

UNIVERSITY OF CAPE TOWN
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**The Limitation of Liability Regime: A Comparison of
United States and South African Law**

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I hereby declare that I have read and understood the regulations governing the submission of the Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Cape Town, South Africa

This _____ day of _____, 2008.

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I. Introduction

A. Historical Background

The concept of limitation of liability has always played an important role in marine ventures; however, limitation did not become a feature of English Admiralty law until 1734.¹ The extent of a shipowner's liability was not merely a domestic issue between the shipper and carrier; for instance, ship investors sought clarity for maximum liabilities associated with a marine disaster; freight rates for cargo interests were based upon estimates of potential liability; and P&I Club rates for marine insurance depended upon the exposure to certain risks associated with perils of the sea.² Throughout history many sea-trading nations faced questions of how or even whether a shipowner should be allowed to limit certain liabilities. In the 18th century, the British Empire conducted much of the world's sea-trade and the English Parliament bowed to the continued requests of shipowners by passing the first of a sequence of statutes limiting a shipowners' liability.³ The preamble of the Responsibility of Shipowners Act gave credence to the importance of limitation by stating:

‘of the greatest consequence and importance to this Kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein.’⁴

In 1854, the English passed the Merchant Shipping Act which relieved shipowners from liability for acts of their master and crew done without ‘privity or knowledge’ of the owner to the extent of the value of the ship, its equipment and freight to be earned prior to the accident causing damage.⁵ By the end of the 19th century, England had collated its limitation statutes into the single measure of § 503 of the Merchant Shipping Act, 1894, which is almost exactly mirrored in § 261 of the South African Merchant Shipping Act, 1951.⁶ The South African Merchant Shipping Act, 1951 embraced the notion of limitation and recognized the principle

¹ Schoenbaum, 2 Admiralty & Mar. Law § 15-1 (4th ed. 2004).

² Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Chp. 11, p.380 (1999).

³ *Id.* at 384.

⁴ Responsibility of Shipowners Act, 7 Geo 2c 15 (1734).

⁵ Schoenbaum, 2 Admiralty & Mar. Law § 15-1 (4th ed. 2004).

⁶ Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Chp. 11, p.384 (1999).

‘that in the interests of encouraging sea-bound trade and enterprise, a shipowner should be protected in a given amount, save where he has been at fault.’⁷

The United States was also forced to address issues relating to limitation of liability for its’ merchant fleet. The English Law of Limitation of Liability was initially adopted in state statutes enacted in Maine and Massachusetts, but there was no general law of limitation under United States federal admiralty law.⁸ Then, in 1848, the case of *New Jersey Steam Navigation Co. v. Merchants’ Bank*⁹ resulted in holding a shipowner fully liable for the loss of cargo, despite a contractual provision limiting the vessel’s liability.¹⁰ American shipowners responded by lobbying the United States Congress to find a workable solution balancing the rights of those parties participating in sea-bound trade. In the meanwhile, American shipowners were experiencing a competitive disadvantage to their English brethren and were being exposed to the full force of their potential liability.¹¹ As a result, the United States Congress passed the Limitation of Liability Act¹² for the purpose of encouraging the development of American merchant shipping.¹³

The scope of this dissertation analyzes the current limitation practices and procedures of both the South Africa and the United States in the context of a global initiative to unify limitation regimes through the ratification of international conventions.

II. The United States Limitation of Liability Act – Practice, Procedure and Possible Problems

A. Introduction

The Limitation of Shipowners’ Liability Act¹⁴ was passed by Congress in 1851.¹⁵ The fundamental purpose of the Act was to limit the liability of a shipowner for any

⁷ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p.382 (1999); Citing – *The Nagos* 1996 (2) SA at 271 (N).

⁸ Schoenbaum, 2 *Admiralty & Mar. Law* § 15-1 (4th ed. 2004).

⁹ *New Jersey Steam Navigation Co. v. Merchants’ Bank*, 47 U.S. (6 How.) 344, 12 L.Ed. 465 (1848).

¹⁰ Schoenbaum, 2 *Admiralty & Mar. Law* § 15-1 (4th ed. 2004).

¹¹ Landrieu, *Stipulations: Sidestepping the Limitation of Shipowners’ Liability Act*, 23 *Tul. Mar. Law*. 429 (1999).

¹² Act of Mar. 3, 1851, ch. 43, 9 Stat. 635, previously codified at 46 U.S.C. § 181-189.

¹³ *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957).

¹⁴ Act of Mar. 3, 1851, ch. 43, 9 Stat. 635, previously codified at 46 U.S.C. § 181-189.

¹⁵ Robertson and Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 31 *Tul. Mar.L.J.* 463, 470

casualty during a voyage of his vessel where losses arose from circumstances beyond his control. The objective of the limitation Act was to bring United States law into line with that of Great Britain and other nations whose laws protected their shipowners.¹⁶ A fundamental provision in the Act declares, ‘the liability for any damage arising from a disaster at sea which is occasioned without the privity or knowledge of the shipowner shall in no case exceed the value of the vessel at fault together with her pending freight.’¹⁷

In essence, the Limitation Act provides a defense for shipowners in suits arising from a maritime casualty involving property damage and/or personal injury and allows the vessel owner to limit its liability. Limitation may be invoked either as a defense to an action seeking damages or as an independent complaint in admiralty.¹⁸ The defense hinges on the vessel owner being free from fault for the accident and the vessel owner must not have knowledge or privity of any negligence of the vessel’s master, crew or managing agent of the vessel owner which caused the casualty.¹⁹ The inherent purpose of the Limitation Act was not to insulate shipowners from liability, but rather to limit their liability to the value of the vessel at the voyage’s end plus her pending freight – commonly referred to as the limitation fund.²⁰

B. Persons Entitled to Limit Liability

The operative provision of the Limitation Act 46 U.S.C. § 30502 applies ‘to seagoing vessels and vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.’²¹ The term ‘owner’²² is defined to

(Summer 2007). The recodification of United States Code Title 46 was passed on September 13, 2007 when the full U.S. Senate and House of Representatives passed the bill. None of the changes in the new recodification were intended to have any substantive significance.

¹⁶ *In Re Vatican Shrimp Co.*, 820 F.2d 674 (5th Cir. 1987); *Just v. Chambers*, 312 U.S. 383, 61 S.Ct. 687, 85 L. Ed. 906 (1941).

¹⁷ *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957).

¹⁸ Limitation can be plead as a defense in a state court action; *Langes v. Green*, 282 U.S. 531 (1931); *In Re Complaint of Vatican Shrimp Co.*, 820 F.2d 674 (5th Cir. 1987).

¹⁹ 46 U.S.C. § 30506(e).

²⁰ *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957); 46 U.S.C. § 30511.

²¹ 46 U.S.C. § 30502 was previously codified as 46 U.S.C. § 183(a). Section 183(a) provides for limitation by ‘the owner of any vessel, whether American or foreign.’ The words ‘whether American or foreign’ were omitted as unnecessary because of § 30502 of the revised title.

include ‘a charterer that mans, supplies, and navigates a vessel at the charterer’s own expense or by the charterer’s own procurement.’²³ This has been interpreted to mean a demise and bareboat charterer, but not a time or voyage charterer.²⁴

In addition, the United States government as a vessel owner may limit liability under the Limitation Act. The same standards of determining privity and knowledge apply to the United States as apply to a private shipowner.²⁵ Foreign vessel owners²⁶ are also entitled to the benefit of limitation of liability.²⁷

C. Additional Protections Afforded to a Shipowner Invoking the Limitation Act

The Limitation Act creates a procedure whereby a shipowner’s liability for certain claims may be limited to the ‘value of the interest of such owner in the vessel’ – the value at the termination of the voyage – and ‘freight then pending’ – freight monies earned by the vessel owner during the voyage.²⁸ More importantly, the Limitation Act provides the vessel owner with a single forum for determining: (1) whether the vessel and its owner are liable at all; (2) whether the owner may in fact limit liability to the value of the vessel and pending freight; (3) the amount of just claims; and (4)

²² The term “owner” is not limited to title ownership. Owner under the Limitation Act is a “liberal, common sense” determination. *Complaint of Nobles*, 842 F.Supp. 1430 (N.D. Fla. 1993); See also *Marine Recreational Opportunities, Inc. v. Berman*, 15 F.3d 270 (2nd Cir. 1994) (owner is someone with either title or actual control over the vessel).

²³ 46 U.S.C. § 30501. Section 30501 was previously codified as 46 U.S.C. § 186 which defined an owner to include an owner *pro hac vice* which by its terms includes “the charterer of any vessel who actually ‘mans, victuals, and navigates’ such vessel at his own expense, or by his own procurement...”

²⁴ *Black’s Law Dictionary*, 7th ed. (2002) – Bareboat Charter is a charter under which the shipowner provides the ship, and the charterer provides the personnel, insurance, and other material necessary to operate it - also termed demise charter.
²⁵ *Empresa Lineas Maritimas Argentinas S. A. v. United States*, 730 F.2d 153 (4th Cir. 1984).

²⁶ 46 U.S.C. § 30502; *Oceanic Steam Navigation Co., v. Mellor*, 233 U.S. 718, 731-32, 34 S.Ct. 754, 58 L.Ed. 1171 (1914) [The *Titanic* Case].

²⁷ In the case of *The Norwalk Victory*, the Supreme Court held that when a claim is brought by a foreign shipowner, the U.S. courts must decide whether a foreign law cap is applicable by determining whether, under foreign law, the cap is substantive or procedural in nature. The district court in *Nigeria National Petroleum Corp. v. S/V Seabulk Merlin* held that Nigeria’s foreign law cap was procedural and hence inapplicable in the limitation of liability proceeding - citing: Robertson and Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 31 Tul. Mar.L.J. 463, 611 (Summer 2007).

²⁸ 46 U.S.C. § 30505; Schoenbaum, 2 Admiralty & Mar. Law § 15-5 at 144 (4th ed. 2004).

how the fund should be distributed to the claimants.²⁹ The Limitation Act vests exclusive jurisdiction in the admiralty courts and is designed to preserve the shipowner's right to limit its liability in a federal forum.³⁰ The procedure is governed by the Limitation Act itself and Rule F of the Admiralty Rules.³¹

When certain property damage or personal injury claims are filed against the vessel owner, the admiralty court has jurisdiction to determine if those claims will exceed the 'value of the vessel plus her pending freight' so that a concursus of claimants may be established. The purpose of the concursus is to assure that all persons having claims against the vessel must file within the limitation proceeding so the court can protect the competing interests of the shipowner and the claimant. The objective of the concursus is to provide an orderly distribution of an inadequate limitation fund among claimants.³²

D. The Requirements for a Shipowner to be entitled to Limitation of Liability

It is a fundamental prerequisite that a shipowner may limit his liability only upon showing that the fault causing the loss occurred without his 'privity or knowledge.'³³

Privity or knowledge can be best understood as the following:

'Privity or knowledge does not necessarily require a showing of actual knowledge. It is deemed to exist if the shipowner has the means of obtaining knowledge, or if he would have obtained the knowledge by reasonable inspection. Knowledge is not only what the shipowner knows, but what he is charged with discovering.'³⁴

'Privity or knowledge refers to the vessel owner's personal participation in, or actual or constructive³⁵ knowledge of, the specific

²⁹ 46 U.S.C. § 30505; Schoenbaum, 2 Admiralty & Mar. Law § 15-5 at 144 (4th ed. 2004).

³⁰ *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957).

³¹ Fed. R. Civ. P. Supp. Rule F.

³² *In Re Tidewater Inc.*, 249 F.3d 342 (5th Cir. 2001), citing *Texaco v. Williams*, 47 F.3d 765 (5th Cir. 1995).

³³ 46 U.S.C. § 30505.

³⁴ *Brister v. A.W.I. Inc.*, 946 F.2d 350, 358 (5th Cir. 1991).

³⁵ Constructive knowledge refers to not what the vessel owner actually knew, but what it should have known. The shipowner is chargeable with knowledge of acts or conditions of unseaworthiness that could have been discovered through reasonable diligence; *Empresa Lineas Maritimas Argentinas S. A. v. United States*, 730 F.2d 153 (4th Cir. 1984).

acts of negligence or conditions of unseaworthiness which caused or contributed to the accident.’³⁶

An important facet of the Limitation Act is that privity or knowledge may be imputed to the vessel owner if the claimant can show privity or knowledge on the part of the owner’s managing agent, officer, or supervising employee (including shoreside personnel).³⁷

A determination of whether a shipowner may limit liability involves a two-step analysis: (1) a determination of what acts of negligence or unseaworthiness caused the casualty and (2) whether the shipowner had knowledge or privity of these acts.³⁸ For instance, a claimant must establish that the injury or loss was caused by the negligence and/or unseaworthiness of the vessel.³⁹ If the causal connection requirement is met, then the burden of proof shifts to the vessel owner to prove that no design, neglect, privity or knowledge of the negligent action or unseaworthy condition may be imputed to the vessel owner.⁴⁰

In some cases, a presumption exists that the owner had privity or knowledge. Under § 30506(e), the privity or knowledge of the master or the owner’s superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner.⁴¹ Another presumption arises if the accident was caused by an unseaworthy condition which existed at the start of the voyage. For example, when the vessel owner is charged with the absolute, non-delegable duty to provide a seaworthy vessel, he is also charged with a duty to use reasonable means to acquire knowledge of conditions likely to produce or contribute to unseaworthiness.

There has been an unmistakable trend in the judicial decisions to interpret the ‘privity or knowledge’ requirement of the Limitation Act as imposing a heavy

³⁶ *In Re Royal Caribbean Cruises, Ltd.*, 55 F.Supp. 2d 1367, 1370 (S.D. Fla. 1999), aff’d. 214 F.3d 1356 (11th Cir. 2000), citing *Hercules Carriers, Inc.*, 768 F.2d 1558, 1563-64 (11th Cir. 1985).

³⁷ *In Re Royal Caribbean Cruises, Ltd.*, 55 F.Supp. 2d 1367, 1370 (S.D. Fla. 1999), aff’d. 214 F.3d 1356, 1371 (11th Cir. 2000),

³⁸ *Id.* at 1369.

³⁹ The initial burden of proving negligence or unseaworthiness is on the claimant: *In Re Complaint of Garda Marine, Inc.*, 1192 AMC 1307 (S.D. Fla. 1991).

⁴⁰ Schoenfeld, *Limitation of Liability: The Defense Perspective*, 28 Tul. Mar. Law. 219 (Summer, 2004) at note 23.

⁴¹ 46 U.S.C. § 30506(e).

burden on shipowners and charterers to exercise a high degree of control and supervision so as to avoid marine casualties.⁴²

E. What Types of Vessels are afforded the Benefits of Limiting Liability?

The Limitation Act applies to ‘all seagoing vessels, and also all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.’⁴³

Courts have interpreted this clause to apply to all vessels; however, to be a vessel, the structure must have, to a reasonable degree, the purpose of transportation.⁴⁴

Another related definition of a vessel is found in 1 U.S.C.S. § 3 which states “a ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”⁴⁵

Some examples of particular crafts or structures considered vessels include barges⁴⁶, fishing vessels⁴⁷, scows, special purpose vessels such as semi-submersible drilling rigs⁴⁸, ferry boats⁴⁹, derrick boats⁵⁰, canal boats, tug boats, yachts⁵¹ and even small pleasure craft,⁵² in the form of ‘jet skis’⁵³ have been held to be entitled to limitation.

Certain structures have also been held to be outside the protections afforded by the Limitation Act.⁵⁴ For example, a seaplane is not considered a vessel within the context of § 30502.⁵⁵ Similarly, a floating dry dock used in the repair of vessels is not a ‘vessel’ with the meaning of the Limitation Act.⁵⁶

⁴² Schoenbaum, 2 Admiralty & Mar. Law § 15-6 at 154 (4th ed. 2004).

⁴³ 46 U.S.C. § 30502.

⁴⁴ Schoenbaum, 2 Admiralty & Mar. Law § 15-2 at 139 (4th ed. 2004).

⁴⁵ 1 U.S.C.S. § 3 (2005).

⁴⁶ *Re Myers Excursion & Nav. Co.*, 57 F. 240 (N.Y. D.C. 1893).

⁴⁷ *Whitcomb v. Emerson*, 50 F. 128 (DC Mass. 1892).

⁴⁸ *In Re Sedco, Inc.*, 543 F.Supp. 561, 1982 AMC 1461 (S.D. Tex. 1982)

⁴⁹ *Grays Landing Ferry Co. v. Stone*, 46 F.2d 394 (CA3 Pa 1931).

⁵⁰ *Patton-Tully Transp. Co. v. Turner*, 269 F. 334 (CA6 Tenn 1920).

⁵¹ *Keller v. Jennette*, 940 F.Supp. 35 (D.Mass. 1996); *In Re Bernstein*, 81 F.Supp. 2d 176 (D.Mass. 1999).

⁵² *Armour v. Gradler*, 448 F. Supp. 741 (W.D. Pa. 1978); The Limitation Act applies to the operation of small pleasure craft on navigable waters even if the craft is not used for commercial purposes.

⁵³ *In Re Keys Jet Ski, Inc.*, 893 F.2d 1225 (11th Cir. 1990).

⁵⁴ 46 U.S.C. § 30501 *et seq.*

⁵⁵ Seaplane is not a “vessel” so as to enable the owner to limit its liability; *Hubschman v. Antilles Airboats, Inc.*, 440 F. Supp. 828 (D.V.I. 1977).

⁵⁶ *Berton v. Tietien & Lang Dry Dock Co.*, 219 F. 763 (D.C. NJ 1915); *De Martino v. Bethlehem Steel Co.*, 164 F.2d 177 (CA Mass. 1947).

Although the Limitation Act appears to define ‘vessels’ as including a wide variety of crafts and/or structures, most courts have had no trouble identifying what particular types of structures and/or crafts are to be considered vessels for limitation purposes.

III. The United States Procedure for Filing for Limitation of Liability under the Admiralty Rules

A. Jurisdiction and Venue

One of the major purposes of the limitation proceeding is to establish a single forum for adjudication of claims and to create a concursus to resolve competing claims against the limitation fund.⁵⁷ Jurisdiction of limitation proceedings is exclusively in the federal district courts.⁵⁸ State courts do not have concurrent jurisdiction to hear limitation issues under the savings-to-suitors clause, 28 U.S.C. § 1333.⁵⁹ The procedure for filing for limitation of liability is controlled by the Limitation Act itself and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims.⁶⁰

Venue is proper in any district where the vessel has been attached or arrested or, if there has been no attachment or arrest, in the district where the owner has been sued.⁶¹ If suit has not yet been commenced against the owner, the limitation complaint may be filed in any district where the vessel is physically present, or if the vessel is not within any district, the complaint may be filed in any district.⁶² Where a claim has been filed against a vessel in state court, the appropriate venue in a limitation action under Rule F(9) is the federal court which encompasses the state court.⁶³

Furthermore, once a vessel owner files for limitation within the federal district court, the vessel owner waives the right to later object to the federal court’s jurisdiction.⁶⁴ For example, in *Karim v. Finch Shipping Co.*, a foreign seaman filed a

⁵⁷ *Langes v. Green*, 282 U.S. 531, 540 (1931).

⁵⁸ *Norwich & New York Transp. Co. v. Wright*, 80 U.S. 104 (1871).

⁵⁹ *In Re Vatican Shrimp Co.*, 820 F.2d 674 (5th Cir. 1987).

⁶⁰ Fed. R. Civ. P. Rule F; Schoenbaum, 2 Admiralty & Mar. Law § 15-5 at 144 (4th ed. 2004).

⁶¹ Fed. R. Civ. P. Rule F(9).

⁶² *Id.*; *In Re Complaint of Mike’s, Inc.*, 317 F.3d 894 (8th Cir. 2003).

⁶³ *In Re Matter of American River Transp. Co.*, 864 F. Supp 554 (E.D. La. 1994).

⁶⁴ *Karim v. Finch Shipping Co. Inc.*, 265 F.3d 258 (5th Cir. 2001).

state court personal injury suit.⁶⁵ In response, the shipping company filed a limitation proceeding in the federal court.⁶⁶ The state court later dismissed the seaman's case for lack of personal jurisdiction over the shipping company.⁶⁷ While the limitation proceeding was still pending, the shipping company attempted to dismiss its limitation proceeding from federal court on the basis of lack of personal jurisdiction.⁶⁸ The court held that the company had submitted itself to the jurisdiction of the federal court by filing for limitation.⁶⁹

B. Time for Filing a Claim

A vessel owner wishing to limit liability must file a limitation proceeding in the United States District Court within six months after receiving written notice of a claim against it.⁷⁰ Written notice may take the form of an actual lawsuit; however, any writing expressing an intention⁷¹ to bring a claim may suffice as sufficient notice to commence the six-month tolling period of the Limitation Act.⁷² On the other hand, the adequacy of the written notice is very fact-dependent such that if the claimant misidentifies the vessel on which the accident is alleged to have occurred, the six-month period may not have begun to run.⁷³

Once a vessel owner files a complaint for limitation of liability, the vessel owner must also:

‘deposit with the court, for the benefit of claimants, an amount equal to the value of the owner’s interest in the vessel and pending freight, or approved security, and in addition to such amounts, or approved security therefore, as the court may from time to time fix as necessary.’⁷⁴

⁶⁵ *Karim v. Finch Shipping Co. Inc.*, 265 F.3d 260 (5th Cir. 2001).

⁶⁶ *Id.*

⁶⁷ *Id.* at 261.

⁶⁸ *Id.* at 262.

⁶⁹ *Id.* at 268.

⁷⁰ 46 U.S.C. § 30511. See also, 3-II *Benedict on Admiralty* § 15 Time for Instituting Limitation Proceedings and Other Actions.

⁷¹ *Complaint of Tom-Mac, Inc.*, 76 F.3d 678 (5th Cir. 1996) - where the owner receives notice of a ‘reasonable possibility’ that a claim has or will be made against the vessel, the six-month tolling period commences.

⁷² *Doxsee Sea Clam Co. Inc. v. Brown*, 13 F.3d 550 (2nd Cir. 1994) - holding that a letter from a claimant’s attorney is sufficient to begin the six-month tolling period; Distinguished by *In Re Salty Sons Sports Fishing*, 191 F.Supp. 2d 631 (D. Md. 2002) - holding that correspondence from claimant’s attorney to vessel owners which did not inform the owners of the claimants’ demand, blame the vessel owners for loss, or inform the owners that the damages might exceed the value of the vessel did not trigger the time limitation.

⁷³ *Billiot v. Dolphin Services, Inc.*, 2000 U.S. App. LEXIS 21424 (5th Cir. 2000).

⁷⁴ 46 U.S.C. § 30511(b)(1).

The court will require the vessel owner to deposit security in a sum determined by the court, usually a bond equal to the value of the vessel at the voyage's end plus pending freight.⁷⁵ Courts have also generally approved of a letter of undertaking from the vessel's insurer as a sufficient method of posting security.⁷⁶

It is important to note even if security has been posted, a claimant's ability to challenge the sufficiency of the amount posted is not threatened. A claimant may bring a motion to increase the security or have an appraisal of the vessel and her pending freight, if the original posting of security is insufficient.⁷⁷ For example, in *Trico Marine Assets, Inc. v. Diamond Servs. Corp.*, the court granted claimants motion to increase security because the letter of undertaking inaccurately estimated the pre-collision value of the vessel and overestimated the depreciation.⁷⁸ The marine surveyor calculated the value of the vessel to be \$4,000,000US million dollars and subtracted an estimated \$500,000US dollars in depreciation.⁷⁹ Diamond, the previous owner of the vessel conceded the value to be \$4,500,000US million dollars and that the actual cost of repairs equaled \$251,870.09US dollars.⁸⁰ The court upon the motion of claimant, determined that Diamond and its surveyor inaccurately calculated the value of the vessel and ordered an increase of \$748,129.91US dollars in security to represent the true value of the vessel and/or limitation fund.⁸¹

The admiralty court retains great discretion in determining what constitutes appropriate security and may either order an independent appraisal or order an increase or reduction in the security.⁸²

C. Injunctions or Stays of other Proceedings against the Vessel Owner
Once a vessel owner has filed for limitation of liability in the district court and deposited the appropriate security, the court will issue a stay of all proceedings in

⁷⁵ 46 U.S.C. § 30511(b)(1); See also *Fed. R. Civ. P. Rule F* – permitting some courts to allow an amount to be deposited into the registry of the court in lieu of a bond for cost.

⁷⁶ *Complaint of Dammers & Vanderheide*, 836 F.2d 750 (2nd Cir. 1988).

⁷⁷ *Luhr Brothers Inc. v. Gagnard*, 765 F.Supp. 1264, 1269 (W.D. La 1991).

⁷⁸ *Trico Marine Assets, Inc. v. Diamond Servs. Corp.*, 2001 U.S. Dist. LEXIS 2710 at 7-8 (E.D. La 2001).

⁷⁹ *Id.* at 4.

⁸⁰ *Id.* at 7.

⁸¹ *Id.* at 9.

⁸² *In Re Complaint of Clearsky Shipping Corp.*, 1997 U. S. Dist. LEXIS 12355 at 4 (E.D. La 1997); Admiralty Rule F(7).

other courts for actions arising out of the casualty in question.⁸³ Under Rule F(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims, all claims and proceedings against a vessel owner or the vessel owner's property cease and an injunction may be issued by the district court in which the limitation proceeding has been filed, enjoining further prosecution of any action or proceeding against the vessel owner with respect to any claim subject to the limitation action.⁸⁴

While the stay is in effect, the federal district court will issue a notice to all persons with potential claims arising from the casualty to file their respective claims in the limitation proceeding.⁸⁵ The deadline for filing of claims shall not be less than thirty days after issuance of the notice; however, the district court may extend the time period for which a claim may be filed if good cause exists.⁸⁶ The district court will also require the vessel owner to publish notice of its limitation proceeding usually in the local newspaper⁸⁷ and the vessel owner must mail notices to all persons presumed or known to have a claim.⁸⁸

The purpose of the injunction and Rule F is so all claims can be filed within a single proceeding and a concursus can be established to protect the interests of the shipowner and all claimants within the limitation proceeding. Once all claims have been filed, the district court will determine whether the claims presented will exceed the value of the limitation fund.⁸⁹ If the court determines that the amount of claims do not exceed the limitation fund, the court has discretion to lift the stay and allow the claimants to litigate in his or her chosen forum.⁹⁰

Two circumstances exist where a claimant can proceed outside the exclusive jurisdiction of the federal admiralty court and request the district court to lift the stay or injunction as long as the rights of the vessel owner are protected.

⁸³ 46 U.S.C. § 30511(c).

⁸⁴ *Fed. R. Civ. P. Rule F(3)*.

⁸⁵ *Fed. R. Civ. P. Rule F(4)*.

⁸⁶ *Id.*; *Texas Gulf Sulphur Co. v. Blue Stack Towing Co.*, 313 F.2d 359, 362-63 (5th Cir. 1963) – Court may allow late-filed claims for good reasons and ‘so long as the limitation proceeding is pending and undetermined, and the rights of the parties are not adversely affected.’ See also *Golnoy Barge Co. v. M/T Shinoussa*, 980 F.2d 349 (5th Cir. 1993).

⁸⁷ For example, in the Eastern District of Louisiana, the court requires the vessel owner to publish notice in the legal section of the *New Orleans Times-Picayune*; See *E.D.LA. Local Adm. R. 64.5*.

⁸⁸ *Fed. R. Civ. P. Rule F(4)*.

⁸⁹ *Fed. R. Civ. P. Rule F(7)*.

⁹⁰ *In Re Port Arthur Towing Co.*, 42 F.3d 312, 316 (5th Cir. 1995).

1. Can a Claimant pursue his Claim against a Vessel Owner outside the Limitation Proceeding?

As stated in section C, *supra*, there are two exceptions that permit a claimant to proceed outside the exclusive jurisdiction of the federal admiralty court and request the district court to lift the stay or injunction. These exceptions initially arose out of the long-standing conflict facing claimants and shipowners. On the one hand, shipowners are entitled to certain protections and rights set forth in 46 U.S.C. § 30501 *et seq.*, which govern the shipowner's right to limitation of liability and also grants exclusive jurisdiction to the district courts sitting in admiralty. On the other hand, claimants have a right to pursue their common law remedies in state court or federal court on the 'law' side under the Savings-to-Suitors Clause of 28 U.S.C. § 1333.

In an attempt to resolve this long-standing conflict, the United States Supreme Court created two circumstances under which claimants in a limitation proceeding may proceed outside the exclusive jurisdiction of the federal admiralty court⁹¹ provided the appropriate stipulations are given: the single claimant-inadequate fund cases;⁹² and the multiple claimant-adequate fund cases.⁹³

a. The Single Claimant-inadequate Fund Exception

The United States Supreme Court in *Langes v. Green* first noted that the major purpose of the limitation proceeding is to create a concursus to resolve competing claims to the limitation fund.⁹⁴ The Court stated that when only one claimant is involved, there are no competing interests to the limitation fund; therefore, there is

⁹¹ The Supreme Court held in *Lewis v. Lewis & Clark Marine, Inc., Lake Tankers Corp. v. Henn* and *Langes v. Green* held that an injunction should be lifted when the shipowner's right to federal admiralty control over the limitation issue can be protected while at the same time honoring the forum-selection rights of those claiming against the ship – citing: Robertson and Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 31 Tul. Mar.L.J. 463, 550 (Summer 2007).

⁹² Donaldson, Effect of other Proceedings of Shipowner's Petition in Admiralty for Limitation of Liability under 46 U.S.C. § 183 *et seq.*, 47 A.L.R. Fed. 490 (1980) at § 3 – 5.

⁹³ *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152 (1957); *Texaco v. Williams*, 47 F.3d 765, 767 (5th Cir. 1995); *In the Matter Tidewater, Inc.*, 938 F. Supp. 375, 377 (E.D. La 1996). See also, Donaldson, Effect of other Proceedings of Shipowner's Petition in Admiralty for Limitation of Liability under 46 U.S.C. § 183 *et seq.*, 47 A.L.R. Fed. 490 (1980) at § 6 – 10.

⁹⁴ Landrieu, Stipulations: Sidestepping the Limitation of Shipowner' Liability Act, 23 Tul. Mar. Law. 429 (1999) at note 17.

no need for a concursus.⁹⁵ As a result, a single claimant should be allowed to try liability and damage issues in his chosen forum.⁹⁶ However, the claimant must first file certain stipulations that protect the shipowner's rights⁹⁷ to adjudicate its claim for limitation of liability in an admiralty court.⁹⁸ If the claimant provides the court with the necessary stipulations, the district court must lift the stay.⁹⁹

b. The Multiple Claimant-adequate Fund Exception

In 1957, the U.S. Supreme Court in *Lake Tankers v. Henn*¹⁰⁰ was faced with another conflict involving the rights of claimants whose claims did not exceed the amount of the limitation fund. The case arose out of a collision between a tug and barge with a pleasure yacht.¹⁰¹ The injured persons originally filed suit in state court for damages exceeding the value of the tug and barge.¹⁰² Thereafter, the injured claimants filed stipulations protecting the shipowner's rights and reduced the amount of their respective claims to an amount less than the value of the vessel and her pending freight.¹⁰³

Weighing in on the situation, the U.S. Supreme Court held that the shipowner's right of limitation under the Limitation Act was fully protected and the United States Court of Appeal for the Second Circuit was correct in lifting the stay and allowing the respondents to proceed in state court pursuant to their common law remedy.¹⁰⁴ The Supreme Court stated:

‘For us to expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it. The shipowner's right to limit liability is not so boundless. The Act is not one of immunity from liability but of limitation of it and we read no other privilege for the

⁹⁵ *Langes v. Green*, 282 U.S. 531, 540 (1931).

⁹⁶ *Id.*

⁹⁷ Bono, Protective Stipulations and the Single Claimant Exception in the Limitation of Liability Proceedings, 17 Mar. Law. 257, 260-64 (Spring 1992).

⁹⁸ *Langes v. Green*, 282 U.S. 531, 540 (1931).

⁹⁹ *Id.* at 540-44; *Ex Parte Green*, 286 U.S. 437, 438-40 (1932); *Helena Marine Serv., Inc. v. Sioux City*, 564 F.2d 15, 18 (8th Cir. 1977).

¹⁰⁰ *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 148 (1957).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Landrieu, Stipulations: Sidestepping the Limitation of Shipowner's Liability Act, 23 Tul. Mar. Law. 429 (1999) at note 33.

shipowner into its language over and above that granting him limited liability. In fact, the Congress not only created the limitation procedure for the primary purpose of apportioning the limitation fund among the claimants where that fund was inadequate to pay the claims in full, but it reserved to such suitors their common-law remedies.¹⁰⁵

Thus the Court recognized that when a shipowner is not exposed to liability in excess of the limitation fund, there is no need for a concursus even if multiple claimants are involved. This factual scenario became known as the multiple claimant-adequate fund exception.

- c. What is needed for a Claimant to execute the ‘Appropriate’ Stipulation protecting the Shipowner and allowing him to litigate in his chosen forum?

The U.S. Supreme Court in *Lake Tankers* and *Langes* provided two means for a district court sitting in admiralty to lift an injunction and allow the claimant to litigate in federal ‘law’ court or state court; however, these exceptions were contingent on the claimant filing the necessary stipulations protecting the vessel owner’s rights to limit liability.

An example of the ‘recurrent and inherent conflict’ between the exclusive jurisdiction that the Limitation Act vests in admiralty courts and the common law remedies embodied in the Saving-to-Suitors Clause¹⁰⁶ was the issue in *Luhr Bros. v. Gagnard*.¹⁰⁷ The court had to reconcile ‘the rights of a shipowner to have all litigation concerning a maritime mishap occur in one admiralty proceeding (and thus without a jury) with the Jones Act which affords to injured crewmen the right to obtain a jury trial in a forum of the crewman's choosing.’¹⁰⁸ The court granted the claimant’s motion to lift the injunction contingent on filing certain protective stipulations protecting the vessel owner’s rights under the limitation proceeding.¹⁰⁹ Those stipulations included: (1) the vessel owner’s right to litigate all issues relating to his right to limit liability in federal court, (2) that the claimant will not seek a judgment in the state forum on the vessel owner’s right to limit his liability and will

¹⁰⁵ *Lake Tankers Corp. v. Henn*, 354 U.S. at 152.

¹⁰⁶ 28 U.S.C. § 1333.

¹⁰⁷ *Luhr Bros., Inc. v. Gagnard*, 765 F. Supp. 1264 (W.D. La 1991).

¹⁰⁸ *Id.* at 1267.

¹⁰⁹ *Id.* at 1270.

waive any right to a claim of *res judicata*¹¹⁰ based on the state court judgment, and (3) that the claimant has to stipulate to the value of the fund.¹¹¹ With regard to the third stipulation, the court further stated, ‘a claimant need not proclaim that the petitioner’s stipulation for value is sufficient; he need only stipulate that the admiralty court will determine the question of sufficiency.’¹¹²

Furthermore, various courts have added to the requirements of a protective stipulation. For example, in *Beiswenger Enterprises Corporation (“BEC”) v. Carletta*, the court examined the contents of a protective stipulation and added that a stipulation must protect the vessel owner from litigation by the claimants in any forum outside the limitation proceeding, not only in a state court.¹¹³ Therefore, a claimant must not only waive *res judicata* for state court judgments but also any judgments in federal court.

Thus, a claimant by filing the necessary stipulations¹¹⁴ can effectively protect the vessel owner’s rights in the limitation proceeding and lift the injunction allowing him to pursue his claim or common law remedy in his chosen forum under the Savings-to-Suitors Clause in 28 U.S.C. § 1333.

d. The Exception within the Exception: The Multiple Claimant-inadequate Fund Scenario

More recently, jurisprudence has developed to handle cases involving multiple claimants and an inadequate fund. The Supreme Court has never directly addressed the issue; however, the circuit courts have acknowledged that claimants can ‘transform a multiple-claims-inadequate-fund into the functional equivalent of a single claim case through executing the appropriate stipulations.’¹¹⁵ The court in

¹¹⁰ Gilmore & Black, *The Law of Admiralty*, § 10-19, at 872-74 (discussing importance of *res judicata* stipulation).

¹¹¹ Tadross, *The Savings to Suitors Clause vs. The Limitation of Liability Act: A Compromise as Found in Lewis v. Lewis & Clark Marine, Inc.*, 26 Tul. Mar. Law. 695 (Summer, 2002) at note 63.

¹¹² *Luhr Bros., Inc. v. Gagnard*, 765 F. Supp. at 1269; See also *Two “R” Drilling Co. v. Rogers*, 943 F.2d 576, 578 (5th Cir. 1991); *Dammers & Vanderheide v. Corona*, 836 F.2d 750, 758 (2nd Cir. 1988); *Valley Line Co. v. Ryan*, 771 F.2d 366, 373 (8th Cir. 1985).

¹¹³ *Beiswenger Enterprises Corporation (“BEC”) v. Carletta*, 86 F.3d 1032, 1044 (11th Cir. 1996).

¹¹⁴ Bono, *Protective Stipulations and the Single Claimant Exception in the Limitation of Liability Proceedings*, 17 Mar. Law. 257, 271 (Spring 1992).

¹¹⁵ Landrieu, *Stipulations: Sidestepping the Limitation of Shipowners’ Liability Act*, 23 Tul. Mar. Law. 429 (1999) at note 56; *Beiswenger Enterprises Corporation (“BEC”) v. Carletta*, 86 F.3d 1032, 1038 (11th Cir. 1996); *Texaco v. Williams*, 47

*Magnolia Marine Transport*¹¹⁶ explained, ‘multiple claimants may reduce their claims to the equivalent of a single claim by agreeing and stipulating as to the priority in which the claimants will receive satisfaction against the shipowner from the limited fund.’¹¹⁷ By executing such a stipulation, the claimants protect the rights of the vessel owner and eliminate the possibility of competing claims.

However, the lower circuit courts have been inconsistent in defining what truly constitutes multiple claims within the meaning of the Limitation Act because the U.S. Supreme Court has not directly addressed the multiple claimant-inadequate fund stipulation. The different lines of reasoning encompassing the lower courts have resulted in a split between the U.S. Circuit Courts.

i. The Split in the U.S. Circuit Courts regarding Third Party Indemnity and Contribution Claims

The Sixth and Eighth Circuits¹¹⁸ have held that a party seeking contribution and indemnity is not to be considered separate claimants because the claim is merely derivative of the plaintiff’s claim and thus does not present a multiple claimant situation for the purposes of Limitation of Liability.¹¹⁹

Moreover, the Fifth Circuit Court has held in several cases that a party seeking contribution and indemnity is considered a claimant for limitation purposes and must sign the appropriate stipulation to ensure the shipowner's rights are adequately protected.¹²⁰

The Second, Third and Eleventh Circuits have also held that the threat posed by an indemnity and contribution claim against a shipowner creates a multiple claim situation necessitating a concursus.¹²¹

F.3d 765, 768 (5th Cir. 1995); *Dammers & Vanderheide v. Corona*, 836 F.2d 750, 756 (2nd Cir. 1988); *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 644 (6th Cir. 1982); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 419 (8th Cir. 1979).

¹¹⁶ *Magnolia Marine Transport Co. v. Laplace Towing Corp.*, 964 F.2d 1571 (5th Cir. 1992).

¹¹⁷ *Id.* at 1576.

¹¹⁸ *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d at 645; *Universal Towing Co. v. Barrale*, 595 F.2d at 419.

¹¹⁹ 46 U.S.C. § 30511 *et seq.*

¹²⁰ *In the Complaint of Port Arthur Towing Co.*, 42 F.3d 312, 316 (5th Cir. 1995); *Odeco Oil & Gas Co. v. Bonnette*, 74 F.3d 671, 675 (5th Cir. 1996).

¹²¹ *Gorman v. Cerasia*, 2 F.3d 519, 526-27 (3rd Cir. 1993); *Dammers & Vanderheide v. Corona*, 836 F.2d 750, 757 (2nd Cir. 1988); *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1042 (11th Cir. 1996).

ii. A Need for Uniformity Among the U.S. Circuit Courts

There is a multiplicity of cases ranging from Circuit to Circuit interpreting the different scenarios for the multiple claimant-inadequate fund stipulation. The reasoning is that a claimant should not be prevented from litigating his or her suit under the common law remedies when all parties make the appropriate stipulations affording the shipowner his protections under the Limitation Act, 46 U.S.C. § 30501 *et. seq.*

The issue of whether a claim for contribution and indemnity is to be considered a separate claim for the purposes of creating a multiple claimant situation has been met with different lines of reasoning on what a possible claimant can or cannot recover from a shipowner in the limitation proceeding.

In *S & E Shipping Corp.*, the court reasoned that the indemnity claim is derived from and dependent on the primary claim against the shipowner.¹²² In essence if the injured claimants proceed against the shipowner, the recovery is limited to the value of the limitation fund.¹²³ Likewise, if the injured claimant proceeds against the third party, the indemnity claim is also limited to the value of the limitation fund.¹²⁴ Because the third party seeking indemnity can only recover what the claimant is entitled to recover which cannot exceed the value of the limitation fund, the third party in essence assumes the position of the injured claimant.¹²⁵ Therefore, the Sixth Circuit concluded that indemnity and contribution claims based on negligence theories do not create a multiple claims fund situation.¹²⁶

On the other hand, the Third Circuit in *Gorman v. Cerasia* reasoned that a multiple claimant situation could arise if the claimant's seek to enforce a state court judgment against the shipowner up to the value of the limitation fund and then proceed to recover the remaining amount of the judgment against the shipowner's codefendants.¹²⁷ If the defendants do not sign the protective stipulations with the admiralty court, they would not be foreclosed from recovering against the shipowner

¹²² *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d at 644.

¹²³ *Id.* at 645.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Gorman v. Cerasia*, 2 F.3d at 527.

for contribution, even though his or her liability (assuming no privity or knowledge exists) has already been exhausted.¹²⁸

Other cases regarding third party claims refer to Justice Cornelia G. Kennedy's concurring opinion in *S & E Shipping* which presents a similar scenario.¹²⁹ Likewise, a similar analogy of the facts presented in *Gorman* was before the court in *Kattelman*, where an unsatisfied judgment could potentially be enforced against a shipowner by way of a third party cross claim and/or indemnification after exhausting the limitation fund.¹³⁰

Due to the diverse opinions in the U.S. Circuit Courts, a claimant in a limitation proceeding may or may not be able to file the appropriate stipulations because of the different interpretations of contribution and indemnity claims. On one hand, a claimant within the Sixth and Eight Circuit's jurisdiction may not be required to stipulate to the third party contribution and indemnity claim because the claim is considered derivative. On the other hand, claimants in the Second, Third, Fifth and Eleventh Circuits would be required to stipulate to the priority of claims because contribution and indemnity are considered separate claims. This creates a potential problem when not all claimants are willing to prioritize their claims behind other claimants. One would assume because of the long standing dilemma between the rights vested in the Limitation Act and those granted under 28 U.S.C. § 1333, a U. S. Supreme Court ruling on multiple claims would resolve the split and put all claimants on 'equal footing'¹³¹ when defining and assessing their respective claims within the limitation proceeding.

- iii. More Problems for Claimants when attempting to execute a Multiple Claimant-inadequate Fund Stipulation

¹²⁸ *Gorman v. Cerasia*, 2 F.3d at 527.

¹²⁹ *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d at 646-48; Judge Kennedy's concurring opinion is distinguishable by the holding in *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1042-43 (11th Cir. 1996).

¹³⁰ *Kattelman v. Otis Engineering Corp.*, 696 F.Supp 1111, 1115 (E.D. La 1988).

¹³¹ For example, all Circuit Courts have recognized that a multiple claimant situation exists where a third party seeking indemnity or contribution also requests attorneys' fees and costs associated with its claim; *Dammers & Vanderheide v. Corona*, 836 F.2d at 756. It is . . . well settled that the potential for claims for attorneys' fees or costs against a shipowner by a claimant or a third party creates a multiple claimant situation necessitating a concursus - *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d at 645-46; See also *Universal Towing Corp. v. Barrale*, 595 F.2d at 419.

Even in holding that a third party claim for contribution and indemnity is considered a separate claim within the Limitation proceeding, the U.S. Circuit Courts are again split on the requirements of executing a multiple claimant stipulation and its effects on the parties involved.

aa. Third Party Codefendants and the Vessel Owners Rights

In *Beiswenger Enters. Corp. v. Carletta*, the Eleventh Circuit reasoned that third party contribution and indemnity claims do present a multiple claims situation requiring a concursus.¹³² However, the court also acknowledged that the shipowner's protections would not be in jeopardy if not all codefendants signed the stipulation.¹³³ The Beiswenger Court held 'that if the stipulation waived the claimants' right to collect any judgment against BEC's codefendants, thereby exposing BEC ('vessel owner') to liability in excess of the limitation fund, until BEC's right to limitation was determined, the stipulation would cure the "multiple claims" problem and would be sufficient to protect the shipowner.'¹³⁴ Thus, all codefendants did not need to sign the stipulation.¹³⁵

Similarly, the Fifth Circuit in *Odeco v. Bonnette* held that parties seeking indemnification and contribution from a shipowner must be considered claimants within the meaning of the Limitation Act.¹³⁶ However, the court further stated 'in order to proceed in state court, all claimants must sign the stipulation protecting the shipowner's rights.'¹³⁷

In examining the different holdings among the U.S. Circuit Courts, the law and requirements regarding how claimants must either stipulate or sign the stipulation to adequately protect the shipowners is unsettled.

bb. Must a Third Party Claimant for Contribution and Indemnity sign the Stipulation in order to adequately protect the Shipowner's Rights in the Limitation Proceeding?

¹³² *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d at 1041.

¹³³ *Id.*

¹³⁴ *Id.* at 1043-44.

¹³⁵ *Id.* See also, *Dammers & Vanderheide v. Corona*, 836 F.2d at 758-59, holding that a vessel owner can be protected from excess liability at the hands of third parties even if they do not enter into any protective stipulations.

¹³⁶ *Odeco Oil & Gas Co. v. Bonnette*, 74 F.3d at 675.

¹³⁷ *Id.*

The inconsistency among the U.S. Circuit Courts as to whether a third party claimant seeking contribution and indemnity actually needs to sign the protective stipulation should also be addressed with uniformity. As stated above, the Eleventh Circuit in *Beiswenger* opined that when a claimant states in his or her stipulation that no judgment is or will be enforced against the shipowner or any other parties (referencing codefendants) until the shipowner's right to limitation has been determined, the stipulation would 'cure' the multiple claims issue.¹³⁸

Similarly, the court in *The Matter of Dianne Self*, dealt with the issue of whether all claimants must sign the stipulation versus the sufficiency of the stipulations.¹³⁹ In its analysis, the court stated that the third party claimants for indemnity and contribution erred by ignoring the inherent authority of the district court to scrutinize not only whether all claimants entered into stipulations, but also to measure the overall sufficiency of existing stipulations to protect the vessel owner from excess liability, regardless of whether all claimants entered into, signed, or crafted their own stipulations.¹⁴⁰ The stipulation stated that the claimant would not seek to enforce 'any judgment exposing petitioners to liability in excess of the ultimately determined limitation fund, whether against petitioners themselves or by enforcement against any third parties entitled to indemnity or contribution from petitioners.'¹⁴¹ The court reasoned that by giving up such claims until limitation is determined, the claimant has eliminated concerns that competing claims will exhaust the limitation fund; additionally, the court was convinced that the stipulation fully protected the vessel owner's rights.¹⁴²

Thus, multiple claimants while disputing a possible third party contribution and indemnity claim would need to execute a proper stipulation specifically stating that:

¹³⁸ *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d at 1044.

¹³⁹ *In The Matter of Dianne Self & William Self Praying for Exoneration From or Limitation of Liability*, 172 F.Supp. 2d 813, 819 (W.D. La 2001).

¹⁴⁰ *Id.* at 819.

¹⁴¹ *Id.* at 820.

¹⁴² *Id.* See also *In Re Two "R" Drilling Co.*, 943 F.2d 576, 578 (5th cir. 1991) - holding that even in multiple claimant situation, a court can lift the stay and allow state court suits if the claimants enter a stipulation that the court determines will adequately protect the shipowner under the Limitation Act and against third party indemnification claims; *Kattelman v. Otis Eng Corp.*, 696 F. Supp. 1111, 1116 (E.D. La. 1988) - finding sufficient a stipulation that prevented third party cross-claims for indemnification or contribution from being in excess of the limitation fund.

‘in the event there is a judgment or recovery in a State or Federal court action in excess of \$1000,000.00US dollars, whether against the vessel owner, or any other liable party or parties who may make a cross claim or claims over against the vessel owner, in no event will claimants herein seek to enforce any judgment(s) in State or Federal court against the vessel owner prior to the complete adjudication of the complaint of limitation of liability in the district court.’¹⁴³

The stipulation addresses the same issue addressed in the Beiswenger Court, raising the issue of whether a third party contribution and indemnity claimant actually needs to sign the protective stipulation.

It would not be necessary for a contribution and indemnity claimant to sign the stipulation because by stipulating not to enforce any judgment whether against shipowner or any third parties, the shipowner’s rights are fully protected. A third party claim for contribution hinges on any judgment against the third party which would not be enforced as stated in the stipulation.

An opposing view is illustrated by Justice Cornelia G. Kennedy’s concurring opinion in *S & E Shipping*. Judge Kennedy examined the problems with a co-defendant’s contribution claim and the multiple claimant situation:

‘The [plaintiffs] could win a large judgment against [the shipowner and its co-defendant] jointly in the state court, say \$1,000,000US. The [co-defendant] could also win a judgment in state court entitling it to contribution from [the shipowner] for anything it pays the [plaintiffs] in excess of one-half the judgment, or \$500,000US. Because of the stipulation they have filed with the District Court, the [plaintiffs] could collect no more from [the shipowner] than the value of the limitation fund as determined by the District Court. If the fund contains only \$250,000US... then [the co-defendant], jointly and severally liable, would be obligated to pay [plaintiffs] the unpaid balance of the judgment or \$750,000US. Under its right to contribution [the co-defendant] would be entitled to recover from [the shipowner] any excess over \$500,000US that it paid the [plaintiffs], or \$250,000US. Since the [co-defendant] did not stipulate that any state court judgment in its favor would not be *res judicata* on the limitation question, it would then have a \$250,000US claim against the [shipowner] that was not subject to limitation. The result would be that the [shipowner] would have to pay an amount in excess of the limitation fund, when under the principles of the Limitation of

¹⁴³

Landrieu, Stipulations: Sidestepping the Limitation of Shipowners’ Liability Act, 23 Tul. Mar. Law. 429 (1999) at note 129.

Liability Act it should only have been liable for the value of the vessel (assuming no privity and knowledge exists.)¹⁴⁴

While Justice Kennedy’s concurring opinion illustrates a practical problem with contribution and indemnity claims, it is distinguishable because it does not take into account the actual wording or adequacy of a protective stipulation which states that no such claim(s) against the shipowner or any other liable parties will be enforced. The Beiswenger Court recognizing the nature of the protective stipulation and its wording stated that third party claims against the shipowner are based solely on their liability to the claimants.¹⁴⁵ The wording of the stipulation effectively eliminates the possibility of competing claims (including contribution and indemnity claims) that could exhaust the limitation fund before the shipowner’s rights are adjudicated in an admiralty court.¹⁴⁶

Furthermore, the U.S. Supreme Court in *Lewis v. Lewis & Clark*¹⁴⁷ stated:

“Stipulations, in addition to other restrictions on state court proceedings, ensure ‘beyond a reasonable doubt that the owner’s right of limitation under the Act was fully protected.’ To expand the scope of the exclusive jurisdiction to prevent state court actions ‘would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it.’”¹⁴⁸

The U.S. Supreme Court reversed the U.S. Court of Appeals stating that when the District Court satisfies itself that a vessel owner’s right to seek limitation will be protected; the decision to dissolve the injunction is well within the court’s discretion.¹⁴⁹

cc. Is there any Possible Resolution for the near Future?

As indicated in the above scenarios, there are still many inconsistencies concerning the multiple claimant-inadequate fund stipulation. Arguments can be asserted on both sides in favor or against the definition of third party contribution and indemnity

¹⁴⁴ *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d at 1042; *Gorman v. Cerasia*, 2 F.3d at 527; citing *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d at 646-648.

¹⁴⁵ *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d at 1043.

¹⁴⁶ *Id.*

¹⁴⁷ *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001).

¹⁴⁸ *Id.* at 451.

¹⁴⁹ *Id.* at 455.

claims and whether those claimants are required to sign a protective stipulation. One opinion is that the U.S. Circuit Courts would be better equipped if the U.S. Supreme Court addressed the split of authorities and resolved the conflict. Much of federal maritime law is based on uniformity, and as such a claimant involved in a maritime dispute should not be thwarted by inconsistent court rulings in the U.S. Circuit Courts.

On the other hand, one could take into consideration the U.S. Supreme Court's inexperience regarding admiralty disputes¹⁵⁰ and opine that a U.S. Circuit Court such as the U.S. Fifth Circuit Court of Appeals may be more attune to decide admiralty issues due to the volume of maritime cases circulating in the district courts and the abundance of maritime scholars. However, the problem would still exist because any decision by the U.S. Fifth Circuit Court of Appeals would not be controlling in the other Circuits.

Nevertheless, when considering past precedent and the exceptions created by the U.S. Supreme Court in *Langes*¹⁵¹ and *Lake Tankers*¹⁵² and the scarcity of decisions thereafter, a decision regarding the adequacy of a multiple claimant-inadequate fund stipulation and defining multiple claims would not likely be addressed by the U.S. Supreme Court in the near future.

IV. The South African Limitation of Liability Regime – Practice, Procedure and Possible Problems

A. Introduction

South African law allows a shipowner to limit its liability for damages arising in relation to a single incident.¹⁵³ There are three primary sources for limitation in South Africa: global limitation per ton is permitted in terms of § 261 of the Merchant Shipping Act, 1951 (hereafter 'MSA, 1951'); the SDR-related kilogram or package limitation under the Hague-Visby Rules as enacted by the Carriage of Goods by Sea Act, 1986; and South Africa's oil pollution legislation, largely based upon Civil Liability Convention limits.¹⁵⁴ South Africa is not a party to either the 1957 International Convention relating to the Limitation of Liability of Owners of

¹⁵⁰ Taking into consideration the problems and inconsistent rulings by the Supreme Court in determining coverage for Longshoreman under the LHWCA.

¹⁵¹ *Langes v. Green*, 282 U.S. 531 (1931).

¹⁵² *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957).

¹⁵³ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 2, p. 56 (1999).

¹⁵⁴ *Id.*

Seagoing Ships or the 1976 Convention on Limitation of Liability for Maritime Claims.¹⁵⁵

However, Chapter Five ('Safety of Ships and Life at Sea') of the Merchant Shipping Act, 1951 includes provisions closely modeled on the 1957 Limitation Convention and Section 503 of the English Merchant Shipping Act, 1894.¹⁵⁶ The relevant sections contained in § 259 – 263 of the MSA, 1951 discuss the rights and obligations of parties with respect to collisions, accidents at sea and limitation of liability. More importantly, § 261 of the MSA, 1951 provides:

‘the owner of ship, whether registered in the Republic or not, shall not be liable for whole damage, if any loss of life or personal injury to any person or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity.’¹⁵⁷

Thus, a party wishing to limit his liability must prove the loss or damage was caused ‘without his actual fault or privity.’

In *Atlantic Harvesters of Namibia, Ltd. v. Unterweser Reederei GMBH of Bremen [The St. Padarn Case]*,¹⁵⁸ the Cape Court relied heavily on English cases dealing with § 503 of the English Merchant Shipping Act, 1894 and ‘held that the burden of proving absence of fault or privity rested on the person seeking to limit his liability.’¹⁵⁹ The English concept of ‘fault or privity’ remains embodied in the South African Merchant Shipping Act of 1951, the 1957 Limitation Convention and the United States Limitation Act; however, England and other sea-trading nations have long since departed from such arbitrary concepts through the enactment of the 1976 Limitation Convention. Presently, the South African MSA, 1951 regulates the limitation of liability regime and the Cape Court in the *Nagos*¹⁶⁰ accepted that limitation is ‘a maritime claim in its own right.’¹⁶¹ A shipowner must look to the provisions of the MSA, 1951 to assess what protections are afforded to those parties involved in maritime ventures.

¹⁵⁵ Dyason, South African Maritime Law – An Overview of Some Developments, 32 J. Mar. L. & Comm. 475, 491 (July 2001).

¹⁵⁶ *Id.*

¹⁵⁷ Merchant Shipping Act, Act 57 of 1951, § 261(1).

¹⁵⁸ *Atlantic Harvesters of Namibia, Ltd. v. Unterweser Reederei GMBH of Bremen [The St. Padarn Case]*, 1986 (4) SA (865) (C).

¹⁵⁹ Dyason, South African Maritime Law – An Overview of Some Developments, 32 J. Mar. L. & Comm. 475, 493 (July 2001).

¹⁶⁰ *The Nagos*, 1996 (2) SA 261 (D).

¹⁶¹ Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Chp. 2, p.56 (1999).

B. Persons Entitled to Limit Liability under the Merchant Shipping Act of 1951

The right to limit extends to a much broader class of persons when compared to the United States limitation statute. The operative provisions addressing the class of persons entitled to limit are found in § 261 and § 263 of the MSA, 1951. Section 261 provides for the ‘owner of a ship, whether registered in the Republic or not...’¹⁶² and § 261(3) further provides ‘that the provisions of this section shall extend and apply to owners, builders, or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until registration...’¹⁶³ The effect of the above provisions not only extends the right to limit to the owner of a ship ‘whether registered or unregistered in the Republic,’ but also to owners, builders and/or other interested persons of ‘any’ ship. A ‘ship’ is defined in § 2 of the MSA, 1951 and includes ‘any vessel used for transportation or any other purpose on or under the surface of the water.’¹⁶⁴

Section 263 encompasses the rights of persons other than the owner and § 263(2) defines ‘owner’ as ‘any charterer, any person interested in or in possession of the ship and a manager or operator of such ship.’¹⁶⁵ The MSA, 1951 definition of ‘charterer’ includes a demise charterer, time charterer and even a voyage charterer¹⁶⁶ whereby U.S. law (46 U.S.C. § 30501) only provides limitation to a shipowner and/or demise/bareboat charterer.¹⁶⁷ In addition, the proviso in § 261(3) specifically includes ships under construction but only from the period of launching to registration.¹⁶⁸ It is important to note that the ship must be under construction at a port or any place located in South Africa.¹⁶⁹ With regard to the period prior to launching, the protections of § 261 would not attach because the vessel is still under construction and arguably not capable of being ‘used for transportation.’¹⁷⁰

¹⁶² Merchant Shipping Act, Act 57 of 1951, § 261(1).

¹⁶³ Merchant Shipping Act, Act 57 of 1951, § 261(2).

¹⁶⁴ Merchant Shipping Act, Act 57 of 1951, § 2.

¹⁶⁵ Merchant Shipping Act, Act 57 of 1951, § 263(2).

¹⁶⁶ Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Chp. 11, p. 385 (1999).

¹⁶⁷ 46 U.S.C. § 30501.

¹⁶⁸ Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Chp. 11, p. 385 (1999).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 386.

Furthermore, Section 261(3) requires that all claims for damage in respect of loss of life, personal injury and loss of or damage to property or rights ‘arise from ‘any single occasion.’¹⁷¹ The single occasion rule takes into account that separate casualties may occur on the same voyage and such reasoning is in accord with the limitation provisions contained in the 1957 and 1976 Limitation Conventions. It is apparent from a reading of the limitation provisions that the MSA, 1951 encompasses a much broader class of persons seeking to limit liability than the United States Limitation Act but both acts are equally ineffective when defining a standard of conduct for which shipowners actions can be judged.

V. The South African Procedure for Filing for Limitation of Liability under the Admiralty Proceedings Rule

A. Admiralty Jurisdiction Regulation Act of 1983 (as amended with effect from July 1, 1992)

The South African Admiralty jurisdiction came of age with the passing of the Admiralty Jurisdiction Regulation Act of 1983 (hereinafter ‘AJRA, 1983’).¹⁷² This Act had the stated purpose:

‘To provide for the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme [High] Court of South Africa, and for the extension of those powers: for the law to be applied by, and for the procedure applicable in, those divisions...’¹⁷³

The AJRA, 1983 sought to extend the jurisdiction of the High Court in Admiralty to all maritime disputes and § 2 of the AJRA, 1983 sets forth the jurisdictional parameters.¹⁷⁴ Section 2 states:

‘Subject to the provisions of this Act each provincial and local division, including a circuit local division, of the High Court of South Africa shall have jurisdiction (admiralty jurisdiction) to hear and determine 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.’¹⁷⁵

¹⁷¹ Merchant Shipping Act, Act 57 of 1951, § 261(3).

¹⁷² Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Chp. 1, p. 16 (1999).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 17.

This broad jurisdiction reflects the unlimited jurisdiction of the High Court and the constitutional right of everyone in South Africa, *incola* or *peregrinus* to have recourse to a court.¹⁷⁶ One caveat for the extension of jurisdiction is that the matter must be a ‘maritime claim’ as defined in Section 1(1).¹⁷⁷ Once the jurisdictional element is met, the court must then also determine the law applicable in light of § 6 of the AJRA, 1983. Section 6 provides the transition for admiralty matters previously decided under the Colonial Courts of Admiralty Act, 1890, of the United Kingdom to the current AJRA, 1983 and sets forth the following order of application: South African statutory law will prevail; choice of law terms will be upheld; in the absence of an applicable statute and where a matter invokes old jurisdiction that predated November 1983, English Law as it was in November 1983 will be directly applicable; and where jurisdiction is new, created by the AJRA, 1983, the present-day South African Roman-Dutch common law applies.¹⁷⁸

Limitation of liability and its procedure is a statutory matter governed by the law of the forum; therefore, the rights available under § 261 are unaffected by the provisions of § 6 of the AJRA, 1983.¹⁷⁹ Thus, once a claimant asserts any claims for damage and a shipowner seeks limitation, the claims will fall under the auspices of § 261 *et seq* of the MSA, 1951.¹⁸⁰ Section 261 will over-ride any choice of law provision in a contract because limitation is a matter of procedural and not of substantive law, regardless of what law created the liability, in delict or in contract.¹⁸¹

The requirement of a maritime claim is key to South African Admiralty jurisdiction and practice.¹⁸² Without a maritime claim as defined by the AJRA, 1983, a litigant has no recourse in admiralty nor does the High Court in admiralty have jurisdiction.¹⁸³ A litigant would have to utilize the common law jurisdiction of the High Court or the Magistrate Court where appropriate.¹⁸⁴ The maritime claim is thus regarded as the keel block of the South African admiralty statutory right *in*

¹⁷⁶ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 1, p. 17 (1999).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 18-19.

¹⁷⁹ *Id.* at 387 and 396.

¹⁸⁰ *Id.* at 396.

¹⁸¹ *Id.* at 396.

¹⁸² *Id.* at 44.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

*rem*¹⁸⁵ and the definitions can be found in § 1 of the AJRA, 1983. While the list for possible ‘maritime claims’ is set out in § 1, only § 1(w), (x), (dd), and (ee) will be examined for the purposes of this article.¹⁸⁶ Section 1(w) defines a maritime claim as arising out of or relating to ‘the limitation of liability of the owner of a ship or of any person entitled to any similar limitation of liability.’¹⁸⁷ Section 1(x) also refers to ‘the distribution of a fund or any portion of a fund held or to be held by, or in accordance with the directions of, any court in the exercise of its admiralty jurisdiction, or any officer of any court exercising such jurisdiction.’¹⁸⁸ The list of maritime claims creates a *numerous clauses*; however, any claimant can usually assert a maritime claim based on the catchall provisions of § (1)(dd) and (ee).¹⁸⁹ A claimant in a limitation proceeding must aver each specific maritime claim as it relates and the significance of classifying the correct maritime claim becomes apparent when the claimant seeks to rank its claim against other claimants sharing in the distribution of the fund.¹⁹⁰

The AJRA, 1983 also sets forth specific parameters in § 3 governing the form of proceedings; Section 4 and 5 for procedure, rules and powers of court; and Section 10 and 11 regarding claims against the fund and ranking of such claims.¹⁹¹ However, the AJRA, 1983 works in conjunction with the Admiralty Proceedings Rules which contain certain provisions for a court to make directions relating to procedures where limitation is claimed.¹⁹²

B. Admiralty Proceedings Rules

The Admiralty Proceedings Rules regulate the conduct of the admiralty proceedings of the several provincial and local divisions of the Supreme Court of South

¹⁸⁵ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 2, p. 44 (1999).

¹⁸⁶ Admiralty Jurisdiction Regulation Act of 1983; The scope of this paper is limited to the rights of persons seeking to limit liability within the provisions of § 261 *et seq.*

¹⁸⁷ Admiralty Jurisdiction Regulation Act of 1983, § 1(1)(w).

¹⁸⁸ Admiralty Jurisdiction Regulation Act of 1983, § 1(1)(x).

¹⁸⁹ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 2, p. 44 (1999).

¹⁹⁰ *Id.*; Section 261(1)(c) provides that if claims for damages in respect of loss of life or personal injury and also claims in respect of loss of or damage to property or rights arise, such claims for loss of life or personal injury shall have priority over claims for damages in respect of loss of or damage to property or rights and the unsatisfied portion of the first-mentioned claims shall rank *pari passu* with the last-mentioned claims. *See also*; Section 9 of the Admiralty Jurisdiction Regulation Act of 1983 empowers the court to sell a vessel in execution and to hold the proceeds of such sale in a fund pending distribution to creditors in terms of Section 11.

¹⁹¹ Admiralty Jurisdiction Regulation Act of 1983.

¹⁹² Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 2, p. 56 (1999).

Africa.¹⁹³ The applicable provision is contained in § 23 titled ‘Representative actions and limitation of liability’ stating:

‘where any person claims to be entitled to a limitation of liability referred to in paragraph (w) of the definition of “maritime claim” in § 1(1) of the AJRA, the court may give such directions as it deems fit with regard to the procedure in any such claim, the staying of any other proceedings and the conditions for the consideration of any such claim, which may include a condition that such amount as the court may order be paid to abide the result of the consideration of the said claim, or that the claimant be required to admit liability for all or any claims made against him or her, or any other condition which the court deems fit.’¹⁹⁴

Under South African law, there is no provision for the issuing of a Writ of Limitation.¹⁹⁵ A shipowner, charterer and/or other interested persons in terms of § 261 and § 263 may plead limitation by way of a defense to a claim, either alone or in the alternative to a general or specific demand as to primary liability on the merits.¹⁹⁶ The procedure for establishing a limitation fund is to apply to court on affidavit for an order permitting owners to limit their liability in South Africa in terms of the MSA, 1951 and the AJRA, 1983 and to establish a fund with the Registrar.¹⁹⁷ It is important to note that it is not necessary to establish a limitation fund or to commence a limitation action for § 261 *et seq.* to apply.¹⁹⁸ The fund can consist of a bank guarantee, bond or P&I club letter of undertaking.

Claims for damage or personal injury caused by a ship or sustained by any person aboard a ship in terms of the MSA, 1951 are subject to a two-year prescription period.¹⁹⁹ The prescription period may vary depending on whether such claims are brought *in personam* or *in rem* and the court has the discretion to extend the two-year period if certain fact requirements are met.²⁰⁰ Furthermore, the establishment of security will also interrupt the running of prescription, even if the

¹⁹³ Admiralty Proceedings Rule, 1997.

¹⁹⁴ Admiralty Proceedings Rule, 1997 §23(2).

¹⁹⁵ Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Chp. 2, p. 56 at note 51 (1999).

¹⁹⁶ Shepstone & Wylie, Maritime Law in South Africa, p. 31 at www.wylie.co.za.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 32.

¹⁹⁹ *Id.* at 29.

²⁰⁰ *Id.*

proceedings have not at that time been issued, provided that further steps to enforce the claim are taken with a one-year period from the posting of such security.²⁰¹

C. Breaking Limitation and the Notion of Actual Fault and/or Privity

The notion of actual fault and/or privity is embodied in the United States limitation statute, South African Merchant Shipping Act of 1951, and the 1957 Limitation Convention. Section 261(1) provides that the owner of a ship is not liable for the whole damage when such damage or loss is caused ‘without his actual fault or privity.’²⁰² Over the years, the definition of actual fault and/or privity has been met with much criticism because of the difficulty in defining what actions constitute actual fault and/or privity. Legal scholars have viewed the phrases ‘actual fault or privity’ and ‘privity or knowledge’ as a relatively poor standard for determining whether a shipowner is allowed to limit his liability. One legal scholar²⁰³ has been noted as saying ‘notions of privity or knowledge are empty containers into which the courts are free to pour whatever content they will.’²⁰⁴

The recent passage of the International Safety Management Code (hereafter ‘ISM Code’) has also revolutionized the factual enquiry regarding the shipowners actions in relation to what actions constitute actual fault or privity.²⁰⁵ The ISM Code requires a shipowner to appoint a ‘designated person’ who is given the responsibility to monitor safety and pollution prevention²⁰⁶ and is now perhaps the most important industry standard against which the actions of a shipowner may be adjudged as prudent.²⁰⁷

Privity or knowledge in the United States can be best understood as the following:

‘Privity or knowledge does not necessarily require a showing of actual knowledge. It is deemed to exist if the shipowner has the means of obtaining knowledge, or if he would have obtained the

²⁰¹ Shepstone & Wylie, *Maritime Law in South Africa*, p. 30 at www.wylie.co.za
²⁰² Merchant Shipping Act, Act 57 of 1951, § 261(1).

²⁰³ G. Gilmore & C. Black, *The Law of Admiralty* § 10-4 (2nd ed. 1975). Professors Gilmore and Black are noted legal scholars in the admiralty and maritime field.

²⁰⁴ Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 *Tul. L. Rev.* 1139, 1145 (June 1983).

²⁰⁵ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 401 (1999).

²⁰⁶ Poulos, *Legal Implications of the ISM Code: New Impediments to Sea Fever*, 9 *U.S.F. Mar. L.J.* 37, 50 (Fall 1996).

²⁰⁷ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 402 (1999).

knowledge by reasonable inspection. Knowledge is not only what the shipowner knows, but what he is charged with discovering.²⁰⁸

The modern reality of shipping has created even more problems in ascribing actual fault or privity because ships are owned by complex corporate structures that are far removed from the day-to-day operations of the ships.²⁰⁹ Furthermore, the burden of proof incorporated into § 261 of the MSA, 1951 also requires the shipowner to discharge the onus of proof that the damage was caused without his ‘actual fault or privity.’²¹⁰ This burden of proof can be viewed as tenuous and South Africa has become a favorable jurisdiction for claimants because the ability to break limitation is easier when compared to other limitation regimes.²¹¹ The 1976 Limitation Convention shifts the burden to the claimant who must prove that the intent, recklessness and knowledge of the defendant shipowner or charterer caused the loss and this standard of conduct is more in accord with the ISM Code.²¹²

Nevertheless, the South African courts in *The Tigr*²¹³ and *The BOS 400* have held that there is ‘nothing opprobrious’ in seeking the most advantageous limitation regime as a legitimate juridical advantage where competing regimes have jurisdiction to hear the claim.²¹⁴ The commercial principles on which limitation was originally founded have been lost in the skewed judicial interpretations of defining what actions constitute ‘actual fault or privity’ and many countries have now adopted the 1976 Limitation Convention’s standard which has resulted in greater certainty and simplicity for both shipowners, claimants and insurers.

D. A New Solution for South Africa?

The Maritime Law Association of South Africa (hereafter ‘MLASA’) was established in February 1974 as a result of concern among maritime lawyers and the shipping industry that legislation in South Africa regulating maritime affairs did not

²⁰⁸ *Brister v. A.W.I. Inc.*, 946 F.2d 350, 358 (5th Cir. 1991).

²⁰⁹ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, P. 388 (1999).

²¹⁰ Hare, *Limitation of Liability Part II, The 1976 Regime: Suitable for Nigeria and South Africa?*, p. 2 (June 2004).

²¹¹ Dyason, *South African Maritime Law – An Overview of Some Developments*, 32 *J. Mar. L. & Comm.* 475, 495 (July 2001).

²¹² Hare, *Limitation of Liability Part II, The 1976 Regime: Suitable for Nigeria and South Africa?*, p. 2 (June 2004).

²¹³ *The Tigr No 4*, 1998 (4) SA 740 (C).

²¹⁴ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 397 (1999).

appear to be keeping pace with developments elsewhere in the world.²¹⁵ One of the objectives of the MLASA was to co-operate, promote, and consider with the Comité Maritime Internationale (hereafter 'CMI') and any other associations' proposals for the unification of maritime, aviation, rail and road transport laws and practice of different nations.²¹⁶ The MLASA recently asked the government to amend the Merchant Shipping Act of 1951 as well as to replace the 'actual fault or privity' requirement with that of 'recklessness and intent' as provided by the 1976 Limitation Convention and also to shift the burden of proof from the carrier/shipowner to the claimant.²¹⁷ The net result is that South Africa, as an interim measure, would adopt the limits of the 1976 Limitation regime, but would also hopefully exclude some of the Convention's flaws.²¹⁸

The MLASA has also expressed a strong desire to work with the CMI in seeking a review of the 1976 Limitation Convention.²¹⁹ The majority of South Africa's major trading partners have adopted the 1976 Limitation Convention and the South Africa Maritime Law Association has presented the topic on numerous occasions to the South African legislature and recently at a CMI Colloquium convened in Cape Town in February 2006.²²⁰ The answer as to whether South Africa will move forward and adopt the 1976 Limitation Convention remains to be seen.

VI. Determining the value of the Limitation Fund

A. United States Law

Under the Limitation Act, the limitation fund is equal to the value of the vessel and her then pending freight.²²¹ The value is determined at the conclusion of the voyage, after the collision or casualty.²²² In cases where the vessel has sunk, the value of the

²¹⁵ Maritime Law Association of South Africa, www.mlasa.org.

²¹⁶ *Id.*

²¹⁷ Hare, Limitation of Liability Part II, The 1976 Regime: Suitable for Nigeria and South Africa?, p. 6 (June 2004).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 7.

²²¹ 46 U.S.C. § 30505(a).

²²² Schoenbaum, 2 Admiralty & Mar. Law § 15-7 at 155 (4th ed. 2004); See also, Bourdeau, Rights, Duties, and Liabilities of Vessel Owners, 70 Am. Jur. 2d Shipping § 410 (November 2007).

vessel will be its salvage value.²²³ If the vessel cannot be salvaged, the ship's value may be zero.²²⁴ Several questions may arise inquiring what the actual value of the vessel consists of when determining the limitation fund.

1. What does 'Pending Freight' Constitute?

The term 'pending freight' for purposes of constituting the limitation fund means the total earnings of the vessel for the voyage.²²⁵ The U.S. Supreme Court in *The Main v. Williams* stated that the real object of the limitation statute is 'to limit the liability of vessel owners to their interest in the adventure,' which necessarily includes the value of the vessel and her freight.²²⁶ The U.S. Supreme Court defined 'freight' broadly, stating that it refers to 'all reward, hire, or compensation, paid for the use of ships.'²²⁷ The U.S. Supreme Court also stated that the 'pending freight' doctrine should be broadly construed in favor of the injured party.²²⁸

For example, the court in *The Complaint of North Am. Trailing Co.*, held that the value of a dredging contract in which the vessel was engaged should be included in the liability fund as 'pending freight.'²²⁹

Similarly, in *In the Matter of Falcon Inland Inc.*, the court held that the value of a drilling contract between the vessel owner and a third party was properly included as 'pending freight' for the purposes of limitation.²³⁰ The vessel owner received \$1,509,387 US dollars as compensation for the use of Falcon Rig No. 54 during the course of the venture in which the alleged injury occurred.²³¹

Courts have increasingly become more inclined to hold that the value of certain vessel contracts are properly included as pending freight for the purposes of the limitation fund.

2. Supplemental Funds for Personal Injury or Death Claims on 'Seagoing Vessels'

²²³ Schoenbaum, 2 Admiralty & Mar. Law § 15-7 at 155 (4th ed. 2004); See also, Bourdeau, Rights, Duties, and Liabilities of Vessel Owners, 70 Am. Jur. 2d Shipping § 410 (November 2007).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *The Main v. Williams*, 152 U.S. 122, 14 S. Ct. 486, 38 L. Ed. 381 (1894).

²²⁷ *Id.* at 129.

²²⁸ *Id.* at 132-33.

²²⁹ *The Complaint of North Am. Trailing Co.*, 763 F. Supp. 152, 162 (E.D. Va. 1991).

²³⁰ *In the Matter of Falcon Inland Inc.*, 1998 U.S. Dist. LEXIS 5640 (E.D. La. 1998).

²³¹ *Id.* at 7.

In the case of personal injury or death claims on ‘seagoing vessels,’ the assessed value of the vessel after casualty may be increased to \$420US dollars per gross ton if the initial fund is inadequate to cover all claims.²³² The supplemental fund is only available for payment of claims for personal injury and death. The term ‘seagoing vessels’ is defined in § 30506(a) and does not include ‘pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels.’²³³ In effect, the above named vessels become exempt from the \$420US dollar per gross ton requirement; however, those vessels may still be entitled to limit liability to the value of the vessel post casualty plus pending freight.²³⁴

Furthermore, the court in *In the Matter of Talbott Big Foot, Inc.*, stated that for a vessel to be ‘seagoing’ under § 183(b)²³⁵ and not exempted by § 183(f),²³⁶ the vessel must be intended to navigate in the seas beyond the nautical boundary²³⁷ in the regular course of its operations.²³⁸ The court can also take into account the design, function and capabilities of the vessel to examine if its intended purpose is to operate beyond the nautical boundary.²³⁹

3. Application of the ‘Flotilla Doctrine’

Another method or way of attempting to increase the value of the limitation fund is through the application of the ‘Flotilla Doctrine.’ The doctrine was invented by Judge Learned Hand in *Standard Dredging Co. v. Kristiansen*, which held that all vessels engaged in the same venture and under common ownership at the time of the injuries must be surrendered into the limitation fund.²⁴⁰

For example, in *Drill Barge No. 2*, the barge owner was engaged in the construction of a levee and used several barges to blast rock, dig the canal and build the levee.²⁴¹ An explosion occurred on barge No. 2 and caused serious injuries to

²³² 46 U.S.C. § 30506(b).

²³³ 46 U.S.C. § 30506(a).

²³⁴ Schoenbaum, 2 Admiralty & Mar. Law § 15-7 (4th ed. 2004); 46 U.S.C. § 30502.

²³⁵ 46 U.S.C. § 183(b) has been re-enacted as 46 U.S.C. § 30502.

²³⁶ 46 U.S.C. § 183(f) has been re-enacted as 46 U.S.C. § 30506(a) and § 30508(a).

²³⁷ The boundary line has been set by the U.S. Coast Guard as twelve nautical miles from the Gulf Coast. 46 C.F.R. § 7.105(a).

²³⁸ *In Matter of Talbott Big Foot, Inc.*, 854 F.2d 758, 761 (5th Cir. 1988).

²³⁹ *Id.* at 762.

²⁴⁰ *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548, 550 (2nd Cir. 1933).

²⁴¹ *In Re Drill Barge No. 2*, 454 F.2d 408 (5th Cir. 1972).

five claimants, all of whom were employees of the barge owner.²⁴² The U.S. Appellate Court affirmed the lower court's ruling increasing the limitation fund from the original sum, the value of the exploded barge, to the value of the entire flotilla.²⁴³

Other courts have not universally accepted the holding by Judge Learned Hand in *Kristiansen* and have attempted to make a distinction between 'pure tort' cases and 'contractual relationship' cases.²⁴⁴ This distinction has arisen out of two U.S. Supreme Court cases. First, the Court in *Liverpool* held that whether or not two or more vessels under common ownership were involved in the same accident, only the vessel actively at fault must be surrendered.²⁴⁵ Then, the Court in *Sacramento Navigation* held that both a tug and barge together constituted a single vessel for limitation purposes because the vessels were performing under a contract of affrieghtment.²⁴⁶

As a result, the U.S. Circuit Courts have applied the 'Flotilla Doctrine' differently. A more modern test for whether a group of vessels operated as a unit or 'flotilla' and should be surrendered is whether the vessels are subject to common ownership and engaged in a single enterprise.²⁴⁷

The end result is that if a person is injured on a vessel and a number of different vessels were operating under the same owner for the same venture, the injured person may be successful in increasing the value of the limitation fund to include all vessels in operation on the day of the accident by applying the 'Flotilla Doctrine.'

4. Third-Party Claims by the Vessel Owner

It is well established that claims against third parties for damage to the vessel during the voyage (for example, collision or explosion damages) are part of the vessel

²⁴² *In Re Drill Barge No. 2*, 454 F.2d 408 (5th Cir. 1972).

²⁴³ *Id.* at 412.

²⁴⁴ Lee, *The Eleventh Amendment, the Flotilla Doctrine, and Other Flanking Maneuvers*, 29 Tul. Mar. Law. 1, (Winter, 2004) at note 168.

²⁴⁵ *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal*, 251 U.S. 48, 52 (1919).

²⁴⁶ *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329 (1927).

²⁴⁷ Schoenbaum, 2 Admiralty & Mar. Law § 15-7 (4th ed. 2004); *Cenac Towing Co., Inc. v. Terra Resources, Inc.*, 734 F.2d 251, 254 (5th Cir. 1984).

owner's interest in the vessel and are included as part of the limitation fund, even though hull insurance proceeds are not included in the limitation fund.²⁴⁸

Benedict on Admiralty states that:²⁴⁹

The shipowner's collateral rights against tortfeasors arising out of the accident or voyage must also be accounted for and added to the stipulation or assigned to the trustees. Such rights are usually collision damages.

In *Petition of Navigazione Libera Triestina*, the limitation petitioner tried to avoid adding the value of the claim against the ship repairer to the limitation fund.²⁵⁰

The court ultimately concluded that:

To permit a shipowner to obtain reimbursement from a tortfeasor, and to prevent those funds from going to the damaged cargo owners, would seem unconscionable.²⁵¹

On the contrary, the court in *Guillot v. Cenac Towing Co.* held that claims against third party tortfeasors for indemnity or contribution for personal injury claims are not included in the limitation fund.²⁵² The court stated:

The theory of the limitation of liability Act is that the shipowner is not liable for damages or injuries occurring without its privity or fault beyond the value of the vessel (and pending freight) immediately after the casualty. Claims for indemnity, contribution, or both against third party alleged tortfeasors can in no sense add to 'the amount or value of the interest of such owner' in the vessel but rather were recoupment of losses from collateral sources.²⁵³

Thus one can conclude that for third party claims by vessel owners to be included in the limitation fund, the claim must be considered as a part of the vessel owner's 'actual' interest in the vessel and her pending freight.

5. Insurance Proceeds

²⁴⁸ *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468 (1886); *O'Brien v. Miller*, 168 U.S. 287 (1897); Duncan, Limitation of Shipowners' Liability: Parties Entitled to Limit; the Vessel; the Fund, 53 Tul. L. Rev. 1046, 1062-63 (June, 1979).

²⁴⁹ Vol. 3-VII *Benedict on Admiralty* § 63, Elements of the Vessel's Value to be Surrendered or Secured, at no. 16.

²⁵⁰ *Petition of Navigazione Libera Triestina*, 34 F.2d 150 (ED NY 1929).

²⁵¹ *Id.* at 152.

²⁵² *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 910-11 (5th Cir. 1966).

²⁵³ *Id.* at 911.

It has been established that the proceeds of insurance, if any, received or due to the shipowner are not considered in determining the value of the limitation fund.²⁵⁴ This rule has been held to apply to both hull insurance and P & I insurance proceeds.²⁵⁵

Therefore, it is of no consequence what amount of insurance proceeds the vessel owner can potentially recover for the marine casualty or loss because such proceeds are not included in determining the limitation fund.

B. South African Law

As previously stated, § 261 of the MSA, 1951 governs limitation and liability is assessed according to the tonnage of a ship whether damaged or undamaged.²⁵⁶ The assessment of liability without taking into account the physical damage suffered by the ship was incorporated into § 261 via the old English law procedures for assessing liability.²⁵⁷ Section 261 prescribes a limitation formula based on tonnage that is to be applied in respect of claims for personal injury, loss of life and/or damage to property.

1. Tonnage Limitation

The limits prescribed in § 261 are determined by applying a unit of account for each ton of the ship's tonnage. Section 262 determines how to calculate a ship's tonnage and states that 'for the purpose of § 261, the tonnage of a ship shall be her gross register tonnage.'²⁵⁸ The method and applicable law for measuring a ship's gross register tonnage is set forth in § 262(3). Section 262 provides: in the case of a South African ship, tonnage is calculated according to the law of the Republic; in the case of a treaty ship registered elsewhere than the Republic, the law of the treaty country where the ship is registered is applied; and in the case of a foreign ship, the law of the Republic is used as long as the ship is capable of being measured under the law of the Republic.²⁵⁹ Section 262(4) also provides a method for determining the ship's

²⁵⁴ *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468 (1886); Vol. 3-VII *Benedict on Admiralty* § 64, Insurance on a vessel not included in her value.

²⁵⁵ *Guillot v. Cenac Towing Co.*, 366 F.2d 898, 910-11 (5th Cir. 1966); *The Barge James Sheridan*, 226 F. Supp. 136 (S.D.N.Y. 1964) – holding hull insurance funds paid to the owner after a marine disaster are not included in the limitation fund.
²⁵⁶ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 385 (1999).

²⁵⁷ *Id.* United States limitation practice determines the value at the conclusion of the voyage, after the collision or casualty.

²⁵⁸ Merchant Shipping Act, Act 57 of 1951, § 262(1).

²⁵⁹ Merchant Shipping Act, Act 57 of 1951, § 262(1-4).

tonnage where the ship is a foreign ship and is not capable of being measured under the law of the Republic.²⁶⁰

The initial wording of § 261 provides liability limits and the units of accounting are an ‘an amount equivalent to two thousand six hundred and thirty-five gold francs or eight hundred and fifty gold francs for each ton of the ship’s tonnage’ depending on the type of claim.²⁶¹ Section 261(4) defines a ‘gold franc as a unit consisting of 65,5 milligrams of gold of millesimal fineness 900,’ and ‘the value of such gold franc in South African currency is determined by the court seized of the case.’²⁶² The gold franc unit of accounting was used to determine the limitation fund until § 261 was amended in September 1997.²⁶³ The 1997 amendment was enacted to remedy the complexity of calculating the limitation fund on the basis of the unstable and arbitrary gold franc standard.²⁶⁴ The difficulty in calculating the currency equivalent of a factor based on the gold franc was not just peculiar to South Africa, but was also one of the reasons behind the 1976 Limitation Convention initiative.²⁶⁵ The unit of accounting now includes a special drawing right²⁶⁶ and serves as the basis for calculating the limitation fund.²⁶⁷

South African law also allows for the collective tonnage of more than one vessel when calculating the limitation fund under § 261.²⁶⁸ Where a single unit comprising of more than one vessel under common ownership causes damage or loss, the aggregate of both tug and tow may be used to calculate the tonnage.²⁶⁹ The ability of a claimant in South Africa to combine the tonnage of a number of vessels under common ownership and engaged in a single enterprise is in accord with the United States ‘Flotilla Doctrine’ and allows a claimant greater recovery rights.

²⁶⁰ Merchant Shipping Act, Act 57 of 1951, § 262(4).

²⁶¹ Merchant Shipping Act, Act 57 of 1951, § 261(1)(a-c).

²⁶² Merchant Shipping Act, Act 57 of 1951, § 261(4).

²⁶³ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 396 (1999).

²⁶⁴ *Id.* at 396 note 66 and 397 note 72. The gold franc was the unit of international borrowing that was replaced by the SDR by the IMF in the 1970’s. From that point on, there was no available way of accurately ascertaining the value of the gold franc.

²⁶⁵ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 396 at note 66 (1999).

²⁶⁶ Discussed in more detail below.

²⁶⁷ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 395 at note 63 (1999).

²⁶⁸ *Id.* at 386.

²⁶⁹ *Id.*

2. Unit of Accounting – Special Drawing Rights

The special drawing right (hereafter ‘SDR’) is an international reserve asset created by the International Monetary Fund (hereafter ‘IMF’) in 1969 to supplement the existing official reserves of member countries.²⁷⁰ The IMF was created in 1945 to help promote the health of the world economy.²⁷¹ The IMF’s responsibilities include ensuring the stability of international monetary and financial systems including payments and exchange rates for national currencies in order to promote trade between countries.²⁷² The SDR serves as the unit of account of the IMF and some other international organizations and its value is based on a basket of key international currencies.²⁷³

Today, the SDR consists of the euro, Japanese yen, U.K. pound sterling and the U.S. dollar.²⁷⁴ The basket composition of currencies is reviewed every five years to ensure that it reflects the relative importance of currencies and market stability in the world’s trading and financial systems.²⁷⁵ The SDR is not a currency or a claim against the IMF but rather it is a potential claim on the freely usable currencies of IMF members.²⁷⁶ The U.S. dollar-value of the SDR is posted daily on the IMF’s website²⁷⁷ and it is calculated as the sum of specific amounts of the four currencies valued in U.S. dollars on the basis of exchange rates quoted each day in the London market.²⁷⁸ As of 31 March 2008, one SDR equaled 0.9576 euro, 0.0061 Japanese yen, 1.2120 U.K. pound sterling, 0.6115 U.S. dollar and 0.0750 South African rand.²⁷⁹ The value of the SDR tends to be more stable than that of any single

²⁷⁰ Special Drawing Rights, IMF Factsheet, www.imf.org/external/np/exr/facts/sdr.htm, (August 2006).

²⁷¹ IMF at a Glance, IMF Factsheet, www.imf.org/external/np/exr/facts/glance.htm, (October 2007).

²⁷² *Id.*

²⁷³ Special Drawing Rights, IMF Factsheet, www.imf.org/external/np/exr/facts/sdr.htm, (August 2006).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ Special Drawing Rights, IMF Factsheet, www.imf.org/external/np/exr/facts/sdr.htm, (August 2006).

²⁷⁷ www.imf.org/external/np/fin/data/rms_five.aspx as of April 1, 2008.

²⁷⁸ Special Drawing Rights, IMF Factsheet, www.imf.org/external/np/exr/facts/sdr.htm, (August 2006).

²⁷⁹ www.imf.org/external/np/fin/data/rms_five.aspx as of April 1, 2008.

currency in the basket and the movement in exchange rates of any one currency will be partly or fully offset by movements in the exchange rates of other currencies.²⁸⁰

3. Loss of Life and Personal Injury Claims versus Property Damage Claims

Section 261 distinguishes between occasions resulting from loss of life and/or personal injury, property damage only and cases where both property damage and loss of life/personal injury occur.²⁸¹ Depending on the type of claim, the formula in § 261 for determining liability limits is expressed as a factor of the SDR x tonnage.²⁸² The current formula for claims involving loss of life or personal injury only is 206,67 SDRs per gross registered ton, property loss or damage only is 66,67 SDRs per gross registered ton and claims for both loss of life/personal injury and property damage are 206,67 SDRs per gross registered ton provided that claims for loss of life/personal injury have priority for the first 140 SDRs per gross registered ton, thereafter sharing a balance *pari passu* with property damage claims.²⁸³ It is important to note that SDR x tonnage formula under § 261 is the same for all sizes of ships²⁸⁴ and is at odds with the 1976 Limitation Convention.²⁸⁵ SDRs are converted into South African currency as determined by the IMF for the day on which judgment is given and can be proved by a certificate issued by the South African Treasury.²⁸⁶

4. Time for Change?

The South African limitation legislation is still not in accord with more modern limitation practices and the amounts to which a shipowner or other party is entitled to limit is considerably lower than those countries in which the 1976

²⁸⁰ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 395 at note 63 (1999).

²⁸¹ *Id.* at p. 394.

²⁸² *Id.*

²⁸³ *Id.* See also Shepstone & Wylie, *Maritime Law in South Africa*, p. 20-31 at www.wylie.co.za.

²⁸⁴ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 395 (1999).

²⁸⁵ The 1976 Limitation Convention provides different SDR amounts depending on the size and tonnage of a ship. For example, the language of the Convention provides certain limits for ships not exceeding 500 tons whereas larger ships have an additional SDR component to be factored in. See www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=664.

²⁸⁶ Dyason, *South African Maritime Law – An Overview of Some Developments*, 32 *J. Mar. L. & Comm.* 475, 495 (July 2001).

Limitation Convention applies.²⁸⁷ Furthermore, the South African Maritime Law Association has asked the government to amend the Merchant Shipping Act, 1951 tonnage limitation provisions to comply with the different measurements of tonnage now required by the International Tonnage Convention, 1969 and to increase the levels of compensation available to claimants so that more uniform results are achieved.²⁸⁸ Many other sea-trading nations have already signed on to international conventions, more particularly the 1976 Limitation Convention and/or 1996 Protocol to amend the 1976 Limitation Convention and when considering the international context in which shipping takes place, shipowners, claimants and/or other parties would be better equipped to resolve limitation issues if South Africa and even the United States acceded to such conventions.

VII. International Conventions

The right to limitation of liability is peculiar to maritime law and has roots dating back to the medieval sea codes.²⁸⁹ Despite the long history, the international community has not been successful in unifying the shipowners' rights regarding limitation of liability.²⁹⁰ In the twentieth century, the Comité Maritime International was founded in Brussels and several attempts were made to bring about international uniformity.²⁹¹ The CMI drafted three limitation conventions, the first in 1924 did not receive widespread acceptance.²⁹² The second attempt resulted in the 1957 Brussels Convention on Limitation of Liability.²⁹³ The 1957 Limitation Convention received much wider international acceptance than the 1924 Convention; however, such maritime nations like the United States and Greece did not ratify the 1957 Limitation Convention.²⁹⁴ The final attempt was proposed in 1976 through the Convention on Limitation of Liability for Maritime Claims. The 1976 Limitation Convention failed in achieving the intended uniformity and this

²⁸⁷ *Id.* at 495.

²⁸⁸ Hare, *Limitation of Liability Part II, The 1976 Regime: Suitable for Nigeria and South Africa?*, p. 6 (June 2004).

²⁸⁹ Schoenbaum, 2 *Admiralty & Mar. Law* § 15-1 (4th ed. 2004).

²⁹⁰ Soyer, 1996 Protocol to the 1976 Limitation Convention, *J.B.L. 2000, MAR*, 153 (2000).

²⁹¹ Gunn, *Limitation of Liability: United States and Convention Jurisdictions*, 8 *Mar. Law* 29 (Spring 1983).

²⁹² Soyer, 1996 Protocol to the 1976 Limitation Convention, *J.B.L. 2000, MAR*, 153 (2000).

²⁹³ *Id.*

²⁹⁴ *Id.* at 154.

failure can be attributed to the fact that the limitation concept is a creature of public policy.²⁹⁵ Wherefore, public policy can change over time and the differences in the economic and social standards within the various maritime nations make achieving a consensus on liability limits very difficult.²⁹⁶

A. International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957

The 1957 Limitation Convention was signed in Brussels and came into force in 1968.²⁹⁷ The 1957 Limitation Convention attempted to unify an entire body of substantive and procedural rules relating to limitation proceedings. The 1957 Limitation Convention dealt with problems of when limitation applies, who is entitled to its benefits, what claims are barred from full recovery, establishing a limitation formula and a system for distributing the limitation fund.²⁹⁸

The principle article of the 1957 Limitation Convention is Article 1(1) which provides that the ‘owner of a sea-going ship may limit his liability...’²⁹⁹ The provision in Article 1(1) effectively applies only to vessels that are characterized as ‘sea-going’³⁰⁰; however, Article 8 provides each contracting state with the right to decide what other classes of ships are to be treated in the same manner as sea-going ships under the Convention.³⁰¹ Article 6(1-3) pertains to those persons entitled to benefit from limitation. The provisions of the 1957 Limitation Convention apply to ‘the charterer, manager and operator of the ship’ as well as ‘master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment.’³⁰² If the masters or crewmen are also owners of the vessel, they may still limit if their own fault occurred while they were wearing their

²⁹⁵

Id.

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Id.

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International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=664.

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Yale Law Journal, Limitation of Shipowners’ Liability – The Brussels Convention of 1957, 68 Yale L.J. 1676, 1684 (July 1959).

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Article 1, International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

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Yale Law Journal, Limitation of Shipowners’ Liability – The Brussels Convention of 1957, 68 Yale L.J. 1676, 1685 (July 1959).

³⁰¹

Article 8, International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

³⁰²

Article 6, International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

master or crew hat, rather than acts they may have done or left undone as an owner, charterer, manager or operator.³⁰³ The 1957 Limitation Convention does not define the term ‘charterer’ and theoretically, it could include a bareboat charterer, time charterer, voyage charterer or even a space charterer.³⁰⁴ Under United States law, only shipowners and demise/bareboat charterers are entitled to limitation.³⁰⁵

While the umbrella of protection for certain persons was expanded in the 1957 Convention, only one limitation fund is made available to all those entitled to limitation arising from a distinct occasion.³⁰⁶ Furthermore, once a limitation fund has been constituted all claimants are enjoined from exercising any other rights against any other assets of the shipowner in respect of which the claim against the limitation fund lies.³⁰⁷

The types of claims affected by limitation are contained in Article 1(1) and for practical purposes can be divided into personal injury/death and property claims. Article 1(1)(a) allows for limitation for claims resulting from ‘loss of life, or personal injury to, any person being carried in the ship and loss of, or damage to, any property on board the ship.’³⁰⁸ Article 1(1)(b) further applies to:

‘loss of life, ore personal injury to, any person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board and/or not on board the ship for whose act, neglect or default the owner is responsible provided such act, neglect, or default occurs in the navigation or management of the ship.’³⁰⁹

Therefore, the 1957 Limitation Convention allows limitation against all maritime and non-maritime claims and additionally, Article 1(3) extends limitation to cases in which ‘proof of negligence’ need not be introduced i.e. cases of absolute liability.³¹⁰ The amounts to which a shipowner may limit his liability vary according to the

³⁰³ Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 Tul. L. Rev. 1139, 1159 (June 1983).

³⁰⁴ *Id.* at 1156.

³⁰⁵ 46 U.S.C. § 30501.

³⁰⁶ *Id.*

³⁰⁷ Article 2(4), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

³⁰⁸ Article 1(1)(a), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

³⁰⁹ Article 1(1)(b), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

³¹⁰ Yale Law Journal, *Limitation of Shipowners’ Liability – The Brussels Convention of 1957*, 68 Yale L.J. 1676, 1693 (July 1959).

classification of the claim as ‘personal’ or ‘property.’³¹¹ The principal way in which ‘personal claims’ are given preferential treatment under the 1957 Limitation Convention is through the creation of different limits based on the tonnage of the vessel, exclusively for such claims.³¹²

However, the 1957 Limitation Convention is flawed in the sense that the funds calculated for ‘personal claims’ are based on the same unit of accounting regardless of the size of the vessel.³¹³ This particular flaw results in inequities that become apparent when loss of life occurs on a larger ship with a smaller crew versus a smaller ship with a larger crew.³¹⁴ The 1976 Limitation Convention attempted to alleviate these inequities for crew claims of smaller, but heavily crewed vessels by requiring more units of account per gross ton for smaller tonnages.³¹⁵

The different methods of calculating the limitation amount have been met with much criticism. The United States rule calculating the fund as ‘the value of the owner’s interest in the vessel and pending freight’³¹⁶ has been described as one of the worst features of U.S. limitation law.³¹⁷ Under the 1957 Limitation Convention, the limitation funds are calculated based on the net tonnage of the vessel: (1) 1,000 francs if only property claims are involved; (2) 3,100 francs if only personal claims are involved; and (3) 3,100 francs if both types of claims are involved, with personal claims sharing exclusively as to 2,100 francs and to the extent not paid, sharing ratably with other claimants as to 1,000 francs.³¹⁸ Article 3(6) defines the franc as a unit of gold³¹⁹ and Article 3(5) further states that if ‘the tonnage of a ship is less than 300 tons, the ship shall be deemed to be 300 tons.’³²⁰

³¹¹ Article 1(2), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

³¹² Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 Tul. L. Rev. 1139, 1165 (June 1983).

³¹³ *Id.* at 1166.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ 46 U.S.C. § 30505.

³¹⁷ Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 Tul. L. Rev. 1139, 1173 (June 1983).

³¹⁸ *Id.* at 1776. Article 3(1)(a-c), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

³¹⁹ Article 3(6), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957. The franc is defined as a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred.

³²⁰ Article 3(5), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

One legal commentator has suggested that the tonnage system, unlike value or value-plus-tonnage, promotes certainty necessary for a uniform limitation law.³²¹ Under the United States ‘value’ system, the variations in the methods used to appraise the vessel coupled with differing applications from jurisdiction to jurisdiction can result in substantially discrepant limitation funds.³²² Furthermore, the ‘value’ system partially depends on the state of the charter market while the tonnage system is more predictable and actually relieves courts of the lengthy and difficult task of determining a ship’s value.³²³

On the other hand, several flaws exist in the 1957 Limitation Convention’s tonnage plan. First, the tonnage plan fails to incorporate a ‘sliding’ scale mechanism flexible enough to adjust the fund ceiling to economic trends.³²⁴ The limitation fund is calculated in terms of a fixed quantity of gold which is to be translated into the currency of the forum nation at the commencement of the action.³²⁵ The gold standard creates additional problems because its value is not associated with economic markets but rather world prices that are determined by the United States’ willingness to purchase gold at a stated price.³²⁶ Secondly, the 1957 Limitation Convention fails to stipulate whether the gold franc is to be converted under the forum nation’s government or current market rate.³²⁷

Another key criticism of the 1957 Limitation Convention is the particular low standard of conduct and burden of proof³²⁸ a claimant must overcome in order to break or deny shipowners’ limitation. The 1957 Limitation Convention allows

³²¹ Yale Law Journal, *Limitation of Shipowners’ Liability – The Brussels Convention of 1957*, 68 Yale L.J. 1676, 1697 (July 1959).

³²² *Id.*

³²³ *Id.* at 1697.

³²⁴ *Id.* at 1699.

³²⁵ Article 3(6), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

³²⁶ Yale Law Journal, *Limitation of Shipowners’ Liability – The Brussels Convention of 1957*, 68 Yale L.J. 1676, 1699 (July 1959).

³²⁷ *Id.* at 1700. See also, Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Chp. 11, p. 395 (1999) stating - The 1957 Limitation Convention currently operates under the SDR as a basis for calculation since adoption of the 1979 Brussels Protocol to the 1957 Limitation Convention.

³²⁸ Article 1(6), International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957 – stating: The question upon whom lies the burden of proving whether or not the occurrence giving rise to the claim resulted from the actual fault or privity of the owner shall be determined by the *lex fori*. It is submitted that uniformity is further negated by allowing the *lex fori* to determine which party (shipowner or claimant) must bear the burden of proof.

limitation for general categories of claims, ‘unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner...’³²⁹ Furthermore, the United States standard provides limitation for a variety of claims provided those claims occurred ‘without the privity or knowledge of the owner.’³³⁰ As mentioned earlier, legal scholars have viewed the phrases ‘actual fault or privity’ and ‘privity or knowledge’ as a relatively poor standard for determining whether a shipowner is allowed to limit his liability. One legal scholar³³¹ has been noted as saying ‘notions of privity or knowledge are empty containers into which the courts are free to pour whatever content they will.’³³² Another legal scholar³³³ has noted that ‘some civil law countries require gross negligence, while in others simple negligence will defeat limitation. The differences between common law and civil law attitudes towards concepts of negligence and its degrees do not add certainty.’³³⁴ It is apparent that different jurisdictions will inevitably have varying interpretations regarding the standard of conduct and these variations add to the unpredictability of whether limitation will be available anywhere an investor of ships may be sued.³³⁵ The standard of conduct and burden of proof contained in the U.S. Limitation Act, South African Merchant Shipping Act of 1951 and the 1957 Limitation Convention are relatively low when compared the 1976 Limitation Convention and both do not support a universal standard by which claimants, shipowners, and insurers are afforded greater protections in return for higher limitation amounts.

B. Convention on Limitation of Liability for Maritime Claims, 1976

Following the 1957 Limitation Convention’s attempt at achieving uniformity, the Comité Maritime International proposed the 1976 Convention on Limitation of Liability for Maritime Claims. The 1976 Limitation Convention came into force on 1 December 1986 although it was not accepted by several major trading nations

³²⁹ Article 1, International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957.

³³⁰ 46 U.S.C. § 30505(b).

³³¹ G. Gilmore & C. Black, *The Law of Admiralty* § 10-4 (2nd ed. 1975). Professors Gilmore and Black are noted legal scholars in the admiralty and maritime field.

³³² Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 *Tul. L. Rev.* 1139, 1145 (June 1983).

³³³ Referring to Professor Luksic; See note 330 below.

³³⁴ Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 *Tul. L. Rev.* 1139, 1146 (June 1983) – Citing: Professor Luksic, *Limitation of Liability for the Raising and Removal of Ships and Wrecks: A Comparative Study*, 12 *J. Mar. L. & Comm.* 47, 58 (1980).

³³⁵ *Id.* at 1146.

including the United States.³³⁶ The 1976 Limitation Convention proposed to attain international uniformity and insurability among maritime nations and it also sought to expand as well as change some principles set forth in the 1957 Limitation Convention.

Article 1(1) of the Convention expands the right to limit liability not only to shipowners' but also salvors. Shipowner is defined as the 'owner, charterer, manager and operator of a sea-going ship.'³³⁷ The term 'charterer' remains undefined thus leaving the door open to all types of 'charterers.'³³⁸ The 1976 Limitation Convention is still at odds with U.S. law which only permits limitation for shipowners and/or demise/bareboat charterers.³³⁹ Salvors are defined in Article 1(2) as any person rendering services in direct connection with salvage operations and salvage is best defined by *Professor Kennedy* as:

'A service which confers a benefit by saving or helping to save a recognized subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor.'³⁴⁰

An insurer of liability for claims subject to limitation is also afforded the rights of limitation³⁴¹ and thus prevents claimants from filing direct actions suits against underwriters.³⁴² The 1976 Limitation Convention further provides limitation protections for certain claims under Article 2 if brought by way of recourse or for indemnity under a contract.³⁴³

In addition, the claims subject to limitation have been expanded under the 1976 Limitation Convention to include not only claims for loss of life/personal injury and property claims but also claims resulting from delay in carriage of cargo and certain salvage claims.³⁴⁴ Claims for damage resulting from oil pollution as well

³³⁶ Schoenbaum, 2 Admiralty & Mar. Law § 15-1 (4th ed. 2004)

³³⁷ Article 1(1), Convention on Limitation of Liability for Maritime Claims, 1976.

³³⁸ Gunn, Limitation of Liability: United States and Convention Jurisdictions, 8 Mar. Law. 29, 51 (Spring 1983).

³³⁹ Gunn, Limitation of Liability: United States and Convention Jurisdictions, 8 Mar. Law. 29, 51 (Spring 1983).

³⁴⁰ Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Chp. 7, p. 292 (1999).

³⁴¹ Article 1(6), Convention on Limitation of Liability for Maritime Claims, 1976.

³⁴² Gunn, Limitation of Liability: United States and Convention Jurisdictions, 8 Mar. Law. 29, 30 (Spring 1983).

³⁴³ Article 2(2), Convention on Limitation of Liability for Maritime Claims, 1976.

³⁴⁴ Article 2(1), Convention on Limitation of Liability for Maritime Claims, 1976.

as contribution in General Average are specifically exempted from limitation.³⁴⁵

There is also a separate fund applicable to passenger claims and applies to persons carried on a ship under a contract of passenger carriage or who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.³⁴⁶

The 1976 Limitation Convention brought about significant improvements³⁴⁷ in the limits of liability for certain claims. In exchange for an increased limitation fund, the 1976 Limitation Convention places a higher burden of proof on the claimant by requiring a showing ‘intentional or willful fault’ on the part of the one claiming limitation.³⁴⁸ Article 4 specifically states ‘a person 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.’³⁴⁹ Article 4 essentially replaces the ‘privity or knowledge’ standard set forth in the 1957 Limitation Convention and U.S. Limitation law and is more aligned with standards for breaking limitations contained in several other maritime conventions.³⁵⁰ While the language does not establish ‘an unbreakable right to limit,’ it provides a better standard for courts to apply when examining a claimant’s right to limitation.

The 1976 Limitation Convention’s limitation fund is based upon tonnage, not post-casualty value, and all assets of the shipowner, including insurance proceeds are available to satisfy the fund amount.³⁵¹ The limitation formula consists of multiplying the gross tonnage of the vessel by the unit of account listed in Article

³⁴⁵ Article 3, Convention on Limitation of Liability for Maritime Claims, 1976.

³⁴⁶ Article 7(1-2), Convention on Limitation of Liability for Maritime Claims, 1976.

³⁴⁷ These improvements are compared to the 1957 Convention; however, several maritime nations did not sign the 1976 Convention because the increased limits were still viewed as inadequate for certain types of claims. State parties and political pressure sought to cure the alleged deficiencies through the IMO 1996 Protocol to the 1976 Convention.

³⁴⁸ Gunn, *Limitation of Liability: United States and Convention Jurisdictions*, 8 Mar. Law. 29, 51 (Spring 1983).

³⁴⁹ Article 4, Convention on Limitation of Liability for Maritime Claims, 1976.

³⁵⁰ Greenman, *Limitation of Liability: A Critical Analysis of United States Law in an International Setting*, 57 Tul. L. Rev. 1139, 1146 (June 1983). Other conventions include: United Nations Convention on the Carriage of Goods by Sea (Hague-Visby Rules); Convention Relating to the Carriage of Passenger and their Luggage by Sea; Convention for the Unification of Certain Rules relating to International Transportation by Air (Warsaw Convention).

³⁵¹ Gunn, *Limitation of Liability: United States and Convention Jurisdictions*, 8 Mar. Law. 29, 51 (Spring 1983).

8.³⁵² Gross tonnage is calculated in accordance with the tonnage measurement rules contained in the International Convention on Tonnage Measurement of Ships, 1969.³⁵³ The 1976 Limitation Convention's unit of account was upgraded to a Special Drawing Right ('SDR'), whose value is determined daily by the International Monetary Fund ('IMF') on the basis of a basket of currencies.³⁵⁴ Article 8 also provides a method for calculating the SDR if the state party is not a member of the IMF and/or if the state party's local laws do not permit the unit of account to be based on the SDR, such units can correspond with the gold franc.³⁵⁵ The SDR ensures uniformity in the valuation of currencies because the value of a fixed number of SDR's in terms of any convertible currency will be identical at any given point in time.³⁵⁶

However, one criticism of the Convention's unit of account is that expressing the limits in SDRs gives little or no protection against world inflation.³⁵⁷ Furthermore, the 1976 Limitation Convention does not establish procedures or other mechanisms for easy adjustment of the limits of liability to counter future deterioration of monetary values.³⁵⁸ In 1996, a Diplomatic Conference was called by the International Maritime Organization ('IMO') to discuss increasing problems revealed in the 1976 Limitation Convention and subsequently, the committee adopted the 1996 Protocol to the 1976 Limitation Convention.³⁵⁹

The 1996 Protocol sought to increase the limits set forth in Article 6, 7 and 8 of the 1976 Limitation Convention as well as address the salvors' rights to limitation for salvage claims brought under Article 13 and 14 of the 1989 Salvage Convention.³⁶⁰ One of the principle reasons for the United States failure to adopt the 1976 Limitation Convention was the belief that the limits of liability based on tonnage were too low, particularly in the case of low tonnage vessels carrying large

³⁵² Gunn, *Limitation of Liability: United States and Convention Jurisdictions*, 8 Mar. Law. 29, 51 (Spring 1983).

³⁵³ Article 6(5), *Convention on Limitation of Liability for Maritime Claims, 1976*.

³⁵⁴ Soyer, *1996 Protocol to the 1976 Limitation Convention*, J.B.L. 2000, MAR, 153, 155 (2000).

³⁵⁵ Article 8(1-4), *Convention on Limitation of Liability for Maritime Claims, 1976*.

³⁵⁶ Soyer, *1996 Protocol to the 1976 Limitation Convention*, J.B.L. 2000, MAR, 153, 155 (2000).

³⁵⁷ Soyer, *1996 Protocol to the 1976 Limitation Convention*, J.B.L. 2000, MAR, 153, 155 (2000).

³⁵⁸ *Id.* at 156.

³⁵⁹ *Id.* at 154.

³⁶⁰ *Id.* at 153-164.

crews or passengers.³⁶¹ Amounts of compensation for maritime claims for loss of life or personal injury and property claims were significantly increased effective May 2004, following the adoption of the 1996 Protocol.³⁶² The 1996 Protocol was opened for signatures from 1 October 1996 to 30 September 2007.³⁶³ The 1996 Protocol can come into force either through ratification, acceptance, approval or accession and some of the following sea-trading nations have signed on: Australia, Denmark, Finland, France, Germany, Japan, Norway, Spain, Sweden, United Kingdom.³⁶⁴ Furthermore, a summary of the status of conventions as of 29 February 2008 provides that 51 contracting states have signed on to the 1976 Limitation Convention accounting for 48.92 per cent of the world's tonnage and 28 contracting states have signed on to the 1996 Protocol accounting for 23.42 per cent of the world's tonnage.³⁶⁵

The 1996 Protocol increased the lowest limitation band from 500 tons to 2,000 tons; however, the Protocol did not alter the provision in Article 15(2) allowing a state party to declare lower limits of liability for ships less than 300 tons, if such state party so desires.³⁶⁶ Applying the new minimum tonnage and increased limits means that the owner of a 500-ton vessel will face increased liability for loss of life, personal injury and property claims. Furthermore, the 1996 Protocol replaced Article 7(1) of the 1976 Limitation Convention and increased the maximum limit of liability for passenger claims from 46,666 SDRs to 175,000 SDRs multiplied by the certified passenger-carrying capacity of the vessel.³⁶⁷ This increase effectively

³⁶¹ Gunn, *Limitation of Liability: United States and Convention Jurisdictions*, 8 Mar. Law. 29, 51 (Spring 1983).

³⁶² Schoenbaum, 2 *Admiralty & Mar. Law* § 15-1 (4th ed. 2004).

³⁶³ Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs Depositary or other Functions, International Maritime Organization, www.imo.org, p. 327-341 (December 31, 2007).

³⁶⁴ Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs Depositary or other Functions, International Maritime Organization, www.imo.org, p. 341 (December 31, 2007).

³⁶⁵ Summary of Status of Conventions, www.imo.org/Conventions/mainframe.asp?topic_id=247, (February 29, 2008).

³⁶⁶ Article 15(2), *Convention on Limitation of Liability for Maritime Claims, 1976*.

³⁶⁷ Soyer, 1996 Protocol to the 1976 Limitation Convention, *J.B.L. 2000, MAR*, 153, 162 (2000).

removed the 25 million SDR cap and allows passengers' to be more adequately compensated for their claims.³⁶⁸

While the 1976 Limitation Convention and subsequent adoption of the 1996 Protocol can be viewed as improving the rights of all parties in a limitation proceeding, some points still remain unclear.³⁶⁹ On the other hand, most of the world's tonnage has signed on to either the 1976 Limitation Convention or the 1996 Protocol and the United States and South Africa's failure to follow suit evidences a failure in their own limitation practices.³⁷⁰ The replacement of the 'privity or knowledge' standard is a significant improvement and shipowners are better equipped to pay higher awards in exchange for reducing a claimants' ability to break limitation. The United States current limitation regime is out of line with the global shipping community and does not produce uniform results when compared to the 1976 Limitation Convention and/or 1996 Protocol. There is still a need to unify the international limitation regimes with modern policy concerns.³⁷¹ The availability of insurance to cover certain losses in marine casualty calls new purposes into play and limitation of liability laws should be drawn to take advantages of economic efficiencies and economies of scale in procuring and paying for insurance to cover potential losses.³⁷²

VIII. Should there be International Uniformity through a New Convention on Limitation of Liability for Maritime Claims?

The question of uniformity in the shipping industry has been met with different answers and perspectives over the last few decades. The word 'uniform' or 'uniformity' is actually defined as 'of similar form or character to another or others' or 'the state or quality of being uniform.'³⁷³ More importantly, the question of uniformity in the context of limitation of liability regimes can be interpreted as applying a universal standard for assessing liability to those nations conducting trade

³⁶⁸ *Id.* at 162.

³⁶⁹ *Id.* at 167. The article discusses several deficiencies noted in the 1996 Protocol but full discussion and analysis is outside the scope of this paper.

³⁷⁰ Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs Depositary or other Functions, International Maritime Organization, www.imo.org, p. 327-341 (December 31, 2007). *See also*: Schoenbaum, 2 Admiralty & Mar. Law § 15-1 (4th ed. 2004).

³⁷¹ Schoenbaum, 2 Admiralty & Mar. Law § 15-1 (4th ed. 2004).

³⁷² *Id.*

³⁷³ *Black's Law Dictionary*, 7th ed. (2002).

with each other. Shipping accounts for 90 per cent of the world's transportation of goods and countries will invariably face issues relating to losses that occur during ocean voyages.

The concept of globalization has also become increasingly important over the last few years. Seaborne trade has grown exponentially since the 1970's and the adoption of containerization.³⁷⁴ As a result, shipping is considered one of the four cornerstones of globalization.³⁷⁵ The growth of world trade and internationalization of economies have made it essential for shipping companies to extend their market coverage globally.³⁷⁶ Increased efficiency in port and shipping services have also made it easier to buy and sell merchandise goods, raw materials and components almost anywhere in the world.³⁷⁷ The development of the European Union has effectively created a single market through a standardized system of laws which facilitate the movement of people, goods, services and capital between member states.³⁷⁸ The creation of economic and regional trade partners also support the concept of globalization. Major world players like the United States, European Union and Japan are currently generating much of the world's trade but one can not ignore the recent exploits of China as it seeks to import oil resources and raw materials from Africa.³⁷⁹ Since 2000, China-Africa trade has quadrupled in volume, such materials like crude oil from Angola, platinum from Zimbabwe, cooper from Zambia, tropical timber from Congo, and iron ore from South Africa are finding their way onto foreign ships and foreign ports.³⁸⁰

While the increase in trade and communication between countries is inevitable as world economies grow, one must ask 'Should there be international uniformity through a new convention on limitation of liability for maritime claims?' One example of uniformity transpired in 1993 when the International Maritime Organization adopted the International Safety Management Code (hereafter 'ISM

³⁷⁴ Askel and Akca, Effects of Globalization on Maritime Industry; Mergers and Acquisitions, 4th International Logistics and Supply Chain Congress, p. 2 (2006).

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 3.

³⁷⁷ Askel and Akca, Effects of Globalization on Maritime Industry; Mergers and Acquisitions, 4th International Logistics and Supply Chain Congress, p. 2 (2006).

³⁷⁸ The Single Market, http://ec.europa.eu/internal_market/index_en.htm.

³⁷⁹ White, England, Hawkins and Reed, China Winning Resources and Loyalties of Africa, The Financial Times at <http://yaleglobal.yale.edu/article.print?id=7051>, p. 1 (February 2006).

³⁸⁰ *Id.* at 1.

Code?').³⁸¹ The ISM Code was designed to provide an international standard for the safe operation and management of vessels as well as to enhance pollution prevention.³⁸² The idea of creating a new international limitation convention is not far removed and was previously attempted three times by the international maritime community. The question above poses the question 'should' and the maritime community through the efforts of the IMO and CMI have attempted to move forward and draft new conventions amenable to all sea-trading nations but countries must be willing to give up some autonomy. Uniform and fair results could be achieved by openly and clearly specifying the interests to be protected³⁸³ and the criteria for commercial shipping could be defined thereby alleviating unsatisfactory results in countries like the United States and South Africa where limitation practices are not in accord with modern practices and policy concerns.³⁸⁴ With the import of globalization and technological advancement in shipping and trade between countries, a uniform international standard to assess limitation of liability practices would better serve the international maritime community by leveling the playing field and would promote an environment conducive to global trade objectives.

IX. Conclusion

The differing regimes regarding limitation of liability for shipowners has presented many questions in the international arena. The development of the 1924, 1957, 1976 Limitation Conventions and subsequent protocols thereto have all attempted to develop a regime that is amenable to all sea-trading nations. The problem that the international shipping community has faced is finding a balance in power between the major sea-trading nations and those countries still seeking full autonomy. The rights of all parties involved in maritime ventures must be protected regardless of the size and strength of its participants. The United States and South African limitation practices can be characterized as 'cargo-friendly,' particularly because of the relatively low limits for breaking limitation. Under these regimes, shipowners are faced with greater liabilities and courts have been inconsistent in clearly defining

³⁸¹ Poulos, Legal Implications of the ISM Code: New Impediments to Sea Fever, 9 U.S.F. Mar. L.J. 37, 38 (Fall 1996).

³⁸² *Id.*

³⁸³ Wagener, South Africa Admiralty and its English Origins – Will it Jump or Must it be Pushed?, 36 J. Mar. L. & Com. 61, 75 (January 2005).

³⁸⁴ Schoenbaum, 2 Admiralty & Mar. Law § 15-1 (4th ed. 2004).

the concepts of 'privity and/or knowledge' for which shipowners actions are to be judged. The more recent development of the 1976 Limitation Convention and 1996 Protocol have reverted back to the traditional and commercial principles of protecting the shipowner from facing the full wrath of total liability for losses associated with marine ventures and is more in line with the concept of insurance and allocation of risk. The international shipping community has also experienced a revolution as many shipping companies are merging with global partners to provide more efficient means of transporting goods; globalization is occurring as sea-trading countries are importing and exporting raw materials from all corners of the world to develop their own economies; and many countries are adopting international conventions as a means reducing judicial ambiguity within the courts. However, the 1976 Limitation Convention and 1996 Protocol have not resolved all limitation issues. Many issues like ranking of claims, release of arrested property, jurisdiction and conflict of laws still need to be addressed; nevertheless, the members of the IMO and CMI are well equipped to discuss and resolve such questions. What remains to be seen is the drafting and adoption of a new international regime for limitation of liability and how will it handle the today's integrated and complex world of shipping and those future developments that will surely occur over time.