UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

Southampton Law School

Reconciling Maritime Liens and Limitation of Liability for Maritime Claims:

A Comparison of English Law and Chinese Law

by

Dingjing Huang

Thesis for the degree of Doctor of Philosophy

March 2015

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF BUSINESS AND LAW

Southampton Law School

Doctor of Philosophy

Reconciling Maritime Liens and Limitation of Liability for Maritime Claims:

A Comparison of English Law and Chinese Law

by Dingjing Huang

In maritime law, there are two special regimes for maritime claims, namely maritime liens and limitation of liability for maritime claims. Each of the regimes provides the maritime claimant or the liable person some special rights. It appears that the legal principles underlying maritime liens and limitation of liability are not related, however, they are interconnected in that both of them seek to strike a proper balance in the encouragement of shipping on the one hand and the effective prosecution of maritime claims on the other hand. Historically speaking, maritime liens and limitation of liability are related in that both of them reflect the impact of the personification of ships. Under this doctrine, a ship is personified to be regarded as a distinct entity with a capacity to contract and to commit torts.

However, after their own development, the two regimes currently have different emphases and opposed purposes. The purpose of maritime liens is to protect the maritime claimant with regard to the fact that ships are highly mobile and can flee the jurisdiction of the court, coupled with the additional fact that their owners could continue to incur liabilities to the detriment of existing creditors. Limitation of liability for maritime claims is more shipowner friendly. Limitation of liability allows shipowners or other persons related to ship operation to limit their liability for damage, loss or injury caused through their acts.

This thesis studies whether maritime liens and limitation of liability for maritime claims can be reconciled with each other under English law and Chinese law. The thesis revisits the relationship between the two regimes and analyses the problems arising from their inconsistences in both jurisdictions as well as in relevant international conventions.

This thesis has raised questions that have not been considered before. These questions include:

(a) What is the relationship between maritime liens and limitation of liability for maritime claims?
(b) What are the conflicts between maritime liens and limitation of liability for maritime claims?
(c) What is the effect of so-called 'conflict clauses'?
(d) How should maritime liens be reconciled under English law and Chinese law?

The answers provided by this research to the above questions are as follows:

(1) The relationship between maritime liens and limitation of liability for maritime claims lies in the personification of ship. Therefore, such a relationship is broken under the tonnage limitation system which does not rely on the personification theory.
(2) Because of the opposed policy consideration and the overlap of the two regimes, the regime of limitation of liability apparently prevents maritime liens' operation.
(3) The conflict clauses have their effect of depriving the application of maritime liens in the limitation proceedings. However, none of these clauses provided an

all-around solution to the conflicts.

(4) Legislation reform is required in order to resolve conflicts between maritime liens and limitation of liability under Chinese law; whereas Reconciling maritime liens and limitation of liability for maritime claims under English law can be achieved by wider application of case law.

The law is stated as of 12 March 2015.

Table of Contents

Cases

Statutes

United Kingdom

Administration of Justice Act 1925

Administration of Justice Act 1956

Civil Procedural Rules 1998

Companies Act 1862

Companies Act 1948

Companies Act 1989

Insolvency Act 1986

Merchant Shipping (Convention on Limitation of Liability for Maritime Claims)(Amendment) Order 1998

Merchant Shipping Act 1854

Merchant Shipping Act 1889

Merchant Shipping Act 1894

Merchant Shipping Act 1979

Merchant Shipping Act 1995

Mersey Dock Acts Consolidation Act 1858

Responsibility of Shipowners Act 1733, 7 Geo. 2, ch 15 (1734)

Senior Court Act 1981

Supreme Court of Justice (Consolidation) Act 1925

Supreme Court of Justice (Consolidation) Act 1925

People's Republic of China

Civil Aviation Law of People's Republic of China 2009

Civil Procedure Law (trial) of People's Republic of China 1982

Civil Procedure Law of People's Republic of China 2012

Contract Law of People's Republic of China 1999

Enterprise Insolvency Law of People's Republic of China 2007

Interpretations of the Supreme People's Court on the Application of the Maritime Procedure Law of the People's Republic of China 2003

Maritime Code of People's Republic of China 1992

Maritime Procedure Law of People's Republic of China 1999

Maritime Traffic Safety Law of People's Republic of China 1983

Property Law of People's Republic of China 2007

Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims 2010

Several Provisions of the Supreme People's Court on Arrest of Ship and Judicial Sale (Draft for Comments) 2013

Several Provisions of the Supreme People's Court on Arrest of Ship and Judicial Sale 2015

International Conventions

Amendments to Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 (2012)

Convention on Limitation of Liability for Maritime Claims 1976

Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions [2001] OJ L 125

International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926

International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels and Protocol of Signature 1924

International Convention on Maritime Liens and Mortgages 1993

International Convention on the Arrest of Ships 1999

International Convention Relating to the Arrest of Sea-Going Ships 1952

International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships and Protocol of Signature 1957

Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976

The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967

UNCITRAL Model Law on Cross-Border Insolvency 2008

Academic Thesis: Declaration Of Authorship

I, **Dingjing Huang**, declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

Reconciling Maritime Liens and Limitation of Liability for Maritime Claims:

A Comparison of English Law and Chinese Law

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;

2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;

3. Where I have consulted the published work of others, this is always clearly attributed;

4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;

5. I have acknowledged all main sources of help;

6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;

7. Either none of this work has been published before submission, or parts of this work have been published as: [please list references below]:

Signed: ……
……..

Date:

……
……

Acknowledgements

Undertaking this PhD has been a truly life-changing experience for me and it would not have been possible to do without the support and guidance that I received from many people, who so generously contributed to the work presented in this thesis.

First and foremost, I would like to express my gratitude to my supervisor, Professor Hilton Staniland. I appreciate all his contributions of time, ideas, and support to make my Ph.D. experience productive and stimulating.

My thanks also go to my advisor, Professor Mikis Tsimplis, who has given me valuable advice and suggestion on my PhD research. I am very grateful to Dr Özlem Gürses, who has encouraged me and helped me to participate in academic activities during my study.

I am hugely appreciative to Ms Johanna Hjalmarsson. Johanna and I worked together on various projects in addition to my own research. These opportunities allowed me to have a wide exposure to different areas of law.

I am also grateful to the Southampton Law School as well as its members who have assisted me during my postgraduate study.

My time at Southampton was made enjoyable in large part due to the many friends and groups that became a part of my life. Special mentions go to Ashygul Bugra, Durand Cupido, Jingbo Zhang, Haihua Song and so on.

Finally, but by no means least, thanks go to my family, for all their love and encouragement. I thank my parents for raising me and supporting me in all my pursuits. They are the most important people in my world and I dedicate this thesis to them.

March 2015

University of Southampton, UK

Chapter I Introduction

1.1 Research background

1.1.1 Limitation of liability for maritime claims

Maritime law gives shipowners[1] an 'unusual privilege' namely limitation of liability for maritime claims.[2] By virtue of the limitation regime, shipowners are eligible often to limit their liability for one particular incident against all possible claimants. A shipowner or other qualified person[3] connected to the operation of a ship is entitled to limit his liability in respect of certain maritime claims arising out of an occurrence to a particular amount, irrespective of the total amount of such claims.[4] It is suggested that limitation of liability for maritime claims has been designed to encourage and protect trade.[5] For the policy consideration underlying limitation, Lord Denning explained as follows

> '*The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. A small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage. I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.*'[6]

It has also been suggested that another consideration behind the limitation regime 'may now be that shipowners should be encouraged to insure against liability, and limitation

[1] Article 1 of the 1976 Limitation Convention provides that persons entitled to limit liability include shipowners, salvors and insurers. Shipowners provided in the Convention refer to the owner, charterer, manager and operator of a seagoing ship.
[2] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 3.
[3] See fn 1 above.
[4] See Article 2, 1976 Limitation Convention.
[5] Aleka Mandaraka-Sheppard, *Modern Maritime Law* (2nd edn, Routledge. Cavendish 2007) 863. See also *The Bramley Moore* [1963] 2 Lloyd's Rep. 429 and *The Garden City* [1982] 2 Lloyd's Rep. 382.
[6] *The Bramley Moore* [1963] 2 Lloyd's Rep. 429, at 437.

makes it easier for them to do so, but that limitation should not be tolerated in the case of outrageous conduct, such as deliberately or recklessly causing loss.'[7]

At present there are three international conventions relating to limitation of liability for maritime claims, namely the International Convention for Unification of Certain Rules Relating to the Limitation of Liability of Ownership of Sea Going Ships1924 (1924 Limitation Convention); the International Convention relating to Limitation of Liability of Ownership of Sea Going Ships 1957 (1957 Limitation Convention) and the Convention on Limitation of Liability for Maritime Claims 1976 (1976 Limitation Convention) and its 1996 Protocol. In terms of the number of signatory states and covering tonnage,[8] the 1976 Limitation Convention together with its 1996 Protocol is the most significant global limitation regime and this research is mainly based on these two documents.

The United Kingdom is a State Party to the 1976 Limitation Convention and the Convention is enacted via the Merchant Shipping Act. The text of the 1976 Limitation Convention and its supplementary provisions are set in Schedule 7 of the Merchant Shipping Act 1995. Claims subject to limitation of liability include claims occurring on board or in direct connection with the operation of the ship or with the salvage operations, claims for loss resulting from delay, claims for rights which have been infringed, costs incurred for wreck removal and claims in respect of measures taken in order to avert or minimise loss.[9] Despite the fact that the 1976 Convention is not applicable directly in mainland China,[10] most provisions of the Convention have been incorporated into Chapter XI of the Chinese Maritime Code 1992.

The current dominant limitation system, including the limitation system adopted in the 1976 Limitation Convention, is the English limitation system. Unlike these earlier

[7] *The Garden City* [1982] 2 Lloyd's Rep. 382, per Staughton J at 398.
[8] According to IMO's report, the 1976 Limitation Convention has 54 contracting parties covering 53.81% of world tonnage and its 1996 protocol has 49 contracting parties covering 45.30% of world tonnage. See IMO, 'Summary of Status of Conventions' <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx > accessed on 19 October 2014.
[9] Article 2, 1976 Limitation Convention; Sch. 7, Merchant Shipping Act 1995.
[10] Hong Kong ratifies the 1976 Limitation Convention and P.R. China, as the sovereign state of Hong Kong is therefore regarded as a contracting state of the 1976 Limitation Convention. In Hong Kong, the limitation of liability for maritime claim is provided in Part III of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap. 434 ("the Shipowners Limitation Ordinance"). Section 12 of that Ordinance made the 1976 Limitation Convention part of the law of Hong Kong.

Continental limitation systems, the English limitation system is not based on the value of the ship; it is based on a monetary limit which is calculated on the ship's tonnage. Therefore, the English limitation system is also called a tonnage limitation system. As one of the new features brought by the English limitation system, a separate limitation fund would be available for claims arising on any distinct occasion and, thus, the extent of aggregation of claims for limitation purposes would be restricted accordingly. The device of a limitation fund has been introduced into the international conventions on limitation of liability, namely the 1957 and 1976 Limitation Conventions, and has been followed by many maritime states due to the broad acceptance of those Conventions. However, under the English limitation system, the limitation amount is to be distributed among the claimants in proportion to their claims rather than according to the priorities of maritime liens. Such a position is expressly confirmed in both the 1957 and 1976 Limitation Conventions.[11]

1.1.2 Maritime liens

Maritime lien is said to represent one of the most striking features of maritime law.[12] A maritime lien is described as a privileged charge on maritime property and arises by operation of law.[13] Such a lien does not depend on possession of the property or on agreement; it accrues from the moment of the event which gives rise to a cause of action and travels with the property.[14] Maritime liens are 'secret' in that there is no requirement of registration; thus it cannot be lost by the sale of the property to a *bona fide* third party purchaser. A maritime lien also consists partly of the right to have the ship itself seized to provide pre-judgment security if it is not released on bail or in return for the provision of security.[15] More importantly, a maritime lien is also considered as a 'privilege' which refers to the high priority enjoyed by a maritime lien holder.[16] A maritime lien is enforceable against other creditors, whether secured or unsecured, and takes precedence over all other creditors whether the claims of those creditors arose before or after the

[11] See Article 3(2), 1957 Limitation Convention and Article 12, 1976 Limitation Convention.
[12] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 2. On the other hand, limitation of liability may be said to be another most striking feature in maritime law.
[13] *The Bold Buccleugh* (1850) 7 Moo PC 267, per Sir John Jervis at 285. The Judge stated that a maritime lien 'gives a privilege or claim upon the thing, to be carried into effect by legal process.'
[14] *Ibid.*
[15] *The Father Thames* [1979] 1 Lloyd's Rep 364, per Sheen J at 368.
[16] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 12.

creation of the lien.[17] Therefore, such liens give claimants an effective and powerful weapon which secures and prefers a restricted list of maritime claims. Maritime liens also have significant policy implications for the purpose of balancing the benefits between maritime claimants and shipowners. Under English law, claims for maritime liens are to be paid prior to mortgages and other statutory rights *in rem*.[18]A similar rule is provided in the Chinese Maritime Code 1992 although there is no *in rem* proceeding under the Chinese legal framework.[19]

There have been three international conventions attempting to create a uniform framework of maritime liens. They are The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926 and its later version of 1967, and The International Convention on Maritime Liens and Mortgage 1993. However, it is sad to say that none of the above Conventions achieved the goal of unification in the sense that these Conventions do not have enough contracting parties.[20] Neither the United Kingdom nor China is a State Party of any of the above Conventions.

Maritime liens under English law have their origins in civil law but are cultivated in the ground of common law.[21] There is no express definition of a maritime lien by legislation of U.K.; and as Sheen J said a maritime lien is more easily recognised than defined.[22] English law established maritime liens deriving from various sources including case law and statutory provisions.[23] At present, effectively recognized maritime liens under English law include liens for seaman's wages, master's wages and disbursements,

[17] This is subject to existing possessory liens, statutory right of detention and other litigation costs.
[18] See *The Two Ellens* (1869-72) L.R. 3 A. & E. 345, where a British colonial vessel was mortgaged by her owners and the instrument of mortgage was duly registered. Order by the master, the plaintiffs did some work on board and furnished supplies to the ship necessary to put her in a seaworthy condition. The proceeds of the ship were insufficient to satisfy the claim of the plaintiffs and the mortgage debt. It was held that the plaintiffs were not entitled to have the amount of their claim paid out of the proceeds until the mortgage debt had been satisfied. It was also held that if the claim was secured by a maritime lien, it would rank before the mortgage debt.
[19] See Article 25, Chinese Maritime Code 1992. Article 25 only provides that a maritime lien is ranked higher than a possessory lien or a mortgage but as a general position of Chinese law, a possessory lien or a mortgage is ranked higher than unsecured debts: see Article 170 of the Property Law of the People's Republic of China.
[20] For the status of these Conventions, see section 2.3.3, below.
[21] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 27.
[22] *The Father Thames* [1979] 1 Lloyd's Rep 364, at 368.
[23] Maritime lien for master's wages and disbursements is a statutory creation. The lien was mentioned in Merchant Shipping Act 1854 for the first time and confirmed by Merchant Shipping Act 1889 at section 1. Now it is recognized by Merchant Shipping Act 1995 at section 41.

salvage, and damages done by a ship.[24]

In respect of provisions on maritime liens, the Chinese Maritime Code was drafted on the basis of the draft version of the International Convention on Maritime Liens and Mortgages considered at the diplomatic conference in Geneva in April 1993.[25] The Chinese Maritime Code defines a maritime lien as a right of the claimant to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim.[26] Payment for wages, other remuneration, crew repatriation and social insurance costs made by the master, crew members; claims in respect of loss of life or personal injury occurred in the operation of the ship; payment for ship's tonnage dues, pilotage dues, harbour dues and other port charges; salvage payment; and compensation for loss of or damages resulting from tortious acts in the course of the operation of the ship are recognized as maritime liens under Chinese law.[27]

1.1.3 Conflicts between maritime liens and limitation of liability for maritime claims

The legal principles underlying limitation of liability and maritime liens do not, at first sight, appear to be connected. However, they are interconnected in that they seek to strike a proper balance in the encouragement of shipping on the one hand and the effective prosecution of the main maritime claims against ships on the other hand.[28] Historically, both maritime liens and limitation of liability were impacted by the personification theory. Under this theory, a ship is personified to be regarded as a distinct entity with a capacity to contract and to commit torts. Therefore, the ship is both the source and limit of liability. There are many facets of legal characteristics of maritime liens are consistent with the personification theory. Moreover, it was true that a shipowner's liability was limited to the value of the ship till the emergence of the

[24] See William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 1400: a brief introduction of English maritime liens written by Robert M. Jaevis. Bottomry and respondentia are also recognised as maritime liens but they have no role to play in today's shipping industry thus it is not worthy to mention them.
[25] The 1993 Maritime Liens and Mortgages Convention had not been published officially at that time.
[26] Article 21, Chinese Maritime Code 1992.
[27] Article 22, Chinese Maritime Code 1992.
[28] *The Father Thames* [1979] 1 Lloyd's Rep 364 at 368. Also in *The Tolten* [1946] P.135, Scott LJ pointed out that there is an 'integral—almost an organic—connection' between limitation of liability and maritime lien in the history of our own Admiralty law, law of sea in which it is deep rooted.

English tonnage system.[29] In this regard, maritime lien was even deemed as a previous limitation system.[30] However, maritime liens and limitation of liability have developed for different purposes. Each maritime lien arises from a service which may be essential to the success of a maritime adventure and arises out of an unforeseen or emergent circumstance. Therefore, maritime liens equally all give their holders, the claimants, a privileged right in circumstances where the person who bears a personal liability may not be readily accessible.[31] The limitation of liability for maritime claims, on the other hand, is the 'bane of creditors' and a major commercial advantage for shipowners.[32]

Following the appearance of the English limitation system, the ship is no longer the source of limit of the liabilities. The limits are calculated on the basis of the tonnage of the ship and the limitation amount is to be distributed in proportion among claimants. In addition, a separate limitation fund may be constituted, which stands for the maximum amount of liabilities. The constitution of a limitation fund has two important practical effects. First, it protects the persons entitled to limitation from any other actions against their property. Second, it may lead to the release of any property of the persons entitled to limitation which has been arrested or attached as a matter of pre-trial security measures. In this sense, the enforceability of a maritime lien would appear to be impacted.

More specifically, the conflicts between the two regimes may be found in the following aspects:

a. Constitution of the limitation fund may prevent the arrest of the ship or may lead to the release of the ship.

Both of the limitation fund and maritime liens have the function of being pre-trial security measures. The constitution of a limitation fund is further deemed as an 'alternative security'[33] for the ship arrested for the purpose of realizing a maritime lien. In this sense, a maritime lien holder may not enforce his maritime lien against the ship

[29] Section 503, Merchant Shipping Act 1894.
[30] Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1979) 53 Tul L Rev 1259.
[31] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 5.
[32] David Gray Calson, 'Reconciling Maritime Liens and the Limitation of Liability Act' (1982) 3 Cardozo Law Review 261-302.
[33] See Francesco Berlingieri, *Berlingieri on Arrest of Ships*: a commentary on the 1952 and 1999 arrest conventions (5th edn, London: Informa 2011) Chapter 14; see also DC Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) Chapter 15.

itself after the constitution of a limitation fund; and his claim will be taken into the procedure of limitation of liability.

b. It is unclear whether the proceeds of selling the arrested ship can be used as the limitation fund.

Under Chinese law, there are no particular regulations in respect of the forms of securities which may be used as the limitation fund. In this sense, a shipowner may apply to the Court for selling the ship and using the proceeds as the limitation fund. If such a method is allowed, the limitation proceeding and maritime liens are against the same object. Those maritime lien holders, no matter they are subject to limitation proceedings or not, will be affected. The lien holders outside the scope of the limitation regime would even lose their entire claims.

c. The distribution rule of a limitation fund is different from the priority rule settled by maritime liens.

The limitation fund is designed to distribute among the claimants in proportion to their established claims against the fund,[34] which is different from priority rule of the ranking of claims created by maritime liens. Due to the overlap between claims subject to limitation regimes and claims giving rise to maritime liens, different priority rules cause confusion. Moreover, the limitation regime itself may provide priority for certain claims. For example, the Chinese Maritime Code, following Article 6(3) of the 1976 Limitation Convention, provides that claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have priority over other property damage claims.[35] Such a provision is inconsistent with Article 23 of the Maritime Code, under which claims for damage to harbour works, basins and waterways and aids to navigation shall be paid in proportion with other damage maritime lien claims.

In addition, it is unclear whether or not a maritime lien which is also subject to limitation of liability will be extinguished after the constitution of a limitation fund. As mentioned earlier, the constitution of a limitation fund may prevent the enforcement of the maritime lien; however, the maritime lien seems still existing even though it is not enforceable. Such a position appears to be unfair for the maritime lien holders because

[34] See Article 12(1), 1976 Limitation Convention
[35] See Article 210, Chinese Maritime Code 1992.

the claims secured by maritime liens will be degraded to normal maritime claims by the unilateral action of the shipowners.

The conflicts between maritime liens and limitation of liability are recognised by English law and Chinese law as well as the international conventions on maritime liens and mortgages. English law attempts to resolve such conflicts by inserting a so-called 'Conflict Clause' in its Merchant Shipping Acts, which provides that no liens or other similar rights shall affect the distribution rules of the limitation fund. The 1926 Convention provides, in Article 7, simply that no sum apportioned to a creditor may exceed the sum due under limitation of liability rules; Article 14(2) of the 1967 Convention provides any party may reserve the right to apply the 1957 Limitation Convention; and Article 15 of the 1993 Convention reads that nothing in the Convention 'shall affect the application of any international convention providing for limitation of liability or of national legislation giving effect thereto'. Article 15 of the 1993 Convention is incorporated into Article 30 of the Chinese Maritime Code. From the wording of these clauses, it is clear that these clauses attempt to make the limitation of liability proceeding prevail where there is a conflict between it and maritime liens. Nevertheless, the construction and application of the conflict clause under Chinese law are obscure; and just one simple clause in the Maritime Code seems not enough to resolve the conflicts between maritime liens and limitation of liability. So far there is little academic work on this specific topic under Chinese law and some thorough comparative study is therefore necessary for the forthcoming amendment of the Chinese Maritime Code 1992.

1.2 Aims, objectives and contributions

This research aims at analysing the problems arising from the conflicts between the regimes of limitation of liability and maritime liens in English and Chines law as well as relevant international conventions and seeking the way to harmonize the two regimes under English law and Chinese maritime law.

The research will examine the history and development of limitation of liability and maritime liens, analyse the underpinning policy of the two regimes, and ascertain the

relationship of the two regimes. A historical review will illustrate the change of theoretical foundation of the two regimes and the formation of their conflicts. The research will compare the attempts of resolving the conflicts between limitation and maritime liens under English law, Chinese law and International Conventions. English law firstly recognised the conflicts between the two regimes and later on the conflicts were discussed in the CMI conferences during the process of drafting and revising the International Conventions on Mortgages and Maritime Liens.[36] Comparison will be made on those attempts and to examine whether or not they have resolved the problem.

The research will reflect on Chinese law and examine the regimes of limitation and maritime liens under the Chinese legal framework. The Chinese Maritime Code 1992 is modelled on the 1976 Limitation Convention in respect of provisions on limitation of liability for maritime claims; and the Maritime Code follows the 1993 Maritime Liens and Mortgages Convention in respect of provisions on maritime liens. However, some of the provisions in the Chines Maritime Code are not exactly in the same as those in the conventions and the construction and application of those provisions are ambiguous. Thus, compared with English law, Chinese law is less clear in this regard. A study of the problems of the Chinese law on the conflicts between limitation and maritime liens will illustrate those defects and indicate where the law should be revised. In the final part, the research will draw conclusions on the basis of the comparative studies of the conflicts between limitation and maritime liens under English law and Chinese law and will propose amendments of the Chinese Maritime Code and other relevant law. English law will have great value of reference in that English law has a long history of dealing with limitation and maritime liens and, more importantly, the tonnage limitation system has originated in English law.

Through this research, the author endeavors to make contributions to both English law and Chinese law in relation to reconciling maritime liens and limitation of liability for maritime claims. This research contributes to English law in that it reconsiders the relationship between maritime liens and limitation of liability under English law, for which there is very little research done before. This includes linking the limitation proceeding under English law with a controversial House of Lord's decision on action

[36] CMI Year Book 1996; see section 6.3.3, below.

in rem, *The Indian Grace* (No.2);[37] providing a thorough analysis on the application and construction of the 'conflict clause' [38] in the Merchant Shipping Act 1995; and reconsidering the position of the maritime lien for damage done by a ship. It is submitted by the author that the underlying legal principle of claims arising from damage done by a ship should be altered so that such maritime liens under English law are harmonised with limitation of liability.

The contribution of this research to Chinese law is that it provides the theoretical foundation for resolving the conflicts under Chinese law. Such a theoretical foundation will be based on the presumption that the privilege of limitation of liability is superior to the privilege of maritime liens under Chinese law; and therefore the maritime liens shall not affect the limitation regime. It follows that the constitution of a limitation fund should be deemed as a measure to extinguish the maritime liens. Besides the theoretical foundation, just one simple clause of Article 30 of the Chinese Maritime Code 1992 is not enough to resolve the problems. Thus another contribution of this research is to make suggestions on revising the Chines Maritime Code and other relevant legislation so that the limitation of liability and maritime liens may be harmonised.

In addition, a comparative study of English law and Chinese law on the relationship between maritime liens and limitation of liability for maritime claims, as of the author's acknowledgement, has never been conducted before this research. The reason why Chinese law is chosen by this research is that China has incorporated provisions from both the 1976 Limitation Convention and the 1993 Maritime Liens and Mortgages Convention in its Maritime Code. Therefore, the conflicts between those two international conventions are directly reflected in the Chinese Maritime Code. In this sense, this research will also be of interest for those States which has enacted both of the above conventions.

1.3 Structure

The thesis is divided into three parts. The first part deals with the history and development of the law on maritime liens and limitation of liability for maritime claims.

[37] [1998] 1 Lloyds' Rep 1.
[38] Para.9, Sch.7 part II, Merchant Shipping Act 1995.

This part contains two chapters, Chapter II on maritime liens and Chapter III on limitation of liability for maritime claims. Chapter II looks at the historic development and current law of maritime liens to examine the enforcement method of maritime liens and the priority rules settled by such right. Moreover, the historic perspective will provide a better understanding of the considerations behind the development of law on maritime liens and will help to ascertain the theoretical foundation of each type of maritime lien. Chapter III, on the other hand, focuses on the history and current regime of limitation of liability, aiming to examine the dominant procedure and effect of such a special system. The development of limitation regime from value based systems to monetary limitation is of great importance because it illustrates the change of relationship between limitation regime and maritime liens. For the purpose of this thesis, only the 'global limitation'[39] will be concentrated of; limitation of liability under carriage conventions applying to individual contracts of carriage of goods by sea, e.g., Hague Rules or Hamburg Rules, or conventions on oil pollution or nuclear damages[40] are not of concern in this research.

The second part of the thesis will compare the two systems on their natures, legislature purpose, and enforcement， with consideration of relevant international conventions and national laws in order to point out where the conflicting issues lie and ultimately to suggest solutions for those issues. This part contains four chapters. Chapter IV will focus on the relationship between limitation of liability and maritime liens on the basis of the research in the first part. The change of relationship between the two regimes will be analysed and the reason for the conflicts will be ascertained. Chapter V focuses on the conflicts between limitation and maritime liens. The main conflict between the two regimes is in the distribution rule of the compensation; and the device of the limitation fund brings difficulties for the enforcement of maritime liens. The next chapter, Chapter VI will discuss the 'Conflict Clauses' existing in the Merchant Shipping Act 1995, the Chinese Maritime Code 1992 and International Conventions on Mortgage and Maritime Lien. Such clauses are drafted to resolve the conflict between limitation and maritime liens. This chapter will focus on the interpretation and application of each of those clauses. Finally, Chapter VII will consider the maritime liens in the situation of

[39] 'Global limitation' refers to the limiting of liability in respect of all claims arising from a single maritime incident.
[40] For example, the Civil Liability Convention 1992, Hazardous and Noxious Substance Convention 1996, Nuclear Damage Conventions, etc.

insolvency and bankruptcy. Under the circumstances of insolvency and bankruptcy, issues will also arise in terms of distribution of a closed fund. The chapter will try to find out whether any lessons can be learned for the distribution of a limitation fund.

The final part of the thesis will investigate the necessity and possibility of amending the Chinese law in respect of resolving the conflicts between limitation and maritime liens. This part contains one chapter, Chapter VIII. Chapter VIII will include an analysis of limitation and maritime liens in Chinese law on the basis of previous research in the first and second parts. A comparison of Chinese law and English law on the issues of conflicts will be made and proposals for reform of Chinese maritime law will be suggested.

1.4 Admiralty jurisdiction in China

In order to provide a basis for the analysis of Chinese law in this thesis, this section will give a brief introduction of the legal framework and judicial system in respect of maritime issues in China. The Chinese legal system is a codified legal system and based primarily on the Civil Law model. Thus judicial decisions in Chinese law do not have binding effect. However, relevant court decisions in China will be reviewed and commented in the thesis so as to illustrate the effect of relevant laws and regulations. For maritime affairs, the Chinese Maritime Code 1992 governs the substantial issues while the Maritime Procedure Law of China 1999 governs the procedural issues. In addition, regulations promulgated by State Council, rules and provisions promulgated by ministries and commissions and judicial interpretation issued by the Supreme People's Court will also be followed in making decisions.

The counter part of the English Admiralty Court in China is the 'Maritime Court'. There are nine Maritime Courts in the P.R.China, which are, from the south to the north, the Maritime Courts of Haikou, Guangzhou, Xiamen, Wuhan, Shanghai, Ningbo, Qingdao, Tianjin and Dalian. The Maritime Court of Wuhan is the only court which is not located in coastal area. Their appeal courts, the courts of the second and final sentence, are the higher people's courts of the province or the municipality directly under the Central Government where each of the maritime courts is located. The Supreme People's Court

hears complaint cases or very important cases which it thinks it should hear. According to the Maritime Procedure Law of China 1999, Maritime Courts have jurisdictions over cases arising from maritime torts, maritime contracts, contracts for the lease of sea-going vessels, marine insurance contracts, for contracts relating to employment of seafarers, maritime securities, and ownership, possession, usage, or maritime liens of a sea-going vessel.[41] It is further provided that Maritime Courts have exclusive jurisdictions over cases arising from port operations, marine pollution and damage caused by the marine activities, and marine exploration and exploitation contracts within the territorial sea of the People's Republic of China and other sea areas over which the People's Republic of China has jurisdictional authority.[42]

1.5 Methodology

This thesis is based on doctrinal methodology under which various research methods are adopted.[43] 'Doctrine' has been defined as 'a synthesis of various rules, principles, norms, interpretive guidelines and values.'[44] It is submitted that the word 'doctrine' refers to legal concepts and principles of all types such as cases, statutes, and rules.[45] For the purpose of this thesis, doctrinal analysis is to be made on case law, statutory provisions, legal principles and judicial interpretations. Particularly, domestic legislations and judicial decisions of the United Kingdom and P.R. China, as well as international conventions relating to maritime liens and limitation of liability will be reviewed throughout the thesis' research.

In the first part of the thesis, the task is to extract doctrines from a historical review. A number of cases or statutory text, throughout the history of English and Chinese maritime law, will be restated, criticised in order to seek for sensible results in light of

[41] Article 6, Maritime Procedure Law of PRC 1999.
[42] Article 7, Maritime Procedure Law of PRC 1999.
[43] See Paul Chynoweth, 'Legal Research' In Andrew Knight, Les Ruddock (Eds), *Advanced Research Methods in the Built Environment*, (Blackwell Publishing, 2008) Chapter 3 <http://www.csas.ed.ac.uk/__data/assets/pdf_file/0005/66542/Legal_Research_Chynoweth_-_Salford_Uni..pdf> accessed on 02 March 2015. According to Chynoweth's view, the doctrinal methodology consists of expository research (Conventional treatisesand articles/ 'black letter law') and Legal theory research (Jurisprudence, legal philosophy, etc.)
[44] Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2010) 197.
[45] Terry Hutchison, Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', Deakin Law Review, 2012.

legal principles and common sense.[46] These results provide for a conceptual foundation of the subsequent chapters. The historic review is of importance in that an uncertain or ambiguous legal ruling may often be more easily interpreted when viewed in its proper historical or social context. In the second part of thesis analysing relationship and conflicts between maritime liens and limitation of liability, the method of deductive logic will be used. The analysis will follow the form of syllogism, comprising major premise, minor premise and conclusion.[47] A major premise identifies a general rule of law which requires a specified legal outcome when particular facts are present in a situation.[48] For example, limitation of liability imposes a limit on the amount secured by a maritime lien, preventing the operation of the lien. A minor premise describes a particular factual situation.[49] For example, establishment of a limitation fund would in essence provide an alternative security to the claims which the maritime liens would arguably attach. Conclusion will be made to state whether the rule in the major premise therefore applies to the facts in the minor premise, and whether the specified legal outcome therefore takes effect.[50]

Shipping is an international industry. It is submitted that almost every topic involving shipping law is greatly has an international element in two senses. Shipping law is greatly influenced by international law in the form of international conventions. Particularly, international conventions substantially affect maritime liens and the limitation regimes. For example, China has incorporated provisions from both the 1976 Limitation Convention and the 1993 Maritime Liens and Mortgages Convention in its Maritime Code. Thus, it is necessary to refer to and analyse relevant international conventions.

Chapter VII of this thesis cuts across two areas of law, i.e. insolvency and shipping law. The proceedings of limitation of liability for maritime claims and the proceedings of insolvency are similar to the extent that both proceedings deal with creditors' rights against an exhaustive fund.[51] Thus the interaction between maritime liens and the insolvency proceeding might potentially provide an answer to the question how

[46] Richard A. Posner, 'Legal Scholarship Today' 115 Harvard Law Review 1314, 2001.
[47] Terry Hutchison, Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', Deakin Law Review, 2012.
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] See below, section 7.4.3.

maritime liens should be reconciled with the limitation proceeding. It is therefore worthwhile to examine the operation of maritime liens in the circumstances of insolvency proceedings for the purpose of suggesting a suitable approach to be used in the circumstances of limitation proceedings by analogy.

A comparative analysis of the law of the Chinese and English jurisdictions is conducted throughout the thesis. Comparative analysis of law provides the following advantage. It not only shows the way the issues created by the conflicts between maritime liens and limitation of liability for maritime claims in different jurisdictions, but also shows whether there is uniformity of rules or resolutions available in different jurisdictions.

Chapter II History and Current Law of Maritime Lien

2.1 Introduction

For the purpose of examining the relationship and inconsistencies between maritime liens and limitation of liability for maritime claims, it is essential to review the relevant aspects of the law on both subjects. History is always the prologue. Therefore this chapter will firstly review the history of maritime liens, aiming to ascertain their origins and also to evaluate the various considerations underpinning maritime liens securing different types of claims. The historical review of maritime liens will help to evaluate their importance while competing with the limitation of liability regimes. It is noteworthy that maritime liens are always attached to the development of maritime law and the admiralty jurisdiction.[52] As Professor Tetley says in his work on maritime liens, 'Maritime liens are the product of evolution of custom, statute and judicial decision. To understand them, one must understand the history of maritime law'. [53] Some pre-mature forms of maritime liens can be found in early maritime laws. Although those were not exactly the same as 'maritime liens' recognised in contemporary maritime law, they nevertheless provide some clues about the origin, development and policy concerning behind such a kind of special right. The historical review of the maritime lien will start from primitive maritime liens that existed in ancient Greek law, Roman law, and other early maritime codes and then focus on the development and jurisprudence of the concept of maritime lien in English law and Chinese law.

The second part of this chapter is to examine the current legislation on maritime liens in the United Kingdom and China. As 'maritime lien' is a broad subject, only those aspects which are potentially related to limitation of liability for maritime claims will be reviewed. On this basis, this part will only examine the definition of maritime liens, recognised maritime liens as well as enforcement of maritime liens under current

[52] See Hilton Staniland, *A Comparative Analysis of Maritime Lien* (Ph.D. Thesis, University of Southampton UK 1999); see also William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 7.
[53] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 60.

English and Chinese law. Finally, conclusions will be drawn on the basis of comparison between English law and Chinese law.

2.2 History of maritime liens

2.2.1 Early maritime law

2.2.1.1 Ancient Greek Law

As a traditional navigation nation, Greek cities played an important role in trade and commerce around the Mediterranean in ancient times. Some of the features of modern law may already be recognised at that early time, which are, unwritten and customary for most part.[54] As pointed out by Professor Sanborn, in *Origins of the Early English Maritime and Commercial Law,* that the Athenians were believed to be familiar with the principles of bottomry contracts.[55] In the case of *Zenothemis* v. *Demon*[56], an early Greek loan on bottomry was dealt with. In that case, a ship sailed from Athens to Syracause after the skipper had procured a 'maritime loan' from Athenian capitalists on the security of ship's hull and armament. When the ship returned to Athens, the creditor who had loaned money on the hull obtained possession of the ship. The cargo owner wanted to take away his corn on board but was opposed. Although the final decision of the case was unknown, it illustrated that a high-rate-interest loan can be made on lender's risk in case of shipwreck and the master can hypothecate cargos even not belonging to him. This kind of 'maritime loan' is similar to a bottomry bond in that both of them refer to the activity of borrowing money at interest on the security of the ship hypothecated in order to enable the ship to continue her voyage.[57] Thus such loans may be regarded as early forms of bottomry bond and the security imposed on the ship is the primitive form of maritime lien.

2.2.1.2 Roman law

Although in history the Romans firstly built large ships for the purpose of war, they still

[54] Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (W.S. Hein 1930) 1-4.
[55] *Ibid*, 6.
[56] This case is used as an example by Professor William Tetley in his work on maritime liens. See *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 9.
[57] For the meaning of 'bottomry', see Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 28. See also, Robert M. Hughes, *Handbook of Admiralty Law* (West Publishing Co. 1901) 87.

lacked knowledge of sea traveling and of sea laws in early times.[58] Therefore, Roman law followed the Rhodian law[59] in respect of sea affairs.[60] However, as the growth of commercial activities later in Rome and of the frequency of over-sea voyages, Roman law started to contribute important principles to the development of maritime law. The contribution of Roman law to maritime liens is reflected in two aspects: one is that there were some primitive forms of maritime liens existing in Roman law; and the other is that the doctrine of hypothecation in Roman times was considered as the origin of maritime liens.[61]

In *Origin of the Early English Maritime and Commercial Law*, Professor Sanborn, summarises several rules existed in Roman law in relation to maritime claims. He states that, in terms of damage maritime liens, there was no special Roman law of collision and cases of collision were governed by ordinary rules of *culpa* or *dolus*.[62] As for the law of salvage, Roman law only dealt with jettison and no liens were mentioned. However, it is submitted that a kind of loan contract similar to bottomry bond did exist in Roman law, which is also called 'maritime loan' by the writer.[63] During the 7th or 8th century A.D., a maritime code, the Rhodian Sea-Law, was made.[64] It was a collection of the maritime laws of the later Rome Empire.[65] The Rhodian Sea Law is composed of three parts. Chapters 17 to 19 in Part II and Chapters 16 to 18 in Part III deal with primitive maritime liens, which are also called 'maritime loan'. By virtue of these provisions, a master, if he owns three quarters of the ship, would have the power to borrow money on the credit of the ship; and the freight or the cargo may hypothecate the ship.[66]

Furthermore, Professor Tetley states that maritime loans under Roman law can be

[58] See Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (W.S. Hein 1930) 7.
[59] The Rhodian Law refers to the earliest written maritime law dated back to c. 800 B.C., which was a maritime code adopted on the Island of Rhodes. For an introduction on the Rhodian Law, see William William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 7.
[60] Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (W.S. Hein 1930) 8.
[61] See *ibid*; see also Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 6.
[62] '*culpa* or *dolus*' means 'negligence or intent'
[63] See Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (W.S. Hein 1930) 17.
[64] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 8.
[65] *Ibid*, 35.
[66] *Ibid*.

categorised into three types: the nautical loan (bottomry); a loan to build, buy or equip a ship secured by a privilege for repairing the ship or supplying the crew; a privilege on cargo by the shipowner or by the person who lent money to pay freight.[67] The submission of William Tetley indicates again that the maritime liens existed in Roman law are only based on the early forms of bottomry and respondentia[68] bond.

Professor Sanborn concludes the characters of such maritime loans as follows:

> a. A contract for a maritime loan was not a gambling contract, but on a contingency in which the parties had a pecuniary interest;
>
> b. Maritime interest could only be contracted for during the continuance of the maritime risk, which begins on the day fixed by the contract for the departure of the ship, and ends, as a rule, when the ship returns;
>
> c. A maritime loan generally contained a pledge or a hypothecation, either of the goods purchased with the money lent, or to be purchased with the proceeds of the sale of the goods, or other goods belonging to the borrower and sailing on other ships or borrower's land.
>
> d. There was a penalty if the loan with interest was lost or insufficient, but what the penalty consisted appeared to be not clear.[69]

As defined by Price, a bottomry bond refers to 'a contract in the nature of a mortgage on a ship, a ship and her freight, or a ship and her freight and cargo, where by the master, in case of necessity and in the absence of other credit, borrows money at interest on the security of the property hypothecated in order to enable the ship to continue her voyage, repayment depending on her safe arrival.'[70] Therefore, it is clear that the above 'maritime loan' in Roman law may be deemed as an immature form of bottomry bond. The learned writer was of the same view by pointing out that the maritime loan

---

[67] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 9.

[68] A bottomry bond and respondent refer to two commercial instruments in early times under which a master in the course of a voyage could procure a loan or advance of credit against the security of the ship or cargo in emergency. Where the ship is charged, the instrument is called as 'bottomry'; where the cargo is charged, the instrument is called 'respondentia'. Such instruments are out of date now. See generaly, D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 206-228; see also Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 28-36.

[69] Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (W.S. Hein 1930) 35.

[70] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 28.

developed into two important forms, one of which was the bottomry bound.[71]

Although there was no such terminology of 'maritime lien' existing in Roman law, the Roman law doctrine of hypothecation found its relationship with maritime liens.[72]In the view of Price, the concept of maritime liens may be found in two sources[73]:

> a. 'By the law of hypothec, many objects, including movables, could be pledged as security for a debt. Possession remained in the debtor, but creditor could assert his right by an action *in rem* against third parties. Further, a lien might be implied by law without express hypothecation;
>
> b. A person who built or repaired a vessel had a privileged claim which may be regarded as a tacit hypothecation.'

Another writer, Paul Macarius Hebert, points out that, under the historical theory advanced by Mr Justice Holmes,[74] the ship was regarded as a juristic entity and bond by its contracts and therefore, it was natural for the Roman doctrine of hypothecation of movables to find its way to the maritime law.[75] In this sense, Hebert submits that the historical theory would trace the origin of maritime liens arising *ex contractu* or quasi *ex contractu* to the hypothecs in Roman law.[76] However, Professor Staniland has a different point of view. First of all, he points out that the view of Hebert, which submits that Roman law recognised an express hypothecation of a vessel by means of a contract 'very similar' to bottomary bond, appears to be a misreading of an earlier writer Holdsworth.[77] Professor Staniland argues that 'the maritime lien, in all its characteristics, cannot be traced directly back to Roman law.' In order to support this view, the writer makes a comparison between maritime lien and hypothecation.[78] In the case of a tacit hypothecation, the *res* is bound without expressed words of convention and obligation and no possession passed. An example was set by the writer: the landlord of a farm let to a tenant had a charge upon his tenant's furniture for the use of the

[71] The other form is the Italian development of insurance law in respect of premium insurance.
[72] Paul Macarius Hebert, 'The Origin and Nature of Maritime Liens' (1929-1930) 4 Tul L Rev 381, at 382; see also Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 6.
[73] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 6.
[74] *Ibid*.
[75] Paul Macarius Hebert, 'The Origin and Nature of Maritime Liens' (1929-1930) 4 Tul L Rev 381, at 382.
[76] *Ibid*.
[77] Hilton Staniland, 'Roman Law as the Oringin of the Maritime Lien and the Action in Rem in the South Africa Admiralty Court' (1996) Fundamina: a Journal of Legal History (2) 285-297.
[78] *Ibid*, a similar view may also be found in Hilton Staniland's Ph.D. thesis, *A Comparative Analysis of Maritime Lien* (PhD Thesis, University of Southampton UK 1990).

habitation.[79] In this sense, the tacit hypothecation may explain the liens arising from seamen's wages and salvage because services are performed to the ship and cargo; but it cannot explain why there are no established maritime lien for towage and pilotage. Furthermore, both Hebert and Staniland agreed that the maritime lien for damage done by a ship, as said before, would appear to have no parallel in Roman law.

Nevertheless, Professor Staniland also argues that:

> '*...[T]he Roman law did, contrary to conventional wisdom, play an important role in creation of the maritime lien and the action in rem cannot be denied.*' [80]

Therefore, a better view could be summarised that Roman law is not the direct origin of maritime liens but it did set up a few moulds for maritime liens such as bottomry and respondentia bond. Moreover, the theory of hypothecation may still be deemed as the original source of maritime liens although the hypothecation in Roman law is not exactly the same as maritime lien known to the contemporary maritime law. Maritime liens might be regarded as a further development of the theory of hypothecation in the context of sea trade.

2.2.1.3 Other maritime codes

After the Roman Empire, there appeared several significant maritime codes around Mediterranean.[81]Although these medieval sea codes do not expressly refer to liens, yet some forms of maritime liens may be found in those codes. In 1063, in the Southern Italy, the *Ordinance of Trani*[82] was set in force. Article XXXI of the *Ordinance* provides that the master of ship may hypothec the ship to repair her because of bad weather or corsairs.[83] The maritime loan under Roman law appeared to have been followed in the *Ordinance.*

Since the time of the *Ordinance*, attention has been drawn to seamen's rights because

[79] *Ibid*
[80] *Ibid*
[81] The period from 1063 to 1500 is described as the most important one, known as a new era, in the history of the sea laws, see Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (W.S. Hein 1930) 42.
[82] The phrase means 'The Decisions of Trani in Sanborn's Work'.
[83] Art. XXXI, *Ordinance of Trani*, The Black Book of Admiralty 524-543. See also, Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (W.S. Hein 1930) 49.

seamen were no longer slaves or chattels on board but freemen instead. However, the *Ordinance* did not provide any liens for seamen for their wages. Afterwards the *Laws of Wisbuy*[84] and the *Consulat de la Mer*[85] started to recognize that the rights of seamen in the ship as security for their wages, and that of merchants for the injury or loss of their goods was something more than mere a personal privilege. Such rights were referred to as 'special hypothecs', which is similar to the present concept of maritime lien.[86] In addition to the lien for seamen's wages, those codes also provide liens for bottomry and general average claims.[87]

The *Consulat de la Mer* was a combination of the Consuls' decisions prepared either at Barcelona in Spain or at Pisa in Italy, which at that time constituted with Venice and Genoa the great trading cities of the Italian peninsula.[88] The *Consulat de la Mer* should be dated before 1096, although the date of the code's first promulgation is unknown.[89] The code consisted of comprehensive rules dealing with various maritime subjects that now entered into the admiralty and maritime law of all civilized nations, including ownership of vessels, duties and responsibilities of the masters or captains, duties of seamen and their wages, freight, salvage, jettison, average contribution, the rights of neutrals in time of war.[90] Principles in this code have been universally adopted by shipping nations during the development of maritime law. In respect of maritime liens, a preference to seamen's wages on cargo is given by Article 62 and a further preference for wages on the ship is given by Article 93.[91] In addition, Article 148 provides a further lien[92] for wages on the ship where the cargo, freight or the charterer cannot provide money for seamen's wages. These preferences are deemed as the possible source of the

[84] Also known as the Rules of Visby; see William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 20-21.
[85] Also known in English as The Customs of the Sea.
[86] Paul Macarius Hebert, 'The Origin and Nature of Maritime Liens' (1929-1930) 4 Tul L Rev 381, at 382.
[87] See William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 20-21.
[88] 'Maritime Law History' <http://www.historyoflaw.info/maritime-law-history.html> accessed on 09 Oct. 14.
[89] The *Consolato del Mare* preceded the First Crusade, which was commenced in A.D. 1096. See 'Maritime Law History' <http://www.historyoflaw.info/maritime-law-history.html> accessed on 09 Oct. 14.
[90] *Ibid*
[91] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 21.
[92] '…a further preference, actually a lien…' says William Tetley. See William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 21.

high ranking of seamen's lien for wages in contemporary maritime law.[93]

Besides the above codes, another significant and influential maritime law in middle ages was the *Roles of Oleron*. *The Roles of Oleron* came into existence at the end of 12th century A.D. which was the first recorded source for modern maritime law in both the civil law and common law jurisdictions. The *Roles* consisted of both stated principles and reported judgment, which was widely spread in the Baltic and Nordic countries and described as the basic written maritime law, the written *lex maritima* of the Atlantic coast of Europe.[94] The principles enunciated in the *Roles*, along with some of the basic principles of earlier maritime codes, inspired the general maritime law of England as well as the maritime law of France and Northern Europe. [95]

From the English version of several articles in the *Roles* provided by Professor William Tetley[96], Article 1 of the *Roles*, which was a description of the bottomry bond, provides that the master may pledge the ship's equipment upon the advice of the crew where he requires money for the expenses of the ship. The law gave the master the authority to hypothecate the ship's equipment for necessary expenses. Forms of liens arising from respondentia and a lien on cargo for salvage may also be found in different manuscript of the *Roles*. According to Professor William Tetley, Article 3 of *Roles* provided for respondentia and arguably a lien on cargo for salvage may be inferred from the provision of Article 4 of the *Roles*.[97]

2.2.2 English law

The English admiralty jurisdiction was impacted by the civil law.[98] As pointed out by Professor Ryan, there are two major sources of law for the admiralty jurisdiction: one source is the *Roles of Oleron*, which were introduced into England and gradually adopted by the Court of Admiralty; the other one is Roman law.[99] The *Roles of Oleron* was incorporated into the Black Book of Admiralty. Thus the concept of maritime lien

[93] *Ibid*.
[94] *Ibid*, 13.
[95] *Ibid*, 18.
[96] *Ibid*, 17.
[97] *Ibid*, 19. The writer refers to the Brittany version of the *Roles.*
[98] The English Admiralty Court emerged sometime between 1340 and 1357. The Court applied Roman law and the *Roles of Oleron*. Doctors in civil law had a monopoly of practice in the Admiralty Court. See *The Goring* (1987) 1 QB 687 and *The Tolten* [1946] P.135.
[99] Edward F Ryan, 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 W Ontrario L Rev 173, at 186-187.

was also introduced to English law and was used as a weapon by the Admiralty Court in its competition with Common Law Courts.

Due to the existence of overlaps between Admiralty jurisdiction and Common law jurisdiction, the two jurisdictions waged a long 'war' to enlarge the territory of each. In the 17th and 18th centuries the common law courts prevented the court of Admiralty from exercising its jurisdiction over individuals personally. As a result, the Admiralty Court used maritime liens along with action *in rem* as the defence in the competition so as not to lose jurisdiction completely.[100] The concept of maritime lien was gradually developed during the competition and by 'the innovatory utilisation of the civilian concepts already embedded in the Admiralty jurisprudence of the time.'[101] The development was through judicial decisions followed by statutory enlargement afterwards.

2.2.2.1 Case law development

According to Professor Ryan, as early as 1614, the King's Bench had recognised the power of the master to hypothecate the ship.[102] Later in 1689, in a case on bottomry lien[103], it was further held that, in such a case, there was 'no colour for a prohibition, for it is a matter properly triable by the maritime law, and they have no remedy at common law.' And it was also held that 'no action lies against the master, but only in the admiralty, because the party hath taken the ship for his security.' In a 1789 case on a bottomry bond as well[104], it was held:

> '*... in the struggles which have been made between the court of admiralty and common law courts, respecting the extent of their respective jurisdictions, the latter have said that, if the parties have bound themselves to answer personally, the former cannot take cognizance of the question. But that cannot be extended to a case where, from the nature of the contrast, the proceedings are confined to the thing in specie over which the court of admiralty has the sole jurisdiction. In such a case as the present the party could have no remedy in the court of common law; for the contrast*

[100] For the competition of jurisdiction, see generally Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 10; see also William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 29-35.
[101] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 9.
[102] Edward F Ryan, 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 W Ontrario L Rev 173, at 186-187.
[103] *Corset* v *Husely* (1689) Holt, K.B. 48; 90 E.R. 924.
[104] *Menetone* v *Gibbons* (1789) Term Reports 267; 100 E.R. 568.

is merely in rem …'

The right of seamen to sue the ship *in rem* is another means by which the concept of maritime lien grew up. By 1700, the law was stated in *Clay* v *Sudgrave*[105], which was a suit for seamen's wages to be that 'the ship itself is answerable'.[106] The Judge held that mariners were permitted to sue in the Admiralty Court for their wages because the remedy in admiralty was the easier and better. For the reasons, the Judge said:

'*…easier, because they must sever here, whereas they may join there; and better, because the ship itself is answerable.*'[107]

Later in 1704 mariner's right *in rem* was grounded in 'usage time out of mind' and liability of the owner.[108] And besides, the Admiralty law seems to have always allowed a seaman to have security on the ship. The Black Book of the Admiralty considered the case where an owner chartered his vessel to someone who died or run away after the mariner has served his time. Under this situation, the Black Book of the Admiralty provided that the ship is bound to pay the mariners because they have served in her.[109] It was also provided:

'*And if by chance the said managing owner of the ship or vessel shall not be willing to observe that agreement with [his mariners] he is bound to make good the loss … even if the said ship shall have be sold.*'

Also in the 18th century, in a salvage case, *The Two Friends*[110], the judge stated that 'every person assisting in rescue has a lien for it upon the thing saved.'[111] But maritime lien was not regarded as a unique concept in the judgement and no attempt was made to distinguish the specified lien from the possessory lien known to the common law.[112] The Admiralty Court, purporting to find its law in the *jus gentium*, declared 'every person assisting in a rescue has a lien on the thing saved … his first and proper remedy is *in*

[105] (1700) 1 Salkeld 33; 91 E.R. 34.
[106] *Ibid*.
[107] *Ibid*.
[108] *Wells* v *Osman* (1704) 2 Lord Raymond 1044; 92 E.R. 193.
[109] 3 Black Book 261-263.
[110] (1799) 1 C. Robinson 271.
[111] *Ibid*, per Sir W. Scott, at 277.
[112] Edward F Ryan, 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 W Ontrario L Rev 173, at 194.

rem.'[113] The same court, 24 years later, clarified another attribute of the emerged salvor's lien where it was held:[114]

> '*It is an ill-founded and absurd notion that unless salvors stick by the ship, they forfeit, or at least impair their title to remuneration. It is very desirable that salvors, generally, should know that in order to maintain their rights it is perfectly unnecessary to remain on board the vessel which may have received their assistance.*'

Since then a maritime lien has been distinct from a common law lien in that there is no requirement of possession for a maritime lien. However, among all the above cases, no such words of 'maritime lien' were used. Instead, the concept of hypothecation or lien was used to deal with the absurd type of cases. Also note that, during that time, the concept of maritime lien was deeply rooted in action *in rem* and the two were even deemed as the same concept.[115]

The Bold Buccleugh

In 1851, in the decision of *The Bold Buccleugh*[116], the phrase 'maritime lien' was used for the first time as a term of art in the history of English law[117], which started to have distinct legal meaning and came to be referred to thereafter in admiralty practice. [118]

In December 1848, a collision took place in the River Humber between '*The William*' and '*The Bold Buccleugh*'. Afterwards, the owner of '*The William*' brought a suit against the owners of '*The Bold Buccleugh*' in the Court of Session in Scotland for damage by collision. *The Bold Buccleugh* was arrested under the process of that Court, and was released upon bail later. During the pending of the proceedings, the ship *Bold Buccleugh* was sold to the new owner and came to the port of Hull. Another suit was brought in the High Court of Admiralty of England and the vessel was arrested under

[113] *The Two Friends* (1799) 1 C. Robinson 271.
[114] *Eleanora Charlotta* (1823) 1 Haggard 156; 166 E.R. 56.
[115] Such a position was reflected in the decision of *The Bold Buccleugh* as is discussed in the following paragraphs.
[116] 7 Moo. P. C. 267.
[117] Before the decision of *The Bold Buccleugh*, 'maritime lien' was used as terminology in an American decision *The Nestor* [1831] 18 Fed Cas 9.
[118] Edward F Ryan, 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 W Ontrario L Rev 173, at 196.

process of the High Court.

In the first instance, the judgment of the High Court did not mention the word 'maritime lien'. In consideration of protection of the 'best security for compensation', it was held that 'a mere change of property does not exonerate a ship from the liability of being sued; neither can a sale of vessel after a collision produces any such effect'.[119] The new owner of the *Bold Buccleugh* appealed. Sir John Jervis affirmed the judgement of the Court below and raised the issue of maritime lien. The learned Judge, first of all, distinguished a maritime lien from the concept of lien in common law stating that:[120]

> '*A maritime lien does not include or require possession. The word used in Maritime Law not in the strict legal sense in which we understand it in the courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession.*'

And then the Judge followed:

> '*This was well understood in the Civil Law, by which there might be pledge with possession, and a hypothecation without possession……Having its origin in this rule of Civil Law, a maritime lien is defined…to mean, a claim or privilege upon a thing to be carried into effect by legal process;…….A maritime lien is the foundation of the proceeding in rem…and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had…*'[121]

First of all, the Judge confirmed that maritime lien in English law originated in civil law and is different from a lien under common law. Secondly the Judge confirmed that the 'maritime lien' was attached to claims arising from 'wages, salvage, collision or … bottomry.'[122] Therefore, a comprehensive and contemporary concept of maritime lien was given in English law in the sense that both the meaning and scope of maritime liens were described by the Judge.

The effect of the decision of *The Bold Buccleugh* was summarised by Edward Ryan in

[119] *The Bold Buccleugh*, (1850) 3 W. Robinson 220, see 230.
[120] *The Bold Buccleugh*, (1851) VII Moore, P.C. 267, see 285.
[121] *Ibid*, at 284.
[122] *Ibid*, at 283.

his article on admiralty jurisdiction and maritime lien:

> *'This was the case not where the maritime lien was born, but rather where it was unveiled and placed in full view.'*[123]

Nevertheless, the concept of maritime lien was not separated from the *in rem* proceeding although it is distinguished as a different category of right. According to Sir John Jervis's view, a maritime lien was still the foundation of the proceeding *in rem*.[124]

2.2.2.2 Statutory Enlargement

Admiralty rules in English law are to be found partly in judicial statements in decided cases and partly in legislative act, statute or rules of procedure.[125] This is also true in relation to maritime liens. Generally speaking, the foundation of maritime lien in English law was developed by case law; however, maritime lien has also been enriched by statutes. As Thomas pointed in his work on maritime liens, maritime liens have their principal legal source in the original or instant jurisdiction of the High Court of Admiralty and municipal statutes; and maritime liens in respect of salvage, seamen's wages and damage all have been extended substantially by subsequent legislative enactments.[126] Although these statutory provisions barely use the phrase 'maritime lien', the scope of each maritime liens were enlarged along with the enlarged Admiralty jurisdiction by virtue of such statutory provisions.

Salvage lien

The Admiralty Court Act 1840 instituted the most significant development in the early history of the salvage jurisdiction of the High Court of Admiralty. Section 6 of the 1840 Act extended the jurisdiction of the High Court of Admiralty from upon high sea to salvage claims arising from services rendered within the body of a country.[127] The geographic extension was followed in the subsequent Supreme Court of Justice

[123] Edward F Ryan, 'Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective' (1968) 7 W Ontrario L Rev 173.
[124] *The Bold Buccleugh*, (1851) VII Moore, P.C. 267 at 284.
[125] DC Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 1.
[126] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 18-19.
[127] The admiralty jurisdiction was confined to claims arising on the high sea during its competition with the Common Law Courts. See 2.3.1.2, below.

(Consolidation) Act 1925. However, in a later case, *The Goring*[128], the House of Lords made it clear that the Admiralty Court did not have jurisdiction regarding salvage rendered in non-tidal water. In addition, the U.K. also made reservations while giving effect to the Salvage Convention 1989 that the Salvage Convention is not applicable on in-land waters which was defined basically as non-tidal water.[129]

Seamen's wages lien

Section 10 of the Admiralty Court Act 1861 provides:

> '*The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise…*'

According to Thomas's view, two results were achieved by the above statutory provision. Firstly, this provision affirms the original jurisdiction over seamen's wages; and secondly, it extinguished the distinction between ordinary and special contracts[130] and therefore, the court had jurisdiction whatever the nature is the contract or the terms of the service.[131] The 1861 Act was ultimately replaced by the Supreme Court of Judicature (Consolidation) Act 1925, wherein the wages jurisdiction was reproduced in substantially similar terms. And later, the Administration of Justice Act 1956 removed the requirement of being 'earned on board' for seamen's wages.[132]

Besides seamen, masters also have liens on their wages. The jurisdiction of the Admiralty court to entertain a suit for wages brought by the master of a ship was first conferred by Section 16 of the Merchant Shipping Act 1844,which provided a master with 'all the Rights, Liens, Privileges and Remedies… which… belong to any Seaman or Mariner.' Such a parallel pattern between a seaman's and master's wages lien was

[128] [1988] 1 Lloyd's Rep. 397.
[129] Merchant Shipping Act 1995, section 224(2) and Schedule 11, Part II para 2(1)(a) and (b). See also William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 346.
[130] An ordinary mariner's contract was described as a hiring on the usual terms made by word and writing only; an employment under the term by deed was a special contract. See D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 171-172.
[131] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 173.
[132] The current law is the Senior Court Act 1981 at section 20(2)(o). According to William Tetley, section 20(2)(o) seems to be an amalgam of the relevant provisions of the 1956 Act.

subsequently followed in the later versions of the Merchant Shipping Acts.[133]

Collision damage lien

The Admiralty Court Act 1840 was the first legislative step in the extension of the jurisdiction of the High Court of Admiralty in respect of claims for damage done by a ship. Section 6 of the 1840 Act removed the former geographic restriction and extended the Admiralty jurisdiction so as to embrace claims arising from damage received within the body of a county. Twenty years later, the Admiralty Court Act 1861, which existed concurrently with the 1840 Act deflected the emphasis away from the nature of the recipient of the damage and focused it on the instrument of the damage. The phrase 'damage done by a ship' was specifically referred to in the 1861 Act and had been reproduced in the following Acts.[134]

Master's disbursement

The maritime lien arising from master's disbursement was a statutory creature.[135] It is submitted that the 'first implied reference'[136] to master's disbursements was in the Merchant Shipping Act 1854, which gave the Admiralty Court authority to order payment of outstanding master's disbursements in certain situations.[137] However, the House of Lords, in the decision of *The Sara*,[138] denied that those statutes created a maritime lien for master's disbursement. Indeed, the lien was agreed to have been created, for the first time, by section 1 of the Merchant Shipping Act 1889, which gave the master the same rights, liens and remedies for the recovery of his disbursement on

---

[133] Masters' lien on wages are currently provided in Section 41 of the Merchant Shipping Act 1995, which provides that 'The master of a ship shall have the same lien for his remuneration, and all disbursements or liabilities properly made or incurred by him on account of the ship, as a seaman has for his wages.'

[134] The Supreme Court of Justice (Consolidation) Act 1925, the Administration of Justice Act 1925, and the Senior Court Act 1981.

[135] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 199-202; see also William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 422-424.

[136] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 423.

[137] Section 191 of the Merchant Shipping Act 1854 provides that:

> '*If in any proceeding in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due.*'

The statute does not expressly attaches a lien to his claims for disbursements but it is said that the effect of their provisions is to give him the right by implication.

[138] *The Sara* (1889) 14 App Cas 209.

account of the ship as he had for wages. The right to a maritime lien for a master's disbursement have been confirmed by subsequent statutes, the Merchant Shipping Act 1894, 1970 and 1995.[139]

2.2.3 Chinese law

2.2.3.1 Pre-1949: before People's Republic of China

Historically speaking, China has always been a shipping nation. Chinese maritime history may be traced back thousands of years. As early as in Tang Dynasty (618-907 A.D.), China was renowned for the flourishing seaborne trade.[140] However, there were barely laws or regulations in relation to shipping and commercial activities. There was even no civil or commercial code separate from the criminal code in traditional Chinese law. The only legislation related to maritime affairs indeed attempted to restrict the development of merchant ships and to control seaborne trade.[141] Furthermore, a 'Haijin' policy, of which the literal meaning is 'sea ban', was conducted during China's Ming Dynasty[142] and again at the time of the Qing Dynasty[143] in order to limit foreign trade. Such a policy imposed huge hardships on coastal communities and sea traders.

The first attempt of making law on maritime affairs appeared in late-Qing Dynasty. In 1909, the Merchant Shipping Law (Draft) was drafted as part of the Commercial Code. Following the German and Japanese Maritime Codes, the Merchant Shipping Law did include one chapter providing for ship's mortgages and maritime liens. However, this Law, unfortunately, had never been enacted before the Qing Dynasty came to an end. During the time of the Republic of China, the Maritime Act of the Republic of China was enacted on December 30 1929, which was based on the German Maritime Code. Following the German law position, this act provided for maritime liens arising from special legislative rights,[144] seamen and masters' wages, salvage, collision damage,[145] bottomry bond and damages to shippers. However, after establishment of the People's

[139] For example, Section 41, Merchant Shipping Act 1995.
[140] Huanning Wu, 'China and Maritime Law' (1988) 5 MLAANZ.
[141] Such regulations existed from Tang Dynasty till Yuan Dynasty.
[142] The Ming dynasty was the ruling dynasty of China from 1368 to 1644.
[143] The Qing was the last imperial dynasty of China, ruling from 1644 to 1912.
[144] Article 27 (1), Maritime Act 1929. The special legislative rights include litigation costs and other costs for the common interests of creditors; tonnage dues, lighthouse dues, port dues, and other similar charges; pilotage, towage, watchman charges; and custody and inspection charges.
[145] Article 27 (4), Maritime Act 1929. The collision damage includes loss of life or personal injuries and property damages.

Republic of China, the 1929 Act was abolished.[146] Therefore, in a historic perspective, maritime liens under Chinese law may also be traced back to Roman law and codified civilian law. In this sense, maritime liens under English law and Chinese law share the same origin historically. Nevertheless, there was no necessary connection between the 1929 Act and the maritime law of the People's Republic of China in that the current Chinese legislation is independent from that before the People's Republic of China.

2.2.3.2 After 1949: law of the People's Republic of China

At the beginning of the People's Republic of China (P.R. China), there was little political and economic communication between China and other countries. Therefore, only few maritime disputes would arise and the demand for maritime legislation is not obvious. As a result, there was no relevant law, both procedure and substantial law, on maritime affairs. At that time, the disputes were seldom dealt with by a court; rather, maritime claims, especially those with foreign elements, were in the charge of administrative authorities.[147] For example, in a 1967 case, a Greek ship, *the Aegean*, was arrested by the court under the instruction of the State Council of China.[148] In the whole period from 1950s till 1970s, there was no legislation or legal practice on maritime issues in China.

However, things have changed since 1978, when the Reform and Open Policy commenced in China. Since then, the commercial activities and international trade have developed tremendously in China, and therefore, the need for law to deal with relevant disputes has also grown. The Maritime Traffic Safety Law of the People's Republic of China was adopted by the standing committee of the People's Congress in September 1983. The Maritime Traffic Safety Law, which is still in force, for the first time, confirmed the jurisdiction of People's Court in maritime disputes.[149] In addition, the Chinese People's Committee established the Maritime Courts in 1984, which are equivalent to the English High Court of Admiralty. However, until that time, there had

[146] The Act is still in force in Taiwan area subject to several amendments afterwards.
[147] Hong Shi, 'Perfection of the Arrest of Ships in China', (LLM dissertation, Dalian Maritime University China 2002).
[148] At that time, an administrative instruction had an equivalent force of law. However, such a method was not in use after the relevant law has been issued.
[149] Article 46 of Maritime Traffic Safety Law provides:
A civil dispute arising from a maritime traffic accident may be settled through mediation by the competent authority. If the parties are unwilling to have the case mediated or if the mediation is unsuccessful, the parties may bring a suit in the people's court.

been no law on maritime liens or arrest of ship.

Nevertheless the Chinese courts did hear several cases relating to maritime liens by following the only applicable laws[150] at that time and international maritime practice and customs, which was a great exploration for the Chinese maritime law practice. The very first case on the issue of a maritime lien heard in People's Republic of China was *The M/V Bell Pe*, which was decided by Shanghai Intermediate People's Court in 1984.[151]

The M/V Bell Pe[152]

On 22nd December 1983, the respondent, Shanghai Foreign Trade Co. ltd, bought the *M/V Bell Pe* from a Panamanian company for the price of 430,000 USD. Prior to the purchase, the vessel asked for supplies and necessaries from the plaintiff, a Federal Germen company, at the port of Constanta in Romania. However, the previous owner had never paid the money for those supplies to the plaintiff. After acknowledgement of the sale, the plaintiff notified the respondent of the debt and claimed payment from the respondent. In order to proceed with the purchase, the previous owner provided to the respondent a letter of indemnity from a bank undertaking to compensate the potential loss; and the respondent accepted. Later, in June 1984[153], the plaintiff brought an action in Shanghai Intermediate People's Court and claimed that he had a maritime lien over the vessel and enjoyed a priority in getting payment. The respondent, on the other hand, contented that there was no contractual relationship between the respondent and the plaintiff.

Although there was no law of maritime lien in China at that time, Shanghai Intermediate People's Court, following relevant international maritime practice, approved the transfer of debit along with the transfer of ownership. In fact, the term 'maritime lien' was not used in the judgement, although the dispute is obviously a claim arising from a maritime lien in nature.

[150] Maritime Traffic Safety Law of PRC 1983 and Civil Procedure Law (Trial) 1982.
[151] There was no maritime court at that time and only one intermediate court in Shanghai.
[152] *Gebuschmarker Limited Partnership Company* v. *Shanghai Municipal Foreign Trade Company*, Bulletin of the Supreme People's Court of the P.R. China (1988) N3, 41.
[153] Although the maritime court had been founded on 1st June 1984, for some other reason, which is unknown to the author, the disputes still went to the intermediate People's Court in Shanghai.

After the hearing, the court decided the case on basis of a 'debt transferring with the vessel'. The court held that the fact that the respondent was notified of the debt before his acceptance of the vessel and the fact that he accepted of the letter of indemnity illustrated that the respondent accepted the transfer of the debt along with transfer of the ownership of the vessel. Therefore, the court rejected the respondent's argument and held that the respondent was responsible for the payment. Finally, a settlement agreement was concluded between the two parties under the supervision of the Court, under which the plaintiff got the payment from the indemnity afforded by the previous owner.

This decision was highly approved by the Supreme People's Court of China in 1985.[154] Nevertheless, some defects may still be found in the decision. First of all, the Court labelled the dispute as a case of 'debts transferrable with ship' and the Court also held that there was a transfer of debt between the previous owner, who was the initial debtor, and the respondent. However, debts transferrable with ship and transfer of debt are not the same concept in that, in the case of a debt transferrable along with the ship, there will be no need for transferring the debt, which shall happen automatically after the change of ownership.[155] Secondly, the letter of indemnity did not make any changes to the original debt and that is to say, there was no actual transfer of debt between the parties. Thirdly, the Court did not explain the applicable law underpinning the decision and the authority in the decision was simply referred to international maritime practice.[156] However, in consideration of the absence of law and even jurisdiction at that time, the decision still shall be recognised a good precedent of maritime lien practice in China.

After the first exploration, Chinese courts made a few more decisions in respect of issues arising from maritime liens. For example, a Soviet Russian vessel, the *M/V Divogosk*, was arrest by Qingdao Maritime Court in a collision case; [157] a Liberia vessel *M/V Opal City*, was arrested by Shanghai Maritime Court for seaman's wages and

[154] The decision of *The M/V Bell Pe* was reported as a leading decision in Gazette of the Supreme People's Court of the People's Republic of China 1985.
[155] Same as the position of maritime liens.
[156] There was no reference in the judgment referring to specific practice or law of other countries.
[157] A summary of the judgement is available in Chinese at <http://gongcunlawyer.com/newsread.asp?id=11> accessed on 01 October 2014.

bottomry.[158] These legal practices in China reflected the demand for regulations on maritime lien.

Regulations on arrest of ship

One year after the decision of *The M/V Bell Pe*, in 1986, the first regulation dealing with issues arising from arrest of ships, the Detailed Regulations of the Supreme People's Court on the Impoundage of Sea Vessels Prior to Litigation (Arrest Regulations 1986)[159], was enacted. The enactment of the Arrest Regulations indicated the establishment of arrest of ship procedures under Chinese law. Additionally, another regulation on judicial sale and compensation, the Detailed Regulations of the Supreme People's Court on the Compulsory Realization of the Detained Ship (Judicial Sale Regulation 1987)[160] was enacted in 1987. The combination of the two regulations opened the window for regulations on maritime liens in China.

The Arrest Regulations 1986, for the first time, provided that ship may be arrested for maritime liens under Chinese law although no terms of 'maritime lien' was used in the Regulations. Article 1 of the Arrest Regulations provided that the maritime claims included claims arising from a 'priority right to be repaid' The 'priority right to be repaid' was an alternative expression of maritime liens which reflected maritime liens' higher ranking in compensation. In addition, the ranking of compensations was listed in Article 3 (2) of the Judicial Sale Regulations 1987, which was basically the same as the priority in Maritime Liens and Mortgages Convention 1967. It can be inferred that those claims such as seamen's wages, salvage, port dues, collision damages etc. as listed in the Judicial Sale Regulations are exactly what the 'priority right to be repaid' in the Arrest Regulations refers to. Therefore, these claims were treated in the same way as maritime liens and the jurisprudence of maritime liens was founded in Chinese law. These two regulations played an important role in China's maritime legal practice before the Chinese Maritime Code 1992 entered into force.

[158] A summary of the judgement is available in Chinese at <http://jpkc.hdu.edu.cn/finance/gjmy/jxzy/al/ys/6.html> accessed on 01 October 2014.
[159] The Arrest Regulations 1986 are expired now. The regulations' name is translated by the author.
[160] The Judicial Regulations 1987 are expired now.

2.2.3.3 The Chinese Maritime Code 1992

In order to meet the needs of growing international trade and transport in China, a comprehensive maritime code was in demand so as to regulate all kinds of maritime affairs. The drafting work of the Chinese Maritime Code can be traced back to 1950s[161] and the Code entered into force in 1992. It is notable that the drafters of the Chinese Maritime Code 1992 did not rely on any maritime legislation prior to the establishment of the People's Republic of China. Although the Maritime Code is purely domestic, it attempted nevertheless to have a significant impact at an international level due to the consideration that shipping involves international relations by its very nature and the fact that China has become a major shipping nation at that time. Therefore, foreign maritime laws and international conventions and practice were taken into consideration for reference and were carefully examined so that China can both profit from those experiences and ensure the effectiveness of the Maritime Code. In respect of maritime liens, the Chinese Maritime Code was drafted with reference to the Draft International Convention on Maritime Liens and Mortgages (1989), which was considered later at the diplomatic conference in Geneva in 1993.[162] The Maritime Code 1992 provides for regulations on maritime liens in section 3 of Chapter II Ships.

For the purpose of cooperation with the Maritime Code, other legislation and judicial interpretations were drafted and came into force, among which the most important one was the Special Maritime Procedure Law 1999. After the adoption of the Maritime Code, China had established a good basis of substantive law on maritime issues; however, it was still silent on enforcement procedures of maritime claims. In this context, the Special Maritime Procedure Law was drafted with reference to China's maritime legal practice over the past and the newly passed International Convention on the Arrest of Ships 1999 (Arrest of Ships Convention 1999). In the Special Maritime Procedure Law, which was implemented on July 1, 2000, the procedure of arrest of ship is set up in Chapter 2 and the procedure of public summons relating to maritime liens is provided in Chapter 11. Thus a sound system of maritime liens, both substantive and procedural, was established under Chinese law. In addition, the judicial interpretations

[161] Huanning Wu, 'China and Maritime Law' (1988) 5 MLAANZ.
[162] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 1285: The People's Republic of China, written by Professor Yuzhuo Si from Dalian Maritime University.

made by the Supreme People's Court are also one of the sources of Chinese law and are applicable by the courts. Judicial interpretations relating to maritime liens will be discussed in the following sections.

2.3 Current legislation on maritime liens

2.3.1 English law

2.3.1.1 Definition of a maritime lien

Although maritime liens have been existing for a long time as a featured aspect in maritime law, the definition has never been clear. There is no clear definition in the domestic legislation of the United Kingdom. However, the concept of a maritime lien has been frequently considered by the courts and, surprisingly, there has been unanimous agreement with regard to the essential characteristics of a maritime lien.[163] These considerations by the judicial decisions are described as 'judicial definitions' in Thomas and Tetley's work but they are more like descriptions of maritime liens. It was an American case *The Nestor*[164] that gave a judicial definition of a maritime lien for the first time.[165] In the judgement, Justice Story explained on the literature meaning of the word 'lien' in the context of a maritime lien:

> '*It is obvious upon the slightest consideration, that this qualification of the doctrine of lien, founded on and accompanying the possessing of the thing, cannot be applicable to claims, which neither presuppose, nor originate in possessing. Indeed, such claims are not, in a strict sense, liens, though that term is commonly used in our law to express, by way of analogy, the nature of such claims. Language is in this way perpetually deflected from its original meaning, and applied to things, which have a strong similitude, but not a perfect identity.*'[166]

The above words distinguish a maritime lien with a normal understanding lien, which is the concept of lien under common law. Then the Judge continues,

---

[163] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 10.
[164] (1831) 1 Sumner 73; 18 Fed Cas 9.
[165] It is also said that it was *The Bold Buccleugh* gave the first comprehensive definition, see D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 10.
[166] *The Nestor* (1831) 1 Sumner 73, at 81.

'*Now a lien by the maritime law is not strictly a Roman hypothecation, though it* ***resembles*** *it, and is often called a tacit hypothecation…It also* ***somewhat resembles*** *what is called a privilege in that law, that is, right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors… A maritime lien does not include, or require, any possession of the thing. It exists altogether independently of such possession.*' (Emphasis added)[167]

Therefore, according to the learned judge, a maritime lien is distinct from a hypothecation and a privilege, which is a unique concept.

In *The Bold Buccleugh*, a maritime lien is defined by Sir John Jervis as,

…to mean a claim or privilege upon a thing to be carried into effect by legal process… that process to be a proceeding in rem…This claim or privilege travels with the thing into whosoever possesssiong it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached[168]

In *The Two Ellens*[169], Mellish L.J. described a maritime lien as follows:

'*A maritime lien must be something which adheres to the Ship from the time that the facts happened which gave the Maritime lien, and then continues binding on the Ship until it is discharged, either by being satisfied or from the laches of the Owner, or in any other way by which, by law, it may be discharged. It commences and there it continues binding on the Ship until it comes to an end.*' [170]

Later, in *The Ripon City,*[171] Gorell Barnes J, following Lord T Tenrerden, held that a maritime lien is 'a privileged claim upon a thing in respect of service done to it [the ship] or injury caused by it [the ship], to be carried into effect by legal process.' On the basis of the above judicial decisions, it is clear at least that a maritime lien is not a common law lien and is neither, strictly speaking, a hypothecation.

[167] *Ibid*, at 83.
[168] (1851)7 Moo.P.C. 267, at 284.
[169] (1871-73) L.R. 4 P.C. 161.
[170] *Ibid*, at 169.
[171] [1897] P.226.

In *The Tolten*,[172] Scott L.J. explained the literature meaning again with reference to its Continental counter party:

> '*The phrase "maritime lien", was not the original expression in our admiralty diction. We borrowed from the French, who had in their word 'privilege' a clearer and less ambiguous name… The essence of the 'privilege' was and still is, whether in Continental or in English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the "privileged" creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages.*'[173]

From all the above so-called 'judicial definition', two points are noteworthy. Firstly, the maritime lien is easy to describe rather than define. Secondly, the word 'privilege' was frequently used while defining or describing the maritime lien. Professor William Tetley stated in his work that no definition of the maritime lien is necessary under French law because 'privilege' is already a term of the Code of Commerce of France.[174] As the Code and civil style of drafting traditionally looks to ordinary dictionary meanings, a maritime lien is clearly defined in the civil law as a 'maritime privileges' which is a type of the privileged claims under the Code.[175]. However, there is no such concept of 'privileged claims' under English law and therefore it is difficult to provide a clear definition for maritime liens under English law. In this sense, a descriptive definition would appear to be the best approach.

In respect of the definition or description of maritime liens, it has been summarised by Professor Tetley as follows:

> '*In consequence, one may say that a traditional maritime lien is a secured right in the 'res', i.e., in the property of another (ordinarily the ship, but sometimes the cargo, freight and/or bunkers as well), deriving from the lex maritima and the civil law; which arises with the claim, without registration or other formalities; which*

[172] [1946] P. 135.
[173] [1946] P. 135.
[174] See William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 59.
[175] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 191.

travels with the vessel surviving its conventional sale (although not its judicial sale); which remains inchoate until it is enforced by an action in rem; and which, when so enforced, gives the lienor's claim priority in ranking over most other claims, notably ship mortgages. In this sense, the maritime lien is a very different animal from the common law possessory lien, (or the similar possessory lien of the shipbuilder and ship repairer) which are purely a right of retention of another's property until a debt relating to that property retained is paid. Those rights are lost if the creditor loses possession of the property in question.'[176]

2.3.1.2 Recognised maritime liens

As mentioned earlier, the decision of *The Bold Buccleugh* confirmed that maritime liens under English law arise in respect of damage done by a ship, salvage, seamen's and master's wages, master's disbursements and bottomry bond. Amongst all, bottomry bond is not in use anymore in contemporary times due to the development of marine insurance. Therefore, only a small number of claims within the ambit of the jurisdiction of the Admiralty Court would be attached by maritime liens.

It is commonly accepted that maritime liens can be categorised as *ex contractu*, *quasi ex contractu* and *ex delicto*.[177] Such classification is based on the legal nature of the claims out of which maritime liens arise. Accordingly, the damage lien is *ex delicto*; the bottomry, wages and disbursement liens are *ex contactu* and the salvage lien is *quasi ex contractu*.

Alternatively, maritime liens may also be classified as absolute liens and non-absolute liens. This classification 'revolves around the extent to which the accrual of a maritime lien is independent upon the establishment of the personal liability of a *res* owner'.[178] The damage lien and the disbursement lien are therefore non-absolute while, in contrast, the bottomry, wages and salvage liens are absolute since those liens arise from the service done to a ship rather than personal liabilities.

On the basis of the above two ways of categorizing, a damage maritime lien seems outstanding in contrast with other maritime liens under English law. Indeed, as

[176] William Tetley, 'Maritime Liens in the Conflict of Law' (1978) 20 Malaya L Rev 111.
[177] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 5-6.
[178] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 6.

illustrated in section 2.2, a maritime lien for damage done by a ship does not find its root in early maritime codes and civil law jurisdictions. It is submitted that such a maritime lien was firstly established by the decision of *The Bold Buccleugh.*[179] In that case, the Privy Council decided in favour of a maritime lien for damage by collision and the decision has been approved by the House of Lords in *Currie* v. *Mcknight*,[180] in which it was said by Lord Watson that

> *The Bold Buccleugh, ..., is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them is to blame, she must bear a maritime lien for the amount of the damage sustained by the other.*[181]

In this sense, a maritime lien for damage done by a ship shall be deemed as the contribution of English law to the development of maritime liens. That is to say, such a lien, unlike other maritime liens created by civil law, is originated in common law. However, such a maritime lien has been accepted widely by civil law countries[182] and recognised by the international conventions on maritime liens.[183]

2.3.2 Chinese law

2.3.2.1 Definition of a maritime lien

Article 21 of the Maritime Code 1992 defines a maritime lien as the right of the claimant, subject to the provisions of Article 22 of this Code, to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim. This is again more description rather than a definition. Similar to the position of English law, 'maritime lien' is not an original expression under Chinese law and is a translation of the terminology from other sources. In fact, although 'maritime lien' is used as a terminology in the English version of the Chinese Maritime Code 1992, the literal meaning of the Chinese words referring to a 'maritime lien' is actually a 'privilege upon ship'. In this sense, Scott L.J.'s words in

[179] [1851] 7 Moo. P. C. 267.
[180] [1897] A.C. 97.
[181] *Ibid*, at 105.
[182] The damage maritime lien was introduced into French Law in 1949. See William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 388.
[183] See Article 4 of the 1967 Maritime Liens and Mortgages Convention and Article 4 of the 1993 Maritime Liens and Mortgages Convention.

The Tolten would appear also apply to the concept of 'maritime lien' under Chinese law.[184] Nevertheless, unlike in those Civil Law countries, there is no such right of 'privilege' recognised under the Chinese legal system; therefore, the right of maritime lien in Chinese law is a unique and distinct concept. Such a right only exists in maritime law under Chinese law and no reference may be found in the civil law[185] perspective.

Although a maritime lien is difficult to define, the definition given by Article 21 of the Maritime Code seems not to be comprehensive enough. The definition in Article 21 only reflects the priority feature of a maritime lien; however, it does not reflect the feature that a maritime lien travels with the vessel surviving its conventional sale and the feature that a maritime lien remains inchoate until it is enforced by arrest of the ship. In effect, the latter two features were provided for in Article 26 and Article 28 of the Code. In this sense, the maritime lien under Chinese law is essentially same as such right under English law while the definition in Article 21 is not wide enough to cover all the features of a maritime lien under Chinese law. As there is no other right similar to a maritime lien under Chinese law, it is necessary to provide a comprehensive and clear definition or description in the Maritime Code.

2.3.2.2 Recognised maritime liens

Article 22 of the Chinese Maritime Code 1992 provides that the following maritime claims shall give rise to maritime liens:

> *'(1) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts;*
>
> *(2) Claims in respect of loss of life or personal injury occurred in the operation of the ship;*
>
> *(3) Payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges*

[184] See 2.3.1.1, above.
[185] 'Civil law' used here refers to a generic term for non-criminal law; it does not refer to the legal system.

(4) Payment claims for salvage payment; and

(5) Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship.'

Following the categorising approach under English law, maritime liens recognised under Chinese law may also be divided into different categories. Accordingly, article 22 (2) and (5) are equivalent to collision damage maritime liens and are *ex delicto* and non-absolute. The rest are *ex contactu* and absolute liens.

Although the Maritime Code 1992 follows a draft version of the 1993 Maritime Liens and Mortgage Convention, the listed maritime liens in the Code are not same as they are in the 1993 Convention. The differences are summarised by Professor Yuzhuo Si as follows:[186]

'(1) Claims for payment of harbour dues precede those for the payment of salvage claims, whereas salvage precedes harbour dues under article 4 of the 1993 Convention.[187]

(2) There are more exceptions to the scope of application in the 1993 Convention. The Code only excludes the application of oil pollution damage referred to by CLC 1969, while the 1993 Convention excludes all claims arising under international conventions or domestic laws providing for strict liability and compulsory insurance.

(3) There are no provisions in the Code similar to article 12 (2) or (3) of the 1993 Convention, requiring that the costs for upkeep of the vessel and the crew, as well as wages, incurred from the time of arrest or seizure be paid out of the proceeds of sale, and that in the event of the forced sale of a stranded or sunken vessel, following its removal by a public authority in the interest of safe navigation or protection of the marine environment, the cost of such removal be paid first out of the proceeds of the sale pursuant to domestic law.'

[186] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 1285.
[187] The ranking of maritime liens will be dealt with in Chapter V.

2.3.3 International unification

There have been three international attempts to create a uniform framework of maritime liens. They are The International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926, the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967, and the International Convention on Maritime Liens and Mortgages 1993.

However, the international unification with regard to maritime liens does not achieve a great success. The 1926 Convention had been ratified by 28 states by 2009.[188] The 1967 Convention, which intended to replace that of 1926, has been ratified by five states and has not yet entered into force. Many of the more powerful maritime nations such as Japan, the United Kingdom and the United States have not ratified either Convention. A third attempt has resulted in the acceptance on 6 May 1993 by delegates of 65 states of the International Convention on Maritime Liens and Mortgages 1993. The Convention came into force on 5 September 2004. So far the 1993 Convention has 17 parties and 11 signatories.[189] The United Kingdom is a State Party to none of these Conventions; China has signed the 1993 Convention but has not ratified it. Nonetheless, the Chinese Maritime Code 1992 incorporated a draft version of the 1993 Convention in respect of regulations on maritime liens.

2.4 Enforcement of maritime liens

2.4.1 Enforcement aspects

As Professor Jackson points out, there are three enforcement aspects of maritime claims. The first one is the interim or provisional remedy aspect, namely the extent to which a remedy may be obtained by a maritime claimant so as to ensure that there will be assets available to turn a judgment into material gain. The second one is the jurisdictional aspect, namely the rules governing the bringing of an action to enforce a maritime claim. The third one is the security aspects, namely the extent to which a

[188] CMI Year Book 2009, Part III, Status of Ratifications to Maritime Conventions.
[189] United Nation, 'Transport and Communication' (Treaty Collection, 2014) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&lang=en> accessed on 01 October 2014.

maritime claimant becomes a preferred creditor. [190]

These three aspects also apply to a maritime lien, which is obviously a type of maritime claim. For the interim or provisional remedy aspect, a maritime lien is affiliated to maritime property, which normally refers to the ship. Therefore, the ship may be sold by the court and the claimants get compensation from the proceeds of the ship. For the jurisdictional aspect, a maritime lien is enforced by an action *in rem* or arrest of the ship and once the writ has been issued or the ship has been arrested, the lien holder is entitled to bring his suit to the Court. In terms of the security aspect, a maritime lien is considered as a privileged claim which enjoys a high priority in ranking and maritime lien holders are often described as 'first class' claimants.[191]

2.4.2 English law

Under English law, a maritime lien has historically been enforced only by means of an action *in rem* and only in the Admiralty Court. This is reflected by section 21(3) of the Senior Court Act 1981 which provides that:

> *'In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.'*

The procedures regulating both the action *in rem* and the arrest are provided for in Order 75 of the Rules of the Senior Court. The action is taken by the issue and service on the ship or other property of a writ *in rem*, usually accompanied by the service of a warrant of arrest. The statement of claim, or a concise statement of its nature, is endorsed on the writ. The parties may be named or described in the writ. The writ is valid for 12 months, but maybe renewed at the discretion of the court. As an alternative to service, the defendant may acknowledge issue or service of the writ. After acknowledgement of the service, the action proceeds as a 'hybrid action' where the action continues as both *in rem* and *in personam*.[192] After the writ is issued, the maritime claimant seeking to arrest a vessel in an action *in rem* must make a motion to the High Court, supported by an affidavit to lead warrant, setting forth the nature and circumstances of his claim, the fact

[190] DC Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 1.
[191] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 6.
[192] DC Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 239.

that it has not been satisfied and giving the name and port of registry of the ship to be arrested.

It is worth mentioning that a maritime lien was initially deemed as the foundation of the action *in rem* in English law according to the judgment of *The Bold Buccleugh*.[193] However, as the enlargement of the Admiralty jurisdiction, an action *in rem* is not necessarily based on a maritime lien. Along with the legislative extension of the Admiralty jurisdiction, there has emerged the concept of a statutory right *in rem* which is independent of a maritime lien. Thus an action *in rem* is not necessarily based on a maritime lien. Nevertheless, it is still true that the maritime lien must be enforced by means of the *in rem* proceeding.

2.4.3 Chinese law

Article 28 of the Chinese Maritime Code provides that a maritime lien shall be enforced by the court by means of arrest the ship which gave rise to the said maritime lien.[194] Under Chinese law, an action can only be brought against a person and no action can be brought directly against a vessel or other property. Arrest of ships is established as a part of maritime claims preservation in Chinese law and is regulated by the general rule of maritime claims preservation, which is set out in Chapter III Section 1of the Special Maritime Procedure Law.

The claimant who wishes to apply for arrest of ship shall file a written application to the competent maritime court.[195] In the application, the particulars of the maritime claim, reasons for the application, the name of the ship and the amount of security required shall be specified with relevant evidence attached. When the supporting documents are in other languages a Chinese translation shall be requested. The maritime court, having accepted the application, shall make an order within 48 hours based on its discretion. Where the arrest of ship is ordered, it will be executed forthwith; where the conditions for the arrest of ship are not met, the court will make an order to reject the application.

Similar to the English law position, Article 25 of the Special Maritime Procedure Law

[193] *The Bold Buccleugh* (1851) 7 Moo. P. C. 267, at 284.
[194] Article 28 of the Chinese Maritime Code reads that '*A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien.*'
[195] A sample application letter for arrest of ship in China is enclosed in the Appendix I; translated into English by the author.

1999 provides that the application of a maritime claimant applying to arrest the involved ship shall not be affected even if the name of the party who opposes the claim cannot be ascertained at once. The claimant may simply put 'the owner of … (name of the ship)' as defendant.

2.5 Conclusion

From the historic review of the law on maritime liens, it is notable that the earliest form of a maritime lien was the 'maritime loan' which existed in ancient Greek law, Roman law and other early maritime codes. Such a 'maritime loan' was used by masters to borrow money on security of the property[196] hypothecated in order to enable the ship to finish her voyage, and was later developed into the bottomry maritime lien. In this sense, the notion of 'maritime loan' or the later bottomry lien attempts to encourage the shipowners to perform sea adventures. Besides the maritime loan, other maritime liens including seamen's wages lien and salvage lien, which existed in early maritime law, all derived from various modes of conduct by which service is rendered to a ship and the adventure of the ship.[197] Thus, historically speaking, the consideration underpinning the maritime lien is to support the shipowners and to encourage seaborne trade.

From the historic perspective, it may arguably be true that maritime liens under Chinese law and English law share same origin, both of which was introduced from continental law and can be traced back to Roman law. Although the forms of legislation and recognised maritime liens under English law and Chinese law are not the same, it is submitted that both jurisdictions reckon a maritime lien as a procedural method to compel the appearance of the defendant. Such a position is also reflected in the enforcement of maritime liens in the United Kingdom and China. Both English and Chinese maritime law recognised the three common aspects of maritime liens in respect of their enforcement. On this basis, it would appear to be safe to make reference to the English law position while dealing with the conflict between maritime liens and limitation of liability under Chinese law.

[196] A ship, a ship and her freight or a ship, her cargo and freight.
[197] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 6. According to Thomas, all maritime liens except damage maritime liens may be characterised as service maritime lien.

Chapter III History and Current Law of Limitation of Liability for Maritime Claims

3.1 Introduction

The right of limitation of liability is peculiar to maritime law. The design of such a special scheme is out of public policy concerning in order to encourage trade and shipping industry. The concept of limitation of liability has been widely accepted among shipping nations and has achieved a successful international unification. Among all the limitation legislation, the Convention on Limitation of Liability for Maritime Claims 1976 (1976 Limitation Convention) is the one with of most importance. The United Kingdom, as a State Party of the 1976 Limitation Convention, enacted the Convention in its Merchant Shipping Act.[198] The 1976 Limitation Convention is not a binding authority of law in mainland China[199]; however, the Chinese Maritime Code 1992 relied on the 1976 Convention to a solid extent in respect of limitation of shipowners' liability.

Similar to the previous chapter, this chapter will review the history and current law of limitation of liability for maritime claims for the purpose of providing a foundation for the later chapters. First of all, this chapter will start with the historic origin of limitation of liability for maritime claims. Then a review will be made on the development of the limitation regime under English law and Chinese law respectively. In addition, the process of the international unification of limitation of liability via international conventions will also be reviewed. The purpose of the historic review is to illustrate the changes of the limitation systems adopted by legislation during the development of such a regime.

Secondly, this chapter will review the current legislation on limitation of liability for maritime claims, attempting to give a comparative study of the current limitation regimes existing under English law and Chinese law. Both substantial law and

[198] The 1976 Limitation Convention was firstly enacted by the Merchant Shipping Act 1979, which is now repealed by the Merchant Shipping Act 1995.
[199] See above, fn 10.

procedure of limitation issues will be taken into consideration. However, this part does not intend to cover every aspects of the law on limitation of liability; only those which will link to the enforcement of maritime liens will be discussed.

Thirdly, discussion will be given on the policy consideration of limitation of liability for maritime claims. As mentioned earlier, policy consideration is crucial for the innovation and development of limitation of liability. This part will examine the changes of policy consideration during the development of law on limitation of liability.

Besides the so called global limitation system, there are still other regimes of limitation of liability including the conventions relating to the carriage of goods by sea (the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules), the conventions relating to the carriage of passengers and their luggage by sea (1974 Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea and the 2002 Protocol thereto), conventions relating to liability and compensation for pollution damage (1969 International Convention on Civil Liability for Oil Pollution Damage and the 1992 Protocol thereto, the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea and the 2010 Protocol thereto, and the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage), as well as the 2007 Nairobi International Convention on the Removal of Wrecks. For the purpose of this research, only the global limitation regime is of concern, however, the reference may also be given to the other limitation regimes for the purpose of comparison.

3.2 History of limitation of liability

3.2.1 Historic origin: Roman law

The actual historic origin of the concept of limitation of liability for maritime claims is unclear. However, several writers invariably refer the origin of limitation of liability for maritime claims back to Roman law, under which there was a notion of *noxae deditio*.[200] The term *noxae deditio* refers to the situation where one individual could discharge

[200] John Hare, 'Limitation of Liability – A Nigerian Perspective' (2004, a paper delivered at the Eighth Annual Maritime Seminar for Judges in Nigeria) at p3 < http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf > accessed on 19 October 2014.

liability for damage to another individual by giving up the offending instrument. As Gotthard Gauci[201] points out, strong similarities may be found between the Roman institution of *noxae deditio* and the implementation of limitation of liability in current United States Federal maritime law, which is a ship value based limitation system and provides for limitation of liability up to the value of the ship[202] and freight. In this sense, the law of *noxae deditio* seems to be the theoretical basis of limitation of liability for maritime claims, at least, under American law.

In *Marsden on the Law of Collisions at Sea*,[203] it is submitted that

> '*…more than one writer has pointed out the analogy between foreign law, which limits the shipowner's liability to the value of ship, and the noxal action—nexae deditio—of Roman Law. The law of deodand has also been thought to be founded on the same idea which seems to personify the inanimate object with which the injury is done and to identify it with the actual wrongdoer. In the face of the express provisions of the Code of Oleron and other sources of English maritime law, which require the wrongdoer to make full compensation to the sufferer in a collision, it seems impossible to accept this view as to the origin of limited liability.*'[204]

However, controversies still exist on whether the Roman law can be deemed as the earliest origin of limitation of liability. In *Norwich Company* v *Wright*,[205] Bradley J gave the unanimous opinion of the Supreme Court of the United States. Relying on the opinion of an earlier decision,[206] the Judge traced the history of limitation in maritime law to the maritime law of modern Europe. Breadley J also referred to Hugo Grotius' observation in his *Law of War and Peace*[207] in which it was stated that Holland had rejected Roman law and had applied its own regulation whereby shipowners should be

[201] Gotthard Gauci, 'Limitation of Liability in Maritime Law: an anachronism?' (1995) Marine Policy Vol 19 No 1 65-74.
[202] It refers to the value after the accident.
[203] Kenneth C. McGuffie, *Marsden on the Law of Collisions at Sea* (10th edn, London: Stevens 1953) 174-175.
[204] However, the writer of the above book was of the view that the origin of limitation of liability cannot be traced back to the Roman law or to any of the medieval codes of maritime law. The reason given by the writer was that both these systems (Roman law and medieval maritime codes) either implied or expressly stated that the wrongdoer in a collision shall make full compensation. See Kenneth C. McGuffie, *Marsden on the Law of Collisions at Sea* (10th edn, London: Stevens 1953) 173.
[205] 80 U.S. (13 Wall.) 104.
[206] *The Rebecca* Ware 187, per Judge Ware at 194.
[207] (1625) Book 2 c. 11 & 13.

bound for acts of the master no further than the value of their ship and freight.[208] The Judge then noted that the French *Ordinance de la Marine of 1681* had also provided that the shipowner was responsible for the acts of the master but would be discharged by abandoning the ship and freight. [209] Similarly, according to Professor John Hare, even though the notion of 'limitation' may be traced back to Roman times, there are no records of limitation in maritime law until the records of the early codes of the Mediterranean city states, such as the *Consols de la Mar*.[210]

Nevertheless, it cannot be denied that the pattern used in the Roman law has, to some extent, impact on the law of limitation of shipowners' liability. A better view of understanding the link between limitation and Roman law was expressed by Gotthard Gauci, who states that:

> '*Although it may be impossible to definitely link the said system of limitation of liability with any Roman legal principle, one may draw certain parallels between the two concepts. Both involve the abandonment, or giving up, of an item which has been the cause of loss for another person. A closely related but distinctly relevant institution is that of abandonment of a vessel in marine insurance. It has been stated that the doctrine of limitation was articulated as early as 1625 by Grotius, and that limitation of liability in civil law jurisdictions can be traced as far back as the eleventh century.*'[211]

The general concept of limited liability in mercantile matters is traced back by one writer, James J. Donovan, to the *contrat de commande*, which originated before the 12th century A.D.[212] The writer commented as follows,

> '*The contrat de commande was a commercial device whereby a merchant could limit his liability in a trading venture to the extent of the goods or funds which were entrusted to another for use in that particular venture. The contract has*

[208] 80 U.S. (13 Wall.) 104 at 116
[209] See also *Strong Wise limited* v *Esso Australia Resources Pty Ltd* [2010] FCA 240, per Rare J at para. 29.
[210] John Hare, 'Limitation of Liability – A Nigerian Perspective' (2004, a paper delivered at the Eighth Annual Maritime Seminar for Judges in Nigeria) at p3 < http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf > accessed on 19 October 2014.
[211] Gotthard Gauci, 'Limitation of Liability in Maritime Law: an anachronism?' (1995) Marine Policy Vol 19 No 1 65-74.
[212] James J. Donovan, 'The Origins and Development of Limitation of Shipowners' Liability' (1978-1979) 53 Tul L Rev 999.

been described as 'a sort of qualified partnership' in which the person who had advanced the goods or funds, through interested in the trading contracts entered into by the merchant or mariner in possession of his property, was not personally liable for those contracts.' [213]

According to Donovan, the limitation of shipowner's liability appeared to have developed firstly in Italy and then to have spread to Spain and France. In the *Consulato del Mare* of Barcelona[214], it was provided that 'the owners (and part-owners) of a vessel were liable for debts incurred by the master in obtaining ship's necessaries or for cargo damage arising from improper loading, or from unseaworthiness, but only to the extent of their respective shares in the ship itself.'[215]

With regard to limitation of liability under maritime law, the first recognition of a shipower's right to limit his liability would appear to be in the Amalphitan Table, which was dating around the 11th century.[216] It is also submitted in *Marsden on the Law of Collisions at Sea* (10th edn) that the contract of *commande*, or joint adventure of shipowners and merchants, corresponding in some respects to the *societe en commandite*, or partnership with limited liability, of modern times, is perhaps the origin of the widespread doctrine of limited liability of shipowners. [217]

Another writer, Patric Griggs, who did not link limitation back to Roman law, submits that the right of a shipowner to limit his liability for damage caused to a third party is a concept which dates back to the 17th century. [218] According to Griggs, limitation provisions may be found in the Statutes of Hamburg of 1603, the Hanseatic Ordinances of 1614 and 1644 and in the Maritime Code of Sweden 1667. The most important legislation was the Marine Ordinance of Louis XIV in 1681, which codified maritime law in France and was used as a model in the Netherland, Venice, Spain and Prussia. However, as a trading nation, the United Kingdom did not have similar provisions at

---

[213] *Ibid*, at p1001.
[214] A collection of maritime laws of disputed origin, supposed to have been first published at Barcelona early in the 14th century. It has formed the basis of most of the subsequent collections of maritime laws.
[215] James J. Donvan, 'The Origins and Development of Limitation of Shipowners' Liability' (1978-1979) 53 Tul L Rev 999.
[216] See William Tetley, *International Maritime and Admiralty Law* (International Shipping Publication Quebec 2002) 274.
[217] Kenneth C. McGuffie, *Marsden on the Law of Collisions at Sea* (10th edn, London: Stevens 1953) 173.
[218] Patrick Griggs, 'Limitation of Liability for Maritime Claims: the Search for International Uniformity', [1997] LMCLQ 369.

that time. Thus limitation of liability was a concept developed under the civil law system rather than under common law.

3.2.2 Continental limitation systems

In the 18th and 19th centuries, the predominant European approach of limitation of liability for maritime claims involved a principle of abandonment in nature. That required the shipowner to limit by reference to the actual value of the ship plus freight after the accident. In an Australian decision, *Strong Wise Limited* v *Esso Australia Resource Pty Ltd*,[219] Rares J restated the historic review on limitation regimes on the basis of existing points of views.[220] It was stated that previously German and Scandinavian law provided that a shipowner had no personal liability for limitable claims.[221] Under those systems, claims were enforceable only against the ship and freight. However, a claimant was entitled to a maritime lien conferring priority rights of recovery from those assets. Such a system is described as the 'execution' system. In other countries, such as France, and later the United States, limitation of liability was implemented in the form of the 'abandonment' system which was termed by Professor Selvig.[222] Under the abandonment system, the shipowner was personally liable for limited claims, but was entitled to avoid liability by abandoning the ship and freight to the claimants so that the liability was limited.

3.2.2.1 The abandonment system

In the Statutes of Hamburg 1603 and the Maritime Codes of Charles II of Sweden 1667, it was provided that if the vessel owners abandon the ship to the creditors, their other property would be protected from those creditors whose claims remained unsatisfied unless the vessel owners had contracted otherwise.[223] These statutory provisions established the model of the 'abandonment' limitation approach.

---

[219] [2010] FCA 240.
[220] [2010] FCA 240, paras 22-23.
[221] *Ibid*. Rares J relied on the view of Mr Robert Cleton, a Dutch Delegate to the 1976 Limitation Convnetion. Also see, Robert Cleton, 'Limitation of Liability for Maritime Claims in Essays on International & Comparative Law in Honour of Judge Erades', Maritime Niihoff 1983.
[222] Erling Selvig, 'An Introduction to the 1976 Convention' in Institute of Maritime Law, *Limitation of Shipowners' Liability: The New Law* (London: Sweet & Maxwell 1986) 3-18, at 3.
[223] James J. Donvan, 'The Origins and Development of Limitation of Shipowners' Liability' (1978-1979) 53 Tul L Rev 999. See also, Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (London and New York: Routledge 2011) 7.

Alex Rein, in his work of *International Variations on Concepts of Limitation of Liability*, has made a comment on the abandonment system as follows:

> '*The abandonment system originated in the Romanic countries of Southern Europe and was perfected in France; it was also called the French system. Such a limitation system was adopted in most countries in Southern and Eastern Europe and outside Europe. Under the abandonment system the owner is personally liable, but with the option of divesting himself of all liability by physical abandonment of the venture bankrupt.*' [224]

Following the above comment, it is clear that, under an abandonment system, the shipowner is considered to be personal liable but entitled to limit his liability by abandoning the ship (along with any pending freight). It is notable that the abandonment of the ship refers to 'physical abandonment', which means the limit of the shipowner's liability will be what was left of the ship after the incidents.

The abandonment system is also deemed as the original form of limitation of liability under US law. However the US limitation system was modified to allow the shipowner either to limit his liability by surrendering the ship and freight to a court appointed trustee, or to limit his liability by posting a bond in the amount of the appraised value of the ship and freight, which is akin to constituting a limitation fund.[225]

3.2.2.2 The execution system

As Alex Rein stated, the execution system 'was developed in the Germanic countries of Northern Europe and was perfected in Germany; it was also called the German System. It was confined to Germany and Scandinavia.'[226] The execution system is also known as 'the maritime liens system', which is based on the fact that such a limitation system provides that all claims against the ship and the pending freight are to be brought as *in*

[224] Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259.
[225] Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (London and New York: Routledge 2011) 17.
[226] Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259, at 1261.

rem action and are to be satisfied according to the maritime liens' priority.[227]

The consideration behind the approach of limiting shipowners' liability to the value of the ship and its freight was that of shared risk.[228] An example for such shared risk was given by Professor Hare, who stated that if the owner of the cargo was prepared to hazard his goods upon a maritime adventure with a real prospect of losing them, the shipowner who was prepared to hazard his valuable ship upon the maritime adventure should equally stand only to lose the value of his vessel and no more.[229] This concept of sharing risk in a joint adventure was appropriate in a time when insuring this type of risk was not particularly common.

The common and different aspects of the abandonment system and execution system have been summarized by Alex Rein in his article of *International Variations on Concepts of Limitation of Liability*. According to this writer, these two systems had the same philosophy and legal justification in that the limitation regime was deemed expedient to encourage seafarers to invest in maritime ventures by reducing their liability to the value of the (remaining) venture assets. The parallel to reducing the investor's risk by allowing him to operate through a separate legal entity, namely, a corporation or etc., is clear and obvious.[230] In addition, the writer further submits that the abandonment system and execution system are in concept identical.[231] The reasons are given by the writer. Firstly, the limitation unit is the voyage under both limitation systems.[232] Secondly, liabilities subject to the limitation systems are practically all those that may arise in the course of the sea venture. These liabilities include not only the owner's vicarious liability for loss or damage but also owner's obligation under contracts concluded by the master in his capacity for or on behalf of the owner, as well as liability for salvage remunerations, general average contributions, and wreck

[227] Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (London and New York: Routledge 2011) 16. See also, Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259, at 1261.
[228] Patrick Griggs, 'Limitation of Liability for Maritime Claims: the Search for International Uniformity', [1997] LMCLQ, 369 at 371. See also John Hare, 'Limitation of Liability – A Nigerian Perspective' (2004, a paper delivered at the Eighth Annual Maritime Seminar for Judges in Nigeria) at p3 < http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf > accessed on 19 October 2014.
[229] *Ibid*.
[230] Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259.
[231] *Ibid*.
[232] *Ibid*.

removal, etc.[233] Thirdly, the assets to be surrendered or executed are the ship along with her appurtenances and freight earned in the venture. It is noteworthy that substitutes for these assets, for example, claims against third parties, are also included in the fund, but insurance proceeds pertaining to the owner's interest in the venture should be excluded.[234] The distribution of the assets among the venture creditors is based on the institution of maritime liens: claimants are satisfied in accordance with the priority of the respective liens attaching to their claims.

In terms of the difference between the two types of limitation systems, Alex Rein points out that such difference relates mainly to the procedure prescribed for the surrender of the assets. It would appear that the abandon system is based on the liability of the shipowner while the execution system is based the personification of the ship which is deemed to be liable.[235] In other words, the theoretical bases of the two systems are different. The theoretical bases will be discussed in Chapter III in relation to the connection between limitation of liability and maritime liens.

3.2.2.3 Shortcomings of value-based limitation systems

One obvious weakness of the value based limitation systems is that the available fund available for compensation may be 'negligible or nil' where the assets are lost.[236] For example, in *The Torrey Canyon* incident, the limit claimed in the US was the value of a single salvaged lifeboat; [237] the limit would have been considerably higher in the English Courts. Such a weakness might lead to the result that the claimants do not get enough protection. Furthermore, where two or more ships are involved in an incident, one may be entitled to limit liability while the other may not. In such a case, difficult tactical questions may arise for third party claimants.

Shipowners do not appear to be justified in claiming a unique, internationalised right to limit liability over and above others who undertake equivalent activities. A very strong criticism can be found in the words of Justice Black:

---

[233] See Article 1 of the 1924 Limitation Convention; cf Article 2 of the 1976 Limitation Convention.
[234] Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259; see also Article 1 of the 1924 Limitation Convention.
[235] The relationship between personification theory and limitation of liability will be discussed in Chapter IV.
[236] Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259, at 1263.
[237] See *The Torrey Canyon* 281 F Supp 228 (1968).

> '*Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions of the shipping industry which induced the 1851 Congress to pass the act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury, rather than subsidies paid by injured persons.*'[238]

Another weakness of the value based limitation systems is that such systems would appear to discourage sea trade. One of the effects of the abandonment or execution system would be that the shipowners attempt to operate aged or low value ships in order to avoid high payment for compensation. Thus the development of sea borne trade and the shipping industry would be restricted, which seems to be against the very idea of limiting shipowners' liability.

3.2.3 English law development and the tonnage limitation system

As mentioned in the previous chapter, English admiralty law traces its origin from the *Roles of Oleron*. However, no mention of limitation of a shipowner's liability to his investment in the vessel can be found in the *Roles*.[239] The law of limitation of shipowners' liability in Britain was triggered by a case in 1733, which was *Boucher* v. *Lawson*.[240] In that case, certain English shipowners were found to be personally liable for the full amount of a cargo of bullion which had been stolen by the master after it had been loaded in Portugal. As a result, this decision was criticised by shipowners in England. The shipowners used this decision to draw the attention of the Parliament to the fact that the European competitors of the English shipowners were entitled to limit their liability up to the value of the carrying ship and its pending freight.[241]

In response to the shipowners' petition,[242] the Parliament thereupon passed a statute that

---

[238] *Hercules Caniers. Inc.* v. *State of Florida*.786 F.2d 1558, citing the United States Supreme Court in *Maryland Casualty Co. Cushing*, 347 U.S. 409 (1954).
[239] James J. Donvan, 'The Origins and Development of Limitation of Shipowners' Liability' (1978-1979) 53 Tul L Rev 999.
[240] (1734) Cun. 144. Prior to the decision of *Boucher* v. *Lawson* 95 E.R. 125; (1735) 1 Cas. t. Hard. 194, the shipowners had already realised their 'blank cheque liability' under normal circumstances because of the decision of *Boson v. Sandford* 91 E.R. 777.
[241] Patrick Griggs, 'Limitation of Liability for Maritime Claims: the Search for International Uniformity', [1997] LMCLQ, 369, at 370. See also, Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (Routledge, London and New York 2011) 10; and James J. Donvan, 'The Origins and Development of Limitation of Shipowners' Liability' (1978-1979) 53 Tul L Rev 999, at 1007.
[242] A group of shipowners in England petitioned to the Parliament in the following terms:

relieved the shipowners of liability for those acts of the master or crew, done without the 'privity or knowledge' of the owner, which caused loss or damage to cargo, but only to the extent of the value of the ship, its equipment, and the freight which was to be earned on that particular voyage. This statute is known as the Responsibility of Shipowners Act 1733. The scope of this Act was restricted to claims arising from the 'embezzlement, secreting or making away with (by the master or mariners, or any of them) of any gold, silver, diamond, jewels, precious stones or other goods or merchandise…'[243]

It appears that shipowners were relatively satisfied for a while with the extent of this measure of protection. In the case of *Sutton* v. *Mitchell*[244] in 1785, where goods were stolen from a ship moored in the Thames by robbers colluding with a member of the crew, the Responsibility of Shipowners Act 1733 was also held to apply by the Court. However, as seaborne trade developed during the 18th century pressure grew for protection to be extended and shipowners were still exposed to unexpected liabilities in cases where the goods were made away with without the involvement of the crew[245]; as a result, a second petition was brought to the Parliament, leading to the passage of the Merchant Shipping Act 1786. Thus, in 1786 the right to limit was extended beyond theft to cover consequences of '… any act, matter, or thing or damage or forfeiture, done or occasioned, or incurred by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners…'[246] The wording of such a provision is wide enough and, for example, the damages arising from a collision is covered.

In terms of the limitation system adopted by the above two Acts, it is noteworthy that

---

'*Greatly alarmed to find by a late Trial, on an Action brought by a Merchant against the Owner of a Ship for Goods which the Master of the ship had run away with, that, by our law, the Owners of Ships are answerable for all Goods for which they are entitled to Freight, although the Goods shall be made away with by the Master, or Mariners, without the Privity of the Owners. That the Petitioners, when they became owners of Ships, did not apprehend themselves exposed to such Hazard or liable as Owners to any greater Loss than that of Ships and Freight; and complaining to which no Owners of Ships are exposed in other trading Nations; and representing to the House that, unless some Provision be made for their relief, Trade and Navigation will be greatly discouraged since Owners of Ships find themselves, without any Fault on their Part, exposed to ruin from which their greatest Circumspection cannot secure them, through the Malversation of the Master, or Mariners, who they are obliged to employ*.'

The above petition was cited by Patrick Griggs in his article 'Limitation of Liability for Maritime Claims: the Search for International Uniformity' [1997] LMCLQ, 369 at 370.

[243] Responsibility of Shipowners Act 1733, 7 Geo. 2, ch 15 (1734).

[244] (1785) 1 T.R. 18.

[245] In the case of *Sutton v. Mitchell* 99 E.R. 948, shipowners were sued when some cargo was forcibly robbed by a group of pirates from a vessel anchoring in the Thames. Although in the decision of this case, the shipowners were entitled to limit their liability depending on the fact that one of the seafarers provided information to the robbers, caution was brought to such kind of loss caused by third parties.

[246] 26 Geo III, c.86.

the Continental approach was adopted allowing a shipowner to limit by reference to the value of his ship plus the freight which had been earned on the voyage in question. As mentioned earlier, following the Continental approach of limitation was out of the consideration of shared risks. However, it has also been discussed above that such an approach has its defects and would to some extent restrict the development of shipping industry.[247]

As Patrick Griggs states, rights of limitation of liability, like other aspects of maritime law, were consolidated in the United Kingdom in the most important shipping statute of the 19th century, namely the Merchant Shipping Act 1894. According to section 503 of that Act, shipowners could limit their liability in cases of loss of life or damage to property which took place 'without their actual fault or privity'. More importantly, since the 1894 Act, the English limitation system departed from the practice of their European counterparts in one crucial respect: in recognizing that the value of the ship and freight should be a determining factor of the extent of the shipowner's liability, the English system took the value of the ship before the accident causing the damage, not after.[248] In order to achieve this purpose, a formula based on the tonnage of the vessel was designed. In accordance to the formula, the limit in respect of loss or damage to property was to be calculated at the rate of 8 pounds per ton of the vessel's limitation tonnage (the net tonnage plus engine room space) and 15 pounds per ton for loss of life and personal injury either along or together with property damage claims. It has been pointed by Patrick Griggs that although the English system adopted such a formula to calculate the limitation amount, the formula was intended to produce a figure which equals to the commercial value of the vessel before causing the damage. Such a position was also confirmed by Rares J in his judgement on the case of *Strong Wise Limited* v *Esso Australia Resource Pty Ltd*,[249] who has stated,

> '*In contrast, England had developed quite a different system of limitation during the eighteenth and nineteenth centuries. This began with an English Act of 1734. That Act recognized the value of the ship and freight as the limit of*

[247] See *supra* 3.2.2.3.
[248] John Hare, 'Limitation of Liability – A Nigerian Perspective' (2004, a paper delivered at the Eighth Annual Maritime Seminar for Judges in Nigeria) at p3 < http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf > accessed on 19 October 2014. The writer also noted that limitation systems by reference to the value of the vessel were, as a concept, not abandoned until the introduction of the 1976 Limitation Convention.
[249] [2010] FCA 240.

> *liability, but contrary to the law of other countries, that value of the ship was arrived at before the accident. And, to achieve this, the English system used a monetary value for the ship based on an amount per ton. It also gave a separate right to recover for personal claims, in addition to rights to recover for property damage. The limitation fund was to be distributed among the claimants in proportion to their claims, not according to the priorities of maritime liens.* '[250]

Although not based on the Merchant Shipping Act 1894, Professor Erling Selvig made his comments on the English limitation system as follows:

> '*This legislation introduced several new principles into limitation law. The key concept is the monetary limit, calculated on the ship's tonnage. An important element is also the idea of an additional amount reserved for personal claims. There is a restrictive approach to the number of limitable claims. In general, only claims arising out of damage to persons or property were subject to limitation. The limitation amount was to be distributed among the claimants in proportion to their claims and not according to the priorities of maritime liens. Finally, a separate limitation fund would be available for claims arising on any distinct occasion and, thus, the extent of aggregation of claims for limitation purposes was restricted accordingly. Without great changes this limitation system was subsequently carried over into the Merchant Shipping Act 1894.*'[251]

Therefore, the English limitation system started from the 1733 Act and was eventually established by the 1894 Act. Although amended by later legislation, the 1894 Act set out the framework of the English limitation system, under which the limit is calculated on the basis of the tonnage of the ship and a separate limitation fund may be established. Such a monetary basis system separated limitation from the physical abandonment of the vessel. It is also noteworthy that the establishment of limitation of shipowners' liability was done by statutes solely.

One significant difference between the English system and two other limitation systems was that the former involved the use of a pre-determinable valuation of the ship,

[250] *Ibid*, at para 25.
[251] Erling Selvig, 'An Introduction to the 1976 Convention' in Institute of Maritime Law, *Limitation of Shipowners' Liability: The New Law* (London: Sweet & Maxwell 1986) 3-18, at 4.

unaffected by the circumstances in which the claims arose. In contrast, the Continental and United States systems value the ship and freight as they were, following those circumstances and allowed the owners to abandon that property in its then state so as to continue the sole means of satisfying all their liabilities. Two consequences follow this difference. First, under the English system, the owners were fixed with an ascertainable, readily insurable, maximum liability. That liability responds to claims made on one distinct occasion and it refreshed or revived in full for claims made on a second or subsequent distinct occasion. Secondly, under the other systems, the owners' liability varied from the British system according to how damaged ship was and what the value of her freight was after the circumstances from which the claims arose. And that liability was not apparently refreshed or revived for claim arising on a second or subsequent distinct occasion. It is also notable that, under the English limitation system, the limits are based on one distinct incident while the limitation unit under the other two is the voyage.[252]

3.2.2 History of the limitation regimes in China

3.2.2.1 Pre-1949: before the People's Republic of China

Prior to the establishment of People's Republic of China, provisions with regard to limitation of shipowners' liability were made in the Maritime Act 1929 of Republic of China. According to Article 23 of 1929 Act, the liability of the shipowner is limited to an amount equal to the value of the ship, the freight and other accessories of the particular voyage. That is to say, the 1929 Act adopted the continental value based limitation system. Nevertheless, as mentioned in the previous chapter, the 1929 Act was abolished by the People's Republic of China and the current maritime law of People's Republic of China is independent of those legislation existed prior to the establishment of P.R.China.[253]

3.2.2.2 After 1949: the People's Republic of China

Before the enactment of the Chinese Maritime Code 1992, there was no formal legislation in China in respect of limitation of liability for maritime claims. On deciding cases on shipowners' right of limitation, the courts could only rely on several

[252] See Article 6(1) of the 1976 Limitation Convention, under which it is provided that the limitation amount is calculated on the basis of 'any distinct occasion.'
[253] See Chapter II, section 2.2.3.1, above.

administrative regulations on such problems, which were issued by the State Council and the Ministry of Transport of P.R.China. In 1959, the Ministry of Transport of P.R.China announced the Several Regulations on Maritime Claims 1959 (Maritime Regulations 1959).[254] This Regulation was the most important authority for issues arising from limitation of liability in that time.

The Maritime Regulations 1959 adopted a value based limitation system and were applicable to sea going vessels which were operating for international voyages (include voyages to/from Hong Kong and Marcau). Under the Maritime Regulations 1959, the person entitled to limitation of liability was the shipowner only, not including charterers, managers or operators. Article 4 of the Regulations provides that the compensation for maritime claims was limited to the value of the ship, the freight and the compensation for the unrepaired damage after the beginning of the voyage.[255] It was also provided in the same article that claims for loss of life or personal injury should not be subject to the limitation and should be compensated in advance to other claims.

The very first case on the issue of limitation of liability for maritime claims heard in People's Republic of China was *The Daqing 245*,[256] which was decided by Qingdao Maritime Court in 1992.[257] On 12 October 1986, a tanker vessel, the Daqing 245 departed from Shanghai to Qingdao on a ballast voyage. On 18 October, the vessel was in the west berth of the Huangdao port and preparing for loading crude oil. An explosion took place in the front of Daqing 245 and the vessel sank after the explosion. The explosion caused damages to the harbor belonging to the Qingdao Port Authority as well as damages to a Japanese merchant ship and personal injuries to the crew on board that ship. In addition, there was cost arising from removal and re-floatation of the wreck of the sunken tanker. The owner of the *Daqing 245*, Guangzhou Sea-Transport Administration Bureau, applied to Qingdao Maritime Court for limitation of its liability.

In accordance to the Maritime Regulation 1959, the Qingdao Maritime Court held that there was no privity of the shipowner in the accident and therefore the owner of the

[254] The name is translated by the author. The Regulations were enforced from 15 Oct. 1959 and was abolished on 2 Dec. 2003 by a decision of the Ministry of Transport.
[255] The Chinese version of the 1959 Regulations may be found at <http://china.findlaw.cn/fagui/p_1/183264.html> accessed on 17 September 2014.
[256] Gendong Xu, Guohua Wang and Kai Xiao, *Private International Law* (Beijing: Tsinghua University Press 2005) 292. This case was used as an example of constitution of a limitation fund by the writers.
[257] The accident in question in fact happened in 1986.

Daqing 245 were entitled to limit his liability for the damages caused by the explosion. According to the Regulation 1959, the Qingdao Maritime Court ordered the shipowner to establish a limitation fund of 571666.70 RMB which was equivalent to the value of the wreck of *Daqing 245* plus the interests. The Court also confirmed that the cost for wreck removal and re-floatation was not subject to limitation of liability. The owner of the Japanese merchant ship was eventually compensated 85000 USD from the limitation fund.

The decision of *The Daqing 245* was made before the enactment of the Chinese Maritime Code 1992[258] when there was neither comprehensive substantial law nor procedure law relating to limitation of liability. However, on the basis of international maritime practice, Qingdao Maritime Court set a good precedent of dealing with cases on limitation of liability for maritime claims and it is notable that the decision and the procedure of compensation decided by the Court set out the basis for drafting relevant legislation, especially for the Special Maritime Procedural Law 1999.

Shortly after the decision of *The Daqing 245*, the Maritime Code of PRC came into force in 1993. Chapter XI of the Chinese Maritime Code 1992 provides for the regime for limitation of liability for maritime claims in China. This chapter contains twelve articles, from article 204 to 215, the text of which is modelled on the International Convention on Limitation of Liability for Maritime Claims 1976. Under the Chinese Maritime Code, shipowners, charterers, operators and salvors may limit their liability for certain maritime claims. The scope of the claims subject to limitation under the Chinese Maritime Code is narrower than that under the 1976 Limitation Convention.[259] The details of the current Chinese legislation on limitation of liability will be discussed below in section 3.4. Thus, the Chinese limitation regime for maritime claims has changed from a value based limitation system to a tonnage limitation system and the latter forms the current limitation system in China.

3.3 International unification

As illustrated above, most Continental European countries applied the principle of

[258] The Maritime Code of P.R.China 1992 came into force as of 1 July 1993.
[259] See Article 207, Chinese Maritime Code 1992.

abandonment in their limitation systems while the United Kingdom, on the other hand, had developed and continued to apply the tonnage limitation system, which only had a historical relationship to the actual value of the ship. The international unification for issues on limitation of liability for maritime claims was triggered by the sinking of *The RMS Titanic*. In 1912, the incident of the *RMS Titanic* gave rise to many claims for loss of life and personal injury as well as claims for loss of property. Those claims, depending on the elements of each of them, were tried in Norway, the US and the United Kingdom, which led to a large number of judgments different from one another.[260] Although the efforts had been made since 1880s at various maritime conference to achieve the international unification of the limitation regime, the incident of the RMS Titanic seemed to be the last straw which drew the attention of international communities to seek an international system for limitation of liability.[261]

The Committee Maritime International (CMI) appointed a committee of lawyers to review the law on limitation of shipowners' liability and the committee prepared a draft convention in 1913.[262] This drafted convention was submitted by CMI to the Diploma Conference in 1922 and 1924 and the Convention was eventually adopted in 1924. The adoption of this Convention was the first 'major step' towards the harmonization of the law on limitation of shipowners' liability.[263]

3.3.1 1924 Limitation Convention

Albert Lilar, in summarizing the effect of the first international convention on Limitation of Liability for Maritime Claims in 1924, said that it was created as a '…result of a laborious compromise between the traditional limitation system applied on the European Continent … and the system in force in Great Britain…'[264] However, in the view of Patrick Griggs, it was in fact not much of a compromise in that the 1924 Limitation Convention was more like 'an international adoption of section 503 of the

[260] Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (Routledge, London and New York 2011)16.
[261] *Ibid*, 18. See also Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259, at 1267; and Arthur M. Boal, 'Efforts to Achieve International Uniformity of Laws Relating to the Limitation of Shipowners' Liability' (1979) 53 Tul L Rev 1277.
[262] Arthur M. Boal, 'Efforts to Achieve International Uniformity of Laws Relating to the Limitation of Shipowners' Liability', 53 Tul. L. Rev. 1277 at 1278-1279.
[263] Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (Routledge, London and New York 2011) 18.
[264] Cited by Patrick Griggs in his article 'Limitation of Liability for Maritime Claims: the Search for International Uniformity' [1997] LMCLQ 369 at 372.

Merchant Shipping Act 1894'.[265] This argument was based on the fact that the 1924 Convention was so similar to section 503 that the United Kingdom government did not deem it necessary to amend the Act.

The 1924 Convention created an optional limitation system which gave shipowners an option to limit their liability to the value of the ship and freight or an amount of 8 pounds per ton. In order to avoid complications in calculation of freight, Article 4 of the 1924 Convention provides that any pending freight was deemed to be covered by a fixed sum of ten percent of the ship's value at the commencement of the voyage. And the article further provides that the aforesaid indemnity was due even where no freight was earned by the vessel.[266]

As Professor Erling Selvig comments on the 1924 Convention as follows,

> '*…the 1924 Convention reflects what has been termed the option-system because the shipowner may limit his liability to the value of the ship and freight or to an amount of £8 per ton. In either case an additional amount of £8 per ton is reserved for personal claims. Thus the monetary limits were equivalent to those originating in the English legislation from 1850-60s, and even in other respects the Convention incorporated elements of English law.*'

The 1924 Convention includes a list of claims for which limitation was available. The list was drafted in a wide manner to extend the right to limit to all claims arising out of the exploitation of the ship and agreements entered into by the master. Claims for wreck removal, salvage and contribution in general average were expressly listed in Article 1 of the Convention.[267]

Although the 1924 Convention was eventually ratified or acceded to in about 15 countries, it never achieved its objective of international unification. Although the convention was deemed as an international application of section 503 of the United Kingdom's Merchant Shipping Act 1894, the United Kingdom did not accede to the Convention. The 1924 Convention still applies to the exclusion of all other Limitation Conventions in Brazil, Hungary and Turkey. Several countries including Poland,

[265] *Ibid*.
[266] Article 4, 1924 Limitation Convention.
[267] See Article 1 (5), (6) and (7) of the 1924 Limitation Convention.

Portugal, Spain and Belgium have adopted subsequent limitation Conventions but have not denounced the 1924 Convention. [268] The CMI regarded the 1924 Convention as a failure and revisited the subject in 1950s, which produced the 1957 Limitation Convention.

3.3.2 1957 Limitation Convention

Efforts to achieve international uniformity in respect of limitation of liability for maritime claims were resumed after the Second World War, of which the result was the 1957 Limitation Convention. The English limitation system received full international recognition in the 1957 Limitation Convention, which was regarded as 'perhaps one of the most remarkable developments' of the 1957 Limitation Convention.[269] The 1957 Limitation Convention completely abandoned the system of the calculation of limitation via the value of the vessel after the incident and exclusively adopted the system of calculation by reference to the tonnage of the vessel. The limits of shipowners' liability were increased and the Convention established separate funds for personal and property claims. Article 3 of the 1957 Convention provided that where an incident exclusively gave rise to property claims the liability was limited to 1,000 francs[270] per ton;[271] where an incident gave rise to personal claims the liability was limited to 3,100 francs per ton.[272] In terms of the incident gave rise to both property and personal claims, the limitation amount was 3,100 franc per ton, of which 2,100 francs per ton was for personal claims and the rest 1,000 francs per ton was for property claims.[273] It was further provided where the 2,100 francs per ton was not sufficient for personal claims, the unpaid balance would share the fund for property claims on a rateable basis.[274] The 1957 Limitation Convention also made it clear that the limit of liability prescribed by Article 3 of this Convention shall apply to the aggregate of personal claims and property

[268] Patrick Griggs, 'Limitation of Liability for Maritime Claims: the Search for International Uniformity,' [1997] LMCLQ 369 at 372.
[269] Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (Routledge, London and New York 2011) 20.
[270] Franc refers to the Poincare gold franc. The use of gold francs was appealed by the use of Special Drawing Right (SDR) by virtue of the Protocol Amending the International Convention Relating to Limitation of the Liability of owners of Sea-Going Ships 1957, which was adopted on 21 December 1979. Such adjustment was due to the fluctuations in the value of Poincare gold franc. On the other hand, the value of SDR is calculated daily by the IMF on the basis of the relative values of five major currencies.
[271] Article 3 (1) (a), 1957 Limitation Convention.
[272] Article 3 (1) (b), 1957 Limitation Convention.
[273] Article 3 (1) (c), 1957 Limitation Convention.
[274] Article 3 (1) (c), 1957 Limitation Convention.

claims which arise on any distinct occasion without regard to any claims which have arisen or may arise on any other distinct occasion,[275] which means the maximum liability is incident based rather than voyage based.

As Professor Erling Selvig has pointed out, Article 3 (1) of the 1957 Convention essentially reflects the same monetary limits as those once fixed by the then 100 years old English statutes drafted for sailing vessels.[276] The Convention was elaborated at a time of fixed and gold-based exchange rates, and it sets out the limits in Poincare gold francs. However, at the 1957 Conference the limits were negotiated in pounds sterling. Thus, the limit for property damage of £24 was meant to be equivalent to the £8 (gold value) of the 1924 Convention.[277] The additional amount reserved for personal claims was agreed to £50 (paper value), i.e. twice the amount set out in the 1924 Convention. Realizing that these limits, based on the tonnage principle, would cause particular hardship in cases involving small ships, the conference also fixed minimum limits calculated on the basis of 300 tons.

Note that the 1957 Limitation Convention had made a few changes to refine the limitation system. There are other a few elements were added to refine the system, for example, claims by members of crew or other employees on board the ship were essentially exempted from limitation. As Professor Selvig states, the main purpose of the additions was to ensure that limitation of liability applies and will be efficiently applied to all liabilities in respect of damage arising from the operation of a ship.[278] Professor Selvig summarised the additions in two aspects. Firstly, in order to solve the 'Himalaya-problem', the right to limit liability, hitherto a benefit for the owner, was extended also to the charterer, manager and operator of the ship as well as to the crew and other servants thereof. Secondly, the 1957 Convention contains several Articles dealing with the procedural implementation of this global limitation.[279] A main objective of these provisions is to ensure the efficiency of the limit of liability and, particularly, to prevent holders of limitable claims obtaining recoveries by separate or successive actions thus causing the total liability for one accident to exceed the applicable limit.

[275] Article 2, 1957 Limitation Convention.
[276] Professor Erling Selvig, 'An Introduction to the 1976 Convention', 1986. In Institute of Maritime Law, University of Southampton, *The Limitation of Shipowners' Liability*: The New Law, p5.
[277] *Ibid*, pp7-8.
[278] Erling Selvig, 'An Introduction to the 1976 Convention' in Institute of Maritime Law, *Limitation of Shipowners' Liability: The New Law* (London: Sweet & Maxwell 1986) 3-18, at 5.
[279] *Ibid*.

Accordingly, Article 7 of the Convention also makes its provisions applicable as *lex fori* whenever limitation of liability is sought before a court of contracting state. [280]

In terms of the scope of limitation, Article 2 of the 1957 Limitation Convention provided that the limitation of liability applied to the aggregate of personal and property claims '…which arise on any distinct occasion without regard to any claims which have arisen or may arise on any other distinct occasion.'[281] The Convention covers maritime claims from the contractual and extra contractual circumstances. It is notable that claims for salvage and general average were expressly excluded in the 1957 Convention, which is contrary to the position of the 1924 Convention.

The 1957 Convention was deemed as a further step of the international unification of limitation of liability and this Convention received a wider acceptance by 52 States including most European states as well as other important shipping countries.[282] The United Kingdom also joined the 1957 Convention. Even though the 1957 Convention was described as endorsing the British limitation system, nonetheless it was still necessary for the United Kingdom government to amend section 503 of the Merchant Shipping Act 1894 to incorporate a number of the new features introduced by the 1957 Convention.

3.3.3 1976 Limitation Convention

It had been submitted that there were several reasons that made the 1957 Convention to be considered not good enough to achieve a universal limitation regime. Factors such as the depreciation in monetary value, the difficulties of establishing a currency equivalent of the gold franc, the need to establish circumstances when the right to limit would be forfeited and the adoption the Convention on Civil Liability for Oil Pollution Damage of 1969,[283] together with the constant increase in the size of ship and the need to extend the list of persons entitled to limit their liability,[284] gave rise to the idea of making a new limitation regime. During the two decades after the adoption of the 1957 Convention the

[280] *Ibid*, 5-6.
[281] Article 2 (1), 1957 Limitation Convention.
[282] CMI Year Book 2013, p625.
[283] John Hare, 'Limitation of Liability – A Nigerian Perspective' (2004, a paper delivered at the Eighth Annual Maritime Seminar for Judges in Nigeria) at p3 < http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf > accessed on 19 October 2014
[284] Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (Routledge, London and New York 2011) 22.

real value of the limits was reduced by about 50%. This was due to the combined effects of world inflation and prevailing policy of maintaining the official gold price in U.S. dollars once fixed. This gold price was also used when calculating Poincare franc into national currency, and the original purpose of fixing the limits of liability in gold, i.e. to maintain the real value thereof, was consequently frustrated. When in the 1970s gold was ultimately substituted by Special Drawing Rights as the basis for the international monetary system, the link between Poincare franc and national currencies also disappeared.

Such effort started in 1972 and a new proposed Convention was submitted to the Diploma Conference held between 1 and 19 November 1976. The new Convention was adopted at the end of the Diploma Conference and entered into force on 1 December 1986. [285]

Professor Selvig, in his contribution in *Limitation of Shipowner's Liability: The New Law*, states that the basic principles reflected in the global limitation system of the 1976 Convention are the following:

(1) Personal claims relating to members of the crew, passengers and other persons on board the ship should be excluded from the global limitation system,
(2) The level of liability for personal claims remaining subject to global limitation should be sufficient to ensure full compensation in most cases,
(3) The level of liability for property claims shall be moderate and take into account that the property involved are usually covered by insurance, and
(4) The global limitation system should actually be 'unbreakable.'[286]

It was further summarised by Professor Hare that the important innovations introduced by the 1976 Convention include the follows:[287]

(1) The method in terms of which the limitation fund is calculated has been altered—the SDR of IMF replaced the gold franc as the unit of account in order

[285] Francesco Berlingieri, *Travaux Preparatoirse of the LLMC 1976 and of the Protocol of 1996*, Comite Maritime International.
[286] Erling Selvig, 'An Introduction to the 1976 Convention' in Institute of Maritime Law, *Limitation of Shipowners' Liability: The New Law* (London: Sweet & Maxwell 1986) 3-18, at 14.
[287] John Hare, 'Limitation of Liability – A Nigerian Perspective' (2004, a paper delivered at the Eighth Annual Maritime Seminar for Judges in Nigeria) at p3 < http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf > accessed on 19 October 2014.

to overcome the defects of the gold franc;[288]

(2) The decision of *The Tojo Maru*,[289]which determined that a salvor not working on board a salvage vessel was not entitled to limit his liability, has been reversed to the extent that a salvor is entitled to limit his liability when rendering service in direct connection with the salvage operation;

(3) Specific provision has been made for claims arising on any distinct occasion for loss of life or personal injury to the passenger of a ship being carried 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 carriage of goods; and

(4) Limitation is made available to an insurer of liability for claims subject to limitation in accordance with the rules of the 1976 Convention and such an insurer is entitled to the benefits of the 1976 Convention to the same extent as that of the assured.[290]

In terms of the real value there has been no significant change in the general level of liability. The 1957 Convention meant an increase in the limit for personal claims, and the 1976 Convention also increased the limits for ships of lower tonnage. In other respects, however, the adjustments of the limits made by the two Conventions went hardly much beyond was required to compensate a fall in monetary values that had already taken place. This means, for example, that in 1976 the limits for property claims contained in the 1976 Convention were essentially on the same level as the monetary limits of the 1924 Convention and of the 19th Century English legislation from which they were taken. Of course, this observation is relevant only for the ships of low or medium sized tonnage and not for the ship of much larger tonnage appearing after the Second World War.

---

[288] In terms of the change from gold franc to SDR, see fn 239, above.

[289] *N.V. Bureau Wijsmuller* v. *'The Tojo Maru'* (Owner) ('*The Tojo Maru*') [1971] 1 Lloyds Rep. 341. Following a collision between *Tojo Maru* and *Fina Italia*, claimant salvors agreed to render salvage services to respondent owners' motor tanker *Tojo Maru*. In course of those services, a diver employed by the salvors and working underwater negligently fired a bolt through plating into a tank on *Tojo Maru* which had not been gas-freed. The resulting explosion substantially damaged *Tojo Maru*. It was held that by the House of Lords that there was no rule of maritime law that a successful salvor cannot be liable in damages to the owner for the result of any negligence on his part and therefore the owners of *Tojo Maru* were entitled to counterclaim damages for negligence of the salvors. On the facts of the case, it was held that the bolt gun was not used in the 'management' of the tug and was not an act 'on board' the tug. On this basis, the House decided that the salvors was not entitled to limit their liability.

[290] Article 1(6), 1976 Limitation Convention.

Patrick Griggs comments on the 1976 Limitation Convention that the overall effect of the 1976 Convention has been completely to transform the law in relation to the rights shipowners (and others) to limit liability. Under the 1957 and 1924 Limitation Conventions a successful claimant was entitled to full reimbursement of his claim unless the shipowner can prove that the occurrence giving rise to the claim is not resulted from the actual fault or privity of the owner.[291] Whereas under the 1976 Limitation Convention, it is the claimant's onus to prove that the loss resulted from the owner's personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.[292] Professor Hare concludes that it would appear that the 1976 Limitation Convention created a compromise: a limitation fund which was as high as possible whilst remaining insurable at reasonable cost, together with the creation of a virtually 'unbreakable' right to limit liability. [293] The 1976 Limitation Convention has received wide acceptance internationally. 53 States have acceded to or ratified the Convention including most of the shipping nations[294] and some other states, despite not ratifying the Convention, have incorporated the Convention into their national law to some extent.

3.3.4 The 1996 Protocol

Seventeen years after the adoption of the 1976 Convention, the 1996 Protocol to the 1976 Convention was adopted on 3 May 1996. The most important consideration behind proposing this protocol was that the limits set up in the 1976 Convention had been eroded by inflation and seemed no longer sufficient to satisfy possible claims.[295] This is again the limits set by the limitation convention were considered to be too low for compensation. Both the general limits and the limits for passenger claims were increased by the 1996 Protocol. The comparison between the 1976 Convention and the 1996 Protocol regarding to the limits of liability for claims can be shown by the following table. Up till now, the limits under the 1996 Protocol appeared to be considered not enough again. In 2012, IMO has proposed another increase on the limits

[291] Article 1(1), 1957 Limitation Convention.
[292] Article 4, 1976 Limitation Convention.
[293] *The Owners of the Ship 'Herceg Novi'* v *The Owners of the Ship 'Ming Galaxy'* [1998] 2 Lloyd's Rep. 454. In this decision, Sir Chistopher Staughton summarized that 'The 1976 Convention was thus a package deal, whereby the limits were raised considerably but in return the shipowner received the benefit of a limit which was thought to be virtually unbreakable'.
[294] CMI Year Book 2013, p677.
[295] Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions* (Routledge, London and New York 2011) 103.

of liability for shipowners. Amendments to increase the limits of liability in the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims were adopted by the Legal Committee of the International Maritime Organization (IMO), when the Committee met for its 99th session in London.[296] The new limits are expected to enter into force 36 months from the date of notification of the adoption, under the tacit acceptance procedure. This is expected to be done on 8 June 2015. Most of the contracting states of the 1976 Convention have joined the Protocol and, as a result, the 1996 Protocol currently have 45 contracting states.[297]

3.4 Current legislations on limitation of liability

3.4.1 English law

By virtue of section 185(1) of the Merchant Shipping Act 1995, the 1976 Limitation Convention has 'the force of law' in the United Kingdom.[298] The text of the 1976 Limitation Convention is applied directly with accompanying provisions specifying the national options taken by the United Kingdom and where necessary translating Convention into national law. The Convention applies to occurrences taking place on or after 1 December 1986 and it applies to 'Her Majesty's ships' as to the others.[299]

The 1976 Limitation Convention is applied to any ship whether seagoing or not, a ship including any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship, and to ships under 300 tons with lower limitation amounts. There is no provision making the setting up of a limitation fund a prerequisite for claiming limitation. Where security is released because of the constitution of a limitation fund, the applicant seeking release is deemed to have submitted to the jurisdiction of the English courts.

---

[296] See IMO, 'Limits of liability for shipping raised with adoption of amendments to 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims' (Briefing: 12 April 19 2012) <http://www.imo.org/MediaCentre/PressBriefings/Pages/12-LLMC-Prot-limits.aspx> accessed on 19 September 2014).

[297] CMI Year Book 2013, p684.

[298] Section 185 of the Merchant Shipping Act 1995 provides:

> *(1) The provisions of the Convention on Limitation of Liability for Maritime Claims 1976 as set out in Part I of Schedule 7 (in this section and Part II of that Schedule referred to as 'the Convention') shall have the force of law in the United Kingdom.*

[299] See Section 185(3) of the Merchant Shipping Act 1995.

The United Kingdom enacted the 1996 Protocol on 13 May 2004 by virtue of the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 (as amended by the identically named Order 2004). It implements the 1996 Protocol and national options exercised by the United Kingdom. The exclusion of special compensation claims in respect of salvage is now included in the Convention. Claims under the HNS Convention are excluded and is modified in respect of passengers on non-sea going ships to apply the limit of liability for death or personal injury in respect of each passenger. The limits of liability for ships under 300 tons are increased.

3.4.1.1 Substantive law

For the purpose of this thesis, two aspects of substantive law on limitation issues shall be addressed namely claims subject to limitation of liability and persons entitled to limitation.

Claims subject to claims

On the basis of the above-mentioned enactment, claims subject to limitation of liability under English law include:

(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;

(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;

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

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.[300]

Details and interpretation of relevant provisions will be dealt with in the next chapter.

In respect of claims arising from wreck removal the Convention is applied only where a fund has been established by order of the Secretary of State to compensate harbour authorities for reduction of amounts recoverable under the Act. Claims except from the Convention in respect of oil pollution damage and nuclear damage are specified in terms of English law. It is further specified that the exclusion of salvage claims encompasses a claim for special compensation in respect of damage or threatened damage to the environment.

According to Francesco Berlingieri in the *Travaux Preparatoirse of the LLMC 1976 and of the Protocol of 1996*, the question of what liabilities are subject to global limitation in the 1957 Limitation Convention is determined by three different but interrelated criteria:

> '*First, the liability must have arisen from loss of life or personal injury (personal claims), or from loss of or damage to property, infringement of any rights, or removal of wreck (property claims). Second, the liability must have arisen, generally speaking, in connection with the operation of the ship. Third, the liability must have been incurred by the shipowner or certain other persons.*'[301]

Those criteria and their relationship were followed and reflected in Article 2 of the 1976 Limitation Convention as enacted in the United Kingdom, which set out a more logical layout for claims subject to the Limitation Convention compared with the 1957 Convention.

---

[300] Article 2, 1976 Limitation Convention; Article 2, Schedule 7 Part I, Merchant Shipping Act 1995.
[301] Francesco Berlingieri, *Travaux Preparatoirse of the LLMC 1976 and of the Protocol of 1996* (Comite Maritime International) III, 5.

As Richard Shaw states in his contribution in *Limitation of Shipowners' Liability: The New Law*, the United Kingdom has opted for the following provisions with regard to the options provided in the 1976 Convention:

(1) Continuing with present limitation provisions, the Convention regime will be applicable to vessels used on inland waterways as it is to seagoing vessels.
(2) The limit of liability for ships under 300 tons shall be half of that applicable to ships of 500 tons.
(3) The United Kingdom has not taken the option of promoting the claims of port installations and harbor authorities above others.
(4) The new regime will not under United Kingdom law be applied to drilling vessels. [302]

According to Article 10 (1) of the 1976 Convention, a State Party may provide that the benefits of limitation may only be obtained by a defendant who has previously constituted a limitation fund with the court in which legal proceedings against him have been commenced. The Merchant Shipping Act 1979 in Schedule 4 Article 10 (1) provides simply that limitation of liability may be invoked notwithstanding that a limitation fund has not been so constituted. This position has remained the same under the current legislation, the Merchant Shipping Act 1995.[303]

The United Kingdom has made a reservation in respect of those wreck removal provisions and so liability continues to be unlimited in such cases. It should be noted, however, that the position would be altered if and when a fund is established in order to compensate harbor authorities for any loss of revenue. Except for this provision relating to wreck removal, no other reservations were made by the United Kingdom.

Persons entitled to limit liability

According to the 1976 Convention, as enacted in the Merchant Shipping Act 1995, four types of persons are entitled to limit their liability for maritime claims, namely shipowners, salvors, insurers of liabilities subject to limitation and third parties for

[302] Institute of Maritime Law, University of Southampton, *Limitation of Shipowners' Liability: The New Law* (London: Sweet & Maxwell 1986)114-117.
[303] Article 10, 1976 Limitation Convention; Article 10, Schedule 7 Part I, Merchant Shipping Act 1995.

whose acts the shipowner or salvor are responsible.[304] Discussion on those persons will be made in relation to personal liability in corresponding chapters.

Procedure of limitation action

Under English law, there are three ways of invoking limitation of liability: (1) raising limitation as a defence to a claim brought against the shipowners;[305] (2) commencing a stand-alone limitation action and applying for a limitation judgment; and (3) commencing a limitation claim by way of a counterclaim[306] on an existing action against the shipowners.[307]

Commencing a limitation action

Limitation of liability may be claimed through a limitation action in respect of all loss or damage arising from one incident or occurrence and hence against numerous potential claimants concurrently. This type of limitation is geared to claims against categories of persons concerned with ships (e.g. shipowners and operators, pilots, and harbours and docks authorities) or exceptionally with a particular type of claim (i.e. oil pollution claims). Practice Direction (PD) 61.11 sets out the practice and procedure relating to limitation actions. To commence a limitation action, a limitation claim form must be issued in which the **claimants' names** and at least **one defendant** shall be listed.[308] The **facts** supporting the limitation claim must be described within the form, for example, the event giving rise to liability, the parties involved and the grounds for information. The claim form must be served on the named defendants and on any other defendant who requests service upon him.[309] Acknowledgement of service is not required unless the defendant wishes to dispute the jurisdiction of the English Court, in which case an acknowledgement of service form must be served within fourteen days.

Where one or more of the named defendants admits the claimant's right to limit or simply fails to defend the claim, a restricted limitation decree against those defendants

[304] Article 1, 1976 Limitation Convention.
[305] PD 10.18.
[306] CPR 61.11 (22).
[307] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 148. See also DC Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) para. 24.28.
[308] CPR, r. 61.11(3).
[309] CPR, r. 61.11(4).

is available upon application by the claimant. The restricted limitation decree need not to be advertised but must be served upon the defendants concerned. Where all the defendants upon whom the claim form has been served admit the claimant's right to limit liability then a general limitation decree can be issued.

Where the right to limit is disputed and the claimant seeks a general limitation decree, the claimant must apply for a case management conference before the Admiralty Registrar within seven days after either the defence has been filed or the time permitted for filing the defence has expired.

Limitation as a defence or counterclaim

Limitation claimed as against the particular liability claimant may always be pleaded as part of the defence or counterclaim. CPR 61.11 (22) reads that a limitation claim for (a) a restricted decree may be brought by counterclaim; and (b) a general decree may only be brought by counterclaim with the permission of the court. PD 10.18 provides that nothing in rule 61.11 prevents limitation being relied on by way of defence.

Arrest, *in rem* and limitation actions

Two means of remedy are available under the Admiralty jurisdiction of the High Court, the action *in personam* and the action *in rem*. An action *in personam* is the ordinary action against a named defendant while an action *in rem* is against the ship or ships of the named or unnamed defendants.[310] Where an action *in rem* is commenced, then the claimant may arrest the ship in question.[311] Furthermore, if the action *in rem* is brought on the basis of a maritime lien, the ship may be arrested by the claimant even if the ship has been sold before the action has been brought. In the view of the authors of *Shipowners' Limitation of Liability*, arrest of ship and action *in rem* are relevant to limitation proceedings in the following ways:

[310] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 143. For the enforcement procedure of *in personam* proceeding and distinction between *in rem* and *in personam* proceedings, see DC Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) Chapter 9; see also, Nigel Meeson and John A. Kimbell, *Admiralty Jurisdiction and Practice* (4th edn, London : Lloyd's of London Press 2011) Chapter 3.

[311] The 'guilty' ship or its 'sister ship'. See Section 21(4), Senior Court Act 1981. For the purpose of arresting a ship, Section 21(4) requires both a relevant ship and a relevant person and the relevant person shall be the person who would be liable on the claim *in personam* and was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship. In order to arrest a 'sister ship', according to Section 21(4), the relevant person should be the beneficial owner of the 'sister ship' as respects all the shares in it at the time when the action is brought.

> '*If the ship is arrested and the owner does not appear in court to defend the action, the ship can be sold and the claim satisfied from the proceeds. In such a case, the in rem claim is limited to the value of the property arrested. If the shipowner appears, the action continues in rem as well as in personam with the effect that the owner becomes exposed to the possibility of paying in excess of the ship's value, subject to the overall limitation of liability rights.*'[312]

On this basis, it would appear that an action in rem may be a preliminary stage of the limitation proceedings. A more detailed discussion on the relationship between limitation action and action in rem and arrest of ship will be discussed in the next chapter.

Obtaining a limitation decree or establishing a limitation fund is not sufficient to enable a shipowner to avoid a ship arrest. CPR, r 61.5 does not make any such statement and it has been held that arrest is permissible for the purpose of establishing jurisdiction even if security has been provided.[313] However, if a limitation fund under the 1996 LLMC has been established, a caution against arrest can be entered in the Admiralty Register on application by the person that has established the limitation fund. Entering a caution against arrest requires a statement that the limitation fund has been established and an undertaking that the person entering the caution will acknowledge service of any claim form against the property referred to in the caution against arrest. In such a case the property can still be arrested but in such circumstances the court has discretion to set aside the arrest and to order the arresting party to pay compensation.

In terms of procedure, where the ship is already under arrest, the limitation fund has been established and the right to limited liability is not challenged, then the owner can apply to the court for releasing the ship.[314] The grounds claimed in applying to the court for a release should be based on Article 13 (2) of the LLMC, which makes the release of the ship compulsory in several cases, one of which is when the limitation fund is established at the place of arrest.

---

[312] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 144. See also *The Dictator* [1892] P 304 (QB).
[313] See *The Anna H* [1995] 1 Lloyd's Rep. 11, where the release of ship upon security provided by the owner's P&I club was considered. The decision was made in consideration of the 1952 Arrest of Ship Convention, to which the United Kingdom is a State Party.
[314] CPR r 61.8 (4)(b).

3.4.2 Chinese law

3.4.2.1 Substantive law

Same as the earlier part on English law, this subsection will only cover the aspects of persons entitled to limitation and claims subject to limitation in accordance with the Chinese Maritime Code.

Claims subject to limitation

According to the Chinese Maritime Code, claims in respect of the following are subject to limitation:

(a) loss of life or personal injury and 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), as well as consequential damages resulting therefrom;

(b) losses resulting from delay in delivery in the carriage of goods by sea or from delay in the arrival of passengers or their luggage;

(c) other losses resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations;

(d) claims of a person other than the person liable in respect of measures taken to avert or minimise loss for which the person liable may limit his liability.[315]

Compared with 1976 Limitation Convention, the Chinese Maritime Code does not include Article 2(1)(e) and (f) of the Convention as a limitation claim. Indeed, the 1976 Limitation Convention provides that contracting states may make reservation on those two types of claims.

In terms of claims excepted from limitation, the Chinese Maritime Code provides that the following claims are excluded from the limitation regime:

(a) for salvage payment or contribution in general average;

[315] Article 207, Chinese Maritime Code 1992.

(b) for pollution damage under the International Convention on Civil Liability for Oil Pollution Damage to which the People's Republic of China is a party;

(c) for nuclear damage under international conventions on limitation of liability for nuclear damage to which the People's Republic of China is a party;

(d) against the shipowner of a nuclear ship for nuclear damage;

(e) by the servants of the shipowner or salvor, if under the law governing the contract of employment, the shipowner or salvor is not entitled to limit his liability or if he is by such law only entitled to limit his liability to a greater amount.[316]

Persons entitled to limit liability

Following the position in the 1976 Limitation Convention, those who are entitled to limit liability under Chinese maritime law are shipowners (including charterers and operators), salvors, and persons for whose act, neglect or default the shipowner or salvors is responsible.[317] Furthermore, where an assured may limit his liability, the insurer shall be entitled to the same limitation as the assured.[318]

3.4.2.2 Procedure of limitation action

Except that Article 213 and 214 of the Chinese Maritime Code provides for simple outlines on the constitution of a limitation fund, the Maritime Code does not specifically regulate procedural matters relating to limitation of liability. In order to implement the substantive provisions set out in the Maritime Code in respect of limitation of liability for maritime claims, the Maritime Procedure Law has introduced detailed provisions in respect of the procedures for constituting a limitation fund for maritime claims and procedures for registration and payment of claims.[319]

[316] Article 208, Chinese Maritime Code 1992.
[317] Article 204, Chinese Maritime Code 1992.
[318] Article 206, Chinese Maritime Code 1992.
[319] Those procedural rules are provided in Chapter 9 and Chapter 10 of the Maritime Procedure Law of China 1999.

Invoking limitation of liability

However, it is noteworthy that the Maritime Procedure Law only provides for the procedure on establishment of a limitation fund[320] and registration of claims[321]. The Maritime Procedure Law seems in lack of a general rule in respect of invoking the right to limit liability. One question would arise whether a shipowner is entitled to bring an action confirming his entitlement of limiting liability.[322] It is submitted by Chinese scholars that, since the Maritime Procedure Law is silent on this point, the shipowner's right of limitation should only be invoked as a defence.[323]Such an approach has also been confirmed by the People's Supreme Court in its Response to the Trial of Zhaoyuan City LingLong Battery Co Ltd and Yantai Ji Yang Container Shipping Co Ltd's Disputes on Limitation of Liability.[324] In this Response, the People's Supreme Court held that the right of limitation shall be regarded as shipowners' defence and therefore, the action for confirming shipowners' right of limitation shall not be supported by the Court. In this sense, it would appear that limitation of liability may only be invoked as a defence in China and the Chinese Courts will not issue any limitation decree as their English counter parties do.

Limitation fund

Same as the English law position, constitution of a limitation fund is not a prerequisite for limitation of liability in China.[325] Any liable person claiming limitation of liability may constitute a limitation fund with a court having jurisdiction.[326] The limitation fund shall be constituted in the sum of such of the amounts calculated in accordance with the limit provided in the Maritime Code, together with interest thereon from the date of the

[320] Chapter 9, Maritime Procedure Law of China 1999.
[321] Chapter 10, Maritime Procedure Law of China 1999.
[322] This is similar to a limitation action under English law as mentioned in section 3.4.1.2.
[323] Lixin He and Meishan Xie, *Limitation of Liability for Maritime Claims* (Xiamen: Xiamen University Press 2008) 230. However, the writer also mentions that such actions have been tried by a few Maritime Courts before the enactment of the Maritime Procedure Law 1999.
[324] [2002]Minsitazi No.38.
[325] However, the parties may, on consensus, apply to the Court to decide, during the process of establishing the limitation fund, whether the relevant person is entitled to limit his liability. For example, in *The LongBo No.6*, the China P&I applied for establishment of the limitation fund for the vessel's oil spill damage. Meanwhile, the China P&I also applied to the Court to decide its entitlement to limit liability and the other parties of the dispute agreed with such an application. Xiamen Maritime Court accepted the application and made a decision on China P&I's entitlement to limit. See Xiamen Maritime Court (2002) xiahaifachuzi No. 001.
[326] Article 213, Chinese Maritime Code 1992.

occurrence giving rise to the liability until the date of the constitution of the fund.[327] Application for the constitution of a limitation fund should be submitted in writing to the Maritime Court, stating the name and address of the applicant(s), details of the vessel and the incident involved, the amount of the limitation fund and the grounds thereof, as well as the names, addresses and means of communications of all interested parties known to the applicant, and with relevant evidence attached.[328] Article 101 of the Maritime Procedure Law provide, *inter alia*, that application for establishment of limitation funds may be submitted prior to or during other proceedings, but application must be made prior to the delivery of the first instance judgment.[329]

Registration and payment of claims

According to Article 112 of the Maritime Procedure Law, after a public notice has been issued by a maritime court, creditors shall apply to register their claims in respect of the accident in question within the period of notice. If the claimants fail to do so, their claims against the limitation fund shall be deemed to have been waived. For the purpose of applying to register the claims, claimants shall submit applications in writing and provide evidence of the claims. Evidence of the claim includes effective judgment, conciliation statement, arbitration award and notarized document of creditor's rights, as well as other supportive evidential materials that prove the existence of maritime claims.[330]

The general principle for distributing the limitation fund is basically that, the fund together with the interests shall be distributed among the claimants in proportion to their established claims which are subject to limitation. Personal injury or loss of life claims shall rank before property damage or loss claims.[331]

3.5 Policy considerations

[327] Article 214, Chinese Maritme Code 1992.
[328] Article 104, Maritime Procedure Law of China 1999.
[329] Article 101, Maritime Procedure Law of China 1999.
[330] Article 113, Maritime Procedure Law of China 1999.
[331] Article 210, Chinese Maritime Code 1992. More discussions on priority rules will be made in Chapter V.

3.5.1 For the shipping industry

For the consideration underlying limitation, Lord Denning explained as follows,

> '*The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. A small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage. I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.*'[332] *It has also been agreed that another consideration behind the limitation regime 'may now be that shipowners should be encouraged to insure against liability, and limitation makes it easier for them to do so, but that limitation should not be tolerated in the case of outrageous conduct, such as deliberately or recklessly causing loss.*'[333]

The English limitation of liability was entirely a creature of statute and the Responsibility of Shipowners Act 1733 expressed this point neatly in its preamble. The development of limitation of liability was 'of greatest consequence and importance to this Kingdom to promote the increase of the number of the ships and vessels, to prevent any discouragement to merchants … which will necessarily tend to the prejudice of the trade and navigation of this kingdom.'[334]

It has also been agreed that another consideration behind the limitation regime 'may now be that shipowners should be encouraged to insure against liability, and limitation makes it easier for them to do so, but that limitation should not be tolerated in the case of outrageous conduct, such as deliberately or recklessly causing loss.'[335]

As Lord Mustil pointed out, there are at least six motives for limitation of shipowner's liability may be discerned:[336]

1. The idea of a joint venture. Lord Mustil stated that there was a sense that it was

[332] *The Bramley Moore* [1963] 2 Lloyd's Rep. 429, at 437.
[333] *The Garden City* [1982] 2 Lloyd's Rep. 382, at 398.
[334] David Steel, 'Ships are different: the case for limitation of liability', [1995] LMCLQ 77.
[335] *The Garden City* [1982] 2 Lloyd's Rep. 382, at 398.
[336] Lord Mustill, 'Ships are different – or are they?' [1993] LMCLQ 490.

unseemly for the entirety of a heavy risk to be removed from one co-adventurer to whom that risk would prima facie attach and placed on the other.

2. High cargo value. In the sense that the value of the cargo substantially exceeded the value of the cargo loss, if the shipowner were to be held liable for the whole cargo loss his contribution would be greatly multiplied. This point was the initial consideration of English limitation regime.

3. Limited share capital. Lord Mustil stated that the increasing pressure to introduce limitation statutes to protect the capital of the shipowner took place at roughly the same time as the development of the joint stock company with limited liability, participation in which risked the potential loss of the entire value of the investment but no more. Such a statement indicated that the limitation for maritime claims seems to be an analogy of limited liability companies. The comparison between limitation of liability for maritime claims and limited liability companies will be made in Chapter VI.

4. Ruin without fault. Lord Mustil was of the view that if the venture was lost through the dishonesty or neglect of the master, and if this made the shipowner liable to his co-adventurer for the whole value of the cargo, he might be ruined by an event for which he was not personally to blame, and about which he could have had no knowledge until after it happened.

5. Attraction of local venture capital. Lord Mustil pointed out that the limitation of liability would remove an obstacle to the investment of venture capital by nobles and rich merchants, and would thus encourage the development of a national merchant marine. It was further mentioned that the British limitation statutes also helped on competition with Britain's trading rivals.

6. General benefit to users. Lord Mustil stated that another motive for the enactment of limitation laws was that they protected not only the carrier but those who benefit from his services. Otherwise, if very large claims have to be borne without limitation, the carrier may either be driven out of business—thus forced to cover the cost of insuring his potential liabilities by means of increases in the freights charged to cargo owners. In this sense, limitation is beneficiary to the whole shipping industry.

3.5.2 For shipowners

To be more specific, the limitation regime is more shipowners friendly.

In his decision of *Strong Wise Limited v. Esso Australia*, Rares J relied on Bradley J's judgement in *Norwich Company v. Wright*[337] which identified the policy reason behind these laws as being the need to protect shipowners so as to encourage investment in trading ships. He then traced the development of English legislation from 1734 to Congress' enactment in 1851 of the United States law for limitation. The Judge saw the Congressional purpose as informed by the prism offered by the law maritime, together with European and British limitation legislation, finding that:

> '*The great object of the law was to encourage ship-building and to include capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline.*' [338]

In the opinion of Rares J, this purpose still informs the policy reasoning that underlies the present Convention.[339]

3.6 Conclusion

From the historic review of the law of limitation of liability for maritime claims, it is obvious that there was a change from the value based limitation regimes to the tonnage limitation regime. This point is also true for both English law and Chinese law. Although the English law for the first time established a limitation system based on the tonnage of the vessel, the original consideration was to set out an easy format for calculating the value of the vessel. In China, the abandonment limitation system was adopted until the enactment of the Chinese Maritime Law 1992. One significant difference between the tonnage limitation system and other value based limitation system is that the former involved the use of a pre-determinable valuation of ship unaffected by the circumstances in which the claims arose; while the value based systems value the ship and freight as they are after the circumstance in which the claims

[337] 80 US at 121.
[338] *Norwich Company v. Wright* 80 US at 121.
[339] See Strong Wise limited v Esso Australia Resources Pty Ltd [2010] FCA 240, at para. 30.

arose. That is to say, the tonnage system creates a 'virtual' limit for the claims rather than using the 'physical' limit, which is the vessel itself.

For the justification of the value based limitation system, Alex Rein stated as follows:

> '*The systems were suited to the social and economic conditions prevailing at the time when they were created. Marine insurance was in its infancy; liability insurance in the modern sense was non-existent. Moreover, the judicial systems were imperfect: to pursue the owner perhaps in a faraway country, for the purpose of holding him liable without limitation was not an attractive solution. It was much easier to give the claimant priority rights in the tangible and seizable assets of the venture and to forget any further claim. These assets were easily identified and the claimants could proceed directly to realization unless the owner paid the claims or provided other security. Furthermore, the fund to be surrendered was easily determined—the market value of the assets.*' [340]

Such consideration may still be justified under current times as the value based systems are still in use for domestic shipping of several jurisdictions such as France and German.[341]

The tonnage limitation system has been widely spread among shipping nations and the 1976 Limitation Convention has been widely adopted. The Convention impacts both English law and Chinese law with regard to limitation issues. The U.K. is a contracting state to the 1976 Convention and also adopted its 1996 Protocol. The Convention has force of law in the United Kingdom. On the other hand, Chapter XI of the Chinese Maritime Code, entitling Limitation of Liability for Maritime Claims, incorporates the text of the 1976 Convention with little amendments. In this sense, the limitation system under English law and Chinese law are pretty much the same. However, as the 1976 Convention leaves the procedural issues to national law, the procedure of invoking limitation are different in some aspects in these two jurisdictions. Different procedural rules may lead to different impacts on litigation practice. For such difference, detailed discussion will be made in the following chapters.

---

[340] Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259, at 1262.
[341] *Ibid*, at 1263.

It has been commonly admitted that the creation of limitation of liability for maritime claims was out of public policy consideration. The limitation was designed to encourage shipping and trade activities by means of protecting the shipowners from financial difficulties. Despite the strong criticism arising from particular situations limitation rights are real and there is no indication that they will be removed in the near future. In this sense, the impact of limitation regime on the enforcement of maritime lien will also exist in the future.

However, the question of whether limitation of liability is still useful and appropriate continues to recur. It can be said that nowadays fewer situations arise where the limits of liability under the global limitation conventions determine the compensation available and this indicates that importance of global limitation of liability has been reducing. This assertion is based on two factors: first, the successive increases the limits of liability for global limitation under the 1976 and 1996 LLMCs and second, the removal of a significant number of claims from global limitation into specific liability regimes. Along with this trend, it is important to examine the possible relationship between limitation regimes and maritime liens.

Chapter IV Relationship between the Maritime Liens and Limitation of Liability for Maritime Claims

4.1 Introduction

As illustrated in the previous chapters, both maritime liens and limitation of liability for maritime claims have been established for a long time in maritime law. It would appear that the legal principles underlying the two regimes are not related, but since that both of them seek to strike a proper balance between the encouragement of shipping and the effective prosecution of maritime claims, [342] they are connected with each other. By the words of Scott LJ in the judgement of *The Tolten*[343], there is 'an integral—almost an organic—connection between the two in the history of our own Admiralty law, law of sea in which it is deep rooted.' The relationship between maritime liens and limitation of liability is of importance for this research in that their relationship will determine how the conflicts between the two shall be resolved.

Historically speaking, maritime liens and limitation of liability are related in that both of them reflect the impact of the personification of ships. By virtue of the personification theory, a ship is regarded as a distinct entity that is capable of entering into contracts and committing torts. It follows that, the ship would appear to be liable for claims arising from the contract she has entered into or the tort she has committed. Therefore, the ship shall compensate the claimant up to her value. This explains why maritime lien was suggested to be regarded as a limitation regime.[344] However, English law produced quite a different system of limitation during the 18th and 19th centuries, namely the tonnage system. The English limitation system adopts a different approach under which the limit of shipowers' liability is based on a monetary amount per ton of the ship. In addition, a separate limitation fund may be constituted and such a fund is to be distributed among the claimants in proportion to their claims, not according to the

[342] *The Father Thames* [1979] 1 Lloyd's Rep 364 at 368.
[343] [1946] P.135.
[344] Alex Rein, 'International Variations on Concepts of Limitation of Liability' (1978-1979) 53 Tul L Rev 1259. See section 3.2.2.2, above.

priority rules of maritime liens. Therefore, under the English limitation system, the relationship between maritime liens and limitation regimes is different from that under ship value based limitation systems.

This chapter will analyse two aspects of the relationship between maritime liens and limitation of liability, namely the theoretical relationship and the practical relationship. The theoretical relationship between maritime liens and limitation of liability refers to the connection of theoretical foundation behind the two types of rights. The first part aims to examine such relationship under value based limitation systems and the tonnage limitation system respectively. In the second part, discussion will be given on the practical relationship which refers to the overlap between claims giving rise to maritime liens and claims subject to limitation regimes. Such overlap existing under current English and Chinese legal framework will be examined. In addition, the relationship between international conventions on limitation of liability and maritime liens will be discussed as well. In the final part of this chapter, conclusion will be drawn on the relationship between the two under both English law and Chinese law.

4.2 Historic origins

The relationship of maritime liens and limitation of liability in respect of their historical origins is discussed by Scott LJ in *The Tolton.*[345] Note that the question to be decided in *The Tolten* was not the relationship between maritime liens and limitation; instead, the main issue concerned by the Court of Appeal in this case was whether the Court had jurisdiction to entertain an action *in rem* for damage done by a vessel to property attached to foreign soil.[346] However, Scott LJ did analyse the 'correlation' between maritime liens and limitation of liability in both English law and international conventions. In the Judge's word, it was 'merely as illustration of the trend of legal opinion' and it was his duty 'to use the knowledge of the 'general law of the sea.'[347] The

[345] [1946] P.135.
[346] The United Africa Co., Ld., the owners and occupiers of the Bulk Oil Wharf at Lagos, brought an action *in rem* against the owners of the British motor vessel *Tolten* for damage done to their wharf when the *Tolten* came into collision with it on October 13, 1944. The plaintiffs alleged that the vessel was negligently navigated by the defendants or their servants. The defendants objected, on a preliminary point of law, that the court had no jurisdiction to adjudicate in an action *in rem* for damage done by a vessel to property attached to foreign soil.
[347] *The Tolten* [1946] P.135, at 149.

Judge's comments on the 'correlation' are as follows:

> '*Limitation of shipowners' liability and maritime lien seem at first sight unconnected topics, but they are not. There is an integral—almost an organic—connection between the two in the history of our own Admiralty law, law of sea in which it is deep rooted. The basic principle underlying the co-relationship is seen most clearly in its origin form, which was still extant in continental law before the Conventions (limitation convention). Both rules were in truth adopted from customs of merchants (who then included shipowners), in whose usage they had been applied as measures of public policy for the encouragement of sea commerce. The first object was to bring within foreseeable and moderate limits the risks to be undertaken by the shipowner, when he adventured his ship on a commercial enterprise. The means adopted was to keep his financial liabilities within his 'fortune de mer' consisting of ship and freight at risk on the voyage. The object of the second was, within that limit, to give to the main creditors of the shipowner, whose claims arose out of his maritime adventure, the protection of a 'privilege' position—that of the maritime lien, or continental equivalent, the French word 'privilege'. The limitation and the 'privilege' were thus interdependent in historic origin.*'[348]

The statement of Scott LJ can be justified by the history of maritime liens and limitation of liability. As illustrated in Chapter II, the earliest form of maritime lien was the 'maritime loan' which later evolved into bottomry maritime lien. Such a loan was used by masters to borrow money on security of the property[349] hypothecated in order to enable the ship to finish her voyage. In this sense, the notion of 'maritime loan' or its later form, the bottomry lien, attempts to encourage the shipowners to perform sea adventures. In effect, other maritime liens, i.e. wage's lien, salvage lien and disbursement lien, all derive from various modes of conduct by which service is rendered to a ship and the adventure of the ship.[350] Thus all these maritime liens serve to support the shipowners and seaborne trade.[351] In terms of limitation of liability for maritime claims, as discussed in Chapter III, the limitation in English law originated front the Responsibility of Shipowners Act 1733 which allowed a shipowner to limit his

[348] *Ibid*.
[349] A ship, a ship and her freight or a ship, her cargo and freight.
[350] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 6.
[351] See Chapter II above.

liability for loss of the cargo caused by negligence of master and crew to value of the ship and her freight. As pointed out by Patrick Griggs, the consideration behind the 1733 Act was to increase the British merchant fleet and to encourage commercial ventures,[352] which is same as the consideration underpinning maritime liens. Such a consideration is also the reason why the limitation regimes are widely adopted in shipping nations. Therefore, despite that maritime liens and limitation of liability put emphasis on different aspects of shipping activities,[353] the historical relationship between the two lies in, as Scott LJ said, that both of the two types of right were 'applied as measures of public policy for the encouragement of sea commerce.'[354]

4.3 Theoretical relationship

4.3.1 The personification theory

In *The Tolten*, Scott LJ emphasised that 'the correlation between limitation and lien remained a foundation of our admiralty law'. However, the Judge only mentioned that limitation of liability and maritime liens are related in their original form while the judge did not expressly point out the theoretical link behind the 'correlation' of the two. Nevertheless, in the judgement, Scott LJ did mention that

> '*..., I use the personification metaphorically for the persons responsible in law for her negligent navigation.*'[355]

The above words indicated that it was the personification theory that was reflected in both of the origin forms of the two rights. Under the personification theory, a ship is personified as a distinct juristic entity with a capacity to contract and commit tort.[356] The personification of vessels can be traced back to the maritime law of the Middle Ages, under which the ship was conceived as both the source and the limit of liability.[357] When discussing the personification theory, Price cited the Black Book of Admiralty in

[352] Patrick Griggs, 'Limitation of Liability for Maritime Claims: the search for international uniformity', [1997] LMCLQ 371.
[353] The difference will be examined in Chapter V.
[354] *The Tolten* [1946] P.135, at 149.
[355] *The Tolten* [1946] P.135, p140.
[356] See D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 7. See also Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 6.
[357] *Ibid*.

which it is said that 'the ship has to pay' and the other property of the owners is exempted.[358] Another writer, Thomas, explained the personification theory as follows:

> '*When damage is caused by a ship the ship herself is the 'offender' or 'wrong doer' and is condemned for her blameworthniss in a like manner as chattels were formerly forfeited under the common law of deodand.*[359] *With regard to services rendered the precise mechanic by which the ship is rendered liable is an express or implied hypothecation, which concept probably emanated from the Civilian hypothec.*'[360]

According to Price, three consequences would logically follow from the personification theory. Firstly, the maritime lien would attach to the ship irrespective of any personal obligation of the owner; secondly, the maritime lien would remain indelible not withstanding any change of ownership; and last but not least, the limit of liability must be the value of the owner.[361] Therefore, if the personification theory is followed, maritime liens and limitation of liability are integrated. The personification theory explains the reason why Scott LJ held that there was 'an integral—almost an organic—connection between limitation and maritime liens.'[362] Nevertheless, the personification theory is not well observed in English Courts.

It is also notable that Scott LJ based his statement on the assumption that the English limitation system was derived from the continental system of the '*fortune de mer*', namely the value based system of allowing a shipowner to limit by reference to the value of the ship and freight earned. However, despite the initially adopted the continental concept in the United Kingdom, the tonnage limitation system has been rooted in the United Kingdom since the Merchant Shipping Act 1894.[363] On this basis, it is difficult to say that the English system has been still following the concept of '*fortune de mer*'; and it is also difficult to say that the theoretical foundation of the English

[358] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 6.
[359] The personification of ship is indeed a civil law concept and has difficulties in explaining the damage maritime lien. The early law of deodand is used to endow a ship with a complete form of personality in respect of explaining damage maritime lien under common law. For more details about the law of deodand, see Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 6-8.
[360] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 7.
[361] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 11. A same view is expressed by another writer in an earlier publication, see Paul Macarius Hebert, 'The Origin and Nature of Maritime Liens' (1929-1930) 4 Tul L Rev 381，at 383. Hebert based his view on Mayer's work on maritime liens.
[362] *The Tolten* [1946] P.135, p149.
[363] Patrick Griggs, 'Limitation of Liability for Maritime Claims: the Search for International Uniformity,' [1997] LMCLQ 369, see 370-371.

limitation system is the personification of the ship in that the limitation amount does not represent the vessel under the English limitation system. Especially after the announcement of the 1957 Limitation Convention, which abolished the mixed system of the earlier 1924 Limitation Convention and adopted a solely monetary system, the position seemed to be more obvious that the monetary limitation system is not linked with the personification theory. Therefore the correlation mentioned by Scott LJ would appear to be broken. In the next two sections, analysis will be given respectively on the value based limitation systems and the tonnage limitation system with regard to their relationship with maritime liens.

4.3.2 Value based limitation systems and maritime liens

As has been reviewed in Chapter III, the limitation system based on the value of the vessel prevailed for a long time in the history of maritime law. Such value based limitation systems can be divided into two types, the execution system and the abandonment system. The execution system was popular in Germany and Scandinavian States. By virtue of such a system, the shipowners had no personal liability for limitable claims; and therefore limitable claims were enforceable only against the ship and freight. On this basis, maritime liens were involved and the claimants shall be compensated according to the priority rule settled by the maritime liens. The abandonment system was prevailing in countries such as France and later the United States. Under such a system, the shipowners were personally liable for the limitable claims but they were entitled to avoid liability by abandoning the ship and freight to the claimants. After the abandonment, the liability transferred from the shipowners to the ship itself, which leads to the consequence of the abandonment was that the claimants were only entitled to recover by their maritime liens in the assets.[364] As Professor Erling Selvig points out, there are two principles embodied in common in the two types of limitation systems, one of which is that the limitation amount was to be distributed among the claimants according to the priority rules for maritime liens.[365]

In the Australian decision *Strong Wise limited* v *Esso Australia Resources Pty Ltd*[366] , Rares J gave a brief review on the history of limitation provisions, namely the

[364] See Erling Selvig, 'An Introduction to the 1976 Convention' in Institute of Maritime Law, *Limitation of Shipowners' Liability: The New Law* (London: Sweet & Maxwell 1986) 3-18.
[365] *Ibid*, 4.
[366] *Strong Wise limited* v *Esso Australia Resources Pty Ltd* [2010] FCA 240.

development of limitation regimes from value based system to monetary system. It is pointed out by the Judge that, at the time of 'executing' system and 'abandonment' system, the limitation amount could be distributed among the claimants according to priority rules applicable to maritime liens. In this regard, the Judge says,

> '*…under other systems, the owners' liability varied from the British system according to how damaged the ship was and what the value of her freight was after the circumstances from which claims arose. And that liability was not refreshed or revived for claims arising on a second or subsequent distinct occasion. Claimants' maritime liens would take priority in respect of the vessel and her freight in accordance with the substantive law in those systems. Thus, once abandoned, the ship and freight ether ceased to be available to respond to claims arising on a later occasion beyond what, if anything, was left of their value after it had satisfied the earlier maritime liens of claimants from the first occasion. The balance constituted the only property or fund to which claimants on all subsequent occasions could resort. …thus, if the ship were totally lost, the liability of the shipowner was at an end, since the ship (and unless it were still payable, her freight) then had no value.*'[367]

A similar approach may be found in the 1924 Limitation Convention and its counterpart, the 1926 Maritime Liens and Mortgages Convention. In the 1924 Limitation Convention, a mixed limitation system, which has also been termed the option-system, was adopted. Under the mixed limitation system, the shipowner may limit his liability to the value of ship and freight or to an amount of 8 pounds per ton.[368] The 1926 Maritime Liens and Mortgages Convention was designed to coordinate with the 1924 Limitation Convention, which was reflected by their provisions. On the one hand, Article 1 of the 1924 Limitation convention provides that the liability of the shipowner is limited to an amount equal to the value of the vessel and the freight. On the other hand, Article 2 of 1926 Maritime Lien and Mortgage Convention states that liens attach to 'vessel, to the freight …and to the accessories'. Therefore, it is implied that the objective of the 1926 Maritime Lien and Mortgage Convention was to provide a lien for those maritime claims for which a shipowner could limit his liability by abandoning the ship.[369]In

[367] *Ibid*, at para 40.
[368] See Article1(8), 1924 Limitation Convention.
[369] John M. Kriz, 'Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952' (1964) Vol 70 Duke Law Review 70.

respect of the distribution of the limitation amount, Article 7 of the 1926 Maritime Liens and Mortgages Convention provides that the claimants whose claims are secured by a lien have the right to put forward their claims in full without any deduction on account of the rules relating to limitation of liability; however, that the sum apportioned to them may not exceed the total amount of the limitation.

From the above, it is clear that value based limitations systems are integrated with maritime liens. The combination of a value-based limitation system and maritime liens reaches the effect that a ship becomes both the source and limit to the liabilities caused by it. Neither the execution system nor the abandonment system is based on the personal liability of the shipowners; and, under such an approach, both limitation of shipowners' liability and maritime liens are to be enforced against one single object, namely the ship or the proceeds of the ship (the freight earned by the ship may also be included). The real effect of value based limitation systems is to deprive shipowners' personal liability and to prevent claims against other assets of the shipowners besides the ship in question. Once such an effect has been achieved, maritime liens would automatically operate and the shipowners' liability would automatically be limited to the value of the ship.[370]

4.3.3 Tonnage limitation system and maritime liens

Since the Merchant Shipping Act 1894, a tonnage limitation system for shipowners' liability has been introduced into English law. Under section 503 of the 1894 Act, shipowners could limit their liability in cases of loss of life or personal injury (personal claims) or loss or damage to property (property claims) which happened without shipowners' actual fault or privity. The limit for property claims was to be calculated at the rate of 8 pounds per ton of the vessel's tonnage; and the limit for personal claims was at the rate of 15 pounds per ton either alone or together with property claims.[371]Along with the tonnage limit, another device, the limitation fund, was also introduced. A shipowner could simply put up a fund calculated in accordance with the foresaid formula and leave the claimants to pursue their claims against that fund. More importantly, the limitation amount was to be distributed in proportion to the claimants

[370] Freight of the voyage may also be included.
[371] Section 503, Merchant Shipping Act 1894.

not according to the priority rules of maritime liens.[372]

Although the monetary calculation formula intended to produce a figure of limit which equated to the commercial value of the vessel, the theoretical foundation of the limitation regime has been changed. It is a strong assumption that, by following the tonnage system, the purpose of limitation is not to make the ship itself as the limit and therefore the limitation is no longer based on the personification of the ship. As pointed out by Patrick Griggs, the concept of linking limitation amount with the value of the ship has been abandoned and now the amount is fixed at a figure in respect of which insurance is readily available.[373] In this sense, the limitation does not necessarily relate to the ship. In other words, a tonnage limitation system provides a separate compensation scheme. On the other hand, a maritime lien is described as a privileged claim upon maritime property.[374] It is one of the fundamental legal characteristics of a maritime lien that the lien is an encumbrance on the maritime property, which would normally be the ship or the ship and her freight. No matter whether personification theory or procedure theory is followed in respect of explaining maritime liens, such a characteristic of maritime liens does not change. That is to say, a maritime lien cannot exist independent of the ship.[375] In addition, unlike the value based limitation systems, a tonnage limitation system is not confined to be enforced through the sale of the ship. Instead, a separate limitation fund may be established under the tonnage limitation system in order to secure the compensation available for the claimants. It is therefore submitted that, under the tonnage limitation system, the limitation amount or the limitation fund does not represent the ship.[376] On this basis, limitation of shipowners' liability and maritime liens would appear to be enforceable against different objects. Thus the relationship between maritime liens and limitation of liability seems to have been broken under English law.

---

[372] Section 504, Merchant Shipping Act 1894.
[373] Patrick Griggs, 'Limitation of Liability for Maritime Claims: the Search for International Uniformity,' [1997] LMCLQ 369, at 373.
[374] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 1. See also D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 12.
[375] This point is also supported by the view that a maritime lien extinguished where the ship is destroyed or lost. For extinction of a maritime lien, see Chapter V, section 5.5, below.
[376] See the minority's view in the decision of *The Countess* [1923] AC. 345. For more discussion on this decision, see Chapter VI, section 6.2.2, below.

4.3.4 Procedural theory

Besides the personification theory, another major theory purporting maritime liens is the procedural theory and, more importantly, it is commonly recognised that the procedural theory has been widely accepted by the English Courts.[377] According to the procedural theory, the maritime lien historically grew out of the process of arrest in order to compel the appearance of the defendant and the provision of bail. In *The Dictator*[378], Jeune J pointed out that when actions beginning with the arrest of the person became obsolete, the action *in rem* by arrest of the vessel came into greater prominence and the doctrine of maritime liens thus developed.[379] On the basis of such an assumption, the procedural theory assumes that a maritime lien was merely a form of proceeding to compel the appearance of the owner.

According to Price, one of the consequences results from the procedural theory is that the recovery in an action *in rem* is not limited to the value of the *res* in the situation where the defendant has appeared to defend the suit *in rem*.[380]This submission is based on the theory formulated in the decision of *The Dictator*. In this decision, the salvor issued a writ *in rem*, directed to the owners and parties interested in the steamship Dictator*,* her cargo, and freight for salvage services. The claimant contented that in an action *in rem*, even when the owners of the *res* appear, there cannot be execution for any amount greater than the value of the property salved.[381] The question before the Court was, when the owners of the res have appeared in a salvage action *in rem*, what is the limitation (other than the value of the property salved) on the powers of the Court to award salvage, or the power of the plaintiff to enforce its payment if awarded. It is submitted by the Judge that this question probably has seldom arisen in a salvage action *in rem*;[382] but in actions of collision damage, the question may readily arise since the limit of liability may exceed the value of the offending ship.[383] According to the view of Jeune J in that decision, if the defendant appears, the action *in rem* becomes an action *in personam* and his other property becomes liable unless he can invoke limitation of

[377] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 11; see also, D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 8.
[378] [1892] P. 304.
[379] Ibid, at 311.
[380] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 12-14.
[381] In *The Dictator,* bail was given by the owners to release the vessel, which was equivalent to the value of the property.
[382] Cf *The Jonge Bastiaan* 5 c. Rob. 332.
[383] *The Dictator* [1892] P. 304 at 310

liability.[384] It is noteworthy that such a position did not cut off the relationship between maritime liens and limitation necessarily. In the situation where a value based limitation system is adopted, the limit of liability is still the value of the ship and both maritime liens and the limitation regime are enforced against the value of the ship. However, the position of procedural theory, as followed in *The Dictator*, did open the window for limiting the liability to a separate fund rather than the proceeds of the ship. Therefore, the combined effect of the procedural theory and the tonnage limitation system would appear to separate maritime liens from the limitation regime. It follows that the enforcement of a maritime lien shall not have impact on limitation of liability for maritime claims. However, such a position would deteriorate a maritime lien holder's rights and due to the overlap between maritime liens and limitation of liability for maritime claims, conflicts between the two types of right may still be found. The cross impact of maritime liens and limitation is discussed in Chapters V and VI.

4.3.5 Chinese law position

The Chinese Maritime Code 1992 was described as 'perhaps the most comprehensive example of the selective incorporation of certain provisions', which contains many of the well-known provisions found in existing international conventions.[385] As illustrated in Chapter II and Chapter III, the Chinese Maritime Code 1992 incorporated the 1976 Limitation Convention in respect of provisions on limitation of shipowners' liability and relied on the 1993 Maritime Liens and Mortgages Convention with regard to provisions on maritime liens. Under this context, maritime liens and the limitation of liability regime under Chinese law are in lack of theoretical foundation in the domestic legal framework. However, some clues in respect of the intention and consideration of the drafters of the Maritime Code 1992 may be found through some of the provisions of the Code.

Article 272 of the Maritime Code 1992 provides that 'the law of the place where the court hearing the case is located shall apply to matters pertaining to maritime liens.' Such a provision indicates that the English law position settled in *The Halcyon Isle*[386] is followed by the drafters of the Chinese Maritime Code. In the decision of *The Halcyon*

[384] *Ibid*, at 323.
[385] Patrick J.S. Griggs, 'Uniformity of Maritime Law - An International Perspective' (1999) 73 Tul L Rev 1551.
[386] [1981] A.C. 221.

Isle, it was held by Lord Diplock, who delivered the judgment for the majority of their Lordships, that in proceedings *in rem* against a ship the order of priority between claims and the recognition of a right to enforce a maritime lien were matters to be determined according to the *lex fori* of the country whose court was distributing the proceeds of sale of the ship. The reason given by the Judge is that a maritime lien is deemed as a procedural method of securing the personal appearance of a defendant and the provision of a fund to meet a judgment and accordingly the question whether a particular class of claim gives rise to a maritime lien or not as being one to be determined by English law as the *lex fori*.[387] Therefore it can be inferred from the provision of Article 272 that the theory purporting maritime liens under Chinese law is the procedure theory rather than the personification theory. Furthermore, Article 28 of the Chinese Maritime Code 1992 provides that a maritime lien may only be enforced by means of arresting the ship. However, an action *in rem* is not recognised under the Chinese legal framework and the lawsuit can only be made against a person, which makes the arrest of ship a mere procedural measure under Chinese law. The combination of the above factors leads to the result that there seems to be no room for the personification theory to be applied in Chinese law and the procedural theory is arguably the most suitable theory for Chinese law in dealing with maritime lien matters.

In terms of the limitation of liability regime under Chinese law, as the 1976 Limitation Convention is followed by the Maritime Code, a tonnage limitation system is therefore adopted in China.[388] Therefore, the position of Chinese law in respect of the relationship between maritime liens and limitation is similar to that of English law. That is to say, there seems no close connection between maritime liens and limitation of liability under Chinese maritime law as well.

4.4 Practical relationship: overlap between maritime liens and limitation of liability for maritime claims

[387] *Ibid*, at 238.
[388] See Chapter 11 of the Chinese Maritime Code.

4.4.1 English law

Maritime liens and limitation of liability are also related in that some claims subject to limitation may give rise to maritime liens as well. Under English law, on the one hand, there are established maritime liens for claims arising from salvage, damage done by a ship, seamen's wages, masters' disbursements, bottomry bonds and respondentia bonds;[389] on the other hand, claims subject to limitation of liability are claims in respect of loss of life or personal injury and property damage in connection with the operation of the ship.[390] As one may notice, under English law the overlap between maritime liens and limitation only exists in respect of claims for damage done by a ship. In effect, such overlap between maritime liens and limitation of liability did not exist in English law before 19th Century. It is noteworthy that neither the initial form of maritime liens or limitation covered claims arising from collision damages. The overlap in respect of claims for collision damage was established by enlargement of the scope of the two rights. In the Responsibility of Shipowners Act 1733, limitation was only allowed to be invoked for loss of the cargo caused by negligence of master and crew.[391] The right to limit was extended by subsequent legislation and it was Section 503 of the Merchant Shipping Act 1894 which finally confirmed that shipowners could limit their liability for loss of life or personal injury or loss or damage to property by reason of the improper navigation of the ship.[392] Such a position was kept in English law as well as in the relevant international conventions. On the other hand, the maritime lien for collision damage was for the first time confirmed by the decision of *The Bold Buccleugh*[393] in 1851.[394] Since then maritime liens and the limitation regime are connected not only theoretically but also practically under English law.

Claims subject to limitation of liability are provided in Article 2 of the 1976 Limitation Convention which has been enacted in the Merchant Shipping Act 1995. Article 2 of the 1976 Convention reads as follows:

---

[389] *The Bold Buccleugh* 7 Moo. P. C. 267.
[390] Article 2, 1976 Limitation Convention as enacted in the Merchant Shipping Act 1995, Schedule 7.
[391] *The Tolten* [1946] P. 135 at 150. See also Patrick Griggs, 'Limitation of Liability for Maritime Claims: the Search for International Uniformity,' [1997] LMCLQ 369, at 370.
[392] Section 503, Merchant Shipping Act 1894. This section also provides limitation for personal and property damage on board the ship but it does not specify the reason by which such damage is caused.
[393] 7 Moo. P. C. 267.
[394] *The Tolten* [1946] P. 135 at 155.

1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(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 connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;

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

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

2. ...

From the wording of the above provision, it is obvious that Article 2(1)(a) and (c) are potentially related to a maritime lien arising from damage done by a ship. Nevertheless, the scope of Article 2(1)(a) and(c) are not necessarily as same as the scope of a damage maritime lien. For the purpose of understanding the scope of damage claims subject to limitation, the following three points need to be clarified.

First of all, claims are qualified for limitation whatever the basis of liability may be. Article 2(1) of the 1976 Convention applies to '… claims whatever the basis of liability may be …'. Such a provision has changed the position under the 1957 Limitation

Convention where no such words may be found. Article 1(1) of the 1957 Convention only refers to '… claims arising from …' a list of specified 'occurrences'.[395] As pointed out in *Limitation of Liability for Maritime Claims* (4th edn.), the position before the enactment of the 1976 Limitation Convention in the United Kingdom had always been that the right to limit liability is restricted to claims for which the shipowner is liable in damages.[396] Such a position was confirmed by both the United Kingdom's statutory provisions and case law. Section 503(1) of the Merchant Shipping Act 1894, as amended by the 1958 Act, referred limitation of liability to claims arising from damages and distinct such claims from other types of claims. In terms of case law, it was held by the House of Lords in *The Stonedale No. 1*[397] that a shipowner could not limit his liability for wreck removal expenses payable under statute since such expenses were in the nature of a debt rather than damages. Similarly, in the decision of *The Kirknes*,[398] it was held that the owners of a towed vessel could not limit their liability for damage caused to the tug since the tow's liability arose not from any breach of contract or duty but from the strict covenant in the towage contract to indemnify the tug. In other words, the tow was not liable in 'damages'. The effect of the 1976 Convention and the 1995 Merchant Shipping Act is to remove altogether the requirement that the claim must be based on damages. Therefore, all claims listed in Article 2 of the 1976 Limitation Convention are subject to limitation no matter the liability arises in contract, in tort or by statutory. Limitation is now available 'even if brought by way of recourse or for indemnity under a contract or otherwise …'[399] subject to certain exclusions.[400] According to the writers' view in *Limitation of Liability for Maritime Claims* (4th edn.), the emphasis of the 1976 Convention is on the nature of the claim for financial relief rather than the legal basis for that claim or the way in which it is pleaded.[401] On this basis, in *Caspian Basin Specialised Emergency Salvage Administration* v. *Bouygues*

[395] Article 1(1) of the 1957 Limitation Convention reads:
'*The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:'*
[396] Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) 18.
[397] *Stonedale No. 1 (Owners) Appellants* v *Manchester Ship Canal Co. and Others Respondents* (*The Stonedale No. 1*) [1956] A.C. 1
[398] [1956] 2 Lloyd's Rep. 651.
[399] *The Aegean Sea* [1998] 2 Lloyd's Rep 39.
[400] Article 3, 1976 Limitation Convention.
[401] Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) 18.

Offshore SA (No. 4), a claim based on alleged misrepresentation was held to be within the 1976 Convention.[402]

Secondly, the meaning of the term 'occurring on board or in direct connection with the operation of the ship or with salvage operations' needs to be clarified. According to Article 2 (1) (a), claims for loss of life, personal injury, loss of or damage to property as well as their consequential losses are all subject to limitation, as long as they occur either on board or in direct connection with the operation of the ship or salvage operations. In *Limitation of Liability for Maritime Claims*, it is pointed out that such a provision in the 1976 Convention seeks to provide a wider definition of claims which are subject to limitation in order to avoid 'unfortunate' decisions such as *The Tojo Maru*[403] where the House of Lords held that the salvors were not entitled to limit their liability because the negligent act of the diver was not an act done either in the 'management' of or 'on board' the tug.[404]

With regard to the interpretation of Article 2 (1) (a), the writers of *Shipowners' Limitation of Liability* are of the view that the meaning of 'loss or damage occurring on board' is clear, which includes everything that goes to the operation of the ship; however, the extent of the concept 'direct connection with the operation of the ship' seems not as easy to determine.[405] On the basis of the judgment of Rix J in *The Caspian Basin*,[406] the writers submit that the wording of 'direct connection with the operation of the ship' has been interpreted as expressing the 'necessary linkage' between the loss suffered and 'the ship in respect of which a claim is made'.[407] The difficulty of distinction between direct and indirect connection with the ship's operation is also demonstrated by judicial decisions.

In *The Bos 400*[408], Rix J held that a claim for loss of a tow arising in part out of misrepresentation as to a tug's bollard pull and brake horsepower was a claim

[402] [1997] 2 Lloyd's Rep 507.
[403] [1971] 1 Lloyd's Rep 341.
[404] Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) 19.
[405] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 56.
[406] [1997] 2 Lloyd's Rep 507 at 522.
[407] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 56.; see also Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) 19.
[408] [1998] 2 Lloyd's Rep 461.

'occurring … in direct connection with the operation of the ship' within Article 2.1(a) of the 1976 Convention. In *The Aegean Sea*[409], the Queen's Bench held that destruction of bunkers, pollution damage and clean-up costs arising when a vessel grounded due to breach of a safety warrenty under a charter party were 'in direct connection with the operation of the ship.'[410] In another decision, *The CMA Djakarta*[411], it was held that such wording also included cargo claims arising from the shipment of undeclared dangerous goods.

Therefore, it is submitted that the wording might be sufficiently broad, for example, to have the effect of enabling a shipowner to limit his liability in respect of claims for personal injury or property damage caused by a person for whose act, neglect or default he is responsible in a situation where the vessel is in dry-dock and the damage is caused by such a person whilst ashore in the performance of an act directly connected with the operation of the ship. It might also encompass external repair and maintenance work and would probably cover the provision of bunkers or supplies since such services would be directly connected with the operation of the ship.

Thirdly, it is unclear to what extent should a loss be confined within the meaning of 'consequential loss resulting therefrom' It is pointed out in *Limitation of Liability* for *Maritime Claims* that Article 2 (1) (a) of the 1976 Limitation Convention expressly allows claims for consequential losses to qualify for limitation purposes.[412] In *The Aegean Sea*[413], Thomas J. found that loss of profit claims by owners and others may be consequential loss claims falling within the ambit of Article 2 (1) (a), as may a claim for an indemnity for amounts paid to salvors in respect of the cargo since that could properly be characterised as a consequential loss resulting from the loss of cargo. This is consistent with Sheen J.'s judgment in *The Breydon Merchant*[414] that the owner could limit in respect of a claim by cargo owners for compensation in relation to the amount which the cargo owners had been required to pay to salvors, albeit there had been no physical loss or damage. In the judgment, the judge observed that the intention of the

[409] [1998] 2 Lloyd's Rep 39.
[410] *Ibid*, at 51 and 52.
[411] [2004] 1 Lloyd's Rep 460.
[412] Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) 20.
[413] [1998] 2 Lloyd's Rep 39.
[414] [1992] 1 Lloyd's Rep 373.

1976 Convention was to extend the right to limit, not to restrict it. He concluded that the cargo owners' claim was within the ambit of Article 2 (1).

As for the provision of Article 2 (1) (c), the requirement of 'occurring in direct connexion with the operation of the ship or salvage operations' remains the same as Article 2 (1) (a). However, there is no such word of 'on board' in this provision; and more importantly, Article 2 (1) (c) only covers claims arising from 'infringement of rights other than contractual rights'. Examples of the type of claims which have been found to come within Article 2 (1) (c) are those for loss of use and loss of profits made by fishing boat owners, yacht owners, fish and shellfish farm owners, shell fish harvesters, fishing net and fishing pot owners, shop owners, local municipalities, local government and the state itself consequent upon pollution.[415] It is also pointed out in *Limitation of Liability for Maritime Claims* (4th edn.) that the draftsmen of the 1976 Convention may also have had considered circumstances where a claimant 'had a statutory right of easement which was capable of being damaged by a ship'.[416] One example of such a right given by the writers is the decision of *Gypsum Carriers Inc* v *The Queen*,[417] under which the wayleave or right of passage enjoyed by a railway company over a bridge spanning a river was considered.[418] A counter example was given by the judgment of *The Aegean Sea* in which it was held that loss of the shipowner's right to earn freight under the charterparty was a claim for infringement of contractual rights, and therefore not within the scope of Article 2 (1) (c).[419] Provided that the right being infringed is not contractual, the writers submit that the precise legal nature of the right and the nature of the legal liability incurred by its infringement do not seem to be relevant in view of the wording of the introductory paragraph to Article 2(1).[420]

To conclude, the combined effect of Article 2 (1) (a) and (c) seems to give the 1976 Convention a wide enough coverage for all types of damage claims caused during the

[415] *The Aegean Sea* [1998] 2 Lloyd's Rep 39.
[416] Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) 22.
[417] (1978) 78 D.L.R. 175 Fed. Ct.
[418] In *Gypsum Carriers Inc* v *The Queen*, Gypsum's ship crashed into federally owned bridge, and they were held liable. Three railway companies also tried to sue for damages, claiming they had an easement. Collier J rejected the claim by holding that, despite having essentials of an easement, there was no easement because there was no intention to create an easement.
[419] *The Aegean Sea* [1998] 2 Lloyd's Rep 39, at 52.
[420] Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) 22.

process of operating the ship.[421] Claims arising from loss of life, personal injury, loss of or damage to property as well as consequential losses are subject to the limitation regime of the 1976 Limitation Convention and the Merchant Shipping Act 1995; and claims by parties which may have suffered losses not linked to property damage, which are mainly economic loss, e.g., loss of use and profits of the sea and coast,[422] are also subject to the limitation regime thereof.

In terms of the linkage between damage maritime lien and limitation of liability, Thomas in his work simply says where a claim arising from damage done by a ship is both in the nature of a maritime lien and also a claim subject to limitation, the right under the maritime lien is limited to the amount specified in the legislation.[423] The writer did not give further comparison between the maritime lien for damage done by a ship and the right of limitation of liability. It is notable that a claim for damage done by a ship also needs to comply with certain conditions precedent so that it may give rise to a maritime lien. First of all, as a damage maritime lien is not an absolute maritime lien, the lien does not arise from the mere fact that damage is done by a ship, but only broadly, when it is shown that the damage complained of is a direct or consequential result of a breach of duty on the part of a person in lawful charge or control of the wrongdoing ship. Although the inveterate practice is to personify the wrongdoing ship, the ship herself is no more than the instrument of damage, and it is the negligence of those in lawful charge and control of the ship which is the source of the maritime lien. According to Thomas, it has been clearly established that a maritime lien for damage is founded on fault. The view which has ultimately prevailed is that the personal liability of a *res* owner is a condition precedent to the accrual of a damage maritime lien. [424]

In *The Druid*[425], it was held that the liability of the ship and the responsibility of the owners are convertible terms; and the ship is not liable if the owners are not responsible and vice versa. Thus no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against. Even when the ship was in the charge of a compulsory pilot, it was held that no damage lien would arise. This is conclusive to show that the liability to compensate must be fixed not merely on the property also on

[421] Except for those claims excluded by Article 3 of the 1976 Limitation Convention.
[422] *The Aegean Sea* [1998] 2 Lloyd's Rep 39.
[423] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 134.
[424] *Ibid*, 127.
[425] [1842] 166 E.R. 619.

the owner throw the property. In simple words, if no negligence of the owner or their servants were proved, no liens come into existence. In this sense, the damage lien is the same as the damage claim subject to limitation because in the limitation action, the owner or other relevant person must be responsible for the liability as well.

Secondly, the ship must be the instrument mischief. In the view of Thomas, for a maritime lien for damage done by a ship to arise it is not enough to show that those in charge of the ship are in breach of duty only; it must be further shown that the ship herself was the active means by which the damage was inflicted.[426] Unless the damage can be shown to be the act of the ship no maritime liens exist. However, it was also pointed out by Thomas that a damage maritime lien does not depend on direct physical impact. Based on Lord Herschell's view in *Currie* v *Mc'Knight* and Scott LJ's view in *The Tolten*, Thomas argues that as long as the damage is produced by the wrongdoing ship, the precise manner in which the damage is complained of is not material.[427] It is also submitted by Professor Tetley that a damage maritime lien may include damage otherwise than through physical contact with ship's hull and for this instance pollution may be the major example.[428]

In addition, it has been established that a maritime lien for damage ensures to the benefit of a lienee in respect of damages both directly and consequentially caused. The lien therefore extends to such damages as may arise from detention of a ship, liability incurred in respect of services rendered by a port authority, salvage services and other such consequential liabilities. Furthermore, even the consequential damage itself can possibly be the basis of a maritime lien.[429]In *The Chr. Knudsen*[430] an obstruction was caused to a harbour through the negligent sinking of one vessel by another. The expenses of removal were held to be recoverable by the harbour authority in an Admiralty proceeding *in rem* as damage done by the wrongdoing ship. Although this point was not precisely decided by the judge, it is arguable that the right *in rem* enjoyed by the harbour authority was in the nature of a maritime lien. If such a position is true, a damage lien would also overlap with Article 2 (1) (d) of the 1976 Limitation

[426] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 131.
[427] *Ibid*, 133. See also *Currie* v *M'Knight* [1897] A.C.97, at 108; and *The Tolten* [1946] P.135 at 146.
[428] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 403.
[429] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 134.
[430] [1932] P.153.

Convention which provides limitation for claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned. However, in keeping with its policy of unlimited liability for wreck removal expenses, the United Kingdom has, by para. 3 of Schedule 7, Part II, and section 185 of the Merchant Shipping Act 1995, made a reservation in respect of Article 2 (1) (d) of the 1976 Convention.[431] It is notable that a maritime lien for damage done by a ship is also known as a 'tort lien', which means such a lien only covers claims in nature of tort. Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship is not within the ambit of a damage maritime lien. As for the claims for loss of life or personal injury, it is contented by both Thomas and Professor William Tetley that such claims do not appear to give rise to a maritime lien under English law.[432]

To summarise the above analysis, under English law the scope of a maritime lien for damage done by a ship is different from the scope of a damage claim under limitation of liability. Claims for loss of life or personal injury are subject to the limitation system but are arguably not within the ambit of a maritime lien for damage done by a ship. As for property damage claims, the limitation regime requires such claims to be 'in direct connection with the operation of the ship'. A same approach may be implied in claims giving rise to a damage maritime lien as a damage liens requires the ship to be the instrument mischief, which indicates that the damage is in direct connection with the operation of the ship. Nevertheless, even though both damage claims subject to limitation and damage claims preferred by a maritime lien cover direct and consequential damages, there is no evidence showing that claims for economic loss, as Article 2 (1) (c) of the 1976 Limitation Convention provides, would give rise to a maritime lien.

Besides damage claims, Article 3 of the 1976 Convention provides for claims which are

---

[431] Section 185 of the 1995 Merchant Shipping Act provides for the general effect of the 1976 Convention in the United Kingdom.
Paragraph 3(1) of Schedule 7, Part II, Merchant Shipping Act provides:
Paragraph 1(d) of article 2 shall not apply unless provision has been made by an order of the Secretary of State for the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in consequence of the said paragraph 1(d), of amounts recoverable by them in claims of the kind there mentioned, and to be maintained by contributions from such authorities raised and collected by them in respect of vessels in like manner as other sums so raised by them.

[432] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 132; see also, William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 406.

not subject to limitation. According to Article 3 (a), claims for salvage or contribution in general average is expressly excluded. The wording of Article 3 (a) has been revised by the 1996 Protocol to amend the 1976 Limitation Convention provides a revised text for Article 3(a). The new provision reads as follows:

> '*Claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in General Average.*'

The above provision now has the force of law in the United Kingdom in respect of claims arising out of occurrences which take place after 13 May 2004.[433] Therefore, maritime liens for salvage claims are excluded from the limitation regime in the United Kingdom.

Article 3 of the 1976 Convention also provides that limitation shall not apply to claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1969) or of any amendment or Protocol thereto which is in force; claims for nuclear damage subject to any international convention or national legislation governing or prohibiting limitation of liability; or claims against the shipowner of a nuclear ship for nuclear damage. However, such claims may still give rise to a maritime lien for damage done by the ship. In this case, damage lien may possibly conflict with other limitation regime such as the limitation system under the CLC 1969; nevertheless such conflict is not within the ambit of this thesis.

In addition, the United Kingdom government has excluded claims for 'loss of life or personal injury' suffered by passengers on 'seagoing ships' from the list of 'claims subject to limitation' set out in Article 2 of the 1976 Convention. It would appear that the right of the shipowner to further limit his liability by applying the global limit under Article 7 of the 1976 Convention is removed. In effect this means that all claims for loss of life or injury to passengers on seagoing ships will be covered by the Athens Convention to the exclusion of Article 7 of the 1976 Convention (as amended by the 1996 Protocol). Similarly, the Chinese Maritime Code 1992 also provides for a separate

[433] The Merchant Shipping (Convention on Limitation of Liability for Maritime Claims)(Amendment) Order 1998, S.I. 1998/1258.

limitation regime for claims in respect of loss of life or injury to passengers on seagoing ships, which is discussed in the following paragraphs.

4.4.2 Chinese Maritime Code 1992

Article 22 of the Chinese Maritime Code 1992 provides:

> *The following maritime claims shall be entitled to maritime liens:*
>
> *(1) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts;*
>
> *(2)* ***Claims in respect of loss of life or personal injury occurred in the operation of the ship****;*
>
> *(3) Payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges;*
>
> *(4) Payment claims for salvage payment;*
>
> *(5)* ***Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship****.*

On the basis of the 1976 Limitation Convention, the Chinese Maritime Code provides in Article 207 that claims in respect of the following are subject to limitation:

> ***(1) loss of life or personal injury and 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), as well as consequential damages resulting therefrom;***
>
> *(2) loss resulting from delay in delivery in the carriage of goods by sea or from delay in the arrival of passengers or their luggage;*
>
> ***(3) other loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage***

operations;

(4) claims of a person other than the person liable in respect of measures taken to avert or minimise loss for which the person liable may limit his liability.

From the above two articles (emphasis added on the bold sections), the overlap of maritime liens and limitation of liability under Chinese law exists in claims for loss of life or personal injuries and claims for loss of or damage to property occurring in connection with the operation of the ship. Such overlap of maritime liens and limitation of liability existing in the Chinese Maritime Code is also a reflection of the overlap between the 1976 Limitation Convention and the 1993 Maritime Liens and Mortgage Convention although slightly different wordings are used in the Chinese legislation and the international conventions. Article 207 (1) and (3) of the Chinese Maritime Code indeed are in identical wording of Article 2 (1) (a) and (c) of the 1976 Limitation Convention. It follows that the meaning and scope of Article 207 (1) and (3) shall be the same as Article 2 (1) (a) and (c) of the 1976 Convention. Therefore, damage claims subject to limitation of liability under Chinese law remain the same as those under English law. Claims arising from loss of life, personal injury, loss of or damage to property as well as consequential losses and claims by parties which may have suffered losses not linked to property damage, such as loss of use and profits of the sea and coast, are subject to the limitation regime.

On the other hand, although the provisions on maritime liens in the Chinese Maritime Code rely on the 1993 Maritime Liens and Mortgages Convention, the wording of Article 22 (2) and (5) are different from the wording of Article 4 (1) (b) and (e) of the 1993 Convention. More exclusive wording may be found in Article 4 of the 1993 Convention. Article 4 (1) (b) and (e) of the 1993 Convention read:

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

Comparing with Article 22 of the Chinese Maritime Code, the wording of the 1993

Convention is much clearer. Firstly, Article 4 (1) (b) and (e) of the 1993 Convention expressly state that the loss of life or personal injury as well as loss of or damage to property may incur both on land and on water. Therefore, damage to objects ashore such as harbour works and loss of life or personal injury of people on shore are all within the scope of a damage maritime lien. Secondly, property damage claims are confined to physical loss or damage. That is to say, claims under Article 207 (3) of the Chinese Maritime Code, which provides for limitation claims for loss or damage arising from infringement or non-contractual rights, would be excluded from a damage maritime lien. Thirdly, the provisions expressly exclude the claims for loss of or damage to cargo, containers and passengers' effects. On this basis, the scope of Article 22 of the Chinese Maritime Code seems to be obscure in that it is not for sure whether the position of Article 4 of the 1993 Convention shall be followed under Chinese law.

Another unclear point of Article 22 of the Chinese Maritime Code is whether expenses of wreck removal may be treated as a consequential damage which also gives rise to a damage maritime lien. As DC Jackson points out, one of the principal changes in the 1993 Convention as to the claims attracting maritime liens from the Convention of 1967 is the exclusion of wreck removal and general average contributions. If such exclusion is also the intention of the draftsmen of the Chinese Maritime Code, claims for wreck removal expenses shall not be covered by the damage maritime lien. Also, same as the English law position, Article 207 of the Chinese Maritime Code, does not include expenses for wreck removal as one of the claims subject to limitation of liability. Such a position is confirmed by Article 17 of Several Provisions of the Supreme Peoples' Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims 2010[434] (Limitation Provisions 2010), which provides that claims subject to Article 207 of the Maritime Code do not include claims in respect of the rising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, or claims in respect of removal destruction or the rendering harmless anything that is or has been on board such ship. Nevertheless, such a position shall be suggested to be inserted into the

[434] Interpretation No.11 [2010] of the Supreme People's Court. The Limitation Provisions was adopted on 22 March 2010 at the 1484th Session of the Judicial Committee of the Supreme Court and came into force on 15 September 2010. For a general introduction on the Limitation Provisions 2010, see Hui Li, 'Limitation of liability for maritime claims in Chinese law' (2011) Shipping & Trade Law, vol.1.

Maritime Code.

Same as Article 3 of the 1976 Limitation Convention, Article 208 of the Maritime Code 1992 provides for claims which are excluded from the limitation regime, among which Article 208 (1) provides that limitation of liability shall not apply to claims for salvage payment or contribution in general average. Thus the maritime lien for salvage which is provided in Article 22 (4) is also expressly excluded from the limitation regime under Chinese law. Again, following the 1976 Convention, Article 208 also provides that claims for oil pollution damage under the CLC Conventions; claims for nuclear damage subject to International Convention on Limitation of Liability for Nuclear Damage to which the P.R. China is a party; and claims against the shipowner of a nuclear ship for nuclear damage are not entitled to invoke limitation.[435]

4.5 International conventions

D.C. Jackson in his book of *Enforcement of Maritime Claims* (4th edn.), put the Mortgages and Liens Convention under the title of 'Limitation for Particular Claims in Addition to Global Limitation', which also implies that the two groups of international conventions are interrelated. The international Conventions for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1926, 1967 and 1993 each refer to limitation of liability. In D.C. Jackson's words, the Maritime Liens and Mortgages Conventions are relevant to the Limitation Conventions insofar as they create or recognise liens based on claims subject to limitation and provide for priorities between them. [436] This statement only reflects the general connection between Limitation Conventions and Mortgages and Maritime Liens Conventions. In effect, each Convention varies in its provisions and therefore the relationship between the Limitation Conventions and Maritime Lien Conventions do not stay the same as the development of the international maritime law. The development and changes of the relationship between maritime liens and limitation are also reflected in those international conventions. As mentioned earlier, the 1924 Limitation Convention

[435] Article 208 (2) (3) and (4), Chinese Maritime Code 1992.
[436] DC Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 610.

coordinate with the 1926 Mortgages and Maritime Liens Convention in that both of them reflect the impact of the personification theory. Although in the 1924 Convention a restricted monetary limitation system had been adopted along with the abandonment system, it is still submitted that the integrate correlation between limitation of liability with maritime liens, should be preserved so as to ensure that the proceeds of ship and freight, or the fund coming from the statutory payment should be distributed by the court in strict accord with the rights and priorities of the lien creditors.[437] However, in the later 1957 and 1976 Limitation Conventions, a pure monetary limitation system was adopted and widely accepted; thus the connection between maritime liens and limitation of liability for maritime claims has become loose.[438] The relationship between the 1976 Limitation Convention and the 1993 Mortgages and Maritime Liens Convention is reflected in the Chinese Maritime Code 1992 as discussed in section 4.4.2.

It is notable that each of the Mortgages and Maritime Liens Convention was drafted after the announcement of the relevant Limitation Conventions. The idea behind this was that the Mortgages and Liens Conventions attempted to cooperate with the existing Limitation Convention. Particularly, each of the Mortgages and Liens Convention contains a so called 'conflict clause' attempting to deal with the relationship between maritime liens and limitation of liability for maritime claims. The effect of these clauses will be examined in Chapter VI.

4.6 Conclusion

From the historic perspective, the relationship between the maritime lien and limitation of liability lies in the both of the two types of right were created as measures of public policy for the encouragement of sea commerce. Under the traditional limitation systems namely the value based limitation systems, the maritime lien and limitation of liability were integrated with each other. By virtue of the personification theory, the ship was both the source and limit of liability and the limitation amount was distributed among claimants in accordance with the priority of maritime liens. However, such a position does not exist under a monetary limitation system in that a monetary system does not

[437] *The Tolten* [1946] P.135, per Scott LJ at 153.
[438] See section 4.3.3, above.

recognise the ship itself as the limit. In a monetary limitation system, a separate limitation fund may be established and maritime liens may not operate upon such a fund. Thus the relationship between maritime liens and the limitation regime is broken under a monetary limitation system.

Furthermore, if the procedural theory is followed, a maritime lien is deemed as a method to compel the appearance of the defendant. In this sense, other assets of the defendant may be executed and therefore the limit of shipowners' liability is not necessarily to be the value of the ship. The procedural theory provides the possibility of separating maritime lien from limitation regime.

Under English law, the monetary limitation system is adopted and the procedural theory is followed. Such combination makes the theoretical relationship between the maritime lien and limitation fall away. Following the 1976 Limitation Convention, the Chinese Maritime Code also adopts a monetary limitation system. It is unclear in terms of the theory purporting the maritime lien under Chinese law; however, it is submitted that the procedural theory may also be adopted in Chinese law on the basis of the wording of the Maritime Code. Thus it seems that the position under Chinese law is similar to that under English law.

Although it may be contented that the maritime lien and limitation of liability are not closely related under both English and Chinese law, the overlap of the two types of rights still exists. Under English law, a claim for damage done by ship may give rise to a maritime lien and may also be subject to limitation of liability. Under Chinese law, claims in respect of loss of life or personal injury and claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship may give rise to maritime liens and such claims are also within the ambit of limitation of liability. In addition, such overlap may also be found in international conventions in respect of limitation and maritime liens. On this basis, the maritime lien and limitation of liability may still have impacts on each other and conflicting issues may arise. In the next Chapter, conflicts between the maritime lien and limitation of liability will be examined.

Chapter V Conflicts between Maritime Liens and Limitation of Liability for Maritime Claims

5.1 Introduction

As discussed in the previous chapter, maritime liens and limitation of liability for maritime claims were closely related during the time when value based limitation systems were dominant; however, under a tonnage limitation system, such relationship seems to be altered. Along with the change of relationship between maritime liens and limitation of liability, conflicts between the two types of rights have emerged. Due to the existence of the overlap between the two types of rights as examined in the previous chapter, limitation of liability appears to have imposed a limit on the amount secured by a maritime lien and establishment of a limitation fund would in essence provide an alternative security to the claims which the maritime liens would arguably attach. In addition, limitation of liability seems to have its impact on the operation of maritime liens in terms of compensation priorities.

Indeed, the conflicts between maritime liens and limitation of liability are rooted in their policy considerations. Although both of the two rights attempt to protect and encourage seaborne trade, each of them focuses on different aspects of the industry. Generally speaking, the limitation regime is more shipowner-friendly while a maritime lien is more claimant-friendly. Such difference is reflected in their enforcement methods, which is the main concern of this chapter.

This chapter will begin with reviewing the policy consideration underpinning maritime liens and limitation of liability on the basis of Chapters II and III. The conflicts between the two rights in respect of different priority rules and enforcement methods under each of the two types of rights will be examined next. Finally, this chapter will discuss on the issue whether the constitution of a limitation fund would extinguish maritime liens which are subject to limitation of liability.

5.2 Policy consideration

Although, as discussed in Chapter IV, the consideration behind maritime liens and limitation of liability are both to encourage seaborne trade, the policy concerning of the two types of right have different emphasis in that the maritime lien concerns more on the efficiency of bringing a claim whereas limitation of liability concerns more on shipowners' solvency. The following sections will examine specific policy consideration underpinning limitation of liability and the maritime lien respectively and analyse their conflicts.

5.2.1 Limitation of liability for maritime claims

As discussed in Chapter III, limitation of liability for maritime claims has long been recognised by many States and it has been commonly accepted that its aim is to encourage and protect trade.[439] For the consideration underlying the limitation regimes, Lord Denning explained as follows,

> '*I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.*'[440]

It has also been agreed that another consideration behind the limitation regime 'may now be that shipowners should be encouraged to insure against liability, and limitation makes it easier for them to do so, but that limitation should not be tolerated in the case of outrageous conduct, such as deliberately or recklessly causing loss.' [441] This consideration was explained by Staughton J in his decision of *The Garden City.*[442]

In effect, limitation of liability for maritime claims encourages and protects trade in the way that it gives an 'unusual privilege' given to shipowners (and other parties involved in the operation of the ship, for example, ship manager, ship operator and etc.) by

[439] See Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn., 2013, London: Informa Law), Chapter 14 Limitation of Liability for Maritime Claims, section 1.1 Justification; See also, Chapter III above.
[440] *The Bramley Moore* [1963] 2 Lloyd's Rep. 429, at 437.
[441] *The Garden City* [1982] 2 Lloyd's Rep. 382, *per* Staughton J at 398.
[442] *Ibid.*

maritime law.[443] By virtue of the limitation regime, qualified shipowners are eligible to limit their liability for one particular incident against all possible claimants. A shipowner or some other persons connected to the operation of a ship are entitled to limit his liability in respect of certain maritime claims arising out of an occurrence to a particular amount, irrespective of the total amount of such claims. Such a position is also illustrated by the terminology used by writers to describe the limitation regime where the 'unusual privilege' is often named as 'limitation of shipowners' liability' or 'shipowners' limitation of liability'.[444]

Although Lord Mustill gave a critical analysis on the concept of limitation of liability, he still confirms that

> '*For centuries the major trading nations have protected the solvency of shipowners by limitation statutes, and for decades those nations have banded together to regulate by international legislation the availability and extent of the limitation of maritime liability.*'[445]

Such a statement makes it clear that the effect of limitation of liability is to prevent shipowners from financial difficulties so that the aim of encouraging trade and increasing fleet number would be achieved.

5.2.2 Maritime liens

By the wording of Thomas, maritime lien represents one of the most striking features of the contemporary maritime law and has been described as 'one of the first principles of the law of the sea.'[446] As mentioned in Chapter II, the effect of a maritime lien is to give a claimant a charge on a *res* from the moment of the circumstances out of which the maritime lien arises and which thereafter travels with the *res* into whosoever's possession it may pass. It has been commonly agreed that there are two advantages accruing to a maritime lien holder. The first one is that from the moment a service is rendered to or damage has been done by an incumbranced *res*, a maritime lien holder is

[443] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability* (2012, London: Wolters Kluwer) 3.
[444] Institute of Maritime Law, University of Southampton, *Limitation of Shipowners' Liability: The New Law* (Sweet & Maxwell, London, 1986); Barnabas W.B. Reynolds & Michael N. Tsimplis, *Shipowners' Limitation of Liability* (2012, , London: Wolters Kluwer).
[445] Lord Mustill, 'Ships are different –or are they?' [1993] LMCLQ 490.
[446] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 2; see also *The Tolten* [1946] p135.

provided with a security for his claim to the value of the *res*. Such a security makes the lien holder able to conquer the difficulties such as the inability to trace a defendant, or the insolvency of a defendant. The other advantage is that a maritime lien holder enjoys a high priority and in circumstances where a multiplicity of competing claims exists against a *res*, the claim of a maritime lien holder is generally the first to be satisfied. On this basis, a maritime lien may protect its holder in three aspects: establishment of jurisdiction, security for claims, and priority in recovery.[447]

5.2.3 Conflicts

On the basis of the above discussion, it is clear that limitation of liability and maritime lien protect different aspects of the shipping industry. A maritime lien intends to protect the maritime claimant with regard to the fact that ships are highly mobile and can flee the jurisdiction of the court, coupled with the additional fact that their owners could continue to incur liabilities to the detriment of existing creditors. Such a position is opposed with the benefit of the shipowners. Therefore the policy consideration behind maritime liens and limitation of liability oppose each other. However the two types of rights are equally universal among shipping nations and due to the overlap between each other, it seems that one must give way to the other, or one must constitute an exception from the other. The preference between maritime liens and limitation of liability will depend on the shipping policy of a State. In a ship-owning State, the limitation will be preferred whereas in a cargo-owning State, the maritime lien would probably prevail in order to protect the cargo owners or suppliers.

5.3 Priority rules

In addition to the conflict arising from the underpinning policy consideration, the difference of maritime lien and limitation of liability also exists, more apparently, in that the two systems refers to contradictory rules in respect of distribution the amount available for the claimants. The distribution rules under each of the regimes will be discussed below.

[447] See Chapter II, section 2.4 above.

5.3.1 Distribution of the limitation amount

Both the 1957 and 1976 Limitation Conventions provide for a general distribution rule that the limitation amount shall be distributed in proportion among all claimants.[448] The 1976 Limitation Convention is enacted by the Merchant Shipping Act 1995 in the United Kingdom; therefore the position regarding the distribution rule is clear. As the 1976 Convention is followed by the Chinese Maritime Code 1992, it would appear that the distribution of the limitation amount shall also be in proportion. However, it is noteworthy that there are no express provisions in the Chinese Maritime Code in respect of the distribution rule of the limitation amount or a limitation fund. The general view is that, on the basis of the wording of Article 210 (3) of the Chinese Maritime Code, it is implied that the fund shall be distributed among the claimants in proportion to their established claims which are subject to limitation.[449]

Besides the general proportionate rule, the limitation amount under the 1976 Limitation Convention is divided into two layers, namely the limitation amount for loss of life or personal injury (personal claims) and the limitation amount for loss or damage to property (property claims) and these two layers are subject to different calculation of the limit.[450] According to Article 6 (3) of the 1976 Limitation Convention, as enacted in the Merchant Shipping Act 1995, where the amount for personal claims is insufficient to pay the claims in full, the amount for property claims shall be available for payment of the unpaid balance of the personal claims and such unpaid balance shall rank rateably with the property claims. That is to say, the 1976 Limitation Convention ranks personal claims over property claims even though such a priority is not the same as the priority of maritime liens. A same provision may be found in Article 210 of the Chinese Maritime Code 1992. Nevertheless, Article 210 (4) also gives a priority to claims in respect of damage to harbour works, basins and waterways and aids to navigation without prejudice to the right of claims for loss of life or personal injury.[451]

To summarise, the ranking of the distribution of limitation amount under English law is as follows:

---

[448] Article 3(2), 1957 Limitation Convention; Article 12, 1976 Limitation Convention.
[449] Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability* (4th edn, 2005, Richmond LLP), see Chapter 13 People's Republic of China, written by Gao Sunlai. See also section 5.4.2 below.
[450] Article 6 (1), 1976 Limitation Convention.
[451] The United Kingdom opts not to grant priority for such claims.

a. claims for loss of life or personal injury (up to the limit)
b. unpaid balance for personal claims and claims for non-personal claims, namely the property claims (up to the limit)
c. other maritime claims which are not within the limitation framework

Within each of the groups (a) and (b), the amount is distributed in proportion.

On the other hand, the ranking of the distribution of limitation amount under Chinese law is as follows:

a. claims for loss of life or personal injury (up to the limit)
b. unpaid balance for personal claims
c. claims for damages to harbour works, basins and waterways and aids to navigation
d. claims for non-personal claims, namely the property claims (up to the limit)
e. other maritime claims which are not within the limitation framework

Within each of the groups a, b, c, and d, the amount is distributed in proportion.

5.3.2 Priority of maritime liens

A maritime lien is considered as a 'privilege' and such a privilege specially refers to the high priority enjoyed by a maritime lien.[452] A maritime lien is enforceable against other creditors, whether secured or unsecured, and takes priority over all other creditors whether the claims of those creditors arose before or after the creation of the lien.[453] Such a position is also confirmed in Article 21 of the Chinese Maritime Code 1992 whereby a maritime lien is described as a right to take priority in compensation.

5.3.2.1 English law

Thomas in his work on maritime liens gives a general approach of the ranking of maritime liens under English law. According to Thomas, no such a general rule of priorities existing either in statutes[454] or in judiciary decisions. In this regards, Thomas

[452] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 12.
[453] This is subject to existing possessory liens, statutory right of detention and other litigation costs.
[454] Thomas does mention that a statutory priority was given to the maritime lien of the life salvor, however, it is not a general ranking rule.

explains as follows,

> '*On the contrary, the English Court of Admiralty has adopted a broad discretionary approach with rival claims ranked by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstance of each case.*'[455]

However, such an approach given by Thomas seems not constant with other writers. As pointed out by Professor Tetley, both McGuffie and Price are of the view that the use of equity when dealing with ranking should be limited.[456] Professor Tetley also agrees with the latter view in submitting that the use of equity today as a major criterion in ranking would be a very dangerous practice. The reason given by Professor Tetley is as follow:

> '*Various rules of ranking have been long established, principally by equity, and should not now be lightly overturned by the modern use of equity if there is to be any uniformity and certainty in our law.*'[457]

Unfortunately, there is no clear conclusion for the above debate. The fact is that, under English law, ranking of maritime claims is not fixed by rigid rules. Therefore, the English Courts may have their discretion, to some extent, in determining the priority of maritime claims; and the window for application of equity regarding to ranking of claims is still open under English law.

Nevertheless, certain general rules of ranking have been commonly accepted. As mentioned in Chapter I, maritime liens may be divided into two categories: the liens *ex contractu* i.e., salvage lien, wages lien and etc., and the liens *ex delicto*, i.e., damage lien. The first general rule is that liens *ex delicto* rank before liens *ex contractu*; the second rule is that lien *ex contractu* rank in the inverse order of their attachment to the *res* while the liens *ex delicto* rank *pari passu* amongst themselves.[458] However, these two rules are not usually followed. The general rules would be influenced by the desire to reward the party who has preserved the *res* for the benefit of the whole body of the

[455] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 234. This approach has been approved by David Steele J in the decision of *The Ruta* [2000] 1 Lloyd's Rep. 359.
[456] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 877.
[457] *Ibid*, 878.
[458] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 103; William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 883.

ship's creditors[459] and consideration of public policy. By these considerations, wages liens and salvage liens may rank in front of damage liens where the first general rule would seem to be reversed.[460]

The ranking of maritime liens includes two layers: one is the ranking between claims giving rise to maritime liens (maritime lien claims) and other maritime claims; the other is the ranking between *inter se* the same maritime lien namely between claims arising from the same maritime lien. The former has been discussed in previous paragraphs. In terms of the latter, different rules would seem to be applicable for different types of maritime liens. Damage liens rank equally *inter se* and the *pari passu* rule would apply; the 'inverse order' rule would apply for salvage liens, i.e., the later salvage takes priority over the earlier one; as between the wages liens, claims for wages rank equally and again, the *pari passu* rule would apply. [461]

Following the above two approaches, the ranking of maritime liens under English law can be summarised as follows:[462]

a. Claims for possessory liens, where the possession is prior to other maritime claims;

b. Claims for Maritime liens:

(1) Salvage liens (rank *inter se* in inverse order);

(2) Damage liens (rank *inter se pari passu*);

(3) Wages liens (may rank *inter se* in inverse order or *pari passu*), where wages liens incurred after salvage or damage liens, which are deemed to preserve the *res* for the common benefit, take precedent over salvage liens;

---

[459] *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 884; D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 235; see also, *The Selina* (1842) 2 Not. Cas. 18; *The Mons* (1932) P. 109 per Langton J. at 111.

[460] See *The Elin* (1882) 8 P.D. 39; *The Inna* [1938] P. 148, where a damage maritime lien is held to be ranked after subsequent salvage maritime lien. See also, *The Ruta* [2000] 1 Lloyd's Rep. 359, where claims for wages were given preference over claims for damage in the situation where the owner was bankrupt.

[461] Although both are wages lien, masters' wages are ranked after seamen's wages. It is submitted that this was because the master was personally liable for seamen's wages in the 18th and 19th centuries. See *The Royal Wells* [1984] 2 Lloyd's Rep. 255; *The Athena* (1921) 8 Ll. L. Rep. 482; and *The Mons* [1932] P. 109. See also, D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 315 and 429. C.f. *The Royal Wells* [1984] 2 Lloyd's Rep. 255, where it was held that master and crew are all employees of the shipowner and their claims are to be ranked equally.

[462] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal, International Shipping Publications 1998) 884-890; Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 103-110; D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 245-250 and 254-256.

(4) Master's disbursements liens;

(5) Bottomry liens (not practised now);

c. Mortgages;

d. Statutory rights *in rem*.[463]

5.3.2.2 Chinese law

Unlike the English law approach, the Chinese Maritime Code 1992 provides a fixed order of priority of maritime liens. Two articles in the Maritime Code are relevant to the ranking of maritime liens:

Article 23 of the Chinese Maritime Code provides that the maritime claims set out in paragraph 1 of Article 22 shall be satisfied in the order listed. However, any of the maritime claims set out in sub-paragraph (4) arising later than those under sub-paragraph (1) through (3) shall have priority over those under sub- paragraph (1) through (3). In case there are more than two maritime claims under sub-paragraphs (1), (2), (3) or (5) of paragraph 1 of Article 22, they shall be satisfied at the same time regardless of their respective occurrences; where they could not be paid in full, they shall be paid in proportion. Should there be more than two maritime claims under sub-paragraph (4), those arising later shall be satisfied first.

Article 25 of the Chinese Maritime Code provides that a maritime lien shall rank before a possessory lien, and a possessory lien shall rank before a ship mortgage. The possessory lien referred to in Article 25 of the Maritime Code means the right of the ship builder or repairer to secure the building or repairing cost of the ship by means of detaining the ship in his possession when the other party to the contract fails in the performance thereof.[464] The possessory lien shall be extinguished when the ship builder or repairer no longer possesses the ship he has built or repaired.

In accordance with these two provisions, the ranking of maritime liens under Chinese law can be summarised as follows:

a. Claims for Maritime liens:

(1) Payment claims for wages, other remuneration, crew repatriation and

[463] Section 20, Senior Court Act 1981.
[464] Article 25, Chinese Maritime Code 1992.

social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts (rank *inter se pari passu*);

(2) Claims in respect of loss of life or personal injury occurred in the operation of the ship (rank *inter se pari passu*);

(3) Payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges (rank *inter se pari passu*);

(4) Payment claims for salvage payment, where salvage incurred after (1), (2) and (3), salvage liens take precedent over other liens (rank *inter se* in inverse order);

(5) Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship (rank *inter se pari passu*);

b. Claims for possessory liens[465];

c. Mortgages;

d. Other maritime claims.

5.3.3 Conflicts

On the basis of the above analysis, the distribution rule of a limitation fund is obviously different from the rule where maritime liens are concerned. Therefore, under the circumstances where a claim giving rise to a maritime lien is also subject to the limitation regime, the conflict of the two distribution rules will be revealed. Such conflict between the operation of maritime liens and limitation of liability is recognised by English law, Chinese law and International Conventions on Maritime Liens and Mortgages as well. English law inserted a so-called 'Conflict Clause' in the Merchant Shipping Act to deal with the liens and other rights upon the property in respect of distribution the limitation fund. Such a mode is also followed by the International Conventions and the Chinese Maritime Code. Details about the 'Conflict Clauses' and their application are discussed and examined in Chapter VI.

As mentioned in Chapter IV, the overlap between the maritime lien and limitation of

[465] Article 25 of Chinese Maritime Code 1992 provides that
'*The possessory lien referred to in the preceding paragraph means the right of the ship builder or repairer to secure the building or repairing cost of the ship by means of detaining the ship in his possession when the other party to the contract fails in the performance thereof. The possessory lien shall be extinguished when the ship builder or repairer no longer possesses the ship he has built or repaired.*'

liability lies in the claims for collision damage and, under either English law or Chinese law, the scope of the maritime lien arising from collision damage is narrower than the scope of property damage claims subject to limitation. Therefore, on the basis of the above analysis in respect of ranking of claims, a maritime lien arising from collision damage may share the fund rateably with other claims under the limitation regime where the priority of the maritime lien seems to be lost.

One possible answer to this conflict is the consideration of public policy. To be more specific, as Thomas points out, different considerations may apply to different maritime lien despite their common fundamental characteristic.[466] In his work on maritime liens, Thomas discussed the policy considerations for each category of the maritime liens recognised under English law. According to the writer, the underlying public policy of damage maritime lien is as follows:

> '*The accrual of a maritime lien for damage is supported by two considerations of public policy. First, the existence of such a lien operates to encourage safe and careful navigation. Secondly, its availability secures a compensation to those who are injured by the negligence of others*.'

Thomas bases his statement on the judgement made by Lord Watson in the decision of *Currie* v *M'knight*.[467] The Judge said,

> *'... to rest upon plain considerations of commercial expediency. The great increase which has taken place in the number of sea-going ships propelled by steam-power at high rates of speed has multiplied to such an extent the risk and occurrence of collisions, that it has become highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And in my opinion it is reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owner, who may have no substantial interest in her and may be without the means of making*

[466] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 2.
[467] [1897] A.C. 97.

due compensation.'[468]

From the above statement, it is clear that the public policy underlying a maritime lien for damage done by a ship focuses on providing the claimants with the choice of bringing an action against the wrongdoing ship and a remedy which ensures that there will be assets available for the enforcement of the claim. In other words, such consideration reflects the jurisdiction function and the interim remedy function of a maritime lien, as discussed in section 2.4 of Chapter II. As for the priority function of a maritime lien, neither Thomas nor Lord Watson mentioned the issue of priority of a damage maritime lien in their statement on the policy concerning of the lien. This may indicates that the notion of a maritime lien for damage done by a ship concerns more about tracing the shipowner and providing security rather than giving priority in compensation, while the priority of a damage maritime lien is of less concern, which is reflected by the relatively lower ranking of a damage maritime lien. Therefore, it seems not harsh for a damage maritime lien holder to lose his preference in a limitation proceeding.[469]

5.4 Impact of the limitation regime

5.4.1 Limitation proceeding

5.4.1.1 English law

The limitation claim brought in English Admiralty Court is an action *in personam* in nature.[470] Limitation of liability for maritime claims under English law may be invoked by the liable person in the following ways:

(a) the limitation may be relied on as a way of defence to any claim;[471]
(b) a limitation claim may be brought by counterclaim with the permission of the Admiralty Court;[472] and

[468] *Ibid*, at 106.
[469] Such an approach may be also part of the reason why those 'conflict clauses' always concern the limitation regime of more importance. For the details of 'conflict clauses', see Chapter VI below.
[470] Senior Court Act 1981, s20 (3)(c).
[471] PD 61, para 10.18.
[472] CPR, r 61.11(22).

(c) a limitation claim is brought by the issue of a claim in admiralty.[473]

It is pointed out by Barnabas W.B. Reynolds and Michael N. Tsimplis in their book on limitation of liability that, under English law, unless a limitation decree has been obtained, limitation must be pleaded as a defence in a single claim situation for the purpose of avoiding risk of a later plea of *res judicata*.[474] As for the approach to choose, the writers give a comment as follows:

> '*The risk in invoking limitation as a defence rather than commencing a limitation action is best illustrated by considering a situation in which the shipowner pleads limitation as a defence to two or more actions and is held liable, but is successful on the issue of limitation in all of the action. In such an instance, each award will be limited but there is a risk that the total award may exceed the limitation amount. By contrast, a successful limitation action ensures that the shipowner's entire liability will not exceed the limit.*'[475]

In this sense, it would be safe for the liable person to take the initiative and start a limitation action unless there is surely only one claimant.

Article 1 (5) of the 1976 Limitation Convention as enacted in Schedule 7 of the Merchant Shipping Act 1995, provides as follows:

> *5. In this Convention the liability of a shipowner shall include liability in an action brought against* ***the vessel itself****.* (Emphasis added)

Such a provision indicates that the limitation framework under the 1976 Limitation Convention (or the Merchant Shipping Act 1995) covers both *in rem* and *in personam* proceedings. Thus a claim arising from a 'limitation lien', namely a maritime lien for damage done by a ship, which has been brought in the form of an action *in rem* is to be deemed as a claim for the liability of shipowner. Although, as discussed earlier, a maritime lien for damage done by a ship does requires for personal liability, the *in rem* nature of a claim arising from a damage lien should not be affected by such a requirement. It seems that the effect of Article 1 (5) is to change an *in rem* action into an

[473] PD 61, para 10.1; Form No. ADM15.
[474] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 10.
[475] *Ibid*, 12. See also *The Volvox Hollandia* [1988] 2 Lloyds' Rep. 461.

in personam action. Such a position seems to be in line with the procedural theory in respect of explaining the nature of actions *in rem*. Although the personification theory has great historic impacts on both limitation and maritime liens, the current dominant theory in English Courts is the procedural theory. The procedural theory is based on the premise that the object of arrest of a vessel is to compel the owner to appear and to obtain a security.[476] In *The Indian Grace* (No.2),[477] a further step was taken by Lord Steyn. In his judgment, Lord Steyn held that once the shipowners enter an appearance there are two parallel actions: the action *in personam* and the action *in rem* and from that moment the owners are defendants in the action *in personam*. On this basis, an action *in rem* is an action against the shipowners from the moment that the Admiralty Court is seized with jurisdiction. The decision of *The Indian Grace* (No.2) reaches the effect that an action *in rem* merges into an action *in personam*. Despite the fact that lots of criticism has been made on the decision of *The Indian Grace* (No.2),[478] the decision of the House of Lords does make the *in rem* action comply with the tonnage limitation system. As. Aleka Mandaraka-Sheppard submits in her book of *Modern Maritime Law and Risk Management* (2nd edn), following the decision, the value of the ship is no longer the limit of liability for maritime claims because once the in rem claim form is served, the action becomes also an action *in personam* from that moment, whether the defendant chooses to appear or not.[479] Such a change eliminates the theoretical difficult of the application of Article 1 (5) of the 1976 Limitation Convention.

Nevertheless the House of Lords did leave a window open for maritime liens in the decision of *The Indian Grace* (No.2). As Lord Steyn said,

> '*…this case in not concerned with maritime liens. That is a separate and complex subject which I put to one side.*'

Thus a maritime lien for damage done by a ship should remain unaffected. It follows that, even though the limitation proceeding is completed, an unsatisfied claimant who is also a damage lien holder may still be able to bring an action *in rem* against the offending ship. However, such an action is expressly debarred by the wording of Article

[476] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 7-8. See also, Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 8-10.
[477] [1998] 1 Lloyds' Rep. 1.
[478] See Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, London: Informa Publishing 2009) 83-87.
[479] *Ibid*, 91.

13 (1) if a limitation fund has been constituted.[480] In this sense, there seem no special rules for maritime liens existing in the limitation regime and the operation of maritime liens is void by the limitation regime. In addition, as a damage maritime lien, unlike the position of wages and salvage liens,[481] requires personal liability as a condition precedent, it is arguable that the decision of *The Indian Grace* (No.2) should be applicable in relation to this type of maritime liens.

5.4.1.2 Chinese law

Under Chinese law, there is no action *in rem* and therefore, all the claims must be based on the personal liability and are against the liable person. In this sense, there is no possibility of a separate *in rem* action arising from a maritime lien paralleled with the limitation proceeding under Chinese law. On this basis, the drafters of the Chinese Maritime Code did not incorporate Article 1 (5) of the 1976 Limitation Convention into the Chinese limitation regime. Limitation of liability for maritime claims under Chinese law may only be invoked by the liable person by means of a defence. The liable person is not entitled to commence a limitation action in order to limit his liability against all potential claimants.

As discussed in Chapter IV, the Chinese Maritime Code 1992 arguably follows the procedural theory in explaining maritime liens. However, without *in rem* action, it would appear to be difficult for the reasoning in the decision of *The Indian Grace* (No.2) to be applicable to the position under Chinese law. As a result, the limitation proceeding under Chinese law should not have the effect of merging a claim arising from a maritime lien (which is also subject to the limitation regime, namely a 'limitation lien') into the limitation proceeding. Following this approach, a limitation lien seems capable of intervening in the limitation proceeding under Chinese law and enforceable against the limitation fund.

5.4.2 Effect of the limitation fund

The constitution of a limitation fund has two important practical effects. First, it protects the persons entitled to limitation from any other actions against their property. Second,

[480] The effect of a limitation fund is discussed in 6.5.2.
[481] Wages and salvage liens are described as 'absolute liens' so that they do not depend on personal liability.

it may lead to the release of any property of the persons entitled to limitation which has been arrested or attached as a matter of pre-trial security measures.

5.4.2.1 English Law

Bar to other securities

A limitation fund may constitute a bar to other securities. Article 13 (1) of the 1976 Limitation Convention, as enacted in Schedule 7of the Merchant Shipping Act 1995, provides:

> '*1. Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising* ***any right*** *in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.*'[482] (Emphasis added)

It is noteworthy that the provision uses a very general phrase 'any right'. According to the writers' view in the book *Shipowners' Limitation of Liability*, the phrase clearly covers the arrest of ship and probably the security proceedings and relief by injunction as well.[483] In this sense, the phrase 'any right' seems wide enough to cover a maritime lien. That is to say, constitution of a limitation fund may effectively debar the arrest of a ship arising from a maritime lien as long as the maritime lien is based on the same incident. However, it is also pointed out by the writers that this restriction should only apply on the right of arresting the ship and not on the commencement of proceeding *in rem*.[484] Such a view is confirmed by the writers of *Limitation of Liability for Maritime Claims* (4th edn) saying that the aim of the subsection is 'to protect the assets of the person seeking limitation and it does not on the face of it prevent a party from pursuing an action on the merits against the person seeking limitation.'[485] In other words, a maritime lien holder may still be able to bring an action *in rem* on the basis of the maritime lien without arresting the ship. Therefore, the only object on which an action *in rem* may be brought would appear to the limitation fund. However, it is unclear that

[482] This article may also raise jurisdiction issues, which is not within the scope of this study.
[483] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 129.
[484] *Ibid*.
[485] Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) 75.

whether the right *in rem* can be transferred against the limitation fund.[486] If the answer is negative, the reservation of a right to bring an *in rem* action is indeed of no effect in that, even though such an action can be brought. It follows another question: whether a limitation fund represents the ship? The answer of the question will determine whether or not a maritime lien continues to be enforceable after the constitution of a limitation fund and whether or not a maritime lien may be transferred to the a limitation fund. The position in this regard will be discussed in the section 5.5.2.

Release of the ship

Article 13 (2) of the 1976 Convention provides for the release of any ship and other property (including security provided) which belongs to a person on behalf of whom the fund has been constituted according to Article 11 of the Convention when which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given.[487] It is notable that release is only applicable if the constitution of the limitation fund is in accordance with Article 11. There is no requirement of proving the entitlement of limitation; as long as the establishment by or on behalf of such person of a limitation fund in accordance with Article 11 of the Convention is fulfilled, the ship may or ought to be released.[488] Thus once the limitation fund is established, the ship, even though attached by a maritime lien

[486] In The Monica S [1967] 2 Lloyd's Rep 113 at 132, Brandon J held that:

> '*I see no reason why, once the plaintiff had properly invoked that jurisdiction by bringing an action in rem, [under section 3(2), (3) or (4) of the Administration of Justice Act 1956] he should not, despite a subsequent change of ownership of the res, be able to prosecute it through all its stages, up to judgment against the res and payment out of the proceeds*.'

In a recent decision, *The Sanko Mineral* [2015] 1 Lloyd's Law Reports Plus 4, it was held by Teare J that When a vessel was sold by the Admiralty Court the holder of a statutory right of action in rem might enforce his right of action in rem by commencing his action in rem within the time provided by the court's order on the sale of the vessel. The claimant had to satisfy the conditions set out in section 21(4) of the SCA 1981 for enforcing admiralty claims *in rem* but where the person liable *in personam* was the beneficial owner of the proceeds of sale he was to be regarded as the beneficial owner of the vessel for the purposes of section 21(4). However, a limitation fund is not necessary in the same nature as the proceeds of sale and therefore, the position of a limitation fund would appear to remain unclear.

[487] Article 13 (2) provides:

> '*2. After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted: (a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or (c) at the port of discharge in respect of damage to cargo; or (d) in the State where the arrest is made.*'

[488] According to Article 13(2), under certain circumstances, the Court is obliged to release the ship after the establishment of the limitation fund.

subject to the limitation regime, will be released. In this sense, a limitation fund may be deemed as an 'alternative security' to the arrest of ship.[489] A limitation fund provides adequate security for all claimants under the control of the Court; therefore, the fund takes the place of the arrested ship as security. However, it is necessary to point out that the nature of a limitation fund may not be as same as other 'alternative securities' such as bail and payment into court which also lead to the release of ship. It is submitted that either bail or payment into court provides a fund representing the ship while a limitation fund indeed represents for all aggregative claims.[490] On this basis, a maritime lien shall not operate in the distribution of the limitation fund because there is no objective for the maritime lien. However, if there is no room for a maritime lien, the claim based on the lien will be transformed into a normal maritime claim against the liable person. Furthermore, after the distribution of the limitation fund, the liability is deemed to be extinct and therefore a maritime lien will also distinguish on the basis that the claim is satisfied. The combined effect of the above is to extinct the right of a maritime lien holder by a unilateral act of the shipowner. It is arguable that such a position would be unfair to certain maritime claimants. Under the situation where a limitation fund is constituted and the ship is released, does it lead to the result that the action *in rem* has been transferred or incorporated into the action *in personam*. And also, the lien holder will face the upcoming competing claimants without the protection of higher rankings provided by maritime liens.

5.4.2.2 Chinese law

Same as the 1976 Limitation Convention, the Chinese Maritime Code 1992 also provides for the device of a limitation fund. Article 214 of the Maritime Code provides for the effect of a limitation fund under Chinese law. The wording of Article 214 is a combination of Article 13 (1) and 13 (2) of the 1976 Convention, which reads as follows:

> '*Where a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other property belonging to the person*

[489] See D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 394.
[490] See Lord Sumner and Lord Phillimore's judgement in *The Countess* [1923] A.C. 345; see also section 5.2.2 of Chapter V. Such a position will affect the extinction of a maritime lien; see the discussion below in section 4.5.

constituting the fund has been arrested or attached, or, where a security has been provided by such person, the court shall order without delay the release of the ship arrested or the property attached or the return of the security provided.'

Therefore , same as the effect of a limitation fund in English law, the establishment of a limitation fund in a Chinese Maritime Court also has two consequences: (1) debarring any right against other assets of the liable person; and (2) release of the ship or other security provided. However, it is notable that Article 214 of the Chinese Maritime Code refers to 'any person having made a claim against the person liable'. Therefore, by such wording, even a claimant who does not claim within the limitation regime is debarred from pursuing his right against the liable person. It is believed that such a term used in Article 214 was a drafting mistake.[491] The intention of Article 214 shall be identical with the provision of Article 13 (1) of the 1976 Convention, where the provision reads 'any person having made a claim against the fund shall be barred…'

5.5 Extinction of maritime liens

Another question which would arise between the maritime lien and limitation is whether the limitation fund extinguishes maritime liens. As mentioned earlier, a limitation fund has the effect of debarring claims against other assets of the liable person and after the distribution of the fund all claims should be extinguished. Therefore, in the situation where the ship is arrested by the claimants for realising a maritime lien but the shipowner invokes limitation of liability and a limitation fund is established, it is crucial for the claimants whether the maritime lien still exists. If a limitation fund does not extinguish maritime liens, the liens, at least in theory, seems still enforceable against the ship even after the distribution of the limitation fund, which would appear to be against the intention of the limitation fund.

5.5.1 Modes of extinction of maritime liens

In the *Two Ellens*,[492] Mellish L.J held that a maritime lien accrues and the continues binding on the ship until it is discharged, either by being satisfied or from the lashes of

[491] Lixin He, Meishan Xie, *Limitaiton of Liability for Maritime Claims* (Xiamen: Xiamen University Press 2008) 264.
[492] (1872) L.R. 4 P.C. 161.

the owner, or in any other way by which it may be discharged by law.[493] It is commonly agreed that there are various modes under English law by which maritime liens may be extinguished, either in substance or effect.[494] For the purpose of this thesis, it is unnecessary to review every method of those modes. As the conflicts with limitation fund is concerned, two modes are worth reviewing, namely satisfaction of the claim and provision of security.[495]

5.5.1.1 Satisfaction of the claim

As a maritime lien is attached to the claim which gives rise to such a lien, it seems to be the clearest principle that a maritime lien is discharged by the payment and acceptance of the claim advanced or other sum as is acceptable to the lien holder by way of full satisfaction.[496] Normally the claim will be satisfied by or on behalf of the shipowner. However, it is noteworthy that, where the claim is satisfied by another person without authority of the shipowner, the maritime lien attaching to the claim would be equally distinguished.[497] Such an approach is of importance in that a limitation fund may be constituted by persons other than shipowner, such as charterer, operator or manager; therefore, whether the maritime liens extinguish in such a situation is unclear.

5.5.1.2 Provision of securities

According to D.C. Jackson's view, the provision of security with regarding to the modes of extinction of maritime liens includes bail, payment into court and security by way of guarantee or undertaking. These three methods may also be found in Thomas and Price's work under different titles.[498]As D.C. Jackson annotates, under Rules of Senior Court Ord. 75 the only type of security dealt with by the rules was bail (see r. 13), but the usual practice is to give an undertaking. Under Civil Procedure Rule there is reference only to 'security' sought by the claimant and the declaration in support of an arrest warrant must specify the amount of security sought 61 Practise Direction

[493] *Ibid*, at 169.
[494] Different writers have their different summery on the modes of extinction of maritime liens.
[495] The categories used here are based on D.C Jackson's manner; see D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 501.
[496] *The William Money* (1827) 2 Hag. Ad136.
[497] See D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 287; Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 84.
[498] Both Price and Thomas do not put these three into one category, instead they are deemed as different modes. However the difference in category does not affect the substance of these methods.

5.3(1)(c). The consequence on any lien may however continue to differ according to the type of security taken.[499]

Bail

As defined by Thomas, bail is an Admiralty process by which a *res* is either protected against arrest or released from arrest by the substitution of a covenant to discharge the obligation of a defendant to pay a sum of money for the corpus of the *res*.[500] In terms of the function of bail, D.C. Jackson says

> '*Bail takes the place of the property as the asset subject to attachment for the claim to the extent that it reflects the value of that asset but it seems unclear whether, for the claimant, the bail is truly a substitute security. If bail is not taken to the full value of the property, as the property (usually a ship) may be rearrested up to that value and the amount of the claim and costs, a lien should remain to the extent of any difference between the amount of bail and value of the property. It is possible to argue that having accepted bail as a substitute the claimant should not be able to return to the ship —but bail should be seen as the amount to be lodged to obtain release rather than necessarily a replacement for the ship for the purposes of the lien.*'[501]

Thomas expresses a similar view in his work. According to Thomas, bail assumes the nature of a bond executed by one or more sureties wherein they covenant to pay such sum in the case of default by the defendant; and the sum usually represents the maximum possible liability of the sureties rather than the value of the property.[502] Therefore, the bail is only a measure of pre-judgment security for the purpose of releasing the vessel. In addition, following the procedural theory, the maritime lien is deemed as a procedural method to compel the appearance of the defendant. Under the situation where no limitation of liability is applied, a defendant is liable for the full amount of the damaged caused by him. Lord Bucknill held in the decision of *The Majfrid*[503] that:

---

[499] See D.C Jackson's manner; see D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 504.
[500] Thomas, *Maritime Liens* (London, Stevens 1980) 287.
[501] D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 504.
[502] Thomas, *Maritime Liens* (London, Stevens 1980) 287, at para.512.
[503] (1943) 77 Ll. L. R. 127.

'*Therefore, even if bail is given to the full value of the ship, the ship can be taken in execution by the sheriff if the bail proves insufficient to satisfy the amount of the judgement debt.*'[504]

However, it is notable that, even though the bail operates to extinguish a maritime lien, such a right of the maritime lien is thereafter transferred against the bail which becomes the subject of the proceedings.[505] In this sense, the priority of a maritime lien survives even after the release of the ship which is made by the operation of the bail and the claimants are compensated in accordance with the ranking rules of maritime liens.

Payment into Court

On occasion, payment into court has been accepted as a security to prevent arrest or to obtain the release of property. No provision was made in the Rules of Senior Court and there is no reference in the Civil Procedure Rules for this role for such a payment. Its availability seems to be as established as its use is rare. Release of property from arrest will depend on an order of the court. To this extent the payment operates in much the same manner as bail. Therefore such a method is also called 'payment into Court in lieu of bail' by Thomas.[506] Thus, similar to the position of bail, the priority of a maritime lien would also be applicable to the payment into court although the lien is deemed to be extinguished.

Security by way of guarantee or undertaking

Alternative to bail or payment into Court, the claimant may agree to accept the guarantee of a third party in return for an undertaking on his part either not to arrest the ship or to the release of the ship from arrest. Such a method is purely a personal arrangement between the parties to the litigation and does not involve the Court. As pointed out by D.C. Jackson, it is clear that no English court would permit the claimant to rearrest of the property or even issue another *in rem* claim form while the undertaking remains of adequate value. Thus a contractual undertaking is surely a basis for preventing or releasing from arrest and at the least an undertaking not to enforce the lien insofar as the undertaking provides adequate security.

[504] *Ibid*, at 129.
[505] Thomas, *Maritime Liens* (London, Stevens 1980) 290, at para 514.
[506] *Ibid*, pp290-291; see also, D.C. Jackson, *Enforcement of Maritime Claims* (4th ed.) 505.

It is noteworthy that the extinction of maritime liens by provision of security is different the extinction by satisfaction of the claims. Although provision of securities does affect the maritime lien they should not be deemed to destroy the liens in that the lien is transferred to the security. In this sense, the maritime lien does not come to an end after provision of security in that the lien is only departed from its attachment on the ship but its priority still survives. As suggested by D.C. Jackson, unless there is clear waiver (implied or express) the lien should continue while it may be enforced; any action or event qualifying the claimant's right should be construed in the light of that right. Provision of security shall be seen as preventing the enforcement of a maritime lien rather than destroying it.[507] The only modes, which indeed destroy a maritime lien, are satisfaction of claims, destruction of the ship, lashes and sale by the Court.

5.5.2 Limitation fund as an alternative security

A limitation fund has the effect of debarring claims against other assets of the liable person and the effect of releasing the ship from arrest; therefore such a fund is deemed an alternative security to arrest of ship.[508] In the chapter on maritime liens, D.C. Jackson puts the title 'limitation of liability—limitation action' parallel with 'bail' when discussing on the extinction of maritime liens.[509] The writer submitted:

> '*Given that the fund reflects the amount recoverable, unless for some reason the fund is not effective or liability not limited the lien will be extinguished on satisfaction of the claim.*'[510]

On this basis, the writer indicates that a limitation fund is similar to bail so that both of them are capable of extinguishing a maritime lien. It is true that there are some similar features between a limitation fund and bail. First of all, both of the limitation fund and bail have the advantage of permitting the shipowner to continue to enjoy the benefit and use of his property while at the same time the plaintiff continues to enjoy the benefit of a pre-judgement security, albeit in different forms. Secondly, the limitation fund represents for the aggregation of all possible liabilities while bail also assumes the nature of a bond to specifying a sum which represents the maximum possible liability of

[507] *Ibid*, 501.
[508] *Ibid*, 394.
[509] *Ibid*, 505.
[510] *Ibid*.

the sureties. Thirdly, neither bail nor a limitation fund is a guarantee given to the plaintiff but is an undertaking given to the Court;[511] therefore both of them may only be given following an appearance of the defendant in the action in question.

However, the two are different in that a limitation fund should comprise the amounts determined by particular calculation on the basis of the ship's tonnage, which represents the maximum liability of the liable person; while a bail is taken according to the value of the ship. Although in the situation where bail is provided there is a concurrent submission of his personal liability beyond the value of the ship,[512] the fact that the sum of bail is the value of the ship still indicates the assumption that bail is the replacement of the ship. In addition, the position that the maritime lien is transferrable to against bail affirms such an assumption.

With regard to the question whether a limitation fund represents the ship, there were two different views submitted by the Judges *The Countess*.[513] In that decision, both Lord Sumner and Lord Phillimore, who were of the opposite opinion to the majority, based their judgement on the assumption that the limitation fund did not represent the vessel. By the words of Lord Sumner, the whole conception of limitation of liability 'is the conception of a discharge of the shipowners on the one hand and a distribution of the aggregate sum, to which they elect to limit their liability, on the other.' In this sense, the fund represents for the aggregative liability rather than the vessel. Lord Sumner argued that a sum brought into Court in a limitation of liability action does not 'represent' the vessel; it represents the aggregate liability of the shipowners to all the parties they have injured. Similar point of view was expressed by Lord Phillimore. The Judge was of the opinion that the right to limit liability given by the statutes is the measure of the liability of the shipowner to everyone, and the value of the ship detained does not enter either by way of diminution or enhancement. It was also pointed out by the Judge that the shipowner must for his legitimate protection bring proceedings for limitation, and he is

[511] Nevertheless, it has been decided in *The Atlantic Confidence* [2013] Lloyd's Rep. Plus 82 that, having regard to the general purpose and intention of the 1976 Convention, a limitation fund could be constituted by the production of a guarantee provided that the guarantee did not contravene United Kingdom legislation and that the court was satisfied that the guarantee provided adequate security for the fund. Thus a letter of undertakings from a P&I club or other forms of guarantees may be accepted as a limitation fund by English Courts. However, it is arguable that such a letter of undertakings or guarantee is still a commitment to the Court representing the maximum liability of the shipowners. In this sense, the position of a limitation fund would not be altered.
[512] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 288.
[513] [1923] A.C. 345.

entitled to bring them; therefore proceedings of this nature are the only proceedings by which the shipowner and the bargeowners can get justice. However, on the other hand, the majority of the Judges held that the payment into Court represented the vessel for the purpose of releasing the vessel. In this sense, the statutory provisions on limitation of shipowner's liability only have the effect in respect of setting up the maximum amount of the liability to be beard. Therefore, the possessory lien of the Board would be transferred to the fund and enjoy its priority. According to this point of view, it seems that maritime liens shall also be transferred to the limitation fund by analogy. Nevertheless, after the appearance of section 7(2) of the 1958 Act, which expressly deprived liens and other similar rights from the limitation fund, it would appear that the conflict clause may indicate that the fund shall not represent the vessel.[514] Therefore a limitation fund seems to be distinguished from bail.

Furthermore, as mentioned earlier, the mode of provision of security does not in effect destroys a maritime lien and should be deemed as to prevent the enforcement of the maritime lien. Following this position, a limitation fund would put maritime lien holders in dilemma: the constitution of a limitation fund prevents the enforcement of the maritime lien but the lien is not destroyed by such prevention and is not transferable to the fund. Thus the lien holder's right has no means of realising. One possible answer to this dilemma would be that the maritime lien is destroyed by satisfaction of claim due to the distribution of the limitation fund. However, in this case, the maritime lien holder would lose his priority in ranking of claims thus it is arguable that the claim is not really satisfied.

Nevertheless, the limitation fund has the effect of releasing securities provided for maritime claims. It is clear that a limitation fund may lead to release a ship from arrest. According to the wording of Article 13 (2) of the 1976 Convention, such effect also reaches on 'any security given'.[515] Therefore, in the situation where a shipowner sets bail for releasing the ship from arrest in the first place and then constitute a limitation fund for all claims against him arising from the incident, bail will be released by the

[514] For more discussions on the effect of section 7(2) of the 1958 Act, see Chapter V.

[515] Article 13 (2) of the 1976 Limitation Convention reads:
'*After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State…*'

constitution of the limitation fund. In this sense, a limitation fund seems to be a superior security in comparison with bail or other securities. Such a position may explain why the distribution rule is different under a limitation fund. Furthermore, as discussed earlier, the limitation proceeding seems to have an effect of converting and action *in rem* into an action *in personam*. On this basis, it seems that under English a limitation fund truly extinguishes the maritime lien.

5.5.3 Chinese law position

With regard to the modes of extinction of maritime liens, Article 29 of the Chinese Maritime Code 1992 provides:

> '*A maritime lien shall, except as provided for in Article 26 of this Law, be extinguished under one of the following circumstances:*
>
> *(1) The maritime claim attached by a maritime lien has not been enforced within one year of the existence of such maritime lien;*
>
> *(2) The ship in question has been the subject of a forced sale by the court;*
>
> *(3) The ship has been lost.*
>
> *(4) The period of one year specified in sub-paragraph (1) of the preceding paragraph shall not be suspended or interrupted.*'

The above three circumstances set out in Article 29 are those under which the maritime lien is absolutely extinguished and destroyed. Article 29 (1) refers to lashes or delay in suit; Article 29 (2) refers judicial sale; and Article 29 (3) refers destruction of the property. Besides these three modes, it is submitted by the editors of *Study on the Theories of Chinese Maritime Law* that the maritime lien may also be extinguished by satisfaction of claims and by provision of security under Chinese law.[516]

However, the editors of the book *Study on the Theories of Chinese Maritime Law* submit that provision of maritime security does not lead the extinction of maritime lien.

[516] Si Yuzhuo and Li Zhiwen (Eds.), *Study on the Theories of Chinese Maritime Law* (Beijing: Peking University Press 2009) 111-115. The editors of the book list seven circumstances under which the maritime lien will be extinguished including: satisfaction of claims, loss of the ship, delay in enforcement, delay in suit, judicial sale, confiscation of ship, and provision of security.

The editors are in favour of the view of another Chinese writer, Li Hai, who submits that the effect of providing maritime security is to make the lien unable to be enforced through arrest of the ship.[517] In effect, such a view is in line with D.C. Jackson's view that provision of security shall be seen as preventing the enforcement of the maritime lien rather than destroying it. Therefore, the editors' view is based on a different understanding of the meaning of 'extinction'. It seems true that the word 'extinction' is construed differently under Chinese law and English law, which would explain the reason why Article 29 of the Maritime Code only provides for three modes 'destroying' the maritime lien. In this sense, 'extinguish' in Article 29 refers the circumstance where a maritime lien comes to an end rather than being prevented from enforcement.

In terms of the provision of security, Chapter 6 of the Special Maritime Procedural Law 1999 provides for rules of maritime security. According to Article 93 of the Special Maritime Procedural Law, types of maritime security include cash, guarantee, mortgage or pledge. In terms of security providing for claims arising from maritime liens, cash and guarantee is normally used. For the amount of security, Article 76 provides that the amount of the security requested for preservation of a maritime claim by a maritime claimant from a person against whom the claim is made shall be equal to the amount of his credit, but shall not exceed the value of the property preserved. Such an approach is similar to bail under English law.

Concerning on limitation fund, Article 79 of the Special Maritime Procedural Law provides that Article 79 the provisions of this Chapter 6 on maritime security may apply mutatis mutandis to securities involved in constitution of maritime limitation fund. However, there is no authority found in Chinese law on the meaning of 'mutatis mutandis'. It can be indicated from the provision of Article 79 that a limitation fund shall be similar to maritime security. On this basis, the similarity and difference between the limitation fund and bail under English law may also apply to the limitation fund and maritime security under Chinese law. In addition, similar wording with Article 13 (2) of the 1976 Limitation Convention may be found in Article 214 of the Chinese Maritime Code 1992.[518] Thus a limitation fund shall also have a higher position than any other

[517] *Ibid*, 189.

[518] Article 214 of the Chinese Maritime Code 1992 reads:

Where a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other property belonging to the person constituting the fund has been arrested or

maritime security under Chinese law and the fund may destroy the maritime lien. Therefore, it seems necessary to insert a provision into the Maritime Code, which confirms that the constitution of limitation of liability shall extinguish the maritime liens.

5.6 Conclusion

From the above sections, it is clear that the enforcement of limitation of liability and maritime liens are inconsistent in certain ways and, more importantly, the regime of limitation of liability apparently may prevent the maritime lien from operating. The impact of limitation on the enforcement of the maritime lien is reflected in the following aspects:

First of all, the limitation regime provides for a *pro rota* distribution rule which is different from the rule settled by the maritime lien; secondly, the limitation proceeding may convert *an in rem* action into an *in personam* action and therefore the maritime lien may not be enforced; and thirdly, the constitution of a limitation fund protects the persons entitled to limitation from any other actions against their property and may lead to the release of any property of the persons entitled to limitation which has been arrested or attached as a matter of pre-trial security measures, which will discharge the security function of the maritime lien. In addition, as the limitation fund is distribution according to the *pro rota* rule, the priority of the maritime lien is also dismissed.

Except the second aspect, the other aspects of the impact exist in both English law and Chinese law. However, it is the second impact that makes the conflict under English law is not as harsh as it is under Chinese law. Under English law, the reasoning in *The Indian Grace* (No.2) provides for a possible theoretical foundation based on which the limitation regime may have a superior position over the maritime lien. On this basis, it is not necessary to have other statutory provision to confirm the position between the limitation regime and maritime liens despite the existence of para.9 Part II Schedule 7 of the Merchant Shipping Act 1995. On the other hand, as *in rem* proceeding is not recognised under Chinese law, such theoretical foundation would not be established.

---

attached, or, where a security has been provided by such person, the court shall order without delay the release of the ship arrested or the property attached or the return of the security provided.

Thus some provisions in respect of dealing with the conflict between limitation and the maritime lien will need to be included in the Chinese Maritime Code 1992 or other relevant law.

For the purpose of reconciling maritime liens and limitation of liability, the so called 'conflict clause' was inserted in the Merchant Shipping Act, international conventions, as well as in the Chinese Maritime Code 1992. The scope and construction of such a clause will be discussed in the next chapter to examine to what extent such a clause could resolve the conflicts between maritime liens and limitation of liability.

Chapter VI 'Conflict Clauses' under English law, Chinese law and International Conventions

6.1 Introduction

In the previous chapter, conflicts between the operation of maritime liens and limitation of liability for maritime claims have been discussed and such conflicts are recognised by English law and Chinese law as well as International Conventions on Maritime Liens and Mortgages. English law attempts to resolve such conflicts by inserting a so-called 'Conflict Clause'[519] in its Merchant Shipping Act.[520] The trigger of inserting such a provision in the Merchant Shipping Act was the decision made by the House of Lords in *The Countess*. In the decision of this case, a possessory lien was given its priority over other damage claims in distribution of a limitation fund. In order to avoid such a result that the distribution of the limitation fund is affected by liens or other rights, Merchant Shipping Act 1958 included a provision reversing the decision of *The Countess*. Due to the prevalence of the 1957 and 1976 Conventions on Limitation of Shipowners' Liability, the tonnage limitation system has been widely spread among shipping nations. Therefore the conflicts between maritime liens and limitation of liability, as exists under English law, have also spread along with the ratification of the limitation conventions. For the purpose of making the Conventions effectively applicable, the drafters of the International Conventions on Maritime Liens and Mortgages also agreed to insert certain provisions to avoid the conflicts. As a result, both the 1967 and 1993 Conventions on Maritime Liens and Mortgages have a specific provision dealing with the relationship between maritime liens and limitation of liability. The Chinese Maritime Code, modelled on the 1993 Convention on Maritime Liens and Mortgages, also includes a 'Conflict Clause' in its Article 30.

Generally speaking, such conflict clauses have their effect by means of depriving the application of maritime liens in the limitation process. However, different wordings are

[519] The term 'Conflict Clause' originated from the title of Article 15 of the 1993 Maritime Liens and Mortgages Convention, in which the term 'Conflict of Convention' is used.
[520] The current 'Conflict Clause' is provide in Sch.7, Part II, Para.9 of the Merchant Shipping Act 1995

used in the Merchant Shipping Act, the International Conventions on Maritime liens and Mortgages and the Chinese Maritime Code. Therefore, different effect will arise from those clauses. It seems that all those conflict clauses are clear enough in that there is little work focusing on those clauses. However, the construction and application of such clauses are still obscure and those clauses would appear to be not enough to resolve the conflicts between maritime liens and limitation of liability. The purpose of this Chapter is to find out to what extent those conflict clauses may be able to resolve the conflicts. Therefore, this Chapter will firstly introduce the origin of the 'Conflict Clause' and the background of creating the clause. Secondly, the Chapter will focus on the wording of the Clauses under current legislation, including International Conventions on Maritime Liens and Mortgages, English law and Chinese law and analysis will be given on how each of those clauses should be interpreted respectively; and in the final part, a comparison on the effect of those clauses will be made.

6.2 English law: the origin of the conflict clause

6.2.1 Statutory provisions

As mentioned in Chapter III, the English limitation system has introduced the concept of a monetary limit based on ship's tonnage and the principle that the limitation amount was to be distributed among the claimants in proportion[521] to their claims. Therefore, in order to clarify the position of maritime liens in the limitation regime, the 'Conflict Clause' originated in the United Kingdom legislation. D.R. Thomas, in his work on maritime liens, has a section dealing with the relationship between ranking of maritime liens and distribution of limitation fund and it particularly concerns on the conflict clause inserted in the Merchant Shipping Act 1958. [522] At the time of his work, namely in 1980, the United Kingdom has already ratified the 1976 Limitation Convention by the Merchant Shipping Act 1979 but Thomas still refers to statutory provisions made before the 1979 Act, which are section 503 and section 504 of the Merchant Shipping Act 1894. According to these two sections, shipowners and other qualified persons are entitled to limit their liability for certain specified claims under a scheme of statutory

[521] The original word used in the Merchant Shipping Act 1894 was 'rateably', which was believed to be of the same meaning of 'in proportion'. For details of the construction, see *infra* section 5.2.2.
[522] See D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 262, the paragraphs is titled 'Distribution of Limitation Fund'.

limitation. Specifically, Section 504 of the Merchant Shipping Act 1894 provides for the right of the High Court in respect of determination the limit of liability and distribution of the limitation fund among several claimants. Section 504 reads:

> '*Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session, or in a British possession to any competent court, and that court may determine the amount of the owner's liability and* ***may*** *distribute that amount* ***rateably*** *among the several claimants, and may stay any proceedings pending in any other court in relation to the same master, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just*.' (Emphasis added)

The above section sets out the outline of the limitation regime, among which the concerning point under this section, for the purpose of this chapter, is that the limitation amount is to be distributed rateably. As Thomas pointed out, a customary meaning associated with the term 'rateably' in section 504 is equally in proportion to the value of the claim. Such an interpretation makes the distribution rules of a limitation fund apparently inconsistent with the ranking rule of maritime liens. Such a way of interpretation is affirmed in more clear words by the Merchant Shipping (Liability of Shipowners and Others) Act 1958, section 7(2), which provides:

> '*No lien or other right in respect of any ship or property shall affect the proportions in which under the said section five hundred and four any amount is distributed among several claimants*.'

Such a position has been kept in the United Kingdom's legislation. The above provision is restated by para.9 of Schedule 7 Part II of the Merchant Shipping Act 1995 without substantial changes.[523]

[523] Sch.7, Part II, Para.9 of the Merchant Shipping Act 1995 reads:

Thomas makes explanations on the effect of the 1958 Act. According to his work, the purpose of the 1958 Act would appear to overrule the decision made by House of Lords in *The Countess*[524] and to establish that each claimant ranks *pari passu* and in proportion to the value of his claim.[525] The general effect of section 7(2) of the 1958 Act is to make the established ranking of maritime liens only applicable to multiple claims which arise out of an occurrence in respect of which liability is not limited; and section 504 has no application to such further claims as may exist and which are unconnected with that occurrence.

However, Thomas only restates what the law is; and the writer does not give any explanation on the considerations behind such changes. Neither does the writer give any commentary words on construction or application of the 'Conflict Clause' in the United Kingdom legislations. These issues will be discussed in the following sections.

6.2.2 Case law: The Countess

As mentioned earlier, the effect of the 1958 Act would appear to overrule the decision made by House of Lords in *The Countess.* Therefore it is worthwhile to review the decision in terms of understanding the underpinning consideration and theoretical foundation of the 'Conflict Clause'. At the time of 1923, when *The Countess* was decided, the limitation regime in the United Kingdom was provided by Merchant Shipping Act 1894 sections 503 and 504. Although the decision was overruled by later legislation, the considerations made by the Lords in the judgement are still valuable to the current research.

The facts of the case were not complicated. The steamship *Countess,* which was lying in a dock belonging to the Mersey Docks and Harbour Board, negligently went ahead instead of astern and crashed through the dock gates into the river. There were a number of barges carrying with the *Countess* and some of those barges were sunk due to the action of the steamship. *The Countess* was holed and had to be beached, and, the Board's assistant marine surveyor having certified that she was a danger to the safe

---

No lien or other right in respect of any ship or property shall affect the proportions in which under article 12 the fund is distributed among several claimants.

The only change made to the earlier version is the different article number referred to thereby.

[524] [1923] AC. 345.

[525] Similar statement may also be found in D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 600, see the footnote 230.

navigation of the port. The Board took charge of her under the powers of the Mersey Docks and Harbour Act 1912, and repaired the steamship at a cost of 1000*l*. The damage done to the Board's dock amounted to 10,000*l* and the damage done to the barges to 55,000*l*. The statutory amount of the *Countess's* liability under the Merchant Shipping Acts was 4468*l* (8*l*. per ton). The Board detained the *Countess* under their statutory powers in respect of the damage done to the dock. Numerous actions having been commenced by the barge owners, the owners of the Countess commenced a limitation action in which they claimed to limit their liability to the amount ascertained under the Merchant Shipping Acts and to have that amount distributed rateably among the claimants and in that action an order was made staying the bargeowners' actions. The owners also commenced an action against the Board for delivery up of the vessel and damages for detention. Ultimately the vessel was released on payment into the Court of 5500*l* made by the shipowners, representing (1) the statutory amount of their liability, and (2) the expenses incurred by the Board in connection with the repair and detention of the vessel. No question was raised as to the latter sum. The Board claimed payment of their claim for damages (up to the limit of the shipowners' statutory liability) out of the fund in Court in priority to the claims of the barge-owners by virtue of their right to detain the vessel (note that the sum representing the vessel) under their private Act of 1858. The barge-owners claimed that the fund ought to be distributed rateably among the several claimants, including the Board, according to the amounts of their claims.

The concerning point of the decision lied in whether a possessory lien of the Dock Board might be ranked before other claims in distribution of the limitation fund. Three out of the five judges was of the opinion that if one claimant had a possessory lien over the ship, effect had to be given to his superior right even to the extent of depriving other claimants of all right of recovering against the limitation fund. Amongst the three judges, Earl of Birkenhead based his decision on the construction of section 504. According to the learned Judge's view, the word 'may' in section 504 was to be read as 'may, if the circumstances may be'; and the word 'rateably' ought to be construed with regard to the priorities as well as to the amounts of the claims which have to be taken into account. The other two Judges expressed similar views in respect of construing the provisions and held that the provisions of section 504 are not compulsory. Viscount Finlay even said that it would be inconceivable if the person having that lien should be

deprived of it by such a provision of section 504.[526] Nevertheless, it is noteworthy that the wording of section 504 has been changed in its subsequent Acts. There are two major differences between section 504 and its latest successor: the word 'may' was substituted by 'shall' and 'rateably' was changed to 'in proportion'.[527] After such changes, the position is clear that a limitation fund ought to be distributed by the Court proportionately among all the claimants. The construction of section 504 made by the Judges in *The Countess* would appear not applicable to the current legislation. Such changes made the conflict between liens and limitation of liability inevitable and in this sense, thus it is necessary to insert the conflict clause into the Merchant Shipping Act.

From the above analysis, the decision of *The Countess*, although said to be overruled by the 1958 Merchant Shipping Act, was not necessarily improper under the context of the law in 1923. But it is worthwhile to mentioning that the decision, unfortunately, was not a straightforward authority on the relationship between maritime liens and the limitation fund. The case indeed dealt with the conflict between a possessory lien and the distribution of a limitation fund. The judges did not expressly make their comments on the situation where there is a maritime lien holder in the limitation process. In the decision of *The Countess*, the possessory lien of the Board was granted by a statutory right of detention.[528] As DC Jackson points out in his work on enforcement of maritime claims, such a statutory right is 'not within the ambit of priorities'.[529] Lord Atkinson, in his judgement, referred such kind of possessory lien as a paramount right to all maritime liens. Similar commentary has also been given by other writers. As Price says in his work, the power of harbour authorities to detain a vessel is a priority over all other claims on the ship, including maritime liens.[530] Once again, Thomas also mentioned in

---

[526] Viscount Finlay says in his judgement,

> '*I do not read the provision of section 504 that the Court may distribute the amount of the owner's liability rateably among the several claimants as meaning that the Court is to have regard in the distribution solely to the amounts of the claims. If the fund in Court represents a ship in which a claimant has a possessory lien, and if the fund in Court would otherwise be subject to a prior claim in virtue of that possessory lien it is to me quite inconceivable that the person having that lien should be deprived of it by such a provision as the present.*'

[527] Article 12(1) of the 1976 Limitation Convention provides *inter alia*:

> '*…the fund shall be distributed among the claimants in proportion to their established claims against the fund.*'

This provision is enacted in Merchant Shipping Act 1995, schedule 7.

[528] By the Mersey Dock Acts Consolidation Act 1858, s. XCIV, when damage is done to any dock or other work of the Mersey Docks and Harbour Board through the negligence of those on board of any vessel, the vessel may be detained until such damage is paid or a deposit is made.

[529] D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 599.

[530] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 109.

his work that before the decision of *The Countess*, it had already established that such a statutory right of detention and sale stands in priority to all other claims against the vessel.[531] On this basis, the decision of *The Countess* seems not in effect applicable to maritime liens. It is also not sure whether the rationale expressed in the judgment can be extended to cover maritime liens by analogy. Although overruled by the majority, Lord Sumner stated in his judgement that the detention by the Board is a bare right to detain and there is no pledge, no charge, and no right ad rem. In this sense, the right of detention is distinguished from an arrest and a proceeding *in rem*. That is to say, the decision of *The Countess* shall have no impact on a maritime lien and its relationship with a limitation fund. If follows that one cannot necessarily argue that the priority of maritime liens shall be granted in distribution of a limitation fund on the basis of the decision of *The Countess* even though there is no such Conflict Clause in the 1958 Act. Therefore, a maritime lien is for sure within the scope of the provision of section 7(2) of the 1958 Act despite the fact that it may be unclear whether section 7(2) of the 1958 Act covers a possessory lien derived from a statutory right of detention[532]. To sum up, the effect of conflict clause in the Merchant Shipping Acts are not necessarily to avoid the result of *The Countess*, but to clarify the position that maritime liens shall not have impact on the distribution of a limitation fund.

6.2.3 Construction of the Clause

Para.9 of the Schedule 7 Part 2 of the Merchant Shipping Act 1995 (referred as para.9 hereafter) reads:

> '*No lien or other right in respect of any ship or property shall affect the proportions in which under article 12 the fund is distributed among several claimants.*'

This paragraph provides for the overriding effect of the 1976 Limitation Convention in terms of its competition with maritime liens.[533] It seems that the wording of this paragraph is so clear that there are very few comments found on this clause. However,

[531] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 231. See also *The Emilie Millon* [1905] 2 K.B. 817; *The Spermina* [1923] 17.

[532] The question of whether the conflict clause shall cover the possessory lien of the Board will also be discussed in the next section. However, the answer to this question does not affect the position of maritime liens in the limitation proceedings.

[533] D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 610. Similar words may also be found in Richard Shaw's Chapter V of Institute of Maritime Law, University of Southampton, *Limitation of Shipowners' Liability: The New Law* (Sweet & Maxwell London 1986) 121.

for dealing with the conflict between maritime liens and the limitation fund, at least, several points need to be clarified.

First of all, what does the 'lien or other right' refer to? As mentioned earlier, the purpose of such a statutory provision is said to be avoiding the consequence of *The Countess* decision. If such a statement is true, a possessory lien arising from the statutory right of detention is included without question by virtue of the word 'lien'. Then what is the situation for a common law possessory lien or a maritime lien? As discussed in the previous paragraph, it has been established that such a possessory lien instituted by statutory power is paramount to other rights in respect of priorities.[534] In the decision of *The Emilie Millon*[535], it was held that such a statutory right of detention and sale stands in priority to all other claims against the vessel.[536] This kind of possessory lien is imposed by the power of statute and therefore it is different from a common law possessory lien;[537] and moreover, a common law possessory lien and a maritime lien are inferior to the possessory lien of a Harbour Authority or Dock Board. On this basis, there is no reason why those inferior liens should not be included otherwise the paramount priority would be broken. However, as pointed out by both Thomas and D.C Jackson, a statutory right of detention is out of the ambit of the province of priorities and questions of priority only fall to be considered after the statutory claimant has been satisfied.[538] Therefore, it may also be arguable that such a statutory right should be superior to the right of limitation as well. In addition, in para.9, 'lien or other rights' is restricted by the following term of 'in respect of any ship or property', which indicates that such liens and other rights shall be adhering to the vessel or other property. Thus it is arguable that the statutory right of detention is not covered by para.9 because such a right does not give rise to any right *ad rem* or *in rem*.[539] Nevertheless, whether the statutory right of detention is within the ambit or not, it does not affect the position of maritime liens in limitation proceedings. On the other hand, by the words of Price, a maritime lien constitutes a charge upon ships of a nature unknown alike to common law

[534] D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 599.
[535] [1905] 2 K.B. 817.
[536] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 231.
[537] For maritime claims, a ship repairer is often granted a possessory lien for the costs of reparation.
[538] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 232. See also D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) 599.
[539] See Lord Sumner's judgement in *The Countess* [1923] AC. 345. See also section 6.2.2 of this Chapter.

and equity.[540] Despite the argument on whether a maritime lien is a right *in rem* or a right *ad rem*,[541] it is clear that a maritime lien has the feature of affiliating to the vessel. By virtue of this character, a maritime lien is no doubt within the meaning of 'lien or right in respect of any ship or property' and therefore it shall not affect the distribution of a limitation fund.

Secondly, that para.9 only provides that the proportions in the distribution of a limitation fund shall not be affected. By such a precise provision, it is not clear for the situation where there no limitation fund is constituted. Article 10 (1) of the 1976 Limitation Convention, which is enacted in Schedule 7 of the Merchant Shipping Act 1995, allows that limitation of liability may be invoked notwithstanding that a limitation fund has not been constituted. This subsection also provides that a State Party may however provide in its national law that a person liable may only invoke the right to limit liability where a limitation fund has been constituted. The United Kingdom does not use this option while ratifying the 1976 Limitation Convention.[542] Therefore, the constitution of a limitation fund is not a condition precedent of invoking limitation of liability. Following this provision, it is possible that a shipowner will be allowed to limit his liability without establishing a limitation fund in the Court. Apparently, under such a situation, para.9 will not be able to apply. However, subsection 2 of Article 10 of the 1976 Convention provides that the terms of Article 12, which deals with distribution of the limitation fund, are applicable even if limitation of liability is invoked without the constitution of a fund.[543] The effect of subsection 2 of Article 10 is to make the situation, where no limitation fund has been constituted, equivalent to the situation where a limitation fund has been constituted. That is to say, no matter a limitation fund has been constituted or not, the amount, up to which the liabilities are limited, shall be distributed in proportion among all the claimants. In this sense, although para.9 only refers to the proportion of the fund, it is arguable that the provision shall be construed to a wilder application which covers the situation without a limitation fund for the purpose of certainty. By doing so, the word 'fund' used in para.9 shall be construed to refer either a limitation fund as provided in Article 11 of the 1976 Convention or the

[540] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 1.
[541] See D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 22-23.
[542] Initially the Merchant Shipping Act 1979, which is replaced by the Merchant Shipping Act 1995.
[543] Article 10 (2) of the 1976 Limitation Convention provides:
If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.

maximum limited amount as provided in Article 6 of the 1976 Convention. In addition, it seems to be true that the constitution of a limitation fund is only not necessary where there is mere one claimant and no other claimants are expected.[544] However, there is nothing in the 1976 Limitation Convention providing that the provision of limitation without a fund shall apply merely to the case where there is only one claimant. If a State party chose to provide in its national law that a limitation fund is a prerequisite of invoking the right to limit, the position is quite clear. Nevertheless, States Parties like the United Kingdom, which does not use the option provided by the Convention, had better to make it clear in respect of the rules for the position of limitation without the constitution of a limitation fund.

Thirdly, in order to avoid the confusion in construction of the provisions, para.9 uses the word 'shall' instead of the word 'may' used in its precedent provision in 1958. In addition, as mentioned earlier, the provision of Article 12 of the 1976 Convention on distribution of the limitation fund has been updated, which provides that the limitation fund **'shall'** be distributed among the claimants '**in proportion'**.[545] The combination of the two articles reaches the effect of making it clear enough that a limitation fund is shared by the claimants proportionately. The disputes in respect of construction of the provisions, which was of concern in *The Countess*, will not happen under the current United Kingdom legislation.

To conclude, the Conflict Clause under current English law clearly leads to the result that maritime liens shall not operate where a limitation fund has been constituted. That is to say, by virtue of para.9, once a limitation fund is constituted, the claimants against the fund share the fund in proportion for their compensation. The wording of the current English Conflict Clause is clear enough to achieve the effect that no maritime liens shall affect the distribution of the limitation fund. However, the question of the ranking of claims in the circumstance where there is no limitation fund is not answered by para.9. Such a question would not exist if the statutory provisions clearly stipulate that the shipowners may be able to invoke limitation without a limitation fund only if there is one claimant in the proceeding.

[544] Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, (London: Kluwer Law International 2012) 132.
[545] Article 12 (1) of the 1976 Convention, which is also enacted in Schedule 7 of the Merchant Shipping Act 1995.

6.3 Conflict clauses in international conventions

6.3.1 The 1926 Maritime Liens and Mortgages Convention

Article 7 of the 1926 Maritime Liens and Mortgages Convention reads:

> '*As regards the distribution of the sum resulting from the sale of the property subject to a lien, the creditors whose claims are secured by a lien have the right to put forward their claims in full, without any deduction on account of the rules relating to limitation of liability provided, however, that the sum apportioned to them may not exceed the sum due having regard to the said rules.*'

Strictly speaking, Article 7 of the 1926 Convention shall not be labelled as a 'conflict clause'. At the time of drafting the first International Convention on Maritime Liens and Mortgages, the English tonnage system had not become the predominant limitation system. As mentioned in Chapter IV, the 1926 Maritime Liens and Mortgages Convention was designed to coordinate with the 1924 Limitation Convention.[546] The close relationship between the two Conventions is reflected by their provisions: Article 1 of the 1924 Limitation Convention which provides that the liability of the shipowner is limited to an amount equal to the value of the vessel and the freight; and Article 2 of 1926 Maritime Liens and Mortgages Convention which provides that liens attach to vessel, the freight and the accessories. It is obvious that both of the two provisions reflect the personification theory and the ships are deemed as both the source and limit of the liabilities. Such a position makes maritime liens integrate with the limitation regime based on which it is implied that the objective of the 1926 Maritime Liens and Mortgages Convention was to provide a lien for those maritime claims for which a shipowner could limit his liability by abandoning the ship.[547] However, as a combined limitation regime, the 1924 Limitation Convention also provides for a monetary limit for collision damages, cargo damages, bill of lading claims and wreck removal claims,

[546] See section 3.3.2 of Chapter III.
[547] John M. Kriz, 'Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952', 1963 DuE L.J. 671.

for which a limit of 8 pounds sterling per ton shall apply.[548] Such a monetary limit applies to the situation where the value of vessel exceeds the 8 pounds sterling per ton value.[549] That is to say, the pure value system remains applicable solely for salvage claims, general average claims, bottomary and respondentia and for cases where the vessel's value is less than the 8 pounds per ton limitation ceiling. Therefore, although the 1924 Limitation Convention is a mixture of both value system and monetary system, the ship value is the ultimate ceiling of all liabilities; that is to say, the limit will in no event exceed the value of the ship. That was the reason why Article 7 of the 1926 Maritime Liens and Mortgages Convention specifically refers to '*the sum resulting from the sale of the property*'.

The general effect of Article 7 of the 1926 Convention is to make sure that the monetary limit provided by the 1924 Limitation Convention is not exceeded. On this basis, although the shipowners are allowed to limit their liability by virtue of the 1924 Limitation Convention, the ship is still considered as the *fortune de mer*. Thus there is no theoretical difficulty for maritime liens to operate in such a limitation regime as in the 1924 Limitation Convention. As long as the vessel is the source and limit of the liability, the proceeds of the vessel will be used as the function of a limitation fund,[550] and therefore maritime liens shall be affiliated to that fund for granted.

In the last chapter of his work, Price gives a detailed explanation on the process of making the 1926 Convention on Maritime Liens and Mortgages, which was the first attempt on international unification of maritime liens.[551] Price mentioned that during the discussion of drafting the Convention, limitation of shipowners' liability was indeed considered by the Sub-Commission. Dr. Sieveking, a German delegate, pointed out the close connection between the draft Treaty on Mortgages and Liens and that on the Limitation of Liability. The German delegates thought that in every case a creditor towards whom the owner was only liable to the extent of the ship and freight should have a lien, thus expressing the point of view of German law where the maritime lien coincides with the limited liability of the owner. Another delegate, M. Le Jeune thought

[548] The last paragraph of Article 1 of the 1924 Convention provides that '…*as regards the cases mentioned in Nos. 1,2,3,4, and 5 the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage.* '
[549] Article 1 of the 1924 Limitation Convention.
[550] Although there were no such words of 'limitation fund' in the 1924 Convention.
[551] See Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) Chapter XXI.

that there should not be a hard-and-fast rule providing for a lien in every case of limitation. The delegate pointed out that the main principle ought to be that where a lien took precedence of a mortgage, the mortgagee should be able to insure. Dealing with the number of liens, M. Franck said that there were two ruling principles: (1) it is necessary to bring the draft into line with that relating to the Limitation of Shipowners' Responsibility in such a way as to give a lien where there was a limited responsibility, and (2) a maritime lien shall be granted 'only where necessity clearly called for it.'[552] The above considerations lead to inserting Article 7 in the 1926 Convention on Maritime Liens and Mortgages. Therefore, at the time of the 1926 Convention, maritime liens were not really affected by the application of limitation of liability and it was not necessary to have a conflict clause in legislations.

However, the situation has become different since the announcement of the 1957 Limitation Convention. The 1957 Limitation Convention substitutes a limitation fund of a fixed monetary amount per ton for the vessel, freight and accessories and the ship-value based limitation system was completely abandoned.[553] Article 3(1) of the 1957 Limitation Convention provides for a monetary limit for shipowners' liabilities. In fact, the prevalence of the 1957 Limitation Convention made the States Parties of the 1926 Maritime Liens and Mortgages Convention in the dilemma where the State Parties may not give effect to both Conventions at the same time. This was one of the factors which triggered the revision of the 1926 Maritime Liens and Mortgages Convention.[554] The impact on the operation of maritime liens of the 1957 Limitation Convention is discussed in the following section.

6.3.2 The 1967 Maritime Liens and Mortgages Convention

Due to the spread of the 1957 Limitation Convention, the 1926 Convention does not comply with the new limitation system. The possibility of a conflict between the Maritime Liens and Mortgages Convention and the impact of the 1957 Limitation Convention was considered by the International Sub-Committee. Such conflicts would exist in two aspects. Firstly, the 1957 Limitation Convention provides that after the constitution of the fund no claimant against the fund is entitled to exercise any right

[552] *Ibid.*
[553] More details in respect of the development of limitation regime form the ship value based system to the tonnage system may be found in Chapter III.
[554] CMI Conference Report 1962 Athens.

against any other assets of the owner; and secondly, the distribution of the fund among the claimants must be made in proportion to the amounts of their established claims. Therefore, the operation of maritime liens is excluded by the established limitation fund. In order to avoid such conflicts, at the Diplomatic Conference, the Delegation of the Federal Republic of Germany made to a proposal to insert a reservation which allows State Parties to apply the 1957 Limitation Convention. The following explanations were given in support of this proposal:

'*We have proposed that this second paragraph be inserted in the protocol, in order to prevent collision between our Convention on liens which we are preparing here and the Brussels Convention of 1957 on liability of shipowners. In our opinion the member States of the 1957 Convention need such a rule - such a reservation, at least - in this form proposed because otherwise they could not ratify our Convention without running the risk of bringing their Courts into a situation where they must violate one of the two Conventions.*

Perhaps you will allow me to give a short example. Suppose a ship flying the flag of a contracting State (party) only to the liability Convention of 1957 is charged by a lien due to a lienor of a contracting State (party) only to our Convention on liens came to a forced sale in a member State of both Conventions, the Court of this latter State would come into an insoluble conflict if there was not a rule or at least the possibility of a reservation like the proposed one. The Courts are on one hand bound to hold the ship free from liens after having constituted the funds, whereas on the other hand they might not deny the maintenance of the liens in relation to the lienor's State. Therefore, we must solve this problem anyway and we can, dealing at the moment only with the present Convention, solve it, as far as we can see, only in the proposed way.'[555]

Such a proposal was adopted by the Conference and a second paragraph was added to Article 14. It is obvious that the consideration of inserting the reservation clause was to make the convention more acceptable by potential States Parties.

There was another proposed draft, the Oxford Draft, which provided in its Article 11:

'*No maritime or other lien securing a claim in respect of which the owner of the*

[555] CMI Year Book 1996.

vessel concerned may limit his liability shall be enforceable after the setting up of the limitation fund.'

This proposed draft has the similar effect of the 'Conflict Clause' in the United Kingdom's Merchant Shipping Act in that it specifically refers to distribution of a limitation fund. Again, there was nothing in this article about the situation where there is no limitation fund. This provision, however, was not included in the subsequent drafts, nor in the draft approved by the CMI New York Conference.

As a result, Article 14 of the Mortgage and Lien Convention 1967 provides:

Any Contracting Party may at the time of signing, ratifying or acceding to this Convention make the following reservations:

1. ...;

2. to apply the International Convention relating to the limitation of the liability of owners of sea-going ships, signed at Brussels on 10 October 1957.

Although it is said that the 1967 Maritime Liens and Mortgages Convention re-confirms the position of English law in respect of dealing with the conflict between distribution of the limitation fund and ranking of maritime liens, the wording of such clauses in the 1967 Convention is not the same as the conflict clause in the United Kingdom legislation.[556] According to Richard Shaw's view in *The Limitation of Shipowner' Liability: The New Law*, the conflict clause in the United Kingdom's Merchant Shipping Act reflects the equivalent provisions in the 1967 Convention on Liens and Mortgages.[557] However, the provision of Article 14 of the 1967 Convention is drafted in the manner of giving State Parties a right of reservation so as to apply the limitation convention. Such a provision cannot be said to be 'equivalent' to the English provision. There is nothing in the 1967 Convention specifying how such a right of reservation should be performed.

[556] Para.9, Part II, Sched.4 of the Merchant Shipping Act 1979 (now updated to MSA 1995).
[557] Institute of Maritime Law, University of Southampton, *Limitation of Shipowners' Liability: The New Law* (Sweet & Maxwell London 1986) 121.

6.3.3 The 1993 Maritime Liens and Mortgages Convention

Due to the appearance of another international convention on limitation of liability for maritime claims, the 1976 Limitation Convention, conflicts between maritime liens and limitation of liability were again concerned by CMI during the process of making the 1993 Convention on Maritime Liens and Mortgages.[558] Initially, The International Sub-Committee did not attempt to change the structure of Article 14 (2) of the 1967 Maritime Liens and Mortgages Convention, but suggested that, in view of the adoption of the 1976 Limitation Convention, either reference be made to the 1976 Convention or reference be generally made to any international convention relating to the global limitation of liability of owners of sea-going ships. In the commentary work on the 1967 Convention, which is made by CMI in 1985, it is suggested that the second reservation must be updated as a consequence of the new 1976 Limitation Convention.[559] The reservation is necessary for otherwise the compliance with Article 12(1) of the 1976 Limitation Convention, whereby the limitation fund must be distributed among claimants in proportion to their established claims against the fund, might be considered a violation of the rule on the priority of maritime liens. It was suggested therefore to replace the text of Article 14 (2) of the 1967 Maritime Liens and Mortgages Convention with the following:

> '*To apply any international convention relating to the limitation of the (global) liability of owners of sea-going ships …*'

Some delegates, however, pointed out the short come of such a proposed text. In their view, it happens that the provisions of an international convention may be made part of national law without ratification of the convention, in which event the States who ratify the Maritime Liens and Mortgages Convention may not provide that the limitation fund is distributed without regard to priorities. In the Lisbon Conference, therefore, it was decided that rather than a reservation, a rule should be adopted to the effect that the Convention does not affect the application of an international convention providing for limitation of liability or of national legislation giving effect thereto. As a result, a new provision, Article 15, was suggested to be inserted into the 1993 Convention on Maritime Liens and Mortgages. The provision is named of Conflict of Conventions,

[558] CMI Year Book 1996.
[559] Francesco Berlingier, *CMI Lisboan Report 1985*.

which provides:

> '*Nothing in this Convention shall affect the application of any international convention providing for limitation of liability or of national legislation giving effect thereto.*'

The provision was only once considered during the process of drafting, but it was accepted without modifications and was then adopted by the Diplomatic Conference.

The Article 15 of the 1993 Convention is no longer in the form of a reservation; and moreover, it deals with the conflict directly. By virtue of such a provision, the position regarding to the conflicts between maritime liens and the limitation regime is clearer in that the right of limitation is prior to maritime liens in nature. Such a view has been supported by Francesco Berlingieri's comment saying that the law is deemed to be unjustified where the priority of maritime liens is given a more important role than the right to limit shipowners' liability.[560] As the Article 15 of the 1993 Convention is incorporated into the Chinese Maritime Code, the construction and application of Article 15 will be discussed in the next section together with the 'Conflict Clause' in Chinese Maritime Code. Nevertheless, it is worth mentioning in this paragraph that the wording of Article 15 is very general and does not provide any detailed guidance on how the maritime liens shall be deprived. The position of the 1993 Convention seems to leave the problem to be resolved by the domestic legislation of its States Parties.

6.4 Conflict clause under Chinese law

6.4.1 Article 30 of the Chinese Maritime Code

The Chinese Maritime Code basically followed one draft version of the 1993 Convention on Maritime Liens and Mortgages and therefore Article 15 of the 1993 Convention was also incorporated into the Code. Article 30 of the Chinese Maritime Code provides:

> '*The provisions of this Section* (section on maritime liens, noted by the author) *shall not affect the implementation of the limitation of liability for maritime claims*

[560] Francesco Berlingier, *CMI Lisboan Report 1985*.

provided for in Chapter XI of this Law.'

As one may see, the wording of Article 30 in the Chinese Maritime Code is different from the wording of Article 15 of the 1993 Maritime Liens and Mortgages Convention. Such difference is caused by translation from Chinese into English because the Chinese version of Article 15 of the 1993 Convention reads the same as Chinese version of Article 30 of the Maritime Code. With reference to the 1993 Convention, a better translation of Article 30 may be suggested as follows:

'*Nothing in this Section* (section of maritime liens) *shall affect the application of Chapter XI of this Code providing for limitation of liability for maritime claims.*'[561]

There is little work on the construction of Article 30 in Chinese law as well. The general effect of this provision is to deprive to the influence of maritime liens on the application of limitation of liability. Therefore, by virtue of Article 30, once the limitation fund is established by the liable person, those claimants whose claims are both subject to limitation and giving rise to maritime liens will only be compensated according to the distribution rule of the limitation fund. Thus there is no room for the ranking rule of maritime liens and those claims preferred by maritime liens will lose their priorities. At the same time, the lien holders of those maritime liens which are not subject to limitation of liability (non-limitation liens), may still arrest the vessel and get compensated by the sale of the vessel.

6.4.2 Effect of Article 30

The effect of Article 30 can be summarised in the following three points.

6.4.2.1 Distribution rule under the limitation fund.

Article 21 of the Chinese Maritime Code 1992 provides for the concept of maritime liens. The Article describes a maritime lien as a right of the claimant, to take **priority** (emphasis added) in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim. Therefore, by the wording of Article 21, a maritime lien holder enjoys a higher ranking among other claimants. However, the high ranking of maritime liens may not comply with the

[561] This version is a suggested translation by the author.

distribution rule of a limitation fund. It is noteworthy that, for some unknown reason, the Chinese Maritime Code does not incorporate Article 12 (Distribution of the Fund) of the 1976 Limitation Convention.[562] The result is that there is no express distribution rule of the limitation fund in Chinese law. It can only be inferred from the wording of Article 210 (3) of the Chinese Maritime Code, which is the correspondence provision of Article 6 (2) of the 1976 Convention, that the fund shall be distributed in proportion. Article 210 (3) provides that unpaid balance of claims for loss of life or personal injuries shall 'rank *pro rata*' with claims arising from property damages.[563] The term 'rank *pro rata*' in this provision indicates that the claimants under a limitation proceeding shall be compensated in proportion. Since the Chinese limitation regime follows the 1976 Limitation Convention, such a presumption would appear to be the right way. Most of the Chinese scholars take it for granted that a limitation fund is to be distributed proportionately among claimants despite the defects of legislation.

If the above position is followed, according to Article 30, the priority of maritime liens subject to limitation of liability shall not affect the distribution rule of the limitation fund. On this basis, once a limitation fund has been constituted, all claimants against the fund share the fund in proportion, no matter the claimant is a maritime lien holder or not. As summarized in Chapter V, the ranking of the distribution of limitation amount under the Chinese Maritime Code is as follows:[564]

a. claims for loss of life or personal injury (up to the limit)
b. unpaid balance for personal claims
c. claims for damages to harbour works, basins and waterways and aids to navigation
d. claims for non-personal claims, namely the property claims (up to the limit)

(Within each of the groups, the amount is distributed in proportion.)

[562] Article 12 of the 1976 Limitation Convention provides that, as a basic principle, the fund shall be distributed among the claimants in proportion to their established claims against the fund.
[563] Article 210 (3) provides,
'*Where the amount calculated in accordance with sub-paragraph (1) above is insufficient for payment of claims for loss of life or personal injury set out therein in full… and such unpaid balance shall rank prorata with claims set out under sub-paragraph (2).*'
[564] See section 5.3.1 of Chapter V.

It is notable that Article 6 of the 1976 Limitation Convention allows a State Party to provide in its national law that claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have priority over other property damage claims. Although mainland China is not a signature party of the 1976 Limitation Convention, the Chinese Maritime Code takes such an option provided by Article 6 of the Convention. Therefore, while distributing the limitation fund, damages to harbour works, basins and waterway shall be paid prior to other normal property claims.

On the other hand, the ranking of maritime liens under Chinese law can be summarised as follows:[565]

(1) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts (rank *inter se pari passu*);
(2) Claims in respect of loss of life or personal injury occurred in the operation of the ship (rank *inter se pari passu*);
(3) Payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges (rank *inter se pari passu*);
(4) Payment claims for salvage payment, where salvage incurred after (1), (2) and (3), salvage liens take precedent over other liens (rank *inter se* in inverse order);
(5) Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship (rank *inter se pari passu*);

As one may notice from the above list, such claims for damages to harbour works and so on also give rise to a tort maritime lien provided in Article 22 of the Chinese Maritime Code 1992.[566] More importantly, the tort lien basically refers to damages done by a ship through the tortious acts no matter such damage is caused against ships, cargoes, or habours. In other words, by the ranking rule of maritime liens in Chinese law, damages to habours shall rank equivalent to other property damages done by a tortious ship. But the claim for damages to harbours is distinguished by the limitation

[565] See section 5.3.2.1 of Chapter V.
[566] Article 22 (5) of the Chinese Maritime Code provides:
'*Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship*.'

provisions; and, due to Article 30 of the Maritime Code, such a claim will be compensated in prior to other property claims against the limitation fund.

6.4.2.2 Arrest and release of the ship

Article 28 of the Chinese Maritime Code provides that a maritime lien shall be enforced by arresting the ship which gives rise to the said maritime lien. Nevertheless, as discussed in Chapter IV, the constitution of a limitation fund has two effects, namely protecting the persons entitled to limitation from any other actions against their property and releasing any property which has been arrested or attached as a matter of pre-trial security measures. Such a position is reflected in Article 214 of the Chinese Maritime Code, which provides that where a limitation fund has been constituted, any person having made a claim against the person liable may not exercise any right against any assets of the person liable; where any ship or other property belonging to the person constituting the fund has been arrested or attached, or, where a security has been provided by such person, the court shall order the release of the ship arrested or the property attached or the return of the security provided. Maritime liens would have impact on the application of limitation of liability in the sense that a lien holder may still seek to arrest the ship to secure his claim on the basis of enforcing a maritime lien even though a limitation fund has already been established.

Therefore, according to Article 30, a maritime claimant may not, after the establishment of a limitation fund, apply for arrest of the ship for the purpose of realising a maritime lien which is based on a maritime claim subject to limitation of liability; and the ship which has already been arrested on the basis of a maritime lien shall be released and the claim is transferred to against the limitation fund. Such a position is also confirmed by a supplementary provision made by the Supreme People's Court.[567] However, the supplementary provision does not have the equivalent force of law although the Courts may take such a provision as an authority while making decision. For the purpose of certainty, it is suggested that a similar provision shall be inserted into the Maritime Code. However, it is notable that whether a maritime lien can be labelled as 'a right

[567] Article 9 of Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims. The provision reads:
'*After the establishment of the limitation fund, if the maritime claimant applies for arrest of the ship in order to realise a maritime lien which is also a maritime claim against which liability is limited …, such an application shall not be approved by the Court*.'

against the vessel' in Chinese law is not certain because there is no recognition of *in rem* action in Chinese legal system.

6.4.2.3 Non-limitation liens

The Chinese Maritime Code provides for five types of claim which give rise to maritime liens. Those claims are (1) seamen and master's wages; (2) loss of life or personal injury; (3) ship's tonnage dues, pilotage dues, harbour dues and other port charges; (4) salvage payment; and (5) loss of or damage to property resulting from tortious act.[568] Therefore, claims (2), (3) and (5) are within the ambit of limitation of liability according to Article 207 of the Code. Maritime liens arising from other types of claims are not subject to the limitation regime. Thus those holders of the non-limitation liens will not be affected by the limitation proceedings. They may still pursue their claims on the basis of maritime liens and arrest the vessel. The priority in payment of the non-limitation lien holders is also not affected by the limitation regime.

However, it is notable that the wording of Article 30 is very general and this article is the only provision in Chinese law dealing with the conflict between maritime liens and limitation of liability. There are several questions which seem not to be covered by Article 30.

Where the limitation fund is not established

The 1976 Limitation Convention only provides that the limitation fund shall be distributed in proportion among claimants. The Convention is silent about the situation where the liable person does not constitute a limitation fund. The Chinese Maritime Code follows the 1976 Convention in respect of limitation of shipowners' liability and therefore it is also unclear in Chinese law about the ranking of claims where the limitation fund is established. By the wording of Article 30, the provisions of maritime

[568] Article 22 of the Chinese Maritime Code provides:
'*The following maritime claims shall be entitled to maritime liens:*
(1) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts;
(2) Claims in respect of loss of life or personal injury occurred in the operation of the ship;
(3) Payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges;
(4)Payment claims for salvage payment;
(5) Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship.'

liens shall not affect any of the provisions in Chapter XI of the Chinese Maritime Code. However, since Chapter XI does not provide for the ranking of maritime claims in the situation of no limitation fund, provisions of maritime liens may not be said to have impact on Chapter XI. That is to say, maritime liens may possibly to operate in the situation where no limitation fund is established. In addition, the Chinese Maritime Law does not incorporate Article 10(2) of the 1976 Convention[569] and there is no similar provision in the Maritime Code either. As a result, unlike the English law position, it cannot be inferred that the distribution rule of a limitation fund shall apply to the situation where there is no such fund.

Whether the maritime liens extinguish after the constitution of limitation fund

As discussed in Chapter IV, Article 29 of the Chinese Maritime Code provides for three situations where a maritime lien shall be extinguished, which are: (1) The maritime lien has not been enforced within one year since the existence of such maritime lien; (2) The ship in question has been the subject of a forced sale by the court; (3) The ship has been lost.[570] There is nothing in Article 29 refers to a limitation fund. Apparently, according to Article 29, the constitution of a limitation fund does not extinguish the maritime liens which are also subject to limitation proceedings. Also there is nothing in the Maritime Code provides that a maritime lien can be transferred to against the limitation fund. In addition, it can be implied from the wording of Article 30 that a maritime lien shall not be transferred to be against the limitation fund; otherwise the distribution rule of the limitation fund is break which is opposite to the intention of Article 30. Therefore, a dilemma will be caused by the constitution of limitation fund in that the maritime lien still exists after the establishment of the limitation fund; however, the lien holder will have no methods to enforce his lien.

The form of the limitation fund is not clear

The 1976 Limitation Convention leaves the procedure issues of constituting a limitation fund to the national legislations of the States Parties. Thus, the 1976 Limitation Convention does not make any stipulations on the form of a limitation fund. The procedural of constitution a limitation is provided in the Chapter 9 of the Special

[569] For the discussion on Article 10 (2) of the 1976 Convention, see section 3.2.3.
[570] Article 29 of the Chinese Maritime Code 1992; see also section 4.5.3 of Chapter IV for the discussion on the Chinese law's position on extinction of a maritime lien.

Maritime Procedure Law 1999. Article 108 of the Special Maritime Procedure Law provides that:

> '*A limitation fund for maritime claims may be constituted either by depositing cash or by providing security acceptable to the Maritime Court.*'

As for the meaning of 'security', no direct reference may be found in either the Special Maritime Procedure Law or the Maritime Code. However, Article 79 of the Special Maritime Procedure Law 1999 provides that the provisions of maritime security in Chapter 6 of the Law may apply 'mutatis mutandis'[571] to securities involved in constitution of a maritime limitation fund. On the other hand, Article 73 of the Special Maritime Procedural Law provides that the types of security include cash, guarantee, mortgage or pledge. Therefore it can be inferred that the word 'security' in Article 108 refers to 'guarantee, mortgage or pledge.' By virtue of the term 'mutatis mutandis', those types of security may not apply as their original form when they are used to constitute a limitation fund. The phrase 'acceptable to the Maritime Court' in Article 108 probably indicates that the Maritime Court shall have discretion in determining the form of security provided as a limitation fund.

6.4.3 Judicial interpretations

In order to provide a guidance for dealing with cases and disputes arising from the limitation of liability for maritime claims, The Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims (Provisions on Limitation of Liability) have been adopted by the Judicial Committee of the Supreme People's Court on March 22, 2010, and came into force on September 15, 2010. Article 9 of the Provisions on Limitation of Liability provides that, in the circumstances where a limitation fund has been constituted, the Court shall not support the application whereby a maritime claimant applies for arresting the ship on the ground of exercising a maritime lien in relation to the maritime claim arising from the same maritime accident which is also subject to limitation of liability as prescribed in Article 207 of the Chinese Maritime Code.

---

[571] Article 79 of the Maritime Procedure Law reads:
The provisions of this Chapter may apply mutatis mutandis to securities involved in the procedures such as constitution of maritime limitation fund and advance execution.

The intention of such a provision would appear to clarify the position of Article 30 of the Maritime Code, however this article have several defects which may make this provision less effective. This provision reflects the principle introduced by the tonnage limitation system that the limitation fund is available for claims arising on any distinct occasion.[572] Nevertheless there is no explicit provision in the Chinese Maritime Code providing that the aggregation of claims shall arise on a distinct occasion.[573] Therefore, a maritime lien arising from another accident may potentially impact the enforceability of this provision. In order to avoid such a dilemma, a provision equivalent to Article 9 of the 1976 Limitation Convention shall be suggested to insert in the Chinese Maritime Code. In addition, this article only provides for the situation where a limitation fund is constituted. However, in terms of the situation where no limitation fund is constituted, it seems unclear that whether a maritime lien holder may join the limitation proceeding and get paid before other claimants. It is submitted that, under the latter situation, the ship may still be arrested for uncompensated maritime liens.[574]

6.5 Comparison and conclusion

As seen from the above analyses, the inconsistencies of maritime liens and limitation of liability have been recognised by both national legislation and international conventions. The Conflict Clause contained in the Merchant Shipping Act 1995 is narrow and precise which refers only to the proportion in distribution of the limitation fund. The Conflict Clause in the 1967 Convention on Maritime Liens and Mortgages is in the form of a reservation, which allows the States Parties to reserve their right of enacting the Limitation Convention. As a new development, the Conflict Clause in the 1993 Maritime Liens and Mortgages Convention, which is followed by the Chinese

[572] Such a position is provided in Article 9 of the 1976 Limitation Convention. Article 9 reads:

> *1. The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion: ……*

[573] The only provision in the Chinese Maritime Code referring to the 'same occurrence' is Article 215, which provides:

> *Where a person entitled to limitation of liability under the provisions of this Chapter has a counter-claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Chapter shall only apply to the balance, if any.*

But this Article does not imply that the extent of aggregation of claims for limitation purposes shall be restricted to the 'same occurrence'.

[574] E'Xiang Wan and *et al* (Eds.), *Understanding and Application of The Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims* (Dalian: Dalian Maritime University Press 2013) 63-64.

Maritime Code, is adopted to the effect that the 1993 Convention does not affect the application of an international convention providing for limitation of liability or of national legislation giving effect thereto.

Despite of different wording, one thing in common among the conflict clauses is that all those clauses deprive the operation of maritime liens from the limitation proceeding. In this sense, those clauses make the limitation of liability a superior right to the right of maritime liens holders. However, none of the Conflicts Clauses provides a complete answer to the conflicts between maritime liens and limitation of liability. One thing unclear is that whether the right of maritime liens shall be allowed to operate in the situation where no limitation fund has been constituted. All the above 'conflict clauses' seems to be unclear on this point. The clause in Merchant Shipping Act 1995 is only applicable to the proportion of the distribution of the fund. The clause in the 1993 Maritime Liens and Mortgages Convention is very general, which only provides the application of limitation regime shall not be affected by maritime liens. Article 30 of Chinese Maritime Code is actually the implement of Article 15 in the 1993 Convention and thus the effect should be the same. However, it is arguable that the only situation where no limitation fund is established should be where there is only one claimant. If this is true, the problem of maritime lien would not arise. Unfortunately, neither the Limitation Convention nor national legislations expressly include such provisions, although the Convention provides for a reservation under which a State Party can make the limitation fund a condition precedent for invoking limitation. Therefore, it shall be suggested that the national legislations ought to make the position clear by either expressly providing the non-fund limitation can only be invoked where there is one claimant or making the limitation fund a condition precedent for invoking limitation. Another unclear position is whether the limitation proceeding leads to extinction of a maritime lien. Despite the fact that all of English law, Chinese law and International Conventions on Maritime Liens provides for the circumstances where a maritime lien would be extinguished, none of those circumstances refers to limitation proceedings. It is unclear whether the conflict clauses would have the effect of extinguishing the maritime liens.

In addition, the conflict clauses in International Conventions on Maritime Liens and Mortgages are more like compromises rather than a profound solution. It would appear

that those conventions intend to leave the problems to be resolved by domestic legislations. Therefore, simply taking the Conflict Clause in the 1993 Convention into the Chinese Maritime Code does not resolve the conflicts completely. The incorporation indeed brings difficulties in both theory and practice. In this sense, Article 30 of the Chinese Maritime Code needs to be updated to cover those difficulties. Thus a reform of the Chinese Maritime Code 1992 in respect of resolving the conflict between maritime liens and the limitation regime shall be suggested.

Chapter VII Maritime Claims and Insolvency Proceedings

7.1 Introduction

As analysed in Chapter VI, the so called 'Conflict Clause' does not provide a complete solution in terms of the conflicts between maritime liens and limitation of liability for maritime claims. Therefore, this Chapter attempts to seek for an approach under which maritime liens can be reconciled with limitation of liability proceedings. For this purpose, it is worthwhile to examine the operation of maritime liens in the circumstances of insolvency proceedings in order to find out whether similar approach could be adopted to the circumstances of limitation proceedings by analogy. The proceedings of limitation of liability for maritime claims and the proceedings of insolvency are similar in that both proceedings deal with creditors' right under a situation where an exhaustive fund is to be distributed. Although, from a historic view, the limitation of shipowners' liability appeared earlier then the limited liability corporations[575], limitation of liability for maritime claims, as mentioned in Chapter III, developed significantly almost during the same time of the innovation of limited liability companies.[576] Therefore, it is reasonable to infer from this fact that the limitation under maritime law had its reference or reliance on the limited liability companies. Also in the case of cross-board insolvency,[577] it would be similar to the situation where a limitation fund is established in the place other than the place where the ship is arrested.[578]

It has been mentioned that a maritime lien provides the lien holder with a position of a secured creditor. Therefore the chapter will examine, firstly, the security function of a maritime lien on the basis of comparing a maritime lien with other forms of security

[575] Graydon S. Staring, 'The Roots and False Aspersions of Shiowner's Limitation of Liability,' 2008. Available at http://works.bepress.com/graydon_staring/22 (accessed on 1 November 2013).
[576] Lord Mustill, 'Ships are different – or are they?' [1993] LMCLQ, p490.
[577] One example of maritime claims in the context of cross-board insolvency could be the decision of *Bank of Tokyo-Mitsubishi UFJ Ltd* v *Owners of The MV Sanko Mineral* (*The Sanko Mineral*) [2014] EWHC 3927.
[578] For example, see the decisions of *Atlasnavios Navegacao LDA* v *The Ship* '*Xin Tai Hai*' [2012] FCA 715 and (No 2) [2012] FCA 1497.

right in order to deter the function of a maritime lien in the situation of insolvency. Secondly, this chapter will analyse the similarity between limitation of liability for maritime time claims and insolvency proceedings. If the similarity between limitation proceedings and insolvency proceedings can be established, it might be hypothesised that maritime lien holder's position of a secured creditor should be followed in the limitation proceedings. Therefore, in the final part of this chapter, analysis will be made on whether a maritime lien may operate under limitation of liability regime in the same way as it does under insolvency proceedings.

7.2 Maritime lien as a security right

7.2.1 Characteristics of a security right

Unlike many other codified systems of law, there is no such a special category of property rights known as 'securities' under the common law system. Therefore it has been submitted that a definition of security right under the common law has to be sought in its function. A security right is described as 'the provision of a means of obtaining satisfaction of an obligation, usually a debt or other monetary obligation, which is not directly enforced through litigation.'[579]This description is based on the functions of security right and is therefore titled as the functional approach. Following this approach, a security is a means of securing satisfaction of an obligation by means other than direct legal action against the obligator or debtor for enforcement. Two principal methods may be adopted by creditors to protect themselves against the risks of non-payment. The first one is 'personal security', such as guarantees, indemnities, joint obligations, stand-by letters of credit and so on. The other method is to seek special rights against selected assets of the debtor, which is called 'property security'. The characteristics of the property security are summarised as follows:

a. A right of preference entitling the secured creditor to payment from the proceeds of the sale of designated assets (the 'collateral') ahead of other creditors;

b. A right of pursuit entitling the secured creditors to follow the collateral into the hands of third parties to whom the assets may have been

[579] Craig C Wappett, David E Allen, *Securities over Personal Property* (Sydney: Butterworths 1999) 1.

transferred; and

c. A right of separation entitling the creditor to keep the collateral 'out of the bankruptcy or liquidation' of the debtor so that it is not 'property available for payment of debts' generally.[580]

Following this approach, whether or not a maritime lien shall be regarded as a security right will depend on whether such a lien meets the above criteria. In the following section, the characteristics of maritime liens will be examined in order to find out whether a maritime lien can fit in with this approach.

7.2.2 Security function of a maritime lien

As discussed in Chapter II, a maritime lien, as a type of maritime claims, has three aspects of enforcement, namely the interim or provisional remedy aspect, the jurisdictional aspect and the security aspect.[581] The security function of a maritime lien has also been pointed out by various writers. When describing the efficacy of maritime liens, Thomas submits that 'the material advantage which accrues to a maritime lienee is that from moment service is rendered to or damage done by an encumbranced *res*, the lienee is provided with a security for his claim to the value of the res.'[582] Also, William Tetley describes a maritime lien as 'a secured right peculiar to maritime law.'[583]

Concerning the functional approach, the security function of a maritime lien should also fit in with the three criteria of the property security as mentioned above. Concerning the first criterion, a maritime lien is a right of preference in that a maritime lien is considered as a privileged claim which enjoys a high priority in ranking. As pointed out by Thomas, maritime lien holders are often described as 'first class' claimants.[584] In terms of the second criterion, a maritime lien is a right of pursuit in that the lien travels with the property, which is normally the ship, secretively and unconditionally.

---

[580] *Ibid* 3.

[581] See Chapter II, 2.4.1. It has been mentioned in this section that a maritime lien is affiliate on maritime property, providing the interim or provisional remedy for the claimant; a maritime lien is enforced by an action in rem or arrest of the ship and once the writ has been issued or the ship has been arrested, the lien holder is able entitled to bring his suit to the Court; and a maritime lien is considered as a privileged claim which enjoys a high priority in ranking.

[582] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 4.

[583] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal: International Shipping Publications 1998) 59.

[584] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 12, citing the decision of The Hope (1873) 1 Asp. Mar Law Cas. 563.

Concerning the third criterion, a maritime lien is a right of separation in that a maritime lien is perfected or crystallised by an action *in rem* against the ship itself. A maritime lien has been described as a 'hypothecary interest in the ship'[585] or 'a right against the ship'.[586] It follows that a maritime lien would appear to be enforced separately from the insolvency or bankruptcy process, entitling the creditor to keep the collateral 'out of the bankruptcy or liquidation' of the debtor; and the ship is therefore not the 'property available for payment of debts' generally.

Furthermore, the English expression of 'maritime lien' suggests that such a right is regarded as special type of lien under English law. A lien at law is regarded as an implied obligation whereby real or personal property is bound for the discharge of some debt or engagement.[587] Therefore the word 'lien' indicated that a maritime lien is a security over personal property, although it has been pointed out by Scott L.J. in *The Tolten*[588] that the word French origin word 'privilege' is a clearer and less ambiguous name for a maritime lien.[589] Various writers are of the opinion that a maritime lien is classified as a special type of lien for maritime matters, for example, in *Goode on Commercial Law*, a maritime lien is categorised by the writer as a legal security which is created by operation of law.[590]

The nature of a maritime lien was also discussed in the decision of *The Halcyon Isle*[591] under the context of international conflict law. The case involved the competition of claims between an English bank, the mortgagee, and an American ship-repairer, who repaired the vessel *Halcyon Isle* in New York. The ship was arrested by the mortgage in Singapore and was subsequently sold by order of the court. Apparently, the proceeds of the sale were not sufficient to satisfy all the claims. Therefore the US ship-repairer applied to the High Court for a declaration that they were entitled to a maritime lien for the price of the repairs so that the repairer could have a high rank in getting the payment. The case was finally appealed to the Privy Council in the United Kingdom.

[585] *The Sara* (1889) 14 App. Cas. 209, at 217 as per Lord Watson.
[586] *The Colorado* [1923] P. 102, at 110 as per Atkin LJ. In the Judge's view, a maritime lien gives a right against the ship, which continues notwithstanding a change of ownership.
[587] Loenard A. Jones, *A Treatise on the Law of Liens* Vol. 1 (Boston, Houghton: Mifflin and Co 1894) 3.
[588] [1946] P. 135.
[589] [1946] P. 135, as per LJ Scott, see also Chapter II.
[590] R.M. Goode (Royston Miles), *Goode on Commercial Law* (4th edn, London: Penguin 2010) 660 and 662. See also Loenard A. Jones, *A Treatise on the Law of Liens*, Vol. 2 (Boston, Houghton: Mifflin and Co 1894), where a maritime lien is discussed as a special type of lien among other liens.
[591] *Bankers Trust International Ltd. Appellant* v *Todd Shipyards Corporation Respondent* (*The Halcyon Isle*) [1981] AC 221.

The issue before the Privy Council was which law should be applied for recognising a foreign maritime lien, the *lex loci* or the *lex fori*.

In order to determine the applicable law, the Privy Council looked at the nature of a maritime lien. The majority of the Judges (three out of five) were of the view that a maritime was a remedy. Lord Diplock, who delivered the majority judgment, stated:

> *'...unlike a mortgage, it [a maritime lien] creates no immediate right of property; it is, and it will continue to be, devoid of any of any legal consequences unless and until carried into effect by a proceeding in rem*'[592]

Nevertheless, this view has been criticised by Professor William Tetley. Professor Tetley argues that there are three flaws in this decision. Firstly, it cuts through the very essence of maritime liens; secondly, it misinterpret the word 'inchoate' used in *The Bold Buccleugh*; and thirdly, it disregards principles applicable to conflict of law.[593]

In contrast, the minority of the Judges of *The Halcyon Isle* contented that a maritime lien is a right of property given by way of security for a maritime claim. In their views, a maritime lien is similar as a mortgage in that (a) each is a limited right of property securing the claim; (b)the lien travels with the claim, as does the mortgage; and (c) the claim travels with the ship. In this sense, the minority of the Judges concluded that 'it would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law.'[594]

It is noteworthy that the decision of *The Halcyon Isle* was not solely decided on the basis of the nature of a maritime lien; policy consideration was the major factor. As stated in the judgment, 'It has the result that the recognition of any new class of claim arising under foreign law, as giving rise to a maritime lien in English law because it does so under its own *lex causae*, may affect not only priorities as between classes of

---

[592] *Ibid*, p234.
[593] William Tetley, 'Maritime Liens in the Conflict of Laws,' 2002, in J.A.R. Nafziger & Symeon C. Symeonides, (Eds.), *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren* (Ardsley: Transnational Publishers Inc. 2002) 439-457.
[594] See *Bankers Trust International Ltd. Appellant* v *Todd Shipyards Corporation Respondent* (*The Halcyon Isle*) [1981] AC 221, per Lord Salmon and Lord Scarman, who delivered the dissenting view. The two judges admitted that, in England, the *lex fori* decides the priority of the rights which exist against a ship, e.g. the rights conferred by a maritime lien taking precedence over the rights of a mortgagee.

creditors of a particular debtor in the distribution of the proceeds of sale of a particular ship in an action *in rem*, but such recognition may also extend the classes of persons who are entitled to bring such an action against a particular ship.[595] For example, an American necessaries man will be able to bring an action against the ship supplied by him which is newly purchased by a British owner and the owner does not have a contractual relationship with the necessaries man. British shipowners' right and British mortgagees' right would therefore be affected.

From the above analysis, it is arguable that the judgment of *The Halcyon Isle* is a 'result leading' judgment and the dicta on the nature of maritime liens shall be regarded as *obiter*.[596] In this sense, the function of maritime lien as security shall not be denied by the reason of applicable law as decided in *The Halcyon Isle*.

7.2.3 The Chinese law position

With regard to the functions of arrest of ship in civil law countries, D.C Jackson has commented as follow:

> '*…The questions of jurisdiction and arrest will be dealt with usually in the Code of Procedure and in many cases independently of each other. Often 'arrest' is relevant only as an interim remedy and there will usually be provision for security (such as bail or guarantee) which may prevent arrest or cause the property to be released from arrest. Jurisdiction on the merits may be based on a more substantial contact between the country and the issue than the seizure of a ship temporarily there.*
>
> *Security for the merits claim is based on the classification of claims as preferred claims which give priority over unsecured creditors and, in addition, may confer enforceability of the claim against purchasers from the person against whom the claim is made. These preferred claims are sometimes labelled 'liens' and will be set*

[595] *Ibid*, per Lord Diplock.
[596] One possible solution to resolve the controversy between protecting the mortgagees and reflecting the true nature of maritime lien would appear to the decision of *The Ioannis Daskalelis* [1974] 1 Lloyd's Rep 174. In *The Ioannis Daskalelis*, the Canadian Supreme Court held that whether a foreign maritime lien shall be recognised is a substantive issue which shall be governed by *lex causa*; whereas the ranking of a foreign maritime lien is a procedural issue which shall be governed by *lex fori*. However, the decision of *The Ioannis Daskalelis* was regarded to be based on misunderstanding by Lord Diplock.

out in the Maritime or Commercial Code.'[597]

As a codified legal system, the above statement also applies to arrest of ship and maritime liens under Chinese law. Those so called 'preferred claims' are listed in Article 22 of the Chinese Maritime Code 1992 and are labelled as 'maritime liens'. However, as mentioned in Chapter II, the literal meaning of the Chinese expression referring to a 'maritime lien' is actually a 'privilege upon ship'. In this sense, a maritime lien is apparently regarded as a privilege rather than a lien under Chinese law. Privilege is a concept that usually exists in the property law of a codified legal system. Such a concept of privilege may be found in the French Civil Code, the Italian Civil Code and etc.[598] However, there is no such a concept of 'privilege' existing under the Chinese civil law framework although it is a codified system which has quite a few reflections of French and German law.[599] There are similar rights existing under Chinese law and these rights are provided separately in different statutes. For example, the Chinese Civil Aviation Law 2009[600] provides in Chapter III section 3 that claimants for remuneration for rescuing the aircraft and for necessary expenses incurred for the custody of the air craft may enjoy a right to take precedence before other claims in compensation against the owner of the air craft.[601] Similarly, Article 21 of the Chinese Maritime Code 1992 provides that claimants for certain maritime claims may take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim.[602] Both of the above two rights are termed as 'privilege' in the Chinese versions of the statutes however the word 'lien' is used in the English

---

[597] See D.C. Jackson, *Enforcement of Maritime Claims* (4th edn, Richmond LLP 2005) Chapter 15.

[598] See Book III, Title XVIII (Of Privileges and Mortgages), Chapter 2 (Of Privileges) of the French Civil Code, under which it is provided in Article 2095 that a privilege is a right which the quality of his credit confers upon a creditor of being preferred to the others, though mortgage-creditors. The English version of the French Civil Code is available at http://www.napoleon-series.org/research/government/c_code.html (accessed on 12 Oct 2014). Under Italian law, privileges are provided in Book VI, Chapter III. See the Chinese translation cited in Mingrui Guo, Xiang Zhong, and Yanli Si, *A Study on Privileges* (Beijing: Peking University Press 2004) 233-245.

[599] Mingrui Guo, Xiang Zhong, and Yanli Si, *A Study on Privileges* (Beijing: Peking University Press 2004) 171-172.

[600] Adopted at the Sixteenth Session of the Standing Committee of the Eighth National People's Congress on October 30, 1995; The current version is as revised in 2009.

[601] Article 18 and 19, Chinese Civil Aviation Law 2009. Article 18 of the Civil Aviation Law provides:

> *A civil aircraft lien is the right of the claimant, subject to the provisions of Article 19 of this Law, to take priority in compensation against the owner and lessee of the civil aircraft with respect to the civil aircraft which gave rise to the said claim.*

Article 19 provides that following obligatory rights shall be entitled to civil aircraft liens: (1) Remuneration for rescuing the civil aircraft; and (2) Necessary expenses incurred for the custody of the civil aircraft. An inverse order rule is also provided by Article 19 for the ranking of the above claims.

[602] Article 21, Maritime Code of PRC 1992.

versions, translated as 'civil air Craft liens' and 'maritime liens' respectively. These facts make a maritime lien as well as a civil air craft lien unique concepts under the Chinese legal framework and therefore, the nature of such rights appears to be unclear.

With regard to the security function of a maritime lien, the Chinese Maritime Code provides an answer. The Chines Maritime Code provides that a maritime lien is 'the right of the claimant … to take priority in compensation against shipowners, bareboat charterers or ship operators';[603] a maritime lien shall not be extinguished by virtue of the change of the ownership of the ship;[604] and a maritime lien is enforced by arrest of the particular ship.[605] It would appear that the above mentioned 'functional approach' is met in that a maritime lien under Chinese law provides the claimant with a right of preference and a high priority in ranking; it travels with the property, namely the ship; and it is enforced via arresting the ship. The only concern is whether arrest of ship shall be regarded as 'a right of separation entitling the creditor to keep the collateral out of the bankruptcy or liquidation'.[606]The fact that arrest of ship in China may only be preceded by a Maritime Court *prima facie* provides a positive answer to this question.[607] Further discussion on the interactions between arrest of ship and insolvency proceedings under Chinese law will be made later.

In addition, various Chinese scholars submit that a maritime lien shall be regarded as a special security right affiliating to *jus in re aliena* under Chinese property law framework.[608] This view is supported by the fact that the section of maritime lien is located together with ship ownership of ships and mortgage of ships in chapter 2 of the Chinese Maritime Code entitled 'Ships'.[609] It is therefore argued that the intention of the draftsmen of the Maritime Code was to regard maritime lien as a type of property right.[610] However, the obstacle for this point of view is the applicable law for maritime liens. Article 272 of the Chinese Maritime Code, matters on maritime lien shall be

[603] Article 21, Maritime Code of PRC 1992.
[604] Article 26, Maritime Code of PRC 1992.
[605] Article 28, Maritime Code of PRC 1992.
[606] See section 7.2.1 above.
[607] Article 13 of Maritime Procedure Law of PRC 1999 provides that Article 13 applications for maritime preservation prior to proceedings shall be submitted to the Maritime Court of the place where the property is located. Arrest of ship is regarded as a special type of maritime preservation so that it shall be also enforced through a Maritime Court.
[608] See Yuzhuo Si and Zhiwen Li (Eds.), *Study on the Theories of Chinese Maritime Law* (Beijing: Peking University Press 2009) 91-102.
[609] Chapter II, Chinese Maritime Code 1992.
[610] Hai Li, *A Study on Real Rights in Ships* (Beijing: Law Press 2002)149.

governed by the law of the place where the court hearing the case, namely *lexi fori*. In this sense, it would appear that the approach of *The Halcyon Isle* is followed by the Chinese Maritime Code and therefore, maritime lien is regarded as a procedural right under Chinese law. However, as mentioned earlier, the decision of *The Halcyon Isle* is mainly out of policy consideration and is not dependent on the true nature of maritime lien. In this regard, Article 272 of the Maritime Code shall not affect the nature and function of maritime lien. It is further submitted that *lex fori* being the applicable law is not due to the nature of maritime lien but the fact that a maritime lien is enforced via specific procedure and such procedure shall be subject to *lex fori*.[611]

7.3 Maritime liens under insolvency proceedings

7.3.1 Security right under insolvency proceedings

As discussed in the above paragraphs, a maritime lien has the function of a security right. A proprietary security is usually taken by creditors from debtors for the purpose to support the repayment of loans or, much less frequently, the performance of other obligations.[612] In *Goode on Commercial Law*, it has been pointed out that the general rule in bankruptcy or winding up is that all creditors are paid *pari passu*, sharing in the proceeds of realised assets; and the principal reason why a lender takes a security is to avoid the effect of this *pari passu* rule.[613] In other words, the most compelling reason for the taking of security is that such a device separates secured creditors from unsecured creditors in the event of the debtor's insolvency. According to the Insolvency Rules 1986, secured creditors do not have to submit a proof of indebtedness to the liquidator or trustee and can avail themselves of their security rights before the estate is distributed; and where the security is insufficient, they may prove for the balance of the debt.[614]

However, it is noteworthy that a security right which is valid and enforceable outside insolvency may suddenly be deprived of effect by the onset of the debtor's bankruptcy

[611] Yuzhuo Si and Zhiwen Li (Eds.), *Study on the Theories of Chinese Maritime Law* (Beijing: Peking University Press 2009) 94.
[612] H. G. Beale, *The Law of Personal Property Security*, (2nd edn, Oxford: Oxford University Press 2012) 3.
[613] R.M. Goode (Royston Miles), *Goode on Commercial Law* (4th edn, London: Penguin 2010) 619-620.
[614] 4.88, Chapter 9, Insolvency Rules 1986; see also Chapter 10 of the Insolvency Rules 1986.

or liquidation. Whether a security right is effective under the insolvency or bankruptcy process depends on whether the security right has been *perfected* (emphasis added). In the case of insolvency and bankruptcy, the proprietors cease to be masters in their own house and their management functions are transferred to the trustee or liquidator, who has the right to impeach a security which is unperfected or is otherwise void or voidable under the insolvency statutes.[615] Perfection of a security refers to the taking of any additional steps prescribed by law for giving public notice of the security interest so as to bind third parties. In this sense, if a maritime lien is regarded as a security right, the lien must be perfected in order to be enforced separate from the insolvency proceeding. The enforcement of *in rem* action and maritime lien in relation to insolvency proceeding will be discussed in the following sections.

7.3.2 Action *in rem* and maritime liens

7.3.2.1 Action *in rem*

As Thomas points out, the law of corporate liquidation and bankruptcy seems to have developed with little regard to the *in rem* proceeding.[616] Thomas comments that it is difficult to fit the Admiralty proceeding into the legislative language of the relevant statutes which regulate the winding up of companies and bankruptcy because 'the need for the latter to accommodate the action *in rem* and the potential conflict between the two processes is plain.'[617] For instance, a ship may concurrently be the subject of an arrest in the Admiralty Court and an asset capable of liquidation in a company's winding up process or in a personal bankruptcy. In such a case it is important for a maritime claimant to be able to ascertain whether it is the jurisdiction of the Admiralty Court or some other court which prevails and which mode of legal process is available for the satisfaction of the claim.[618]

The relationship between Admiralty law and insolvency law can be traced to the provisions of the Companies Act 1862. In the decision of *In re Australian Direct Steam Navigation Company*[619], it was held that the arrest of a ship in the Admiralty

[615] *Winkworth* v *Edward Baron Development Co Ltd* [1986] 1 WLR 1512; *Brady* v *Brady* [1988] 2 All ER 617; see also R.M. Goode (Royston Miles), *Goode on Commercial Law* (4th edn, London: Penguin 2010) 625.
[616] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 65.
[617] *Ibid.*
[618] See *Ibid*.
[619] (1875) L.R. 20 Eq. 325.

Division was a 'sequestration' within the meaning of Section 163 of the Companies Act 1862.[620] This section is almost similar in wording to Section 228 of the Companies Act 1948 and the insolvency Act 1986, except that the earlier Act was not confined to a company registered in England or England and Wales. In the case of *In re Australian Direct Steam Navigation Company*, Sir George Jessel, M.R., held that the term 'sequestration' had no particular meaning, but simply meant the detention of property by a Court of Justice for the purpose of answering a demand which is made. Therefore, arrest of ship under admiralty jurisdiction obviously fits in with this interpretation. However, if such an arrest was made after the winding-up order, it was void under Section 163 of the earlier Act as well as its successors.[621]

It has been established by case law that an *in rem* creditor who has issued his writ *in rem* before presentation of the winding up petition has already acquired the status of secured creditor. In *The Zafiro*[622], the status of an *in rem* creditor in the liquidation process was discussed by Mr. Justice Hewson. The facts of the case were as follows.

During November 1957 to January 1958, the claimant firm made certain necessary disbursements on account of two vessels, the *Oro* and the *Zafiro*, both owned by the B. & G. Shipping Company, Ltd. On January 6 1958, the *Zafiro* was involved in a collision with the steamship Pinewood. On January 17 1958, the owners of the *Zafiro* published a notice in the 'London Gazette' that a meeting of their creditors would take place on February 14 1958. Later, the notice of that meeting was sent by post to the defendants' creditors, including the plaintiffs. In February1958, a writ of summons *in rem* was issued by the claimant against the owners of the *Zafiro* and the vessel was arrested by order of the Admiralty Marshal in the port of London. By a resolution passed by the creditors, the owners were wound up and Mr. Justice Karminski ordered that the *Zafiro* should be appraised and sold by the Admiralty Marshal. On May 21, 1958, the owners of the *Pinewood* issued a writ against the owners of the *Zafiro* claiming damages arising out of the collision on 6 January1958. The liquidator admitted liability for that collision. On March 25 1958, the vessel was duly sold for an

[620] Section 163 of the Companies Act 1862 provides that
'*Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.*'

[621] In re Australian Direct Steam Navigation Company (1875) L.R. 20 Eq. 325. See also, D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 65.

[622] *John Carlbom & Co. Ltd.* v *Zafiro (Owners)* (*The Zafiro*) [1959] 1 Lloyd's Rep. 359.

amount over £5000 and the proceeds were paid into the Court. On Oct. 6, 1958, the owners of the Pinewood brought a motion for judgment in their claim against the proceeds of sale of the *Zafiro*. The motion was unopposed and Mr. Justice Karminski gave judgment for the plaintiffs and ordered a reference to the Admiralty Registrar. On Mar. 9, 1959, Mr. Justice Hewson granted priority to the owners of the *Pinewood*, and, on April 27, 1959, the owners of the *Pinewood* applied by motion for collision damages out of the proceeds of sale of the *Zafiro*.

On deciding the case, Mr. Justice Hewson reviewed the relevant sections in the Companies Act 1948. The Judge held that, firstly, the arrest of a ship in an action *in rem* was the means, given by law, that a necessaries man obtained security for a debt of a special character without a judgment or order for payment of money. By arresting the ship, the necessaries man became a secured creditor. Secondly, Authority and the wording of the 1948 Act showed that the arrest of a vessel was not 'execution' within the meaning of Section 325[623] of the Companies Act 1948 and therefore, this section was not applicable. The Judge further stated that even if that section was applicable, the Court would still be left to exercise its discretion. And thirdly, the necessaries men were given a right to secure the risks they took in catering for shipping, and, if they exercised their rights without undue delay, their rights to become secured creditors should be respected and enforced.[624]

In another case, *Re Aro Co.*[625], the conflict between admiralty proceedings and compulsory winding-up was discussed. This case was also decided under the context of the Companies Act 1948, of which Section 231 provides that 'when a winding up order has been made ... no action or proceeding shall be proceeded with or commenced against the company except by leave of the court ...' On January 16, 1978, an

[623] Section 325 of the Companies Act 1948 provides that:
(1) Where a creditor has issued execution against the goods . . . of a company . . . and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution . . . against the liquidator in the winding up . . . unless he has completed the execution . . . before the commencement of the winding up:
Provided that
(a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall, for the purposes of the foregoing provision, be substituted for the date of the commencement of the winding up . . .

[624] The judgment confirmed the position established by earlier case law, including the decisions of *In re Australian Direct Steam Navigation Company* (1875) L.R. 20 Eq. 325 and *The Cella* (1888) 13 P.D. 82.

[625] [1980] Ch 196.

unregistered Liberian shipping company was ordered to be wound up compulsorily on a petition presented by a P & I club in respect of an admitted indebtedness of US $134,912.37 owed for calls. The company's principal place of business was at Piraeus and it had no place of business in the United Kingdom whereas its only asset was the vessel *Aro,* which had been laid up in the Black-water River for lack of employment since 1975. The value of the vessel was about US $300,000 for scrap. There were various claims brought against the company. The plaintiffs' claim is against Aro Co. Ltd. for damages for alleged shortage of oil cargo deliveries or alternatively for damages for breaches by that company of a settlement agreement that was made in August 1975, under which the claim is for $62,500. Besides that, other debts were claimed to be owing, namely, one of US $147,598.40 to Shell Ltd. for fuel supplied, one of £106,000 to another company for disbursements, management fees and expenses, and an unliquidated claim by the plaintiffs for damages in respect of damage to a cargo of oil carried by the vessel in September 1974, estimated at US $60,000. Shell Ltd., which had a claim for bunkers supplied to the ship, issued a writ in rem against her and in May 1977 the ship was arrested. On July 28 the plaintiffs, in order to protect their interests, filed a praecipe in the Admiralty Registry and a caveat was entered in the caveat book against the release of the arrested vessel and against distribution of the proceeds of any sale. Meanwhile the petitioning creditor had commenced proceedings in the Commercial Court, and had obtained an injunction restraining the company from removing the vessel from the jurisdiction. On July 29, 1977, the plaintiffs issued a writ in the Admiralty Court in respect of their claim for damages, but such a writ was not served nor was the vessel arrested by the plaintiffs. The plaintiffs merely entered a caveat in the Admiralty Register on the same day as the issue of their writ, with the result that if Shell Ltd. lifted its arrest, the vessel could still not be moved by the company without notice to the plaintiffs. The relief sought by the plaintiffs was leave to continue an Admiralty action *in rem* against the ship *Aro* and *in personam* against her owners, Aro Co. Ltd., notwithstanding the compulsory liquidation of the company.

In the first instance, Oliver J. was of the view that the plaintiffs, not having served the writ or arrested the vessel, had not invoked the jurisdiction of the Admiralty Court and perfected the security of their claim and were thus not secured creditors and should not achieve priority over other unsecured creditors by being granted leave to proceed with their action. Therefore he dismissed a summons by the plaintiffs for leave pursuant

to section 231 of the Companies Act 1948 to continue their action against the vessel and the company pending in the Admiralty Court notwithstanding the making of the winding up order.

The Court of Appeal allowed the appeal of the plaintiffs. The Court of Appeal held that firstly, regardless of whether the plaintiffs had invoked the jurisdiction of the Admiralty Court prior to the winding up, they should be considered as having the status of secured creditors because after the issue of the writ they could have served it and could have arrested the *Aro* with the result that the vessel was effectively encumbered with their claim; and secondly, whether or not leave to proceed with an action was given under section 231 of the Companies Act 1948[626] was a matter for the discretion of the court and was not dependent on a claimant having established the status of a secured creditor and in the circumstances even if it were wrong to regard the plaintiffs as secured creditors at the time of winding up, the court ought to exercise its discretion in their favour.

Particularly, Brighton J held that Sections 228 and 231 of the Company Act 1948 apply to secured creditors as well as to unsecured creditors but 'a secured creditor is in a position where he can justly claim that he is independent of the liquidation, since he is enforcing a right, not against the company, but to his own property.'[627] With regard to the nature of an action *in rem*, the judge was of the view that:

> '*The usual object of suing in rem is to obtain security. The plaintiff became entitled upon the institution of his suit to the arrest and detention of the subject matter in the custody of an officer of the court pending adjudication, and on adjudication in his favour to a sale and satisfaction of his judgment out of the net proceeds thereof, subject to other claims ranking in priority to or pari passu with his own.*'[628]

In this sense, the right of a plaintiff suing *in rem* have points of similarity with the rights of a legal or equitable mortgagee or charge and therefore such persons are also entitled

[626] Section 231 of the Companies Act 1948 provides:
Actions stayed on winding-up order
When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.

[627] *Re Aro Co.* [1980] Ch 196, at 204. See also *In re David Lloyd & Co.* (1877) 6 Ch.D. 339, a case under the predecessor of section 231.

[628] [1980] Ch 196, at 207.

in appropriate circumstances to have the subject matter of the charge preserved for their benefit, and if the account is in their favour to have it sold in order to satisfy the debt.

From the above two decisions, it is clear that when the claimant, who has a statutory right *in rem*, enforces it by arresting the ship before the filing of the petition (in compulsory winding-up)[629] or the passing of resolution in a voluntary winding-up[630], he will not be affected by the subsequent winding-up. The claimant must nevertheless ask for leave to continue, which request will almost certainly be granted. It has been therefore confirmed that an admiralty writ *in rem* may give rise to a security interest upon the vessel. Such a type of a security is described as a procedural security, which makes the asset in question a security for the claimant to which the plaintiff can have recourse for satisfaction of his judgment even if other party has meanwhile become bankrupt or gone into liquidation.[631] On this basis, where a company in court protected administration (such as winding-up) achieves a moratorium against creditors' claims, the claimant may seek to attach assets of the debtor elsewhere in the world, for example by ship arrest, to achieve secured status, which is regarded as a statutory lien.[632]

If the event giving rise to a statutory right *in rem* has occurred but the claimant has not yet enforced his right by arresting the ship before the winding-up commences or the resolution is passed, the court's discretion will come into play. The effect of the Court of Appeal's decision in *Re Aro Co* is that a claimant who has issued a writ or entered a caveat against release before the commencement of the winding-up or the passing of the resolution will be treated as a secured creditor. It is noteworthy that in *The Cella*,[633] *The Zafiro*, *The Monica S*[634] and *Re Aro Co*, it had been decided that the holder of a statutory right *in rem* became a secured claimant at the time when the admiralty jurisdiction was invoked. Such a position indicated that only if such a statutory right had been perfected, the lien holder would be a secured creditor. Consequently, the court will probably

[629] *Re Aro Co.* [1980] Ch 196.
[630] *John Carlbom & Co. Ltd.* v *Zafiro (Owners)* (*The Zafiro*)[1959] 1 Lloyd's Rep. 359.
[631] *Goode on Commercial Law* (4th ed.), pp663.
[632] See *The Monica S* [1968] P. 741; and *The James W Elwell* (1921) 8 Ll. L. Rep. 115. See also, DC Jackson, *Enforcement of Maritime Claim* (4th ed.), Chapter 23.
[633] (1888) 13 P.D. 82.
[634] [1968] P. 741. In *The Monica S*, On Nov. 11, 1966, plaintiff cargo-owners issued a writ in rem against motor vessel Monica Smith, then owned by S., claiming for alleged breach of contract of carriage by sea. On Jan. 4, 1967, before writ had been served, Monica Smith was transferred to the new owner. It was held by Brandon J that in cases where the claim does not give rise to a maritime lien, if there is a change of ownership after action brought but before service or arrest, the right which is given to proceed *in rem* against the ship is thereupon to lapse.

exercise its discretion in his favour and allow the proceeding in Admiralty.

On one hand, if the claimant has not yet issued a writ at the time of the commencement of the winding-up or the passing of the resolution, he will be treated as an unsecured creditor and the court will stay the proceedings. Oliver J in *Re Aro Co* stated that to grant leave to an unsecured creditor who had only issued a writ and not yet served it, would be to enable him 'to perfect that which … was unperfected, and to achieve priority over other unsecured creditors.' Thus, a *fortiori*, the creditor who has not yet issued a writ certainly remains unsecured. Nevertheless, as was pointed out in *Re Aro Co.*, the court's discretion is very wide and it may decide to stay or not to stay proceedings according to what it decides is fair in the circumstances.

On the other hand, where the event giving rise to a statutory right in rem occurs after the commencement of the winding-up or the passing of the resolution, the claimant will be unsecured and the court will stay any proceedings commenced in Admiralty.

As discussed above, the traditional standpoint of English law has been noticeably secured creditor friendly when it comes to the types of property in relation to which security may be granted and the rights and remedies of the secured creditor once the debtor is in financial difficulty. Such a position is adopted by the EC regulation on insolvency proceedings (EC 1346/2000) as a comprise: whereas under Article 4 the law of the Member State in which proceedings are opened (the *lex concursus*) applies to most issues that arise in an insolvency, by virtue of Article 5(1) that law shall not affect creditors' rights in rem in relation to assets situated in a different Member State.[635] Article 5(1) of the EC Insolvency Regulation reads that:

> *The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets both specific assets and collections of indefinite assets as a whole which change from time to time belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.*

A similar position may also be found in the UNCITRAL Model Law on Cross-Border

[635] Philip Smart, 'Rights In Rem, Article 5 and the EC Insolvency Regulation: An English Perspective,' Int. Insolv. Rev.,Vol. 15: 17-55, 2006. It is notable that the same language is used in Article 21(1) of Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions [2001] OJ L 125.

Insolvency. It is submitted in the Guide to Enactment of the UNCITRAL Model Law that, by virtue of Article 32 of the UNCITRAL Model Law, claims of secured creditors or creditors with rights *in rem* (a matter that depends on the law of the State where the proceeding is conducted) shall not be affected although the UNCITRAL Model Law is solely intended to establish the equal treatment of creditors of the same class.[636]

7.3.2.2 Maritime liens

In *Re Aro Co*, Brightman L.J. mentioned that there were two classes of maritime claims which need to be reviewed for his decision, namely a claim giving rise to a maritime lien and a claim giving rise to a statutory lien.[637] In the case of a maritime lien, the Judge held that a maritime lien holder ranked as a secured creditor under the insolvency legislation and the lien holder took priority over a mortgage of the ship. In this sense, leave would automatically be given under section 231 to enable the holder of maritime lien to enforce his charge despite the existence of a winding up order. Such a statement confirmed the position established by and earlier decision, In *re Rio Grande Do Sul Steamship Co.,*[638] where the master of a ship entitled to a maritime lien over his ship was allowed to take proceedings in Admiralty *in rem* despite the existence of the winding up order.

A maritime lien is regarded as a type of maritime claims and shall be enforced by means of *in rem* proceeding. It would therefore appear that the issue of an admiralty writ arising out of a maritime lien should give rise to a procedural security; however, a maritime lien is peculiar in that it composes of a security by its very nature which is a security provided by the operation of law.[639]

As discussed already, a maritime lien is a security over the vessel; however, a maritime lien is different from other forms of liens as a security right. As Thomas comments, a maritime lien is distinct from both a common law and equitable lien. It is distinct from a common law lien in that it is not dependent on possession. Although a maritime lien is similar to an equitable lien to the extent that it arises independently of both possession

[636] UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> accessed on 09 Oct. 2014.
[637] *Re Aro Co.* [1980] Ch 196.
[638] (1877) 5 Ch.D. 282.
[639] See section 6.2, Chapter VI. See also, R.M. Goode (Royston Miles), *Goode on Commercial Law* (4th edn, London: Penguin 2010) 662.

and agreement, the maritime lien is otherwise distinct from an equitable lien in that it survives into the hands of a *bona fida* purchaser for value without notice. The writer concludes that a maritime lien represents a charge on maritime property unknown alike to the common law and equity.[640] Besides liens, a maritime lien is also similar to a mortgage in that 'under both there is a created charge on a ship which may be enforced against the original owner and any subsequent purchaser.'[641] Nevertheless, the charge of a mortgage arises completely by virtue of the mortgage agreement which must be in a form prescribed by statute; whereas a maritime lien arises by operation of law and there are no formal requirements for giving rise to a maritime lien.[642] The right of a mortgagee to pursue his security into the hands of a third party is founded on notice which is secured by a public scheme of registration while the same right of a maritime lienee arises by operation of law and, as mentioned earlier, is independent of notice.

Adrian Moylan has pointed out in his article, *Arrest Protection and Enforcement Remedies*, that upon insolvency or administration, a creditor is not permitted to 'enforce security over the company's assets' except with the leave of the court and the question whether the exercise of a lien, i.e. contractual, possessory or created by statute, is prohibited depends on how the lien is characterised.[643] The writer has mentioned that a statutory right of detention is not permitted; a lien over sub-hires and sub-freight has been permitted by the court to perform despite the insolvency. Nevertheless, the writer does not discuss over the situation of a maritime lien.

A lien over sub-hire/freight in the process of insolvency has been discussed in a recent decision, *Cosco bulk Carrier Co ltd* v. *Armada Shipping SA & Anor*.[644] The material fact and dispute of the case are as follows.

Cosco Bulk, as a despondent owner, chartered the Spar Sirius to Armada Shipping on 3rd September 2009 on an amended NYPE 93 Form. Armada Shipping sub-chartered the Vessel to STX Pan Ocean on 4th December 2009, again in an amended NYPE 93 Form. Clause 23 of the charter party between Cosco and Armada provided for a lien on

[640] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 3. See also *The Feronia* (1868) L.R. 2 A&E. 65, per Sir Robert Phillimore at p. 72.
[641] *Bankers Trust International Ltd. Appellant* v *Todd Shipyards Corporation Respondent* (*The Halcyon Isle*) [1981] AC 221, per Lord Salmon and Lord Scarman.
[642] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 3.
[643] Adrian Moylan, 'Arrest Protection and Enforcement Remedies' Shipping & Trade Law, Vol. 11, Number 8, 2011.
[644] [2011] EWHC 216 (Ch).

sub-freights and/or sub-hire in the following terms:

The Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire for any amounts due under this Charter Party, including general average contributions, and the Charterers shall have a lien on the Vessel for all money paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once….

Clause 96 of the sub-charter provided as follows:

> '*Neither Owners nor Charterers may assign the benefit of this contract or the benefit of any rights arising out of this contract in whole or in part without the prior consent in writing of the other party. The party who is named as Owner and the party who is named as Charterers in this contract shall always remain fully responsible for the due fulfilment of all the terms of this contract.*'

On 28th December 2009 Armada made a voluntarily filing for liquidation with the court of Fribourg in Switzerland. By then, the Vessel had taken on bunkers at Gibraltar and was on passage to Suez where, in due course, either she or the bunkers (the evidence does not make clear which) were arrested for non-payment of bunkers at Gibraltar. Cosco obtained the release of the Vessel by paying for the bunkers itself. On 30th December 2009 solicitors for Cosco sought to exercise its lien over sub-hire by fax to STX, referring to the time charter and clause 23 in particular, the sub-charter, and to a sum then alleged to be owing by Armada to Cosco of US$285,000 odd.

The English High Court identified one of the principal issues as being the legal nature and effect of an owner's lien over sub-hire. The judge referred to conflicting case law as to whether the owner's lien operates as an equitable charge on what is due from the shipper to the charterer, or whether it is a personal contractual right of interception similar to an unpaid seller's right of stoppage in transit and not a charge or proprietary right at all. However, the Judge did not eventually make a decision as to the nature and effect of such a lien. The judge concluded that it would be inappropriate for him to rule on this issue himself and that it should be decided at the same time as the other issues in the underlying dispute, which was decided in arbitration. Nevertheless the judge reviewed this issue on an 'in-principle' basis. The Judge held:

> '*A series of first instance decisions, following on from an obiter dictum of Lord*

Russell in Federal Commerce & Navigation Ltd v. Molena Alfa Inc. (The Nanfri) [1979] 1 Lloyd's Rep 201 at 210, have concluded that an owner's lien on sub-freights created by contract in a charterparty operates as an equitable charge on what is due from the shipper to the charterer.

...

The contrary argument, ..., is that the owner's lien on sub-freights is a personal contractual right of interception analogous to an unpaid seller's right of stoppage in transit, and not a charge or proprietary right at all.'[645]

Therefore such a lien over sub-hires and sub-freights under a charter party or bill of lading is either a right to intercept or a security charge. It is noteworthy that a lien on sub-hire is different from a maritime lien. For the maritime lien case, in the decision of *The Cella*,[646] Lord Esher, M.Rsaid as follows:

'*. . . are undoubtedly based on the same rule as the two bankruptcy cases, and they show that though there may be no maritime lien, yet the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged by it to be due to the claimant.*'[647]

The above statement indicates that a maritime lien is a security right in nature; and it follows that the maritime lien holder is a secured creditor without the requirement of submitting a writ *in rem*, which has a superior position to a normal maritime claimant. Such a conclusion is in line with one of the characteristics of a maritime lien, by which a maritime lien adheres to the Ship from the time that the facts happened which gave the Maritime lien and then continues binding on the Ship until it is discharged.[648] In other words, a maritime lien is 'perfected' when the claim arises and in this sense, it provides the creditor with a privilege under the insolvency process.

[645] *Cosco bulk Carrier Co ltd* v. *Armada Shipping SA & Anor* [2011] EWHC 216 (Ch), at para. 27.
[646] (1888) 13 P.D. 82
[647] *The Cella* (1888) 13 P.D. 82
[648] *The Two Ellens* (1871-73) L.R. 4 P.C. 161.

7.3.3 Priority

7.3.3.1 The *pari passu* principle

The basic scheme of the legislation on company law is that the unsecured creditors of an insolvent company are to rank *pari passu* subject to statutory provision as to preferential payments.[649] In order to achieve this result, there are provisions which restrict the right of a creditor to make use of procedures outside the liquidation. Secured creditors are not separately catered for by the Companies Act 1948 or its predecessors, except that the Bankruptcy Rules are expressed to apply to the respective rights of the secured and unsecured creditors.[650]

Finch on *Corporate Insolvency Law* submits that the *pari passu* principle is often said to be constitute a fundamental rule of corporate insolvency law, which holds that, in a winding up, unsecured creditors shall share rateably in those assets of the insolvent company that are available for residual distribution. The writer also contents that, 'in what might be called the 'strong' version of *pari passu*, 'rateably' means that unsecured creditors share rateably within the particular ranking that they are given on insolvency by law. The 'strong' version prescribed by the writer in effect refers to the fact that there are several exceptions to the *prai passu* rule under insolvency law.'[651]

Similarly, under the tonnage limitation system, the principle of *pari passu* is also set as a basic rule regarding to distribute the limitation amount. The comparison between the limitation of liability for maritime claims and insolvency of limited liability companies will be discussed later.

7.3.3.2 The priority rules

In *The Law of Personal Security*, Beale H.G. concludes that the various priority rules are as follows: the first rule is that the statutory rights of dock and harbour authorities in respect of harbour damage, dock and harbour dues, and conservancy charge override all maritime liens; the second rule is that purchasers from such authorities obtain a clean title that overrides pre-existing lien entitlements and encumbrances; the third rule is that

[649] See *In re Redman (Builders) Ltd.* [1964] 1 W.L.R. 541.
[650] See section 317 of the 1948 Act.
[651] Vanessa Finch, *Corporate Insolvency Law: Perspective and Principles* (2nd edn, Cambridge: Cambridge University Press 2009) 599.

mortgages and owners out of possession, though not incurring personal liability, are deemed to authorize mortgagors and charterers respectively to incur maritime liens arising in the course of the employment of the ship and so are subordinated to those liens; the fourth rule deal with the effect of a transfer of possession or ownership on existing maritime liens. The maritime lien binds the ship even if it is purchased without notice of the lien, so long as 'reasonable diligence' is employed in enforcing the lien.[652] Following the third priority rule, and therefore a maritime lien therefore defeats an earlier security interest.

Professor Tetley in his work on maritime liens submits that if the claimant with a maritime lien or ship mortgage enforces it by arresting the ship before the commencement of the compulsory winding-up or before the passing of the resolution in a voluntary winding-up, the claimant's proceedings in rem will be unaffected by the subsequent winding-up. This is because maritime lien holders and ship mortgagees are 'secured creditors', realising their own security interest in property, rather than asserting a claim against the company.[653] Furthermore, even if the claimant has not yet enforced his maritime lien or mortgage by arresting the ship at the time of the commencement of the winding-up or the passing of the resolution, the court will use its discretion to determine whether or not the proceedings shall be stayed.[654] Since the claimant with a maritime lien or mortgage is a secured creditor from the time of the accrual of the lien, the court will exercise this discretion in favour of the maritime lien claimant and the latter will usually be allowed to commence his proceedings in Admiralty.[655]

Of course, if both the arrest and judicial sale of the ship occur before the commencement of the compulsory winding-up or the passing of the resolution in voluntary winding-up, the execution is then 'completed' and is unaffected by the subsequent winding-up.[656]

In terms of international conventions, none of the three International Conventions on maritime liens and mortgages 1926, 1967 or 1993 contains any specific provisions on the bankruptcy or insolvency of the shipowner, including enforcement of maritime liens

[652] Beale H.G., *The Law of Personal Security* (Oxford: Oxford University Press 2007) 16.11.
[653] *Re Aro Co Ltd.* [1980] 1 All E.R. 1067.
[654] Insolvency Act 1986, sections 126, 130, 112, and 183.
[655] *Re Rio Grande do Sol Steamship Co.*, (1877) 5 Ch. D. 282; see also, *Re Aro Co Ltd.* [1980] 1 All E.R. 1067.
[656] Section 183, Insolvency Act 1986.

or ship mortgages or on the appropriate jurisdiction to adjudicate maritime lien and mortgage claims against maritime bankrupts. The 1926 Maritime Liens and Mortgages Convention, at Article 16, leaves all questions of the 'competence of tribunals, modes of procedure or methods of execution' to 'national law' The 1967 Maritime Liens and Mortgages Convention, by its Article 2, assigns 'all matters relating to the procedure of enforcement' to the 'law of the State where enforcement takes place.' Article 2 of the 1993 Convention is of the same effect. Jurisdiction and enforcement issues on interactions between admiralty and insolvency proceedings are thus left to the domestic law, 'in the absence of any international harmonization'.[657]

7.3.4 Chinese law position

7.3.4.1 Arrest of ship and insolvency proceedings

In terms of the relationship between admiralty proceeding and insolvency proceeding, there is no explicit rules or regulations under Chinese law. Article 109 of the Chinese Enterprise Insolvency Law 2006[658] provides that a creditor secured by an encumbrance over the property belonging to the insolvent enterprise, the creditor may enforce such right and get paid prior to other creditors.[659] According to the Chinese Maritime Procedure Law 1999, arrest of ship is provided as a special type of 'maritime preservation', which refers to a compulsory measure, upon the request of the claimant, ordered by Maritime Courts against the property of the respondent to ensure any maritime claims of the claimant can be fulfilled.[660] Furthermore, there is no *in rem* action existing under Chinese Law and therefore all claims are brought *in personam* against the liable person. In this sense, it seems difficult to argue that arrest of ship under Chinese law would provide any security right to the claimant.

Therefore, the position of Chinese law is unclear in the case where a ship is arrested and meanwhile the shipowner is insolvent. Whether or not the ship can be arrested outside the framework of insolvency proceeding needs to be clarified by Chinese legislature. In November 2013, the People's Supreme Court issued Provisions on Issues Relating to

[657] William Tetley, *Maritime Liens and Claims* (2nd edn, Montreal: International Shipping Publications 1998) 1126.
[658] The Enterprise Insolvency Law of the People's Republic of China was adopted at the 23rd Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 27, 2006 and came into effect as of June 1, 2007.
[659] Article 109, Chinese Enterprise Insolvency Law 2006.
[660] Article 12, Maritime Procedure Law of China 1999. The provisions on arrest of ship are contained in section 2 of the second chapter of Maritime Procedure Law entitled 'Maritime Preservation'.

Ship Arrest and Judicial Sale (Draft for comments) which was published for the purpose of collecting public comments and opinions.[661] In the draft Provisions, Article 25 provides that only claims arising from maritime liens, maritime possessory liens and ship mortgages shall be separated from insolvency proceedings and the remaining part of the proceeds of the ship shall be returned to the People's Court dealing with the owner's insolvency case.[662] From this proposition, it would appear that, in the People's Supreme Court's view, an unsecured maritime claim shall be included in the insolvency proceedings. In other words, the right of arrest of ship does not provide the claimant with a security, i.e. a right similar to a statutory lien under English law.

7.3.4.2 Maritime liens

As mentioned earlier, it has seemed to be commonly agreed that a maritime lien should be regarded as a security right under Chinese law notwithstanding that the Chinese Maritime Code or other legislation does not confirm such a position. In consideration of insolvency of the shipowner, it is submitted that a maritime lien shall be treated as an encumbrance within the meaning of Article 109 of the Chinese Enterprise Insolvency Law.[663] It is further submitted that analogy may be drawn between a maritime lien and contractor's lien on construction project.[664] According to Article 286 of the Chinese Contract Law 1999, where the contract-offering party fails to pay the contracted prices, the contractor may apply to a people's court for the auction of the construction project and the payment for the construction of the project shall be effected, in priority, out of the proceeds from the conversion into money or auction of the said project.[665] The right of the contractor hereunder is deemed to be a security right and to be enforced according to the procedure of effecting a security right as provided in the Civil

[661] The public consultation was closed on 15 December 2013. However, for the sake of prudence, the Supreme Courts has been consulting shipping law practitioners since March 2014.
[662] The final version of the Provisions on Issues Relating to Ship Arrest and Judicial Sale was issued by the People's Supreme Court on 28 February 2015 and came in to force on 1 March 2015. For reasons unknown to the author, Article 25 of the Draft Provisions was not included in the final version. Thus the position of maritime liens and arrest of ships under insolvency proceedings still needs to be clarified under Chinese law.
[663] Ying Jiang, Bo Wang, 'Enforcement of Maritime Liens under the Insolvency Proceeding', Management & Technology of SME, 2009, vol. 8. Article 109 of the Chinese Insolvency Law 2006 provides that 'secured creditor is entitled to obtain payment in priority over debtor's specific asset.'
[664] Article 286, Chinese Contract Law 1999.
[665] Although no express word 'lien' is used in Article 286 of the Chinese Contract Law, it is implied that the contractor's right hereunder is in nature a type of 'lien'.

Procedure Law 2012.[666] Such a position has recently been supported by the Provisions on Issues Relating to Ship Arrest and Judicial Sale (Draft for comments). Article 25 of the Draft Provisions provides explicitly that a maritime lien can be enforced separately from insolvency proceeding. Sale of the ship belonging to the insolvent enterprise may be delegated to a Maritime Court[667] and the Maritime Court will deal with the registration and compensation for maritime liens, possessory liens[668] and ship mortgages. Where the proceeds of the ship are not exhausted, the Maritime Court will hand over the rest of the proceeds to the court hearing the insolvency case. This article of the Draft Judicial Interpretation confirms that a maritime lien can be enforced notwithstanding the insolvency of the shipowner. If the Draft Provisions and its Article 25 have finally been approved, the maritime lien holder under Chinese law would have a stronger position.

7.4 Limitation of liability and limited liability companies

7.4.1 Function and effect of limited liability companies

Goode on Commercial Law has a comment on the origin of insolvency and bankruptcy law. It is stated that life for the medieval debtor seemed to be 'nasty, brutish and short'in that falling into debt was considered moral sin and an Act was passed by which 'receivers who fell into arrears with their accounts were to be imprisoned in irons, and if they were unable to make restitution, they were left to rot, if necessary for the rest of their lives'.[669] These measures, as submitted by *Goode on Commercial Law*, were designed for the protection of the individual creditor.[670] The notion of official collection and realization of a debtor's estate for the purpose of distribution among his creditors was introduced by a statute of Henry VIII, the first enacted bankruptcy statute.[671].

[666] Articles 196 and 197, Chinese Civil Procedure Law 2012; see Junqiang Xu, 'Issues regarding connection of maritime proceedings with the amended Civil Procedure Law of the People's Republic of China', Chinese Journal of Maritime Law, 2013, 24(1).
[667] However, the Draft Provisions do not provide for the situation under which such delegation may be made; nor does it provide the delegation shall be made by the claimant or the court hearing the insolvency case.
[668] Here the possessory lien refers to ship-repairer's possessory lien. See Article 24 of the Chinese Maritime Code 1992.
[669] R.M. Goode (Royston Miles), *Goode on Commercial Law* (4th edn, London: Penguin 2010) 903.
[670] *Ibid*.
[671] *Ibid*.

The preamble of the Statute reads as follows:

> '*Where diverse and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience. Be it therefore enacted…*'[672]

The 1542 Act empowered the Lord Chancellor and other designated officials to seize the body and assets of the debtor, to realize the assets and to distribute the proceeds to his creditors 'rate and rate alike, according to the quantity of their debts.'[673] Thus the principle of '*pari passu*' distribution was created and remains a cardinal principle of bankruptcy law.

Another writer, Vanessa Finch summarizes the function of insolvency and bankruptcy law as follows:

> '*…in a society that facilitates the use of credit by companies there is a degree of risk that those who are owed money by a firm will suffer because the firm has become unable to pay its debts on the due date. If a number of creditors were owed money and all pursued the rights and remedies available to them, a chaotic race to protect interests would take place and this might produce inefficiencies and unfairness. On this basis, a main aim of insolvency law is to replace this free-for- all with a legal regime within which creditors' rights and remedies are suspended and a process established for the orderly collection and realization of the debtors' assets and the fair distribution of these according to creditors' claims.*'[674]

7.4.2 Function and effect of shipowners' limitation of liability

As discussed in Chapter II, the policy consideration underlying limitation of liability for maritime claims is, *inter alias*, the need to protect shipowners so as to encourage investment in trading with ships. The proceedings of a limitation action for maritime

[672] Hen VIII, c 4 (1542).
[673] R.M. Goode (Royston Miles), *Goode on Commercial Law* (4th edn, London: Penguin 2010) 903.
[674] Vanessa Finch, *Corporate Insolvency Law: Perspective and Principles* (2nd edn, Cambridge: Cambridge University Press 2009) 15.

claims also have the function of staying other proceedings in relation to the incident in question in that claims must be made against the limitation fund. Particularly, the constitution of a limitation fund has the effect of debarring other actions against shipowners for the claims subject to the limitation framework.[675] The intention of such a position is to ensure that, when a limitation fund has been constituted under the 1976 Limitation Convention, the other assets of a liable person should not be exposed to separate action in respect of claims arising out of the occurrence which are also 'subject to limitation' under the 1976 Limitation Convention.[676] In this sense, the limitation fund stands for the maximum liability of the liable shipowner and is available to all the claimants within the framework of the limitation convention or corresponding legislation.

7.4.3 Similarity between limitation of liability for maritime claims and insolvency of limited liability companies

Lord Mustil, in his article 'Ships are Different—or are They', mentions that the increasing pressure to introduce limitation statutes to protect the capital of the shipowner took place at roughly the same time as the development of the joint stock company with limited liability, participation in which risked the potential loss of the entire value of the investment but no more. Such a statement indicated that the limitation for maritime claims seems to be an analogy of limited liability companies. In addition, from the above two sub-sections, it is obvious that some similarity may be found between the insolvency proceeding and the limitation of liability for maritime claims. Both of the two proceedings attempt to bring all creditors' claims into one single procedure and a limited fund is shared between creditors on a '*pari passu*' basis.[677]

JJ Donovan reports in *The Rebecca*[678] that the Court pointed out the similarity in the function of limited liability for shipowners and limited liability for corporate stake holders. By the terms of the *Consulato del Mare* of Barcelona, the owners and part-owners of a vessel were liable for debts incurred by the master in obtaining ship's necessaries or for cargo damage arising from improper loading, or from

[675] Article 13, 1976 Limitation Convention.
[676] See Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Richmond LLP 2005) Chapter III.
[677] This is of course subject to some exceptions under both proceedings.
[678] 20 F Cas 373, 376,

unseaworthiness, but only to the extent of their respective shares in the ship itself.[679] The similarity between corporate stakeholders' limited liability and the limitation regime for maritime claim is expressed by the Judge as follows:

> '*They held the owners severally bound in solido for the acts of the master, whether of tort or contract, but limited the extent of their liability to the value of the ship. The creditors had always their remedy against the vessel, and through that, each owner was liable, but not beyond his share in the vessel. That this was the settled law of the Mediterranean is abundantly proved by several chapters in the Consulate of the Sea, which governed the maritime commerce of all the ports of that sea. In chapter 239 it is said that if the master borrows money for the necessities of the ship, in a place where the owners do not reside, the whole ship shall pay the loan, and no part owner can object. But if the ship is lost before the loan is paid, no part owner is bound to pay anything. Let the lender then take care how he lends, for the owners lose enough in losing their shares.*'[680]

However, a limitation regime for maritime claim is different from a winding up or liquidation process in that the limitation of liability for maritime claims attempts to protect shipowners' interests, namely the debtor's interest, whereas the insolvency proceeding was designed to protect creditor's right. Such difference would appear to explain, to some extent, why a maritime lien may be enforced separately from the insolvency proceeding but may be forfeited by the limitation proceeding by virtue of 'conflict clauses'.[681]

7.4.4 Maritime liens in limitation proceedings

Under both English and Chinese law, it is clear that a maritime lien is enforced by means of arrest of the 'offending' ship. By virtue of Article 13 of 1976 Limitation Convention,[682] where a limitation fund has been constituted, arrest of the ship will be

[679] Oya Z. Özçayair, *Liability for Oil Pollution and Collision* (Informa Law 1998) 299.
[680] *The Rebecca* 20 F Cas 373, 376
[681] Limitation proceedings for maritime claims may sometime conflict with insolvency proceedings. For instance, if there are insolvency proceedings in Country B and also limitation proceedings in Country L, should the limitation proceedings in Country L be allowed to continue, with a distribution of assets among claimants against the fund, separately from the distribution of assets in the insolvency proceedings in Country B? However, this question is not within the scope of this research.
[682] Article 13 of LLMC 1976 is incorporated as Article 214 in the Chinese Maritime Code 1992.

barred;[683] and any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached may be released by order of the Court.[684] In the case where a claim giving rise to a maritime lien is also a claim subject to the limitation framework, it would appear that the enforcement method of the lien is barred by the constitution of limitation fund. In addition, paragraph 9 of Schedule 7, Part II, to the 1995 MSA[685] provides that no lien or other right in respect of any ship or property shall affect the proportions in which the fund is distributed among several claimants. A similar provision may also be found in the Chinese Maritime Code 1992.[686]

Following the above two provisions, it seems that a maritime lien may not be enforced separately from the limitation proceeding. However, if an analogy may be drawn between the limitation proceeding and the insolvency proceeding, a maritime lien shall also be enforceable separately from the limitation proceeding. It is submitted that the insolvency law has long relied on two basic principles. Firstly, only the debtor's assets can be can be distributed to meet the debtor's obligations and therefore, asset that belong to third parties should be returned to them, not distributed to the debtor's creditors. The consequence of this rule is that proprietary claimants can remove 'their property' from the pool of assets that otherwise constitutes the debtor's property.[687] The second one is that the inevitable losses which must be shared by these personal creditors should be shared *pari passu*.[688] Where these two principles are followed in the limitation proceeding, a maritime lien holder would be able to remove 'his property', the ship, from the 'pool', namely the limitation fund. But the difficulty is, under the tonnage limitation system, the limitation fund is a nominal fund based on monetary calculation. Thus, it is unclear whether or not the 'ship' or its equivalent value is regarded as part of fund.

On the other hand, the purpose of the above-mentioned two restrictions is to protect the assets of the person seeking limitation from being double-executed. Nevertheless, whether the maritime lien, as a substantive right of the claimant, shall be affected or not remains unclear. The answer might dependent on the policy consideration of different

[683] Article 13(1), LLMC 1976.
[684] Article 13(2), LLMC 1976.
[685] which is given the force of law by virtue of section 185 of that Act
[686] Article 30, Chinese Maritime Code 1992.
[687] John Lowry and Loukas Mistelis (Eds.), *Commercial Law: Perspective and Practice* (Lexis Nexis Butterworths 2005) 194.
[688] *Ibid*.

jurisdictions.

7.5 Conclusion: should a maritime lien be enforced separately from limitation proceeding?

From the above analysis and discussion, it is commonly agreed that maritime lien has its function as a security right. Even though, under both English and Chinese law, the applicable law for maritime liens is determined to be *lex fori*, it is arguable that the nature of maritime lien shall not be affected. In terms of enforcement of a maritime lien against an insolvent shipowner, it has been decided by case law (under English law) and judicial interpretation (under Chinese law) that a maritime lien may be enforced separately from the insolvency proceeding.

Whereas shipowner's limitation of liability is considered, the limitation proceeding is similar to the insolvency proceeding in that both of the two proceedings attempt to bring all creditors' claims into one single procedure and a limited fund is shared between creditors on a '*pari passu*' basis. This leads to the question whether a maritime lien may also be enforced separate from the limitation proceeding. The answer to this question appears to be unclear. The author submits that the answer should be dependent on the policy considerations of different jurisdictions. In a jurisdiction which intends to protect maritime claimants' interests, the legislature should be able to allow the maritime lien to be enforced separately from limitation proceeding; in a jurisdiction which attempts to encouraging shipowners, the enforcement of maritime liens shall be restricted and limitation of liability shall take precedence over the liens. However, by doing either way, difficulties of harmonising the limitation of liability and maritime lien would arise. Particularly, under current Chinese legislation, the interaction between maritime lien and limitation of liability seems not to be well regulated. In the next chapter, suggestions will be made on how to solve the difficulties under Chinese law.

Chapter VIII Conclusion: Reconciling Maritime Liens and Limitation of Liability for Maritime Claims

8.1 Summary of the issues

8.1.1 History and current law

Chapter II and Chapter III have reviewed the historic development and current law of maritime liens and limitation of shipowner's liability under both English law and Chinese law. In Chapter II, the historical development and current law on maritime liens have been reviewed. Maritime liens can be traced back to ancient Greek law, Roman law and other early maritime codes.[689] Originally maritime liens were in the form of 'maritime loans', which were used by masters to borrow money on security of the ship hypothecated in order to enable the ship to finish her voyage. Other maritime liens including seamen's wages maritime lien and salvage maritime lien, both of which existed in early maritime law, all derived from various modes of conduct by which service is rendered to a ship and the adventure of the ship.[690] In this sense, the notion of 'maritime loan' or the later bottomry lien attempts to encourage the shipowners to perform sea adventures.

In Chapter III, the history and current law of limitation of liability for maritime claims have been reviewed. It has been commonly admitted that the creation of limitation of liability for maritime claims was out of public policy consideration: the limitation of liability system was designed to encourage shipping and trade activities by means of protecting the shipowners from financial difficulties.[691] Most importantly, there was a change of dominant limitation regimes from value based limitation regimes to the tonnage limitation regime. One significant difference between the tonnage limitation system and value based limitation systems is that the former involved the use of a pre-determinable valuation of ship unaffected by the circumstances in which the claims

[689] See Chapter II, 2.2.1.
[690] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 6. According to Thomas, all maritime liens except damage maritime liens may be characterised as service maritime lien.
[691] On this point, see Chapter III, section 3.5.

arose; while the latter value the ship and freight as they are after the circumstance in which the claims arose. Such a change potentially brought impact on the interactions between maritime liens and limitation of liability for maritime claims.

8.1.2 Relationship and conflicts between maritime liens and limitation of liability for maritime claims

The relationship between maritime liens and limitation of liability for maritime claims has been discussed in Chapter IV. Both of the two regimes have a long history and their relationship has been changing along with their development. Under the traditional value based limitation systems, the maritime lien and limitation of liability were integrated with each other. By virtue of the personification theory, the ship was both the source and limit of liability and the limitation amount was distributed among claimants in accordance with the priority rules of maritime liens. However, such a position does not exist under a tonnage limitation system. In a tonnage limitation system, a separate limitation fund may be established and maritime liens may not operate upon such a fund. Although it seems that maritime liens and the tonnage limitation system are not closely related, the overlap of the two systems still exists. Under English law, a claim for damage done by ship may give rise to a maritime lien and may also be subject to limitation of liability. Under Chinese law, claims in respect of loss of life or personal injury and claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship may give rise to maritime liens and such claims are also within the scope of limitation of liability. On this basis, maritime liens and limitation of liability may still have impacts on each other and conflicting issues may arise therefrom.

The conflicts between maritime liens and limitation of liability were examined in Chapter V and Chapter VI. In Chapter V, the difference in policy consideration underpinning maritime liens and limitation of liability has been reviewed and the conflicts between the two systems in respect of different priority rules and enforcement methods have been discussed. By comparing the English law and Chinese law, it has been found that the conflicts under English law are not as harsh as it is under Chinese law. In Chapter V, the ‘conflict clauses’ which attempt to resolve the conflicts between maritime liens and limitation of liability have been reviewed. Such clauses exist under both English law and Chinese as well as international conventions on maritime liens and

mortgages. Generally speaking, such conflict clauses have their effect by means of depriving the application of maritime liens in the limitation proceedings. However, after revisiting these clauses, it has been discovered that none of these clauses provided a good solution to the conflicts.

8.1.3 Seeking for solutions

Chapter VI focuses on the similarity between limitation proceeding and limited liability companies along with the enforcement of maritime liens under insolvency proceedings. This chapter aims to examine the operation of maritime liens in the circumstances of insolvency and bankruptcy in order to find out whether similar principle could be applied to the situation of limitation proceedings by analogy. Under both English law and Chinese law, it has been commonly agreed that maritime liens have the function of security and therefore may be enforced separate from the insolvency proceeding. This provides a theoretical foundation to the argument that maritime liens should also be enforced separately from the limitation proceeding. However, whether or not such an analogy shall be made will be dependent on a State's policy consideration. Apparently, the Chinese legislature attempts to protect shipowners' interests and therefore the limitation proceeding would be prioritised over maritime liens. However, there are obstacles in achieving this goal under Chinese law. In this regard, amendments to current Chinese legislation are necessary.

This Chapter will provide recommendations, as contribution of this thesis, on reform of the reform of the Chinese maritime law as well as other relevant legislation. In terms of the impact of limitation of liability on maritime liens, certain provisions under Chinese law cause confusion and make it difficult to provide a foundation for resolving the conflicts between maritime liens and limitation. Therefore, suggestions will be made on revising those provisions under Chinese law. Lastly, as the contribution of this thesis, recommendations on reforming the Chinese maritime legislation will be made in respect of reconciling maritime liens with the limitation of shipowner's liability. These recommendations will include changes on both substantive and procedural law on the issues relating to maritime liens and limitation of liability.

8.2 Interactions between maritime lien and limitation of liability

8.2.1 Two hierarchies

The maritime lien system and the limitation of liability system have certain features in common. It is submitted that 'each system generates a fund which may be established, in part, by judicial sale of the vessel; each system provides an option whereby the vessel owner may avoid loss of the vessel by substituting adequate security; and under each system, claimants are expected to litigate for the fund, with adverse consequences if they choose not to do so.'[692]

Under value-based limitation systems, limitations of liability are integrated with maritime liens. The combination of a value-based limitation system and maritime liens reaches the effect that a ship becomes both the source and limit to the liabilities caused by it and the proceeds of the ship constitute a fund available for claimants.[693] Nevertheless, the enforcement of the tonnage limitation and maritime liens are inconsistent with each other in certain ways and more importantly, each of the regimes creates a hierarchy for maritime claims. On the one hand, the LLMC 1976/1996 creates a hierarchy under which the ranking is as follows:[694]

d. maritime liens which are not subject to limitation of liability
e. claims for loss of life or personal injury (up to the limit)
f. unpaid balance for personal claims and claims for non-personal claims, namely the property claims (up to the limit), including maritime liens subject to limitation of liability
g. other maritime claims[695]

On the other hand, maritime liens create a different ranking of claims, which is as follows:

a. maritime liens

[692] David Gray Carlson, 'Reconciling Maritime Liens and the Limitation of Liability Act,' 3 Cardozo L. Rev. 261 1981-1982, at 261. Although this statement is made on the basis of American law, these common features also apply under English law and Chinese law.
[693] See Chapter III, 3.3.2.
[694] See Chapter IV, 4.3.1
[695] This ranking will be different if a member state of the 1976 Limitation Convention and its 1996 Protocol chooses to give priority to claims for damages to harbour works, basins and waterways and aids to navigation. Although China is not a member state of LLMC, such a choice is reflected in the Chinese Maritime Code 1992. See Chapter IV, 4.3.1.

b. other maritime claims

And the ranking of maritime liens *inter se* is subject to complicated rules 'by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstance of each case.' [696]

Apparently, the distribution rule of a limitation fund is different from the rule where maritime liens are concerned. Therefore, under the circumstances where a claim giving rise to a maritime lien is also subject to the limitation regime, the conflict of the two distribution rules is revealed.

The impact of limitation on the enforcement of the maritime lien is reflected in the following aspects. First of all, the limitation regime provides for a *pro rota* distribution rule that is different from the rule settled by the maritime lien; secondly, the limitation proceeding may convert an *in rem* action into an *in personam* action and therefore the maritime lien may not be enforced; and thirdly, the constitution of a limitation fund protects the persons entitled to limitation from any other actions against their property and may lead to the release of any property of the persons entitled to limitation which has been arrested or attached as a matter of pre-trial security measures, which will discharge the security function of the maritime lien. In addition, as the limitation fund is distribution according to the *pro rota* rule, the priority of the maritime lien is also dismissed.[697]

As seen from the previous chapters[698], the inconsistence of maritime liens and limitation of liability has been recognised by both national legislation and international conventions. The English Conflict Clause is narrow and precise which refers only to the proportion in distribution of the limitation fund. The Conflict Clause in the 1967 Convention on Maritime Liens and Mortgages is in the form of a reservation, which allows the States Parties to reserve their right of enacting the Limitation Convention. As a new development, the Conflict Clause in the 1993 Maritime Liens and Mortgages Convention, followed by the Chinese Maritime Code, is adopted to the effect that the 1993 Convention does not affect the application of an international convention

[696] D.R. Thomas, *Maritime Liens* (London, Stevens 1980) 234. For the ranking of maritime liens *inter se*, see Chapter V.
[697] Lixin He, Meishan Xie, *Limitation of Liability for Maritime Claims* (Xiamen: Xiamen University Press 2008) 63-67.
[698] See Chapters IV, V, and VI.

providing for limitation of liability or of national legislation giving effect thereto.

In addition, the conflict clauses in International Conventions on Maritime Liens and Mortgages are more like compromises rather than a profound solution. It would appear that those conventions intend to leave the problems to be resolved by domestic legislations. Therefore, simply taking the Conflict Clause in the 1993 Maritime Liens and Mortgages Convention into the Chinese Maritime Code does not resolve the conflicts completely. The incorporation indeed brings difficulties in both theory and practice. In this sense, Article 30 of the Chinese Maritime Code needs to be updated to cover those difficulties. Thus a reform of the Chinese Maritime Code 1992 in respect of resolving the conflict between maritime liens and the limitation regime shall be suggested.

8.2.2 English law

In Chapter IV and V, it has been discussed that the impact of limitation proceeding on the enforcement of maritime liens is recognised under English law. As mentioned above, t limitation proceeding impacts on the enforcement of the maritime lien in three aspects.[699] Except for the second aspect, the other aspects of the impact exist in both English law and Chinese law. However, it is the second impact, i.e. the limitation proceeding have the effect of converting an *in rem* action into an *in personam* action, that makes the conflict under English law is not as harsh as it is under Chinese law. Under English law, the rationale of the decision of *The Indian Grace* (No.2)[700] provides for a possible theoretical foundation based on which the limitation regime may have a superior position over the maritime lien. In this decision, Lord Steyn held that an action *in rem* is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction,[701] which reaches the effect that an action *in rem* merges into an action *in personam*. In addition, Article 1(5) of 1976 Limitation Convention provides that limitation of liability covers both *in rem* and *in personam* proceedings. Therefore, the combination of *The Indian Grace* (No.2) and Article 1(5) of 1976 Limitation Convention would appear to have the effect that an action *in rem* will be transformed to a limitation proceeding automatically where the limitation is invoked by the shipowner.

[699] See above, 8.2.1.
[700] [1998] 1 Lloyds Rep. 1.
[701] *Ibid*, at 10.

In Chapter VI, it has been mentioned that English law attempts to resolve the conflicts between maritime liens and limitation proceedings by inserting a so called 'conflict clause' in the Merchant Shipping Act. The overriding effect of the 1976 Limitation Convention in terms of its competition with maritime liens is provided by para.9 Part II Schedule 7 of the Merchant Shipping Act 1995. However, if the statement in the previous paragraph is true, it seems not necessary to have such a statutory provision to confirm the position between the limitation regime and maritime liens.

Furthermore, the position of maritime lien arising from damage done by a ship should be reconsidered under English law. It is submitted that the procedural theory has been most prominent in collision cases.[702] This point of view is supported by various decisions.[703] Particularly, in *The Utopia*,[704] it was held that where the shipowner is not personal liable for the damage, neither was the vessel liable for an *in rem* action. As discussed in Chapter V, it is arguable that the decision of *The Indian Grace* (No.2) shall be applicable to a maritime lien arising from damage done by a ship. If this is true, a further step would be taken, namely an action *in rem* brought for a damage maritime lien would be regarded as an action *in personam* against the shipowner *ab initio*. In this sense, a damage maritime lien would only be enforceable in an *in personam* proceeding under which limitation of liability would normally arise. If this is the position of English law, there should be no conflict between maritime liens and limitation of liability under English law. The obstacle of this approach would seem to be that the security function of a damage maritime lien will be affected in the sense that the owners of a guilty ship may sell the ship to avoid liability and the ship cannot be arrested due to the absence of personal liability. Although the claimant will still be able to arrest a sister ship by means of statutory right *in rem*,[705] Section 21 (4) of the Senior Court Act 1981 provides for several prerequisites of bringing an action *in rem* against 'any other ship' which is not the offending ship. According to Section 21(4), a 'sister ship' refers to any other ship of which, at the time when the action is brought, the liable person is the beneficial owner as respects all the shares in it.[706] The wide use of single ship companies makes it

[702] Griffith Price, *The Law of Maritime Liens* (London: Sweet & Maxwell 1940) 20.
[703] For example, *The Druid* (1842) 1 W. Rob. 391.
[704] [1893] A.C. 492. A vessel was damaged through collision with the Utopia which was sunk in Gibraltar Bay. The vessel was in the charge of the port authority when the collision happened and it was therefore held that the fault was the port authority's rather than the master's.
[705] See Section 21(4) of the Senior Court Act 1981.
[706] Section 21 (4)(b)(ii), Senior Court Act 1981. See also, *The Helene Roth* [1980] 1 Lloyd's Rep 477.

difficult to rely on this section to arrest a sister ship.[707] For example, in the decision of *The Evpo Agnic*,[708] *The Evpo Agnic* was owned by a separate company from that which owned *The Skipper*, but both companies were owned and controlled by the same shareholder and president. It was held that the holding company of the two sister companies was not the beneficial owner of all the shares in *The Evpo Agnic*.[709] However, the term 'beneficial owner' do suggest that the distinct legal personality could be defeated in certain ways. It was held in *The Tjaskemolen*[710]that where the corporate structure is used as a sham or a façade to avoid its existing liabilities, the corporate veil should be lifted and the Court should investigate the true beneficial owner of the assets.[711] Nevertheless, the claimant would bear extremely heavy burden of proof in order to lift the corporate veil.[712] In this sense, unless corporate veil could be easily lifted for maritime claims, the security function of a damage maritime lien would be dissolved if the decision of *The Indian Grace* (No.2) is applicable. One suggestion to avoid such consequences could be introducing the approach under South African law in respect of arresting 'associated ships'. According to Section 3(7) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983 of South Africa, a ship owned by a person who controlled the company which owned the ship concerned,[713] or a ship owned by a company which is controlled by a person who owned the ship concerned or controlled the company which owned the ship concerned[714] can be arrested for maritime claims. If this approach is introduced into English law, the decision of *The Evpo Agnic* would be different. *The Evpo Agnic* would have been arrested as an associated ship of *The Evpo Agnic* and used as a security for the claim brought in the Admiralty Court. Thus, the availability of associated ships as security would patch up the lost security function of a

[707] Dr Dimitrios Ph. Christodoulou, *The Single Ship Company : The Legal Consequences from its Use and the Protection of its Creditors* (Athens : Ant. N. Sakkoulas 2000) 24-25. The writer submits that the combination of the 1952 Arrest of Ships Convention (the Convention is incorporated into the Senior Court Act 1981) and the distinct personality of the company allows shipowners to use the form of single ship company as a lawful means of avoiding the sister ship arrest. As for the general position of distinct legal personality, see the House of Lords' decision of *Salomon* v *A Salomon & Co* [1897] AC 22. It was held that the concept of legal personality given to a corporation means that, no matter who the shareholders are, the company is a legal person separate from its controllers, with its own separate rights and liabilities, and it owns its own assets.
[708] [1988] 3 All ER 810.
[709] Similarly, in *The Maritime Trader* [1981] 2 Lloyd's Rep 153, a ship owned by a subsidiary of the parent company is held not to be a sister ship of the ship chartered to the parent company.
[710] [1997] 2 Lloyd's Rep 465.
[711] *Ibid*, at 470. See also, *The Saudi Prince* [1982] 2 Lloyd's Rep 255.
[712] Such a position is resulted from two UK Supreme Court's decisions: *VTB Capital plc* v *Nutritek International Corp and others* [2013] UKSC 5 and *Prest* v Petrodel Resources Ltd [2013] UKSC 34.
[713] Section 7 (a) (ii), Admiralty Jurisdiction Regulation Act No. 105 of 1983.
[714] Section 7 (a) (iii), Admiralty Jurisdiction Regulation Act No. 105 of 1983.

damage maritime lien.

8.2.3 Chinese law

As mentioned in Chapter IV, there is no action *in rem* under Chinese law; and all the claims must be brought against the liable person. Therefore there is no possibility of a separate *in rem* action arising from a maritime lien paralleled with the limitation proceeding under Chinese law. For this reason, the draftsmen of the Chinese Maritime Code did not incorporate Article 1 (5) of the 1976 Limitation Convention into the Chinese limitation regime. As *in rem* proceeding is not recognised under Chinese law, the English law approach with regard to resolving the conflicts between maritime liens and limitation of liability would be of little help. Both maritime lien proceeding and limitation proceeding under Chinese law are *in personam* proceedings; therefore, a clear national legislation seems to be necessary in order to prioritise maritime liens and limitation of liability.

Following the 1993 Maritime Liens and Mortgages Convention, the Chinese Maritime Code 1992 also has a 'conflict clause'.[715] The wording of Article 30 in the Chinese Maritime Code is slightly different from the wording of Article 15 of the 1993 Maritime Liens and Mortgages Convention but of similar effect under which, apparently, the limitation proceeding will not be affected by enforcement of maritime liens. However, as pointed out in Chapter VI, a single clause in the Maritime Code is not sufficient to provide a comprehensive resolution in relation to reconciling maritime liens with limitation of liability under Chinese law.

In August 2010, the People's Supreme Court issued Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims (Judicial Interpretation on Limitation of Liability)[716], aiming to clarify a few issues regarding the limitation proceeding. Article 9 of this Judicial Interpretation provides that a maritime claimant may not, after the establishment of a limitation fund, apply for arrest of the ship for the purpose of realising a maritime lien which arises from a maritime claim subject to limitation of liability. Nevertheless, this Article only

[715] Article 30, Chinese Maritime Code 1992.
[716] The Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims, which have been adopted at the 1484th session of the Judicial Committee of the Supreme People's Court on March 22, 2010, came into force on September 15, 2010.

provides a detailed explanation on Article 30 of the Maritime Code in respect of arrest of ship.[717]

As discussed in Chapter VI, there are several questions which seem not to be covered by Article 30 of the Chinese Maritime Code. Firstly, since Chapter XI of the Maritime Code does not provide for the ranking of maritime claims in the situation of no limitation fund, maritime liens may arguably operate in the situation where no limitation fund is established. In addition, Article 10(2) of the 1976 Limitation Convention is not incorporated in to the Chinese Maritime Code [718] and neither may similar provisions be found under other legislation. As a result, unlike the English law position, it cannot be inferred that the distribution rule of a limitation fund shall apply to the situation where there is no such fund.

Secondly, according to Article 29 of the Chinese Maritime Code, the constitution of a limitation fund does not extinguish the maritime liens which are also subject to limitation proceedings. Also, there is nothing in the Maritime Code providing whether or not a maritime lien can be transferred to against the limitation fund although it can be implied from the wording of Article 30 that such transfer shall not be allowed, otherwise the distribution rule of the limitation fund would be broken which is opposite to the intention of Article 30. Therefore, a dilemma will be caused by the constitution of limitation fund in that the maritime lien still exists after the establishment of the limitation fund but the lien holder will have no methods to enforce his lien.

Thirdly, the form and nature of the limitation fund is not clear. The establishment of a limitation fund in a Chinese Maritime Court have two consequences: (1) debarring any right against other assets of the liable person; and (2) release of the ship or other security provided.[719] In this regard, the limitation fund works as an 'alternative security' which replaces the arrested ship. However, it is obscure whether or not the limitation fund is a substitute of the ship. If the fund is a substitute of the ship, it would appear that the maritime lien shall be transferred to the fund, which will be controversial with the position stated in the above paragraph. A common view is that the limitation fund stands for the maximum liability of the shipowner for those claims subject to limitation of

[717] Even if there is no such a judicial interpretation, the position of Article 9 is implied by Article 30 of the Maritime Code. See Chapter V, section 5.4.2.2.
[718] For the discussion on Article 10 (2) of the 1976 Convention, see Chapter III, 3.2.3.
[719] Article 214, Chinese Maritime Code 1992.

liability. However, following the conclusion drawn in Chapter VI, an analogy may be made between limitation of liability for maritime claims and limited liability companies. Both of the two proceedings attempt to bring all creditors' claims into one single procedure and a limited fund is shared between creditors on a '*pari passu*' basis.[720] Although the nature of maritime liens is unclear under Chinese law, it is a common practice in China that maritime liens may be enforced separately from the insolvency proceeding[721] and such a position is confirmed by the People's Supreme Court's Provision on Arrest of Ship and Judicial Sale (Draft for comments).[722] If this analogy can be successfully made, a maritime lien holder would be able to remove 'his property', the ship, from the 'pool', namely the limitation fund. But the difficulty is, under the tonnage limitation system, the limitation fund is a nominal fund based on monetary calculation.

Whether or not the above approach should be allowed is dependent on the policy consideration of the jurisdiction. In a jurisdiction that is keen to protect maritime claimants' interests, the legislature will attempt to allow the maritime lien to be enforced separately from limitation proceeding; or *vice versa*. In consideration of the Chinese law position, the Chinese law makers still incline to protect shipowners' interest notwithstanding that the commodity trade are becoming more and more important nowadays.[723] This position is evident by a set of guidelines published in September 2014 to support shipowners and shipping companies.[724] These guidelines consisted of tax and other regulatory reforms for the purpose of pushing shipping firms to upgrade

[720] See Chapter VI, 6.4.1.3.

[721] One example can be the decision of *Kyeong Sig Lee* v. *Cho Yang Shipping Co. Ltd* as reported in *Annual of China Maritime Trial* 2003. The defendant, Cho Yang Shipping Co. was wound up by order of a Korean Court in September 2001. Meanwhile the defendant's vessel, the *Korean Pearl* was arrested by the Qingdao Port Authority for her harbour dues. A public notice was given for the purpose of registration of claims. The claimant, Kyeong Sig Lee, who was the chief engineer of the Korean Pearl, registered his claims with Qingdao Maritime Court for unpaid wages and severance pay. According to Article 22 of the Chinese Maritime Code, it was held by the Court that the Kyeong Sig Lee's claim was secured by a maritime lien (the claim for severance pay was held not included in the wages maritime lien and was therefore entitled to take priority in getting the payment out of the proceeds of the ship. Moreover, the owner's liquidator's petition for stay of the proceedings in China was not supported by the Court.

[722] Article 25, Provisions on Arrest of Ship and Judicial Sale (Draft for Comments).

[723] E'Xiang Wan and *et al* (Eds.), *Understand and Application of Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims* (Dalian: Dalian Maritime University Press 2013) 15.

[724] Brenda Goh, 'China outlines plan to modernise shipping industry, shares jump' Reuters, <http://uk.reuters.com/article/2014/09/03/uk-china-shipping-idUKKBN0GY0FW20140903 > accessed on 01 March 2015.

and modernise their fleets.[725] In addition, the fact that the limit of shipowners' liability has been kept at a low level in China since 1992[726] whereas the maritime liens are limited to a small number of claims indicates that China's shipping policy remain committed to promoting shipowners' position and the interests of maritime claimants are of secondary concern. Therefore, under Chinese law, maritime liens should be reconciled with the limitation regime by means of surrendering their operation to the limitation proceeding. However, two obstacles exist under Chinese law. First, the overlap between maritime liens and limitation of liability under Chinese law is wider than that under English law; and second, maritime liens do not extinct after the establishment of a limitation fund. Then next question is how the Chinese maritime law shall be reformed so that these two obstacles could be overcome.

8.3 Reform of Chinese Maritime Law

In this section, suggestions will be made on those aspects which need to be reformed under Chinese maritime law in order to reconcile maritime liens and limitation of liability for maritime claims.

8.3.1 Definition of maritime lien

For the purpose of thesis, it is not the aim to suggest a new definition of maritime lien under Chinese but suggestion will be given on the basis of Article 21 of the Chinese Maritime Code in order to make it reflect all legal characteristics of maritime liens. Article 21 of the Maritime Code 1992 defines a maritime lien as 'the right of the claimant, subject to the provisions of Article 22 of this Code, to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claims'.[727] The definition in Article 21 only reflects the priority feature of the maritime lien; it does not cover the feature that the maritime lien travels with the vessel surviving its conventional sale and the feature that the maritime lien remains inchoate until it is enforced by arrest of the ship. The latter two

[725] *Ibid.*
[726] Article 210, Chinese Maritime Code 1992. This article is identical with Article 6 of the 1976 Limitation Convention.
[727] Article 22, Chinese Maritime Code 1992.

features were provided for in Article 26 and Article 28 of the Maritime Code.[728] It may be suggested that Articles 21, 26 and 28 shall be merged into one article which provides a more comprehensive definition of maritime liens under Chinese law.

By having such a comprehensive definition, the characteristics and functions of maritime liens would be reflected. Furthermore, it is submitted that a new article shall be inserted at the beginning of Chapter II of the Maritime Code entitled 'Real Right of Ships'.[729] The new article is submitted to be a general provision which provides that 'real rights of ship shall include ownership of ships, mortgages of ships, maritime liens and possessory liens of ships.'[730] By virtue of this new article, the position of maritime liens will be clearer under Chinese law. Included as a real right on the ship, a maritime lien will be without question categorized as a security over the ship, which is in line with Chinese maritime law practice. Although Chinese law prioritise limitation of liability over maritime liens, confirming the nature of maritime liens as security rights will enhance maritime lien holders' position. In other words, the maritime lien holder may lose his priority in the limitation proceeding but he will have better protection where the shipowner is insolvent. In this way, a balance between shipowners and maritime claimants would appear to be achieved.

8.3.2 Extinction of maritime liens

According to Article 29 of the Chinese Maritime Code, there are three circumstances under which a maritime lien is extinguished: (1) the maritime claim attached by a maritime lien has not been enforced within one year of the existence of such maritime lien;[731](2) The ship in question has been the subject of a forced sale by the court;[732] and

[728] Article 26 of the Chinese Maritime Code provides that:
'*Maritime liens shall not be extinguished by virtue of the transfer of the ownership of the ship, except those that have not been enforced within 60 days of a public notice on the transfer of the ownership of the ship made by a court at the request of the transferee when the transfer was effected.*'
Article 28 of the Chinese Maritime Code provides that:
A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien.
[729] The current title of Chapter II of the Chinese Maritime Code is 'Ships'. When the maritime code was made, the Property Law of PRC had not been issued so there was no legal background for the real right of ships. For this reason, the chapter was entitled as 'ships' instead.
[730] Yuzhuo Si, Zhengliang Hu and others (ed), *Maritime Code of China: Drafted Revision, Reference and Explanations*, Dalian Maritime University Press, 2003.
[731] Article 29(1), Chinese Maritime Code 1992.
[732] Article 29(2), Chinese Maritime Code 1992.

(3) The ship has been lost.[733] Apparently, the constitution of a limitation fund does not belong any of the three circumstances as provided in Article 29 of the Maritime Code. Besides these three modes, it is submitted that the maritime lien may also be extinguished by provision of security or by satisfaction of claims under Chinese law.[734] It is arguable that constitution of a limitation fund, which represents the maximum liability of the shipowner, should be regarded as a form of security provided by the defendant. However, there seems no clear authority supporting this point of view. It is unclear whether or not a limitation fund falls within the meaning of 'maritime security' as provided in Article 93 of the Chinese Maritime Procedure Law.[735] In terms of satisfaction of claims, Article 177 of the Property Law of the People's Republic of China 2007 provides that a security interest shall extinguish where principal claim extinguishes.[736] This provision arguably provides a legal basis for the proposition that the establishment of a limitation fund should extinguish a maritime lien that is subject to the limitation regime. However, two questions would arise. Firstly, should a maritime lien be regarded as a security interest under Chinese law? It is mentioned in section 4.3.5 that the procedure theory suits maritime liens under Chinese law better than the personification theory. It follows that a maritime lien should only be a method of compelling the appearance of the defendant rather than a substantive security interest. Furthermore, Article 23 of the Chinese Maritime Procedure Law 1999 provides that arrest of sister ships is only not available for claims in respect of ownership or possession of the vessel.[737] This suggests that, under Chinese law, a claimant may arrest a sister ship for a claim secured by a maritime lien, which is different from position of Section 21 (3) of Senior Court Act 1981 under English law.[738] In this sense, a maritime lien under Chinese law does not have the characteristic of a proprietary right and

[733] Article 29(3), Chinese Maritime Code 1992.

[734] Si Yuzhuo and Li Zhiwen (Eds.), *Study on the Theories of Chinese Maritime Law*(Beijing: Peking University Press 2009) 111-115. The editors of the book list seven circumstances under which the maritime lien will be extinguished including: satisfaction of claims, loss of the ship, delay in enforcement, delay in suit, judicial sale, confiscation of ship, and provision of security.

[735] Chapter IV, 4.5.3.

[736] Article 177 of the Chinese Property Law provides for three circumstances under which a security interest extinct, namely (1) the principal claim extinguishes, (2) the security interest is enforced, and (3) the creditor waives the security interest.

[737] Article 23, para 2 of the Chinese Maritime Procedure Law provides that
'*The Maritime courts may arrest other vessels that, at the time of the arrest, are owned by the owner, demise charterer, time charterer, or voyage charterer, who is liable for the maritime claim, except in cases where the claims are in respect of ownership or possession of the vessel.*'

[738] Section 21(3) of the Senior Court Act 1981 provides that
'*In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.*'

therefore should not be regarded as a security interest. If the intention of the drafters of the Chinese Maritime Code is to categorise a maritime lien as a security interest, an explicit provision is expected to be inserted into the Code. Secondly, should the constitution of a limitation fund be regarded as satisfaction of potential claims? Although a limitation fund represents the maximum liability of the shipowners, shipowners' limitation of liability might be debarred if it is proved that the loss resulted from their act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.[739] Thus, the establishment of a limitation fund does not necessarily mean that all the potentials claims will be satisfied by the fund.

Therefore, it seems uncertain whether constitution of a limitation fund will extinguish maritime liens securing claims subject to limitation of liability. In terms of the result, the limitation fund has the effect of debarring maritime liens from enforcement. An article may be suggested to insert in the Maritime Code to clarify the situation, which stipulates the constitution of limitation of liability shall extinguish the maritime liens. A further question would arise, in the case where there is no limitation fund constituted, will maritime liens be extinguished by simply invoke limitation of liability as a defence? In such a case, none of the above mentioned circumstances which extinguish maritime liens would arise. For the purpose of certainty, it is better to keep the situation where a limitation fund is constituted same as the situation where no limitation fund is constituted. In this regard, it is necessary to provide in the Maritime Code that, once limitation of liability is invoked, maritime liens subject to limitation shall be extinguished as well. Nevertheless, it is noteworthy that where the shipowner is proved to be not entitled to limit his liability, those extinguished maritime liens shall be retrieved.[740]

8.3.3 Overlap between maritime liens and limitation of liability

The overlap of maritime liens and limitation of liability under Chinese law exists in claims for loss of life or personal injuries and claims for loss of or damage to property occurring in connection with the operation of the ship. Such overlap of maritime liens

[739] Article 209, Chinese Maritime Code 1992.
[740] Following the 1976 Limitation Convention and its 1996 protocol, shipowner's limitation of liability would appear also very difficult to break under Chinese Maritime Code.

and limitation of liability existing in the Chinese Maritime Code is also a reflection of the overlap between the 1976 Limitation Convention and the 1993 Maritime Liens and Mortgage Convention. The overlap between maritime liens and limitation of liability will not only cause confusion for the enforcement of those maritime liens subject to the limitation framework but also will have impact on those non-limitation maritime lien holders.

Article 22 of the Chinese Maritime Code 1992 provides that claims in respect of '*loss of life or personal injury occurred in the operation of the ship*' and '*compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship*' give rise to maritime liens. Article 207 of the Chinese Maritime Code provides that claims in respect of '*loss of life or personal injury and 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), as well as consequential damages resulting therefrom*' are subject to limitation of liability. The wordings of these two articles are not identical. The differences between the two articles will possibly make some of the personal injury lien holders and property damage lien holder not subject to the limitation framework. In this case, it will make the ranking of maritime liens very complicated. If the Chinese legislature attempts to absorb maritime liens for personal injury and property damage done by a ship, a better approach is to make these two articles identical so that the complicated ranking of maritime liens may be avoided. China is not a state member of either the 1976 Limitation Convention or the 1993 Maritime Lien and Mortgage Convention; those provision incorporated from the two conventions do not have binding effect in China and therefore, there is no difficulties for Chinese legislature to change the wording of Articles 22 and 207 of the Maritime Code.

8.3.4 Procedure of limitation of liability

According to Article 30 of the Chinese Maritime Code, the provisions of maritime liens shall not affect any of the provisions in Chapter XI of the Chinese Maritime Code. However, since Chapter XI does not provide for the ranking of maritime claims in the situation of no limitation fund, provisions of maritime liens may not be said to have impact on Chapter XI. That is to say, maritime liens may possibly to operate in the situation where no limitation fund is established. In addition, the Chinese Maritime Law

does not incorporate Article 10(2) of the 1976 Convention and there is no similar provision in the Maritime Code either. As a result, unlike the English law position, it cannot be inferred that the distribution rule of a limitation fund shall apply to the situation where there is no such fund. On this basis, if it is the intention of the draftsmen that the limitation amount shall be distributed in the same no matter a limitation fund is constituted or not, a provision of such an effect shall be inserted in Chapter XI of the Maritime Code.

8.4 Recommendations on revising the Chinese maritime law

8.4.1 Chinese Maritime Code 1992

On the basis of the above paragraphs, the proposed draft amendments to the Chinese Maritime Code are as follows.[741]

Article 21 of the Chinese Maritime Code

A maritime lien is the right of the claimant, subject to the provisions of Article 22 of this Law, to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim. **Such a right shall be enforced by the court by arresting the ship that gave rise to the said maritime lien and shall not be extinguished by virtue of the transfer of the ownership of the ship, except those that have not been enforced within 60 days of a public notice on the transfer of the ownership of the ship made by a court at the request of the transferee when the transfer was effected.**

A maritime lien holder shall be regarded as a secured creditor to the liable person.[742]

Article 29 of the Chinese Maritime Code

Article 29 A maritime lien shall, except as provided for in **Article 21** of this Code, be extinguished under one of the following circumstances:

[741] The bold texts are amendments suggested by the author..
[742] It has been suggested in section 8.2.3 that an explicit provision confirming the position of a maritime lien as a security interest will need to be inserted.

(1)……;

(2)……; and

(3)……;

For a maritime lien securing a claim subject to limitation of liability as provided in Article 207 of this Code, such a lien shall be extinguished where a limitation fund is constituted or limitation of liability is invoked without constitution of a limitation fund; In the circumstances where the liable person is not entitled to limit his liability, such a maritime lien should be retrieved and may be enforced separately from the limitation proceeding. [743]

……

Article 30 of the Chinese Maritime Code

Article 30 The provisions of this Section shall not affect the implementation of the limitation of liability for maritime claims provided for in Chapter XI of this Law.

Where a limitation fund is constituted, the maritime claimant may not apply for arrest of the ship for the purpose of realising a maritime lien which is based on a maritime claim subject to limitation of liability; the ship which has already been arrested on the basis of such a maritime lien shall be released and the claim is transferred to against the limitation fund.

8.4.2 Chinese Maritime Procedure Law 1999

Hereunder are the proposed draft amendments to the Chinese Maritime procedure Law 1999 on relevant provisions:

Article 101

Where limitation of liability is applied according to law after the occurrence of a maritime accident, the **shipowner, charter, manager, operator, salvor,** and insurer may apply to the maritime court to constitute a limitation fund for maritime claims liability.

[743] This amendment is based on the analysis provided in section 8.2.3 above.

……

Application for establishment of limitation funds may be submitted prior to or during the proceedings, but such application must be made before the first instance judgment is made. **Where there is no limitation fund established, the liable person may still invoke limitation of liability according to Article 207 of the Maritime Code of People's Republic of China and the provisions of Article 210 of the Maritime Code shall apply correspondingly.**

8.5 Contribution to the knowledge

To sum up the above, this thesis has raised the following questions:

(a) What is the policy consideration of maritime liens and how is such consideration reflected in the enforcement of maritime liens?
(b) What is the policy consideration of limitation of liability for maritime claims and how is such consideration reflected in the limitation proceeding?
(c) What is the relationship between maritime liens and limitation of liability for maritime claims?
(d) What are the conflicts between maritime liens and limitation of liability for maritime claims?
(e) Have the conflicts been resolved by so-called 'conflict clauses'? How should those clauses be interpreted?
(f) Does the limitation proceeding extinct maritime liens subject to the limitation regime? Can maritime liens survive the limitation proceeding in the same way as it survives insolvency proceedings?
(g) How should maritime liens be reconciled under Chinese law?
(h) How should maritime liens be reconciled under English law?

These questions have not been thoroughly considered by other academics before this

research. Thus, this thesis provides answers to the above questions as the contribution to knowledge. The answers are summarised as follows:

(1) Through the historical review, it has been found that the consideration underpinning the maritime lien is to support the shipowners and to encourage seaborne trade. Such consideration has been altered to support maritime claimant under contemporary legal framework in that a maritime lien is affiliated to maritime property providing claimants with security for claims; a maritime lien helps the lien holder establish jurisdiction on substance; and a maritime lien is considered as a privileged claim allowing lien holders to rank before other claimants.

(2) The policy reason behind limitation of liability for maritime claims is considered as being the need to protect shipowners so as to encourage investment in trading ships. This approach is true under both value based limitation systems and tonnage limitation system. However, the tonnage limitation system appears to be more suited to the current social and economic conditions, which is evident by the wide-spread 1976 Limitation Convention. Under the tonnage limitation system, priority of maritime claims is of secondary concern and a proportional rule is applied in distributing the limitation fund.

(3) The relationship between maritime liens and limitation of liability for maritime claims lies in the personification of ship. Under value based limitation systems, maritime liens and limitation of liability are integrated and the ship is both the source and limit of liability. However, such a relationship does not exist under a tonnage limitation system. In a tonnage limitation system, a separate limitation fund may be established which will restrict the operation of maritime liens.

(4) The enforcement of tonnage limitation and maritime liens are inconsistent in certain ways and the regime of limitation of liability apparently may prevent the maritime lien from operating. This is because of the opposed policy consideration of each regime and the overlap of the two regimes.

(5) Generally speaking, the conflict clauses have their effect by means of depriving the application of maritime liens in the limitation proceedings. However, none of these clauses provided an all-around solution to the conflicts. Particularly, the

conflict clause in Chinese Maritime Code is suggested to be amended so that it could provide a theoretical foundation for reconciling maritime liens and limitation of liability under Chinese law.

(6) Whether or not maritime liens should survive the limitation proceeding depends on the policy considerations of different countries. In a pro-shipowner country, such as China and the UK, the enforcement of maritime liens shall be restricted and limitation of liability shall take precedence over the liens.

(7) Reforms of Chinese maritime law have been suggested as to reconcile maritime liens and limitation of liability for maritime claims in China. The reforms include amending relevant provisions in the Chinese Maritime Code and Maritime Procedure Law so that the limitation proceeding has the effect of extinguishing maritime liens that are subject to the limitation regime.

(8) Reconciling maritime liens and limitation of liability for maritime claims under English law can be achieved by wider application of the decision of *The Indian Grace* (No.2). It is submitted that the decision of The Indian Grace (No.2) shall apply to a maritime lien arising from damage done by a ship. In this sense, a damage maritime lien will be channelled into an *in personam* proceeding under which limitation of liability would arise.

Bibliography

Books

Francesco Berlingieri, *Berlingieri on Arrest of Ships*: a commentary on the 1952 and 1999 arrest conventions (5th ed.), 2011, London: Informa

Vanessa Finch, *Corporate Insolvency Law: Perspective and Principles* (2nd ed.), 2009, Cambridge: Cambridge University Press

R.M. Goode (Royston Miles), *Goode on Commercial Law* (4th ed.), 2010, London: Penguin

Patrick Griggs, Richard Williams, Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th ed.), 2005, Richmond LLP

Mingrui Guo, Xiang Zhong, and Yanli Si, *A Study on Privileges*, 2004, Beijing: Peking University Press

Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions*, 2011, London and New York: Routledge

Lixin He and Meishan Xie, *Limitation of Liability for Maritime Claims*, 2008, Xiamen: Xiamen University Press

Institute of Maritime Law, University of Southampton, *Limitation of Shipowners' Liability: The New Law*, 1986, Sweet & Maxwell, London

John Lowry and Loukas Mistelis (Eds.), *Commercial Law: Perspective and Practice*, 2005, Lexis Nexis Butterworths

D.C. Jackson, *Enforcement of Maritime Claims* (4th ed.), 2005, Richmond LLP

Loenard A. Jones, *A Treatise on the Law of Liens*, 1894, Boston, Houghton: Mifflin and Co, Vol. 1&2

Hai Li, *A Study on Real Rights in Ships*, 2002, Beijing: Law Press

Aleka Mandaraka-Sheppard, *Modern Maritime Law* (2nd edn.), 2007, Routledge. Cavendish

Kenneth C. McGuffie, *Marsden on the Law of Collisions at Sea* (10th edn.), 1953, London: Stevens

Nigel Meeson and John A. Kimbell, *Admiralty Jurisdiction and Practice* (4th edn.), 2011, London : Lloyd's of London Press

Oya Z. Özçayair, *Liability for Oil Pollution and Collision*, 1998, Informa Law

Griffith Price, *The Law of Maritime Liens*, 1940, London: Sweet & Maxwell

Barnabas W.B. Reynolds, Michael N. Tsimplis, *Shipowners' Limitation of Liability*, 2012, London: Kluwer Law International

Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law*, 1930, Williams Hein & Company

Yuzhuo Si, Zhengliang Hu and others (Eds), *Maritime Code of China: Drafted Revision, Reference and Explanations*, Dalian Maritime University Press

Yuzhuo Si and Zhiwen Li (Eds.), *Study on the Theories of Chinese Maritime Law*, 2009, Beijing: Peking University Press

William Tetley, *Maritime Liens and Claims* (2nd edn.), 1998, Montreal, International Shipping Publications

D.R.Thomas, *Maritime Liens*, Stevens & Sons, London, 1980

Craig C Wappett, David E Allen, *Securities over Personal Property*, 1999, Sydney: Butterworths

E'Xiang Wan and *et al* (Eds.), *Understanding and Application of The Several Provisions of the Supreme People's Court on the Trial of Cases of Disputes over the Limitation of Liability for Maritime Claims*, 2013, Dalian: Dalian Maritime University

Press

Gendong Xu, Guohua Wang and Kai Xiao, *Private International Law*, 2005, Beijing: Tsinghua University Press

F. L. Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* , 1971, Cambridge : Cambridge University Press

Sarah C. Derrington, James M. Turner, *The Law and Practice of Admiralty Matters*, 2007, Oxford; New York: Oxford University Press

Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2004, St. Paul, MN : Thomson/West

Herbert R. Baer, Admiralty Law of the Supreme Court, 1979, Charlottesville, Va : Michie Co

Verónica Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law*, 2011, Oxford: Oxford University Press

Xia Chen, *Limitation of Liability for Maritime Claims: A Study of U.S.Law, Chinese Law and International Conventions*, 2001, Hague, Netherlands: Kluwer Law International

Robert Force, A. N. Yiannopoulos, Martin Davies, *Admiralty and Maritime Law*, 2006, Washington D.C.: Beard Books

Len Sealy, David Milman, *Annotated Guide to the Insolvency Legislation* (7th edn.), 2014, London: Sweet & Maxwell

Look Chan Ho (Ed), *Cross-border Insolvency: a commentary on the UNCITRAL model law* (3rd edn.), 2012, London: Globe Business Publishing

Ian Fletcher, *Insolvency in Private International Law: national and international approaches* (2nd edn.), 2007, Oxford: Oxford University Press

Sharon Li, Colin Ingram (Eds), *Maritime Law and Policy in China*, 2002, United Kingdom: Cavendish Publishing Limited

Francesco Berlingieri, *International Maritime Conventions Volumes I & II*, 2014, Informa Law from Routledge

Sir Travers Twiss (Ed), *Monumenta juridica : the Black Book of the Admiralty : with an appendix*, 1871-1876, London : Longman.

Book Chapters

Professor Erling Selvig, 'An Introduction to the 1976 Convention' (1986). In Institute of Maritime Law, *Limitation of Shipowners' Liability: The New Law*, Sweet & Maxwell, London (pp3-18)

Geoffrey Brice, Q.C., 'The Scope of the Limitation Action' (1986) In Institute of Maritime Law, *Limitation of Shipowners' Liability: The New Law*, Sweet & Maxwell, London (pp18-33)

Professor David Jackson, 'The 1976 Convention and International Uniformity of Rules' (1986) In Institute of Maritime Law, *Limitation of Shipowners' Liability: The New Law*, Sweet & Maxwell, London (pp126-144)

Sarah Worthington, 'Priprietary Remedies and Insolvency policy: The Need for a New Approach' (2005) In John Lowry and Loukas Mistelis (Eds.), *Commercial Law: Perspective and Practice*, Lexis Nexis Butterworths (pp191-206)

Journal Articles

David Gray Calson, 'Reconciling Maritime Liens and the Limitation of Liability Act'

Paul Macarius Hebert, 'The Origin and Nature of Maritime Liens', Tul. L. Rev. 1929-1930, p38

Hilton Staniland, 'Roman Law as the Oringin of the Maritime Lien and the Action in Rem in the South Africa Admiralty Court', Fundamina: a Journal of Legal History, (2), 285-297

Huanning Wu, 'China and Maritime Law', (1988) 5 MLAANZ

John Hare, ‘Limitation of Liability – A Nigerian Perspective’, paper delivered at the eighth annual Maritime Seminar for Judges in Nigeria in 2004

Gotthard Gauci, ‘Limitation of Liability in Maritime Law: an anachronism?’ (1995) Marine Policy, Vol. 19, No. 1

Patrick Griggs, ‘Limitation of Liability for Maritime Claims: the Search for International Uniformity’, [1997] LMCLQ, 369

James J. Donovan, ‘The Origins and Development of Limitation of Shipowners’ Liability’ 53 Tul. L. Rev. 999 1978-1979

Rein Alex, ‘International Variations on Concepts of Limitation of Liability’ 53 Tul. L. Rev. 1259, 1978-1979.

Arthur M. Boal, ‘Efforts to Achieve International Uniformity of Laws Relating to the Limitation of Shipowners’ Liability’, 53 Tul. L. Rev. 1277.

David Steel, ‘Ships are different: the case for limitation of liability’, [1995] LMCLQ, p77

Lord Mustill, ‘Ships are different – or are they?’ [1993] LMCLQ, p490

Ying Jiang, Bo Wang, ‘Enforcement of Maritime Liens under the Insolvency Proceeding’, Management & Technolosy of SME, 2009, Vol. 8

Tingzhong Fu, ‘Value Conflict of Maritime Lien and Limitation of Liability for Maritime Claims and Way to Harmonize’, Chinese Journal of Law, 2013, Vol. 6

Tingzhong Fu, ‘Fundamental Principles and Methods of Reforming the Maritime Code of People’s Republic of China’, Morden Law Science, 2006, Vol. 5

Tingzhong Fu, Wen-jun Wang, ‘The Nature of Substitution about Subject Matter of Maritime Lien’, Annual of China Maritime Law, 2006, Vol. 00

Steven Rares, ‘Maritime Liens, Renvoi and Conflicts of Law: the far from Halcyon Isle’ [2014] LMCLQ, p183

George L Varian, ‘Rank and Priority of Maritime Liens’, 47 Tul. L. Rev. 751 (1972-1973)

Raymond P Hayden, Kipp C Leland, ‘The Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens’, 79 Tul. L. Rev. 1227 (2004-2005)

Frank G Harmon, ‘Discharge and Waiver of Maritime Liens’, 47 Tul. L. Rev. 786 (1972-1973)

Jan M Sandstrom, ‘The Changing International Concept of the Maritime Lien As a Security Right’, 47 Tul. L. Rev. 681 (1972-1973)

Andrew Winton, ‘Limitation of Liability and the Ownership Structure of the Firm’, The Journal of Finance, 1993, Vol. 48, Issue 2

Kevin X Li, ‘Development of Maritime Limitation of Liability in China (1993-2011)’, 42 Hong Kong L.J. 253, 2012

Norman A Martínez Gutiérrez, ‘New Global Limits of Liability for Maritime Claims’, International Community Law Review, 2013, Vol. 15, Issue 3

Donald C Greenman, ‘Limitation of Liability: A Critical Analysis of United States Law in an International Setting’, 57 Tul. L. Rev. 1139 (1982-1983)

Rosalind Mason, ‘Cross-border Insolvency and Legal Trans-nationalisation’, International Insolvency Review, 2012, Vol. 21, Issue 2

S. Chandra Mohan, ‘Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?’ International Insolvency Review, 2012, Volume 21, Issue 3, pages 199–223

Yuzhuo Si, ‘Research on the Pre-emption Doctrine of Limitation of Liability for Maritime Claims——the Legal Character of Right of Limitation of Liability for Maritime Claims’, Annual of China Maritime Law, 2011, Vol. 02

Phoebe Hathorn, ‘Comment: Cross-Border Insolvency in the Maritime Context: The

United States' Universalism vs. Singapore's Territorialism', 38 Tul. Mar. L. J. 239, 2013

Lixing Zhang, 'Shipping Law and Practice in China: Legal Analysis of the Draft Maritime Code and Maritime Jurisdiction', 1990, 14 Tul. Mar. L. J. 209

Online Resources

History of Maritime Law, <http://www.historyoflaw.info/maritime-law-history.html>

IMO press briefings, <http://www.imo.org/MediaCentre/PressBriefings/Pages/12-LLMC-Prot-limits.aspx>

John M. Kriz, 'Ship Mortgages, Maritime Liens, and Their Enforcement: The Brussels Conventions of 1926 and 1952', < http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1894&context=dlj>

Graydon S. Staring, 'The Roots and False Aspersions of Shiowner's Limitation of Liability,' 2008 <http://works.bepress.com/graydon_staring/22>

French Civil Code, <http://www.napoleon-series.org/research/government/c_code.html>

UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf>

CMI, 'Jurisprudence on Maritime Conventions: The Limitation Convention (LLMC) 1976', <http://www.comitemaritime.org/The-Limitation-Convention-%28LLMC%29-1976/0,27104,110432,00.html >

Brenda Goh, 'China outlines plan to modernise shipping industry, shares jump' Reuters, http://uk.reuters.com/article/2014/09/03/uk-china-shipping-idUKKBN0GY0FW20140903

Thesis and Dissertations

Hilton Staniland, 'A Comparative Analysis of Maritime Lien', (1999) Ph.D. Thesis,

University of Southampton, UK

Hong Shi, ‘Perfection of the Arrest of Ships in China’, (2002) LLM dissertation, Dalian Maritime University, China

Oscar Egerström, ‘Securing maritime claims-The ship arrest regimes in Sweden and England’ (2005) Master Thesis, University of Lund, Sweden

CMI Instruments

CMI Year Book 1993

CMI Year Book 1996

CMI Year Book 2009

CMI Year Book 2013

CMI Conference Report 1962 Athens

Francesco Berlingier, CMI Lisboan Report 1985

Francesco Berlingieri, *Travaux Preparatoirse of the LLMC 1976 and of the Protocol of 1996*, Comite Maritime International

Appendix I

Application for Pre-suit Arrest of Ship (Sample)

Applicant: Shanghai Elephant Import and Export Co. Ltd.

Address of domicile: No.123 Nanjing Road, Shanghai Post Code: 200002

Legal Representative: Zhang San, chairman of the board

Respondent: Shipowner or bareboat charter of M/V Whale

Content of Application

Apply to arrest M/V Whale to seek 100,000 USD as security for the claim.

Facts and Reasons

……

Regards,

Shanghai Admiralty Court

Applicant: Shanghai Elephant Import and Export Co. Ltd.

05/02/2006

Appendix II

Maritime Code of People's Republic of China 1992 Provisions

Chapter II Ships

Section 3 Maritime Liens

Article 21 A maritime lien is the right of the claimant, subject to the provisions of Article 22 of this Code, to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim.

Article 22 The following maritime claims shall be entitled to maritime liens:

(1) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts;

(2) Claims in respect of loss of life or personal injury occurred in the operation of the ship;

(3) Payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges;

(4) Payment claims for salvage payment;

(5) Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship.

Compensation claims for oil pollution damage caused by a ship carrying more than 2,000 tons of oil in bulk as cargo that has a valid certificate attesting that the ship has oil pollution liability insurance coverage or other appropriate financial security are not within the scope of sub-paragraph (5) of the preceding paragraph.

Article 23 The maritime claims set out in paragraph 1 of Article 22 shall be satisfied in the order listed. However, any of the maritime claims set out in sub-paragraph(4) arising later than those under sub-paragraph (1) through (3) shall have priority over those under sub-paragraph (1) through (3). In case there are more than two maritime claims under sub-paragraphs (1),(2),(3) or (5) of paragraph 1 of Article 22, they shall be satisfied at the same time regardless of their respective occurrences; where they could not be paid in full, they shall be paid in proportion. Should there be more than two maritime claims under subparagraph (4), those arising later shall be satisfied first.

Article 24 The legal costs for enforcing the maritime liens, the expenses for preserving and selling the ship, the expenses for distribution of the proceeds of sale and other expenses incurred for the common interests of the claimants, shall be deducted and paid first from the proceeds of the auction sale of the ship.

Article 25 A maritime lien shall have priority over a possessory lien, and a possessory lien shall have priority over ship mortgage.

The possessory lien referred to in the preceding paragraph means the right of the ship builder or repairer to secure the building or repairing cost of the ship by means of detaining the ship in his possession when the other party to the contract fails in the performance thereof. The possessory lien shall be extinguished when the ship builder or repairer no longer possesses the ship he has built or repaired.

Article 26 Maritime liens shall not be extinguished by virtue of the transfer of the ownership of the ship, except those that have not been enforced within 60 days of a public notice on the transfer of the ownership of the ship made by a court at the request of the transferee when the transfer was effected.

Article 27 In case the maritime claims provided for in Article 22 of this Code are transferred, the maritime liens attached thereto shall be transferred accordingly.

Article 28 A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien.

Article 29 A maritime lien shall, except as provided for in Article 26 of this Code, be extinguished under one of the following circumstances:

(1) The maritime claim attached by a maritime lien has not been enforced within one year of the existence of such maritime lien;

(2) The ship in question has been the subject of a forced sale by the court; (3) The ship has been lost.

The period of one year specified in sub-paragraph (1) of the preceding paragraph shall not be suspended or interrupted.

Article 30 The provisions of this Section shall not affect the implementation of the limitation of liability for maritime claims provided for in Chapter XI of this Code.

Chapter XI Limitation of Liability for Maritime Claims

Article 204 Shipowners and salvors may limit their liability in accordance with the provisions of this Chapter for claims set out in Article 207 of this Code.

The shipowners referred to in the preceding paragraph shall include the charterer and the operator of a ship.

Article 205 If the claims set out in Article 207 of this Code are not made against shipowners or salvors themselves but against persons for whose act, neglect or default the shipowners or salvors are responsible, such persons may limit their liability in accordance with the provisions of this Chapter.

Article 206 Where the assured may limit his liability in accordance with the provisions of this Chapter, the insurer liable for the maritime claims shall be entitled to the limitation of liability under this Chapter to the same extent as the assured.

Article 207 Except as provided otherwise in Articles 208 and 209 of this Code, with respect to the following maritime claims, the person liable may limit his liability in accordance with the provisions of this Chapter, whatever the basis of liability may be:

(1) 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, as well as consequential damages resulting therefrom;

(2) Claims in respect of loss resulting from delay in delivery in the carriage of goods by sea or from delay in the arrival of passengers or their luggage; (3) Claims in respect of other loss resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations;

(4) Claims of a person other than the person liable in respect of measures taken to avert or minimize loss for which the person liable may limit his liability in accordance with the provisions of this Chapter, and further loss caused by such measures.

All the claims set out in the preceding paragraph, whatever the way they are lodged, may be entitled to limitation of liability. However, with respect to the remuneration set out in sub-paragraph (4) for which the person liable pays as agreed upon in the contract, in relation to the obligation for payment, the person liable may not invoke the provisions on limitation of liability of this Article.

Article 208 The provisions of this Chapter shall not be applicable to the following claims:

(1) Claims for salvage payment or contribution in general average;

(2) Claims for oil pollution damage under the International Convention on Civil Liability for Oil Pollution Damage to which the People's Republic of China is a party;

(3) Claims for nuclear damage under the International Convention on Limitation of Liability for Nuclear Damage to which the People's Republic of China is a party;

(4) Claims against the shipowner of a nuclear ship for nuclear damage;

(5) Claims by the servants of the shipowner or salvor, if under the law governing the contract of employment, the shipowner or salvor is not entitled to limit his liability or if he is by such law only permitted to limit his liability to an amount greater than that provided for in this Chapter.

Article 209 A person liable shall not be entitled to limit his liability in accordance with

the provisions of this Chapter, if it is proved that the loss resulted from his act or omission done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

Article 210 The limitation of liability for maritime claims, except as otherwise provided for in Article 211 of this Code, shall be calculated as follows:

(1) In respect of claims for loss of life or personal injury:

a) 333,000 Units of Account for a ship with a gross tonnage ranging from 300 to 500 tons;

b) For a ship with a gross tonnage in excess of 500 tons, the limitation under a) above shall be applicable to the first 500 tons and the following amounts in addition to that set out under a) shall be applicable to the gross tonnage in excess of 500 tons:

For each ton from 501 to 3,000 tons: 500 Units of Account;

For each ton from 3,001 to 30,000 tons: 333 Units of Account;

For each ton from 30,001 to 70,000 tons: 250 Units of Account;

For each ton in excess of 70,000 tons: 167 Units of Account.

(2) In respect of claims other than that for loss of life or personal injury:

a) 167,000 Units of Account for a ship with a gross tonnage ranging from 300 to 500 tons; b) For a ship with a gross tonnage in excess of 500 tons, the limitation under a) above shall be applicable to the first 500 tons, and the following amounts in addition to that under a) shall be applicable to the part in excess of 500 tons:

For each ton from 501 to 30,000 tons: 167 Units of Account;

For each ton from 30,001 to 70,000 tons: 125 Units of Account;

For each ton in excess of 70,000 tons: 83 Units of Account.

(3) Where the amount calculated in accordance with sub-paragraph (1) above is

insufficient for payment of claims for loss of life or personal injury set out therein in full, the amount calculated in accordance with sub-paragraph (2) shall be available for payment of the unpaid balance of claims under sub-paragraph (1), and such unpaid balance shall rank rateably with claims set out under sub-paragraph (2).

(4) However, without prejudice to the right of claims for loss of life or personal injury under sub-paragraph (3), claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have priority over other claims under sub-paragraph (2).

(5) The limitation 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 gross tonnage of 1,500 tons.

The limitation of liability for ships with a gross tonnage not exceeding 300 tons and those engaging in transport services between the ports of the People's Republic of China as well as those for other coastal works shall be worked out by the competent authorities of transport and communications under the State Council and implemented after its being submitted to and approved by the State Council.

Article 211 In respect of claims for loss of life or personal injury to passengers carried by sea, the limitation of liability of the shipowner thereof shall be an amount of 46,666 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's relevant certificate, but the maximum amount of compensation shall not exceed 25,000,000 Units of Account.

The limitation of liability for claims for loss of life or personal injury to passengers carried by sea between the ports of the People's Republic of China shall be worked out by the competent authorities of transport and communications under the State Council and implemented after its being submitted to and approved by the State Council.

Article 212 The limitation of liability under Articles 210 and 211 of this Code shall apply to the aggregate of all claims that may arise on any given occasion against shipowners and salvors themselves, and any person for whose act, neglect or fault the shipowners and the salvors are responsible.

Article 213 Any person liable claiming the limitation of liability under this Code may constitute a limitation fund with a court having jurisdiction. The fund shall be constituted in the sum of such an amount set out respectively in Articles 210 and 211, together with the interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund.

Article 214 Where a limitation fund has been constituted by a person liable, any person having made a claim against the person liable may not exercise any right against any assets of the person liable. Where any ship or other property belonging to the person constituting the fund has been arrested or attached, or, where a security has been provided by such person, the court shall order without delay the release of the ship arrested or the property attached or the return of the security provided.

Article 215 Where a person entitled to limitation of liability under the provisions of this Chapter has a counter-claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Chapter shall only apply to the balance, if any.