

# 2023 Insurance Sector Webinar Programme

## **Marine | Containers overboard – bigger ships, bigger problems?**

25 October 2023

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# What we will cover

- 01** Introduction to container ship casualties,  
Richard Oakley
- 02** Charterer's concerns,  
Steven Wise
- 03** Impact on freight forwarders,  
Anthony Woo
- 04** Cargo perspective,  
Andrew Horton
- 05** Limitation in different jurisdictions,  
Helen Tang
- 06** Insurers' perspective and trends,  
David McKie

# Your speakers today



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# Introduction to container ship casualties

Richard Oakley

# Container ships

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Then

MV Benavon, built 1972

73,000 gross tons, 3,500 TEU



Now

MV MSC Loreto, built 2023

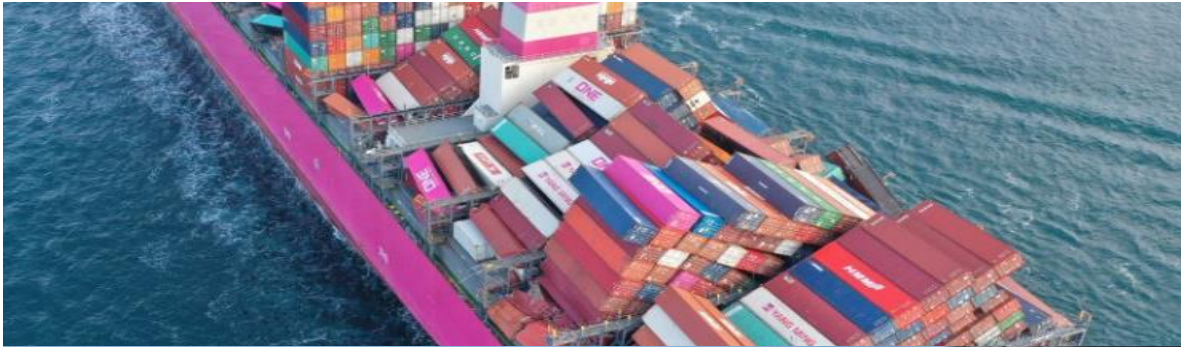
233,300 gross tons, 24,300 TEU

Can emergency services respond?



# Container ship losses, yes, they still occur

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Stow collapse  
Container fire  
Reefer container failure



Inter-ship collision  
Grounding  
Dock and crane damage



Structural failure

# Casualty check-list

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Priority – safety of the crew and preventing damage and pollution to the environment

Engage salvors?

Local authorities aware?

Flag and class?

Communication and flow of information critical



# Casualty check-list

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Notify insurers – H&M P&I

Early evaluation of liability  
Evidence collection – electronic

Declare General Average?



# Limitation strategy

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MSC LORETO, GRT 233,300 SDR 1.312

## **1976 Limitation Convention**

Property US\$31.0 million

PI / loss of life US\$62.8 million

with 1996 Protocol

Property US\$74.6 million

PI / loss of life US\$149.2 million

with 2015 Amendments

Property US\$ 112.7 million

PI / loss of life US\$225.4 million

# Limitation strategy

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MSC LORETO, GRT 233,300

## **1957 Convention**

Property US\$16.7 million

PI / loss of life US\$51.8 million

## **Non convention countries?**

No right to limit

Non signatories, but 'adopted' terms

USA



# Wreck Removal – limitation



*Star Centurion*, Hong Kong Court of Final Appeal 2023

Hong Kong applies 1976 Convention with newest 2015 limits

**Article 2**, claims subject to limitation:

(1) (a): loss of life or personal injury or loss of or damage to property occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom.

...

(1) (d): Raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned.

(2): Subject to limitation even if brought by way of recourse or for indemnity under a contract or otherwise although not if they relate to remuneration under a contract with the person liable.

**Article 18**

(1) provides that contracting states may reserve the right to exclude the application of Article 2(1)(d) and Hong Kong had implemented legislation to that effect.

Court found that general provisions do not overrule specific provisions



## Charterers' concerns Steven Wise



# What are Charterers' concerns?

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In a major container ship casualty, Charterers will be primarily concerned about:

- Cargo claims under their own bills of lading
- Potential claims from shipowners

In both cases, questions arise in relation to:

- The jurisdiction for such claims
- Charterers' ability to limit their liability

# Cargo claims against Charterers

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Charterers may be time charterers or slot charterers

In liner service, either type of Charterers will usually issue their own bills of lading

Such bills will usually, but not always, contain a choice of jurisdiction for claims, often the place of incorporation of Charterers or their “home” jurisdiction (which may be the same)



# Where might Charterers be sued?

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Charterers might be sued by cargo interests in:

- The jurisdiction stated in Charterers' bills of lading
- Charterers' place of incorporation ("as of right")
- Any other place where Charterers carry on business
- If Charterers themselves own vessels, any other jurisdiction in which such a vessel calls and is arrested by cargo interests

# Can Charterers move the claim to another jurisdiction?

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Depends on the jurisdiction Charterers are seeking to move **from** and the jurisdiction Charterers are seeking to move to

Take Hong Kong as an example. If Charterers are incorporated in Hong Kong, they can be sued in Hong Kong “as of right”. They can also be sued in Hong Kong if their bills of lading contain a Hong Kong jurisdiction clause, or if they own a vessel which is arrested in Hong Kong.

It may be possible to move the claim to another jurisdiction where a limitation fund has been established. For example, if there is no jurisdiction clause, Charterers may be able to show that the place where the limitation fund has been established is the appropriate forum – applying the test in *The Spiliada*.

# Is the limitation fund relevant to cargo claims against Charterers?

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Convention on Limitation of Liability for Maritime Claims 1976

## ***Article 1: Persons entitled to limit liability***

- 1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.*
- 2. The term “shipowner” shall mean the owner, **charterer**, manager or operator of a sea-going ship.*

CMA CGM v Classica Shipping (2004, Court of Appeal)

- Charterer includes a time charterer

The MSC Napoli (2009, Admiralty Court)

- Charterer includes a slot charterer



# What is the effect of Charterers' ability to limit?

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## ***Article 9: Aggregation of claims***

1. The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:
  - (a) against the person or persons mentioned in paragraph 2 of Article 1...

## ***Article 11: Constitution of the Fund***

1. *Any person alleged to be liable may constitute a fund...*
3. *A fund constituted by one of the persons mentioned in ... Article 9 or his insurer shall be deemed constituted by all persons mentioned [in Article 9].*

# What is the effect of Charterers' ability to limit?

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## ***Article 13: Bar to other actions***

- 1. Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.*

### Note:

- Article 13 is only a bar to other actions if a fund has been established in another state party to the 1976 Convention
- Even if proceedings in another jurisdiction are allowed to continue, enforcement of any judgment should only be against the fund
- It is unclear whether Owners are entitled to any form of contribution from Charterers who take advantage of a fund established by Owners

# Can Charterers limit as against Owners?

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This question arises in the event Owners contend that Charterers were responsible for the casualty – e.g. Charterers loaded undeclared dangerous cargo which caused a fire / explosion, damaging the ship and other cargo.

Owners' claim will be subject to the jurisdiction / arbitration clause of the relevant charterparty.

In principle, Charterers can limit their liability as against Owners, but the practical effect of this right is limited because it only applies to a certain type of claims by Owners.



# For which claims can Charterers limit as against Owners?

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## ***Article 2: Claims subject to limitation***

1. *Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:*
  - (a) *Claims in respect of ... loss of or damage to property..., occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom*

CMA CGM v Classica Shipping (2004, Court of Appeal)

- Charterers can only limit as against Owners in respect of cargo claims which Owners have settled
- Charterers cannot limit as against Owners in respect of claims for: damage to the ship, Owners' liability in salvage, Owners' liability in general average

# For which claims can Charterers limit as against Owners? (cont.)

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The MSC Flaminia (No. 2) (2023, Court of Appeal)

1. Held, “the claims referred to in Article 2 must be interpreted to exclude claims by an owner against a charterer to recover losses suffered by the owner itself”
2. Charterers can therefore only limit for “liabilities that originate outside the group of entities that are defined as ‘shipowners’ for the purposes of limitation”



## Impact on freight forwarders

Anthony Woo



# The position of a Freight Forwarder in a limitation action



- “MOL Comfort” - HK Admiralty Court’s decision in 2017 where the Freight Forwarder applied for a stay of the claims brought by cargo owners pending resolution of the Japanese proceedings (limitation action by time charterers / action against the builder)
- Freight Forwarder was not a beneficiary nor a party to the limitation action
- Time Charterer / Owner petitioned for “latent defect not discoverable by due diligence” and therefore no liability
- Freight Forwarder wishes to avail itself of the evidence filed in the Japanese proceedings to defend the cargo claim

***(AIG Europe Ltd and Others v Fast-Link Express Ltd  
[2017] 3 HKLRD 112)***

# Stay of proceedings



- Stay would only be granted in “rare and compelling circumstances”
- Not satisfied in ***AIG Europe v Fast Link Express Limited ([2017] 3 HKLRD 112)***. Court decided against Freight Forwarder:
  1. Evidence in Japanese proceedings readily available, Time Charterer has already filed evidence in the Japanese proceedings
  2. Time Charterer is a contracting party to Freight Forwarder and has a vested interest to assist to defend the claim
  3. Final determination of the Japanese proceedings can take years
  4. Freight Forwarder is not a party to the Japanese proceedings and HK Court is not bound by the outcome
  5. Prejudice and injustice to cargo claimant
  6. Cargo claimant suing as of right pursuant to an exclusive jurisdiction clause

# Can Freight Forwarder join the carrier in the HK proceedings?



- Not if contract with carrier subject to an exclusive foreign jurisdiction clause
- HK Admiralty Court refused a joinder in 2019, also arising from “MOL Comfort”
- Unfortunately for Freight Forwarder, new claim against carrier in Japan already time barred by then (query: the application of Art.3 rule 6 bis of the Hague Visby Rules under Japanese law)
- Important for Freight Forwarder to investigate governing jurisdiction and protect suit time against Carrier under master bill of lading

***(Li Lian International Ltd and Others v Herport Hong Kong Ltd and Another [2019] HKCFI 826)***





Cargo perspective  
Andrew Horton

# Cargo Perspective



Image source: <https://gcaptain.com/one-apus-sets-sail-from-japan-months-after-cargo-loss/>

What are the circumstances of the loss?

- Different issues will arise from the sinking of a carrying vessel/ major container collapse e.g., ONE APUS and a collision.
- In a Sinking or container collapse the target is the vessel or the Contractual carriers.
- In a collision the target is the colliding vessel based on a claim in negligence.
- In general, unless there is evidence of unseaworthiness, action against the carrying vessel is difficult due to the defence of errors of navigation.
- Note however there are certain jurisdictions in which the errors of navigation defence does not operate.



# Sinking/Major Container Collapse



Image source: <https://www.marinelink.com/news/comfortclass-scantlings357496>



Image source: <https://traderiskguaranty.com/trgpeak/mol-comfort-worst-shipping-disaster/>

- In a sinking situation the first question is whether the vessel has a sistership or is owned by an SPV company.
- If the company that owns the vessel only has one asset, being the vessel that has sunk, problems arise.
- A P&I policy is an indemnity policy in nature. Strict application of the Club Rules mean that the owner must pay the claim first and then seek compensation from its club.
- If the Vessel sinks, then it is unlikely the SPV Company will continue in business, but instead will collect the hull proceeds and then cease to trade.
- If this occurs, then the claim will not be paid by the owner and the club will not deal directly with the cargo claimant.
- Note however the Norwegian clubs are vulnerable in these situations because legislation exists in Norway that compels the insurer to deal directly with the claimant regardless of the indemnity principle in cases of insolvency.

# Other Options

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- If faced with a one ship company, there are other routes to consider.
- As we have seen a NVOCC cannot participate in the fund and will still have to face a contractual claim.
- The same is true of a charterer that has issued its liner bill, even a slot charterer and if that charterer owns vessels, then security can be obtained via an arrest.
- Associated vessel arrest in places such as South Africa may be an option if the stricken vessel was part of a larger fleet which all have the same beneficial owner.
- A freezing injunction over the hull proceeds preventing hull insurers paying the owners' claim can be considered.
- Insolvency proceedings. By commencing an action against the owning company, in respect of which it may allow a judgment in default to be entered, the company can be wound up and then action taken to claw back the hull proceeds through the liquidation process.



# Sinking or Collision claims considerations



- In the case of a sinking and the vessel has a sistership or you are dealing with a container collapse and the vessel survives, it is likely on a major incident, security and/or limitation will become a factor.
- The same is true of an action against a colliding vessel so as to secure the claim in negligence.
- Cargo interests can face the issue of security/ limitation reactively or proactively.
- If no fund has been set up after a major incident, there will be an element of forum shopping.
- Claimants will wish to arrest a vessel owned by the target to the litigation in a jurisdiction which gives it the largest limitation fund (Upper 1996).
- Care needs to be taken to find a jurisdiction which has a connection to the actual claim, if possible, to defend any potential application for a stay of proceedings.
- If the incident occurs on the high seas this consideration is less important, but if the incident occurs in territorial waters, this will be a heavy factor in favour of the courts in that jurisdiction being seized of the claims arising therefrom (***Pusan Newport Co Ltd v. Owners and/or demise charterers of the ships or vessels “Milano Bridge” and “CMA CGM Musca” and “CMA CGM Hydra” [2022] HKCA 157***)
- The owning company’s domicile and the vessel’s flag can also be important factors.

# Facing a claim



- Forum shopping occurs on both sides and often owners will serve a cargo interest with a limitation action to set up a fund.
- Frequently the jurisdiction chosen will be one with a lower limit ( e.g., 1976)
- Careful consideration should be given as to whether to agree to the jurisdiction, allowing the owners to limit liability there.
- Such an action by the owner can lead to a coordinated response by various cargo interests to arrest a vessel in another jurisdiction with a higher limit.
- This will lead to a negotiation on what level of fund will be set up and where.
- If the owner will not back down and provides security for the claim on arrest without conceding jurisdiction, it will be necessary to resist any subsequent application for a stay of the action to the less favourable jurisdiction (***Bright Shipping Ltd v Changhong Group (HK) Ltd [2019] HKCA 1062***)
- Note: Consideration should always be given as to whether there is possibility of breaking limitation, although frequently this is very difficult.

# Bringing the claim in time



- There will be the usual contractual or Hague/Hague Visby limits applying to a claim against the carrying ship e.g., 9 months or one year.
- For a collision claim the time bar is two years.
- In addition to these limits, there may be a time limit set by the court after the fund has been set up. The claimant will need to file its claim within the time set. The existence of the fund and time limit will usually be advertised in Lloyds List or Trade Winds plus a local newspaper.
- If out of time to file according to the Court's order, an application can be made to the court to allow the claim to be accepted late.
- If this application is made within the statutory time bar, which exceeds the time limit set by the local court, this should be fine (***Eleni Maritime Ltd v Heung-A Shipping Co Ltd and Others (The Eleni and The Heung-A Dragon) [2017] HKCFI 795***)
- If outside both the statutory time bar and the court time bar, the claim will probably be closed out.



# Proving the claim



- If a fund is set up and you are a party affected, you will need to prove the claim although in the case of a total loss this task is not too onerous.
- More difficult is a situation in which cargo is salvaged. Often the operations take some time and the assured under a policy is simply not interested in the cargo or assessing its worth.
- Defences can be raised by the colliding vessel or carrier that the cargo was not a full loss.
- Issues such as title to sue can still be raised.



# Challenging other claimants



- If the fund is oversubscribed, then frequently the owner will walk away conceding liability and allowing the claimants to agree the distribution of the fund amongst themselves.
- Arguments will often ensue between competing claimants.
- In the case of sinkings or container collapses where the claimants are bringing claims against the owner/ carrier, competing claimants can examine each other's claims to see if they would be contractually limited or limited via Convention.
- In the case of other carriers such as an NVOCC bringing an indemnity claim into the fund which has not yet been settled, care must be taken that the full claim is not admitted, only for the NVOCC to be settling the claim at a lesser amount with the actual claimant.
- A similar scenario often occurs when the owner attempts to introduce claims that it asserts it has settled outside of the fund or the owners of the colliding ship introduce claims which have been brought by cargo interests on board their vessel for which they should have a defence.

# Summary

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- When an incident like this occurs, attempt to obtain as much information as possible to calculate the likelihood of the fund being oversubscribed.
- Look at actions against NVOC operators that cannot limit. Frequently this may be a quicker way to a recovery than becoming involved in an enormous case that could take years to resolve. The recovery may also be higher.
- Gather documents as quickly as possible as you will need to prove the claim.
- Keep a careful eye on the press to see if a fund has been set up and consider whether your interests are best served joining the pack or going it alone.
- Note time bars and limits that need to be followed, so as to avoid being shut out of any recovery.





## Limitation in different jurisdictions

Helen Tang

# Problems in other Jurisdictions

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- Upper/Lower 96, 76?
- Timing of limitation fund being set up
- Types of claims that can be admitted
- Documents required



# Upper/Lower 96, 76 etc?

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- Possibility of arrest – forcing owners to set up another fund in a jurisdiction with higher limit
- Possibility of commencing action in another jurisdiction, whether by arrest or not
- Consult local lawyers

# Timing of limitation fund being set up

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- E.g. China – owners tend to set up limitation fund very early
- Advertise only in local newspaper
- Claims need to be filed within 60 days from the last notice being advertised in a local newspaper
- Procedural vs statutory time limit

# Types of claims that can be admitted

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- Subrogated
- Freight forwarders
- Need to have crystallised?

# Documents required

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- POA required?
- Notarisation / legalisation?
- Can claimants meet the deadline for filing against the limitation fund?





## Insurers' perspective and trends

David McKie

# Insurers' perspectives and trends

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- Claims frequency falling but costs rising exponentially
- Claims more complicated - more expensive
- Few coverage issues in practice
- Cargo fires an increasing risk
  - misdeclared and improperly packed DG
- General Average
- Broader environmental liabilities

# General Average

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- GA still has a role to play
- Higher GA absorption clauses
- GA Bonds and Guarantees
  - Pay attention to wording and don't jump the gun!
- Unseaworthiness
  - Everyone now focussed on passage planning since CMA CGM LIBRA
- Unrecoverable GA will increase





# Greater environmental liabilities

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- Rising clean-up costs
- Expanding range of pollutants
- Plastics
  - RINA
  - X-PRESS PEARL
- International conventions
  - Bunkers Convention
  - Wreck Removal Convention 2007
  - HNS Convention 2010
- National legislation increasingly likely to fill the gaps







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