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LLM (Commercial Law)

**TOPIC: The First Draft Merchant Shipping, Bill: Should South Africa implement the proposed amendments in section 271 of the Bill, in its current form?**

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Word Count: [19 518]

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM (Commercial Law) in approved courses and a minor dissertation.

The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM (Commercial Law) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## ACKNOWLEDGEMENTS

I would like to express my utmost gratitude to **Prof. Graham Bradfield** for giving me the opportunity to complete my Master's thesis under his supervision. You are by far the most brilliant, dedicated and humble lecturer I have ever worked with. Your dedication to student's development far exceeds what is required. I take away from our association, your passion and wealth of knowledge in the field of Shipping Law. It has been a tremendous experience growing in this field of research under your guidance. Thank you Prof!

I extend my gratitude to **Prof. Malebakeng Forere** of the University of the Witwatersand (Law faculty), who contributed immensely to my decision to pursue a postgraduate degree in what she defined as an 'unconventional' field of study. Your guidance shaped my career, and for that, I remain indebted to you and your dedication to inspire young women. I salute you.

To **Silindile Nkosi** and **Sonia Mbowa**, you started this journey with me and saw it to completion, I am grateful that, when the end seemed far and unrealistic, you inspired confidence in me. You held me to a greater standard, but not only that, you helped me live up to it. To my **UCT minions**, I love you and thank you for making the process so much easier. **Bongani Motha**, you are a champion in every sense of the word, I appreciate you. To my **Cape Town Energy Pill**, you have not only refueled my energy, you were the source of it. A family far away from home. Kea leboga!

This degree would have not been possible without the sponsorship of the National Research Foundation ("NRF"). Organizations like yours turn dreams into reality. Who would have ever thought a girl from the dusty villages of North West, Ga-Motla would be a UCT Master's graduate. Continue to promote access to quality education to those who are unable to fund their own.

To my **family**,

*'Msiza, Liphahla, Mrholozi, Thubana, Swangubo, Mnguni, Umalila angakabethwa, Mfazi wamabele amade owamunyisa umntwana ngaphetjheya kweligwa niligwana!'*

This journey would have not been possible without your support and love. To **Johanna Msiza** (biological mother) and **Naomi Mkadule**, I appreciate the sacrifices you made in ensuring that I was fed and warm. Your words of affirmation when I was doubting my capabilities, gave me a sense of direction and strength to press on. Your prayers kept and sustained me.

Most importantly, to **Sharon**. You are a fighter, an embodiment of strength and persistence. An epitome of greatness and inspiration. Woman, you are your ancestor's wildest dreams. Thank you for surviving, for stretching and challenging yourself. I wake up every morning and thank God that you are the person I carry in me. I am in awe.

*'Be thankful in all circumstances, for this is God's will for you who belong to Christ Jesus.'*

1Thessalonians 5:18

## **CHAPTER 1 INTRODUCTION**

### **I The Aim of the thesis.**

The 20th century saw efforts to achieve uniformity in respect of limitation regimes through a series of Conventions adopted in 1924,<sup>1</sup> 1957,<sup>2</sup> and, most recently, 1976.<sup>3</sup> Roughly sixty years after the adoption of the Merchant Shipping Act<sup>4</sup> ('MSA'), South Africa has not participated in these efforts to achieve uniformity, in that it has not yet amended the provisions of the MSA. Although it was never implemented, a Bill which proposed amendments to the MSA was published in 2009.<sup>5</sup> Subsequent to that, in 2018, the Draft Merchant Shipping Bill<sup>6</sup> ('MSA Draft Bill') was published by the Minister of Transport for the public to comment on the amendments proposed therein. The aim of this thesis is to comment on the proposed amendments contained in section 271 of the MSA Draft Bill, relating to the limitation of shipowners' liability, and to propose how these proposed amendments should be implemented. Further, it interrogates other relevant aspects relating to the need to reform the current regime.

### **II Thesis**

The proposed amendments in the MSA Draft Bill are in line with the objective to reform the current regime, which is to fix problems of the current dispensation presented by the MSA, i.e. issues relating to conduct barring limitation. In addition to its aim, this thesis argues that the 'fix' should be in a way that does more than to address the issue of, for example, conduct barring limitation or claims and people entitled to limitation. It should also advocate for the achievement of uniformity in order to avoid the problem of forum shopping that is associated with lack of uniformity.

### **III Structure of the thesis**

This thesis responds to two main research questions: (1) Should South Africa's current regime for the limitation of shipowners' liability be amended by implementing the proposed amendments in the MSA Draft Bill published for comments? (2) Regardless of whether or not the MSA Draft Bill should be implemented as proposed, what other aspects of amending the current regime must be interrogated and or considered?

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<sup>1</sup> International Convention for The Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, 1924.

<sup>2</sup> International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, 1957, Brussels, as amended by Protocol of 1979 (1957 Limitation Convention).

<sup>3</sup> Convention on Limitation of Liability for Maritime Claims, 1976, amended by the 2012 Protocol as adopted by the International Maritime Organization (IMO) on 19 April 2012 which came into force in 2015. (1976 LLMC, as amended).

<sup>4</sup> The Merchant Shipping Act 57 of 1951. (MSA).

<sup>5</sup> The Merchant Shipping Amendment Bill, 2009, (MSA Bill), published for comment in GN 695 in GG 32303 9 June 2009.

<sup>6</sup> The First Draft Merchant Shipping Bill, 2018 available at <https://juta.co.za/media/filestore/2018/04/Draft-Merchant-Shipping-Bill-2018.pdf> last accessed on 02/02/2019. (The MSA Draft Bill, 2018).

The first research question involves the examination of the three provisions of the MSA Draft Bill being: limitation levels, conduct barring limitation/onus and claims and people entitled to limitation of liability. In answering the second research question, this thesis will expound on the issue of, and the need for, uniformity and harmonization of laws.

In its examination of the abovementioned provisions, this thesis will comment on the proposed amendments and highlight trade-offs entrenched therein, and further discuss how these will affect the relevant parties, i.e. the shipowners and claimants. First, it will expound on the limitation levels and will consider various factors including, the mechanism adopted in fixing limitation as well the currently proposed monetary limitations.

Although shipowners are allowed to limit their liability when they are legally liable for loss or damage suffered, their right to do so can be forfeited under certain circumstance. In terms of the current regime, this is possible where the damage caused was due to the actual fault or privity of the owner.<sup>7</sup> Therefore, the second provision that this thesis will examine relates to the breaking of limitation/conduct barring limitation and the onus thereof.<sup>8</sup> It will further outline how courts have treated the question of ‘actual fault and privity’ as provided in the MSA, and also how that position has been altered by the introduction of a more restrictive test under the MSA Draft Bill.

Lastly, section 263 of the MSA does not allow for certain claims and excludes certain categories of persons from the benefit of limitation of liability. However, the MSA Draft Bill recognises some of those claims and entitles certain people to limit their liability. For example, the MSA excludes salvors as persons entitled to limit liability, whereas the MSA Draft Bill makes provision for them.

There are two different perspectives from which limitation can be viewed: from claimant’s perspective, on one hand, and, on the other hand, the perspective of those enjoying the benefit of limitation of liability, and the examination of these three provisions will consider both these respective perspectives. In addition, due to the transnational nature of the maritime industry, this thesis will briefly discuss the provisions of the 1976 LLMC in comparison to both the MSA and the MSA Draft Bill.

The second research question will detail the significance of operating under a uniform legal system. Further to this, it will indicate the impact of the current regime on the objective of achieving uniformity and harmonization of laws, and how the implementation of the MSA Draft Bill will affect this objective. Lastly, it will examine other factors related to uniformity which includes, the purpose of the right to limit liability, marine insurance and forum shopping and it will further show how these factors influences the need for uniformity and harmonization of laws.

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<sup>7</sup> Section 261 (1) (a) of the MSA.

<sup>8</sup> Section 261 (1) of the MSA; s 271(2) of the MSA Draft Bill, 2018.

## **CHAPTER 2 : SHOULD THE CURRENT REGIME RELATING TO SHIPOWNERS' RIGHT TO LIMIT LIABILITY BE AMENDED BY IMPLEMENTING THE PROPOSED AMENDMENTS IN THE MSA DRAFT BILL PUBLISHED FOR COMMENTS?**

### **I Introduction**

For over a period of over sixty years, South Africa has applied the provisions of the MSA enacted in 1951 to matters relating to shipowner's right to limit liability. Since then, Parliament has made several attempts at amending the MSA with no success. However, determining whether South Africa should implement the proposed amendments in terms of the MSA Draft Bill, is an inquiry that should not only include a comparison of the old order with the newly proposed order, but, it should also require reasons as to why the reform should be achieved in a particular manner. This is important because knowing what the discrepancies of the current dispensation are, will enable us to evaluate whether the newly proposed amendments will address them.

This chapter considers the provisions of the MSA, the MSA Draft Bill and the 1976 LLMC, as amended. It discusses the proposed amendments presented by the MSA Draft Bill and compares those amendments to the current provisions of the MSA. Further, it provides an overview position of the relevant international convention, the 1976 LLMC, regarding these specific provisions. Hence, this chapter will consist of three parts, the first will deal with monetary limits and the second will focus on the onus and conduct barring limitation. Lastly, it will expound on claims and people entitled to limit liability.

#### *(a) Monetary limits*

##### *(i) Introduction*

In terms of South African civil law, any person who has suffered a loss either under a contract or in delict can claim for damages in order to redress the wrong.<sup>9</sup> Generally the idea is that the non-defaulting party under the contract, or a victim of the delict, so recover in full the damages to which they are entitled in law subject to legal rules which defines what may be claimed and the defendant's ability to pay. However, in maritime law, a shipowner (as defined in the MSA)<sup>10</sup> has the statutory right to limit his liability according to the limits stipulated therein.

The subject of monetary limits captures the very essence of the purpose of the limitation of shipowners' liability. While the purpose was originally and unashamedly to protect shipowners,<sup>11</sup> it has, since the early part of the 20<sup>th</sup> century, been to protect victims by giving them a greater assurance of receiving compensation.<sup>12</sup> Though such compensation is limited, the benefit provides greater certainty on the level of damages the liable shipowner might have to pay; that certainty allows insurers

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<sup>9</sup> J. E Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2ed (2009) (Hare) p 514.

<sup>10</sup> Section 261 of the MSA.

<sup>11</sup> B. Luksic 'Why is a Review of the 1976 Convention on Limitation of Liability Desirable?', (1995) *UPP* 37 at 73.

<sup>12</sup> David Steel, ships are different, or are they? p 1.

to provide cover at lower premiums than they would do if the shipowners' liability was potentially unlimited.<sup>13</sup> The lower premiums made insurance cover more affordable and shipowners, it was thought, would therefore be more likely to insure themselves against liability. Given that insurance companies might be regarded as being in a better financial position than some shipowners, the insurance cover reduced the risk of the liable shipowner who is unable to compensate a victim from being declared insolvent.

(i) *Position under the MSA Draft Bill*

In terms of section 271(1) of the MSA Draft Bill, where a claim for loss of life or personal injury is raised without a subsequent claim for loss of or damage to property, an owner/salvor shall not be liable to compensate the claimant an aggregate amount exceeding 3 000 000 Special Drawing Rights ('SDR') if the ship concerned has a tonnage not exceeding 2000 tons.<sup>14</sup> 'For purposes of section 271, the tonnage of a ship shall be her gross register tonnage.'<sup>15</sup> However, for a ship with tonnage over 2000 tons, the liability shall be limited to 3 000 000 plus 20 000 SDR including an additional 1 208 SDR for each ton if the ship has a tonnage of 2001 to 30 000 tons.<sup>16</sup> For example, an owner of a ship with a total tonnage of 2001 will be entitled to limit his liability to an aggregate amount of 3 021 208 SDR.

However, where a claim raised relates only to loss of or damage to property, the owner/salvor will only be entitled to limit his liability to an aggregate amount not exceeding 1 510 000 SDR for a ship with tonnage not exceeding 2000 tons.<sup>17</sup> But, if the ship concerned has a tonnage exceeding 2000, for each additional ton, 604 SDR will be added.<sup>18</sup> Hence, for an example, a ship that has a total of 2001 tonnage, will entitle the owner to limit his liability to an aggregate amount of 1 510 604 SDR.

Presuming an owner with a ship that has a tonnage of 2000 tons is involved in incident which resulted in claims for both loss of life or personal injury and loss of or damage to property being raised against the owner, he shall be liable for a claim exceeding the total aggregated amount calculated in terms of claims for loss of life and personal injury, being, 3 000 000 SDR.<sup>19</sup> This, however, will apply provided that within the total amount claimed, the amount for loss of life or personal injury exceeds that for loss of or damage to property.<sup>20</sup> Only after the claims for loss of life or personal injury are settled, will claims for loss of or damage to property be settled from the

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<sup>13</sup> John Hare, 515

<sup>14</sup> Section 271 (1) (a) (i) of the MSA Draft Bill, 2018.

<sup>15</sup> Section 272 of the MSA Draft Bill, 2018.

<sup>16</sup> Section 271 (1) (a) (ii) (aa) of the MSA Draft Bill, 2018.

<sup>17</sup> Section 271 (1) (b) (i) of the MSA Draft Bill, 2018.

<sup>18</sup> Section 271 (1) (b) (ii) (aa) of the MSA Draft Bill, 2018.

<sup>19</sup> Section 271 (1) (c) of the MSA Draft Bill, 2018.

<sup>20</sup> Section 271 (1) (c) (i) of the MSA Draft Bill, 2018.

remaining balance.<sup>21</sup> Even so, claims for loss of or damage to property shall not exceed an aggregate amount initially calculated for those claims, being 1 510 000 SDR.<sup>22</sup>

(ii) *The Position under the MSA*

In terms of section 261 (1) of the MSA, the extent of the owner's limitation is also towards claims for loss of life, personal injury and damage to or loss of property or rights arising on any single occasion. Hence, according to the MSA, the owner shall not be liable to a claimant for personal injury or loss of life to an aggregate amount exceeding 206,67 SDR for each ton of a ship's tonnage.<sup>23</sup> Neither shall the owner be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 SDR for each ton of a ship's tonnage.<sup>24</sup> In circumstances where both claims for loss of life or personal injury and damage to property arises, the shipowner shall not be liable for damages to an aggregate amount exceeding 206,67 SDR for each ton of a ship's tonnage.<sup>25</sup> This will be applicable provided that claims for loss of life or personal injury shall have priority over claims for loss of or damage to property or rights only to an extent of an aggregate amount not exceeding the equivalent of 140 SDR for each ton of the ship's tonnage.<sup>26</sup> Therefore, 'where the fund reserved exclusively for personal injury is not sufficient to satisfy all the claims, the claims of that balance ranks [pari passu] with the property claims against the property fund'.<sup>27</sup>

Save for differences in amounts, the provisions of the MSA adopt the similar method of calculating the owners liability as the proposed amendments in terms of the MSA Draft Bill, in that the aggregate amount is calculated according to the ship's tonnage.<sup>28</sup> However, unlike the MSA, the MSA Draft Bill introduces a more advanced mechanism for determining limits. It confers upon the Minister of Transport a duty to, by notice in the Government Gazette, determine the amount relating to limitation of liability from time to time. This method does away with the cumbersome approach of implementing amendments, which would normally require that a Bill be tabled before the Parliament every time there is a need to amend a regime, and with the possibility of periodic increases, it is easier for limits to be increased using this approach.

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<sup>21</sup> Section 271 (1) (c) (ii) of the MSA Draft Bill, 2018.

<sup>22</sup> Section 271 (1) (c) of the MSA Draft Bill, 2018.

<sup>23</sup> Section 261 (1) (a) of the MSA.

<sup>24</sup> Section 261(1)(b) of the MSA.

<sup>25</sup> Section 261 (1) (c) of the MSA.

<sup>26</sup> Section 261 (1) (c) of the MSA

<sup>27</sup> Section 261 (1) (c) of the MSA.

<sup>28</sup> Section 272 (1) of the MSA Draft Bill, 2018.

(iii) *Current position under the 1976 LLMC*

The 1976 LLMC has recently been amended by the 2012 amendment to the 1996 Protocol as adopted by the International Maritime Organization (IMO) on 19 April 2012 which came into force in 2015.<sup>29</sup>

According to the 2012 amendments, the limit of liability for claims for loss of life or personal injury on ships not exceeding 2 000 gross tonnages is 3 020 000 SDR.<sup>30</sup>

‘In terms of the 2012 Protocol, the following are the limits for larger ships:

- (i) For each ton from 2,001 to 30,000 tons, 1,208 SDR (up from 800 SDR)
- (ii) For each ton from 30,001 to 70,000 tons, 906 SDR (up from 600 SDR)
- (iii) For each ton in excess of 70,000, 604 SDR (up from 400 SDR).

The limit of liability for property claims for ships not exceeding 2 000 gross tonnage is [1 510 000] SDR.

This amount has increased from For larger ships, the following additional amounts are used in calculating the limitation amount:

- (i) For each ton from 2,001 to 30,000 tons, 604 SDR (up from 400 SDR)
- (ii) For each ton from 30,001 to 70,000 tons, 453 SDR (up from 300 SDR)
- (iii) For each ton in excess of 70,000 tons, 302 SDR (up from 200 SDR).<sup>31</sup>

Thus, when compared to the MSA, it shows that the limits increased by 51 per cent.<sup>32</sup> Whereas under the MSA, if a ship has a tonnage of 2000 gross tonnage, the aggregate amount to be paid for claims is 413 340 SDR which is considerably low compared to the 3 020 000 SDR, with a difference of 2 606 660 SDR which is way above 100 per cent increment.

It is submitted that the reason why the 1976 LLMC was adopted, annulling the 1957 Limitation Convention, is because the limits in the latter convention became significantly low because of inflation,<sup>33</sup> in that the funds were not sufficient to provide compensation that is proportionate to the damage sustained, or at least, compensation that is economically reasonable under the circumstances prevailing at the relevant time. The 1957 Limitation Convention mirrors the wording of the MSA, and because one of the major concerns with the former were unrealistic low limits, the similar logic might have been applied when the MSA Draft Bill was drafted.

In support for the implementation of the MSA Draft Bill, it is crucial to discuss how the proposed amendments affect the issue of inflation, which was a major concern with the provisions of the 1957 Limitation Convention. For example, if the aggrieved party is a shipowner whose vessel was damaged solely by the negligence of the other vessel’s crew in failing to adhere to the laws of sea on speed, the current limits in the MSA, though intended to protect shipowners against excessive claims, may not be sufficient in assisting the aggrieved owner to repair his vessel in this current

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<sup>29</sup>The 1976 LLMC, as amended.

<sup>30</sup> The 1976 LLMC, as amended.

<sup>31</sup> The 1976 LLMC, as amended.

<sup>32</sup> Luke Lane ‘LLMC 1996, 2012 amendment. FAQs’ available at <https://www.ukpandi.com/knowledge-publications/article/llmc-1996-2012-amendment-faqs-132703/> last accessed 2017/08/14.

<sup>33</sup> Collin De La Rue & Charles B Anderson *Shipping and the environment: Law and practice* 2ed (2015) at 787.

economy. Consequently, this may inevitably affect the owner's business which will in turn negatively affect the economy he participates in (maritime industry) and the greater global economy.

In the maritime industry, which does not directly operate in sync with the general economy,<sup>34</sup> inflation may be influenced by factors such as prices for energy and commodities, trade and shipping.<sup>35</sup> However, inflation in the maritime industry is not entirely detached from the overall economy and does however rely on the health of it.<sup>36</sup> Therefore, say for example, the amount paid as compensation for the damage to a commercial vessel, is significantly low, the owner may seek to cover the difference by charging high freight. This will unfavorably affect the very essence of this industry, being trade and shipping.

The publication of the MSA Draft Bill for public comments indicates that, among other reasons, South Africa has awakened to the realization that the effects of inflation in this current dispensation are dire and that limits in the MSA have become unreasonably low considering that the cost of living is currently too high. It must be borne in mind that the limits in the MSA were adopted in 1951 and a lot has happened from then till now and certainly the economy has experienced a lot of changes as well. Therefore, this dissertation suggests that the provisions relating to limitation levels/ monetary limits as provided in the MSA Draft Bill should be implemented as law in South Africa for the above mentioned reasons.

#### (iv) *Conclusion*

It appears that from the perspective of the claimants, the higher the levels the better. This is supported by the argument on inflation, that even though the shipowner may be entitled to limit his liability, at the very least the claimant can still be fairly compensated if limits are higher. However, from the perspective of those who are entitled to limit their liability, the lower the levels the better. In support for lower limits, one may argue that it is good for commercial practice as it will allow shipowners to, if insured, to pay for insurance premiums that are affordable. Consequently, it then becomes a matter of weighing interests between those entitled to limit liability and the claimants.

This thesis argues for the higher monetary levels as proposed by the MSA Draft Bill which favours the claimants for the following reasons. First, if limitation applies, the claimants are already put at a disadvantaged position by the fact that their claims will not be paid in full. Secondly, it is problematic to further subject the very person to monetary limits which are lower than their claims considering inflation. Unlike in the past when shipowners were individual persons, currently most ships are owned by corporations/legal entities with more than just one ship under their control, which means they are in a position to compensate without being liquidated or unable to operate financially.

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<sup>34</sup>Marcon International Inc 'Inflation and marine industry', available at <http://www.marcon.com/library/articles/2008/InflationandtheMarineIndustry.pdf>, last accessed 11/02/2019, 1. (Marcon International Inc.)

<sup>35</sup> Marcon International Inc, 1..

<sup>36</sup> Marcon International Inc, 1..

In addition, marine insurance has become a very big part of the maritime industry, most ship owning companies have taken out insurance on their vessels, which is a guarantee that claims which are proven, may be settled.

Thus, based on the analysis of monetary limits, the argument that the MSA Draft Bill should be implemented seems valid.

*(b) Onus and burden of proof in 'breaking' limitation*

*(i) Introduction*

The shipowner's right to limit liability can be 'broken', and the owner will be precluded from relying on the right to limit in certain circumstances, referred to as 'breaking' limitation.<sup>37</sup> This remains the ever present threat to the limitation of liability because a shipowner may forfeit this right completely if certain requirements are met, meaning he therefore becomes liable to settle the claimant's claim in full. This provision has also undergone developments in terms of the 1976 LLMC which shifts the onus and burden of proof on the claimant and further establishes a more restrictive test on the part of the claimant in proving why liability should not be limited.

*(ii) Position under the MSA Draft Bill.*

In terms of section 271(2) of the MSA Draft Bill, which states:

'... the owner of a ship is not entitled to the benefit of the limits of liability in subsection (1) if it is proved that the loss, injury or damage in question resulted from the owner's personal act or omission, committed either with intent to cause the loss, injury or damage or recklessly and with knowledge that the loss, injury or damage would probably result. The onus of proving that this subsection applies is on the person alleging its application.'

The MSA Draft Bill is identical to the provisions of the 1976 LLMC when it comes to conduct barring limitation. Therefore, the amendments proposed by the MSA Draft Bill would assume the similar interpretation as the 1976 LLMC provided below. As a result, this thesis will not engage further on the legal effects of the amendments contained in the MSA Draft Bill in this section.

*(iii) Position under the Merchant Shipping Act.*

In terms of Section 261 (1) of the MSA, being the current regime in South Africa, the liability of the shipowner can be limited provided that the loss or damage was not caused by his actual fault or privity. There are numerous attempts at defining the words 'actual fault or privity'. Therefore, this chapter will provide a synopsis of how scholars and courts have defined those words in order to establish why the test under the MSA requires to be reformed.

Nonetheless, the phrase 'actual fault or privity' is an inquiry into two circumstances. It requires the owner to have actual fault leading to the loss or damage or that the owner to have been privy to knowledge that, if disclosed, loss or damage could not have occurred. The word 'or' suggests that either one of the situations would suffice to attract the application of s 261(1).<sup>38</sup> The former attributes liability on the personal acts of the owner which caused the loss or damage, while the latter attributes

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<sup>37</sup> Section 261 (1) of the MSA.

<sup>38</sup> Hare, 521.

liability based on the acts of people other than the shipowner, provided that the shipowner had knowledge of those acts.<sup>39</sup>

Professor John Hare states that the words ‘fault’ would not prove to be difficult to a South African lawyer if we adopt the idea that fault exists ‘whenever the defendant’s wrongful and blameworthy’ acts cause harm to another.<sup>40</sup> It is the meaning of privity, he writes, that is rather more complex;<sup>41</sup> the inquiry would require more than just the dictionary meaning as outlined in his book.<sup>42</sup>

However, in the case of *Eurysthenes*,<sup>43</sup> the court held that for the shipowner to be privy to the damage suffered, he ought to have had knowledge of the unseaworthiness of his vessel and still allowed her to sail under those conditions. It is believed that this knowledge does not need be actual, hence it is suggested that the test should be objective, in that the owner ought to have known of the condition leading to the harm suffered.<sup>44</sup> Therefore, privity refers to liability incurred through the acts of other people, i.e. agents, of which the owner had knowledge.<sup>45</sup>

In addition, not only does section 261(1) of the MSA require that there be actual fault or privity, it also places the burden on the owner to prove that he had no actual fault or privity. In *The England* case,<sup>46</sup> Megaw LJ said:

‘it is not in dispute that the onus is on the plaintiff seeking limitation to establish that there was no fault on the part of the person in the position of the managing owner; and if they fail so to establish, so that there was a court, it is then for them further if they can, to establish that fault was not the cause of the casualty.’<sup>47</sup>

The Judge reiterated that the owner, as a party seeking the benefit of limitation, has the onus of proving that there was no fault or privity on his part. He also addressed the second important requirement, that of causation. He stated that in order for the owner not be entitled to limit his liability, it is not sufficient that there be fault or privity on his part, such fault or privity must have caused the damage or loss suffered. This principle was approved in the cases of *The Norman*,<sup>48</sup> and *The St Padarn*.<sup>49</sup>

In requiring that the shipowner proves that it had no fault or privity in order to limit their liability under the 1957 Limitation Convention, some thought that shipowners were almost always found to

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<sup>39</sup> *Compania Maritima san Basilio SA v The Oceanus Mutual Underwriting Association (Bermuda) Ltd ‘The Eurysthenes’* [1976] 2 Lloyd’s Rep 171 (CA). (The Eurysthenes case)

<sup>40</sup> Hare, 521.

<sup>41</sup> Hare, 521.

<sup>42</sup> Per the *Shorter Oxford English Dictionary* ‘participation in the knowledge of something private or secret, usually implying concurrence or consent’.

<sup>43</sup> *The Eurysthenes* case.

<sup>44</sup> Hare, 522.

<sup>45</sup> Gutiérrez, 54.

<sup>46</sup> *The England* [1973] 1 Lloyd’s Rep 373 (CA).

<sup>47</sup> *The England* [1973] 1 Lloyd’s Rep 373 (CA) at 377.

<sup>48</sup> *The Norman* [1960] 1 Lloyd’s Rep 1 (HL).

<sup>49</sup> *The St Padarn* 1986 (4) SA 875 (C).

have not discharged the burden of proving that they had no fault or privity.<sup>50</sup> Thus, they were readily denied the right to limit their liability, which made breaking the limit quite easy. Therefore, since the South African legislation mirrors the wording in the 1957 Limitation Convention, the same contentions about the ease to break limitation applies to South Africa.<sup>51</sup>

As a result, there are concerns raised regarding this position as addressed below which explains why there is a need to implement the provisions of the MSA Draft Bill.

(iv) *Position under the 1976 LLMC*

During the negotiations leading to the adoption of the 1976 LLMC, shipowners demanded indisputable or virtually unbreakable right of limitation in return for the proposed higher limits.<sup>52</sup>

Therefore, it was concluded at the 1976 Conference that the actual fault or privity test should be replaced by a more restrictive test.<sup>53</sup> Hence, the 1976 LLMC provides that:

‘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.’<sup>54</sup>

In order to understand the significance of this Article holistically, there are certain words and terms contained therein which needs to be analysed and discussed in detail. The first one is ‘intent’ and, according to Gutiérrez , ‘intent is something completely different from carelessness or recklessness, no matter how careless or reckless the conduct may be.’<sup>55</sup> Thus, not only should the owner knowingly and intentionally commit the wrongful conduct, but in doing so, he must at all times be aware that the conduct is wrong.<sup>56</sup> As a result, this requires more from the person who is challenging the right of the owner to limit liability i.e. one must prove that the owner deliberately collided with another vessel, or object, which makes is difficult to break the limitation.

Secondly, another term used in the Article that warrants interpretation is ‘recklessness’. Provided that the claimant fails to prove intent on the part of the owner, he can break the limit by proving recklessness on the part of the owner. Eveleigh LJ in *Goldman v Thai Airways International Ltd* held that:

‘When conduct is stigmatized as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly, he acts in a manner which indicates that a decision to run the risk or the mental attitude of indifference to its existence [...] One cannot decide

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<sup>50</sup> *The Herceg Novi* [1998] 2 Lloyd’s Rep 454 at 457.

<sup>51</sup> *The St Padarn* 1986 (4) SA 875 (C).

<sup>52</sup> Norman A. Martínez Gutiérrez *Limitation of liability in international maritime conventions: the relationship between global limitation conventions and global particular liability regimes* (2011) , 62. (Gutiérrez).

<sup>53</sup> Gutiérrez , 62. (*Ibid*).

<sup>54</sup> Article 4 of the 1976 LLMC, as amended.

<sup>55</sup> Gutiérrez, 64.

<sup>56</sup> *Horabin v British Overseas Airways Corp* [1952] 2 Lloyd’s Rep. 450 at 459.

whether or not an act or omission is done recklessly without considering the nature of the risk involved.’<sup>57</sup>

In addition to this, Gutiérrez in his book refers to the Dutch courts which have held that conduct is reckless and with knowledge:

‘[...] if the person conducting himself in this way knew the risk connected to that conduct and was conscious of the fact that the probability that the risk would materialize was considerably greater than it would not, but all this did not restrain him from behaving in this way.’<sup>58</sup>

When considering the two excerpts above, they illustrate why it is necessary for the owner to become aware of the risk involved when he conducts himself in a specific manner and reconciling himself with that risk by undertaking to act nonetheless. However, it is not enough to show that the conduct could possibly cause the loss, but that it would probably cause it.<sup>59</sup>

The last term worth mentioning is ‘with knowledge’. Although this term appears to be closely related to that of recklessness, they do differ in that recklessness has to do with knowledge of the risk probably occurring while this term relates more to knowledge of information which, if revealed, it would have deterred the harm from occurring.<sup>60</sup> For example, that the owner knew the radar was defective and failed to communicate that information to the master. It is believed that in terms of Article 4, knowledge refers to actual knowledge and not constructive knowledge. The former relates to something that the owner actually knew as compared to the latter which relates to something the owner ought to have known.<sup>61</sup>

Morison J, in the case of *Rolls Royce v HVD*,<sup>62</sup> addressed the problem of determining actual knowledge as it requires establishing the state-of-mind of the liable party. In his attempt to clarify how courts should determine what is in the mind of a man, he said knowledge is determined:

‘through admission by the person concerned or by drawing inferences. For present purposes it is sufficient to say that there is a clear distinction between what a person ought to (should) have known and what the person must have known (did know). Only the latter will suffice under this part of the convention.’<sup>63</sup>

Therefore, it appears that the test to determine knowledge is subjective according to Morison J. However, there are instances where courts have drawn inferences by adopting the objective test, i.e. where the question relates to what a ‘reasonable man’ would have done under like circumstances.<sup>64</sup> Regardless of the approach adopted by other courts, the 1976 LLMC requires the application of a

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<sup>57</sup> *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693 at 699. (*Goldman v Thai Airways International Ltd*).

<sup>58</sup> Gutiérrez , 65.

<sup>59</sup> Gutiérrez , 65.(*ibid*)

<sup>60</sup> Gutiérrez , 65.

<sup>61</sup> Gutiérrez , 66.

<sup>62</sup> *Rolls Royce v HVD* [2000] 1 Lloyd’s Rep 653 (*Rolls Royce v HVD*).

<sup>63</sup> *Rolls Royce v HVD* at 659.F

<sup>64</sup> Gutiérrez , 66.

subjective test because of the wording contained therein, ‘with knowledge’ instead of the phrase ‘knew or ought to have known’.<sup>65</sup>

From the analysis on what constitutes intent, recklessness, and ‘with knowledge’, a person seeking to challenge the owner’s right to limit liability would not ordinarily be able to do so with much ease as one would under the MSA.<sup>66</sup> Furthermore, unlike the MSA, the burden of proving that the shipowner acted with intent or recklessly rests with the person challenging the application of the limitation in terms of the 1976 LLMC.<sup>67</sup>

(v) *Conclusion*

In conclusion, there are trade-offs between the claimant and the shipowner that needs to be highlighted. First, from the perspective of the claimant, the position under the MSA seems favourable as it is easier to break limitation to receive full compensation. However, from the perspective of the shipowner, the position under the 1976 LLMC, alternatively the MSA Draft Bill, is more favourable because it makes it harder to break limitation. Also, it increases the certainty with which they can assess the extent of the liability to which they may be exposed to.

In addition, claimants would prefer that the onus and burden of proof to continue resting with the shipowner as it will relieve them of having to prove fault and privity. While those entitled to limit liability would prefer the protection afforded by the 1976 LLMC, alternatively the MSA Draft Bill, which places the burden of proof on the claimants.

Therefore, in light of the monetary limits discussed in the previous section, it is preferable that the onus and burden of proof rest on the claimant for the following reasons. First, it is highly probable for the court to find that the owner acted with actual fault or was privy to certain knowledge which would refuse him to limit his liability as discussed above. Therefore, this makes shipowners vulnerable to claims that are most likely to be successful and requiring to be paid in full, defeating the very purpose of the right to limit liability which, *inter alia*, includes to serve the needs of commerce in the maritime industry, and to encourage investment in the shipping industry.<sup>68</sup>

Secondly, the adoption of the 1976 LLMC, alternatively the MSA Draft Bill, seeks to remedy deficiencies which resulted from the application of the 1957 Limitation Convention; and because the MSA mirrors the wording of the latter convention, the remedial effect of the 1957 Limitation Convention through the adoption of the 1976 LLMC can be extended to the MSA. By adopting a subjective test in determining the owner’s contribution to the loss or damage suffered, the 1976 LLMC sets the standard higher, ultimately making it hard for claimants to break the limit.

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<sup>65</sup> *Goldman v Thai Airways International Ltd* at 699.

<sup>66</sup> The MSA 57 of 1951.

<sup>67</sup> *The Bowbelle* [1990] 1 Lloyd’s Rep. 532 at 535.

<sup>68</sup> Kourosh Taheri ‘Limitation of Liability for Maritime Claims: Multiple Perspectives and Legal Implications’ (unpublished LLM thesis, Lund University, 2013), 7. Available at <https://lup.lub.lu.se/student-papers/search/publication/3858032> last accessed on 08.02.2019

As discussed in part one (monetary limits), the MSA does not provide fair and reasonable compensation to claimants when one considers the effects of inflation. The 1976 LLMC and the MSA Draft Bill balances its high standards for breaking the limit with higher monetary limits, thus, should a claimant fail to prove why the owner should not be entitled to rely on his right to limit liability, he (the claimant) can always be entitled to a higher compensation as compared to the MSA. Consequently, both the interests of the shipowner and those of claimants can be fairly protected should South Africa implement the proposed amendments relating to, both limitation levels and conduct barring limitation, as codified in the MSA Draft Bill.

(c) *Claims and persons entitled to limitation*

(i) *Introduction*

This chapter will discuss the categories of people entitled to limit their liability and secondly, discuss which claims attract this right. As a result, it will expound on the reasons why, among other reasons, did the 1976 LLMC incorporate salvors as persons entitled to limit their liability for loss of life or personal injury and loss of or damage to property. Further, it will discuss briefly why the same reasons are attributable to MSA Draft Bill.

(ii) *The position under the MSA*

In terms of the MSA, an 'owner' is defined to include 'any charterer, any persons interested in or in possession of such ship, and a manager or operator of such a ship',<sup>69</sup> and it further includes builders or other persons interested in a ship being built at any port or place in the Republic of South Africa.<sup>70</sup>

In addition, section 263 (2) provides that a 'manager or operator' shall be regarded as the owner for purposes of s 261. However, it does not clearly specify under what circumstances a manager or operator will be regarded as an owner with the right to invoke the benefit of limitation of liability. For example, In terms of the Hague-Visby Rules,<sup>71</sup> where a carrier has entered into a contract of carriage with a shipper, and as a result of that agreement, a third party (i.e. cargo interest) incurs liability, such liability may be attributed to the carrier where he was negligent in caring for the cargo on board (hereinafter referred to as commercial default)<sup>72</sup> or the carrier may be exempted from liability, where there was defective navigation or management of the vessel<sup>73</sup> (hereinafter referred to as Vessel Management default).<sup>74</sup>

Therefore, this would suggest that since the carrier, who is usually referred to as the owner under a charter party entered into in terms of the NYPE '93 form,<sup>75</sup> can be exempted from liability arising out of vessel management default, where navigation and management of the vessel is performed by a party independent of the owner/carrier. Hence, in that case, it would mean the manager or operator is different from the 'owner' of the ship and he (the manager/operator) shall be held responsible for any loss or damage resulting from their negligent conduct independently of that of the owner. Usually ship management is carried out by an independent company on behalf of the

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<sup>69</sup> Section 263 (2) of the MSA.

<sup>70</sup> Section 261 (2) of the MSA.

<sup>71</sup> The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968. (The Hague Visby Rules).

<sup>72</sup> Eun Sup Lee & Seoan OK Kum 'A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel' (2000) *Transp. L.J* at 205. (Eun Sup Lee & Seoan OK Kum)

<sup>73</sup> Article IV (2) of the Hague Visby Rules.

<sup>74</sup> Eun Sup Lee & Seoan OK Kum, 205.

<sup>75</sup> The New York Product Exchange form 1993.

owner for a fee,<sup>76</sup> which makes sense why the shipowner would be exempted from liability arising out of the negligence of an independent party.

Also, the MSA states that ‘any person interested in or in possession of such a ship’<sup>77</sup> will be able to limit their liability. It does not provide a definition of what constitutes an ‘interested person’. Usually in law, an interested party is an individual person or legal entity with a right, claim or other interest in a particular matter.<sup>78</sup> Thus, it is correct to submit that an interested person in terms of the MSA would be one whose interests in the vessel have been affected by the claims brought against the vessel.

However, it is interesting that Griggs, Williams and Farr actually regard ‘operators and managers’ of the vessel as interested parties under the meaning of the 1957 Limitation Convention.<sup>79</sup> Nonetheless, their submissions prove problematic if they are to be given a restricted interpretation in that interested person can only be the operator or manager of the vessel. Further, the wording of the Act is structured in a way so to suggest that an operator or a manager is different to ‘any interested person’ because of the word ‘and’ separating the two classes of people.

The MSA does not provide an indication of how wide is the scope of determining who is ‘an interested party’. In fact it leaves so much room for interpretation which may potentially extend this right to any person or entity claiming to have an interest. Could this undefined scope be so wide that an owner of an associated ship could be considered an interested party for purposes of limitation of liability? In that they may be allowed to invoke the limitation of liability should they be faced with an action in rem for damaged property caused by the other ship (ship concerned). This is a pertinent concern which proves to be relevant because the Admiralty Jurisdiction Regulation Act (AJRA) allows for the arrest of an associated ship to recover from the owner.<sup>80</sup>

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<sup>76</sup> MI News Network ‘What is ship management’ 21 July 2016 available at <https://www.youtube.com/watch?v=GkpN3uiZ-Ew> last accessed 2017/11/06.

<sup>77</sup> Section 263 (2) of the MSA.

<sup>78</sup> *The Legal English Dictionary*, available at <https://www.translegal.com/legal-english-dictionary/interested-party> last accessed 07/11/2017.

<sup>79</sup> Gutiérrez, 31.

<sup>80</sup> Section 3(6) of the Admiralty Jurisdiction Regulations Act 105 of 1983.

(iii) *Position under the 1976 LLMC*

According to the 1976 LLMC persons entitled to limit liability are shipowners and salvors, as defined below.<sup>81</sup> In terms of the 1976 LLMC the term 'shipowner' shall mean the owner, charterer, manager and operator of a seagoing ship while a salvor shall be defined as any person rendering services in direct connection with salvage operations.<sup>82</sup> Salvage operations shall also include operations referred to in Article 2, paragraph 1(d), (e) and (f). What is apparent between the provisions of the convention and those in the MSA is that the 1976 LLMC extended the right to limit liability to apply to salvors. The decision to include salvors on the list of the individuals who are able to limit their liability followed after the court's judgment in the case of *Tojo Maru*.<sup>83</sup>

In this case, the court held that, firstly, there was no rule of maritime law which precluded the owners of a salvaged vessel from bringing a claim for damages resulting from the negligence of the salvors in cases where a salvage operation had been successful or, alternatively, where the salvors had done less damage. Thus, the owners had locus standi to bring an action by way of counterclaim for the actual loss caused by the negligence of the diver and they were not constrained to a right to set off that loss against the amount of the salvage award. Secondly, the contractors were not entitled to limit their liability because the diver in firing the gun did not act 'in the management or navigation' of the tug within the meaning of the s 503(1) of the 1894 Act,<sup>84</sup> nor was it an act by a person on board the tug. Accordingly, the owners were entitled to be awarded the sum by which the agreed damages exceeded the amount of the remuneration to which the contractors would have been entitled but for their negligence.<sup>85</sup>

Immediately after this decision was delivered, the International Salvage Community lobbied strongly, in negotiations that led to the adoption of the 1976 LLMC, to have their interests protected.<sup>86</sup> Although salvors are recognised under the 1976 LLMC, the convention however does not allow for the limitation of liability for claims for salvage or claim for special compensation in terms of Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average.<sup>87</sup> This means, salvors can limit their liability where, in carrying out the salvage operation, someone lost their lives or was injured and or cargo was damaged or lost. The right cannot be invoked where the claim relates to the salvage award, meaning that if the shipowner employs the services of a salvor, he is liable to pay for those services without invoking the benefit of limitation of liability.

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<sup>81</sup> Article 1 (1) of the 1976 LLMC, as amended.

<sup>82</sup> Article 1 (2) and (3) of the 1976 LLMC, as amended.

<sup>83</sup> *N.V. Bureau Wijsmuller v. "Tojo Maru" (Owners) (the "Tojo Maru")* [1971] 1 Lloyd's rep. 341. (The Tojo Maru case).

<sup>84</sup> Merchant Shipping Act, 1894.

<sup>85</sup> *The Tojo Maru* case.

<sup>86</sup> Gutiérrez, 32.

<sup>87</sup> Article 3 (a) of the 1976 LLMC, as amended.

(iv) *Claims entitled to limitation*

Contrary to the provisions of the MSA, The 1976 LLMC states that:

‘(d) claims in respect of raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship.’<sup>88</sup>

Gutiérrez submits that these sub-paragraphs were devised considering the claims brought by conservancy authorities and or other public entities and he states that the right to limit under these sub-paragraphs is only available where the said claims do not relate to remuneration under a contract with the person liable.<sup>89</sup>

However, the issue of wreck removal and the costs thereof is one that requires special attention particularly where shipowners may abandon their vessels which might pose danger to the environment and obstruct marine traffic. This would then bestow upon the authorities such as The South African Maritime Safety Authority (SAMSA), the duty to remove the wreck at its own cost which proves disadvantageous.<sup>90</sup> Accordingly, it becomes necessary to implement and adopt laws that seek to regulate these kinds of irregularities.

Wreck removal in South Africa is regulated by the Wreck and Salvage Act,<sup>91</sup> the National Ports Act,<sup>92</sup> and the Marine Pollution (Control and Civil Liability) Act (‘the Marine Pollution Act’).<sup>93</sup> However, the ambit and purpose of these statutes differ but they overlap when it comes to wreck removal.<sup>94</sup> The Wreck and Salvage Act does not make provision for shipowners to limit their liability, while limitation of liability in terms of the Marine Pollution Act applies where a wreck is likely to cause discharge of oil. The National Ports Act confers upon the Authority the right to remove the wreck and recover ‘all costs’ associated with the removal of such from the owner.<sup>95</sup> The Act makes no mention of the shipowner’s right to limit their liability for claims instituted by the Authority. However, section 46 of the National Ports Act confers upon the shipowner the right to appeal any decision of the Authority regarding fees charged, this may include fees for wreck removal. Thus, should the Authority charge a fee for removal and the shipowner has reasons to believe that the fee charged is not reasonable based on sound reasons, he/she may appeal to the Regulator.

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<sup>88</sup> Article 2 of the 1976 LLMC, as amended.

<sup>89</sup> Gutiérrez, 44.

<sup>90</sup> Livashnee Naidoo ‘The Nairobi International Convention on the Removal of Wrecks, 2007: Sinking or salvaging South Africa’s wreck-removal legislation?’ (2015) *SALJ* p 852. (Livashnee Naidoo).

<sup>91</sup> Wreck and Salvage Act 94 of 1996.

<sup>92</sup> National Ports Act 12 of 2005.

<sup>93</sup> Marine Pollution (Control and Civil Liability) Act 6 of 1981.

<sup>94</sup> Livashnee Naidoo, 852.

<sup>95</sup> Section 74(2) (b) of the National Ports Act.

Therefore, from the legislative provisions aforementioned, it seems that the only time an owner in South Africa will be allowed to limit their liability is if their ship is declared a wreck which causes discharge of oil.

Notwithstanding the above, South Africa has acceded to the Nairobi Convention on Wreck Removal ('Nairobi Convention').<sup>96</sup> Livashnee Naidoo identifies certain deficiencies with the relationship between wreck removal and limitation and summarizes them as follows: if the owner who abandoned the vessel cannot be identified, SAMSA cannot compel wreck removal and neither can it recover the costs spent on removing the wreck; and, provided that the owner can be identified, there is still no guarantee that it will be financially stable to compensate SAMSA for the liability incurred.<sup>97</sup>

Nevertheless, the Nairobi Convention does allow ship owners to limit their liability, as long as the limitation amount is calculated in terms of national legislation or international convention such as the 1976 LLMC.<sup>98</sup>

However, Livashnee Naidoo is of the view that South Africa should not accede to the 1976 LLMC and the Nairobi Convention simultaneously as it may create a new set of difficulties.<sup>99</sup> Rather, South Africa may accede to the Nairobi Convention with continued preservation of the right not to allow limitation for wreck removal.<sup>100</sup> Therefore, it appears that should a case on wreck removal arise, it would be decided based on the provisions of the relevant legislation, and if that legislation does not have internal provisions regarding limitation of liability, then we will have to resort to the position under the Wreck and Salvage Act, which is that the owner may not limit his liability.

Nevertheless, regarding the issue of not being able to identify who is the owner of the wreck, it remains unclear as to how the matter will be decided, but it appears that the state will bear the responsibility to ensure that the traffic within their territorial waters is not obstructed as this may impact negatively on the smooth operation of businesses in the maritime industry and the global economy as a whole.

Unlike the MSA, the 1976 LLMC has a list of all the claims that are excluded from limitation, one such claim is that for salvage operations. Other claims include those for oil pollution within the meaning of the CLC,<sup>101</sup> and for any nuclear damage.<sup>102</sup> However, for purposes of this dissertation, it is not necessary to delve further than what has already been discussed.

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<sup>96</sup> Nairobi International Convention on the Removal of Wrecks, 2007. (the Nairobi Convention).

<sup>97</sup> Livashnee Naidoo, 862.

<sup>98</sup> Article 10 (2) of the Nairobi Convention.

<sup>99</sup> Livashnee Naidoo, 862.

<sup>100</sup> Livashnee Naidoo, 862.

<sup>101</sup> Article 3 (b) of the 1976 LLMC, as amended.

<sup>102</sup> Article 3 (d) of the 1976 LLMC, as amended.

Therefore, since South Africa has acceded to the Nairobi Convention and thus the provisions contained therein would be applicable to a matter requiring the administration of the convention, the view that simultaneous accession to the 1976 LLMC would create new set of difficulties may very well be true in that South Africa would have to come into terms with two conventions.<sup>103</sup> However, that school of thought creates an idea that it is best not to change the status quo if there may be challenges with adopting a new order of doing things. If anything, differences between these two conventions should be treated as an opportunity for South Africa to carefully study the provisions therein and find a way to consolidate them and create a new legal regime.

(v) *The position as presented by the MSA Draft Bill*

In terms of the MSA Draft Bill, an ‘owner in relation to a ship, includes any charterer of the ship, any person interested in or in possession of the ship, any manager or operator of the ship’.<sup>104</sup> Unlike the MSA, it recognises salvors as persons entitled to limit liability and defines the same as:

‘any person conducting a salvage operation as defined in Article 1 of the International Convention on Salvage, 1989, as amended, being the Schedule to the Wreck and Salvage Act, 1996, provided that the service must be rendered in relation to a ship.’<sup>105</sup>

Article 1 of the International Convention on Salvage (‘ICS’) defines salvage operations as ‘any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.’ Article 1 of the ICS is self-explanatory and reading it in conjunction with the definition of a salvor in terms of the MSA Draft Bill, the understanding is that, the assistance provided by the salvor must have occurred in navigational waters in an attempt to rescue any vessel or any property that is endangered.

In addition, the MSA Draft Bill introduces a provision that was previously not included in the MSA. This provision states that ‘the limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which, he is rendering salvage services shall be calculated according to a tonnage of 1,500 tons.’ The wording of this section is not clear in that, it is not easy to make out whether the drafters intended for salvors’ limitation of liability to be calculated only to a maximum of 1500 tons, even if the vessel in which the salvor used, had a tonnage that is more than 1500 tons; or whether the 1500 tons limit only applies to those salvors who were not operating from a ship. However, if it is the latter, the 1500 tons limit makes sense in that it becomes a mechanism to calculate liability where it would normally not be possible to determine tons.

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<sup>103</sup> Livashnee Naidoo, 862.

<sup>104</sup> Section 271 (6) (a) of the MSA Draft Bill, 2018.

<sup>105</sup> Section 271 (6) (b) of the MSA Draft Bill, 2018.

Assuming there was no vessel involved in the salvage operation, i.e. a person attempted to save an endangered precious property floating on navigational waters, but in addition to saving this property, he caused a great deal of damage to it and the owner seeks to claim for damages. In those instances, it is impossible to calculate the limit of liability using tonnage because there was no ship involved, hence one would think the MSA Draft Bill proposes an easily ascertainable figure to settle matters of this nature.

In so far as amendments are concerned, the MSA Draft Bill does not extend the right to limit liability to any other person other than those already specified in the MSA. Although it recognises salvors, it denies owners the right to limit their liability for claims relating to salvage, and where applicable, claims for special compensation under Article 14 of the ICS, as amended. The right to limit liability also does not apply to claims for oil pollution damage, nuclear damage or claims by servants of the owner of a ship or the salvor, and claims for wreck removal.<sup>106</sup>

However, considering the need for and objective of uniformity, it is necessary to expound on any overlaps between the provisions of the MSA Draft Bill and the 1976 LLMC in this regard. Though similar in many respects concerning claims and people entitled to limit liability, the MSA Draft Bill does not allow limitation of liability for wreck removal claims. Thus, although this thesis suggests that South Africa should implement the provisions of the MSA Draft Bill in order to reform the current regime, it proposes that the Parliament should consider including claims for wreck and removal.

(vi) *Conclusion*

The analysis of the three sources of law above indicates that there is a lot that needs to be taken into consideration when amending the MSA. For one, the inclusion of salvors as persons entitled to limit liability, which is proposed by the recent MSA Draft Bill. Also, the recognition of claims for wreck removal being subject to limitation. Although Lavishnee Naidoo suggests it will be problematic for South Africa to deal with the operation of two conventions, being the Nairobi Convention and the 1976 LLMC, this thesis argues that the best way to consolidate them is by amending the provisions of the MSA to reflect the position as contained the 1976 LLMC and the Nairobi Convention. For example, if the MSA would provide that an owner is entitled to limit its liability for wreck and removal, it should also provide that the owner will only be able to do so in the event that he/she had no intention or knowledge of events which caused the vessel be declared a wreck. It would also be wise to include compulsory insurance that, in the event where the owner may not be entitled to limit its liability, they may still be able to pay for the cost of removal.

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<sup>106</sup> Section 271 (8) (b) to (e) of the MSA Draft Bill, 2018.

However, it is apparent that the MSA falls short when compared to both the 1976 LLMC and the MSA Draft Bill, hence this dissertation strongly suggests that there should be amendments made to the MSA. The first of these amendments would be to include salvors as persons entitled to limit their liability. The second amendment would be to include claims for wreck removals.

### **CHAPTER 3 : Regardless of whether or not the MSA Draft Bill should be implemented as proposed, what other aspects of amending the current regime must be interrogated/considered?**

#### **I Introduction**

For purposes of international relations, the topic of uniformity and harmonization of laws is relevant for many reasons. Hence, the aim of this chapter is to convey the importance of the objective of uniformity and harmonization of laws, particularly in the maritime industry. The Minister published a new Bill for public comments, the MSA Draft Bill, and as indicated in the preceding chapters, this Bill proposes for the amendment of quite a number of sections in the MSA pertaining to the limitation of shipowner's liability, with these amendments, several trade-offs are presented as a package deal i.e. higher monetary limits coupled with the harder test for breaking limitation. Although the package deal may favour one group over the other, the consolation for accepting the package deal is to be found in the benefits of uniformity. In those circumstances, uniformity serves as a 'tie-breaker'.

This chapter contends that, additional to the arguments about the outdated legal system which regulates shipowner's right to limit their liability, the implementation of the MSA Draft Bill and the consideration of the 1976 LLMC, is necessary for purposes of unifying laws. This may ultimately result in the prevention of forum shopping, preservation of the purpose of the right to limit liability as well as participation of key role players in the maritime industry such as insurers and salvors.

In the maritime industry, the objective of uniformity has always been considered of the utmost significance.<sup>107</sup> There has been dissemination of laws and the adoption of efforts to achieve legal convergence which resulted in attempts to create laws that are internationally 'uniform'.<sup>108</sup> Thus, this chapter will discuss largely the objective of uniformity with particular attention to maritime law and or the maritime industry. Further, it will outline how domestic laws governing the maritime industry in South Africa are contrary to those in the international law regimes, and discuss how the contradiction proves to be disadvantageous on matters of comparable interests.

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<sup>107</sup> Paul Myburgh 'Uniformity or unilateralism in the law of carriage of goods by sea?' (2000) 31 *Victoria University Law Review*, 357. (Paul Myburgh).

<sup>108</sup> Camilla Baasch Andersen 'Defining Uniformity in Law' (2007) *Uniform Law Review* 5. (Camilla Baasch Andersen).

## II Uniformity and harmonization of laws

As a result of its transnational nature, the maritime industry and its transactions have been historically perceived as independent from domestic laws; the industry was governed independently by a series of sea codes of uniform flavor and transnational application.<sup>109</sup> As has been said,

‘[The] purpose of these codes was to give all who engaged in maritime trade a uniform understanding of their rights and obligations, thereby minimizing surprises and supporting trade rather than restricting trade.’<sup>110</sup>

Although States have that discretion to choose whether to ratify an international convention and to adopt its provisions into national legislation,<sup>111</sup> it is problematic, in matters that operate transnationally, for the legal order to be governed by a different set of rules which are unique to each country; especially when it is highly likely that disputes may arise between two parties from different countries, as is the case in the maritime industry.

For example, in South Africa, the shipowner’s right to limit liability is regulated by section 261 of the MSA, which mirrors the wording of the 1957 Convention on the Limitation of Liability. However, the International Maritime Organization (IMO) introduced the 1976 LLMC, which is significantly different from the 1957 Convention on Limitation of Liability regarding monetary limits, burden of proof and claims that attract the limitation of liability. Therefore, in light of these recent developments, this chapter will address why and how South Africa should participate in uniformity and harmonization of laws.

First, this thesis acknowledges the existence of two systems of unification of laws, namely; the historic and modern unification of laws. There needs to be a distinction drawn between the two. The understanding is that ‘modern unification of laws is a political, voluntary process whereby different jurisdictions elect to share a set of rules - it is not imposed upon them’.<sup>112</sup>

However, historic unification of laws was imposed as a matter of compulsion. This idea is derived from the statement recorded in Cicero, *De Republica*, 3.22.33:

‘There shall not be one law at Rome, another at Athens, one now, another hereafter, but one everlasting and unalterable law shall govern all nations for all time ...’.<sup>113</sup>

This statement advocates for the uniformity of laws at the Roman Empire, and if it is accepted as a definition of uniformity then alternatively, we agree that the objective of uniformity is derived from the Roman Empire.<sup>114</sup> Paul B. Stephan states that one of the admirable things about the Roman Empire was its coherent law which unified the rules of commerce and he believes that the reason

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<sup>109</sup> Paul Myburgh, 357.

<sup>110</sup> Gordon W. Paulsen ‘Historical Overview of the Development of Uniformity in International Maritime Law’ (1982-1983)57 *Tul. L. Rev.* 1065, 1091.

<sup>111</sup> John Eugene Harley ‘The obligation to ratify treaties’ (1919) 13 *American Journal of International Law* at 391.

<sup>112</sup> Camilla Baasch Andersen, 18.

<sup>113</sup> Camilla Baasch Andersen, 18.

<sup>114</sup> Camilla Baasch Andersen, 18.

Roman law was revived during the 11<sup>th</sup> and 12<sup>th</sup> centuries at the Western and Central Europe, was to feed onto the desire of acquiring a single template for shaping the rules governing trade.<sup>115</sup>

As glorified as it is, Roman law is an example of the compelling/compulsory nature of historic unification. Both people of Athens and Rome had no freedom to voluntarily choose to share a set of rules governing their respective jurisdictions and it appears that there was no provision for the amendment of the law to represent other interests.

However, uniformity in the maritime industry has been in existence from ancient times; it is said to have existed before the rise of the Roman Empire and was codified in the Rhodian Sea Laws as early as 900 BC.<sup>116</sup> Although the rise of the Roman Empire altered the influence of Rhodian Sea Law, it was still essential to the Mediterranean trade which, for over a thousand of years, was governed by the Rhodian law.<sup>117</sup> However, there still exists a school of thought which holds that uniformity has not yet been achieved in the maritime industry.<sup>118</sup>

The historic tradition of unification of laws provides for a resilient expectation that uniformity in the modern maritime law is desirable and attainable.<sup>119</sup> However, the persuasive power and necessity of modern unification can be extracted from two proposed objectives.

Firstly, it is the political goal, which is aimed at promoting economic development through the application of rules which are alike in order to encourage trade and industry.<sup>120</sup> This is concluded on the basis of the opening address by the Secretary-General of the United Nations Boutros Boutros-Ghali at the proceedings of the UNCITRAL Congress in May 1992.<sup>121</sup> Secondly, it is what is termed the lawmaking-goal which establishes clear, flexible, modern and fair rules applicable across the borders.<sup>122</sup> This too, was derived from the speech by the former UNCITRAL Secretary and prominent scholar, John Honnold, made at the congress in 1992.<sup>123</sup>

It appears that these two goals are interdependent and one has no effect without the application of the other. Although modern unification does not impose its laws on any State, it indirectly persuades States to participate in the unification in order to be able to trade, which one can argue that is the main purpose of shipping. Thus, should a State choose not to be a participant in the adoption of

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<sup>115</sup> Paul B. Stephan 'The Futility of Unification and Harmonization in International Commercial Law' (1999) 39 *Virginia Journal of International Law* 3.

<sup>116</sup> Gordon W. Paulsen, 1091.

<sup>117</sup> Gordon W. Paulsen, 1069.

<sup>118</sup> William Tetley 'Uniformity of International Private Maritime Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention' (2000) 24 *Tul. Mar. L.J.* 775, 856. (William Tetley).

<sup>119</sup> Paul Myburgh, 357.

<sup>120</sup> Camilla Baasch Andersen, 19.

<sup>121</sup> In UNCITRAL's Uniform Commercial Law in the Twenty-First Century (United Nations, 1992) 1, available at [https://www.uncitral.org/pdf/english/texts/general/Uniform\\_Commercial\\_Law\\_Congress\\_1992\\_e.pdf](https://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf) last accessed 21 September 2017.

<sup>122</sup> Camilla Baasch Andersen, 20.

<sup>123</sup> In UNCITRAL's Uniform Commercial Law in the Twenty-First Century (United Nations, 1992) 11, available at [https://www.uncitral.org/pdf/english/texts/general/Uniform\\_Commercial\\_Law\\_Congress\\_1992\\_e.pdf](https://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf) accessed 21 September 2017.

laws that seek to promote international uniformity, it stands to be in a disadvantaged position when it comes to matters of trade.

Consequently, because South Africa has still not ratified any convention relating to the limitation of liability and its national legislation mirrors the wording of the old convention,<sup>124</sup> there are reasons why participating in the desired uniformity presented by the latest convention<sup>125</sup> would be necessary for South Africa. Expounding further on these reasons, it is important to define uniformity and determine its objectives and address its attainability in this current dispensation.

After considering various aspects including, the dictionary meaning of uniform,<sup>126</sup> the terminology of globalization and the terminology of soft and hard laws, all which aided in deducing an intermediary definition of uniformity, uniformity was defined as ‘the result of specific instruments, of whatever origin or form, which deliberately aim to create similar effects’.<sup>127</sup> Thus, at the international level, international conventions would be regarded as instruments which aim at creating similar effects; in this case being that all party states participating in international trade through shipping goods or anything to that effect, should be regulated by similar laws.

However, uniformity is not exclusively dependent on the adoption of treaties and protocols and their subsequent acceptance by states.<sup>128</sup> There are many other tools that are used to achieve international uniformity and substantially contribute to the harmonization of international laws and they include, (a) Model Rules (these are various documents produced by the Comite Maritime International ‘CMI’ e.g. The York-Antwerp Rules), (b) standard-form contracts of insurance policy, savage, charter party etc., and (c) Customs and practice for documentary credits 1993.<sup>129</sup>

The concern regarding South Africa and the provisions of its current national legislation is the fact that South African shipowners or non- South African shipowners whose vessels sail within the territorial waters of South Africa would, for example most likely be affected by the monetary limits contained in the MSA. These limits are significantly lower than those in the 1976 LLMC and in the event that one sustains loss or damage within the territorial waters of South Africa, courts will be obliged to apply the provisions of the MSA with its limits.

Consequently, in circumstances where a dispute relating to an incident that occurred at the high seas arise between vessels of different nationality, it will be problematic should it happen that neither of the two nations are party to any convention on limitation of liability. This raises questions like, where such an incident attracts liability to a third party claimant, would each party to the incident be

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<sup>124</sup> 1957 Convention on Limitation of Liability.

<sup>125</sup> The 1976 LLMC, as amended.

<sup>126</sup> *The American Heritage Dictionary of the English Language* (New College Edition) ‘1 .a. Always the same; unchanging; unvarying. b. Without fluctuation or variation; consistent; regular 2. Being the same as another; identical; consonant’.

<sup>127</sup> Camilla Baasch Andersen ,6.

<sup>128</sup> William Tetley ,787.

<sup>129</sup> William Tetley, 787.

required to compensate the said claimant relying on their national laws (which are different from each other) or will it be a matter of consent, where one party consents to the administration of the claim by laws of the other state? Thus, in the event of such uncertainty, it is imperative to have unified set of rules and laws that govern the relationship between states on an international level because parties may opportunistically elect a jurisdiction known for its eccentric rules and practices. In anticipation of this, parties will devote themselves in ways to protect themselves from this opportunism, including at the margin turning away from otherwise profitable transactions.<sup>130</sup>

Uniformity creates an environment where there is a legal system that allows individuals to make precise legal commitments with foreseeable consequences which makes it easier for people to rely on each other and hence increase the productive cooperative behavior.<sup>131</sup>

The preamble of the 1976 LLMC provides that ‘the states parties to this convention, having recognised the desirability of determining by agreement certain uniform rules relating to the limitation of liability for maritime claims, have decided to conclude a Convention for this purpose’.<sup>132</sup> Further, because the nature of the convention is so that it could apply internationally to establish a unified practice, it can be concluded that one of the aims of the 1976 LLMC is to assist states parties to be able to determine the extent of, and the applicability of their right to limit liability with a specific degree of certainty irrespective of the jurisdiction in which events that gave rise to the claims had occurred.

The fact that the 1976 LLMC succeeds the 1957 Convention on Limitation of Liability can also be understood as a measure adopted to achieve uniformity and harmonization of laws. The adoption of new rules allows for the introduction of better laws that improve on the status quo in respect to some normative social goal, for example, to enhance economic welfare.<sup>133</sup> In relation to conventions on the limitation of liability, the move from the 1957 Convention on Limitation of Liability to the subsequent adoption of the 1976 LLMC arguably enhances economic welfare and achieves equity in that it makes it hard to break limitation and at the same time, it has increased monetary limits allowing the claimants the ability to get higher compensation for their loss or damage as compared to the previous convention.

Moreover, the attainment of uniformity and harmony is equally beneficial to lawyers that have to interpret the rules and apply them and it makes it easier for them to be able to enhance communication between each other and as a result, provide effective service to the clients.<sup>134</sup> Therefore, for a country like South Africa that has not yet acceded to the current international regimes

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<sup>130</sup> Paul B. Stephan ‘The Futility of Unification and Harmonization in International Commercial Law’ (1999) 39 *Virginia Journal of International Law* 4. (Paul B. Stephan)

<sup>131</sup> Paul B. Stephan, 4.

<sup>132</sup> The 1976 LLMC, as amended.

<sup>133</sup> Paul B. Stephan, 5.

<sup>134</sup> Paul B. Stephan, 7.

on the limitation of liability or adopted the provisions of these regimes, it does not only become problematic to shipowners and claimants, but also to the legal practitioners who constantly have to go through a set of rules to find a common ground.

It therefore makes sense that South Africa should desire to participate in the development of laws that regulate international relations between nationals because that would allow other nationals to be open to the idea of doing business with South Africa. Although the practice of uniformity is desirable, it is not as clear cut, and there are disadvantages particularly to business people as the rules may force them to alter their business transactional relationships in order to operate within the law, which may be unproductive to business.<sup>135</sup>

Even if the rules allow for alternative ways to maintain good relationships, the parties are the ones that are expected to address all those instances where they would prefer alternatives.<sup>136</sup> This may prove problematic because there are different ways in which state parties may choose to apply the so called 'uniform rules'. Other state parties may elect to implement the relevant text from the convention directly by giving it the force of law in their domestic legislation while some states have treated conventions as self-executing. These divergent methods adopted by states to give effect to international rules aggravates the lack of uniformity.<sup>137</sup>

However, even though it appears as if complete attainment of uniformity is without disadvantages, the advantageous side of it is far more desirable and it does not only serve to achieve harmony of laws, but also to achieve harmonious relationships between nations as well. Therefore, this thesis submits that for purposes of uniformity and harmonization of laws, South Africa implement the proposed amendments in the MSA Draft Bill.

### **III Factors related to the objective of uniformity**

Other factors relate to and or enhance the achievement of the objective of uniformity and harmonization of laws. These factors inform the importance of this objective and they ought to further influence South Africa why should it implement the proposed amendments in the MSA Draft Bill and reform its current regime to achieve uniformity. The objective of uniformity is not mutually exclusive from other two reasons why the regime should be reformed, which are, 1) outdated laws that need to be developed and 2) the effect that outdated laws has on marine commerce and standard practice in this industry. This is why the factors below will touch on issues of development of laws and the effect it has on the marine commerce. The first factor relates to the purpose of the benefit of limitation.

### **IV Relationship between the purpose of limitation of liability and salvors.**

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<sup>135</sup> Paul B. Stephan, 4.

<sup>136</sup> Paul B. Stephan, 4.

<sup>137</sup> Paul Myburgh, 362.

Ancient as this right is, some scholars are of the opinion that the right to limit liability as a shipowner has outlived its usefulness.<sup>138</sup> Thus, suggesting that its purpose no longer serves the interests of the marine industry. Nevertheless, this thesis considers it as an imperative task when proving the significance of the objective of uniformity, to discuss the relationship between the purpose of limitation of liability and salvors. This is particularly because ‘purpose’ is a concept which determines why something exists and interrogates the need for continuing to practice something; in this context it relates to the continued application of the right to limit liability. The reason why this dissertation links ‘purpose’ with ‘salvors’ is on the basis that salvors are important in the maritime industry yet South African legislation fails to afford them with the right to limit liability. Considering that the right to limit liability is still a big part of the maritime industry, it is necessary to incorporate salvors as persons entitled to limit liability for reasons provided in chapter 2; and since this right is also an internationally entrenched right, it is necessary that the purpose be uniformly executed. A synopsis of what is understood as the purpose of this benefit will be provided below together with an explanation of the relationship it has with salvors; and how that relationship affects the objective of uniformity and harmonization of laws.

In the year 1625, Grotius explained the importance of this benefit, he stated:

‘Men would be deterred from employing ships if they lay under a perpetual fear of being answerable for the acts of their masters to unlimited extent... This would not be conducive to the public good.’<sup>139</sup>

Exactly what constitutes ‘public good’ is open to interpretation. However, it has been submitted that shipowner’s ability to pay for insurance premiums that are affordable can be considered as public good.<sup>140</sup> Nonetheless, expanding on the statement of Grotius, his words may be interpreted to mean that shipowners will be reluctant to pursue business opportunities if they have no protection from the law for the conduct of their employees who were acting within the course and scope of their employment. Although Grotius does not necessarily address the issue of uniformity, his statement illustrates how lack of protection from the law may influence shipowner’s decisions in matters of utmost importance and for the most part, the lack of protection is a result of laws that are not unified.

The international law of marine salvage operates largely on the concept of salvage agreements; and one of the widely used agreements is the Lloyd’s Open Form (LOF) as published by the Lloyd’s Committee.<sup>141</sup> First, the LOF provides that the law that shall be applicable is English law. Secondly, clause 21 of the first LOF bestowed upon the contractors (this included salvors) the right to limit

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<sup>138</sup> David Steel ‘Ships are different: the case for limitation of liability’ [1995] *LMCLQ* 2 at 77. (David Steel).

<sup>139</sup> Grotius *De Jure Belli AC Pacis* 139 (Campbell transl. 1901), quoted in Baer ‘Down to the seas again’ (1962) 40 *N.C.L Rev.* 377, 397.

<sup>140</sup> M J Derrington ‘The Effects of Insurance on the Law of Damages’ in Paul Desmond Finn (ed) *Essays on Damages* (1992, The Law Book Company Limited) 146.

<sup>141</sup> Edgar Gold ‘marine salvage: towards a new regime’ (1989) 20 *Journal of Maritime Law and Commerce*, 487. (Edgar Gold).

liability 'as if the provisions of the [1976 LLMC] were part of English law'.<sup>142</sup> This is rather confusing considering that the position under English law regarding salvors is that they are not entitled to limit their liability as held in the case of *Tojo Maru*.<sup>143</sup> Considering that the LOF is a contract only binding to its parties thereof, does it mean that the provisions of clause 21 are applied to salvage disputes regardless of what the law holds in England? Thus, such situations create inconsistencies in the maritime industry and may influence salvors' (who did not enter into an agreement prior to salvage operation) decision in rescuing a ship in distress.

In the event where a salvor declines to offer its services because of lack of protection or benefit provided by the law, its refusal to intervene in preventing a collision or any incident that may result in the damage of property, loss of life or damage to the environment, may result in commercial disadvantages. For one, refusal may burden the South African Maritime Safety Authority (SAMSA) and the National Ports Authority (NPA) with the duty to remove wrecks and ensuring safety within the ports. In cases where the vessels in distress become abandoned and likely to cause danger to the environment or even cause traffic, the SAMSA and the NPA may be obligated to intervene without any possible compensation for their services.<sup>144</sup> This may affect maritime commerce.

Ifeanyichukwu Emmanuel Igwe is of the opinion that the doctrine of limitation of liability has outlived its usefulness, he is however, against the complete abolition of this doctrine as he holds it may bring adverse implications for smaller shipping companies and subsequently to the global economy.<sup>145</sup> Although Igwe does not explicitly argue that the purpose of the benefit of limitation is to improve the economy, he does imply that the doctrine somehow affects the global economy in a positive way.

Therefore, the position under the MSA regarding salvors overlooks the fundamental objective of salvors, which is to save life, property and the environment.<sup>146</sup> Also, it overlooks the fact that in carrying out its objectives, salvors' work benefits coastal states, shipowners and their insurers.<sup>147</sup> Thus, failing to afford salvors the same protection given to other shipowners may influence them to not rescue ships which are in distress and that may affect the global economy negatively. Hence it is commendable that the MSA Draft Bill proposes for their inclusion as persons entitled to limit liability.

Not only does the position under the MSA negatively affect salvors, it also affects trade between shipowners from South Africa and those from countries that have adopted the 1976 LLMC's position.

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<sup>142</sup> Edgar Gold, 487.

<sup>143</sup> *The Tojo Maru* case.

<sup>144</sup> Section 18 of the Wreck and Salvage Act 94 of 1996.

<sup>145</sup> Ifeanyichukwu Emmanuel Igwe 'Limitation of Ship owners' Liability in Maritime Transport: the Question of its Prolonged Presence' (2015) *Scholars Journal of Economics, Business and Management*, 636.

<sup>146</sup> Mark Hodditnott 'The role of salvors in keeping ports clear and safe', available at from <http://www.marine-salvage.com/media-information/articles/recent/the-role-of-salvors-in-keeping-ports-clear-and-open/> last accessed in 03/02/2018. (Mark Hodditnott).

<sup>147</sup> Mark Hodditnott above at 135.

For example, where in country 'X' a shipowner's right to limit liability is protected by a restrictive test, whereas in South Africa, a shipowner's right to limit can be easily broken. Consequently, the operation of two different systems subject shipowners to different treatment which may lead to forum shopping or hostility in trading with other countries, which may then affect the global economy in a negative way.

Lack of uniformity and harmonization of laws does not merely lead to forum shopping as shown below; it also defeats the purpose of this benefit as indicated above. Even though the purpose of the benefit appears to be defeated more in the case of salvors, we cannot avoid the important role salvors play in the maritime industry. Therefore, the call for uniformity does not only serve to achieve simplicity in matters of comparable interest, it also helps preserve the purpose of the benefit of limitation.

Therefore, abolishing this benefit as suggested by other scholars would be disastrous both to the marine industry and the global economy. The abolishment will serve to exterminate a practice laid down for over centuries which regulated and maintained good trade practice among shipowners and third party interests.

## **V Marine Insurance**

Marine insurance is also of utmost importance to the maritime commerce and industry.<sup>148</sup> It provides shipowners with the ability to cover their liability against any loss or damage sustained by, for example, a third party claimant. Accordingly, it allows for trade and commercial investment to advance, in that both shipowners and prospective claimants will not be reluctant to actively participate in commercial maritime relations due to an 'anticipated' inability to pay or to receive compensation.

However, in order to determine how legal principles governing marine insurance affects the objective to achieve uniformity and harmonization of laws, if at all, this thesis will detail the relationship between marine insurance and the shipowner's right to limit liability. In terms of the 1976 LLMC, it is stated that:

'An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.'<sup>149</sup>

One would expect an insurer in terms of the 1976 LLMC refers to Protection & Indemnity Clubs (P&I Clubs) because their primary obligation is to insure against liability. Although P&I Clubs provide most shipowners with unlimited coverage already, this is because national maritime laws determine a specific amount to which shipowners can limit their liability.<sup>150</sup> This assists P&I Clubs

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<sup>148</sup> Leslie J Buglass 'Limitation of Liability from a marine insurance viewpoint' (1979) 53 *Tulane Law Review* at 1365. (Leslie J Buglass).

<sup>149</sup> Article 1 (6) of the 1976 LLMC, as amended.

<sup>150</sup> Leslie J Buglass, at 1364.

to ascertain risks involved, alternatively, to manage the extent of their liability bearing in mind that, although the cover provided is unlimited, the assured's right to limit liability creates an opportunity to limit their liability further to the same extent as the assured. This means they are able to compensate the third party claimant for loss and damage sustained only to the extent at which the assured would have been liable. Actions against the insurers which are not submitted by or through the assured may be brought through the 'direct action mechanism' by third party claimants.<sup>151</sup>

The same interpretation appears to be the objective of the 1976 LLMC.<sup>152</sup> Thus, the Convention does not intend to place a more burdensome obligation on the insurer than what the assured would have had to bear.<sup>153</sup> Therefore, adopting the wording of the Convention would not necessarily place South Africa at a more advantageous position than its current one, but the question is, what happens when the assured is not entitled to limit their liability i.e. loss or damage was due to the assured's actual fault or privity, and its liability exceeds the sum insured?

The first concern is, will the insurer not be entitled to limit its liability and may be expected to pay out to the claimant on behalf of the assured in full and claim the difference from the assured, or the insurer will be liable to the extent of its obligations as per the insurance contract entered into with the assured? The 1976 LLMC does not expressly deal with this concern, as a result, this thesis will address it below.

If the assumption is that the insurer is to be liable in full where the assured is denied the right to limit liability, it may prove to be against the objective of the 1976 LLMC and it could not have been the intention of the drafters of the Convention that it should defy the contract between the assured and the insurer. First, despite the fact that the 1976 LLMC recognises insurers as persons entitled to limit their liability, Article 1 (6) of the Convention depends on the validity and successful conclusion of an insurance policy between the assured and the insurer. In other words, the administration of the provisions of the 1976 LLMC depend on the conclusion of the insurance policy. Therefore, it creates a contradiction when the assumption is that the provisions of the 1976 LLMC should be interpreted separately from the terms of the insurance policy.

Thus, in the event where the assured is denied his right to limit liability and is expected to pay out the liability in full, the insurer cannot be expected to pay for the entire liability if such liability exceeds the sum insured as agreed in the marine insurance. Practically, the insurer will pay out the entire amount claimed, provided the claims are proven and were brought through the direct action mechanism. Therefore, the third insurer may seek to recover the outstanding balance from the assured through a separate legal action.

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<sup>151</sup> Christopher Hill *Maritime Law* 6 ed (2003, Lloyd's of London Press, London), p. 14.

<sup>152</sup> Patrick Griggs, Richard Williams & Jeremy Farr (eds) *The 1976 Limitation Convention Limitation of Liability for Maritime Claims* (2005, Informa, London UK) (Griggs), 15.

<sup>153</sup> Griggs, 15.

The position in the United Kingdom ('UK') is similar; Griggs, Williams and Farr also disagree with the assumption that insurers should be fully liable where the assured is denied the right to limit liability. Their submissions are founded on the provisions of section 1 (1) of the 1930 Act,<sup>154</sup> which provides:

'...his (the assured's) rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was incurred'<sup>155</sup>

They state that, notwithstanding the fact that section 185 of the 1995 MSA that gives effect to the provisions of the 1976 LLMC, where the assured is fully liable to the third party, it is only to those limited rights as entrenched in the 1930 Act. Accordingly, the 1930 Act merely defines the extent of liability and only after such determination, the relevant provisions of the 1976 LLMC comes into play.<sup>156</sup>

Although the position in the UK is different from that of South Africa in that, their 1995 Act gives effect to the 1976 LLMC while South Africa has not yet taken similar steps, Griggs, Williams and Farr's submissions suggest that the 1976 LLMC is subject to the terms and conditions of an insurance policy between the assured and the insurer.

The second concern relates to the fact that the 1976 LLMC confers upon shipowners a more stringent test in having their right to limit liability broken (conduct barring limitation) and places the onus on the person who wishes to restrict the shipowner from relying on his right. This creates what one would call 'double barrel' protection. As established above, the objective of the 1976 LLMC is to place the insurer in the same position as the assured, this means the claimant still needs to show that the assured intentionally or recklessly caused the damage or loss. Therefore, because South Africa has no legislative provisions similar to those of the 1976 LLMC, even the recently proposed MSA Draft Bill does not make mention of insurers, they (insurers) are exposed to the likelihood of having their client's right to limit liability easily broken, thus being expected to cover the loss or damage sustained by third parties as per the insurance policy, whereas limitation would have entitled them to a lesser liability.

Notwithstanding the above, it appears that failing to include insurers as persons entitled to limit liability does not materially affect the objective to achieve uniformity and harmonization of laws; the problem is the potential interpretation difficulties that may result in uncertainty when it comes to determining the extent of the insurer's liability to a third party. Therefore, to reform the MSA as proposed will not necessarily be beneficial other than that it will allow South Africa to participate in

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<sup>154</sup> Third Parties (Rights against Insurers) Act, 1930.

<sup>155</sup> Griggs, 16.

<sup>156</sup> Griggs, 16.

the achievement of uniformity and harmonization of laws as far as interpretation is concerned, and for that reason, reform should be in line with the 1976 LLMC.

## VI Forum shopping

In every dispute, the law often is mostly favourable to one party than it is to the other. Lawyers are well aware of this and will seek a forum which they believe will apply the law that is favourable to their case. This practice is commonly known as forum shopping. It is said that this practice is unethical and should be avoided for number of reasons discussed below.<sup>157</sup> The contrary view is that forum shopping is nothing other than forum selection and should not be viewed as an unethical practice.<sup>158</sup> However, the focus is not on the ethical aspect of this practice, but rather why, for purposes of uniformity and harmonization of laws, countries should adopt laws that are similar.

Throughout the years, forum shopping has been defined differently by authors. Guido Rennert defines it as:

‘... tactical activity of a litigant to choose (among several available venues) a specific forum in a specific jurisdiction in order to achieve the application of the most favourable procedural and substantive law to a case.’<sup>159</sup>

The attitude amongst most writers is that forum shopping does not exist independently or separately from forum selection,<sup>160</sup> hence Petshe’s definition of it as a practice that consists of forum selection which is considered ‘bad’.<sup>161</sup> Some scholars are of the view that in order for a practice to be considered as forum shopping it must have an element of ‘unfairness’ to it.<sup>162</sup> However, these scholars do not provide an explanation of what is meant by ‘unfairness’ or even a test to determine ‘unfairness’. If we assume the ordinary definition of unfairness defined in the dictionary as ‘not based on or behaving according to the principles of equality and justice’,<sup>163</sup> forum shopping would require that the party instituting proceedings to be in a position where, when selecting a forum, he would have exercised his choice in a disadvantageous way which puts him in at a better position as compared to the other party. Evidently, this is the extent of forum selection that is considered bad and suggested to be curbed.<sup>164</sup>

Nonetheless the question is, how does forum shopping inform the need to amend the current regime in South Africa and consequently, achieve the objective of uniformity and harmonization of laws?

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<sup>157</sup> Marcus a Petshe ‘What’s Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice’ (2011) 45 *The International Lawyer* 4. (Marcus a Petshe).

<sup>158</sup> Marcus a Petshe, 4

<sup>159</sup> Guido Rennert ‘Is Elimination of Forum Shopping by Means of International Uniform Law and Impossible Mission’ (2005) 2 *Macquarie Journal of Business Law* 119.

<sup>160</sup> Marcus a Petshe, 6.

<sup>161</sup> Marcus a Petshe, 6.

<sup>162</sup> Marcus a Petshe, 4.

<sup>163</sup> *English Oxford Living Dictionaries* available at <https://en.oxforddictionaries.com/definition/unfair> last accessed in 01/10/2017.

<sup>164</sup> Marcus a Petshe, 4.

The House of Lords, in *The Atlantic*,<sup>165</sup> held that:

‘Forum shopping is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented; this should be a matter neither for surprise nor for indignation.’<sup>166</sup>

There have been many recent criticisms of ‘forum shopping’ and I regard it as undesirable.’<sup>167</sup>

Lord Simon of Glaisdale is of the opinion that selecting a forum that is advantageous to an individual is an expected response when that individual is presented with an option to choose, he states that there is really no reason therefore, to be resentful and surprised when the said individual selects what serves his interests.<sup>168</sup> Meanwhile, Lord Reid shows no regard for forum shopping and considers it as an undesirable practice.<sup>169</sup>

Lord Simon’s statement, might be interpreted to mean that in order to ensure that people do not participate in forum shopping, there are measures that must be adopted which will actively prevent forum shopping. This is similar to what Professor Mary Garvey suggests.<sup>170</sup>

Although not desirable, some believe that forum shopping is not entirely bad, if the law permits a claimant the right to choose his preferred forum, he would ordinarily seek to choose that which is both necessary and advantageous to his case and would also expect his legal representative to advise him on how to obtain that.<sup>171</sup> Therefore an attorney’s obligation to promote their clients’ interests and to meticulously analyse what is beneficial to their case is in conflict with his obligations to conduct himself in an ethical way by not promoting forum shopping, a practice considered to be evil.<sup>172</sup>

Guido Rennert states that forum shopping creates legal uncertainty in that different private international laws of different forums leads to different substantive laws; increases litigation costs and also leads to overload of work for particular forums which is likely to open floodgates of litigation for the courts of that particular jurisdiction.<sup>173</sup> This will burden the courts and consequently affect the effectiveness of that country’s judicial system, leading to increased delayed judgments and as the mantra goes, ‘justice delayed is justice denied’.<sup>174</sup>

For example, South African courts in exercising their jurisdiction on matters relating to limitation of liability will apply the provisions of the MSA, which does not adopt the current provisions as contained in the MSA Draft Bill and the 1976 LLMC. Therefore, in the event where

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<sup>165</sup> *The Atlantic Star*, [1973] 2 WLR 795, at 817 (HL) (*The Atlantic Star*).

<sup>166</sup> *The Atlantic Star*, at 817

<sup>167</sup> *The Atlantic Star* at 810.

<sup>168</sup> *The Atlantic Star*, at 817

<sup>169</sup> *The Atlantic Star* at 810.

<sup>170</sup> Mary Garvey Algero ‘In Defense of Forum Shopping: A Realistic Look at Selecting a Venue’ (1999) 78 *Nebraska Law Review*, 79.

<sup>171</sup> C Granger ‘The conflict of law and forum shopping: some recent decision on jurisdiction and free enterprise in litigation’ (1974) *Ottawa Law Review*, 417. (C Granger).

<sup>172</sup> Guido Rennert, 119

<sup>173</sup> Guido Rennert, 119.

<sup>174</sup> Erwin Chemerinsky ‘Justice Delayed Is Justice Denied’ (1997) 2 *Nexus*.

there was no prior contract of salvage entered into, and an incident occurs which involves a claim by a shipowner against the salvor for negligence or aggravating the damage, the shipowner will most definitely choose the South African's jurisdiction as a place to litigate over the case because salvors are not permitted to limit their liability in terms of the MSA. However, if the salvage was rendered in terms of a contract, that contract may contain limitation provisions on which the salvor could rely.

In circumstances where there was no contract, the AJRA states that:

‘a court may exercise its admiralty jurisdiction in relation to any matter arising in connection with any maritime claim, (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.’<sup>175</sup>

Therefore, in terms of this section, a South African court will entertain claims arising out of the shipowner's right to limit liability,<sup>176</sup> even if the parties to the case are not domiciled or nationals of South Africa.

Although, section 7(1)(a) of the AJRA empowers the court to decline to exercise jurisdiction where it is of the opinion that there is a more appropriate court to decide the matter or where requirements are met,<sup>177</sup> this approach does not necessarily alleviate the practice and success of forum shopping. This is because, in exercising jurisdiction, the court's inquiry does not interrogate 'why' party 'A' seeks to litigate at a specific forum, rather it interrogates 'jurisdiction' i.e. whether it is appropriate for the court to adjudicate over the matter given that there might be a more competent and appropriate forum to adjudicate.

Therefore, in the context of this dissertation, the substantive law relating to the shipowner's right to limit liability in South Africa may prove favourable to a party seeking to invoke this right because the monetary limits are considerably low compared to other States. Thus, where the court decides to exercise jurisdiction, that party is likely to receive a judgment in their favour; as a result, forum shopping is perpetuated. Hence, even though it seems impractical to conclude that South Africa should amend its current regime to be in line with the 1976 LLMC solely to prevent forum shopping, but the proposed amendment would inevitably eliminate any slight possibility of forum shopping that may subtly occur. This may very well be an acceptable ground to reform the regime considering that South African laws are not uniform with those of other States in this regard. Thus, for that reason, it is sufficient to submit that implementing the provisions of the MSA Draft Bill and amending the MSA to be in line with the 1976 LLMC will, even in the slightest form, will prevent forum shopping.

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<sup>175</sup> Section 2 (1) of the AJRA.

<sup>176</sup> Section 1 (w) of the AJRA.

<sup>177</sup> Gys Hofmeyr *Admiralty Jurisdiction: Law and practice in South Africa* 2ed (2012) at 63.

The existence of forum shopping also indicates a failed attempt at achieving the goal of uniformity,<sup>178</sup> because traditionally the lack of unification of laws is considered as the main reason why people practice forum shopping.<sup>179</sup> Therefore, if attaining uniformity and harmonization of laws on an international level fails, this may conversely advance forum shopping particularly within those jurisdictions which provide for advantageous laws, i.e. South Africa with its unfavourable status for claims against salvors.

However, some scholars argue that unification and substantive law would not prevent forum shopping,<sup>180</sup> because there are other reasons that would lead one to select a specific jurisdiction, for example, the varying degree of efficacy and speed of judicial proceedings, the forum's reputation for fairness, and the cost of court proceedings.<sup>181</sup> Except, when given a choice between waiting for a considerable period of time to receive positive results, versus speedy judicial proceedings which may result in losing the case, most lawyers will most likely opt to wait.

One of the ways to eliminate or reduce forum shopping is by creating or adopting international substantive uniform laws which applies directly to specific legal issues; then require that a set of 'requirements' be met in order for that specific law to apply.

## **VII Conclusion**

Achieving uniformity and harmonization of laws helps to eliminate any confusion that may arise when determining which legal principles are applicable in a dispute and further assists lawyers that have to interpret and apply those principles. In addition, the achievement of uniformity and harmonization of laws will create an environment where there is a legal system that allows individuals to make precise legal commitments with foreseeable consequences. This means, it will not be necessary for parties to go forum shopping.

Lack of uniformity and harmonization of laws hinders the purpose of the right to limit liability, which is to advance the maritime commerce. Though separate, uniformity and harmonization of laws, together with forum shopping are not mutually exclusive and as a result, should always be considered from the same lenses. Although forum shopping does not prove to be a pressing issue to factor when considering whether South Africa should amend the its current regime, the fact that there exist a slight possibility that South African courts may be susceptible to acts of forum shopping, is reasonable enough to submit that the proposed amendment is desirable to eradicate the furtherance of this practice.

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<sup>178</sup> C Granger, 417.

<sup>179</sup> A Elisabeth et Dick *International jurisdiction and commercial litigation: uniform rules for contract disputes*, (2009) p6. (A Elisabeth et Dick).

<sup>180</sup> A Elisabeth et Dick, 6.

<sup>181</sup> F Ferrari 'Forum shopping' despite international uniform contract law conventions' (2002) 51(3) *I&CLQuarterly* at 690. (F Ferrari).

Thus, the need for uniformity and harmonization of laws in the maritime industry is valid and needs to be adhered to, and for this reason, South Africa is encouraged to amend its current regime by implementing the provisions of the MSA Draft Bill whilst considering the 1976 LLMC for overlapping issues.

## CHAPTER 4 CONCLUSION

Historically, the doctrine of limitation of liability was regarded as a privilege because it was an exception to the general rule of law that a successful claimant was entitled to compensation by the shipowner for the full amount of the loss, damage or injury suffered by him.<sup>182</sup> However, currently it is considered as a right which can be relinquished entirely if certain requirements are fulfilled depending on the provisions of the law concerned. Over time, the law regulating the administration of this right developed further and due to its transnational nature, this thesis argues that this right needs to be reformed for various reasons, including the need to advance the achievement of uniformity and harmonization of laws.

Early English law appears to not have adopted the doctrine of limitation of liability as seen in the case of *Boucher v Lawson*<sup>183</sup> where the party at fault was required to pay the claim in full even though there was no fault on the shipowner.<sup>184</sup> However, following this decision, a petition was submitted before the English Parliament to reform the issue on liability, the Parliament received the submissions well and it was in 1734 that the first legislation limiting the shipowners' liability was passed.<sup>185</sup> England codified all its statutes relating to limitation in s 503 of the Merchant Shipping Act.

Although the law regulating maritime claims in South Africa finds its roots in English Law, section 6(1)(a) of the AJRA states that the law to be applied in maritime claims is English law 'as at 1 November 1983 where a pre-1983 South African Court of Admiralty [...] had jurisdiction immediately prior to 1 November 1983'.<sup>186</sup> Thus, according to this provision, English law shall not be applicable in the event where there is a relevant legislation in South Africa that is applicable to matters in which section 6(1) (a) refers to, i.e. limitation of liability.<sup>187</sup> Now, with regards to other matters beyond the scope of section 6(1), section 6(1)(b) indicates that Roman-Dutch law will apply regarding all those other matters.

In 1960 the Merchant Shipping Act came into force, and s261 of the Act regulates matters of limitation of liability. Therefore, in respect of s 6(2) of the AJRA, English law as at 1 November 1983 would not be directly applied but the scope of its applicability is reduced by s261 of the Act.<sup>188</sup>

This thesis has engaged in a formal study on the need to reform the current legislation by implementing the relevant sections of the MSA Draft Bill to reflect the position as is in the 1976 LLMC. Despite the history briefly summarized above, this right still forms part of our law and

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<sup>182</sup> Proshanto K. Mukherjee, *Maritime Legislation*, World Maritime University Publications, 2002, P 197.

<sup>183</sup> *Boucher v Lawson* (1733) 95 ER 73 (KB).

<sup>184</sup> Hare, 518.

<sup>185</sup> Hare, 518.

<sup>186</sup> Staniland, Hilton 'Limitation of liability in South Africa' in Griggs, Patrick, Williams, Richard and Farr, Jeremy (eds) *Limitation of Liability for Maritime Claims* (2005, Informa London) pp. 399. (Staniland Hilton).

<sup>187</sup> Section 6(2) of the AJRA.

<sup>188</sup> Staniland, Hilton, 399.

subsequent to the MSA Bill being tabled before Parliament in 2009, it is alarming that South Africa has still not amended its current regime, and it appears as though reasons for its reluctance are unknown. Thus this thesis advocates for the implementation of the current Bill. In addition to its proposal to reform the current regime, this thesis expounded on various measures which may be adopted in order to achieve this reform. In so doing, it considered the current position as codified in the MSA, the proposed amendments in terms of the MSA Draft Bill and the position as outlined in the 1976 LLMC.

Following a study of the relevant sections of the MSA Draft Bill and those of the 1976 LLMC, it appears as though certain provisions contained therein are similar. However, following an extensive analysis of the two sources of law, this thesis concludes that the proposed reform can be achieved by implementing the MSA Draft Bill while considering the provisions of the 1976 LLMC.

The analysis focused mainly on the following three provisions of the MSA:

1. Monetary Limits
2. Onus and burden of proof
3. Claims and persons entitled to limit their liability.

With regards to monetary limits, the analysis revealed that both the MSA Draft Bill and the 1976 LLMC, as amended by the 2012 protocol, provides for similar limits and that both these sources of law provide for limits that are more favourable to claimants than as provided in the MSA. Thus, this thesis took the inquiry a step further and interrogated other factors which necessitates the adoption of new and increased limits. One such factor being the effect of inflation taking into consideration the current standard of living.

The effects of inflation relates to unreasonably low limits and may be classified into two; (1) inflation does not allow the aggrieved party to reasonably recover their loss considering high prices for replacing what was lost and damaged, (2) as a result of the inability to reasonably recover their loss, business operations and its ability to make profit might be affected, thus having a negative impact on the economy. Consequently, claimants would not be compensated the exact amount of loss suffered because of limitation.

However, although the shipowners can invoke their right to limit liability, this right is not absolute and can be limited. This was the second leg to the analysis, discussing ways in which shipowner's right to limit liability may be limited. In terms of the MSA, this right can be limited where the owner fails to prove that they had no fault or privity in causing the loss or damage,<sup>189</sup> hence placing the onus on the owner. However, the position is completely different under the MSA Draft Bill and the 1976 LLMC; the two require that the claimant, who seeks to challenge the owner's right to limit, to bear the onus of proving that the owner had intent or that he acted recklessly or with

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<sup>189</sup> S 261 (1) of the MSA.

knowledge that the loss will probably occur.<sup>190</sup> Yet again, the position in terms of these two sources of law seem to harbor similarities.

It was argued that the position under the Act i.e. the 1957 Limitation of liability Convention, is not favourable because it makes it easy for one to break the limit, ultimately resulting in owners having to pay their liability in full.<sup>191</sup> Although subjecting owners to compensate the aggrieved party in full may, directly or indirectly, seek to justify the argument advanced under monetary limits, which is to provide reasonable and fair compensation, it defeats the purpose of the limitation which is to encourage trade and shipping,<sup>192</sup> if it is addressed in isolation. Particularly if this position creates an inevitable possibility for this right to be limited. However, under the MSA Draft Bill and the 1976 LLMC, it is rather difficult to break limitation yet at the same time, the monetary limits are higher. Hence, although one may not be able to break the limit, they can receive compensation that is reasonably fair considering inflation and prevailing economic circumstances.

In addition, and in light of the position as advocated for under monetary limits, it is almost useless to be able to break limitation as and when the owner has failed to prove that he had no actual fault or was not privy to the cause of the damage, when the compensation one will receive will invariably be low and most likely fail to redress the damage caused. Hence, it is recommended that, even though one's claim might be limited, it is better to opt for a system where numbers are competitive and claimants are most likely to receive more than what they would be entitled to under the MSA. This system is the one which allows for higher limits with a more restrictive test for breaking limitation.

One last statutory consideration relates to claims and people entitled to rely on the limitation of liability as a ground to mitigate their liability. The right to limit liability is available only to specific persons as indicated in the MSA.<sup>193</sup> Salvors are excluded from the list of those persons. As such, in South Africa salvors are not afforded any protection as provided in the MSA Draft Bill and the 1976 LLMC.<sup>194</sup> Nonetheless, the decision to include salvors under the 1976 LLMC came after the international salvage community lobbied strongly to have their interests to be protected,<sup>195</sup> for that reason and also because salvors are an integral part in shipping and in the maritime industry due to the nature of their function, this thesis submits that South Africa should adhere to salvors concerns and afford them with the same protection as in the 1976 LLMC.

The position regulating shipowners' right to limit liability when their vessel is declared a wreck and needs to be removed from the sea is not a direct inquiry in South Africa. There are number of

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<sup>190</sup> Article 2 of the 1976 LLMC, as amended.

<sup>191</sup> Gutiérrez p 65.

<sup>192</sup> Kouros, Taheri, 75.

<sup>193</sup> Section 263 (2) of the MSA.

<sup>194</sup> Article 1 (1) of the 1976 LLMC, as amended.

<sup>195</sup> Gutiérrez, 32.

statutes to refer to in this instance, namely: the Wreck and Salvage Act, the National Ports Act and the Marine Pollution Act. The Wreck and Salvage Act does not allow shipowners to limit their liability while the Marine Pollution Act permits them to limit in accordance with the provisions of the Act itself. South Africa is a contracting party to the Nairobi Convention which provides that limitation of liability should be permitted in so far as national law or the 1976 LLMC provides. The only legislation which provides for limitation of liability is the Marine Pollution Act in so far as the wreck caused or likely to cause discharge of oil. Although there are submissions made against amending national legislation to reflect both the position of the Nairobi Convention and the 1976 LLMC, this dissertation submits that the current regime should be amended in a way that would reflect the position of both these conventions.

In addition, this dissertation considers the objective of uniformity and harmonization of laws in support of the argument for the amendment of the current regime. In transnational industries like the maritime one, it gets difficult to regulate matters relating to trade or the general practice of that industry especially if the international convention and domestic legislation regulating that practice are in conflict. For example, where laws are in conflict, businesses are unable to make some transactions with certainty and this will most likely affect the commercial aspect of such an industry. This also applies to the maritime industry.

Furthermore, it becomes problematic for lawyers to constantly have to apply and interpret laws that are foreign to them and as a result, they are unable to enhance communication among themselves or even provide satisfactory service to their client. Hence, to have in place a legal system that is uniform and harmonized, would result in positive international relations.

There are other factors which relate to and enhance the objective of uniformity and harmonization of laws. Firstly, it considered the relationship between the purpose of limitation of liability and salvors. Under this factor, it established that the purpose of limitation has always been said to serve the needs of commerce in the maritime industry and that salvors participate largely on the commercial aspect of this industry. Therefore, their exclusion in the MSA as persons entitled to limit their liability has a great potential to affect the needs of commerce in South Africa as this may create difficulties for the NPA and SAMSA.

The second factor under the objective of uniformity and harmonization of laws dealt with was the marine insurance. According to the 1976 LLMC, insurers are entitled to limit their liability while the MSA does not recognise same. The unfortunate result of this exclusion in the MSA, is that insurers are most likely to charge higher premium rates to its clients, which most probably will affect maritime commerce.

Further, it discussed the principle of forum shopping; a principle which has been discussed relentlessly when it comes to international trade and law. These discussions gave birth to divergent

views by writers of this principle; some maintain that forum shopping is bad while others advocate that it is a good practice.<sup>196</sup>

Nonetheless, others believe that the existence of forum shopping also indicates a failed attempt at achieving the goal of uniformity.<sup>197</sup> Thus, due to the MSA not adopting similar provisions to those of the 1976 LLMC, this may likely attract litigants to pursue their cases in South Africa in order to capitalize on the differences. Although South African courts exercising admiralty jurisdiction have discretion to decline to exercise jurisdiction on the grounds that there is a more appropriate jurisdiction,<sup>198</sup> this does not necessarily mean that forum shopping will be alleviated because courts are not concerned with the motive which influenced litigants to approach the courts when they decide whether to exercise jurisdiction or not. Although, it is argued that there are other reasons why one would choose one forum over the other, for example, speedy judicial proceedings,<sup>199</sup> what they fail to recognise is that all those factors actually contribute to forum shopping. Thus, even if forum shopping does not pose an imminent danger, it is submitted that for South Africa to reform its current regime to be in line with the 1976 LLMC will eliminate any slight possibility of forum shopping because at least then, the position in South Africa will be similar to the one adopted on the international level.

Although the legislature has taken steps to reform the current regime, Parliament has not passed any law to this effect. Therefore, the current position in terms of the MSA needs to be reformed by implementing the provisions of the MSA Draft Bill and by considering the provisions of the 1976 LLMC for the above given reasons.

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<sup>196</sup> Marcus a Petshe, 6.

<sup>197</sup> C Granger, 417.

<sup>198</sup> Section 7 of the AJRA.

<sup>199</sup> F. Ferrari, 690.

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