CHAPTER 8

Limitation of Liability for Maritime Claims and Politics: Curse or Cure?

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Introduction

The Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976)\(^1\) opens with the following preamble

THE STATES PARTIES TO THIS CONVENTION,

HAVING RECOGNIZED the desirability of determining by agreement certain uniform rules relating to the limitation of liability for maritime claims, […]

I will illustrate that, although the LLMC 1976 and the amending Protocol of 1996\(^2\) have brought some uniformity in the world of global limitation of liability for maritime claims (hereafter: global limitation), there are still a lot of differences in the way global limitation is effected worldwide. It seems that whilst aiming for uniformity, new problems and differences were created, the main reason for this being that the LLMC 1976 and its 1996 Protocol have not resolved all issues involved with global limitation and are a result of political compromise. Compromises, for instance, on the subject of limitation for wreck removal claims, that can undermine international uniformity and lead to forum-shopping.

These compromises especially become apparent where the LLMC 1976 allows states to make reservations on certain subjects. Furthermore, since no consensus could be reached on certain definitions used, for instance with defining the ship-owner\(^3\) or on how to determine when a vessel qualifies as a “sea-going ship” and whether a “slot-charterer” qualifies as “charterer,”\(^4\) these issues were left to be regulated by the states themselves. The LLMC 1976 also

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4 Art. 1(2) of the LLMC 1976.
leaves the manner in which the limitation procedure is organized at the discretion of the states parties.\footnote{In the Netherlands the procedure for limitation of liability is regulated in Arts. 642a–642z Dutch Code of Civil Procedure.}

The 1996 Protocol’s main aim was to provide for enhanced compensation and therefore the limits of liability were raised considerably.\footnote{The limits of the 1996 Protocol are, in general, approximately 2.5 times higher than the limits of the LLMC 1976.} However, the protocol did not contain any provision as to the denunciation of the 1976 Convention. This has created the situation where in some states the 1976 Convention – with lower limits – is still applicable whereas in other states the limits of the 1996 Protocol\footnote{The 1996 Protocol entered into force in the Netherlands on 23 March 2011.} apply (and some of those did not denounce the 1976 Convention). Finding a 1976-state where liability could be limited is therefore very beneficial to a ship-owner.

These are just a few examples of the lack of uniformity that will be discussed in more detail below. The question of course is whether lack of uniformity leads to the conclusion that there is actually something wrong with this sphere of international law itself. Do compromises and lack of uniformity in respect of certain issues as set out above really constitute a problem that should be solved, or should this just be accepted as a reality of developing international law and of the convention drafting process? There does not seem to be an alternative to developing this sphere of international law through political compromises laid down in conventions. And because of the international character of shipping on the one hand, and the (still expanding) obligations to recognize and enforce foreign judgments under, for instance European Union (EU) law, on the other, abrogating conventions such as the LLMC 1976 is not a real option since neither ships nor the legal effects of (foreign) judgments can be contained in one country.

It is interesting to observe what happens when the decision-makers themselves are confronted with the results of this lack of uniformity due to compromises made, for instance, on the subject of wreck removal, and the combined effect of international/EU law and the LLMC 1976.

This will be illustrated by a recent case in the Netherlands (involving the \textit{Baltic Ace}) which concerns the effects of global limitation in relation to the recovery of substantial wreck removal costs leading to political debate. To put that case in its proper context, it will be followed by an overview of the relevant legal framework after which the decision of the Netherlands Supreme Court in the \textit{Seawheel Rhine/Assi Eurolink} case in 2006\footnote{The Netherlands Supreme Court, judgment of 29 September 2006, S&S 2007, 1 (Seawheel Rhine/Assi Eurolink).} will be discussed. This case is