

CONTEMPORARY DEVELOPMENTS IN GLOBAL LIMITATION OF LIABILITY OF SHIPOWNERS AND OTHERS

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The long established right to limit liability in relation to maritime claims is in the modern law principally governed by the 1976 Convention on Limitation of Liability for Maritime Claims. This has not established a settled legal position for questions consistently arise about the application of the Convention. In this contribution recent cases in the UK and Hong Kong relating to persons entitled to limit, limitable claims and loss of the right to limit are analysed. Also analysed is the procedural right to institute limitation proceedings and the conflict of conventions issues that may arise. There is a final comment on state practice expanding the right to limit by national legislation on the basis of the scheme in the 1976 Convention.

Keywords: *Limitation of Liability for Maritime Claims Convention 1976; persons entitled to limit; limitable claims; loss of right to limit; limitation proceedings; national law; expanding the right to limit.*

1. INTRODUCTION

The global right to limit liability in respect of claims arising on a distinct occasion has long been recognised in international maritime law.¹ It would be identified by many, if not most, commentators as one of the distinguishing features

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¹ See Selvig, E., An Introduction to the 1976 Convention, Chapter 1, in *Limitation of Shipowners' Liability: The New Law*, Institute of Maritime Law, University of Southampton, Sweet & Maxwell, London, 1986.

of the law.² It has existed in the modern law since at least the eighteenth century in west European nations in one form or other.³ Initially, the limitation mechanism was related to the value of the ship and freight earned or to be earned, and sometimes also additional factors, such as accessories, which remains the case in the Admiralty law of the USA.⁴ In the early 19th century English law began to abandon this approach in favour of limitation assessed by reference to the tonnage of the ship, giving birth to what became known as the English system.⁵ This approach subsequently gained favour both nationally and internationally but never acquired dominance.

Over the course of the 20th century there was a determined attempt to develop an international consensus on limitation of liability based on an international convention. This resulted in the emergence of international conventions in 1924, 1957 and 1976.⁶ The 1924 Convention based limitation on “an amount equal to the value of the vessel, the freight, and any accessories of the vessel” but in relation to death and bodily injury claims a tonnage rule was introduced.⁷ The 1957 Convention committed fully to tonnage limitation and the 1976 followed suit.⁸ Under the tonnage scheme an agreed monetary value, expressed as a special drawing right,⁹ is attached to each registered ton of the relevant vessel, with the limitation amount arrived at as a multiple of both.¹⁰ The 1976 Convention was amended by a Protocol in 1996, one effect of which is to raise the calculation of the limitation amount.¹¹

² See, generally, Griggs, P.; Williams, R.; Farr, J., *Limitation of Liability for Maritime Claims*, 4th edn., Informa Law from Routledge, London, 2005; Martinez Gutierrez, N. A., *Limitation of Liability in International Maritime Conventions*, Routledge, London, 2011.

³ The first Act in England was the Responsibility of Shipowners Act 1733; Donovan, J. J., *The Origins and Development of Limitation of Shipowners' Liability*, *Tulane Law Review*, vol. 53 (1979), no. 4, pp. 999-1045.

⁴ Limitation of Liability Act 1851 (46 U.S.C. App 181 – 189).

⁵ Responsibilities of Shipowners Act 1813.

⁶ *Supra* n. 2.

⁷ International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Ships 1924, Arts. 1 and 7.

⁸ International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957, Art. 3; International Convention on Limitation of Liability for Maritime Claims 1976, Art. 6.

⁹ As defined by the International Monetary Fund (IMF), see 1976 Convention, Art. 8.

¹⁰ Tonnage is gross tonnage as measured under the rules contained in Annex 1 of the International Convention on Tonnage Measurement of Ships 1969 (see Art. 6(5)).

¹¹ The 1996 Protocol and 1976 Convention are to be read and interpreted together as a single instrument, see Art. 9(1) of the Protocol. When the Protocol is adopted the Convention is often

The prevailing intention was that each successive convention would supersede the preceding convention, but this is not the reality. In the result each convention survives and has its nation state adherents, albeit the 1976 Convention is by a significant margin the dominant convention. This historical process has given rise to what may be regarded as a regrettable situation which has fed conflict of conventions difficulties.¹² The conventions collectively, in particular the 1976 Convention, continue to attract litigation primarily relating to questions of interpretation. The focus of the present contribution is directed mainly at the drafting of the 1976 Convention.¹³

The progress of the conventions has witnessed significant legal refinements and an expanding right to limit. This is particularly true of the parties who may claim the right to limit and the claims which are subject to limitation. The earlier conventions applied to “the owner of a seagoing ship” whereas the 1976 Convention confers the right much more widely on “shipowners and salvors”.¹⁴ Shipowner is defined to include “owner, charterer, manager and operator of a seagoing ship”.¹⁵ And salvor means “any person rendering services in direct connection with salvage operations”.¹⁶ The right survives whether the claim is made *in personam* or *in rem*,¹⁷ and is also conferred on any person for whose conduct the shipowner or salvor is vicariously liable¹⁸ and also the insurers of liability.¹⁹

The early Articles of the 1976 Convention identify the persons and claims which are subject to limitation,²⁰ and also the claims that are excluded.²¹ The legal

referred to as the Limitation Convention 1996. An amendment to the 1996 Protocol was agreed in 2012 and came into force in 2015. It introduced new limits of liability which have been adopted in UK law by the Merchant Shipping Act 1995 (Amendment) Order 2016, SI 2016/1061.

¹² See *infra*, under the title, “Limitation and Liability – The Relationship”.

¹³ *The Travaux Préparatoires of the LLMC Convention 1976, and of the Protocol of 1996*, Berlingieri, F. (ed.), Comité Maritime International, Antwerpen, 2000, are a helpful aid to the interpretation of the 1976 Convention.

¹⁴ Art. 1(1).

¹⁵ Art. 1(2).

¹⁶ Art. 1(3)) The application of the Convention to salvors is a direct consequence of the decision in *The “Tojo Maru”* [1971] 1 Lloyd’s Rep. 341 (HL).

¹⁷ Art. 1(5).

¹⁸ Art. 1(4).

¹⁹ Art. 1(6). The insurance may also be on terms that the indemnity payable is confined to the limited liability of the assured, which is the case with P&I insurance.

²⁰ Art. 1 and 2 respectively.

²¹ Art. 3. The excluded claims may themselves have their own limitation of liability conditions, as for example, liability claims for ship sourced oil pollution under the CLC Convention 1992.

basis of a limitable claim is immaterial,²² nor is the fact that the claim is brought by way of recourse or for an indemnity.²³ There is at the same time the general rule that the right to limit is lost if the loss giving rise to the liability resulted from the person's personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result.²⁴

The 1976 Convention is concerned with what is often described as "global" limitation.²⁵ The limitation applies to the aggregate of all limitable claims arising "on any distinct occasion".²⁶ Claims are settled from and to the extent of the available limitation fund rateably,²⁷ with certain rights of subrogation also recognised.²⁸ Although it is customary to speak of "a limitation fund" this is not technically accurate. The fund has different constituent parts. There are distinct funds established in relation to claims relating to loss of life and personal injury, and to "other" claims, with the former enjoying a degree of priority.²⁹ If life and personal injury claims are not satisfied in full out of the relevant part, the unpaid balance carries into to the "other" part where it ranks rateably with the other claims.³⁰ In the case of loss of life or personal injury claims suffered by passengers on a ship, a separate and heightened fund is established.³¹ A separate limitation provision applies to a salvor operating solely on the ship to which salvage services are being rendered.³² This concise overview conceals the fact

²² Art. 2(1).

²³ Art. 2(2).

²⁴ Art. 4. This provision is considered in greater detail later in the text.

²⁵ This description is both convenient and adequate but it is not strictly accurate.

²⁶ Art. 6(1), 7(1), 9(1). These kinds of aggregation clauses are common in liability insurance contracts and raise many questions relating to their proper construction.

²⁷ Art. 12(1).

²⁸ Art. 12(2)-(4).

²⁹ Art. 7, Art. 11(1).

³⁰ Art. 6(2).

³¹ Art. 7(1) as amended by Art. 4 of the 1996 Protocol. The limitation amount is 175,000 Units of Account (as defined in Art. 8 (Unit of Account)), multiplied by the number of passengers the ship is authorised to carry according to the ship's certificate. Art. 7(2) defines the claims that fall within the designation "passenger claims". Art. 15(3) bis of the amended 1976 Convention permits a State Party to set higher limits of liability and under UK law the shipowner's liability is restricted to the limits specified in the 2002 Athens Convention as enforced in UK law.

³² Art. 6(4). The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons. This rule solves the problem encountered in *The "Tojo Maru"* [1971] 1 Lloyd's Rep. 341 (HL).

that the administration of a limitation fund as between the different categories of potential claimants may give rise to multiple complexities.³³

This right to global limitation is distinct from the right to limit that may attach to various particular maritime claims, such as a cargo claim under an international convention.³⁴ With regard to such claims the right to limit is substantive, in other words it relates to and defines the legal right. By contrast the “global” right to limit is procedural and does not affect the nature of the right. The right is made in its legal fullness against the fund, but by virtue of the limitation procedure it may be compensated only in part.³⁵ The interplay between the two categories of limitation right may result in a claim subject to a substantive right of limitation being further reduced by reference to the global right of limitation.³⁶

The establishment and administration of a limitation fund are governed by the law of the State Party in which the fund is constituted.³⁷ It may be constituted by a party alleged to be liable of a limitable claim with the court of a State Party in which legal proceedings are instituted.³⁸ This would appear to suggest that a limitation fund must be established with the court that has jurisdiction over the claim, but modern practice does not take this course.³⁹ It must be for the appropriate limitation amount (as previously indicated) plus interest⁴⁰ in the form of a cash deposit or acceptable guarantee.⁴¹ Once constituted the fund is available only to meet limitable claims,⁴² and the expectation is that all limitable claims arising out of the “distinct occasion” will be made against the fund.⁴³ It is

³³ See *supra* n. 2.

³⁴ For example, under the Hague-Visby Rules 1968, Art. IV r. 5.

³⁵ *Caltex Singapore Pte. Ltd. v. BP Shipping Ltd.* [1996] 1 Lloyd’s Rep. 286, 294, per Clarke J. (as he then was); *The “Happy Fellow”* [1997] 1 Lloyd’s Rep. 130, 135, per Longmore J. (as he then was).

³⁶ To give a simple example. A cargo claim may be subject to limitation under the Hague-Visby Rules and further reduced by global limitation proceedings.

³⁷ Art. 14 (Governing Law).

³⁸ Art. 11(1).

³⁹ This aspect of the 1976 Convention is examined later in the text under the title “Limitation and Liability – The Relationship”.

⁴⁰ Art. 11(1). Interest at the assessed percentage rate runs from the date of the occurrence out of which the liability arises until the date of the constitution of the fund.

⁴¹ Art. 11(2). A guarantee may be given by a P&I Club.

⁴² Art. 11(1).

⁴³ The 1976 Convention does not in fact state this expressly, but it is likely to be one of the objectives of the court rules relating to the constitution and administration of the fund.

also recognised that subrogated rights to claim may be acquired.⁴⁴ But invoking limitation does not amount to an admission of liability.⁴⁵

Once a claim is made against the fund, the claimant is barred from exercising any right against the assets or any ship of the party who has established the fund or on whose behalf the fund was established.⁴⁶ Further, any ship or property under arrest or attached may be released and is obliged to be released in given circumstances.⁴⁷

Unless a State Party decides to the contrary, it is possible for a defendant to plead limitation of liability without constituting a limitation fund.⁴⁸ The right to limit may simply be pleaded by the party liable in the proceedings. This course, for example, may be adopted when there is a sole claimant or a small and certain number of identifiable claimants. The disadvantage of the procedure is that the right to limit applies only in the proceedings instituted.⁴⁹ In the event of a later claim or claims being instituted no credit is allowed for the payment(s) already made. In this circumstance the right to limit must be pleaded afresh or a limitation fund constituted.⁵⁰

2. SOME CONTEMPORARY DEVELOPMENTS AND PROBLEMS

2.1. Persons Entitled to Limit

It has previously been observed that Art. 1 of the 1976 Convention identifies the persons entitled to limit liability. In Art. 1(2) “shipowner” is defined to mean “the owner, charterer, manager and operator of a seagoing ship”. All are familiar terms save for the “operator” of a seagoing ship. The only implication which is clear is that it is a category which extends beyond owners, charterers and managers. It is the case that the term is in wide use in maritime law but this does not assist in arriving at a clear understanding of the meaning of the term in the current context.⁵¹

⁴⁴ Art. 12(2)-(4).

⁴⁵ Art. 1(7).

⁴⁶ Art. 13(1).

⁴⁷ Art. 13(2).

⁴⁸ Art. 10.

⁴⁹ *The “Penelope II”* [1980] 2 Lloyd’s Rep. 17, 21, per Brandon L.J. (C.A.).

⁵⁰ In some States a limitation claim may be brought only if a limitation fund is first established. When this is the case the procedure described in the text is not available.

⁵¹ For example, International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, Art. 1(3) where “shipowner” is defined to mean “the owner, including the registered owner, bareboat charterer, manager and operator of the ship”.

This question came before the English courts recently in *Splitt Chartering APS and Others v. Saga Shipholding Norway AS and Others (The “Stema Barge II”)*.⁵² The essential facts of the case were that a consortium of contractors was engaged to repair a coastal railway line in Kent, England. One contractor entered into a contract with Stema Shipping (UK) Ltd. (Stema UK) for the supply of rock armour. Stema UK, in turn, purchased the rock armour from an associated Danish company, Stema Shipping A/S (Stema A/S), which chartered the barge *Stema Barge II* from Splitt Chartering A/S (Splitt), the registered owners, to perform the contract.

The rock armour was transported by the barge in tow from a quarry in Norway to the English coastal site where the barge was anchored. During a storm the barge dragged her anchor and at the same time an undersea cable supplying electricity from France registered a tripping. The owners of the cable, RTE, alleged that the cable had been damaged by the anchor.

Stema UK had been responsible for placing personnel on board the barge to operate the machinery of the barge whilst anchored off the English coast. It had also been involved in monitoring the weather and in the decision to leave the barge at anchor during the storm.

RTE commence legal proceedings for damages in the Danish courts against Splitt, the registered owners of the barge, and Stema A/S.

Stema UK commenced proceedings in the English High Court for a declaration of non-liability. In connection with these proceedings the question arose whether Stema UK was entitled to limit liability under the Limitation Convention 1976. There was no doubt that Splitt and Stema A/S as registered owner and charterer respectively of the barge were entitled to limitation of liability. The position of Stema UK was less clear.

Stema UK contended that it was entitled to limit liability by virtue of being the “operator” of the barge. It also argued, in the alternative, that it was a manager of the barge. RTE disputed these contentions and the entitlement to limit. It claimed that Stema UK was not an operator because it had no direct responsibility for the management and control of the vessel, with regard to the commercial, technical and crewing operations of the barge.

At first instance Teare J. (the Admiralty judge) was satisfied that Stema UK’s relationship to the operations of the barge was sufficient for it to be described as an “operator” of the barge.⁵³ The Court of Appeal viewed the position differently and allowed the appeal by RTE.

⁵² [2021] EWCA Civ 1880 (15 December 2021).

⁵³ [2021] 2 Lloyd’s Rep. 307.

The Court of Appeal reasoned that an “operator” was a party involved in the management or control of a vessel. A party who provided services to a vessel, such as operating the machinery of a vessel or providing personnel to operate such machinery, could not be described as the operator of the vessel. The position was no different in relation to unmanned vessels. There was no reason why the physical operation of such a vessel, such as the provision of a crew, should be interpreted as involving a degree of management and control. Phillips LJ. expressed the position in the following terms⁵⁴ – “...the term ‘operator’ must entail more than the mere operation of the machinery of the vessel (or providing personnel to operate that machinery)... The term must relate to ‘operation’ at a higher level of abstraction, involving management or control of the vessel, or else... categories of service providers would be included notwithstanding their express exclusion by the contracting parties as revealed in the *travaux préparatoires*.”

In the opinion of the Court of Appeal Stema UK’s actions had been on behalf of and supervised by Splitt and Stema A/S. Its actions had been by way of assistance, without assuming the role of a second or alternative operator or manager. It, therefore, did not fall within the list of persons entitled to limit liability under the 1976 Convention.⁵⁵

Accordingly Stema UK was not entitled to limit liability.

2.2. Claims Subject to Limitation

There is a particular interest and uncertainty if claims arising in connection with wreck removal operations are limitable. This precise question is not new but most recently it came before the Hong Kong Special Administrative Region Court of First Instance in *Perusahaan Perseroan (Persero) Pertamina v. Trevaskis Ltd.*⁵⁶

On the facts of the case the plaintiff’s ship (in the application) collided with the defendant’s vessel which was lying at anchor in Indonesian waters, and as a result sank.

The defendants commenced *in personam* proceedings in Hong Kong and employed salvors to remove pollutants from the wreck, and also to render the wreck harmless and dispose of it.

In response, the plaintiffs commenced proceedings in Hong Kong seeking declaratory relief that it was entitled to limit liability. In these proceedings the

⁵⁴ *Supra* n. 52, [par. 58].

⁵⁵ The court followed the reasoning in *ASP Ship Management Pty. Ltd. v. Administrative Appeals Tribunal* [2006] FCAFC 23.

⁵⁶ [2021] HKCFI 396; [2021] 2 Lloyd’s Rep. 637.

defendants responded by seeking a declaration that those parts of the plaintiff's claim relating to raising, removal, destruction and rendering harmless of the sunken vessel were not subject to limitation.

The clear issue between the parties was whether wreck removal claims were limitable. The claims that are limitable are set out in Art. 2(1) of the 1976 Convention. There are three categories of potential relevance:

“(a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

...

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

(e) Claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship.”

Art. 18(1) (Reservations) of the 1976 Convention provides:

“Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right to exclude the application of Article 2 paragraph 1(d) and (e). No other reservations shall be permissible to the substantive provisions of this Convention.”

The 1976 Limitation Convention was incorporated in Hong Kong law by a legislative Ordinance in 1993. It further provided:

“Paragraph 1(d) of Article 2 of the Convention shall not apply unless an order has been made [by the Chief Executive under Section 15(1) of the Ordinance].”

No such Order had been made, and consequently para. (d) did not apply in Hong Kong.

The defendant's case, in its essence, was that the application of para. (d) had been suspended because no Order had been made by the Chief Executive. It was, therefore, the clear legislative intention that claims within para. (d) were not limitable.

In response, the plaintiffs accepted that para. (d) did not apply but contended that they were entitled to limit liability under para. (a). Following from the collision the defendants claim would include a claim for consequential losses, including the cost of wreck removal. A recourse claim for wreck removal was subject to limitation and there was nothing in the Ordinance to preclude the plaintiff from relying on limitation under para. (a).

The judge rejected the contention of the plaintiffs, being of the opinion that on the proper construction of the relevant provisions of the 1976 Convention wreck removal claims fell within para. (d) exclusively, and therefore was not subject to limitation under Article 2. This interpretation, in the opinion of the judge, was consistent with the terms of the 1976 Convention generally and, in particular, the right of States to opt out of para. (d). The right to opt out would be meaningless if wreck removal claims fell under paras. (a) and (d).

The relationship between limitation of liability and claims arising in connection with wreck removal and related costs has long been somewhat uncertain. This is true of UK law in which para. 1(d) is also subject to a reservation. In the early English authorities there is to be found, on the basis of the then extant law, the recognition of a distinction between a statutory right to wreck removal costs and the same right by way of recourse for consequential damages, with the right to limit applying only to the latter.⁵⁷ There is a rationale to the distinction: the right to limit is denied when the recovery protects public investment but is available to a party sued for damages.

The judge rejected the argument that this distinction carried into the 1976 Convention, accepting that it was contrary to the proper construction of Article 2 (1) and the mutual exclusivity of paras. (a) to (f).⁵⁸ The judge concluded that all wreck removal claims were to be channelled to para. (d) and where a State had decided not to adopt para. (d) there was no right to limit liability.

It might be said that this decision appears to rewrite para. 1(a); ignores the introductory words “whatever the basis of liability may be”; too readily adopts as a rule of construction that the paras. in Art. 2(1) are “mutually exclusive” and fails to appreciate the public interest difference between a recourse claim and a claim by a maritime authority. Nonetheless the relevance of the debate turns very much on the approach taken to the concept of consequential loss. The more restricted the adoption the more limited the opportunity to seek the aid of para. (a).

2.3. Conduct Barring Limitation

Article 4 of the 1976 Convention alludes to conduct barring the right to limit with the party liable obliged to fully compensate a claimant. It is a familiar term

⁵⁷ *The Stonedale* (No. 1) [1956] AC 1; [1955] 2 Lloyd’s Rep. 9.

⁵⁸ Following *The “Tiruna and Peloris”* [1987] 2 Lloyd’s Rep. 666 (Australia, Supreme Court of Queensland Full Court).

in maritime law, appearing in several other conventions.⁵⁹ Nonetheless, whatever the legal context, it never fails to cause difficulties of interpretation.

Article 4 provides:

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

It is readily observable that the provision has four elements: (a) the loss must have resulted from the personal act or omission of the party entitled to limit, (b) committed with intent to cause the loss, or (c) recklessly and (d) with knowledge that such loss would probably result. The last two elements are particularly problematic because it is uncertain whether knowledge is an ingredient of recklessness or an additional requirement. The first element also causes difficulty because the party entitled to limit will predominantly be a company, and this leads to an enquiry to identify the *alter ego* of the company.

There is also the question about the burden of proof. Under the 1976 Convention the burden of proof is on the claimant which is a reversal of the historical approach.⁶⁰ It is accepted that it will be difficult for a claimant to discharge the burden of proof, thereby entrenching the right to limit. This is in keeping with the clear policy of the 1976 Convention which is that the right to limit should be virtually unbreakable, and only capable of being broken in the most extreme of circumstances.

Article 4 is awkwardly drafted and it is difficult to comprehend why it has been so loyally replicated in the development of the international regime. Unsurprisingly, an unwelcomed outcome of this practice has been jurisdictional differences in the interpretation of the article, which has brought about the differential application of the international limitation regime as between jurisdictions. This is innately unsatisfactory and IMO has recently attempted to arrest this growing dilemma by promulgating principles to be applied when interpreting the Article. The following were identified:

- (a) the right to limit is breakable only in very limited circumstances;
- (b) the level of culpability described is analogous to wilful misconduct;⁶¹

⁵⁹ See Hague-Visby Rules, Art. IV(5)(e); CLC Convention 1992, Art. V(2); HNS Convention 1996/2010, Art. 9(2) (not yet in force); Montreal Convention, Art. 22(5); CMR Convention, Art. 29; COTIF-CIV Convention, Art. 48.

⁶⁰ 1924. Convention Art. 2(1); 1957 Convention Art. 1(1) and (6).

⁶¹ “Wilful misconduct” is a standard exclusion in marine insurance policies governed by

(c) the term “recklessly” is to be accompanied by “knowledge” that such damage or loss would probably result. The two terms establish a level of culpability that must be met in their combined totality and should not be considered in isolation of each other; and

(d) the conduct of a party other than the shipowner, for example the master, member of the crew or servant, is irrelevant and not to be taken into account when seeking to establish whether the test has been met.

The object appears to be that these principles will exist as elements of a Resolution for the unified interpretation of the 1976 Limitation Convention.⁶²

The identified principles also appear to follow the approach adopted in English law to the interpretation of Article 4.

In the case of a corporate applicant, the probable case in practice, the act or omission and state of mind to be established is that of the *alter ego*, the directing mind and will of the company.⁶³ This is to identify a natural person whose acts and omissions and state of mind may be attributed to the corporate applicant. In all instances this is a question of fact. It also has to be the personal conduct or omission of that person. The conduct of a servant or agent or some other person is not relevant.⁶⁴

It is not sufficient to establish intent or recklessness on the part of the applicant. It must also be proved that the applicant had actual knowledge that the loss that occurred would or would probably be the result of his acts or omissions. More specifically the applicant must foresee the probability of the actual loss that has occurred, a more demanding requirement than the kind of loss that has occurred.⁶⁵

All this analysis serves to emphasise the point already made that the test set out in Art. 4 is particularly demanding in matters of both substance and procedure, and only in exceptional circumstances will it be satisfied with the right to limit lost.⁶⁶ This is not the unintended consequence of a poorly drafted article. It is in keeping with the clear policy of the 1976 Limitation Convention.

English clauses and law. Traditionally it refers to deliberate or reckless loss attributable to the conduct of the assured. It connotes conduct more reprehensible than negligence. See also Marine Insurance Act 1906 Section 55(2)(a).

⁶² See Editorial in *The Journal of International Maritime Law*, vol. 27 (2021), no. 6, written by Prof. George Theodoridis (WMU).

⁶³ *The “MSC Rosa M”* [2000] 2 Lloyd’s Rep. 399.

⁶⁴ *The “Leerort”* [2001] 2 Lloyd’s Rep. 291.

⁶⁵ *Ibid.* *The “MSC Rosa M” supra*; *“The Leerort”*.

⁶⁶ *The “Saint Jacques II” and “Gudermes”* [2003] 1 Lloyd’s Rep. 2003; *The “Atlantik Confidence”* [2016] EWHC 2412 (Admlty).

2.4. Limitation and Liability – The Relationship

One of most prominent issues associated with this branch of the law, aside from the underpinning policy,⁶⁷ relates to the legal relationship between “liability” and “limitation”. In English law there are two guiding principles – (a) the establishment of liability is not a condition precedent to the commencement of a limitation action,⁶⁸ and (b) a limitation action is distinct and separate from the liability action.⁶⁹

These principles render possible that which frequently arises in practice following an incident at sea. An application to establish a limitation fund is commenced in a particular jurisdiction and the related liability action is determined by a court in another jurisdiction.⁷⁰

This practice is further encouraged by the fact that different Limitation Conventions with different limits of liability are at play internationally, principally the 1957 and 1976 Conventions, giving rise to a conflict of Conventions at issue.⁷¹ The parties traditionally respond by developing strategies based on self-interest, according to whether the object is to maximise the compensation obtainable or the right of limitation. To an outsider it must appear very strange and unseemly.

It is not easy to align the practice described with the provisions of the 1976 Convention. The opening sentence of Art. 11(1) appears to associate the constitution of a limitation fund with the court of any State Party in which a claim subject to limitation is instituted. This reflects the attractive and supportable notion that liability and limitation should travel in parallel and be vested in the same court. But the sub-article may also and reasonably be interpreted as being permissive and not restrictive. In other words it permits but does not compel an alignment between liability and limitation. This latter view prevails in English Admiralty law, with the jurisdiction of the Admiralty Court to entertain applications to constitute a limitation fund considered as independent, unambiguous and unrestrictive.⁷²

⁶⁷ As to which see, Mustill, M. J., *Ships are Different – Or are They?*, *Lloyd's Maritime and Commercial Law Quarterly*, Part 4 (1993), pp. 490-502; Steel, D., *Ships are Different: A Case for Limitation of Liability*, *Lloyd's Maritime and Commercial Law Quarterly*, Part 1 (1995), pp. 77-88.

⁶⁸ *Caspian Basin Specialised Emergency Salvage Administration and Another v. Bouygues Offshore S.A. and Others (No. 4)* [1997] 2 Lloyd's Rep. 507.

⁶⁹ *Ibid.*, (Nos. 1, 3, 4 and 5) [1998] 2 Lloyd's Rep, 461 (CA).

⁷⁰ The recent *Ever Given* incident in the Suez Canal in March 2021 provides an example. Notwithstanding the location of the incident and the governing law, the owners constituted a limitation fund with the English Admiralty Court in London. The claims were later settled by agreement.

⁷¹ Invariably the Limitation Conventions of 1957 and 1976 are involved. See, for example, *Caltex Singapore Pte. Ltd. v. BP Shipping Ltd.* [1996] 1 Lloyd's Rep. 286.

⁷² Senior Courts Act 1981, Section 20(1)(b) and (3)(c); C.P.R., P.D. 49F, Cl. 1.5(c).

An implication of the split is that it encourages forum shopping and causes the subject to be embroiled in international jurisdictional issues. It is possible that challenges may be made to the assumption of jurisdiction in relation to limitation proceedings. For example, an application to constitute a limitation fund before the English Admiralty Court might be challenged based on principles of *forum conveniens*⁷³ or *lis pendens*.⁷⁴ It follows that even if the English Admiralty Court has jurisdiction to constitute a limitation claim, it may on the facts of any particular case, in the interests of justice decide to surrender jurisdiction. When applicable, similar considerations may arise under EU Rules on jurisdiction and the recognition and enforcement of judgments.⁷⁵

2.5. Extending the Reach of the 1976 Convention

There are various limitations on the application of the 1976 Convention. It applies to seagoing ships⁷⁶ and a State Party may by its national law regulate limitation of liability in respect of ships (a) intended for navigation on inland waterways and (b) ships of less than 300 tons.⁷⁷ The Convention does not apply to (a) air-cushion vehicles and (b) floating platforms constructed for exploring or exploiting the natural resources of the sea-bed or underling subsoil.⁷⁸ Nor, when prescribed conditions apply, does it apply to ships constructed or adapted for and engaged in drilling.⁷⁹

The prescribed limits to the 1976 Convention itself do not preclude a State Party in its national law from applying or giving effect to the provisions of the Convention in their entirety or in part to other maritime situations. This is to apply the policy of the Convention by analogy and in so doing there is, of course, no obligation to adhere to the precise terms and language of the Convention.

An example provided by UK law is the extension of the right to limit liability “to a harbour authority, a conservancy authority and the owners of any dock or canal” under Section 191 of the Merchant Shipping Act 1995. This statutory provision sets out its own limitation mechanism and incorporates parts of the 1976 Convention, namely the loss of the right to limit under Article 4.

⁷³ *The “Volvox Hollandia”* [1988] 2 Lloyd’s Rep. 361 (CA); *The “Falstria”* [1988] 1 Lloyd’s Rep. 495.

⁷⁴ *The “Happy Fellow”* [1997] 1 Lloyd’s Rep. 130.

⁷⁵ Brussels 1 Regulation (recast). Reg. (EU) No. 1215/2012.

⁷⁶ Art. 1(2) where shipowner is defined as a person with any one of several possible relationships to “a seagoing ship”.

⁷⁷ Art. 15(2).

⁷⁸ Art. 15(5).

⁷⁹ Art. 15(4).

The Section was recently considered in *Holyhead Marina Ltd. v. Farrer and Others*.⁸⁰ The facts concerned an incident at the marina in Holyhead harbour, Anglesey, North Wales. In March 2018 the marina was hit by a violent and exceptional storm which drove in from the North East. The pontoons within the Marina broke up, became detached, and about 89 craft moored in the marina were damaged. There was expert evidence that suggested that the design, construction and maintenance of the marina were defective. In particular there was no shelter from the north-east.

It was estimated that the resulting claims would total £5 million and the owners of the marina, claimants in the proceedings, commenced limitation proceedings, seeking to limit its liability to some £500,000. The owners of the damaged craft, defendants in the proceedings, resisted the claim to limit, alleging that the claimant did not have the right to limit and, if otherwise, the right had been lost. They also disputed the amount of the alleged right to limit. The claimants for limitation applied to strike out the defences by the defendant owners of craft and for summary judgment.

On the first question the right to limit was confined “to a harbour authority, a conservancy authority and the owners of any dock or canal”. There was no doubt that the claimants were owners of the marina but was the marina a “dock” within the legislation. “Dock” was defined in the Section to include “...slips, quays, wharves, piers, stages, landing places and jetties...” Marinas were not mentioned specifically but this was not conclusive because the definition was clearly inclusive.

The judge considered this question at length and regarded the statutory definition as very flexible. He reasoned that adopting the natural and ordinary meaning of “dock” it was unambiguous that the marina was not a dock. But the marina was made up of pontoons which were places where small leisure craft were moored, where those on board returning craft step ashore and land, so in this sense they were a landing place. The fact that this did not take place in the context of commercial shipping or passenger liners was not critical, nor was it inconsistent with the object or purpose of Section 191 which was to extend the right to limit liability to the entities identified in the legislation. The pontoons were landing places and within the extended definition of “dock”.

The second issue was, even if the claimant brought itself within the regime established by Section 191, had the right to limit been lost under Art. 4 of the 1976 Convention which was incorporated into the extended limitation regime. This article

⁸⁰ [2020] EWHC 1750 (Admlty); [2021] 2 Lloyd’s Rep. 221.

has previously been considered.⁸¹ On the facts of the case the defendants contended that the two directors of the corporate owner of the marina when it was constructed, and who remained directors over subsequent years when the marina was used and required to be maintained, were the “controlling minds” of the claimants. It followed that their acts and omissions were attributable to the claimant company and satisfied the terms of the loss of the right to limit test in Art. 4.

This was a highly implausible line of argument and doomed to failure. On the evidence it was close to impossible to argue that the personal acts or omissions of the two directors had been committed with intent or recklessly to cause damage to the craft moored at the marina, and with knowledge that such loss would actually occur. Nonetheless the judge took a generous approach to the issue, given that it was a preliminary application by the claimant to strike out the defence, and allowed the defence to survive to trial. This is not to be viewed as indicating tacit support for the argument. It was simply a procedural decision to be understood in context.

The third issue concerned the quantum of the limitation fund. Section 191(2) provided that the limit was to be assessed “by reference to the tonnage of the largest United Kingdom ship which, at the time of the loss or damage is, or within the preceding five years has been, within the area over which the authority or person discharges any functions”. Thereafter the method of calculation followed the 1976 Limitation Convention.

The parties were in dispute over the application of the words “over which the authority...discharges any functions”. The claimants contended that they related to the area of the marina which was the area over which it exerted control. The defendants argued that the words embraced the entire harbour, including the outer harbour. Alternatively, that they embraced the fairway to the inner harbour and the harbour to the west of the fairway. If either contention was accepted it would result in the inclusion of those parts of the harbour used by the Holyhead to Dublin ferries.

The financial consequences of the alternative contentions were significant. It will be recalled that the claimants were facing claims of about £5 million. If their interpretation was accepted the largest craft to have visited the marina would have been less than 300 GRT and the limitation amount would have been £550,000. Adopting the defendants’ argument limitation would have been based on a ferry of 43,532 GRT which would have produced a limitation amount which exceeded the claims by the defendants, and so the right to limit would have been of no benefit.

⁸¹ *Supra*, under the title “Conduct Barring Limitation”.

The claimant's contention succeeded. The claimant was a lessee of the marina from the Harbour Port Authority and thereunder assumed contractual obligations to ensure that users of the marina complied with the byelaws. It assumed responsibility for controlling movements within and in to and out of the marina. But Section 191 was not restricted to the exercise of statutory duties. The claimants assumed the function of ensuring that craft owners complied with the byelaws and regulations of the harbour authority and to the extent that the effects this function on specific occasions extended beyond the boundary of the marina did not amount to the discharge of its functions over the entire harbour area. The judge also perceived this reasoning to be consistent with the logic of the situation. Whilst there was logic in limiting the liability of the marina to the largest craft using the marina there was no logic in limiting its liability to a passenger ferry using the harbour and over which the marina had no regulatory authority, and which did not and was almost certainly incapable of using the marina.

3. CONCLUSION

An eminent British judge described the right to limit liability in the maritime sphere as "...a rule of public policy which has its origin in history and its justification in convenience".⁸² A more practical judicial response is to view it as being "in truth no more than a way of distributing the insurance risk".⁸³ Both perspectives have their advocates and detractors, and the debate continues to be worthy of careful enquiry.

There can, however, be no doubting that this is yet another area of law where shipping benefits from being the first international trading regime to emerge, significantly in the eighteenth century, and in the political and commercial climate of that period was able to claim for itself beneficial rights which have continued to survive and evolve, becoming more expansive with the passage of time. Running parallel with this historical development it may be judged that the supporting policies have become correspondingly diluted with the evolution of trading and shipping practices, and the emergence of diverse global transit systems. Nonetheless the right to limit remains firmly entrenched and is uncritically incorporated in the expanding international maritime liability regime.

⁸² *The "Bramley Moore"* [1963] 2 Lloyd's Rep. 429, P. 200, 220 per Lord Denning MR.

⁸³ *The "Garden City" (No 2)* [1984] 2 Lloyd's Rep. 37, 44 per Griffiths LJ.

BIBLIOGRAPHY

Books:

1. Berlingieri, F. (ed.), *The Travaux Préparatoires of the LLMC Convention 1976, and the Protocol of 1996*, Comité Maritime International, Antwerpen, 2000.
2. Griggs, P.; Williams, R.; Farr, J., *Limitation of Liability for Maritime Claims*, 4th edn., Informa Law from Routledge, London, 2005.
3. Martinez Gutierrez, N. A., *Limitation of Liability in International Maritime Conventions*, Routledge, London, 2011.

Book Chapters:

1. Selvig, E., An Introduction to the 1976 Convention, Chapter 1, in *Limitation of Shipowners' Liability: The New Law*, Institute of Maritime Law, University of Southampton, Sweet & Maxwell, London, 1986.

Articles:

1. Donovan, J. J., The Origins and Development of Limitation of Shipowners' Liability, *Tulane Law Review*, vol. 53 (1979), no. 4, pp. 999-1045.
2. Mustill, M. J., Ships are Different – Or are They?, *Lloyd's Maritime and Commercial Law Quarterly*, Part 4 (1993), pp. 490-502.
3. Theocharidis, G., IMO Revisits “Wilful Misconduct” Provision of the Global Liability Limitation Regime, *The Journal of International Maritime Law*, vol. 27 (2021), no. 6 (Editorial).
4. Steel, D., Ships are Different: A Case for Limitation of Liability, *Lloyd's Maritime and Commercial Law Quarterly*, Part 1 (1995), pp. 77-88.

Legislation:

1. Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (PAL) 2002.
2. Convention on Limitation of Liability for Maritime Claims (LLMC) 1976.
3. Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956.
4. COTIF-CIV Convention 1999.
5. Hague-Visby Rules 1968.
6. HNS Convention 1996/2010.
7. International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Ships 1924.

8. International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.
9. International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992.
10. International Convention on Limitation of Liability for Maritime Claims 1996.
11. International Convention on Tonnage Measurement of Ships 1969.
12. International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957.
13. Limitation of Liability Act 1851.
14. London Dumping Convention 1972.
15. Marine Insurance Act 1906.
16. Montreal Convention 1999 (MC99).
17. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012, Brussels 1 Regulation (recast).
18. Responsibilities of Shipowners Act 1813.
19. Senior Courts Act 1981.
20. The Protocol to the London Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter 1996.

Case Law:

1. *Afromar Inc. v. Greek Atlantic Cod Fishing Co. (The "Penelope II")* [1980] 2 Lloyd's Rep. 17, 21.
2. *ASP Ship Management Pty. Ltd. v. Administrative Appeals Tribunal* [2006] FCAFC 23.
3. *Barameda Enterprises Pty. Ltd. v. Ronald Patrick O'Connor and K.F.V. Fisheries (Qld) Pty. Ltd. (The "Tiruna" and "Pelorus")* [1987] 2 Lloyd's Rep. 666.
4. *Bouygues Offshore S.A. v. Caspian Shipping Co. and Others (Nos. 1, 3, 4 and 5)* [1998] 2 Lloyd's Rep. 461.
5. *Caltex Singapore Pte. Ltd. v. BP Shipping Ltd.* [1996] 1 Lloyd's Rep. 286, 294.
6. *Caspian Basin Specialised Emergency Salvage Administration and Another v. Bouygues Offshore S.A. and Others (No. 4)* [1997] 2 Lloyd's Rep. 507.
7. *Holyhead Marina Ltd. v. Farrer and Others* [2020] EWHC 1750 (Admlty).
8. *Margolle and Another v. Delta Maritime Co. Ltd. and Others (The "Saint Jacques II" and "Gudermes")* [2002] EWHC 2452 (Admlty.) [2003] 1 Lloyd's Rep. 203.
9. *MSC Mediterranean Shipping Co. S.A. v. Delumar Boba and Others (The "MSC Rosa M")* [2000] 2 Lloyd's Rep. 399.
10. *N.V. Bureau Wijsmuller v. "Tojo Maru" (Owners) (The "Tojo Maru")* [1971] 1 Lloyd's Rep. 341.
11. *Perusahaan Perseroan (Persero) PT Pertamina v. Trevasakis Ltd. and Others (The "Antea" and the "Star Centurion")* [2021] HKCFI 396.

12. *Polish Steam Ship Co. v. Atlantic Maritime Co. (The "Garden City" (No. 2))* [1984] 2 Lloyd's Rep. 37, 44.
13. *Saipem S.p.A. v. Dredging VO2 B.V. and Geosite Surveys Ltd. (The "Volvox Hollandia")* [1988] 2 Lloyd's Rep. 361.
14. *Schiffahrtsgesellschaft Ms "Mercur Sky" M.B.H. & Co. K.G. v. Ms Leerort Nth Schiffahrts G.M.B.H. & Co. K.G. (The "Leerort")* [2001] EWCA Civ 1055 [2001] 2 Lloyd's Rep. 291.
15. *Splitt Chartering APS and Others v. Saga Shipholding Norway AS and Others (The "Stema Barge II")* [2021] EWCA Civ 1880.
16. *The "Atlantic Confidence"* [2016] EWHC 2412 (Admlty.).
17. *The "Bramley Moore"* [1963] 2 Lloyd's Rep. 429.
18. *The "Happy Fellow"* [1997] 1 Lloyd's Rep. 130, 135.
19. *The "Stonedale No. 1."* [1955] 2 Lloyd's Rep. 9.

Sažetak:

SUVREMENI RAZVOJ INSTITUTA OPĆEG OGRANIČENJA ODGOVORNOSTI BRODARA

Dugo uspostavljeno pravo na ograničenje odgovornosti za pomorske tražbine u suvremenom pravu načelno je uređeno Konvencijom o ograničenju odgovornosti za pomorske tražbine iz 1976. godine. To nije dovelo do ustaljenog pravnog stajališta jer se stalno pojačuju pitanja o primjeni Konvencije. U ovom su prilogu analizirani nedavni slučajevi u Ujedinjenom Kraljevstvu i Hong Kongu koji se odnose na osobe s pravom na ograničenje, tražbine za koje se može ograničiti odgovornost i gubitak prava na ograničenje. Također se analizira procesno pravo na osnivanje fonda ograničene odgovornosti, kao i pitanja vezana uz mogući sukob različitih konvencija o ograničenju. Konačno, komentira se i praksa država koje nacionalnim zakonodavstvom proširuju pravo ograničenja na temelju Konvencije iz 1976. godine.

Ključne riječi: Konvencija o ograničenju odgovornosti za pomorske tražbine, 1976.; osobe s pravom na ograničenje; tražbine za koje se može ograničiti odgovornost; gubitak prava na ograničenje; postupak osnivanja fonda ograničene odgovornosti; nacionalno pravo; proširenje prava na ograničenje.