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**LIMITATION OF LIABILITY UNDER
SOUTH AFRICAN LAW GENERALLY
AND IN THE CONTEXT OF
WRECK REMOVAL SPECIFICALLY**

Research dissertation presented for the approval of Senate
in fulfillment of part of the requirements for
the degree of Master of Laws
in approved courses and a minor dissertation.
The other part of the requirement for this degree
was the completion of a programme of courses.



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LLOYD'S LIST

Friday March 15 1996

AFRICA WEEKLY

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'Spirit of Cape Town' capsizes headache for port

Salvors wait for ro-ro go-ahead

By Dee Rissik

SAFAGE experts were awaiting a decision on the righting and removal of the ro-ro container vessel, *Spirit of Cape Town*, capsized and sank along the quay at the port's container berth in the early hours of the morning.



Capsized vessel to be righted

THE righting of the capsized *Spirit of Cape Town*, got underway last Friday and was completed in a 24 hour process which had seen the R2m price tag for the vessel. Chief engineer, said damage to the vessel was to be repaired with 21 loaded containers before transport is completed.

SAFAGE experts were awaiting a decision on the righting and removal of the ro-ro container vessel, *Spirit of Cape Town*, capsized and sank along the quay at the port's container berth in the early hours of the morning.

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The ups and downs of a ship's life as a ro-ro's spirit is laid to rest

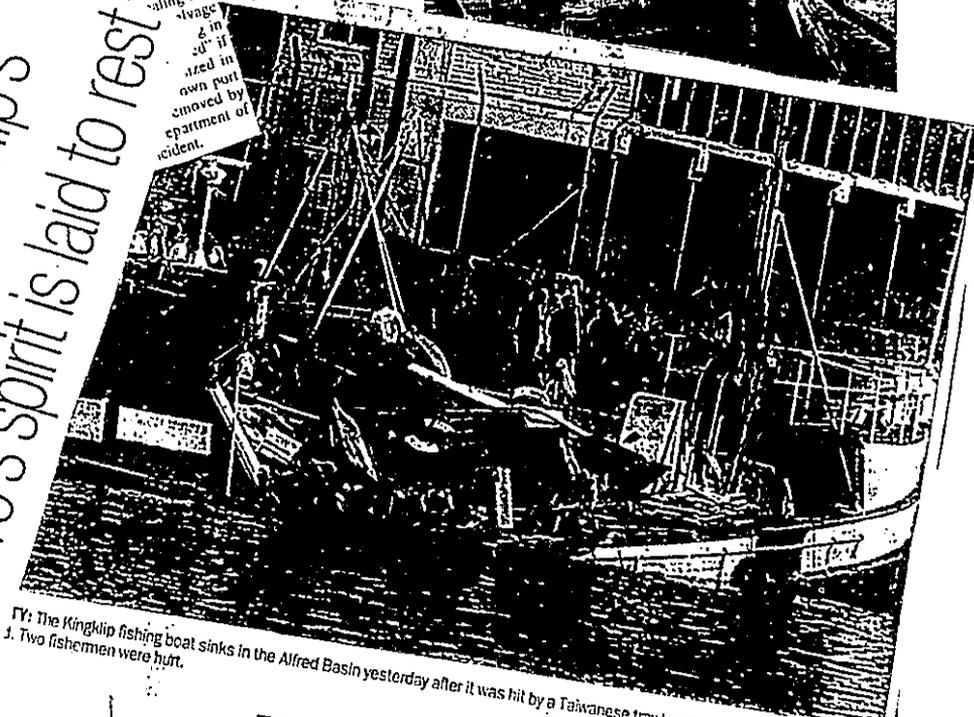


PHOTO: THE KINGSHIP FISHING BOAT SINKS IN THE ALFRED BASIN YESTERDAY AFTER IT WAS HIT BY A TAIWANESE TRAWLER. FIVE OTHER BOATS WERE DAMAGED. TWO FISHERMEN WERE HURT.

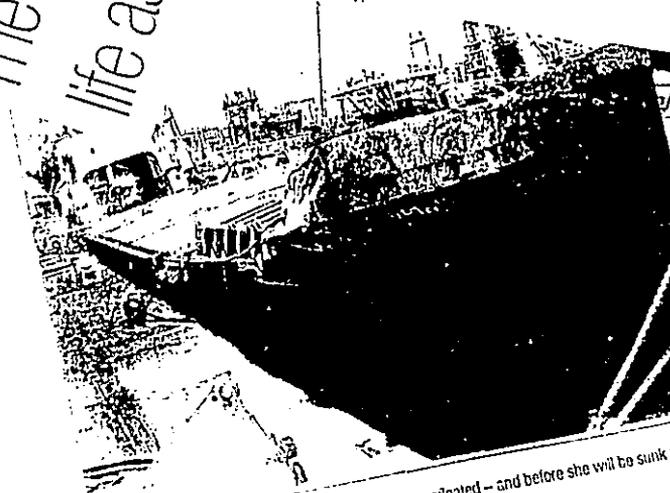
PICTURE: CRAIG GIRDLESTONE, WATERFRONT CHARTERS

Two hurt as trawler smashes into boats

CYNTHIA VONGAI

TWO fishermen were injured yesterday when a Taiwanese trawler smashed into five fishing boats in the Alfred basin at the East

harbour master at Waterfront. Mr. Craig Girdlestone, who saw the incident, said the trawler started going backwards. When the fishermen saw the trawler coming at them, they jumped out of the boats.



RESURRECTED: THE SPIRIT OF CAPE TOWN AFTER SHE WAS REFLOATED - AND BEFORE SHE WILL BE SUNK AGAIN.

PART I

"(L)imitation 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."⁽¹⁾

INTRODUCTION : HISTORICAL BACKGROUND

The rule that a shipowner can limit his liability to persons suffering loss or damage as a result of the negligent navigation of his ship is one of the most characteristic features of shipping law. In fact, it sets shipping apart from all other branches of industry and commerce. Its historical origin is based on the simple premise that it was deemed necessary to encourage the capitalist to invest money in the risky business of maritime ventures. The horrendous perils of the sea would have stifled the adventurous spirit of a shipowner who would have faced almost instant bankruptcy on the occurrence of a maritime disaster. In the interests of the promotion and flourishing of international trade, it quite simply came to be that maritime ventures had to be subsidised⁽²⁾.

The suspension of the general legal principle that if a person causes injury or loss to another by his negligent conduct or by that of his agent or servant, that person is liable to pay damages to the other sufficient to restore his former position appears at first sight to be unfair. However, given its origins in the early part of the 18th century, to a time when ships spent many months, sometimes years, away from their home ports, out of touch with the shipowner under circumstances where the shipowner had very limited control over the Master and his crew, it becomes clear why the notion was considered necessary.

(1) Lord Denning, Master of the Rolls, in : The "Bramley Moore", [1964] p.200 at 220 (c.a.)

(2) See generally Alex Rein "International Variations on Concepts of Limitation of Liability" 1979 53 Tulane Law Review 1259

Because navigation and shipping is essentially an international business, shipowning interests worldwide were anxious to make the laws governing limitation of liability uniform. To some extent this was achieved by the adoption of appropriate international conventions that could then become incorporated into national law and the initial work in this regard during the late 1800's of the Comité Maritime International (CMI) has been propagated by other international organisations such as the International Maritime Organisation (IMO), the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Conference on International Trade Law (UNCITRAL)⁽³⁾.

In 1908 the CMI had introduced a system which was designed to circumvent the problems which the international shipping community experienced because of the co-existence of several systems for limitation, coupled with conflicting rules on choice of law which was clearly unsatisfactory. In effecting limitation under the 1908 system, the owner effectively had three choices: to abandon ship and freight or, secondly, to surrender the value of ship and freight at the end of the voyage or, thirdly, to pay the amount of 200 francs per ton for the satisfaction of all claims, property and person, relating to the voyage. Although attempts were hereby made to bridge the gaps between the major ruling systems, the three choices available to the shipowner gave him the best of three worlds⁽⁴⁾.

In terms of the International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels, signed at Brussels on 25 August 1924, a similar compromise solution was adopted. In addition to claims for damage, the owner could limit his liability for salvage, contribution in general average, and for obligations under contracts entered into by the Master for the purposes of preserving the ship or continuing the voyage. The limitation fund comprised the value of the ship and freight or the aggregate of 8 pounds per ton, whichever was the lesser. Article 7 provided that where the owner was liable for damages arising out of death or bodily injury caused by the actual fault of the captain, crew, pilot or any other person in the service

(3) See A H E Popp, JC "Limitation of Liability in Maritime Law - An Assessment of its Viability From a Canadian Perspective" Journal of Maritime Law and Commerce, vol. 24 no. 2, April 1993

(4) See Rein at pg 1267

of the vessel in an amount exceeding the limit of liability referred to above and in Article 1, an amount of 8 pounds sterling per ton of the vessel's tonnage would be added to constitute the overall extent of his liability. In cases of collision or any other accidents and as regards all claims connected therewith, the value of the vessel was its condition at the time of her arrival at the first port of call after the accident⁽⁵⁾.

It was the 1957 Convention on the Limitation of Liability of Owners of Seagoing Ships (itself based on earlier conventions), which provided the basis of the English legislation the following year, 1958, which saw the passing of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 which established the then current rules by which limitation was to be controlled and governed. In terms of the provisions of that convention, a shipowner claiming the benefit of limitation was required to prove that the relevant damage or loss arose without his "actual fault or privity". This criterion can be referred to as the basis of the "former" law.

While this second effort to bring about international unity in the field of limitation was hailed as a revision of the 1924 Convention, it was in effect a revised version of the British tonnage system. In terms of the 1957 Convention the limitation fund is calculated on the basis of the tonnage of the ship and provides for one fund per accident or occurrence⁽⁶⁾. The instability of world currencies after the Second World War had led to wide variations in the value of a fund from one state to another. As a result, it was envisaged that the amount per ton would be expressed in terms of gold francs of a specified weight and fineness, namely the Poincaré Franc which is a unit consisting of 65.5 mg of gold of millesimal fineness 900. The 1957 Convention extended the right to limit to owners, charterer, managers and operators of the ship as well as to the Master, members of the crew and other servants of the owners, acting in the course of their employment, in the same way as it applied to the owner himself. In addition, the financial limits were raised thus reaching a compromise between those states which had argued for a higher limit and those which had argued against. The solution was a huge success inasmuch

(5) Rein at pg 1268

(6) See Articles 2 and 3 as well as Clare Dillon "Limitation of the Shipowners Liability" MB 1980 105

as more than 30 states acceded to the Convention with the USA and the USSR being two of the more notable exceptions. The 1957 Convention also extended the right to limit to claims for loss of life, personal injury and damage to property ashore, an area which was not previously covered in the legislation of the UK⁽⁷⁾.

At the International Conference on the Limitation of Liability for Maritime Claims which took place in London between 1 and 19 November 1976 under the auspices of the IMO, it was generally agreed that the limitation figures contained in the 1957 Convention needed to be increased and that the circumstances in which the shipowner could be deprived of his right to limit needed to be reviewed. In addition the problems associated with the lack of a standard price of gold which made assessing its value under the 1957 convention problematical, were sought to be overcome. The result saw a change in the whole method of calculation of the limitation fund by introducing the Special Drawing Right (SDR) of the International Monetary Fund (IMF) as the unit of account⁽⁸⁾ to resolve the competing requirements of claimants who it was felt should be suitably compensated for any loss or injury which they had suffered, on the one hand, and the shipowner, on the other, who it was felt should be entitled to limit his liability, for public policy reasons, to an amount which was readily insurable at a reasonable premium. The Convention of Limitation of Liability for Maritime Claims, 1976 which was promoted by the IMO and was based on a draft prepared by the CMI at its Hamburg Conference in 1974⁽⁹⁾ heralded the introduction of a limitation fund which was as high as a shipowner could cover by insurance at a reasonable cost, and the creation of a virtually unbreakable right to limit liability. It saw the replacement of the actual fault and privity principle with one which can be viewed thus : limitation will only be removed "if it is proved that the loss resulted from the shipowner's personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result"⁽¹⁰⁾. The

(7) See Article 1(1)(b)

(8) Article 8(1)

(9) See generally C N Cheka "Conduct Barring Limitation" Journal of Maritime Law and Commerce, vol. 18 no. 4, October 1987

(10) See Article 4

introduction of this test - far more onerous for a claimant wishing to defeat the shipowner's entitlement to limit his liability - can be referred to as the "new" law. The 1976 Convention introduces different limitation figures according to a sliding scale whereby the number of units of account changes in accordance with the increase in tonnage of the particular vessel.⁽¹¹⁾.

THE SOUTH AFRICAN BASIS FOR LIMITATION : S 261 OF THE MERCHANT SHIPPING ACT AND THE ACTUAL FAULT OR PRIVILEGE PRINCIPLE

It is not within the purview of this work to contrast in minute detail the principles of the 1976 Convention with those of the 1957 Convention. South Africa is not a party to either of those conventions but enjoys its own tonnage limitation legislation in sections 261 to 263 of the Merchant Shipping Act, No. 57 of 1951. In terms of those sections, an owner, charterer, person interested in or in possession of a ship, or a manager or operator of a ship, is entitled to limit liability to any one incident causing damage based on the tonnage of the ship concerned. Section 261, in part, reads as follows:-

- "(1) The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privilege:-**
- (a) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding an amount equivalent to two thousand six hundred and thirty-five gold francs for each ton of the ship's tonnage;**
- or**

(11) See Article 5

- (b) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding an amount equivalent to eight hundred and fifty gold francs for each ton of a ship's tonnage; or
- (c) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding an amount equivalent to two thousand six hundred and thirty-five gold francs for each ton of a ship's tonnage : provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to one thousand seven hundred and eighty-five gold francs for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent to two thousand six hundred and thirty-five gold francs for each ton of the ship's tonnage, the unsatisfied portion of the first-mentioned claims shall rank pari passu with the last-mentioned claims."

- (2) The provisions of this section shall extend and apply to the owners, builders or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until the registration thereof under the provisions of this Act.
- (3) The provisions of this section shall apply in respect of claims for damages in respect of loss of life, personal injury and loss of or damage to property or rights arising on any single occasion, and in the application of the said provisions claims for damages in respect of loss, injury or damage arising out of two or more distinct occasions shall not be combined.

- (4) For the purposes of this section:-
- (a) a gold franc means a unit consisting of 65,5 milligrams of gold of millesimal fineness 900; and
 - (b) the value of such gold franc in South African currency shall be determined by the court seized of the case.

The South African Courts have on only one occasion⁽¹²⁾ had cause to consider these provisions, but inasmuch as the South African limitation legislation has retained the actual fault or privity principle, the focus of what follows will be on the type of conduct which will deprive the shipowner of the benefits of limitation under South African law, and thereafter will follow a discussion of the type which will deprive him of the benefit under Article 4 of the "new" law which, as mentioned above, has been incorporated into the English Merchant Shipping Act of 1979,⁽¹³⁾ reference being had to recent English decisions adjudged according to the new law. Indeed, the words "without their actual fault or privity" which appeared in Section 503(1) of the Merchant Shipping Act, 1894 on which Section 261 of the South African Merchant Shipping Act is based, are possibly the most significant and meaningful words in the entire scope and structure of shipping law⁽¹⁴⁾ and the precise extent to which the shipowner's conduct would deprive him of his statutory right to limitation depended and in South Africa continues to depend on the true construction of the terms "actual fault or privity".

(12) The 1931 case of South African Railways and Harbours v Smith's Coasters (Prop.) Ltd, 1931 AD 113 dealt with s. 503 of the 1894 Act

(13) Section 17, schedule 4, Article 4

(14) See Hill at page 84

Section 503(1) read as follows:

"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity : [that is to say],

- (a) Where any loss of life or personal injury is caused to any person being carried in the ship;
- (b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

The Merchant Shipping Act of 1894 as well as the Merchant Shipping (Liability of Shipowners and Others) Act of 1958 were repealed in the Republic in 1960 in terms of Schedule 1 to the Merchant Shipping Act No. 57 of 1951 which came into force in 1960. Section 261 of the South African Act was modelled on Section 503 of the British Act but not all of the amendments created by the 1958 Act were incorporated into it.

Lord Justice Willmer suggested in "The Lady Gwendolen"⁽¹⁵⁾ :

"(The) test to be applied in judging whether shipowners have been guilty of actual fault must be an objective test."

If the test is objective the question is this : how did this particular shipowner measure up to the standards of reasonably prudent comparable shipowners in the management and control of their vessels?⁽¹⁶⁾

C.N. Cheka, writing in the October 1987 edition of Journal of Maritime Law and Commerce,⁽¹⁷⁾ does not favour the objective test as it involves a comparison of the conduct of the defendant shipowner with that of the "reasonable man" without attempting to discover what went on in the particular case. He remarks that the degree of conduct required of the shipowner for limitation purposes is uncertain if an objective test is adopted, "objectivism being such a mythical test that a shipowner in a particular case could not readily, and in advance of a mishap and a court decision concerning it, tell what kind of conduct constituted a bar to limitation". Preferring the approach of a subjective test as enunciated by Lord Justice Buckley in the case of Asiatic Petroleum Co. Limited v Lennard's Carrying Limited⁽¹⁸⁾ in which it was said that the words actual fault or privity "infer something personal to the owner, something blameworthy in him as distinguished from constructive fault or privity of his servants or agents", Cheka holds the view that adjudication under the subjective test must be preferable because it envisages an assessment of the closeness of the connection between the owner and the act or omission giving rise to the liability in damages⁽¹⁹⁾.

It is submitted, however, that the test for limitation purposes is largely academic, given that the case law throughout the years has imposed on the shipowner various duties relating principally to the equipment of the ship and

(15) [1964] 2 Lloyd's Rep. 99 (Adm. Div.); appeal dismissed [1965] 1 Lloyd's Rep. 335 (C.A.)

(16) Sweet & Maxwell p 169

(17) See footnote 4 above

(18) [1915] AC 705 affirming [1914] 1 K.B. 419 at 432 [C.A.]

(19) See Cheka at 489

its navigation. The more vexing question and one which flows logically from the subjective approach, namely whose actions can be considered to be those of the shipowner himself in the modern day complexities of mammoth shipping corporations, subsidiary companies, consortia and joint ventures, merits more illustration and discussion. What depth of investigation does an owner have to undertake into the detailed running of his ships and how much responsibility can be delegated to his subordinates?

Formerly, the shipowner seemed entitled to limit his liability where the fault was navigational since navigation was a matter necessarily left in the hands of the master, officers and crew. However, in the watershed decision of "The Norman"⁽²⁰⁾ that trawler had sunk with loss of life after striking an uncharted rock at night in fog in newly exploited fishing grounds in Danish territorial waters off the coast of Greenland. The dependents of the deceased crew members alleged that the owners were at fault in failing to provide adequate navigational equipment. The evidence was that a practice had developed in terms of which the insurers of the "Norman" and other trawlers issued circulars about navigational hazards in fishing grounds, a practice which had been followed in the case of the "Norman" up to the time of her sailing. The evidence showed that whilst the "Norman" was at sea, her owners received information about the presence of a previously uncharted rock off the Greenland coast. The owners contended that to have radioed the new information to the "Norman" "would have been an unnecessary departure from their normal practice of waiting until the respective ship came back to port"⁽²¹⁾. They contended further that had they thought it necessary, their insurers would have sent out a general warning to all trawlers in the area and that they, as owners, were entitled to rely upon the judgment of their insurers. Moreover, sending out the information, they argued, was unnecessary because not only was the rock in waters already known by the skipper to be unsafe but was also within territorial waters in which the "Norman" had been forbidden to go. The question in issue was whether the owners were at fault in not informing the Master of the "Norman" of the new hazards by radio communication, and if they were, whether this fault had been causative of the disaster.

(20) [1960] 1 Lloyd's Rep. 1

(21) At page 3.

The Court of Appeal held that there indeed existed such a duty on the part of the shipowners. They should have foreseen the possibility of the "Norman" being in the area in which he was at the time she grounded. Lord Radcliffe of the House of Lords affirmed the Court of Appeal's decision holding the view that it was not so much a case of ensuring what could reasonably be foreseen as of enquiring what was the reasonable thing to do when little could safely be foreseen:-

"... it was just as much a matter of routine, prudence and good care to send off a wireless message to the "Norman" as it would have been to send a copy of the circulars down to the dock if she had been there and about to sail"⁽²²⁾.

It is submitted that the imposition of a duty to act which attaches when there is a reasonable likelihood of damage or loss is somewhat anomalous in that reasonable likelihood presupposes the existence of circumstances the precise nature and significance of which are often impossible to predict and only become manifest after the incident giving rise to the liability.

Nevertheless, as a result of the "Norman" it became clear that the shipowner's duty with respect to navigation is, firstly, to foresee the geographical scope of her navigation, and secondly, to ensure that the vessel's crew is apprised of new navigational hazards within that area as a matter of routine prudence and good care.

The case of "The Lady Gwendolen" reinforced the view that a shipowner has a duty to exercise some measure of supervision and control over the navigation of his ship, a duty which is not to be construed narrowly. In that case, to which reference will be had below in the context of the alter ego analysis of a company, a collision was caused by a vessel owned by Arthur Guinness & Co., brewers of stout, proceeding at too high a speed through fog. The owners of the "Lady Gwendolen" had delegated the management of the navigation of

(22) At page 11 to 12

their ships to one Robbie, their marine superintendent. Robbie reported to Boucher, the traffic manager, and Boucher reported to Williams, the assistant managing director and member of the board who was in origin a chief brewer. The Court of Appeal held that the collision had not occurred without actual fault on the part of the owners, the fault which effectively caused the collision being found in the management of the navigation, namely in the control and instruction of the master of the vessel in terms of speed and the use of radar. The "Lady Gwendolen" had collided with the "Freshfield" which was at anchor in the Mersey. Despite the fog, the "Lady Gwendolen" was proceeding at full speed with her radar operating but not continuously manned, with the Master only occasionally glancing at it. The Master had been in the habit of sailing at excessive speed for some time and if the superintendent had examined the ship's log, as he should have done, he would have discovered that this was the case. Consequently, the failure of the superintendent to train the vessel's Master in the use of radar and in particular the failure to detect the Master's non-compliance with the Collision Regulations and to warn him that radar would not permit him to travel safely at full speed in fog, were omissions for which the assistant managing director and hence the company was responsible. It follows then, that the collision, which resulted from the vessel's excessive speed in fog, did not take place without the actual fault or privity of the owner as a consequence of which the owning company was denied the right to limit its liability.

In the case of the "The Dayspring"⁽²³⁾ that vessel collided with a motor tanker off the Isle of Man. Her owners had kept standing orders displayed in the wheel house providing, inter alia, that at least two crewmen should be in the wheel house at all times and that a log book should be kept. Just prior to the collision, the mate, who had defective eyesight, had left the wheel house after sighting the tanker but failed to give instructions to the helmsman. It was held that the fault lay with her owners in failing to insist that log books were properly kept and in failing to ensure that much more positive action was taken than the mere posting of a notice in the wheel house. Inasmuch as their breach of duty aforesaid was causative of the loss the owners were deprived of their right to limit their liability.

(23) [1968] 2 Lloyd's Rep. 204

A further decision which illustrates how far the pendulum had swung against shipowners is that of the "The Anonity"⁽²⁴⁾. The "Anonity" was a small tanker which in April 1995 was lying at an oil jetty at Thameshaven. Her owners FT Everard & Sons Ltd had given instructions by letter that before berthing at such a jetty, galley fires had to be extinguished and there was to be a visual check to ensure that no sparks or other means of ignition would be a likely source of danger. In disregard of those instructions, the galley fire was kept alight a spark from which caused a disastrous fire. The Court of Appeal held the view that the instructions given in the circular letter were insufficient, and that "some arresting notice should have been displayed near the stove". The decree to limit their liability which the owners sought was accordingly refused. Sir Barry Sheen, in an address delivered on his retirement as chairman of the British Association of Average Adjusters in 1987 commented :

"One cannot help wondering whether, if one of those judges had been a member of the board of directors of FT Everard & Sons before the incident in question and if he had been asked whether he had given instructions to extinguish galley fires before berthing at an oil berth, his answer would not have been "Yes, we have sent a letter to the master of every ship". How many directors would have thought that such a step was inadequate?"⁽²⁵⁾

Although the effect of the decisions referred to above appears to have been to diminish to a large extent the right of shipowners to limit their liability even when the direct cause of the casualty was the negligence of the master of the ship or his crew, it has been pointed out that those decisions can be justified on the basis that the shipowning industry had been given full warning, both by the underwriting industry and by wreck commissioners who had held enquiries into various casualties,⁽²⁶⁾ of the consequences of not tightening up the management of their individual concerns and issuing strict instructions to their masters.

(24) [1961] 1 Lloyd's Rep. 203 (Adm. Div.) but cf, "The Diamond" [1906] P.282 where limitation was allowed in circumstances where a fire was due to negligent overheating of the galley stove by the crew.

(25) See Sir Barry Sheen in "Limitation of Liability : The law Gave and the Lords have Taken Away", Journal of Maritime Law and Commerce, volume 18 No. 4, October 1987

(26) See Sheen at page 482 and 484

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Not only did the shipowner have to exercise certain duties with respect to navigation, he also had to equip his ship adequately. He had to provide effective gear⁽²⁷⁾, to insist on a vessel design that provided for adequate light⁽²⁸⁾ and, as has been noted above, to issue adequate and proper notices prohibiting the use of galley fires in oil jetties⁽²⁹⁾.

In the case of "The England"⁽³⁰⁾ a collision occurred on the Thames, the evidence being that the Master did not have copies of the Port of London by-laws on board. This was held to amount to actual fault or privity on the part of the owners sufficient to expose them to unlimited liability. In the case of "The Alletta"⁽³¹⁾ the Plaintiffs applied to limit their liability after a collision between their ship and the Defendant's ship, the "England" in the River Thames. The defendants argued that the collision was caused or contributed to by the actual fault or privity of the "Alletta's" managing owner in failing to ensure that the Master did not navigate the Thames without a pilot and in failing to supply the Master with copies of the relevant river by-laws. In the words of Willmer, LJ, the owner had displayed managerial ineptitude in the discharge of his duties :

".... in that he failed to take reasonable steps to see that the "Alletta" was properly equipped with the necessary publications. That ... amounted to a fault on his part within the meaning of Section 503 of the Merchant Shipping Act."⁽³²⁾

(27) The "Radiant", [1958] 2 Lloyd's Rep. 596 where limitation was disallowed because ropes, lights and gear box were defective

(28) See the HMS "Truculent", [1951] 2 Lloyd's Rep. 308 at 319 where the shipowner was held privy to a design of a vessel with inadequate lights.

(29) "The Anonity", see footnote 24 above.

(30) [1973] 1 Lloyd's Rep. 375

(31) [1973] 1 Lloyd's Rep. 375, C.A.

(32) At 384. See, also, Cheka, at 490

But perhaps one of the most controversial cases to come before the House of Lords reflecting on the 1957 Convention and the actual fault or privity rule contained therein was that of Grand Champion Tankers Limited v Norpipe A/S & Others (the "Marion")⁽³³⁾. The Master of that Liberian Tanker ruptured an undersea pipeline when he dropped the ship's anchor while waiting for a berth at Hartlepool. Oil companies who had an interest in the pipeline sued the ship's owners, claiming USD 25 million damages in respect of direct and consequential losses. The reason why the "Marion" came to anchor so close to the pipeline was that her Master was using an out-of-date chart. Although there was an up-to-date chart on board the "Marion", the Master omitted to take the elementary precaution of looking at the bottom left hand corner of the chart in use. Had he done so, he would have realised that the chart was out of date. The owners had long since delegated the operation and management of the vessel to English ship managers who had supplied charts to the ship. Their assistant operations manager held a master's certificate of competency and had 12 years experience with BP Tankers Limited. The Admiralty Court Judge, Mr Justice Sheen, hearing the application to limit, initially granted limitation on the ground that the acquisition and maintenance of the charts was the sole responsibility of the Master as was his negligence in using an out-of-date chart which was the sole cause of the incident giving rise to the liability for damages. However, neither he nor the assistant operations manager who had been negligent in not having out-of-date charts removed could be considered the alter ego⁽³⁴⁾ of the company and accordingly the decree limiting liability which the owners sought was granted.

The Court of Appeal and the House of Lords took a different view, however, holding that it was the ship manager's duty to ensure that there was an effective and properly supervised system of chart provision and maintenance and finding that such a system was absent in this case. This lack of an adequate system was highlighted by the fact that a Liberian inspectorate report, issued over a year before the pipeline incident and which drew particular attention to the lack of correct updating of charts, had not been acted upon. The House of Lords held that the owners were not entitled to limit

(33) [1984] 2 Lloyd's Rep. 1

(34) See infra

their liability because the director of the company, who was absent on business in Greece, had not given instructions that he should be sent the report. He was not entitled to leave it to his marine superintendent who by implication, it was held, could not be relied upon. This case neatly illustrates the lengths to which the English Courts went to defeat a right which parliament had given to shipowners : the superintendent who had been the master of a BP tanker for 12 years and whose qualifications were evidenced by his certificate of competency, was earmarked as someone who could not be trusted by his employers to use an up-to-date chart if they wanted to enjoy the benefits of limitation.

From the foregoing, it will be seen that where the owner is an ordinary person, determining whether or not there is actual fault or privity on his part, may not be too difficult. However, the position is clearly not so straightforward where, as in most cases, the owner is a company. Lacking physical form as it does, a company can never itself actually be at fault or privy and thus the actual fault or privity that will deprive it of the protection afforded by the limitation provisions can only be that of an employee or agent. Thus the question is: of which employee or agent can it be said that his act is the very act of the company itself? In Lennard's Carrying Company case⁽³⁵⁾ Lord Dunedin, in his dissenting opinion, refused to uphold the proposition that the actual fault of the whole body of directors must be proved before a company could be found to have been actually at fault⁽³⁶⁾. However, Viscount Haldane laid down an approach, the alter ego analysis, which was consistently followed by Courts subsequently⁽³⁷⁾. Viscount Haldane said of a company:-

(35) [1915] AC 705

(36) See Michael Thomas at 1225 and Lennard's Carrying Co. case at 715 to 716

(37) See, for example, "The Steamship", [1952] P.1 where the British Crown was denied the right to limit its liability in circumstances where the lights exhibited by HMS Truculent were insufficient, the fault being that of the third seafarer, a responsible member of the Board of Admiralty, who was or must be deemed to have been aware of the insufficiency of the lights.

"[It] is an obstruction. It has no mind of its own ... : its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."⁽³⁸⁾

The "fault or privity" of the company is therefore :

"the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself."⁽³⁹⁾

This approach would seem to suggest that the alter ego of a shipowning company must be found amongst the directors or at least the senior employees of that company. It also seems to suggest that a proper delegation of responsibility to a reputable management team would enable the shipowner to limit his liability. Where the day to day tasks of running a shipowning company are delegated to a reputable management company chosen by the shipowner's directors it would seem just, it is submitted, for the shipowning company to be entitled to limit its liability if the managers were negligent without the directors' knowledge.

Whereas in Lennard's case the alter ego of the owning company was found not within that company itself, but in the person of the active director of the company that managed the vessel concerned who was found to be privy to the unseaworthiness which eventuated in a fire, in "The Lady Gwendolen"⁽⁴⁰⁾ the Court of Appeal, whilst adhering to the approach laid down in Lennard's case, indicated that it might be prepared to find the alter ego at a lower level in the

(38) See at 713

(39) See 713 to 714. At p 715 Viscount Haldane said : "I should be inclined to think there was enough known about Lennard to show that, to use the appellant's learned counsel's own phrase, he was the alter ego company. He was a director of the company. I can quite conceive that a company may be entrusting its business to one director be as truly represented by that one director as, in ordinary cases, it is represented by the whole board."

(40) See footnote number 15 above

management structure⁽⁴¹⁾. As has been mentioned, the owning company was directed by a managing director assisted by three assistant managing directors, each of whom was responsible for specific departments of the business. One such department was the traffic department, which included the running of three ships. A traffic manager headed the traffic department and he was assisted by a marine superintendent as far as matters concerning the management of the ships was concerned. Of these three men, only the marine superintendent had any knowledge or experience of ships, and he, as an engineer, had no navigational experience. While the obvious sources of fault lay with the Master and the marine superintendent, inasmuch as the traffic manager never displayed any interest in the navigation of the ships, and the supervision of the traffic department by the assistant managing director was limited to one interview with the traffic manager per week, the company was nevertheless found to be actually at fault. Lord Justice Willmer said:-

"At first sight it may well seem that this is an obvious case for a decree of limitation. The fault which brought about the collision was *prima facie* a fault in navigation, which would ordinarily be regarded as entirely within the province of the master of the ship ... the case set up by the defendants in opposition to the claim for a decree in limitation was that faults in the navigation of the "Lady Gwendolen" were at least partly due to failure on the part of the management to exercise proper control over the masters of their ships."⁽⁴²⁾

Lord Justice Winn said:-

"Two guiding principles are plain. First, an owner who seeks to limit his liability must establish that, although for the immediate cause of the occurrence he is responsible on the basis of *respondeat superior* in no respects which might possibly have causatively contributed was he himself at fault. An established causative link is an essential element of any actionable breach of duty : therefore, "actual fault" in the context does not invariably connote actionable breach of duty : an owner is not

(41) [1965] 1 Lloyd's Rep at 340

(42) [1965] 1 Lloyd's Rep at 341

himself without actual fault if he owed any duty to the party damaged or injured which (a) was not discharged; (b) to secure the proper discharge of which he should himself have done but failed to do something which in the given circumstances lay within his personal sphere of performance."

And so, too, did the case of "The Garden City" concern excessive speed in fog⁽⁴³⁾. On 19 March 1969 a collision occurred in the North Sea between the Plaintiff's vessel "Zaglebie Dabrowski" and the Defendant's vessel the "Garden City". The "Garden City" sank and was a total loss, as was most of her cargo. In a collision action in 1976 it was held that the former and latter vessels respectively were 60% and 40% to blame. The "Zaglebie Dabrowski" was owned by the Polish state shipowning organisation, Polsteam. The faults alleged were in essence similar to those alleged in "The Lady Gwendolen" : failure to check on the navigational habits of the Master of the vessel. The chief navigator of Polsteam, a post reasonably similar to the post of marine superintendent in "The Lady Gwendolen", was at fault but it was held by Staughton J that his fault was not the fault of Polsteam. The duties he had carried out negligently had been delegated to him and the only issue relevant was whether the system of management adopted by Polsteam, including that delegation, was faulty. It was not, and there was no actual fault on the part of Polsteam. This case supports the proposition that in circumstances where authority has been delegated one can only attribute fault to the owners if the system of delegation was itself a faulty one⁽⁴⁴⁾.

Similarly, in "The Marion" it was made clear that a shipowner had a duty to exercise some measure of supervision and control over the navigation of his ship and this duty was not to be construed narrowly. No new principle emerged from this case. It was the last limitation action in English law under the old law, and it merely illustrated the lengths to which the Courts were prepared to go to defeat a right which parliament had given to shipowners. Commending on the apparent increasing willingness of the courts both to trace faults through the management structure to board level and to lay faults in navigation at the boardroom door, Michael Thomas in his article "British

(43) Polish Steamship Company v Atlantic Maritime Co. ("The Garden City No. 2") [1982] 2 Lloyd's Rep. 382 [Went to the Court of Appeal, [1984] 2 Lloyd's Rep 37 on a different point]

(44) See Sweet & Maxwell page 107

Concepts of Limitation of Liability"⁽⁴⁵⁾ comments that in the 20 years preceding the adoption of the 1976 Convention into English law no shipowner had been granted a limitation action in England⁽⁴⁶⁾ in contested proceedings.

The only reported South African case in which consideration has been given to the question whether the claimant's loss was caused without the actual fault or privity of the owner of the ship within the meaning of Section 261 of the Merchant Shipping Act, is that of Atlantic Harvesters of Namibia v Unterweser Reederei (the "St. Padarn")⁽⁴⁷⁾ : in terms of an oral agreement between the parties, the defendant undertook to tow an unmanned vessel owned by Atlantic Harvesters from Ijmuiden to Bremerhaven on the terms and conditions embodied in the Unterweser towage agreement. The plaintiff's vessel, the "St. Padarn", ran aground during the journey on 31 October 1983 when the towline parted as well as the emergency line, attempts at reconnection having failed. The plaintiff instituted a claim for damages, the quantum of which was by agreement fixed at R500 000-00 alleging breach of contract for failure to deliver the "St. Padarn" at Bremerhaven. In an alternative Plea the owners of the "Luneplate" pleaded that in terms of the provisions of Section 261(1)(b) of the Merchant Shipping Act No. 57 of 1951, their liability for damages was limited to an amount of R 9 051-86.

After evidence had been heard, three issues remained for decision by the Court:

- (a) whether the defendant, through its servants, was in culpable breach of the said agreement, or was negligent, and whether such fault caused the loss sustained by the plaintiff;
- (b) the validity according to German law of a clause in the defendant's general conditions of towage excluding liability altogether; and
- (c) whether the loss of the tow of the "St. Padarn" was caused without the actual fault and privity of the defendant within the meaning of Section 261(1)(b) of the Merchant Shipping Act.

(45) Michael Thomas "British Concepts of Limitation" (1979) 53 Tulane Law Review 1205

(46) Ad 1229

(47) 1986 (4) 865 (CPD)

Having established that the defendant was clearly in culpable breach of the towage agreement and that clause 2(b) of the contract was invalid in terms of German law⁽⁴⁸⁾, the Court went on to deal with the limitation issue.

The owner of the "Luneplate" was a corporation with two managing directors. Immediately below them was a nautical superintendent, one Litwinski, who was not a director but who was, at his level, responsible for the sea towage and salvage department, the harbour towage and salvage department and the supply shipping department. It was his duty to keep the ships running and to keep them supplied with towing equipment and to superintend repairs. He visited each of the tugs every three months for inspection and his assistant would visit every single tug once a month. Nautical equipment, the tow gear, the safety equipment and the general equipment would be inspected. The choice of towline and the manner in which it had to be connected to the tug was left entirely to the Master of the tug and would depend on all the circumstances of the particular tow which was being undertaken. The defendant contended that, as regards towing gear and stretchers in particular, the evidence revealed that it had a reasonably efficient system of management and supervision in material respects, one which sought to guard against that which was reasonably foreseeable⁽⁴⁹⁾.

Van Heerden, J found that the grounding of the "St Padarn" and the failure to deliver her at Bremerhaven was the result of the fault of the Master of the "Luneplate". He furthermore found that actual fault or privity on the part of her owner had been shown in regard to its lack of instruction and supervision concerning (i) the inspection of towing stretchers; (ii) the fitness for use of towing stretchers; and (iii) the use of a polypropylene line as a towing line; (iv) its lack of instruction to its masters to report on and comply with any qualification attached to the seaworthiness certificate of the object being towed⁽⁵⁰⁾; (v) its failure in appropriate circumstances to enquire as to the existence of any such qualification; (vi) its failure to prevent the

(48) At 870G and 875G respectively

(49) At 877 D

(50) The certificate of the Classification Society prohibited the commencement of a tow if a wind of force 6 or more prevailed. The tug captain had been negligent in that he had misread the certificate as allowing the commencement of the tow in a wind of up to force 6 (the tow had commenced in a wind of force 6)

commencement of the towage notwithstanding that the Master had failed to comply with his obligation to report on the prevailing weather conditions; and (vii) its failure in appropriate circumstances to enquire as to the weather conditions and the towing equipment being used in the circumstances⁽⁵¹⁾. The Court placed a heavy reliance on English authorities dealing with the actual fault or privity concept remarking that the reasons for introducing the limitation provisions in South African legislation appeared to be the same as was the case in English law. It thus seems likely that the questions of actual fault or privity, the bearing of onus and enquiries regarding the person of a corporate shipowner will continue in South Africa to be judged according to English case law dealing with the old regime prior to the incorporation in England of the provisions of the 1976 Convention.

THE DEMISE OF ACTUAL FAULT OR PRIVITY AND THE INTRODUCTION OF INTENT AND RECKLESSNESS - THE 1976 CONVENTION

At the conference in London in November 1976 from which the Convention of that year emanated, 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. The test as to what conduct would prevent a shipowner from limiting his liability was laid down in Article 4 of the Convention in these words:-

"A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."

It should not be overlooked that the phrase quoted above is a near verbatim adoption of Article 25 of the Warsaw-Hague Convention on the Unification of Certain Rules of International Carriage by Air, 1955,⁽⁵²⁾ of Article 13 of the

(51) At 865 D to F

(52) Article 25 of the Warsaw Convention 1929 as amended by Article 13 of the Hague Protocol 1955 provides that: "The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents done with intent to cause damage or recklessly and with knowledge that damage would probably result ..."

Athens Convention,⁽⁵³⁾ Article IV Rule 5(e) of the Hague-Visby Rules⁽⁵⁴⁾ and Article 8, Rule 1 of the Hamburg Rules.⁽⁵⁵⁾ Whilst subtle differences exist in the wording of the abovementioned conventions (for example, the Warsaw Convention refers expressly to the acts of "the carrier, his servants or agents" whereas the Hague-Visby Rules refers only to the word "carrier"), Hobhouse J in "The Lion"⁽⁵⁶⁾ has stated that "it is clearly important and correct that there should be a consistent approach to the construction of similar Maritime Conventions using similar terms and expressing similar ideas". In fact, given that the 1976 Convention still provides that it is the "personal" act or omission of the person liable which will defeat the right to limit, it will still be necessary to consider in the case of corporations, whose act or omission will be treated as the "personal" act or omission which may defeat the right to limit. The alter ego concept will, it is submitted, still have to be applied in order to ascertain whose "action is the very action of the company itself".

It is clear that in order to deprive the person liable of the right to limit, it may be proved that that person had the subjective intent (or mens rea) to cause the loss. Standards of reasonableness are not of concern. It must be shown that the person liable himself actively intended the loss and not that a reasonably competent or prudent person could not have failed to conclude that his act or omission would cause the loss.⁽⁵⁷⁾ In addition, it should be noted that the

(53) Article 13 of the Athens Convention provides that:

"The Carrier shall not be entitled to the benefit of the limits of liability prescribed in Articles 7 and 8 and paragraph 1 of Article 10 if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

(54) Article IV Rule 5(e) of the Hague-Visby Rules provides that:

"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result."

(55) Article 9 Rule 1 of the Hamburg Rules provides that:

"The Carrier is not entitled to the benefit of the limitation of liability provided for in Article 6 if the loss, damage or delay resulted from an act or omission of the carrier done with intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result."

(56) [1990] 2 Lloyd's Rep at 149

(57) See Griggs at page 38

mental element, intention or recklessness as the case may be, is to be applied not to the negligent act but to the consequences, that is to say the loss giving rise to a liability for damages. The alternative to intent is recklessness, coupled with knowledge that such loss would probably result. The meaning of the words "recklessly" or "recklessness" has been construed by courts both in the United Kingdom and in South Africa in the context of the criminal law and more particularly with reference to the concept of *dolus eventualis*.⁽⁵⁹⁾ These words would appear to connote either carelessness or utter disregard of consequence with the result that the perpetrator is deemed to have considered neither the probability or even the possibility of a likely result. Perhaps the best guidance may be sought in the case of Goldman v Thai Airways International Limited⁽⁵⁹⁾ which concerned the Warsaw Convention and in which Eveleigh LJ cautioned against the dangers of proceeding on the basis of constructions drawn from English criminal statutes when considering an international convention drawn up in a number of languages. In that case the Court of Appeal said that the word "recklessly" in Article 25 of the Warsaw Convention had to be construed along with the words "and with knowledge that damage would probably result". At page 700 it was stated :

"An act may be reckless when it involves a risk, even though it cannot be said that the danger envisaged is a probable consequence. It is enough that it is a possible consequence, although there comes a point when the risk is so remote that it would not be considered reckless to take it. We look for an element of recklessness which is perhaps more clearly indicated in the French term "temerairement". Article 25 however, refers not to possibility, but to the probability of resulting damage. Thus something more than a possibility is required. The word "probable" is a common enough word. I understand that to mean something is likely to happen. I think that is what is meant in Article 25. In other words, one anticipates damage from the act or omission."

(52) UK cases : R v Caldwell 1982 [A.C.] at 354 and R v Lawrence Stephen - [1982] A.C. at 520
 SA cases : S v Ngubane 1985 (3) SA 677 (A) at 685 D
S v Beukes 1988 (1) SA 511 (A) at 521-2

(59) [1983] 3 All ER 693

The meaning of privity in the context of actual fault or privity was considered in the context of the Marine Insurance Act in the case of "**The Eurysthenes**"⁽⁶⁰⁾. That vessel was entered with a P&I Club for Class I risks, and stranded during the course of a voyage. Her P&I insurers alleged that she was unseaworthy and that they were not obliged to indemnify the shipowner if it could be shown that the vessel was sent to sea in an unseaworthy condition with the privity of the shipowner within the meaning of section 39(5) of the Marine Insurance Act, 1906. The Court of Appeal held that, in this context, "privity" meant "with knowledge and consent".⁽⁶¹⁾ The test under the 1976 Convention is one of recklessness ... with knowledge that damage would probably result. Cheka argues for a subjective test of knowledge given that the convention requires that the perpetrator's knowledge of the probability of damage was meant to be *proved* and not implied.⁽⁶²⁾ Indeed, whereas under the old law the burden of proof lay upon the person seeking to establish the right to limit it now appears that in terms of the 1976 Convention, the burden of proof has been placed on the other side. Article 2(1) of the 1976 Convention states that "... subject to Articles 3 and 4 the following claims ... *shall be* subject to limitation of liability" (emphasis added).

This would seem to suggest that the right to limit applies automatically unless evidence is produced proving that the party seeking limitation is party to conduct barring limitation within the provisions of article 4. Sheen J in the case of the "**Bowbelle**"⁽⁶³⁾ stated that specified claims were subject to limitation of liability unless the person making the claim proved that the loss resulted from a personal act or omission of the shipowner committed with intent to cause such loss or recklessly or with knowledge that such loss would probably result. It can now safely be assumed, it is submitted, that this imposes a heavy burden on the claimant. A case in point is that of "**The Capitan San Luis**"⁽⁶⁴⁾. The circumstances giving rise to the litigation was a collision off the coast of Cuba between the "**Capitan San Luis**", and the plaintiff's cruiseliner

(60) [1976] 2 Lloyd's Rep 171

(61) See 179, column 1; 185, column 2; 188, column 1

(62) See Cheka at 497

(63) [1990] 1 Lloyd's Rep 532

(64) [1993] 2 Lloyd's Rep 573

"Celebration" in 1989. In its defence and counterclaim to the plaintiff's writ in rem, the defendant alleged an entitlement to limit its liability pursuant to the Merchant Shipping Act of 1979 which had given effect to the 1976 Convention. In their reply in defence to the counterclaim, the Plaintiffs asserted that the defendants were not entitled to limit their liability in that:-

- (a) they caused or allowed the "Capitan San Luis" to sail from Havana when it was known or ought to have been known that her electrical equipment was defective;
- (b) they failed to operate an adequate or any system of maintenance and inspection of the electrical equipment of the "Capitan San Luis" to ensure that her electrical equipment was in an efficient and working state when she was at sea;
- (c) they failed to dispatch to the "Capitan San Luis" in due time assistance by other vessels on learning that she had suffered an electrical blackout and was lying unlit and immobilised in the busy shipping lane off the north Cuban coast; and
- (d) they caused or allowed the "Capitan San Luis" to remain lying unlit and immobilised in the busy shipping line off the north Cuban coast⁽⁶⁵⁾

The liability for the collision having been settled on a 25% ("Celebration") and 75% ("Capitan San Luis") basis, the defendants sought a declaration that they were entitled to limit their liability. The application was granted and the plaintiffs afforded an opportunity of investigating whether it had sufficient facts at its disposal to attempt to defeat the shipowner's right to limit. Dealing with the question of onus Clarke, J said⁽⁶⁶⁾:

"Under the 1976 Convention the position is in my judgment very different. The shipowner merely has to establish that the claim falls within Article 2 of the Convention. Once he establishes that, he is entitled to a decree limiting his liability, *unless the claimant proves the facts required by*

(65) At 574, column 2

(66) At 578, column 2

Article 4. It is of course a matter for the claimant whether he wishes to investigate that question" (emphasis added).

The formulation of intent and recklessness contained in Article 4 would seem to produce a result extremely favourable to limitation. It is quite clearly going to be far harder under the 1976 Convention to "break" limitation because the instances of recklessness or intention to cause loss must by their very nature be fewer under the actual fault or privity regime.

LIMITATION AND "FORUM SHOPPING"

One further aspect requiring consideration, is the choice of jurisdiction in cases involving maritime claims arising out of delicts and the impact that limitation of liability has on such a choice. A practitioner advising a client whose prospects of success in escaping liability altogether are not very strong will want to advise his client to seek a jurisdiction in which the limitation fund of the vessel is as small as possible and the prospects of maintaining his right to limit are as good as possible. The reverse is also true. It has been seen that different systems of limitation apply - the abandonment system (such as in the USA), the 1957 Convention where the limits are fixed by reference to SDR's, the 1957 Convention which fixes the limit in gold francs (such as South Africa), and now the 1976 Convention which adds a fourth choice. Whereas in the case of most maritime contract claims the document giving rise to the claim (such as a charterparty agreement or contract for the sale and purchase of a ship) will undoubtedly contain a provision in which the parties make an express choice of governing law and jurisdiction, in the case of maritime claims arising out of a delict, the choice of jurisdiction frequently lies with the parties. Three recent English cases, one of which saw the charterers of a tug launching injunction proceedings to restrain the owners of a barge which had run aground off the Cape coast from continuing with proceedings in South Africa, bear testimony to this.

In the case of "**The Hamburg Star**"⁽⁶⁷⁾ containers on board that vessel were either lost overboard or were damaged with consequent loss or damage to their

(67) [1994] 1 Lloyd's Rep 3990

contents just prior to discharge at Hamburg. The vessel proceeded to Cyprus where she was arrested. Against the furnishing of security, she was released. The defendants entered an appearance to defend and thereafter instituted proceedings in Cyprus claiming a declaration that they were not liable and in the alternative, a declaration that they were entitled to limit their liability. Cargo actions were thereafter instituted in the English Admiralty Court and the defendants applied for a stay of those proceedings on the basis that Cyprus was the more appropriate forum. It was common cause that the 1976 Convention had no application in Cyprus, that jurisdiction applying the actual fault or privity test as enacted in section 503 of the Merchant Shipping Act, 1894. The issue in the limitation proceedings in Cyprus was whether the limitation fund was calculated by reference to the 1894 act or by reference to the Merchant Shipping (Liability of Shipowners & Others) Act of 1985. The cargo owners asserted that the 1958 Act applied which would create a fund in the order of £ 3 million. The shipowners, on the other hand, asserted that the 1894 Act was applicable which yielded a fund in the order of £117 000. In terms of the 1976 Convention, applicable in England, the fund was in the region of £2.4 million. Thus, it became apparent that if the cargo owners were correct they would be better off in Cyprus than in England but that if the shipowners were right, they would be much better off in Cyprus.⁽⁶⁸⁾

The cargo owners argued that if the action was stayed in favour of Cyprus they would be deprived of a "legitimate juridical advantage" by being deprived of the benefit of the limitation fund in England. This, they said, was a legitimate advantage because it flowed from an international convention to which the United Kingdom was a party and the only reason that the position in Cyprus was different was that Cyprus had not become a party to or adopted that convention despite the fact that it was regarded by the international maritime community as laying down appropriate principles for the limitation of liability. The shipowners, on the other hand, relying on "The Spiliada"⁽⁶⁹⁾ refuted the deprivation of a legitimate benefit and said that this could not be so because a juridical advantage of one party is a juridical disadvantage of another party.⁽⁷⁰⁾ This case is somewhat inconclusive on this question in that Clarke, J found

(68) At 408, column 1

(69) Spiliade Maritime Corp v Cansulex Ltd (The Spiliada) [1987] 1 Lloyd's Rep 1 (HL)

(70) At 409, column 1

other compelling reasons in support of his conclusion that Cyprus was not the more appropriate forum for the resolution of the disputes in the interests of all parties and for the ends of justice and thus did not firmly decide the application for a stay of the English proceedings on the basis of the limitation argument.

The matter of Caltex Singapore Pte.Ltd. & Others v BP Shipping Limited⁽⁷¹⁾ arose out of a collision in Singaporean waters between the "British Skill", owned by the defendants and a jetty belonging to Caltex Singapore. Caltex's claim was estimated at USD 10.5 million. BP had admitted liability for the collision in limitation proceedings which it had commenced in Singapore. The Singaporean Merchant Shipping Act gave effect to the 1957 Convention allowing a shipowner to limit his liability to an aggregate amount not exceeding in the currency of Singapore the equivalent of 1000 gold francs per ton provided that he proved that the relevant damage was caused without his actual fault or privity. The 1976 Convention, applicable in England, made provision for a significantly greater limit of liability but it would obviously be much more difficult for Caltex to break the limit. BP brought an application for a stay of the action brought against them by Caltex Singapore in England on the basis that Caltex's claim should be heard and determined in Singapore. The plaintiffs contended that if they had to claim in Singapore they would be unable to recover the difference between their claim of USD 10.5 million and the Singapore limit of about USD 5.8 million. This disparity between Caltex's claim and the 1957 Convention limit which would be applicable in Singapore was regarded by Clarke J as a special circumstance which may require that the action proceed in England, BP having established that Singapore and not England was the natural and appropriate forum for the trial of the action. As a result, the proceedings in England were stayed temporarily in order to enable the issues of quantum to be determined in Singapore. The question as to whether there should be a final stay was left for later determination:-

"In these circumstances in my judgment a plaintiff deprived of the larger limit would be deprived of a legitimate juridical advantage. I am not sure that it is still appropriate to think in terms of "legitimate juridical advantage", but whether it is or not, I have reached the conclusion that the plaintiffs have established that to be deprived of the larger limit is a

(71) [1996] 1 Lloyd's Rep 286

relevant special circumstance as a result of which justice potentially requires that the action be allowed to proceed in England".⁽⁷²⁾

In Ultisol v Bouygues⁽⁷³⁾, Ultisol, time charterers of the tug "Tigr" brought an application for an injunction restraining Bouygues, the hirer of the tug on the BIMCO Towcon form, from continuing its action against Ultisol in South Africa on the grounds that there was an English exclusive jurisdiction clause in the Towcon contract. The litigation between the two parties arose out of the loss of Bouygues' barge "Bos 400" on 26 June 1994 when she stranded on the South African coast after the towline by which she had been attached to the tug parted. One of the arguments advanced in support of the application was that if the merits were to be determined in South Africa there was a serious risk that a different and less favourable regime of limitation of liability would be applicable. Ultisol submitted that in all likelihood the South African Court would apply the regime presently in force in South Africa, namely that laid down by the 1957 Convention, whereas in England the Court would apply the provisions of the 1976 Convention. On the facts of this case and on the 1957 Convention, the limit of Ultisol's liability would be £ 80 000-00 but only if it proved that the casualty proved without its actual fault or privity. Under the 1976 Convention, the limit of Ultisol's liability would be £ 573 717 unless Bouygues was able to prove that its loss resulted from Ultisol's personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Bouygues, on the other hand, argued that it hoped to defeat Ultisol's claim to limit its liability on the basis that Ultisol would be unable to prove the absence of actual fault or privity. Clarke, J considered Ultisol's right to seek to limit its liability in accordance with the law of the chosen forum and thus under the 1976 Convention as a potentially very valuable right particularly in view of the fact that there was a much greater risk that it would be unable to limit its

(72) At 299, column 1

The term "legitimate juridical advantage" emanated from the case of MacShannon v Rockware Glass Ltd [1978] 1 All ER 625 (HL) where it was held that in order to obtain a stay of proceedings, a defendant had to satisfy two requirements; namely (i) that there was another forum to whose jurisdiction he was amenable and in which justice could be done between the parties at substantially less inconvenience and expense, and (ii) the stay should not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he were to proceed in the English Court.

(73) [1996] 2 Lloyd's Rep 140

liability at all in South Africa, in which case it would be exposed to a very large claim, and it was a right of which Ultisol should not lightly be deprived. The court viewed this as a powerful factor in favour of requiring Ultisol to be sued in England.⁽⁷⁴⁾ The application for an injunction was thus granted in favour of Ultisol.

OTHER LIMITATION REGIMES

Having discussed in some detail the general limitation regime applicable in South Africa and England, it is perhaps apposite to mention a number of other regimes that include limitation of liability for the benefit of the shipowner.

(i) The Athens Convention, 1974

The current international rules regulating liability for the carriage of passengers and their luggage are set out in the 1974 Athens Convention.⁽⁷⁵⁾ The provisions of the Athens Convention have not been adopted in South Africa, although a discussion paper has been distributed by the Department of Transport to parties in the industry designed to test the waters with regard to adoption of this convention. In addition to setting limits of liability for passengers and their luggage, the Convention establishes the basis of liability and fixes the conditions for breaking limitation of liability in Article 3. As in the case of the limits established for the carriage of goods, the limits for the carriage of passengers and their luggage are subject to the overall limits established under the general limitation rules. The convention provides a limit of liability for death or personal injury per passenger of 46 666 SDR's which operates as a first stage of limitation in relation to each contract of carriage.⁽⁷⁶⁾ The Convention came into force internationally on 28 April 1987. In March 1990 at an IMO Conference held in London, a new protocol was approved to enhance compensation and to establish a simplified procedure for updating limitation amounts.

(74) See page 152, Column 1

(75) The full name of the convention is the Convention Relating to the Carriage of Passengers and Their Luggage. It replaced the earlier 1976 Convention on the Unification of Certain Rules Relating to Carriage of Passengers and Their Luggage.

(76) See Sweet & Maxwell, page 54

(ii) Section 9(5) of the Prevention and Combating of Pollution of the Sea by Oil Act No. 6 of 1981

The emergence of super tankers in the 1960's and a general perception that the provisions of the 1957 Limitation Convention did not provide adequate levels of compensation led to the International Convention on Civil Liability for Oil Pollution Damage of 1969 (the CLC). This convention imposes strict liability upon the registered owner of a ship carrying persistent oil in bulk as cargo for pollution damage resulting from a spill of oil from that ship.⁽⁷⁷⁾ This liability is subject to a limited number of defences: act of war, act of God, sabotage, or negligence of a government or other authority in the upkeep and maintenance of navigational aids.⁽⁷⁸⁾ Substantially higher limits of liability were imposed on the shipowner than under the 1957 Convention. Article 8(1) makes provision for the breaking of the owner's right to limit, the actual fault or privity test being the relevant criterion. South Africa has acceded to the CLC but it has never been given the force of law in this country. Rather, the South African authorities have chosen to enact the Prevention and Combating of Pollution of the Sea by Oil Act No. 6 of 1981 (the "Oil Pollution Act"). The Oil Pollution Act is purportedly based on the CLC but does not follow it word for word and in fact goes further in some respects than the CLC. In line with the CLC the only defences available to the shipowner are the those "outs" referred to above. The liability of the shipowner can be limited to 133 special drawing rights up to a maximum of 14 million SDRs. Section 9(5)(a) expressly excludes the provisions of Section 261 of the Merchant Shipping Act. If, however, limitation is broken on the basis of absence of fault or privity or if the claims exceed the limitation fund, then, depending on various criteria, recourse may be had by a claimant to TOVALOP and/or CRISTAL for further compensation.⁽⁷⁹⁾

(77) See Article 3 (1)

(78) See Sweet & Maxwell at page 144 and Article 3(2) of the Convention

(79) The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) extends the cover provided by CLC and is also based on strict liability. CRISTAL (A Contract Regarding a Supplement to Tanker Liability for Oil Pollution) was devised to provide compensation supplementary to that available from tanker owners and bareboat charterers under TOVALOP. In common with TOVALOP, CRISTAL was amended with effect from 20 February 1987 to, amongst other things, substantially increase the amount of compensation available worldwide to those affected by an oil spill from a tanker carrying cargo owned by a party to CRISTAL. The 1992 Protocol to the CLC came into force on 30 May 1996 for the original 10 states (Denmark, Egypt, France, Germany, Japan, Mexico, Norway, Oman, Sweden and the UK). The 1992 Protocol to the Fund Convention came into force on the same date for the same states, except Egypt.

(iii) The Hague-Visby Rules

In terms of section 1(1) of the Carriage of Goods by Sea Act No. 1 of 1986 the Hague-Visby Rules⁽⁸⁰⁾ as set out in the schedule to that act enjoy the force of law in South Africa⁽⁸¹⁾. Whether the Hague-Visby Rules are incorporated in a bill of lading or whether they apply as a matter of statutory law, the ship or a carrier of goods is, in terms of Article IV, Rule 5(a), read with (e), entitled to limit its liability for any loss or damage to or in connection with the goods to an amount not exceeding the equivalent of 10 000-00 francs per package or unit, or to 30 000-00 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher. "Carrier" is defined in the rules as the owner or the charterer who has entered into a contract of carriage with a shipper. It has already been noted that there is no entitlement to the benefit of limitation of liability where the damage resulted from the act or omission of the carrier which was done with intent to cause damage, or recklessly and with knowledge that damage would probably result. In addition, the shipper can defeat limitation by declaring and inserting in the bill of lading the value of the goods.

The basis of limitation in the Merchant Shipping and Carriage of Goods by Sea Acts would appear to be the same in that they both refer to gold francs and they both define a franc as a unit consisting of 65.5 milligrams of gold of millesimal fineness 900.⁽⁸²⁾ Inasmuch as the date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case, it is arguable that the method of conversion that will be adopted in South Africa will, for practical purposes, be that which is used for the determination of the gold franc value in terms of the Merchant Shipping Act. In this regard, the reader is referred to the discussion in Part 2 of this work on the determination of the value of the gold franc for the purposes of the calculation of a limitation fund in South African currency.⁽⁸³⁾

(80) Derived from the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25 August 1924 as amended by the protocol signed at Brussels on 23 February 1968

(81) Reading Section 1(1) of the Carriage of Goods by Sea Act together with Article X of the Hague-Visby Rules there are six types of voyage which can be identified to which the Hague-Visby Rules Apply : see LAWSA Volume 25, paragraph 165.

(82) See Article IV (5)(d) of the Hague-Visby Rules

(83) See page 55 of Part 2 below

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(82) See Article IV (5)(d) of the Hague-Visby Rules

(83) See page 55 of Part 2 below.

(iv) The HNS Convention, 1996

The two oil conventions described above are confined to damage caused by "persistent" oil carried in oil tankers as cargo. At the Brussels Conference in 1969 where the CLC was adopted, the IMO was encouraged to intensify its work on all aspects of pollution by agents other than oil. The result was an emerging regime of liability and compensation for the maritime carriage of hazardous and noxious substances (HNS), which has featured in the work programme of the Legal Committee of the IMO for the last 20 years. This result has been an instrument running into 54 articles containing rules on liability and compensation which will impose additional financial burdens on shipowners, importers of chemicals and their insurers for the benefit of the victims of marine accidents involving HNS cargoes which was submitted to a diplomatic conference earlier this year. The convention covers claims for loss of life or personal injury on board or outside ships carrying HNS and also loss or damage to property outside the ship. The convention further covers loss or damage as a result of contamination of the environment provided that compensation for impairment of the environment is limited to the costs of reasonable measures of reinstatement. The cost of preventative measures is also covered. The liability imposed on the owner in terms of this convention is strict, although a limited number of defences are available to the shipowner. The three defences available under the CLC apply as well as a fourth defence of which the shipowner can avail himself if he can establish that the damage was wholly or partly caused by the failure of the shipper to furnish information concerning the hazardous and noxious nature of the cargo or where the shipper's failure has led the owner not obtaining insurance cover in respect of HNS risks. The limits of liability are contained in Article 9 which also provides that the owner may lose the right to limit if it is proved that the accident arose from his reckless conduct and where he knew that the damage which occurred would probably result from his conduct.

The convention envisages an equitable share between ship and cargo of the financial responsibilities for the consequences of an HNS spill. The HNS Fund, to which cargo interests will contribute, will only be called upon when the underlying fund provided by the shipowner based on the limitation figures proves to be insufficient to meet all claims. The convention will enter into force 18 months after at least 12 states, including 4 states each with a fleet of more than 2 million gross tons, have

ratified the convention and the Secretary-General is satisfied that those persons in those states who would be liable to contribute to the HNS Fund have received, during the preceding year, a total of not less than 46 million tons of contributing cargo.⁽⁸⁴⁾ It is expected that there will be a reasonable time lag before the HNS convention comes into force internationally. However, the comments of national delegations at the recent diplomatic conference reportedly left the distinct impression that there will be wide support for this convention, particularly in Europe.⁽⁸⁵⁾

(84) See Article 46

(85) For more detailed analysis of the convention's provisions and its likely future, see Patrick Griggs, [1996] International Journal of Shipping Law, Part IV, September 1996, page 254

PART 2

LIMITATION OF LIABILITY AND WRECK REMOVAL : THE SOUTH AFRICAN PERSPECTIVE

Introduction

On her first voyage trading the South African / West African route and just after midnight on 5th March 1996, the 3500 dwt "Spirit of Cape Town", owned by German based Atlantic Shipping slipped off the quayside beside the coastal container berth at the Cape Town port with 83 containers on board, 11 of which were removed by the port authorities before she sank in 9.5 metres of water. During the ensuing weeks, her Russian based hull underwriters rejected owners' notice of abandonment and owners themselves failed to comply with a directive from the port authorities issued pursuant to the Legal Succession to the South African Transport Services Act No. 9 of 1989 ⁽¹⁾ to raise and remove her. Placing reliance on, inter alia, the pay to be paid rule, her protection and indemnity insurers felt disinclined to meet the costs of such an exercise. The result saw local salvors, Pentow Marine, being awarded a reportedly R2 million contract with the authorities for the righting, sealing and raising of the vessel.⁽²⁾ Nevertheless, both owners and insurers had cause to consider the vexed question whether the expenses incurred by the Minister or authorities and referred to in the enabling legislation, would fall within one of the categories of liability in respect of which a shipowner is entitled to limit its liability in terms of Section 261 of the Merchant Shipping Act.

On Saturday, 6th July 1996 at approximately 03h00, the Belize registered diamond recovery vessel, the "Big Red" ran hard aground on a heading of approximately 330° at approximately 6 knots on Penguin Island within the port limits of Luderitz, Namibia while returning to sea after replenishing stores, fuel and water during an unscheduled port call. Within days, the Namibian Ports Authority and in conjunction with the Ministry of Works & Transport, exercising the powers

(1) and more particularly paragraph 11 of the Second Schedule thereto
(2) Lloyd's List Africa Weekly, Friday July 5, 1996

conferred on it in terms of the Namibian Ports Authority Act, No. 2 of 1994, issued a directive to the owners calling on them to remove the wreck forthwith. Her London based hull underwriters similarly rejected notice of abandonment tendered by her owners who, together with their P & I insurers, also had cause to consider the possibility of limiting their liability to the authorities in the event of the latter attending to the raising and removal of the wreck consequent upon their failure to do so.

Liability for wreck removal expenses - statutory debt or damages?

Section 304A of the Merchant Shipping Act, as amended, provides thus:

- "(1) (a) When a ship is wrecked, stranded or in distress within the territorial waters of or on or near the coasts of the Republic, the minister may direct the master or owner of such ship, or both such master and such owner, either orally or in writing to move such ship to a place specified by the Minister or to perform such act in respect of such ship as may be specified by the Minister.
- (b) If the master or owner of a ship referred to in paragraph (a) fails to perform within the time specified by the Minister any act which he has in terms of that paragraph been required to perform, the Minister may cause such act to be performed.
- (2) The Minister may, notwithstanding the provisions of sub-section (1), cause any wreck or any wrecked, stranded or abandoned ship or any part thereof to be raised, removed or destroyed or dealt with in such manner as he may deem fit.
- (3) If the Minister incurred any expenses in connection with the exercise of any power in terms of sub-section 1(b) or (2), the Minister may recover such expenses from the owner of the wreck or ship in question or, in the case of an abandoned wreck or ship, from the person who was the owner thereof at the time of the abandonment."

A provision couched in similar terms appears in paragraph 11 of Schedule 1 to the Legal Succession to the South African Transport Services Act which reads as follows:

"11 The Company shall be entitled-

- (d) to raise, remove or destroy any sunken, stranded or abandoned ship or wreck within the area owned by the Company, to recover from the person liable in terms of this paragraph all costs incurred in such raising, removal or destruction and in lighting, buoying, marking or detaining the ship or wreck and, on non-payment after written demand of such costs or any part thereof, to sell such ship or wreck and out of the proceeds of the sale defray such unpaid costs, rendering the surplus, if any, to the person entitled thereto and recovering any unpaid balance from the owner of such ship or wreck or from the person who was the owner of the ship at the time it was sunk, stranded or abandoned; and

The provisions of paragraph 11(d) apply to a casualty which is situate within port limits which is the area owned by the Company and referred to in that paragraph. There is thus some overlap between the empowering provisions conferred upon the Minister of Transport in the Merchant Shipping Act, on the one hand, and on Portnet in the Schedule to the Legal Succession to the South African Transport Services Act, on the other hand. It is submitted, however, that inasmuch as port limits fall within the territorial waters of or are situate on or near the coast of the Republic (as referred to in Section 304A(1)(a) of the Merchant Shipping Act) the Minister would similarly be able to exercise the powers conferred on him in terms of that Act in respect of a casualty situate within port limits. Interestingly, whereas the Minister is empowered to direct the owners to themselves remove any sunken, stranded or abandoned ship or wreck, the harbour authorities are not so empowered and would appear merely to be empowered to themselves attend to the removal.

The equivalent legislation in Namibia is couched in almost identical terms. Section 304A of the South African Merchant Shipping Act enjoys the force of law in Namibia. In addition, Section 15(3) of the Namibian Ports Authority Act confers upon the port authority the power "to raise, remove or destroy any sunken, stranded or abandoned ship or wreck within the authorities' area of jurisdiction and to recover, in accordance with sub-section (3), the costs incurred in connection therewith."

Sub-section 3 entitles the authority when it has raised, removed or destroyed any sunken, stranded or abandoned ship or wreck pursuant to the provisions of paragraph (d) of sub-section (1):

- "(a) to recover from the owner of the ship or wreck, or any other person who had the beneficial use of the ship at the time it sank or stranded or was abandoned, all costs incurred in such raising, removal or destruction, and in lighting, buoying, marking or detaining the ship or wreck; and
- (b) on non-payment after written demand of such costs or any part thereof, to sell such ship or wreck and out of the proceeds of the sale to defray such unpaid costs, rendering the surplus, if any, to the person entitled thereto and recovering any unpaid balance from such owner or such other person."

Whereas it may, and often does, happen that the port authorities (usually the Port Captain) will issue a directive to the owners of a wreck to remove it under threat of in the event of their failing to do so the authority itself attending thereto on behalf of the owner and recovering the expenses from the owner, it would theoretically be possible for a shipowner to attack the legitimacy of this directive in that it is *ultra vires* the powers conferred on the authority in terms of the enabling legislation, but in view of what is said above relative to the duplicity of function between the Minister and the port authorities it would be futile for an owner to do so given that the port authorities could merely prevail upon the Minister to issue such a directive which would have the desired effect and would be competent in law.

There does not appear to be any South African authority dealing directly with the question of the applicability, if at all, of Section 261 of the Merchant Shipping Act in the context of wreck removal. However, there are a number of English decisions which, it is submitted, are of assistance and provide an indication of the direction that our Courts are likely to follow.

Before reviewing the English cases, however, reference should be had briefly to the case of South African Railways and Harbours v Smith's Coasters (Prop.) Ltd⁽³⁾ which involved an appeal against the dismissal of an exception to the defendant's plea. The harbour authority (SAR&H) controlled and managed Durban Harbour. In October 1927 the "Karin" sank in the approach to the harbour. Her owners neglected to remove her. The SAR&H contracted with a third party for her removal and sued Smith's Coasters for damages in an amount in excess of £ 7000. Smith's Coasters pleaded, inter alia, that the damage suffered by the SAR&H was due to an occurrence which took place without their actual fault or privity within the meaning of Section 503(1) of the Merchant Shipping Act, 1894 as amended by Section 1 of the Merchant Shipping (Liability of Shipowners & Others) Act 1900⁽⁴⁾. In so doing they sought to reduce their liability to £ 3 002. To this defence the harbour authorities excepted as bad in law on the basis that the plaintiff was the Crown and that the provisions of the Merchant Shipping Act relied upon did not bind the Crown. De Villiers CJ, on appeal, upheld the exception saying:-

"... we have come to the conclusion that the contention is correct, and that the Crown is not bound by Section 503 of the Merchant Shipping Act, 1894. The result is that the appeal succeeds".⁽⁵⁾

Having reached this conclusion, the Court did not have to investigate whether in fact the liability which it was sought be limited was one which fell within the parameters of Section 503(1) at all. In any event, it is submitted that this case will not assist a modern shipowner who seeks to limit under Section 261 of the Merchant Shipping Act since the Act expressly binds the State to its provisions and no exclusions or exceptions are made in respect of Sections 261 to 263.

(3) 1931 AD 113

(4) see infra

(5) at 131

In "The Millie", 1939 (Vol 64), Lloyds Rep 318 (Adm) the Court was asked to consider whether a shipowner was entitled to limit its liability in terms of Section 503 of the Merchant Shipping Act, 1894 as amended by the Merchant Shipping (Liability of Shipowners and Others) Act 1900, for expenses incurred by the Manchester Ship Canal Company in removing the wreck of the "Millie" which had sunk as a result of a collision and was constituting an obstruction in the canal. The Manchester Ship Canal Company had removed the wreck of the "Millie" from the canal in terms of the powers conferred upon it in Section 32 of the Manchester Ship Canal Act, 1936, which entitled the authority to remove the wreck of the vessel and further provided that:-

"(2) The Company may recover from the owner of any such vessel all expenses incurred by the company under this section in connection with the vessel"

The shipowners relied in part on Section 1 of the 1900 Act which provided thus:-

"The limitation of the liability of the owners of any ship set by Section 503 of the Merchant Shipping Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship."

Section 503 of the 1894 Act was in the following terms:

- "(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,)
- (a) Where any loss of life or personal injury is caused to any person being carried in the ship;

- (b) Where any damage, or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;
- (c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;
- (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts ..."

Mr Justice Langton rejected the shipowner's claim that it was entitled to limit its liability in respect of the wreck removal expenses. Of relevance is that the learned Judge found that the expenses in question did not constitute "loss or damage caused to property or rights of any kind". In this regard it was held as follows⁽⁶⁾:-

"It is evidently arguable that although expenses may not be loss or damage strictly so-called, equally the right of the Manchester Ship Canal Company to an unobstructed fairway has in this case been interfered with, and it is no great stretch of language to describe the price of restoring that right as a form of loss or damage. The difficulty, however, is to see how the loss or damage in question is caused to any property or rights. To state the matter as exactly as possible : the right of the Manchester Ship Canal Company is infringed by an obstruction : the removal of the obstruction causes a certain expense : but neither the right nor the property of the

(6) at 321

company has thereby suffered any loss or damage. To illustrate the matter in legal language, the canal company in seeking to recover these expenses under its statutory rights is proceeding rather by way of a simple action for debt than by laying an action in tort against the shipowner."

In 1955 the House of Lords had cause to consider the question in the case of "The Stonedale No. 1".⁽⁷⁾ A barge (the "Stonedale No. 1") belonging to the appellants and which was under tow of the steam tug the "Warrendale" in the Manchester Ship Canal grounded and sank owing to the improper navigation by the tug owners' servants of the tug which was under the same ownership. No evidence of the tug owners' personal fault or privity was forthcoming. The canal company (respondent), having raised the barge at the request of its owners, sought to recover the expenses of so doing under the Manchester Ship Canal Act, 1936 and more particularly Section 32 (2) thereof. The resulting claim gave rise to a dispute regarding the right of the barge owners to limit their liability. The amount for which the appellants would have been liable if their claim to limit was well-founded would have been £ 1 681 2s 6d whereas the Respondents had incurred expenses amounting to £ 7 609 1s 4d. The barge owners sought a declaration of limitation of their liability based on Sections 1 and 3 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900 or, failing that, the provisions of the local statute (the Manchester Ship Canal Company Act, 1897). Section 1 of the 1900 Act (which was repealed in 1958) provided that:-

"The limitation of the liability of the owners of any ship set by Section 503 of the Merchant Shipping Act 1894 shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation of the ship."

(7) The Stonedale No. 1 Richard Abel & Sons Ltd, Owners of Dumb Barge Stonedale No. 1 v Manchester Ship Canal Co. and others [1955] 2 All ER 689 (HL)

Section 1 had to be read in conjunction with Section 3 which provided:-

"The limitation of liability under this Act shall relate to the whole of any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or private act of parliament and notwithstanding anything contained in such act."

The Manchester Ship Canal Company Act (which was amended in 1936) conferred on the canal company wide powers of removal of obstructions, and displays striking parallels to the South African Merchant Shipping Act and the relevant provisions contained therein. It provided the legal machinery for the canal company to obtain reimbursement of its costs by way of selling the wreck and recouping from the proceeds. It also purported to allow the owners of vessels becoming wrecks or obstructions in the canal, to limit their liability to a fixed calculable amount for any injury or damage caused by them⁽⁸⁾.

In the Court of first instance, Mr Justice Wilmer considered the decision in the "Millie" and held that, whilst he was by no means satisfied that the reasoning of Mr Justice Langton was correct, he was obliged to follow that decision and accordingly held that the shipowners were not entitled to limit their liability.

The barge owners' appeal to the Court of Appeal was dismissed⁽⁹⁾. Lord Justice Singleton held that the shipowners were not entitled to limit their liability because the claim of the Manchester Ship Canal Company for the reimbursement of its expenses was not a claim for damages and accordingly Section 1 of the 1900 did not apply. The Judge stated as follows:⁽¹⁰⁾

(8) Hill at p 541

(9) [1954] 2 All ER 170

(10) at 179A to C

"Under s. 32 of the Ship Canal Act, 1936, there is an additional step, viz., the giving of notice to the owner before the raising or removal of the vessel, on which counsel for the defendants submitted that the expense of removal was not damages resulting from faulty navigation, but was expense incurred by the defendants because the shipowner had not on notice removed his stranded vessel. I prefer to look on the case in this way. There is no claim for damages. The defendants' claim is in respect of an expense incurred by them under the terms of the statute, which gives them a right to recover, not damages, but expense incurred in performing their duty or obligation to keep navigation open. If the question is looked at in this way there is no conflict between the private Act and the provisions as to limitation in the Merchant Shipping Acts. The section enables the defendants to recover from the plaintiffs all the expenses incurred. The plaintiffs cannot avoid a great part of their liability by saying that they were negligent in causing the original obstruction. A decision to the contrary might well result in the plaintiffs being much better placed if their vessel, sunk through faulty navigation, was of considerable value, and they left the defendants to raise it and to return it to them. In my judgment, an amount payable under s.32 is not an amount of damages, and shipowners are not entitled to limitation in respect of the amount."

Similarly, Mr Lord Justice Jenkins⁽¹¹⁾ stated as follows:-

"It follows that the plaintiffs, in order to succeed, must bring the case within s. 1 of the Act of 1900. That section is confined to liability to damages, and although the range of

(11) at 184A to E

damages to which it extends includes damages in respect of any loss or damage to property or rights of any kind caused by the improper navigation or management of a vessel, provided that there is no actual fault or privity on the part of the owners, no claim which is not a claim to damages can fall within it. I agree that, if a vessel was sunk or stranded in the canal through the negligence of those in charge of her, and the defendants brought an action for damages at common law in respect of the obstruction, her owners (provided there was no actual fault or privity on their part) could limit under the Act of 1900. The position may well be the same where a statute (eg. s. 74 of the Act of 1847) imposes, irrespective of negligence, a liability in damages on the owners of a vessel which does damage to the canal, provided that in the particular case the necessary conditions of improper navigation and absence of actual fault or privity on the part of the owners can be established.

But a close consideration of s. 32 of the Act of 1936 leads me to the conclusion that the liability of the owner of a sunken or stranded vessel under that section to pay the expenses incurred by the defendants in and about the raising and removal of the vessel is not a liability to damages at all. The object of the section is to enable the defendants in their own interests and in those of all users of the canal to secure that their navigation is kept clear of obstructions in the shape of sunken, stranded or abandoned vessels and to cause this to be done either by and at the expense of any such vessel or at the option of the owner by the defendants at his expense. In the latter case the expenses incurred by the defendants, so far as not met by a sale of the salvaged vessel, are, according to the terms of the section, expressed to be recoverable, not as damages, but as civil debt."

When the dispute reached the House of Lords, which finally confirmed without criticism the trial court's decision that the 1900 Act only allowed the limiting of liability where the liability was one for damages, whereas the canal company's claim on the facts and under the circumstances was for the recovery of a debt, Viscount Simonds was persuaded by the reasoning of Jenkins, LJ who⁽¹²⁾ had drawn attention to the anomaly which would result were the owner to exercise the option conferred on him in terms of section 32(3) of the Ship Canal Act of 1936 to himself raise and remove the vessel. It was stated that there had been no submission or contention to the effect that on the exercising of that option, the owner could claim any limitation of the expenses he himself incurred. If, however, limitation applied in the event of the owner electing to leave the raising to the canal company, while the owner had to pay the expenses in full if he elected to do the work himself, the option "becomes no more than a trap, and no prudent owner would ever exercise it". Jenkins LJ also contemplated the situation arising whereby an owner would be able to recover a valuable vessel at the expense of the authorities to the extent of the difference between the full and the limited cost of raising it were limitation to apply. This the House of Lords stated had to be rejected as an "absurd result" and one which was "repugnant to justice and common sense"⁽¹³⁾.

The House of Lords upheld the finding of the Court of Appeal that the claim by the owners did not come within the wording of Section 9 of the Manchester Ship Canal Act of 1897 which afforded owners an entitlement to limit their liability where a vessel caused any "injury or damage to the portion of the canal without actual fault or privity of the owners". Referring to the decision in Workington Harbour and Dock Board v Towerfield SS (Owners)⁽¹⁴⁾ the Court held that these words were confined to damage which a vessel may do to the works which constitute the harbour, dock or pier⁽¹⁵⁾ and did not cover the loss incurred by the company in respect of its undertaking to clear the canal⁽¹⁶⁾.

(12) at 185D to H of the Court of Appeal Judgment

(13) at 693F to G

(14) [1950] 2 All ER 414

(15) see the Workington judgment at p 443

(16) at page 694 I

There have been other cases in which the harbour authorities have enjoyed a right to recover sums due to it in respect of wreck removal under a local statute without the shipowner being able to limit under the Merchant Shipping Acts. Limitation in respect of wreck-raising expenses became an issue in the "**Berwyn**".⁽¹⁷⁾ On 15th February 1976, that vessel struck the Queen's North Training Bank near Taylor's Spit at the entrance to the Crosby Channel, as a result of which she suffered damage including holing, was taken in tow and later sank in Liverpool Bay. The plaintiff harbour authorities, in the exercise of powers granted by the Mersey Docks and Harbour Act, 1894 which included the power to remove wrecks or other obstructions to the port, the power to sell the wreck and to recover the costs of wreck removal from the proceeds and, additionally, the right to recover any deficiency which may be outstanding and unsatisfied out of such proceeds from the party who owned the wreck at the time of her sinking, stranding or abandonment, raised her.

In further exercise of their statutory powers the Plaintiffs sold certain articles saved from the vessel for £ 225 which they retained to reimburse themselves in part for the cost of removal, the balance of which amounted to £ 25 263.28. It was common cause that the casualty was the direct result of negligent navigation and neither party to the litigation attempted to argue that the shipowner was personally at fault or that the harbour authority was not acting within the scope of its authority. The amount of the defendant shipowner's limited liability under the Merchant Shipping Acts, 1894 to 1974 was £ 19 163.47. Also included in the Mersey Docks and Harbour Act was a provision which purported to provide protection to the shipowner by way of imposing a maximum liability to the harbour authority of a sum not exceeding the amount specified in Section 503 of the Merchant Shipping Act, 1894⁽¹⁸⁾ if he was not entitled to limit under the Merchant Shipping Act and its various amendments. The relevant Section 3(3) provided thus:-

(17) [1977] 2 Lloyd's Rep. 99, CA

(18) as amended in 1958

"If the proceeds of sale of the wreck of the vessel ... so ... removed ... are insufficient ... to reimburse the harbour authority ... they may recover the deficiency from the person who was the owner of the vessel at the time of the sinking ...

Provided that if the owner of the vessel so ... removed ... is not under the provisions of the Merchant Shipping Act 1894 to 1974 ... entitled to limit his liability in respect of the said deficiency, that owner shall not be liable to pay ... the sum exceeding the amount prescribed ... as the limit of the liability to damages of the owner of the ship in respect ... damage to ... goods ... or other things."

The plaintiffs had based their claim on two separate and distinct causes of action : one based on the principle of fault, the other arising from a statutory debt which was not dependent on there being negligent navigation. Their claim was to recover damages for negligence, on the one hand, and £ 25 263.28 being the balance of the removal costs, on the other. The shipowners argued that the authority had to elect on which of these two bases to proceed and that by reason of their election to claim for recovery of the statutory debt, were precluded from claiming damages for negligent navigation. By virtue of the terms of the proviso to subsection 3 the shipowners contended that their liability under the Mersey Docks and Harbour Board Act was limited to £ 19 163.47⁽¹⁹⁾.

The authority submitted that to each of its two causes of action the shipowners had a separate and distinct defence. In respect of both the claim for damages and the debt they had a right to limit their liability to £ 19 163.47. The authority had the right, it contended, to enforce both claims cumulatively so long as the total amount recovered did not exceed the amount of the deficiency, namely £ 25 362.28⁽²⁰⁾.

(19) see p101 col 2

(20) see p104 col. 1

The question for consideration was the meaning of the words "his liability in respect of the said deficiency". Did it mean the liability imposed on the shipowner irrespective of his own or his servants' or agents' fault by the first part of sub-section 3 to pay that net loss as a statutory debt? Or did it include the shipowners' liability to pay the same amount at common law for the negligence or other actionable fault of his servants or agents?⁽²¹⁾

Counsel for the shipowner argued for the second and wider construction, whereas the respondent authorities asked the Court to follow the narrower construction which was accepted. It was held that the words "in respect of the said deficiency" referred only to the liability of the shipowner in respect of any deficiency of wreck-raising and ancillary expenses imposed by statutory debt irrespective of fault and had no reference to any other liability for damages in respect of the same deficiency arising from negligence or other actionable fault. The harbour authority was entitled to plead both causes of action independently of the other⁽²²⁾. It is clear from the preceding pages that the benefit of limitation is available in circumstances where damage has been caused by acts, omissions or defaults of the shipowner's servants in the navigation or management of the ship, provided only that there was no actual fault or privity on the part of the shipowner. What emerges from this judgment most clearly is that limitation of liability as contemplated by the Merchant Shipping Act is based on the concept of fault, whereas a statutory debt which arises irrespective of fault is not a claim against which limitation will or can operate⁽²³⁾.

In some instances, wreck removal expenses have been included as part of the claim of a shipowner for damages in a collision action and, being part of the claim for damages, have been subject to limitation. The case of the "Arabert" [1961]⁽²⁴⁾ is a case in point:

(21) see page 103, ccl. 1 of the judgment

(22) see 99, col. 2

(23) see Hill Maritime Law, page 542

(24) 1 Lloyd's Rep 363 and [1961] 2 All ER 385

On 23 December 1995 a collision occurred in the port of Newcastle between the "Arabert" and the "Cyprian Coast" as a result of which the latter vessel sank in the harbour. The "Arabert" was solely to blame for the collision and no question arose as to there being actual fault or privity on the part of the owners of the "Arabert". The Tyne Improvement Commission under a local Act⁽²⁵⁾ had the wreck raised by contractors and handed her over to her owners for removal and repair on the owner's undertaking to repay all costs which the Commission had incurred. The owners of the "Arabert" brought an action for the right to limit their liability for damages payable to the owners of the "Cyprian Coast", to the owners of the cargo on board that vessel and to all other persons enjoying claims against them arising from the collision. It was conceded by the owners of the "Cyprian Coast" that the wreck raising expenses would be part of their damages in a collision action which they in turn had brought and in which they had succeeded. There was thus no dispute about the liability of the "Arabert" to pay damages, including the wreck raising expenses, or about the right to limit in respect of the liability to damages, other than in relation to the wreck raising expenses⁽²⁶⁾. The owners of the "Cyprian Coast" argued that the costs of repairs to their vessel were recoverable and should be the subject of limitation, whereas the costs of restoring the vessel to the surface where she would be capable of being repaired would similarly be recoverable but should not be subject to limitation⁽²⁷⁾.

The provisions of section 503(1) of the Merchant Shipping Act, 1894 are cited above and reference should be had thereto once again.

Placing reliance on the "Stonedale No. 1" (supra), the "Urka"⁽²⁸⁾ and "The Cairnbahn"⁽²⁹⁾, Lord Merriman concluded⁽³⁰⁾ that there had been "damage" to the "Cyprian Coast" as a result of the improper navigation of the "Arabert" within the meaning of Section 503 of the 1894 Act. In other words, the Court held that the wreck-raising expenses constituted "damage" to the vessel within the meaning of Section 503(1)(d) of the 1894 Act and, if this were not so, would constitute damage to the property of the owners of the sunken vessel and also to their rights within the meaning of Section 1 of the Merchant Shipping (Liability of Shipowners

(25) Incorporating s 56 and s 74 of the Harbours, Docks and Piers Clauses Act, 1847

(26) at 385 F to H

(27) at 389 E

(28) [1953] 1 Lloyd's Rep 478, although Lord Merriman opined that this case was wrongly decided

(29) [1914] p.25 at p33

(30) at 393 G

and others) Act of 1900. Placing great reliance on the nature of the claim it was held that limitation of liability under Section 503 of the 1894 Act was applicable in respect of such expenses when claimed as damages for negligence in a collision action against the ship at fault. The Learned Judge referred to the nature of the claim as being one which arose in tort because it was the "Arabert's" negligent navigation alone which caused the "Cyprian Coast" to sink, thereby causing damage to the Defendant's property and to their "rights" to her services as a ship⁽³¹⁾.

On the afternoon of 7th October 1996 a Taiwanese trawler entering the Robinson drydock in the port of Cape Town reportedly⁽³²⁾ got stuck in reverse gear and tore across the Alfred basin damaging five fishing boats moored at the Concentra. One of the boats, the "Kinglip" sank after being damaged beyond repair. It would not be unrealistic to suspect that her owners were or will be on the receiving end of a directive from the port authorities to remove the wreck.

The case of the "Arabert" could invite the owner of the Taiwanese trawler, if considered the negligent party, to delay in settling the claim for wreck removal of the sunken ship. It is clear that if an owner of a sunken ship does not comply with an order for wreck removal the authorities are be entitled to remove the wreck and claim the costs from the owner. If the sinking was caused by a collision with another ship, the owner who paid the costs of wreck removal can recover the costs from the other ship to the extent that liability can be attributed to that other ship. Given the finding in the "Arabert" to the effect that the owner of the "guilty" ship should be entitled to limit its liability in respect of the indemnity claim for the costs of wreck removal which the owner of the sunken vessel had fully paid, it would be far more favourable for that owner to wait until the owner of the sunken vessel has paid for the full costs of wreck removal with no limitation of liability, and then to settle the portion of the costs for which he is found to be responsible, subject to his entitlement to limit his liability.

(31) at 395 B to C

(32) The Cape Times, Tuesday 8 October 1996

Wreck Removal, Limitation of Liability and the 1957 and 1976 Conventions

The Merchant Shipping (Liability of Shipowners and Others) Act of 1958 significantly amended the nature of the limited liability available under Section 503 of the Merchant Shipping Act of 1894. It provided:

2(1) In subsection (1) of section five hundred and three of the Merchant Shipping Act 1894, the following paragraphs shall be substituted for paragraphs (c) and (d)-

- (c) where any loss of life or personal injury is caused to any person not carried in the ship through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship;**
- (d) where any loss or damage is caused to any property (other than any property mentioned in paragraph (b) of this subsection) or any rights are infringed through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship, or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship;**

and for the words "loss of or damage to vessels, goods, merchandise or other things", both where they occur in paragraph (i) and where they occur in paragraph (ii), there shall be substituted the words "such loss, damage or infringement as is mentioned in paragraphs (b) and (d) of this subsection".

Section 2(2) of that Act made provision for any occurrence giving rise to any obligation or liability arising in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned to be treated as one of the occurrences mentioned in paragraphs (b) and (d) of Section 2(1) of the Act. This

provision was incorporated into 1958 following the wording of Article 1(1)(c) of the 1957 Convention which extended the right to limit to "liability imposed by any law relating to removal of wreck". However Section 2(5) of the 1958 Act provided that Section 2(2)(a) would not come into force in the United Kingdom until such day as the Secretary of State decreed by statutory instrument. No date was ever appointed and accordingly this provision never became effective in the United Kingdom⁽³³⁾.

Interestingly Article 2(1)(d) of the 1976 Convention included a provision confirming the right to limit in respect of claims for the raising, removal or destruction of a ship which had sunk, was wrecked or was stranded or abandoned. Article 2(1)(d) makes provision for limitation "whatever the basis of liability may be" and thus in theory envisages limitation being competent whether the wreck is removed under statutory authority or pursuant to a contractual right or duty, or where the claim sounds in damages. Just as the British government never brought the relevant provisions of the 1957 Convention as enacted by the 1958 Merchant Shipping Act into operation, so too has a reservation been made in respect of the British version of the 1976 Convention⁽³⁴⁾. Consequently, liability for claims for the cost of wreck removal remains unlimited insofar as the operation is performed pursuant to statutory powers. In this regard the preamble to Article 2(1)⁽³⁵⁾ and the reservation made in respect thereof appear to be at variance with each other in that the latter appears, by implication, to apply only to instances where a wreck is removed at the order of government or local authority⁽³⁶⁾. Conversely, if one takes the ordinary meaning of the opening words of Article 2 it is irrelevant as to what the basis of liability is when claims in respect of the raising, removal, destruction or rendering harmless of a ship form the basis of an action for limitation. There is thus some doubt as to exactly what is meant in this paragraph as the preamble envisages all those claims listed in Article 2 being subject to limitation whereas it is quite clear that a reservation has been made in respect of wreck removal expenses. It is interesting to note that P&I insurers, as a general rule, usually cover the risk of wreck removal expenses but only in circumstances where the removal is compulsorily required by order of a national or local authority acting pursuant to a statutory power.

(33) see Griggs (book) page 22

(34) see paragraph 3 of Schedule 4, Part II of the 1979 MSA

(35) i.e. the reference to the words "whatever the basis of liability may be"

(36) see Hill, p 404

At this stage, a brief consideration of what constitutes damages in South African law may be apposite. In this regard it should be borne in mind that the recovery of wreck removal expenses by the authority from a shipowner is not dependent on there being negligence or any wrongdoing on the part of the shipowner.

LAWSA Volume 7, paragraph 16, defines damages by alluding to concepts such as the "reparation of a wrong" or the payment of a sum of money "in proportion to the wrongdoer's blameworthiness".

In the case of Russell Loveday NO v Collins Submarine Pipelines 1975 (1) SA 110, the Court had cause to consider whether a claim for the recovery of certain monies in terms of an insurance policy should be allowed. Clause 1(c) of the relevant policy purported to indemnify the assured in respect of the following:

"All other sums which the assured shall ... by contract or agreement become liable to pay in respect of claims made against the assured for damages of whatsoever nature."

The facts of the case are not material to the present enquiry; suffice to say the question that arose was whether the assured's liability to a third party who was the other party to a building contract with the assured was one for damages.

In argument reliance was placed⁽³⁷⁾ on the definition of damages given in Halsbury, Laws of England,⁽³⁸⁾ which is as follows:

"Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether such act or default is a breach of contract or a tort; or, put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him."

(37) at 145 G

(38) Third Edition, Volume 11, paragraph 383

The Court did not criticise the accuracy of the above definition, and found that the sum claimed by the insured constituted "damages" because on the facts the sum was payable to the third party as the result of the insured's breach of contract or wrongdoing. By implication, it is submitted, had the Court accepted the argument that the sum claimed under the policy had been payable to the third party even if there had not been a breach of contract or wrongdoing on the part of the insured, the Court would in all likelihood have found that the sum claimed did not constitute "damages" and accordingly would not have been claimable in terms of the policy. We thus see in this case a heavy reliance being placed on damages being a process of reparation or restoration of a patrimonial or non patrimonial loss arising out of a breach of contract or negligent wrongdoing. As noted above, it is quite clear that the circumstances giving rise to an authority's entitlement to claim wreck removal expenses from a shipowner are not dependent on either of those circumstances giving rise to the liability and accordingly wreck removal expenses cannot, it is submitted, be regarded as damages giving rise to an entitlement to limit in terms of Section 261 of the Act for expenses incurred by the Minister in terms of Section 304A(2).⁽³⁹⁾

DETERMINATION OF THE LIMITATION FUND AND THE VALUE OF THE GOLD FRANC

As appears from Section 261(4)(b) of the Act, quoted above, if a Court grants an Order entitling a shipowner to limit his liability in terms of Section 261 of the Act, it is incumbent upon that Court to determine the value of the gold franc used for the purposes of the calculation of a limitation fund in South African currency.

Unfortunately, and as a result of the differences between the South African and English Merchant Shipping Acts as they presently stand, little assistance can be obtained from the English authorities. Prior to the amendment of the English Merchant Shipping Act in 1979 the value of the gold franc for the purposes of limitation was set in periodic statutory instruments, as was the case in South Africa prior to the amendment of the South African Merchant Shipping Act in 1995. The English Merchant Shipping Act, 1979 gave effect to the 1976 Convention on Limitation of Liability for Maritime Claims and introduced the Special

(39) For a comprehensive review on the position in American law of wreck removal and a shipowner's right to limitation see Arthur J Blank "Wreck Removal; Statutory Restrictions and Harbours Act" (1979) 53 *Tulane Law Review*, 1299

Drawing Right (SDR) as the unit to be used for the purposes of calculating the quantum of the limitation fund. Article 8 of the Convention states that the limitation amounts "shall be converted into the national currency of the state in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that state is equivalent to such payment." As noted above, the original British tonnage-based limitation statutes (Merchant Shipping Act 1854, 1862 and 1894) fixed the limits at £15.00 or £ 8.00 sterling per ton. The limits in Article 3(1) of the 1957 Convention were expressed in francs which were defined in Article 3(6) as being "units consisting of 65.5 milligrammes of gold of millesimal fineness 900". The system was based on gold values which were thought to be stable and uniform. However, as has been noted, when that proved not to be the case the international community turned to the Special Drawing Rights of the International Monetary Fund (IMF) which is a unit of account whose value is determined daily by the IMF on the basis of a number of currencies⁽⁴⁰⁾.

A Protocol to the 1957 Convention was agreed on in December 1979 which converted its gold franc figures into SDR. The protocol was brought into force in the United Kingdom by Section 1 of the Merchant Shipping Act, 1981, and entered into force on 6th October, 1984⁽⁴¹⁾.

When amending its Merchant Shipping Act in 1985, South Africa did not follow the 1979 Protocol. The determination by Government Notice 2515 contained in Government Gazette dated 25 November 1985 was as follows:

- i) Liability for damages in respect of loss of life or personal injury where no loss of or damage to property or rights arises:- limited to R432,00 per ton.
- ii) Liability in respect of loss of or damage to property or rights where no claim for damages in respect of loss of life or personal injury arises:- R139,00 per ton.

(40) Sweet and Maxwell p37

(41) Sweet and Maxwell p38

- iii) Liability arises for damages in respect of loss of life or personal injury as well as in respect of loss of or damage to property or rights arises:- an aggregate amount of R432,00 per ton with R293,00 per ton enjoying preference in respect of claims for loss of life or personal injury, with the unsatisfied portion of a claim for loss of life or personal injury ranking pari passu with a liability arising in respect of loss of or damage to property or rights.

Prior hereto⁽⁴²⁾ the limits of £ 15 per ton and £ 8 per ton were substituted by 3100 and 1000 gold francs respectively with 2000 francs per ton enjoying preference in respect of claims for loss of life or personal injury over property damage claims. In 1985, these limits were reduced to 2635 gold francs and 850 gold francs respectively⁽⁴³⁾. The limits in iii) above were reduced from 3100 and 2100 to 2635 and 1785 gold francs respectively.

By Government Notice dated 24th September 1993 the Director-General specified 2635 francs as being equivalent to R552, and 850 gold francs as being equivalent to R178.

In 1995⁽⁴⁴⁾ Section 261 was amended so that subsection 261(4) now reads:

- "(a) a gold franc means a unit consisting of 65.5 mg of gold of millesimal fineness 900;
- (b) the value of such gold francs in SA currency shall be determined by the Court seized of the case."

Section 261(5) was deleted in its entirety. It will be recalled that subsection 5 empowered the Secretary of Transport to specify the rand equivalent of the gold franc limits referred to in Section 261(1)(a) to (c). Thus, the 1995 South African tonnage limitation provisions left the "currency" of the calculation in gold francs but included a provision to the effect that the Court seized with the relevant litigation would have to determine the rand value of the gold francs on the basis of

(42) as per Act No 30 of 1959 which amended the MSA

(43) as per Act 25 of 1985

(44) as per the Transport General Amendment Act No 16 of 1995 which appeared in Government Gazette No 16524 dated 5 July 1995

evidence presented on the actual value of 65.5 milligrams of gold of millesimal fineness 900. The only clue that is given is that a gold franc is said to be 65.5 mg of millesimal fineness 900.

To date there have been no South African Court decisions which indicate how these provisions are to be dealt with. The formula set out below thus constitutes a view of a possible, if not probable manner, in which a Court will make such a calculation. The calculation is dependent upon the gold price which is quoted in South Africa in United States Dollars. Accordingly, the calculation will vary from time to time depending on fluctuations in the gold price and in the rand/dollar exchange rate:

Step 1

On the assumption that the gold price as quoted relates to gold of millesimal fineness 900 and in circumstances where the gold price is quoted in United States Dollars, ascertain the price of 1 ounce gold in rand;

Step 2

Convert the price to 1 gram in rand terms (1 ounce = 31.104 grams and 1 gram = 0.032 ounces) by dividing the rand price by 31.104. This will convert to the rand price of 1 gram;

Step 3

Divide the price of 1 gram by 1000 and multiply by 65.5.
This will equal the rand price of 1 gold franc.

Step 4

Multiply the rand price of 1 gold franc by the gross registered tonnage of the vessel in question, and then by 2635 or 850 or 1785 as the case may be.

The following represents a comparison of the tonnage limitation figures before and after the 1995 amendment⁽⁴⁵⁾:

	Pre-Amendment	Post-Amendment
Claims for damages in respect of loss of life or personal injury as in (i) above	R 552.00 per ton USD 123.00 per ton	R 9489.00 per ton USD 2109.00 per ton
Claims for damages in respect of damage to property as in (ii) above	R 178.00 per ton USD 39.50 per ton	R 3 031.00 per ton USD 680.00 per ton

Thus it will be seen that in the absence of a statutory determination of the rand value of the gold franc unit, practitioners, in advising shipowners facing claims in circumstances where they would be entitled to limit their liability, cannot with nearly as much degree of specificity as before advise their clients as to their maximum liability exposure. Coupled herewith is the question as to on what date conversion of the unit of account (as in the UK) or value of the gold franc (as in RSA) into the national currency of the country where limitation is sought should take place. In these times of widely fluctuating currencies, the answer to this question could make a great difference to the amount that one party has to pay and the other is entitled to receive. Article 8(1) of the 1976 Convention makes it clear when the conversion should take place in circumstances where a limitation fund has been constituted. However, what is the relevant date where no limitation fund is constituted? Article 8(1) of the Convention does not refer to the date on which the decree is pronounced. The only relevant date appears to be that of payment⁽⁴⁶⁾.

Section 1(3) of the UK Merchant Shipping Act of 1981 specifically provided that if no fund was constituted the date of judgment was to be the date of conversion⁽⁴⁷⁾.

(45) based on prevailing SAR / USD exchange rate of R4.50 / USD 1.00 and USD 380.00 per ounce

(46) Sweet and Maxwell page 38

(47) Sweet and Maxwell page 38 footnote 34

In the late 1960's, the English Courts had cause to consider this question in two cases, namely that of "The Mecca"⁽⁴⁸⁾ and "The Abadesa"⁽⁴⁹⁾. In both these cases the date for conversion was crucial as a statutory declaration changing the rate of the sterling equivalent of the gold franc was made after the date of collision giving rise to the limitation action but before the decree of limitation was made.

In the case of "The Abadesa" the limitation claim arose from a collision in the River Scheldt between that vessel and the "Miraflores" as the result of which a third vessel, the "George Livanos" ran aground and was damaged in February 1963. Apportionment of liability was established in February 1967 but in February 1966 the Plaintiffs (owners of the "Abadesa") had already commenced limitation proceedings. In November 1967 the pound sterling was devalued and shortly thereafter and also in November 1967 a new conversion rate came into force⁽⁵⁰⁾. In February 1968 a limitation decree was made in which the Admiralty Registrar applied the new conversion rate which produced a higher limit than the old conversion rate would have done. Mr Lord Justice Karminski at page 730 B said:

"In my view the Order of 1967 meant that as from November 22 1967, the Court had to convert into sterling at the rate there stated. The Admiralty Registrar applied accordingly this rate at the time he made the decree of limitation, namely on February 21, 1968. In my view he was right in so doing, and on this point the Plaintiffs' appeal must fail".

Similarly, in the case of "The Mecca" the Plaintiffs, the United Arab Maritime Company brought, a claim to limit their liability for damages in respect of a collision between their ship the "Mecca" and Blue Star Line Limited's ship the "Freemantle Star" which took place in the Gulf of Suez in May, 1965. In February 1968 the Admiralty Registrar decreed that the amount of the limit of the Plaintiffs' liability should be ascertained by applying the conversion rate specified by the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order of 1967. This was the new conversion rate for the conversion of gold francs mentioned in Section 1 of

(48) [1968] 2 or ER 731

(49) [1968] 2 or ER 726

(50) as specified by the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order of 1967

the Merchant Shipping (Liability of Shipowners and Others) Act of 1958 after the devaluation of the pound sterling. The Plaintiffs appealed against the determination of the Registrar on the basis that the Registrar should have applied the conversion rate that was applicable under the corresponding Order of 1958, being the rate applicable when the collision took place in 1965. The court applied the statutory Order or determination in force at the date when ascertainment was made (i.e. when limitation was decreed), but with the caveat that if a payment into Court was made at an earlier date it would be adequate if calculated in accordance with the statutory determination in force at the date of such payment. The dismissal of the validity of the decree made by the Admiralty Registrar had the result of fixing the Plaintiffs' liability for damages at £215 620.00 whereas had the earlier statutory determination been adopted they would have been liable only for a lesser sum, namely £184 816.00.

The Durban and Coastal Local Division of the South African Supreme Court had cause to consider this question in the case of Nagos Shipping Limited v Owners, cargo laden on board the MV "Nagos".⁽⁵¹⁾ On 26 May 1993 the "Nagos" sank with loss of life and cargo some 15 nautical miles south of Cape St. Francis. Violent seas were said to have accounted for the disaster. The vessel had sailed from Richards Bay a day or so earlier where it had loaded a cargo of low ash coal destined for Antwerp. The cargo owners had sought and obtained an order for the arrest of 9 life jackets which had survived the sinking as security for their claims as owners of the cargo. It was these claims for the loss of the cargo that gave rise to an application by the owners of the vessel for a declaration entitling it to the right, if any, in terms of Section 261(1)(b) of the Merchant Shipping Act, to limit its liability in respect of cargo claims to the equivalent of 850 gold francs per ton of the ship's tonnage. When the application was launched, the Rand equivalent of 2 635 and 850 gold francs had been fixed by the Director-General of Transport in November 1985 at R432 per gold franc and R139 per gold franc, respectively. However, by the time of the hearing, those equivalents had been updated by the Government Notice of September 1993 to R552 and R178 respectively. In granting the declaration, the Court ruled that the rate fixed by the later notice applied for the following reasons:-

(51) [1996] 2 SA 261 (D)

"In South Africa, the Director-General of Transport is seized of the matter : and it does no disservice, I feel, to the proper confines of judicial knowledge that in the present matter the shrinking value of the Rand underlies the new and increased values he has now determined. The argument is of course obvious. A claimant under section 261 should not be bound to a Rand equivalent of the gold franc which no longer represents its true value. The Act envisages that changes can be called for. That is what has been done. It would be artificial in the extreme, as I see it, that the shipowner should be entitled to rely on an obsolete Rand - gold franc conversion rate that no longer reflects its true value. The reasoning of Brandon, J (*in the Mecca*) is, with respect, entirely persuasive. The Director-General of Transport is not legislating retrospectively. He is determining a conversion rate in order to give proper substance to any limitation fund that may be set up. In my view the Applicant was well advised to put forward the alternative figure of R6 582 796 based on the new values."⁽⁵²⁾

It is submitted that some additional guidance as to the approach which a South African Court will be likely to adopt might be obtained by considering the South African Courts' attitude to damages awarded in a foreign currency. As a general rule, where a claimant is awarded damages in a foreign currency, the applicable date for calculating the South African rand equivalent of the foreign currency is the date of payment: And so, for example, in the case of Barclays Bank of Swaziland Limited vs Mnyeketi⁽⁵³⁾ where the Plaintiff, a company of bankers incorporated under the Laws of the Kingdom of Swaziland brought an action for provisional sentence against the South African resident Defendant, one finds the Court entering provisional sentence against the Defendant for payment to the Plaintiff of an amount stated in the currency of the Kingdom of Swaziland, or "the equivalent in South African rands at the time of the payment"⁽⁵⁴⁾. Stegmann J chose to ignore the obiter dictum of Nestadt J in the earlier case heard in the same Division, namely that of Voest Alpine Intertrading Gesellschaft MbH vs Burwil and Co SA (Pty) Limited⁽⁵⁵⁾ where it was held that the relevant date for conversion was the date when the damages were suffered as opposed to the date when the damages were quantified by judgment of the court, or at the rate of exchange on any other

(52) at 272 J to 273 C

It is of course no longer true that the Director-General of Transport is empowered to determine the rand value of the gold franc, it now being left to the Court seized with the matter.

(53) 1992(3) SA 425 (W)

(54) see page 438 A to B

(55) 1985(2) SA 149 (W)

date. After having given lengthy consideration to the question as to whether in fact the Court had the power to enter Judgment for payment to be made in a foreign currency and having considered the judgments in Malilang and Others vs MV "Houda Pearl"⁽⁵⁶⁾ and Murata Machinery Limited vs Capelon Yarns (Pty) Ltd⁽⁵⁷⁾ the Learned Judge found that there was no general rule of common law or procedure which precluded the Transvaal Court "from giving judgment for payment of a sum of money expressed in units of any foreign currency, or its equivalent in South African Rands at the time of payment, when the relevant legal obligation was incurred in a manner which contemplated quantification of the debt in such foreign currency"⁽⁵⁸⁾.

In the case of Standard Chartered Bank of Canada vs Nedfin Bank Limited⁽⁵⁹⁾ the appellant bank which was incorporated under Canadian Law had sued the respondent bank which was incorporated under South African law for damages amounting to some USD2.5 million allegedly suffered by it as a result of its reliance upon a negligent misstatement allegedly made by the respondent. Having established that it was competent for a South African Court to award delictual damages (as well as damages for breach of contract) in a foreign currency⁽⁶⁰⁾, it was held that the damages to be awarded in the present case should be expressed in United States Dollars as it was in that currency in which the loss was "felt"⁽⁶¹⁾. At 777 C - D Corbett, CJ said:

"I accordingly conclude that the damages to be awarded in this case should be expressed in US Dollars. It is implicit in any Order to this effect that the Judgment debt may be satisfied in South Africa by payment in the foreign currency or by the payment of its equivalent in rand when paid ... Any other conversion date could render meaningless the award of the foreign currency".

(56) 1986(2) SA 714 (A)

(57) 1986(4) SA 671 (C)

(58) at 435 H to I

(59) 1994 (4) SA 747

(60) having placed heavy reliance on the case of the Despina R 1979[1] All ER 421 (HL) and case of Malilang and Others vs MV "Houda Pearl", supra

(61) at 777 A to B

In conclusion and applying the abovementioned principles, should a shipowner institute a limitation action and should, as a result thereof a limitation fund be constituted, it is probable that the Court will apply the gold price prevailing as at the date of the constitution of the fund for the purposes of determining the South African rand equivalent of the gold franc limitation amount. Should the shipowner raise its right to limit its liability as a defence to a claim, and should that defence be successful, it is submitted that a South African Court will in all likelihood apply the gold value prevailing at the time of the shipowner's payment of the limited amount of the claimant's claim. Although, as indicated above, Section 261 of the South African Merchant Shipping Act differs from the equivalent provisions in the English Merchant Shipping Act, a South African Court will undoubtedly take note of the provisions of the 1976 Convention as referred to above.

CONCLUSION

Diplomatic conferences usually take place in smoke-filled rooms. The conventions which emanate therefrom, although they are the product of hours of intense debate, invariably present their own problems of interpretation and application. This work does not purport to be a detailed A to Z guide to limitation of liability but rather to create an awareness of some, if not all, of the circumstances in which a shipowner will be entitled to limit his liability.

Limitation is a question which plagues the minds of practitioners immediately upon the occurrence of an incident giving rise to liability. In fact, it touches just about every casualty. Passengers on the ill-fated "Achille Lauro" who lost goods worth thousands of rands when it sank almost two years ago, are still fighting for financial reparation, a battle which will be governed to a large extent by the provisions of the Athens Convention, for example. The international community has come a long way in reaching international uniformity. Although the oil regime and the emerging HNS regime suggest that perhaps limitation of liability can only survive when coupled with other schemes that ensure that in most cases claimants will receive full compensation which, in turn, would seem to suggest the erosion of the general limitation of liability, there can be no doubt that the inherent risks in shipowning being what they are, limitation of liability must remain an invaluable facility.

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7. A H E Popp, QC "Limitation of Liability in Maritime Law - An Assessment of its Viability from a Canadian Perspective" Journal of Maritime Law and Commerce, Volume 24 No. 2, April 1993
8. Alex Rein "International Variations on Concepts of Limitation of Liability" (1979) 53 Tulane Law Review 1259
9. Sir Barry Sheen "Limitation of Liability : The Law Gave and the Lords Have Taken Away," Journal of Maritime Law and Commerce, Volume 18, No. 4, October 1987
10. Michael Thomas "British Concepts of Limitation of Liability", (1979) 53 Tulane Law Review, 1205

APPENDIX 1

RATIFICATIONS AND ACCESSIONS

Belgium	2. 6.30
Brazil	28. 4.31
Denmark	2. 6.30 ⁽¹⁾
Dominican Rep.	23. 7.58
Finland	12. 7.34 ⁽¹⁾
France	23. 8.35 ⁽²⁾
Hungary	2. 6.30
Malgache Republic	23. 8.35 ⁽³⁾
Monaco	15. 5.31 ⁽⁴⁾
Norway	10.10.33 ⁽¹⁾
Poland	26.10.36
Portugal	2. 6.30
Spain	2. 6.30
Sweden	1. 7.38 ⁽¹⁾
Turkey	4. 7.55

Note

- (1) Convention denounced, with effect from June 30, 1963.
- (2) Convention denounced, with effect from October 26, 1976.
- (3) By the notification of France.
- (4) Convention denounced, with effect from January 24, 1977.

INTERNATIONAL CONVENTION RELATING TO THE LIMITATION OF THE LIABILITY OF OWNERS OF SEA-GOING SHIPS. SIGNED AT BRUSSELS ON OCTOBER 10, 1957

THE HIGH CONTRACTING PARTIES

Have recognised the desirability of determining by agreement certain uniform rules relating to the limitation of the liability of owners of sea-going ships:

Having decided to conclude a Convention for this purpose, and thereto have agreed as follows:

Article 1

1. 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 occurrence giving rise to the claim resulted from the actual fault or privity of the owner:

- (a) loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;
- (b) loss of life of, or personal injury to, any other person whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: Provided however that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit his liability when

the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers;

- (c) any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbour works, basins and navigable waterways.

2. In the present Convention the expression "personal claims" means claims resulting from loss of life and personal injury: the expression "property claims" means all other claims set out in paragraph (1) of this article.

3. An owner shall be entitled to limit his liability in the cases set out in paragraph (1) of this Article even in cases where his liability arises, without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership possession, custody or control of the ship.

4. Nothing in this Article shall apply:

- (a) to claims for salvage or to claims for contribution in general average;
- (b) to claims by the Master, by members of the crew, by any servants of the owner on board the ship or by servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives or dependants, if under the law governing the contract of service between the owner and such servants the owner is not entitled to limit his liability in respect of such claims or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 3 of this Convention.

5. If the owner of a ship is entitled to make a claim against a claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Convention shall only apply to the balance, if any.

6. The question upon whom lies the burden of proving whether or not the occurrence giving rise to the claim resulted from the actual fault or privity of the owner shall be determined by the *lex fori*.

Article 2

1. The limit of liability prescribed by Article 3 of this Convention shall apply to the aggregate of personal claims and property claims which arise on any distinct occasion without regard to any claims which have arisen or may arise on any other distinct occasion.

2. When the aggregate of the claims which arise on any distinct occasion exceeds the limits of liability provided for by Article 3, the total sum

representing such limits of liability may be constituted as one distinct limitation fund.

3. The fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

4. After the fund has been constituted, no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund if the limitation fund is actually available for the benefit of the claimant.

Article 3

1. The amount to which the owner of a ship may limit his liability under Article 1 shall be:

- (a) where the occurrence has only given rise to property claims, an aggregate amount of 1,000 francs for each ton of the ship's tonnage;
- (b) where the occurrence has only given rise to personal claims, an aggregate amount of 3,100 francs for each ton of the ship's tonnage;
- (c) where the occurrence has given rise both to personal claims and property claims, an aggregate amount of 3,100 francs for each ton of the ship's tonnage, of which a first portion amounting to 2,100 francs for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to 1,000 francs for each ton of the ship's tonnage shall be appropriated to the payment of property claims; provided however that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the second portion of the fund.

2. In each portion of the limitation fund the distribution among the claimants shall be made in proportion to the amounts of their established claims.

3. If before the fund is distributed the owner has paid in whole or in part any of the claims set out in Article 1 paragraph 1 he shall *pro tanto* be placed in the same position in relation to the fund as the claimant whose claim he has paid, but only to the extent that the claimant whose claim he has paid would have had a right of recovery against him under the national law of the State where the fund has been constituted.

4. Where the shipowner establishes that he may at a later date be compelled to pay in whole or in part any of the claims set out in Article 1 paragraph 1 the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable the shipowner at such later date to enforce his claim against the fund in the manner set out in the preceding paragraph.

5. For the purpose of ascertaining the limit of an owner's liability in

accordance with the provisions of this article the tonnage of a ship of less than 300 tons shall be deemed to be 300 tons.

6. The franc mentioned in this article shall be deemed to refer to a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amounts mentioned in paragraph 1 of this Article shall be converted into the national currency of the State in which limitation is sought on the basis of the value of that currency by reference to the unit defined above at the date on which the shipowner shall have constituted the limitation fund, made the payment or given a guarantee which under the law of that State is equivalent to such payment.

7. For the purpose of this Convention tonnage shall be calculated as follows:

—in the case of steamships or other mechanically propelled ships there shall be taken the net tonnage with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage.

—in the case of all other ships there shall be taken the net tonnage.

Article 4

Without prejudice to the provisions of Article 3, paragraph 2 of this Convention, the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted.

Article 5

1. Whenever a shipowner is entitled to limit his liability under this Convention, and the ship or another ship or other property in the same ownership has been arrested within the jurisdiction of a contracting State or bail or other security has been given to avoid arrest, the Court or other competent authority of such State may order the release of the ship or other property or of the security given if it is established that the shipowner has already given satisfactory bail or security in a sum equal to the full limit of his liability under this Convention and that the bail or other security so given is actually available for the benefit of the claimant in accordance with his rights.

2. Where, in circumstances mentioned in paragraph 1 of this Article, bail or other security has already been given:

- (a) at the port where the accident giving rise to the claim occurred;
- (b) at the first port of call after the accident if the accident did not occur in a port;
- (c) at the port of disembarkation or discharge if the claim is a personal claim or relates to damage to cargo;

the Court or other competent authority shall order the release of the ship, bail or other security given, subject to the conditions set forth in paragraph 1 of this Article.

3. The provisions of paragraphs 1 and 2 of this Article shall apply likewise if the bail or other security already given is in a sum less than the

full limit of liability under this Convention: Provided that satisfactory bail or other security is given for the balance.

4. When the shipowner has given bail or other security in a sum equal to the full limit of his liability under this Convention such bail or other security shall be available for the payment of all claims arising on a distinct occasion and in respect of which the shipowner may limit his liability.

5. Questions of procedure relating to actions brought under the provisions of this Convention and also the time limit within which such actions shall be brought or prosecuted shall be decided in accordance with the national law of the Contracting State in which the action takes place.

Article 6

1. In this Convention the liability of the shipowner includes the liability of the ship herself.

2. Subject to paragraph 3 of this Article, the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment, in the same way as they apply to an owner himself: Provided that the total limits of liability of the owner and all such other persons in respect of personal claims and property claims arising on a distinct occasion shall not exceed the amounts determined in accordance with Article 3 of the Convention.

3. When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the master or member of the crew is at the same time the owner, co-owner, charterer, manager or operator of the ship, the provisions of this paragraph shall only apply where the act, neglect or default in question is an act, neglect or default committed by the person in question in his capacity as master or as member of the crew of the ship.

Article 7

This Convention shall apply whenever the owner of a ship, or any other person having by virtue of the provisions of Article 6 hereof the same rights as an owner of a ship, limits or seeks to limit his liability before the Court of a Contracting State or seeks to procure the release of a ship or other property arrested or the bail or other security given within the jurisdiction of any such State.

Nevertheless, each Contracting State shall have the right to exclude, wholly or partially, from the benefits of this Convention any non-Contracting State, or any person who, at the time when he seeks to limit his liability or to secure the release of a ship or other property arrested or the bail or other security in accordance with the provisions of Article 5 hereof, is not ordinarily resident in a Contracting State, or does not have

his principal place of business in a Contracting State, or any ship in respect of which limitation of liability or release is sought which does not at the time specified above fly the flag of a Contracting State.

Article 8

Each Contracting State reserves the right to decide what other classes of ship shall be treated in the same manner as sea-going ships for the purpose of this Convention.

Article 9

This Convention shall be open for signature by the States represented at the tenth session of the Diplomatic Conference on Maritime Law.

Article 10

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Government which shall notify through diplomatic channels all signatory and acceded States of their deposit.

Article 11

1. This Convention shall come into force six months after the date of deposit of at least ten instruments of ratification, of which at least five by States that have each a tonnage equal or superior to one million gross tons of tonnage.

2. For each signatory State which ratifies the Convention after the date of deposit of the instrument of ratification determining the coming into force such as is stipulated in paragraph 1 of this Article, this Convention shall come into force six months after the deposit of their instrument of ratification.

Article 12

Any State not represented at the tenth session of the Diplomatic Conference on Maritime Law may accede to this Convention.

The instruments of accession shall be deposited with the Belgian Government which shall inform through diplomatic channels all signatory and acceding States of the deposit of any such instruments.

The Convention shall come into force in respect of the acceding State six months after the date of the deposit of the instrument of accession of that State, but not before the date of entry into force of the Convention as established by Article 11, paragraph (1).

Article 13

Each High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. Nevertheless, this denunciation shall only take effect one year after the date on which notification thereof has been

received by the Belgian Government which shall inform through diplomatic channels all signatory and acceding States of such notification.

Article 14

1. Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Government that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Government extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.

2. Any High Contracting Party which has made a declaration under paragraph 1 of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Government that the Convention shall cease to extend to such territory. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government.

3. The Belgian Government shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this article.

Article 15

Any High Contracting Party may three years after the coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to this Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

Article 16

In respect of the relations between States which ratify this Convention or accede to it, this Convention shall replace and abrogate the International Convention for the unification of certain rules concerning the limitation of the liability of the owners of seagoing ships, signed at Brussels on the 25th of August 1924.

In witness whereof the Plenipotentiaries, duly authorized, have signed this Convention.

Done at Brussels, this tenth day of October 1957, in the French and English languages, the two texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

PROTOCOL OF SIGNATURE

1. Any State, at the time of signing, ratifying or acceding to this Convention may make any of the reservations set forth in paragraph 2. No other reservation to this Convention shall be admissible.

2. The following are the only reservations admissible:

- (a) Reservation of the right to exclude the application of Article 1 paragraph 1 c);
- (b) Reservation of the right to regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons;
- (c) Reservation of the right to give effect to this Convention either by giving it force of law or by including in national legislation, in a form appropriate to that legislation, the provisions of this Convention.

STATUS: Entered into force on May 31, 1968

RATIFICATIONS AND ACCESSIONS

Algeria	18. 8.64
Australia	30. 7.80 ⁽¹⁾
Bahamas	21. 8.64 ⁽¹⁾⁽²⁾
Barbados	4. 8.65 ⁽¹⁾⁽³⁾
Belgium	31. 7.75
Belize	21. 8.64 ⁽¹⁾⁽³⁾
Denmark	1. 3.65 ⁽¹⁾⁽⁵⁾
Dominican Rep.	4. 8.65
Fiji	10.10.70
Finland	19. 8.64 ⁽¹⁾⁽⁵⁾
France	7. 7.59 ⁽¹⁾⁽⁶⁾
German Dem. Rep.	14. 2.79
Germany, Fed. Rep.	6.10.72 ⁽¹⁾
Ghana	26. 7.61
Grenada	4. 8.65 ⁽¹⁾⁽²⁾
Guyana	25. 3.66 ⁽¹⁾
Iceland	16.10.68
India	1. 6.71 ⁽¹⁾
Iran	26. 4.66 ⁽¹⁾
Israel	30.11.67 ⁽¹⁾
Japan	1. 3.76 ⁽¹⁾
Kiribati	21. 8.64 ⁽¹⁾
Malgache Republic	13. 7.65
Mauritius	21. 8.64 ⁽¹⁾
Monaco	24. 1.77
Netherlands	10.12.65 ⁽¹⁾
Norway	1. 3.65 ⁽¹⁾⁽⁵⁾
Papua New Guinea	14. 3.80
Poland	1.12.72
Portugal	8. 4.68 ⁽¹⁾
St. Lucia	4. 8.65 ⁽¹⁾⁽⁵⁾
St. Vincent Grenadines	4. 8.65 ⁽¹⁾⁽⁵⁾
Seychelles	21. 8.64 ⁽¹⁾⁽⁵⁾
Singapore	31. 5.68
Solomon Islands	21. 8.64 ⁽¹⁾⁽⁹⁾
Spain	16. 7.59 ⁽¹⁾
Sweden	4. 6.64 ⁽¹⁾⁽⁵⁾
Switzerland	21. 1.66
Syrian Arab Rep.	10. 7.72
Tonga	13. 6.78
Tuvalu	21. 8.64 ⁽¹⁾⁽³⁾
United Arab Rep.	7. 9.65 ⁽¹⁾
United Kingdom	18. 2.59 ⁽¹⁾⁽¹⁰⁾
Vanuatu	8.12.66 ⁽¹⁾
Zaire	17. 7.67

Notes

(1) Declaration, reservation or statement issued at the time of deposit of the

- instrument of acceptance, the text of which may be found by reference to the *CMI Yearbook* (1984/1985) at pp. 91-95.
- (2) Originally by the accession of the United Kingdom, subsequently by succession on becoming an independent state.
 - (3) By the accession of the United Kingdom.
 - (4) Egypt denounced the Convention, with effect from May 8, 1985.
 - (5) Denmark, Finland, Norway and Sweden denounced the Convention, with effect from April 1, 1985.
 - (6) Extended to New Hebrides from December 8, 1966.
 - (7) Including Berlin (West).
 - (8) Japan denounced the Convention on May 19, 1983, with effect from May 20, 1984.
 - (9) By succession, maintaining the reservations originally formulated by the United Kingdom, subsequently by independent accession on July 7, 1978.
 - (10) United Kingdom acceded on behalf of: Isle of Man, November 18, 1960; Bermuda, British Antarctic Territories, Falkland Islands and Dependencies, Hong Kong, Gibraltar, British Virgin Islands, August 21, 1964; Guernsey and Jersey, October 21, 1964; Cayman Islands, Montserrat, Turks and Caicos Islands, August 4, 1965.
 - (11) United Kingdom denounced the Convention with effect from December 1, 1986.
 - (12) Reportedly as a consequence of the extension to the New Hebrides (see n. 6 above).

PROTOCOL OF 1979 AMENDING THE INTERNATIONAL CONVENTION RELATING TO THE LIMITATION OF THE LIABILITY OF OWNERS OF SEA-GOING SHIPS. DATED OCTOBER 10, 1957. AGREED IN BRUSSELS DECEMBER 21, 1979

1. Article 3, paragraph 1 of the Convention is replaced by the following:

"1. The amounts to which the owner of a ship may limit his liability under Article 1 shall be:

- (a) where the occurrence has only given rise to property claims an aggregate amount of 66.67 units of account for each ton of the ship's tonnage;**
- (b) where the occurrence has only given rise to personal claims an aggregate amount of 206.67 units of account for each ton of the ship's tonnage;**
- (c) where the occurrence has given rise both to personal claims and property claims an aggregate amount of 206.67 units of account for each ton of the ship's tonnage, of which a first portion amounting to 140 units of account for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to 66.6 units of account for each ton of the ship's tonnage shall be appropriated to the payment of property claims.**

Provided however that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the second portion of the fund."

2. Article 3, paragraph 6 of the Convention is replaced by the following:

"6. The unit of account mentioned in paragraph 1 of this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in that paragraph shall be converted into the national currency of the State in which limitation is sought on the basis of the value of that currency on the date on which the shipowner shall have constituted the limitation fund, made the payment or given a guarantee which under the law of that State is equivalent to such payment. The value of the national currency, in terms of the Special Drawing Rights, of a State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

"7. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of the paragraph 6 of this Article may, at the time of ratification of the Protocol of 1979 or accession thereto or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows:

- (a) in respect of paragraph 1, a) of this Article, 1000 monetary units;
- (b) in respect of paragraph 1, b) of this Article, 3100 monetary units;
- (c) in respect of paragraph 1, c) of this Article, 3100, 2100 and 1000 monetary units, respectively.

The monetary unit referred to in this paragraph corresponds to 65.5 milligrammes of gold of millesimal fineness 900.

The conversion of the amounts specified in this paragraph into the national currency shall be made according to the law of the State concerned.

"8. The calculation mentioned in the last sentence of paragraph 6 of this Article and the conversion mentioned in paragraph 7 of this Article shall be made in such a manner as to express in the national currency of the State as far as possible the same real value for the amounts in paragraph 1 of this Article as is expressed there in units of account. States shall communicate to the depositary the manner of calculation pursuant to paragraph 6 of this Article or the result of the conversion in paragraph 7 of this Article, as the case may be, when depositing an instrument of ratification of the Protocol of 1979 or of accession thereto or when availing themselves of the option provided for in paragraph 7 of this Article and whenever there is a change in either."

3. Article 3, paragraph 7 of the Convention shall be renumbered Article 3, paragraph 9.

STATUS: Entered into force on October 6, 1984