lxv, addressing particularly the problems resulting from the interpretation of the provisions on the establishment and distribution of limitation funds in HR-2018-1260-A (Full City).
11. *Selvig*, Limitation of shipowners' liability and forum shopping in EU/EEA states Simply 2010 pp. 359, at pp. 371-73, cf. my Comments in ND 2008 pp. xxi- xxv.
12. See my Comments in ND 2017 pp. lxviii-lxxxvi to the numerous decisions involved in these proceedings. Subsequently, *LA- 2020-99757* (*Gard III*) decided certain jurisdiction issues left open by HR-2020-1328-A, but the Supreme Court bluntly denied the application for yet another hearing relating to the Gard-case. The message was clear and. eventually, all the Gard cases ended with a multilateral settlement between the owners of the colliding ship and the groups of insurers involved.
13. Government Bill Ot.prp. nr.13 (1963–1964), jf. *Selvig*, Rederansvaret, part I and II, in MarIus no. 25 (1977) and MarIus no. 35 (1978), and Government Bill Ot.prp. nr. 32 (1982-83).
14. Government Bill Ot.prp. nr. 32 (1982–1983) and NOU 1980:55, cf. Ot.prp. nr. 13 (1963–1964), subsequently included in chapters 9 and 12 in a new Maritime Code of 24. June 1994 no. 39.

15. The 1996 IMO Protocol and the 1976 Convention as amended by the 1996 Protocol are set out in Annex 2 and 3 in Ot.prp. nr. 90 (1998–1999) s. 42 et seq.
16. Government Bill Ot.prp. nr. 90 (1998–1999) s. 13-19, cf. Government Bill Ot.prp. nr. 79 (2004–2005) pp. 6-8, cf. Rt. 2007 p. 246 (ND 2007 s. 110 NSC) and my Comments in ND 2008 s. xiii-xvi.
17. Government Bill Ot.prp. nr. 79 (2004–2005) p. 18-19 and 23, cf. *infra* 2.3 at notes 19 and 20
18. Government Bill Ot.prp. nr. 79 (2004–2005) p. 11-12, 15, 18-20 and 23.
19. This two-track approach first appeared in the Report of the Maritime Law Committee in NOU 2002:15 s. 36-40, and constituted subsequently – in somewhat simplified form – the basis for the Government Bill Ot.prp. nr. 79 (2004–2005), cf. pp. 23-29 and 41-42.
20. Government Bill Ot.prp. nr. 79 (2004–2005) p. 26-29.
21. Government Bill Ot.prp. nr 79 (2004-2005) p. 41.
22. Government Bill Ot.prp. nr. 79 (2004–2005) p. 41, cf. p. 23.
23. Government Bill Ot.prp. nr. 79 (2004–2005) p. 35-36.
24. Government Bill Ot.prp. nr. 79 (2004–2005) p. 35-36.
25. ND 2012 p. 394 DSC "*Assens Havn*", cf, my Comments I ND 2017 p. lxx-lxxi.
26. *Falkanger & Bull*, Sjørett (edition 8, 2016) p. 170 points out liability for cargo damages is subject to limitation, and that it is debatable whether even other types of charterer liabilities may be limited.
27. ND 2017 p. 63 NSC "*Server*" where it was held that a manager did not have the role of an owner, even if the management agreement provided for outsourcing of important operational tasks.
28. Government Bill Ot.prp. nr. 32 (1982-83) p. 23, stating that this applies only to the claims actually subject to limitation according to Article 2, paragraph 1). As pointed out there, this may also include any liability in tort for damage caused during salvage operations by loss-prevention measures as mentioned in Article 2 paragraphs 1 (d), (e) and (f), cf. *Falkanger & Bull* l.c. p. 170.
29. Government Bill Ot.prp. nr. 32 (1982-83) p. 26. The provision in Article 3, paragraph (a) exempting "claims for salvage" covers not only salvage awards, but also claims for other compensation payable according to contracts for services rendered in direct connection with salvage operations, cf. Article 2, paragraph 2 second sentence.
30. Government Bill Ot.prp. nr. 79 (2004-2005) p. 26-27.
31. Government Bill Ot.prp. nr. 32 (1982-83) p. 25-26 according to which the provision in Article 2, paragraph (f) also applies to claims referred to in Article 2, paragraph 1 (d) and (e).
32. Government Bill Ot.prp. nr. 32 (1982–1983) p. 26-27.
33. Government Bill Ot.prp. nr. 79 (2004-2005) p. 26-29 and 41.
34. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 41 and 44.
35. Article 2, paragraph 1 (a) does not include the words "with the operation" of the ship, but it is obvious – when compared to Article 2, paragraph 1 (c) – that this is due to an editorial error, disregarded in MC § 172, paragraph 1 (1).
36. Government Bill Ot.prp. nr. 79 (2004-2005) p. 41-42.
37. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 18-19 and 23-26.

38. Government Bill Ot.prp. nr. 79 (2004-2005) p. 41, pointing out that the interpretation of Article 2 paragraphs 1 (d) and (e) also serves as a "point of departure" when interpreting MC § 172a.
39. Government Bill Ot.prp. nr. 79 (2004-2005) p. 23 and 41-42, cf. p. 36-29. *Solvang*, Some reflections concerning the scope of the Maritime Code section 172a, SIMPLY 2016 (MarIus nr. 482) p. 29, at p. 36 and 39-43, apparently, does not take into account this difference in legal character of the treaty-based and the national limitation regimes.
40. Supra 2.3.3. Government Bill Ot.prp. nr. 79 (2004-2005) p. 42 illustrates this through the discussion of a case of owners' claim for loss of income due to oil spill on a quay installation preventing use of the quay. The view expressed there is that § 172 applies if loss of income resulted from an oil spill as a "physical" damage to the quay as such, but that § 172a would apply to a claim for loss due to a cleaning up operation of the oil spill preventing use of the quay.
41. Government Bill Ot.prp. nr. 32 (1982–1983) p. 24-25 and NOU 1980: 55 pp. 15-16, cf. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 41 and 44.
42. Rt. 1996 p. 1472 NSC, at p. 1476, cf. *Hagstrøm & Stenvik,* Erstatningsrett (2015) pp. 381- 82, 428-30 and 491-99.
43. The view expressed in Government Bill Ot.prp. nr. 79 (2004-2005) p. 42 is that MC § 172, paragraph 1 (1) applies to claims in respect of property damage and the economic consequences of the property damage.
44. Government Bill Ot.prp. nr. 79 (2004-2005) pp. 23 and 41-42 and the observations on the "quay" example referred to *supra* note 40. A decision of 16.11.2021 by the Hordaland district court in the case 21-058354TVI-THOD/TBER (*KNM Helge Ingstad*) applies this view when distinguishing between the scope of MC §§ 172 and 172a.
45. *Hagstrøm & Stenvik,* Erstatningsrett (2015) pp. 50-56, 375-82 and 428-30, cf. in particular Supreme Court decisions in Rt. 1955 p. 872, Rt. 1973 p. 1268, Rt. 1996 s. 1473, Rt. 2006 p. 690 and Rt. 2010 p. 24.
46. Government Bill Ot.prp. nr. 79 (2004-2005) p. 27-28, cf. *supra* note 40. See also *Hagstrøm & Stenvik,* Erstatningsrett (2015) pp. 380-82, cf. 377-78.
47. ND 2012 p. 245 NLG, cf. my Comments in ND 2014 pp. lxx-lxxi and *Falkanger & Bull*, Sjørett (8th edition 2016) pp. 211-15.
48. Government Bill Ot.prp. nr. 77 (2006-2007) pp. 12-14, cf. *Falkanger & Bull*, l. c. pp. 199-201. In ND 2017 p. 63 NSC "*Server*" it was held that a manager did not have the role of an owner, even if the management agreement provided for outsourcing of important operational tasks. This is consistent with the observation in Government Bill Ot.prp. nr. 77 (2006-2007) pp. 12-14 that a manager according to the various management agreements regularly used in modern shipping, is ordinarily not a subject of the statutory remedies in PA or PNWA.
49. Government Bill Ot.prp. nr. 77 (2006-2007) section 3.3 and 4.3, cf. *Falkanger & Bull*, l. c. pp. 200-201.
50. The Court's conclusion relied on the opinion expressed in Government Bill Ot.prp. nr. 79 (2004-2005) p. 26-27. This opinion also defines the relationship between the limitation regimes of the Maritime Code and regulatory orders issued according to the Act on Ports and Navigable Waters §§ 17-18, cf. Government Bill Prop. 86 L (2018-2019) section 8.9.4.
51. Government Bill Ot.prp. nr. 79 (2004-2005) p. 27-29, cf. *Falkanger & Bull* l.c. p. 214 and my Comments in ND 2017 pp. xx-xxii, at p. xxiii.

52. The owner/operator also has strict liability for pollution damage caused to other third parties (PA § 55). An order, according to PNWA § 18, paragraph 4, may also provide for the cover of cost caused to users of ports and navigable waters.
53. Government Bill Ot.prp. nr. 79 (2004-2005) p. 41.
54. Government Bill Ot.prp. nr. 79 (2004-2005) p. 41-42, where it is pointed out that a ship may be "sunk, stranded or abandoned" without being a wreck, and also that a ship which can normally be salvaged, cannot be regarded as a wreck.
55. NOU 2002: 15 pp. 15-16, 38-39 and 40, Government Bill Ot.prp. nr. 79 (2004-2005) pp. 26-29 and 43, *Falkanger & Bull*, l.c. p. 214, cf. *supra* 2.3.1 at notes 35 to 40. Moreover, if the claims arise as a consequence of damage to the ship, the public authority or any third party – having no direct interest in the property damaged – may not recover their removal or cleanup costs on the basis of such property damage and its consequences (*supra* 3.4.1 at note 45).
56. This question is discussed in *Solvang*, Some reflections concerning the scope of the Maritime Code section 172a, SIMPLY 2016 (MarIus nr. 482) p. 29, at p. 36 and 39-43.
57. Government Bill Ot.prp. nr. 32 (1982-83) p. 26. Cf. *Falkanger & Bull*, l.c. p. 176.
58. Government Bill Ot.prp. nr. 32 (1982-83) p. 24, cf. *supra* 3.2.
59. See My Comments in ND 2017 pp. xxix-xxxiv and lii-lv.
60. See My Comments in ND 2017 pp. xxiii-xxxv.