



**FACULTY OF LAW**

**Lund University**

Kourosh Taheri

# **Limitation of Liability for Maritime Claims: Multiple Perspectives and Legal Implications**

Supervisor: Professor Proshanto K. Mukherjee

JASM01 Master Thesis

Maritime Law

30 higher education credits

2013

## **Table of Contents**

<b>SUMMARY</b>	<b>4</b>
<b>LIST OF ABBREVIATIONS</b>	<b>6</b>
<b>INTRODUCTION</b>	<b>7</b>
<b>1.1 Purpose and Composition</b>	<b>8</b>
<b>1.2 Research and Material</b>	<b>9</b>
<b>EVOLUTION OF THE CONCEPT OF LIMITATION OF LIABILITY</b>	<b>10</b>
<b>2.1 The Origin of the Concept of Limitation of Liability</b>	<b>10</b>
<b>2.2 Common Law Concept of Limitation of Liability</b>	<b>16</b>
<b>2.3 United States' Limitation of Liability</b>	<b>20</b>
<b>OVERVIEW OF THE INTERNATIONAL MARITIME CONVENTIONS</b>	<b>22</b>
<b>3.1 International Convention on Limitation of Liability 1924</b>	<b>22</b>
<b>3.2 International Convention relating to the Limitation of Liability 1957</b>	<b>23</b>
<b>3.3 Limitation of Liability for Maritime Claims (LLMC) 1976</b>	<b>24</b>
<b>3.4 International Bunkers Convention 2001</b>	<b>27</b>
<b>3.5 Civil Liability Convention 1992</b>	<b>29</b>
<b>3.6 USA Oil Pollution Act (OPA) 1990</b>	<b>31</b>
<b>JUDICIAL PERSPECTIVES OF LIMITATION OF LIABILITY</b>	<b>35</b>
<b>4.1 Public Policy versus Justice</b>	<b>35</b>
<b>4.2 Conduct Barring Limitation</b>	<b>36</b>
<b>4.3 The Rule of Attribution</b>	<b>38</b>
<b>4.4 Personal Injury Cases</b>	<b>42</b>

<b>4.5 International Safety Management Code</b>	<b>45</b>
<b>MULTI-PERSPECTIVES ANALYSIS ON LIMITATION OF LIABILITY</b>	<b>50</b>
<b>5.1 Deliberation; Limitation as Anachronism or Necessity</b>	<b>50</b>
<b>5.2 Legal Expectation of Justice</b>	<b>51</b>
<b>5.3 Legal- Economic Theory Analysis</b>	<b>52</b>
<b>5.4 Compensation versus Deterrence</b>	<b>57</b>
<b>5.5 Limitation of Liability and Role of Insurance</b>	<b>60</b>
<b>5.6 Promotion of the Trade</b>	<b>63</b>
<b>5.7 Corporate Limitation and Maritime Limitation of liability</b>	<b>64</b>
<b>SUMMARY AND CONCLUSION</b>	<b>66</b>
<b>BIBLIOGRAPHY</b>	<b>69</b>

## SUMMARY

The thesis is an attempt to analyse the concept of limitation of liability for maritime claims with multiple legal and policy perspectives. In trying to analyse the issues related to limitation of liability, the thesis explores the historical background to the development of the concept of limitation of liability within both civil and common law.

A synoptic overview on the development of international conventions pertaining to maritime claims has been presented. One particular issue that is highlighted is the recent development of the case law on the conduct barring limitation provision in the convention which may to some extent show the policy consideration behind the legal reasoning from a common law perspective. Further, the discussion encompasses a brief examination of the legal effects of International Safety Mechanism in particular, the role of designated person, concerning *alter ego* concept pertaining to rule of attribution within a corporate structure.

In addition, an introduction to the economic analysis of law has been presented in order to show how liability concept is examined by this discipline and in what ways such study contribute to the discussion of the effect of limitation of liability within the context of the thesis. The emphasis has been on the examination of justifications of proponents and antagonists on the limitation of liability for maritime claims.

## **Acknowledgments**

I would like to convey my sincere gratitude to Professor Proshanto K. Mukherjee, Course Director, Master's Programme in Maritime Law, Lund University, for his uncompromising supervision of my thesis and for guiding me through the master programme and this endeavour.

I wish to take this opportunity to extend my thanks to Dr. Abhinayan Basu Bal, Managing Programme Director, Lund University, for his teaching and guidance through the course. My thanks also extend to Mr. Anders Tröjer, Master Programme Coordinator and Miss Ann-Sofie Larsson, Course Administrator, for their kind support.

Furthermore, I would like to thank my sister, Sara, for her encouragement and support.

## **LIST OF ABBREVIATIONS**

<b>CMI</b>	Comite Maritime International
<b>CLC</b>	Civil Liability Convention 1992
<b>DPA</b>	Designated Person Ashore
<b>IMO</b>	International Maritime Organization
<b>ISM</b>	International Safety Management Code
<b>HNS</b>	Hazardous and Noxious Substance Convention 1996
<b>LLMC</b>	Convention on Limitation of Liability for Maritime Claims 1976
<b>OPA</b>	Oil Pollution Act 1990 (United States)
<b>P&amp;I</b>	Protection and Indemnity
<b>USA</b>	United States of America
<b>USD</b>	US Dollar

## Chapter 1

### INTRODUCTION

The right of global limitation of liability was conceived to serve the needs of commerce and in the maritime field to encourage investment in the shipping industry. Although the concept of limitation evolved to this day, antagonists<sup>1</sup> believe that in a modern era, the limitation of liability for shipowner is outdated and should be abolished citing its absence of justification that prevailed long ago. Shipowner's limitation of liability has been described as an outdated principle “which should be relegated to the era of wooden hulls”.<sup>2</sup> In contrast, others believe that it is a balancing and thriving factor in international trade, shipping and insurance sectors. At the time of the inception of doctrine within the milieu of maritime law, the policy makers or judges did not forecast the advancement of technology relating to shipping, or the increase of the receiving parties to the limitation, and the fact that insurance development plays such a considerable impact on the shipping industry in particular concerning liability cover.

Further, the effect of maritime activities on the environmental was also ignored to the extent that for instance in the *Torrey Canyon* oil spill of 1967, the liability of the shipowner was held to be USD 50, while the clean-up cost to the governments of the United Kingdom and France was USD 18 million.<sup>3</sup> The issue of limitation of liability has been scrutinised in great deal but the enquiry still continue on the validity of its prolonged presence in the maritime legal and commercial field. The question remains whether it is still a necessity for the shipping, transportation and insurance industries

---

<sup>1</sup>Gotthard Gauci, ‘Limitation of Liability in Maritime Law, an anachronism?’ *Marine Policy*, vol. 19, no. 1, (1995) pp. 65-74.

<sup>2</sup> Edward T. Hayes, ‘In The wake of the M/V Bright Fields, A Call for Abandoning The Shipowner’s Limitation of Liability Act’, *Loyola Law Review*, Vol. 44, (1998), p.135.

<sup>3</sup>Billah Muhammad Masum, ‘Economic Analysis of Limitation of Shipowners’ Liability’, *U.S.F. Maritime Law Journal*, Vol. 19, No. 2, (2006-7), p. 299.

and whether this legal heritage, incentive, privilege or concession should be retained in light of modern development of communication, transport, and insurance industries. The liability spectrum in maritime field has been developed from *Torrey Canyon* to OPA 1990<sup>4</sup>, one was being the weakest point of the limitation and the latter the extreme form of unlimited liability.

## 1.1 Purpose and Composition

The purpose of the thesis is to examine and analyse limitation of liability for maritime claims in light of the recent advancement in communication and shipping related technology as well as legal development in this field. This issue will be analysed in two different parts namely, policy and legal consideration with a multiple perspectives.

One particular issue that will be highlighted is the recent development of the case law on the conduct barring limitation clause in the convention which may to some extent show the policy consideration behind the legal reasoning. On the other hand through judicial decisions, and more importantly, national legislation, there are tendencies to restrict that limitation with the strict liability mechanism such as the USA's Oil Pollution Act (OPA) 1990.

The main research questions set out to answer and cover the topic are *inter alia*;

1. What are the factors and justifications supporting the limitation of liability for different parties in maritime transportation?
2. Is Limitation of Liability a privilege or right?

---

<sup>4</sup> Oil Pollution Act of 1990, (33 U.S.C. 2701).

3. How various international conventions, legislation, case law jurisprudence has interpreted the concept of limitation of liability?
4. What are the effects of OPA as an example for global limitation of liability?
5. Is the conduct barring clause a balancing factor for limitation of liability for maritime claims? Is the test a tendency toward criminalisation in the limitation of liability field?
6. Is limitation of liability an anachronism in the modern era?

## **1.2 Research and Material**

In writing the thesis the author will adapt the legal dogmatic approach in analysing various international conventions relating to limitation of liability in particular for maritime claims, publication of international organisation such as IMO, judicial decisions, case law in the United Kingdom and United States. Further, secondary resources such as books, peers reviewed articles and reports will be used. The justification for the policy part including sectoral expectation and historical background will be discussed to illustrate the development of the international conventions and legal doctrines. To some extent, the thesis will take a comparative study in the historical background to the establishment and development of the concept of limitation of liability.

## Chapter 2

### EVOLUTION OF THE CONCEPT OF LIMITATION OF LIABILITY

The basic principle of shipowners' limitation of liability is to hold the shipowner liable in principle but to reduce this liability by limiting his total exposure.<sup>5</sup> Limitation permits a shipowner, whether with respect to liability arising from collision, allision<sup>6</sup>, grounding, cargo damage, death or personal injuries, to claim a limit upon his damages.<sup>7</sup> Historically, limitation of liability was considered a privilege because the concept was an exception to, or a variation of, the general rule of law that a successful claimant was entitled to be recompensed by the wrongdoer for the full amount of the loss, damage or injury suffered by him.<sup>8</sup>

#### 2.1 The Origin of the Concept of Limitation of Liability

Limitation of liability is closely linked to the Roman law notion of *noxae deditio*<sup>9</sup>, in terms of which an owner could discharge liability for damage to another individual by giving up the offending instrument.<sup>10</sup> It should be noted that some writers believe that such theory in linking the notion of limitation to the Roman law is not unanimously

---

<sup>5</sup> Alex Rein, 'International Variations on Concepts of Limitation of Liability', *Tulane Law Review*, vol. 53, (1979), p. 1256.

<sup>6</sup> Allision, Maritime Law, The contact of a vessel with a stationary object such as an anchored vessel or a pier. Bryan A. Garner, *Black's Law Dictionary*, Ninth Edition (West, Thomson Reuters, 2009), p. 88.

<sup>7</sup> William Tetley, 'Shipowners' Limitation of Liability and Conflicts of Law: The Properly Applicable Law', *Journal of Maritime Law and Commerce*, Vol. 23, No. 4, October, (1992), p. 558.

<sup>8</sup> Proshanto K. Mukherjee, *Maritime Legislation*, World Maritime University Publications, 2002, Page 197.

<sup>9</sup> James J. Donovan, 'The Origins and Development of Limitation of Shipowner's Liability', *53 Tulane Law Review*, (1978-1979), p. 1000, "Oliver Wendell Holmes, in his treatise *The Common Law*, traced the doctrine which made the ship not only the source but the limit of liability, to the Roman legal principle of "*noxae deditio*".

<sup>10</sup> Gauci, *supra* note 1, p. 65.

well received by scholars. In any event, there is little reason to believe that a Roman maritime code, if one existed, contained any provision for shipowners' limitation of liability.<sup>11</sup> Such observation is well-founded, but most scholars do not regard it as the provision for the shipowners' limitation, but a projection of the notion of the limitation of liability doctrine.

The *contrat de commande*, which seems to be the base of the limitation of liability in mercantile matters, originated before the twelfth century. Under this method the party who had advanced the goods or funds was not personally liable for contracts.<sup>12</sup> Accordingly, a merchant was responsible to the extent of his share of goods or fund which were intrusted to another party, or was invested in someone else trading venture. In this context, the logical reason is the fact that those who invested had not been directly engaged in the adventure.

It appears that the *Tablets of Amalfi* is the earliest extant evidence of the shipowner's right to limit his liability. The commercial code was written for the Republic of Amphilia (Italy) in about eleventh century. Later, the code of Valencia and its contemporary, the *Consolato Del Mare* of Barcelona, were compiled under the direction of Peter IV of Aragon.<sup>13</sup> Under the terms of the *Consolato Del Mare*, owners and part owners' liability was limited only to the extent of their respective share in the ship itself for debts incurred by the master in obtaining ship's necessities or for cargo damage arising from improper loading or from unseaworthiness.<sup>14</sup> Limitation in this period is defined or interpreted to the extent that the burden and expenses related to the master's ship's necessities and possible cargo damage was shared in accordance with the various parties share of investment in that particular maritime adventure.

---

<sup>11</sup> Donovan, *supra* note 9, p.1000.

<sup>12</sup> Oya Z. Özçayair, *Liability for Oil Pollution and Collision* (Lloyd's of London Press, 1998), p.299.

<sup>13</sup> Donovan, *supra* note 9, p. 1001.

<sup>14</sup> Özçayair, *supra* note 12, p. 300.

Thus, in doing so, the responsibility of the shipowner and the master was limited to the extent of their investment.<sup>15</sup>

Following commercial revolution of the sixteenth and seventeenth centuries the privilege of shipowner's liability was adapted in almost all the continental maritime jurisdictions such as the Atlantic coast trading communities, the North Sea and the Baltic communities.<sup>16</sup> The early examples of the statute concerning limitation of liability in Europe are *inter alia*; the Statutes of Hamburg of 1603, the Hanseatic Ordinance of 1614 (and 1644), the Maritime Codes of Charles II of Sweden (1667) and 1721 Ordinance of Rotterdam. According to these statutes, the liability of a shipowner was limited to the value of his vessel. The important element of the concept of limitation was that the proceeds of the value of the ship were to satisfy the claimants. Additionally it is submitted that under those mentioned statutes, shipowner enjoyed two options, one to compensate the full value of the ship or to abandon his vessel. The interesting characteristic of such process is that the ship-owners other property or asset was protected unless agreed by contractual arrangement.<sup>17</sup>

Limitation of liability as a rule in maritime law was probably first codified at the time of Louis XIV in the seventeenth century<sup>18</sup> where it is declared that "the owners of ships shall be answerable for the deeds of the master, but shall be discharged, abandoning their ship and freight".<sup>19</sup> The Ordinance of Rotterdam promulgated in 1721 declared

---

<sup>15</sup> Duggu Damar, *Wilful Misconduct in International Transport Law* (Springer, 2011), p. 9. Donovan, *supra note 9*, p. 1001, *see also*; Özçayair, *supra note 12*, p. 300.

<sup>16</sup> D.R. Owen, 'The origins and Development of Marine Collision Law', *51 Tulane Law Review*, (1979), p. 760, *see also*; Özçayair, *supra note 12*, p. 300, Donovan, *supra note 13*, p. 1002.

<sup>17</sup> Donovan, *supra note 9*, p. 1003.

<sup>18</sup> The Marine Ordinance of Louis XIV was first codification and was compiled under the direction of Minister Colbert in 1681.

<sup>19</sup> Graydon S. Staring, 'The Roots and False Aspersions of Shipowner's Limitation of Liability', *Journal of Maritime Law & Commerce*, vol. 39, No. 3, (2008), p.323.

that “the owners shall not be answerable for any act the master has done without their order, any further than their part of the ship amounts to”.<sup>20</sup>

The great Dutch publicist and legal scholar, Hugo Grotius promoted it as a matter of public policy.<sup>21</sup> The Marine Ordinance of Louis XIV (1681)<sup>22</sup> was incorporated into the *French Code de Commerce of 1807* (the Code Napoleon). As a result of these incorporations it formed part of the maritime law of several European and Latin American countries.<sup>23</sup> From the same era comes the *Rhodian Law of Jettison*, adopted in Roman law and now developed as general average, in which vessel and cargo and freight are partnered under the authority of the master.<sup>24</sup> Although both these concepts are considered separate, they share some characteristics which served the purpose of filling the vacuum of insurance in the past and playing the same role partially taking into account the insurance perspective.

Historical background shows the origin and development of the concept of limitation of liability from its inception to the modern day. It shows that at the time when there was not insurance in modern day term, the concept was somehow a mechanism for sharing the loss by different participants. It can be safely deduced from such study that the sharing of loss of the adventure and assets were to ensure that the risks are partial for the shipowner and business participants, reducing the loss of the shipowner, master and the crew.

The parties in the maritime adventure were of course limited at the time, and as it can be seen later in the judicial interpretation of limitation of liability section of this

---

<sup>20</sup> Donovan, *supra* note 9, p. 1003.

<sup>21</sup> Edgar Gold, *et al.*, *Maritime Law*, (Irwin law, 2003), p. 718.

<sup>22</sup> Ordonnance de la Marine of Louis XIV.

<sup>23</sup> Özçayair, *supra* note 12, p. 300.

<sup>24</sup> Staring, *supra* note 19, p. 321.

thesis, the inception of the corporation made this part of the development more complex in particular to the liability concept of the maritime adventure. Based on the historical study, the primary characteristics of the liability was that the shipowner's liability was limited to the value of his vessel in that particular adventure merely for the reason that that ship was the instrument of the loss, or according to the modern day concept, it was considered as an insurance for the liability related to such particular loss. Later with codification of the concept of limitation in Europe, the shipowner's other vessels or properties were spared in the assessment of his liability.

Under the first developed systems of the maritime community practically all liabilities, contractual or non-contractual, were subject to limitation as long as they arose during the maritime adventure. The only exception to this rule was where they were sustained through a personal act of the shipowner.<sup>25</sup> All the systems which were developed in the seventh century, including the French and German systems<sup>26</sup> had some similarities such as recognising the voyage as the limitation unit and liabilities subject to limitation were those that might arise during such particular venture. The surrendering assets of the shipowner were the ship, its appurtenances and the freight earned in the venture.<sup>27</sup> In the civil law, there were two theories of limitation; abandonment, which is associated with France, and execution, applied in Germany and Scandinavia.<sup>28</sup>

By virtue of abandonment, a shipowner, while personally liable, was able to absolve himself of all claims by relinquishing his ship as well as any pending freight.<sup>29</sup> At this time, England and the United States were not interested in adapting similar statutes or acts that the Europeans pioneered, but recognised it as general principles of maritime

---

<sup>25</sup> Özçayair, *supra* note 12, p. 301.

<sup>26</sup> The abandonment system originated in the Romanish countries of Southern Europe and developed in France, and the maritime lien system was developed in the Germanic countries of Northern Europe and was perfected in Germany, so it was called the German system.( Özçayair , Page 301, Para 3).

<sup>27</sup> Özçayair, *supra* note 12, p. 301.

<sup>28</sup> Tetley, *supra* note 7, p. 587.

<sup>29</sup> Tetley, *supra* note 7, p 587.

law. Finally, limitation of liability for maritime claims reached England in the eighteenth century and the USA in the nineteenth century.<sup>30</sup>

Apart from legal considerations in protecting shipping interests and subsequent policy tendencies to encourage shipping, the spread of statutory limitation in this period has been attributed to the growth of trade and its capital demands, and changes in the business relationships of owners and masters, as well as the risks of sea adventures and the inability of owners to control the fortunes they sent on sea voyages.<sup>31</sup>

As mentioned above while various limitation of liability regimes were sanctioned in Europe and South American countries, the inception of English and American Limitation of liability is notable, since one of the considerable justifications for the enactment of the limitation of liability by Parliament in England was the disadvantage of the British trade interests in comparison with their continental and international rivals. In particular the English concept of the doctrine, as we shall see, and the effects of the English on conventional limitation of liability are interesting as they are considered as late comers in the development of the international maritime limitation of liability convention but the effect of its statutory limitation on the American Limitation of liability and the 1957 convention is notable. The common law concept of limitation of liability will be discussed in the following section.

---

<sup>30</sup> Damar, *supra* note 15, p. 9, *see also*; Donovan, *supra* note 9, p.1009.

<sup>31</sup> Staring, *supra* note 19, p.323.

## 2.2 Common Law Concept of Limitation of Liability

Traditionally, English admiralty law traces its origin to the *Rules of Oleron*<sup>32</sup> which contain no mention of limitation of a shipowner's liability to his investment in his vessel.<sup>33</sup> They were included in the Black Book of Admiralty, a reference book used in the English admiralty courts, where they were considered dispositive.<sup>34</sup> English maritime interests were therefore burdened by the common law doctrines of insurer liability of common carriers<sup>35</sup> and *respondant superior*.<sup>36</sup> So before enactment of the statute on the Responsibility of the Shipowners' Act, shipowners were considered as common carriers and therefore if they failed to observe due care and diligence for the cargo, the liability was in the form of strict liability.<sup>37</sup> That meant that the shipowner would have assumed the sole responsibility as the carrier and insurer.<sup>38</sup>

In addition, the common carrier principle was an implied obligation distinct from the express contractual arrangement.<sup>39</sup> The inception of the first English statute of limitation of liability for shipowners is connected to the case of *Boucher v. Lawson*<sup>40</sup>, where a ship owner was liable for the loss of cargo of gold bullion which was stolen by the master. Since there was no limitation of liability similar to other European countries, the shipowner was found personally liable to the full value of the cargo. The rationale for limitation of liability in this period was to protect the innocent owner

---

<sup>32</sup> Circa 1150 A.D.

<sup>33</sup> Donovan, *supra* note 9, p. 1005.

<sup>34</sup> Donovan, *supra* note 9, p. 1006.

<sup>35</sup> Common carriers are those who are willing to carry goods of any person who could pay their charges as long as there is enough space available. See; Oya Z. Özçayair, *supra* note 12, p. 305, Para 2.

<sup>36</sup> Donovan, *supra* note 9, p. 1007.

<sup>37</sup> For Instance see cases of *Coggs v. Bernard (1703) 2 Ld. Raym 909* and *Forward v. Pittard (1785) 1 T.R.27* in Özçayair, *supra*, note, 12, PP. 305-306.

<sup>38</sup> Oya z. Özçayair, *supra* note 12, p. 305, Para 2.

<sup>39</sup> *Ibid*, p. 305, Para 3.

<sup>40</sup> (1733) Cas. T. hard 53; 95 E. R. 116.

from unlimited liability for negligence of those particular servants who were beyond his physical control.<sup>41</sup> The outcome of the case promoted a petition to the Parliament by the shipowners and merchants “that, unless some provision is made for their relief, trade and navigation will be greatly discouraged, since owners of ships find themselves . . . exposed to ruin”.<sup>42</sup>

Thus the preamble of The Responsibilities of Shipowners Act 1733 clearly states the reasons and justifications for the Act (which is also a direct respond to the shipowners’ petition) as the following:

It is of greatest consequences and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being concerned therein..... [Failing to do so] will necessarily tend to the prejudice of the trade and navigation of this kingdom.<sup>43</sup>

The effect of the Act and its intended interpretation was to limit the shipowners liability for those acts of the master or crew that had been done without the “privity or knowledge” of the owner that resulted in causing loss or damage to cargo. The 1733 Act had the effect of limiting a shipowner’s liability for loss of cargo by theft by master and the crew.<sup>44</sup> The extent of the limitation was the value of the ship, its equipment, and the freight which was to be earned on that particular voyage.<sup>45</sup> The 1733 Act was considered to be an innovative development, since there has not been any evidence of its existence in other European statutes, which were mentioned

---

<sup>41</sup> Kenneth E. Roberts, ‘For Retention of Limitation of Liability for Shipowners’, *American Bar Association. Sec. Ins. Negl. & Comp. L. Proc.* (1968), p. 421.

<sup>42</sup> Donovan, *supra* note 9, p.1007.

<sup>43</sup> Nigel Messon, *Admiralty Jurisdiction and Practice*, 3rd Edition, (Informa Business Publishing, 2003), p. 107.

<sup>44</sup> Christopher Hill, *Maritime Law*, 6th Edition, (Lloyd’s of London Press, 2003), p. 394.

<sup>45</sup> Donovan, *supra* note 9, p. 1007.

earlier, such as the Roles d' Oleron, which is considered as the instrument from which the English shipowners drew their inspiration.<sup>46</sup>

Another development by Parliament in enacting a new statute, again, emanated from “forced robbery” on board a vessel in the Thames in 1784. Here the term “embezzlement” in the previous statute promoted enquiries as to whether the term covered “forced robbery” which would have protected shipowners if the answer was affirmative. Since the outcome was not to the satisfaction of the shipowners, there was yet another petition to the Parliament for more protection for the shipowners which resulted in the new Act of 1786.<sup>47</sup> Consequently, the right to limit was extended to include any act by the master or crew occurring without the privity of the shipowner.<sup>48</sup>

In 1813 another act concerning the liability of shipowners was passed. The act provided for shipowners' limitation of liability for damages which arose as a result of negligence, and expressly provided for limitation in the event of collision.<sup>49</sup> But it was by virtue of the Merchant Shipping Act of 1894 that limitation has undergone a major change to a different standard by which limitation was to be calculated by reference to a ship's tonnage rather than the value of the ship which was intended to reach a more certain basis than the more uncertain value of ship and freight alternative.<sup>50</sup> The 1894 Act was the most comprehensive legislation of the times according to which the concept of limitation of liability was extended to collision liability thereby fortifying a maritime rule of unlimited liability that prevailed in all other areas of the law.<sup>51</sup>

---

<sup>46</sup> Proshanto K. Mukherjee, *Essentials of the regimes of limitation of liability in Maritime law*, *Admiral IV*, (Lund University, 2012), p. 40.

<sup>47</sup> Donovan, *supra* note 9, p. 1008.

<sup>48</sup> Patrick Griggs, *et al.*, *Limitation for Maritime Claims*, (Informa Law, 2005), p. 4.

<sup>49</sup> Mukherjee, *supra* note 8, p. 40.

<sup>50</sup> Hill, *supra* note 43, p. 394.

<sup>51</sup> Mukherjee, *supra* note 45, p. 44.

Today, provisions of the Convention on Limitation of Liability for Maritime Claims 1976, which was originally enacted into English law by the Merchant Shipping Act 1979, is now to be found in Schedule 7 to the Merchant Shipping Act 1995.<sup>52</sup>

Under the British system limitation could be invoked only with respect to claims arising out of wrongful acts committed by the owner's servants in the course of their service to the ship. That is a reference to the concept of "actual fault and privity" in the British system. Limitation unit was any distinct occasion or occurrences giving rise to liability".<sup>53</sup> The expression "distinct occasion" is very important, as it will determine the circumstances in which the aggregated limit is to apply, in particular in a complex marine casualty since there may be doubt as to what amounts to a distinct occasion or on a separate occasion, where the claims are the result of the same act of negligence.<sup>54</sup>

A clear example for the expression "distinct occasion" is that, if in a particular voyage, there is a collision at the beginning and another at the end, the court will most likely consider each one as one "distinct occasion" and accordingly there would be a separate limitation Fund for each occasion.<sup>55</sup> For instance in the case of *the Rajah*<sup>56</sup>, where a ship struck a tug and also a tow, it was held that since one act of negligence caused the casualty, it is regarded as one distinct occasion, therefore one limitation fund should be constituted.<sup>57</sup>

Under the English statute, the extent of the owner's liability was calculated on the value of the vessel immediately prior to the incident, rather than on the continental

---

<sup>52</sup> Messon, *supra* note 42, p. 107.

<sup>53</sup> Özçayair, *supra* note 12, p. 303.

<sup>54</sup> Michael White, *Australian Maritime Law*, 2<sup>nd</sup> edition, (Federation Press, 2000), p. 323.

<sup>55</sup> Özçayair, *supra* note 12, p. 368.

<sup>56</sup> [1872] L.R. 3A.&E. 539.

<sup>57</sup> See also case of *The Shawn* [1892] P.419 in Özçayair, *supra* note 12, p. 368.

post-accident formula.<sup>58</sup> In the international shipping community, there are many systems for limitation and differences between these systems cause conflicts on the choice of law.<sup>59</sup>

## 2.3 United States' Limitation of Liability

The privilege of limitation of shipowners' liability made its first statutory appearance in the United States, in the states of Massachusetts (1819) and Maine (1821). The Massachusetts Act was, surprisingly, modelled on the 1734 English statute, not the more recent enactment of 1813.<sup>60</sup>

The American Limitation of Shipowner's Liability Act was passed in 1851 and modelled on the first English Act of 1734.<sup>61</sup> Until the introduction of the act the shipowner's liability was not limited. The Act was mainly based on the abandonment system, originated from the French system, meaning that the limitation amount depends on the status of the vessel after casualty, and that what is left of the vessel in term of value would have been abandoned to the creditor or claimants. According to this system the owner could dissociate himself of further liability by transferring his interest in the vessel and freight to a court-appointed trustee. According to such system the limitation unit is the voyage.<sup>62</sup>

It is submitted that the only major amendment to the 1851 Act was in 1936. The amendment was to provide a fund based on tonnage, later increased, for personal injuries and deaths where the abandoned amount is insufficient. The only tonnage limitation known in the United States is the limitation of USD 420 per ton in the event

---

<sup>58</sup> Donovan, *supra* note 9, p. 1008.

<sup>59</sup> Özçayair, *supra* note 12, p.302.

<sup>60</sup> Donovan, *supra* note 12, p. 1009.

<sup>61</sup> Staring, *supra* note 19, p. 316.

<sup>62</sup> Özçayair, *supra* note 12, p. 302.

of personal injury and death claims. This limitation dates from 1935, when it was first established at USD 60 per ton, and raised to its present level in 1984.<sup>63</sup>

It has long been widely recognized that the Act is outmoded and should be superseded by one based on tonnage of the vessel, which would provide the same fund regardless of the vessel's survival, such as the International Convention now in force in other major maritime nations.<sup>64</sup> The American limitation of liability has been criticised on two front, first, the need for an upgrade and the second, abolishing the concept of limitation of liability altogether. Such submission is supported by statement of Judge Kozinski in the American case of *Esta Lataer Charters, Inc v Ignacio*<sup>65</sup> where in reference to limitation of liability , he indicated that “misshapen from the start, the subject of later incrustations, arthritic with age, ....this is an area that could profit from modern legislative attention... congress might be well advised to examine other approaches or to consider whether the rationale underlying the liability Act continues to have vitality as we enter the last decade of the twentieth century”.<sup>66</sup>

---

<sup>63</sup> Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 3rd edition, (Westlaw, 2001), p. 828, *see also*; William Tetley, ‘Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, which Benefits from Both Its Civil and Common Law Heritages’, *Tulane Maritime Law Journal*, Vol. 23, (1998-1999), p. 327.

<sup>64</sup> Staring, *supra* note 19, p. 316.

<sup>65</sup> Nos. 88-8728; 88-2730, 1989.

<sup>66</sup> Gauci, *supra* note 10, p. 70.

## Chapter 3

### OVERVIEW OF THE INTERNATIONAL MARITIME CONVENTIONS

#### 3.1 International Convention on Limitation of Liability 1924

In line with national development of limitation of liability for maritime related activities and “in order to strengthen the international competitiveness of national merchant fleets, efforts were made by means of global limitation of liability to attract people to invest in the branch so to build up a competitive merchant marine”.<sup>67</sup> It has been submitted that the first effort for uniformity of the limitation regimes was in 1908, by the Comité Maritime International (CMI), which was based on the existing systems at the time and modelled on the Belgian system which embraced a compromised mixture of all available limitation of liability regimes. According to which shipowner had three choices; he could abandon the ship and freight as in the French system, or surrender the value of the ship and freight at the end of the voyage as in the American system, and the last choice was similar to the British system which the shipowner had to pay 200 francs per tonne for the satisfaction of all the claims, property and personal, relating to the voyage.<sup>68</sup> CMI continued its quest for uniformity by introduction of the 1924 Convention which had 13 parties, mainly from Europe, but did not garner much support.<sup>69</sup> Based on the 1924 Convention,<sup>70</sup> the limitation unit is the accident and the limitation fund is constituted on the basis of the value of the ship after the accident plus 10 per cent of its value at the commencement of the voyage.<sup>71</sup>

---

<sup>67</sup> Gauci, *supra* note 10, p. 66, Para 4.

<sup>68</sup> Özçayir, *supra* note 12, p. 303.

<sup>69</sup> Mukherjee, *supra* note 45, p. 45.

<sup>70</sup> International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels and Protocol of Signature 1924.

<sup>71</sup> Özçayir, *supra* note 10, p. 303.

### 3.2 International Convention relating to the Limitation of Liability 1957

As the 1924 convention failed to gain support, *Comite Maritime International (CMI)* initiated yet another effort for uniformity which resulted in the 1957<sup>72</sup> convention on limitation of liability. The 1957 Convention gathered 50 parties, the bulk of the world's principal shipping nations except that of the United States, Greece and Russia. That convention still remains in force for a few. Its successor of 1976 is "the last effort to create uniformity on the global limitation"<sup>73</sup> which garnered 50 parties, and the Protocol of 1996 further raising values was ratified by 23 of them.<sup>74</sup> At present, even though there are several jurisdiction who still subscribe to the 1957 regime, it is the LLMC 1976 modified by its Protocol of 1996 that represents the international convention law on global limitation of liability.<sup>75</sup>

The 1957 Convention is a revised version of the British tonnage system. Under the convention limitation is restricted to liability for damage or infringement of rights and wreck removal. The limitation is again the "distinct occasion" and the fund is set up exclusively on the tonnage of the ship. In order to find a compromise both to states that wanted a higher limit and those that did not, the measure based on the average value of British ships was reinstated. USA and Russia have not ratified the convention.<sup>76</sup>

---

<sup>72</sup> International Convention relating to the Limitation of Liability of Owners of Seagoing Ships and Protocol of Signature, 1957.

<sup>73</sup> Mukherjee, *supra* note 45, p. 45, Para 3.

<sup>74</sup> *Ibid*, p. 45.

<sup>75</sup> *Ibid*, p.45, Para 6.

<sup>76</sup> Özçayair, *supra* note 12, p. 352.

### 3.3 Limitation of Liability for Maritime Claims (LLMC) 1976

The International Conference on the Limitation of Liability for Maritime Claims took place in London between 1 and 19 November 1976 under the auspices of the International Maritime Organization (IMO).<sup>77</sup> The reason for a new convention was that the rules relating to the limitation of liability for maritime claims in the 1957 Limitation Conventions required changes to embrace an increase in the limitation figures due to the problem of inflation. The problem of inflation regarding the compensation figures in the 1957 promoted the desire to create a mechanism to deal with such a problem. The effect of depreciation in monetary values was that the limitation amount had become practically low. On the other hand, the size of the ships had increased due to technological advancement and economic preferences. There was a need to accommodate new categories of operators to be included in the convention such as salvage. Article one of the Convention on Limitation of Liability for Maritime Claims 1976 (hereafter 1976 Convention) provides a right to ship owners and salvors to limit their liability for claims that is provided in Article two of the same Convention. According to Article 1(2), the term shipowner is defined as “the owner, charterer, manager and operator of a seagoing ship”. Article 2 of the LLMC 1976 sets out the claims as follows:

- (a) claims in respect of loss of life or personal injury or loss or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting there from;
- (b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

---

<sup>77</sup> IMO: [www.imo.org/about/conventions/listofconventions/pages/convention-on-limitation-of-liability-for-maritime-claims-\(llmc\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/convention-on-limitation-of-liability-for-maritime-claims-(llmc).aspx), visited on 19 May 2013.

- (c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;
- (d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
- (e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
- (f) Claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

Article 1(3) of the LLMC 1976 states that salvor includes “any person rendering services in direct connection with salvage operations”. The inclusion of the above provision in the LLMC 1976 fills the gap in the 1957 Convention that was revealed in *The Tojo Maru* case.<sup>78</sup> In that case, the salvor was unable to limit in respect of a claim arising out of the negligence of one of its divers, brought against it by the owners of the salvaged vessel.<sup>79</sup> On the other hand the inclusion of the salvors to the class of persons, who can limit their liability, is emanated from the dissatisfaction of the salvage industry and the international maritime community with the decision of the House of Lords in the *Tojo Maru* case.<sup>80</sup> Therefore protection of those new categories of operators was a factor which promoted the need for a new convention.<sup>81</sup>

The need for revision became more urgent as a result of the 1969 Convention on Civil Liability for Oil Pollution Damage, which was in some respect inconsistent with the

---

<sup>78</sup> [1972] AC 242, HL. *Tojo Maru (Owners) v Nv Bureau Wijsmuller (The Tojo Maru)* [1972] A. C.242

<sup>79</sup> Simon Baughen, *Shipping Law*, 4<sup>th</sup> Edition, (Routledge, 2009), p. 406.

<sup>80</sup> Mukherjee, *supra* note, 45, p. 46.

<sup>81</sup> Özçayair, *supra* note 12, p. 352.

1957 Convention.<sup>82</sup> It was recognised that the previous system of limitation had given rise to too much litigation that needed to be evaded in the future.<sup>83</sup> It is submitted that the conference had to consider the competing interest of the shipowners in retaining the right to limit their liability and consequently being able to insure such liability at a reasonable premium. In doing so, the interest of the insurers has also been taking into consideration that is closely related to the shipowners demand for insurance cover.

On the other hand, with the increase of the compensation figures and establishment of a limitation fund, a successful claimant will be ensured of a reasonable compensation for his loss or injury. It was agreed that the limitation fund should be at a level that the shipowners could protect themselves by reasonable insurance cover at a reasonable premium. Finally, the creation of an unbreakable term enshrined in Article 4 of the convention was considered as a move to balance the competing interests of various parties at the conference on the limitation of liability for maritime claims.<sup>84</sup> Article 4 of the 1976 Convention, is regarded as a major change in comparison to the 1957 convention which states that “a person shall not be entitled to limit its liability if it is proved that the loss resulted from his personal act or omission with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result”.<sup>85</sup> Article 4 of the LLMC 1976 will be discussed in details in the ‘Conduct Barring Limitation’ chapter.

Although the amount of compensation were increased previously, as explained above, pursuant to the LLMC Protocol of 1996, in a new development, the limitation amount

---

<sup>82</sup> *Ibid*, p. 352, Para 4.

<sup>83</sup> Griggs, *et al.*, *supra* note 47, p. 4.

<sup>84</sup> *Ibid*, p. 5.

<sup>85</sup> According to the 1957 Convention on Limitation of Shipowner Liability, “The owner of a sea going ship may limit his liability in accordance with article 3 of this convention in respect of claims arising from any of the following occurrences, unless the occurrences given rise to the claim resulted from the actual fault or privity of the owner.

were increased by amendments<sup>86</sup> that were adopted on 19 April 2012 which will enter into force on 8 June 2015, by the Legal Committee of the International Maritime Organization (IMO), when the Committee met for its 99th session in London. The LLMC Convention sets specified limits of liability for two types of claims against shipowners namely claims for loss of life or personal injury, and property claims such as damage to other ships, property or harbour works.<sup>87</sup> The main reasons for the amendments were inadequacy of compensation to cover the claims, in particular claims arising from incident involving bunker fuel spills.<sup>88</sup>

### **3.4 International Bunkers Convention 2001**

The reasons for adaptation of the Bunkers Convention<sup>89</sup> were stated by IMO as “to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships’ bunkers”.<sup>90</sup> The Bunker convention is modelled on the International Convention on Civil Liability for Oil Pollution Damage, 1969.

The bunker Convention is applicable for vessels of more than 1000 gross tonnage. The key requirements of the Convention are respectively, compulsory insurance cover by the registered owner and a mechanism of direct action against insurers. Although the bunker Convention is a standalone instrument but it is submitted that its limits of liability is tied to the limits contained in the LLMC 1996 Protocol. The Bunkers Convention has been adapted to fill a gap in the CLC regime that the application of which is, with some exception, limited to pollution damage emanating from laden

---

<sup>86</sup> Resolution Leg.5(99), adapted on 19 April 2012.

<sup>87</sup> International Maritime Organization website :< [www.imo.org/MediaCentre/PressBriefings/Pages/12-LLMC-Prot-limits.aspx](http://www.imo.org/MediaCentre/PressBriefings/Pages/12-LLMC-Prot-limits.aspx) > visited on 19 May 2013.

<sup>88</sup> *Ibid.*

<sup>89</sup> International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) Adoption: 23 March 2001; Entry into force: 21 November 2008.

<sup>90</sup> IMO Website<[www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-\(bunker\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-(bunker).aspx) > visited on 19 May 2013.

tankers.<sup>91</sup> At a practical level such statement means that the bunker pollution from non-tankers remained uncovered as it is not covered by the CLC Convention.

However, it is submitted that in most instances, the damage caused by bunker fuel pollution exceeded the limits of compensation available under the applicable LLMC 1976 or national regimes.<sup>92</sup>

As mentioned above the limitation of liability for bunkers Convention is connected to the LLMC 1976, but it has been noted that pollution damage does not fall under the claims mentioned in Article 2 of the LLMC 1976. It is for this reason that there are uncertainties as to whether the shipowner can limit his liability under the Bunkers Convention without governmental interference for its effective implementation. In reference to the Article 6<sup>93</sup> of Bunker Convention, it has been observed that the provision stated in Article 6 of the Convention is not in harmony with the application of international regime, since the issue of shipowner's liability will be determined by the law of the State where bunker related pollution occurred, meaning that a conflict of laws is triggered since States have different rule on this subject.<sup>94</sup> Therefore it has been suggested that the State parties must make sure that the shipowner has a right to limitation regarding bunkers Convention through their respective national law by way of interpretation after ratifying the LLMC 1996 Protocol. Consequently, if such measures are taking into consideration and acted upon, then such actions will provide international uniformity.<sup>95</sup>

---

<sup>91</sup> Mukherjee, *supra* note 45, p. 48.

<sup>92</sup> Alan Khee-Jin Tan, *Vessel-Source Marine Pollution, the Law and Politics of International Regulation*, (Cambridge University Press, 2006), p. 329.

<sup>93</sup> Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

<sup>94</sup> Norman A. Martínez Gutiérrez, 'The Bunkers Convention 2001: Challenges for Its Implementation', *EU Maritime Policy and the (Northern) Adriatic*, 2011, p. 12.

<sup>95</sup> *Ibid*, Page 13.

### 3.5 Civil Liability Convention 1992

Civil Liability Convention 1992, as a specific convention regime, is considered to be the equivalent of the OPA 1990, as both created to deal with similar subject matter, namely oil pollution, but with different approaches regarding liability and compensation mechanism. On the other hand, OPA has become a standard for comparison regarding its effectiveness, extent of compensation and in particular limitation of liability. The Civil Liability Convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.

However, the other main reason for adaptation of such mechanism is to provide uniform rules regarding procedures and liability.<sup>96</sup> Article II of the CLC Convention, sets the application of the convention to “pollution damage” and “preventive measures” in a geographical zone which embraces the territorial zone and exclusive economic zone<sup>97</sup> of the contracting States. The Convention applies to all seagoing vessels actually carrying oil in bulk as cargo, but only ships carrying more than 2,000 tons of oil are required to maintain insurance in respect of oil pollution damage.<sup>98</sup> According to Article I(5) of the convention, “oil” means any persistent hydrocarbon mineral oil, such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship. Article I (6) refers to “pollution damage” as follows:

---

<sup>96</sup> Jingjing Xu, ‘Marine Pollution Private Law Conventions’, Course material, (Lund University, 2012), p. 6.

<sup>97</sup> Article II(ii) of the CLC 1992, “... if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured”.

<sup>98</sup> IMOwebsite<[www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-\(clc\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-(clc).aspx)>, accessed on 15 May 2013.

- (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
  
- (b) the costs of preventive measures and further loss or damage caused by preventive measures.

The channelling of liability for pollution damage, by the Convention, is rooted to the registered owner of the ship from which the polluting oil escaped or was discharged. However, except where the owner has been guilty of actual fault, they may limit liability in respect of any one incident. Shipowners are normally entitled to limit their liability to an amount which is linked to the tonnage of the ship.<sup>99</sup>

Subject to a number of specific exceptions,<sup>100</sup> the Convention stipulates the principle of strict liability for shipowners and creates a system of compulsory liability insurance. Article VII of the Convention requires ships covered by it to maintain insurance or other financial security, such as the guarantee of a bank or a certificate in sums equivalent to the owner's total liability for one incident. The above mentioned exception includes act of war, hostilities, civil war, insurrection or "a natural phenomenon of an exceptional, inevitable and irresistible character",<sup>101</sup> act or omission of third party and in case of the negligence or other wrongful act of any government or other authority responsible for the maintenance of navigational aids in the exercise of such function.

---

<sup>99</sup> Måns Jacobsson, 'The International Regime for Compensation of Tanker Oil Spills', Course Material, Faculty of Law, (Lund University, April 2012), p. 2.

<sup>100</sup> CLC, Article III (1) (2).

<sup>101</sup> CLC, Article III (2) (a).

Further, if the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.<sup>102</sup> Under the 1992 Civil Liability Convention, Article V (2), shipowners are deprived of the right to limit their liability if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.<sup>103</sup>

The 1992 Fund Convention, which is supplementary to the 1992 Civil Liability Convention, establishes a regime for compensating victims when the compensation under the applicable Civil Liability Convention is inadequate.<sup>104</sup> "Essentially there are three levels of liability limits; the first level borne by the shipowner through his protection and Indemnity insurer, and the second by cargo owner, namely the oil industry through the vehicle of a compensation fund financed through levies exacted from importers of oil in countries who are state parties to the Fund Convention".<sup>105</sup> A third tier of compensation is in the form of a Supplementary Fund which was established on 3 March 2005 by means of a Protocol adopted in 2003.<sup>106</sup>

### **3.6 USA Oil Pollution Act (OPA) 1990**

In the history of marine pollution regulation, nothing catalyses change more radically than a huge shipping disaster. The *Amoco Cadiz* spill in 1978 and the explosion of the *Ixtoc I* exploratory well in Mexico a year later promoted further concern for marine

---

<sup>102</sup> CLC, Article III(3).

<sup>103</sup> Jacobsson, *supra* note 97, p. 2.

<sup>104</sup> Jacobsson, *supra* note 97, p. 2.

<sup>105</sup> Mukherjee, *supra* note 45, p. 48.

<sup>106</sup> Jacobsson, *supra* note 97, p. 3.

environmental protection in the US.<sup>107</sup> The United States Congress passed the OPA in the wake of several oil spills, most notably the *Exxon Valdez* spill<sup>108</sup>, to more adequately compensate those harmed by these spills.<sup>109</sup>

The Preamble to the OPA 1990 states that the Act is to establish limitations on liability for damages resulting from oil pollution, to establish a fund for the payment of compensation for such damage(s).<sup>110</sup> However, it can be assumed that, the effect of deterrence has been in the mind of the legislators, in order to make the waters of the United States safer and shipping activities cautious on the environmental issues.

According to section 1002 of the Act, responsible parties, or those who are exposed to direct liability are *inter alia*; vessel owner, operator and demise charterer. However, time charterer, voyage charterer and cargo owners are exempt under the statute unless exposed under indemnity clauses.<sup>111</sup> It should be mentioned that under the California statute, which is considered to be based on unlimited liability mechanism, any class of person who has an interest in the vessel including that of tanker owner, operator, charterers and manager are considered to be the responsible parties.<sup>112</sup> Limit of liability for the mentioned responsible parties are stated in Section 1004 of the Act as follows:

---

<sup>107</sup> Khee-Jin Tan, *supra* note 90, p. 319.

<sup>108</sup> On 24 March 1989, The US registered tanker, the Exxon Valdez, ran aground in Prince William sound, Alaska, as a result of a navigational error. More than 10 Million gallon ( 37,000 tonnes of oil were released into the pristine waters of Aleska. ( Alan Khee-Jin Tan, Page, 320).

<sup>109</sup> Thomas C. Galligan & Brittan J. Bush, 'Displacement and Preemption: The OPA's Effect on General Maritime Limitation of Law and State Tort law Punitive Damages Claims', *Cumberland Law Review*, Vol. 42.1, (2012), p. 2.

<sup>110</sup> Oil Pollution Act of 1990[As Amended through P.L. 106–580, Dec. 29, 2000], United States Senate website; <[www.epw.senate.gov/opa90.pdf](http://www.epw.senate.gov/opa90.pdf)> last visited 12.05.2013.

<sup>111</sup> Hill, *supra* note 43, p. 422.

<sup>112</sup> *Ibid*, Page 444.

the total of the liability of a responsible party under section 1002 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed— (1) for a tank vessel, the greater of— (A) \$1,200 per gross ton; or (B)(i) in the case of a vessel greater than 3,000 gross tons, \$10,000,000; or (ii) in the case of a vessel of 3,000 gross tons or less, \$2,000,000; (2) for any other vessel, \$600 per gross ton or \$500,000, whichever is greater.

According to OPA 1990, Section 1003, which is concerning the defence of liability, a responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by an act of God, act of war and an act or omission of a third party, other than an employee or agent of the responsible party or a third party.<sup>113</sup>

The limit of liability in OPA 1990 is considerably higher than the CLC<sup>114</sup>, and the mechanism for the loss of right to limit is distinctly different based on Section 1004 of the Act.<sup>115</sup> Consequently, conduct barring limitation is made virtually impossible to break since it is based on gross negligence or wilful misconduct.<sup>116</sup> The effect of the OPA 1990, is considered to be, as far as uniformity of law is concerned, “a double standard”, when taking into account the CLC Convention. On the other hand, higher limits of liability under the OPA and its impending unlimited liability under state law

---

<sup>113</sup> OPA of 1990, *supra* note 107, p. 234.

<sup>114</sup> Civil Liability Convention: CLC 1969 & Protocol 1992.

<sup>115</sup> (c) EXCEPTIONS.—(1) ACTS OF RESPONSIBLE PARTY.—Subsection (a) does not apply if the incident was proximately caused by—(A) gross negligence or wilful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

<sup>116</sup> Gotthard Gauci, *Oil Pollution at Sea, Civil Liability and Compensation for Damage* (Wiley & Sons, 1997), p. 171.

put the international conventions in a position where it is difficult to consider them as effective as the OPA and make their ratification impossible.<sup>117</sup>

Hill believes that the Act put the vessels trading to or from United States with full cargo of oil in danger of becoming uninsurable.<sup>118</sup> The reason is that both the OPA 1990 and the State law of California, require financial responsibility or capability and guarantee for the potential responsible parties to meet their maximum possible liability. Further, this “anticipatory responsibility” is not welcomed by the P&I clubs, due to its anticipatory nature, uncertainty of possible liability and considerable risk exposure.<sup>119</sup> However, it is noted that the term ‘uninsurable’ mentioned above is no longer applicable, since there are independent insurance alternatives other than the P&I clubs in order to cover the shipowners excess liability.

In contrast, the OPA is more advantageous to the victims with substantial compensation in comparison to the CLC 1992 Convention, especially when the event leading to litigation is a catastrophic spill.<sup>120</sup> Gauci considers this as a positive development as the effect of OPA in implementing the polluter-pay principle, since the victims are adequately compensated.<sup>121</sup>

---

<sup>117</sup>Özçayair, *supra* note 12, p. 281.

<sup>118</sup> Hill , *supra* note 43, p.442

<sup>119</sup> *Ibid*, p. 445.

<sup>120</sup> *Ibid*, p. 444.

<sup>121</sup> Gauci, *supra* note 113, p. 5.

## Chapter 4

### JUDICIAL PERSPECTIVES OF LIMITATION OF LIABILITY

Judicial attitude toward limitation of liability is of fundamental importance and relevance in legal inception of the concept of liability and its limitation concerning maritime law. In particular, in some jurisdiction it embraces law-making as well as interpretation of law pertaining to limitation of liability whether it is based on national legislation or global conventions.

#### 4.1 Public Policy versus Justice

Limitation of liability was awarded to the ship-owners long ago based on public policy to encourage the investment in a highly risky business, and the fact that many of those policy reasons are long gone, has made this particular subject of considerable importance in the maritime law domain. Lord Denning stated in the case of *The Bramley Moore*<sup>122</sup>, in reference to a shipowner's right to limit his liability, that "there is not much justice in this rule, but limitation of liability is not a matter of justice, it is a rule of public policy which has its origin in history and its justification in convenience".<sup>123</sup> Such a view was clearly stated in the case of *The Amalia*<sup>124</sup> where Dr. Lushington described the statutory entrenchment of the principle of limitation of liability as a political stimulus to the growth of merchant shipping by affording shipowners statutory protection of their personal assets.<sup>125</sup>

---

<sup>122</sup> [1964] P200.

<sup>123</sup> Gold, *et al.*, *supra* note 21, p.719.

<sup>124</sup> *JF Cail and others v George Michael Papayanni* [1863] 1 MooNS 471 at 473 and *The Amalia* (1863), Br. &Lush 151; 176E.R.323, *See also*, Mukherjee, *supra*, note 45, Page 42.

<sup>125</sup> Mukherjee, *supra* note 8, p. 40.

Another recent example of the judicial attitude toward limitation of liability is the case of *The Garden City No. 2*<sup>126</sup> where Griffiths L.J. stated that [limitation of Liability] is a long standing and generally accepted by the trading nations of the world. It is a right given to promote the general health of trade and in truth; it is no more than a way of distributing the insurance risk.<sup>127</sup>

## 4.2 Conduct Barring Limitation

Article 4 of the 1976 Convention is a product of the most radical change in the philosophy underlying the concept of a shipowner's right to limit the extent of his liability for his acts and those of his servants.<sup>128</sup> One of the opposing arguments based on law and policy considerations, was that the new test which converted what was originally a privilege into a right<sup>129</sup> and has made it virtually unbreakable; much to the satisfaction of the marine insurance which ultimately has to indemnify the losses in most cases.<sup>130</sup>

Hill stated that ironically this article [article 4], though only just under four lines in length possibly produces the most significant alteration from its corresponding Article in the 1957 Convention.<sup>131</sup> Conduct barring limitation is a counter-balance to the concept of limitation of liability. It is considered to be a counter-balance, since it is the result of the compromise struck between the parties, in particular when shipowners were being prepared for higher compensation and in return article 4 has

---

<sup>126</sup>[1984] 2 Lloyd's Rep. 37.

<sup>127</sup> Gauci, *supra* note 10, p. 69.

<sup>128</sup> Griggs, *et al.*, *supra* note 47, p. 33.

<sup>129</sup> Mukherjee, *supra* note 45, p. 54.

<sup>130</sup> Mukherjee, *supra* note 8, pp.197-198.

<sup>131</sup> Hill, *supra* note 43, p. 406.

been created in such a way that is harder for the claimants to prove. The rationale by the insurance industry was that certainty of insurance liability was crucial for the shipping industry and therefore the *quid pro quo* for raised limits was a watertight provision making limits virtually unbreakable.<sup>132</sup>

On the other hand the departure from the 1957 convention probably was that the actual fault and privity was subject of much litigation especially in the UK courts, since based on the 1957 convention “limitation was available in accordance with the provisions of the convention except where the occurrence giving rise to the claim resulted from the actual fault or privity of the owner”.<sup>133</sup> From 1854 to 1986 shipowners were not liable to pay damages beyond the limit of liability if certain occurrences took place without their “actual fault or privity”.<sup>134</sup> During the 1976 conference on limitation of liability, it was decided that the words “actual fault or privity” no longer afforded sufficient protection to shipowners. Shipowners were prepared to agree higher limits of liability in exchange for certainty of the right to limit their liability.<sup>135</sup>

Conduct barring limitation was imported into maritime law from other conventions or from instruments in other field, notably in aviation.<sup>136</sup> The first maritime instrument to incorporate the new test was the Hague-Visby Rules of 1968, which reflect the current regime.<sup>137</sup> Notwithstanding the rationale for compromise mentioned above, the 1976 Convention was an effort to balance the interests of shipowners and insurance industry; however it is evident that with the wording of the article 4

---

<sup>132</sup> Mukherjee, *supra* note 45, p. 53.

<sup>133</sup> Griggs, *et al.*, *supra* note 47, p. 33.

<sup>134</sup> Barry Sheen, ‘Limitation of Liability, The Law gave and the Lords have taken away’, *Journal of Maritime Law and Commerce*, Vol. 18, No. 4, 1987, p. 475.

<sup>135</sup> *Ibid*, p. 485.

<sup>136</sup> Mukherjee, *supra* note 45, p. 54.

<sup>137</sup> *Ibid*, p. 51.

according to which the burden of proof shifted to the claimants<sup>138</sup> who suffered damage or injury, the current system is unfair to the victim.<sup>139</sup>

In a clear explanation the “the new test imposed on the claimant a “double barrelled burden of proof”, first in the ordinary course of litigation, the claimant as plaintiff had to carry the burden of proof with regard to the merits of his claim”, second, the claimant, would also need to prove that the shippowner was not entitled to limit his liability.<sup>140</sup> According to the old test, the onus of proof fell on the shipowner to show that he was entitled to limit his liability “the reversal of onus reflected the principle that limitation was a privilege and not a right.<sup>141</sup>

### **4.3 The Rule of Attribution**

At the present time the rule of attribution<sup>142</sup> mainly concerns the development of ship ownership from the traditional ownership to the modern corporate one. The situation was easier at a time, when the owner was also the master of the ship, since the establishment of the person liable for the fault was known and easy. Nevertheless, with the advancement of shipping companies and corporations it is harder to establish the actual fault or privity of the shipowner through the rule of attribution.

The owners, managers, operators, and charterers of ships are corporate bodies. In law, a personality is attributed to a corporation by a fiction. Since a corporation is not a living person, the attribution of liability to a corporation was originally solved by the

---

<sup>138</sup> *Goldman v Thai Airways [1983] 3 All E. R. 693*, concerning Warsaw convention or Convention for the Unification of Certain Rules Relating to International Carriage by Air.

<sup>139</sup> Gold, Aldo, Kindred, *supra* note 21, p. 721.

<sup>140</sup> Mukherjee, *supra* note 45, p. 54.

<sup>141</sup> *Ibid*, p. 55.

<sup>142</sup> Also Known as “Identification Doctrine”.

development of a concept known as the ‘*alter ego*’.<sup>143</sup> In such cases the vital point is how to prove ‘personal act’ of the company and proof of personal act or omission of the *alter ego* of the company will be essential to such assessment. This is related to cases where the decision-making power or authority is delegated to another body or agent within the corporate structure.

Under English law, the test of actual fault, privity and the concept of the *alter ego* requirements were established in the cases of the *Lady Gwendolen*<sup>144</sup> and the *Marion*<sup>145</sup>. *The Marion* set out the criteria to determine who the alter ego of the company is. According to the mentioned case, the *alter ego* of the company includes members of the board of the directors and the person dealing with actual management and control over the relevant branch of the company’s business. According to English law, acts of the master of the ship cannot be attributed to the shipowner in terms of proving the shipowner’s personal act or omission under Article 4 of the LLMC 1976.<sup>146</sup>

Moreover in the case of *Asiatic Petroleum Co. Ltd. v. Lennard's Carrying Co. Ltd.*<sup>147</sup> the court held that, upon the true construction of section 503 of the MSA 1894<sup>148</sup>, the fault or privity must be the fault or privity of someone who is not merely a servant or agent for whom the company is liable, but somebody for whom the company is liable

---

<sup>143</sup> Mandaraka-Sheppard, *Modern Admiralty Law with Risk Management Aspects* (Cavendish Publishing Limited, 2001), p. 919.

<sup>144</sup> [1965] 1 Lloyd’s rep. 355.

<sup>145</sup> *Grand Champion Tankers v Norpip AIS (The Marion)* [1984] A.C. 563.

<sup>146</sup> Ozlem Gurses, ‘Convention on Limitation of Liability for Maritime Claims 1976’, *Britannia Insurance Association*, No 3(June 2011), p. 3.

<sup>147</sup> (1914) 1 K.B. 419, at 432, *see also; Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

<sup>148</sup> Under section 503 of the Merchant Shipping Act 1894, a person may limit his liability only if the incident giving rise to liability arose without his actual fault or privity.

because his action is the very action of the company itself.<sup>149</sup> In the same case Lord Justice Buckley stated that “the words actual fault or privity in my judgment infers something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents. In addition Lord Justice Hamilton added that “actual fault negatives that liability which arises solely under the rule of *respondeat superior*.<sup>150</sup>

Civil liability for collision is based on the existence of “fault” which contributes or causes the collision.<sup>151</sup> In general, when a shipowner applies for a decree of limitation, he must show that the incident was not caused by his actual fault and privity, but also that he has not contributed to the actual fault or privity. In considering whether the shipowner is guilty, the court will look at his conduct leading to the incident.<sup>152</sup>

In the *Lady Gwendolen* case, a collision occurred due to the vessel being sailed in full speed in thick fog. The radar was switched on but was not observed at all times by the master. The shipowner’s superintendent had failed to examine the ship’s log, where he could have found about the master’s full speed in that condition. He also failed to transmit the notice of the Ministry of Transport to the master urging the vessels to reduce speed in such a poor visibility. It is submitted that the master also did not have a proper training in the use of the radar. The fault of the marine superintendent on its own would not have been sufficient to amount to that of the shipowners, as he was too far down the corporate hierarchy for his acts to be identified with that of the company.

On the other hand, in the case of *The Marion*, the vessel fouled a pipeline cause by using an outdated chart. The manager was at fault, so the fault as a matter of law, was

---

<sup>149</sup> Griggs, *et al.*, *supra* note 47, p. 33.

<sup>150</sup> Rui M. Fernandes, ‘The Limitation of Liability of a Shipowner in Anglo-Canadian Law’, *Journal of Maritime Law and Commerce*, Vol. 16, No. 2, (1985), p. 225.

<sup>151</sup> Özçayair, *supra* note 12, p.100.

<sup>152</sup> Griggs, *et al.*, *supra* note 47, p. 35.

the actual fault of the shipowner. In other word the shipowner's failure to establish a system to check on the master's in having and using an updated chart caused the accident.

The main issue in these cases were that under the 1957 convention, a shipowner or salvor would not be able to limit their liability unless they could prove that the reckless or negligent act were occurred without their actual fault or privity. Further, in such cases, since the agent or employee of the shipowner were distance or far down the corporate hierarchy, it would have been difficult to show that the reckless act was directly attributed to the shipowner himself. However, the fault of the marine superintendent had become that of the company because of the failure of its managing director and traffic manager to take any interest in navigational matters, the shipowners therefore lost their right to limit. In other word, the collision did not take place without the actual fault or privity of the owner and that owning company was barred from limiting its liability. In the case of *Eurythenes*,<sup>153</sup> Lord Denning MR stated that;

when the old common lawyers spoke of a man being 'privity' to something being done, or an act being done 'with his privity', they meant that he knew of it beforehand and concurred in it being done. If it was a wrongful act done by his servant, then he was liable for it if it was done 'by his command or privity that is, with his express authority or with his knowledge and concurrence. 'Privity' did not mean that there was any wilful misconduct by him, but only that he knew of the act beforehand and concurred in it being done.<sup>154</sup>

---

<sup>153</sup> *Compania Maritima San Basilio SA v. Oceanus Mutual Underwriting Association (Bermuda) Ltd, 'Eurythenes'* [1976] 2 LLOYD's Rep 171, CA.

<sup>154</sup> Susan Hodges, *Cases and Materials on Marine Insurance Law*, (Cavendish Publishing Limited, 1999), p. 319.

In both cases there was no intentional or reckless wrongdoing by any employee with a status sufficient for his acts to be attributed to the owning company. Although the master of *the Lady Gwendolen* acted recklessly, not only would he have been insufficiently senior in the corporate hierarchy for his recklessness to be attributed to the owning company, but Art 4 also requires that there must be “knowledge” that such loss would probably result. This element, together with the transfer of the burden of proof to the claimant, makes it almost impossible to negate the right of limitation. Under the new test, the right to limit would almost certainly not have been lost in either *the Lady Gwendolen* or *the Marion*.<sup>155</sup>

It should be noted that one of the reasons behind the leniency of the judges toward the claimants was that during those times there had been many collisions and therefore under the same public policy doctrine, there has been tendencies to reduce such occurrences as Sheen J. stated that on the decision of *the Lady Gwendolen*, he had remembered Hewson J. affirming that “if shipowners disregarded advice then the only way to make them listen was to hit them in their pockets”.<sup>156</sup> *The Marion* case was the last limitation action under the old law, and it merely illustrates the lengths to which the courts have gone to defeat a right which Parliament gave to shipowners. But in the end the shipowners have gained ascendancy by the enactment of a law consistent with the 1976 Convention on limitation of liability.<sup>157</sup>

#### **4.4 Personal Injury Cases**

Limitation of liability permits a shipowner to claim a limit upon his damages, in respect of, among others, death or personal injuries. In this section, some cases related to such category is considered since it seems that the judges were more sympathetic

---

<sup>155</sup> Baughen, *supra* note 77, p. 425.

<sup>156</sup> Sheen, *supra* note 130, p. 483.

<sup>157</sup> Sheen, *supra* note 130, p. 486.

toward the victims and on the other hand has used such cases to put more pressure on shipowners to observe safety of the crews and those pertaining to the shipping safety.

In the case of *The Anonity*,<sup>158</sup> although the crew had been given clear instruction by a letter in order to avoid any kind of spark, other than ignition when lying near an oil jetty, the court rejected the letter as warning to the crew, requesting “arresting warning notice” near the event and thereby refusing the claim for a decree of limitation. The owners argued that the negligence was not the actual fault of shipowners.

The case of *Dayspringe*<sup>159</sup> is another example where it was hard to attribute the fault of a collision to the board of directors of the owning company of having two men on the bridge at the time of the collision of *Dayspringe* with *Auspicity*. The court refused to grant the owner of *Dayspringe* a decree of limitation, asserting that if clear instruction were given, then an officer would have been on the bridge in addition to the helmsman. The background to the case is that, at the time, there was many casualties for similar incident and there has been many investigation on the matter, meaning that the situation promoted the judges to make shipowners notice the danger and to have a proper communication with the crew to minimise the casualties.<sup>160</sup> This somehow corresponds to the deterrence nature of liability which will be discussed further in the thesis in connection with limitation of liability.

In addition, under the 1976 (Article 4), the test no longer involves the actual fault or privity of the owner. New definition requires proof of loss resulting from personal act or omission of the person liable for the loss that was committed with intent to cause such loss, or recklessly and with knowledge, that such loss would probably result. It will still be required to perform the test for determining the ‘*alter ego*’ of the

---

<sup>158</sup> [1961] 1 Lloyd's Rep. 203 (Adm. Div.).

<sup>159</sup> [1968] 2 Lloyd's Rep.204 (Adm. Div.).

<sup>160</sup> Sheen, *supra* note 130, p. 481.

corporate person seeking to limit, the so-called *Lady Gwendolen* test, since it is necessary to find the personal acts or omissions of the party liable”.<sup>161</sup>

A recent Canadian case on the limitation of liability and application of Article 4 is the case of *Peracomo Inc. v. Société Telus Communications*<sup>162</sup>, with some similarity to the case of *the Marion*, in which the plaintiff was the owner of two submarine cables on the bottom of the St. Lawrence River. The defendants were the corporate owner and operator of a fishing vessel who was also the principal of the owner. The operator tore up one of the submarine cables belonging to the plaintiff while fishing. The operator cut the cables with a saw believing that it was not in use. A few days later he did the same thing a second time.

The plaintiff commenced proceedings alleging negligence and damages of approximately USD 1 million to repair the cable. The defendants denied liability stating that insufficient notice had been given of the location of the cables in the chart and that, in any event, the cables should have been buried. The defendants further disputed the damages and claimed the right to limit liability. On the issue related to limitation of liability the trial Judge noted that to avoid limitation the plaintiff had to prove personal act or omission of the defendant committed either “with intent to cause such loss” or “recklessly and with knowledge that such loss would probably result”. The trial Judge held that this test had been met and the defendants were not entitled to limit liability.<sup>163</sup>

Considering the landmark cases mentioned in this chapter, initially, most of the judges acknowledged that the doctrine is rooted in history; a possible interpretation will be

---

<sup>161</sup> Hill, *supra* note 43, p. 406.

<sup>162</sup> 2011 FC 494, 2012 FCA 199.

<sup>163</sup> Admiralty Website: <://www.admiraltylaw.com/limitation.php> visited on 23.03.2013.

that it is so entwined with the history of maritime law, that it is used as a considerable factual justification for its continuity.

On the other hand, in some cases taking into consideration the realities of the trade in maritime field, and considering the exigencies of the occurrences such as safety at sea, seafarer's condition in personal injury or death scenarios and increase of accidents, judges attempted to shift their attention more toward justice rather than the influential concept of public policy, a notion once acknowledged by them not relevant to the concept of limitation, but commercial and legal convenience. Most importantly, based on the 1957 Convention, judges had more flexibility in dealing with or granting the privilege of limitation of liability but with the wording of the Article 4 of the 1976 Convention, as submitted before, the uncertainty of the case decisions are gone with the flexibility of judges.

In the following section the effect of International Safety Management (ISM) Code on conduct barring limitation pertaining to Article 4 of the 1976 Convention will be considered. Due to the fact that today almost every carrier or shipowner is a corporation, the effect of the ISM Code on the attribution of fault will be important to conduct barring limitation in article 4 of the 1976 Convention.

## **4.5 International Safety Management Code**

Through 1994 amendments to the International Convention for the Safety of Life at Sea (SOLAS), 1974, which introduced a new chapter XI<sup>164</sup>, into the Convention, the International Safety Management (ISM) Code was made mandatory.<sup>165</sup> As part of

---

<sup>164</sup> Management for the Safe Operation of Ships.

<sup>165</sup> ISM Code, 'International Safety Management Code and guidelines on Implementation of the ISM Code', *International Maritime Organization*, 3<sup>rd</sup> Edition, 2010, p. V.

SOLAS, the ISM Code is regarded as one of the pragmatic mechanism that the IMO has heralded to tackle poor management of shipping.

It is noted that the existence of the ISM Code and the Designated Person Ashore (DPA) may assist in unravelling the complex problem of the *alter ego* in cases relating to Article 4 of the LLMC 1976.<sup>166</sup> The Code was created with the purpose of improving and extending the standards of maritime safety by establishing a written Safety Management System (SMS) for every shipowner or manager (refer to as “the Company” in the ISMC Code).<sup>167</sup> The ISM Code has affected shipping operation, but has also some impact on legal aspects in relation to liability issues. The most important are the liability arising out of the duty to provide a seaworthy ship under contracts of carriage and the insurance requirements related to the seaworthiness of the ship.<sup>168</sup>

One of the most imperative articles in the ISMC, which is relevant to this part of discussion, is article 4 of the ISM code, which requires shipowners to appoint Designated Person Ashore (DPA), who has direct access to the highest level of management within the owning company.<sup>169</sup> It is conceivable that with such a system in place, it will be easier or at least more convincing, to challenge some elements of the requirements related to the right to limit in the terms of Article 4 of the 1976 Convention. This, however, is hard to prove since it is related to the practical consequence of the effect of the ISMC and in particular DPA on litigation. There is no precedent to support this at least in relation to DPA.

With advancement of the communication, where the ship-owners constantly are in contact with their ship, the establishment of a control factor is easier than before. The effect of such development in communication between the shipowner and his ship is

---

<sup>166</sup> The International Safety Management Code for the Safe Operation of Ships and Pollution Prevention 1994 has been adopted by the IMO Resolution A.741 (18) of 4 November 1993(amended in December 2000 by Resolution MSC.104 (73).

<sup>167</sup> Simon Kverndal, ‘The ISM & ISPS: Influence on the evolution of liabilities’ in *Liability Regimes in Contemporary Maritime Law*, ed. By Rhidian Thomas (Informa, 2007), p. 151.

<sup>168</sup> Damar, *supra* note 15, p. 215.

<sup>169</sup> Griggs, *et al.*, *supra* note 47, p. 36.

that the shipowner does have enough knowledge (privity) on the whereabouts and condition of his vessel, so it is possible that the privity and personal fault will be easier to establish in comparison with past conditions.

Thus, the distinctive effect of Article 4 of the ISMC is that it shows that the *alter ego* of the company is in a position that with the employment of the designated person has in fact actual or imputed knowledge of the facts which give rise to legal liability.<sup>170</sup> This is supported by the fact that the whole purpose of the Article 4 is based on the communication between the DPA and a senior director. In another word it is based on a system which contemplates report from the DPA and is bound to gain reaction to such report, from the senior director(s). Lord Donaldson has referred to the role and connection of DPA and the *alter ego* of the company, as “the errant shipowner’s Achilles heel”<sup>171</sup> with the following statement:

The blind eye’ shipowner is faced with a catch 22 situation. If he hears nothing from the Designated Person, he will be bound to call for reports, for it is inconceivable there will be nothing to report. If the report is to the effect that all is well in a perfect world, the shipowner would be bound to enquire how that could be, as the safety management system is clearly intended to be a dynamic system which is subject to continuous change in the light, not only of the experience of the individual ship, and of the Company as a whole, but also of the experience of others in the industry. So there will always be something to report. Quite apart from this, the shipowner can at any time be called upon to produce documentary evidence of his internal audits of every area of his system including the work of the Designated Person.<sup>172</sup>

---

<sup>170</sup> Kverndal, *supra* note 159, pp. 153-154

<sup>171</sup> Phil Anderson, ‘The ISM and ISPS: A Critical Analysis’ in *Liability Regimes in Contemporary Maritime Law*, edited by Rhidian Thomas (Informa, 2007), p. 175.

<sup>172</sup> Phil Anderson, *ISM Code: A practical Guide to the Legal and Insurance Implications*, 2<sup>nd</sup> edition, (Lloyd’s Practical Shipping Guides, Routledge, 2005), p. 32.

The rationale for such statement is based on the fact that the Safety Management System is intended to be a dynamic system susceptible to constant change, meaning that if the DPA fails to report to the senior director or even if there is a report indicating that the state of safety is well, it is the duty of the shipowner to enquire about every report either way.

It is hard to identify the DP as the *alter ego* of the company without establishing his/her relation to the company, the rule of attribution (or the identification doctrine) will follow from the same procedures as mentioned in the conduct barring limitation above, similarly in the same case it will be identified as the *alter ego* of the company depending on the assignment of his responsibility and identification within the corporate or company structure.

However in cases, where by application of the normal rule of attribution, it is difficult to identify the person in question with the ego of the company, the courts may apply “the Meridian rule of attribution”.<sup>173</sup> By this approach, the court has to interpret the substantive rule of law under which liability is sought in order to determine whether the policy or the intention of the substantive rule requires the court to attribute liability to the company in question, even if the person is ranked lower in the hierarchy of the company’s directing mind.<sup>174</sup>

As such, if a designated person is identified as the manager of the ship, or is a person whose act, omission, neglect or fault constitute as that of the shipowner, such person is entitled to limit his liability under the 1976 Convention. However, it should also be kept in mind that, as with any other person liable under the 1976 Convention system,

---

<sup>173</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918.

<sup>174</sup> *Mandaraka-Sheppard*, *supra*, note 139, Page 919.

a designated person will also lose his right to limitation if he is guilty of the conduct specified in Article 4 of the 1976 Convention.<sup>175</sup>

In summary, it is believed that the ISM has not affected the range of liability to which the ship operators and other involved in the maritime and insurance sectors, but it has certainly changed the expectation by potential claimants and the courts, in particular existence of specific objective evidence.<sup>176</sup> However, if the factual situation of *The Lady Gwendolen*, *The Marion*, *The Garden City* and *The Anonity*, were to be decided today with the ISMC in place, questions would be raised as to how and why the directing mind of the company was unable to ensure that an appropriate safety system was not in operation. Such enquiry will reveal that the directing mind of the company, failed to act or omitted to correct any inadequacy, on the knowledge (report) provided by the ISMC. In addition it will show that the failure of the ego of the company, were reckless as to the consequences, through his act or omission to do the thing that would have prevented the kind of loss claimed.<sup>177</sup>

---

<sup>175</sup> Damar, *supra* note 15, p. 215.

<sup>176</sup> Anderson, *supra* note 164, p. 178.

<sup>177</sup> Mandaraka-Sheppard, *supra* note 139, p. 933.

## Chapter 5

### MULTI-PERSPECTIVES ANALYSIS ON LIMITATION OF LIABILITY

#### 5.1 Deliberation; Limitation as Anachronism or Necessity

In view of modern day analysis limitation of liability has been around for a long time, it has served its purpose with justifications that are no longer valid. It has its advocates for its continuation and antagonists' criticism for its application. As far back as 1625, the Dutch jurist, Grotius, submitted that men would be deterred from employing ships if they lay under the perpetual fear of being answerable for the acts of their masters to an unlimited extent.<sup>178</sup>

There are several principal grounds of opposition with limitation of liability embracing different categories of argumentations. For instance in a broader view, the opposition argue that limitation of liability doctrine affords shipowners a unique privilege with no economic justification. Others believe that one of the reasons or justification for retention of the limitation regime is a pragmatic one which concerns claims arising from the operation of a ship which may arise in any part of the world. Consequently if the offending ship is arrested, the admiralty court will give a limitation to the shipowner and the claimants can get damages up to the value of the ship<sup>179</sup> Another point of view in support of the limitation of liability, relies on the historical justification, leaning on the principle associated with general average, meaning joint adventure and distribution of the risks.<sup>180</sup>

---

<sup>178</sup> Roberts, *supra* note 40, p. 419.

<sup>179</sup> Sheen, *supra* note 130, p. 474.

<sup>180</sup> Mustill, 'Ships are different - or are they?' *Lloyd's Maritime and Commercial Law Quarterly* (1993), p. 492.

Some form of argumentation is equated with a reformist view, such as that a law of limitation has its basis, if any, in the finances of merchant shipping and therefore should not be applied to pleasure craft.<sup>181</sup> Probably the strongest opposition arguments emanates from those who submit that having insurance as a source for compensation and the fact that corporate limitation already enjoyed by shipowners, makes the case for proponents of limitation of liability unnecessary and in a weaker position. These argumentations with legalistic and legal-economic viewpoints will be discussed in the proceeding chapters with a brief introduction to “economic analysis of the law”.

## 5.2 Legal Expectation of Justice

Liability is “a breach of standard of conduct, behaviour or action”, and the concept of limitation is properly expressed by the term “limitation of damages or compensation”, or it is the amount or quantum of damages that is limited by the application of the doctrine of limitation”.<sup>182</sup> One of the important arguments which the opposition to limitation of liability purposes, at least regarding damages, is that there is “no legal basis for retention of limitation of liability”.<sup>183</sup>

The obvious reason for such submission is that a person who damages or cause damage to the property of another should pay for it or at least the law should provide some form of remedy which leads to *restitutio in integrum*. In civil litigation the vast majority of claims are for damages to compensate the plaintiff for the damage which he has suffered by reason of the conduct of the defendant. That conduct may have been a breach of contract, or it may have been negligence.<sup>184</sup>

---

<sup>181</sup> Staring, *supra* note 19, p. 316.

<sup>182</sup> Mukherjee, *supra* note 45, p. 41.

<sup>183</sup> Guaci, *supra* note 10, p. 69.

<sup>184</sup> Sheen, *supra* note 130, p. 473.

The principle of limitation of liability is that the full indemnity, the natural right of justice, will be abridged for political reasons.<sup>185</sup> In another word limitation is a “matter of public policy not law”.<sup>186</sup> This conflict of law and policy has been recognised by Lord Blackburn in *Stoomvaart Maatschappij Nederland v. Peninsula and Oriental Navigation Company*<sup>187</sup>, where he submitted that there appeared to be some injustice in reducing liability owed by those who are to blame to those who are not to blame.<sup>188</sup> It is apparent that the concept of limitation of liability goes against the basic concept in law of *restitutio in integrum*. That is, once the level of damages has been assessed, then the settlement should be in full. Full compensation will be regarded and result in materialisation of unlimited liability. The wrongdoer should restore the aggrieved party to its former state, as if he had not broken the contract or committed a tort.<sup>189</sup>

### 5.3 Legal- Economic Theory Analysis

Economic analysis of law tend to answer two main questions about legal rules, such as the effect of a legal rule on the behaviour of the rational actors in a particular field, and consequently, whether those effects are socially desirable.<sup>190</sup> From a legal perspective, a liability regime has various functions such as provision of compensation to the victims who have suffered harm. In economics, it is argued that

---

<sup>185</sup> Serge Killingbeck, ‘Limitation of Liability for Maritime Claims and Its Place In the Past Present and Future- How Can It Survive?’ *Southern Cross University Law Review*, Vol. 3, (November 1999), p. 2.

<sup>186</sup> Mukherjee, *supra* note 45, p. 42.

<sup>187</sup> (1882) 7 AppCas 795 (HL).

<sup>188</sup> Killingbeck, *supra* note 177, p. 3.

<sup>189</sup> Damar, *supra* note 15, p. 6.

<sup>190</sup> Louis Kaplow and Steven Shavell, ‘Economic Analysis of Law’, *Harvard School of Law and National Bureau of Economic Research, Handbook of Public Economics*, Volume 3, (2002),p. ,1666.

providing compensation is no longer the primary purpose of private law because accident insurance is generally available in modern societies.<sup>191</sup>

As such liability is viewed as a device for compensating the victims of harm, but it is argued that insurance can also provide compensation more cheaply than the liability system.<sup>192</sup> Basically, legal liability for accident is governed by tort law, and it is through such medium that society can reduce the risk of harm by penalising potential injurers with having to compensate for the harm they cause.<sup>193</sup>

Economist analysis of law employ two basic rules of liability, strict liability, and the negligence rule (fault-based liability). According to the strict liability the injurer must always pay for the injury caused. However, in the negligence rule which is the dominant form of liability, the injurer must always pay for the harm caused conditional to the standard of duty of care.<sup>194</sup> One example of the economic analysis of law relating to the strict liability<sup>195</sup> regime is provided bellow to illustrate the arguments provided in this section:

Under strict liability, injurers pay damages equal to  $h$ <sup>196</sup> whenever an accident occurs, and they naturally bear the cost of care  $x$ . Thus, they minimize  $x + p(x)h$ ; accordingly, they choose  $x^*$ . Under the negligence rule, suppose that the due

---

<sup>191</sup> Jingjing Xu , ‘The Law and Economics of Pollution Damage arising from carriage of oil by Sea’, *Maritime Policy & Management* (2009), p. 313

<sup>192</sup> Kaplow and Shavell, *supra* note 182, p. 1667.

<sup>193</sup> *Ibid*, p. 1667.

<sup>194</sup> There are more factors which affect such liability mechanism in legal terms, but in Economic analysis of law, the error of judges in calculating risk, duty of care and even error in judgment are considered.

<sup>196</sup> (Formula Key) Let  $x$  be expenditures on care (or the money value of effort devoted to it) and  $p(x)$  be the probability of an accident that causes harm  $h$ , where  $p$  is declining in  $x$ . Assume that the social objective is to minimize total expected costs,  $x + p(x)h$ , and let  $x^*$  denote the optimal  $x$ .

care level  $x$  is set equal to  $x^*$ , meaning that an injurer who causes harm will have to pay  $h$  if  $x < x^*$  but will not have to pay anything if  $x > x^*$ . Then it can be shown that the injurer will choose  $x^*$ : clearly, the injurer will not choose  $x$  greater than  $x^*$ , for that will cost him more and he will escape liability by choosing merely  $x^*$ ; and he will not choose  $x < x^*$ , for then he will be liable (in which case the analysis of strict liability shows that he would not choose  $x < x^*$ ).<sup>197</sup>

The primary social function of liability system is viewed as the provision of incentives to reduce risk or prevent harm.<sup>198</sup> Those incentive will form the actions that the injurer, and in different type of scenarios, the victim, can take to alter the risk, for instance in cases of collision or pollution, arrangements to take optimal care to prevent collision or pollution is regarded as the actions required by the shipowners.

The reference to both parties, namely the injurer and the victim in a given situation, here the collision or resultant pollution, is borrowed from the famous article of Ronald Coase<sup>199</sup>, where it is suggested that the traditional view where A injures B, the standing or influential view is that A should compensate B in monetary form, but Coase believes that, this is a reciprocal problem and both A and B are engaged in the process, or both parties are “inputs in the production of damage”.<sup>200</sup>

---

<sup>197</sup> Kaplow and Shavell, *supra* note 182, 1668.

<sup>198</sup> *Ibid*, p. 1667, and Xu, *supra* note 183, p. 313.

<sup>199</sup> Ronald H. Coase, ‘The Problem of Social Cost’, *the Journal of Law and Economics*, 3 J.L. & Econ. 1 (1960).

<sup>200</sup> Donald A. Wittman, *Economic Analysis of the Law*, Selected Readings, (Blackwell Publishing, 2003), p. 4.

Further in such analysis, the accident is divided into Unilateral and Bilateral accidents. Unilateral accident is where injurer alone can influence the risk, whereas in bilateral accident, both injurer and injured effect the risk.<sup>201</sup> In the economic analysis of the law, such examination assume that both parties are risk neutral and that the analysis consider two sub-subject to the study, namely, the level of duty of care and the level of activity.<sup>202</sup>

Dr. Xu has applied this theoretical economic analysis of law to the Civil Liability Convention 1969, in which a strict liability system is applicable to oil spills, and considers that limitation of liability may be necessary as a supplementary method to provide incentive for the victim to take care only when oil spills are viewed as bilateral accidents. However, in cases where oil spills are viewed as unilateral accidents, it may be desirable to employ unlimited liability<sup>203</sup> If we assume that the injured in a given scenario is natural environment or natural resources, by employing the unilateral accident and reciprocity of the connection between the injurer and the injured mentioned above, it is submitted that the environment or natural resources cannot observe the implied precaution, in this type of problems, the unlimited liability is desirable, since this will fall under the unilateral accident.<sup>204</sup>

Thus, based on the division of mentioned bilateral and unilateral assessments, it is shown that both systems of limited and unlimited liability are required for different type of problems for instance in pollution cases. Similar analogies are applicable to fishermen and the polluters of natural resources, although the fishermen are able to locate, but they are not able to affect the situation in a polluted environment.

---

<sup>201</sup> Kaplow and Shavell, *supra* note 182, p. 1667, *See also*; Xu, *supra* note 183, p. 314.

<sup>202</sup> Kaplow and Shavell, *supra* note 182, p. 1668.

<sup>203</sup> Xu, *supra* note 183, p. 321.

<sup>204</sup> *Ibid*, p. 320.

Further, economic analysis of the law employs two distinct examination methods which includes a descriptive and normative analysis. For example if we take limitation of liability as our object of examination, in a descriptive analysis, the first enquiry is about examination of the limitation mechanism on the behaviour of the shipowner. In doing so, the examination tend to measure the behaviour of the shipowner in observing due care to prevent or reduce collision or pollution at sea. On the other hand the normative examination, concerns with the fact that whether the rule in question, taking into consideration the employment of governmental interference in creating regulation, is socially desirable for the polluter by comparing the cost on shipowner.<sup>205</sup> In order to assess the social desirability of liability and regulation, in economic analysis of law, the following is considered:

It is necessary to set out a measure of social welfare; and here that measure is assumed to equal the benefits parties derive from engaging in their activities, less the sum of the costs of precautions, the harms done, and the administrative expenses associated with the means of social control.<sup>206</sup>

The cost in the above analysis includes the increased cost for precaution, or reduced activities and administration cost. The comparison is ultimately between the cost of shipowner, and the benefit of having a pollution-free sea or reduced collision at sea for the industry and for the community at large.<sup>207</sup>

On the ground that economists tend to be more interested about maximising production value and allocation of resources, Coase submit that the legal rules is about who has the right to do something( what) but when the transaction is costless,

---

<sup>205</sup> Billah, *supra* note 3, p. 305 - Kaplow and Shavell, *supra* note 182, p.1666.

<sup>206</sup> Steven Shavell, 'Liability for Harm Versus Regulation of Safety', in Wittman, *supra* note 192, p. 60.

<sup>207</sup> Kaplow and Shavell, *supra* note 182, p. 1666.

the right can be rearranged.<sup>208</sup> Moreover it is submitted that the so-called “polluter-pays principle”, which is rooted in the traditional economic theory of internalisation of externality, suggest that government interfere through various mechanisms so that the external costs are internalised by the polluter”.<sup>209</sup>

However, Robert Cooter, in reference to Coase theorem which identifies the problem of externalities with the cost of the bargaining process, rejects such theorem and submits that it is illuminating falsehoods because it offers a guide to structuring law in the interest of efficiency.<sup>210</sup> In addition, it has been submitted that the shifting of loss is justified as a device to achieve maximum efficiency in the allocation of resources by shifting losses to those in the best position to either prevent or avoid accidents or minimise the amount of loss.<sup>211</sup> It is for this reason that under economic studies, it has been argued that limitation of damages will reduce the required incentive for the shipowners to take optimal care in reducing or minimising the loss. But in contrast, even if shipowners were to pay full compensation, in particular in the case of the one-ship companies, that will result in what is called a “judgment proof” case.<sup>212</sup>

## 5.4 Compensation versus Deterrence

There are many issues and points of argumentation regarding compensation mechanism, from analysis of what the purpose of compensation is, to highlighting

---

<sup>208</sup> Wittman, *supra* note 192, p. 10.

<sup>209</sup> Proshanto K. Mukherjee and Jingjing Xu, ‘The Legal Framework of Exhaust Emissions from Ships: A Selective Examination from a Law and Economics Perspective’, In *Impacts of Climate Change on the Maritime Industry* (World Maritime University, Malmo), 2009, p. 83.

<sup>210</sup> Robert Cooter, “The Cost of Coase” on Coase Theorem and Hobbes Theorem in Wittman, *supra* note 192, p. 16.

<sup>211</sup> Gauci, *supra* note 113, p. 10.

<sup>212</sup> Xu, *supra* note 183, p. 319.

lack or inadequacy of compensation in the LLMC 1976 or other international conventions. As it has been mentioned earlier in the thesis, one of the most significant changes regarding limitation of liability convention was the increase of the compensation with the 1996 Protocol to the 1976 Convention.

Following the legal-economic analysis mentioned above, which was related to the actual activities of the shipping industry and the cost for precaution, there is another dimension which is associated with the efficiency of compensation mechanism. With such viewpoint one focuses on the issue related to the actual cost of litigation and compensation mechanism, since the whole idea of economic analysis of law is about efficiency. The central problem with the concept of limitation of liability is the lack and inadequacy of compensation to the victim, in particular not from the liable party but from other sources.<sup>213</sup> However, since victims can obtain insurance, which were mentioned earlier, then the legal system need not be relied on to provide compensation. It is noted that providing compensation through legal rules tends to be significantly more expensive than doing so through insurance.<sup>214</sup>

One issue related to the above criticism is that the notion of justice and fairness is somehow ignored when considering the victim, but it is also relevant that it is the quantum of damages which is limited as it is the liability concept that is related to the justice and fairness, is intact, since it has been proven and assessed prior to the award of damages. The term polluter-pay principle is sometimes referring to the idea that the polluter should compensate the victim, whereas the said principle is mainly concerned with polluter being charged with the cost of pollution prevention and control measures.<sup>215</sup>

---

<sup>213</sup> Billah, *supra* note 3, p. 298.

<sup>214</sup> Kaplow and Shavell, *supra* note 182, p. 1763.

<sup>215</sup> Gauci, *supra* note 113, p. 3.

In normal circumstances deterrence should be a logical factor behind liability system such as in tort cases. It seems that with the limitation of liability system in place; such important justification for correction of the conduct of the wrongdoer is partially paralysed. By controlling the magnitude of liability, limitation of liability reduces the expected liability of shipowners and consequently their optimal precaution and encourages negligent navigation.<sup>216</sup> Although the above analysis is relevant to some degree, in particular concerning the end-result of deterrence factor related to rectification of negligent conduct, but one cannot ignore the application of many safety mechanisms in place for instance collision, shipping safety measures by national and respective international organisations such as International Maritime Organization. When this argumentation is considered in isolation to the above facts, the analysis is correct but with other safety mechanisms in the shipping industry to regulate safety of navigation, it seems that the deterrence factor is exaggerated to some extent.

In addition to the above examples of safety mechanism, some has argued that if channelling of liability were to be restricted only to the shipowner, without holding other actors, such as charterers, to be jointly and severally responsible for the incident that will deter for instance the charterers from using sub-standard ships. A clear example for this is OPA 1990, where the charterers are included in the responsible parties or class of persons exposed to liability. On the other hand, since the main purpose of the CLC/Fund, HNSC<sup>217</sup> and Bunkers Conventions is compensation, it has been submitted that those can be redesigned to promote deterrence, behavioural change and incentive for compliance. Thus, a more widely burden-sharing regime, will promote quality shipping.<sup>218</sup> Whether unlimited liability will make the shipping activists more vigilant about their duty of care, due diligence and seaworthiness might be questionable but in economic terms, unlimited liability mechanism will prove to be effective as the parties will have a considerable asset to lose in comparison to having

---

<sup>216</sup> Billah, *supra* note 3, p. 298.

<sup>217</sup> Hazardous and Noxious Substance (HNS) Convention 1996.

<sup>218</sup> Khee-Jin Tan, *supra*, note 90, Page 343.

limited liability. The main problem with limitation of liability is not under-compensation of the victim, but under-deterrence of shipowners.<sup>219</sup>

## 5.5 Limitation of Liability and Role of Insurance

The issues related to the insurance sector, at least in relation to the concept of limitation of liability topic, embraces several matters among which the most important are certainty, reinsurance, limited and unlimited liability. Limitation of liability ought to be for the shipowners alone, but with development of the 1957 Convention and in particular the 1976 Convention, other group or persons also benefit from the concept of limitation.

One particular field which benefit directly or indirectly from the convention and regulation related to limitation of liability is the insurance industry. Article 1(6) of the 1976 Convention introduced another class of person entitle to limit, namely the insurer, who is entitle to limit liability “to the same extent as the assured” through direct action mechanism. The effect of Article 1(6) of the 1976 Convention is that if the insurer is being sued by third party under the 1930 Act (third parties)<sup>220</sup>, it can plead limitation of liability when this is applicable and has not been raised by the assured.<sup>221</sup>

Although insurance cover is different and conspicuously separate from the shipowner’s limitation of liability, there is one connection between the two, that the insurer covers only shipowner’s liability. In the same line of analysis, the shipowner can limit his liability because he has no cover for the excess of the limitation fund or

---

<sup>219</sup> Billah, *supra*, note 3, Page 304.

<sup>220</sup> United Kingdom: Third Parties Rights Against Insurers Act of 1930.

<sup>221</sup> Hill, *supra*, note 43, Page 403 – See also: Griggs, *et al.*, *supra*, note 47, Page 14.

the P& I clubs are basically covering whatever the amount of limitation is being assessed.<sup>222</sup> In another word, the insurer gain indirect benefit from successful limitation by the shipowner since the usual policy term provides that the insurer will pay up to but not beyond the assured legal liability.<sup>223</sup>

It is now a common concept that certainty is the most important element in the insurance industry for calculation of the risk, and possible liability in case of a casualty or incident in marine insurance. For instance, the Hull underwriters knows the maximum amount of his exposure to a risk, namely the insured values as a result of this certainty, he is only paying for this amount and associated legal fees.<sup>224</sup> It is submitted that the unlimited liability proponents ignores the problem of realistic insurable limits, as the clubs insurance considerably depends on the cost of the reinsurance.<sup>225</sup>

At a practical level limitation most directly benefit the insurers of shipowner's liability and in turn, benefit shipowners in the lower premiums they are required to pay for such insurance cover.<sup>226</sup> In contrast, the only benefit for the claimants is that they are ensured of the availability of the insurance cover for the liability incurred and the liability fund available to satisfy their claims.<sup>227</sup> It has been argued that the role of insurance in compensating the injured party on behalf of the defendant (tortfeasors) negates any justification concerning subsidising the shipowners or retaining the limitation of liability for that matter.

---

<sup>222</sup> Özçayair, *supra* note 12, p. 379.

<sup>223</sup> Schoenbaum, *supra* note 62, p. 814.

<sup>224</sup> Özçayair, *supra* note 12, p. 377.

<sup>225</sup> *Ibid*, p.378.

<sup>226</sup> Simon Gault (ed.), *Marsden on Collisions at Sea*, (Sweet& Maxwell, 2003), p. 591.

<sup>227</sup> *Ibid*.

On the other hand, in defence of insurance industry and its interconnection to liability and damages, it has been observed that insurance is a useful social tool and the distribution of the risk through limitation of liability will enable tortfeasors to escape ruin and also enable the injured parties to recover damages which they are awarded rather than to be left with a “barren judgement”.<sup>228</sup> This, however, touches on two different but analogous protection mechanisms through public policy device such as the protection and survival of the insurance industry and the shipowners since application of higher award of compensation, means higher insurance premiums.<sup>229</sup>

It has been mentioned that the problem of non-availability of insurance or higher premium for insurance cover is one justification for retention of limitation of liability. However having widespread insurance cover, in particular third party insurance for the shipping industry is a reason to assume that one of the arguments for retention of limitation of liability specific to maritime field is refuted. This has also been suggested as an alternative for a shift of limitation to the insurance providers, but not the negligent party.

Professor Wetterstein<sup>230</sup> submitted that the insurance cost cannot be as a key argument for limitation of maritime liability since there are other means of supporting the national fleet, and not at the expense of the injured parties. The alternative that it is suggested for minimising the cost of insurance in the absence of limitation of liability is that insurance could have a ceiling for covering liability similar to the P&I clubs in cases of unlimited liability concerning oil pollution, as no insurer will accept unlimited liability.<sup>231</sup>

---

<sup>228</sup> M.J. Derrington, ‘The Effects of Insurance on the Law of Damages’ in *Essays on Damages*, edited by Paul Desmond Finn (The Law Book Company Limited, 1992), p. 146.

<sup>229</sup> *Ibid.*, p. 157.

<sup>230</sup> Gauci, *supra* note 10, p. 67.

<sup>231</sup> *Ibid.*

## 5.6 Promotion of the Trade

The most widespread and highly cited justifications for retention of limitation of liability are the promotion and encouragement of shipping and insurance industries which is also considerably challenged by many scholars. The premises for such support emanate from the fact that shipping industry is engaged in perilous adventure and need capital and investment to prosper. Without limitation of liability potential investment might be dissuaded from entering the shipping industry.<sup>232</sup>

In addition, the application of limitation will attract people to invest and consequently it will build up a competitive mercantile shipping industry at national and international level. The counter arguments for such support submit that sea voyages and the degree of “perils of the sea” are not as dangerous as it used to be due to technological development and advanced communication.<sup>233</sup> Gauci criticised Tetley in stating that “peril of the sea” is a factor justifying limitation of liability, as “the term perils of the sea” has some significance, it may be said to be indicative of the typical risks appertaining to sea-transportation.

However, other adversaries of limitation argue that investment in shipping is also satisfactorily widespread so that the shipping industry does not require any special treatment.<sup>234</sup> In respond to such argument it has been emphasised that although limitation of liability provides support to shipowners, it has been a catalyst in increasing the need for a larger workforce for shipping industry and also other industries providing services to shipping, such as insurance.<sup>235</sup> In the same line of the argument, the opposition to limitation of liability propose that even if the shipping

---

<sup>232</sup> *Ibid*, p. 66.

<sup>233</sup> *Gold, et al.*, *supra* note 21, p. 720.

<sup>234</sup> Gauci, *supra* note 10, p. 66.

<sup>235</sup> Damar, *supra* note 15, p. 14, see *also*; Mandaraka-Sheppard, *supra* note 139, p. 864.

industry needs support it should not be by way of subsidising a minority group against the public interest or discriminatory in nature.

## 5.7 Corporate Limitation and Maritime Limitation of liability

One of the arguments against the shipowners' limitation of liability is that in the corporate world, shipowners are actually able to limit their liability by reducing or limiting their capital to what is called the "One Ship Company".<sup>236</sup> This reasoning is a well-founded argument since if the availability of corporate limitation was enough in protecting the shipowners, then such justification for limitation of liability, as an extended protection mechanism, will negate its logical ground. However it has been argued that this method is part of the general corporate law and is not in any way unique to shipowners.<sup>237</sup>

On the other hand the same argument has been used to justify retention of the limitation of liability as a remarkable factor, since it has survived the development and ready availability of corporate limitation.<sup>238</sup> It is of course claimed that by the universal use of the corporate device, limitation of liability is of much less economic importance than it was in the past. Nevertheless, even where a ship, or a fleet of ships, is owned by a corporation, the privilege of limitation will insulate the remaining corporate assets from claims for which they would otherwise be subject.<sup>239</sup>

In reference to the 1957 convention, Sheen J. stated that the combined effect of the decisions in the landmark cases of *the Norman*<sup>240</sup> and *The Lady Gwendolen* had created public exposure of the whole organisation or corporation when the shipowner

---

<sup>236</sup> Yvonne Baatz (ed.), *Southampton on Shipping Law*, Institute of the Maritime Law, (Informa, 2008), p. 202.

<sup>237</sup> *Ibid.*

<sup>238</sup> Staring, *supra* note 19, p. 315.

<sup>239</sup> Roberts, *supra* note 40, p. 415.

<sup>240</sup> [1960] 1 Lloyd's Rep. 1 (H.L.).

commenced action claiming a decree of limitation. The public exposure was not in the interest of the shipowners and that these cases were considered to be a turning point in that shipowners never again enjoyed the right to limit their liability as much as their underwriters expected.<sup>241</sup>

Limitation of liability has a direct connection with the corporation system, as Sheen J. believes that parliament created corporation with limited liability, but judges had a limited scope to deal with that because they were protected by the law, but the introduction of the “sister ship arrest” was a mechanism to deal with such protection. The response of the shipping industry was the creation of the “one ship” company, provoking attempts to lift the corporate veil.<sup>242</sup>

---

<sup>241</sup> Sheen, *supra* note 130, p. 477.

<sup>242</sup> *Ibid*, p. 475.

## Chapter 6

### SUMMARY AND CONCLUSION

While examining historical background to the origin and development of the concept of the limitation of liability in the first chapter, the issues that has been covered, shows that at the time when there was no insurance in the modern day term, the concept of limitation of liability was a mechanism for sharing the loss by different participants. It can be safely deduced from such study that the sharing of the 'loss of the adventure' and assets were to distribute the risks attached to the maritime activities including the distribution of risk in the context of cargo responsibility and the wider industry perspective, a principle which is still a valid justification for retention of limitation of liability and beneficial to maritime related industries.

If we consider the concept of limitation of liability through a public policy lens, its objective of distribution of risks, as a catalyst factor, is fulfilled considering the growth of the insurance industry including the protection and indemnity clubs. The fact that insurance is available, the counter-argument for shifting the burden of liability to those who are responsible in circumstances is also valid and notable.

It has been stated that the primary characteristics of the limitation of liability was that the shipowner's liability was limited to the value of his vessel in that particular adventure merely for the reason that that ship was the instrument of the loss. Later with codification of the concept of limitation in Europe, the shipowner's other vessels or properties were spared in the assessment of his liability, a similar notion to the corporate limitation of liability. Similarly, this is used as justification by both camps for retention and abolishment of the concept of limitation of liability.

The common law concept of limitation of liability was briefly discussed which is tied to or entwined with development of limitation of liability in Europe and elsewhere which were sanctioned in order to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from participation in the shipping industry. It was a measure to tackle the prejudice of the trade and

navigation of the United Kingdom. It is this justification, namely the promotion of the trade and shipping industry which provokes a uniform criticism and mostly cited arguments, that it is time to abandon such privilege since there are other means of supporting the shipping industry.

The rationale for limitation of liability in this period was to protect the owner from unlimited liability for negligence of those particular servants who were beyond his physical control, but with the developments in every aspect of shipping, nowadays such justification is not relevant. However, as it has been mentioned, there is still criticism about the development of limitation of liability in the United State, which was modelled on the English Act of 1734.

Although OPA 1990 is considered to be an example for unlimited liability, in particular, the Californian State legislation, it was stated that OPA has achieved the objective of an increased compensation rate for the victims, but it seems that the litigation process is expensive, timely and complex. On the other hand whether OPA will change the behaviour of the shipping industry in term of safety management or reduce maritime disasters is questionable, and remain to be seen. It is notable that if the shipping and insurance industries are able to cope with OPA 1990, then that may make the position of the antagonists' proposal of abandoning limitation of liability stronger. Thus, the negative effect of the OPA 1990 on the uniformity of international maritime law pertaining to limitation of liability is a valid argument.

Further it was submitted that the 1957 Convention was criticised for many reasons and those factors were catalyst in the development of the LLMC 1976. The most important factors for such changes includes considerable litigation related to 1957 Convention regime and uncertainty of outcome of the judgments regarding the right to limit. It is also submitted that the limitation concept through its certainty provide a quick settlement system, which is consider to be a positive point for having limitation of liability regime.

In addition, it is noted that the "privilege of limitation" was converted into a "right to limitation" pursuant to changes by Article 4 of the LLMC 1976 Convention. It is also remarkable that the wording of Article 4 of the 1976 Convention resembles the *mens rea* requirement in the criminal law. Further, judges had more flexibility under the 1957 Convention than the current regime. In addition, the application of International

Safety Mechanism was considered, and it is submitted that at least, as far as evidence in the limitation of liability litigation is concerned, it will prove to be a positive point, as well as possibly changing the behaviour of the shipping industry toward safer and quality shipping.

Finally, the economic analysis of the law shows that if there are incentives for ship owners, then the rate of compliance is greater which will result in cleaner environment and quality shipping. Further, such study promotes and encourages designed regulation for behavioural change, deterrence and incentive for compliance, such as many regulation and conventions drafted by International Maritime Organization. Through legal- economic analysis, both regimes of limited and unlimited liability is desirable for different subject matters, which will provide justification for both liability regimes similar to CLC 1992 and OPA 1990.

In conclusion, the assessment of any liability regime, in particular, the limited liability mechanism, even if considered as an incentive, depends on the result of the purposes for which it is created. It is doubtful whether unlimited liability will change the behaviour of the shipping industry for compliance and succeed in providing a better system. The argumentations and justifications of both camps for retention and abolishment of the limitation of liability has been considered, but the main point is that the result of any changes for both blocs will alter the players which benefit in the process of such transformation.

## BIBLIOGRAPHY

### Books

1. Anderson Phil, *ISM Code: A practical Guide to the Legal and Insurance Implications*, 2nd edition, Lloyd's Practical Shipping Guides, Routledge, 2005.
2. Baatz Yvonne (ed.) *Southampton on Shipping Law*, Institute of Maritime Law, Informa, London, 2008.
3. Baughen Simon, *Shipping Law*, 4th Edition, Routledge- Cavendish Publication, 2009.
4. Damar Duygu, *Wilful Misconduct in International Transport Law*, International Max Planck Research School (IMPRS) for Maritime Affairs, University of Hamburg, Springer, 2011.
5. Gauci Gotthard, *Oil Pollution at Sea, Civil Liability and Compensation for Damage*, Wiley&Sons, 1997.
6. Gold Edgar, Aldo E Chircop and Hugh M Kindred, *Maritime Law*, Irwin Law, 2003.
7. Gutierrez, Norman A. Martinez, *Limitation of Liability in International conventions, the Relationship between global Limitation conventions and particular liability regimes*, Routledge, 2011.
8. Hill Christopher, *Maritime Law*, 6th Edition, Lloyd's of London Press, 2003.
9. Hodges Susan, *Cases and Materials on Marine Insurance Law*, Cavendish Publishing Limited, 1999.
10. Khee-Jin Tan Alan, *Vessel-Source Marine Pollution, the Law and Politics of International Regulation*, Cambridge University Press, 2006.
11. Mandaraka-Sheppard, *Modern Admiralty Law with Risk Management Aspects*, Cavendish Publishing Limited, 2001.
12. Meeson Nigel, *Admiralty Jurisdiction and Practice*, 3rd Edition, Informa Business Publishing, 2003.
13. Özçayair Oya Z., *Liability for Oil Pollution and Collisions*, Lloyd's of London Press, 1998.
14. Schoenbaum Thomas J., *Admiralty and Maritime Law*, 3rd edition, Westlaw, 2003.

15. Sturt, H. B. Richard, *The application and enforcement of the Merchant shipping Regulation 1989*, 3rd Edition, Lloyd's of London Press, 1991.
16. Thomas Rhidian, *Liability Regimes in Contemporary Maritime Law*, Informa, London, 2007.
17. White Michael, *Australian Maritime Law*, Federation Press, 2nd Edition, 2000.
18. Wittman Donald A, *Economic Analysis of the Law, Selected Readings*, Blackwell Publishing, 2003.

**Chapter in Books:**

1. Anderson Phil, 'The ISM and ISPS: A Critical Analysis' in Rhidian Thomas (ed.), *Liability Regimes in Contemporary Maritime Law*, Informa, 2007, pp. 169-101.
2. Derrington, The Hon. M. J. , 'The Effects of Insurance on the Law of Damages' in Finn Paul Desmond, *Essays on Damages*, The Law Book Company Limited, 1992.
3. Kverbdal Simon, 'The ISM & ISPS: Influence on the evolution of liabilities' in Rhidian Thomas (ed.) , *Liability Regimes in Contemporary Maritime Law*, Informa, 2007, pp. 151-167.
4. Mukherjee Proshanto K. and Jingjing Xu, 'The Legal Framework of Exhaust Emissions from Ships: A Selective Examination from a Law and Economics Perspective', In Bellefontaine Neil and Olof Linden (ed.), *Impacts of Climate Change on the Maritime Industry*, World Maritime University, Malmo, 2009, pp. 69-103.

## Articles

1. Billah Muhammad M., 'Economic Analysis of Limitation of Shipowners' Liability', (2006-2007) *U.S.F. Maritime Law Journal*, Vol. 19 No. 2, (Hein Online 19 U.S.F. Mar. L.J., PP 297-320).
2. Coase Ronald H., 'The Problem of Social Cost', (1960), *Journal of Law and Economics*, 3 J.L. & Econ. 1.
3. Craig Allen, 'Limitation of Liability', (2000) *Journal of Maritime Law and Commerce*, Vol. 31, No. 2, April, (HeinOnline -- 31 J. Mar. L. & Com. 263 2000), PP 263-280.
4. Donovan James J, 'The Origins and Development of Limitation of Shipowner's Liability', (1978-1979) *53 Tulane Law. Review*, 999-1095.
5. Fernandez M. Rui, 'The Limitation of Liability of a Shipowner in Anglo-Canadian Law', (1985) *Journal of Maritime Law and Commerce*, Vol. 16, No. 2, April, (Hein Online -- 16 J. Mar. L. & Com. 218 1985).
6. Galligan Thomas C. & Brittan J. Bush, 'Displacement and Preemption: The OPA's Effect on General Maritime Limitation of Law and State Tort law Punitive Damages Claims', (2012) *Cumberland Law Review*, Vol. 42.1,1-65.
7. Gauci Gotthard, 'Limitation of Liability in Maritime Law, an anachronism?'(1995) *Marine Policy*, vol. 19, No 1, PP. 65-74.
8. Gurses Ozlem, 'Convention on Limitation of Liability for Maritime Claims 1976', *Britannia Insurance Association*, No.3, June 2011.
9. Gutiérrez Norman A. Martínez , 'The Bunkers Convention 2001: Challenges for Its Implementation', Paper presented at the round-table EU Maritime Policy and the (Northern) Adriatic, *Maritime Law Association of Slovenia (MLAS)*, Slovenia 2011.
10. Hayes Edward T., 'In the Wake of the M/V Bright Field. A Call for Abandoning the Shipowner's Limitation of Liability Act', (1998) *Loyola Law Review*, Vol. 44, (HeinOnline -- 44 Loy. L. Rev. 137 1998-1999), PP 135-154.
11. Jacobsson Måns, 'The International Regime for Compensation of Tanker Oil Spills', *Course Material, Faculty of Law, Lund University*, April 2012.

12. Kaplow Louis and Steven Shavell, 'Economic Analysis of Law', (2002) Harvard School of Law and National Bureau of Economic Research, *Handbook of Public Economics*, Volume 3, PP. 1665-1765.
13. Killingbeck Serge, 'Limitation of Liability for Maritime Claims and Its Place In the Past Present and Future- How Can It Survive?'(1999)*Southern Cross University Law Review*, Vol. 3, (Heinonline: 3 S. Cross U. L. Rev. 1 1999).
14. Mukherjee Proshanto K., 'Essentials of the regimes of limitation of liability in Maritime law', *Admiral IV, Course Material, Lund University*, 2012.
15. Mustill, 'Ships are different - or are they?' (1993)*Lloyd's Maritime and Commercial Law Quarterly*, 490-501.
16. Owen D. R., 'The origins and Development of Marine Collision Law', (1979) 51 *Tulane Law Review*, 759-764.
17. Rein Alex, 'International Variations on Concepts of Limitation of Liability', (1979) 53 *Tulane Law Review*, 1259-1276.
18. Roberts Kenneth E. , 'For Retention of Limitation of Liability for Shipowners', HeinOnline – (1968), *American Bar Association, Sec. Ins. Negl. & Comp. L. Proc.* PP 415-423.
19. Sheen Barry , 'Limitation of Liability, The Law gave and the Lords have taken away' , (1987)*Journal of Maritime Law and Commerce*, Vol. 18, No. 4, October, PP.473-486. (HeinOnline -- 18 J. Mar. L. & Com. 473 1987).
20. Staring S. Graydon, 'The Roots and False Aspersion of Shipowner's Limitation of Liability', (2008) *Journal of Maritime Law & Commerce*, Vol. 39, No. 3, PP.315-332.
21. Tetley William , 'Maritime Law as a Mixed Legal System(with Particular Reference to the Distinctive Nature of American Maritime Law ,Which Benefits from Both Its Civil and Common Law Heritages', (1998-1999)*Tulane Maritime Law Journal*, [Vol. 23], (HeinOnline -- 23 Tul. Mar. L.J. 318, PP 318- 350.
22. Tetley William, 'Shipowners' Limitation of Liability and Conflicts of Law: The Properly Applicable Law ', (1992) *Journal of Maritime Law and Commerce*, Vol. 23, No. 4, October, (1992), (HeinOnline -- 23 J. Mar. L. & Com. 585, PP 585-606.
23. Xu Jingjing, 'The Law and Economics of Pollution Damage arising from carriage of oil by Sea', (2009) *Maritime Policy & Management*, 36:4, 309-323.

### **International Conventions:**

1. Civil Liability Convention: CLC 1969 & protocol 1992.
2. Conventions on Carriage of Goods by Sea (Hague Rules 1924, the Hague-Visby Rules of 1968 (Hague Rules as amended by the 1968 Protocol).
3. Hazardous and Noxious Substance (HNS) Convention 1996.
4. International Convention for the Safety of Life at Sea (SOLAS), 1974 (amended 1994).
5. International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels and Protocol of Signature 1924.
6. International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) Adoption: 23 March 2001; Entry into force: 21 November 2008.
7. International Convention on Limitation of Liability for Maritime Claims (LLMC) 1976.
8. International Convention relating to the Limitation of Liability of Owners of Seagoing Ships and protocol of Signature, 1957.
9. The International Safety Management Code for the Safe Operation of Ships and Pollution Prevention 1994, adopted by the IMO Resolution A.741 (18) of 4 November 1993(amended in December 2000 by Resolution MSC.104 (73).

### **National Legislations:**

#### United States of America

1. Oil Pollution Act of 1990[As Amended through P.L. 106–580, Dec. 29, 2000.
2. The American Limitation of Shipowner's Liability Act 1851.

#### United Kingdom

3. The Merchant Shipping Act 1995.
4. United Kingdom: Third Parties Rights Against Insurers Act of 1930.

5. The Merchant Shipping Act of 1894.
6. The Responsibilities of Shipowners Act 1733.

**Table of Cases:**

1. *Amalia, The* (1863), Br. & Lush 151.
2. *Anonity, The* [1961] 1 Lloyd's Rep. 203 (Adm. Div.).
3. *Boucher v. Lawson* (1733) Cas. T. hard 53; 95 E. R. 116.
4. *Bramley Moore, The* [1964] P200.
5. *Coggs v. Bernard* (1703) 2 Ld. Raym 909
6. *Forward v. Pittard* (1785) 1 T.R.27
7. *Compania Maritima San Basilio SA v. Oceanus Mutual Underwriting Association (Bermuda) Ltd, 'Eurysthenes'* [1976] 2 Lloyd's Rep 171, CA.
8. *Dayspringe* [1968] 2 Lloyd's Rep.204 (Adm. Div.).
9. *Esta Lataer Charters, Inc v Ignacio* Nos. 88-8728; 88-2730, 1989.
10. *Garden City No. 2, The* [1984] 2 Lloyd's Rep. 37.
11. *Lady Gwendolen, The* [1965] 1 Lloyd's Rep. 355.
12. *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705
13. *Marion, The* [1984] 2 Lloyd's rep. 1.
14. *Norman, The* [1960] 1 Lloyd's Rep. 1 (H.L.).
15. *Peracomo Inc. v. Société Telus Communications* 2011 FC 494, 2012 FCA 199.
16. *Rajah, The* [1872] L.R. 3A. &E. 539.
17. *Shawn, The* [1892] P.419.
18. *Stoomvaart Maatschappy Nederland v. Peninsula and Oriental Navigation Company* (1882) 7 AppCas 795 (HL).
19. *Tojo Maru, The* [1972] AC 242, HL.

**Internet websites:**

International maritime Organization:

<[www.imo.org/about/conventions/listofconventions/pages/convention-on-limitation-of-liability-for-maritime-claims-\(llmc\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/convention-on-limitation-of-liability-for-maritime-claims-(llmc).aspx)>, visited on 19 May 2013

< [www.imo.org/MediaCentre/PressBriefings/Pages/12-LLMC-Prot-limits.aspx](http://www.imo.org/MediaCentre/PressBriefings/Pages/12-LLMC-Prot-limits.aspx) visited on 19 May 2013.

<[www.imo.org/about/conventions/listofconventions/pages/internationalconvention-on-civil-liability-for-bunker-oil-pollution-damage-\(bunker\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/internationalconvention-on-civil-liability-for-bunker-oil-pollution-damage-(bunker).aspx) > visited on 19 May 2013.

United States Senate website:

Oil Pollution Act of 1990[As Amended through P.L. 106–580, Dec. 29, 2000], United States Senate website; <[www.epw.senate.gov/opa90.pdf](http://www.epw.senate.gov/opa90.pdf)> last visited 12.05.2013.

Admiralty Website: <[://www.admiraltylaw.com/limitation.php](http://www.admiraltylaw.com/limitation.php)> visited on 23.03.2013.