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Contents

CHAPTER 1 INTRODUCTION	4
I Aim	4
II Background	5
a) General.....	6
b) Issue of Certainty	6
c) Issue of Uniformity	7
III Structure.....	8
IV Purpose	8
CHAPTER 2 LIMITATION OF LIABILITY AS A GLOBAL CONCERN	9
I Introduction to Limitation of Liability	9
II Transportation by Sea and Globalisation	9
III The Importance of Limitation to Marine Liability Underwriters	11
IV Origin of the Idea of Limitation of Liability as a Global Concern	11
V The European Case Investigated.....	13
a) Introduction.....	13
b) Origins of European Law.....	13
VI The United States Case Investigated.....	15
VII Limitation of Liability explained under the LLMC.....	16
VIII The South African Case Investigated	18
CHAPTER 3 LIMITATION OF LIABILITY IN SOUTH AFRICA.....	22
I Understanding Actual Fault and Privity in South African Context	22
II Case Law around the Burden of Proof required for Breaking Limitation	23
III Global Interpretations around Limitation of Liability, Breaking Limitation, Burden Of Proof, Fault and Actual Privity	23
a) English Case Law	24
i) Atlantik Confidence Case	24

ii) The Eurysthenes - English Decision, Dealing with the Requirement of Proving Fault	25
iii) Lennards Case – English Decision, Limitation of Liability of Juristic Entities and the Director as an Alter Ego’s	26
iv) Marion Case – English Decision, Limitation of Liability and the Alter Ego of a Juristic Entity	26
i) Saint Jacques II -England Limitation of Liability under the LLMC, Breaking Limitation	27
b) Canadian Case Law	28
i) Bayside Towing Ltd Case – Canadian Case, Right to Limit Liability under the LLMC	28
ii) Peracomo Case – Canadian Case, Limitation of Liability and the Level of Fault required to Break Limitation	29
c) South African Case Law	31
i) Nagos Case – SA Decision, Limitation of Liability as protection for the Ship Owner	31
ii) St Padarn Case – South African Decision, Limitation of Liability and the Burden of Proof for Actual Fault and Privity	31
iii) The Lady Gwendolen Case – South African Decision, Limitation of Liability and the Acts of the Master	32
iv) Atlantic Harvesters – South African Decision, Breaking Limitation	32
CHAPTER 4 FORUM SHOPPING AND THE NEED FOR LEGISLATIVE REFORM IN SOUTH AFRICA	34
I Forum Shopping	34
II Forum Shopping in the South Africa context	34
III Conclusion	35

CHAPTER 1 INTRODUCTION

I Aim

A person who suffers loss, damage or some other form of damage as the result of another party's action, may in these instances invoke the law of the country in order to claim damages. The damages which are claimed are aimed at compensating the person who has suffered a loss and are based on the law of delict and contract. In South Africa, the stakes are a bit higher in so far as the claimant will need to show that the damage was foreseeable, that there was causation and further remoteness which are all listed as the deciding factors in a claim for liability¹.

To this end, Maritime Law in South Africa has a primary exclusion which is applied to the shipowners² right to limit his/her liability based on the causative enquiry into "actual fault or privity"³. Causative actual fault or privity is thus the primary exclusion for a shipowner's right to limit his liability and is extensively based on the English Law rules. The concept of Limitation of Liability has extensive history in so far as its evolution is concerned and currently acts as a 'basic premise upon which maritime commerce is conducted'⁴.

Based on the importance of the concept and the issues around the South African application of the rules and interpretation of legislation in decided cases, the South African Government has published a draft Merchant Shipping Bill (draft MSB)⁵ for comment. Among other changes it proposes, is that it advocates the replacement of the current dispensation on limitation of shipowners' liability with that contained in the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC)⁶.

¹ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 514.

² Shipowner in context of this dissertation shall include all parties as referenced in S263(2) of the *Merchant Shipping Act* and includes the "charterer and any person interested in or in possession of such ship, and a manager or operator of such ship". This is an extension of the narrow confines which applies to the English Merchant Shipping Act of 1958 under s503. S261 mirrors s503 closely.

³ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 520.

⁴ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 514.

⁵ First Draft of the Merchant Shipping Bill of South Africa 2018 accessed at <http://mastermarinersa.co.za/wp-content/uploads/2018/04/Draft-Merchant-Shipping-Bill-2018.pdf> on 5 December 2018.

⁶ Convention on Limitation of Liability for Maritime Claims, 1976 (herein after referred to as the 'LLMC') Adoption: 19 November 1976; Entry into force: 1 December 1986; Protocol of 1996: Adoption: 2 May 1996; Entry into force: 13 May 2004. Protocol of 2015; Entry into force 8 June 2015 (The amendment brought a 51% raise to the liability limits of ship owners).

The two distinctive features of the proposed regime under the draft MSB are thus 1) the higher limitation levels when compared to the current regime and 2) that it advocates an amendment to the current test for determining whether the benefit of limitation will be lost in a specific instance.

It seems that on an evaluation of the draft MSB, that the higher limitation levels may well be welcomed by maritime claimants, while the opposite may be true for the test associated with establishing such limitation. The test for determining whether the benefit of limitation is lost would meet with some resistance by claimants in so far as the test will result in a significantly more difficult task for claimants to ‘break limitation’ than would be the case under the current dispensation. It will thus be argued that, although the virtually impregnable benefit proposed in the draft MSB may not be viewed favourably by maritime claimants, it should still none the less be embraced by all parties involved in the maritime adventure because of the numerous benefits which the proposed regime poses not only to interested parties only in South Africa, but in fact, for all interested parties globally.

For South Africa to partake in the global arena of Maritime Law, it is imperative that it conforms to the preferred international position and aligns with the LLMC. By introducing the published draft, the benefits it holds will undoubtedly outweigh the disadvantage as seen from the perspective of maritime claimants and so despite the validity of the objections which may be raised by maritime claimants, it does seem that the amended MSB while favouring ship owners, will be a worthwhile trade off and a middle ground for insurers, ship owners and maritime claimants. These objections should thus not be seen as the deterring factor steering one away from the implementation of the draft MSB.

II Background

‘South Africa is not a party to the 1967 International Convention relating to the limitation of liability of owners of sea going ships, the Convention on Liability for Maritime Claims, 1976 (LLMC), nor the 2001 International Convention on Civil Liability for Bunker Oil Pollution

South Africa is not a party to the LLMC. In this regard see “International Maritime Organisation (‘IMO’) Status of Conventions-Comprehensive information including signatories, contracting states, reservations, objections and amendments”, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf>, accessed on 25 January 2018, which provides an updated list of parties who have adopted the LLMC and the further protocols. For South Africa, the current limitation of liability regime is contained in the Merchant Shipping Act 57 of 1951, ss 261-3. The amended regime is contained in the draft MSB, s 271.

Damage (Bunkers Convention)'.⁷ From the legislation that is applied in court in South Africa it does however indicate that S261-3 of the Merchant Shipping Act is modelled closely to the 1957 Convention and Section 503 of the *English Merchant Shipping Act of 1894*⁸(which includes the onus of proving a lack of personal fault or privity on the part of the owner).

The result is that issues which were previously experienced in English Law find itself into South African courts and because the law in South Africa has not changed despite the English courts moving towards a different interpretation around Limitation of liability, the South African system has not followed suit, until now that is.

a) General

In summary, the issues/disadvantages with the proposed legislation are that the onus rests on the claimant to prove subjective elements associated with the subjective test where the focus is on recklessness with knowledge. Secondly, it is virtually impossible to break limitation and this will be illustrated by various cases used herein below to illustrate the difficulty in interpreting the law around this.

b) Issue of Certainty

A key component which will be addressed in this dissertation, is the request for certainty which is important when considering which regime should apply to Limitation of Liability. The importance of the concept of certainty is directly related to the level of exposure which a potential claimant may have for damages and where the cap of liability would sit for the ship owner. Certainty with regard to level of exposure to damages results in affordable insurance cover and this primarily has 2 distinct advantages namely: 1) With regard to claimants, there is the likelihood of a greater assurance of recovery on claims, albeit that they will recover a limited claim where such claim exceeds limitation cap; 2) There is also the greater assurance of recovery of a claim than if such claimant relied solely on the financial ability of shipowner to pay the claim. On the other side of the spectrum, the certainty associated with implementing

⁷ Wandile Zondo *Limitation of liability for Maritime Claims: a South African perspective* (published LLM thesis, World Maritime University, 2016) 511.

⁸ International Maritime Organisation ('IMO') "Status of Conventions-Comprehensive information including signatories, contracting states, reservations, objections and amendments" available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf>, accessed on 25 January 2018.

the MSB also provides the insurer with a greater level of comfort as they have an understanding as to the maximum liability of exposure and can calculate the risk in accordance with such exposure.

The advantages to advocating the proposed changes to the MSB are therefore the certainty as to the limit of liability as compared to the current dispensation under which it is relatively easier to 'break limitation'. The result is as aforesaid, that insurance cover is more expensive and ship owners therefore cannot afford premiums which results in both the ships and cargo not being insured. Claimants thus have less protection as there is no insurance cover in these instances, placing them at a disadvantage if an insurable event does result in a loss to the claimant. With the new dispensation however, there will be greater certainty as to maximum level of exposure which has as a distinct benefit, the securing of insurance cover at more affordable premiums for the ship owner and acts as an incentive to the shipowners to carry insurance cover. The claimant thus has a greater chance of recovering loss or damage albeit to a limited value. This position also aligns more closely to the global limitation dispensation with special limitation regimes being applied. Instances of these include a package or unit limitation test for breaking limitation⁹, ship-sourced oil pollution regimes and other pollution compensation, hazardous substances, bunkers and the like.

Important to record at this juncture is that while the Draft MSB is not without fault, it does seem to have as its result a worthwhile trade off of higher limitation levels for a more certain breaking point, in some way driving the economic argument for both the ship owner as they get a more unbreakable breaking point, while if it is penetrated, the claimant has a bigger potential to claim as a result of the higher limitation levels.

c) Issue of Uniformity

While it seems that neither of the solutions provide a uniform answer to all issues which are raised by the interested parties and in so doing all parties may not be completely satisfied, but at least with the draft MSB they all seem to be better appeased. By applying the MSB, the position will be in kilter with the global limitation and result in harmonisation of the legislative positions and uniformity across jurisdictions reducing the need for forum shopping. Uniformity of rules relating to Limitation of Liability is important in so far as uniform rules which are applied across territorial divisions, will result in a global standard of interpretation of the law applied to Limitation of Liability irrespective of its local legislation.

⁹ also referred to as 'Conduct barring limitation'.

III Structure

The main purpose of Chapter 2 of the dissertation will be to provide an introduction to Limitation of Liability and the ideas which drive the importance of the need for uniformity and certainty on a global level. This will also include an argument for uniformity from the South African perspective and globally.

Chapter 3 will go on to focus and evaluate the global importance of the concept of limitation of liability currently and briefly expand on its importance in the Insurance industry. Following on the aforementioned, the South Africa position will be expounded on with a very specific focus on the law as it stands and the courts interpretation of the current legislation.

Chapter 4 will briefly address the issue of forum shopping which has resulted due to the historic lack of uniform rules applied to the topic and how the draft MSB will address this issue to a certain degree. Lastly, the chapter will conclude with a summary of the argument in favour of the legislative change advocating the pertinent points as contained in the text as the main drivers justifying the change.

IV Purpose

The primary driver for reform of current legislation is the lack of certainty around the application of limitation of liability, which also is affected by the uniformity of limitation of liability as a global driver for transformation of laws which are out of kilter with the global limitation of liability. The purpose of this dissertation is to advocate the reform of current legislation in line with the draft MSB.

CHAPTER 2 LIMITATION OF LIABILITY AS A GLOBAL CONCERN

I Introduction to Limitation of Liability

The Chapter initially explores ideas of globalisation and transportation by sea and then turns the focus to the origin of Limitation of Liability in various jurisdictions. By unpacking and understanding the origin, it becomes clearly recognisable that the need for the limitation exists, but given the focus of this paper, the Origin will be used to substantiate the need for uniformity of the law on Limitation of Liability as the idea is common to most countries and deserves recognition on a global scale. The importance of the origin in context of this dissertation, is thus to illustrate that the origin fosters the expectation that uniformity in modern maritime law is both desirable and achievable. This provides a sound starting point for modern harmonisation of the law which draws strongly on the open-minded perspective and a mutually understandable abstract language for maritime lawyers from common law and civilian jurisdictions that is not as evident in other areas of law.

Subsequent to the discussion around the origin of the idea which fuels the argument for uniformity, the South African position as it stands currently will be highlighted. In the South African case investigated, a brief comparison will ensue so as to highlight the issues surrounding the current legislation when compared to the international preferred standard of interpretation. Factors like the application and test will be briefly addressed as well as a description of the manner in which the new legislative dispensation addresses these perceived deficiencies. Following on this, a brief explanation of the LLMC will complete this chapter.

II Transportation by Sea and Globalisation

Transportation by sea has been heralded through the ages as the preferred mode of transport in respect of both goods and in other instances passengers who are moved across borders from one country to another. It is one of the oldest forms of transportation known to civilised man and is commonly used in trade as a cheaper alternative to air transportation when moving goods from one area of the world to another and is especially lucrative for usage by parties involved in cross border transportation where the purpose remains an economic gain and/or profit for all the parties involved in the maritime adventure.

With the global community constantly growing and evolving and the need for efficiencies increasing for global traders, transportation by sea satisfies the requirements of bulk transportation on a mass scale whereby suppliers reach even the most distant customer, making transportation by sea one of the most efficient routes to market and satisfies the ultimate goal

of financial reward or economic profit in most instances for all concerned. The idea underpinning this growth is 'Free Trade' and Globalisation.

The shipping industry has thus enabled Globalisation to a large degree and with this, comes the need for certainty and standardisation/uniformity of laws across various jurisdictions. Globalisation which therefore acts as a mechanism to improve infrastructure, technological advancements and international standardisation of products and services, also acts as a driver to standardise the law which supports the industry.

The shipping industry seems to be not only the preferred mode of transport, but by its very being, has been the enabler for international and inter-regional trade by creating borderless global communities. A consequence of these borderless communities is the efficiencies created in transportation guidelines and evolution of the insurance industry, where the focus is always on mitigating risk exposure, putting the shipping industry squarely in the running for a very lucrative business if correctly managed.

In a "perfect market" like shipping, in which brutal competition, chronic overcapacity and a reliable flow of destabilizing events conspire to give the industry the lowest cycle-to-cycle financial returns with the highest inter-cycle volatility of any asset-intensive industry, one might be tempted to conclude that the business would do nothing but destroy capital... But the fact is that shipping has contributed to more fortunes than any other business except technology¹⁰.

Based on the foregoing, it is not surprising that the maritime industry has transformed its technologies, national registries, and labour resources over the past decades to serve the demands of the global economy. The concern however arises when the route to market is not realised and the goods which are being transported, never reaches its destination due to an insurable event and/or force majeure, or even negligence of the owner and/or crew.

The ocean as we know it is a very tumultuous place and it is because of the uncertainty and inherent risks associated with this form of transportation, that Limitation of Liability and a universal standard of rules become important considerations and areas of focus.

¹⁰ Barry Glasmen "Shipping : Globalisation's Lifeblood" available at <https://www.forbes.com/sites/advisor/2013/01/02/shipping-globalizations-lifeblood/#74166edd296e>, accessed on 25 January 2018

III The Importance of Limitation to Marine Liability Underwriters

Marine insurance was probably one of the first forms of insurance which was contemplated by merchants when international trade began¹¹. It is perhaps unnecessary to say the principles of limitation of liability is important to marine liability underwriters. The fact of the matter is that the marine insurance industry relies on it; marine liability policies are written on the general premise that such limitation will indirectly benefit underwriters. Indeed some years ago it was estimated that liability insurance premiums might increase 25-30% if ship-owners (and therefore underwriters) were deprived of the shield. An even more important reason for maintaining the principle of limitation of liability is that the commercial marine insurance market has only so much capacity at realistic rates. The concept of unlimited liability ignores the problem of realistic insurable limits. The insurable limit is the maximum amount of overall coverage available at a realistic cost in respect of any one catastrophe, however it may be divided into primary underwriters, excess underwriters, and those underwriters' re-insurance. The amount in turn determines the cost to the insured.

IV Origin of the Idea of Limitation of Liability as a Global Concern

Limitation of liability was during the earlier years found mostly in maritime carriage, since carriage by sea was historically the first means of transporting cargo between various ports and countries¹².

However, as previously advised, to date, the exact place, time or origin of the idea of limitation of liability is not known, but what we do know is that the concept of limiting liability was first applied in maritime case law¹³. It is possible to determine that there were various principles relating to the idea under vicarious liability of ship owners under Roman Law

¹¹ Johanthan Bruce, Alex Kemp, Rebecca Huggins "The Shipping Law Review - Edition 5 Marine Insurance" available at <https://thelawreviews.co.uk/edition/the-shipping-law-review-edition-5/1170842/marine-insurance> accessed on 18 January 2018.

¹² Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University,2013) 10.

¹³ Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University,2013) 10.

specific to their contractual obligations and the law of tort¹⁴, but to determine a clear principle from the history relating specifically to limitation of liability, is not possible¹⁵.

What does become apparent, is that historically, in the absence of insurance as we know it today, the concept of limitation of liability, acted like a mechanism for distributing loss between the parties involved in the common adventure.

Accordingly, in the absence of a definitive timeline relating to the evolution of the idea of Limitation of liability, we do find references to similar concepts in Roman Law under the principle of Noxae Deditio¹⁶ in terms of which an owner of property could compensate a claimant by surrendering the property which was the cause of the loss¹⁷. The principle was historically applied in cases where an animal or a slave caused damage and was later argued to be applicable to the shipping industry as well, in so far as the owner was liable for the actions of its master or crew. In these instances, the owner who was found liable for actions of his master and crew, would therefor prefer to abandon his seagoing vessel either with or without the cargo and in some instances, the ship, freight and cargo were abandoned, thus limiting his liability to the maximum value of the assets which have been abandoned¹⁸. This above discussion is however not seen by all scholars to the origin of the idea of limitation of liability and is disputed by some with those presenting another view as will be discussed more fully herein below.

The other view presented by differing scholars was found before the 12th Century the ‘contrat de commande’ is the basis for the idea of limiting a contacting party’s liability. The

¹⁴ The free legal dictionary defines Tort Law as a ‘body of rights, obligations, and remedies that is applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others. The person who sustains injury or suffers pecuniary damage as the result of tortious conduct is known as the plaintiff, and the person who is responsible for inflicting the injury and incurs liability for the damage is known as the defendant or tortfeasor’.

¹⁵ Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University, 2013) 10

¹⁶ James J Donovan, ‘*The Origins and Development of Limitation of Shipowners Liability*’, 53 *Tulane Law Review*, (1978-1979), p. 1000 ‘oliver Wendell Holmes, in his treatise *The Common Law*, traced the doctrine which made the ship not only the source but the limit of liability, to the Roman legal principles of ‘noxae deditio’.

¹⁷ Gauci, supra note 1 p65.

¹⁸ Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University, 2013) 110.

idea was based on the principle that the ‘party who advanced the goods or funds, is not personally liable for the contracts¹⁹. Accordingly, what resulted, was that the merchant was only liable to the third party to the extent of the value of his share in the goods or funds. The logical reason for same would be that those who invested had not been directly involved in the adventure²⁰.

‘The primary characteristics of the liability was thus that the shipowner’s liability was limited to the value of that ship as it was considered the instrument for the loss and in modern day concepts of marine insurance, as an insurance for the liability related to such particular loss²¹. The only requirement to limit the liability would be that it should not have been sustained by virtue of a personal act of the shipowner²² which equates to the idea of the shipowner ‘having actual fault or privity’²³.

V The European Case Investigated

a) Introduction

As a hub for international trade across the globe since the 1600s, England has a long and distinguished history as a center for insurance excellence. During that time, various new classes of insurance have arisen, but marine insurance, from an English law perspective, still maintains its pre-eminence and historical importance in giving us many of the principles that guide insurance law today across the globe.

b) Origins of European Law

The tablets of Amalfi written for the town of Amphilia in Italy around the 11th Century, appears to be the earliest evidence of the shipowners right to limit his liability. Later, the code of Valencia was compiled and became known as Consolato Del Mare, in terms of which owners and part owner’s liability was limited to the extent of their respective share in the ship itself for

¹⁹ Oya Z. Ozcayair, *Liability for Oil Pollution and collision* (Lloyds of London Press 1998), p299.

²⁰ Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University, 2013) 11.

²¹ Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University,2013) 14.

²² Oya Z. Ozcayair, *Liability for oil pollution and collision* (published PhD dissertation, University of Exeter, 1997). note 12, 301.

²³ Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University,2013) 10.

debts incurred by the Master in obtaining the ships necessities or for cargo damage arising from improper loading or from unseaworthiness²⁴. The ship owner and the master in these instances, thus had their liability capped at the rate of their investment²⁵.

The Marine Ordinance of Louis XIV was the first codification of the rule of Maritime Law as it relates to Limitation of Liability and was compiled under the direction of Minister Colbert in 1681²⁶. The Marine Ordinance of Louis XIV where stated that ‘the owners of ships shall be answerable for the deeds of the master, but shall be discharged, abandoning their ship and freight.’²⁷ several other statutes were enacted where the focus of such statute was that the liability of the shipowner was limited to the value of his vessels.

The responsibility of seagoing vessels owners Act was passed in the year 1734 in Great Britain and was specifically introduced after numerous requests by seagoing vessel owners’ to limit the liability of the seagoing vessels-owners in a maritime claim²⁸. The Act was introduced for the protection of seagoing vessels owners and by introducing the legislation, the government attempted to cap the liability of the seagoing vessels owners in instances where the crew or the master had misappropriated and/or misused goods. In such instances, the legislation limited the liability of the seagoing vessels owner to an amount equal to the value of the vessel inclusive of equipment and any cargo on board.

An interesting case which dealt with this matter at the time, was *Sutton v. Mitchell*²⁹, where goods stolen by thieves acting together with a member of the crew, managed to steal goods from a seagoing vessel which was moored. From the above, it however became clear that while liability for instances where theft occurred with the assistance of master or crew

²⁴ Oya Z. Ozcayir, *Liability for oil pollution and collision* (published PhD dissertation, University of Exeter, 1997) note 12, 300.

²⁵ Duggu Damar, *Wilful Misconduct in International Transport Law* (2011), 9. Donovan, supra note 9, 10001, see also Oya Z Ozcayir, *Liability for oil pollution and collision* (published PhD dissertation, University of Exeter, 1997) footnote 7, 300.

²⁶ Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University, 2013), 12 footnote 18.

²⁷ Graydon S. Staring, ‘The Roots and False Asperations of Shipowners limitation of Liability’ *Journal of Maritime Law and Commerce*, vol. 39, No3, (2008) p.323.

²⁸ https://en.wikipedia.org/wiki/Responsibility_of_Seagoing_vesselsowners_Act_1733.

²⁹ *Sutton v Mitchell* [1785] 1 T.R 18

were subject to a cap on liability, the same was not applicable to instances where goods were stolen without assistance from the crew.

In 1786, the government passed the Merchant Shipping Act of 1786 which was later repealed by the section 4 of the Shipping Repeal Act 1854.

Later, the concept of morality of ship owners limiting their liability was debated by the English parliament and a subsequent attempt at managing the process was formulated, based on 'value of the ship or the values of the ship and cargo, or an amount of currency per ton.'³⁰

Eventually, in 1894, the Merchant Shipping Act of 1894³¹ extended to collision liability³² and attempted to make provision for liability of ship owner to be linked to the tonnage of the ship, provided that the ship owner was not in 'actual fault of privity to that default in causing the loss'³³

Interesting to note at this juncture, is that in the United States, the limit is calculated according to the value of the ship after the accident/event causing liability and included pending cargo. In the United Kingdom however, claims arising from the acts of the "owners servants"³⁴ committed in the course of their service to the ship and unit of limitation was any distinct occasion which gave rise to liability, which means where there is a collision at the beginning and at the end of a voyage, the possibility exists that the court would be included to interpret each collision as separate and have 2 claims flowing from these events³⁵.

Under English statute, the extent of the owners liability was calculated proportionate to the value of the vessel immediately prior to the incident which had occurred and the post accident value was thus not considered.

VI The United States Case Investigated

The United States of America passed the Limitation of Liability Act of 1851 (LLA) in the year 1851. While on the one side of the globe, the Europeans were setting waves with the new ideas implemented relating to limitation of liability, the United States had at that stage not caught up

³⁰ Limitation of liability by statute, convention and contract by Hon Justice Elizabeth Heneghan.

³¹ Merchant Shipping Act, 1894 (United Kingdom) 57 & 58 Vict.c. 60.

³² Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (LLM thesis, Faculty of Law, Lund University,2013) 18.

³³ Honourable Justice Elizabeth Heneghan, David Colford, Brisset Bishop "Limitation of Liability by Statute, Convention and Contract" accessed at <http://www.brissetbishop.com/wp-content/uploads/2014/08/Limitation-of-Liability-Canada-April-2018.pdf> accessed on 8 February 2019.

³⁴ Alex Rein International Variations on Concepts of Limitation of Liability, 53 *Tulane Law Review* 1265(1979)

³⁵ *The Rajah* [1872] L.R. 3A. &E. 539.

to Europe. Accordingly, in an attempt to level the playing field between ships registered under the United States register, and those which were registered in foreign territories like Europe, the United States of America, being a superpower, and not wanting to be out of kilter with the other super power, modelled the act on the first English Act of 1734³⁶.

The most important consideration at the time, was that seagoing vessels faced the daunting task of traveling around the world with limited communication capabilities. This in turn resulted in economic exposure for a ship owner in cases where the vessel was involved in a significant maritime casualty. The result in these instances would be that the ship owner could have faced liability far exceeding the value of the vessel. The protections afforded under the Act have been greatly expanded, and owners of recreational boats have now frequently initiated limitation proceedings. Part of its purpose was therefore aimed at providing an opportunity for owners of seagoing vessels registered in the United States of America to overcome the commercial disadvantage associated with an open-ended liability for seagoing vessels owners and in such a manner to compete with other foreign owned seagoing vessels by incorporating the ideas of Limitation Liability in legislation which had already been enacted in Europe³⁷. The European community and more specifically, the British Empire, was a forerunner in respect of international trade on the oceans of the world and as such were one of the first countries to limit liability of seagoing vessels owners.

The importance of the idea of limitation Of Liability therefore lies not ‘as a matter of justice, but rather a rule of public policy which has its origin in history and its justification in convenience’³⁸.

VII Limitation of Liability explained under the LLMC

The LLMC was historically the product of various conventions which evolved to create a balance between the ship owners need for public policy reasons to ‘limit liability to a readily insurable amount at a reasonable premium and on the other side of the coin, the compensation levels that was deemed sufficient for successful claimants³⁹. The aforementioned view is similar to that which is expressed by the recommendation contained in the Comite Maritime International which states that ‘the limits should be fixed by reference to the amount of liability

³⁶ Graydon S Staring, *The Roots and False Aspersions of Shipowners Limitation of Liability*. *Journal of Maritime Law and Commerce* (2008) note 19, 316.

³⁷ <https://www.rmlawcall.com/maritime-law-limitation-of-liability>.

³⁸ *The Bramley Moore* [1963] 2 Lloyds Rep 429 at 439 per Denning, M.R.

³⁹ Surge Killingbeck, (1999) ‘*Limitation of Liability for Maritime Claims and its Place in the Past, Present and Future - How can it survive?*’

insurance, which having regard to the cost thereof, can reasonably be required of ships engaged in ordinary commercial shipping, since the cost of this insurance is inevitably reflected in the freight rates payable by shippers.⁴⁰

Although the aforementioned practice was being followed by most of the civilised world who was a party to the convention, what was clear, is that the shipping industry was continuing to evolve, and with this came technological advancements and investment in the industry which in turn resulted in bigger ships which were able to function at a more advanced level than before⁴¹ and the depreciated value of money as contained in the 1957 convention was no longer an accurate reflection of the industry norms.

Then in 1971 following the Tojo Maru Case⁴², the position and plight of the salvor became another consideration which was not addressed by the LLMC. The facts of this case is briefly that the salvor was not permitted to limit its liability due to the negligent acts of the driver who was assisting in the salvage operation. Limits were categorised into three forms of claims, namely, claims for loss of life or personal injury, passenger claims and property claims (such as damage to other ships, property or harbour works).

The 1976 LLMC created a right to limit liability to sums which are calculated in relation to the vessel's tonnage. Both shipowners and salvors could claim the right defined in Article 1(2) provided firstly that the relevant claim was covered by Article 2 and secondly that it was not a claim excluded by Article 3⁴³.

⁴⁰ Erling C Selvig, *An introduction to the 1976 convention. In the Limitation of shipowners' liability: The new law.* London: (1986) 9.

⁴¹ Kourosh Taheri *Limitation of Liability for Maritime Claims: Multiple perspectives and legal implications Evolution of the concept of Limitation of liability* (published LLM thesis, Faculty of Law, Lund University, 2013) 19.

⁴² The Tojo Maru [1971] 1 Lloyd's Rep 341.

⁴³ Exclusions were as follows: 'The rules of this Convention shall not apply to:

15 (a) claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average; (b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force; (c) claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage; (d) claims against the shipowner of a nuclear ship for nuclear damage; (e) claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in

Accordingly, one could only limit your liability under the LLMC, if the loss resulted from the personal act or omission of the person who was liable and wanted to invoke the limitation provided that the act or omission was ‘committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.’ (LLMC, 1976, Art. 4). The result was that under Article 4⁴⁴, the right to limitation of liability was almost impossible to break in return for a cap on liability that was noticeably higher⁴⁵.

An interesting case which summarised the history of the convention was found in the *Herceg Novi*⁴⁶ case where under the heading of conflict of conventions, Sir Christopher Staughton summarised as follows: ‘(1) The 1976 Convention was thus s package deal, whereby the limits were raised considerably but in return the shipowner received the benefit of a limit which was thought to be virtually unbreakable. It was largely the work of the Comite Maritime International, a non governmental body representing the parties interest of all those involved in the sea transport. The draft was finalised by the CMI at its 1974 Conference in Hamburg which one of us attended.’ The insinuation in this 1998 case is thus Governments have distorted the intention of the LLMC and that it was aimed at being a protection for interested parties striking a balance between interest of claimant and ship owner alike. With governmental insolvent and lack of uniformity of laws across the globe, the position became more and more distorted.

VIII The South African Case Investigated

The amendment which is proposed under s 271 as suggested in the proposed draft is aimed at effecting changes specifically to s 261-3 of the Merchant Shipping Act 57 of 1951 (‘the Act’) which is the applicable law in South Africa governing limitation of liability of ship owners. The Act is based on the 1957 Conventions which speaks to ‘actual fault and privity’. While South African case law is limited in dealing with this matter, the English courts have previously dealt with the topic extensively prior to the evolution of the 1957 into the current basis for limitation

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 6.’

⁴⁴ Article 4 of the LLMC: ‘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’.

⁴⁵ Wandile Zondo *Limitation of liability for Maritime Claims: a South African perspective* (published LLM thesis, World Maritime University, 2016) 511.

⁴⁶ *The Owners of the Ship Herceg Novi and the Owners of the Ship Ming Galaxy* [1998] (AD) 2 Lloyd’s Rep 457.

of liability as found in the Limitation of Liability for Maritime Claims of 1976 and later amendments.

The absence of actual fault or privity is imperative in deciding whether an insured can limit his liability and evade being liable for the entire loss by capping his liability in accordance with S261 of the Act. S261 of the Act requires that the insured proves on a balance of probability that he did not have 'actual fault or privity'. The onus therefore rests on the insured who relies on the section of the Act (aimed at capping his liability) to prove that he did not have knowledge and it will include those under his direct employ. The cap on the Insured's liability can extend to loss of life or personal injury or damages/loss to property or rights of any kind.

a) Uniformity in SA

As previously advised, the global limitation of liability is a concept which is specific to maritime law. The foundation for the existence of the concept is closely linked to mitigation of loss and damage for the parties concerned in spite of the perils of the sea. This negation of the perils in turn result in an investment case for a potential investors and therefore encourages the capitalist to invest money in the risky business of maritime adventures⁴⁷. From the historic application of the concept as well as the discussion around the origins, what seems to be prevalent, is that these of limitation created a presumption of privilege which was reserved for owners and operators of ships and the servants⁴⁸, albeit that the South African system seems to currently rather favour the claimant to a certain degree as articulated herein above.

As we can see from the historical perspective, the international shipping community each seem to apply very different rules and each system has its own interpretation for the idea of limitation. It is in the opinion of the writer and academics such as Hare⁴⁹ that these differences between systems result in conflict in respect of the choice of law that applies and in turn, the problem with choice of law result in forum shopping. Claimants tend to opt for systems where they will be successful in their claim, which ship owners want either no claim to be possible (with a virtually unbreakable limitation), alternatively, have it capped at a low level so that the minimum can be paid by such ship owner in the event of a successful claim by a claimant.

⁴⁷ Alex Rein International Variations on Concepts of Limitation of Liability, 53 *Tulane Law Review* 1259 (1979) Rein compares this to subsidising maritime adventures which he contends is the modern day equivalent.

⁴⁸ Alex Rein International Variations on Concepts of Limitation of Liability, 53 *Tulane Law Review* 1259 (1979).

⁴⁹ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 544.

There is undoubtedly a strong global movement to drive uniformity of laws especially in the maritime industry and it is thus not unreasonable that South Africa is wanting to fall in line with the more globally accepted standard of interpretation. Currently, under the Act, the positions seem to favour the claimant in so far as the limitation is more easily breakable albeit a lower cap on liability which could result in less money being paid to the claimant in the event of a claim. The global limitation of liability position is however more in line with the Convention and the LLMC which speak to higher limitation levels coupled with a virtually unbreakable limitation. Under the current law in SA, the main concern which has been highlighted, is around the interpretation of the s 261⁵⁰ of the Merchant Shipping Act 57 of

261. When owner not liable for whole damage.-(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 privity- (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 206,67 special drawing rights for each ton of the ship's tonnage; or [Para. (a) amended by s. 33 (a) of Act No. 30 of 1959 and substituted by s. 7 (a) of Act No. 25 of 1985 and by s. 11 (1) (a) of Act No. 23 of 1997.] Wording of Sections (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 66,67 special drawing rights for each ton of the ship's tonnage; or [Para. (b) amended by s. 33 (b) of Act No. 30 of 1959 and substituted by s. 7 (b) of Act No. 25 of 1985 and by s. 11 (1) (a) of Act No. 23 of 1997.] Wording of Sections (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 206,67 special drawing rights for each ton of the 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 140 special drawing rights 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 206,67 special drawing rights 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. [Para. (c) amended by s. 33 (c) and (d) of Act No. 30 of 1959 and substituted by s. 7 (c) of Act No. 25 of 1985 and by s. 11 (1) (a) of Act No. 23 of 1997.] Wording of Sections (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) (a) The amounts mentioned in subsection (1) shall be converted into South African currency on the basis of the value of such currency on the date of the judgment or the date agreed upon by the parties. (b) For the purpose of converting from special drawing rights into South African currency the amounts mentioned in subsection (1) in respect of

1951⁵¹ and the reference in the legislative text to actual fault or privity. The preferred test which is being advocated and which is more in line with the draft MSB and global interpretation of limitation of liability is not a test for 'actual fault or privity' but rather a test for whether 'the loss resulted from the shipowner's personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result'.

which a judgment is given, one special drawing right shall be treated as equal to such a sum in South African currency as the International Monetary Fund have fixed as being the equivalent of one special drawing right for- (i) the day on which the judgment is given; or (ii) if no sum has been so fixed for that day, the last day before that day for which a sum has been so fixed. (c) A certificate given by or on behalf of the Treasury stating- (i) that a particular sum in South African currency has been so fixed for a particular day; or (ii) that no sum has been so fixed for that day and that a particular sum in South African currency has been so fixed for a day which is the last day for which a sum has been so fixed before the particular day, shall be prima facie proof of those matters for the purposes of subsection (1); and a document purporting to be such a certificate shall, in any proceedings, be admissible in evidence and, in the absence of evidence to the contrary, be deemed to be such a certificate. [Sub-s. (4) added by s. 33 (e) of Act No. 30 of 1959 and substituted by s. 4 (a) of Act No. 16 of 1995 and by s. 11 (1) (b) of Act No. 23 of 1997.] Wording of Sections (5) [Sub-s. (5) added by s. 33 (e) of Act No. 30 of 1959, substituted by s. 7 (d) of Act No. 25 of 1985 and deleted by s. 4 (b) of Act No. 16 of 1995.] .

⁵¹Merchant Shipping Act 57 of 1951 Available at <http://www.wylie.co.za/wp-content/uploads/MERCHANT-SHIPPING-ACT-NO.-57-OF-1951.pdf>, accessed on 5 January 2019

CHAPTER 3 LIMITATION OF LIABILITY IN SOUTH AFRICA

In this chapter the law as it stands will be considered. By reviewing the facts associated with decided cases and expanding on the final judgments which have been handed down, a process of critical review of the law will take place and the various concerns around application of the law relating to Limitation of Liability in South Africa will be highlighted. It will become evident that these inconsistencies in the application of the law when applied to Limitation of Liability fuel the need for the proposed changes in legislation to take effect and thus provide support in favour of the Draft MSB to be enacted in South Africa.

I Understanding Actual Fault and Privity in South African Context

The phrase ‘actual fault or privity’ is borrowed from the Merchant Shipping Act of 1894 under S57 & S58. It means ‘something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents⁵²’. The right to limit liability is in respect of indirect or vicarious liability only and is lost where the party seeking to invoke the right fails to prove that the loss or damage was not caused by its direct fault⁵³. Ship owners in South Africa could historically discharge the onus and successfully uphold a cap on liability by showing that the ship owner or other interested party did not have fault or privity. A case which will be discussed further herein below which speaks to this, is *Atlantic Harvesters of Namibia*⁵⁴. In the historic regime, if the onus is therefore successfully discharged, the ship owner or other interest party is entitled to limit his liability at a considerably lower level than in countries where the 1976 convention⁵⁵ applies.⁵⁶ In instances where the ship owner is a juristic entity, a claimant will need to prove that the person whose acts or omissions caused the loss was someone whose acts or omissions could be

⁵² *Asiatic Petroleum Co Ltd v Lennard’s Carrying Co Ltd* [1914] 1 KB 419 (HL) 432, quoted in *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 4 SA 865 (C) 876A.

⁵³ *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 4 SA 865 (C) 876E-G; *Nagos; Shipping Ltd v Owners, Cargo lately laden on board the MV Nagos* [1996] 2 SA 261 (D) 264I-J.

⁵⁴ *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 4 SA 865 (C).

⁵⁵ LLMC.

⁵⁶ Dyason.(2001). South African Maritime Law-An overview of some developments. *Journal of Maritime Law and Commerce* .32(3). 495.

attributed to the ship-owning entity⁵⁷. ‘Fault’ in the strict interpretation of the word means ‘whenever the defendant’s wrongful and blameworthy act causes harm to another⁵⁸’.

In *Piermay Shipping Co Sa v Chester, ‘Michael’* [1979] 1 *Lloyds Rep* 55, the privity issue was investigated. The vessel was held to be scuttled. The judge in this decision, held that ‘privity can range from active complicity to passive concurrence and turned to medieval history to illustrate the point. An owner who therefore makes it clear that he wants his ship at the bottom of the sea but does not want to know any more about it, is privy to the sinking in just the same was as Henry II was privy to the murder of Thomas Becket when he said “will no one rid me of this turbulent priest”⁵⁹

II Case Law around the Burden of Proof required for Breaking Limitation

The onus of proof in limitation of liability cases were altered in England with the decision in *The Norman*⁶⁰, where the House of Lords required the shipowners to prove their failure to act did not cause the casualty. Onus of Proof in the South African context is that the defence of limitation to the cargo plaintiffs claim is raised as a first by the shipowner.⁶¹ The onus thus shifts to the ship owner who invoked the limitation provision and is substantially different from the Norman case in which the cargo claimants in limitation proceedings would have to plead the actual fault of the owners⁶². The approach taken in South Africa is different but aligned to s503 of the English Merchant Shipping Act, 1894. Under both these pieces of Legislation, the burden of proof seems to be placed squarely on the shipowners evoking the protection of the Limitation. As mentioned previously, the South African limitation regime under s261 of the South African Merchant Act could be said to be loosely based on the provisions of the English Merchant Shipping Act, 1894. As a result, South African courts could be said to still be following many of the English decisions based on the 1894 Act.

III Global Interpretations around Limitation of Liability, Breaking Limitation, Burden Of Proof, Fault and Actual Privity

Generally, a person who suffered loss or damage caused by another, whether in contract or in tort, may seek redress through the power of the law. However, such redress is not without its

⁵⁷ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 11.2.1.

⁵⁸ Wille’s *Principles Of South African Law* 9th ed (2007) 1091.

⁵⁹ Susan Hodges, *‘Cases and Materials on Marine Insurance Law’* (1999)

⁶⁰ *Norman* [1960] 1 *Lloyd’s Rep* 1 (HL) 480.

⁶¹ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 524.

⁶² Sir Barry Sheen, *Limitation of Liability: The Law Gave and the Lords Have Taken Away* *Journal of Maritime Law and Commerce*. (1987) 18(4), 480.

limits as most systems of law require the loss or damage to at least be a result of the defending party's actions. As can be seen from the previous chapters, the concept of limitation of liability has remained around for a lengthy time and is a concept which is entrenched in the various jurisdictions.

South Africa Law is very similar to the older English court decisions when determining actual fault or privity in accordance with the 'Reasonable person' test. In the Kruger Case⁶³ the court held that the test for culpa, is based on the 'diligens paterfamilias in the position of the defendant a) would have foreseen the reasonable possibility that his/her conduct could result in harm/damage to another person or his/her property and in so doing would cause the claimant patrimonial loss; and (b) Having foreseen that the loss or damage could occur, would the diligent paterfamilias take reasonable steps to guard against such occurrence; and c) the defendant failed to take such steps.' For a party to successfully evade liability under both the English and South African systems, it must be shown that the person acted reasonably. The test was described as follows: "the owning company is not guilty of actual fault unless it can be shown that there came a moment when a reasonably competent director would have said to the offending director, 'But surely you ought to do this or you ought not have done that'⁶⁴." Important for this test, is establishing whether the person who made the decision could make the decision on behalf of the juristic entity. The test it seems is focused solely on the person who can actually be said to be the one making decisions as if those decisions were actually made by the company itself.

a) *English Case Law*

i) *Atlantik Confidence Case*

Atlantik Confidence⁶⁵ is another case which deals with limitation of liability and the application of Article 4 of the Convention. In this case, based on the specific facts, the English court found that the fire was deliberately started by the Master and chief engineer had with the aim of deliberately sinking the seagoing vessels at the request of the owners of the vessel who were in financial difficulty. The aim was to scuttle the ship in order to pay the ship owners bank loans by using the proceeds from the hull insurance proceeds. Accordingly, court held that Article 4 of the Convention was breakable in so far as the actions of the Master could be

⁶³ *Kruger v Coetzee* [1966] (2) SA 428 (A).

⁶⁴ Sir Barry Sheen, Limitation of Liability: The Law Gave and the Lords Have Taken Away *Journal of Maritime Law and Commerce*. (1987) 18(4), 476.

⁶⁵ *Atlantik Confidence* 2 Lloyd's Rep 525 [2016] EWHC 2412.

imputed to the owners and the owner therefore could not rely on the limitation of their liability as the loss resulted from the owners personal acts committed with intent to cause such loss. The owner intended the cargo and the seagoing vessels to be destroyed and therefore could not limit or cap his liability in accordance with Article 4 of the LLMC.

In summary, it therefore appears that to evoke Article 4 of the LLMC, the party who alleges that the cap should not apply, will need to prove that the insured acted recklessly and with the knowledge that such loss will probably result, and despite this knowledge, still acted in the same way which then resulted in the loss. The insured therefore does not need to intend for the loss to ensue, but rather that he had a duty to know, which will also qualify to exclude the limitation for the insured.

This case demonstrates that there is a high threshold that any party who wants to break the limitation will need to satisfy to be successful in breaking the limitation as contained in Article 4 of the LLMC. In the words of Phil James⁶⁶ ‘Whilst it is reported that this is a landmark case (because it is reportedly the first time there has been a successful defence to an Article 4 application) it isn’t a landmark decision in the sense that it breaks any new legal ground’.⁶⁷ The implication is that while it is the first time that the limitation has been broken successfully, the idea of breaking limitation is not in any way a new or novel topic as the courts have been tested with the legal ground for many years.

ii) *The Eurysthenes*⁶⁸ - *English Decision, Dealing with the Requirement of Proving Fault*

In the *Eurysthenes*⁶⁹ Case in 1976, came the first attempt by a High Court authority to attempt to determine the meaning of “privity” with the aim of defining the concept⁷⁰. In defining “privity”, the court considered the meaning of the term in the context of the Marine

⁶⁶ Phil James “Weighmans – insights “Atlantic Confidence – Breaking the 1976 Limitation for Maritime” available at <https://www.weightmans.com/insights/atlantik-confidence-breaking-the-1976-limitation-for-maritime/>, accessed on 18 January 2019.

⁶⁷ Phil James “Weighmans – insights “Atlantic Confidence – Breaking the 1976 Limitation for Maritime” available at <https://www.weightmans.com/insights/atlantik-confidence-breaking-the-1976-limitation-for-maritime/>, accessed on 18 January 2019.

⁶⁸ Susan Hodges, ‘Cases and Materials on Marine Insurance Law’ (1999) ; John Hare *Shipping Law & Admiralty Jurisdiction in South Africa, 2nd Edition* (2016) 521.

⁶⁹ *The Eurysthenes* [1976] 2 Lloyd’s Rep 171 (CA).

⁷⁰ Susan Hodges, ‘Cases and Materials on Marine Insurance Law’ (1999).

Insurance Act, 1906, and defined it to mean term which requires an action “with knowledge and consent’. For Lord Denning⁷¹“when the lawyers spoke of a man being ‘privy to something being done or an act being done with his privity, they meant that he knew about it beforehand and concurred in it being done. It was a wrongful act by his servant then he was liable for it if “done by his command or privity’. This required his knowledge and concurrence and excluded wilful misconduct by the person. It also did not require that he personally did the act. Without his actual fault therefore meant the act was done without actual fault of the owner personally. Without his privity means without his knowledge⁷² and concurrence. If a ship is therefore sent to sea in a unseaworthy condition of which he knew and concurred, the owner acted with privity. This did not necessarily mean that the owner wilfully took part in misconduct but rather that he knew of the act beforehand and agreed with it being done⁷³. In this example, there seems to be an element of recklessness on the part of the owner in failing to act and instead consenting to the acts of the Master.

iii) *Lennards Case – English Decision, Limitation of Liability of Juristic Entities and the Director as an Alter Ego’s*

In the Lennard’s ⁷⁴case, the actions of the Directors who sent circulars containing maritime safety rules to the crews, but did not impress upon them the need for strict compliance and according resulted in the company being found guilty of ‘actual fault and privity ‘The directors, were seen as the alter ego of the company itself, who had the ‘directing mind’ of the company. To clarify, it seems that the subordinate would not be considered as the alter ego for a juristic entity⁷⁵.

iv) *Marion Case – English Decision, Limitation of Liability and the Alter Ego of a Juristic Entity*

The Marion case⁷⁶ was very controversial in so far as the court initially found that assistant operations manager was not the alter ego of the juristic entity which was its employer and accordingly, no actual fault or privity could be imputed to him. The appeal was successful

⁷¹ *The Eurysthenes* [1976] 2 Lloyd’s Rep 171 (CA), Lord Denning 179.

⁷² Knowledge is not confined to only positive knowledge, but also knowledge expressed in the phrase “turning a blind eye” and refrains from further enquiry. Then the person will be regarded as knowing the truth.

⁷³ Susan Hodges, *Cases and Materials on Marine Insurance Law* (1999) 319.

⁷⁴ *Lennard’s Carrying Company v Asiatic Petroleum Company* [1915] AC 100 (HL).

⁷⁵ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa, 2nd Edition* (2016) 523.

⁷⁶ *Marion Case* [1982] 2 Lloyd’s Rep 52; and on appeal in [1984] 1 Lloyd’s rep 1 (HL).

and house of Lords held that the director who failed to inform the requisite parties of his absence from office while on a business trip, was the alter ego of the business and so his failure to inform the requisite parties which resulted in Liberian authorities annual inspection report being sent with nobody above to receive it, amounted to actual fault or privity on the part of the owners. This decision was one of the last decisions in the English court before the 1976 LLMC limitation regime came into effect.

v) *Leerort Case – English Decision, Limitation of Liability And Intent to Cause Loss*

The court of Appeal in the Leerort⁷⁷ Case held it necessary to identify the act or omission of the ship owner which caused loss and that such act or omission was committed with intent to cause such loss, or that the party acted recklessly with knowledge that such loss would probably result to defeat the right to limit. The court in this matter held that “it is totally absurd to suggest that a 50 second interruption in the operation of the engine, as a consequence of which the collision took place, might be reasonably attributable to an act or omission of the owners done with the intention of bringing their ship into a collision, or performed recklessly with knowledge that it was likely to produce this result’. This case is an example of just how strong the 1976 LLMC limitation is. From this decision it is evident that limitation will only be broken in such a situation if the innocent ship owners in a collision can prove that the owners of the guilty ship (the ship that caused the collision) intended that the ships should collide or in the alternate, intended that his ship should collide with another vessel or acted recklessly with the knowledge that it was likely to do so. Such intent or knowledge seems extremely difficult to actually prove in practice.

i) *Saint Jacques II -England Limitation of Liability under the LLMC, Breaking Limitation*

The Saint Jacques Case⁷⁸ was one of the only cases in England which challenged the status quo by creating a possibility for a claimant to break the virtually unbreakable limitation of liability provision of the LLMC.

The Saint Jacques II, a motor fishing vessel, collided with the motor tanker Gudermes in the English Channel after the Saint Jacques II had crossed the South West Traffic Lane and headed against the flow of traffic. The owner of the Saint Jacques II raised the defence of limitation in an attempt to limit his exposure to the claim for damages arising out of the

⁷⁷ *Schiffahrts Gesellschaft MS "Mercury Sky" m.b.H. & Co. K.G. v MS Leerort Nth Schiffahrts G. m. b.H & Co. K.G. The "Leerort" (C.A.) [2001] 2 Lloyd's Rep. 291.*

⁷⁸ *Loic Ludovic Margolle & Another v Delta Maritime Company Ltd & Two Others [2003] 1 Lloyd's Rep 203*

collision under the Merchant Shipping Act 1995. The Tanker opposed. Court found in favour of the owner and upheld the defence of limitation of liability, dismissing the claimants' right to challenge the limitation as the court was of the opinion that the claimant had no real prospect of challenging the right to limitation.

On Appeal, the court found 'as to the reckless navigation of Saint Jacques II across the Traffic Separation Scheme, this was a repeated practice in flagrant breach of the Collision Regulations directed personally by the first claimants for commercial reasons and for present purposes, conceded to be reckless; the first defendant had a real prospect of defeating the claimant's right to limit at trial'⁷⁹

This case illustrates just how difficult it is to break the limitation under the 1976 LLMC. This case is still considered more of an exception rather than the rule to the almost unbreakable limitation as it is difficult to find cases which have followed suit in English law. The way the courts have interpreted 'actual fault and privity' in English and South African courts seems unsatisfactory⁸⁰. The interpretation, in terms of whose acts can be considered to show 'actual fault or privity', seems too broad as even the actions of people who are not at least directors in a company have been considered to be the acts of the company itself. Attributing actual fault or privity on the part of the company because of the acts of such persons seems below the standard contained in the 1976 LLMC where the owner is only barred from claiming limitation where the loss "resulted from his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result"⁸¹. This could be considered the formula for the almost unbreakable limitation contained in the convention⁸².

The court held that 'appalling navigational practice' performed with knowledge by the owner, coupled with the obvious risk of an accident which may arise, will be inferred that the owner in those circumstances had actual knowledge at the time that the collision would probably result and therefore could not rely on the limitation.

b) Canadian Case Law

i) Bayside Towing Ltd Case – Canadian Case, Right to Limit Liability under the LLMC

⁷⁹ *Loic Ludovic Margolle & Another v Delta Maritime Company Ltd & Two Others* [2003] 1 Lloyd's Rep 209

⁸⁰ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 527

⁸¹ Article 4 of the LLMC.

⁸² John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 527.

In the Bayside Case⁸³ under Canadian case law, the defendant challenged the right of the Plaintiff to limit liability under the LLMC. Plaintiff brought the application to strike out portions of the Statement of Defence and the court held: 1) ‘it cannot be excluded that the elements of knowledge and recklessness, required by article 4 of the LLMC for loss of the right to limit liability may exist in a case of a collision which is attributable to negligent navigation. 2) the concept of wilfulness could also be similar to the test under Article 4 of the Convention.

ii) *Peracomo Case – Canadian Case, Limitation of Liability and the Level of Fault required to Break Limitation*

In a recent *Peracomo Case* in Canada,⁸⁴ the Supreme Court Of Canada (‘SCC’) had to decide what level of fault would be required of a person when attempting to apply Article 4 of the LLMC. The SCC in this instance held that a statutory exclusion for loss attributable to ‘wilful misconduct’ of the insured does not require proof that the insured intended to cause the loss, but rather that such insured had a ‘duty to know’ and acted recklessly in the face of such duty, even if the insured believed that there was no risk or harm. The recent decision in this case serves to illustrate that the system of limiting liability introduced by the LLMC 1976 is virtually unbreakable and the facts are set out briefly herein below.

The insured was a crab fisherman and operated his own fishing boat (‘fisherman’). In 2005, while fishing, he dropped anchor and snagged into a cable belonging to a telecommunications company during this process. Later that year, he went to a local museum in a former church and came across an old map which showed a line running through the area where he had fished for crab. Besides the line, the word abandoned was handwritten and so the crab fisherman erroneously assumed that what he had hooked previously was an abandoned line. In 2006, the cable was snagged again, but this time he went as far as to cut the electric cable and attached a buoy to one end of the cable. A few days later his lines caught the cable again and proceeded to cut the cable again.

In this case, the main question related to breaking limitation and the standard of proof or required in respect of same.

Breaking Limitation under Article 4 of the LLMC

Court held that on the facts, the conduct of the crab fisherman and the expressed intention to cut the cable was insufficient to break the limit on liability under art. 4 of the LLMC. Rather,

⁸³ *Bayside Towing Ltd Eugen Beckstroom and William Frizell v Canadian Pacific Railway B.C Tel and Rivtow Marine Ltd*, Federal Court of Canada [2000].

⁸⁴ *Peracomo Inc v TELUS Communications Co* [2014] 1 SCR 621.

in order to break that limit, the respondent had to prove that the crab fisherman ‘intended to cause the loss that actually resulted or that he acted recklessly and with knowledge that the loss would probably occur’⁸⁵. The appeal court also criticized the trial judge’s decision in so far as they found that the crab fisherman had thought the cable was useless but still found that he intended to cause the loss and/or knew that it was a probable consequence. In cutting the cable, the crab fisherman clearly did not intend to cause the loss which was eventually suffered as he firmly believed that it was a useless wire. It was therefore an error of law for the lower courts to conclude that the crab fisherman intended to cause any loss, or that he was reckless and knew that such loss would probably occur, within the meaning of art. 4 of the LLMC. The bar in respect of proving fault is set at a very high level and although there is a duty on the crab fisherman to be aware of the cable which he clearly failed to comply with, his acts were outside the range of conduct to be expected of him in the circumstances as to constitute misconduct.

In an effort to make a finding on the aspect of misconduct, the Court continued to compare the provision of the Marine Insurance Act⁸⁶ (‘MIA 1993’) with that of Article 4 of the LLMC. In so doing, it was established that both the MIA and the LLMC required proof of the same subjective criterion which centered around the question of whether “the insured had knowledge of the harmful consequences of his or her act, and intended or was acting with reckless regard to those consequences’. The act by the crab fisherman was not found to be characterized as wilful misconduct as there was no proof of a deliberate act by the crab fisherman which was intended to cause the harm or that he had subjective knowledge that his actions would have resulted in the loss suffered. “Proving conduct exhibiting reckless indifference in the face of a duty to know is but the first step, as it must then be proven that this misconduct was wilful. If after considering the possible consequences of an act, an insured sincerely, although erroneously, believes that the act will cause no loss, his or her misconduct cannot be characterized as wilful.”

The fact that a reasonable person ought to have known, or that a person had a duty to know, does not suffice to justify a finding that an act has the characteristics of willful misconduct: it is also necessary to establish that the person intended to cause the loss, and to prove gross negligence or misconduct in which there is a very marked departure from the conduct of a reasonable person. The Court held that the intent required to break limitation was subjective because the purpose of the LLMC was to set an “unbreakable” limitation with

⁸⁵ Peracomo Inc v TELUS Communications Co [2014] 1 SCR 621.

⁸⁶ Marine Insurance Act, S.C. 1993, c. 22, s. 53 .

limited exceptions and granted the limitation action. This meant that it had to be proven that the crab fisherman had the intention of cutting a “live” wire, and also to cause the telecommunications blackout, and on both elements, the level of proof could not be satisfied. The crab fisherman could therefore not have been found to have acted with wilful misconduct which enabled the crab fisherman to claim the benefit of coverage under his liability insurance policy while at the same time capping his liability under the LLMC

c) *South African Case Law*

i) *Nagos Case – SA Decision, Limitation of Liability as protection for the Ship Owner*

As per the discussion on origin herein above, in the Nagos⁸⁷, Limitation of Liability was considered a matter of justice in that it provided protection to shipowners who were exposed to the risk of conducting business on the sea where they were constantly exposed to perils of the sea.

From the chapter dealing with ‘origin’ herein above, it seems that the main position of protection was aimed at the ship owner and so accordingly, the interpretation of the current legislation which is more in line with protecting the claimant without much cognisance being had for perils of the sea and how it affects the interest of the ship owner, is a matter which needs to be redressed, as it does result in legislation that is out of kilter with the global position leaning more towards protection of the ship owner.

ii) *St Padarn Case – South African Decision, Limitation of Liability and the Burden of Proof for Actual Fault and Privity*

The court in *The St Padarn*⁸⁸ dealt with an oral agreement between parties in South Africa and is one of the leading cases for limitation of liability in the territory. Whilst undertaking the voyage, the plaintiff’s vessel *The St Padarn* ran aground. The plaintiffs instituted a damages claim against the Tug Owners and they in turn raised the defence of Limitation. The court held that the owners failed to discharge the burden of proof placed to show that the damage was caused without their fault or privity. The owners, due to their lack of instruction and supervision with regards to the inspection of the towing stretchers, the use of an appropriate towing line and the fitness for the use of the towing stretchers, were regarded as having actual fault or privity. The tug owner’s right to limit was affected by their failure to instruct its masters to report on and be in compliance with any qualification attached to a certificate of seaworthiness

⁸⁷ *Nagos Shipping Ltd v Owners, Cargo Lately Laden on Board the MV Nagos* [1996] (2) SA 261 (D).

⁸⁸ *The St Padarn v Atlantic Harvesters* [1986] (4) SA 875 (C).

of the tow and to prevent the onset of the towage in the prevailing weather conditions. It must be pointed out that, similar to *The Lady Gwendolen* case, the owner's nautical superintendent, while not a director of the company, was still responsible for several departments including the harbour towage and salvage department, supply shipping department as well as the sea carriage and salvage department. Therefore, inspecting towing equipment would have been part of the superintendent's designated tasks. The *St Padarn* followed the earlier decision in *The Lady Gwendolen* as opposed to the one in *The Marion*. Under South African Law, the acts of subordinates may still be attributable to the juristic entity in order to break limitation. The result is that South Africa becomes a preferred destination for claimants who wish to break limitation rather than those countries who apply the Global limitation of liability regimes. It has been written by Hare in his textbook that South African courts should not consider bad law developed in England to be a restriction on the court⁸⁹. Ideally, South Africa should be following the International example in so far as it has adopted a whole new limitation regime to compensate the previous ones inefficiencies and accordingly the LLMC was adopted. The Draft MSB is more in line with the global movement favouring application of the Limitation regime in accordance with the guidance as stipulated in the LLMC.

iii) *The Lady Gwendolen Case – South African Decision, Limitation of Liability and the Acts of the Master*

In the case of the *The Lady Gwendolen*⁹⁰, the tanker *Lady Gwendolen* was on voyage between Dublin and Liverpool in foggy weather conditions. The vessel collided with the *MV Freshfields*. The cause of the collision was as a result of the master failing to reduce its speed and the installed radar appropriately. The ship owner could not limit their liability as the errors of the master could clearly be attributed to the actions of the Master. The court held that the shipowners should have taken steps to ensure that their masters were actually using their radars in an appropriate manner. The problem associated with the radar were described as being 'one of such serious import as to merit the personal attention of the owners. The case was appealed and dismissed with a clear message that the courts expected shipping companies to exercise better oversight of their employees even if the fault in question could be attributed solely to acts of the master.

iv) *Atlantic Harvesters – South African Decision, Breaking Limitation*

⁸⁹ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 527.

⁹⁰ *The Lady Gwendolen v MV Freshfield*. [1964] 2 *Lloyd's Rep* 99.

A case which is of importance when assessing the impact and requirements of ‘without actual fault or privity’ as stipulated in ss 261 of the Act, is the *Atlantic Harvest of Namibia*⁹¹ case. In this case, a seagoing vessel was run aground and the court found that the failure to deliver her at her destination (‘delivery port’) of Bremerhaven was the result of the fault of the Master tug boat which was to deliver the vessel to the delivery port. The onus of proof required in these circumstances are that on a balance of probabilities, the court must be persuaded that the damage caused to the seagoing vessels occurred without ‘actual fault or privity’ on the part of the defendant and it also included the defendant’s servants acting in the course and scope of their employ. On the facts, the court held that the owner’s actual fault or privity was in fact proven in so far as it failed to provide instructions and supervision to the master and crew on matters which it should have required feedback and reporting from the Master. The owner has the onus to show that he did all that he possibly could to avoid the damage from having been incurred. Taking this further, privity does not mean that the owner personally did a wrongful act, but includes acts done by other parties which he has a duty to supervise or has some form of control over i.e. a master or crew.

In this regard, Article 4 of the LLMC is a convention which raised limits considerably in comparison to its 1957 predecessor, but in return the owner of the seagoing vessel received the benefit of a limit which was thought in most sources to be virtually unbreakable.

⁹¹ *Atlantic Harvest of Namibia (Pty) Ltd v Unterweser Reederei* (1986) 4 All SA (536) (C).

CHAPTER 4 FORUM SHOPPING AND THE NEED FOR LEGISLATIVE REFORM IN SOUTH AFRICA

I Forum Shopping

Looking to the International arena and importance of the topic of Limitation of Liability, it is not surprising the weight which is attached to decisions around the topic especially for a potential claimant or ship owner, as it can materially impact a claimant or ship owners profits and performance commercially. Limitation of liability albeit a statutory matter for the law of the specific territory or forum⁹², the problem with having a different set of rules applying in different territories, will inevitably lead to forum shopping where parties have any choice in the matter. The problem of forum shopping is thus a direct fall out of the lack of uniform rules to govern the topic in different jurisdictions/territories. Different jurisdictions who therefore each apply different legal regimes will result in different outcomes or judgements for interested parties in the maritime adventure/voyage. With forum shopping, all claims for damages, both tort and contractual, brought in a forum of choice, of convenience, of commission or otherwise, will be subject to the limitation legislation adopted in the country of that forum. In each country, depending on the legislation applicable to Limitation of Liability in that territory, will also override any choice of law provision which is detailed in an agreement as it will be regarded as a matter of procedural law not substantive law, irrespective of the origin of the claim and whether created by liability, in tort or in contract⁹³. English courts also share this view as confirmed in the *Caltex Singapore*⁹⁴ case.

II Forum Shopping in the South Africa context

Given the limitation legislation adopted by South Africa not being in accord with the 1976 LLMC, it is not surprising that examples of forum shopping have arisen in the past with examples of Litigation in England and South Africa. In *The Tigr No 4*⁹⁵ proved to be one of the better example of such forum shopping. This case was over the loss of the derrick barge BOS 400 near Cape Town in June 1994. Another Tug which was known as *Tigr*, was towing the barge into Cape Town when the tow wire broke in a storm. The result was that the BOS 400 ran aground and the owners and the charterers of the *Tigr* were sued for £50million by the

⁹² John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 537

⁹³ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, 2nd Edition (2016) 537

⁹⁴ *Caltex Singapore Pte Limited v BP Shipping Ltd.* ([1996] 1 Lloyd's Rep 286

⁹⁵ *The Tigr No 4* [1998] 4 SA 740 (C)

owners of the BOS 400 barge. The Cape Town port authority was one of the third parties drawn into the dispute. Limitation based on the gold franc applied to this case because the cause of action arose before amendments to s261 of the South African Merchant Shipping Act which brought about Special Drawing Rights as the unit of account. Cape Town was the preferred forum for proceedings for the owners of the BOS 400 as it was considered easier to break limitation in South Africa by proving actual fault or privity. The English High Court had ruled, per Rix J, that the owners and charterers of the Tigr may limit their liability in the English action to £573 717. (*Bouygues Offshore SA v Caspian Shipping Co* [1997] 2 Lloyd's Rep 493). However Bouygues, who had favoured Cape Town as the preferable forum, appealed the limitation order as well as the injunction granted to the charterers of the tug. The result of the injunction now meant that they were prevented from further proceedings in Cape Town. The judge in this case, Walker J, found that adoption of the 1976 Limits by England, was a reflection of what was internationally regarded as 'substantial justice'. As stated previously, in order to break limitation under the 1976 LLMC one would have to prove intent to cause loss, or that the loss was caused recklessly and with knowledge that such loss would arise. This is why the owners of the BOS 400 tug would have been intent on proceeding having the matter heard in South Africa instead of England. King DJP in the Cape court found that there was 'nothing opprobrious' in seeking the most advantageous limitation regime as a 'legitimate juridical advantage' where competing regimes had jurisdiction to hear a claim.

This is but one instance of forum shopping as found in our courts historically and as such is used to gain an advantage of sorts depending on the law that is applied and the further, the limitation which also differ from one jurisdiction to another. The solution it seems is in finding a middle ground where both the ship owner and the claimant (eg cargo owner) find a workable solution. As mentioned herein above, while the draft MSB is not without fault, it does seem to result in an amenable trade off of higher limitation levels for a more certain breaking point. The result is that if this interpretation of Limitation of Liability is applied uniformly on a global scale, parties will be subject to one set of rules and the issue of forum shopping will no longer be a consideration, as the same laws will apply in every forum.

III Conclusion

As an introduction to this dissertation, the issue of certainty and uniformity were considered, and has been the common thread which was used throughout the dissertation to justify the need for change and reform of the current legislation. While Limitation of Liability is by no means an easy topic to deal with, the issue of the lack of uniformity in application of the law applicable to the topic in different jurisdictions, is a global concern that does need to be addressed.

From the historical perspective which has evolved over time, it becomes apparent that despite the clear lack of uniformity in the application of the laws and rules across territories and jurisdictions, limitation of liability still serves an important function in so far as it caps liability of ship owners and other interested parties to ensure a viable industry continues to function in what would otherwise be considered a very risky environment exposed to the perils of the high seas. The aim of keeping ship owners and investors interested in the industry, would thus be the main driver for acceding to the proposed new draft regulations which have been submitted.

The general test which is considered when enquiring around the South African Interpretation of the law applicable to Limitation of Liability centres around the idea of actual fault and privity, whereas the preferred global position which has evolved in English Courts, seem to be a more objective test, which is almost unbreakable albeit at the trade off of a higher cap on the limitation of liability for the ship owner. The preferred approach would thus be to consider whether 'the loss resulted from the shipowner's personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result'. Currently, there is no overarching uniformity in the amount of countries which have acceded to the aforementioned test which is aligned to the Draft MSB proposed.

In the publication by the IMO in 2016, it was recorded at the time that there were 54 and 52 contracting parties to the 1976 LLMC and its 1996 Protocol respectively. The figures represented 54, 80% and 57, 41% respectively of the world tonnage and it becomes apparent that these figures albeit outdated, do not reflect uniformity in respect of the concept of limitation of liability of shipowners worldwide. This is especially concerning if one considers other conventions like the 1992 CLC Protocol which has 136 contracting parties, making up 97% of the world tonnage. The disunity is clearly evident and while the 1976 LLMC was intended to replace the 1957 Convention on limitation, many states still apply the previous convention, which include Countries like the United States of America.

The result of the inconsistencies in application of the laws relating to Limitation of Liability results in what was described previously as forum shopping, where South Africa is the preferred destination if the party wishes to stand a greater chance of breaking limitation, albeit at a lower cap on the limitation of liability for the claimant. The lower cap on the Limits of Liability in South Africa, has in the past made South Africa a favourable forum⁹⁶ for those

⁹⁶ *The Tigr* No 4 [1998] 4 SA 740 (C)

who wanted a lower cap on liability with a higher risk of breaking limitation, and as such was not a territory favoured by the English courts when parties have disputed forum.⁹⁷

By way of a short recap, this dissertation has considered several aspects of the limitation concept in a South African perspective as well as the preferred international position and has set out the origin of the idea to provide context to the topic. What followed, was a discussion around decided cases which was used as evidence to justify the change considering the clear differences in interpretation which are applied by the courts when considering the two distinct tests for deciding a case where the limitation is invoked. During the process of researching the topic and recording the arguments herein above, it became apparent that South African courts were uncertain on some components of the concept and that the certain concepts relating to Limitation of Liability remains largely untested with a lot of reliance placed on the English decisions and legislation which existed prior to the United Kingdom adopting the 1976 LLMC regime.

Accordingly, in view of the decided cases and in attempting to eradicate injustices created by forum shopping, to bring a sense of continuity and uniformity to the industry, it is proposed that the new dispensation contained in the proposed draft legislation be implemented. If implemented, South Africa will benefit from the global economy where the focus is on trade that is lucrative for the parties involved with the least amount of risk and so doing increase its involvement and desirability for all interested parties on the international global stage, protecting the interests of its importers and exporters, which would be good for South African trade.

The trade-off between the higher limitation and virtually unbreakable limitation seems to be a matter that is long overdue to be remedied and the only recourse would be to find an alternative compromised position which can be implemented which continues to protect the ship owner⁹⁸ and the maritime claimants.

It seems that on an evaluation of the draft MSB, the compromised position has been found. In the draft MSB, the higher limitation levels will be welcomed by maritime claimants, albeit that this higher cap on liability comes at the cost of having an almost unbreakable limitation. The maritime claimant will however now also have the benefit of insurance which may not previously been available, as ship owners will now more readily be able to have the

⁹⁷ *Caltex Singapore Pte Limited v BP Shipping Ltd.* [1996] 1 Lloyd's Rep 493

⁹⁸ as originally intended from the uncertainties associated with conducting its business on uncertain waters of the ocean.

ship insured along with its goods if the insurers are convinced that the limitation cannot be easily broken. While it seems that both the ship owner and the maritime claimant is not completely appeased by the law as it stands in the Draft MSB, it certainly provides a better position for all involved in the maritime adventure and more aligned with the global limitation regime.

For South Africa to partake in the global arena of Maritime Law, it is imperative that the legislation applied to a topic as crucial as Limitation of Liability conforms to the preferred international position and aligns with the LLMC. By introducing the published draft MSB, the benefits it holds will undoubtedly outweigh the disadvantage as seen from the perspective of maritime claimants and so despite the validity of the objections which may be raised by maritime claimants, it does seem that the amended MSB while favouring ship owners, will be a worthwhile trade off and a middle ground for insurers, ship owners and claimants.

There can thus be no doubt around implementing the Draft MSB as it will ultimately not only benefit the country of South Africa, but also create a sense of certainty and align with the global position as it relates to Limitation of Liability which is applied by the majority of countries.

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