

# O OBVEZI OSNIVANJA FONDA OGRANIČENE ODGOVORNOSTI

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## O OBVEZI OSNIVANJA FONDA OGRANIČENE ODGOVORNOSTI

### *ABOUT THE OBLIGATION TO CONSTITUTE A LIMITATION FUND*

#### SAŽETAK

*Fond ograničene odgovornosti brodar je pravni institut namijenjen prvenstveno osiguranju potraživanja oštećenih osoba u slučaju štete koju je skrivio brodar (brodovlasnik). Konvencija o ograničenju odgovornosti za pomorske tražbine (London, 1976.) ostavlja svakoj državi ugovarateljici samostalno pravo odlučivanja o tomu, hoće li osnivanje fonda biti preduvjet za ograničenje odgovornosti. U Pomorskom zakoniku (NN, br. 181/04., 76/07., 146/08. i 61/11.) Republika Hrvatska je osnivanje fonda odredila kao obvezno (čl. 395., st. 1.). Cilj ovoga članka je istražiti opravdanost takve odredbe. Na početku rada označit će se glavna obilježja instituta i njegov povijesni razvoj. U središnjem dijelu analizirat će se postojeće stanje u međunarodnom i pozitivnom pomorskom pravu s naglaskom na pravne posljedice osnivanja fonda te odnos posebnog i općeg ograničenja odgovornosti (nova Rotterdamska pravila i Londonska konvencija iz 1976.). Završni dio odnosi se na pravni položaj fonda u stečajnom postupku te na odnos fonda i pomorskog osiguranja odgovornosti. Zaključno se ukazuje na probleme u provedbi te razloge o (ne) opravdanosti postojanja obveze osnivanja fonda.*

**Ključne riječi:** brodar (brodovlasnik), pomorske tražbine, fond ograničene odgovornosti, Direktiva 2009/20/EC, obvezno osiguranje od odgovornosti

#### SUMMARY

*“Limitation fund” is a legal concept primarily intended for securing the claims of injured persons in the event of a loss caused by the shipowner. The Convention on Limitation of Liability for Maritime Claims (London, 1976) leaves it to every State Party to decide whether the constitution of such a fund will be a prerequisite for the limitation of liability. The Croatian Maritime Code (Official Gazette, No. 181/04, 76/07, 146/08 and 61/11) provides that the constitution of a limitation fund is mandatory (article 395, paragraph). The aim of this article is to explore the validity of such a provision. At the beginning of the paper, the main characteristics of the concept are identified and its historical development explained. The main part of the paper consists of an analysis of the current situation in both the international and the domestic maritime law, with special emphasis on the legal effects of the fund and the relationship between the specific and general limitation of liability (new Rotterdam Rules and the London Conventions of 1976). The final part deals first with the legal status of the fund in bankruptcy proceedings, then with the relationship between the fund and the marine liability insurance. Finally, the authors emphasize the problems of implementation and state the reasons for the absence of any further obligation to constitute the fund.*

**Key words:** shipowner, maritime claims, limitation fund, Directive 2009/20/EC, mandatory liability insurance

## 1. UVODNA RAZMATRANJA

Fond ograničene odgovornosti broдача (dalje: fond ili fond ograničene odgovornosti) je pravni pojam koji, šire gledajući, postoji jedino u pomorskom prijevozu jer riječni (CMNI konvencija (2001.)), cestovni (CMR konvencija (1956.)), željeznički (COTIF-CIM konvencija (1999.)) te zračni transport (Varšavska konvencija (1929.) i Monteralska konvencija (1999.)) ne poznaju fond ograničene odgovornosti, nego isključivo ograničenje odgovornosti bez fonda. Fond se u pomorstvu veže za opće ili globalno [1] ograničenje ugovorne i izvanugovorne odgovornosti i predstavlja krajnju, gornju granicu do koje dužnik-brodar odgovara vjerovnicima za sve tražbine koje nastanu iz *jednog* štetnog događaja [2]. U praksi se osniva i zbog naknade izvanugovornih šteta velikih, katastrofalnih razmjera (onečišćenja od broda, nuklearne štete i sl.), ali koje nisu pomorske tražbine [3]. Hrvatski Pomorski zakonik (dalje u tekstu: PZ), na tragu najsuvremenijih rješenja u svijetu, opće ograničenje odgovornosti uređuje opsežno u šestom dijelu pod nazivom *Brodar*, a sam postupak ograničenja brođareve odgovornosti člancima 401. – 427. Iz ovog ograničenja odgovornosti isključene su tražbine navedene u čl. 389. PZ-a (zbog toga ih i nećemo detaljnije obrađivati iako i za njih postoji mogućnost osnivanja posebnih fondova). Glavna funkcija fonda je dodatna zaštita ili osiguranje opravdanih interesa vjerovnika kojima je dužnik (brodar) svojom krivnjom nanio štetu i oni stoga imaju pravo na novčanu kompenzaciju. Osniva se pred odgovarajućim tijelima državne vlasti (obično sudom) i predstavlja posebnu imovinu dužnika koja služi *isključivo* za namirenje oštećenika iz štetnog događaja te se za druge svrhe ne može niti smije upotrijebiti [4]. Od *konstitutivnog* značaja za osnivanje fonda nije polaganje odobrenih sredstava fonda i iznosa za namirenje troškova postupka, nego podnošenje sucu pojedincu trgovačkog suda pred kojim se vodi izvanparnični postupak dokaza o polaganju tih sredstava [5]. Brodar gubi pravo na ograničenje odgovornosti ako se dokaže da je šteta nastala zbog radnji i propusta koje je brodar učinio iz neizravne namjere (*dolus eventualis/wilful misconduct/recklessness*) ili iz namjere (*dolus*) [6].

U sklopu odgovornosti broдача je i pomorsko obvezno i dragovoljno osiguranje od odgovornosti. Direktiva 2009/20/EC od 23. 4. 2009. (*Directive 2009/20/EC of the European Parlia-*

## 1 INTRODUCTION

“Limitation fund” (hereinafter: the Fund or the limitation fund) is a legal term which, generally speaking, exists only in maritime transport since the river (CMNI Convention (2001)), road (CMR Convention (1956)), rail (COTIF-CIM Convention (1999)) and air transport (Warsaw Convention (1929) and the Montreal Convention (1999)) as well know only the limitation of liability without such a fund. In maritime affairs, the Fund is linked to a general or global [1] limitation of contractual and non-contractual liability and represents the maximum amount of the ship operator-debtor’s liability for all claims of creditors arising from an adverse event [2]. In practice, the Fund is constituted for the purpose of compensating large, catastrophic non-contractual losses (pollution from ships, nuclear disasters, etc.), which are not maritime claims [3]. In keeping with cutting-edge solutions in the world, the Croatian Maritime Code (hereinafter: MC) extensively regulates the general limitation of liability in Section Six entitled “The ship operator”; the process of limiting the ship operator’s liability is set out in articles 401-427. All claims listed in article 389 of the MC are excluded from this limitation of liability (therefore, they are not analyzed further although it is possible to constitute special funds for them as well). The main function of the Fund is to additionally protect or ensure the legitimate interests of creditors who suffered damages caused by the debtor (ship operator), thus giving them the right to financial compensation. The Fund is constituted before the competent state authorities (usually the court) and represents a special property of the debtor used exclusively to compensate the persons injured in an adverse event and may not be used for other purposes [4]. It is not the act of depositing the approved assets of the Fund and the amount to cover the costs of the proceedings that is of a constitutive importance for the constitution of the Fund, but rather the act of filing evidence of the deposited assets with the sole judge of the commercial court which conducts the extrajudicial proceedings [5]. The ship operator loses the right to the limitation of liability if it is proved that the damage was caused by acts and omissions as a result of recklessness (*dolus eventualis*) or intent (*dolus*) on his part [6]. Both the maritime mandatory and the voluntary liability insurance are linked to the ship operator’s responsibility. Directive 2009/20/EC of 23<sup>rd</sup> April 2009 re-

ment and of the Council, 23 April 2009 on the insurance of shipowners for maritime claims (L 131/128, 28. 5. 2009.) nalaže brodarima osiguranje odgovornosti za pomorske tražbine za brodove od 300 bruto tona i više. Ovaj akt ne obvezuje RH do ulaska u EU, ali ga je svrsishodno što prije usvojiti radi *unifikacije* s europskim pravom u cilju snažnije zaštite vjerovnika.<sup>1</sup>

## 2. SUSTAVI OGRANIČENJA I POVIJESNI RAZVOJ INSTITUTA

Ograničenje odgovornosti broдача (brodovlasnika) može biti *stvarno* i *osobno*, pa zavisno od toga odgovara li određenim dijelom imovine (npr. brodom) ili cjelokupnom svojom imovinom do određenog iznosa. U prvom slučaju riječ je o *stvarnom*, a u drugom o *osobnom* ograničenju odgovornosti [7]. Na navedenim načelima razvili su se svi međunarodni instrumenti iz ovoga pravnog područja.

### 2.1. Sustavi ograničenja odgovornosti

U povijesti pomorstva najpoznatija su tri sustava (modela) ograničenja: (1.) *abandon* (tzv. mediteranski sustav), (2.) *sustav egzekucije* (tzv. njemački sustav) te (3.) *sustav odgovornosti ograničene na određeni iznos* (tzv. engleski sustav). Osnovna karakteristika *abandona* je ograničenje odgovornosti na sam brod i vozarinu za obveze nastale u poslovanju broda, tj., brod i vozarina pravno i stvarno predstavljaju fond za namirenje vjerovnika [8]. Do ograničenja dolazi nakon što brodar izjavi da prepušta brod i vozarinu vjerovnicima radi namirenja, s tim da eventualni višak pripada njemu [9]. U sustavu *egzekucije* izjava nije potrebna jer brodom vlasnik odgovara ograničeno unaprijed (prije štetnog događaja) pomorskom imovinom bez obzira je li ili nije u posjedu broda. Prema modelu *ograničene odgovornosti do određenog iznosa* brodar odgovara cjelokupnom imovinom, a za izračun odgovornosti koristi se tonaža broda.

### 2.2. Međunarodni povijesni izvori

Povijesno, rimsko pravo je poznavalo pravilo *receptum nautarum* prema kojem bi odgovornost pomorskog prijevoznika za svaku propast ili oštećenje povjerenih mu stvari “*prestajala je*

<sup>1</sup> Države članice su bile dužne do 1. 1. 2012. donijeti propise radi usklađenja s ovom Direktivom (čl. 9.).

quires the ship operators to have the liability insurance for maritime claims for ships of 300 gross tons and over. This Directive will become binding for Croatia after its accession to the EU, however, it would be practical to implement it as soon as possible, thus achieving a harmonization with the European law which provides a stronger protection to creditors.<sup>1</sup>

## 2 SYSTEMS OF LIMITATION AND HISTORICAL DEVELOPMENT OF THE CONCEPT

The limitation of liability of a ship operator (owner) may be in kind and a personal one depending whether it is limited to a certain asset (e.g., the ship) or up to a specific amount of her entire assets. In the first case it is in kind, and in the second a personal limitation of liability [7]. All international legal instruments in this area are based on those principles.

### 2.1 Limitation of Liability Systems

The three best known systems of limitation in maritime history are: (1) the abandonment system (referred to as the Mediterranean system), (2) the execution system (known as the German system), and (3) the system of a limited liability of the established amount (referred to as the English system). The fundamental feature of the abandon system is a limited liability for the ship and freight for liabilities incurred during operations of the ship, i.e. the ship and freight, legally and really, represent the fund for paying off creditors [8]. The limitation takes effect after the ship operator has declared abandoning the ship and freight to pay off the creditors, while any surplus belongs to him [9]. In the execution system, the declaration is not required because the shipowner had limited liability prior to the adverse event with maritime assets regardless or not whether he is in possession of the ship. According to the system of limited liability up to a certain amount, the ship operator is liable with his entire assets, and tonnage is used to calculate the amount of the liability.

<sup>1</sup> Member States were obliged to enact provisions to comply with this Directive (article 9) by 1st January 2012

dino u slučaju kada je do štete došlo višom silom” [10]. Francusko pravo dalo je dva izuzetno važna propisa iz pomorskog prava: (1.) *Ordonnance de la Marine marchande* iz 1681. te (2.) *Code de commerce* iz 1807. U Ujedinjenom Kraljevstvu ograničenje odgovornosti uvedeno je 1733. u *Responsibility of Shipowners Act*. Brodovlasniku je bilo dopušteno ograničiti svoju odgovornost za slučajeve šteta uzrokovanih krađom zapovjednika ili posade. U 1786. g. ograničenje je prošireno na svaku radnju zapovjednika ili posade koja je nastala bez brodovlasnikove osobne krivnje. U SAD je još uvijek na snazi Zakon o ograničenju odgovornosti (*U. S. Limitation of Liability Act*) iz 1851. prema kojem ovlaštena osoba, ako preduvjetom da nema osobne krivnje, odgovara do vrijednosti broda i pripadajuće vozarine (stvarno osiguranje) [11].

### 2.3. Domaći povijesni izvori

Na našim prostorima do stupanja na snagu Zakona o pomorskoj i unutrašnjoj plovidbi (Sl. list SFRJ, br. 22/77., 13/82., 30/85., 80/89. i 29/90. dalje u tekstu: Plovidbeni zakon) vrijedio je sustav *abandona*, preuzet iz francuskog Trgovačkog zakona (*Code de commerce*) te austrijskog Političkog edikta o plovidbi iz 1774. [12]. U razdoblju do Drugog svjetskog rata važio je Nacrt pomorsko-trgovačkog zakona iz 1937. te Uredba o izvršenju i sigurnosti na brodu zbog novčanih tražbina i o privremenim naredbama koja je donesena 21. 3. 1940. Brodovlasnik je bio osoba koja je odgovarala za štete proizišle iz korištenja broda po propisima općeg privatnog prava, ako nije bilo drugačije određeno. U pogledu odgovornosti s brodovlasnikom se izjednačuje brodar koji tuđim brodom, ali za svoj račun, u cilju privređivanja vrši plovidbu kao i glavni uzimalac pod naval [13]. Nakon Drugog svjetskog rata glavni izvor bio je Zakon o ugovorima o iskorištavanju pomorskih brodova (Sl. list FNRJ, br. 25/59. i Sl. list SFRJ, br. 20/69.) koji je ukinuo pravila iz Trgovačkog zakona te prihvatio Bruxellesku konvenciju iz 1957. (tzv. engleski sustav ili sustav ograničene odgovornosti utvrđenim iznosom) jer Konvenciju o općem ograničenju odgovornosti iz Bruxellesa iz 1924. Jugoslavija nije potpisala, a niti ratificirala [14]. Navedeni Zakon sadržavao je i odredbe o općem ograničenju odgovornosti za pomorske tražbine (čl. 378. – 396.) pa je ovlaštena osoba mogla konzumirati i te povlastice u određenim iznosima (čl. 390.). Ako je

### 2.2 International Historical Sources of Law

Historically, the *receptum nautarum* rule was known in Roman law, under which the maritime carrier's liability for any destruction or damage of the entrusted objects would “be waived only in cases where the damage was caused by force majeure” [10]. French law has provided two very important instruments of maritime law: (1) *Ordonnance de la marine marchande* of 1681 and (2) *Code de Commerce* of 1807. In the UK, limitation of liability was introduced in 1733 with the *Responsibility of Shipowners Act*. The shipowner was allowed to limit his liability for damages caused by theft committed by the master or crew. In 1786, limitation was extended to every act of the master or crew that was committed without the fault on the ship operator. Under the *Limitation of Liability Act* of 1851, which is still in force in the U.S.A., the authorized person is liable for the value of the ship and associated freight (so-called real insurance), provided there is no personal fault [11].

### 2.3 Domestic Historical Sources

Before the entry into force of the *Maritime and Inland Navigation Act* (Official Gazette of SFRY, No. 22/77, 13/82, 30/85, 80/89 and 29/90, hereinafter: Navigation Act) the *abandon system* was applied in ex-Yugoslavia, as taken from the French Commercial Code (*Code de commerce*) and the Austrian Political Edict of Navigation of 1774 [12]. The Draft of the Maritime-Commercial Act of 1937 and the Regulation on Enforcement and Security on Board for monetary claims and on interim orders of 21<sup>st</sup> March 1940 were in force during World War II. Under the rules of the general private law, the shipowner was the person liable for the damages arising from the use of the ship, unless otherwise provided. The shipowner and a ship operator, who navigates someone else's ship, on his own, for the purpose of doing business as a charterer, have equal liability [13]. After World War II, the main source was the Contracts of Seagoing Ships Exploitation Act (Official Gazette of FPRY, No. 25/59, and Official Gazette of SFRY, No. 20/69) which abolished the rules of the Commercial Code and accepted the Brussels Convention of 1957 (known as the English system or the system of limited liability of the established amount). The Brussels Convention on General Limitation of Liability of 1924 was neither signed nor ratified by Yugo-

brodar želio ograničiti svoju odgovornost putem instituta općeg ograničenja odgovornosti *morao* je osnovati fond ograničene odgovornosti (čl. 390.) [15]. Pomorski zakonik (NN, br. 17/94., 74/94. i 43/96. – dalje u tekstu: PZ 94.) bio je prvi cjeloviti i sustavni pomorski zakonodavni zbornik, pravi hrvatski *corpus iuris maritimi* [16], a imao je uzor u derogiranom Plovidbenom zakonu [17], kao i u rješenjima iz Konvencije o ograničenju odgovornosti za pomorske tražbine, London, 1976. (*Convention on Limitation of Liability for Maritime Claims, 1976* – dalje u tekstu: LLMC). Zakonik ne sadržava odredbe o obveznom osnivanju fonda ograničene odgovornosti (čl. 415.). “*Angažiranje velikih novčanih iznosa od strane broдача*” [18], bio je razlog da se u ovaj Zakonik uvede *fakultativna* odredba o osnivanju fonda<sup>2</sup> sukladno LLMC-u.

### 3. KONVENCIJE O GLOBALNOM OGRANIČENJU ODGOVORNOSTI BRODOVLASNIKA

Radi ujednačavanja prava ograničenja odgovornosti brodo vlasnika na međunarodnoj razini bilo je potrebno donijeti međunarodne instrumente. U području općeg ograničenja odgovornosti koje uređuje odgovornost brodo vlasnika za pomorske tražbine kao međunarodni pravni izvori bili su (kronološki poredano):<sup>3</sup> (1.) Međunarodna konvencija za ujednačavanje određenih pravila o ograničenju odgovornosti vlasnika pomorskih brodova, Bruxelles, 1924. (vlasnik pomorskog broda odgovara do visine vrijednosti broda, vozarine i uzgrednosti broda s tim da iznos ne prelazi 8 funti sterlinga po toni zapremine broda); (2.) Međunarodna konvencija o ograničenju odgovornosti vlasnika pomorskih brodova, Bruxelles, 1957. (sukladno čl. 3. postoje i formalno dva fonda: a) za materijalne štete na ukupan iznos od 1.000 Poincarè franaka po toni zapremine broda te b) za tjelesne štete (smrti i tjelesne ozljede) na ukupan iznos od 3.100 Poincarè franaka po toni zapremine broda s tim da tjelesne štete imaju prvenstvo te konkuriraju fondu za materijalne štete ako fond za tjelesne štete nije dovoljan za potpuno namirenje tih vjerovnika); (3.) Konvencija o

<sup>2</sup> Čl. 416., st. 1. određuje “*Svaka osoba koja bi mogla odgovarati u sporu može osnovati fond*”.

<sup>3</sup> Konvencije zaslužuju posebno isticanje jer se s njima ujednačuje međunarodno pomorsko pravo. Neke su još uvijek važće bez obzira kada su donesene te stupile na snagu.

slavia [14]. The above mentioned act contained provisions for the general limitation of liability for maritime claims (articles 378-396) and the authorized person could use these privileges up to certain amounts (article 390). If a ship operator wanted to limit his liability by applying the concept of general limitation of liability, he had to constitute a fund of limited liability (article 390) [15]. The Maritime Code (Official Gazette, No. 17/94, 74/94 and 43/96; hereinafter MC 94) was the first complete and systematic maritime code, the real Croatian *corpus iuris maritimi*, [16] and was modeled on the repealed Navigation Act, [17] as well as on solutions from the *Convention on Limitation of Liability for Maritime Claims, 1976* (hereinafter: LLMC). The Code does not contain provisions on the mandatory constitution of a limited liability fund (article 415). “*Engaging large sums of money by the ship operator*” [18] was the reason to introduce an *optional* provision into the Code for the constitution of such a fund<sup>2</sup> in accordance with the LLMC.

### 3 CONVENTIONS ON THE SHIP OPERATOR'S GLOBAL LIMITATION OF LIABILITY

For the purpose of standardizing the rights of the ship operator's liability limitation at the international level, it was necessary to adopt international instruments. In the area of general liability limitation which deals with the liability of the ship operator for maritime claims, as international legal sources there were (in chronological order)<sup>3</sup>: (1) International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels, Brussels, 1924, (the shipowner is liable to the extent of the ship's value, freight and accessories of the vessel provided that the amount does not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage), (2) International Convention Relating to the Limitation of the Liability of Owners of Seagoing ships, Brussels, 1957, (pursuant to article 3 two funds exist formally: a) for damages of an aggregate amount of 1,000 francs for each ton of the ship's tonnage, and b)

<sup>2</sup> Article 416, paragraph 1 provides that “Any person who could be liable in a dispute may constitute the fund”.

<sup>3</sup> It is very important to mention the conventions because they are used to standardize international maritime law. Some of them are still valid regardless of when they were enacted and put into force.

ograničenju odgovornosti za pomorske tražbine, London, 1976.; (4.) Protokol o izmjenama i dopunama Međunarodne konvencije o ograničenju odgovornosti vlasnika pomorskih brodova iz 1957., Bruxelles, 1979. te (5.) Protokol iz 1996. kojim se mijenja i dopunjuje Konvencija o ograničenju odgovornosti za pomorske tražbine iz 1976. (v. u nastavku).

#### 4. FOND OGRANIČENE ODGOVORNOSTI U MEĐUNARODNOM I DOMAĆEM POZITIVNOM PRAVU

##### 4.1. Vrste i polje primjene

LLMC konvencija postala je, kao ratificirani i objavljeni međunarodni ugovor dio unutar-njeg prava Republike Hrvatske u 1993. te sastavni dio PZ 94. (v. *supra*). Postoje četiri vrste fondova ograničenja odgovornosti koje mogu osnovati vlasnik broda (vlasnik, naručitelj u brodarskom ugovoru, brodar i poslovođa pomorskog broda) i spašavatelj: (1.) za potraživanja zbog smrti ili tjelesne ozljede (čl. 6., st. 1.); (2.) za sva ostala potraživanja (čl. 6., st. 1.); (3.) za spašavatelja koji ne obavlja akcije spašavanja s nekog broda ili za svakog spašavatelja koji djeluje isključivo na brodu kojemu se pruža pomoć (čl. 6., st. 4.); (4.) za potraživanja putnika (čl. 7.). Osnova za izračunavanje granice odgovornosti za tjelesne i materijalne štete je bruto tonaža broda koja se izračunava prema Dodatku I. Međunarodne konvencije o baždarenju brodova, 1969. (čl. 6., st. 5.), dok se ograničenje u odnosu na spašavatelja obračunava prema tonaži od 1.500 tona (čl. 6., st. 5.).<sup>4</sup> Posebne granice odgovornosti vlasnika broda vrijede za putnike i iznose 46.666 SDR po putniku, ali najviše 25 milijuna SDR (čl. 7., st. 1.). Međutim, pozivanje na ograničenje odgovornosti ne znači priznanje te odgovornosti (čl. 1., st. 7.).

LLMC je, kao i drugi instrumenti podložan stalnim izazovima. Uobičajeno se novele međunarodnih ugovora rade putem protokola koji su samostalni međunarodni pravni akti [19]. Protokol iz 1996. kojim se mijenja i dopunjuje Konvencija o ograničenju odgovornosti za po-

for bodily harm (loss of life and personal injuries) of an aggregate amount of 3,100 francs for each ton of the ship's tonnage, with personal injuries having priority and when the first portion of the fund is insufficient to pay the personal claims in full, the unpaid balance of such claims ranks rateably with the property claims for payment against the second portion of the fund), (3) Convention on Limitation of Liability for Maritime Claims, London, 1976, (4) Protocol on Amendments to the International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, Bruxelles, 1979 and (5) The 1996 Protocol, amending the Convention on Limitation of Liability for Maritime Claims of 1976 (see below).

#### 4 LIMITATION FUND IN INTERNATIONAL AND DOMESTIC POSITIVE LAW

##### 4.1 Types and Scope of Application

The LLMC Convention became, as a ratified and published international agreement, a part of the Croatian domestic law in 1993 and an integral part of the MC 94 (*supra*). There are four types of limitation funds that the shipowner (owner, charterer, ship operator and manager) and the salvor may constitute: (1) for claims in respect of loss of life or personal injury (article 6, paragraph 1), (2) for all other claims (article 6, paragraph 1), (3) for a salvor who does not perform the salvage operation from a ship or for any salvor who works exclusively on board the vessel which is being salvaged (article 6, paragraph 4), (4) for passenger claims (article 7). The basis for calculating the limits of liability in respect of personal and property damages is the gross tonnage of the vessel, which is calculated according to Annex I of the International Convention on Tonnage Measurement of Ships, 1969 (article 6, paragraph 5), while the limit in respect of salvor is calculated according to the tonnage of 1,500 tons (article 6, paragraph 5).<sup>4</sup> Special limits of the liability of the shipowner apply to passengers and are an amount of 46,666 SDR multiplied by the number of passengers, but not exceeding 25 million SDR (article 7, paragraph 1). However,

<sup>4</sup> Granice odgovornosti za navedene tražbine proizišle isključivo iz jednog događaja obračunavaju se prema čl. 6., st. 1. LLMC.

<sup>4</sup> The limits of liability for claims arising on any distinct occasion are calculated under article 6, paragraph 1 of the LLMC.

morske tražbine iz 1976. (*Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976* – dalje u tekstu: Protokol LLMC) donosi značajne promjene pravila o granicama odgovornosti broдача u odnosu na tražbine za tjelesne i ostale štete, kao i za tjelesne štete putnika na brodu (čl. 3. i 4.) (Konvencije o ograničenju odgovornosti za pomorske tražbine (NN, MU, br. 2/92.). Protokol iz 1996. kojim se mijenja i dopunjuje Konvencija o ograničenju odgovornosti za pomorske tražbine iz 1976. (Zakon o potvrđivanju Protokola iz 1996. kojim se mijenja i dopunjuje Konvencija o ograničenju odgovornosti za pomorske tražbine iz 1976., NN, MU, br. 12/05.). Novi, pooštreni sustav općeg ograničenja prema ovlaštenim osobama u svoje pomorsko zakonodavstvo unijela je i Republika Hrvatska putem izmjena i dopuna PZ-a (NN, br. 146/08.).<sup>5</sup>

LLMC se ne primjenjuje na lebdjelice i ploveće platforme za istraživanje i iskorištavanje morskog dna i podzemlja (čl. 15., st. 5.).

#### 4.2. Osobe s pravom na ograničenje odgovornosti

Krug osoba ovlaštenih ograničiti odgovornost prema konvencijama o općem ograničenju odgovornosti stalno se širi. Konvencija iz 1924. to pravo priznaje brodovlasniku, brođaru nevlasniku i glavnom naručitelju u brođarskom ugovoru (čl. 1. i 10.). Konvencija iz 1957. pored brodovlasnika, brođara, naručitelja prijevoza u brođarskom ugovoru, pravo na ograničenje daje i poslovođama brođa, zapovjedniku brođa, članovima posade i drugim radnicima osoba ovlaštenih ograničiti odgovornost (vlasnika, naručitelja prijevoza, brođara, poslovođe brođa<sup>6</sup> (čl. 6.).<sup>7</sup> LLMC u odnosu na Konvenciju iz 1957. povećava broj dodajući spašavatelja i osobe za čija djela, propuste ili pogreške on odgovara te osiguratelja odgovornosti za tražbine koje podliježu ograničenju odgovornosti u skladu s ovom Konvencijom (čl. 1.) [20].

<sup>5</sup> Među strankama ovoga Protokola, Konvencija i ovaj Protokol, smatraju se i tumače zajedno kao jedinstvena isprava (čl. 9. Protocol LLMC).

<sup>6</sup> PZ je propustio u čl. 386. unijeti poslovođu brođa (*operator*) i upravitelja (*manager*) kao osobe koje mogu ograničiti svoju odgovornost. Predlažemo *de lege ferenda* da se i ove osobe uvrste u krug ovlaštenih osoba u skladu s LLMC.

<sup>7</sup> Razlog povećanju broja ovlaštenih osoba je u odluci engleskog Apelacijskog suda *The Himalaya* iz 1955. kojom je pravo na ograničenje dano i zapovjedniku brođa.

the act of invoking limitation of liability shall not constitute an admission of liability (article 1, paragraph 7).

LLMC, like other instruments, is subject to constant challenges. The revision of treaties is usually made through protocols that are independent international legal acts [19]. The Protocol of 1996 amending the Convention on Limitation of Liability for Maritime Claims of 1976 (*Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976*, hereinafter: LLMC Protocol) introduced significant changes in the rules on the liability limits of the ship operator in respect of claims for personal or other damages, as well as personal damages to passengers of a ship (article 3 and 4). The Republic of Croatia introduced in its maritime legislation a new, stricter system of general limitation to authorized persons through amendments of the MC (Official Gazette, No. 146/08).<sup>5</sup> LLMC does not apply to air-cushion vehicles and floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof (article 15, paragraph 5).

#### 4.2 Persons Entitled to Limit Liability

Under the conventions on general limitation of liability, the circle of persons entitled to limit their liability is constantly expanding. The Convention of 1924 recognizes this entitlement to the owner of a seagoing vessel, to the person who operates the vessel without owning her and to the principal charterer (articles 1 and 10). The Convention of 1957 gives the entitlement to limit liability to the shipowner, ship operator, charterer, manager, master, members of the crew and other servants of the owner (shipowner, charterer, manager<sup>6</sup> or operator and the ship herself (article 6)).<sup>7</sup> In relation to the Convention of 1957, LLMC increases the number by adding a salvor, persons for whose acts, neglect or default the salvor is responsible, and the insurer of liability for claims subject to limi-

<sup>5</sup> The Convention and this Protocol shall, as between the Parties to this Protocol, be read and interpreted together as one single instrument (article 9 of the Protocol LLMC).

<sup>6</sup> MC has failed to mention in article 386 the ship operator and the manager as persons who are entitled to limit their liability. We suggest *de lege ferenda* (what the law ought to be) that both these persons be included in the circle of entitled persons in accordance with the Maritime Code.

<sup>7</sup> The reason for increasing the number of the entitled persons lies in the decision of the English Court of Appeal, "The Himalaya" case of 1955, by which this entitlement was given to the master.



### 4.3. Ograničenje odgovornosti bez osnivanja fonda ograničenja

Pravilo je da se ovlaštena osoba može pozvati na opće ograničenje odgovornosti s ili bez osnivanja fonda (čl. 10.).<sup>8</sup> Fond je dakle *fakultativan*, pa svaka država ugovarateljica ima suvereno pravo odlučiti hoće li ili ne u svoju legislativu ugraditi njegovo osnivanje pri čemu je najvažnije da se određene granice odgovornosti, ponekad samo donji iznosi naknade štete, primjenjuju na *ukupnost svih tražbina* koje su nastale iz istog štetnog događaja. Drugim riječima, ovlaštenik prava na ograničenje mora, prilikom pozivanja na ograničenje, poštivati *kogentna* pravila o granicama svoje odgovornosti za sve tražbine predviđene u LLMC, a sukladno pravu države u kojoj ograničava odgovornost (*lex fori*). RH se odlučila za rješenje prema kojem je brodar koji želi ograničiti svoju odgovornost **dužan** osnovati fond ograničene odgovornosti, pa ako se brodar poziva na ograničenje odgovornosti, a fond ograničene odgovornosti nije osnovan, odgovarajuće se primjenjuju odredbe članka 397. ovoga Zakonika (čl. 395.).<sup>9</sup>

### 4.4. Osnivanje i dioba fonda

Fond se osniva u iznosima iz čl. 6. i 7. LLMC-a, uvećanima za kamate koje teku od dana događaja iz kojeg je nastala odgovornost do dana

tation in accordance with the rules of the Convention (article 1) [20].

### 4.3 Limitation of Liability without Constituting a Limitation Fund

The rule is that limitation of liability may be invoked notwithstanding that a limitation fund has not been constituted (article 10).<sup>8</sup> The fund is therefore *optional*, and each State Party has the sovereign right to decide whether or not to incorporate the constitution of the fund into its legislation with the emphasis on certain limits of liability, sometimes only the lower compensation amounts, being applied to *the totality of all claims* arising from the same adverse event. In other words, when invoking the right to limit liability, a person liable must adhere to the *mandatory rules* about the limits of its liability for all claims provided for under the Convention, and in compliance with the law of the State in which the liability is being limited (*lex fori*). Croatia opted for a solution according to which a ship operator who wants to limit his liability **must** constitute a limitation fund, so if the ship operator invokes the right to limit liability, and the fund has not been constituted yet, the relevant provisions of article 397 of the Maritime Code (article 395)<sup>9</sup> shall be applicable.

<sup>8</sup> Poznat je slučaj *Seismic Shipping Inc* protiv Total E&P UK plc (The Western Regent). U pitanju je bio zahtjev Seismic Shipping Inc za ograničenje odgovornosti za štetu počinjenu 2. 10. 2004. engleskoj kompaniji Total E&P UK plc (sudar sa signalnom plutačom u Sjevernom moru). English High Court kao prvostupanjski sud donio je 22. 3. 2005. presudu o pravu predlagatelja na ograničenje odgovornosti i bez osnivanja fonda. English Court of Appeal potvrdio je odluku 29. 6. 2005. Ukratko: *In this case, the judge held that the ability to constitute a limitation fund under Article 11 of the 1976 Convention is not a pre-condition of the court's jurisdiction to hear and determine claim for limitation, nor of its power to grant a limitation decree. Article 10 of the Convention provides a freestanding entitlement to claim limitation, irrespective of whether a fund is ever constituted.* Dakle, temeljem odluke engleskog suda (koji je sebe proglasio nadležnim) štetnik je dužan platiti samo 3,8 milijuna američkih dolara umjesto iznosa od 9,9 milijuna američkih dolara koliko bi mu na ime naknade štete pripalo da je presudu donio američki sud. Naime, engleski sud se ravnao prema Konvenciji iz 1976. prema kojoj je granica odgovornosti predlagatelja za tonažu plutače od 5,975 tona iznosi 2,59 milijuna SDR (oko 3,8 milijuna US\$). Više na internet stranici: <http://www.onlinedmc.co.uk>. (12. 07. 2012.).

<sup>9</sup> Čl. 397. PZ govori o načelima diobe i subrogaciji. Ipak, trebalo bi zaključiti da brodar koji nije osnovao fond, a želi ograničiti svoju odgovornost, odgovara vjerovnicima neograničeno.

<sup>8</sup> The best known case is *Seismic Shipping Inc* versus *Total E & P UK plc* (The Western Regent). On the issue of was a request made by *Seismic Shipping Inc* for limitation of liability for a damage caused on 10th October 2004 to the English company *Total E & P UK plc* (collision with the signal buoy in the North Sea). The English High Court, as the court of first instance, ruled on 22<sup>nd</sup> March 2005 on the applicant's right to limit liability and without constitution of the fund. The English Court of Appeal upheld the decision of 29<sup>th</sup> June 2005. In short: *In this case, the judge held that the ability to constitute a limitation fund under art. 11 of the 1976 Convention is not a pre-condition of the court's jurisdiction to hear and determine claim for limitation, nor of its power to grant a limitation decree. Article 10 of the Convention provides a freestanding entitlement to claim limitation, irrespective of whether a fund is ever constituted.* Therefore, based on the decision of the English court (that proclaimed itself competent), the claimant was required to pay only U.S. \$ 3.8 million instead of the U.S. \$ 9.9 million, which he would have been awarded to in the case of the U.S. court ruling. The English court applied the 1976 Convention according to which the limit of liability of the claimant to buoy tonnage of 5.975 tons is 2.59 million Units of Account (about U.S. \$ 3.8 million). More on the web page: <http://www.onlinedmc.co.uk>. (12<sup>th</sup> July 2012).

<sup>9</sup> Article 397 of the MC indicates the principles of distribution and subrogation. However, it should be concluded that a ship operator who has not constituted a fund but wants to limit his liability, is liable to creditors without limits.

osnivanja fonda (čl. 11.).<sup>10</sup> Osnovani fond je na raspolaganju *samo* za isplate tražbina radi kojih se može pozvati na ograničenje odgovornosti (stroga namjena fonda), a može se osnovati polaganjem svote ili pružanjem jamstva koje je prihvatljivo u državi gdje je fond osnovan.<sup>11</sup> Fond koji osnuje jedna od ovlaštenih osoba ili njezin osiguratelj, smatra se da je osnovan od svih osoba. Samo *diobi* fonda (podjeli novčanih sredstava) pristupa se kada se nesporno utvrdi prizna pravni položaj vjerovnika u prilično složenom postupku ograničenja odgovornosti koji je konvencijski prepušten nacionalnim zakonodavstvima (čl. 12.).<sup>12</sup> Osnovna pravila diobe su pravilo prvenstva (*prioriteta*) i pravilo razmjernosti (*pariteta*) što znači da će tražbine za tjelesne ozljede biti u redosljedu namirenja prije ostalih tražbina, dok će se tražbine istog isplatio redom namirivati razmjerno (*pro rata*). Ako u fondu nema sredstava za isplatu svih naknada za tjelesne štete one će tada s ostatkom konkurirati drugom isplatom redom (ostale štete). LLMC zaštićuje i pravo subrogacije.

#### 4.5. Pravne posljedice osnivanja fonda

Temeljno je pravilo da vjerovnik koji prijavi potraživanje prema osnovanom fondu kod suda koji upravlja tim fondom, ne može prema dužniku (brodaru) za čije tražbine on odgovara ograničeno, istaknuti zahtjev za njegovu preostalu imovinu (sprječavanje drugih zahtjeva). Daljnje pravne posljedice osnivanja fonda prema PZ-u su: (1.) privilegiji na brodu prestaju

<sup>10</sup> Ne kaže se izriječno o kojim se kamata radi pa je moguće da su to zatezne kamate koje se plaćaju na dospjele novčane tražbine iako, s druge strane pozivanje na ograničenje odgovornosti ne znači i priznanje te odgovornosti dužnika novčane obveze. I PZ ništa ne govori o vrstama kamata što je propust koji dovodi do pravne nesigurnosti budući da od trenutka nastanka štetnog događaja do osnivanja fonda može proteći i nekoliko godina jer konvencijama i zakonima nije određen rok u kojem brodar mora osnovati fond pod prijetnjom zastare ili prekluzije što je nesporno još jedna njegova povlastica (čl. 396.). Međutim, na pravodobno prijavljeno potraživanje teče zakonska zatezna kamata od dana osnivanja fonda. Plovidbeni zakon je imao drugačija rješenja: zatezna kamata teče od dana događaja na temelju kojega je nastalo potraživanje do dana osnivanja fonda ograničene odgovornosti, ali nakon osnivanja fond zatezne kamate ne teku (383.). U svakom slučaju, pitanje kamata treba precizno urediti.

<sup>11</sup> Pojam jamstva treba shvatiti ekstenzivno što znači da je, pored gotovog novca na sudskom depozitu prihvatljiva i bankarska garancija kao i jamstvo od P&I klubova kao najčešći oblici jamstava.

<sup>12</sup> LLMC ostavlja svakoj državi ugovarateljici da samostalno odredi postupak ograničenja brodarove odgovornosti. RH je iskoristila to pravo pa su te odredbe propisane u čl. 401. – 429. PZ.

#### 4.4 Constitution and Distribution of the Fund

The fund shall be established in the amounts as set out in articles 6 and 7 of LLMC, together with the increased interest thereon, reckoning from the date of the occurrence giving rise to the liability up to the date of the establishment of the fund (art. 11).<sup>10</sup> Any fund thus constituted shall be available *only* for the payment of claims in respect of which limitation of liability can be invoked (strict purpose of the Fund) and may be constituted either by depositing the sum or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted<sup>11</sup>. A fund constituted by one of the entitled persons or by their insurer shall be deemed constituted by all persons respectively. The fund shall be distributed among the claimants in proportion to their established claims against the fund when indisputably established- recognized- their legal position of creditors in a fairly complex procedure of liability limitation which was under the Convention left to national legislations (article 12).<sup>12</sup> The basic rules of the distribution are the rule of *priority* and the rule of *parity*, which means that claims for personal injuries have priority over other claims, while the same priority claims are paid off proportionally (*pro rata*). If the fund has no assets to pay all claims for personal damages they will then compete with the rest of the second order of settlement (other damages). LLMC protects the right of subrogation.

<sup>10</sup> The type of interest is not explicitly mentioned so it is possible that these are default interest payable on outstanding monetary claims, although, on the other hand, the act of invoking limitation of liability shall not constitute an admission of liability. The MC says nothing about the type of interest which is an oversight that leads to legal uncertainty since it may take several years from the date of the adverse event to the constitution of the fund, because the conventions and acts have not defined a deadline in which the ship operator must constitute a fund under the threat of statute of limitation which is undoubtedly one more of his benefits (Article 396). However, legal interest of a claim filed in due time runs from the day of constitution of the fund. The Navigation Act had a different solution: default interest runs from the day of the event upon which the claim arose till the day of the constitution of the limitation fund, but after the constitution of the fund the default interest stops running (383). In any case, the issue of interest should be precisely regulated.

<sup>11</sup> The term “guarantee” should be understood extensively which means that in addition to cash on the court deposit, a bank guarantee is also acceptable, and the guarantee of the P&I clubs as the most common forms of guarantees as well.

<sup>12</sup> LLMC leaves to each State Party to independently determine the ship operator’s liability limitation procedure. The Republic of Croatia has exercised that right, and these provisions are stipulated in articles 401-429 of the MC.

osnivanjem fonda ograničene odgovornosti za tražbine osigurane privilegijem na brodu koje su podvrgnute ograničenju odgovornosti (čl. 246., st. 1., t. 4.); (2.) hipoteka na brodu ne pre-staje osnivanjem fonda (čl. 236. PZ); (3.) oslo-bađanje zaustavljenog ili zaplijenjenog broda (čl. 398., st. 2.) (V. Međunarodnu konvenciju za izjednačenje nekih pravila o privremenom zau-stavljanju pomorskih brodova iz 1952., stupila je na snagu 24. 2. 1956. Ratificirana od strane bivše Jugoslavije (Sl. list SFRJ, MU i drugi spo-razumi, br. 12/67.) koja je iskoristila pravo uno-šenja rezerve u pogledu neprimjenjivanja Kon- vencije glede sporova o vlasništvu broda (čl. 10. a). Preuzeta je od strane Republike Hrvatske 8. 10. 1991. (NN, MU, br. 1/92.)). [21]; (4.) obu- stava ovršnog postupka i postupka osiguranja i ukidanje svih provedenih radnji u tim postupci- ma te zabrana pokretanja redovitog ovršnog postupka (čl. 407.) i dr.<sup>13</sup> Ovakva rješenja su potpuno opravdana jer osnovan fond znači si- gurnost vjerovniku (ovrhovoditelju, predlagate- lju osiguranja i tužitelju) u naplati kroz izvan- parnični sudski postupak, ali i zaštitu stvarnih prava drugih na brodu.

#### 4.6. Odnos međunarodnih ugovora o posebnom i općem ograničenju odgovornosti

Brodar samostalno odlučuje kako će zaštititi svoj pravni interes u konkretnom štetnom doga-đaju za koji je odgovoran (temeljem *krivnje*). Može koristiti povlastice općeg ograničenja od- govornosti, ali odgovara i neograničeno ako baš mora. Može li, međutim, brodar odgovarati pre- ma pravilima posebnog ograničenja odgovorno- sti za teret, putnike i prtljagu budući osnovica za obračun nije ista? Odgovor je potvrđan jer me- đunarodni ugovori iz područja posebnog ograni- čenja za teret (Haaška, Haaško-Visbyjska i Ham- burška pravila) ne mijenjaju ni prava ni obveze prijevoznika što proizlaze iz bilo kojeg važećeg zakona koji se odnosi na ograničenje odgovor- nosti vlasnika pomorskih brodova. Zato Jakaša s pravom zaključuje da će brodar odgovarati pre- ma pravilima za posebno ograničenje sve dok njegova odgovornost ne dosegne iznose općeg ograničenja odgovornosti koje je gornja granica njegove odgovornosti [22]. Sve ovo pod uvjetom da brodar ima pravo na ograničenje odgovorno-

<sup>13</sup> Upitno je treba li, kao pravna posljedica osnivanja fonda, biti prekinut parnični postupak jer tužitelj može prijaviti svoje potraživanje u postupku ograničenja odgovornosti i u tom po- stupku ga ostvarivati.

#### 4.5 Legal Effects of the Constituted Fund

The basic rule is that a claimant, who brings a claim against the limitation fund before the Court administering that 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 (ship operator) the fund has been constituted (as to prevent other requests). Further legal effects of the fund constituted by the MC are: (1) maritime liens upon a ship stop with the constitution of the limitation fund for claims secured by maritime liens upon a ship that are subjected to limitation of liability (article 246, paragraph 1, sub-paragraph 4.), (2) a mortgage on the ship does not stop with the constitution of the fund (article 236 of the MC), (3) the release of a stopped or seized ship (article 398, paragraph 2) [21], (4) suspension of enforcement proceedings and of insurance pro- ceedings, and the abolition of all actions made in these matters, and prohibition from institut- ing regular enforcement proceedings (article 407), etc.<sup>13</sup> These solutions are justified because a constituted fund means security to the claim- ant (to the execution creditor, the proponent of insurance and to the plaintiff) in the collection of the *ex parte* proceedings and the protection of property rights of others on board.

#### 4.6 The Relation between International Treaties on the Special and General Limitation of Liability

The ship operator independently decides how to protect his legal interest in a particular adverse event for which he is responsible (based on *fault*). He can use the privileges of the general limitation of liability but is liable unlimitedly if he must. However, could the ship operator be liable under the rules of the special limitation of liability for cargo, passengers and luggage, since the basis for the calculation is not the same? The answer is yes, because inter- national treaties governing special limitation for cargo (The Hague, The Hague-Visby and Hamburg Rules) do not alter the rights or obli- gations of any carrier arising out of any applica- ble act relating to the limitation of liability of owners of seagoing ships. That is why Jakaša rightly concludes that the ship operator can be liable under the rules for special limitation until

<sup>13</sup> It is questionable whether, as a legal effect of the constitution of the fund, litigation should be terminated because the plaintiff can bring his claim in the process of the limitation of liability and exercise it in these proceedings.

sti jer gubitkom ovoga prava odgovara neograničeno do stvarne štete.

#### 4.7. Odnos Rotterdamskih pravila i općeg ograničenja odgovornosti

Konvencija Ujedinjenih naroda o ugovorima o međunarodnom prijevozu stvari u cijelosti ili djelomično morem (*United Nations Convention on Contracts for the International Carriage of Goods wholly or partly by Sea* – RR ili Rotterdamska pravila) je nova konvencija s ambicijama zamijeniti Haaška, Haaško-Visbyjska i Hamburška pravila (*maritime plus*) [23].<sup>14</sup> Čl. 83. određuje: “Ništa u ovoj Konvenciji ne utječe na primjenu bilo koje međunarodne konvencije ili nacionalnog prava u odnosu na globalno ograničenje odgovornosti brodovlasnika” [24]. To znači da su Rotterdamska pravila samo nastavak dobro poznatih pravila u odnosima konvencija za posebno i opće ograničenje odgovornosti (v. primjerice čl. 8. Haaških pravila iz 1924.). Drugim riječima, one se međusobno ne isključuju pa stoga predstavljaju još jednu povlasticu (*privilegij*) brodarica [25].

Dakle, odgovornost prijevoznika mora se najprije utvrditi prema ovoj Konvenciji, a nakon toga iznosi moraju biti kalkulirani na temeljima čl. 59. (granice odgovornosti) ili 60. (granice odgovornosti za gubitak prouzročen zakašnjenjem) iz RR-a [26]. Ako prijevoznik želi koristiti opće (globalno) ograničenje prema pravilima LLMC-a zato što je njegova odgovornost prema RR-u veća od opće granice prema LLMC-u, onda mora započeti postupak ograničenja odgovornosti te će svaki oštećenik moći tražiti svoje pravo u tom postupku u visini iznosa koji se temelji na čl. 59. ili 60. RR-a. Razlika između ovih dvaju ograničenja je u tome što se granice iz RR-a primjenjuju automatski, dok se u slučaju LLMC-a zahtijeva sudski postupak. Daljnja razlika je i u tome što oštećena soba u slučaju kada brodar odgovara prema RR-u može računati na novčanu satisfakciju do granica ograničenja, dok je u slučaju kada se osniva fond situacija složenija i neizvjesnija. Naime, svaki fond se osniva u visini iznosa propisanih čl. 6. i 7. LLMC-a uvećanih za kamate koje teku od dana događaja iz kojeg je nastala odgovor-

<sup>14</sup> U našoj pravnoj literaturi vrlo često se naziva *Rotterdamska pravila* jer je 23. 9. 2009. potpisana u Rotterdamu. Konvenciju su potpisale 24 države. Zasad su RR ratificirale samo dvije države: Španjolska (19. 1. 2011.) i Togo (17. 6. 2012.). Stupit će na snagu nakon što joj pristupi najmanje 20 država.

it reaches the liability amounts of general liability limitations, which is the upper limit of his liability [22]. All these, provided that the ship operator has the right to limit liability because with the loss of this right his liability is unlimited - up to the material damage.

#### 4.7 The Relation between the Rotterdam Rules and the General Liability Limitation

*The United Nations Convention on Contracts for the International Carriage of Goods wholly or partly by Sea* – RR or the Rotterdam rules- is a new convention with ambitions to replace The Hague, The Hague-Visby and the Hamburg Rules (*maritime plus*) [23].<sup>14</sup> Article 83 provides: “Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners” [24]. This means that the Rotterdam Rules are just a continuation of the well-known rules to conventions regulating special and general limitation of liability (see e.g., article 8 of The Hague rules of 1924). In other words, they are not mutually exclusive and therefore represent another privilege for the ship operator [25].

Therefore, the carrier’s liability must first be determined under this Convention and thereafter amounts shall be calculated subject to articles 59 (Limits of Liability) or 60 (Limits of Liability for Loss Caused by Delay) from the Rotterdam Rules [26]. If the carrier wishes to exercise the general (global) limitation under the LLMC rules because its responsibility under the Rotterdam Rules is higher than the general limits under the LLMC, he must initiate the limitation of liability proceedings, and each claimant will be able to stake a claim in this proceedings in the amounts established under articles 59 or 60 of the Rotterdam Rules. The difference between these two limitations is that the limits of the Rotterdam Rules apply automatically while, in the case of the LLMC, court proceedings of the shipowner are required. A further difference is that the persons who have suffered damage where the ship operator is liable under the Rotterdam Rules can count on financial satisfaction to the limitation

<sup>14</sup> In our legal literature it is often referred to as the “Rotterdam Rules” since it was signed in Rotterdam on 23rd September 2009. The Convention was signed by 24 countries. So far, the Rotterdam Rules have been ratified by only two countries: Spain (19th January 2011) and Togo (17th June 2012). It will enter into force after accession of at least 20 States.

nost do dana osnivanja fonda (čl. 11. LLMC-a). Potom vjerovnici prijavljuju tražbine dužniku (brodaru) koje treba razvrstati u dva fonda (jedan za tjelesne, a drugi za ostale štete). Dioba (distribucija) fonda obavlja se po načelu pariteta što znači da će se vjerovnici namirivati *pro rata* (prema jednakom postotku za sve vjerovnike od iznosa utvrđene tražbine). U slučaju da u fondu za tjelesne štete nedostaje novčanih sredstava tada ostatak tražbina za tjelesne štete konkurira fondu za ostale štete.<sup>15</sup>

#### 4.8. Pravni položaj osnovanog fonda u stečajnom postupku

Pravila o osnivanju fonda ograničene odgovornosti i njegovoj diobi vrlo su slična stečajno-pravnoj proceduri (nedostaje stečajni upravitelj kao zakonski zastupnik) [27]. No, nejasno je kakav je pravni položaj (*status*) fonda u otvorenom stečajnom postupku. PZ kao poseban zakon u odnosu na Stečajni zakon (NN, 44/96., 29/99., 129/00., 123/03., 197/03., 187/04., 82/06., 116/10. i 25/12. – dalje u tekstu: SZ), ne daje odgovor pa ga treba pronaći u stečajnom pravu među odredbama koje se tiču razlučnih vjerovnika (čl. 81. – 84.). Fond kao posebna, izdvojena imovina dužnika na depozitu suda, predstavlja pravo vjerovnika (fonda) koje je radi osiguranja na njih prenio dužnik (čl. 83., st. 1.). Sve poslove u svezi fonda preuzet će stečajni upravitelj kao novi zastupnik po zakonu brodar stečajnog dužnika.

Drugačija je pravna situacija ako ne postoji osnovan fond. Tada oštećene osobe nemaju posebna prava na imovini stečajnog dužnika te su “obični” stečajni vjerovnici ukoliko su u roku podnijeli prijavu svoga potraživanja stečajnom upravitelju (čl. 96.). Ako su pokrenuli parnični spor protiv brodar, on će biti prekinut (čl. 212. Zakona o parničnom postupku (NN, br. 53/91., 91/92., 58/93., 112/99., 88/01., 117/03., 88/05., 02/07., 84/08., 123/08., 57/11. i 148/11.), dok se postupci ovrhe i osiguranja prekidaju temeljem čl. 98., st. 3. SZ-a. Može li se stečajni upravitelj, prilikom izjašnjenja o prijavljenoj tražbini oštećene osobe (sada stečajnog vjerovnika) izjasniti koristeći se pravima iz posebnog ograničenja odgovornosti PZ-a? Svakako da može jer su otvaranjem stečajnog postupka na njega prešla

limit, while in the case of a fund constitution the situation is more complex and uncertain. Namely, the fund shall be constituted to the sum of the amounts as set out in articles 6 and 7 of the LLMC together with the interest reckoning from the date of the occurrence giving rise to the liability up to the date of the constitution of the fund (article 11 LLMC). Thereupon the claimants report to the debtor (ship operator) their claims, which need to be distributed into two funds (one for personal and another for other damages). The distribution of the fund shall be completed under the principle of parity, which means that the claimants will be compensated by the *pro rata* (based on an equal percentage for all claimants to the established amount of the claim). In case the Fund for personal damages has insufficient funds then the remainder of the claims for personal damages competes with the fund for other damages.<sup>15</sup>

#### 4.8 Legal Status of a Fund Constituted in the Bankruptcy Proceedings

The rules on the constitution of the limitation fund and its distribution are very similar to bankruptcy and legal procedure (missing is the trustee in bankruptcy as a legal representative) [27]. However, the legal status of the fund in the bankruptcy proceedings is unclear. The MC as a special act in relation to the Bankruptcy Act (Official Gazette, No. 44/96, 29/99, 129/00, 123/03, 197/03, 187/04, 82/06, 116/10 and 25/12, hereinafter: BA), does not give the answer, so it must be found in the bankruptcy law among the provisions relating to secured creditors (articles 81- 84). As a special, separate debtor's assets on the deposit in Court, the Fund represents the right of creditors which was conveyed to them by the debtor to secure the claim (article 83, paragraph 1). All activities related to the fund will be taken over by the trustee in bankruptcy as a new representative under the law of the ship operator (debtor).

The legal situation is different if the fund has not been constituted. Then the injured persons have no special rights to property of the debtor and are the “ordinary” creditors if they have staked their claims to the trustee (article 96) on time. If they have initiated proceedings against the ship operator, it will be terminated (article 212 of the Legal Proceedings Act (Official Gazette No. 53/91, 91/92, 58/93, 112/99, 88/01,

<sup>15</sup> Tako Berlingieri, Francesco, (autorizirani tekst dostavljen autoru od 31. 8. 2011.).

<sup>15</sup> BERLINGIERI, Francesco, (author of the copyrighted text delivered to the author on 31st August 2011).

sva prava dužnikovih tijela (čl. 89. SZ-a) kao i obveza zaštite stečajne mase (čl. 67. SZ-a).

#### 4.9. Fond i pomorsko osiguranje odgovornosti

Osnovno načelo ugovora o osiguranju profesionalne odgovornosti jest obveza osiguratelja nadoknaditi, do iznosa osigurane svote osiguranja iz police, iznose koje je osiguranik (prijevoznik) dužan platiti *trećoj osobi*<sup>16</sup> (oštećeniku) temeljem odgovornosti za štetu [28]. Ovo osiguranje, međutim, nije obvezno što objektivno može predstavljati značajan problem za oštećenika u vezi naplate naknade materijalne štete ako brodar nije osnovao fond ili nije solventan, odnosno prezadužen je pa mora u stečaj. No, u slučaju kada je ovo osiguranje *obvezno*, kao i u slučaju odgovornosti za smrt i tjelesnu ozljedu člana posade broda i narušavanju zdravlja člana posade,<sup>17</sup> oštećenik može zahtijevati neposredno od osiguratelja naknadu štete (*actio directa*) koju je pretrpio događajem za koji odgovara osiguranik, ali najviše do iznosa osiguravatelje obveze (čl. 743., st. 2. PZ-a).<sup>18</sup> Ako je odgovornost brodara pokrivena istim ugovorom kojim je osiguran brod, naknada za osiguranje odgovornosti daje se neovisno o visini naknade ostalih šteta pokrivenih osiguranjem broda (čl. 744., st. 1. PZ-a). Ako u ugovoru nije predviđena posebna svota za osiguranje odgovornosti brodara, smatrat će se da je njegova odgovornost osigurana na istu svotu na koju je osiguran i brod (čl. 744., st. 2. PZ-a).

Treba li onda PZ propisati pravila o obveznom osiguranju od odgovornosti? Za brodara bi to značilo povećane troškove poslovanja, a za korisnike njegovih usluga povećane cijena usluga što je za njih prihvatljivo rješenje zbog mogućnosti korištenja instituta *actio directa*. U dobrovoljnim osiguranjima od odgovornosti primjena ovog instituta nije predviđena u PZ-u.

Na razini EU postoji već spomenuta Direktiva 2009/20/EC o obveznim osiguranjima brodo-

117/03, 88/05, 02/07, 84/08, 123/08, 57/11 and 148/11)), while the execution and securing procedures are terminated pursuant to article 98, paragraph 3 of the BA. Can the trustee, upon the reported claim of the injured person (now the bankruptcy creditor) make a declaration using the rights from the special liability limitation of the MC? Of course, because by initiating the bankruptcy proceedings all rights of the debtor's bodies (article 89 of the BA) as well as the protection of the bankruptcy estate (article 67 of the BA), were assigned to him.

#### 4.9 Fund and Maritime Liability Insurance

The basic principle of the contract for the insurance of professional liability is the insurer's obligation to reimburse costs, up to the amount insured from the insurance policy that the policy holder (the carrier) has to pay to a *third party*<sup>16</sup> (injured person) on the basis of the responsibility for the damages [28]. However, this insurance is not mandatory and this can objectively be a significant problem for the injured person in regard to the collection of pecuniary damages in the case the ship operator has not constituted the fund, isn't solvent or is overdue and must go into bankruptcy. But, when this insurance is *compulsory*, as is in the case of liability for death or personal injury of the crew member or in situation when the crew member's health has deteriorated,<sup>17</sup> the injured person may require compensation directly from the insurer (*actio directa*) for the damages he had suffered in an event for which the insurer is responsible, but only up to the maximum insurer's liability (article 743, paragraph 2 of the MC).<sup>18</sup> If the owner's liability is covered by the same agreement which insured the ship, the fee for liability insurance is given regardless of the compensation of other damages covered by marine insurance (article 744, paragraph 1 of the MC). If the contract does not provide for a

<sup>16</sup> To su osobe koje nisu subjekti ugovora o osiguranju (čl. 684., st. 6. PZ-a). No, osiguranjem *nije* pokrivena odgovornost osiguranika prema trećim osobama, ako ugovorom o osiguranju nije drugačije određeno (čl. 706., st. 2. PZ-a).

<sup>17</sup> Sukladno čl. 390., st. 2. PZ-a, brodar ne može ograničiti svoju odgovornost za štete nastale smrću ili tjelesnom ozljedom osoba koje brodar zapošljava.

<sup>18</sup> Ona je jednaka granicama odgovornosti iz PZ odnosno Protocol LLMC (RH je usvojila najviše svjetske standarde. Naravno, u slučaju da je ugovorom o osiguranju predviđena posebna svota za osiguranje odgovornosti brodara, osiguratelj je u obvezi do visine tako naznačene svote (čl. 743., st. 4.).

<sup>16</sup> These are the persons who are not parties to the insurance contract (article 684, paragraph 6 of the MC). However, the insurance does not cover insured liability towards third parties, if the insurance contract provides otherwise (article 706, paragraph 2 of the MC).

<sup>17</sup> Pursuant to article 390, paragraph 2 of the MC, the ship operator cannot limit his liability for damages resulting from death or bodily harm to a person employed by him.

<sup>18</sup> It is equal to the limits of liability from MC and LLMC Protocol (The Republic of Croatia has adopted the highest international standards. Of course, in the case that the insurance contract provided for a specific amount of liability insurance of the ship operator, the insurer is under obligation to the extent so specified in the contract (article 743, paragraph 4).

vlasnika za pomorske tražbine u visini granica odgovornosti iz Protokola LLMC-a za svaki brod od 300 i više BT po jednom štetnom događaju (čl. 4., st. 3.). To je zapravo dodatan sloj osiguranja oštećenim osobama u slučaju postojanja naknade štete od strane brodovlasnika. Osiguranje se dokazuje svjedodžbom (ili svjedodžbama) koja se mora nalaziti na brodu (čl. 5.), a izdaju ga P & I klubovi (čl. 3.).

## 5. ZAKLJUČNA RAZMATRANJA

Obveznost osnivanja fonda ograničene odgovornosti za brodarku koji želi ograničiti svoju odgovornost (čl. 396., st. 1. PZ-a) nesporno je dobar instrument zaštite oštećenih osoba. S druge strane, fond je istovremeno za sve sudionike u postupku i neekonomičan, skup, strogo formalan te dugotrajan izvanparnični sudski proces. Stoga se i može razumjeti njegovo vrlo skromno korištenje u domaćem i inozemnom pomorskom pravu od strane ovlaštenih osoba. Moguće je, međutim, da će u bliskoj budućnosti obveza osnivanja fonda kao preduvjeta za ograničenje odgovornosti, čak i izgubiti svrhu svoga postojanja u našem pravu. Naime, imamo u vidu, najnovije, velike promjene u granicama odgovornosti brodarku u međunarodnom (čl. 3. Protocol LLMC) i hrvatskom pravu (čl. 391. PZ-a) iz područja *općeg* ograničenja odgovornosti, kao i promjene iz obveznog osiguranja na razini EU-a putem Direktive 2009/20/EC s granicama iz LLMC-a (v. *supra*). Sve to ukazuje da obveza osnivanja fonda ograničene odgovornosti brodarku konceptijski više nije suvremen i funkcionalan način pomoći štetniku, a niti zaštiti oštećenih osoba. Smatramo stoga da bi se s odredbom o *fakultativnom* osnivanju fonda (sukladno čl. 10. LLMC-a) postigli isti učinci. S time se niti na koji način ne dovodi u pitanje postojanje ograničenja odgovornosti, kao *tradicionalnog instituta* iz prijevoznog prava koje se gubi samo u slučaju brodarku osobne *kvalificirane* krivnje (*dolus eventualis* te *dolus*) što je danas međunarodni pravni standard u svim konvencijama.

Prema sadašnjem stanju stvari, brodovlasnik za nastale štete može, na jednak način, koristiti povlastice posebnog ili *općeg* ograničenja odgovornosti koje supostoje i međusobno se ne isključuju. Iz ekonomske perspektive, brodarku će trebati kvalitetnu analizu koristi i troškova iz posebnog ili *općeg* ograničenja odgovornosti.

specific amount of the ship operator liability insurance, it will be presumed that his liability is insured to the same amount as the ship (article 744, paragraph 2 of the MC).

Should the MC prescribe rules on mandatory liability insurance? For the ship operator that would mean substantive increase in operating costs. For the users of his services, it would mean an increase in service prices. For the users this would be an acceptable solution because it would give them the opportunity to use *actio directa*. In the case of voluntary liability insurance, the application of this institution is not provided in the MC.

At the EU level, there is the aforementioned Directive 2009/20/EC of the European Parliament and of the Council of 23<sup>rd</sup> April 2009 on the insurance of shipowners for maritime claims in the amount of the limits set out by the LLMC Protocol for each vessel of 300 GT or more per one adverse event (article 4, paragraph 3). This represents an additional insurance for the victims in the case of damages from the shipowners. Insurance is proven by a certificate (or certificates) that must be carried on board (article 5), and is issued by P & I Clubs (article 3).

## 5 CONCLUDING REMARKS

The obligation to constitute the Limited liability fund for a ship operator who wants to limit his liability (article 396, paragraph 1 of the MC) is undoubtedly a good instrument for the protection of injured persons. At the same time, the Fund is uneconomic, expensive, very formal and long extrajudicial court process for all participants in the process. Therefore, its very modest use in domestic (Croatian) and international maritime law can be understood. It is possible, however, that in the near future obligations of the Fund as a precondition to limit liability even lose the purpose of its existence in Croatian law. Specifically, one must bear in mind the latest major changes in the limits of liability in the international (article 3 of the LLMC Protocol) and Croatian maritime law (article 391 of the MC) in the areas of *general* liability limitations, and the changes from the compulsory insurance at the EU level through Directive 2009/20/EC with limits from the LLMC (*supra*). All this indicates that the obligation of the Fund on the limited liability of the carrier is not conceptually a more modern and

Naime, iznosi ograničenja odgovornosti iz Protokola LLMC-a i PZ-a po putniku sada su jednaki granicama odgovornosti za tražbine zbog smrti ili tjelesnih ozljeda putnika na brodu kao i u Protokolu Atenske konvencije iz 1990. koji još uvijek nije stupio na snagu (175.000 SDR). Razlika postoji samo u odnosu na ukupnost svih tražbina zbog smrti ili tjelesnih ozljeda. Što se tiče šteta na teretu, Haaško-Visbyjska pravila ograničavaju odgovornost prijevoznika na iznos od 666,67 SDR po koletu ili jedinici tereta ili 2 SDR po kilogramu bruto težine izgubljene ili oštećene robe, odnosno Hamburška pravila na iznos od 835 SDR ili 2,5 SDR, zavisno koji je od tih iznosa viši. Troškovi općeg ograničenja odgovornosti za tjelesne i materijalne štete nalaze se u LLMC-u i PZ-u.

Na kraju, pored Direktive 2009/20/EC o osiguranju brodovlasnika za pomorske tražbine koja će uskoro ulaskom u EU obvezivati i RH, pa se mora neodgodivo unijeti u naš PZ, trebalo bi razmisliti i o dodatnom ojačanju položaja te sigurnosti oštećenih putem obveznog pomorskog osiguranja odgovornosti brodovlasnika, ali najviše do iznosa osigurateljeve obveze koristeći institut *actio directa*. Brodovlasnicima će obvezno osiguranje značiti veći trošak poslovanja te posljedično i veće cijene usluga prijevoza, dok će oštećenim osobama biti kvalitetan mehanizam za sigurnu naplatu naknade štete od osiguratelja osiguranika. PZ će, kao i obično slijediti rješenja prihvaćena u LLMC-u.

functional way to help them, nor to protect the injured persons. We believe, therefore, that with the provision of an *optional* constitution of the Fund (pursuant to article 10 of the LLMC) the same effects would be achieved. Such claims do not, in any way, give rise to the question of the existence of the limits of liability, as a *traditional institute* of the transport law which is lost only in the case of a *qualified* shipowner's personal guilt (*dolus eventualis* and *dolus*) what is now an international legal standard in all conventions.

According to the present state of things, the shipowner may, for the incurred damages, use, in the same way, special privileges or general liability limitations that coexist and are not mutually exclusive. From an economic perspective, the ship operator will need a sound analysis of costs and benefits from a special or general liability limitation. Namely, the amount limitations of the LLMC Protocol and MC per passenger are now equal to the limits of liability for claims for death or bodily injury to passengers on board as well as that of the Protocol to the 1990 Athens Convention that has not yet entered into force (175,000 SDR). The difference exists only in relation to the totality of all claims for death or bodily injury. As for the damage to the cargo, the Hague-Visby Rules limit the carrier's liability to the amount of 666.67 SDR per packages or cargo unit or 2 SDR per kilogram of gross weight of lost or damaged goods, while the Hamburg Rules limit it to the amount of 835 SDR or 2.5 SDR, whichever of these amounts are higher. The costs of general limitations of liability for personal and property damage are in the LLMC and MC.

Finally, besides the Directive 2009/20/EC on the insurance of the shipowner for maritime claims, which will soon become binding for the Republic of Croatia upon its admission to the EU, and must promptly enter into our MC, we should think how to additionally strengthen the position and safety of injured person through compulsory maritime insurance liability of the shipowner, but only to the amount of the insurer's liability by using the institute of *actio directa*. The compulsory insurance for the shipowner will mean higher business dealing costs and, consequently, higher transport service costs, while, to the injured person, this will be a quality mechanism to secure the payment of compensation from the insurer. The MC will, as usually, follow the solutions adopted in the LLMC.



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