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# JURISDICTION OVER SHIPOWNERS' LIMITATION OF LIABILITY PROCEEDINGS

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# INTRODUCTION

The system of shipowners' global limitation of liability was, as Hugo Grotius wrote in 1625,[1] praised as natural justice[2] or natural equity[3] in the Middle Ages and through the sixteenth and seventeenth centuries of the commercial revolution in the European maritime countries.[4] Indeed, such praise was taken for granted then in the eyes of a public international law scholar or a mercantilist to encourage the risky investment of capital in merchant shipping adventure by allowing the limitation of investors' personal liability.

However, in the course of the development of the statutory codification of shipowners' limitation of liability and the ensuing increase of judicial disputes surrounding maritime claims the doctrine of limited liability was re-defined as "for the tortious acts of the master . . . [it] appears to be founded in justice"[5] or as "[t]he principle of limited liability is, that full indemnity, the natural right of justice, shall be abridged for political reasons"[6] or as "limitation of liability is not a matter of justice, [but] [i]t is a rule of public policy which has its origin in history and its justification in convenience."[7]

These comments were still moderate euphemism without colour as compared with such extreme hostility as to criticise the rule as "Act of Parliament is sufficiently tyrannical as it is"[8] or as "[i]f shipowners really need an additional subsidy, Congress can give it to them without making injured seamen bear the cost."[9] Commentators also have argued variously to abolish or restrict the system of shipowners' limitation of liability.[10]

Nevertheless, the regime of shipowners' limitation of liability is most unlikely to be repealed by any of the countries that have adopted directly or indirectly one of the

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1 Grotius, infra Ch. 1 n.58.
2 4 Marsden, infra Ch. 1 n.12, at 130.
3 Baer, infra Ch. 1 n.57, at 332.
4 Donovan, infra Ch. 1 n.1, at 1002.
5 *The Rebecca*, 20 F. Cas. 373, 381 (No. 11, 619) (D. Me. 1831) (Ware, J.).
6 *The Amalia,* (1863) 1 Moo. N.S. 471, 473 (Dr. Lushington).
7 *The Bramley Moore*, [1963] 2 Ll. L.R. 429, 437 (CA) (Lord Denning, M.R.).
8 *The Ettrick,* (1881) 6 P.D. 127, 136 (C A) (Brett, L.J.).
9 *Maryland Casualty Co. v. Cushing,* 347 U.S. 409, 437 (1954) (Mr. Justice Black, dissenting).
10 Comment, *Shipowners' Limited Liability,* 3 Colum. J. L. & Soc. Probs. 105 (1967); Sprague, infra Ch. 1 n.1; Walton, *Pleasure Boat Owner Tort Liability in Admiralty: An Examination of the Limited Liability Act and a Proposal for Reform*, 50 S. Cal. L. Rev. 549 (1977); Tiffany, *Limitation of Liability and Pleasure Boats: 65 Years of Judicial Misinterpretation of the Intent of Congress,* 12 Transp. L. J. 249 (1981).

International Conventions on the Limitation of Liability of Shipowners and Others or the traditional system of shipowners' limitation of liability. In view of the trend in the development of the International Conventions to the present, the benefit of shipowners' limited liability has been extended in the scope of the maritime claims subject to limitation, in that of the persons entitled to limitation and as to the conditions of the conduct barring limitation of liability. The limits of the liability of shipowners and others are not exceptions in that their burden of liability has been diluted in accordance with the passage of time after a new Convention or amendment of the relevant statutes to increase the limits of liability had been adopted one or two decades ago. In particular, the success of shipowners' interests in obtaining the last goal of the subjective requirement for unbreakability of limitation (intent or recklessness test)[11] in the 1976 Convention, though not encompassing all maritime countries, was consummated on the occasion of the adoption of the 1996 Protocol to the 1976 Convention by completely diluting the increased burden of the limitation amount in the 1976 Convention from that of the 1957 Convention.

In the course of such developments, however, the uniformity of shipowners' limitation of liability has been split and looks unlikely to be resurrected at least in the near future under the conflicts of national interests. At the present the countries adopting in any form the system of shipowners' global limitation of liability for general maritime claims can be categorised into three groups: the 1976 Convention countries; the 1957 Convention countries;[12] and the others adopting independent systems outside the two Conventions.

It follows necessarily that seagoing vessels are always uncertain about where they may be exposed to accidents giving rise to maritime claims and by which jurisdiction of courts they may be governed. The shipowners and their interests would cope with such situations to minimise their loss whereas the claimants would strive to achieve the full recovery of their loss or damage as soon as possible. So far as the claims are subject to limitation of liability, from the start the competition for forum shopping to pre-empt jurisdiction favourable to each party would commence between the owners and the claimants.

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11 Moreover, the subjective test rather than the objective test is the majority opinion. Grime, *The Loss of the Right to Limit*, The New Law 102, 111 (1986); Cheka, *Conduct Barring Limitation*, 18 J. Mar. L. & Com. 487, 495-97 (1987); Gaskell, infra Ch. 1 n. 118, at 21-185.

12 However, with the passage of time the 1957 Convention countries will be absorbed into the States Parties of 1976 Convention. Meanwhile, the 1924 Limitation Convention is still maintained only in 3 Contracting States (infra Ch. 1 n. 200), but it is almost unlikely that this Convention should apply internationally.

Here, the owners would take a pre-emptive strike by commencing a limitation action if they think that the potential claims might exceed the limits of liability before the claimants are drawn "to the light" like "a moth".[13] As a matter of fact, the United States federal courts are exercising great influence in drawing forum shopping in maritime as well as non-maritime claims.

In addition to these global limitation regimes for general maritime claims, there have been developed the special limitation regimes for oil pollution claims (1969 CLC and 1992 CLC) and HNS claims (1996 HNS Convention). Thus, the old simple ship's value or monetary limitation regime has been diversified according to the groups of maritime claimes, enabling to cause not only the proliferation of limitation funds but also the international conflicts and competition of limitation jurisdiction. Nevertheless, these Limitation Conventions, whether general or special, do not contain any effective schemes to restrict or minimize the conflicts and competition of limitation jurisdiction even between the same Convention States, with a result that the limitation court cannot administer the limitation procedure effectively in terms of judicial economy and in the common interests of the parties. Although the 1968 Brussels Convention and the 1988 Lugano Convention (art. 6a each) have improved to provide for the equality of jurisdiction over liability and limitation actions, it is not only anomalous but also contrary to the principles of international uniformity for shipowners' limitation of liability regime, to provide for the limitation jurisdiction in such non-Limitation Conventions covering only the specific group of States on the globe. Moreover, even under the 1968 and 1988 Conventions, the concourse of all related limitable claims cannot be realized where a limitation fund has been established for multiple claimants involving international conflicts of jurisdiction amongst the Member States.

This thesis is intended, first, to explore and analyse the jurisdictional aspects of shipowners' limitation proceedings through intensive comparative study on the conflicts of limitation jurisdiction amongst the global Limitation Conventions (including special Limitation Conventions) and national laws either to implement them in their major Participating States or to regulate independently outside the Conventions,[14] secondly, to

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13 *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 WLR 730, 733 (CA 1982) (Lord Denning, M.R.).

14 It is not the purpose of this thesis to develop a detailed comparative study on the limitation jurisdiction aspects of the non-Convention states' national laws. However, the U.S forums with the background of the unique traditional limitation law and the huge shipping and trade market are greatly influencing the

survey and comment on how the case law has been developed with respect to such conflicts of limitation jurisdiction, and, thirdly, to explore the insufficiencies of the jurisdiction provisions in the Limitation Conventions and to propose some amendments thereto, thereby contributing to the common interests of the parties and judicial economy in limitation proceedings and further to the resurrection of the international uniformity in shipowners' limitation of liability regimes.

Chapter 1 treats of the origins and developments of shipowners' limitation of liability. While the origins could be traced to the maritime usage in the Middle Ages established at the seaports of the Mediterranean Sea, the Roman law was also traced to find whether it contained any germ of the system. After focusing on the major provisions of the *Consolato del Mare* pertaining to ship co-owners' limitation of liability, the writer explored briefly the ensuing codifications of the European maritime states in the sixteenth and seventeenth centuries. As compared with the Continental limitation regimes which are generally classified into the French abandonment system and the German execution system,[15] the English limitation regime started with the ship value limitation system in 1734 and developed into a monetary limitation regime while the U.S. limitation law was modelled on the English ship value system. In view of the predominance of the English monetary limitation regime in the developments of the Limitation Conventions its historic background was explored in depth while being generally compared with the U.S. counterpart to demonstrate why the latter has maintained its rigidity as an outsider of the Conventions. Further, this Chapter contains the brief introduction to the diversified developments of the Limitation Conventions because the contents of those Conventions determined the features of the respective limitation jurisdiction either in the Conventions themselves or in the national laws of the respective Convention States.

Chapter 2 covers the following contents:

1. Developing a comparative research into the conflicts of provisions between the Limitation Conventions and national laws as to whether to allow limitation defence without constitution of a limitation fund and then commenting on the

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limitation jurisdiction under the existing Limitation Conventions. Thus, the U.S courts' limitation jurisdiction and its conflicts with that of the Limitation Convention States are also discussed in depth.

[15] However, some countries adopted a hybrid or option system. See infra Ch. 1 n. 76.

merits and demerits of each position, the writer raises a question whether the exclusive provisions barring limitation pleading without a fund constituted are waivable or not, submitting his opinion in the affirmative.

2. The positions of the general Limitation Conventions on jurisdiction over limitation actions are compared with one another and with the national laws of the Contracting States. The writer is criticizing the positions of the Limitation Conventions having omitted the express provisions of limitation jurisdiction since the art. 5 (2) of the CMI Madrid Draft Convention (1955) which could not be adopted in the 1957 Convention due to some developed countries' unreasonable strong opposition. As to the interpretation of the 1976 Convention, art. 11 (1), the writer supports the opinion that it does not restrict the limitation jurisdiction only where a liability action is instituted but provides for one optional jurisdiction over limitation proceedings.

3. As for limitation jurisdiction under the special Limitation Conventions (1962 Nuclear Convention, 1969 CLC, 1992 CLC and 1996 HNS Convention), upon comparative discussions on the liability and limitation jurisdiction provisions as provided for therein, the writer particularly presents his opinion that a practicable "linkage" scheme should have been adopted in the 1996 HNS Convention.

4. As regards the limitation jurisdiction under the 1968 & 1988 Conventions, the scope of application of art. 6a is extensively analyzed and, in particular, with respect to its relation to art. 57, the split interpretations are introduced together with the writer's opinion that art. 6a does not, by virtue of art. 57, extend to apply to the jurisdiction provisions provided in the special maritime Conventions such as the 1952 Arrest Convention, the 1952 Collision Jurisdiction Convention and so on.

5. With respect to a stay or injunction of liability actions before or after a limitation fund is or has been constituted, the positions of the Limitation Conventions and national laws are compared in detail with the writer's comments on the merits and demerits of the respective positions. Further, the

writer submits an opinion that the Limitation Conventions should contain the provisions to ensure an international concourse at least between the same Limitation Convention States.

6. In respect of international conflicts of limitation jurisdiction, a variety of limitation jurisdiction conflicts not only between the same Limitation Convention States but also between different Limitation Convention States or between the Convention States and non-Convention States, including the cases actually disputed in case law and to be raised hypothetically, is explored and compared with one another together with the writer's comments.

7. In addition, as a representative unique aspect of limitation jurisdiction conflicts between the federal and state courts within a federal country, the U.S. practice is introduced for general comparisons.

8. Lastly, at the end of this Chapter the writer develops the doctrine of equity and guidance relating to the recognition and enforcement of foreign judgments on maritime claims for limitation of liability in the contexts of the conflict between limitation or liability jurisdiction and *res judicata.*

Chapter 3 treats of the three factors affecting or altering the statutory limitation forums: the applicable limitation law, the doctrine of *forum non conveniens* and forum selection clauses.

First, this Chapter demonstrates empirically why and how maritime claimants prefer the forums of the United States to those of the 1976 Convention States or the 1957 Convention States. In particular, as the reasons thereof the easy breakability of limitation by the U.S. forums is intensively exemplified by citation of the U.S. case law. It is further analyzed here how the substantive/procedural dichotomy has been discussed and applied in case law in connection with governing limitation law. However, such dichotomy theory having failed to present an established test, the writer concludes that just as Limitation Convention States are always obliged to apply their adopted Convention by virtue of its provisions themselves,[16] so the courts of non-Convention states should be free to apply their

[16] E.g., art. 7 of 1957 Convention; art. 15 of 1976 Convention.

own domestic limitation law as a strong domestic policy without recourse to the conflicts of limitation law rules.

Second, as to the doctrine of *forum non conveniens*, stressing that this doctrine should be applied flexibly to liability actions competing with a limitation action in order to supplement the deficiencies of the Limitation Conventions to realize the international concourse when a limitation fund has been established, the writer reviews and comments on the recent case law and, in particular, points out the confusion in the case law with respect to the relation and applicability of the *forum non conveniens* to arts. 21 and 22 of the 1968 Brussels Convention. He further submits his opinion that these provisions may not apply to the relation between liability and limitation actions because a limitation action has a unique nature not to apply "the doctrine of first seisin" but to be applied by the independent principles of the Limitation Conventions.

Third, as for forum selection clauses, it is discussed here how these clauses (including arbitration clauses) can operate in limitation proceedings. Pointing out that also in this field the case law has been and even now confused, the writer presents his opinion that in terms of party autonomy such clauses should be respected to the extent that they do not frustrate limitation procedure nor do they operate to the detriment of the other claimants in cases of multiple claimants.

In the Final Remarks, the writer urges on the one hand the Member States of the developed Limitation Conventions and the U.S. to increase their efforts to resurrect international uniformity of limitation regimes and presents on the other some proposed draft provisions to amend the existing Limitation Conventions for limitation jurisdiction and international concourse in terms of judicial economy and in the common interests of the parties.

# CHAPTER 1

## ORIGINS AND DEVELOPMENTS OF SHIPOWNERS' LIMITATION OF LIABILITY

There have been many treatises and articles in respect of the origins of shipowners' limitation of liability.[1] Despite such extensive research by many writers of authority, no definite theory has ever been presented to the extent of no doubt as regards when and where this system had derived. It might be because maritime law was formed by way of maritime usage before any codification of law. The arguments on the origins of shipowners' limitation of liability began concerning whether under the Roman law a shipowner had the benefit of limitation of liability. Thus, it will be analysed hereunder how the arguments have been developed with respect to the situation of the Roman law and thence to the medieval maritime customs and traces of regulations.

### 1. In the Roman Law

In accordance with the enlargement of territories by military conquest of many adjacent nations, in Roman society the commerce became of much more importance than agriculture which had been respected for a long time. In the districts where the Roman army conquered, Roman merchants made a rush and many ports of Italy were congested with vessels. Thus, sea trade caused catalysis to stimulate an incentive of enterprise of Roman people.[2]

In about the second century A.D., the territory of Rome was the largest and its powers were extended up to the Euphrates to the east, Scotland to the west, the Sahara to the

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1 Sprague, *Limitation of Ship Owners' Liability*, 12 N.Y.U.L.Q. Rev. 568 (1935); Putnam, *The Limited Liability of Shipowners for Master's Faults,* 17 Am. L. Rev. 1 (1883); Springer, *Amendments to the Federal Law Limiting the Liability of Shipowners,* 11 St. John's L. Rev. 14 (1936); Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 Tul. L. Rev. 999 (1979); The Maritime Law Ass'n of the U.S., *The History and Present Status of Domestic and Foreign Laws Concerning Limitation of Shipowners' Liability,* MLA Doc. No. 169 (1935); Note, *Limitation of Shipowners' Liability - The Brussels Convention of 1957,* 68 Yale L.J. 1676 (1959) (*"The Brussels Convention of 1957"*); Gilmore & Black, *The Law of Admiralty* 818 n.3 (2nd ed. 1975); Robinson, *Admiralty* 875-77 (1939); *The Rebecca,* 20 F. Cas. 373 (No. 11, 619) (D. Me. 1831); *Norwich & N.Y. Transp. Co. v. Wright,* 80 U.S. (13 Wall.) 104 (1872).

2 Komachiya, *Shipowner's Liability in Roman Law*, 47 Hogaku Kyokai Zatshi ( J. of Jurisprudence Ass'n) 759, 762-63 (Tokyo, 1929) (citing Azoux, Action exercitoire, thése Paris, 1894, p.9).

south and the Volga to the north. In order to keep *pax Romana* in every territory as well as safety of sea routes, the Roman empire made the Mediterranean the inland sea of Rome, facilitating the development of navigation business and thereby complicating Roman maritime law.[3]

According to Roman thought the relationship between credit and debt was personal to the parties concerned, not affecting a third party. In consequence, there was no system of agency in Roman law.[4] However, a third party who made a contract with a slave or minor felt inconvenient because he could not have any right against the *patriarcha* of the slave or minor whereas the rights obtained by their contracts vested in the *patriarcha*. In order to alleviate such inequity and inconveniences, Roman Consuls admitted *actio quod iussu*,[5] *actio de in rem versso*,[6] and *actio de peculio*.[7] In addition, in order to protect the merchants on land, they admitted *actio institoria* by which the *patriarcha* was liable unlimitedly for the acts of his slave or minor who was generally authorised in operation of commercial and industrial business, and also *actio exercitoria* or *exercitor navis* by which the shipowner was liable unlimitedly for the acts of the master.[8]

Of such various rights of action, the *actio exercitoria* was related to shipowners' liability. A ship owner or operator was called *exercitor* who appointed a *magister* or *magister navis* in order for him to manage and direct the navigation on board the ship. Since correspondence had been underdeveloped in those days, the *magister navis* had wide authority for the owner as compared to modern masters of ships. Thus a *magister* not only could direct and control the ship but also was authorised to act in respect of the ship operation and purchase and sale of merchandise.[9]

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3 Hong Seung-In, *Origins and Development of Shipowner's Limitation of Liability*, 14 J. of Korean Mar. L. Ass'n 137, 138 (Seoul, 1992).

4 Komachiya, supra n. 2, at 765. See also Hunada, *2 Roman Law* 294 (Tokyo, 1972).

5 *actio guod iussu* means the right of action against the *patriarcha* arising out of an act of the slave or minor based upon express authorization by the *patriarcha*.

6 *actio de in rem versso* was a right of action allowed to the other party of a contract with a slave or minor against their *patriarcha* directly to the extent that the *patriarcha* obtained profit from the contract and the profit still remained.

7 *actio de peculio* was a right of action allowed to the other party of a contract with slave or minor when the *patriarcha* authorised them the management of property but only to the extent that the property still remained.

8 Komachiya, supra, at 765-67 (citing Girard, *Manuel Élémentaire de Droit Romain* 102 suiv., 702 suiv. (1924), etc.).

9 Hong, supra n. 3, at 139. In consequence, some commentators distinguish *magisters* from the concept of modern masters. Komachiya at 770.

The *exercitor* was subject to unlimited liability for acts of the *magister navis* to third parties under the two requirements that the *magister* act first in his capacity and second within the scope of his authority given by the *exercitor*. The scope of authority given to a *magister* depended on the nature of ship operation whether it was for the carriage of cargo or passengers or for inland carriage or sea-going transportation.

Of the most importance was the bottomry by the *magister* for the prosecution of a specific voyage. However, in order for a bottomry to be effective to the *exercitor* it was required for the *magister* to carry out his duty and its scope should not be beyond the extent inevitable for the accomplishment of the voyage. Where such requirements were not fulfilled, the *actio exercitoria* could not be constituted.

Since the liability of the *exercitor* based upon a contract made through the *magister* was unlimited to the other party of the contract, he could not limit his liability either by way of surrendering the ship or on account of her foundering.[10] The co-owners were liable jointly and severally, provided that between themselves the liability was shared in proportion to their shares.

This situation of the shipowners' unlimited liability was the same even in the case of tort committed by the *magister* in the course of his duty or of his theft of cargo because the injured could resort to *actio legis aquiliae* (in case of tort by *magister*), *actio furti* (in case of theft) and *actio recepto* (in case of cargo or luggage received by the *magister*).[11]

As has been discussed above, so far as the *actio exercitoria* was concerned, the shipowners' limitation of liability was not admitted.[12] In the meantime, however, in other point of view or by analogy some commentators argued that there existed in Roman law the

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10 Komachiya at 777. See also Omoda, *English System of Shipowners' Limitation of Liability* 77 (11-12) Hogaku Shimpo (Chuo L. Rev.) 39, 41 (Toyko, 1970).

11 Hong, supra n. 3, at 141-142.

12 4 Marsden, *The Law of Collisions at Sea* 129 (B.S.L. Vol. 4, McGuffie, rev. 11th ed. 1961). See also Sanborn, *Origins of the Early English Maritime and Commercial Law* 118 (1930, reprinted, 1989). Sanborn explains that in Roman law no shipowners' limitation of liability was admitted for acts of the master "while engaged in the discharge of his functions" and that in case of several part owners each was bound individually for the full amount of the master's contractual obligations, but that as for his tortious obligations "each was bound only for his part, that is, in proportion to the interest he had in the ship." Id. However, he does not explain whether each part owner's liability in proportion to his share in the ship was against the third parties or against other part owners internally. His purport seems to mean the latter in view of the fact that under the *actio legis aquiliae* the shipowner was jointly and severally liable for the tort of the master committed in the course of his duty.

system of shipowners' limitation of liability. The representative theory was that of Oliver Wendell Holmes, Jr.[13] and that of Komachiya.[14] Quoting the ancient rule of Old Testament origin provided for in The Twelve Tables (451 B.C.) as "[i]f an animal had done damage, either the animal was to be surrendered or the damage paid for",[15] the rule of which was succeeded in one of the Roman legal principles as *noxae deditio*, Holmes analogised the modern concept of shipowners' limitation of liability, which in his phraseology was represented as that "the ship was not only the source, but the limit, of liability"[16] to the Roman doctrine of *noxae deditio*.[17]

In this connection, arguments have arisen as to whether Holmes presented a theory that the modern concept of shipowners' limitation of liability originated from the Roman doctrine of *noxae deditio*. While introducing the "analogy" by Holmes between the shipowners' limitation of liability to the value of the ship and the noxal action - *noxae deditio* - of the Roman law, some commentators commented that it seemed impossible to accept "this view" as the origin of limitation of liability on the grounds that even in the express provisions of the Code of Oleron and other sources of English maritime law the wrongdoer in a collision was to make full compensation to the sufferer.[18] Another commentator interpreted that Holmes appeared to have used the "offending thing" concept as an analogy to limitation rather than its basis.[19]

In view of the fact that Holmes did never claim directly that the system of *noxae deditio* in the Roman law was the origin of the modern concept of shipowners' limitation of liability, and that the *naxae deditio* did not permit to surrender the ship itself to creditors but only allowed to surrender the slave or animal which caused harm to third parties, neither is it to be construed that the analogy of Holmes was the argument on the origin of modern concept of shipowners' limitation of liability, nor could the *noxae deditio* be the origin thereof.

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13 Holmes, Jr., O.W., *The Common Law* 30 (Boston, 1881).

14 Komachiya, *3 The Study of Maritime Law* 33 *et seq.* (Toyko, 1931) (hereinafter cited as 3 Komachiya).

15 Holmes, supra, at 8.

16 Id. at 30.

17 Id. See also *Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn Eastern District Terminal,* 251 U.S. 48, 53 (1919) (holding that "[t]he notion, as applicable to a collision case, seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III. : "If my dog kills your sheep and I, freshly after the fact, tender you the dog, you are without recourse against me."" (citing Fitzh. Abr. Barre, 290).

18 4 Marsden, supra n. 12, at 130.

19 Greenman, *Limitation of Liability : A Critical Analysis of United States Law in An Int'l Setting,* 57 Tul. L. Rev. 1139, 1140 n.8 (1983).

Another introduction by Komachiya in respect of *noxae datio* in the Roman law under which the shipowner could be exempted from liability by surrendering his slave or minor when they committed a tort to a third party was also nothing but an analogy of the modern concept of Shipowners' limitation of liability. As to this aspect Komachiya made it clear in another article[20] that in the Roman law there was no system of shipowners' limitation of liability.

The reason why the Roman law did not admit shipowners' limitation of liability was obviously as follows: first, the strict unlimited liability was the Roman tradition; second, the position of merchants and financiers for ships were more respected and more required to be protected than that of shipowners; and third, no other nations were so competitive in merchant shipping as to protect Roman shipowners.

## 2. In the Middle Ages

It has often been pointed out that "it is impossible to pinpoint the exact origin of the limitation theory"[21] or that "[t]he practice of permitting a shipowner to limit liability to the value of his vessel is of *uncertain origin*."[22] Opinions are split among commentators even in respect of when and where and from what system of customs or codification the limitation of shipowners' liability originated.

### A. *Colonna* in the *Tabula di Amalfi*

The first theory is that the system of *Koinonia* (later described as *colonna* in the

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20 Komachiya, supra n. 2, at 776-78.

21 Bjork, *Shipowners' Limitation of Liability and Personal Injuries : A Need for Re-evaluation*, 48 Tul. L. Rev. 376, 377 (1974).

22 Donovan, supra n. 1, at 1000; Gunn, *Limitation of Liability : United States and Convention Jurisdictions*, 8 Mar. Law. 29, 30 (1983).

contents of the *Tabula di Amalfi)*[23] was the origin of shipowners' limitation of liability.[24] According to Komachiya, this theory is summarised as follows:

Since the decrease of powers of the East and West Roman Empires in about 700 A.D., the commercial sea routes in the Mediterranean Sea lost the safety of sea transportation because of the swarming of pirates with a result that large shipping enterprises were met with great danger and risk so that they disappeared gradually. There were very few shipowners who dared to invest in merchant shipping industry individually. In addition, the system of slaves were abolished by the influence of Christianity and thereby the class of free labourers appeared. Thus, unlike the shipping enterprises in the Roman era, medium and small shipping enterprises with several part owners of ships were prevailing rather than large scale shipping enterprises with sole ownership of ships. The master and the mariners also were usually free workers, being not pure employees of shipowners but participators interested with some shares in the shipping enterprises or with some dividend from the freight earned instead of pure salaries. Thus, the part owners of a ship, merchants and mariners would conclude a common entity to be a partnership (or association), which the owners provided with a ship, the merchants with cargo and the mariners with labour on board. The duration of the partnership was usually from the sailing to the ending of the voyage and the partnership was administered by the *patronus*. This type of partnership was called *colonna*. The ratio of each investor's share was decided by the customs, but if any dispute arose the Consul ruled. The loss or profit arising out of the operation of the partnership belonged to itself, being separated from other assets of the participants. Thus, any liability to third parties arising out of the operation of the partnership, say operation of the ship, was borne jointly and severally by the *patronus* and the whole assets of the partnership only, without affecting any other general assets of the partners.

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[23] According to Friedell, 1 Benedict on Admiralty s.12 at 1-28 (7th ed. 1994), the *Tabula di Amalfi* was a collection of sea laws from the 11th century, when Amalfi was an important seaport. These texts were lost or mislaid for about a century, but recently published again by the Italian Maritime Law Association. Sprague also traced the limitation of shipowners' liability: "It apparently had its birth in the compilations of maritime customs that followed the great commercial revival in the Mediterranean accompanying the Crusades. The Amalphitan Table, compiled for 'the free and trading republic of Amalphi in Italy about the time of the First Crusade towards the end of the eleventh century' and whose 'authority and equity were acknowledged by all the states of Italy' probably contained the germ of the principle." Sprague, supra n. 1, at 568-69 (quoting 3 Kent, *Commentaries* 10).

[24] Komachiya, *Shipowners' Liability in the Middle Ages (I)*, 47 J. of Jur. Ass'n 871, 877-83 (Tokyo, 1929) (citing Rehme, G.E.S. 24; Goldschmidt, U.G., S. 340 Ann. 25).

The commentator, therefore, asserts that this system of *colonna* was the real origin of shipowners' limitation of liability.

### B. *Commenda* in the *Consolato del Mare*

The second theory, the majority opinion in respect of the origin of shipowners' limitation of liability, is that the *contrat de commende* (or *commenda*) in the *Consolato del Mare*[25] was the origin.[26] According to the commentators, the *commenda* was a contract of joint venture of shipowners and merchants, etc., which was developed from the contract of *colonna* prevailed at the major ports of the Mediterranean Sea including Amalfi, Genoa, Marseilles, Valencia, etc. from the 11th or 12th century. The *commanda* was also a pattern of partnership consisting of merchants representing merchandise, part owners of a ship, financiers, etc., but excluding mariners who participated not as partners but as employees receiving a part of freight as remuneration for their services.[27] The parties of *commenda* varied according to the situation, i.e., the *commenda* was made between the merchants remaining on land and other merchant sailing on board the ship or between shipowners and financiers or between the merchants (cargo) and co-owners of the ship, one of whom became a *patronus* entrusted to direct the voyage.[28] Thus, the investors remaining on land were called *commendators* and the party who executed the voyage was called *commendatar* or *patronus* (in the early form of *commenda*) or *senyor de la nau* (or simply *senyor*) (in the *Consolato del Mare*). The *patronus* or *senyor* was in most of the cases a part owner of the

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25 It is often referred to as *La Consolat de la Mer* or the *Consulate of the Sea.*

26 Donovan, supra n. 1, at 1001; Yamada, *The Doctrine of Shipowners' Limitation of Liability* 5-10 (Toyko, 1992); Lyon-Caen et Renault, *Traité de Droit Commercial*, 4 ed. t. 5, No. 198; Danjon, *Traité de Droit Maritime*, t. 2 No. 565 bis (1912); Bonnecase, *Traité de Droit Commercial Maritime* 482 (1923); 4 Marsden, supra n. 12, at 129; Frémery, *Etude de Droit Commercial*, c. 27 (1833).

27 Komachiya, supra n. 24, at 884-85. However, another commentator considers the *commenda* as "an undisclosed agency by which one or many principals (*commendatores)* entrusted the master, a member of the crew, or a merchant passenger, with a quantity of merchandise for barter or sale during the voyage." Kuhn, *International Aspects of the Titanic Case*, 9 Am, J. Int'l L. 336, 342 (1915). Kuhn's opinion is, however, improper because the effect in the *commenda* similar to an agency relationship was nothing but only a part effect of the contract. See *The Rebecca*, 20 F. Cas. at 379, where it was held that "[t]he master, who was, in point of fact, ordinarily, if not always, a part owner, was considered as the head and acting partner in a commercial enterprise, and not as the agent of the owners of the vessel, and merchants dealt with him and trusted him in that character."

28 Komachiya, supra n. 24, at 886-87.

ship and also played the role of the master. Sometimes several part owners as patronuses sailed on board the ship.[29]

In the early era of *commenda*, the merchants having interests in the cargo also embarked on board the ship in order to take care of their cargo or to sell it during the voyage. However, in the era of the *Consolato del Mare* they remained behind the home ports, only embarking their clerks to protect their interests on their behalf.[30] Thus, upon the ending of the voyage by the ship's returning to the home port, the net profit accrued from the voyage was divided among the partners in proportion to their respective shares.

With respect to the external relationship towards third parties, only the *senyor* or *patronus* was representing the interested parties in the contract of *commenda*. The *Consolato del Mare* prescribed in detail concerning the rights and obligations of the parties interested in the contract of *Commenda*.[31] The major rules concerning the parties of *commenda* to third parties were as follows:

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29 Id. at 889. *Senyor* is translated as "managing owner" in Twiss, *The Black Book of the Admiralty*, Vol. 3 at 37 *et seq*. (1857, reprinted, 1985).

30 Yamada, supra n. 26, at 6.

31 The *Consolato del Mare* was a compilation of extensive customary rules of the then maritime courts applied in Barcelona, Genoa, Marseilles, Valencia, etc. in the Mediterranean Sea as from about 1266 A.D. See 1 Peters, *Admiralty Decisions in the District Court of the United States for the Pennsylvania District*, App. lxviii (1807). However, 1 Benedict on Admiralty, s.9 at 1-27, describes that it was first published in Barcelona of Spain in 1494 while other commentators (e.g., A. Flinter & A. Brunk, *1 Ocean Marine Insurance* ss. 2-3 (1992)) cite an ordinance of Barcelona in 1435 as the first codification. According to Grotius, it was made up of various enactments (customary rules) of the Greek Emperors, Germany, the Kingdoms of France, Spain, Syria, Cyprus, Majorca and the republics of Venice and Genoa for the use of commercial judges called "consuls of the sea". 1 Benedict, id. at 1-27.
Desjardins, in his *Droit Commercial Maritime, Introduction Historique* 62 n. (1) - (13) (1890), classified the rules of the *Consolato del Mare* as follows: (1) Obligations of the master, shipbuilder and investor in shipbuilding and sale of ship (c. 2-11, c. 198-200, 227, 238); (2) Duties of *contre-maitre*, ship clerk and other employees (c. 12-15, 17, 205, 206); (3) Obligations of the master and mariners (c. 79-138, 148, 178, 180-183, 193, 202, 222, 223, 228, 252); (4) Documents, contract and obligations in respect of charter (c. 41-47, 56-57, 59-60, 62-65, 143-145, 187, 189, 190, 208, 212-213, 215, 224, 236, 246, 248); (5) Stowage, full loading and discharge of cargo (c. 18-30, 139-141, 153-154, 191-192, 204, 229); (6) Commende of ship and cargo (c. 165-177, 210, 234-235, 242, 244); (7) Anchoring of ship at anchorages, seashores and in harbours (c.155-158, 161-164, 183); (8) Mutual Obligations for the master, cargo owner and passenger (c.16, 31-33, 68, 71-78, 179, 209, 214); (9) Interruption of sailing by master or shipper (c.35-40, 58-61, 139-140, 146-147, 149, 216-221, 233, 237); (10) Continuance of voyage (c.48-49, 241); (11) A grounding and other marine accidents (c.50-55, 66-67, 142, 150-152, 188, 201, 207, 226, 232, 239, 250-251); (12) Loss of merchant ship by enemy or pirates (c.185-186, 203, 231, 243, 245); (13) Obligations of master and ship interests (c.184, 194-197, 211, 249); (14) Performance and good faith in sales (c. 247-248). Yamada, supra, at 50. According to Sprague, the *Consolato del Mare* was probably compiled by private individuals by order of the Kings of Aragon during the Middle Ages and eventually "became the common law of all the commercial powers of Europe" and two separate chapters therein "expressly limits the liability of the part owner to the value of his share in the ship." Sprague, supra n. 1, at 569 (quoting 3 Kent, *Commentaries* 10 & *The Main v. Williams,* 152 U.S. 122 (1894)).

(1) Chapter 141 provided that with respect to the cargo loaded on deck without any consent or approval of the shipper the *senyor* should be unlimitedly liable for loss or damage arising therefrom, whereas the liability of the other investors or co-owners should be limited to their respective shares in the ship.[32] In this case, if the claims were not recovered by the *senyor's* personal assets, the merchants could be paid from the sale of the ship.

(2) Chapter 182 mandated that the *senyor* be liable in full for loss or damage to the cargo arising out of any want of proper rigging or appurtenances for the ship, whereas other investors should not be liable beyond their respective interest in the ship.[33]

(3) According to Chapter 18, the *senyor* had to be liable in full for loss or damage to the cargo caused by bad stowage, such as stowage of cargo in damp compartments,[34] and where the claims were not covered fully from the *senyor's* personal assets, then the ship had to be sold to settle the balance of claims without further pursuance of claims against the other assets of the investors other than their interests in the ship.

(4) Chapter 27 provided that while neither the *senyor* nor the ship would be liable for wet damage to cargo in loading or discharging it, even if the ship were to pay the damages the *senyor* and each part-owner would be liable only in proportion to their respective shares.[35]

(5) Lastly, Chapter 194 had similar provisions in respect of a bottomry, limiting the part-owners' liability to their respective shares in the ship.[36]

In the case of a bottomry (or *bodmerei*) the investors' shares in the ship included the value of the ship plus freight and therefore in bottomry the co-owners' liability was limited to the value of the ship and freight for the cargo. Thus, some French commentators suggest that

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[32] Pardessus, *Collection de loise Maritimes Anterieures* au XVIII siecle 155 (1824); Sanborn, supra n. 12, at 119; 3 Black Book at 243-45.
[33] Pardessus, id. at 205; 3 Black Book at 343-45.
[34] 3 Black Book at 93.
[35] Id. at 103.
[36] Id. at 385.

the provision of Chapter 194 in the *Consolato del Mare* with respect to the system of *bodmerei* was the origin of shipowners' limitation of liability.[37] However, this theory is criticised on the grounds that the limited liability in bottomry was fixed by the contract and therefore that the general aspects of shipowners' limitation of liability could not be explained.[38] It is submitted that just as personal contract claims must be excluded from the modern limitation of shipowners' liability, so the contract of bottomry should be excluded from the unique concept of shipowners' limitation of liability.

The foregoing analysis is mostly concerning the shipowners' limitation of liability arising out of the breach of contract of *commenda*. On the other hand, however, no express provision is found in the *Consolato del Mare* in respect of shipowners' limitation of liability distinguishing between the breach of contract and torts committed by *senyors* and mariners in the course of their duties. Nevertheless, commentators interpret that some chapters of the *Consolato del Mare* applied not only to the breach of contract but also to torts committed by *senyors* and mariners in the course of their duties. Thus, in cases where loss or damage to the cargo or luggage was attributable to any act or negligence of the *senyor* or mariners, they were liable for the loss or damage to the full amount with all their assets or with the sale proceeds of the ship, but other part owners of the ship were only liable to the extent of their respective shares in the ship by the application of chapters 13, 18, 94, 113, 148, 169 and 214, provided, however, that where any loss or damage to the cargo was caused due to the negligence of shipowners, their liability was unlimited pursuant to chapter 144.[39]

Although there included no express provision in the *Consolato del Mare* as to collision liabilities by navigational faults, it is presumed that the same principles of liability must have been applied; the *senyor* or mariners who caused the collision had to bear unlimited liability and other part owners were limited for their liability to the extent of their respective shares in the ship.[40] This presumption was, it is accorded, based upon the grounds that, so far as the district where the *Consolato del Mare* applied was concerned, in most of the claims against the ship interests, the relevant rules limited the liability of co-owners of the

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37 Frémery, supra n. 26, at 83.
38 Komachiya, supra n. 24, at 893-94.
39 Id. at 897-98.
40 Id at 899.

ship to their respective interests in the ship.[41] Provided, however, that there was an express provision of Chapter 155 in the *Consolato del Mare* providing that if the collision is accidental, the shipowner shall not be liable because it was not caused by his fault.[42]

### C. *Commenda* in Northern Europe

While in the Mediterranean Sea in the Middle Ages the maritime law of Latin lineage states was developing as mentioned above, in northern and northwestern Europe the German lineage states were forming other maritime usages and rules.

First of all, by the influence of the Crusades the trade between the Mediterranean Sea and Northern Europe was facilitated. The Il d'Oleron, an island on the Atlantic coast of France became the midway port prosperous with many ships and merchants in particular for wine trade from the 10th and 11th centuries[43] and also many commercial and maritime disputes were discussed on the island. Thus, many judgements of the Maritime Court of the island of Oleron were compiled for a long time, which were codified as the *Roles (or Rolls or Rules) of Oleron*. The date of its promulgation is, although disputed, accepted by the majority of scholars to have been in the second half of the 13th century (1266) or even before.[44] The *Rolls of Oleron* are assessed as being of great importance in the development

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41 Accord: Putnam, supra n. 1, at 5; *The Rebecca*, 20 F. Cas. at 379. In this case, Ware, J., held : "The custom which exempted the owners from personal responsibility for the acts of the master, extended, as has been observed, as well to obligations arising *ex contratu* as *ex delicto*. No distinction was made between them, and on the principles upon which the custom stood in its origin and in the time of the Consulate of the Sea, there does not appear to be any just ground for a distinction."

42 3 Black Book at 283; Sanborn, supra n. 12, at 119.

43 Cumming, *The English High Court of Admiralty*, 17 Tul. Mar. L.J. 209, 215 (1993).

44 1 Schoenbaum, *Admiralty and Maritime Law* 9 (2nd ed. 1994). However, Owen, *The Origins and Development of Marine Collision Law*, 51 Tul. L. Rev. 759, 762 (1977), agrees that the *Rolls of Oleron* originated around 1150 (citing 1 D. Azuni, *The Maritime Law of Europe* 379 (1806)). Although England and France contended for the honour of having originated the *Rolls of Oleron*, it was held in *Thompson v. The Catharina*, 23 F. Cas. 1028, 1029 (No. 13, 949) (D. Pa. 1795), that Eleanor of Aquitaine, mother of Richard I, when ruling Western Europe and making the island of Oleron her seat of government, ordered the compilation of all extant maritime codes (the *Rolls of Oleron*) to be adapted for use in the maritime courts of her French Empire, after which Edward I imported it into England. Thus, at latest by the 14th century the *Rolls of Oleron* were recognised as law in the maritime courts of England, Normandy and Brittany. 1 Black Book at lxi-lxiv. *Cf. The Gas Float Whitton No. 2* [1896] P. 42, 47-48 (CA), in which Lord Esher, M.R., held on the one hand that the Code, "being considered as the edict of an English prince, has been received with particular attention in the court of Admiralty" but on the other hand stated : "Neither the laws of the Rhodians, nor of Oleron, nor of Wisbuy, nor of the Hanse Towns, are of themselves any part of the Admiralty law of England . . . To any one who reads some of their strange enactments . . . it must be ridiculous to suggest that they are part of the English law. But they contain many valuable principles and statements of marine practice which . . . were used by the judges of the English Court of Admiralty when they were molding and reducing to form the principles and practice of their Court."

of modern maritime law and not only became the basis of the common maritime law of the North Sea and the Atlantic Ocean[45] but also greatly affected French and English maritime laws.[46] However, so far as shipowners' limitation of liability was concerned, no rules were contained in the *Rolls of Oleron*.[47] It means that as early as the second half of the 13th century when the *Rolls of Oleron* were promulgated, the contract of *commenda* was not imported yet because the Laws of Oleron were "a code earlier than the Consulate, at least in the form in which we now have it, and which constitutes the basis of the maritime law of the western parts of Europe."[48]

On the other hand, in the Baltic Sea of the northern Europe the Scandinavians developed one of the oldest maritime law. They explored commercial sea routes to the western Europe and up to the Black Sea from the early Middle Ages (roughly from the 9th century).[49] However, in the 12th century they were retreated by German traders and other foreign traders who centred on Visby (Visbuy or Wisby or Wisbuy), the capital of the island of Gothland located in the centre of the Baltic Sea. Visby became the centre of trade in the northern Europe by traders from Sweden, Russia, Denmark, Prussia, Germany, Finland, Saxony, England, Scotland and France, and their commercial and maritime disputes were administered by the local magistrates, for which the Rules of Visby were published in 1506.[50] However, no express provision as to shipowners' limitation of liability is found in the Rules of Visby.[51] Nor is found any record in the early Hanse Towns until the 17th century that there was a codification of shipowners' limitation of liability. The maritime code published at Lübeck in 1597[52] as a result of formation of the Hanseatic League consisting of traders of many seaport cities in Northern Europe ("Hansa Towns") established at first for the

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45 1 Schoenbaum at 9.

46 Cumming, supra, at 215.

47 Kuhn, supra n. 27, at 343; Jenner, *et al.*, 3 Benedict on Admiralty 1-31 (7th ed. 1994); Note, *Limitation of Liability of Shipowners*, 35 Colum. L. Rev. 246, 247 n.1 (1935); Sanborn, supra n. 12, at 121.

48 Sanborn, id. at 121.

49 Komachiya, supra n. 24, at 1119-20.

50 Paulsen, *A Historical Overview of the Development of Uniformity in International Maritime Law*, 57 Tul. L. Rev. 1065, 1071 (1983).

51 3 Benedict at 1-31. The Laws of Visby are also called the "Gotland Sea Laws", the contents of which are introduced in 4 Black Book of the Admiralty xxii *et seq.* and 1 Peters, *Admiralty Decisions in the District Court of the United States for the Pennsylvania District*, App. 1xxvii (1807) and reprinted in 30 F. Cas. 1189-95. See also Gilmore & Black at 6-7 n.20; Donovan at 1005.

52 Paulsen, supra, at 1072.

protection against the piracy of the Baltic Sea, did not contain any express provision as regards shipowners' limitation of liability.[53]

Then, the question remains whether there was no maritime usage of *colonna* or *commenda* in Northern Europe in the Middle Ages similar to those of the Mediterranean Sea. Some commentators introduce traces of *colonna* in the Swedish law in the 13th century and of a system similar to *commenda* such as Gütergemeinschaft in Iceland in the 9th century, *sendeve* and *wedderleginghe* in Hanseatic Towns since 1165, asserting that in these systems the master or co-owner acting as master bore unlimited liability to third parties in respect of his act while other co-owners were presumed to have been liable only to the extent of their respective shares in the ship.[54]

However, it is not certain whether in these forms of contracts the co-owners' liability was limited to their shares in the ship because there is no production of supporting materials. Although it is further concluded by Komachiya that, even in the obligation *ex delicto* by the master or mariners such as a collision, the negligent master or mariners were subject to unlimited liability, but co-owners remaining on land were entitled to limitation of liability with the ship itself, no evidence of express rules is produced or cited and therefore such assertion would not be respected.

In the meantime, other commentators presume that the doctrine of limitation of liability "spread from the Western Mediterranean to the Atlantic coast trading communities (but not to England) and thence to the North Sea and the Baltic communities."[55] However, these commentators do not demonstrate such statement. Nevertheless, even though no direct origin of this doctrine has been proved by an express provision of any code or rules from Northern Europe, this last theory has, it is submitted, a considerably persuasive power.

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53 3 Benedict at 1-31; *The Main v. Williams*, 152 U.S. 122, 126 (1894). However, as will be seen infra, the Ordinances of the Hanseatic League as amended in 1614 and 1644 included shipowners' discharge of liability for damage to cargo by sale of the ship for the benefits of the cargo claimants. 3 Benedict at 1-32. See also Kuhn, supra n. 27, at 343; Valroger, *Revue Internationale de Droit Maritime* 630 (1904). As to the Hanseatic League, see infra n. 62.

54 Komachiya, supra n. 24, at 1121-24.

55 Donovan, supra n. 1, at 1002-03; Owen, supra n. 44, at 764.

## D. Characteristics of Shipowners' Limitation of Liability in *Commenda* of the Middle Ages

The primitive concept of shipowners' limitation of liability originated from the contracts of *colonna* or *commenda* in the Middle Ages spread throughout the whole of Europe by way of the development of merchant shipping industries for several centuries until the 16th century. However, in those days due to the underdeveloped shipbuilding and communication and the rampage of pirates after the demise of the Roman Empire, the merchant shipping was so risky that without any safety device for one's investments thereto no one could dare to participate in shipping business. Moreover, the system of insurance was not devised yet. As a result, whoever wants to invest in shipping enterprise would conceive the least safety device that his participation in the adventure with a ship should be based upon his belief that the *senyor* or the managing co-owner acting as the master would surely succeed in the adventure voyage with good seamanship, returning with considerable profits. If, on the contrary, the adventure ended in failure unfortunately, the responsibility for the result had to be borne solely by the direct operator of the ship. Thus, all the co-owners other than the boarding co-owner or master entrusted the operation of the ship entirely to the latter, in consideration of which no further liability arising out of any misfortune in the course of operating the ship had to fall upon them except their shares in the ship. The limitation of their liability to such an extent had to be applied in any event whoever the claimants might be. They wanted to remain as investors rather than operators of ships. The doctrine of agency was not still devised in those days. In the circumstances, such a concept of limitation of co-owners' liability was generally accepted as natural justice in the field of merchant shipping trade. This practice spread widely and was maintained for a long time, being consolidated into commercial and shipping usages. No one, including a consul of the sea, could deny, or deviate from, such usages. Therefore, the shipowners' limitation of liability in the Middle Ages was based upon the commercial usages formed from the point of convenience of the parties who invested in shipping business, rather than public policy for the protection of shipping industries by states or insurability of ships which became the purport of the current system of shipowners' limitation of liability. The foregoing concept of limitation of liability formed in the Middle Ages was changed gradually with the advent of nationalism beginning in Northern Europe, whereby from around the early 17th century the

codification of shipowners' limitation of liability based upon the addition of national public policy was promoted in many states.

### 3. In the 17th Century

Marsden also admits that "[i]t is not until the beginning of the seventeenth century that we find protectionist doctrines put forward upon grounds of public policy as a reason for limiting shipowners' liability."[56] The comment of a Dutch scholar of international law, Hugo Grotius, is often quoted or cited[57] as having stated in his 1625 treatise[58] that "men would be deterred from employing ships, if they lay under the perpetual fear of being answerable for the acts of their masters to an unlimited extent" and that to impose unlimited liability on shipowners for acts of the masters being "neither consonant to natural justice . . . nor . . . conducive to the public good" in Holland the Roman law was never in force on that subject as it was "an established rule that no action can be maintained against the owner for any greater sum than the value of the ship and goods therein."[59] Despite the references by the commentators of authority to the "saying" of Grotius, however, it is regrettable that no further detail in respect of the statute or regulation or case law ruling shipowners' limitation of liability, which Grotius asserted, has been introduced or demonstrated. Also is disputed or at least questionable whether the doctrine of Grotius concerning shipowners' limitation of liability applied in Holland not only to contracts but also to torts.[60]

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56 4 Marsden, supra n. 12, at 129-30.

57 Baer, *Admiralty Law of the Supreme Court* 332 (3rd ed. 1979); 4 Marsden at 130; Donovan at 1003; Sanborn at 121; Kuhn at 343; *The Rebecca*, 20 F. Cas. at 376; *Norwich & N.Y. Transp.*, 80 U.S. at 116.

58 Grotius, *De Jure Belli et Pacis* (The Law of War and Peace), BK II, c.11, s.13 (1625; Campbell trans. 139, 1901).

59 The word "goods" in the quoted phrase "the value of the ship and goods therein" is interpreted as meant by Grotius to be "freight". Baer, supra, at 332 n.3; *Norwich & N.Y. Transp.*, 80 U.S. at 116 (citing Boulay Paty, *Droit Maritime*, t. 3, sec. 1 at 276). According to Bradley, J., in the *Norwich* case, the phrase "the ship and goods therein" is the translation of *"Navis et eorum quae in navi sunt"* of Grotius's original phrase. Meanwhile, Vinnius, an early Continental writer, was cited as having construed Grotius's foregoing statement to mean that by the law of the land the owners were not chargeable beyond the value of the ship and "things that were in it" (Emphasis added) in 3 Benedict at 1-32. Hence, the "goods therein" referred to by Grotius must be interpreted as having meant the things belonging to the ship (including "freight") other than cargo.

60 Samborn at 121; 4 Marsden at 130. Although it is further introduced that in Vinnius's book (Peckium p. 155) published in 1647 there included a statement that Holland had a system of shipowners' limitation of liability to the extent of the ship and freight (see Omoda, supra n. 10, at 54 n. (11)), there is no reference to the related statute or regulation.

It is also reported that a statute of Hamburg[61] provided the system of shipowners' limitation of liability in 1603. Since Hamburg was one of Hanse Towns as will be seen below, the statute of Hamburg must have affected the amendment of the maritime code of the Hanseatic League.[62] While, as has been seen supra, the maritime code of 1597 published in Lübeck by the Hanseatic League did not contain any provision of shipowners' limitation of liability, the subsequent Ordinances of the Hanseatic League as amended in 1614 and in 1644 limited shipowners' liability to the value of the ship by pronouncing that their other goods be discharged from all claims for damages by the sale of the ship to pay them.[63]

In 1667, the Maritime Code of Charles II of Sweden, which was drafted by Heidrick de Moucheron and relied heavily upon the Rules of Visby and the Hanseatic precedents,[64] adopted the abandonment system by providing that if the owner chooses to abandon the ship to creditors, the latter can demand nothing more, nor can they touch the owners' other assets for the balance of claims unless otherwise contracted.[65]

In the meantime, the Ordinance of Rotterdam of 1721 provided that shipowners were not answerable for any act of the master done without the order of the owners, further than the value of the ship (art. 167) and that the part-owners should not be liable for claims arising out of the operation of the ship beyond their respective shares in the ship (arts. 126 & 127), and these provisions later affected German law to form the execution system.[66]

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61 *The Rebecca*, 20 F. Cas. at 377 (citing Statute of 1603, tit. 18, art. 3; Kurike in Jus Marit. Hans, tit. 6, art. 2, p.766).

62 The Hanseatic League was a conference of merchants at mostly Northern Europe seaport cities including Lübeck, Hamburg, Bremen, Visbuy, etc., formed for the mutual protection against the piracy of the Baltic Sea and for the furtherance of their commercial interests, in the 13th century. The League framed and promulgated a maritime code known as the "Laws of the Hanse Towns" or *Jus Hanseaticum maritimum*. The power of the League was at its zenith during the period of 1356 to 1377, but gradually declined until its last general assembly held in 1669. See Black's Law Dictionary 716-17 (6th ed. 1990); Paulsen, supra n. 50, at 1072. It is also reported in the preface of 30 F. Cas. at 1197-1201 that the number of the member towns of the Hanseatic League was once 81 towns and that the laws of the Hanse Towns were evidently founded on those of the neighbouring city of Visby and the celebrated *Roll d'Oleron*.

63 *The Main*, 152 U.S. at 126. See also Donovan, supra n. 1, at 1003; 3 Benedict at 1-32; Kuhn, supra n. 27, at 343.

64 Paulsen, supra n. 50, at 1073 n. 23 (citing K. Modéer, *Frann Grotius Till Grönfors* (1981)).

65 *The Rebecca*, 20 F. Cas. at 377 (citing Maritime Code of Charles II, 1667, pt. 1, c.16).

66 Omoda, supra n. 10, at 53-54 n. (7); Abbott, *Merchant Ships and Seamen* 638 (14th ed., J. P. Aspinall, *et al.*, 1901, reprinted, 1984).

In 1681, the celebrated French *Ordonnance de la Marine* of Louis XIV was enacted under the direction of Minister Colbert.[67] Art. 2 of Book II, Tit. 8, provided : "The proprietors (owners) of vessels shall be responsible for the acts of the master, but they shall be discharged by abandoning the ship and freight."[68] Surrounding the scope of applicability of "the acts of the master" to the owners' limitation of liability, arguments were raised among French commentators for a long period on whether the article 2 should not apply to the contract by the master binding the owner, in which case the owner should be liable personally without any limit of liability (except contracts of bottomry) but only apply to the obligations resulting from the master's fault or negligence (Valin), or whether it should apply both to obligations arising *ex contractu* and *ex delicto* (Emerigon and Pother). Despite these arguments, the provision of art. 2 of the Ordinance was carried over, nearly as it was, into art. 216 of the French *Code de Commerce* of 1807.[69] The above-mentioned arguments on the acts of the master still continued until at last the *Cours de Cassation* adopted the opinion of Valin by rejecting the owner's limitation of liability in respect of the master's contract for the owner[70] and maintained the same position in the subsequent cases.[71] Against these decisions, however, arose strong objections from shipowners with a result that by the act of 1841 the art. 216 of the *Code de Commerce* (known as the *Code of Napoleon*) was amended to the effect that the shipowner should be liable not only for the acts of the master but also for contractual debts arising out of the master's acts for the shipowner (para. 1), and further that the owner should be discharged from all such liabilities by abandoning the ship and freight to the claimants.

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67 The French 1681 Ordinance was drafted by a special legislation committee under the guiding genius of Minster Colbert after the study for about ten years of all the then prevailing maritime usages and codes of European nations, including even the *Roles of Oleron*, the *Consolato del Mare*, and the *Goidon de la Mer* a compilation dating from the late 16th century and published in Rouen, as the single most important basis for the Ordinance. Donovan, supra n. 1, at 1004; Pineus, *Sources of Maritime Law Seen From A Swedish Point of View*, 30 Tul. L. Rev. 85, 97 (1955).
This Ordinance aimed at pursuing the policy of merchantilism at the advent of ocean-going, large-scale merchant shipping across the Atlantic Ocean up to the new Continents of America and India. This Ordinance consisted of five Books and 713 articles: Book I Des Officiers de l'Amirautéde leur Jurisdiction; Book II Des Gens et des Bâtimeuts de Mer; Book III Des Contrats Maritimes; Book IV De la Police des Ports, Côtes, Rades et Rivages de la Mer; and Book V de la Pêche. Yamada, supra n. 26, at 71 n. (35) - (36).

68 *The Rebecca*, 20 F. Cas. at 377; *Norwich & N.Y. Transp.*, 80 U.S. at 117-118; *The Main*, 152 U.S. at 126; 3 Benedict at 1-32; 30 F. Cas. 1203-16 (1880) reprinting The Marine Ordinances of Louis XIV from 2 Peters, *Adm. Decisions in the Dist. Ct. of the U.S. for the Pa. Dist.*, App. iii (1807), in which the Article 2 is arranged as art. II of "Mariners and Ships, Title Fourth."

69 Gilmore & Black at 8 n.29; Yamada, supra n. 26, at 26; Sprague, supra n. 1, at 569-70.

70 Cours de Cassation, 16 juillet 1827.

71 Cours de Cassation, 14 mai 1833; 1 juillet 1834.

Since the French Ordinance of 1681 was the model for most of the modern maritime codes,[72] the doctrine of the abandonment system in respect of shipowners' limitation of liability became rooted firmly, being subsequently carried over or incorporated into several European and Latin American countries: Code of the Netherlands, art. 321; Italian Code, art 311; Spanish Code, arts. 621-622; Portuguese Code, art. 1345; Brazilian Code, art. 494; Argentine Code, art. 1039; Chilean Code, art. 879; and Japanese Commercial Code, art. 690.

Meanwhile, however, although in terms of limiting shipowners' liability to the extent of the value of the ship and freight, the French Ordinance of 1681 became the basis of the majority of the world's maritime codes,[73] a variation in the form of legislation appeared among the European countries. In other words, the difference was related to whether the owner's act of abandonment of the ship and freight was required or not for the benefit of limitation of liability. As distinguished from the abandonment system of the French Ordinance of 1681, the system of *commenda* under the *Consolato del Mare*, the maritime code of the Hanseatic League as amended in 1614 and 1644 and the Ordinance of Rotterdam of 1721 did not require the abandonment or relinquishment of the ship and freight. On the contrary, however, nor did these codes prohibit expressly the shipowners' option of abandonment of the ship and freight. Thus, in the course of further development of legislative policy on the limitation of liability, the French system required the shipowners' abandonment of the ship and freight as a condition precedent for the benefit of limitation of liability, whereas Scandinavian countries and Germany adopted the different formality of legislation not to require the owner's abandonment of the ship and freight, the claimants being entitled to proceed against the ship and freight directly.[74] Thus, with the advent of English monetary limitation system in the 19th century,[75] four systems of shipowners' limitation of liability were confronted until the coming into force of the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships, 1957 in France and Germany.[76]

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72 *The Main*, 152 U.S. at 126-27; Sprague at 570.

73 Note, 35 Colum. L. Rev. at 247 n.3 (citing Prodromidés, *Les Restrictions Légales a la Responsabilité des Propriétaires de Navires* 169-70 (1919)).

74 German Mar. Code, art. 452.

75 The English and American systems of shipowners' limitation of liability since 1734 Act of Great Britain shall be introduced in detail below with notes of the sources of jurisdiction over limitation proceedings in view of the nature of this thesis.

76 Four systems were: (1) French abandonment system, (2) German execution system, (3) the United States ship value system (prior to the 1935 Amendment) and (4) English monetary limitation system (since the

## 4. Developments in Anglo-American Statutes

### A. English Monetary Limitation Regime

#### (1) 1734 Act

Traditionally English maritime interests were governed by common law and the doctrine of *respondeat superior*.[77] A shipowner as a common carrier had to be unlimitedly liable for loss or damage to the cargo as an insurer according to the general customs of the realm just like a common carrier on land, except for an act of God, public enemy, inherent vice in goods or other certain exceptions. Any limitation of his liability was inconsistent with the common law concept of natural justice. On the occasion of the unlimited judgment on a cargo claim in *Boucher v. Lawson*,[78] however, confronted with the petition of British shipowners who were being unfavourably treated as compared with the Continental owners already being protected by the limitation of liability statutes, the English owners' unlimited liability system could no longer be maintained. In 1734, the Parliament enacted the Responsibility of Shipowners Act[79] to allow owners' limitation of liability for loss of cargo caused by the acts of the masters or mariners, done "without the Privity and Knowledge" of the owner, but only to the extent of "the Value of the Ship or Vessel, with all her Appurtenances, and the full Amount of the Freight due or to grow due for and during the

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1862 Amendment). See also Danaka, *Detailed Lectures on Maritime Law* (Kaishoho Shyo-ron) 82-84 (Toyko, 1970). However, the U.S. system became a combined system of (3) and (4) since 1935. Further, the Belgian System of 1808 was the Option system of (1), (3) and (4) (200 francs per ton). Rein, *Int'l Variations on Concepts of Limitation of Liability,* 53 Tul. L. Rev. 1259, 1267 (1979). Meanwhile, the German system was more remarkably distinguished as follows: "The German system of limitation differs from the French merely in that 'the thing itself and not the owner is liable for any damage done by it; that is to say, that the owner is in no way personally liable, but is bound to hand over the ship and her freight to meet the claim of his creditors, or rather of the creditors of the ship.' In other words, under the French system 'abandonment' is a condition precedent to shipowners' limitation of liability; under the German system it is not a condition but merely a consequence." Sprague at 570-71 (citing Sieveking, *The German Law of Carriage of Goods by Sea* 86).

77 Donovan, supra n. 1, at 1007.

78 (1734) Cas. T. Hard. 85, 95 E.R. 53. This case was related to a cargo of bullion stolen by the negligence or embezzlement of the master after it had been shipped in Portugal for London. It was held that the case could not be distinguishable from that of a common carrier within the compass of his employment. On the judgment of this case, London shipowners, some merchants and other shipping interests petitioned the House of Commons for the protection and relief of shipowners. 4Marsden at 131 n.15.

79 7 Geo. II, c. 15 (1734), entitled "An Act to settle how far Owners of Ships shall be answerable for the Acts of the Masters or Mariners." The preface of the Act proclaimed: "Whereas it is of the greatest Consequence and Importance to this Kingdom, to promote the Increase of the Number of Ships and Vessels, and to prevent any Discouragement to Merchants and others from being interested and concerned therein. . ." In The Dundee (1823) 1 Hagg. 109, 121, Lord Stowell stated that England followed the limitation law of Holland.

Voyage".[80] The 1734 Act confined the limitable claims to cargo claims arising out of any act of "the master or mariner" only. Further, the Act conferred upon "any Court of Equity" the jurisdiction over a bill of the owner's limitation of liability.[81]

### (2) 1786 Act

In 1784, a large quantity of silver bullion was forcibly plundered at night by a gang of robbers on board a merchant ship moored at the Thames and it was proved that one of the crew members aided in the robbery by giving information and later sharing in the plunder. In the action by the cargo owner against the shipowners, it was questioned whether the 1734 Act should apply to embezzlement by third parties other than the master or mariners, but Lord Mansfield (*Nisi Prius*) held for the plaintiff to the full amount relying only on the first part of s.I. Upon the motion for a new trial by the defendant's counsel relying on the new ground, the second part of the same section, the Full Court (Lord Mansfeild, Willes, Ashhurst & Buller, JJ.) unanimously modified the previous judgment and applied the 1734 Act, on the grounds that the Act was purported "to relieve the owners of ships from hardships, and to encourage them" and that one of the seamen was in collusion with the robbery.[82] However, the representatives of shipowners who felt apprehension to 1734 Act petitioned the House of Commons again to amend the Act.[83] Thus, in 1786 another Responsibility of Shipowners Act to amend the 1734 Act was passed in the Parliament.[84]

### (3) 1813 Act

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80 The 1734 Act, s.1.

81 The 1734 Act, s.2 provides:
"II. And it is hereby further enacted by the Authority aforesaid, That if several Freighters or Proprietors of . . . Goods or Merchandize, shall suffer any Loss or Damage by any of the Means aforesaid in the same Voyage, and the Value of the Ship . . . and the Amount of the Freight . . . shall not be sufficient to make full Compensation to all and every of them, then such Freighters or Proprietors shall receive their Satisfaction thereout in Average, in Proportion to their respective Losses or Damages: And in every such Case it shall and may be lawful to and for such Freighters or Proprietors or any of them, . . . or to and for the Owners of such Ship or Vessel or any of them, . . . , to exhibit a Bill in any Court of Equity for a Discovery of the total Amount of such Losses or Damages, and also of the Value of such Ship or Vessel, Appurtenances and Freight, and for an equal Distribution and Payment thereof amongst such Freighters or Proprietors, in Proportion to their respective Losses or Damages, according to the Rules of Equity."

82 *Sutton v. Mitchell* (1785) 1 T.R. 18, 99 ER 948.

83 1786 H.C. Jour. 296.

84 26 Geo. III, c. 86. By this new Act, s.1 of 1734 Act was amended to extend the application of liability to robbery by persons other than the master or mariners. The sections 2 & 3 of 1734 Act were combined and renumbered sec. 4. The new sec. 2 provided for owners' exemption from liability for loss or damage to the cargo arising from any fire on board the ship. Another new sec. 3 also exempted owners from liability for loss of valuable cargo the true nature, quality and value of which had not been inserted in the bill of lading or otherwise declared in writing to the master.

In 1813, the third Act entitled 'An Act to limit the Responsibility of Ship Owners in certain Cases' was enacted by the Parliament to amend the previous Act by amplifying it into 17 sections.[85] The major features of this Act were as follows:

(a) The scope of maritime claims subject to limitation was extended to include collision cases (s. 1). However, any lighter and other ships used only in rivers or inland navigation or not duly registered according to law were excluded from the application of the Act. Thus, it applied only to sea-going British registered ships.

(b) As to jurisdiction over the bills for limitation proceedings of the owner or other persons liable, the Act enacted more distinctly as "any Court of Equity having competent jurisdiction" (s. 7)[86] and other detailed provisions of limitation procedure (ss. 7 to 16).

(c) The Act further provided that the hire to be included into "freight" might not begin to be earned until the expiration of 6 months after the loss or damage in case of time charter (s. 2). Under this Act, however, it was held that the prepaid freight should be included in the "freight" for the limitation fund,[87] that the value of the ship for limitation fund was to be taken immediately before the incident,[88] and that the ship's appurtenances also should be included in the value of the ship.[89]

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85 53 Geo. III, c. 159 (1813).

86 As to jurisdiction, s.7 provides:
"And be it further enacted, That if several Persons shall suffer any Loss or Damage in or to their Goods, . . . , Ships or otherwise, by any means for which the Responsibility of any Owner or Owners is limited by this Act as aforesaid, and the Value of the Ship . . . and the Amount of the Freight . . . shall not be sufficient to make full Compensation . . . , it shall and may be lawful to and for the Person or Persons liable to make Satisfaction for such Loss or Damage . . . and the other Owner or Owners . . . to exhibit a Bill in any Court of Equity having competent Jurisdiction, against all the Persons who shall have brought any such Action or Actions . . . for any Loss or Damage arising or happening by the same separate and distinct Accident . . . , to ascertain the Amount of the Value of the Ship . . . and Freight, and for Payment or Distribution thereof rateably amongst the several Persons claiming Recompense as aforesaid, in Proportion to the Amount of the several Losses or Damages sustained by such Persons . . . , according to the Rules of Equity, and as the case may require. . . ."

87 *Wilson v. Dickson* (1818) 2 B. & A. 2; *Cannan v. Meaburn* (1824) 1 Bing. 465.

88 *Brown v. Wilkinson* (1846) 15 M. & W. 391 (Brown, J. held that the value of the ship had to be ascertained immediately prior to the loss on the grounds that Parliament intended to limit loss, not to exempt the owners from liability even in case of no value of the ship remaining by her sinking).

89 *The Dundee* (1823) 1 Hagg. 109; *Gale v. Laurie* (1826) 5 B. & C. 156; *The Triune* (1834) 3 Hagg. 114.

### (4) M.S.A. 1854 (Part IX)

In 1854, a new statute of the Merchant Shipping Act 1854[90] was enacted and incorporated all the public and private merchant shipping regulations by replacing the past statutes with appropriate alterations and amendments. So far as liability and limitation of shipowners were concerned, the relevant provisions were re-enacted at c. 104, Part IX, ss. 502 *et seq.*[91] By this Act, s. 504, the owners' limitation of liability was extended to claims for loss of life and personal injury,[92] provided that so far as the claims of loss of life or personal injury to any passenger were concerned, a minimum value of £15 per registered ton was placed upon all seagoing British passenger ships.[93] This was the first device of a combined monetary limitation system. However, due to this exception of the monetary minimum limit of liability, an unexpected imbalance resulted in that badly maintained or inferior ships had an advantage over those of well-maintained ships, which was inconsistent with the Parliament's legislation policy. This unreasonableness was destined to be amended by further amendment.

In the meantime, however, this Act, s. 514, conferred jurisdiction over the owners' limitation proceedings upon the High Court of Chancery (in England and Ireland),[94] the Court of Session (in Scotland), and any competent Court (in any British Possession).[95] It is to be

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90 17 & 18 Vict., c. 104 (1854).

91 Secs. 503-506 provided for limitation of liability; ss. 507-516 for mode of procedure.

92 Such extension was a result led by the enactment of the Fatal Accident Act 1846 (Lord Campbell's Act, 9 & 10 Vict. c.93) creating the right to recover for loss of life. Brice, *The Scope of the Limitation Action*, The Limitation of Shipowners' Liability: The New Law 18, 19 (1986).

93 Sec. 504, proviso, reads: "[I]n no case where any such Liability as aforesaid is incurred in respect of Loss of Life or personal Injury to any Passenger, shall the Value of any such Ship and Freight thereof be taken to be less than Fifteen Pounds *per* registered Ton." This minimum value limit was intended "to prevent the owners of much less valuable ships [from] benefiting as compared to the owners of the better class of ship." Brice, id. at 19.

94 *Glaholm v. Barker* (1866) L.R. 1 Ch. App. 223 was an example which the High Court of Chancery exercised jurisdiction over the bill by the owners of the offending ship for limitation of liability against collision claims under the M.S.A. 1854, s. 514.

95 In 1860, pursuant to the enactment of M.S.A. 1854, Part IX, conferring limitation jurisdiction upon the High Court of Chancery, the Common Law Procedure Act 1854, s. 88, was replaced by the Common Law Procedure Act 1860 (23 & 24 Vict., c. 126), s. 35, which provided: "The Eighty-eight Section of "The Common Law Procedure Act, 1854", shall be and is hereby repealed; and from and after the passing of this Act the Superior Courts or any Judge thereof may, upon summary Application, by Rule or Order, exercise such and the like Jurisdiction as may be exercised by the Court of Chancery under the Provisions of the Ninth Part of The Merchant Shipping Act, 1854." Further, on the occasion of the enactment of the Admiralty Court Act 1861 (24 Vict., c.10), the High Court of Admiralty obtained on the one hand the greatly expanded jurisdiction over various liability actions (claims for building, equipping or repairing of ships; for cargo imported; for damage by any ships; for ownership, etc. of ships; for salvage; for wages of or disbursements by master; for mortgages of ships; etc.) and on the other hand the concurrent jurisdiction over limitation actions when an *in rem* proceeding is pending and other procedural powers.

noted that the Act did not require any liability action to be pending for the owner to commence a limitation action.

### (5) M.S.A. Amendment Act 1862

This Act[96] was enacted in order that badly maintained or inferior ships could not have an advantage over well-maintained or superior ships in calculation of the limitation fund in the combined limitation system of ship's value and monetary minimum limit. Section 54 of 1862 Act, which replaced ss. 504 & 505 of 1854 Act, struck a rough average value for all ships "whether British or foreign" at £15 or £8 per ton ("gross" for steamships; "registered" for sailing ships), with the valuation to be at the higher or lower rate according to whether the incident was accompanied by loss of life or personal injury either alone or together with property damage, or accompanied only by property damage.[97] The Act extended the

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Sec. 13 provided: "Whenever any Ship or Vessel, or the Proceeds thereof, are under Arrest of the High Court of Admiralty, the said Court shall have the same Powers as are conferred upon the High Court of Chancery in England by the Ninth Part of "The Merchant Shipping Act, 1854.""
As to the application of the words "under Arrest" it was held in *The Northumbria* (1869) L.R. 3A. & E. 24 that even in case where bail has been given in lieu of actual arrest in an *in rem* proceeding, the Court of Admiralty was entitled to proper jurisdiction over the owner's limitation proceeding on the grounds that the bail was the representative of the "res" seized by the Court as if the "res" itself had been under warrant of arrest and released. Despite the provision of s. 13 of this Act, however, the struggle between the common law courts and the Court of Admiralty in respect of the latter's jurisdiction in limitation actions and its ancillary powers to issue injunctions continued. In *The Normandy,* (1870) L.R. 3A. & E. 152, where the owners instituted in the Court of Admiralty a suit of limitation of liability and applied for an injunction to stop all other actions pending in other Courts (including common law courts), it held that it had jurisdiction to entertain the limitation action and also "power to stop all actions relating to the same subject-matter wherever pending", on the grounds of s. 514 of M.S.A. 1854 expressly referring to "actions in any other Court" and refused the motion by claimants in an action pending in the court of Exchequer to dissolve the injunction. Id. at 158-60. However, the Court of Exchequer declined to accept the above injunction of the Admiralty Court when the owners applied for a rule to stay, on grounds that under the Common Law Procedure Act 1852, s. 226, only a superior court of law or equity could issue an injunction to stay the pending action. *Milburn v. London & South-Western Ry. Co.* (1870) L. R.6 Ex. 4.
The confrontation between the two Courts did not stop there. The Court of Exchequer directed the plaintiff of liability action to declare in prohibition, which he did accordingly. The Court held that a prohibition would lie to the Court of Admiralty and that as neither the ship nor the proceeds thereof was or were "under arrest" of the Court of Admiralty, as enacted by sec. 13 of the Admiralty Court Act 1861, the latter Court had no jurisdiction over the limitation action. *James v. London & South-Western Ry. Co.* (1872) 1 Asp. Mar. L. Cas. 226; L.R. 7 Ex. 287. Now the owners of the *Normandy* filed the bill again before the Court of Chancery for the limitation proceeding and the injunction as well, eventually having been granted by the Master of the Rolls the limitation of liability to the amount of £15 per ton and the injunction as well except for the luggage claim of James who had obtained the writ of prohibition of the Court of Exchequer, but on appeal by the owners against James the Chancery Court of Appeals reversed, granting the injunction to stay the action of James too by the application of s. 514 of M.S.A. 1854. *London & South Western Ry. Co. v. James* (1873) L.R. 8 Ch. 241 (CA).

96 25 & 26 Vict., c. 63 (1862).

97 Thomas, *British Concepts of Limitation of Liability,* 53 Tul. L. Rev. 1205, 1208 (1979). However, given the absence of clear explanation on the ground that the Parliament (Select Committee on Shipping 1860) selected the figures of £15 and £8 per ton, it must have been a compromised legislation. *Cf.* Gaskell, *The Amount of Limitation,* The New Law 33, 34 n. 8 (1986) (stating that the £8 figure appears to have been a

privilege of limitation of liability to foreign ships except for the application of 1854 Act, s. 503 (reproduced as s. 502 of 1894 Act) providing for the privilege of excluding the liability of British shipowners for fire and valuables.[98] With the 1862 Amendment Act passed, the British monetary limitation system of shipowners' liability was completely formed without regard to the value of the ship and freight. However, no alteration was made by this Act as regards jurisdiction over limitation proceedings.

By virtue of the enactments of the Supreme Court of Judicature Acts 1873 & 1875,[99] all the jurisdiction previously vested in the Common Law Courts and the Admiralty Court, etc., was transferred to the High Court of Justice as one of the Divisions of the Supreme Court of Judicature (1873 Act, ss. 3, 4, 16 & 76). Further, the Acts provided for the plaintiff's option to choose one of the Divisions of the High Court of Justice by marking the document with the name of such Division. As to the jurisdiction over limitation actions, it was interpreted that by virtue of s. 11 (replacing s.35 of 1873 Act) of the Judicature Act 1875 the Admiralty Division of the High Court of Justice could obtain and deal with actions of limitation of liability brought in the said Court and assigned by plaintiffs to the Admiralty Division, "in the same manner as if that Division had been the proper Division to which such actions were assigned under the Rules of Court now in force."[100]

### (6) M.S.A. 1894 (Part VIII)

Sections 54 *et seq.* of 1862 Act were repealed by the M.S.A. 1894,[101] which re-enacted the liability of shipowners in Part VIII, ss. 502-509. The M.S.A. 1894 became the basic structure of British system of shipowners' limitation of liability, thus being called the principal Act. The major provisions of this Act were as follows.

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concession to the owners of sailing ships); Rein, supra n. 76 at 1265 (stating without citing authority that the £15 was the estimated average value of British passenger ships in 1854, the £8 being that of all British ships in 1862); Selvig, *An Introduction to the 1976 Convention*, The New Law 3, 4 (1986) (stating without citing authority that £8 per ton at the time was regarded as an average value of "good English sailing ships").

98 Temperley, *Merchant Shipping Acts* 165 (B.S.L. Vol. 11, Thomas & Steel, rev., 7th ed. 1976).

99 36 & 37 Vict., c. 66 (1873); 38 & 39 Vict., c. 77 (1875).

100 Williams & Bruce, *Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals* 379 (1902, reprinted, 1986). The very same interpretation is stated in Roscoe, *The Admiralty Jurisdiction and Practice* 242 (5th ed., 1931, reprinted, 1987) as to s. 58 of the Judicature (Consolidation) Act 1925 replacing s.11 of the Judicature Act 1875.

101 57 & 58 Vict., c. 60 (1894).

(1) Section 502 provided for the exclusion of British sea-going ship owners from liability for loss of or damage to any goods, etc., by fire on board the ship and to any valuables shipped on board the ship unless the true nature and value of them were declared at the time of shipment in the bills of lading or otherwise in writing.

(2) Section 503 incorporated s. 54 of 1862 Act and s. 506 of 1854 Act, thus providing for the limits of liability of a British or foreign shipowner on distinct occasion to be not exceeding £15 per ton for loss of life or personal injury either alone or together with property damage and £8 per ton for property damage only. The limitable claims by s. 503 were as follows:

(a) Where any loss of life or personal injury is caused to any person being carried in the ship;

(b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the *improper navigation* of the ship;

(d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the *improper navigation* of the ship.

Thus, this Act did not still cover all tort claims arising from direct operation of the ship and consequently the scope of the subject-matter jurisdiction over limitation of liability was still restricted.

(3) Section 504 conferred the jurisdiction over limitation actions in England and Ireland upon the High Court, and in Scotland upon the Court of Session, and in a British possession upon any competent court, and further powers upon those courts to stay proceedings pending in any other court in relation to the same matter.

### (7) M.S.A. 1898

The M.S. (Liability of Shipowners) Act 1898,[102] c.14, ss. 1-5, extended the application of Part VIII of 1894 Act to the owners, builders or other parties interested in any ship under incomplete construction from her launching until the registration thereof but only for a limited period of 3 months after the launching. This Act did not contain any provision concerning jurisdiction.

### (8) M.S.A. 1900

The M.S. (Liability of Shipowners and Others) Act 1900, c. 32,[103] was to extend the application of limitation of liability to property claims to "all cases where (without actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or *management* of the ship" (s.1).[104] However, personal claims subject to limitation as provided for in s. 503 (1) (a) & (c) were not extended. Thus, in *The Athelvictor*,[105] where due to the 3 sea valves left open about 60 tons of petrol escaped from the ship upon arrival at the discharging port causing fire and explosion of the ship and loss of many lives and personal injuries on board and ashore, it was held that the cause of incident fell within the "improper management" and not "improper navigation" of M.S.A. 1900 and therefore that the owners were entitled to limitation of liability only against property claims but not against personal claims.

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102 61 & 62 Vict., c. 14 (1898).

103 63 & 64 Vict., c. 32 (1900).

104 The 1900 Act further provided for the limitation of liability of the owners of any dock or canal or a harbour authority or a conservatory authority for loss or damage to any ship or goods, etc. on board the ship (s.2). The limit of liability of such owners was not to exceed £8 per ton of the largest British registered ship which had called within the area of such dock, etc. for the previous 5 years. Other provisions of chapter 32 were related to supplementary ones in respect of the limitation of liability of dock owners, etc., the distinct occasion unit, etc.

105 [1946] P.42 (further holding that "improper management of the ship" was wide enough to cover any mishandling of a *physical part* of the ship or her appliances). See also *The Vigilant* [1921] P. 312 (holding that the improper casting off the tow rope was an act of improper navigation within the meaning of s. 503 of M.S.A. 1894 as amended by M.S.A. 1900, entitling the tug owners to limit liability).

### (9) M.S.A. 1921

M.S.A. 1921[106] extended the application of limitation of liability to owners or bareboat charterers of "lighter, barge, or like vessel used in navigation in Great Britain, however propelled" except for such vessels as used exclusively in non-tidal waters other than harbours (s. 1 (1) & (2)) and further except for loss of life or personal injury caused to any person carried therein (s.3).[107]

### (10) National Legislation of Limitation Conventions

The British monetary limitation regime greatly affected to accomplish the uniformity of international limitation Conventions from the 1957 Convention although the 1924 Convention could not be successful. M.S. (Liability of Shipowners and Others) Act 1958[108] was to implement the 1957 Convention by amending Part VIII of M.S.A. 1894 and s. 2 of M.S.A. 1900. The major features of 1958 Act were as follows:

(a) Substitution of 3,100 gold francs and 1,000 gold francs[109] for £15 and £8 as the limits of liability, with a minimum limit for ships less than 300 tons except where property claims only arose (s. 1 (1));

(b) Extension of the scope of limitable claims from the navigation (or management) of the ship to "the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship" (s. 2 (1));

(c) Reservation of wreck removal liability from the application of limitation (s. 2 (2) (a), (5) - (7));

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106 11 & 12 Geo. 5, c.28 (1921). Before this Act, the M.S.A. 1906 (6 Edw. 7, c.48) also included some amendments: Calculation of steamships' limitation tonnage (s. 69); Deletion of 3 months restriction after ship's launching (s. 70); and Extension of application of limitation to demise charterers (s. 71).

107 *Cf. The Goring* [1988] A.C. 831 (HL) (holding that there was no admiralty jurisdiction over salvage claims in respect of assistance to a ship in non-tidal inland waters of the Thames above Reading Bridge).

108 6 & 7 Eliz. 2, c. 62 (1958).

109 For these amounts of limit there were substituted 206.67 SDR and 66.67 SDR respectively by the 1979 Protocol to the 1957 Convention.

(d) Extension of the persons entitled to limitation (s. 3);

(e) Extension of the "ship" to include ships unregistered or launched before completion of construction (s. 4);

(f) Release of arrest or security on certain conditions (s. 5);

(g) Restriction on the enforcement of judgement on certain conditions (s. 6); and

(h) Distribution of limitation fund (s. 7).[110]

However, first, as the Act rewrites the provisions of 1957 Convention, it could not reproduce the purport of the Convention correctly (e.g., the Act, s. 2(1), omitted the words of the employment relation giving rise to limitable claims). Second, section 5 (Release of Ships, etc.) incorporated uncritically the art. 5 of 1957 Convention in that the court seized of a liability action (including *in rem* proceeding) was bound to decide whether the limitation of liability could be allowed or not and that the literal operation of the section could result in the detriment of the claimant to be deprived of full security for his claim when the limitation of liability should be broken.[111] Third, even under the 1958 Act, since the s. 1 proviso of M.S.A. 1921 was not repealed, any ship used exclusively in non-tidal waters other than harbours should not be applicable to the limitation of liability. Fourth, as s. 504 of M.S.A. 1894 was not repealed by the 1958 Act, the jurisdiction over limitation actions was not altered by the Act.[112]

Meanwhile, The Hovercraft Act 1968 (c. 59), s. 1, gave Her Majesty power to make Orders in Council with respect to hovercraft as she considers expedient for, *inter alia*, applying the enactment of shipowners' limitation of liability (para. (h) & (i)), by which the Hovercraft (Civil Liberty) Order 1971 (S.I. No. 720) was enacted. According to this Order

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110 The 1958 Act came into force on August 1, 1958, Temperley, supra n. 98, at 165, much earlier than the date when the 1957 Convention entered into force internationally on May 31, 1968. The Institute of Maritime Law, *The Ratification of Maritime Conventions*, I. 2-77 (hereinafter referred to as "RMC").

111 Temperley, supra n. 98 at 531 n. 3 & 4 citing *The Putbus* [1969] 1 Ll. R. 253 (CA) (holding that the court should in principle exercise its discretion in allowing the release).

112 However, under the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5, c.49), s. 4, the "High Court" consisted of three Divisions: The Chancery Div., The King's Bench Div., and the Provate, Divorce and Admiralty Div. ("Provate Division"). As the Act, s. 58 (replacing s. 11 of the Judicature Act 1875), provided for the option to choose the Division of the High Court, the plaintiff for a limitation action became entitled to assign it to the Provate Division.

(art. 6), Part VIII of M.S.A. 1894 and M.S. (Liability of Shipowners and Others) Act 1958 should apply, subject to the modifications[113] set out in Schedule 3 to the Order relating to limitation of liability for personal and property claims (except for passenger and luggage claims) arising in connection with the operation of a hovercraft deemed to be a ship for the purpose of the application of liability provided for in these enactments, where at the time of incident "the hovercraft was on or over navigable water, or on or over the foreshore, or place where the tide normally ebbs and flows, or was proceeding between navigable water and a hoverport, or was on or over a hoverport either preparing for or after such transit" (art. 6, proviso). To such extent admiralty and limitation jurisdiction applies to claims arising from a hovercraft incident.

As to oil pollution liability limitation, the M.S. (Oil Pollution) Act 1971[114] was enacted to give effect to the 1969 CLC. Also to give effect to the 1971 FC as a supplement to 1969 CLC, the M.S.A. 1974 was enacted. The main provisions of 1971 Act are summarised hereunder:

(a) Requirement of the owner's liability and the scope of applicable damage and costs (s. 1);

(b) Exceptions from liability (s. 2);

(c) Owner's limitation of liability for the specific oil pollution damage (2,000 gold francs per ton or 210 million gold francs, whichever is the less) (s. 4);

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113 The main modifications are:
(1) The para. (a) of s. 503 (1) of 1894 Act (i.e., personal claims by any person carried in the ship) does not apply. Ord. 1971, Sch. 3, A. (2)-(3).
(2) The limits of liability set out in s. 503 (1) (i) & (ii) as amended by 1958 Act were substituted with £3.50 per kg. of the hovercraft's maximum authorized weight for 3,100 gold francs, and £1 per kg. of the hovercraft's maximum authorised weight for 1,000 gold francs respectively. Id. Sch. 3. A. (6).
(3) In case of the weight being less than 8,000 kg., it should be deemed 8,000 kg. Id. Sch. 3 A. (6).
(4) s. 2 (2) (a) & (4) - (7) of 1958 Act (provisions for wreck removal; claims by servants of owners, etc.), s. 4 (unregistered ship and ships in course of completion or construction), s. 5 (3) (5) & (6) (court's mandatory release of arrest or security, etc.), s. 8 (5) & (6) (substitution of para. (a) of s. 5 (6) of the Crown Proceedings Act 1947 and provisions for repealing certain enactments), and ss. 9 to 12 (transitional sections, etc.) should not apply respectively. Id. Sch. 3, B. (4) - (11).

114 1971 c. 59. After receiving the Royal Assent, the Act partly came into force on September 9, 1971 by M.S. (Oil Pollution) Act 1971 (Commencement) Order 1971 (S.I. No. 1423) and the remaining part on June 19, 1975 by M.S. (Oil Pollution) Act 1971 (Commencement No. 2) Order 1975 (S.I. No. 867). Meanwhile, as to the 1974 Act to implement the 1971 FC, see Cusine, *The Int'l Oil Pollution Fund as Implemented in the United Kingdom,* 9 J. Mar. L. & Com. 495 (1978).

(d) Owner's optional invocation of a limitation by way of either defence or limitation action (ss.4(1) & 5);

(e) Restriction of enforcement of claims after the establishment of limitation fund (s. 6);

(f) Separate proceedings of oil pollution limitation action from other concurrent claims (s. 7);

(g) Effect of the establishment of limitation fund in neighbor Contracting State (s. 8);

(h) Inclusion of oil pollution claims into admiralty jurisdiction; Requirement of the U.K. jurisdiction and Application of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (s. 13); and

(i) Application to hovercraft (s. 17).

As to jurisdiction over limitation actions, section 5 provided that the owner could apply "to the court" for limitation of liability and section 20 (1) provided that "the court" meant the High Court in England and Wales, the Court of Session (in Scotland) or the High Court in Northern Ireland or a judge thereof. Thus, the jurisdiction is the same as in the cases of general global limitation of liability.

M.S.A. 1979 (c. 39) enabled the U.K. to ratify, *inter alia*, the 1974 Athens Convention, the 1976 London Convention and 1976 Protocols to 1969 CLC and 1971 FC. M.S.A. 1995 (c. 21) is "An Act to consolidate the Merchant Shipping Acts 1894 to 1994 and other enactments relating to merchant shipping."

M.S.A. 1979, s. 14 (replaced by s. 183 of M.S.A. 1995), gave the force of law to the 1974 Athens Convention set out in Sch. 3, Part I (replaced, Sch. 6, Part I of 1995 Act) and s.16 (replaced, 1995 Act, s. 184) provided for the application of Sch. 3 before coming into force of the Convention and to domestic carriage. Since the limits of liability (arts. 7 & 8)

are too low,[115] however, the U.K. increased the limit of liability for personal claims against the carriers whose principal place of business is in the U.K. to 100,000 SDR.[116]

As the 1974 Convention does not affect any other Convention (art. 19), the 1976 Convention may be invoked by the owner as carrier. The limit for passenger claims under 1976 Convention is 46,666 SDR multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate, but not exceeding 25 million SDR. Thus, for example, in case of the casualties being more than 535, the carrier will elect to bring a limitation action under 1976 Convention. A U.K. carrier will bring a limitation action if the casualties are over 250 in one distinct occasion. Art. 17 of 1974 Convention provides for the jurisdiction in a claimant's liability action only (at his option in certain courts). Thus, there may be conflict judgments when liability actions are brought in different courts. The 1974 Convention has not been supported by major maritime countries[117] and even in the U.K. an influential argument to denounce it is raised.[118]

M.S.A. 1979, s. 17 (replaced, M.S.A. 1995, s. 185) gave the force of law to 1976 Convention set out in Sch. 4, Part I (replaced, Sch. 7, Part I of 1995 Act) and supplemented by Sch. 4, Part II (replaced, Sch. 7, Part II of 1995 Act). Under these Acts, the main modifications to the 1976 Convention are: (1) Exclusion of the claims of the employees or service contractors from the application of limitation; [119] (2) Application of the Convention to any ship whether seagoing or not;[120] (3) Reservation of the application of limitation for wreck removal claims;[121] (4) Separate provisions of limitation amount for ships less than 300 tons;[122] (5) Powers of the court for discretionary stay of liability actions in cases of the

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115 In case of personal claims, the liability of the carrier shall not exceed 700,000 francs (46,666 SDR by the 1976 Protocol, art. 2 (1)) *per capita*. The limits per passenger per carriage of cabin luggage, vehicle and other luggage are 833 SDR, 3,333 SDR and 1,200 SDR respectively. 1976 Protocol, art. 2 (2).

116 1974 Convention, art. 7 (2); The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1987 (S.I. 1987/855), as amended by The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) (Amendment) Order 1989 (S.I. 1989/1880).
In the meantime, a new Protocol to the 1974 Convention was approved at an IMO Convention in London in March 1990 to increase the limitation amounts. The limits of liability provided for in the 1990 Protocol are: For personal claims *per capita* 175,000 SDR; For cabin luggage *per capita* 1,800 SDR; For per vehicle 10,000 SDR; For other luggage 2,700 SDR; For optional deductibles for a vehicle 300 SDR and for luggage 135 SDR. This Protocol has not come into force as of 1997. RMC I. 5 - 86/1.

117 France, Germany, Norway, Sweden, The Netherlands, Denmark, Finland, Japan, etc. did not ratify or acceded to 1974 Convention as of 1996. RMC I.5-82.

118 Gaskell, Annotated, *Merchant Shipping Act 1995*, 2 Cur. L.S. 1995, 21-209 & 360 (1996).

119 1979 Act, s. 35, replaced, 1995 Act, s. 185 (4) (a).

120 1979 Act, Sch. 4, Pt. II, para. 2, replaced, 1995 Act, Sch. 7, Pt. II, para. 2.

121 1979 Act, Sch. 4, Pt. II, para. 3, replaced, 1995 Act, Sch. 7, Pt. II, para 3.

122 1979 Act, Sch. 5, Pt. II, para. 5, replaced, 1995 Act, Sch. 7, Pt. II, para. 5.

limitation fund having been constituted;[123] and (6) Modified application of the Convention to hovercrafts[124] and to harbour, conservancy, dock and canal authorities.[125] Thus, the 1976 Convention and the relevant Provisions of M.S.A. 1979 giving the force of law to the Convention came into force on December 1, 1986.[126]

The M.S. (Salvage and Pollution) Act 1994 (c. 28), s. 5, enabled the U.K. to ratify 1992 CLC Protocol and 1992 FC Protocol and gave effect to them as enacted in the M.S.A. 1988, c. 12, s. 34. The 1994 Act, c. 28, was repealed by M.S.A. 1995 and the two 1992 Protocols were not directly incorporated but rewritten with modifications. The provisions to modify or supplement 1992 CLC are as follows:

(a) The M.S.A. 1995, s. 170 (4) (a), extended the territorial scope of the U.K. to apply its oil pollution provisions (whether 1992 CLC or 1976 LLMC applies) up to any area "within the British fishery limits set by or under the Fishery Limits Act 1976;" for which, however, there was substituted "specified by virtue of section 129 (2) (b)".[127]

(b) The owner (but not others) may invoke limitation of liability pursuant to s. 157 without constituting a limitation fund, which is a departure from the Convention (art. V (3)).

(c) Under the 1992 CLC, the conduct barring limitation of liability should be that the oil pollution damage resulted from the owners "personal" act or omission committed with the intent, etc. (art. V (2)), whereas the equivalent of the M.S.A. 1995 is modified as "resulted from anything done or omitted to be done by the owner either with intent . . . " (s. 157 (3)).

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123 1979 Act, Sch. 4, Pt. II, para. 8(2), replaced, 1995 Act, Sch. 7, Pt. II, para 8(3).

124 1979 Act, s. 19, Sch. 5, para. 4; Hovercraft Act 1968, Hovercraft (Civil Liability) Order 1986 (S.I. 1986 No. 1305), as amended (S.I. 1987 No. 1835).

125 1979 Act, s. 19, Sch. 5, para. 1(1) - (3), s. 50(4), replaced, 1995 Act, s. 191.

126 M.S.A. 1979 (Commencement No. 10) Order 1986 (S.I. 1986 No. 1052).

127 M.S. & Maritime Security Act 1997 (c. 28), s. 29(1), Sch. 6, para. 5. The substituted s. 129 (2) (b) of M.S.A. 1995 reads: "(b) specifying areas of sea above any of the areas for the time being designated under section 1(7) of the Continental Shelf Act 1964 as waters within which the jurisdiction and rights of the United Kingdom are exercisable in accordance with Part XII of that Convention [UN Convention on the Law of the Sea 1982] for the protection and preservation of the maritime environment;"

(d) The competent court for the owner to bring a limitation action is the High Court, or in Scotland the Court of Session (ss. 158 & 170).[128]

In 1997, the Parliament enacted the Merchant Shipping and Maritime Security Act 1997 (c. 28), of which s. 14 incorporates the 1996 HNS Convention in Chapter V of M.S.A. 1995, conferring upon Her Majesty the powers to make Order in Council to give effect to the Convention, and s. 15 of the 1997 Act provides for the similar powers to give effect to the 1996 Protocol to the 1976 Limitation Convention.

### B. The U.S. Limitation Regime

In the early United States, the merchant shipping was inferior to that of the European major countries and was mainly in the position of a cargo country. It was natural, therefore, that until the 18th century no necessity for an enactment of shipowners' limitation of liability was felt either by the underdeveloped shipping industry or by Congress. Thus, the doctrine of *respondeat superior* and the common law governed for a long time as to the unlimited liability of carriers by sea as well as by land. However, according to the development of American shipping industry, the necessity to protect it began to be felt by the northeastern states.

#### (1) Mass. Act 1819 and Maine Act 1821

The Mass. Act 1819[129] was the first statute in the U.S. for shipowners' limitation of liability and modelled on the 1734 English Act (7 Geo. II, c. 15).[130] After amendments three

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[128] Supreme Court Act 1981, (c. 54) was to consolidate with amendments the Supreme Court of Judicature (Consolidation) Act 1925 and other enactments relating to the Supreme Court in England and Wales and the administration of justice therein. Under this Act, the Supreme Court of England and Wales consists of the Court of Appeal, the High Court of Justice and the Crown Court (s. 1 (1)). The High Court consists of the Chancery Division, the Queen's Bench Division and the Family Division (s. 5 (1)). The Q.B.D. consists of an Admiralty Court and a Commercial Court (s. 5 (6)). Section 20 provides for the categories of Admiralty jurisdiction including, *inter alia*, limitation actions by owners and others under the M.S. Acts. 1894 to 1979 and the M.S. (Oil Pollution) Act 1971 (paras. (3) (c) & (5) (a)). Section 62 (2) provides: "The Admiralty Court shall take Admiralty business, that is to say causes and matters assigned to the Queen's Bench Division and involving the exercise of the High Court's Admiralty jurisdiction or its jurisdiction as a prize court." Further, the Rules of the Supreme Court, Ord. 75, r. 2 (1) provides that "every limitation action" shall be assigned to the Q.B.D. and taken by the Admiralty Court.

[129] Act of Feb. 20, 1819, Gen. Laws, c. 122, entitled "An Act to Encourage Trade and Navigation Within This Commonwealth." The Preamble of the Mass. Act was almost identical with that of 7 Geo II, c. 15. Sprague, supra n. 1, at 574 n. 27.

[130] Donovan, supra n. 1, at 1009.

times this Act was repealed in 1902.[131] The Maine Act 1821[132] was almost the exact copy of the Mass. Act 1819 with minor modifications.

### (2) Limitation of Liability Act 1851

It was not until 1851 that the U.S. Congress enacted a Limitation of Liability Act. In *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston (The Lexington)*,[133] where during the voyage from New York to Providence, Long Island a fire broke out and the ship sank with loss of the wooden crate cargo containing $18,000 in coin and commercial papers as well as losses of many passengers and crew, the Supreme Court held that despite the exception clause in the bill of lading the owner as a common carrier was liable for the fire and loss of cargo in full due to the gross negligence of himself and the master and crew. This judgment against the contractual exception of the owner's liability frightened shipowners. They developed the movement of petitions to Congress and lobbied for the enactment of shipowners' limitation of liability. As a result, on January 25, 1851, Senator Hannibal Hamlin of Maine presented a Bill "To Limit the Liability of Shipowners and for Other Purposes" in order to "place our commercial marine upon an equal footing with [England]."[134] This Bill was passed by Congress in a month.[135]

The 1851 Act consisted of: s. 1 Owners' exception of liability by fire commonly known as the Fire Statute; s. 2 Exemption or limitation of liability for valuables on certain conditions; s. 3 Owners' limitation of liability to the extent of the value of the ship and pending freight;[136] s. 4 Proportional compensation to claimants from the limitation amount

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131 It was dropped in the Revision of 1902 under the heading of "Disposition made of the Public Statutes: c. 69, 1-4 same U.S. Revised Statutes 4283-4289 *et. seq.*" Sprague, supra n. 1, at 576 n.30.

132 Me. Pub. Laws 1821, c. 14, ss. 7-10, entitled "An Act Respecting the Willful Destruction and Casting Away of Ships and Cargoes, the Custody of Shipwrecked Goods and Trade and Navigation." Gunn, supra n. 22, at 31 n. 10.

133 47 U.S. (6 How.) 344 (1848).

134 Cong. Globe, 31st Cong., 2nd Sess. 331-32 (1851).

135 Limitation of Liability Act of Mar. 1851, c. 43, 9 Stat. 635. Sections 1, 2, 3 & 6 of this Act were substantially adopted from the 1786 English Act (26 Geo. III, c. 86), but s. 5 was copied from the Revised Statute of Maine, 1840, c.47 which adopted the provisions of the Mass. Act. Gilmore & Black at 819 n. 5.

136 Sec. 3 reads:
"Be it further enacted, That the liability of the owner or owners of any ship or vessel for any embezzlement, loss, or destruction, by the master, officer, mariner, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending."

and the owner's option to bring a limitation action;[137] s. 5 Extension of the application of owners' limitation of liability to bareboat charterers; s. 6 Rights of the owner for indemnity from master or mariners; s. 7 Punishment of shippers for shipping dangerous cargo without disclosing the nature and character thereof; and s. 8 Exclusion of inland or river carriers from application of this Act.

### (3) 1871 Act

In 1871, sec. 2 of the 1851 Act was amended to extend the list of valuables by inserting the phrase for other kinds of valuables.[138]

### (4) Admiralty Rules

On May 6, 1872 the Supreme Court promulgated Admiralty Rules 54-57 prescribing the practice in limitation proceedings to be assigned exclusively to federal courts.[139] These Rules, with slight amendments, were carried over into Admiralty Rules 51-54, promulgated on December 6, 1920 and amended again in 1948.[140]

### (5) 1874 Act

The Amendment Act of 1874 (Rev. Stat. s. 5596) deleted the proviso of sec. 1 of 1851 Act and also deleted the word "goods" from the same section to make it clear that non-

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137 Sec. 4 reads:
"And be it further enacted, That if such embezzlement, loss or destruction shall be suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner or owners of any ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this Act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee to be appointed by the court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease."

138 Act of 1871, c. 100, s. 69, 16 stat. 458.

139 Admiralty Rules 54-57, 80 U.S. at xiii-xiv (1872). These Admiralty Rules for limitation proceedings were devised immediately after the case of *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1872) because s. 4 of the 1851 Act was so imperfect, fragmentary and ambiguous as to be workable. Gilmore & Black at 819-20.

140 Admiralty Rules 51-54, 254 U.S. App. at 25-29 (1920), and Admiralty Rules 51-54, 334 U.S. 864-69 (1948).

merchandise such as baggage of passengers should not be applied. At the same time, all the provisions of 1851 Act as amended were cast into the U.S. Revised Statutes (R.S. which began to be published in 1873) at s. 4281 (s. 2 of 1851 Act), s. 4282 (s. 1 of 1851 Act), s. 4283 (s. 3 of 1851 Act),[141] s. 4284 (s. 4, 1st para. of 1851 Act), s. 4285 (s. 4, 2nd para. of 1851 Act), s. 4286 (s. 5 of 1851 Act), s. 4287 (s. 6 of 1851 Act) and s. 4289 (s. 7 of 1851 Act), with minor modifications.[142]

### (6) 1875 & 1877 Acts

By 1875 Act[143] and 1877 Act,[144] minor verbal modifications were made to the provisions of 1851 Act without altering the meaning or import of the statutes.[145]

### (7) 1884 Act

Sec. 18 of the 1884 Act[146] was interpreted to have extended the application of the limitation statutes to *non-maritime* tort claims ("any and all debts and liabilities"),[147] whether they are found *ex contractu* or *ex delicto*, provided however that the limitation of liability should not apply to "wages due to persons employed" by shipowners.

### (8) 1886 Act

Sec. 4 of the 1886 Act[148] provided for the amendment to R.S. 4289 (currently codified at 46 U.S.C.A. s. 188) so as to apply the limitation statutes "to all sea-going vessels, and also

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141 In *The Scotland,* 105 U.S. 24 (1882) (Bradley, J.), it was held that the interest of the owner should be taken at the end of the voyage or after the disaster and also that a foreign shipowner could enjoy the benefit of the Limitation Statute. See also *The City of Norwich,* 118 U.S. 468 (1886) (Bradley, J.) (holding that the value of the ship and freight after (not before) the collision should be taken and that hull insurance proceeds should not be included in the limitation fund; Dissenting, Justices Miller, Harlan, Matthews and Gray).

142 3 Benedict on Admiralty, s. 5 at 1-36.

143 Act of 1875, c. 80, 18 Stat. 320.

144 Act of 1877, c. 69, 19 Stat. 251.

145 Donovan, supra n. 1, at 1020; Sprague, supra n. 1, at 580 nn. 42-46.

146 Act of June 26, 1884, c. 121, s. 18, Stat. 57 (also called Dingley Act), currently codified at 46 U.S.C.A. s. 189.

147 In *Richardson v. Harmon,* 222 U.S. 96, 106 (1911), it was held that this section "harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."

148 Act of June 19, 1886, c. 421, s. 4, 24 Stat. 80.

to all vessels used on lakes or rivers or inland navigation, including canal boats, barges, and lighters."

### (9) Restriction by DOHSA

In *The Harrisburg*,[149] the Supreme Court (Waite, C.J.) held that in the absence of an Act of Congress or statute giving a right of action to recover damage for the death of a human being on the high seas caused by negligence, no cause of action would lie in the courts of the U.S. under the general maritime law.[150] On the other hand, however, the Supreme Court decided that foreign shipowners were entitled to the benefit of the Limitation Act against maritime claims involving deaths of foreign crew and passengers on the high seas,[151] although if the law of the flag did not allow shipowners' limitation of liability for claims of crew carried on board the vessel, the decisions of the U.S. courts could not have binding effect in the country of the ship's flag. In order to eliminate such inconsistencies, in 1920 Congress enacted the Death on the High Seas Act (DOHSA).[152] Sec. 761 of the Act confers upon the U.S. district courts the admiralty jurisdiction over the right of action for deaths of persons caused by wrongful act, neglect or default occurring on the high seas against the vessel or liable persons, but sec. 764 excludes from the application of the Limitation Act the rights of action for such death claims given by foreign countries.[153]

### (10) Casting into the U.S. Code (1926)

On the occasion of the compilation of the U.S. Code as an integration of federal statutes in 1926, the Revised Statutes were compiled into the U.S. Code and the provisions of the Limitation of Liability Act were also arranged at 46 U.S.C.A. ss. 181 to 189.

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149 119 U.S. 199 (1886).

150 Id. at 213.

151 *The Scotland*, 105 U.S. 24, 33 (1881); *Oceanic Steam Nav. Co. v. Mellor (The Titanic)*, 233 U.S. 718, 732-34 (1914); *The La Bourgogne*, 210 U.S. 95, 115 (1908).

152 Act of March 20, 1920, c. 111, 41 Stat. 537 (currently codified at 46 U.S.C.A. ss. 761-768).

153 DOHSA, s. 764 provides:
"Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default occurring on the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect of the amount for which recovery is authorised, *any statute of the United States to the contrary notwithstanding*."

### (11) 1935 Amendment Act

Along with the increase of the number of American steamships for great demand of marine trade through the late 19th and early 20th centuries, marine disasters involving losses of human lives occurred frequently.[154] Among them, the fire disaster of *The Morro Castle* in 1934 gave Congress a decisive motive to supplement the dissatisfaction of the Limitation Act.[155] Thus, the movement to amend the statutes started with "A Bill of Fixing the Liability of Owners of Vessels"[156] introduced in January 1935 by William I. Sivorich (New York), a member of the House of Representatives. Borrowing the supplemental monetary limitation system of British M.S.A. 1862, Congress passed the adjusted Amendment Act of 1935.[157]

Sec. 1 of the Act added to R.S. 4283 (46 U.S. C.A. s. 183) a proviso consisting of three paras. that (1) the total liability of the owner of any seagoing vessel, whether American or foreign, for loss of life or personal injury caused without the fault or privity of such owner should be an amount not less than $60 per ton of the tonnage of the vessel if the value of his interest in the ship and pending freight is less than such amount; (2) the tonnage of a steam or motor ship should be her gross tonnage for the purpose of calculating limitation fund; and (3) such limitation amount should be constituted on every distinct occasion.

Sec. 2 provided for the privity or knowledge of the master or superintendent or managing agent of the owner of a seagoing vessel for loss of life or bodily injury to be deemed conclusively the privity or knowledge of the owner.

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154 *The Princess Sophia,* 278 F. 180 (W.D. Wash. 1921), *aff'd*, 61 F. 2d. 339 (9 Cir. 1932), *cert. den.*, 288 U.S. 604 (1933) (sinking of the ship with losses of all passengers and crew 350 in the Lynn Canal, Alaska). See also *The Morro Castle (Settlement)*, 1939 AMC 895 (SDNY) (losses of 135 lives and injuries of more than 200 with great loss of property due to fire on board the ship en route to New York from Havana); *The Havana* (Jan. 7, 1935); *The Mohawk* (Jan. 24, 1935, losses of 74 lives).

155 Such dissatisfaction led to the outburst of rage when the owners received the hull insured amount $2,100,000 against the limitation fund of only $20,000. In *The Princess Sophia*, the limitation fund was only $600. In *The Mohawk*, the hull insurance proceeds were $2,500,000 against the limitation fund of $9,000.

156 The Sivorich Bill, H.R. 4550, 74th Cong., 1st Sess. (1935).

157 Act of Aug. 29, 1935, c. 804, 49 Stat. 960, reproduced in 1935 AMC 1261 (1935). Notes: Purdy, *The Recent Amendment to the Maritime Limitation of Liability Statutes*, 5 Brooklyn L. Rev. 42 (1935); Comment, *The Effect of the Recent Amendment to the Federal Limitation of Shipowners' Liability Act*, 10 Tul. L. Rev. 119 (1935).

Sect. 3 added a new section as "section 4283A" after sec. 4283, regulating the stipulations of minimum time limits for filing claims and commencing suit. This new section was codified at 46 U.S.C.A. s. 183b.

### (12) 1936 Amendment Act

The 1935 Act was hastily passed in the course of serious debate without systematic arrangement of the provisions and sophistication of the phraseology. Thus, in 1936 Congress amended the Limitation Statute again to re-arrange the provisions and modify some incomplete provisions,[158] in particular, adding the six-month time limit for filing a limitation action.

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[158] Act of June 5, 1936, c. 521, 49 Stat. 1479, reproduced in 1936 AMC 920 (1936). Annotation: Springer, supra n. 1.
The Amendment was as follows:
(1) The body provision of R.S. 4283 (46 U.S.C.A. s. 183) was renumbered subsec. (a) and added the words "whether American or foreign" with other minor alteration of phraseology like the current version of s. 183 (a).
(2) The 1st para. of the proviso of the same section was renumbered subsec. (b) and rephrased like the current version of s. 183 (b) except the words "$420" for the words "$60".
(3) The 2nd para. for the same proviso was renumbered subsec. (c) with minor alterations of the phraseology.
(4) The 3rd para. of the same proviso was renumbered subsec. (d) and rephrased like the current version of s. 183 (d).
(5) Sec. 2 of 1935 Act, which provided for the privity or knowledge of the master or superintendent or managing agent to be deemed that of the owner, was replaced by subsec. (e) of s. 183.
(6) Subsec. (f) of R.S. 4283 (46 U.S.C.A. s. 183) defined the words "seagoing vessel" in respect of subsec. (b) to (e) of the same section and R.S. 4283A (46 U.S.C.A. s. 183 b), as excluding pleasure boats, tugs, towboats, tank vessels, fishing vessels or their tender, lighters, barges, canal boats etc. This newly arranged subsec. (f) is nearly identical with the current version of s. 183 (f). The term "tank vessel" refers only to the river and harbour type tankers. *In re Panama Transp. Co.*, 73 F. Supp. 716 (SDNY 1947); *In re Dodge, Inc.*, 282 F. 2d 86 (2 Cir. 1960). And as to criticism on the restriction of application of this subsection to sea-going vessels only, see Springer, supra n. 1, at 32-33.
(7) Sec. 4283A was unamended but renumbered s. 183b. 46 U.S.C.A. s. 183a had been codified from s. 3 of the 1935 Act, but was repealed by s. 5 of the 1936 Act and replaced by s. 183 (e), as amended.
(8) Sec. 4283B was newly inserted after R.S. 4283A (i.e., 46 U.S.C.A. s. 183b) and codified at 46 U.S.C.A. s. 183c, which nullifies stipulations relieving or limiting liability for loss of life or bodily injury by negligence.
(9) Sec. 3 of the 1936 Act amended R.S. 4285 (46 U.S.C.A. s. 185) to make it complete and workable like the current version of the same section with the 6-month time limit added. Further, this amendment deleted the restricting words "embezzlement, loss, or destruction of any property, goods or merchandise" as provided for in R.S. 4285 of 1874 Act, so that the constitution of limitation fund may apply not only to property claims but also to personal claims.
(10) Lastly, s. 4 of 1936 Act amended R.S. 4289 (46 U.S.C.A. s. 188) so that, except as otherwise provided, "the nine preceding sections" and s. 18 of 1884 Act (46 U.S.C.A. s. 189) should apply to all vessels including inland or river vessels.

### (13) Supplemental Admiralty Rules - Rule F

On February 28, 1966, the Supreme Court merged the Federal Rules of Civil Procedure (FRCP, effective October 16, 1938) and the Admiralty Rules 51-54. As a replacement to the Admiralty Rules, it adopted Supplemental Rules for Certain Admiralty and Maritime Claims (Rules A-F, effective July 1, 1966). Of the Supplemental Rules, Rule F (Limitation of Liability),[159] most of which derived from and rephrased the previous Admiralty Rules 51-54, applies basically to limitation procedure although other rules of FRCP and practice of federal courts apply simultaneously. In addition, some district courts have their own local rules to supplement the Supplemental Rules to FRCP.[160]

### (14) 1984 Act

This Act[161] was to amend the monetary limitation amount "$60" per ton of 46 U.S.C.A. s. 183(b) to increase to be "$460" per ton for loss of life or bodily injury. This Amendment was a reflection of the U.S. position not to ratify the 1976 Convention. Meanwhile, the Maritime Law Association of the U.S. (MLA) adopted a draft Act to replace the Limitation of Liability Act in May 1979, suggesting to the pertinent House committee to amend the Act. The suggestion was adopted and on March 21, 1984 the House committee introduced a bill (H.R. 5207) modelled on the MLA draft.[162] The Bill was reintroduced the

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159 Rule F (Limitation of Liability) provides for (1) Time for Filing Complaint & Security, (2) Complaint, (3) Claims Against Owner & Injunction, (4) Notice to Claimants, (5) Claims and Answers, (6) Information to Be Given Claimants, (7) Insufficiency of Fund or Security, (8) Objection to claims & Distribution of Fund, and (9) Venue & Transfer.

160 3 Benedict on Admiralty, s. 3 at 1-29.

161 Pub. L. No. 98-498, Title II, s. 213 (a), 98 Stat. 2306, effective October 19, 1984.

162 Parks, *The U.S. and the 1976 Convention*, The New Law 260, 275 (1986). Soon after the London Conference for the 1976 Convention, the Committee on Limitation of Liability of MLA and a Special Committee of CMI made a Joint Committee upon the knowledge that the U.S. was not expected to ratify 1976 Convention. A 14-member special working group (Chairman: Richard W. Palmer) appointed by the Joint Committee prepared a draft Act to replace the Limitation Statute, and the draft was approved at the Annual Meeting of MLA in May, 1979. MLA Doc. No. 618 (May, 1979). This proposed Act (MLA Doc. No. 619) consisted of eleven sections, *inter alia*, providing for the limits:

(a) Claims for loss of life or personal injury:
  (i) $1,000,000 for a vessel up to 500 G/T;
  (ii) for a vessel over 500 G/T, the following amount to be added: 501-1,000 tons, $2,000 p/t; 1,001-10,000 tons, $1,000 p/t; 10,001-20,000 tons, $500 p/t; 20,001-30,000 tons, $300 p/t; 30,001-70,000 tons, $200 p/t; over 70,000 tons, $100 p/t.
  (iii) an additional sum of $100,000 for each crew member.
  (iv) maximum total limit: $50,000,000.

(b) Claims other than personal claims:
  (i) $500,000 for a vessel up to 500 G/T;
  (ii) for a vessel over 500 G/T, the following amount to be added: 501-30,000 tons, $200 p/t; 30,001-70,000 tons, $150 p/t; over 70,000 tons, $100 p/t.

next year in January 1985 as H.R. 277 and another Bill with modifications as H.R. 3156[163] was introduced the same year, but all failed to revise the current Limitation of Liability Act.

### (15) Oil Pollution Limitation Acts

Although there have been other statutes controlling oil pollution in the U.S., the Water Quality Improvement Act of 1970 (WQIA)[164] was the first statute dealt with not only penalty provisions but also civil limitation of liability of shipowners and others. The WQIA was passed in the aftermath of the *Torrey Canyon* stranding in 1967 and the *Santa Barbara* oil spill in 1969 and as a negative response to the 1969 CLC.[165] This Act was amended by the Federal Water Pollution Control Amendment Act of 1972 (FWPCA).[166] The WQIA (33. U.S.C.S. 1161) was replaced by 33 U.S.C. s. 1321. So far as the limitation of shipowners and others was concerned, the same structure and limitation amounts were maintained, but the application of limitation was extended to "a hazardous substance" (s. 1321 (f)).

The Trans-Alaska Pipeline Authorization Act 1973 (TAPS)[167] imposes strict liability (subject to certain exceptions) on shipowners transporting oil through the Trans-Alaska Pipeline between the terminal facilities of the pipeline and ports under the U.S. jurisdiction and also on the holder of the pipeline right-of-way for oil pollution damages, public or

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(c) Claims for a salvor not operating from a vessel or operating solely: Based upon a tonnage of 1,500 tons.
(d) Passenger claims: Amount not exceeding $100,000 x number of passengers authorised to be carried, but no less than $2,500,000 nor more than $50,000,000.
In addition, s. 4 of the Draft imposes the burden of proof for the absence of the intent or recklessness on the owners.

163 H.R. 3156, 99th Cong., 1st Sess. (1985). In cases of personal injury claims, this Bill eliminated the tonnage requirement, proposing instead a maximum recovery of $600,000 plus medical expenses *per capita*, with a ceiling of $3,000,000 per accident. Id. s. 31105(b). In cases of property claims the following limitation fund was scheduled:
(1) for a vessel of not more than 500 G/T, $500,000.
(2) for a vessel of more than 500 G/T up to 30,000 G/T, $500,000 plus $200 p/t over 500 G/T.
(3) for a vessel of more than 30,000 G/T up to 70,000 G/T, $6,400,00 plus $150 p/t over 30,000 G/T.
(4) for a vessel of more than 70,000 G/T, $12,400,00 plus $100 p/t over 70,000 G/T, but not more than $30,000,000.
Id. s. 31105 (c).

164 Pub. L. No. 91-224, 84 Stat. 91, 33 U.S.C.A. s. 1161 *et seq.* (1970).

165 Gilmore & Black at 826 n. 13p.
WQIA imposed strict liability (except certain exceptions) for cleanup costs of discharged oil but limited the liability of the owner or operator whose vessel discharged oil, to the lesser of $100 per G/T or $14,000,000 and that of the owner or operator of an onshore or offshore facility from which oil was discharged, to $8,000,000 unless such discharge of oil was caused by their "wilful negligence or misconduct within the privity and knowledge." 33 U.S.C.A. 1161 (f) (1) - (3) (1970).

166 Pub. L. No. 92-500, Oct. 18, 1972, 86 Stat. 816, etc., 33U.S.C. ss. 1251 - 1376 (Supp. III. 1973).

167 Pub. L No. 93-153, 87 Stat. 584, 43 U.S.C. ss. 1161-1655 (1988).

private, resulting from discharge of oil from vessels or activities along or in the vicinity of the right-of-way, but limits their liability to the specified amounts.[168] The Intervention on the High Seas Act of 1974[169] does not provide for shipowners' civil liability and its limitation of liability.

The Deepwater Port Act 1974 (DPA)[170] as to establish a licensing and regulatory program governing off-shore deepwater port development beyond the territorial limits and off the U.S. coasts. In addition to civil penalty for certain violations of the Act, it imposed strict liability on the owner or operator of a vessel or the licensee of the deepwater port for oil discharge, but limited their liability to the specified amounts with the maximum limit supplemented by the Deepwater Port Liability Fund. However, these provisions were replaced by the corresponding new scheme of the Oil Pollution Act of 1990.[171]

The FWPCA 1972 was amended by the Clean Water Act 1977,[172] and the titles of these two Acts are alternately used to mean the same Act, confusing the readers.[173] The CWA increased the limitation amount and eliminated the ceiling of $14 million for a shipowner or operator. So far as the discharge of "oil" is concerned, however, the provisions of the Act concerning the elements of civil liability and its limitation were superseded by the OPA 1990.[174] The amount remaining in the revolving fund under the CWA was carried over into the Oil Spill Liability Trust Fund under the Internal Revenue Code of 1986 (26 U.S.C. s. 9509).[175]

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168 The liability of the right-of-way holder was limited to $50 million for one accident. Id. s. 1653 (a) (2). But this subsec. was amended by the OPA 1990, s. 8101 (b) to increase the limit to $350,000,000. The liability of a ship owner or operator was limited to $14 million, but beyond this limit the Trans-Alaska Pipeline Liability Fund (TAPS Fund) had to cover oil pollution damages up to $100 million. Id. s. 1653 (c) (3) & (8). However, s. 1653 (c) was superseded by the OPA 1990 and the balance of TAPS Fund was carried over into the Oil Spill Liability Trust Fund established under the Internal Revenue Code of 1986 (26 U.S.C. s. 9509). OPA 1990, s. 8102 (a) (1) - (2).

169 Pub. L. No. 93-248, 88 Stat. 8, 33 U.S.C. ss. 1471-1478 (1976).

170 Pub. L. No. 93-627, 88 Stat. 2126, 33 U.S.C. ss. 1501-1524 (1976).

171 Pub. L. No. 101-380, Aug. 18, 1990 [H.R. 1465], *reproduced in* 3 Benedict on Admiralty at 9-185 *et seq.*, main sections codified at 33 U.S.C. ss. 2701-2761 (1994).

172 Pub. L. No. 95-217, 91 Stat. 1566.

173 In order to eliminate such confusion, a simple reference to FWPCA here means the 1972 Act and the FWPCA as amended in 1977 is referred to as the Clean Water Act (CWA).

174 OPA 1990 s. 2002 (a).

175 Id. s. 2002 (b) (2).

The Outer Continental Shelf Land Act Amendment Act 1978 (OCSLA 1978)[176] amended the OCSLA 1953.[177] The Amendments aimed mainly at intensifying the regulation of marine environment on the outer continental shelf. The Act provided for the limitation of liability for damages other than the costs of removal with an Offshore Oil Pollution Compensation Fund supplemented. However, these provisions under title III of 1978 Act (43 U.S.C. ss. 1811-1824) were repealed by the OPA 1990 and the remaining Fund was carried over into the Oil Spill Liability Trust Fund.[178]

The Comprehensive Environmental Response, Compensation and Liability Act 1980 (CERCLA or Superfund)[179] regulates discharges of hazardous substances other than petroleum, natural and related products.[180] Therefore, this Act was not superseded by the OPA 1990 but pre-empts the Clean Water Act to the extent that the latter is inconsistent with the CERCLA. This Act imposes strict liability (subject to certain exceptions) on the owner or operator of a vessel who discharges a hazardous substance, for damages resulting therefrom,[181] but limits the liability differently according to the type and tonnage of vessels and the nature of cargo, unless the release or threat thereof resulted from wilful misconduct or wilful negligence within the privity or knowledge of such owner or operator or the primary cause of the release was due to the breach of the specified standards or regulation.[182] The Act further provides for direct action against insurers and for civil penalties for certain violations.[183]

In the aftermath of a series of large oil spill disasters in the late 1980's including the *Exxon Valdez* grounding in Prince William Sound in Alaska on March 24, 1989, followed by the *American Trader* accident in California, the *Mega Borg* explosion in the Gulf of Mexico, etc., Congress unanimously passed on August 3, 1990 a renovating, comprehensive oil pollution Act, OPA 1990. The provisions relating to limitation of liability are as follows:

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176 Pub. L. No. 95-372, 92 Stat. 629, *reprinted in* 1978 U.S. Code, Cong. & Adm. News 629, 2856.

177 67 Stat. 462, 43 U.S.C. ss. 1333 *et seq.* (1976).

178 OPA 1990 s. 2004.

179 42 U.S.C. ss. 9601-9675.

180 Id. s.9601 (14) (F).

181 The damages recoverable include costs and other damages for injury or destruction or loss of natural resources and economic loss therefrom. Id. s. 9607 (a) (c) & (h).

182 Id. s. 9607. This provides the limits of liability as follows:
(1)Vessel carrying hazardous substance as cargo or residue: $300 per G/T or $5,000,000, whichever is greater;
(2) Other vessel: $300 per G/T or $500,000, whichever is greater; and
(3) Incineration vessel or facilities: $50,000,000 (except response costs to be unlimited).

183 Id. ss. 9608 (c) & 9609.

This Act also imposes strict liability with narrow exceptions (33 U.S.C. s. 2703) for removal costs and damages (s. 2702(b)) on the responsible parties (s. 2701(32)) for a discharge or substantial threat of a discharge of oil from a vessel or a facility into or upon the navigable waters or other certain areas (ss. 2702(a) & 2701(8)), and increases their limitation of liability unprecedently higher than any of other oil pollution schemes in the world.[184] The Act further allows states to impose additional liabilities and requirements or penalties on shipowners for oil pollution without being affected by this Act or the global Limitation of Liability Act 1851 as amended.[185] Thus, many coastal states now have independent state statutes of very strict and onerous liabilities and penalties for oil discharge.[186] Such position of the OPA 1990 is substantially the same as excluding limitation of liability so far as oil pollution is concerned.[187]

As to jurisdiction under the OPA 1990, not only the federal district courts but also state courts have jurisdiction over liability actions (s. 1717 (b) (c)). However, jurisdiction over limitation actions is not conferred upon state courts even under this Act.

## 5. Developments of International Conventions

### A. Necessity for Uniformity of Shipowners' Limitation of Liability

One of the salient characteristics of maritime law is its universality. It derives from the innate international character of maritime commerce transcending the boundaries of a

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184 Except as otherwise provided, the total liability of a responsible party, with respect to each incident, shall not exceed:
"(1) for a tank vessel, the greater of -
(A) $1,200 per gross ton; or
(B) (i) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or
(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;
(2) for any other vessel, $600 per gross ton or $500,000, whichever is greater;
(3) for an offshore facility except a deepwater port, the total of all removal costs plus $75,000,000; and
(4) for any onshore facility and a deepwater port, $350,000,000."
33 U.S.C. s. 2704 (a).
No limitation is allowed if the incident was proximately caused by gross negligence or wilful misconduct, or by a violation of a federal safety, construction or operation regulations by the liable party, its agent or employee or a person acting pursuant to a contract with the liable party. Id. s. 2704 (c) (1). Moreover, any potential limitation would be waived if the liable party should not report the discharge or fail to cooperate with or abide by the orders of the officials concerned with removal activities. Id. s. 2704 (c) (2).

185 Id. s. 2718 (a) - (c).

186 See generally 3 Benedict on Admiralty at 9-49.

187 Accord: 2 Schoenbaum, *Admiralty and Maritime Law* 386 (2nd ed. 1994). Further details: Kende, *The United States Approach*, Liability for Damage to the Marine Environment 131 (ed. De La Rue, C.M. 1993).

single country. When the parties concerned are bound to meet with different laws in carrying out maritime business, the inconvenience must be great, further increasing the risk of investment in international merchant shipping. Thus, it has been stressed that the ideal legal system to govern maritime trade be "a uniform one".[188]

The law concerning the limitation of liability of shipowners and others is not one of the exceptions to the universality of maritime law.[189] The historical review on the shipowners' limitation of liability systems[190] reveals the uniformity from the Middle Ages through the mid-19th century only to the extent that their liability did not exceed their interest in the ship or its equivalent. While the French Abandonment system and the German Executive (or Maritime Lien) system were essentially identical in their limitations which had been the *Fortune de Mer*, the procedural difference existed between them; in the former the owners whose liability was *in personam* were entitled to surrender the remaining assets of the ship to creditors, whereas in the latter the creditors had only an action *in rem* against the remaining assets with no further claims *in personam*.[191]

On the other hand, the British system was different from the Continental system in adopting a tonnage fund system.[192] The U.S. system limiting the owners' liability to the value of the ship and pending freight[193] was similar to the Continental system, but in 1935 it was amended to include a supplemental monetary system for personal claims.[194] It further permits the owners to elect to surrender the interest in the ship at the end of the voyage or to pay the equivalent amount to the court. With the advent of nationalism through the last century, many other countries enacted independent statutes by copying or combining or modifying the systems of shipowners' limitation of liability from the advanced maritime countries.[195]

In consequence, the need for the unification of law governing shipowners' limitation of liability was persistently stressed before and after the beginning of the 20th century. The

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188 1 Manca, International Maritime Law 10 (1970).
189 As to the uniformity of maritime law, see Paulsen, supra n. 50.
190 As to the historical review, further to the materials listed supra n. 1, see Baer, supra n. 57, at Ch.10; *The Main v. Williams*, 152, U.S. at 126-29 (1894).
191 Rein, supra n. 76, at 1261-62.
192 M.S.A. 1854, s.504; M.S.A. 1862, s.54.
193 The Limitation of Liability Act 1851, s.3, currently codified at 46 U.S.C.A. s.183(a).
194 Act of Aug. 29, 1935, c.804, 49 Stat. 960, s. 1., currently codified at 46 U.S.C.A. s. 183 (b), (c) & (d).
195 Rein, supra n. 76, at 1267.

centre of discussions was the Comité Maritime International (CMI).[196] The shipowners' limitation of liability was discussed in 1909 (Venice), 1911 (Paris), 1913 (Copenhagen) and 1921 (Antwerp) respectively convened by CMI.

### B. 1913 Draft

In 1913 CMI prepared and brought up a Draft International Convention Relating to Shipowners' Limitation of Liability. Although this Draft could not reach to be approved as an International Convention, some essential provisions of the Draft were thereafter transplanted into the 1924 Convention.[197] However, the Draft did not provide for any jurisdiction or venue over the limitation of liability. At any rate, the 1913 Draft could not be discussed in any primary sessions of conference because of World War I from 1914 to 1918. It had to await until the Antwerp Conference in 1921 to resume the study and re-preparation of another Draft Convention.

### C. 1924 Convention

A new Draft Convention prepared by CMI plenary sessions in 1921 was submitted to the Diplomatic Conference held at Brussels in 1922 and 1924. Thus, based upon the CMI Draft, the Diplomatic Conference adopted the 1924 Convention.[198] This Convention was a compromise of the traditional Continental system and the British tonnage system although the common law countries did not ratify or accede to it. However, it must be given a special meaning in that it was the first International Convention for the unification of the limitation

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196 As to the origin and development of CMI, see Berlingieri, *The Work of the Comité Maritime International: Past, Present, and Future*, 57 Tul. L. Rev. 1260 (1983); CMI Bull. No. 103 Antwerp Conference 1947 xvii (1949). The Statute of CMI provided for its purpose and functions in detail. CMI Bull. No. 103 at xxiii; CMI Doc. No. 1974 IV at 292.

197 The basic characteristics of the 1913 Draft were provided in art.1. The limit of shipowners' limitation of liability was "only on the ship, on the freight and on the accessories of the ship and freight appertaining to the voyage" (art. 1). The limitable claims were (1) Indemnities due to third parties for damage caused by the acts and defaults of the owners' employees in the service of the ship; (2) Indemnities for damage to cargo or other property on board; (3) Obligations resulting from bills of lading; (4) Indemnities due by reason of nautical default in carrying out a contract; and (5) Obligations for wreck removal (art. 1). These represent most of "maritime and admiralty claims", if not encompassing all to be subject to limitation of liability. While the Draft conferred also on a time-charterer the right to invoke limitation of liability, it excluded from limitation the obligations resulting from the owner's own negligence, authorisation or rectification, or from the employment of service by seafarers.

198 International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, Brussels, August 25, 1924, reprinted in Singh, *International Maritime Law Conventions* (B.S.L.8, Vol. 4) 2959 (1983).

of shipowners' liability and that a considerable number of States adopted it directly or indirectly.[199]

The limit of liability was an optional combined system between "the value of the vessel, the freight and the accessories of the vessel" after the accident in question and the aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage as defined in the Convention or in the cases of death or bodily injury involved an additional aggregate sum equal to 8 pounds sterling per ton, whichever the lesser, provided however that the freight is deemed as earned at 10% of the ship's value at the commencement of the voyage (arts. 1, 4 & 6). Further, the Convention provided for the list of limitable claims (art. 1), the exclusions of limitation (art. 2), the assessment of limitation fund (art. 3), the scope of freight and accessories to be included in the fund (arts. 4 & 5), the ranks of claims (arts. 6 & 7), persons entitled to limitation (art. 10), the calculation of the ship's tonnage applicable to limitation and the monetary units applicable to tonnage limitation (art. 15), etc.

Since the 1924 Convention was adopted as an International Convention without full discussions amongst the maritime countries, it included many impracticable or unreasonable provisions that prevented a wide range of ratifications by the leading maritime countries including the U.K. which could never return to its already abolished ship's value and monetary optional or hybrid limitation of liability regime. Besides, the significant reasons for the failure of 1924 Convention were: (1) Mosaic listing of limitable claims (e.g., B/L obligations, salvage, G/A contribution and other contractual claims, art. 1 (3) - (4), (6) - (8)); (2) Complexity and difficulties in assessing the ship's value (art. 3); (3) Unreasonable inclusion into the limitation fund of the 10% of freight to be deemed as earned (art. 4); and (4) Allowance of priority to maritime liens in the distribution of the limitation fund (arts. 6 & 7). Above all, one of the greatest obstacles to prevent wide support to the Convention was art. 15, which provided that the monetary units meant their gold value. In 1936 Great Britain abrogated the Gold Standard Act fixing the relation of the pound sterling to gold, and in

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[199] The 1924 Convention came into force on June 2, 1931. Until then, Belgium, Brazil, Denmark, Hungary, Monaco, Portugal and Spain ratified it and thereafter Dominican Republic (1958), Finland (1934), France (1935), Malgache Republic (1935), Norway (1935), Poland (1936), Sweden (1938) and Turkey (1955) ratified or acceded to it. CMI Yearbook 1993 at 212. The U.K., Japan, Italy, etc. were signatories to it, but they did not ratify. Singh, supra, at 2965. On the other hand, the third group of countries such as USSR and the Republic of Korea adopted the basic contents of 1924 Convention in their national statutes. The previous Merchant Shipping Code of USSR, arts. 274-279; the Commercial Code of Korea, arts. 746 *et seq.* before its Amendment in 1991.

consequence the pound sterling ceased to be a stable value for reference, there being no longer gold currency.[200]

### D. 1957 Convention and 1979 Protocol

After World War II, CMI resumed its work for the unification of maritime law. First of all, CMI circulated Questionnaire No. 2 to its members of national Associations in respect of modifications of 1924 Convention.[201] Based upon the Answers from the member Associations, the Antwerp Conference of CMI in 1949 adopted a Resolution, inter alia, that as the gold pound sterling provided in art. 15 of 1924 Convention could not be applied, the Bureau Permanent of CMI be instructed to appoint a Committee to study a new monetary unit applicable to the limitation of liability. The Gold Clause Subcommittee of CMI held several meetings and collected opinions from its members, but the proposals to amend the 1924 Convention were widely split.[202] The Amsterdam Conference (1949) of CMI adopted another Resolution that the Bureau Permanent instruct the International Commission on the Limitation of Liability of Shipowners of CMI to re-examine the whole question of limitation of liability, to consult the national Associations, and to present a report embodying, if necessary, a new Draft Convention at the next CMI Conference.[203] However, the next Naples Conference (1951) did nothing more than adopting a Resolution to instruct the Bureau Permanent to transmit it to the Belgian Government to convene a Diplomatic Conference to amend the 1924 Convention.[204] The material development was made as from the Belgium Meeting (1954) of the CMI Subcommittee, at which a new Draft Convention was prepared, the divergent written opinions submitted from national Associations having been taken into account.[205]

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200 CMI Bull. No. 103 at 44; CMI Bull. No. 105 Naples Conference 1951 at 132-33 (1952). Since the mid-1970's there remain only 3 Contracting States of 1924 Convention: Brazil, Hungary and Turkey. CMI Yearbook 1993 at 212; RMC I.2 - 76/5-77; Griggs, *Limitation of Liability for Maritime Claims: The Search for Int'l Uniformity*, [1997] LMCLQ 369, 372 & 377-78. Thus it may well be regarded that 1924 Convention has in fact no probability of international application.

201 CMI Bull. No. 103 at LI. Answers were sent back from Great Britain, U.S.A., Belgium, Denmark, France, Italy, Norway, the Netherlands and Sweden. Most of them replied that the 1924 Convention should be modified. Id. at 8 *et seq.*

202 CMI Bull. No. 104 *Amsterdam Conference 1949* at 1 *et seq.* (1949).

203 Id. at ix & 509.

204 CMI Bull. No. 105 at vi & 346-48.

205 CMI *Madrid Conference* at 71 *et seq.* (1955). Among the opinions submitted at the Conference, the delegation from the British Maritime Law Association proposed a new Draft Convention based upon a completely monetary limitation system including, inter alia, the limits of owners' liability to be £24 (Frs. 1,000) for property claims and £50 (Frs. 2,100) for loss of life and personal injury claims, the maximum

The CMI Subcommittee reported its Draft Convention to CMI Madrid Conference convened in September 1955.[206] CMI Madrid Conference finally adopted a complete new Draft Convention to be submitted to the next Diplomatic Conference to be held at Brussels in 1957. This Draft consisted of the essential main provisions of 8 Articles and one Protocol, leaving the Final Clauses to be prepared by the Diplomatic Conference.[207]

In 1957 the Diplomatic Conference of maritime law was held at Brussels at the invitation of the Belgian Government to deliberate the agenda of shipowners' limitation of liability based upon the CMI Madrid Draft Convention. The delegations from 33 countries participated with diverse proposals and observations submitted.[208] As done in CMI Meetings and Conference, the delegation of Great Britain, France, Belgium and Scandinavian countries played the leading role in the deliberations. As a result of ardent debates and compromises the Brussels Conference adopted a new Convention titled 'International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships, Brussels, October 10, 1957'.[209]

The 1957 Convention was a great success of the British monetary regime and an opening of the new era of worldwide uniformity in the system of shipowners' limitation of liability. The main contents of the Convention are as follows:

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limit for both property and personal claims being £74 (Frs. 3,100). This proposal was supported by France, Norway, Sweden, Spain, etc., but it was rejected by Italy, Finland, Greece, etc. Id.

206 *Madrid Conference* 1955 at 209-21.

207 Id. at 575-90. The contents of CMI Madrid Draft Convention were: art. 1 Claims Subject to Limitation; art. 2 Limitation Unit, Distinct Occasion Application, and Effect of Establishment of the Fund; art. 3 Limits of Liability, Monetary Unit, Tonnage, etc.; art. 4 Proper law of Procedural Matters and Jurisdiction; art. 5 Arrest of Ship, Security, Powers of Court, etc.; art. 6 Parties Entitled to Limitation; art. 7 Scope of Application; art. 8 Right of Reservations and a Protocol (Right to reserve for ships less than 300 tons).

208 Details: Royaume de Belgique, *Conférence Diplomatque de Droit Maritime*, Dixiéme Session, Bruxelles, 1957 (1958, "*Brussels Conference 1957*").

209 Singh, supra n. 198, at 2967. As to comparisons with the U.S. law, see Eyer, *Shipowners' Limitation of Liability - New Directions for an Old Doctrine*, 16 Stan. L. Rev. 370 (1964); Note, supra. n. 1, *The Brussels Convention of 1957.*

(1) Persons Entitled to Limitation: owner, charterer, manager and operator of the ship and their servants acting in the course of their employment (art. 6 (2));[210]

(2) Claims Subject to Limitation: "Personal claims" (loss of life or personal injury) and "property claims" (all other claims including infringement of any right) caused by the act of any person whether on board the ship or not for whose act the owner is liable for the damage occurring "in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers" and wreck removal claims (art. 1(1) - (3));[211]

(3) Claims Excepted from Limitation: Claims for salvage or G/A contribution, and claims of the servants whose duties are connected with the ship on certain conditions (art. 1(4));[212]

(4) Conduct Barring Limitation: "Actual fault or privity" of the owner or others liable, except the master or crew members who may limit liability even if the damage resulted from the actual fault or privity of one or more of such persons (arts. 1(1) & 6(3));[213]

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[210] As to art. 6(2) serious discussions were developed in the plenary sessions. The draft of this para. as per CMI Madrid Draft had contained the words "and agents" of the owner, etc. The aim was to include an independent contractor (e.g., stevedore or plumber, etc.) and the draft was supported by some delegations (e.g., Norway). However, the U.S. delegation was strongly opposed to such wide extension. As a result of the vote, the words "and agents" were deleted. *Brussels Conference* 1957 at 327-38. Meanwhile, the 1924 Convention, art. 10, had added only the operator and principal charterer of the ship as the person entitled to limit liability without providing for their servants' rights of limitation.

[211] Canada had proposed to delete art. 1 (1) (c) (wreck removal and harbour works claims) wholly, but it was rejected in the vote. Id. at 265, 274-76. The Scandinavian delegations argued that the phrase "and any obligation of liability arising out of damage caused to harbour works, basin and navigable waterways" be deleted on the grounds that such claims are covered by the provisions of art. 1(1) (b) and (2). However, the British delegation was strongly opposed to the deletion, rebutting that under English law a shipowner whose vessel damages any dock, etc. is absolutely liable irrespective of any negligence on his part. Against this rebuttal, the Norwegian delegation countered again that art. 1 (3) was aimed at meeting just such a case as the British delegate apprehended. Id. at 263-65. It seems that the Norwegian argument was right and in consequence the above-quoted provision was redundant.

[212] The art. 2(3) of 1924 Convention did not add such conditions to the servants' claims against the owner. The phrase of art. 1(4) (b) of 1957 Convention "including the claims of their heirs, personal representatives or dependents" was added by the Norwegian proposal against the opposing French opinion that the claims put forward by such dependents in their own names should be limited in accordance with their national law. *Brussels Conference 1957* at 255-56.

[213] The "actual fault or privity" test was adopted as it was by the strong argument of the British delegation at the Brussels Conference despite of the then legislative diversity among the participating states' national laws. 1 Manca, supra n. 188, at 147 n. 7; *Brussels Conference 1957* at 91-92 (British delegate Sir

(5) Limits of Liability: 3,100 francs per ton in cases of personal claims occurred either alone or together with property claims, of which 2,100 francs per ton is given priority to personal claims with spillover to the balance fund, and 1,000 francs per ton in cases of property claims alone (art. 3(1));[214]

(6) Rights of Reservation: The Contracting States may reserve the rights: (a) to extend the application of the Convention to class of ships other than seagoing ships (art. 8), (b) to exclude the application of art. 1(1) (c) (limitation against wreck removal and harbour works claims) (Proto. of Signature), and (c) to regulate separate limitation system on ships less than 300 tons (same); and

(7) Provisions of Procedure and Governing Law (arts. 4, 5 & 7).[215]

The 1957 Convention came into force on May 31, 1968.[216] With ratification or accession obtained from about 45 States until the early 1980's,[217] it made a considerable success although the U.S. never did adopt it. Taking into consideration some states that incorporated the 1957 Convention into their national laws without formal accession to it (e.g., Canada),[218] the more countries at one time implemented the 1957 Convention limitation regime. While at the present most maritime countries have denunciated it to transfer to the 1976 London Convention, it is still in force in more than 25 mostly small developing countries.[219] Although the number of its Contracting States would be decreased with time,

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Pilcher's strong sponsoring statement in the 2nd plenary session of the Brussels Conference). The burden of proof on the owner's actual fault or privity was also seriously confronted between the common law delegations and the Continental proposal led by the French delegation. Id. at 562-63. The logically weak British delegation could succeed in neutralizing the governing law of the burden of proof (*lex fori*, art. 1(6)) by giving up the uniformity thereon. Id. at 93.

214 The monetary unit "franc" means a unit consisting of 65.5 mg of gold of millesimal fineness 900 (art. 3(6)). By virtue of the 1979 Protocol to 1957 Convention, for the figures of 3,100 francs, 2,100 francs and 1,000 francs there were substituted 206.67 SDR, 140 SDR and 66.67 SDR respectively. The 1979 Protocol came into force on October 6, 1984. CMI Yearbook 1993 at 228. However, the non-member states of IMF may declare to substitute the words "monetary unit" for "francs" in art. 3(a) - (c), provided that the "monetary unit" corresponds to 65.5 mg of gold of millesimal fineness 900 (1979 Prot. art. II(2), 2nd sub-para). The limitation tonnage is net tonnage plus the engine room space in cases of steam or motor ships and net tonnage in cases of other ships (art. 3(7)).

215 These provisions shall be discussed in the next Chapter.

216 RMC I.2-77.

217 RMC I.2-79.

218 Canada Shipping Act, R.S.C. 1970, c. S-9, ss. 649 *et seq.*, replaced, R.S.C. 1985, c. S-9, ss. 574 *et seq.*; Popp, *Limitation of Liability in Maritime Law - An Assessment of its Viability from a Canadian Perspective,* 24 JMLC 335, 337 (1993).

219 *Cf.* RMC I.2-79 & 89.

its actual fault or privity test is sometimes working as a significant factor for maritime claimants' forum shopping.[220]

### E. 1976 Convention

In the early 1970's a movement was raised to renew the 1957 Convention due to the change of the circumstances where the Convention was purported to cover.[221] Above all, the demise of the gold franc as a stable monetary unit of limitation gave one of decisive momenta to the movement.[222] On the occasion of the adoption of 1969 CLC and 1971 FC., the task for International Conventions on maritime law began to be administered by the IMCO (IMO)[223] with the co-operation of other organisations concerned, in particular, CMI.

In March 1972, the International Subcommittee of CMI initiated the task of reviewing the 1957 Convention by circulating the Questionnaire to its member national Associations.[224] At the Meeting of IMO Legal Committee held in London on January 21, 1973, it was agreed that CMI should act as a Working Party for IMO in preparing for a revision Draft. Through the Meetings of the Working Group and of the subsequently appointed Drafting Group, the International Subcommittee of CMI prepared two Drafts: a Draft Protocol (Mini Draft) to amend the 1957 Convention and a new Draft Convention (Maxi Draft), both of which were

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220 *Caspian Basin v Bouygues Offshore SA (No. 4)* [1997] 2 L1. R. 507 (QBD Adm. 1997).

221 Coghlin, *The Convention on Limitation of Liability for Maritime Claims 1976*, the International Maritime Organisation 234-35 (1984), points out the following reasons as regards the need to replace the 1957 Convention: (1) the erosion of the value of the limits by worldwide inflation; (2) the need to take account in a new Convention of the 1962 Nuclear Convention and the 1969 CLC; (3) the protection of certain salvors not protected by limitation under the 1957 Convention; (4) the defects of gold franc as calculation of units; (5) the impact of 1969 Tonnage Measurement Convention; and (6) the frequent breaking of limitation by courts.

222 Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, 650-64 (1974); Bristo, *Gold Franc - Replacement of Unit of Account*, [1978] LMCLQ 31, 32; Mendelsohn, *The Value of the Poincaré Gold Franc in Limitation of Liability Conventions*, 5 J. Mar. L. & Com. 125 (1973); Heller, *The Value of the Gold Franc - A Different Point of View*, 6 J. Mar. L. & Com. 73, 81-86 (1974).

223 IMCO was established as the 12th specialised agency of the U.N. by the Convention on the Inter-Governmental Maritime Consultative Organization (IMCO), Geneva, 1948, which came into force on March 17, 1958. Its original purpose was mainly related to the technical matters of shipping industry and maritime safety, etc. But it was extended through many amendments so widely as to deal with matters such as drafting International Conventions on maritime law and convening diplomatic conferences. IMCO was renamed by its 1975 Amendment as International Maritime Organization (IMO). Singh, supra n. 198, at 3161 *et seq.*; Wiswall, 6B Benedict on Admiralty 12-2 *et seq.* (7th ed. 1994).

224 CMI Subcommittee, *Introductory Report and Questionnaire*, CMI Doc. 1972 I at 14. The national Associations of the following countries expressed concern by sending back their replies: Denmark, Switzerland, Yugoslavia, Norway, Greece, Great Britain, Sweden, Belgium, the Netherlands, France, Canada and Germany. The Committee appointed a Working Group consisting of the representatives from 6 countries: Norway, U.S.A., Great Britain, West Germany, Japan and Belgium. The Subcommittee, *Second Report*, CMI Doc. 1974 I at 12.

presented to the Hamburg Conference of CMI convened the following year. The two Drafts of the Committee contained the same points of amendments to the 1957 Convention.[225]

The two Drafts were put on the agenda of the Hamburg Conference of CMI held from April 1 to 5, 1974 and adopted with some modifications as the Hamburg Draft Convention 1974 and the Hamburg Draft Protocol 1974 to be submitted to the IMO.[226] In May 1974, the two Drafts were submitted to the Legal Committee of IMO with the Introductory Report and Explanatory Notes accompanied.[227] Based upon the CMI Drafts, the Legal Committee held a series of its own Meetings to study and prepare its own Draft Convention. As a result, it prepared a new Draft Convention to replace the 1957 Convention. Instead of organising a new arrangement of draft articles completely different from those of CMI Draft Convention, the Legal Committee maintained the basic structure and arrangement of the draft articles contained in the CMI Hamburg Draft Convention either by modifying the draft provisions or by adding new ones. Thus, in order to put it on the agenda of the Diplomatic Conference convened by IMO to be held in London in November 1976, the Legal Committee completed its own Draft Convention in September 1976, circulating it to the IMO Member States and relevant international organisations and recommending their observations and proposals.[228]

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225 Id. at 16-51. The main points of the amendments were: (1) Extension of persons entitled to limitation to pilots, salvors and insurers of liability, (2) Extension of claims subject to limitation by amending the words for the connection between the claims and the ship and by including sue and labour claims, (3) Extension of claims excepted from limitation to oil pollution claims subject to 1969 CLC, nuclear damage claims, and passenger claims subject to other international conventions, (4) More restriction to conduct barring limitation by replacing the 'actual fault or privity' test with the 'intent or recklessness' test, (5) Replacement of the limitation tonnage with gross tonnage, and (6) Increase of limitation amounts.

226 CMI Doc. 1974 at 304-331. The Hamburg Draft Convention 1974 consisted of: art. 1 Persons entitled to limit liability; art. 2 Claims subject to limitation; art. 3 Claims excepted from limitation; art. 4 Conduct barring limitation; art. 5 Counterclaims; art. 6 Limits of liability; art. 7 Aggregation of claims; art. 8 Distribution of the amounts; art. 9 Constitution of the fund; art. 10 Distribution of the fund; art. 11 Bar to other actions; art. 12 Governing law. The difference of the Hamburg Draft from that of CMI Subcommittee were: (1) addition of claims resulting from delay of cargo to limitable claims (art. 2 (1) (b)), (2) exclusion of infringement of contractual rights from limitable claims (art. (1) (c)), (3) addition of claims for contribution or indemnity to limitable claims (art. 2 (2)), (4) new provisions for the calculation of limitation tonnage to apply to salvor not operating from a ship (art. 6 (2)), and (5) a new provision for interest of limitation fund to be included (art. 9 (1)).

227 CMI Doc. 1974 III at 380-429.

228 IMO, *Official Records of the International Conference of the Limitation of Liability for Maritime Claims 1976*, at 30-40 (1983) ("*Official Records 1976*"). The significant variations of IMO Draft from CMI Draft Convention were as follows:
(1) CMI Draft included in its definition provision of a shipowner not only the charterer, manager and operator of the ship but also "any person rendering service in direct connection with the navigation or management of the ship", whereas IMO Draft did not include the latter quoted above and instead provided a separate para. to allow the owner's servant or agent to avail themselves of the owner's right of limitation.
(2) CMI Draft excluded from its application the passenger claims subject to other Conventions, whereas IMO Draft included a separate Article for passenger claims.

In respect of IMO Draft, many countries and international organisations concerned submitted their observations and proposals. The London Conference was held from November 1 to 19, 1976 and attended by the delegations of 47 states, observers from 3 states and from non-governmental organisations.[229] Through ardent deliberations article by article in the sessions of the Committee of the Whole and the Plenary Sessions, a new Convention titled 'Convention on Limitation of Liability for Maritime Claims, 1976' was adopted.[230] The main alterations from the 1957 Convention are as follows:

(1) Persons Entitled to Limitation: Addition of a salvor,[231] "any person for whose act, neglect or default the shipowner or salvor is responsible"[232] and a liability insurer (art. 1);[233]

(2) Claims Subject to Limitation: Substitution of the words "occurring on board or in direct connexion with the operation of the ship or with salvage operations" (art. 2 (1) (a), (c))[234] for the equivalent of 1957 Convention (art. 1(a) - (b)); and the addition of claims for delay in carriage of cargo, passenger or luggage (art. 2 (1) (b)), for cargo wreck removal (art. 2 (1) (e)), and for preventive measures or for further loss by such measures (art. 2 (1) (f));[235]

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(3) CMI Draft maintained the monetary unit of limitation (gold franc) as did the 1957 Convention, whereas IMO Draft adopted both the SDR and the gold franc for the certain non-member States of IMF.
(4) As opposed to CMI Draft, IMO Draft provided for an option of a State Party to regulate by its national law the mandatory constitution of a limitation fund as a condition of invoking the limitation of liability.
(5) In addition, IMO Draft provided for reservations by national laws of the application of the Convention in respect of the residents of non-Contracting States, a certain class of ships, etc.

229 *Official Records 1976* at 41-58.

230 As to contents of debates, see *Official Records 1976* at 209 *et seq.* A collection of articles on the 1976 Convention: Institute of Maritime Law, THE LIMITATION OF SHIPOWNERS' LIABILITY, THE NEW LAW (1986). Further comparative study: Watson, *The 1976 IMCO Limitation Convention: A Comparative View*, 15 Hous. L. Rev. 249 (1978); Boal, *Efforts to Achieve Int'l Uniformity of Laws Relating to the Limitation of Shipowners' Liability*, 53 Tul. L. Rev. 1277 (1979).

231 The background that a salvor not operating from a ship was added as one of the persons entitled to limitation was the case of *The Tojo Maru* [1972] A.C. 242 (HL). In the application of limitation amount such a salvor is regarded as done salvage operations from a ship of 1,500 tons (art. 6 (4)).

232 This quoted phrase was to include the owner's or salvor's servants or agents (e.g., independent contractors such as stevedores or terminal operators).

233 This addition reflected some U.S. courts' decisions. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F. 2d 230, 1969 AMC 1571 (5 cir. 1969) (affirming dismissal of insurer's invoking limitation of liability), cert. den., 397 U.S. 989 (1970).

234 The new phrase imports a wider meaning than the old equivalent. *Cf.* Brice, supra n. 92, at 22-23.

235 Details of the split opinions on art. 2 (1) (f): *Official Records 1976* at 240-44.

(3) Claims Excepted from Limitation: Addition of oil pollution claims under the 1969 or its amendment Protocol and nuclear claims (art. 3 (b) - (d)),[236] and of claims by the servants of (the owner or) "salvor" whose duties are connected with (the ship or) the salvage operation (art. 3 (e));

(4) Conduct Barring Limitation: Replacement of the "actual fault or privity" test with the "intent or recklessness" test (art. 4);[237]

(5) Limits of Liability: Increase of limitation amounts but with scaling down of the unit amount per ton (P/T) as per increase of the ship's tonnage (art. 6(1)),[238] application of "gross" limitation tonnage (art. 6(5)) and separate limitation fund for passengers' personal claims (art. 7).[239]

(6) Rights of Reservation: A State Party may in its national law provide for or reserve the rights not only to extend the application of the Convention to class of ships other than seagoing ships (art. 15(2) (a)),[240] to exclude art. 2(1) (d) - (e) from application of limitation (art. 18(1)), and to regulate separate limitation system for ships less than 300 tons (art. 15(2) (b)),[241] but also to

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236 Canada proposed a blanket exclusion with a simple phrase "(b) claims for damage caused by oil or other pollutants;" and the U.S. seconded this proposal because it was not likely that they could accede to 1969 CLC. Germany and many other states countered with support of the finally adopted para.(b). *Official Records 1976* at 152-53, 342-52.

237 It was linked with the increase of the limits of liability to adapt them to the maximum capacity of commercial insurability for owners' liability. Carbone, *An Analysis of the CMI Draft Convention as Amended by IMCO*, CMI Doc. 1976 III 166, 174-75. The same test had already appeared in other International Conventions: 1955 Hague Protocol, art. 13, to amend art. 25 of 1929 Warsaw Convention; 1961 Passengers Convention art. 7; 1969 Luggage Convention art. 7; 1968 Hague-Visby Rules, art. 4(5) (e); 1974 Athens Convention art. 13. Canada proposed to reintroduce the actual fault or privity or gross negligence rule. *Official Records 1976* at 155. Germany (Fed. Rep. of) proposed to adopt the words "gross fault". Id. at 104. However, Great Britain, Sweden, Spain, etc. agreed to adopt the new rule as the CMI and IMO Drafts stood. Id. at 263.

238 (a) For personal claims: 333,000 SDR for a ship up to 500 G/T; for a ship in excess thereof, to add the following cumulative amount: 500 SDR P/T (501 - 3,000 G/T), 333 SDR P/T (3,001 - 30,000 G/T), 250 SDR P/T (30,001 - 70,000 G/T) and 167 SDR P/T in excess of 70,000 G/T.
(b) For property claims: 167,000 SDR for a ship up to 500 G/T; for a ship excess thereof, to add the following cumulative amount: 167 SDR P/T (501 - 30,000 G/T), 125 SDR P/T (30,0001 - 70,000 G/T) and 83 SDR P/T in excess of 70,000 G/T.
(c) However, the fund (b) above is always available for payment of the balance of personal claims unpaid by the fund (a) above although it shall rank rateably with property claims, if any (art. 6(2).

239 The limit of liability for passengers' personal claims is the amount of 46,666 SDR multiplied by the maximum number of passengers authorized to be carried by the ship's certificate, but not exceeding 25 million SDR (art. 7).

240 However, the Convention shall not apply to air-cushion vehicles and drilling platforms (art. 15(5)).

241 These items of (a) (b) (c) are similar to the equivalent provisions of 1957 Convention (art. 8 and Proto. of Signature).

regulate separate limitation regime applicable only to its own national interests not involving other State Party nationals' (art. 15(3)), to exclude drilling ships from application of the Convention on certain conditions (art. 15(4)), and to allow priority of claims for damage to harbour works, etc. over other property claims (art. 6(3)); and

(7) Constitution & Distribution of Limitation Fund and Governing Law (arts. 10-15).[242]

It has been over 10 years since the entry into force of the 1976 Convention.[243] Nonetheless, the degree of international concern over the 1976 Convention has not been as much as with the 1957 Convention, compared with the number of the States Parties to the latter Convention 10 years after its entry into force in 1968 (over 40 States). In particular, as was in respect of the 1957 Convention, the United States has not acceded to the 1976 Convention on the grounds that its limits of liability are too low and the unbreakability of limitation (intent or reckless test) under the Convention is also one of the great barriers against the U.S. participation in the 1976 Convention.[244]

### F. 1996 Protocol

Just as the 1976 Convention was adopted about 20 years after the formation of 1957 Convention and about 10 years after its coming into force in 1968, so emerged another Limitation Convention, the 1996 Protocol to 1976 Convention, but only to amend the Convention "to provide for enhanced compensation and to establish a simplified procedure for updating the limitation amounts."[245]

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242 These provisions shall be analysed in detail in the next Chapter.

243 The 1976 Convention came into force on December 1, 1986. RMC I. 2-87. As of March 1996, 27 States ratified or acceded to it. Id. at I.2-89. Most of the advanced maritime countries substituted 1976 Convention for 1957 Convention. Besides, there are countries which adopted or incorporated most of the contents of 1976 Convention into national laws without ratification or accession; e.g., China, Korea, etc. Li, *The Chinese Maritime Law on Global Limitation of Liability,* [1996] LMCLQ 393; The Commercial Code of Korea, as amended, December 31 1991, Law No. 4470, arts. 746 *et seq,*; An Act Relating to Limitation Procedure of Shipowners and Others, December 31, 1991, Law No. 4471.

244 As to details of the failure of the U.S. Congress to adopt International Conventions on Shipowners' Limitation of Liability, see O'Donnell, *Disaster Off the Coast of Belgium: Capsized Ferry Renews Concerns over Limitation of Shipowner Liability*, 10 Suff. Trans. L. J. 377, 400-423 (1986).

245 Preamble of the 1996 Protocol, IMO LEG/CONF. 10/8 (9 May 1996).

The features of the 1996 Protocol adopted on May 2, 1996 at the London Conference convened by IMO are as follows:

(1) Replacement of art. 3(a) of 1976 Convention to include the words "any claim for special compensation" under art. 14 of the 1989 Salvage Convention into the salvage claims to be excepted from limitation (1996 Prot. art. 2);

(2) Replacement of art. 6(1) to increase the limits of liability other than passenger claims (1996 Prot. art. 3);[246]

(3) Replacement of art. 7(1) to increase the limits of liability for passengers' personal claims to 175,000 SDR multiplied by the maximum number of passengers permitted to carry by the ship's certificate (by deleting the existing upper limit of 25 million SDR) (1996 Prot. art. 4);

(4) Addition of art. 15, para. *3bis*, to allow a State Party to regulate in its national law separate limits of liability for passengers' personal claims, but not lower than those of the Convention (1996 Prot. art. 6);[247]

(5) Replacement of art. 18(1) to allow a State Party to reserve the right to exclude the 1996 HNS Convention or its Protocol claims from the application of 1976 Convention as amended (1996 Prot. art. 7); and

(6) Restrictive reinforcement of the requirements of procedure to further increase the limits of liability (1996 Prot. art. 8).

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[246] The increased "general limits" of liability are:
(a) For loss of life or personal injury claims,
  (i) 2 million SDR for a ship up to 2,000 G/T;
  (ii) for a ship exceeding 2,000 G/T, (i) + the following cumulative amount as per the ship's tonnage: 800 SDR/T (2,001 - 30,000 G/T); 600 SDR/T (30,001 - 70,000 G/T); and 400 SDR/T in excess of 70,000 G/T; and
(b) For other claims,
  (i) 1 million for a ship up to 2,000 G/T;
  (ii) for a ship exceeding 2,000 G/T, (i) + the following cumulative amount : 400 SDR/T (2,001 -30,000 G/T), 300 SDR/T (30,001 - 70,000 G/T) and 200 SDR/T in excess of 70,000 G/T.

[247] The provision was adopted by Japanese strong proposal. IMO LEG. 71/4/2 (9 Sept. 1994) & LEG. 72/5/2 (3 Mar. 1995). However, its proviso in fact makes the 1974 Athens Convention and its 1990 Protocol incompatible with the 1996 LLMC. In response, the M.S. (Convention on LLMC) (Amendment) Order 1998 (S.I. 1998 No. 1258), art. 7(b) & (e), excludes passengers' personal claims of seagoing ships from the application of the 1996 LLMC.

The 1996 Protocol, art. 11(1), provides that it shall enter into force 90 days after 10 States have expressed their consent to be bound by it. It is expected that the Protocol will come into force without difficulties within 10 years from its adoption because the extent of increase of the limitation amounts did not fully reflect the depreciation of SDR purchasing power for the period of 20 years.[248]

## G. Special Limitation Conventions[249]

As the systems of the global limitation of liability for special group of claims, there are three kinds of International Conventions: Conventions on nuclear damage by the operation of a nuclear ship, on specified oil pollution damage by a ship and on HNS damage by a ship.

### (1) 1962 Nuclear Convention

In July 1959, the CMI Subcommittee prepared a Draft Convention on the liability of nuclear ship operators, which was adopted at CMI Rijeka Conference 1959. Based upon this the Brussels Diplomatic Conference adopted the Convention on the Liability of Operators of Nuclear Ships, Brussels, May 25, 1962.[250] This Convention provides for a good example of

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248 The extent of increase of the limits in art. 6 is as follows: A ship of 500 G/T: 6 times; 1,000 G/T: about 3.5 times; and ships exceeding 2,000 G/T: about twice. Meanwhile, however, the SDR purchasing power in major 12 countries during the 18 years (1976 - 1994) was 0.51 (Belgium), 0.64 (Canada), 0.45 (Denmark), 0.45 (France), 0.47 (Germany), 0.41 (Italy), 0.26 (Japan), 0.51 (Netherlands), 0.41 (Spain), 0.38 (Switzerland), 0.38 (U.K.) and 0.48 (U.S.) respectively (thus 0.45 on average). IMO, *Consideration of a Draft Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, 1976*, LEG/CONF. 10/6(b)/6, Annex 7. The SDR purchasing power must have decreased to less than 45% on average in 1996 since 1976, whereas the limits of liability for ships exceeding 2,000 G/T were amended to be increased only about twice although the smaller the ship is, the less the gap arises or it reverses. In particular, Japanese and U.K. shipowners and their interests will much reduce their burden on the limits of liability by the 1996 Protocol. As to British legislation of the 1996 Protocol and general note, see Gaskell, Annotated, *Merchant Shipping and Maritime Security Act 1997,* 2 Cur. L. S. 1997, 28-69 (1997); M.S. (Convention on LLMC) (Amendment) Order 1998 (S.I. 1998 No. 1258), Commented, Gaskell, *New Limits for Passengers and Others in the United Kingdom,* [1998] LMCLQ 312.

249 The term "global" limitation of liability is used academically to differentiate from the term "individual" limitation of liability (e.g., package or weight limitation under the Hague or Hague-Visby Rules; *per capita* passenger or luggage limitation under 1974 Athens Convention). However, the Conventions on special substances damage were severed from the former. Thus, it would be appropriate to use the terms "general global limitation of liability" or simply "general limitation" and "special global limitation of liability" or simply "special limitation".

250 1 Manaca, supra n. 188, at 169. Under this Convention, a nuclear ship means any ship equipped with a nuclear power plant (art. 1.1), and an operator means the person authorised by the licensing State to

jurisdiction over a limitation action and for the constitution of a limitation fund.[251]

### (2) 1969 CLC, 1971 FC & 1992 Protocols

On the occasion of the *Torrey Canyon* disaster[252] in March 1967, the International Torrey Canyon Subcommittee started to study the legal liability matters of oil pollution with mutual co-operation.[253] The Draft Convention prepared by CMI Subcommittee was adopted with modifications at CMI Tokyo Conference (1969),[254] based upon which IMO Legal Committee prepared its own Draft (1969).[255] IMO Draft was put on the agenda of the International Legal Conference on Marine Pollution Damage convened by the Assembly of IMO. As a result of deliberations,[256] the Conference adopted the International Convention on Civil Liability for Oil Pollution Damage, Brussels, November 29, 1969 (1969 CLC).[257]

The 1969 CLC provides for: (i) The scope of its application (arts. I & II);[258] (2) Channelling of liable party to the owner excluding his servants or agents only (art. III (1) & (4)); (3) Exemptions of liability (art. III (2) - (3)); (4) Joint or several liability of two or more owners involved in inseparable damage (art. IV); (5) Limits of liability (art. V (1));[259]

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operate a nuclear ship or the State directly operating such ships (art. 1.4). A licensing State means the Contracting State which operates or which has authorised the operation of a nuclear ship under its flag. The operator is absolutely liable for any nuclear damage caused by a nuclear accident involving the nuclear ship (art. 2.1). The operator's liability is limited to 1,500 million francs in respect of one nuclear accident, notwithstanding that it resulted from any actual fault or privity of that operator, without including interest thereon (art. 3.1). The operator should maintain insurance or other financial security covering its liability (art. 3.2). This Convention did not, however, attract concern from the have-states of nuclear ships, having not come into force. CMI Yearbook 1993 at 229.

251 Details are discussed in the next Chapter.

252 Details of *The Torrey Canyon*: Liberican Board of Investigation, *In the Matter of the Stranding of the Torrey Canyon*, 6 I.L.M. 480 (1970); *In re Barracuda Tanker Corp. (The Torrey Canyon)*, 409 F. 2d 1013 (2 Cir. 1969); CMI Subcommittee, *Preliminary Report on Torrey Canyon*, CMI Doc. 1968 I 68.

253 Healy, *The CMI and IMCO Draft Conventions on Civil Liability for Oil Pollution*, 1 J. Mar. L. & Com. 93 (1969).

254 CMI Doc. 1970 I 2-44 & 76-88.

255 IMO, *Official Records of International Legal Conference on Marine Pollution Damage, 1969*, 442-502 (1973, "*Official Records 1969*").

256 Id. at 78-123, 611-764.

257 Id. at 173-186. 1969 CLC came into force on June 19, 1975. RMC I.7-17. As of March 1996, more than 90 States ratified or acceded to it. Id. at I.7-19. Details on 1969 CLC : Doud, *Compensation for Oil Pollution Damage: Further Comment on the Civil Liability and Compensation Fund Conventions*, 4 JMLC 525 (1973).

258 The 1969 CLC applies "exclusively" to any "pollution damage" and "preventive measures" caused outside any "seagoing" tanker "on the territory" of a Contracting State by the escape or discharge of "any persistent oil" "actually [carried] in bulk as cargo" on board such a ship (arts. I & II).

259 An aggregate amount of 2,000 francs per ton or 210 million francs, whichever is the less (art. V(1)). These figures were replaced with 133 SDR and 14 million SDR by the 1976 Protocol to 1969 CLC, which came into force on April 8, 1981. Singh, supra n. 198, at 2489.

(6) Owner's conduct barring limitation (actual fault or privity, art. V (2)); (7) Calculation of limitation tonnage (art. V(10)); (8) Constitution and distribution of limitation fund (arts. V (3) - (8), (11), VI & IX);[260] (9) Compulsory insurance or other financial security for ships carrying more than 2,000 tons (art. VII); (10) Time limitation (art. VIII); (11) Recognition and enforcement of judgments between the Contracting States (art. X); and (12) Others.

Meanwhile, pursuant to the 'Resolution on Establishment of an International Convention Fund for Oil Pollution Damage' adopted simultaneously with the adoption of 1969 CLC to ensure adequate compensation for victims of large scale oil pollution incidents, a Draft for a compensation scheme by the constitution of an International Fund was prepared by the IMO Legal Committee. Based upon the Draft, the Conference convened by the Assembly of IMO and held at Brussels from November 19 to December 18, 1971 adopted the 'International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971' (1971 FC) as a Supplement to the 1969 CLC.[261]

Only a few years after the entry into force of 1971 FC from October 1978 was it required that the two oil pollution Conventions be revised because since the adoption thereof the limitation amounts had been eroded by inflation whereby the victims of large scale oil pollution incidents could not be compensated adequately.[262] In addition, the disaster of the *Amoco Cadiz* (March 1978)[263] expedited the movement for the revision of the two Conventions. The IMO Legal Committee worked and had four informal meetings from late 1981 (Stockholm) through May 1983 (London) to prepare the two Draft Protocols to 1969

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260 Details are discussed in the next Chapter.

261 Singh, id. at 2481. Details: IMO, *Official Records of the Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971* (1978 ed. *"Official Records 1971"*). The 1971 FC came into force on October 16, 1978. RMC I. 7-38.
The main contents of 1971 FC are as follows:
(1) Establishment of "The International Oil Pollution Compensation Fund" (IOPC Fund, art.2); (2) Scope of application of the Convention (art. 3); (3) Requirements of compensation by the Fund (art. 4(1); (4) Exemptions of the Fund's liability (art. 4(2) - (3)); (5) Maximum limit of the Fund's compensation (art. 4(4): 450 million francs including the compensation amount actually paid by the owner under 1969 CLC, for which there was substituted 30 million SDR by the 1976 Protocol to 1971 FC entered into force on Nov. 22, 1994, RMC I. 17-42, but afterwards increased to 675 million francs (about 45m. SDR) by the Assembly of the Fund on April 20, 1979, Singh, supra n. 198, at 2503 n. 5); (6) Indemnification from the Fund of a portion of the owner's compensation paid under 1969 CLC (art. 5); (7) Time limitation (art. 6); (8) Jurisdiction over actions against the Fund (art. 7); (9) Recognition and enforcement of judgments against the Fund (art. 8); (10) Recourse of the Fund, etc. (art. 9); (11) Contributions to the Fund by the oil cargo interests (art. 10 & 11); and (12) Others.

262 Göransson, *The 1984 and 1992 Protocols to the Civil Liability Convention, 1969 and the Fund Convention, 1971,* Liability for Damage to the Marine Environment 71 (De la Rue ed. 1993).

263 *In re Amoco Transport Co. (The Amoco Cadiz)*, 1979 AMC 1017 (N.D.I11. 1979); Jacobsen & Yellen, *Oil Pollution : The 1984 London Protocols and the Amoco Cadiz*, 15 J. Mar. L. & Com. 467 (1984).

CLC and 1971 FC. Based upon them the International Conference convened in London from April 20 to May 25, 1984,[264] adopted the 1984 Protocol to the 1969 CLC (1984 CLC)[265] and the 1984 Protocol to the 1971 FC (1984 FC).[266]

As opposed to the expectation of the delegations for the adoption of 1984 Protocols, however, the entries into force of the two Protocols became impossible mainly due to the rejection of the U.S.A. and Japan which were the first and second largest oil-receiving countries as of 1990.[267] The U.S. was not from the start satisfied with the Protocols on the grounds that the limits of liability thereby were too low. In view of its relatively large burden of contributions, nor was Japan willing to ratify the Protocols without the U.S.

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264 IMO, *Official Records - - - - and the International Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Fund Convention, 1992,* Vol. I 132, Vol. III 157 *et seq.* (1993 ed. *"Official Records 1984/1992").*

265 The main amendments of 1969 CLC by 1984 CLC were:
(I) Replacement of art. I (1), (5), (6) & (8) concerning the definitions of "ship" (to include any sea-going ship "constructed or adapted for the carriage of oil in bulk as cargo"), "oil" (to mean "any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil" whether carried "as cargo or in the bunkers of such a ship" but excluding "whale oil"), "pollution damage" (to restrict "compensation for impairment of the environment" to "costs of reasonable measures of reinstatement" but excluding "loss of profit"), and "incident" (to include any occurrence creating "a grave and imminent threat" of causing damage) (Prot. art. 2);
(2) Replacement of art. II to extend the applicable oil pollution area to "the exclusive economic zone" of a Contracting State up to 200 nautical miles from its baselines (Prot. art. 3);
(3) Replacement of art. III (4) to channel the liable party to the owner only (Prob. art. 4 (2));
(4) Replacement of art. V (1) to increase the limits of liability: (a) 3 million SDR for a ship up to 5,000 G/T; (b) for a ship in excess of 5,000 G/T, (a) + 420 SDR per ton or 59.7 million SDR, whichever is the less (Prot. art. 6 (1));
(5) Replacement of art. V(2) to substitute the "intent or recklessness" test for the "actual fault or privity" test (Prot. art. 6 (2)); and
(6) Replacement of art. V(3) to allow the constitution of limitation fund even before any liability action pending (Prot. art. 6 (3)).

266 The 1984 FC amended the 1971 FC:
(1) Deletion of the relevant provisions (arts. 2(1) (b), 5, 6(2), etc.) for indemnification by the Fund to the owner (so called roll-back relief) (Prot. arts. 3 & 7(2));
(2) Replacement of art. 4(4) to increase the maximum compensation by the Fund to 135 million SDR and to provide for its automatic increase to 200 million SDR when the combined quantity of contributing oil received by 3 Contracting States during the preceding calendar year exceeded 600 million tons (Prot. art. 6(3)); and
(3) Replacement of art. 4(6) to delete the power of the Fund Assembly to change the maximum limit of compensation and instead to give powers to pay compensation in exceptional cases even if the limitation fund has not been constituted (Prot. art. 6(5)).
Further Details: Jacobsson & Trotz, *The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention,* 17 JMLC 467 (1986).

267 In the light of the requirements for the entry into force, it was most unlikely that both Protocols would come into force, without participation of the U.S. and Japan. The requirements were in 1984 CLC Protocol 12 months after the date on which 10 States including 6 States each with not less than one million units of gross tanker tonnage have ratified or acceded (art. 13(1)), and in 1984 FC Protocol 12 months after the date on which (a) 8 States have ratified or acceded and (b) it has been confirmed, with the information received by IMO from the Contracting States, that the total quantity of the contributing oil received by such persons as were bound to pay the contributions during the previous calendar year exceeded 600 million tons of contributing oil (art. 30(1)).

participation.[268] Under the circumstances, on the occasion of the *Exxon Valdez* disaster[269] in Alaskan waters in 1989, the U.S. Congress expressed its clear intention not to ratify the 1984 Protocols by enacting its independent legislation of the OPA 1990. Thus, the Assembly of the IOPC Fund established a Working Group to prepare new Draft Protocols to 1969 CLC and 1971 FC. The new texts prepared by the Working Group were only to relax the requirements for the entry into force and other minor modifications to the texts of the 1984 Protocols. In May 1992, the Draft Protocols were submitted to IMO Legal Committee.[270] Approved by the Legal Committee, the two Draft Protocols were put on the agenda of the International Conference on the Revision of 1969 CLC and 1971 FC convened by IMO in London in November 1992. The Conference adopted the 1992 CLC Protocol and the 1992 FC Protocol together with five Resolutions.[271]

### (3) 1996 HNS Convention

It is common ground that the *Torrey Canyon* disaster in 1967 not only expedited the adoption of 1969 CLC and 1971 FC as the first stage but also further gave IMO an impetus to work as the second stage for a separate international scheme on maritime claims arising in connection with the carriage of hazardous and noxious substances (HNS).[272] The IMO Legal Committee prepared a Draft HNS Convention and submitted it to the International Conference in 1984 together with the 1984 Draft Protocols to CLC & FC, but it failed because too many complex issues were left open. It was only possible that the 1984 Conference adopted a resolution requesting IMO "to prepare a new and more widely

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268 Göransson, supra n. 262, at 76-77.

269 *In re The Exxon Valdez*, 1991 AMC 1482 (D. Alaska 1991).

270 *Official Records 1984/1992*, Vol. 4 at 44.

271 Id. at 130 *et seq.* The text of 1992 CLC Protocol is the same as that of 1984 CLC Protocol except the substitution of the words "four states" for "six states" in art. 13(1). The requirement of coming into force of 1984 FC Protocol also was relaxed by replacing the phrase "600 million tons" with "450 million tons" (art. 30(1) (b)). Besides, in 1992 FC Protocol a new provision was included to restrict the aggregate amount of the annual contributions payable in respect of the contributing oil received in a single Contracting State (e.g. Japan) during a calendar year not to exceed 27.5% of the total amount of the annual contributions until such total quantity reaches 750 million tons or until five years after the entry into force of the Protocol, whichever occurs earlier (art. 36 ter).
The two 1992 Protocols came into force on May 30, 1996. RMC at I.7-28 & 45. As to comparison with the U.S. OPA 1990, see Little & Hamilton, *Compensation for Catastrophic Oil Spills: A Transatlantic Comparison*, [1997] LMCLQ 391.

272 Librando, *Maritime Liability and Chemical Transport*, IMO Chemistry & Industry, No. 19, 749 (1996); Cleton, *Liability and Compensation for Maritime Carriage of Hazardous and Noxious Substances (HNS)*, Liability for Damage to the Marine Environment 173 (1993); Griggs, *Extending the Frontiers of Liability - The Proposed Hazardous Noxious Substances Convention and its Effect on Ship, Cargo and Insurance Interests*, [1996] LMCLQ 145.

acceptable draft for submission to a diplomatic conference which may be convened in the future."[273]

Based upon the new draft text submitted under the lead country procedure by 11 states' Working Group[274] and opinions submitted by other countries, the Legal Committee opened a series of sessions since 1991 to prepare its own Draft Convention. One of the most controversial issues was whether there should be included the provisions of "linkage" with the general Limitation Conventions and national limitation regimes and, if included, which option should be adopted.[275] By July 1995, the Legal Committee prepared its new Draft Convention,[276] which was submitted to the Diplomatic Conference held at the Headquarters of IMO from 15 April to 3 May 1996.[277] At last, the Conference adopted the 'International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996' (HNS Convention),[278] from which however the "linkage" provisions were dropped out. Its basic structure is modelled on the 1992 CLC & FC, adopting the two-tier fund system and thus borrowing many similar provisions therefrom and some others from the 1989 CRTD.

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273 *Official Records 1984/1992*, Vol. 3 at 198. As to Discussions on the 1984 HNS Draft Convention of IMO, see De Biévre, *Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea,* 17 JMLC 61 (1986).

274 Canada, Denmark, Finland, France, Germany, Japan, the Netherlands, Sweden, the U.K., the U.S. and the USSR. IMO LEG/64/4 (25 Jan. 1991).

275 Until the 1996 Conference the following Options were proposed:
(Details : IMO LEG/CONF. 10/6/(a)/2)
(1) Option A (Linkage with gap filling) was to include in the HNS Convention the provisions of the 1924 or 1957 Convention State's mandatory denunciation thereof but to allow the 1976 Convention State's retaining thereof for a transitional period and to fill the gaps between the 1976 or 1996 LLMC and 1996 HNS limitation funds to be constituted in one limitation proceeding, from the HNS Fund or with refund from the 1976 or 1996 LLMC State Party having caused the gaps through a mechanism to be contained in the HNS Convention (proposed by Norway).
(2) Option B (No linkage with no gaps) was to provide for a strict separation of the HNS Convention from any of the general Limitation Conventions (Argued by Germany & Switzerland, LEG 71/4/1; LEG/CONF. 10/6(a)/24).
(3) Option C (Linkage with no gap filling) was to include in the HNS Convention the provisions of the 1924, 1957 or 1976 Convention State's mandatory denunciation thereof but to provide for linkage in one limitation proceeding of both the HNS and 1996 LLMC or national limitation procedure without any gap filling required (Proposed by the U.K. until its amendment to Option D (LEG/CONF.10/6/(a)/2, Annex at 6 (c)).
(4) Option D (Hybrid Linkage with "Accepting Gaps") was to amend the Option C not to mandate the 1924, 1957 or 1976 Convention State to denunciate it but to maintain the linkage by combining the general limitation proceeding in the HNS limitation proceeding with the gaps accepted by the HNS combined limitation fund but without gap filling from the HNS Fund (Amended Proposal by France, the Netherlands & the U.K., LEG/72/4/6).

276 LEG/CONF.10/6(a), which included the provisions of linkage in art. 9; Commented, Griggs, supra n. 272.

277 IMO, HNS Convention, IMO-479E, 45 (1997).

278 Id.; LEG/CONF.10/8/2 (9 May 1996). As to general notes, see Gaskell, supra n. 248, at 28-64 & 131.

The main features of HNS Convention are: (1) Wide listing of HNS applicable (art. 1.5);[279] (2) Providing for loss of life or personal injury "on board or outside the ship" carrying HNS whereas property damage should be incurred to "damage outside the ship" (art. 1.6); (3) Exclusion of contractual claims from application (art. 4.1); (4) Exclusion from application of workers' compensation or social security claims, oil pollution claims by 1969/1992 CLC and radioactive claims (art. 4.2-3); (5) Exclusion from application of non-commercial ships owned or operated by a State (art. 4.4-6); (6) Rights of reservation for a ship not exceeding 200 G/T, or carrying HNS only in packaged form, or trading only between ports or facilities of a State (art. 5); (7) Owner's strict liability and listed exemptions (art. 7.1-3); (8) Channelling of the liable party to the owner (art. 7.5); (9) Limits of the owner's liability (art. 9.1);[280] (10) Jurisdiction over limitation action (art. 9.3); (11) Distribution of the limitation fund (arts. 9.4-8 & 11); (12) Effect of constitution of the fund (art. 10); (13) Priority of personal claims over property claims to the extent of two thirds of the limitation fund (art. 11) and any compensation amount by the HNS Fund as well (art. 14.6); (14) Compulsory insurance of the owner (art. 12); (15) Limits of compensation by the HNS Fund (art. 14.5);[281] (16) Provisions relating to contributions to the HNS Fund by HNS cargo receivers (arts. 15-23); (17) Time bar of liability actions (art. 37); (18) Jurisdiction over liability actions (arts. 38 & 39); (19) Recognition and enforcement of liability judgments (art.

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279 Art. 1.5 provides for wide list of HNS "carried on board a ship as cargo":
(i) oils carried in bulk listed in App. I of Annex I to MARPOL 73/78 as amended;
(ii) noxious liquid substances carried in bulk referred to in App. II of Annex II to MARPOL 73/78 as amended, and those substances and mixtures provisionally categorized as falling in pollution category A, B, C or D in accordance with regulations 3(4) of the said Annex II;
(iii) dangerous liquid substances carried in bulk listed in ch. 17 of Int'l Code for the Construction & Equipment of Ships Carrying Dangerous Chemicals in Bulk 1983 (IBC Code) as amended, and the dangerous products prescribed by the Administration concerned in accordance with para. 1.1.3 of the Code;
(iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by IMDG Code as amended;
(v) liquefied gases as listed in ch. 19 of IBC Code as amended, and the products prescribed by the Administration concerned in accordance with para. 1.1.6 of the Code;
(vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed-cup text); and
(vii) solid bulk materials possessing chemical hazards covered by App. B of the Code of Safe Practice for Solid Bulk Cargoes (BC Code) as amended, to the extent that those substances are also subject to the provisions of IMDG Code when carried in packaged form.

280 The owner's limits of liability (art. 9.1):
(a) 10 million SDR for a ship up to 2,000 G/T; and
(b) for a ship in excess thereof, (a) + the following amount:
1,500 SDR per ton (2,001 - 50,000 G/T); 360 SDR per ton in excess of 50,000 G/T, or 100 million SDR, whichever is the less.

281 250 million SDR including any compensation actually paid by the owner where applicable (art. 14.5).

40); (20) the HNS Fund's subrogation and recourse (art. 41); and (21) Other relevant provisions.[282]

### H Other Derivative Conventions

The 1974 Athens Convention as amended by its 1976 and 1990 Protocols is a derivative Limitation Convention separated from the global limitation regime (1957 Convention or national law) in the course of the developments of shipowners' limitation of liability system, so as to allow the owners and others to further limit passengers' personal and luggage claims "individually". Since the 1974 Convention is not categorised as a global limitation regime, the detailed introduction is omitted here.[283] However, in view of the fact that although some major maritime countries are outside it, a considerable number of states are still its members,[284] it would sometimes surely affect whether to invoke or select limitation jurisdiction under the general Limitation Conventions or even under a special Limitation Convention in cases of combination ships (carrying passengers and HNS cargo). To such extend the 1974 Convention and its 1990 Protocol (if entered into force) have close relation with the conflicts of limitation jurisdiction.

### I. Failure of Uniformity

As has been summarised above, contrary to the CMI's initial efforts to accomplish a global uniformity in respect of shipowners' limitation of liability, the subsequent international efforts for improvement of the regime have been transformed into the new concepts of regional or group by group uniformity of limitation regime (whether group of states or class of maritime claims) by giving up the global uniformity. Thus, the once unified single monetary Limitation Convention has now been diversified into multiple Conventions,

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282 The HNS Convention will come into force 18 months after the date when (a) 12 States including 4 States each with not less than 2 million units G/T have expressed their consent to be bound by it, and (b) IMO has received information that the receivers liable to contribute pursuant to art. 18.1 (a) and (c) received during the preceding calendar year a total quantity of at least 40 million tons of cargo contributing to the general account (art. 46).

283 The brief notes: supra nn. 115-118. Details: Grime, *The Carriage of Passengers and the Athens Convention in the United Kingdom*, The Int'l Maritime Organization 252 (1984); Gaskell, *The Zeebrugge Disaster: Application of the Athens Convention 1974*, 137 N.L.J. 285 (1987).

284 The 1974 Convention came into force on April 28, 1987 and as of 1998 its States Parties include some EEC & EFTA members (Belgium, Greece, Luxembourg, Poland, Spain, Switzerland, UK), Argentina, China, Egypt, Liberia, Russia, etc. RMC I.5-82. But its 1990 Protocol is not yet in force as of 1998, nor is it likely that it will enter into force. RMC I.5-85 & 86/1.

resulting in the inevitable proliferation of limitation funds in different or even in the same limitation jurisdiction and deepening the conflicts of such jurisdiction[285] and further accelerating the inconvenience and cost increase of the parties concerned.[286] While beyond the limit of this thesis, the following questions may be posed as a whole:

(1) Whether it was necessary and justified to differentiate the limits of compensation between passengers' or HNS personal claims and the other personal claims;

(2) Whether the "intent or recklessness" test barring wider uniformity of the limitation regime and being criticised as inequity protecting even the idlest owners, should be maintained;

(3) Whether the indiscriminately wide listing of HNS applicable to the HNS Convention to the detriment of legal certainty should be acceptable;[287]

(4) Whether it is equitable that neither the 1992 CLC nor the HNS Convention applies to oil pollution damage caused by the escape or discharge of the bunkers of a ship other than oil tankers as defined by the 1992 CLC; and

(5) Whether it was proper and better not to adopt the "linkage" (in any form) in the HNS Convention with the general Limitation Conventions.

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285 This was the significant reason why the developments of shipowners' limitation of liability regimes had to be described prior to the discussions on the conflict of laws in limitation jurisdiction in this thesis.

286 As to further aspects of "relatively little uniformity" in this area, see Griggs, supra n. 200.

287 The HNS Conference (1996) itself also conceded this anxiety by adopting the 'Resolution on the relationship between the HNS Convention and a prospective regime on liability for damage in connection with the transboundary movements of hazardous wastes'.

# CHAPTER 2

## CONFLICT OF LAWS IN LIMITATION JURISDICTION

The rules of adjudicative jurisdiction over shipowners' limitation of liability were traditionally considered to be the matter of national laws, reflecting their specific judiciary backgrounds and policies. Thus, as has been in other international Conventions, the provisions for uniformity of procedural matters including jurisdiction have been restricted to the least in the shipowners' Limitation of Liability Conventions, notwithstanding the peculiar nature of global liability limitation regimes requiring the concourse of all limitable claims in one limitation court ("fund court"). As a result, the conflict of laws in limitation jurisdiction remains uncontrolled by the Conventions, thus cutting off the realisation of the owners' limitation of liability and impeding the purposes of the Conventions. This chapter treats of the various aspects of such conflicts of limitation jurisdiction and procedure through intensive discussions and comparisons between the relevant Conventions and national laws.

### 1. Jurisdiction over Limitation Defence

#### A. Liability Action Court's Jurisdiction

It might well be presumed that the owner's invocation of limitation of liability originated from an affirmative or alternative defence against the claimant's initiative action because it was enough for the owner to abandon or surrender the ship and pending freight (if remained) in order to discharge himself from further liability (under the old French Abandonment System) or to allow the claimants to execute their rights on the remaining assets of the voyage (under the old German Execution System). Such procedure of limitation defence has survived even after the advent of the ship's value or combined monetary limitation regime and the procedural device of the owner's offensive limitation action pursuant to admiralty court rules and practice. Thus, so far as the owner's limitation defence pleading without constitution of a limitation fund is concerned, the competent court seized of a liability action has in principle the jurisdiction not only over the liability aspects but also over the limitation aspects.

However, under the British 1734 Limitation Act based upon the ship's "value" (including her appurtenances and pending freight)[1] to be ascertained immediately prior to the limitation accident without allowing the owner's abandonment of the ship's remaining assets,[2] it was felt necessary and equitable to allow by express provisions not only the claimants but also the owners or part-owners "to exhibit a Bill in any Court of Equity for a Discovery of the total [claim] Amount of such Losses or Damages, and also of the Value of such Ship [etc.] and for an equal Distribution and Payment thereof amongst such Freighters and Proprietors, in Proportion to their respective Losses or Damages, according to the Rules of Equity."[3] Since then, while the two options of the owner's initiative limitation action and passive limitation defence have been in general allowed by court rules or practice, the positions of Limitation Conventions and national laws are not uniform and some national legislations are departing from the Conventions even in cases of no reservation allowed therein.

## B. Whether to Allow Limitation Defence without Constitution of Limitation Fund

### (1) Positions of Limitation Conventions

The 1924 Convention leaves all the procedural matters to national laws on the one hand (art. 14),[4] but contains a separate provision on the other allowing the owner to invoke limitation of liability without constitution of a limitation fund (art. 8, para. 4).[5] Apart from the invocation of limitation defence, however, these provisions are impracticable for the following reasons: (1) each court is unable to expect whether the other foreign courts would also allow the defendant's limitation of liability; (2) each court would meet difficulties to ascertain the exact claim amounts of the foreign liability actions until the foreign judgments can be recognised or enforceable; and (3) if the courts should stay actions until the owner

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1 The 1734 Act, 7 Geo. II, c.15 (1734), s.1.

2 *Brown v. Wilkinson* (1846) 15 M. & W. 391, supra Ch. 1, n.88.

3 The 1734 Act, s. 2, supra Ch. 1 n. 81. This provision seems to be the origin of the owner's limitation action. *Cf.* Brice, supra Ch. 1 n. 92, at 19 (stating that the 1813 Act, s. 7, was "the origin of the present limitation action").

4 Art. 14 provides: "Nothing in the foregoing provisions shall be deemed to affect in any way the competence of tribunal modes of procedure, or methods of execution authorized by the national laws."

5 Art. 8, para. 4, reads: "If different creditors take proceedings in the courts of different states, the owner may, before each court, require account to be taken of the whole of the claims and debts so as to insure that the limit of liability be not exceeded." Further, the next para. (para. 5) provides that the national laws shall determine "questions of procedure . . . for the purpose of applying the preceding rules."

could prove the other courts' final and binding judgments the former court's delay of procedure would be inevitable, failing to realise the speedy judicial protection of maritime claims.

The 1957 Convention does not contain any direct provision in respect of the owner's option to invoke limitation defence without constitution of a limitation fund, but only provide for the general governing law of limitation procedure (art. 4).[6] This wide opening of the procedure rules to national laws resulted in the conflict of laws in this respect amongst the States Parties.

The 1976 Convention includes a special provision allowing the invocation of limitation defence without constitution of a limitation fund while further allowing a State Party the option to regulate in its national law the separate system that only by the constitution of a limitation fund may the limitation of liability be invoked (art. 10(1)). In this connection, art. 10 (2) further provides: "If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly." This para. (2) mandates the court seized of liability action to apply art. 12 (Distribution of the fund) *mutatis mutandis* on the assumption that had the limitation fund been constituted with the court it would have distributed to the plaintiffs. However, the application of this provision is restricted as follows. First, when a limitation fund has been constituted with any other court, art. 10 (2) is not applicable. Second, this provision may only be applicable where there is only a single claimant or where multiple claims or actions are consolidated in one court subject to the national law of the State Party. By contrast, where multiple actions are pending in different States Parties it is very difficult for this provision to be applicable unless the national laws concerned have regulated in detail for the preparation of such a situation. Moreover, the assessment of the various claims and the evidences thereon may be conflicted between the courts.[7] Further, as opposed to where a limitation court administers the fund and distributes it, art. 12 (4) may also be very difficult to be applied in the court of a liability action. Art. 12 (4), which is also required by art. 10 (2) to apply *mutatis mutandis*,

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6 Art. 4 provides: "Without prejudice to the provisions of Article 3, paragraph (2) of this Convention, the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted."

7 Under such circumstances, the different courts would be usually reluctant to transfer the actions to the foreign "related" court. If, however, settlements except one major action are made, art. 12(2) may be *mutatis mutandis* applicable in the remaining court.

provides for the limitation court's discretionary order to set aside provisionally a sufficient sum from the limitation fund to pay for the future subrogation claim. In a liability action being defended with the limitation of liability, however, even if *a sufficient sum* is reserved provisionally not to include the proportional award in the liability judgment, the court may have to reopen the hearings to award the would-be difference of amounts between the already awarded and the total limits of liability.[8]

Meanwhile, the 1969 or 1992 CLC (art. V(3) each) and the 1996 HNS Convention (art. 9(3)) do not allow the owner to invoke limitation of liability without constitution of the limitation fund. Further, these Conventions provide for the separate "exclusive" jurisdiction over limitation of liability and over liability actions, conferring the former on the limitation court (fund court) only and the latter on the certain listed courts only (1969/1992 CLC, arts. V(3) & IX (1) - (3); 1996 HNS Convention, arts. 9(3), 38 (1) - (2) & (5)).[9]

### (2) National Laws

As to whether to allow the owner to invoke limitation of liability by way of defence, the common law countries follow the British tradition of wide option, whereas the Continental countries are split in this matter. The position of the early English Act started with the expression that "it shall and may be lawful . . . to exhibit a Bill . . ."[10] or that "it shall be lawful . . . to entertain Proceedings at the suit of any Owner . . ."[11] or that "the owner *may* apply . . . to the High Court . . . that court may determine the amount of the owner's liability and may distribute rateably among the several claimants . . . "[12] All these expressions did not restrict the owner's right to invoke limitation only by way of a limitation action. The same position has been taken more clearly by the M.S.A. 1979 and 1995 incorporating the

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8 Because of various difficulties above-mentioned, there appeared the legislative example of a reserved judgment system in German and Scandinavian laws.

9 In the interpretation of the 1969/1992 CLC, art. IX (3) each, and the HNS Convention, art. 38 (5), a question may be posed whether in terms of these limitation jurisdiction provisions expressing the fund court's "exclusive" jurisdiction to determine "all matters relating to the *apportionment* and distribution of the fund" the Conventions confer the jurisdiction over liability aspects only on the liability action courts (nonfund courts) when liability actions are pending therein. However, it should be construed that the jurisdiction over the liability aspects are concurrently vested in both the fund and nonfund courts; for (1) the original nature and function of a limitation action was to bring about the concourse of all limitable claims in one fund court, (2) the fund court has to assess the claims filed therewith without a liability action instituted, and (3) the phrase "all matters relating to the apportionment" purports to include the assessment of claims.

10 1734 Act, s. 2; 1786 Act, s. IV; 1813 Act, s. 7.

11 M.S.A. 1854, s. 514.

12 M.S.A. 1894, s. 504, which was not amended by M.S.A. 1958.

1976 Convention directly[13] and by the M.S. (Oil Pollution) Act 1971 and M.S.A. 1995 modifying the 1969/1992 CLC, [14] with a further supplementary provision of R.S.C., Ord. 18, r.22.[15]

Such English rule was followed by the Admiralty Act 1988 of Australia (s. 25(4)).[16] Canada Shipping Act, R.S.C. 1970, c. S-9, s. 647 *et seq.*,[17] incorporated by re-writing the 1957 Convention, of which s. 648[18] provided for the fund court's power to administer the limitation proceeding commenced by "the application of [the] owner" while containing no express provision restricting the ways of invoking limitation only to the way of instituting a limitation action.

Under the U.S. Limitation Act as amended[19] and Admiralty Rules,[20] it has been taken for granted that the owner may plead limitation of liability by way of simple defence in the claimant's liability action.[21]

Of the Continental countries, Germany (West) took the position that a debtor who desired to invoke limitation of liability should apply for the commencement of limitation procedure for the payment and distribution of the limitation fund by virtue of the 1972 Act relating to the procedure of payment and distribution of limitation amount as enacted for the

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13 M.S.A. 1979, s. 17(1), Sch 4, replaced, M.S.A. 1995, s. 185(1), Sch. 7.

14 M.S. (Oil Pollution) Act 1971, s. 4(1), replaced, M.S.A. 1995, s. 157(1), as compared with 1969/1992 CLC, art. V(3) each.

15 R.S.C., Ord. 18, r. 22, provides: "Nothing in Order 75, rules 2 and 37 to 40, shall be taken as limiting the right of any shipowner or other person to rely by way of defence on any provision of the Merchant Shipping Acts, 1894 to 1981, which limits the amount of his liability in connection with a ship or other property."

16 The Admiralty Act 1988 of Australia, s. 25(4), reads: "Where a court has jurisdiction under this Act in respect of a proceeding, that jurisdiction extends to entertaining a defence in the proceeding by way of limitation of liability under a law that gives effect to the provisions of a Liability Convention."

17 Replaced, Canada Shipping Act, R.S.C. 1985, c. S-9, s.574 *et. seq.*

18 Replaced, id., s. 576.

19 46 U.S.C.A. ss. 181-189 (1994).

20 Admiralty Rules 54-57 (1872), 80 U.S. at xiii (1872), replaced, Admiralty Rules 51-54 (1920) codified in 28 U.S.C.A. at 5233 (1958) as amended, replaced, FRCP Supplemental Rules for Certain Admiralty and Maritime Claims, 1966, Rule F, 28 U.S.C.A. at 846 (1994) ("Supp. Rule F").

21 *The Scotland*, 105 U.S. 24, 34-35 (1882); *Carlisle Packing Co. v Sandanger*, 259 U.S. 255, 260 (1922); *Langnes v. Green*, 282 U.S. 531, 540 (1931); *Deep Sea Tankers, Ltd. v. The Long Branch,* 258 F.2d 757, 772 (2 Cir. 1958) ("A shipowner may institute a separate proceeding by the filing of a petition for limitation [by s.185] or he may plead the limitation statute, 46 U.S.C.A. s. 183 (a), in his answer as a defense to suit against him."), cert. den., 358 U.S. 933 (1959). However, the *Deep Sea* court's reasoning that the s. 183 (a) is a substantive provision of the owner's limitation of liability whereas the s. 185 provides for a procedural option of invoking a limitation action, is not widely supported.

implementation of the 1957 Convention.[22] However, in order to ratify and implement the 1976 Convention in 1987, Germany altered its position by replacing the 1972 Act[23] and amending the relevant provisions of the Commercial Code,[24] whereby the owner now may invoke limitation by way of defence without constitution of a limitation fund.[25]

Meanwhile, however, France[26] and Japan[27] took different positions in implementing the 1957 Convention. The French 1967 Décret, s. 59, provides that the owner and others who desire to take the benefit of limitation of liability shall apply for the commencement of limitation procedure to the Commercial Court. Japanese 1975 Act, s. 3(1), provides that the owners or others may limit their liability "pursuant to the provisions of this Act." This provision is interpreted as meaning that the limitation of liability may be invoked only by way of application for the limitation procedure as provided in the Act.[28] The above-cited provisions have not been altered on the occasions of national implementation of the 1976 Convention. Such legislative policy has also been followed by other countries.[29] In addition, the States Parties of the 1969 or 1992 CLC are implementing the art. V(3) (requisite constitution of limitation fund) by direct incorporation of the Convention or by re-writing its contents in their national laws.[30]

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22 Gesetz über das Verfahren bei der Einzahlung und Verteilung der Haftungssumme zur Beschrängkung der Haftung Reederhaftung (Seerechtliche Verteilungsordnung vom 21. Juni 1972), s. 1 (BGB1. 1972 I S. 953).

23 Gesetz über das Verfahren bei der Errichtung und Verteilung des Fonds zur Beschrängkung der Haftung für Seeforderungen (Seerechtliche Verteilungsordnung vom 25. Juli 1986), BGB1. 1986 I S. 1130).

24 Gesetz zur Änderung des Handelsgesetzbuchs und anderer Gestze (Zweites Seerechtsänderungsgesetz) vom. 25. Juli 1986).

25 The Commercial Code as amended in 1986, s. 487 e(2). However, in view of the difficulties in ascertaining the claim amounts in other multiple actions, Germany further amended the Civil Procedure Act to provide for a reserved judgment system. Thus, it is provided that the court seized of a liability action may, on defence of limitation but due to the uncertainty of various claim amounts, render a reserved judgment pursuant to art. 305a of the Civil Procedure Act to the effect that the defendant may constitute a limitation fund or exercise the right to limit the liability. Yamasida, *As to the Second Amendment of Maritime Law in West Germany,* 31 Japan Mar. L. Ass'n J. 3 at 16 (1987). This example in German court practice illustrates well the difficulties of the *mutatis mutandis* application of the Convention, art. 12, when the limitation of liability is invoked in a liability action as a defense without constituting the limitation fund.

26 Loi No. 67-5 du 3 janvier 1967, portant statut des navires et autres bâtiments de mer; Décret No. 67-967 du 27 Octobre 1967, portant statut des navires et autres bâtiments de mer ("1967 Décret").

27 An Act Relating to Limitation of Liability of Shipowners and Others, 1975 (Law No. 94) ("1975 Limitation Act").

28 Inaba, *et al., Annotations on the Act Relating to the Limitation of Liability of Shipowners and Others* 87 (Tokyo, 1989); Danikawa, *et al., Shipowners' Limitation of Liability Act and Oil Pollution Damage Compensation Act* 37 (Tokyo, 1979).

29 E.g., the Commercial Code of Korea as amended in 1991, art. 752(1).

30 E.g., German Commercial Code as amended, art. 486(2); Japanese OPCA 1975, s. 5; Korean OPCA 1992, s.6.

### (3) Advantages & Disadvantages

The optional limitation pleading system (allowing the invocation of limitation by way of either a defence or a limitation action) and the exclusive limitation action system (allowing invocation of limitation only by way of a limitation action) have the following advantages and disadvantages:

First, in cases of multiple claimants the exclusive limitation action system is convenient to both the claimants and the owners in view of their availability of speedy, uniform and cost-reducing procedure; in particular, it is more favourable to the part of the owners.

Second, even in cases of apparently single claimant the owner would have the benefit of taking a pre-emptive strike by initiating the limitation action in his natural forum and of foreclosing any probable dispute from potential claimants. The claimant also may have the benefit of procuring the security (limitation fund) without taking a separate provisional and protective proceeding.

Third, however, when a liability action is pending with no other claimants being likely to emerge, to institute a separate limitation action will be burdensome on both parties, particularly, where the security has already been given to the plaintiffs or otherwise there is no concern about executing the judgment. Such inconvenience may be the same even in cases where only a small number of claimants exist and their actions can be consolidated in a court pursuant to the available procedure rules of national law.

In the light of the above analysis, both systems have the merits and demerits, but assuming that adequate security could be given to claimants, the optional limitation pleading system would be more convenient to both parties.

### (4) Waivability of Exclusive Provisions

Thus, there may be posed a question whether the statutory provision of the exclusive limitation action system can be waived by an agreement between the parties or otherwise. While never discussed ever, it is arguably submitted in the affirmative for the following

reasons: (1) the purport of the exclusive limitation action system is to protect the interests of the parties concerned rather than the interests of the courts; (2) thus, if the parties should agree not to comply with the procedure of a limitation action but to rely on the adjudication of the nonfund court in respect of the dispute on limitation of liability, there would be no reason why such an agreement should be held null and void; (3) just as a forum selection clause or a submission to jurisdiction is valid in principle, so is not only such an agreement but also an implied waiver[31] of objection by the plaintiff in the liability action to be held to have conferred upon the court the jurisdiction over limitation of liability which otherwise had not been vested therein under the exclusive limitation action system unless seized of the limitation action; and (4) the relation to the other claimants is up to the risk of the owners, being no deterrent to the waiver of the exclusive limitation action provisions.

### (5) Exception of Jurisdiction over Limitation Defence

Under the optional limitation pleading system, the competent court seized of a liability action should have full powers to adjudicate not only liability aspects but also limitation aspects so far as the owner has invoked limitation defence even without a separate limitation action instituted. In the United States, however, owing to its unique background of federalism and lack of statutory clear regulation on the allocation of admiralty and maritime jurisdiction between the federal and state courts, a controversy has not been firmly settled as to whether the state courts which are traditionally vested with admiralty jurisdiction concurrently with the federal courts should not exercise jurisdiction over limitation defence. In view of the reality that the U.S. courts' decisions are greatly affecting the international maritime (limitation) disputes with the background of its vast shipping market, the above controversy shall be summarised infra.

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[31] E.g., the plaintiff's contestation on the merits of the defendant's pleading of limitation in trial without objection to the court's lack of limitation jurisdiction may be deemed to have waived such objection and conferred limitation jurisdiction on the court. As a matter of fact, in cases of a single claimant, when adequate security has been given, it is not necessary to raise the limitation procedure for the constitution and distribution of limitation fund and public notice. In such a case, there is no reason why the requirement of the phrase "pursuant to the provisions of this Act" should be complied with.

## 2. Jurisdiction over Limitation Action under General Limitation Conventions

### A. 1924 Convention

As for jurisdiction over the owner's limitation of liability, the 1924 Convention provided nothing direct, although arts. 8 & 9 provided for a certain power of the court seized of arrest proceedings for claims subject to limitation.

First, the Convention did not provide for the owner's initiative limitation action, leaving open to national laws in respect of the questions of limitation procedure (arts. 8 (5) & 14). Consequently, under 1924 Convention, all aspects of jurisdiction over limitation actions, such as whether the constitution of a limitation fund is required to invoke the limitation of liability, or with which court a limitation fund may be constituted, or whether the owner should admit his liability when he applies for the constitution of a limitation fund, or whether a limitation action must be restricted by time limit, etc., were regulated freely by national laws.

Second, however, the Convention contained a very equivocal provision that the court by which a ship was arrested should be deemed to be a limitation court. Article 8 (1) provided: "Where a vessel is arrested and security is given for an amount equal to the full limit of liability, it shall accrue to the benefit of all creditors whose claims are subject to this limit." This provision mandates the court seized of an arrest proceeding to transfer the security to a limitation fund.[32] However, the drafters of this provision must have confused a security for a particular claim with a limitation fund. A bond or other security provided for the release of arrest is to secure a particular claim whereby the security becomes a special security accordingly, the amount of which would be either more or less than the limitation amount. Whether the arrest of a ship is proceeded *in rem* or as an attachment, the nature of the security furnished may not be lost until the limitation of liability pertaining to the claim secured by the security is allowed bindingly. In view of such a characteristic of the security provided for the release of a ship, it may not be transferred to a limitation fund to the detriment of the claimant. If the owner seeks to invoke the limitation of liability, he must constitute a separate limitation fund, or he may apply for the constitution of a limitation fund

[32] As a result, it may be said that art. 8(1) provides indirectly for one option of jurisdiction over limitation proceedings so as to be vested in the arrest court.

instead of providing the security. In the latter proceeding, however, the arrest is maintained, compelling the loss of demurrage or detention of the ship to the owner. In short, art. 8 (1) was an inappropriate provision.

Third, art. 8 (2) provided for the discretion of the court by which the ship was arrested again in respect of the same event, to release the ship without any separate security obtained, upon the owner's proving that security equal to the limitation amount has been provided in another court. In this provision too, the drafters of the Convention used erroneously the word "security" to mean a limitation fund without regard to the distinction that the former is for a particular claimant whereas the latter is constituted against all the claimants subject to limitation. Moreover, this provision is inconsistent with the reality of general court practice. If the parties in the court second seized are different from those of the court first seized, it must be interpreted that the respective arrest of the same ship does not fall within *lis alibi pendens*. In case where the first court allowed the limitation of liability under the Convention with the limitation fund provided and nevertheless the second arrest was executed in another State between the same parties and for the release thereof a security was provided, then the latter security may be released so far as both countries are implementing the same Limitation Convention as Contracting States.[33] By contrast, even if a limitation fund has been constituted in a Contracting State, an arrest of a ship belonging to the party liable may not be barred in another Contracting State insofar as the limitation itself is contested. Thus, art. 8 (2) was also an incomplete provision.

### B. CMI Madrid Draft Convention (1955)

#### (1) Jurisdiction Provisions

As for jurisdiction and other procedural matters, CMI Madrid Draft Convention provided for in detail.[34] Art. 4 (2) was an epochal provision for jurisdiction over the owner's

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33 *The Putbus* [1969] 1 Ll. R. 253 (CA).

34 CMI, *Madrid* Conference at 581 *et seq.* In particular art.4 provides:
"(1) Where the owner of a ship limits his liability in accordance with the provisions of this Convention, the rules relating to the constitution and the distribution of the limitation fund and all other rules of procedure shall be determined in accordance with the domestic law of the State in which the fund is constituted.
(2) The limitation fund may be constituted at the choice of the owner within the following limits.
(a) the place of the accident;
(b) the first port where the ship enters after the accident or if the claim relates to damage to cargo the port of destination;

limitation proceeding although some questions might be raised. It provided for a wide range of the owner's choice of forum with which he could constitute a limitation fund: (a) the place of accident, (b) the first port of the ship's call after the accident, or the port of destination, (c) the first port of ship arrest, (d) the owner's principal place of business, or (e) any court before which a liability action is pending.

The principal provision of the para. (2) wording "The limitation fund may be constituted at the choice of the owner within the following limits" was to be interpreted as meant that even without any liability action *in rem* or *in personam* pending, the owner could make a pre-emptive strike by electing a court to apply for the constitution of the limitation fund. Consequently, this provision of para. (2) could be assessed as conferred on the courts independent jurisdiction over the owner's limitation action. In this sense, CMI Madrid Draft purported to ensure the owner's right to limit his liability as conveniently as possible not only by setting forth the substantive rights to limit his liability, but also by substantially guaranteeing the owner the equal opportunity of electing jurisdiction between adversarial parties of maritime claims. A shipowners' limitation of liability would never be guaranteed only by the unification of substantive law through international Conventions without ensuring a complete international concourse of all the claimants concerned into one limitation court in view of the reality that the conflicts of jurisdiction are too often argued between the parties and between the relevant courts of different States as well. While this particular para. (2) was not adopted at the subsequent Brussels Conference for the 1957 Convention, the merits involved therein are enough worthy of being further analysed.

First, the phrase "The limitation fund may be constituted" means that a limitation proceeding may be applied for the constitution and distribution of a limitation fund for all limitable claimants, as opposed merely to provide a bail or other security for a particular claimant. In order to clarify the allowance of such a proceeding, the first proviso of that para. (2) provided: "Provided that the choice provided for by this Article shall only be

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(c) the first port at which any vessel belonging to the owner has been arrested with the object of obtaining payment of a claim covered by the limitation fund;
(d) the place where the owner has his principal place of business;
(e) the place of the Tribunal before which there is a pending action for the recovery of a claim covered by the limitation fund.
Provided that the choice provided for by this Article shall only be exercisable if the domestic laws of the place for which the owner elects so permits and provided that the place chosen shall be within the jurisdiction of one of the contracting States."

exercisable if the domestic laws of the place for which the owner elects so permits." This proviso is taken for granted because if no internal law were to be arranged for limitation proceedings, neither a limitation action nor the constitution of a limitation fund could be allowed. For this reason, an International Convention for the unification of shipowners' limitation of liability must also contain a supplemental provision to mandate the Participating States to prepare for the rules of limitation proceedings. Nevertheless, CMI Draft did not include such a mandatory provision, merely leaving the rules relating to the constitution and distribution of the limitation fund and all other procedural rules to domestic laws of the State with which the fund could be constituted (art. 4(1)). With such liberty provisions permitted to national laws, an international concourse relating to a limitation proceeding could never be accomplished.

Second, art. 4 (2) (d) provided for "the place where the owner has his principal place of business" as one optional district for the limitation fund to be constituted. This forum provision could have been the most convenient of all the fora for the owner had it been survived to 1957 Convention. Since the owner's principal place of business is the centre of his business activities and also the substantial seat of a shipping corporation, the court for such a place might well be given jurisdiction in limitation actions. In general, a forum provision which gives a creditor to elect the court for his own domicile is criticised as one of exorbitant and oppressive jurisdiction provisions for the other parties in modern jurisprudence on adjucatory jurisdiction theory.[35] However, a limitation proceeding is not a positive action to recover loss or damage but a partially negative declaration action. Apart from an *in rem* or attachment proceeding against a ship, the owner's principal place of business is in general a representative connecting factor for jurisdiction in claimants' liability actions *in personam*. Just as in general claims there is no reason to deny jurisdiction in a negative declaration action brought in the court for the debtor's domicile, so is there no reasonable ground to exclude a maritime debtor's domicile (usually being his principal place of business) from jurisdiction over his limitation action. In this sense, art. 4 (2) (d) of CMI Madrid Draft Convention was one of the most equitable draft provisions.

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[35] See e.g. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968, art. 3 (2), O.J. 1978 L 304/36 (*"1968 Brussels Convention"*).

Third, another requirement of jurisdiction over the owner's limitation action by constituting the limitation fund in one of the five choices provided for in the para. (2) was that such choice had to be "within the jurisdiction of one of the Contracting States" (2nd proviso of the same para.). This proviso was added by the suggestion of an amendment submitted by the Belgian delegation at the Madrid Conference.[36] Therefore, according to this proviso, if, for instance, the country of the first arresting port was not a Contracting State, the owner could not invoke the sub-para. (c) of the same para. (2) in order to constitute a limitation fund with the court for the first arresting port, although he could provide a bond or other security to obtain the release of the arrest.

Fourth, however, the sub-para. (c) providing for the first arresting port as one of the places where the owner could constitute a limitation fund could never be appropriate to be acceptable. According to this requirement, where the owner's several ships were arrested at different ports, or his one ship was arrested several times at different ports, only the first arresting port could be the proper port at which the owner could constitute a limitation fund even where the ship was arrested there for a small claim. Such a restriction in selecting a port by the owner to constitute a limitation fund had no reasonable ground.

### (2) Release of Arrest

Article 5 of CMI Madrid Draft Convention provided for the effect of the constitution of a limitation fund, the court's discretionary release of the arrested ship when the limitation fund has already been constituted in other jurisdiction and the court's power to take all steps to ensure that the aggregate bail or other security provided in two or more Contracting States should not exceed the amount equal to the limitation fund. While that Article had such purport, however, it repeated the inappropriate expressions not correctly articulated from those of art. 8 of 1924 Convention. Thus, the same comment as mentioned in respect of 1924 Convention may be made on art. 5 of CMI Draft Convention. At any rate, some part of this draft provision was adopted into 1957 Convention.

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[36] *Madrid Conference* at 567.

## C. 1957 Convention

### (1) Debates on Forum Provisions

During the debates the most ardently argued was focused on the questions whether to take the tonnage-basis limitation system only[37] or whether to maintain the ship's value-basis system,[38] the amount of limitation,[39] actual fault or privity,[40] and the minimum tonnage.[41] However, also critically discussed was whether the limitation forum provision (1955 CMI Madrid Draft Convention, art. 4 (2)) should be adopted or not. A strong opposition was commenced by the U.S. delegation.[42] The U.K. delegation also supported the opposition.[43]

The Scandinavian delegations objected to "Art. 4, sub-section (2)" of 1955 CMI Madrid Draft Convention if its purport was to make the establishment of a limitation fund a condition for limiting liability, but they did not have any particular view to contain rules on

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37 The U.K. delegation led the van of taking the tonnage-basis limitation system. *Brussels Conference 1957* at 71.

38 The U.S. delegation argued to maintain the ship's value limitation system. Id. at 69 and 135.

39 Id. at 39, 116 & 293.

40 Id. at 40, 91-99.

41 Id. at 41, 81, 117-122.

42 Id. at 122 & 674. Mr. Morse (United States) argued:
"The question as I understand it is, is it convenient to mention the places where the limitation fund can or will have to be constituted? As we understand it, reading Article 4, the whole choice of the forum is vested in the owner of the vessel. The provision which requires all things to be enforced in that forum chosen by the owner is not acceptable to the United States. The vessel owner should not have the right to choose the forum without regard to the convenience of others or to limit their rights of recovery through the jurisdiction of a distant country, some of which may only recently have become maritime nations. The shipowners can be protected from the dangers of being subjected to litigation in numerous jurisdictions by permitting him to show in a litigation proceeding the amount he has been compelled to pay in another jurisdiction, so his total liability could not exceed a single litigation fund. I think that adequately expresses our views that the forum should be as much a matter of right for the claimant, who, after all, is the injured person, rather than being solely the right of the shipowner."

43 Id. at 125. Sir Gonne Pilcher (Great Britain) stated:
"Our Government takes the view that the paragraph is unnecessary. One must have regard to practical matters. Take a serious collision which may lead to a demand for limitation of liability - one can surely rely upon the person injured or the vessel injured to take steps to arrest the wrongdoing ship or to obtain bail in the place of his choice, which will probably be the next port to which the ship gets. To leave the choice to the owner of the vessel himself, we feel, is unreasonable . . . .
To provide, for instance, the limitation fund may be constituted at the choice of the owner at the place of accident leads one to the perhaps captious thought of his constituting it in the middle of the Atlantic, where the accident has taken place, . . .
Therefore, on behalf of my Government, I venture to support the observation of the two or three last speakers and to suggest that sub-paragraph 2 of Article 5 should be eliminated from the Convention."

forum in the Convention.[44] On the other hand, the USSR delegation absolutely agreed to the art. 4 of CMI Madrid Draft as it was.[45]

Here, it is necessary to comment on the positions excepted to including a forum provision for limitation proceedings in the Convention. The argument of the U.S. delegation that the forum should be as much a matter of right for the claimant was excessive and unreasonable. Even in the U.S. law the choice of forum for limitation actions has been concurrently allowed to both the owners and the claimants. A claimant may commence a libel *in rem* against the vessel[46] and an action *in personam* against the owner. The owner also may take an initiative limitation action if he feels that the claim amount would exceed the limitation fund without regard to any inconvenience of the claimant.[47] The art. 4 (2) of CMI Madrid Draft Convention in respect of the international forum for the constitution of a limitation fund was neither essentially inconsistent with nor departed from the position of the U.S. law on international conflict of jurisdiction. The U.S. delegation at the 1957 Brussels Conference might have feared that a limitation fund constituted with the court of a distant new maritime State would not be administered in a fair and reasonable way. Then, such a fear would have been led to a conclusion that limitation proceedings should be confined to advanced maritime States. The U.S. delegation added that the owner could be protected from the dangers of being subjected to several actions in different fora by allowing him to show he had already been compelled to provide bail or other security in a previous action equal to the limitation fund. However, the international reality in cases of jurisdictional conflicts would not in practice protect the owners as easily as supposed, even in the U.S. federal courts.[48] Moreover, despite the art. 4 (2) of CMI Madrid Draft Convention it could

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44 Id. at 124. However, in view of the fact that the Scandinavian delegations proposed an amendment to the arts. 4 & 5 of CMI Madrid Draft by modifying them but by deleting the para. (2) of art. 4, id. at 707, and that the amendment proposal led to the basic draft of the art. 5 of 1957 Convention, they seem to have felt that any forum provision for limitation action was not necessary.

45 Id. at 683 & 687.

46 *U.S. v. The Little Charles*, 26 F. Cas. 979 (C.C.D. Va. 1818); Walker, *The Personification of the Vessel in United States Civil In Rem Actions and the International Law Context*, 25 Tul. Mar. L.J. 177 (1991); Supplemental Rules for Certain Admiralty and Maritime claims, Rule C.

47 Supplemental Rules, Rule F (9) sub-para. 2, provides that "but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district." Of course, this provision governs the venue within the United States, wherefore it does not apply between the U.S. federal courts and foreign courts. In cases where a liability action has been brought in a foreign court against a U.S. flag vessel, there is no regulation to bar the U.S. owners to commence a limitation action in a U.S. federal court.

48 *Belcher Co. of Alabama v. M/V Maratha Mariner*, 1984 AMC 1679 (5 cir. 1984) (holding that the rule of *lis alibi pendens* does not apply between a foreign court's attachment proceeding and a U.S. court's federal court's *in rem* action involved with the same claim and the same parties); *Poseidon Schiffahrt v.*

not prevent a claimant from arresting a ship to obtain bail or other security for the claim exceeding the limitation fund without being supplemented by other provisions such as those allowing international injunction or at least mutually guaranteeing the recognition and enforcement of judgments. In short, the argument to delete the forum provision for a limitation proceeding and the ensuing deletion thereof were a great mistake in adopting the 1957 Convention and left a bad precedent that a limitation forum provision was difficult to be contained in an International Convention.

### (2) Leaving to National Laws

Although the controversial art. 4 (2) of CMI Draft was not adopted into 1957 Convention, the owner's choice of limitation forum was not barred under the Convention.

#### (a) Article 4 and National Laws

Art. 4 of 1957 Convention derived from art. 4 (1) of CMI Madrid Draft Convention with minor modifications. This provision leaves the rules relating to the constitution and distribution of the limitation fund and all rules of procedure to the national law of the State in which the fund would be constituted. This provision is interpreted as having left the competent forum of limitation procedure to the national laws of the Contracting States. Thus, if a Contracting State allowed in its national law the court for the owner's principal place of business to have jurisdiction in a limitation proceeding, no courts of other Contracting States could disregard that jurisdiction. Here, it is necessary to briefly survey comparative laws of the representative Contracting States on how they implemented the 1957 Convention so far as the jurisdiction of limitation proceedings was concerned.

First of all, in Great Britain the M.S. (Liability of Shipowners and Others) Act 1958[49] to implement 1957 Convention did neither repeal nor substitute the section 504 of M.S.A. 1894,[50] which allowed shipowners to commence limitation actions in England and Ireland before the High Court, or in Scotland before the Court of Session, or in a British possession before any competent court. In these fora, there might exist the owners' principal places of

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*M/S Netuno*, 335 F. Supp. 684 (S.D. Ga. 1972) (requesting bail as condition of dismissal in two *lis alibi bendens* actions pending concurrently in a Canadian court and a U.S. federal court).

[49] 6 & 7 Eliz. 2, c. 62 ("M.S.A. 1958").

[50] 57 & 58 Vict. c. 60. See also R.S.C. Ord. 75 rr. 2 & 37-40.

business. However, no restriction was provided for such owners not to be allowed to use those fora in respect of their limitation jurisdiction. Nor prerequisite was provided for an owner to have been sued by a claimant or for any ship to have been arrested when he sought to invoke a limitation proceeding. This provision further conferred on the court a power to stay any other proceedings pending in other courts in relation to the same matter, although it did not apply to the courts of other Contracting States.

In France, under the 1967 Loi and Décret to implement the ratified 1957 Convention, the owner who wants to limit his liability should apply for the commencement of a limitation proceeding before a Commercial Court.[51] The venue is, in case of a French ship, the port of ship's registry, and, in case of a foreign ship, the French port of accident, or the first French port of call after the accident, or in absence of such ports the first place where a ship was arrested or security has been given.[52] After the establishment of the limitation fund pursuant to the court's order, any other proceedings for the execution of limitable claims against the other assets of the owner may not be allowed.[53]

In Germany (West) too, under the 1972 Ordinance[54] enacted in 1972 to implement the 1957 Convention, a shipowner may apply for the constitution and distribution of a limitation fund to the court of ship's registry in cases of registered ships, and in cases of other ships to the court of the applicant's place of business (or residence) or to the court having jurisdiction over a liability action, or to the court in which an enforcement proceeding for a limitable claim is pending.[55] Upon application for such a limitation proceeding the owner may also apply for a stay of other pending proceedings for enforcement against other assets of the owner.[56]

In Japan, under the 1975 Limitation Act a shipowner or others entitled to invoke the limitation of liability in accordance with the Act may apply for the commencement of the limitation of liability to the court of the ship's registry and in cases of non-registered ships to the court of the applicant's ordinary venue (domicile or residence in cases of individuals and the principal place of business in cases of companies), or of the place of accident, or of the

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51 1967 Décret, s. 59.
52 Id.
53 Id. s. 65.
54 Seerechtliche Verteilungsordnung 1972 (BGB1. 1972 I S. 953).
55 Id. s. 2.
56 Id. s. 5(4).

first place of the ship's call after the accident, or to the court in which an enforcement proceeding for a limitable claim is pending.[57] The court may only issue a ruling to commence the limitation procedure when the limitation fund has been constituted pursuant to the court's order. The court may on application order to stay any other proceedings pending in other courts for the enforcement against other assets of the owner and others.[58]

The foregoing survey reveals that in cases of national registered ships the flag forum is commonly conferred the jurisdiction over limitation actions. So far as national registered ships are concerned, the port of a ship's registry may usually be overlapped with the owner's principal place of business except for convenient flag ships. In cases of non-registered ships (including foreign registered ships), German and Japanese laws allow the court for the owner's principal place of business (or residence) the proper forum over a limitation proceeding. In short, under the 1957 Convention, the owner's limitation forum is freely left to the national laws of the Contracting States. Neither art. 4 nor art. 2 of the Convention restricts the limitation forum to any specific court. The words "After the fund has been constituted" in art. 2 (4) is interpreted as including the case where the fund has been constituted with the court for the owner's principal place of business in accordance with the national law of the State. Even in such a case, "no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant." (art. 2 (4)).[59]

In the meantime, the legislation of jurisdiction over limitation actions in federal common law countries is not consistent from one another although the federal courts are exclusively or concurrently vested with jurisdiction over limitation actions. In Canada, which incorporated the 1957 Convention without formal ratification, the limitation jurisdiction was vested in "the Exchequer Court" (now Federal Court)[60] and now in "the Admiralty Court".[61] In Australia, which ratified and implemented the 1957 Convention,[62] the limitation action

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57 1975 Limitation Act ss.9 & 17; The Civil Procedure Act ss. 2 & 4.

58 Id., s. 35.

59 The phrase "no claimant against the fund" in art. 2(4) should be interpreted as including no claimant having made a claim against the fund without any reservation and no claimant having been able to claim against the fund.

60 Canada Shipping Act, R.S.C. 1970, c. S-9, s. 648.

61 Canada Shipping Act, R.S.C. 1985, c. S-9, s. 576.

62 Australia ratified the 1957 Convention in 1980 and denounced it in 1990 with effect from May 30, 1991. RMC I.2-79.

jurisdiction is concurrently vested in "the Federal Court"[63] as well as in "the Supreme Court" of any State or Territory.[64]

In the U.S., a limitation action may be filed only with one of the federal district courts, in the order of (a) the *in rem* or *quasi in rem* proceeding court, (b) the *in personam* action court, (c) the court for vessel-entering port, or (d) any federal district court.[65] It is to be noted that any of the above-cited statutes does not particularly exclude from limitation action jurisdiction the court for the place where the owner's principal place of business exists, nor does it require necessarily that a liability action has already been pending, provided however that where a liability action has already been pending, that court has priority of limitation action jurisdiction.

(b) Article 5 and National Laws

Art. 5 of 1957 Convention provides for the court's discretionary and mandatory release of the arrested ship or security in cases where it is proved that the owner has already given satisfactory bail or security equal to the limitation amount. However, although this provision is purported to realise the centralisation of claimants subject to limitation into one limitation court, it does only give a general guidance to the relevant courts of Contracting States, thus having no binding effect unless supplemented with other mandatorily implementing clauses.

Art. 5 (1) provides for the court's discretionary release of an arrested ship or given security when it is proved that the owner has already given a bail or security equivalent to the limitation amount. This provision requires as conditions of the court's exercising its discretion three requirements: (1) that the owner must be entitled to limitation under 1957 Convention, (2) that he has already given satisfactory bail or security equal to the limitation amount, and (3) that the bail or other security so given is actually available to claimants. As to the first requirement, which court is given to decide whether the owner is entitled to limitation? Art. 5 (1) can be read as given the court seized of the arrest proceedings

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63 The Admiralty Act 1988 (No. 34 of 1988), s. 25.

64 Id. s. 9(2); Limitation of Liability for Maritime Claims Act 1989 (No. 151 of 1989), s. 9(1) (providing for limitation action jurisdiction in the order of (a) the Supreme Court of a State or Territory already seized of a liability action and (b) the Supreme Court of any State or Territory in case of no liability action being pending).

65 FRCP, Supp. Rule F(1) & (9).

jurisdiction to adjudicate the question of limitation of liability. Otherwise, the phrase "When a shipowner is entitled to limit his liability under this Convention" would not have been added to the para. (1). However, first, if the arresting court could intervene in deciding whether the owner is entitled to limitation, the result would be contrary to the basic principle that only one limitation fund should be constituted and only the limitation court should have exclusive jurisdiction over the limitation of liability. Second, this provision also uses the inappropriate words "bail or security" instead of the words "limitation fund", although the purport of this condition is that the owner has already applied for a limitation proceeding and constituted the limitation fund in the proceeding pursuant to the court's order or decree. Third, however, if it could be established that a particular claimant has been actually able to obtain his distribution from the fund, a considerable time would be required until at least the limitation court's order or decree to allow the owner's limitation of liability becomes binding and further until any barrier to the transfer of foreign currency control from the State of the limitation court is proved as cleared. In short, art. 5 (1) seems to be an inappropriate provision.

The same criticism may be commented on the provision of art. 5 (2) providing for a mandatory release in the specific cases. This provision mandates the court seized of the arrest proceeding to release the ship or the bail or other security when the owner has already given satisfactory bail or security (a) at the port of the accident, or (b) at the first port of the ship's call after the accident, or (c) at the port of disembarkation or discharge. The phrase "where, . . . , bail or other security has already been given" is also an inappropriate one, but its purport seems to mean where a limitation fund has already been constituted in other competent court. Given that purport of para. (2), the following questions may be posed as to its interpretation.

First, although the Convention does not contain a provision providing for jurisdiction over limitation proceedings directly, leaving it to the national laws of the Contracting States, the para. (2) of art. 5 articulates to give priority to one of the three alternative fora among those conferred by the national laws. To such an extent this provision is an indirect and supplemental rule in respect of the limitation jurisdiction, guiding the Contracting States to give priority to the three alternative fora in their national laws and also implying those places to have the most substantial and direct relationship with the parties concerned and the

limitation court. However, where the national laws provide for exclusive jurisdiction in a limitation proceeding otherwise than those three alternative fora, the para. (2) cannot be applied under such national laws to the extent that the three places are excluded.

Second, the three places of para. (2) seem to be aimed at protecting the claimant's interests rather than the owner's. Save the cases of collisions, the port of accident (e.g., an allision or other accident in loading or discharging ports), the first port of call (e.g., returning or continuing the voyage except calling at a port of a third State after the accident) and the discharging or disembarking port are all more relating to claimants than the owners. Thus, it may be commented that so far as jurisdiction is concerned the 1957 Convention is intended to protect the interests of claimants more than those of the owners.

Third, despite the distinctive discretionary and mandatory forms of provisions between para. (1) and para. (2) of art. 5, both provisions cannot but operate in practice in the same way as is a discretionary stay usually ordered by the court seized of an arrest proceeding when it is contested on the ground that a limitation fund has already been constituted. Moreover, the mandatory release provision (art. 5 (2)) has not been incorporated in most of the national laws of Contracting States as it is. The conditions of releasing the arrest or the bail or other security as provided for in paras. (1) and (2) of art. 5 is the same except for the places where the limitation fund has been constituted. As has been analysed supra, the court seized of a liability action *in rem* or *in personam* with an attachment proceeding would not easily *release* the arrest or security until the order or decree to allow the limitation of liability has given binding effect between the owner and the specific claimant of the liability action, apart from exercising its discretion to stay it. This practice would not be differentiated even though the limitation fund has been constituted at one of the ports of para. (2).[66] On the

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[66] See, e.g., *The Wladyslaw Lokietek* [1978] 2 L1. R. 520 (Q.B. Adm. 1978). In a collision between the Polish state-owned ship *Marceli Nowotko* and the German ship *Sleipner* occurred in the Baltic Sea in 1976, the Polish owners commenced a limitation action in a Polish court of their ship's first calling port, which allowed to constitute the limitation fund pursuant to 1957 Convention already ratified by Poland, although the constitution of the fund was delayed during the appeal proceeding relating to the ways of the constitution. Pending the Polish limitation proceeding, the English cargo owners brought an *in rem* action against the Polish ship *Wladyslaw Lokietek* a sister ship of the *Marceli Nowotko*. Two days after the arrest the Polish owners paid the limitation fund into the Polish court. Against the owners' motion to release the security provided with the Admiralty Court to obtain the release of the ship and the owners' alternative motion to stay the English cargo claim action, it was held, with the motion denied, that the words "has previously been given" in s.5 (2) (a) of M.S.A. 1958 had to be construed as referring only to the security given before the arrest of the ship, but that the limitation fund was paid after the arrest, and therefore that the defendant's motion failed. This case was an example that the release of arrest or given security was denied even if the requirement by art. 5(2)(b) of 1957 Convention had been met. In view of the fact that

contrary, even where the fund has been constituted elsewhere (e.g., with the court for the owner's principal place of business), if the owner establishes that the decree of allowing the limitation of liability by the limitation court has been binding between the owner and the particular claimant and further that the distributed portion of the fund is actually available to the claimant, the court seized of the liability action *should* release the bail or other security upon the application therefor by the owner. Such being the circumstances, there are no substantial merits to separately provide for the paras. (1) and (2) of art. 5.

Lastly, the para. (3) provides for the application *mutatis mutandis* of the proceeding paras. (1) and (2) if the security already given in other court is less than the limitation amount, provided that the balance be supplemented in full. However, this provision is unnecessary as a separate one because the paras. (1) and (2) cover fully such a situation as provided for in the para. (3), although the bail or other security provided in the court seized of the liability action would not be released only with the fact of the balance paid into the limitation fund.

### D. 1976 Convention

Now, compared to the 1957 Convention, what is the position of the 1976 Convention as regards the constitution of a limitation fund by the owner and other procedure in connection with the limitation of liability? The questions have been raised on whether the 1976 Convention does not provide for any express jurisdiction over a limitation action,[67] whether under the Convention a limitation fund may only be constituted where a liability action is brought,[68] and whether a vessel-arrest proceeding cannot be regarded as "legal proceedings" provided in the art. 11 (1) of the Convention as held by the Dutch Supreme Court in 1992.[69]

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the Polish limitation proceeding was commenced much earlier and that the limitation fund was paid before the security was provided with the English court, the latter court could have allowed the owners' alternative motion to stay the English action, although the release of security could be denied.

67 Jackson, *Enforcement of Maritime Claims* 134 (2nd ed. 1996), states that the 1976 Convention does not contain any express jurisdiction provision.

68 As to posing questions, see id. at 137 n. 51, 239, 523 and 533. As to an affirmative opinion, see Shaw, *Practice and Procedure*, The Limitation of Shipowners' Liability: The New Law 113 at 118-20 (1986).

69 *The Sylt,* 28 Feb. 1992, Hoge Raad, cited in Berlingieri, *The 1976 Limitation Convention : A Dangerous Decision of the Dutch Supreme Court* (The Sylt), [1993] LMCLQ 433.

### (1) Jurisdiction Provisions

Although the Convention does not provide unequivocally for exclusive fora over limitation proceedings, it does provide for several places where the owner or others alleged to be liable may constitute a limitation fund. As mentioned supra, the constitution of a limitation fund is one procedure of the limitation action, as opposed to merely giving a bail or security and in consequence the provisions listing the courts or places where a limitation fund *may* be constituted are optional or conditional forum provisions for limitation actions, because the limitation action or jurisdiction are subject to the owner's option or national laws of States Parties which do not exclude such fora as listed in the Convention.

First, art. 11(1), 1st sentence, provides: "Any person alleged to be liable may constitute a fund with the court . . . in any State Party in which legal proceedings are instituted in respect of claims subject to limitation." It does not provide to the effect that the owner may constitute a fund with a court having jurisdiction over a liability action. The latter form of jurisdiction provision confers *per se* on the court the jurisdiction over a limitation action as well as a liability action, whereas the former provision confers limitation action jurisdiction only when the owner filed a limitation action with the same court. If the owner files the limitation action with another competent court of any State Party, the first court may not have jurisdiction over limitation of liability.[70] Thus, art. 11 (1), 1st sub-para., must be read as giving the owner or others alleged to be liable one optional forum over a limitation action. Any national law requiring a liability action to be pending as a prerequisite to file a limitation action would be a modification of, rather than a result of correct interpretation of, said provision of the Convention.

Second, subject to the national laws of States Parties, art. 13 (2) proviso provides for additional optional places where the limitation fund may be constituted: (a) the port of

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[70] The owner may contest the liability jurisdiction instead of filing a limitation action with the court in which the liability action is pending (e.g. in a State Party having no contact with the accident). However, the filing of limitation action without contesting jurisdiction may be deemed to have submitted to the court's jurisdiction including limitation jurisdiction. If, on the contrary, the art. 11(1), 1st sentence, should be construed as meaning that the court in which a liability action is pending was conferred jurisdiction including limitation jurisdiction by the filing of the liability action even before any filing therewith of a limitation action, it would be illogical because the limitation jurisdiction once attached to the court by a claimant's simple suing must be lost again by the owner's filing of the limitation action with another State Party's competent court. Therefore, the said provision *per se* cannot be interpreted as conferred limitation action jurisdiction on the liability action court even before any filing of a limitation action therewith unless otherwise conferred.

accident or of the first call after the accident, or (b) the port of disembarkation of passengers, or (c) the port of discharge of cargo, or (d) the State where the arrest is made. Art. 13 (2) and (3) were transposed from art. 5 (1) and (2) of 1957 Convention with some modifications and consequently the interpretation as to the latter may also be applied to the former. While in accordance with art. 14 of 1976 Convention as to the governing law of the rules of procedure relating to limitation proceedings the national laws may provide otherwise than the four places of art. 13 (2) proviso for the fora of limitation actions, the purport of that proviso is that unless the four alternative places are excluded from the fora of limitation actions by the national laws the owner may elect one of such alternative places where a limitation fund can be constituted, in which case the court seized of any arrest proceeding *shall* release the arrest or substituted bail or other security, although the certain conditions must be met pursuant to para. (3) of the same article.

Third, however, a question may be raised on whether even in such cases a liability action should be pending in one of the four places before a limitation fund is constituted and whether the fund must be constituted only with the court in which the liability action is brought. The answer depends on how the phrase "After a limitation fund has been constituted in accordance with Article 11" of art. 13(2) should be read because the words "such release" of the proviso thereof may be read as encompassing the whole sentence of the body provision of the same para. However, the scope of the words "in accordance with Article 11" is the key point to be given a reasonable interpretation. Article 11 consists of three categories of provisions: first, the optional jurisdiction for any person alleged to be liable to constitute a limitation fund (para. (1), first sub-para.), second, the ways of constituting the fund and amounts (para. (1), second sub-para and para. (2)), third, the effect of the constitution of the fund (para. (1), third sub-para.). The second and third categories of art. 11 (1) apply commonly whenever a limitation fund is constituted under the Convention. It would be an erroneous interpretation if they should apply only where a limitation fund is constituted according to the first sub-para. of art. 11 (1) unless the Convention sets forth other provision for the common ways of constituting a limitation fund and the effect thereof similar to the second and third categories of art. 11. Moreover, art. 11 (2) and (3), in which the words "A fund" instead of "The fund" are used, are not read as qualified to the cases where "Any person. . . constitute a fund with the Court . . . in which legal proceedings are instituted in respect of claims subject to limitation." The drafters of the Convention must have

combined the three categories of provisions into one paragraph of the Article for convenience sake only. It would then follow that in the interpretation of the words "in accordance with Article 11" of art. 13 (1) and (2) there is no ground to understand that the words necessarily encompass all the three categories of the provisions of art. 11 (1). Thus, art. 13 (1) and (2) apply not only where a limitation fund has been constituted with the court in which liability actions had already been instituted but also where a limitation fund has been constituted without any liability action pending, but in accordance with the ways of constituting the limitation fund as provided for in art. 11. This interpretation is supported by the word "always" used in the proviso of art. 13 (2). In short, the words "such release" in the proviso must be interpreted as meaning such a case that despite that "the fund" has been "constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund" (i.e. "in accordance with Article 11"), any ship or other property has been arrested or attached by other court of a State Party for a claim which may be raised against the fund, or any security given, whereby the court may on application order the release of the arrest or security.[71]

Fourth, as compared to art. 5 (2) of 1957 Convention, art. 13 (2) proviso provides for an additional item "(d) in the State where the arrest is made" as one of the alternative places to constitute a limitation fund mandating the court seized of an arrest proceeding to release the arrest or security. It appeared firstly in IMO Draft Convention (1976) as art. 13 (2) proviso (d)[72] without any purport thereof reported. It was passed to the current art. 13 (2) proviso (d) as it was drafted, with no argument or objection raised at the London Conference

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71 The purpose to differentiate between the discretionary release (art. 13(2) body sentence) and the mandatory release (art. 13(2) proviso) seems to encourage the States Parties to regulate in national laws the uniform limitation jurisdiction to be vested in the courts having the close relation with relevant accidents. However, this discriminative treatment not only has failed in reaching the uniformity of limitation jurisdiction but also may raise international conflicts of limitation jurisdiction. Moreover, if and when it is proved that the requirements of art. 13(3) (claimant's accessibility to the fund and its actual availability and free transferability) are met, the arrest or security other than the fund should be released whether the fund was constituted in the "four" places or in other competent court, or whether the fund was constituted with the court in which a liability action had previously been pending or in other competent court. In cases of multiple claims, what would be a difference in most claimants' benefits between the case where the fund was constituted with a court in which a specific small claimant's action had been pending and the other cases where the fund was constituted without any previous liability action pending? The most significant concern by most of the claimants would be whether the fund has been constituted adequately "in accordance with" the arts. 6 & 7 as were applicable (art. 11), rather than whether the fund was constituted with the court in which a specific claimant's action was pending. In this respect also, there is no ground that the phrase "in accordance with Article 11" of art. 13(1) & (2) must be interpreted as necessarily including the first sentence of art. 11(1).

72 *Official Records 1976* at 37.

for 1976 Convention. It cannot be said that because an arrest proceeding is not included in the "legal proceedings" provided for in art. 11 (1), the new item (d) of art. 13 (2) was added. The words "the arrest" in the item includes an arrest or attachment on "any ship or other property belonging to a person on behalf of whom the fund has been constituted" "for a claim which may be raised against the fund", i.e. in short, an arrest of a ship or other property in pursuance of a claim subject to limitation.[73] It encompasses not only an attachment[74] on a ship in an action *in personam* but also an action *in rem* against the ship herself. The Convention, art. 1 (5), also provides: "In this Convention the liability of a shipowner shall include liability in an action brought against the vessel herself." Moreover, since even an arrest only to secure a maritime claim confers on the court the jurisdiction to determine the case on the merits,[75] such an arrest as a conservatory measure must also be interpreted as an enforcement of the limitable claim.[76] Once by the execution of the arrest the jurisdiction over the liability claim has been conferred on the court, it naturally follows that the jurisdiction over the defendant's limitation of liability having the same cause of action must also be attached to the court at his option to raise either by defence or by an application for the constitution of a limitation fund subject to the rules of procedure in the court. Thus, the arrest of a ship, whatever its nature might be, is an exemplary case of "legal proceedings . . . instituted in respect of claims subject to limitation" provided for in art. 11 (1).

Fifth, as mentioned supra in respect of the counterpart provisions of 1957 Convention, the mandatory release provision of art. 13 (2) proviso of 1976 Convention may only be operated in practice in the same way as in cases of the court's discretionary stay of a liability action together with the discretionary retention of the security. Thus, unless the Convention contains an exclusive jurisdiction provision as to a limitation action, the separate provisions of the discretionary or mandatory release are meaningless save giving inequitable guidance to States Parties in regulating jurisdiction over limitation proceedings in their national laws. Art. 13(2), proviso (d), giving priority to a specific claimant is also inequitable.

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73 As to the general meaning of arrest, see International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952 (*1952 Arrest Convention*) art. 1 (2); Draft Revision of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships 1952 (*The Lisbon Draft 1985*), art. 1 (2), reprinted in Berlingieri on *Arrest of Ships* at 186 (2nd ed. 1996).

74 The Lisbon Draft 1985, art. 1 (2); Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 Tul. L. Rev. 1274, 1287 n. 63 (1983) (stating that the word "arrest" . . . in the Brussels Convention of 1952 relating to the arrest of sea-going ships is used in the American sense of "attachment").

75 1952 Arrest Convention art. 7 (1).

76 Berlingieri, supra n. 69, at 434.

In short, although art. 13 (1) provides for one optional jurisdiction over a limitation proceeding and art. 13 (2) proviso lists four places where a limitation fund may be constituted subject to national laws, the Convention does not restrict the owner's limitation action only to the court in which a liability action is brought,[77] nor does it prohibit a State Party from regulating limitation jurisdiction in its national law including the court for the owner's principal place of business. It should be recalled that during the debates on art. 13 of IMO Draft Convention the Swiss delegation argued persistently but unsuccessfully to add the item (e) the owner's principal place of business and another item (f) the flag state of the ship following the item (d) of art. 13 (2) proviso. It is to be noted that the proposed item (e) was not based upon the requirement that any liability action be pending at the owner's principal place of business. Notwithstanding that art. 13 (2) proviso was not to confer direct jurisdiction over a limitation action, the debates were misguidedly focused on whether the owner's principal place of business should be allowed expressly in the Convention as a new forum provision for the constitution of a limitation fund without connecting any prerequisite of a liability action.[78] The proposal to add item (e) was adopted in the Committee of the Whole.[79] Due to the strong opposition by the delegations of Norway and Sweden, however, it was deleted again by failing to obtain the required 2/3 majority in the separate reconsideration vote at the 4th Plenary Meeting.[80] Although the majority of the delegations supported the aborted sub-para. (e), it was eventually excluded from the Convention. This

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77 See *Forthergill v. Monarch Airlines Ltd.* [1981] A.C. 251, 278 (HL 1980), where Lord Wilberforce held: "[T]he use of travaux préparatoires in the interpretation of treaties should be cautious, . . . [and] should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention." The IMO travaux préparatoires, *Official Records 1976*, do not report such a clear intention that only when and where a liability action is instituted, may the owners constitute a limitation fund. On the contrary, during the debate for the adoption of the 1976 Convention, the U.S. delegation stated: "Article 11 appeared to offer unlimited freedom for a person seeking limitation to select the forum in which to institute a limitation action or to constitute a fund." *Official Records 1976* at 325. The French delegation observed that the text of art. 11 left the choice of court to the claimant and that it seemed to him "very unlikely that a shipowner would deliberately set up a fund in a court other than the one in which proceedings were brought." This argument disregarded the reality of marine accidents. In particular, in a large accident or a multiple-claim accident, the owners and their interests would fall under an urgent situation to prevent further damage by multiple actions or multiple arrests of their ships. Id. at 326. However, his observation was not that only in the liability action court should a fund be constituted. Moreover, neither does French law since the 1967 Décret provide for a liability action pending requirement.

78 Id. at 337. The delegation of German Democratic Republic said: "Either sub-paragraph (e) or (f), as proposed by Switzerland, should therefore be added, since they had the advantage of providing for a special new jurisdiction for constituting the fund corresponding to the jurisdiction for civil proceedings." French delegation also supported the addition of the proposed sub-para. (e).

79 Id. at 338 & 395.

80 Id. at 482-83. The reconsideration vote for the sub-para. (e) was 20 votes in favour, 15 against, and 6 abstentions.

was the second time that the owner's principal place of business, whether it be direct or supplemental jurisdiction over a limitation proceeding, could not be provided for in the Conventions for the limitation of liability.

### (2) Article 14

Art. 14 provides: "Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the laws of the State Party in which the fund is constituted." This provision is the same as art. 4 of 1957 Convention save the substitution of the phrase "Subject to the provisions of this chapter" for "Without prejudice to the provisions of Article 3, paragraph (2) of this Convention" (the pro rata distribution of limitation fund). Despite the difference of the subject-to provisions between both Conventions, the interpretation as to jurisdiction in limitation proceedings is substantially the same save the provision of art. 11 (1). The actual application of the discretionary and mandatory release provisions would not be differentiated between art. 13 (2) and (3) of 1976 Convention and art. 5 (1) and (2) of 1957 Convention. However, art. 13 (3), which provides for the conditions of the release of the arrest or security, is properly refined as compared to the provisions of the conditions (art. 5 (1)) in 1957 Convention.[81]

The burden of proof to the conditions of the release lies on the motioner, i.e., the owner or other interests of the arrested ship or security. If in the limitation proceeding the right to limit the liability is contested by the claimants pursuant to the procedural rules of the national law, say in the first, second or third instance, it will take a considerable period of time until the limitation fund is "actually available and freely transferable" to the claimants. Further, some claimants who have failed to make claims against the fund may contest that they are barred from exercising their rights against other assets of the owner or his interests than the limitation fund.[82] Such situations may also reduce the strict applicability of the mandatory release provisions.

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[81] The phrase "freely transferable" was added by the Swedish proposal to IMO Draft art. 13 (3) after a considerable debate. *Official Records 1976* at 99-100, 338-40, 396 & 455.

[82] The Italian and Swiss proposals to amend the words "any person having made a claim against the fund" in art. 13 (1) as "any person entitled to make a claim" against the fund was not adopted despite serious discussions. Id. at 172, 177 & 331-36. As to details of this phrase, see infra nn. 202-206. However, in view of the purport of the provision art. 13 (2), it must be interpreted that the provision must also apply not

### (3) National Laws

Since the Convention, art. 14, left the rules relating to the constitution of a limitation fund to the national laws of States Parties, they have in general been maintaining their previous rules or practice of courts on the occasions of their respective ratification and internal implementation of the Convention.

For example, in the United Kingdom, prior to the coming into force of 1976 Convention, it had completed the preparation to implement the Convention internally through the enactment or amendment of the Statutes concerned. The M.S.A. 1979, ss. 17-19,[83] is the basic statute giving the force of law in the U.K. to the Convention by incorporating the arts. 1-15 as they are, in Part I of Schedule 4 to the Act.[84] At the same time the Act contains the supplemental provisions in Part II of Schedule 4 having effect in connection with the Convention. Amongst the provisions of Part II of Schedule 4, it is to be noted that para. 8 (2) provides that "[w]here a fund is constituted with the court in accordance with article 11 for the payment of claims arising out of any occurrence, the court *may stay* any proceedings relating to any claim arising out of that occurrence which are pending against the person by whom the fund has been constituted."(Emphasis added).[85] This sub-para. encompasses all the provisions of art. 13 (1), (2) & (3) of the Convention including the para. (2) proviso which is in form a mandatory release provision, and further encompasses such other cases that the court may stay English actions *in rem* or *in personam* on the ground of a forum selection agreement, *lis alibi pendens* or *forum non conveniens*, etc. While the Act anticipates the cases where a mandatory release may be applied pursuant to art. 13 (2) proviso,[86] it nevertheless does not restrict the requirement of its application more narrowly than the provision of the Convention. Thus, as has been construed supra, the mandatory release provisions cannot but be operated in practice flexibly with the orders of discretionary stay of

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only to any claimant who could have made his claim against the fund, but also to any claimant having made a claim against the fund *under reservation or protest against limitation,* provided that limitation is determined individually.

83 1979 c. 39. The ss. 17-19 were replaced by M.S.A. 1995, ss. 185-186.

84 This form of legislation was basically different from that of 1957 Convention which had been rewritten, in order to contribute to the uniform interpretation of 1976 Convention.

85 M.S.A. 1979, Sch. 4, Pt. II, para. 8 (2), replaced, M.S.A. 1995, Sch. 7, Pt. II, para. 8 (3).

86 M.S.A. 1979, Sch. 4, Pt. II. para. 10, replaced, M.S.A. 1995, Sch. 7, Pt. II, para. 10.

any other proceedings relating to the limitation fund and of discretionary retention of the security provided in such proceedings.[87]

In the meantime, the U.K. enacted the Supreme Court Act 1981,[88] which confers admiralty jurisdiction including limitation actions on the High Court, in which the admiralty jurisdiction is assigned to the Admiralty Court of the Queen's Bench Division.[89] In order to implement these provisions, the R.S.C. Ord. 75 provides in detail for admiralty proceedings including the assignment provisions and relevant rules in respect of limitation proceedings.[90] In addition, M.S.A. 1979, Sch. 4, Pt. II, para.11[91] provided that the references in the Convention and the preceding provisions of that Pt. II to "the court" were references to the High Court (England and Wales), or to the Court of Session (Scotland), or to the High Court of Justice (Northern Ireland). Thus, jurisdiction over limitation actions has not been altered by the ratification and internal implementation of 1976 Convention. Indeed, the English concentration system of jurisdiction over admiralty proceedings including limitation actions is one of the unique and convenient systems of civil procedure.

In Germany, France and Japan, all being the States Parties to the 1976 Convention, they have not substantially amended their internal rules of procedure in limitation proceedings, in particular, so far as the limitation jurisdiction or venue is concerned.[92] As a representative example of these States, Japan amended in 1982 the Shipowners' Limitation Act 1975 by rewriting in Japanese the provisions of 1976 Convention except the final clauses.[93] The provision requiring the owner to constitute a limitation fund in order to

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87 *The Bowbelle* [1990] 1 Ll. R. 532 seems to be distinguishable in that the limitation fund was constituted in the English court instead of a foreign court and that the court did not need to weigh the requirement of art. 13 (3) of the Convention, although under the 1976 Convention as compared with the 1957 Convention, the court may take into account in exercising the discretion that the limitation of liability will not easily be broken even in the foreign courts of the States Parties in view of the conduct requirement (the intent or recklessness test) barring the limitation. However, the unbreakability of limitation can only be operated as one factor in assessing the requirement of releasing the arrest or security.

88 1981 c. 54.

89 S.C.A. 1981, ss.5, 6 (b), 20 (1) (b) & (3) (c).

90 R.S.C. Ord. 75, ss. 2 & 37-40.

91 Replaced, M.S.A. 1995, Sch. 7, Pt. II, para. 11.

92 As mentioned supra nn. 23-24, however, German Commercial Code was amended in 1986 to implement the 1976 Convention. So far as limitation procedure is concerned, Die Seerechtliche Verteilungsordnung 1972 was replaced with Die Seerechtlich Verteilungsordnung 1986, which as opposed to the former, *inter alia*, provides for the prerequisite of a liability action to be pending in Germany for the filing of a limitation action (s. 1(3)).

93 Amendment Act of May 21, 1982, Law No. 54.

invoke limitation was not altered by the 1982 Act.[94] Section 9 (Venue of Limitation Proceeding) was also amended in accordance with the categories of limitation and whether a salvor rendered his service from a ship or not, but no substantial change was made. A limitation proceeding must be instituted to the court of the ship's registry, or in cases of non-registered ships (including a foreign flag ship) to the court of (1) the applicant's ordinary venue, (2) the place of accident occurrence, (3) the first port of the ship's call after the accident, or (4) the place where the applicant's property has been arrested or attached in respect of a limitable claim. The places (3) and (4) do not apply to a salvor who has not rendered his service from a ship. These fora are exclusive (s.9). The applicant's "ordinary venue" is provided for in the Civil Procedure Act (CPA). An individual's ordinary venue is his domicile or residence or in its absence his last known address (CPA s.2). The ordinary venue of a corporation is its principal place of business or in absence thereof its chief executive's domicile (CPA s. 4 (1)). A foreign corporation's place of business or office in Japan is deemed to be its principal place of business in the application of its ordinary venue in Japan (CPA s.4 (3)). Thus, a foreign shipping company may apply for a limitation proceeding to the court for its place of business or office in Japan whether the cause of action is related to it or not and whether it is its principal place of business or not.[95]

In Japanese law there included no provision requiring a liability action to be pending in order for the owners and others to apply for the commencement of limitation procedure. When the application is supported by evidence, the court should order the constitution of the limitation fund (1975 Limitation Act as amended, s. 19), only upon the constitution of which the court may issue the order for the commencement of limitation procedure (s. 26). Within a certain time from the date of receipt of the service or the publication of the order, the limitable claimants are entitled to make claims against the fund and they are barred from exercising any claims against any other assets of the applicant or the person on whose behalf

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94 Sec. 3 (1) provides that a shipowner or others may limit his liability *pursuant to the provisions of the Act* in respect of "the following claims".

95 This forum may be conveniently used in case where a foreign shipping company is alleged to be liable by a Japanese claimant in respect of an accident occurred out of Japanese jurisdiction. In particular, in Japanese law a pecuniary action may be brought in the court for the place where the obligation is to be performed (CPA s.5) and the pecuniary obligation must be tendered at the creditor's present address unless otherwise agreed (The Civil Code, art. 484). Hence, if the foreign shipping company applies for a limitation proceeding to the court for its Japanese place of business or office and then applies for a transfer the case to the court for the claimant's address (Limitation of Liability Act, s.10), the venue will be proper and convenient for both parties.

the fund has been constituted (s. 33).[96] In this connection, the Japanese Act contains a supplemental provision to defer to the constitution of a limitation fund already constituted with a foreign court of a State Party. Section 96 (1) provides that where a limitation fund has been constituted in a foreign State Party pursuant to 1976 Convention and is available in respect of a limitable claim, the claimant is barred from exercising his right against other assets of the owner or a salvor or others by or on behalf of whom the fund has been constituted. In such a case no set-off is valid between the limitable claim and that of the person by and on whose behalf the fund has been constituted in either a domestic or a foreign court of a State Party (ss. 34 & 96 (2)). However, there is no discretionary or mandatory release provisions corresponding to art. 13 (2) of 1976 Convention; rather the requirement of release is more restricted. Irrespective of whether the arrest or security was executed or given before or after the constitution of the limitation fund in a domestic or foreign court, it is necessary for the owners or others whose property has been arrested or attached in Japan in respect of the limitable claims to raise a formal objection action as provided for in ss. 35 and 36 of the Act whenever they seek to release the arrest or security (ss. 96 (2) & 35-36). In view of the difficult breakability of limitation under the 1976 Convention as compared to the 1957 Convention, the section 96 of the Act should have been amended otherwise so that the release may be allowed through summary procedure or so that at the least any other court proceedings than the limitation procedure may be stayed pending the outcome of the latter procedure. To allow a contestation on the subject-matter of the limitation of liability in the other proceedings concurrently pending is contrary to the purpose of the Convention to realise a concourse of limitation jurisdiction once a limitation fund has been constituted.

Meanwhile, as introduced supra,[97] the U.S. and Australian laws provide for the order of the courts to be chosen for a filing of a limitation action, although the owners would have the opportunity to take preemptive strike unless a liability action is instituted in domestic competent courts. In short, under 1976 Convention which allows the national laws of the States Parties to regulate the constitution and distribution of a limitation fund, it is not only impossible to accomplish the uniformity of jurisdiction over limitation proceedings but also

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96 This provision is corresponding to art. 13 of the 1976 Convention. However, the Japanese Act does not require that the claimant has made a claim against the fund in order to give effect to barring him from other proceedings but it is enough for him to be entitled to make a claim against the fund.

97 Supra nn. 62-65.

difficult to deter the disputes on the competence of jurisdiction over limitation of liability in connection with the interpretation of arts. 11(1), 1st sub-para., & 13.

## 3. Jurisdiction over Limitation Action under Special Limitation Conventions

### A. 1962 Nuclear Convention

Although the 1962 Nuclear Convention has not come into force, it contains the exclusive jurisdiction provisions for limitation as well as liability proceedings. Under this Convention any action for compensation may only be brought either before the court of the licensing State or before the court of a Contracting State in whose territory nuclear damage has been sustained (art. 10.1).[98] However, a limitation fund may only be constituted in a court of the licensing State and the operator or the licensing State is required to constitute the fund with the court which has certified at the request of the operator, a claimant or the licensing State that all claims arising out of a nuclear incident are likely to exceed the limit specified in art. 3 (art. 11.1).[99] That court is exclusively competent to determine all matters relating to the apportionment and distribution of the fund (art. 11.3).

There is no provision in the Convention that the limitation fund may only be requested when a liability action has been brought. When the claimants elected to sue the operator before the court of non-licensing Contracting State, such actions and the limitation proceeding would be pending in different States. Thus, the Convention provides for the recognition and enforcement of the foreign judgments (art. 11.4).[100] After the limitation fund has been constituted, the claimant is barred from exercising any right against any other assets

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98 Provided that any dispute between two or more Contracting Parties concerning the interpretation or application of this Convention may be submitted to arbitration if requested by one of them (arts. 20-21).

99 It is to be noted that "a claimant" also may request the court to certify that all claims exceed the limitation amount in order to expedite his recovery because the limitation cannot be broken even if the nuclear incident has resulted from any actual fault or privity of the operator (art. 3.1).

100 A final liability judgment rendered by a court having competent jurisdiction is enforceable without review on the merits in other Contracting States, but subject to the limitation procedure rules if applicable. Art. 11.4 provides:

"4. (a) A final judgment entered by a court having jurisdiction under Article X shall be recognised in the territory of any other Contracting State, except:

(i) where the judgment was obtained by fraud; or

(ii) the operator was not given a fair opportunity to present his case;

(b) A final judgment which is recognised shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting State where enforcement is sought, be enforceable as if it were a judgement of a court of that State;

(c) The merits of a claim on which the judgment has been given shall not be subject to further proceedings."

of the operator, and any bail or security (other than security for costs) given by or on behalf of that operator in any Contracting State shall be released (art. 11.7).[101]

## B. 1969 CLC & 1992 CLC

### (1) 1969 CLC

The 1969 CLC applies exclusively only to oil pollution damage caused by a oil-carrying ship on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimise such damage (arts. II & I). In view of the regional characteristics of marine oil pollution damage, it was necessary to take into account the convenience of the sufferers in the damaged area in fixing jurisdiction over pollution-relevant actions. CMI Tokyo Draft Convention (1969), art. 5 (2), provided that in order to invoke limitation of liability the owner should constitute a limitation fund with the court mentioned in art. 9 of the Draft.[102] Art. 9 provided that any liability action could only be brought in the courts of one or more Contracting States in whose territory or territorial waters any pollution damage occurred (para. (1)). Art. 9 further provided for the owner's option to constitute the fund with one of such courts (when liability actions were brought in the courts of more than one Contacting State), and for the exclusive cognizance of the court with which the fund was constituted, over the distribution of the fund (paras. (2) & (3)). These draft provisions did not require the prerequisite of any liability action to be pending before a limitation fund could be constituted. In other words, an equal opportunity was given between both parties of the owner and the claimants in respect of the choice of jurisdiction.

Meanwhile, however, the Working Group of IMO Legal Committee was met from the start with widely divergent views on jurisdiction; one extreme proposal was to extend the jurisdiction as widely as under the normal rules of law including the right to bring

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101 The exercise of rights against other assets of the operator is also barred when no limitation fund has been constituted but the licensing State has adopted appropriate measures to ensure that adequate sums could be available to claimants according to such foreign judgments (art. 11. 6-7).

102 CMI Doc. 1970 I 76 & 78. This provision provided not only for the prerequisite (the constitution of the fund) to invoke limitation of liability but also for the jurisdiction over the limitation proceeding. As to the prerequisite, a serious opposition was unsuccessfully raised from the preliminary debates in CMI International Subcommittee at Tokyo Conference (1969) on the grounds that it would not be consistent with the 1957 Convention which allows limitation of liability as a defence without constituting a limitation fund. CMI 1969 IV 96-102.

proceedings *in rem* anywhere.[103] As a result of further sessions, IMO Legal Committee reported a Draft Convention, in which, inter alia, the following draft provisions on jurisdiction were contained. Art. V(3) provided for the forum to constitute a limitation fund similar to that of CMI Draft, with a difference, however, of the phrase "with the court . . . in which action is brought under *paragraph 2 of Article VIII*" [104] from that of the latter "with the court . . . mentioned in Article 9." These provisions clearly conferred on the claimants a priority in electing jurisdiction, only leaving to the owner an option when liability actions have been brought in more than one court. These draft provisions on jurisdiction were put on the agenda as a part of IMO Draft at the Brussels Conference (1969).[105] The draft art. V(3) was passed as art. V(3), 1st sentence, as it was, to be finally adopted without any objection raised, but only having been added with the 2nd sentence regarding the ways of constituting the fund. As to the draft art. VIII, some discussions resulted in adopting the alternative A by renumbering it as art. IX with some modifications and the substitution of sub-para. (2).[106] Thus, under the 1969 CLC the aspects of jurisdiction over the owner's limitation of liability can be summarised as follows.

First, the limitation fund may only be constituted when and where a liability action has been brought (art. V(3)), provided that the liability action may only be brought in the courts[107] of any Contracting State or States in whose territory (including the territorial sea)

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103 Working Group II, *Report to the Legal Committee*, CMI Doc. 1969 III 90, 102.

104 IMO Legal Committee, *Progress Report of the Legal Committee on the Work of Its Fifth Session*, CMI Doc. 1969 III 126 at 135. This IMO Draft provision art. V(3) was the same as the passed 1969 CLC art. V(3), 1st sentence, except substitution of "Article IX" for "paragraph 2 of Article XIII". The IMO Draft, art. VIII (Alternative A) (2), provided: "The owner of the ship may establish a limitation fund with one of the courts *seized*, or with any other competent authority in any State *where an action is brought.*" Id. at 136. This art. VIII (2) was deleted afterwards as unnecessary.
The alternative B of art. VIII (Jurisdiction) was to widen the jurisdiction to include the courts of any Contracting State where the owner or insurer or other person providing financial security has his permanent residence or principal place of business, and to allow actions *in rem* in any Contracting State. Id. at 137. This alternative B was also included in IMO Draft reported to the Brussels Conference (1969). *Official Records 1969* at 492. Having regard to the substantial opposition by the U.S.A. and Norway, the IMO Secretariat deleted it. Id. at 569, 573 and 588.

105 Id. at 480 & 490.

106 As to the debates on jurisdiction, see id. at 697-99, 588, 761. But the contents of records on this point in *Official Records 1969* are not sufficient.

107 Subject to the provisions of the 1969 CLC, however, the rules of jurisdiction and venue are left to the national laws of the Contracting States. See, e.g., British M.S. (Oil Pollution) Act 1971 (as amended by S.C.A. 1981), ss. 13 (1) (2), 5 & 20 (1), replaced, M.S.A. 1995, ss. 166 (1) (2), 158 & 170. Japanese Oil Pollution Compensation Act 1975 (OPCA 1975), s. 11, provides for as wide a range of venue for liability actions as allowed by the venue provisions of the Civil Procedure Act. However, a limitation action may only be brought in the court for the district where pollution damage occurred or in the ordinary venue of the person who took the preventive measures within Japanese territory if pollution damage did not occur therein, provided that the ordinary venue of a foreigner who took such measures should be Tokyo District

the pollution damage has been caused (art. IX (1)), and further provided that only when the liability actions are pending in the courts of different Contracting States, may the owner elect one of them to constitute the limitation fund.[108]

Second, after the fund has been constituted with the court pursuant to the Convention, the court has "exclusive" subject-matter jurisdiction over the limitation of liability and no other court has power to adjudicate or determine any matter relating to it (art. IX (3)). Since any other court seized of a liability action in other Contracting State may not adjudicate the limitation of liability for lack of subject-matter jurisdiction, it can only award without the application of limitation.

Third, where the owner has constituted and is entitled to limit his liability, no oil pollution claimant shall be entitled to exercise any right against any other assets of the owner and any arrest (whether *in rem* or not) or attachment or security provided therefor in respect of a limitable claim should be released if and when it is proved that the claimant was entitled to make a claim against the fund and that the fund is actually available in respect of that claim (art. VI).[109]

Fourth, although art. X does not particularly provide for restrictions on the enforcement of judgments against the fund, as will be seen infra in section 8 in detail, such enforcement of judgments may only be allowed subject to the limitation procedure rules including the fund court's *equitable* rulings on the apportionment and distribution of the fund. Despite the simplified prerequisites of art. X leaving even the above-mentioned restrictions to

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Court (s. 31; Procedure Rules for OPCA, s.2). Similar provision for limitation action jurisdiction: Korean Oil Pollution Damage Compensation Act (OPCA) 1992, s. 33.
It is to be noted that neither British nor Japanese law requires that only when a where a liability action has been brought may the owner constitute the limitation fund. In Germany, however, as the 1969 CLC was given the force of law directly upon its ratification thereof and also by virtue of s. 486(2) of the Commercial Code as amended in 1986, the art. V(3) of 1969 CLC was implemented as it was.

108 The 2nd para. of CMI Draft art. 9 (supported by the draft art. 8 (2) proposed by the U.S. delegation) as to actions brought in more than one Contracting State was not adopted but the interpretation on the finally adopted CLC must be the same.

109 See, e.g., M.S.A. 1971, s.6, replaced, M.S.A. 1995, s. 159. By contrast, Japanese OPCA 1975, s. 38, provides for the *mutatis mutandis* application of the general Limitation of Liability Act 1975, ss. 35 & 36 providing for the owner's objection suit against the claimant's execution proceedings on any other assets of the owner. In addition, the OPCA 1975, s. 41, provides for a similar objection suit against the claimant's execution proceedings on any other assets of the owner even when the limitation fund has been constituted in other Contracting State. These provisions seem exorbitant and inconsistent as well to the purport of 1969 CLC which confers "exclusive" subject-matter jurisdiction on the court with which the fund has been constituted (art. IX (3)).

national laws, some legislations require further prerequisites for the recognition and enforcement of judgments such as reciprocity contrary to the purpose of the Convention.[110]

### (2) 1984/1992 Protocols

In the meantime, when the 1984 CLC Protocol was adopted, the provisions or jurisdiction were amended. First of all, in parallel with the extension of geographical application of the Convention by the replacement of art. II of 1969 CLC (Prot. art. 3), art. IX (1) of 1969 CLC was also amended by being added the phrases "or an area referred to in Article II" and "or area" in appropriate place (Prot. art. 8).[111] At the same time, IMO Draft came out with the drafts of alternative A and B to amend art. V(3) of 1969 CLC, both of which, inter alia, included an addition of the words "or, if no action is brought, with any Court or other authority competent under this Convention." It goes without saying that the purport was to preclude the requirement that in order to constitute a limitation fund a liability action has been brought.[112] While no explanation was reported in respect of this draft amendment, nor was any objection to the amendment raised through the debates at London Conference for 1984 CLC Protocol. The above-mentioned words to be added were more clearly modified again in the text approved by the Committee of the Whole II : *"or, if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX."*[113] The alternative B to amend art. V(3) of 1969 CLC in order to allow the owner an option whether to constitute a limitation fund necessarily or not in invoking the limitation of liability was not adopted. The last draft text to amend art. V(3) approved by the Committee of the Whole II was passed through as it was by the Plenary Session.[114] This amendment text of art. V(3) of 1969 CLC was also

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110 *Cf.*, e.g., M.S.A. 1971, s. 13 (3), replaced, M.S.A. 1995, s. 166 (4); Japanese OPCA 1975, s. 12; Korean OPCA, s. 13. These provisions are examples of the incorporation of 1969 CLC, art. X, into national laws, provided that they require further formalities (recognition) or procedure (for enforcement of foreign judgments) as provided for in the national laws. Therefore, despite the provisions of art. X of 1969 CLC, the limitation court may only recognise such foreign liability judgments when all the requirements are established as fulfilled. However, as opposed to British Foreign Judgments (Reciprocal Enforcement) Act 1933 as amended, which shall apply to any judgment given by a court of a 1969 CLC Contracting State, Japanese and Korean laws as cited above excluded the requirements of public policy and reciprocity by applying only the requirements (a) & (b) of 1969 CLC, art. X (1) in foreign judgment enforcement proceedings.

111 *Official Records 1984/1992*, Vol. 1 at 66 and 249.

112 Id. at 62-63, 244-45.

113 Id. Vol. 2 at 153.

114 Id. Vol. 3 at 205.

adopted in 1992 CLC Protocol without any modification.[115] This amended art. V(3) still maintains the priority of claimants over the owners in the choice of jurisdiction.

However, the 1969 CLC, art. VI (Effect of Constitution of Limitation Fund and of Entitlement of Limitation) and art. X (Recognition and Enforcement of Foreign Judgments) were not amended by 1984/1992 Protocols.

### (3) Conflict of Jurisdiction

(1) Under 1969 CLC the forum of a limitation action depends on which court the claimant elected and which court the claimant should elect depends on where (i.e., in which Contracting State's territory) his pollution damage has been caused (arts. V(3) & IX(1)). If the incident occurred in the territory of State A and the pollution damage occurred in that of State B, the court of State B would have the exclusive jurisdiction in view of the definition of the "pollution damage", "wherever such escape or discharge may occur" (art. I(6)). Even if, in this case, the preventive measures were taken in State A and only in State B did the pollution damage occur, the liability actions could be brought only in State B because it must be understood that the words "pollution damage" used in art. IX(1) does not include the costs of "preventive measures" notwithstanding the definition of "pollution damage" including such costs by art. I(6); the words "preventive measures" in art.IX (1) is used to indicate those taken to prevent or minimize "pollution damage in such territory" (i.e.,"pollution damage [caused] in the territory"), in whose courts only actions for compensation may be brought. However, in some national laws (e.g., Japanese OPCA 1975, s.31), the jurisdiction over the claims for the costs of preventative measures taken in non-polluted territory of a Contracting State is modified from the above interpretation of 1969 CLC, art.IX (1).

If State A ratified 1992 CLC, the conflicts of the governing law and jurisdiction might arise. The court of State A would not be bound to release any arrest or security unless the limitation fund has been constituted pursuant to 1992 CLC, even if a limitation fund has been constituted in State B pursuant to 1969 CLC. On the other hand, would the court of State B respect the fund which was constituted in State A pursuant to 1992 CLC? In a strict interpretation of 1969 CLC, that fund would not be regarded as having been constituted in

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[115] Id. Vol. 4 at 101.

accordance with art.V and further it may be uncertain whether the owner would be entitled to limitation if 1969 CLC should apply, in particular, under the "actual fault or privity" test. Under such circumstances, the owner may be compelled to constitute another fund in State B pursuant to 1969 CLC.

(2) From one incident may arise oil pollution claims and other maritime claims. The limitation of liability against the former is governed by 1969 CLC or 1992 CLC while that against the latter is governed by 1957 Convention or 1976 Convention until the 1996 HNS Convention enters into force. The jurisdiction over each is conferred separately and must not be mixed in one proceeding.[116] Even when in view of the convenience the owner entitled to limitation under 1969 or 1992 CLC has brought in both limitation actions against oil pollution claims and other general maritime claims in one court where the damage giving rise to both groups of claims had occurred, the two limitation actions must be separately docketed. However, when the State in whose territory pollution and other damage concurrently occurred ratified 1992 CLC and 1976 Convention but the owner and others alleged to be liable belong to a Contracting State of 1957 Convention, they may choose a different forum so far as their general limitation of liability is concerned, apart from the probability that the conflict of substantive limitation laws might arise.[117]

### C. 1996 HNS Convention

#### (1) Relevant Provisions

The jurisdiction provisions of 1996 HNS Convention are modelled on those[118] of 1969/1992 CLC and 1971/1992 FC. Art. 9(3), 1st sentence, of the HNS Convention provides that the owner shall constitute a fund "with the court . . . of any one of the States Parties in which action is brought under article 38 or, if no action is brought, with any court . . . in any one of the States Parties in which an action can be brought under article 38." The structure of this provision is the same as that of art. V(3), 1st sentence, of 1992 CLC. However, the art. 38 provides not only for the jurisdiction over liability actions for HNS damage caused in the

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116 See, e.g., M.S. (Oil Pollution) Act 1971, s. 7, replaced, M.S.A. 1995, s. 160 (Concurrent liabilities of owners and others).

117 Such international conflicts of limitation jurisdiction are exemplified, infra, in detail.

118 1969/1992 CLC, arts. V(3) & IX each; 1971/1992 FC, art. 7 each.

territory of a State Party (para. 1 similar to art. IX(1) of 1992 CLC),[119] but also for liability action jurisdiction for HNS damage caused "exclusively" outside the territory to be the courts of a State Party having: (a) the ship's registry or flag, or (b) the owner's "habitual residence" or "principal place of business", or (c) a limitation fund constituted (art. 38(2)).[120] Further, art. 38(5) provides for the exclusive jurisdiction of the fund court "to determine all matters relating to the apportionment and distribution of the fund."[121]

### (2) Determination of Proper Forum

While the art. 38 provides for exclusive fora separately in respect of HNS damage caused in the territory (including EEZ waters) of a State Party (para. 1, "territorial damage") and HNS damage caused exclusively outside the territory of a State Party (para. 2, "nonterritorial damage" including damage caused on the high seas and in the territory of non-Convention states), some questions may be posed in respect of the following cases:

First, as in the case of oil pollution damage applicable to 1969/1992 CLC, the criterion to determine proper forum (para. 1 forum or para. 2 forum) must be based upon the area where the HNS damage was caused, notwithstanding the area where the incident occurred.[122]

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[119] Art. 38(1) of the HNS Convention is similar to art. IX(1) of 1992 CLC except the addition of the phrase "against the owner or other person providing financial security for the owner's liability".

[120] Art. 38(2) provides:
"2. Where an incident has caused damage exclusively outside the territory, including the territorial sea, of any State and either the conditions for application of this Convention set out in article 3(c) have been fulfilled or preventive measures to prevent or minimize such damage have been taken, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of:
(a) the State Party where the ship is registered or, in the case of an unregistered ship, the State Party whose flag the ship is entitled to fly; or
(b) the State Party where the owner has habitual residence or where the principal place of business of the owner is established; or
(c) the State Party where a fund has been constituted in accordance with article 9, paragraph 3."

[121] Meanwhile, as to any compensation action against the HNS Fund, art. 39 separately provides for the jurisdiction similarly to art. 7 of 1971/1992 FC (Jurisdiction over compensation actions against the IOPC Fund). The jurisdiction over a compensation action against the HNS or IOPC Fund is in principle the same as that over the liability action against the owner or his guarantor (HNS Convention, art. 39(1); 1971/1992 FC, art. 7(1)). In cases of any liability action being pending in a competent court, that court has exclusive jurisdiction over any compensation action against the Funds (HNS Convention, art. 39(4); 1971/1992 FC, art. 7(3)), except where a liability action under 1992 CLC is brought in a State Party to 1992 CLC but not to 1992 FC (1992 FC, art. 7(3) proviso).

[122] Each phrase of "Where an incident has caused damage in the territory" (para. 1) and "Where an incident has caused damage exclusively outside the territory" must be read to be based upon the damage-area criteria.

Second, when one distinct incident caused territorial as well as nonterritorial damage, are both the para. 1 & 2 fora concurrently applicable and does the owner have the option to choose one of them in order to file a limitation proceeding? The phrase "damage exclusively outside the territory" in para. 2 seems to cover such a case; i.e., its purport was to confer on the para. 1 forum the exclusive jurisdiction over all the claims including nonterritorial damage. However, is such a result reasonable? Supposing that an HNS incident occurs aboard a combination ship on the high seas and passengers injured thereby are evacuated to a hospital of a State Party where some of them die during the medical treatment, does any court of that State Party have the exclusive jurisdiction over all the claims arising out of the incident even if the forum has no contact therewith except the medical treatment only because the damage was not caused "exclusively" outside the territory? When some HNS damage caused during the carriage of HNS by sea includes territorial as well as nonterritorial damage, the liability actions may be concurrently instituted in both the para. 1 & 2 fora and the plaintiffs of the para. 2 fora may not have information on whether or where other actions are pending. It would be unjust to have them investigate the situation of multiple actions to follow other claimants' fora. Under the circumstances, it would have been better not to include the word "exclusively" in the para. 2 of art. 38 so that when multiple actions are pending in the para. 1 & 2 fora or before they are commenced, the owner could file a limitation action with his natural forum (principal place of business or place of accident) to invoke a concourse of all the claimants by appropriate notice.[123]

Third, to alleviate the above-mentioned inequity the word "exclusively" must be interpreted restrictively so as to be applied only to the damage caused at the time of incident occurrence although when a series of occurrences of one distinct incident[124] stretch from outside up to within the territory of a State Party, the damage should be held to have occurred not exclusively outside the territory.

Fourth, so far as preventive measures are concerned, when damage other than the costs of preventive measures was caused "exclusively" outside the territory, the requirements of para. 2 fora are met even though the preventive measures were taken within and outside

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123 If in such a case the word "exclusively" of art. 38(2) were deleted, it would be possible to interpret that where liability actions are pending in both the para. 1 & 2 fora, the owner may choose one of them to file a limitation proceeding.

124 "Incident" means "any occurrence or series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage" (art. 1(8)).

the territory because (1) the word "damage" in art. 38(1) & (2) is used not to include the costs of preventive measures,[125] and (2) the preventive measures in art. 38(2) are not necessarily required to take "exclusively" outside the territory.

Fifth, in view of the omission in art. 38(2) of the phrase "or in an area referred to in article 3(b)" provided in art. 38(1),[126] any environmental damage caused in EEZ or *quasi* EEZ waters of a State Party may only be claimed in the para. 1 fora. If, however, in such areas personal or other HNS claims occur concurrently with environmental claims, the conflict of jurisdiction between the para. 1 & 2 fora may arise again, although under the said present provision only the para. 1 fora have the exclusive jurisdiction over all the claims.

Sixth, art. 38(2) (c) provides for one of the alternative para. 2 fora to the effect that a liability action may be brought in the court of "the State Party where a fund has been constituted in accordance with article 9, paragraph 3." However, this provision (c) is contrary to the purpose of realizing a concourse because it expressly allows a claimant to bring an action in the State Party of the limitation fund court despite his entitlement to make a claim against the fund. Moreover, the same provision is a redundant one because even in its absence a para. 2 claimant may choose one of the same para. forums (Where a fund has been constituted with the para. 1 forum, there is no room to apply the para. 2 due to the word "exclusively").

Seventh, art. 38 does not apply to claimants' provisional and protective proceedings such as arrest proceedings to obtain security. However, in cases of claimants' arrest proceedings, nor does the art. 7 (arrest court's jurisdiction on the merits) of 1952 Arrest Convention apply because of the HNS Convention, art. 42 (Supersession clause).

Lastly, despite some deficiencies above-mentioned, it is a remarkable progress that in a limitation Convention the owner's principal place of business and the ship's registry and flag State are approved expressly as the proper fora for a limitation action (art. 38(2) (a) (b)). When the ship which is registered in a State Party or in absence of registry entitled to fly the

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125 The definition of "damage" includes "the costs of preventive measures" (art. 1(6)), but the word used in art. 38 should be read not to include "the costs of preventive measures" because it is illogical to take preventive measures to prevent or minimise "the costs of preventive measures."

126 Further by virtue of the phrase "and either the conditions for application of this Convention set out in article 3(c)" provided in art. 38(2), the environmental damage does not apply to the para. 2 fora.

flag of a State Party has caused HNS damage exclusively outside the territory, the court of that State has exclusive jurisdiction over limitation or liability actions, whether or not the owner's principal place of business exists in the same State[127] or in non-Convention state.[128]

### (3) Failure of Linkage with General Limitation Conventions

As mentioned in Chapter 1, the provisions of linkage with general Limitation Conventions could not be adopted in the HNS Convention. However, in terms of the effective administration of limitation proceedings a practicable linkage scheme should have been devised to be contained in the HNS Convention. In retrospect, either of the pro and con opinions expressed by delegations in IMO Legal Committee for several years and during the debates in the 1996 International Conference for the HNS Convention could not be supported with practicable or reasonable grounds.

First, the proposals for a linkage (Option A, C and hybrid)[129] were either to involve mandatory denunciation of the existing Limitation Conventions or to link the HNS Convention with such existing Conventions.[130] However, it would be impracticable to compel the member States of the existing Limitation Conventions in order for them to ratify or accede to the HNS Convention which increased the limits of liability greatly as compared with such existing Conventions. Moreover, in view of the past trend of the States Parties' transfer in turn from a lower Limitation Convention to a higher one, there would be no probability for them to accede to the HNS Convention without transferring in turn from the existing general Limitation Conventions to the 1996 LLMC. Further, doubt should have been cast whether a country which has never consented one of the existing Limitation

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127 When both are in different States Parties, the owner will choose the court for his principal place of business.

128 When the owner's principal place of business is in a non-Convention state, the claimants will choose the court of the State Party in which the ship is registered or whose flag she is entitled to fly.

129 IMO LEG/CONF. 10/6(a)/2.

130 The last proposed amendments on "linkage" submitted to IMO Legal Committee in 1995 under the lead country procedure by France, the Netherlands and the U.K. consisted of the following structure:
Art. 7 (Limitation Proceedings) provided for: (1) Owner's obligatory constitution of limitation fund with the exclusive forum (para. 1, same as the present art. 9(3)); (2) Application of 1924, 1957 or 1976 Convention or its Amendments with the initial fund for general claims to be constituted thereby in a State Party to one of the Conventions and the HNS Convention as well (para. 2); (3) Application of national law with the initial fund for general claims to be constituted thereby in a State Party to the HNS Convention but not to one of the general Limitation Conventions (para. 4).
Art. 7A (Supplementary Fund) provided for the constitution of the supplementary fund for HNS claims in the amount of difference between the initial fund and the maximum limits of the owner's liability as would be provided therein with the one and same court (paras. 1 & 3), etc.

Conventions would ratify the HNS Convention without participation in the 1996 LLMC or with the linkage to its national law. It follows consequently that only the linkage between the HNS Convention and the 1996 LLMC should have been devised without including the linkage with the 1924, 1957 or 1976 Convention.

Second, the opposing opinion on the linkage scheme was that any linkage would reduce the distribution to claimants of general Limitation Conventions;[131] that the linkage draft provisions would deprive the owners of the right to invoke limitation without constitution of a fund;[132] and that "[t]he linkage principle is therefore far too complex and leads to harmful economic problems and distortion of competition."[133] However, the opposing opinions were not based upon demonstrative grounds with no searching for a practicable device.

### (4) Perspective

In view of the much increase of the limits of liability in the HNS Convention as compared to the 1996 LLMC, it is expected that the former will enter into force far later than the latter even if some advanced countries may accede to both Conventions at the same time. When both Conventions come into force and both categories of maritime claims occur concurrently, many problems will be disputed, in particular, in borderline cases and more complex conflicts of jurisdiction between both Conventions and sometimes involving the 1992 CLC or its further amendments. Before such complicated problems may frustrate or at least cut down the purpose of shipowners' limitation regimes, the member States of general and special Limitation Conventions should reinforce international co-operation and harmonization for the uniformity of shipowners' limitation of liability. In order to contribute to such purposes even a little in terms of limitation jurisdiction, this thesis is intended to suggest some draft provisions to amend a part of the Limitation Conventions in the Final Remarks.

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131 LEG 71/4/1 (Memorandum by Germany, Aug. 5, 1994). But this defect was corrected by the subsequent amendment of linkage draft provisions.

132 Id. As to this criticism the amendment of the linkage draft provisions added a para. in respect of the owner's right to invoke limitation by way of defence so far as the limitation by the general Limitation Conventions is concerned, but with no further device to solve the difficulties in the procedure of multiple actions countered with limitation defences.

133 LEG/CONF. 10/6(a)/24 (April 2, 1996 by Switzerland) at 8. This opposing opinion argued that it would be enough to treat the relation between the HNS Convention and the LLMC Conventions with the principle of *lex specialis derogat legi generali* just as between the 1969 CLC and the LLMC Conventions.

## 4. Limitation Jurisdiction under 1968 Brussels & 1988 Lugano Conventions

### A. Article 6a

When the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and Annexed Protocol, 1978,[134] was adopted, the art. 6 of 1968 Brussels Convention[135] was adjusted with the addition of art. 6a, which confers jurisdiction over limitation proceedings on the court having jurisdiction in actions relating to liability arising from the use or operation of a ship.[136] In 1982 Greece also acceded to 1968 Brussels Convention as amended by 1978 Accession Convention.[137] In 1989 the Convention of Accession by Spain and Portugal to 1968 Convention as amended was adopted.[138] Further, in 1996 Austria, Finland and Sweden also acceded thereto by the 1996 Accession Convention.[139] In the meantime, in 1988 the Member States of EEC and EFTA concluded the Lugano Convention very similar to 1968 Brussels Convention as amended.[140] Article 6a each of both 1968 Brussels Convention as amended and 1988 Lugano Convention is identical.

### B. Relevant Jurisdiction Provisions

Indeed, art. 6a is purported to guarantee the equality of forum choice between the maritime claimants subject to limitation of liability and the persons entitled to limitation.[141]

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134 O.J. 1978 L304/1. This Accession Convention came into force on November 1, 1986. RMC I.2-33. See also Schlosser, *Report on the 1978 Accession Convention*, O.J. 1979 C 59/71.

135 *The original 1968 Brussels Convention* was signed by 6 States, Belgium, Germany, France, Italy, Luxembourg and the Netherlands. O.J. 1978 L304/36. See also Jenard, *Report on The 1968 Brussels Convention*, O.J. 1979 C59/1.

136 Art. 6a reads:
"Where by virtue of this Convention a court of a Contracting State has jurisdiction in actions relating to liability arising from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction over claims for limitation of such liability." The reason for the insertion of art. 6a in the Convention was that "it would . . . be desirable that liability and limitation issues should be dealt with in the same jurisdiction." *The Happy Fellow* [1998] 1 L1.R. 13, 18 (CA 1997).

137 O. J. 1982 L. 388/1. The 1982 Accession Convention came into force on April 1, 1989. RMC I.2-34

138 O. J. 1989 L. 285/1. The 1989 Accession Convention came into force on February 1, 1991. RMC I.2-38

139 O.J. 1997 C15/1; RMC I.2-35.

140 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 1988. O.J. 1988 L319/9; Jenard & Möller, *Report on 1988 Lugano Convention*, O.J. 1990 C189/57. It came into force on January 1, 1992. RMC I.2-36.

141 Hereinafter any reference to any Article number of both Conventions includes reference to the same number each of both Conventions.

*By virtue of* both Conventions the forum for the owner and others alleged to be liable to choose in applying for a limitation proceeding is as follows.

### (1) Article 2

Since the basic forum of liability actions under both Conventions is the court for the domicile of the debtor (art. 2), the owner or others liable may bring a limitation action in that court.[142] In case of an individual a domicile is determined by the *lex fori* (art. 52), and in case of a corporation, by its "seat" to be determined by private international law (art. 53).[143] In this connection, in *The Volvox Hollandia*[144] the Court of Appeal, reversing the judgment of the first instance having denied the owners' motion to set aside the service or process or to stay the action on grounds of their having constituted a limitation fund in the Rotterdam court, held that so far as English Courts were concerned the practice had been that a shipowner was at liberty to choose his domiciliary Court as the forum in which to set up his limitation fund and to establish his right to limit his liability against claimants.[145]

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142 Schlosser commented that since the owner "could be sued in those courts, it would be desirable also to allow him to have recourse to this jurisdiction" and that "[i]t is the purpose of Article 6a to provide for this." O.J. 1979 C59/71 at 110.
Here for the first time the court for the principal place of business of the owner was conferred jurisdiction over his limitation action on the occasion of the 1978 Accession Convention being adopted. It is to be noted that while the leading maritime countries which played a decisive role in adopting 1957 Convention and 1976 Convention for the unification of limitation of liability were posing the negative or passive positions on the proposals that the owner's principal place of business be provided for in the Conventions as a forum of limitation proceedings, the same forum provision was required as one of the essential factors to realise the unification of jurisdiction amongst the Member States of EEC and EFTA. *Cf.* Preambles of 1968/1978/1988 Conventions; *Brussels Conference 1957* at 124-26; *Official Records 1976* at 337, 395 & 481-83.

143 Details on domicile: Civil Jurisdiction and Judgments Act 1982, ss. 41-46; Collins, *The Civil Jurisdiction and Judgment Act 1982* 37-44 (1983); Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* 278 *et seq.* (1987).

144 [1988] 2 L1. R. 361 (CA). This case was related to the damage to a pipeline in the oil field of the North Sea of Conoco (U.K.) Ltd. during the operation of the suction dredger *Volvox Hollandia* owned by a Dutch corporation as a sub-contractor to the contractor Saipem SpA which made the head contract with Conoco. It should be noted that in 1984 when the accident occurred, both the Netherlands and Great Britain were still Contracting States of the 1957 Convention and also the 1968 Convention. The two contracts were made in 1984 by correspondence including English law and forum clause respectively. One year after the accident the owners filed a limitation action with Rotterdam court. After its limitation decree Saipem and Conoco began liability actions in England claiming damages and negative declaration of the owners' non-entitlement of limitation. The motion for stay of English actions was on the ground of *forum non conveniens.* Moreover, the English action was *in personam.* There were no merits to maintain the English action by invoking the doctrine of *forum non conveniens.*

145 Id. at 379 (Nicholls, L.J.). Meantime, however, it was erred that Kerr, L.J., held that the owner could bring action only in the court (foreign or domestic) where a liability action has been brought if the latter was commenced first (quoting Dicey & Morris, 11th ed r. 29 (8) Vol. 1 at 350). Id. at 372-73.

### (2) Article 5 (1)

Against any contractual maritime claim the owner may constitute a limitation fund with the court for the place of performance of the contractual obligation (art. 5 (1)). The place of performance is determined by the substantive law applicable to the obligation in question under the conflicts of law rule of the court seized. [146] In respect of a contract of affreightment or a voyage charter the loading port and the destination in the contract would be the places of performance of the characteristic obligation to carry and deliver the cargo.[147]

### (3) Article 5 (3)

In cases of tortious maritime claims "the court for the place where the harmful event occurred" is also the proper forum in which the owner may bring a limitation action (art. 5 (3)). The claimant can sue at his option before the court for the place of the event giving rise to the damage or the court for the place where the damage occurred.[148] Hence, if the harmful event occurred at the loading or embarking port but the damage resulted at the discharging or disembarking port or at the first port of call, the court for any of those ports would be the proper forum for both the owner and the claimants. In cases where either the harmful event or the resultant damage occurred only on the high seas (e.g., the foundering of a ship by a collision), it would be convenient for the owner alleged to be liable to use the court for his domicile unless otherwise compelled to follow the claimant's choice of forum.

### (4) Article 6

Art. 6 each of 1968/1988 Conventions provides for ancillary jurisdiction.[149] Where the owner and others are jointly or severally liable for an event giving rise to maritime claims,

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146 *Custom Made Com. Ltd. v. Stawa Metallbau GmbH* [1994] ECR I-2913; *Industrie Tessili Italiana Como v. Dunlop* AG [1976] ECR 1473. As to analysis on art. 5 (1), see O'Malley & Layton, *European Civil Practice* 388 *et seq.* (1989); Hill, *Jurisdiction in Matters Relating to a Contract under the Brussels Convention*, (1995) 44 ICLQ 591.

147 Jackson, supra n. 67, at 150 n. 97 (stating that the place of performance in a contract of carriage will normally be the port of unloading in cargo claims by citing *The Apj Priti* [1992] I.L. Pr. 194 (Corte di Appello Genoa 1990)). Accord: *MSG v. Les Gravieres* [1997] All ER (EC) 385, 405 (ECJ 1997) (same in T/C). *Cf. Union Transport plc v. Continental Lines SA* [1992] 1 WLR 15 (HL 1991).

148 *Shevill v. Press Alliance SA* [1995] 2 WLR 499 (ECJ), Noted, Reed & Kennedy, *International Torts and Shevill: The Ghost of Forum Shopping Yet to Come*, [1996] LMCLQ 108; *Schimmel Pianofortefabrik GmbH v. Bion* [1992] I.L. Pr. 199 (French Cour de Cassation 1991).

149 Art. 6 each of 1968/1988 Conventions provides:
"A person domiciled in a Contracting State may also be sued:

any one of them may bring a limitation action in one of the courts of the Contracting States where the others are domiciled and can be sued by any claimant (art. 6 (1)). For example, in a both-to-blame collision one of the owners or bareboat charterers involved in the collision may bring a limitation action against the third party claimants in the court for the other's domicile whether or not the other owner has already commenced his own limitation action before that court against the same claimants. Between both parties of the collision a collision liability action and a counterclaim may be consolidated in the same court. One of the owners, charterers, managers, operators or their liability insurers of one ship may bring a limitation action in one of the courts for one of the others' domiciles when they are alleged liable for an event giving rise to maritime claims. In such a case the others may avail themselves of the limitation fund once constituted.[150]

The word "counterclaim" as provided for in art. 6 (3) must be construed as not including a limitation action because the jurisdiction over the latter is independently governed by art. 6a without any necessity to be supplemented with art. 6 (3).[151] Further, since 1976 Convention, art. 11 (1), provides as one optional jurisdiction over a limitation action that the limitation fund may be constituted with the court in which a liability action is instituted, the owner's right to avail himself of the court seized of the liability action need not be supplemented with a redundant application of art. 6 (3) each of 1968/1988 Conventions so far as a limitation action is concerned.

### (5) Article 17

Art. 17 provides that a court designated by a jurisdiction agreement between the parties in respect of a particular legal relationship should have exclusive jurisdiction,

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1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled;
2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;
3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending."

150 1976 Convention art. 11 (3); 1957 Convention art. 6 (2).

151 The meaning of the word "counterclaim" is not uniform amongst the national laws, but to avoid confusion it would be desirable not to use the word as including a limitation action. The word should only be used where the defendant of the original action also has a positive cause of action arising out of the same event. *Cf.* Collins *et al., 1 Dicey and Morris on The Conflict of Laws* 369 (12th ed. 1993). The "counterclaim" by the owner as defendant for a decree of limitation of liability in *Yuille v. B. & B. Fisheries Ltd. (The Radiant)* [1958] 2 L1. L.R. 596 (Adm. Div. 1958) was nothing but a mode of limitation defence.

provided that the requirements of formalities provided therein are met. Art. 17 has two meanings: first, it gives effect to a jurisdiction agreement (prorogation of jurisdiction) on certain conditions, and second, it gives the *exclusive* effect on such an agreement. Consequently, such a court may also be elected by the owner as one of the fora for his limitation action *by virtue of* 1968/1988 Conventions unless otherwise restricted. This interpretation will only apply when a jurisdiction agreement does not expressly include jurisdiction over the owner's limitation action. If it includes expressly in itself the limitation jurisdiction as well, it is conferred by the jurisdiction agreement itself rather than *by virtue of* the Conventions.

However, it is construed that the applicability of art. 17 may be restricted not only by the relevant provisions of International Conventions[152] but also by the national law of the Contracting State selected.[153] Therefore, in maritime claims too, not only must all the requirements for a forum selection clause be fulfilled but also even if it could be held to be valid whether the exclusiveness of jurisdiction should also be given to a limitation action would not necessarily be held in the affirmative. The regulation to deal with a forum selection clause has been diversified according to municipal laws and judicial attitude to the increase of international transaction. For example, in common law system the courts had hostilities against forum selection clauses of maritime contracts, in particular, selecting foreign courts. Even an arbitration clause in a charter party was not formerly upheld.[154] The forum selection clauses in the bills of lading of foreign carriers were mostly disregarded on grounds of the court's discretion unless they selected English courts.[155]

In 1982 the House of Lords upheld the reversing judgment of the Court of Appeal that the forum clause in the bill of lading designating the Amsterdam court should be held null and void on the ground that it could lessen the carrier's liability than provided for in the

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152 E.g., 1974 Athens Convention art. 17 (2); 1978 Hamburg Rules art. 21 (5); 1980 Multimodal Convention art. 26 (3).

153 Kaye, supra n.143, at 1032.

154 *Thompson v. Charnock* (1799) 8 T.R. 139; *The Agelos Raphael* [1978] 1 Ll. R. 105 (Can. Ct.).

155 *The Athenee* [1922] 11 Ll. L. R. 6 (CA); *The Vestris* [1932] 43 Ll. L.R. 86 (Adm.); *The Fehmarn* [1957] 2 Ll. R. 551 (CA); *The Adolf Warski* [1976] 2 Ll. R. 241 (CA); *The Vishva Prabha* [1979] 2 Ll. R. 286 (Q.B. Adm.); *The El Amria* [1982] 2 Ll. R. 119 (CA); *The Blue Wave* [1982] 1 Ll. R. 151 (Q.B. Adm. 1981); *The Panceptos* [1981] 1 Ll. R. 152 (Q.B. Adm. 1980); *The Atlantic Song* [1983] 2 Ll. R. 394 (Q.B. Adm.); *The Frank Pais* [1986] 1 Ll. R. 529 (Q.B. Adm.); *The Al Battani* [1993] 2 Ll. R. 219 (Q.B. Adm.).

Hague-Visby Rules as incorporated in the U.K. COGSA 1971.[156] The acceptance of service of the writ *in rem* and of the letter of guarantee by the defendant's solicitors was held to be a variation of the forum selection clause in the bill of lading.[157] In a recent case a defendant's motion to set aside the service of the writ was denied on the grounds that if service were set aside pursuant to the Singaporian jurisdiction clause in the bill of lading, the action would be completely time-barred.[158] It was also an example of non-respecting the forum clause in the bill of lading that the action was allowed to be stayed only on the condition of a stipulation that the package limitation be waived.[159]

On the other hand, however, in other cases the forum clauses in the bills of lading were respected and the number of respected cases has been increasing in recent years. In *The Cap Blanco*[160] the bill of lading clause on German jurisdiction and subject to German law was respected but on the defendants' undertaking to waive the time bar. A bill of lading clause designating the discharging port as a settling place of disputes according to British law was respected.[161] In many other cases the motions to stay actions sued in breach of foreign forum clauses in the bills of lading were allowed.[162]

In *The Sydney Express*[163] the bill of lading clause conferring jurisdiction on the Bremen Courts was respected with the application of 1968 Brussels Convention, art. 17. In *The Havhelt*[164] where a ship was arrested for a cargo claim under the bill of lading including a Norwegian jurisdiction clause the court allowed the motion to stay the proceedings by respecting the forum selection clause but it maintained the arrest for a security pursuant to the CJJA 1982, art. 26.

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156 *The Morviken* (sub nom. *The Hollandia)* [1983] 1 Ll. R. 1, [1982] 3 All ER 1141 (HL). See also *Compagnie des Messageries Maritimes v. Wilson* [1954] 94 C.L.R. 577 (Aus. H.C.) (upholding s. 9 (2) of the Sea-Carriage of Goods Act 1924 providing for the nullity of a foreign forum clause in a bill of lading); Bissett-Johnson, *The Efficacy of Choice of Jurisdiction Clauses in International Contracts in English and Australian Law*, 19 ICLQ 541 (1970); Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. Mar. L. & Com. 17 (1970).

157 *The Pia Vesta* [1984] 1 Ll. R. 169 (Q.B. Adm. 1983).

158 *Citi-March Ltd. v. Neptune Orient Lines (The Humber Bridge)* [1997] 1 Ll.R. 72 (QBD Com. 1996).

159 *The Benarty* [1984] 2 Ll. R. 244 (CA) rev'g the judgment [1983] 2 Ll. R. 50 (Q.B. Adm.).

160 [1913] P. 130 (CA).

161 *Maharani Woolen Mills Co. v. Anchor Line* [1927] 29 Ll. L. R. 169 (CA).

162 *The Media* [1931] 41 Ll. L. R. 80 (Adm.); *The Eleftheria* [1970] P. 94 (Q.B. Adm.1969); *The Sindh* [1975] 1 Ll. R. 372 (CA 1974); *The Makefjell* [1976] 2 Ll. R. 29 (CA); *The Kislovodsk* [1980] 1 Ll. R. 183 (Q.B. Adm. 1979); *The Indian Fortune* [1985] 1 Ll. R. 344 (Q.B. Adm.); *The Rewia* [1991] 2 Ll. R. 325 (CA) reversing the judgment [1990] 1 Ll. R. 69 (Q.B. Adm.); *The Nile Rhapsody* [1994] 1 Ll. R. 382 (CA 1993).

163 [1988] 2 Ll. R. 257 (Q.B. Adm.).

164 [1993] 1 Ll. R. 523 (Q.B. Adm. 1992).

In respect of the validity of a forum clause contained in a bill of lading under art. 17 of 1968 Convention the E.C.J. rendered an interesting precedent. In *The Tilly Russ*[165] it was held that the forum clause in the bill of lading would satisfy the conditions of art. 17, (1) if the parties agreed to the B/L conditions including the forum clause expressly in writing, or (2) if the forum clause had expressly been the subject-matter of a prior oral agreement and the B/L signed by the carrier should be regarded as confirmation in writing of the oral agreement, or (3) if it was established that the framework of a continuing business relationship between the parties included the B/L containing the forum clause. The court further held that a third B/L holder could come in the same position as the shipper if the forum clause was valid between the carrier and the shipper and by virtue of the relevant national law the B/L holder succeeded to the shipper's rights and obligations. However, this test is too strict and narrow to be supported as reasonable in view of the characteristics of a bill of lading and the practice of trade. According to this criterion, in many cases the B/L forum clause may be excluded from the application of art. 17, a uniform interpretation thereon being impossible. This ruling unreasonably imposes the carriers or their agents to procure signatures from or oral explanations to every new shipping requester about the B/L conditions. In cases of liner ships such prior arrangements would not actually be made. Consequently, it must be held that art. 17 is applicable to every B/L forum clause once it has been issued by the carrier.

Next, even if a forum clause in a maritime contract comes validly within art. 17, its exclusiveness does not always apply to a limitation action. Where there is only a single claimant or even in cases of multiple claimants their liability actions are all pending in one court, art. 17 may be applicable to a limitation action too. In other cases, however, art. 17 is not applicable to a limitation action owing to the conflicts of multiple claimants' interests.[166]

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165 [1984] ECR 2417. A Belgian company as the consignee of the cargo of wood carried from Toronto to Antwerp under the bills of lading which contained on each back a Hamburg forum clause sued the German carrier before the Antwerp court for a small cargo claim. The first and second instance courts in Antwerp held for the plaintiffs, rejecting the carrier's objection to the jurisdiction of the courts raised on grounds of the bill of lading clause and art. 17 of 1968 Convention. On appeal the Hof van Cassation referred to the E.C.J. for a preliminary ruling in respect of the applicability of the bill of lading forum clause to art. 17 of 1968 Convention. Id. at 2419.

166 *The Volvox Hollandia* [1987] 2 L1. R. 520 (Q.B. Com.), rev'd, [1988] 2 L1. R. 361 (CA). As to the disputes on jurisdiction over the liability actions pending in London court against the Dutch sub-contractor (owner of the dredger) and also over the defendant's limitation action previously brought in the Rotterdam court in breach of the same English forum clause contained in the sub-contract as in the head contract, Staughton, J., held: "If there is only one claimant, and that person has agreed with the shipowner on some other jurisdiction , art. 17 prevails and art. 6A does not operate. But if there is another claimant who has not made an agreement with the shipowner as to jurisdiction, both art. 6A and art. 17 confer jurisdiction

## C. Article 57

### (1) Its Nature

Art. 57 (1) each of 1968/1988 Conventions provides: "This Convention shall not affect any Conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments." This provision should be construed as a cautionary provision and not as a creative one. In other words, even if there is no such an express provision in the Conventions the same interpretation must be made. If any specific Conventions should be superseded by the 1968/1988 Conventions, these two Conventions make it clear as provided in art. 55 each. Hence, even though art. 57 (1) is not specifically contained in the 1968/1988 Conventions, any other Conventions in relation to particular matters cannot be affected pursuant to the general principle of interpretation on the relation between the general provisions and the special ones on special matters (*specialia generalibus derogant*).[167]

Despite such nature of art. 57(1) as a precautionary provision, one learned annotator stated: "The most important consequence of this is that provisions on jurisdiction contained in special conventions *are to be regarded as if they were provisions of the 1968 Convention iteself*, even if only one Member State is a Contracting Party to such a special convention."[168] (Emphasis added). However, this statement arbitrarily distorts and enlarges the ordinary meaning of the text of art. 57. First, the provision does not provide to incorporate any special Convention or its jurisdiction provisions into the 1968 or 1988 Convention but only provides that it "shall not affect" such a special Convention. Art. 57 only declares that it does neither supersede nor interfere with the application of any special Convention providing for jurisdiction, etc. Each Convention should be given the independent principle of interpretation in respect of its provisions. Any jurisdiction provision of special Conventions may not be regarded as if it were either incorporated into or a part of the 1968 or 1988

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and may confer it on different Courts . . . In those circumstances it seems to me that the Dutch proceedings are properly brought under art. 6A despite the provisions of art. 17. But the English actions are also properly brought under arts. 2, 6(1) and 17." [1987] 2 L1. R. at 527. This part of holdings was not reversed in the Court of Appeal. Nicholls, L.J., held: "If the Convention had applied to these actions, only the Dutch Court would have had jurisdiction to determine the question whether the shipowners were entitled to limit their liability in this case, *art. 17 notwithstanding.*" (Emphasis added). [1988] 2 L1. R. at 379.

167 Jenard & Möller, supra n. 140 , at 189/91.

168 Schlosser, supra n. 134, at 59/140.

Convention . Second, art. 57 does not provide that any special Convention shall apply "even if only one Member State is a Contracting Party to such a special convention." A Member State of 1968 or 1988 Convention which has not yet acceded to a special Convention may not be compelled to apply it by art. 57 in relation to another Member State of 1968 or 1988 Convention as well as of the special Convention.

### (2) Relation to 1952 Arrest Convention

Influenced by Schlosser's annotation on art. 57, a misguided interpretation of the application of art. 6a "by virtue of" the 1968 or 1988 Convention (i.e., art. 57(1) each) has already appeared.[169] If, as Schlosser annotated, any jurisdiction provision in special Conventions should be regarded as if it were incorporated into the 1968 or 1988 Convention by art. 57, the limitation jurisdiction to be applied by art. 6a would be greatly enlarged beyond the provisions of the 1968 or 1988 Convention itself. Then, is there any room that the 1952 Arrest Convention can be applied by art. 6a of 1968 or 1988 Convention? Art. 7(1) of the 1952 Arrest Convention provides for the arresting court's jurisdiction to determine the case on the merits on the certain conditions that (a) "the arrest was made" and (b) "the domestic law of the country in which the arrest is made gives jurisdiction to such Courts" or the arrest was made for certain claims or in certain places such as the claimant's "habitual residence or principal place of business" and so on. Applying the said interpretation that by virtue of art. 57 of 1968 Convention the art. 6a also confers limitation jurisdiction "upon any court which *would* have jurisdiction over the shipowner in an action by the claimant under the 1952 [Collision Jurisdiction] Convention," it would follow that the owner may file a limitation action with the court for the claimant's habitual residence or principal place of business upon arrest there *by virtue of arts. 57 & 6a of 1968 Convention.*

However, first, art. 57 did not incorporate the art. 7 of 1952 Arrest Convention into the 1968 or 1988 Convention; second, the phrase "by virtue of this Convention" used in art.

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[169] Kaye, supra n. 143, at 804 n. 8, states: "Since the Brussels Convention of 1952 on Certain Rules Concerning Civil Jurisdiction in Matters of Collision is applicable *by virtue of* Article 57 of the Judgments Convention, Article 6A also confers jurisdiction in the shipowner's action to limit his liability upon any court which would have jurisdiction over the shipowner in an action by the claimant under the 1952 Convention." See also *The Xin Yang* [1996] 2 L1.R. 217, 224 (Clarke J) (stating as a *dictum* that Holland is more appropriate forum than England "especially as the defendants have begun limitation proceedings there . . . notwithstanding the fact that if the action on the merits were to proceed here the English Court would have jurisdiction under art. 6a of the Convention.").

6a must be read not to include any special Convention but to mean "by virtue of" the jurisdiction provisions only provided in the 1968 or 1988 Convention itself; third, the arresting court's jurisdiction over the merits of the case is conferred only when "the arrest was made";[170] and fourth, the arrest court's jurisdiction over a limitation action can be conferred not by virtue of art. 6a of 1968 or 1988 Convention but by the independent provisions of the Limitation Conventions themselves[171] or national laws allowed to regulate therein by the Limitation Conventions. Thus, there is no room to apply the 1968 or 1988 Convention so far as any limitation jurisdiction with respect to arrest proceedings under the 1952 Arrest Convention is concerned.

Next, as regards the interpretation of art. 57, another question was posed with respect to the relation between art. 17 of the 1968 Convention and art. 7 of the 1952 Arrest Convention. In *The Bergen*,[172] where the defendants applied to set aside the cargo action *in rem* or alternatively to stay it on grounds of the German forum clause in the B/L by invoking art. 17 of the 1968 Convention, Mr. Justice Clarke, denying the primary motion, held: "Article 7 of the Arrest Convention is *preserved* by art. 57 of the Brussels Convention. It *confers* jurisdiction upon the Courts of the state in which the arrest is made to determine the case upon its merits in accordance with the domestic law of that state" because art. 57(2) provides that ". . . this Convention shall not prevent a Court of a Contracting State which is a party to a convention on a particular matter from assuming jurisdiction in accordance with that Convention . . . "[173]

However, first, art. 57 *per se* does neither *preserve* nor *confer* any jurisdiction as provided in special Conventions but only provides not to affect or prevent the effect or the

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170 *The Deichland* [1990] 1Q.B. 361, 378 (CA 1989) ("[A]rticle 7 [of 1952 Convention] did not confer jurisdiction where bail or other security was given to avoid arrest.").

171 E.g., 1976 Convention, art. 11(1).

172 *The Bergen* [1997] 1 L1.R. 380 (QBD Adm. 1996). During the carriage of wood pulp cargo under the B/L including a forum selection clause of German carrier's principal place of business from Wilmington, U.S.A. to Aberdeen, Scotland, smoke and fire took place about 700 miles east of Nova Scotia. Due to the measures taken to extinguish the fire, to tow the ship and to discharge and re-ship the cargo, G/A contribution claims arose. However, the cargo owners brought an action *in rem* in the English court despite the B/L forum clause. See also a similar case, *Srl Siamar v. Srl Spedimex* [1990] I.L.Pr. 266 (It. S. Ct. 1987)(aff'ming the lower courts' denial of defendant's motion to stay Genoa court's action as *lis pendens* to Rotterdam court's action by B/L forum clause, on grounds that arts. 17 & 2 of 1968 Convention should be subordinated to art. 7(1) of 1952 Convention by virtue of art. 57 of 1968 Convention).

173 Id. at 383. He further stated that "if art. 17 applies the Court would have to refuse to assume jurisdiction under art. 7 of the Arrest Convention" yet "that is the very thing that is prohibited by art. 57.2." Id. at 384.

court's assumption of such jurisdiction. Second, art. 57 does not further provide for exclusive precedence of such jurisdiction provisions over all the provisions of the 1968 Convention. The arrest court may be conferred jurisdiction on the merits pursuant to the national law, but it is another matter that the court's assumption of such jurisdiction may be prorogated by other factors; e.g., the parties' forum selection agreement. If all the provisions could not apply to such jurisdiction, the mandatory or exclusive jurisdiction provisions would all be deterred from application to such special jurisdiction cases; e.g., art. 21 *(lis pendens)* of the 1968 Convention also could not apply to any court seized of arrest proceedings under the 1952 Convention in relation to other court first seized of the same case between the same parties (Such inapplicability of art. 21 would clearly be contrary to the decision of *The Tatry* [1994] ECR I-5439). Third, according to this judgment, art. 17 may not be applied to all special jurisdictions as provided in special Conventions whether the forum selection agreement is made before or after the occurrence of the cause of action. Fourth, art. 7 of the 1952 Arrest Convention does not provide for exclusive jurisdiction on the merits nor does it invalidate any forum selection clause. Rather, para. 3 of the article provides that in cases including forum selection clauses the arrest court *may* fix the time for the claimant to bring actions in the agreed forum. The word "may" should be construed as giving the court to fix the time to bring actions *in personam* or decline jurisdiction on the merits. Fifth, apart from the application of art. 17 of the 1968 Convention, it is the English law that a forum selection clause (in a B/L) is to be construed as "exclusive" even if the word is not included therein.[174] If that is the case, it would be anachronistic to follow the former practice to *stay* the action instead of *dismissing* it in cases involving forum selection clauses.

### (3) Relation to 1952 Collision Jurisdiction Convention

Meanwhile, art. 1(1) of the 1952 Collision Jurisdiction Convention provides for jurisdiction over collision liability actions.[175] Of the fora provided therein, the connecting

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[174] *Svendborg v. Wansa* [1997] 2 L1.R.183 (CA 1997); *Continental Bank v. Aeakos Cia. Nav. SA* [1994] 1 WLR 588 (CA 1993); *I.P.Metal Ltd. v. Ruote O.Z. SpA (No. 2)* [1994] 2 L1. R. 560 (CA 1994); *Sohio Supply Co. v. Gatoil (USA) Inc.* [1989] 1 L1.R.588 (CA 1988).

[175] Art. 1(1) provides:
"(1) An action for collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced:
(a) either before the court where the defendant has his habitual residence or a place of business;
(b) or before the Court of the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished;

factors of the defendant's habitual residence, place of business, place of arrest and place of collision would not raise any question about the owner's limitation jurisdiction because they are covered by art. 6a of 1968 or 1988 Convention or the Limitation Conventions. However, as to "the Court of place . . . where arrest could have been effected and bail or other security has been furnished,"[176] if the art. 1(1) were to be regarded as incorporated into the 1968 or 1988 Convention, art. 6a thereof should also apply to said art. 1(1) of the 1952 Collision Jurisdiction Convention, whereby it would follow that the owner could file a limitation action with "the Court of place . . . where arrest could have been effected and bail or other security has been furnished." As has been discussed above, however, such conclusion may not be upheld now that art. 6a does not apply to any jurisdiction provisions of special Conventions other than those of the 1968 or 1988 Convention.

### D. Articles 21 & 22

Art. 21 each of 1968/1988 Conventions provides for the doctrine of *lis alibi pendens* and art. 22 each sets forth a guideline for the court's discretionary stay or rejection of "related actions". In connection with the application of these two provisions, it is questioned whether a limitation action pending in one court and a liability action *in rem* pending in another court of any other Contracting State are governed by art. 21 or art. 22. Where an action for a whole or partial negative declaration and an *in rem* action are concurrently pending in different Contracting States, which provision of art. 21 and art. 22 should apply depends on how the *in rem* action is ruled.

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(c) or before the Court of the place of collision when the collision has occurred within the limits of a port or in inland waters."

176 As opposed to the provisions of 1952 Arrest Convention, "the Court of the place . . . where arrest could have been effected and bail or other security has been furnished" is conferred jurisdiction over collision liability actions (1952 Collision Jurisdiction Convention, art. 1(1) (b)). In order to remove this difference the Lisbon Draft 1985, art. 7(1), of CMI to revise the 1952 Arrest Convention and the Revised Draft Articles for a Convention on Arrest of Ships, art. 7(1), prepared in 1995 by the Secretariats of IMO and UNCTAD, substituted respectively "The Courts of the State in which an arrest has been effected or *security given to prevent arrest* or obtain the release of the ship" for "the Courts of the country in which the arrest was made." Berlingieri, *Arrest of Ships* 189, 195 (2nd ed. 1996). However, the difference was not completely removed. In the former, "the Court of the place . . . where arrest could have been effected" is given much weight rather than the place where security has been furnished, whereas in the latter the Courts of the State in which "security [has been] given to prevent arrest" is conferred jurisdiction over the merits of the case. Thus, if the ship is entering a port of State A and security to prevent arrest is given to the claimant in State B, then under the former provision the court of State A and under the latter the court of State B are conferred the jurisdiction respectively.

In common law it was formerly established that an action *in personam* (e.g., an attachment on a ship) in a foreign court and an action *in rem* in England were in their nature different and the plea of *lis alibi pendens* could not be accepted.[177] Even after the entry into force of 1978 Accession Convention, in *The Nordglimt*[178] where after the cargo interests sued the owners and charterers *in personam* in Antwerp, they brought an action *in rem* against the sister ship, it was held that the English action *in rem* was not "proceedings involving the same cause of action and between the same parties" of art. 21 but that both actions might be dealt with under art. 22.

More recently, in *The Maciej Rataj*[179] where after the shipowners brought an action for negative declaration *in personam* against a group of cargo claimants involved in the same voyage and the same kind of cargo in a Rotterdam court, two groups of the cargo owners (one group: the defendants of the Rotterdam court action; the other: not yet sued in Rotterdam) issued writs *in rem* against the sister ship in the Admiralty Court, it was held that both actions could not fall within art. 21 or art. 22 of 1968 Convention as amended on the grounds, inter alia, that the owners did not have any cause of action against the cargo owners. On appeal from the owners the Court of Appeal held that insofar as the action *in rem* by the defendants of the previous action *in personam* in Rotterdam was concerned, both actions had the same cause of action, i.e., the same contractual relationship and the same subject-matter.[180] The

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177 *The Bold Buccleugh* (1851) 7 Moo. P.C. 267, 13 ER 884.

178 [1988] 1 Q.B. 183 (Adm. 1987), Commented (dissent), Hartley, *The Effect of the 1968 Brussels Judgments Convention on Admiralty Actions in Rem*, (1989) 105 L.Q.R. 640, 656; Blackburn, *Lis Alibi Pendens and Forum Non Conveniens in Collision Actions after the Civil Jurisdiction and Judgments Act 1982*, [1988] LMCLQ 91, 96.

179 [1991] 2 L1. R. 458 (Q.B. Adm. 1991)(Sheen J).

180 [1992] 2 L1. R. 552 (CA) (citing *Gubisch Maschinenfabrik v. Giulio Palumbo* [1989] ECC 420), Commented, Collins, *Negative Declaration and the Brussels Convention*, (1992) 109 L.Q.R. 545. Similar decisions: *The Deichland* [1990] 1Q.B. 361, 389 (CA 1989) (Sir Denys Buckley) ("The underlying complaint, however, is the same whether the action be framed *in personam* or *in rem*."); *The Indian Grace (No. 2)* [1996] 2 L1.R.12, 23 (CA 1996), where rev'g Mr Justice Clarke's judgment, Staughton L J held: "We are however convinced that s. 34 [of CJJA 1982] must have been intended, like arts. 2 and 21 of the [1968] Convention, to prevent the same cause of action being tried twice over between those who are, in reality, the same parties. Where the owners of the vessel served in an Admiralty action *in rem* are the same person as would be liable in an action *in personam*, that test is satisfied, as it is in the case. We therefore hold that the government's claim is barred by s. 34."
This holding was unanimously upheld by the House of Lords, *The Indian Grace (No. 2)* [1998] 1 L1.R.1 (HL 1997), where also upholding the decisions of *The Deichland* [1990] 1 Q.B. 361 (CA) and *The Maciej Rataj* [1995] 1 L1.R. 302 (ECJ), Lord Steyn held that since s. 34 was modelled on art. 21 of 1968 Convention "it would be curious if one were to arrive at a decision on "the same parties" in respect of s. 34 which diverges from that which applies to art. 21" and therefore that "for the purposes of s. 34 an action *in rem* is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction . . . by the service of a writ, or where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service." (Citation omitted). Id. at 8 & 10. Critical Comments:

court further held, however, that it was necessary to seek the guidance of the E.C.J. to determine whether the hybrid action *in rem* and *in personam* which had resulted by the acknowledgement of service of the writ *in rem* and the previous action *in personam* for declaratory relief pending in the Rotterdam court could also fall within art. 21 and whether the other cargo action *in rem* and all the Rotterdam proceedings are "related actions" in art. 22. The E.C.J. held to the effect that (1) when the parties were overlapped in part in both actions pending in different Contracting States in respect of the same cause of action, art. 21 should apply only to the extent that the parties were overlapped regardless of whether one action was *in personam* and the other became an action *in rem* and *in personam* or only *in personam*, and that (2) whether art. 22 should apply or not should depend on whether "separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences."[181]

Despite the decision of the E.C.J., however, whether the related actions should be stayed or dismissed is left to the discretion of the court seized of those actions. Art. 22 has more significance on the court's discretionary stay of related actions than on the dismissal of them,[182] given that the national laws of the Member States are divergent on whether the consolidation of related actions as a condition of the court's dismissal are permitted or restricted.[183] Consequently, in *The Maciej Rataj* case the English court could exercise its discretion not to stay the action *in rem* brought by the group of cargo claimants who were not pre-empted by the owners' action for negative declaration.

However, in 1990 after the issuance of the writs *in rem* but before the judgment by the Admiralty Court, the owners initiated limitation proceedings in the Rotterdam court in respect of the entire cargo claims pursuant to 1957 Convention.[184] Thus, now the situation developed into a question whether the provisions of arts. 21 & 22 of 1968 Brussels Convention could be preceded by the 1957 Convention. If the limitation proceeding was

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Teare, *The Admiralty Action in Rem and the House of Lords,* [1998] LMCLQ 33; Rose, *The Nature of Admiralty Proceedings - The Indian Grace (No. 2)*, [1998] LMCLQ 27.

181 [1994] ECR I-5439, 5482, [1995] 1 L1.R. 302, 310 (ECJ 1994), Noted, Davenport, *Forum Shopping in the Market*, (1995)111 LQR 366; Bell, *The Negative Declaration in Transnational Litigation*, (1995)111 LQR 674 (emphasising that a negative declaration action should not be antagonised); Briggs, *The Brussels Convention Tames the Arrest Convention - The Tatry*, [1995] LMCLQ 161, 163 (opposing the decision and arguing priority of the latter Convention over the former).

182 O'Malley & Layton, supra n. 146, at 638.

183 Jennard, supra n. 135, at 59/41.

184 [1994] ECR at I-5464. The 1976 Convention came into force on September 1 1990 in The Netherlands but the cargo claims occurred in 1988.

commenced as an alternative claim combined to the previous negative declaration action, the two actions could be for exoneration from or limitation of liability. This form of limitation actions is used in practice in the U.S. federal courts.[185] The 1957/1976 Conventions also allow the invocation of limitation of liability without admission of liability.[186] Thus, under these Limitation Conventions an alternative limitation action is open to be ruled by national laws. When an action for exoneration from liability being an action for negative declaration and liability action are concurrently pending in different Contracting States, art. 21 should apply and does not give any room of applicability of any Limitation Convention, which does not cover any negative declaration. As to a limitation proceeding, however, it is *arguendo* interpreted that arts. 21 & 22 of 1968 Convention may not apply. First, since a limitation action is a proceeding against all limitable claimants (including potential ones), the limitation court may not decline jurisdiction only because any other court has first seized of a specific liability action based upon the same cause of action. Second, even in cases of an apparently single claimant,[187] a limitation proceeding would commence and proceed with unique and independent procedural rules allowed by the Limitation Conventions and national laws, wherefore the limitation court may not stay or decline the limitation action on the ground that a liability action (related action) has already been pending in another court. Therefore, nor can art. 22 apply between the two actions.[188]

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185 Supplemental Rules for Certain Admiralty and Maritime Claims 1966, as amended, Rule F (2).

186 1957 Convention art. 1 (7); 1976 Convention art. 1 (7).

187 In a limitation action the allegation that there is only a single claimant may not be easily acceptable. Even if there seems ostensibly to be only one claimant, there may be remaining potential domestic or foreign claimants who can raise claims until the expiration of time bar, contesting any irregularities of the limitation procedure. One claimant's attorney fees may be additionally claimed, in which case it is not a single claimant case. The cases of personal injury or death claims are usually multiple claims. Thus, a purely single claim case is very rare unless an appropriate stipulation is submitted by the claimants. Consequently, art. 21 of 1968/1988 Conventions is almost not applicable between a limitation action and one or more liability actions. Accord: *The Falstria* [1988] 1 L1. R. 495 (Q.B. Adm. 1987).

188 Schlosser, supra n. 134, at 59/110, states that art. 22 is always applicable when two limitation actions are pending in two States. However, it is unthinkable that the owner would raise two limitation actions without being compelled to do so. Nevertheless, when two States adopt different limitation Conventions and liability actions are pending in both States, the owner may be compelled to constitute separate limitation funds. Even in such cases, arts. 21 & 22 are not applicable.
Further, Kaye argues that art. 22 (Related Actions) must be applied between a liability action and a limitation action. Kaye, *Jurisdiction in Shipowners' Liability Limitation Actions: The Falstria*, (1990) 9 Litigation 107 at 110. He states: "Nonetheless, it is plain that the two actions may still be regarded as being 'related' within the meaning of Article 22, para. 3 (so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings: imagine, for example, if the Danish courts were to hold the charterers not to be liable at all), so that the second-seized courts would possess a discretion to stay their proceedings under Article 22, para. 1." However, first, a limitation action itself is based on the assumption of liability to the extent of the limitation amount, thus the hypothesis of no liability being unnecessary. Second, as has been seen supra, a limitation court may not *stay* the proceedings or *decline* jurisdiction on the grounds that a particular

In consequence, insofar as the State of limitation court and that of the court seized of liability actions are the Contracting States to the same Limitation Convention, the latter court would rather stay the liability actions, irrespective of whether these actions were commenced before or after the limitation action. Even if the liability actions could be continued by the court's discretion up to judgments, the enforcement against any other assets of the owner would be barred, although the judgments conclusively determined the claim amounts. Where, as in the case of *The Maciej Rataj*, the State in which liability actions are pending had already denounced the 1957 Convention, implementing the 1976 Convention,[189] the court may proceed with the actions *in rem* and *in personam* or solely *in personam* up to judgments and enforcement thereof on the security already furnished because nowhere a limitation fund has been constituted in accordance with the 1976 Convention. In *The Maciej Rataj*, if the group of cargo claimants whose English actions might have been stayed on grounds of *lis pendens* had won the Rotterdam action they could have resumed the English actions. If the total claim amount exceeded the limits by 1976 Convention, the owners would have to constitute another limitation fund in the English court pursuant to 1976 Convention. In such a case the owners could participate by subrogation in the English limitation fund only to the extent of the Rotterdam limitation fund against the English fund, provided that the Rotterdam proceedings could have been closed with that limitation fund.[190]

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liability action has already been pending in another court and fearing that any risk of irreconcilable judgments may arise. If both Contracting States are implementing the same limitation Convention (either 1957 Convention or 1976 Convention), all other courts than the limitation court shall upon application stay the liability actions upon the claimants' filing claims against the limitation fund. Even if a liability action is not stayed and proceeded on to a judgment of success in full amount, the enforcement against other assets of the owner shall be barred except for the benefit of the proportional distribution from the fund. There can be no conflict of judgment between the decree of limitation of liability and the award of liability. On the other hand, if both States are implementing different limitation Conventions, the two proceedings (the limitation action and the liability action) may be proceeded respectively so long as each court has competent jurisdiction. In *The Falstria* case, the Danish court had jurisdiction by the provision of art. 2 of the 1968 Brussels Convention while the Admiralty Court had jurisdiction over the limitation action by the provision of art. 5 (3). However, if in Denmark the 1976 Convention was in force when the accident occurred while in England the 1957 Convention was still in force, the dock company could maintain its liability action pending in the Danish court without necessity of having the English limitation action stayed unless otherwise barred by the Danish court, although the latter court did not need to stay the liability action because the English limitation fund would not have been constituted in accordance with art. 11 of the 1976 Convention. Whatever the cause might be, however, the dock company could not be entitled to move the stay of English limitation action. In consequence, in whatever respect, art. 22 of 1968 Convention is not applicable between a limitation action and a liability action.

189 In the U.K. the 1976 Convention came into force on December 1, 1986, before the cargo claims arose in 1988. RMC I. 2-90.

190 1976 Convention art. 12 (2) - (4).

## E. Recognition and Enforcement of Judgments

The 1968/1988 Conventions include the detailed provisions for the recognition and enforcement of judgments (art. 25 *et seq.* of Title IV each). These frames of the Conventions do apply to judgments on maritime claims in two ways; one is that these provisions apply wholly to the judgments relating to some Conventions on maritime claims when the latter do not provide for the recognition and enforcement of judgments and the other is that the 1968/1988 Conventions may only additionally but not inconsistently apply to the judgments relating to other Conventions which contain in themselves the related provisions on the recognition and enforcement of judgments.[191]

Insofar as limitation proceedings are concerned, the recognition and enforcement of judgments may be applicable to both aspects of enforcing the judgement of liability actions against the limitation fund and of recognising the judgment of the limitation court. When the owner commences a limitation action early in the probability that the aggregate claim amount exceeds the limitation fund, he will not actively meet with liability actions save having such actions stayed pending the limitation proceeding. When the liability actions are all stayed, there will be no case to enforce a foreign judgment. By contrast, however, if the liability itself or the claimable amount is contested and the applicability of limitation of liability depends on the result of the action, the provisions of 1968/1988 Conventions for the enforcement of judgments will operate when the owner selects a different competent court to limit the liability laid down or to be laid down by the liability judgments.

The importance of the mandatory provisions on the recognition and enforcement of judgments lies in the applicability of the provisions to the judgment of a limitation court rather than to a liability judgment. A decision to allow the limitation of liability would be ruled by an order or a decree, but such a decision is also included in the word "judgment" for the purpose of the Conventions (art. 25 each). A limitation decree by a limitation court of a Contracting State must be recognised without review of jurisdiction of the court in other Contracting States (art. 28) where the recognition is sought for the release of a bail or other security already provided for a claim subject to the limitation. The court in which recognition is sought may stay the proceeding when an ordinary appeal against the limitation

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[191] E.g., 1969/1992 CLC, art.X; 1971/1992 FC, art. 8; 1996 HNS Convention, art. 40. As to details of the Recognition & Enforcement of Judgments on LLMC in general, see infra section 8.

decree has been lodged (art. 30). If, however, the applicant for the recognition proves that as between him and a specific claimant against whom the release of the bail or other security is sought the decree has been final and binding, the decree shall be recognised and the security be released. According to internal procedure rules the recognition of a limitation decree would not necessarily be required.[192]

As has been reviewed, the Member States of EEC and EFTA have remarkably advanced in the accomplishment of a European regional uniformaity in the system of shipowners' limitation of liability by implementing 1968 Brussels Convention as amended and 1988 Lugano Convention. However, the uniformity of the substantive limitation laws among the Member States has yet to be reached now that a part of the Member States are still deferring to accede to 1976 Convention which is being implemented by most of them.[193]

## 5. Stay or Injunction of Liability Actions

### A. Nature of Limitation Proceeding

That the British 1734 Act, s. II, conferred jurisdiction over a Bill for shipowners' limitation of liability on the *"Court of Equity"* to administer the proceeding "according to *The Rules of Equity"* suggests the *equitable* nature of limitation proceedings. This nature has particularly been emphasized by the U.S. federal courts which began to administer limitation actions much later.[194] In order to realise *equity* amongst the claimants it was taken for granted that the limitation court should exercise exclusive jurisdiction over the same subject-matter with all other related actions stayed or enjoined.[195] This unique characteristic of a limitation

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192 Upon receipt of the proportional distribution from the limitation fund a release agreement may be available if the claimant does not contest the limitation of liability.

193 As of March 1996, Italy, Luxembourg, Ireland, Portugal and Iceland had not yet acceded to the 1976 Convention. RMC I.2-89.

194 *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 120 (1872) ("The laws of [Me. & Mass.] seem to have limited the shipowner's liability in cases of damage to cargo alone; and for complete relief, they refer him to *proceeding in equity.*"); *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207, 215 (1927) ("[T]he proceeding is *equitable* in its nature and is to be likened to a bill to enjoin multiplicity of suits."); *Just v. Chambers*, 312 U.S. 383, 387 (1941) ("There is thus jurisdiction to fulfill the obligation to do *equity* to claimants by furnishing them a complete remedy although limitation is refused."); *The Miramar*, 1929 AMC 234, 236 (SDNY 1929) ("A [limitation proceeding] is nothing less than the administration of *equity* in an admiralty court.").

195 M.S.A. 1854, s. 514; U.S. Admiralty Rules 1872, s. 54; *Norwich & N.Y. Transp. Co.*, 80 U.S. at 125 (1872) ("Having done this, the [owner] will be entitled to . . . an order restraining the prosecution of other suits."); *Providence & N.Y. SS. Co. v. Hill Mfg. Co. (The Oceanus)*, 109 U.S. 578, 597 (1883) ("But when this was done and the amount of the confessed liability was paid into court, they were entitled to an injunction against all other suits and proceedings wherever instituted or pending."); *Hartford Accident &*

proceeding was believed to have been the same also in the Continental countries through the 19th century even though the names of courts exercising maritime causes were different from each other.[196] Nevertheless, modern national laws are not uniform in terms of the exclusiveness and powers of limitation courts, nor have the Limitation Conventions succeeded in ensuring such uniformity.

### B. Prior to Constitution of Limitation Fund

#### (1) Positions of Limitation Conventions

The 1924, 1957 or 1976 Convention does not contain any provision that the court with which a limitation action is filed may before the constitution of a limitation fund stay other relevant proceedings either of its motion or on application of a party concerned. This matter is completely left to national laws. Nor does any special Limitation Convention include such a provision.

#### (2) National Laws

However, some national laws contain the provisions that the court seized of a limitation proceeding may on motion stay other courts' execution proceedings pending against any other assets of the limitation petitioner or other liable person even before the court's ruling of the commencement of limitation procedure upon constitution of the limitation fund pursuant to the court's allowance.[197]

Modelled on the equivalents of the Company Rehabilitation Acts[198] in force respectively in those countries, these provisions purport to prevent the execution proceedings

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*Ind. Co.*, 273 U.S. at 215 ("[A]ll others having similar claims against the vessel and the owner may be brought into *concourse* in the proceeding by monition and *enjoined* from suing the owner and vessel on such claims in any other court.").

196 *Providence & N.Y. SS. Co.*, 109 U.S. at 597 ("It is believed that in all other countries except England, the courts of admiralty or tribunals of commerce having cognizance of maritime causes, exclusively exercise this [limitation proceeding] jurisdiction.").

197 German Seerechtliche Verteilungsordnung 1972, s. 5(4), as replaced by 1986 Gesetz; Japanese Limitation Act 1975 as amended, s. 23; Korean Limitation Procedure Act 1991, s. 16. The latter two legislations commonly require that the court may issue a stay ruling only when (a) it is deemed necessary and (b) on the condition that its effect stands until the court's ruling whether to allow or dismiss the application for the commencement of limitation procedure, provided that the time period of its effect shall not be over 2 or 3 months.

198 E.g., Japanese Company Rehabilitation Act, s. 37.

pending in other courts from being closed with the seized assets disposed before the limitation court decides whether to allow the commencement of limitation procedure or not. However, the common law countries maintain different positions to meet the same purposes.[199]

### (3) Comments

Notwithstanding the stay system prior to the constitution of a fund and the court's ruling of the commencement of limitation procedure in some countries, doubt is cast whether it has the same merits as in cases of an application for rehabilitation of an insolvent company in view of the differences between them that (1) not all the limitation cases are involved with multiple claimants; (2) as opposed to cases of company rehabilitation proceedings, a limitation procedure involves much less public interests; (3) it would be very rare that the motioner for a stay of other proceedings has not had such an opportunity as to file a limitation action much earlier than necessary for such an urgent stay even before the constitution of limitation fund; and (4) when an *ex parte* application for the commencement of limitation procedure has been supported to be a *prima facie* case, the court should issue an order to constitute the limitation fund and upon its constitution issue the ruling of the commencement of limitation procedure rather than issue a ruling to stay other proceedings.

Moreover, as opposed to limitation actions under Anglo-American practice, the court's ruling or decree of the commencement of maritime distribution (in Germany) or of the commencement of limitation procedure (in Japan) or the court's *ordonnance* confirming the limitation fund having been duly constituted (in France) may be issued by the applicant's *ex parte* application for limitation procedure, on the conditions that it may be set aside by any claimant's well grounded objection. Thus, upon the applicant's *prima facie* case being supported with reliable documents, the court would issue the order to constitute the limitation fund for the ensuing issuance of limitation decree within such a short time as not necessary for an urgent order to stay other proceedings even before the constitution of limitation fund.

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[199] In Anglo-American law a limitation fund may be constituted voluntarily by the owner upon his filing of the limitation action without prior permission of the court. R.S.C. O.75, r. 37A; FRCP Supp. R. F(1). The difference between them is whether the proceedings may be stayed by the limitation court's order or is statutorily stayed upon the constitution of the fund. M.S.A. 1979, Sch. 4, Pt. II, para. 8(2), replaced, M.S.A. 1995, Sch. 7, Pt. II, para. 8(3); FRCP Supp. R.F (3).

For the afore-mentioned reasons, the merits to contain such provisions not only in national laws but also in an international Limitation Convention are to be held very little.

### C. Upon Constitution of Limitation Fund

Contrary to the cases where a limitation fund has not been constituted, the establishment of the fund must not be disregarded by any claimant or liability action court not only within a State but also amongst the courts of States Parties of the same Limitation Convention. A Limitation Convention must not be a simple treaty to apply the same limits of liability to the States Parties' national shipowners in order for them not to compete with one another in international trade but it should further ensure a complete scheme that once the limitation fund has been established in a competent court of a State Party, the court should have exclusive jurisdiction over the merits of the same subject-matter by accomplishing a concourse of all limitable claimants.[200] Then, as regards this purpose, what are the positions of Limitation Conventions and national laws?

#### (1) Positions of Limitation Conventions

Art. 9 of 1924 Convention provides for the court's power to order a stay of the "proceedings against the property of the owner other than the vessel, its freight and accessories."[201] However, it is not clear which court is empowered to order the stay, and moreover it does not cover all liability actions pending in other courts. Thus, it follows that under this provision a claimant may maintain his liability action in a State Party and execute the judgment in a non-Convention country. The 1924 Convention does not ensure the international concourse of limitable claims for the owner's limitation proceeding. However, it was praiseworthy that the 1924 Convention contained a provision for the court to order a stay of other execution proceedings pending a limitation proceeding.

Art. 2(4) of 1957 Convention provides that after the fund has been constituted "no claimant against the fund shall be entitled" to exercise any right against the other assets of the

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200 Staring, *Limitation Practice and Procedure*, 53 Tul. L. Rev. 1134, 1155 *et seq.* (1979) ("Without concourse, the substantive right given by the Act would be a hollow one in most instances.").

201 Art. 9 provides: "In the event of any action or proceeding being taken on one of the grounds enumerated in article 1, the court may, on the application of the owner of the vessel, order that proceedings against the property of the owner other than the vessel, its freight and accessories shall be stayed for a period sufficient to permit the sale of the vessel and distribution of the proceeds amongst the creditors."

owner if the fund is actually available for his benefit. This provision only bars claimants' execution proceedings against other assets of the owner instead of allowing the court to stay other related actions. Thus allowing liability actions *in personam*, the 1957 Convention gave up the concourse scheme in limitation proceedings. Meanwhile, art. 2(4) is inconsistent with art. 5 providing for the court's discretionary and mandatory release of arrest or security therefor when the fund has already been constituted. The literal reading of art. 2(4) allows only the court's mandatory release of the owner's other assets arrested or security so long as the phrase "no claimant against the fund" is duly held to mean "no person having a claim against the fund."

In order to correct this inconsistency art. 13(1) of 1976 Convention was drafted by IMO Legal Committee to be "any person *having made* a claim against the fund" when the Committee restored the court's discretionary release provision (art. 5(1)) of 1957 Convention from art. 11(1) of CMI Hamburg Draft 1974 for 1976 Convention, which was modelled on art. VI of 1969 CLC with the discretionary release provision excluded.[202] Thus, the purport of the phrase "any person *having made* a claim against the fund" in art. 13(1) of 1976 Convention as compared with the equivalent of 1957 Convention, art. 2(4) and that of CMI Draft, art. 11(1)(a) ("no person *having* a claim arising out of that occurrence") was that (1) when the owner constituted the fund where he chose, the claimant may exercise his right against other assets of the owner instead of filing his claim with the fund court and (2) the court also should have discretionary or mandatory power for the release of the arrest or security according to the places of fund constitution.[203] Given such background, it would follow that when the claimant has made a claim against the fund, his arrest of the owner's

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202 Art. 11(1) of CMI Draft was:
"1. where, after the occurrence giving rise to the liability, a person liable is entitled to limit his liability and a limitation fund has been constituted in accordance with Article 9 by him or for his benefit:
(a) *no person having a claim* arising out of that occurrence shall be entitled to exercise any right in respect of such claim against any other assets of the person liable;
(b) the Court . . . of any Contracting State *shall* order the release of any ship or other property belonging to the person liable, which has been arrested in respect of a claim arising out of that occurrence, and *shall* similarly release any bail or other security furnished to avoid such arrest." CMI Doc. 1974 II, 304, 314; CMI Doc. 1976 III, 198, 210.

203 *Official Records 1976* at 334. Here Mr. Rein (Observer, CMI) is reported to have stated:
"The reason underlying the rule in Article 5 of the 1957 Convention was valid, but the solution that emerged was less satisfactory. The court could maintain the arrest unless the place in which the fund had been constituted appeared to have been a reasonable one, in which case it must order the ship's release . . . The draft Convention left the question of whether or not a release should be ordered to the discretion of the judge, except in specific circumstances. The question before them [*sic*] was, in fact, a simple one. Could an exception to the rule be allowed and [*sic*] might a shipowner constitute the fund wherever he liked, provided the claimant could bring his action wherever it suited him?"

other assets should be released wherever the fund has been constituted, whereas when he arrested the owner's other assets without making his claim against the fund, the court may exercise its discretionary release only when the owner constituted the fund with the court for the place other than the four places as provided in art. 13(2) proviso.

Whatever the drafters' intention on art. 13(1) & (2) might have been, however, the reasonable interpretation thereon should be another matter not necessarily to be bound by it. Even if the claimant arrested the owner's other assets in the places of a State Party other than the four places as provided in art. 13(2) proviso without filing his claim against the fund, the arrest court should release the arrest or substituted security as soon as it is proved that the claimant's right was deemed to have been extinguished by reason of the time limit as fixed by the fund court to file claims against the fund pursuant to the national law also based upon the allowance of the Convention. Now that the Convention left States Parties to regulate limitation jurisdiction in national laws, the fact that the fund has been constituted in the places other than the four places in question but with competent court of a State Party pursuant to its national law (e.g., the owner's principal place of business) should not be disregarded or discriminated only because the place of fund constitution does not fall within the four places of art. 13(2) proviso. Therefore, the four places in question must only be understood to be provided for in national laws as the primary, but not restricted, fora for the constitution of a limitation fund.

Meanwhile, against the controversial text of IMO Draft, art. 13(1), Italy[204] and Switzerland[205] proposed amendments at the London Conference for 1976 Convention. Their purposes were to amend the phrase "any person *having made* a claim against the fund" but were met with serious debates and rejected at the vote.[206] The above all background led the

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[204] Italian proposal was to substitute "any person entitled to make a claim subject to limitation in accordance with the present Convention shall be barred . . ." *Official Records 1976* at 172.

[205] Swiss draft amendment was "no person having a claim arising out of that occurrence shall be entitled . . . " modelling on art. VI(1)(a) of 1969 CLC: "(a) no person having a claim for pollution damage arising out of that incident shall be entitled . . . " Id. at 177.

[206] Id. at 331-336.
*Pros:* France, Algeria, Greece, USSR, Germany (E), Belgium, etc.
*Cons:* Australia, USA, UK, Norway, Sweden, Germany (W), etc. Id.
In particular, the following reported statements are to be noted:
Mr. Wiese (U.S.): "[T]he proposals, both of which would give the shipowner a freedom of action which was undesirable in the sense that it would allow him to constitute a fund from which claimants would have great difficulty in obtaining compensation." Id. at 334.

approach of a concourse scheme in the 1976 Convention to be given up as was in the 1957 Convention. Neither of 1969 or 1992 CLC (art. VI each) nor 1996 HNS Convention (art. 10) does ensure a complete concourse system including stay of liability actions *in personam* pending in the courts of States Parties other than the limitation court.

### (2) National Laws

Most legislations implementing 1957 or 1976 Convention as well as special Limitation Convention, 1969 or 1992 CLC, contain provisions relating to stay of other related proceedings when a limitation decree is issued upon or after the constitution of the limitation fund. In German law any other actions pending in other courts upon the fund court's ruling of the commencement of limitation procedure should in principle be stayed,[207] provided however that when the fund has been constituted in a foreign State Party and the requirements of 1976 Convention, art. 13(3), has not been proved, a domestic claimant may proceed with an execution proceeding against other assets of the owner.[208] However, since the 1976 Convention does not provide for a stay of liability actions pending between its States Parties, German courts are not empowered to issue an order of stay of liability actions pending in foreign States Parties.

In France, the 1967 Décret as amended provides only for the bar to any execution proceeding against other assets of the owner when the fund constitution has been confirmed by an order of the fund court (s. 64). However, since it is provided that any claim not filed against the fund within a certain time shall be extinguished (ss. 72 & 73), a separate liability action may not be prosecuted instead of being filed against the fund. Thus, at least internally, the concourse is ensured.

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Mr. Howlett (U.K.): "[I]t would be preferable, in his view, to retain the present text of Article 13(1) and (2). Those paragraphs were based on the principles established in the 1957 Convention and seemed to him to be adequate to prevent the abuses that had been mentioned."
However, the rejection vote has left an important question of interpretation that neither the drafters of the phrase nor the debaters at the London Conference had expected, i.e., whether a claimant who has not made a claim against the fund but proceeded with a liability action to obtain a judgment may seize other assets of the owner with a writ of execution in a State Party because such a seizure does not fall within the concept of *arrest* or *attachment* as provided in art. 13(2). In view of the purport of the Convention that once a limitation fund has been constituted no other assets of the owner should be exposed to a limitable claim, it is to be construed that such a seizure must also be barred. Fortunately, the representative national laws to be mentioned below provide as such.

[207] Die Seerechtliche Verteilungsordnung 1972, as replaced, 1986, s. 8. However, the applicant in an execution proceeding may attack the stay by having the owner raise an objection suit. Id. s. 8(3).

[208] Id. s. 34.

In Japan, the concourse of all claims into the fund court is not completely ensured. When the court issued a ruling of the commencement of limitation procedure, any execution proceeding against other assets of the owner is barred (1975 Limitation Act, s. 33). However, the execution proceeding does not automatically cease but the owner must commence an objection suit praying not to allow the execution on the ground that the ruling of the commencement of limitation procedure has been issued in respect of the same subject matter (s.35). Nor may any liability action *in personam* be stayed without an application by the plaintiff thereof to stay the same (s. 64). Since the owner is not entitled to apply for a stay of the liability action, he may only plead a defence of the limitation procedure having been duly commenced, in which case the liability action court may render a conditional judgment or dismiss the action. One exception is that when an objection suit is pending in the fund court in respect of a specific claim and a liability action is pending in other court as to the same claim, the fund court may request the nonfund court to transfer the liability action to consolidate the trials (s. 66). Further, when the fund has been constituted in a foreign State Party, a claimant who had access to the fund is barred from exercising his right against other assets of the owner (s. 96). In short, Japanese concourse system in cases of limitation proceedings is not complete even internally.

In the U.K., when a limitation fund is constituted with the court in accordance with art. 11 of 1976 Convention, "the court *may* stay any proceedings relating to any claim arising out of that occurrence which are pending against the person by whom the fund has been constituted."[209] However, this provides only for a discretionary stay. Meanwhile, R.S.C. O.75, r. 39(5) also provides for a discretionary stay of other related actions.[210] Thus, the British concourse scheme is not ensured not only statutorily but also in court practice and particularly when the owner does not admit liability in a limitation action the practice is that

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209 M.S.A. 1979, Sch. 4, Pt. II, para. 8(2), replaced, M.S.A. 1995, Sch. 7, Pt. II, para. 8(3).
Historically, under M.S.A. 1854, s. 514, the High Court of Chancery began to grant injunctions staying liability actions pending in other Courts, *Leycester v. Logan* (1857) 3K. & J. 446, 69 E.R. 1184; *London & S.W. Ry.Co. v. James* (1873) L.R. 8 Ch. 241 (CA). The High Court of Admiralty also granted an injunction, *The Normandy* (1870) L.R. 3A. & E. 152, although it was not respected. Since then the Admiralty Court or Division were restrained to issue injunctions and thus even the actions pending in the Q.B.D. have not necessarily been transferred to the Admiralty Div. seized of a limitation action. Temperley, *Merchant Shipping Acts* 182 (B.S.L. Vol. 11, 7th ed. by Thomas M. & Steel D. 1976).

210 R.S.C. O.75, r. 39(5) reads:
"(5) Save as aforesaid, on the making of any decree limiting the plaintiff's liability arising out of an occurrence the Court may distribute the limitation fund and *may* stay any proceedings relating to any claim arising out of that occurrence which are pending against the plaintiff."

the court would not issue a stay order or injunction of liability actions pending in other courts.[211]

The Canadian practice is also the same as in English law and practice. Section 648(1) of Canada Shipping Act provides that in a limitation proceeding the "judge may stay any proceedings pending in any court in relation to the same matter."[212] In the application of this discretionary stay provision to the case of *Nisshin Kisen Kaisha Ltd. v. Canadian Nat'l Ry. Co.*,[213] the Federal Court of Appeal, reversing the trial court's injunction of the liability action, held that though the court had jurisdiction to entertain the liability issue, the limitation proceeding authorised by s. 648(1) was "not for the purpose of establishing legal responsibility, but for the purpose of apportioning the limitation fund among the claimants" and therefore that "when responsibility is not admitted by the shipowner the injured party's recourse is to have it established by judgment in the damage action."[214]

By contrast, in the U.S. law the limitation court's power to stay or enjoin any related proceedings pending in other courts is absolute based upon the statutory "cease" of such proceedings.[215] The background of such strong legislation seems to be based upon the U.S.

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211 *Caspian Basin v. Bouygues Offshore SA (No. 4)* [1997] 2 L1.R. 507, 531 (QBD Adm. 1997) (Rix J) ("Of course, there can be no distribution of that fund or stay of the actions brought against Ultisol and Caspian, until they are respectively admitted liability or suffered judgment against them."); *Miller v. Powell* (1875) 2R. 976, 979 (CS) ("When they admit liability the Court will proceed to stop all actions and suits brought or to be brought for the purpose of constituting liability. When they deny liability the Court will allow such actions to go on.").

212 R.S.C. 1970, c. S-9, s. 648(1), replaced, R.S.C. 1985, c. S-9, s. 576(1). In *Valley Towing Ltd., v. Celtic Shipyards (1988) Ltd.* [1995] 3 F.C. 527 (Can. F.C.), where a barge being towed by a tug collided with the premises of the defendant shipyard and the tug owner applied for constitution of limitation fund and stay of proceedings against the owner arising from the collision, the court ordered a conditional stay that only to obtain security, taxation and payment of costs could any existing or new actions be prosecuted.

213 *Nisshin K.K. v. Can. Nat'l Ry.* (1981) 122 DLR (3d) 599 (FCA 1981).

214 Id. at 605-606. As to such restrictive interpretation, Thurlow CJ reasoned that M.S.A. 1854, c. 104, s. 514, had conferred on the High Court of Chancery in England the limitation jurisdiction including the power to stop any proceedings pending in other courts but as the Chancery Court did not have jurisdiction over the liability aspects, it exercised jurisdiction only over "the amount of damage" (limitation aspects), and that even after M.S.A. Amendment 1862 which conferred on the High Court of Admiralty the limitation jurisdiction when the ship or its proceeds were under arrest in that Court which also had liability jurisdiction, but that "the practice followed was to keep the proceedings for limitation separate for those brought to establish liability.") (citing *Georgian Bay Transp. Co. v. Fisher* (1880) 5 OAR 383, 404 holding: "If I correctly apprehend the practice in the Court of Admiralty, it did not happen there, any more than in Chancery, that the question of liability was litigated in the cause of limitation.").

215 46 U.S.C.A. s. 185, 2nd para.: "Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question *shall cease.*"
FRCP Supp. R.F. (3) also provides:
"Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question *shall cease.* On application of the plaintiff the court *shall enjoin* the further prosecution of any action or proceedings against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action."

federalism, aiming mainly at injunction or stay of state courts' liability actions although those pending in other federal courts are also bound by the statutes. Since in the U.S. law it is statutorily allowed and in practice used that the owner may petition for "exoneration from as well as limitation of liability" simultaneously before the competent federal district court,[216] any liability action based upon the same subject-matter pending in other courts not only falls within *lis alibi pendens* but also lose its jurisdiction subject to the legal effect of the mandatory "cease" provisions.[217]

### (3) Comments

The variety of national laws with respect to the scope of jurisdiction over limitation of liability proceedings can be classified into the following three categories.

a. Limitation & Liability Non-Separate Jurisdiction System (Germany, Japan, etc.)

As explained above, in German and Japanese law, in order to resume or destroy the execution proceeding against other assets of the owner once stayed by the ruling of the commencement of limitation procedure, the claimant may apply to resume it and the owner must institute a separate objection suit praying not to allow the execution proceeding. Further, in Japanese law a liability action between a claimant and the owner pending in other court is not stayed unless the claimant applies for it in order to file the same claim with the fund court, but he may resume the liability action at any time (1975 Limitation Act as amended, s. 64). In those proceeding and action the limitation aspects can be argued despite the fund court's ruling of the commencement of limitation procedure.[218] It follows that in such cases jurisdiction over the limitation issue is concurrently exercised by both the fund and nonfund courts and therefore that the risk of irreconcilable judgments may not be avoidable

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See also the U.S. Supreme Court's precedents noted supra n. 195.

216 FRCP Supp. R.F (2).

217 *Metropolitan Redwood Lumber Co. v. Doe (The San Pedro),* 223 U.S. 365, 372 (1912) ("In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every court, Federal or State, to stop all further proceedings in separate suits upon claims to which the limited-liability act applied."); *The Pelotas,* 1924 AMC 286, 290 (EDNY 1924) ("[A]ll activity by way of further proceedings in the instant actions must stop until final decree in the limitation of liability proceeding. To do more than this would be to give the word "cease" the meaning of "vacate and dismiss" and instead of stopping only, it would destroy a right already acquired.").

218 Danikawa, *et al.,* supra n. 28, at 144; Inaba, supra n. 28, at 266.

with respect to the limitation aspects. Such a result is clearly contrary to the purpose of the unique limitation proceeding system.

b. Limitation & Liability Separate Jurisdiction System (U.K., Canada, etc.)

Although, under this system, mainly where the owner does not admit his liability and a liability action is pending in other court, the practice is that jurisdiction over limitation and liability disputes is separately exercised between the fund and nonfund courts, there seems to be no reasonable ground to maintain such practice except for the historical and traditional background of the Chancery Court's restricted exercise of jurisdiction under the M.S.A. 1854, s. 514. First, such dichotomy jurisdiction practice is contrary to judicial economy. Second, where multiple liability actions are pending in multiple courts, the risk of irreconcilable judgments are not excluded unless all the actions are consolidated in one court. Third, the claimants can not have the opportunities to attack one another's claim amount (heads and measure of damage) as opposed to cases where they all file their claims with the fund court. Such opportunities must be given in the limitation proceedings partly because the distribution may be greatly affected by one another's claim amount and partly because the owners would not defend the liability actions actively now that their limitation of liability could not be broken and that the liability courts would not touch on limitation issues.

c. Limitation & Liability Consolidated Jurisdiction System (U.S., France, etc.)

In French law, even if there is no provision for a stay of a liability action pending in other courts, any execution proceedings against other assets of the owner pending in other courts are barred (1967 Décret as amended, s. 65) and any claim not filed within a certain time with the fund court (whether a liability action for it is going on or not) is extinguished. Further, in the limitation proceeding all the ways of objections and remedies are ensured to claimants (ss. 77, 79, 85, etc.). By contrast to German and Japanese laws, French law does not provide for an objection suit with respect to any execution proceeding against other assets of the owner. In this sense, the French system can be classified into this third category (although it is not so much a consolidated proceeding as an exclusive one) and may be commented as more economical and convenient scheme for the purposes of limitation procedure than the U.S. counterpart. Moreover, under the French courts' practice the

limitation court's discretion to allow a claimant's filing of expired claims against the fund is not so much flexible as in under the U.S. courts' practice.

### D. Approach to International Concourse

The present Limitation Conventions are all classified into the second category, Limitation & Liability Separate Jurisdiction System, in that (1) they provide only for a stay of or bar to execution proceedings against other assets of the owner without providing for a stay of any liability action when the fund has been constituted;[219] (2) in 1976 Convention, by virtue of the words "any person having made a claim against the fund" it allows the claimant an option to file his claim with the fund court or proceed with a separate liability action out of the limitation proceeding;[220] and (3) some special Limitation Conventions show an impression that the fund court has only limitation jurisdiction, by providing that the court "shall be exclusively competent to determine all matters relating to the *apportionment* and distribution of the fund."[221] In consequence, the Limitation Conventions have all taken over the same demerits as those of the second categorial dichotomy system with respect to limitation jurisdiction.

Moreover, in cases of international conflicts of limitation jurisdiction complicated with diverse interests of the parties concerned as well as of the courts of different States Parties, the present Limitation Conventions are far from substantially realising the shipowners' limitation of liability even amongst the same Convention States. Thus, it may well be taken for granted that the national concourse scheme in a limitation action must be extended to an international concourse as well. It may also be practicable if only a part of advanced maritime countries should discard anachronic chauvinism and prejudice on the natural fora of limitation actions. The present Limitation Conventions must be amended to include an international concourse scheme under the following guidelines: First, the 1976 Convention should be amended to include jurisdiction provisions for a limitation action and, second, 1976 Convention, 1969/1992 CLC and 1996 HNS Convention must be amended to

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219 1924 Convention, art. 9; 1957 Convention, arts. 2(4) & 5; 1976 Convention, art. 13; 1969 or 1992 CLC, art. VI each; 1996 HNS Convention, art. 10.

220 Since this phrase is nothing but what the Convention itself opens to national laws as to procedural matters, however, national laws would not follow the same phrase.

221 1969 or 1992 CLC, art. IX (3) each; 1996 HNS Convention, art. 38(5). However, it is as opined supra that a reasonable interpretation on these provisions need not necessarily be bound by the intention of the drafters of the Conventions.

contain provisions for mandatory stay of any liability actions pending in States Parties upon application with the claimants' accessibility to the fund proved.

## 6. International Conflicts of Limitation Jurisdiction

### A. Conflicts of General Limitation Jurisdiction

#### (1) Between 1957 Convention States

Since, as has been discussed above, even between the same 1957 or 1976 Convention States the conflicts of jurisdiction over limitation proceedings would occur frequently not only because of the lack of safety device in the Conventions to prevent such conflicts but also because of some courts' chauvinistic policy in jurisdiction competition and forum shopping of the parties concerned.

In *The Wladyslaw Lokietek*,[222] a Polish ship collided with a German ship on the high seas of the Baltic Sea in 1976, resulting in the latter's total loss with her cargo of timber bound for Newport. The Polish owners filed a limitation proceeding with the Polish court at the first calling port of their ship under 1957 Convention. However, during the appeal proceeding against the court's order to deposit the limitation fund in cash despite the hull underwriter's letter of guarantee applied for the fund constitution, the cargo claimants began an action *in rem* against the *Wladyslaw Lokietek*, a Polish sister ship before the Admiralty Court. Two days after the arrest of this ship, the Polish owners deposited the fund as ordered by the Polish court and one day later gave security for the arrest. After obtaining the release of arrest, the owners motioned to release the security or alternatively to stay the English action on the ground that the limitation fund has been constituted. However, the Admiralty Court refused the motion on the grounds that (1) the owners failed to prove their "absence of actual fault or privity" for the benefit of limitation of liability, and (2) the limitation fund should have "previously" been constituted before the arrest pursuant to M.S.A. 1958, s. 5(2).

This case was an example of limitation jurisdiction conflicts between the same 1957 Convention States. However, first, was it righteous for the Admiralty Court to have

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[222] See supra n. 66, *The Wladyslaw Lokietek* [1978] 2 L1.R. 520 (Brandon J).

exercised jurisdiction over limitation issues concurrently with the pre-existing limitation court of a State Party? It was in error that the nonfund court exercised limitation jurisdiction by demanding the owners to discharge the burden of proof for their absence of actual fault or privity because the literal reading of s. 5(1) of M.S.A. 1958 did not require the establishment of the owners' entitlement to their limitation of liability but only required that the claim appeared to be a kind of limitable claim, i.e., a claim subject to limitation if applicable.[223]

In a similar case of *The Putbus*, [224] where the defendants who had constituted the limitation fund in the Rotterdam court for the collision claims applied for release of the security provided to obtain release of the sister ship arrested in English *in rem* proceedings, the Court of Appeal did not touch on any question of whether the defendants were entitled to limitation but only adjudged whether their liability was "*a type of liability* to which a limit is set by Sect. 503 (as amended) or not." This position was correct in that it did not interfere with the fund court's exclusive jurisdiction over whether the owners were entitled to limitation or not.

Second, art. 5(1) of 1957 Convention from which s. 5(1) of M.S.A. 1958 derived provides "Whenever a shipowner is entitled to limit his liability under this Convention" as one of the conditions of releasing the arrest or security, but the phrase must not be construed

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[223] M.S.A. 1958, s. 5(1) reads: "(1)Where a ship or other property is arrested in connection with a claim which appears to the court to be founded on a liability to which a limit is set by [s. 503 of M.S.A. 1894] or security is given to prevent or obtain release from such an arrest, the court may, and in the circumstances mentioned in subsection (3) of this section shall, order the release of the ship, property or security, if the conditions specified in subsection (2) of this section are satisfied;"
As opposed to have been held by Brandon J, the phrase "a claim which appears to the court to be founded on a liability to which a limit is set by" meant that the claim appeared to be a kind of limitable claim, i.e., a claim subject to limitation (if the owner is entitled to limitation). Thus, s. 5(1) could not be interpreted as conferred on the arresting court jurisdiction over limitation issues. It was enough for the court to hold that the cargo claims arising out of the collision appeared to be limitable claims falling within the "property claims" set out in art. 1(1)(b) of 1957 Convention.

[224] *The Putbus* [1969] 1 L1.R. 253 (CA). This case was not between the courts of 1957 Convention States because the collision occurred before the Convention came into force on May 31, 1968. However, the U.K. had already implemented the M.S.A. 1958 giving the force of law to the Convention. Thus, the situation was similar to that of *The Wladyslaw Lokietek* except that the fund court in Rotterdam in the former case was neutral as one of the third countries to the East German ship *Stubbenkammer* and the English tanker *Zenatia* involved in the collision occurred in 1967 within Dutch territorial waters. The former ship sank, raising wreck removal costs to the Dutch Government. The East German owners commenced a limitation proceeding before the Rotterdam court while the English owners arrested the sister ship *Putbus* in London. The Admiralty Court dismissed the defendants' motion to release the security not because of any limitation disputes but because of doubt about the *res judicata* of an English judgment on the collision liabilities. However, the Court of Appeal reversed and allowed the release of the security on the ground that the conditions of s. 5(1) of M.S.A. 1958 were fulfilled.

as conferred on the arresting court jurisdiction over limitation issues but should only be understood to mean that the owner's entitlement to limitation is established.[225]

Third, it seems to have been another error that Brandon J held that the payment of the fund in the fund court should have been made "previously" to the arrest in question in interpretation of s. 5(2) of M.S.A. 1958. The original equivalent of 1957 Convention, art. 5(1) and (2), is also similar ("has already given" or "has already been given"). However, the provisions *per se* do not require that the payment of the fund should necessarily have been made prior to the arrest nor seems it to be reasonably so grounded. The criterion of whether the fund has been constituted or not must be based upon the time when the application for the release is filed with the court or more correctly speaking the time when the court decides whether to allow release of the arrest or security, for the reasons that the arrest proceeding is nothing but to obtain security for a claim or its judgement and that if only the conditions to release the arrest or security (i.e., entitlement to limitation and the accessibility to and actual availability of the fund) should be proved at latest prior to the court's ruling, the court could have no grounds to refuse the release.

Fourth, however, the arresting court could refuse the release on other grounds if it deemed that the owners' entitlement to limitation was not proved.[226] Nonetheless, the reason why the court did not invoke this ground must have been that this reason was provisional in that sooner or later the Polish court's decree allowing the limitation of liability would become final and binding whereby the owners could apply for the release of security again. After all, anticipating that the owners' limitation claim should be reviewed by it,[227] the English court further denied the owners' alternative motion for a stay of the action by borrowing the doctrine of *forum non conveniens*.[228] This case exemplifies that in international competition of limitation jurisdiction the traditional Limitation & Liability Separate Jurisdiction Practice may not be followed even between the same Convention States.

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225 The same construction must be applied to the equivalent wording ("entitled to limit") of 1969/1992 CLC, art. VI (1) each and 1996 HNS Convention, art. 10(1). *Cf.* 1976 Convention, art. 13(2) (not using the words "entitled to limit").

226 [1978] 2 L1.R. at 539 (stating that it was not decided in the Polish Court that the owners were entitled to limitation).

227 Id. at 540 ("If the English cargo-owners' action is continued, the Polish shipowners may have to bring a second set of limitation proceedings here in addition to those already brought by them in Poland.").

228 Id. (citing s. 41 of 1925 Act and *MacShannon v. Rockware Glass Ltd.* [1978] 2 WLR 362).

*The Volvox Hollandia*[229] was also a case of limitation jurisdiction conflicts between the courts of the 1957 Convention States, the Netherlands and the U.K. However, it was to be noted that despite the fact that the same English law and jurisdiction clauses were contained in the head contract of the North Sea oil field work and the sub-contract involving the owners of the dredger in question and that the primary claimant Conoco was an English company, the Commercial Court's dismissal of the owners' alternative motion for a stay of English liability actions on grounds of *forum non conveniens* was reversed by the Court of Appeal in order for the claimants to participate in the Rotterdam court's limitation proceeding. It might have been taken into account that the two countries were Member States of the 1968 Brussels Convention.[230]

### (2) Between 1976 Convention States

*The Xin Yang*[231] was an example of jurisdictional conflicts between the courts of 1976 Convention States. On Nov. 19, 1995, the Chinese ship *Xin Yang* collided with the *Jo Aspen* moored alongside a loading berth of Vlaardingen, the Netherlands. The former was arrested by the Rotterdam court at the behest of the damaged jetty operator. On Nov. 22, the demise charterers of the *Jo Aspen* arrested the former's sister ship *An Kang Jiang* in England. On Nov. 24, the Chinese defendants filed a limitation petition with the Rotterdam court and then applied for a stay of the English action on the grounds of *forum non conveniens*. Despite the *de facto* conflict of limitation jurisdiction, the disputes were focused on whether the court had discretion for a stay of an action on grounds of *forum non conveniens* under the 1968 Convention and the CJJA 1982 without discussions on the relevant provisions of the 1976 Convention. Mr. Justice Clarke stayed the English action properly despite his incorrect *dictum* that if the court proceeded the action on the merits, it would also have jurisdiction over the defendants' second set of limitation actions under art. 6a of 1968 Convention.[232]

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229 Supra nn. 144 & 166, *The Volvox Hollandia* [1987] 2 L1.R. 520 (Staughton J), rev'd, [1988] 2 L1.R.361, 372 (CA, Kerr and Nicholls L JJ, Dillon LJ dissenting) ("But the limitation action is a *lis alibi pendens* in relation to which the plaintiffs seek to bring parallel proceedings in England by their claims for negative declarations.").

230 See also *Aldington Shipping Ltd. v. Bradstock Shipping Corp. (The Waylink & Brady Maria)* [1988] 1 L1.R. 475 (Gibraltar CA 1987), reversing CJ's denial of the defendants' motion for a stay of the liability action to send it to W. German court on the ground of *forum non conveniens*, where the defendants' limitation action had already been pending in Germany in respect of a collision occurred in the River Elbe.

231 *The Xin Yang & An Kang Jiang* [1996] 2 L1.R. 217 (QBD Adm. 1996).

232 Id. at 224.

Another example of limitation jurisdiction conflicts between the courts of 1976 Convention and 1968 Convention States was *The Happy Fellow.*[233] This case was related to an issue whether the English court having no contact with the collision occurring near the mouth of the Seine between foreign ships whose interests were foreigners except one English P & I Club could maintain the jurisdiction over a limitation action filed with the English court by a post-collision agreement of London forum made between the limitation petitioner and a specific T/C contractual claimant. The reason why the petitioner, owners of the *Darfur* devised the post-collision choice of forum agreement with her T/C charterers in respect of the latter's collision-related claims against the former was "because the French Courts had determinedly flouted their international obligations by paying lip-service to the Convention test while allowing claimants to break the limit when no reasonable Court would have allowed the limit to be broken."[234]

Because of lack of stay provisions in the 1976 Convention the grounds of application by one of the 7 French claimants to set aside or stay the limitation action was based upon arts. 21 or 22 of the 1968 Convention. Mr. Justice Longmore held that the French actions and the English limitation action did not fall within art. 21 but were "related" to fall within art. 22 wherefore "the English proceedings should be stayed insofar as they affect Sloman Neptun" and the Court of Appeal also upheld this ruling, dismissing the owners' appeal on the same grounds.[235] However, these rulings deserve the following comments. First, was the English limitation jurisdiction competent as against claimants other than the T/C charterers by virtue of art. 6a of 1968 Convention? Second, had it not been for the post-collision London jurisdiction agreement between the owners and T/C charterers of the *Darfur*, the English court could not have had any jurisdiction over the collision claims either under English law or under French law unless she was arrested in an English port (s. 59 of 1967 Décret as

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233 *The Happy Fellow* [1997] 1 L1.R. 130 (QBD Adm. 1996), aff'd, [1998] 1 L1.R. 13 (CA 1997). A collision occurred in 1995 near the mouth of the Seine between the *Darfur* time chartered to Seerederi Baco-Liner GmbH from the owners Blue Nile Shipping, *et al.* and the *Happy Fellow* bareboat charted to Vigor Tankers, *et al.* from the owners Iguana Shipping allegedly due to defective steering geer of the *Darfur*. The *Happy Fellow* interests, 7 French claimants including her owners and operators arrested the *Darfur* and issued an "Assignation" (writ) for "full damages" against the owners of the *Darfur* from the Commercial Court of Le Havre. Meanwhile, in 1996 the owners and T/C charterers of the *Darfur* agreed to change the German arbitration clause in the T/C to the English High Court forum clause. Then, Baco-Liner began an indemnity action for various claims arising from the collision in London, upon accepting service of which the owners commenced a limitation action here against all claimants. The instant case was related to an application by one of the 7 French claimants (Sloman Neptun) for a stay of the English limitation action on grounds of arts. 21 or 22 of the 1968 Brussels Convention.

234 [1997] 1 L1.R. at 135 (submission of solicitors for owners).

235 Id. at 138 and [1998] 1 L1.R. at 18.

amended).[236] Third, if the rulings could be grounded on art. 22 of 1968 Convention, the English court could maintain the limitation action always when the limitation action was seized earlier than any liability actions whereby any post-accident forum agreement made between the specific parties may compel the other parties (claimants) to be bound by such an agreement in cases of multiple claimants involved.[237]

### (3) Between Different Convention States

*The Falstria*[238] was an example of limitation jurisdiction conflicts between the court of a 1957 Convention State (the U.K.) and the court of Denmark where the 1976 Convention had already been in force. In this case it was discussed whether the limitation action filed with a competent court could be stayed by a motion of a specific claimant on the ground of *forum non conveniens*. Dismissing the motion, Mr. Justice Sheen held that "the Court does not have an inherent jurisdiction to stay the action upon the application of only one of those claimants" and further that as "the relief [of limitation decree] claimed by the plaintiff . . . cannot be obtained in a Danish Court . . . [t]hat decree can be granted by this Court and only by this Court."[239] The first reason was correct but the second casts doubt. Was the dock company not entitled to proceed with the Danish action disregarding the English limitation action? Given that Denmark was already implementing the 1976 Convention,[240] the Danish court could not have regarded the limitation fund constituted in the English court under the 1957 Convention as one of the funds constituted under the 1976 Convention and then could not have stopped the liability action nor could any Danish court have refused the enforcement

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236 It would be unreasonable if r. 4 (1) (c) of R.S.C. O.75 ("(c) an action arising out of the same incident or series of incidents is proceeding in the High Court or has been heard and determined in the High Court") should be extended to apply also to a case where the jurisdiction over such an action was only conferred by a post-accident forum agreement between the parties of that action.

237 See supra n. 188. It may well be said that a limitation action pending in a court and liability actions pending in other courts are "related" each other, but it must be another matter whether to apply art. 22 or not because it mandates that only the court other than the court first seized of a related action should decide whether to decline or stay its action.

238 *The Falstria* [1988] 1 L1.R. 495 (QBD Adm. 1987). On Aug. 9, 1986, when the 1976 Convention did not come into force in the U.K., a Danish ship *Falstria* collided with the quay and a large gantry crane of Felixstowe Dock & Ry. Co. at the Landguard Container Terminal, causing the damage of some £1.5m. The demise charterers began a limitation action in England under the 1957 Convention. However, 3 days later the apparently single claimant, the dock company, commenced a liability action against the owners and charterers in Denmark which was already implementing the 1976 Convention internally, under which the limit of liability exceeded the claim amount.

239 Id. at 498-99.

240 RMC I.2-79 & 80 n. 5. Denmark denounced the 1957 Convention effective on April 1, 1985.

of the Danish judgment available to the dock company unless its claim had not been extinguished by an English judgment.[241]

Next, *The Vishva Abha*[242] was related to a limitation jurisdiction conflict between a cargo action filed with the English court in 1989 and the defendants' collision liability action already pending in a S. African court in Durban where the 1957 Convention was in force. Dismissing the defendants' motion to stay the English action, Mr. Justice Sheen held: "It does seem to me that it would be a grave injustice to deprive them of their right to litigate in this country and send them to South Africa where their chances of recovering damages would be limited to so much less than the sum they may recover in this country."[243]

More recently, the same principle was applied in *Caltex Singapore Pte. Ltd. v. BP Shipping Ltd.*,[244] where the limitation jurisdiction conflicted between the court of Singapore where a limitation action was pending under the 1957 Convention against the plaintiffs' claims arising from the jetty damage caused in 1994 by an allision of the defendants' ship *British Skill* and the English court in which the jetty interests brought liability actions against the owners. Reserving the final stay applied by the British owners on grounds of *forum non conveniens* until submission of evidence to prove claim amounts, Mr. Justice Clarke held on the one hand that the limitation provisions whether in British or Singaporean law were not substantive but only procedural as part of *lex fori* and on the other that to be deprived of the larger limit is a relevant special circumstance as a result of which justice potentially requires that the action be allowed to proceed in England."[245] Although it was not necessary to

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241 It seems that there is no provision in English law to extinguish a limitable claim not filed within the time fixed by the fund court. The r. 39 (4) of R.S.C. O.37 provides only that "after the expiration of the time so allowed, no claim may be filed or summons taken out to set aside the decree except with the leave of the registrar."

242 *The Vishva Abha* [1990] 2 L1.R. 312 (QBD Adm. 1990). A Collision occurred in the Red Sea in 1987 between the Indian defendant's ship *Vishva Apurva* and the *Dias* whereby the former sank with water flooded into her other parts of the collision. The Indian owners found the *Dias* in Durban and arresting her took the preemptive strike by commencing a collision liability action in a S. African court while many actions were pending in Singapore, Holland, India, etc. The German owners of cargo laden on board the *Dias* sued the Indian owners in England, against which the defendants filed a motion to stay this action on grounds of *forum non conveniens* to send it to S. Africa whose national law adopted the 1957 Convention.

243 Id. at 315.

244 *Caltex v. BP* [1996] 1 L1.R. 286 (QBD Adm. 1995). The same principals were also applied in *The Herceg Novi* [1998] 1 L1.R. 167 (QBD Adm. 1997)(Clarke J)(denying FNC stay of action competing with Singaporean liability and limitation actions), but rev'd, [1998] LMLN 490(CA); *The Kapitan Shvetsov* [1998] 1 L1.R.199 (HK CA 1997)(rev'g FNC stay of H.K. action competing with Singaporean actions).

245 Id. at 299 (quoting Lord Goff's holding in *The Spiliada* [1987] A.C. 460, 483: "I do not think that an English Court would, *in ordinary circumstances*, hesitate to stay proceedings brought by one of them in this country merely because he would be deprived of a higher award of damages here."). Thus, Mr.

invoke the substantive/procedural dichotomy in applying the *lex fori* in a Limitation Convention State, his perspective expressed in this holding with respect to limitation aspects was considerably rectified as compared to his negative ruling in *The Hamburg Star*,[246] where it was argued whether the cargo claimants' legitimate judicial advantage of higher limitation under 1976 Convention in the English action than that under 1957 Convention in the Cyprus limitation court should be a criterion to apply the doctrine of *forum non conveniens* or not in view of Lord Goff's negative dictum in *The Spiliada*.

Lastly, *Ultisol Transport Contractors Ltd. v. Bouygues Offshore SA*[247] involved the acutely adversarial disputes on the conflict of limitation jurisdiction between the court of S. Africa which was implementing the 1957 Convention and the English court of the 1976 Convention State. As contrasted with other conflicts of limitation jurisdiction, however, in this case the tug interests preferred the higher-limit 1976 Convention as a judicial advantage to the lower-limit 1957 Convention, fearing that the SA court could break limitation. Granting the anti-suit injunction on conditions of the availability of the security given to Bouygues in SA court in lieu of the attached bunkers, Mr. Justice Clark held: "Ultisol's right to seek to limit its liability in accordance with the law of the chosen forum and thus under the 1976 Convention is a potentially very valuable right" [which] "should not lightly be

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Justice Clarke properly suggested that so far as limitation of liability is concerned, Lord Goff's dictum above may not be applied.

246 *The Hamburg Star* [1994] 1 L1.R. 399 (QBD Adm. 1993). In this case the limitation jurisdiction potentially conflicted between the Cyprus court first seized of both the arrest and limitation proceedings under 1957 Convention and the English court seized of a cargo action with respect to the same occasion having caused the container cargo losses and damage during the voyage between Rotterdam and Hamburg in 1993. Dismissing the defendants' motion to stay the English action on ground of *forum non conveniens*, Mr. Justice Clarke held as to the legitimate judicial advantage of limitation of liability: "If it were necessary to choose between these competing arguments I would prefer the plaintiffs' submissions to those of the defendants. But it is not necessary to choose because at best from the defendants' point of view *the existence of the limitation action in Cyprus is neutral*." Id. at 409.

247 *Ultisol v. Bouygues* [1996] 2 L1.R. 140 (QBD Adm. 1996) (Clarke J). During the towage of the barge *BOS 400* owned by Bouygues (a French Co.) by the tug *Tiger* owned by Caspian Basin (former Azerbaijan gov't body) and time chartered to Ultisol (a Bermudan co.) from Congo to Cape Town under a BIMCO Towcon form contract made in 1994 between Ultisol and Bouygnes, the barge became total loss after stranding in S. African waters because the towline parted. Bouygues arrested the tug in the S. African Supreme Court ("SA court") and filed liability actions therewith against Ultisol and Caspian claiming some Fr. 450 m. Ultisol and Caspian contested SA court's jurisdiction by invoking cl. 25 of the Towcon (English law and jurisdiction). However, to avoid time bar if SA court declined jurisdiction, in May 1995, Bouygues issued a writ in England against Ultisol and Caspian. Then, in June 1995 Ultisol brought this action praying for an injunction restraining Bouygues from continuing SA action. As the SA court dismissed the jurisdiction objection, Ultisol proceeded with the English action and in Dec. 1995 further added a limitation action (without admitting liability) with the limitation fund (£575,717.58) constituted under the 1976 Convention. Meanwhile, as in Sept. 1995 Bouygues extended its SA litigation by suing the Cape Town port authority (Transnet Ltd. or "Portnet") alleging negligence in connection with the casualty, Portnet obtained an attachment order *nisi* in Jan. 1996 from the SA court on the tug and her bunkers.

deprived", "because of the much greater risk that will be unable to limit its liability at all in South Africa, in which case it will be exposed to a very large claim."[248]

This ruling was a counterattack against the SA court's dismissal of Ultisol's jurisdiction objection based upon the parties' voluntarily bargained agreement of exclusive jurisdiction. The ruling reasoned that Ultisol's right to limit its liability under the 1976 Convention was based upon the choice of forum agreement with Bouygues and therefore that it should not lightly be deprived. However, any exclusive forum clause does not necessarily bind the limitation jurisdiction over an accident arising out of or in connection with a maritime contract when it is involved with multiple claimants.[249] The present case was a multiple claimant case (Bouygues and Portnet).[250] Ultisol was a time charterer of the tug who was in a position to make recourse to Caspian if its liability could be admitted at all. Bouygues had already sued Caspian, Ultisol and Portnet in the SA court being a natural forum, which in consequence should also have been one of the natural limitation fora commonly applicable to all the parties concerned notwithstanding the London jurisdiction clause binding only Bouygues and Ultisol. Under these situations, had Caspian as principal liable party filed a limitation action with the SA court, Ultisol could not have asserted London court to be a competent limitation forum. Nevertheless, the situations were changed to a case where the London court could have the competent limitation jurisdiction by Bouygues' filing its liability action therewith against Ultisol and Caspian whatever its purpose might have been. Hence, Ultisol's "right to limit its liability" in the London court "under the 1976 Convention" was justified by Bouygues' filing the liability action therewith but not by the choice of forum agreement between them.[251]

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248 Id. at 152. He further supplemented: "In the light of the contract, it would not be just to require Ultisol to face a claim by Bouygues other than in the agreed jurisdiction, where its right to limit will be governed by the 1976 Convention." This proposition is justified only as against Bouygues.

249 *The Quarrrington Court*, 1939 AMC 421 (2 Cir.), cert. den., 307 U.S. 645 (1939) (denying the effect of a London arbitration clause in a T/C during the owners' limitation proceedings).

250 *Caspian Basin v. Bouygues (No. 4)* [1997] 1 L1.R. 507, 527 (Rix J) ("But Portnet has already claimed a contribution against Caspian (and Ultisol) in South Africa and has attached the tug . . . Caspian's limitation action has to be viewed as genuinely brought against several potential claimants and not merely against Bouygues."). Caspitan filed its limitation action by availing itself of the fund established by Ultisol in Mar. 1996, but Portnet had already obtained the attachment order *nisi* in S.A. on the tug and the bunkers. *Ultisol* [1996] 2 L1.R. at 143.

251 In this sense, if Bouygues wanted to invoke the 1957 Convention in the SA court, it made a great mistake by dually instituting its liability actions in the London court. So far as Portnets' contribution claim was concerned, it could not be weighed much in the choice of limitation action because its claim was a derivative claim of Bouygues' primary claims.

Meanwhile, Caspian also applied for an injunction restraining Bouygues' SA action against it by invoking the Himalaya clause of the Towcon. However, Mr. Justice Morison dismissed the application on the ground that the Himalaya clause did not apply to the London jurisdiction clause of the Towcon[252] and further held that "[i]n my view the centre of gravity of the dispute with Caspian is more in South Africa than here."[253] After this judgment, in order to compel Portnet to participate in the English actions, Caspian and Ultisol applied for leave to serve the third party notices on Portnet and obtained the grants by Mr. Justice Clarke and Master Prebble respectively. Against this, Portnet applied to set aside the orders on the grounds that (1) Caspian actively would proceed with SA actions instead of its English action, (2) SA was the natural forum, (3) England had no connection with the cause of action and (4) the joinder of Portnet would simply increase the risk of inconsistent decisions in different jurisdiction. However, Mr. Justice Colman dismissed Portnet's motion on grounds that Portnet was a necessary and proper third party on weighing diverse interests.[254]

As for the two sets of limitation actions filed by Ultisol and Caspian with the Admiralty Court, Bouygues issued its summons to stay the limitation actions followed with its separate summons to stay its English action against Caspian. However, Mr. Justice Rix, declining to stay the limitation actions, laid down a contingent limitation decree under neither admission nor determination of liability.[255] Bouygues' applications to lift the anti-suit injunction and to stay its action against Caspian were also dismissed.[256] The conditional limitation decree by Mr. Justice Rix created a new precedent in English limitation of liability practice and his rationale was not in principle erroneous but was not enough. First, upon tracing the former authorities on this subject, he correctly concluded that "there is no authority which survives with unbroken force today to require an admission or determination

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252 *Bouygues v. Caspian (No. 2)* [1997] 2 L1.R. 485, 490 ("[The Himalaya clause] does not confer rights and obligations on non-contracting parties; that is not purpose [and] [t]he jurisdiction clause does confer such rights and obligations and falls outside the ambit of the Himalaya clause.") (citing Lord Goff's holding in *The Mankutai* [1996] 2 L1.R. 1 (PC 1996)).

253 Id. at 491.

254 *Bouygues v. Caspian (No. 3)* [1997] 2 L1.R. 493 (Colman J).

255 *Caspian v. Bouygues (No.4)*[1997] 2 L1.R. at 531. As to the limitation jurisdiction he correctly held: "*The Volvox Hollandia* stands as a firm reminder, within the modern *Spiliada* era, that it is not for the liability claimant to choose the forum for limitation, but for the shipowner who seeks to limit. It is true that England is not the domiciliary forum for Caspian, as Holland was for the shipowner in that case. Nevertheless, it is entirely legitimate and appropriate forum, first because Caspian has itself been sued here by Bouygues, secondly because Bouygues has consented to be served here with Caspian's limitation proceedings, and thirdly because Caspian is entitled to take advantage of the limitation fund constituted by Ultisol, an advantage which it does not possess in South Africa." Id. at 530-31.

256 *Bouygues v. Caspian (No. 5)* [1997] 2 L1.R. 533 (Walker J).

of liability as a condition precedent to the commencement of a limitation action or the granting of a decree in that action."[257] Second, however, it was in error that he inferred that art. 1 (7) of the 1976 Convention allowing the invocation of limitation without an admission of liability could be regarded "as a pointer that there is nothing wrong in principle with the Court dealing with and thus pronouncing on limitation at a time when liability is still in issue." (Id. at 520). Art. 1 (7) provides only for the right to invoke limitation without an admission of liability but does not further refer to the procedures of the limitation court which is left to the national law (art. 14).

Under the limitation procedures of the Continental laws (German, French, Japanese, etc.), an application for the commencement of limitation procedure may be filed *ex parte* by the owner or other liable party with the competent court with supporting documents attached to prove a *prima facie* case to obtain a ruling or decree of the commencement of limitation procedure by showing, *inter alia*, that the aggregate claim amount may probably exceed the limits of liability although any express admission of liability is not required nor is the application regarded as an admission of liability. The U.S. limitation procedure rules more clearly allow a complaint for "exoneration from as well as limitation of liability." (FRCP Supp. R.F.(2)). By contrast, in English limitation procedure, the hearing of the summons should proceed before a limitation decree and only when the limitation appears not to be disputed, shall the court make a limitation decree (R.S.C. O.75, r.38). Nevertheless, upon the court's review of the affidavit submitted by the plaintiff, it must be a *prima facie* case that the aggregate claim amount may probably exceed the limits of liability even if he does not admit his liability. This basic requirement seems to be the same between the Continental and English systems. Thus, only when it is proved by the plaintiff that the aggregate claim amount may probably exceed the limits of liability may the court issue a conditional limitation decree even before the liability is either admitted or determined.

### (4) Between Convention and Non-Convention States

Since there is no principle governing the rules and practice of limitation jurisdiction between non-Convention States or between Convention and non-Convention States, the choice of limitation forum depends on each national law and forum shopping of the parties

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[257] *Caspian v. Bouygues (No. 4)* [1997] 2 L1.R. at 519, aff'd, [1998] LMLN 491 (CA 1998).

concerned. It is not the purpose of this thesis to list and compare the limitation jurisdiction aspects between those nations in detail and therefore exemplifications here are restricted to those between the United States and other countries because the U.S. as one of the outsiders of Limitation Convention regimes is not only greatly influencing world shipping and trade markets but also uniquely maintaining judicial practice giving rise to forum shopping of foreign claimants.

In the U.S., there is neither statute nor established judicial doctrine on how to deal with any limitation jurisdiction conflicts between the U.S. federal courts and foreign courts. A review of the case law reveals the diverse practice based upon the wide discretion vested in the federal courts. A few representative cases are summarized hereunder.

*The Western Farmer*[258] involved a limitation jurisdiction conflict between the English limitation court and the U.S. liability court. The trial court (SDNY) dismissed the German plaintiff's cargo action because "the foreign court and the foreign limitation proceedings merit recognition where international trade and a collision on the high seas are involved."[259] However, the Second Circuit reversed on the ground that the English law adopting the proportional fault rule in collision liabilities and the monetary limitation regime was not "essentially more equitable than ours."[260]

In *The Steelton,*[261] where the U.S. ship collided with the Canadian lift bridge No. 12 spanning the Welland Canal, destructing the bridge and obstructing the canal, the owners filed a limitation action with the Federal Court of Canada and constituted the limitation fund (Can.$680,733.56 equivalent to US$691,761.44)[262] and then a second limitation action with N.D. Ohio court by constituting the second limitation fund (US$850,000) to abide by the six-month time limit after many actions against the owners were brought in the court. Nevertheless, the U.S. court proceeded with the limitation action by disregarding the first

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258 *Kloeckner v. A/S Hakedal (The Western Farmer),* 1954 AMC 643 (2 Cir.), cert. den., 348 U.S. 801 (1954). A collision occurred on the high seas in the English Channel between the Norwegian ship *Bjorgholm* and the U.S. ship *Western Farmer*, whereby the latter was cut in two with her German libellant's cargo of coal totally lost. The collision liability actions were pending between both the owners in the English court together with the Norwegian owners' limitation action. However, the German libellant brought the instant cargo action in New York.

259 Id. at 645.

260 Id. at 647. Assent: Note, *Admiralty - Jurisdiction,* 68 Harv. L. Rev. 706 (1955).

261 *In re Beth. Steel Corp.(The Steelton)*, 1977 AMC 2203 (N.D. Ohio 1976), aff'd, 1980 AMC 2122 (6 Cir. 1980), cert. den., 450 U.S. 921 (1981).

262 *Beth. Steel Corp. v. St. Lawrence Seaway Authority* [1978] 1 F.C. 464 (Can. F. Ct. 1977).

seized limitation action pending in a neighbouring country on the grounds that the limitation law of both countries were procedural to be applied by the *lex fori*.

*The Artic Explorer*[263] was another example of *lis alibi pendens* with the limitation action already brought in the Federal Court of Canada by the owners and the T/C charterers with respect to the Canadian ship's sinking within Canadian territorial waters off the coast of Newfoundland with a result of losses of 13 lives. The U.S. limitation action was filed within the six-month time limit because 20 different suits in various federal and state courts of Texas against her T/C charterers were expected.[264] However, the U.S. court granted the limitation petitioner's *forum non conveniens* dismissal on grounds that the T/C charterers' "right to limit liability" was substantive to be applied by the Canadian law[265] and that based upon the relevant private and public factors, Canada was "a more appropriate forum for the instant litigation."[266]

*The Nordic Regent*[267] was a case of potential conflicts of limitation jurisdiction between the U.S. and foreign courts. The Liberian ship owned by Norcross Shipping Co. collided with a Trinidad pier, West Indies, owned by the plaintiffs, Alcoa, causing damage of some $8,000,000. A New York company, Alcoa commenced the instant action *in rem/in personam* in New York because under the law of Trinidad its claim would be limited to $570,000 only. Affirming the trial court's conditional dismissal of the action on grounds of *forum non conveniens*, the Second Circuit held: "It is abundantly clear, however, that the prospect of a lesser recovery does not justify refusing to dismiss on the grounds of *forum non conveniens.*"[268] This ruling is to be contrasted with the English court authorities cited supra which held that the prospect of higher limitation was a legitimate judicial advantage; only recently, however, on the occasion of the Court of Appeal's reversing decision in *The Herceg Novi* (CA 1998) is the English case law on this point approaching to that of the U.S. courts.

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263 *In re Geophysical Service, Inc. (The Arctic Explorer)*, 1984 AMC 1413 (S.D. Tex. 1984).

264 Id. at 2417.

265 Id. at 2428. Canada Shipping Act 1970, R.S.C. 1970, c. S-9, s. 649(1)(a) provides: "(1) Sections 647 and 648 extend and apply to (a) the charterer of a ship;"

266 Id. at 2430-34 (citing *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970)). The U.S. limitation proceeding and the doctrine of *forum non conveniens* were very usefully invoked in this case for the limitation petitioners in that they could realise the concourse of the multiple actions to send them into the Canadian limitation fund.

267 *Alcoa S.S. Co. v. M/V Nordic Regent*, 1978 AMC 365 (SDNY), aff'd, 1980 AMC 309 (2 Cir. 1980), cert. den., 449 U.S. 890 (1980).

268 1980 AMC at 327-28.

## B. Conflicts of Special Limitation Jurisdiction

Although reported cases are not found, conflicts of limitation jurisdiction may occur between the 1969 or 1992 CLC States or between a 1969 CLC State and a 1992 CLC State. Further, when the 1996 HNS Convention comes into force, more complicated conflicts of limitation jurisdiction will be controversial. Here some hypothetical cases are exemplified.

(1) In cases where oil pollution damage is caused by one incident across two or more Contracting States of the 1969 or 1992 CLC, there will be no problem in choice of limitation forum by the owner liable because he may choose one of the courts of such States persuant to art. V(3) each if the damage is likely to exceed the limit of liability. If the owner is not a citizen of, or nor does have his principal business in, one of the oil polluted States, the claimants would procure the jurisdiction either by arrest of the ship or by obtaining a letter of undertaking including the jurisdiction.

(2) Where the pollution damage is caused across a 1969 CLC State and a 1992 CLC State (including EEZ), the owner will be entitled to constitute a limitation fund only when and where the claim amount for the pollution damage caused within one of the States exceeds the limit of liability pursuant to the CLC which that State adopted. Any claim arising within one of the States may not be filed with the court of the other oil polluted State even if the incident occurred in the latter State.[269]

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[269] Although this interpretation may bring an unreasonable discrimination between the claimants of the 1969 CLC and those of the neighbouring 1992 CLC State within which the incident occurred, it is inevitable on the following grounds. Art. IX of 1969/1992 CLC each provides: "Where an incident has caused pollution damage in the territory . . . of one or more Contracting States . . . , actions for compensation may only be brought in the Courts of any such Contracting State or States." The words "any such Contracting State or States" mean the very State or States within which the pollution damage occurred. The fore part of this provision casts some doubt whether the incident or the resultant pollution damage should have occurred in the territory. However, each CLC "shall apply exclusively to pollution damage caused on [or in] the territory" (art. II each) and "pollution damage" is defined as "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, *wherever such escape or discharge may occur.*" (art. I(6) each). Thus, the CLCs take the position that the criterion of application thereof should be based upon the place where the pollution damage occurred, *wherever the incident causing the damage may occur.*
Consequently, even if the incident (escape or discharge of oil from the ship) should occur in the territory of the 1992 CLC State, causing pollution damage in the territory of the neighbouring 1969 CLC State, the claimants of the latter State could not file their actions with the court of the former State. This result is clearly unreasonable, but to correct it the CLCs must be appropriately amended.

(3) Any claim for the costs of preventive measures must follow the jurisdiction over the pollution damage for the prevention or minimization of which such preventive measures were taken.[270]

(4) Where oil pollution damage occurs in the territory of a non-Contracting state or on the high seas or preventive measures are taken to prevent or minimize such damage, the 1969 or 1992 CLC does not apply, nor does the 1976 LLMC apply unless the national law of that state regulates to cover such damage,[271] although the 1924 or 1957 Convention may apply. The 1992 HNS Convention also takes the same position as does the 1976 LLMC.[272] In consequence, the jurisdiction over such pollution damage is not governed by the Conventions but may be conflicted between the laws of that state and those of the state in which actions are brought. The claimants would pursue forum shopping to a higher limitation state either by arrest of the ship in such a state or by bringing actions in the state where the owner has his principal place of business. The courts of those states may not decline jurisdiction because the jurisdiction provisions of 1969 or 1992 CLC do not apply.

(5) Where oil pollution is spread across a 1969 or 1992 CLC State and a non-Convention state, the claimants of the latter state will pursue forum shopping. They are neither bound nor entitled to participate in a limitation proceeding in the 1969 or 1992 CLC State. If the two neighbouring states are Parties to the 1976 LLMC, another limitation fund may be required in one of the two States provided that the national laws regulate to apply the 1976 LLMC to such pollution damage.

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270 E.g., where preventive measures were taken in the territory of the 1969 CLC State to prevent or minimize oil spread thereon from that of the neighbouring 1992 CLC State, the costs thereof should belong to the claimants of the former State except where such preventive measures also contributed to prevent or minimize the pollution damage to be caused or enlarged in the territory of the latter State.

271 Accord: Selvig, *The 1976 Limitation Convention and Oil Pollution Damage*, [1979] LMCLQ 21. Art. 3(b) of 1976 LLMC excludes from its application the "claims for oil pollution damage *within the meaning of [1969 CLC, as amended]*." However, the 1969 or 1992 CLC confines the geographical scope of its application only to the territory (and EEZ in cases of 1992 CLC) of a Contracting State apart from its definition of oil pollution damage (arts. II & I(6) each). Examples of modifications in national laws to cover by the 1976 LLMC such oil pollution damage as inapplicable by the 1969 or 1992 CLC: M.S.A.1979, Sch. 4, Pt. II, para. 4(1), replaced, M.S.A. 1995, Sch. 7, Pt. II., para. 4(2); Korean Commercial Code, art. 748-3.

272 Art. 4(3)(a) of 1996 HNS Convention reads:
"This Convention shall not apply:
(a) to pollution damage as defined in [the 1969 CLC, as amended], whether or not compensation is payable in respect of it under that Convention;"

(6) Where HNS damage is caused in the territory (including EEZ) of one or more States Parties of the 1996 HNS Convention, any liability or limitation action may be filed only with the courts of such States Parties (art. 38(1) & 9(3)). As these provisions are very similarly modelled on the equivalents of the 1992 CLC, any jurisdiction conflicts between the courts of two or more HNS Convention States will be handled in the same way as in the cases of jurisdiction conflicts between two or more 1992 CLC States.

(7) Where any CLC oil pollution damage and HNS damage[273] are caused concurrently by one incident in the territory of one State Party to both the 1969 or 1992 CLC and the HNS Convention, only the court of that State will have the exclusive jurisdiction over any liability or limitation action with two separate sets of limitation funds constituted if applicable (1992 CLC, art. V(3); 1996 HNS Convention, art. 9(3)). However, where the two groups of damage occur concurrently by one incident across two 1969 or 1992 CLC States, or one 1969 or 1992 CLC State and other non-Contracting state, the HNS claimants or the owner may bring their liability or limitation proceedings only in the court of the HNS Convention State where the ship is registered or whose flag the ship is entitled to fly or where the owner's principal place of business is established (art. 38(2)). The limitation exclusive jurisdiction over the 1969 or 1992 CLC claims, CLC-inapplicable oil pollution claims and HNS claims will be separated to different courts.[274] The CLC-inapplicable oil pollution claimants will not necessarily follow the HNS Convention jurisdiction because they may not possibly be benefited by higher limitation than that of 1996 LLMC if available also in other States. Even where the separation of 1969 or 1992 CLC pollution damage and HNS damage is not reasonably possible, all such damage may not be deemed to be HNS damage (art. 1(6), and sub-para. proviso),[275] but may only be treated either as 1969 or 1992 CLC pollution damage if occurred in the territory of a CLC State, or be applied by the national law of a non-CLC State if such damage occurred in the territory of this state, or by that of the HNS

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273 "HNS damage" used here means any HNS damage to be covered by the HNS Convention.

274 However, as it is prospected that any HNS Convention State will also be a 1992 CLC State, the jurisdiction over the HNS and CLC damage caused in the territory of that State will be the same: the court of that State.

275 Art. 1(6), 2nd sub-para., of the HNS Convention provides: "Where it is not reasonably possible to separate damage caused by [HNS] from that caused by other factors, all such damage shall be deemed to be caused by [HNS] except if, and to the extent that, the damage caused by other factors is damage of a type referred to in [art. 4(3)]." Art. 4(3) provides for the exclusion of any CLC-defined damage and radioactive damage from application. Thus, the exception provision above poses a question because the claimants whose damage was inseparably mixed with HNS and CLC oil pollution damage will be unreasonably excluded from the benefit of higher limitation of the HNS Convention unless the 1992 CLC is amended to increase the limits of liability to the extent of those of the HNS Convention.

Convention State in which the ship was registered or whose flag the ship was entitled to fly or in which the owner's principal place of business exists.

### C. Conflicts Between General & Special Jurisdiction

If an incident has caused multiple groups of claims applicable to general and special Limitation Conventions, a proliferation of limitation funds in several jurisdictions may be inevitable.

(1) Where claims for the 1969 or 1992 CLC pollution damage or for the 1996 HNS Convention damage and other general claims concurrently occur by one incident in the territory of one or more States Parties of such a Convention, the liability or limitation forum for the general claims may be separated from the exclusive jurisdiction over the special Convention claims. However, any inseparably mixed damage caused by HNS and other factors not being CLC-defined oil pollution should be deemed to be HNS damage, wherefore most of HNS-related claimants may prefer the HNS Convention jurisdiction and HNS limitation court if applicable to any general limitation court.[276] The courts will meet great difficulties and complexities to distinguish between the HNS claims and the other claims.

(2) Where claims for the 1969 or 1992 CLC-defined pollution damage and general claims concurrently occurred by one incident outside the territory of such a CLC State all claims would be subject to a general Limitation Convention or national limitation law as the case may be. Thus, according to some national law (e.g., the U.S. law), multiple limitation funds may be compelled.

(3) Where claims to be covered by the HNS Convention ("HNS claims")[277] and general claims concurrently occur by one incident exclusively outside the territory of any HNS Convention State, jurisdiction may be conflicted between the court of a 1996 LLMC State or non-Convention State and the court of the HNS Convention State having the exclusive jurisdiction by art. 38(2). However, the claimants for mixed damage caused by

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276 Art. 1(6), 2nd sub-para., of the HNS Convention applies to all such mixed damage wherever occurred.

277 Any claim for damage caused outside the territory of an HNS Convention State by HNS carried on board a ship other than a ship registered in a State Party or entitled to fly such a State's flag is not "HNS claim" (art. 3(c)).

HNS and other factors not being CLC-defined oil pollution will choose the HNS Convention forum.[278]

## 7. Conflicts of Limitation Jurisdiction in Federal Countries

As opposed to other federal countries such as Canada and Australia,[279] the limitation jurisdiction conflicts between the federal and state courts of the U.S. have been for long controversial and are not established. Although the jurisdiction over limitation actions are statutorily vested in the federal courts, the state courts' jurisdiction over limitation defence in liability actions is not clearly regulated by statutes and consistently confused not only between the courts but also between the parties concerned. Such confusion would arise mostly in relation to the issuance or lift of injunctions by the federal limitation courts. As contrasted with international conflicts of limitation jurisdiction between Contracting or non-Contracting States of Limitation Conventions, the limitation jurisdiction conflicts between the U.S. courts are generally related to limitation defence in the state courts before which the claimants particularly for personal claims whether domestic or foreign are always pursing forum shopping. Such conflicts and struggle for limitation jurisdiction for the purposes of breaking limitation in the huge United States as an outsider of international Limitation Conventions are adversely affecting the uniformity of international Limitation Conventions. Then, what is the background of such unique aspects of limitation jurisdiction in the U.S.? A brief research thereinto will help to contrast with international conflicts of limitation jurisdiction.

### A. 1789 Judiciary Act

The United States has maintained an equivocal allocation system of subject-matter jurisdiction over Admiralty and maritime cases. The basic ground of granting admiralty

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278 The question is how to distinguish between the mixed damage and other (general) damage. HNS damage must be "caused by those substances" (art. 1(6)(a)-(b)), which means "caused by the hazardous or noxious nature of the substances" (art. 1(6), 3rd sub-para.). However, this definition is not clear as to whether it requires direct and physical damage by HNS or includes indirect personal ("on board or outside the ship") or property ("outside the ship") damage arising out of an incident caused by the nature of HNS. In view of "the dangers posed by the world-wide carriage by sea of [HNS]" (Preamble of the Convention), the latter interpretation must be adopted.

279 In Canada jurisdiction over limitation proceedings is vested in the Federal Court (Admiralty Ct.), Canada Shipping Act, R.S.C. 1985, c. S-9, s. 576, whereas in Australia it is conferred on the Federal Court and the Supreme Courts of a Territory and a State, Admiralty Act 1988, ss. 9(2) & 25. However, limitation defence without constitution of a limitation fund is not restricted.

jurisdiction was founded by the Art. III, sec. 2, of the U.S. Constitution providing that "[t]he judicial Power shall extend . . . to all cases of admiralty and maritime Jurisdiction." Since the U.S. Constitution is the basic law, *inter alia*, of the power structure of the nation, the reference to the "judicial Power" means the federal judicial Power, i.e., the subject-matter jurisdiction of the federal courts.[280] The purpose of the Constitutional direct grant of admiralty jurisdiction to the Federal judiciary is explained as "in terms of the impact on foreigners and the necessity of a uniform system of law[281] or "a uniform Federal system, as essential to maritime commerce."[282] Further the U.S. Constitution delegates Congress to ordain and establish the inferior federal courts.[283]

To implement the Constitutional grant, Congress enacted the Judiciary Act of 1789,[284] sec. 9 of which provided that "the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; . . . "[285] This provision is very delicate and ambiguous allocation of admiralty jurisdiction between the federal courts and the state courts. Many discussions and critiques have been developed on what cases are exclusively vested in the federal courts or concurrently given subject-matter jurisdiction to the state courts.[286] The majority opinion in the interpretation of the "saving clause" of the above-mentioned provision is that the admiralty and maritime jurisdiction of all actions *in personam* is concurrently exercisable either by federal district courts in admiralty or at law side, or by state courts so far as such admiralty cases have been admitted as common law remedies, and that other admiralty (monetary) claims which are not known under common law, such as an *in rem* action or a limitation action, are exclusively

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280 1 Schoenbaum at 55.

281 Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Calif. L. Rev. 661, 670 (1963).

282 Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 Cornell L.Q. 460, 469 (1925).

283 U.S. Const. Arts. III, s. 1 & I, s. 8 (9).

284 Act of Sept. 24, 1789, c. 20, 1 Stat. 76.

285 In the 1948/1949 revisions of the Judicial Code, this provision was amended as follows (28 U.S.C. s. 1333):
"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."
As to the background of revision, see Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216 (1948).

286 Gilmore & Black at 20; Black, *Admiralty Jurisdiction : Critique and Suggestions*, 50 Colum. L. Rev. 259 (1950). Black states: "Now this is very strange way of defining an "exclusive" jurisdiction. Exclusiveness seems to be given with one hand, and taken away, in some yet to be defined part, with the other. The very strangeness of the locution may have done something to camouflage the contours, which we are now to explore, of the even stranger effect." Id. at 263.

cognisable only in federal courts in admiralty.[287] In *Leon v. Galceran*[288] in relation to mariners' wage claims, the Supreme Court held that common law remedies are not competent to enforce a maritime lien by a proceeding *in rem* and consequently the jurisdiction in such cases is exclusive in the district courts, but by waiving his lien the injured party may resort to his common law remedy in the state court.[289]

### B. Jurisdiction Over Limitation Actions

The shipowner's claim for limitation of liability against maritime claims also has the nature of maritime disputes in that it is nothing but a reverse side of the same coin of admiralty liability claims, but the limitation of liability system was a product of a federal statute as a federal policy of protecting the national merchant shipping. In consequence, the claim for limitation of liability against maritime claims may not be saved by the "saving clause". Congress made it clear by enacting that "[t]he vessel owner . . . may petition *a district court of the United States* of competent jurisdiction for limitation of liability . . . " (Emphasis added).[290] However, the owner may invoke limitation of liability as a defence without commencing an "offensive" limitation action. There is no express provision on subject-matter jurisdiction over such limitation defence, but no doubt is raised on the federal court's jurisdiction to adjudicate the merits of limitation defence, although there is an opposing opinion, as will be seen *infra*, that state courts do have jurisdiction to decide the defendant's affirmative defence of limitation of liability raised without a limitation action brought in a federal district court.

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287 Black, id. at 266-71; Gilmore & Black at 37; 1 Schoenbaum at 61-61 (enumerating exclusive federal admiralty jurisdiction cases : actions *in rem*, salvage, prize, general average, as well as, by statutes, suits arising under the Limitation of Liability Act, the Ship Mortgage Act, 46 U.S.C. s. 911 *et seq.*, the Suits in Admiralty Act, id. s. 471 *et seq.*, the Public Vessels Act, id. s. 781 *et seq.*, and the Foreign Sovereign Immunities Act, 28 U.S.C. s. 1330).

288 78 U.S. (11 Wall.) 185 (1871).

289 Id. at 191-192. See also the following cases holding the federal district courts' exclusive jurisdiction over *in rem* actions: *The Ad. Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867) (collision); *The Moses Taylor v. Hammons*, 71 U.S. (4 Wall.) 411 (1867) (passenger's *in rem* action); *The Belfast*, 74 U.S. (7 Wall.) 624 (1869) (*in rem* action for cargo claims). As to concurrent jurisdiction : *American S.B. Co. v. Chase*, 83 U.S. (16. Wall.) 522 (1873) (state court was held to have maritime jurisdiction over death claims *in personam*); *Panama R.R. Co. v. Vasquez*, 271 U.S. 557 (1926) (state court was held to have concurrent maritime jurisdiction in a suit for personal injury claims); *Pierpoint v. Barnes*, 892 F. Supp. 60 (D. Conn. 1995) (holding that state courts have concurrent jurisdiction over DOHSA claims).

290 46 U.S.C.A. s. 185. Rule (F) (1) of the Supplemental Rules for Certain Admiralty and Maritime Claims, FRCP, provides that "any vessel owner may file a complaint in *the appropriate district court* . . ." (emphasis added), which derived from the former Admiralty Rules. r. 54.

## C. Single Claimant Cases

### (1) State Courts' Decisions

In *Simpson v. Story*,[291] where the owner of a fishing vessel raised a limitation defence against the plaintiff's claims for repairs and supplies furnished in foreign ports, it was held that Stat. U.S. 1884, c. 121, s. 18[292] could not apply to fishing vessels on the grounds that Congress was not dealing with fishing vessels but with vessels engaged in foreign commerce.[293] This decision was clearly exercising jurisdiction by a state court over a question whether the Limitation of Liability Act was applicable or not. In *The Golden Touch*,[294] it was held that the state court had jurisdiction to determine the issue of limitation of liability which the third party defendant shipowner asserted by way of answer. In this case, Light, J. cited a *dictum* in *Larsen v. Northland Transp. Co.* holding that "[w]hile in certain circumstances the shipowner may ask limitation in the State court, he is not compelled so to do."[295] However, the Supreme Court in *Larsen* case did not hold further under what circumstances the State court also could adjudicate the issue of limitation of liability. In *Fishboats, Inc. v. Welzbacher*,[296] where the owners of a fishing vessel raised an alternative limitation of liability defence in a seaman's injury action, the Supreme Court of Miss. held that the trial court did not err in denying the limitation of liability defence on the ground that the owners had general knowledge of the unseaworthy condition of the vessel. Most recently, in *Mapco Petro., Inc. v. Memphis Barge Line*,[297] the Supreme Court of Tenn., modifying the lower court's decision, held that "[b]ased upon the foregoing discussion, we hold that a state court is empowered to decide the applicability and merits of a s. 183 limitation defence when it is raised by way of answer and there is no companion s. 185 proceeding in federal court."

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291 14 N.E. 641 (S.J. Ct. Mass. 1888).

292 Currently codified at 46 U.S.C.A. s. 189 ("any and all debts and liabilities").

293 Id. at 642.

294 1967 AMC 353 (R.I.S. Ct. 1966), cert. den., 226 A. 2d 505 (R.I. 1967).

295 *Larsen v. Northland Transp. Co.*, 292 U.S. 20, 24 (1934).

296 413 So. 2d 710, 719 (S. Ct. Miss. 1982).

297 1993 AMC 2113, 2120-21, 849 S.W. 2d 312 (S.C. Tenn. 1993) (citing *Loughin v. McCaulley*, 40 A. 1020 (Pa. 1898)), cert. den., 114 S. Ct. 64 (1993), Noted, Volk, *Limitation of Liability and the Tennessee Supreme Court*, 27 J. Mar. L. & Com. 305 (1996). See also *De Pinto v. O'Donnell Transp. Co.*, 55 N.E. 2d 855 (C.A.N.Y. 1944) (rev'g the lower court's judgment denying the owner's motion to amend the answer in order to raise limitation of liability).

To the contrary, however, in *Cooper v. Allison,*[298] the Supreme Court of Oregon reversed the lower state court's decision, holding that a state court had no jurisdiction to try the issues raised by the defence of limitation.

### (2) Federal Courts' Decisions

In federal district courts the disputes began to be raised on whether it was necessary to allow a limitation proceeding or an injunction enjoining state court actions when there was only a single claimant. In *The Rosa,*[299] where after a passenger death suit had been brought in a state court, a petition for limitation of liability was filed with the federal district court, the petition was dismissed on the grounds that in a single claimant case all that was needed "in either court" was an *answer* setting up a limitation defence. In *The Lotta,*[300] however, the holding was developed into a distinguishable situation. After a liability action for death claims had been brought in a state court against the owner, he filed a limitation petition with the federal district court and obtained an order of injunction restraining the prosecution of the suit in the state court. When the claimant moved to dissolve the injunction on grounds of a single claimant case, the court, granting the motion, held that the owner could by answer in the state court set up as a defence a limitation of liability, provided however that "[t]he petition, however, will not be dismissed; for if it should hereafter appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognisance of such a question."[301] This holding was followed by the following Supreme Court case.

In *Langnes v. Green,*[302] where after a seaman of a fishing vessel had commenced a personal injury action in a state court, the owner petitioned the limitation of liability in the federal district court, obtaining an injunction, the Supreme Court (Mr. Justice Sutherland), reversing the lower courts' judgments, held that in case of only a single claimant the owner's limitation of liability might be obtained by proper pleading in a state court and that the injunction should have been dissolved on the condition of retaining, "as a matter of precaution", the limitation proceedings in preparation for the instance where the claimant

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298 412 P. 2d 356 (Or. 1966).
299 53 F. 132, 134 (SDNY 1892).
300 150 F. 219 (D.S.C. 1907).
301 Id. at 223.
302 282 U.S. 531, 540, 543 (1931) (citing *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 260 (1922)).

would contest limitation of liability in the state court. In other words, the Supreme Court made it clear that the injunction should have been dissolved on the assumption that if the right of petitioner to a limited liability be brought into question in the state court, only the federal district court should have exclusive cognisance of such a question.[303] This *Langnes* "doctrine of abstention" is still the law with some refinements.[304] After the injunction was dissolved, however, the claimant again contested the seaworthiness of the vessel that could affect the limitation of liability in the state court, whereby the federal court did, upon the owner's application, issue a conditional injunction again.[305] Against this disposition of the federal district court, the claimant brought a motion for leave to file a petition for a writ of mandamus, which was however denied, but it was reversed by the Ninth Circuit. The Supreme Court, reversing again, held: "The matter was properly brought before the federal court, and that court held that the question of the owner's right to limited liability having been raised, the cause became cognizable only in admiralty, and that its further prosecution in the state court should be enjoined. In this the district court was right, and the motion for leave to file the petition for writ of mandamus must be denied."[306] Thus, while the rulings of the two *Green* cases of the Supreme Court are not unambiguously predicated, the whole context in the two decisions can be summarised as follows:

(a) Where a single claimant's action in a state court and the owner's limitation action in a federal district court are properly pending respectively, the federal court has exclusive jurisdiction so far as the issue of limitation of liability is concerned; provided that it is the latter courts' sound discretion to stay the limitation action and to dissolve the injunction on the assumption (or condition) that the claimant may not contest the limitation of liability in the state court.[307]

(b) Where a liability action by a single or multiple claimants is pending in a state court and no limitation action has been brought in a federal court, the Supreme Court decisions do not state directly whether the state court may adjudicate the issue of limitation of liability when it is contested by the claimant. The dictum in *Langnes* held that the Court

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303 Id. at 542-543.

304 *In re McCarthy Bros. Co.*, 1996 AMC 2153, 2158-59, 83 F. 3d 827 (7 Cir. 1996).

305 *The Aloa (In re Langnes)*, 56 F. 2d 647 (W.D. Wash. 1932).

306 *Ex Parte Green*, 286 U.S. 437, 440 (1932).

307 The failure of the district court to dissolve the injunction under such situation would constitute "an abuse of discretion subject to the correcting power of the appellate court below and of this court." *Langnes*, 282 U.S. at 542.

accepted the view that "in a state court, when there is only one possible claimant and one owner, the advantage of this section [s. 4283, U.S.C. title 46, s. 183] may be obtained by proper pleading."[308] However, this dictum was refined and modified in the same judgment to be conditional that the limitation issue is not contested. Even if a limitation petition has not been brought in a federal district court, it is to be interpreted that the Supreme Court purported through the two *Green* precedents that whenever the limitation of liability is contested in a liability action in a state court, that issue is cognizable only in a federal district court because it held that "the shipowner was free to invoke the jurisdiction of the federal district court"[309] under the then circumstances where there was no six-month time limit before the 1936 Amendment Act. Thus, it can be concluded that whenever the limitation of liability is contested in a state court action, it has no jurisdiction to adjudicate the issue of limitation of liability. At the same time, however, in cases of a single claimant against a shipowner *Langnes* mandates the federal district court to allow the state court action to be continued with the reservation of the limitation issue to be decided by the federal court if contested, whereby the two *Green* decisions reconciled harmoniously the two conflicting statutes of the Judiciary Act 1789, s. 9, as amended (28 U.S.C. s. 1333 ensuring the "saving to suitors" clause), and the Limitation of Liability Act 1851, s. 4, as amended (46 U.S.C.A. s. 185). This purport of the Supreme Court has been refined further to develop "an imaginative body of jurisprudence attempting to reconcile and to preserve these two conflicting rights"[310] as to what conditions are required for the district court to dissolve the injunction.

### D. Stipulations to Lift Injunction

Supp. Rule F (3) provides for the limitation court's mandatory injunction enjoining any further prosecution of any other action against the owner or his property when his limitation action has been met with the requirements of the "subdivision (1) of this rule." Then the court must issue a monition to all potential claimants to file their claims with the court within a certain period of time.[311] This procedure is for the purpose of realising a concursus being the "the heart" of the limitation proceeding.[312] Since the owner may or

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308 Id. at 540.
309 Id. at 541.
310 *In re Luhr Bros. Inc.*, 1992 AMC 594, 597 (W.D. La. 1991).
311 Supp. Rule F (4); Rubin, *Complex Limitation : The Court's View*, 53 Tul. L. Rev. 1395, 1400 (1979); Staring, supra n. 200, at 1155.
312 *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 154 (1957).

usually do demand exoneration from or limitation of liability,[313] personal injury claimants would prefer state courts' jurisdiction allowing jury trials to federal district courts in admiralty without a jury.[314] In order to continue the prosecution of liability actions in the state court they would in practice file a motion with the limitation court to dissolve or lift the injunction or restraining order to stay the state courts actions.

### (1) Stipulations by Single Claimant

Even in the cases of a single claimant, the federal district court has jurisdiction to entertain the owner's limitation action.[315] Based upon the rules of *Langnes v. Green*, however, the lower federal courts have further refined the conditions to lift the injunctions issued in the limitation proceedings through their strict screening of the stipulations submitted by the claimants depriving the courts of the limitation jurisdiction.[316] In this connection, sometimes it was not easy to determine whether the case involves only a single claimant or multiple claimants. Where a claimant sued several parties involved in a distinct incident and one of them brought a limitation action, it was held not to be a single claimant case.[317] In cases of indemnity or contribution claims being involved, it is split among the Circuits whether the case is a single claimant case or not. In *In re S & E Shipping Co.*,[318] where a

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313 Supp. Rule F (2); *Lenzi, Limitation. Proc.*, 1991 AMC 1531 (E.D. Pa. 1991), aff'd w/o, 958 F. 2d 363 (3 Cir. 1992).

314 Staring, supra n. 200, at 1172; Volk, *Limitation of Liability : Jury Trial*, 15 J. Mar. L. & Com. 127 (1984) criticising *Red Star Towing & Transp. Co. v. The Ming Giant*, 552 F. Supp. 367 (SDNY 1982) (allowing jury trial in limitation action).

315 *The Hoffmans*, 171 F. 455 (SDNY 1909); *White v. Island Transp. Co.*, 233 U.S. 346 (1914); *Strong v. Holmes*, 238 F. 554 (9 Cir. 1916).

316 *The Helen L.* 109 F. 2d 884 (9 Cir. 1940); *In re Red Star Barge Line*, 160 F. 2d 436 (2 Cir.), cert. den., 331 U.S. 850 (1947)(conditioning waiver of *res judicata* relevant to issue of limited liability to be based on a state court's judgment); *Newton v. Shipman*, 718 F. 2d 959 (9 Cir. 1983) (claimant filed satisfied stipulations); *In re Midland Enter., Inc.*, 1990 AMC 1158 (6 Cir. 1989) (same).

317 *The M. Moran*, 107 F. 526 (EDNY 1901) (3 actions brought by a dredge owner against the tug, its owner and charterer); *In re Read*, 200 F. Supp. 504 (S.D. Fla. 1961) (claimant could sue owners in different jurisdictions); *In re Helena Marine Serv.*, 564 F. 2d 15 (8 Cir. 1977), cert. den., 435 U.S. 1006 (1978) (where indemnity claim is involved).

318 678 F. 2d 636, 645 (6 Cir. 1982) (Kennedy, J. dissenting) citing *Universal Towing Co. v. Barrale,* 595 F. 2d 414, 419 (8 Cir. 1979). In *S &E Shipping*, however, the court reversed the modification of the injunction by N.D. Ohio on the ground that the dock operator's claim for attorney fees and costs presented a multiple claims-inadequate fund situation which required a concursus. Meantime, the Sixth Circuit held that the supplemental stipulations by the claimants and the dock operator were improperly accepted by the district court after *S & E* filed its notice of appeal. Hence they were disregarded by the Sixth Circuit because they were in breach of Rule 10 (e) providing for Corrections or Modification of the Record. Id. at 641. However, this holding was in breach of the rule that an appeal in admiralty opened the case for a trial *de novo* in the circuit court. *Langnes,* 282, U.S. at 535-36 (citing *Irvine v. The Hesper*, 122 U.S. 256). The Sixth Circuit could have treated the supplemental stipulations as proper new evidences and did not have to reverse the case.

couple of seamen sued the shipowner, a dock owner and its operator as joint tortfeasors in the seaman's slip injury adjacent to the dock in a state court and the shipowner brought a limitation action, the Sixth Circuit held that the dock operator's independent claim of indemnity or contribution based upon the joint tort did not create a multiple claim-inadequate fund situation and that "[t]he injured party's claim and the third party's indemnity claim should be treated as a single claim for purposes of a limitation action." According to this opinion it follows that the indemnity claimant need not participate in the stipulations to lift the injunction of the limitation court. By contrast, in *W. E. Hedger Transp. Corp. v. Gallotta*,[319] where the injured claimant longshoreman joined the charterer of the barge in question as another defendant in the state court action after he obtained the lifting of injunction from the limitation court and the charterer filed a cross claim against the petitioner (barge owner) in the state court, the Second Circuit held that the charterer's cross claim for indemnity created a situation of multiple claimants, although the indemnity claim was not a limitable one against the owner because of its nature as a personal contractual claim.

Most recently, the Fifth Circuit also held, reversing the partial lifting of injunction by E.D. La., that "parties seeking indemnification and contribution from a shipowner must be considered claimants within the meaning of the Limitation Act" in *Odeco Oil & Gas Co. v. Bonnette ("Odeco II")*, where five Odeco employees injured working on a fixed platform in the Gulf of Mexico sued the jointfeasors in the state court but the defendants did not sign the amended stipulations by the injured only.[320]

Further, it has been repeatedly held that any attorney fees and costs potentially to be claimed against the owner by a claimant or a third party should be treated as a multiple claimant situation.[321] However, where there are only a single claimant and one owner, the

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[319] 1944 AMC 1462, 1465 (2 Cir. 1944). Accord: *In re AMF*, 1982 AMC 2881 (SDNY 1982) (holding that a personal injury claim and its indemnity claim arising from a collision against the petitioner of limitation action exposed a situation of multiple claimants); *In re Dammers & Vanderheide*, 836 F. 2d 750, 757 (2 Cir. 1988) (holding that "the reasonable prospect of claims for indemnification should constitute a multiple claim situation necessitating a concursus."); *In re Garvey Marine, Inc.*, 1996 AMC 1151, 1156 (N.D. I11. 1995) ("We find the reasoning of the Second Circuit more persuasive and hold that the potential indemnification claims are neither phantom nor derivative and that therefore a multiple claims potential remains.").

[320] *Odeco Oil & Gas Co. v. Bonnette ("Odeco II")*, 1996 AMC 913, 918 (5 Cir. 1996) citing *In re Port Arthur Towing Co.*, 42 F. 3d 312, 316 (5 Cir. 1995).

[321] *Helena Marine*, 564 F. 2d at 19 (8 Cir. 1977); *Universal Towing*, 595 F. 2d at 419 (8 Cir. 1979); *S & E Shipping*, 678 F. 2d at 645-46 (6 Cir. 1982); *Dammers*, 836 F. 2d at 756 (2 Cir. 1988) ("It is equally well settled that the potential for claims for attorneys' fees or costs against a shipowner by a claimant or a third party creates a multiple claimant situation necessitating a concursus."); *Gorman v. Cerasia*, 1994 AMC

claimants' attorney fees and costs may not be considered separate claims unless any assignment of a part of the claimant's claim was made in advance with written notice as a contingency fee. An insurer's subrogation claim is derivative of the assured's, creating no separate claim in limitation proceedings.[322] However, a spouse's claim for loss of consortium for the other spouse's personal claims is a separate claim.[323]

### (2) Stipulations by Multiple Claimants

In cases of a multiple-claimant situation, if the appropriate stipulations are filed with the limitation court the court may lift or modify the injunction.[324] The limitation court would not accept in principle a relative lifting of injunction when only a part of multiple claimants filed the stipulations.[325] However, the injunction may be modified by the discretion of the court to the extent that such lift does not frustrate the limitation jurisdiction.[326]

In order to obtain the extinguishment of the limitation jurisdiction vested in federal district courts the claimants must in practice file appropriate stipulations satisfied with the court. Multiple claimants need to transform their claims into a single claimant situation by way of stipulating the priority among the claimants,[327] or reduction or abandonment of certain

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583, 591 (3 Cir. 1993) ("However, all courts have recognized that a multiple claimant situation exists where a third party seeking indemnity or contribution also requests attorneys' fees and costs associated with its claim."). Discord: *In re Rep. of S. Korea*, 175 F. Supp. 732, 735 (D. Or. 1959).

322 *In re Humble Oil & Refining Co.*, 210 F. Supp. 638, 639-40 ( S.D. Tex. 1961), aff'd, 311 F. 2d 576 (5 Cir. 1962).

323 *Dammers*, 836 F. 2d at 756 (2 Cir. 1988) citing *Am. Export Lines v. Alvez*, 446 U.S. 274, 284-86 (1980) (recognizing it as an independent cause of action under general maritime law); *In re Texaco, Inc.*, 1991 AMC 2624, 2626 (E.D. La. 1991). Contra: *In re Hardy*, 1989 AMC 1862, 1863 (N.D. Fla. 1989) (holding that the spouse's claim for loss of consortium was derivative of her husband's Jones Act suit not creating a multiple-claim situation).

324 *In re Magnolia Marine Transport Co.*, 964 F. 2d 1571, 1576 (5 Cir. 1992) ("Multiple claimants may reduce their claims to the equivalent of a single claim by agreeing and stipulating as to the priority. . ."). See also *Kattleman v. Otis Engin'g Corp.*, 1990 AMC 578 (E.D. La. 1988); *Jefferson Barracks Marine Serv. v. Casey*, 763 F. 2d 1007 (8 Cir. 1985).

325 *In re Port Arthur Towing*, 42 F. 3d 312 (5 Cir. 1995) (motion to lift injunction by two seamen's stipulations without participation of the other shipowner in a collision was denied); *Persing Auto Rentals, Inc.*, v. Gaffney, 279 F. 2d 546 (5 Cir. 1960) (motion to lift injunction by two of the four claimants was denied).

326 *In re Mucho K., Inc.*, 1979 AMC 986 (5 Cir. 1978) (modifying injunction so that the claimant could preserve time limitation); *In re Am. Export Lines*, 1975 AMC 2651 (SDNY 1975) (same); *In re U.S. (The USNS Potomac),* 1964 AMC 1725 (EDNC 1964) (same); *The Tassia*, 1966 AMC 1856 (SDNY 1966) (injunction was modified to permit cargo claimant to attach the proceeds of hull insurance).

327 *Garvey Marine*, 1996 AMC at 1160 & 1157 (N.D. Ill. 1995) ("The multiplicity of claims will not bar dissolution of the stay order if the claimants, by their stipulations, transform the multiple claims into a single claim for purposes of the exception.") (citing *Dammers,* 1988 AMC at 1684; *S & E Shipping*, 678 F. 2d at 644; *In re Moran Transp. Corp.*, 185 F. 2d 386, 388 (2 Cir. 1950), cert. den., 340 U.S. 953

claims.[328] In addition to such transforming conditions, the stipulations of the claimants must include further appropriate conditions enough to extinguish the limitation jurisdiction. The following four-part test was suggested and accepted by some federal courts: A claimant must

(a) file his claim in the limitation proceeding;

(b) where a stipulation for value has been filed in lieu of the transfer of the ship to a trustee, concede the sufficiency in amount of the stipulation;

(c) consent to waive any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court; and

(d) concede petitioner shipowner's right to litigate all issues relating to limitation in the limitation proceedings.[329]

However, the condition (a) need not be included in the stipulations but it is a preliminary requirement to file the stipulations. The condition (b) is attacked not to be required as one of the conditions.[330] It was already held in *Langnes* that the value of the vessel and her freight could be decided in the state court,[331] wherefore the condition (b) need not be included in the stipulations. However, the lower courts retain the power to re-evaluate the value of the vessel and her freight that will affect the limitation of liability.[332] As to the condition (d) the claimant need not concede the owner's *right to limitation* but it is enough for him to concede the owner's right to seek limitation in the federal limitation court, which

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(1951)). See also *Universal Towing*, 595 F. 2d at 420 ("This is the identical situation encountered in the ordinary single claim case.").

328 *Anderson v. Nadon*, 360 F. 2d 53, 59 (9 Cir. 1966) (holding that if claimants abandon certain claims, an exercise of sound discretion will require the district court to dissolve the injunction).

329 *Moran Transp.*, 185 F. 2d at 387 (2 Cir. 1950); Gilmore & Black at 871; *Jefferson Barracks*, 763 F. 2d at 1010 (8 Cir. 1985); *Dammers*, 836 F. 2d at 758 (2 Cir. 1988); *In re Mister Wayne*, 1990 AMC 570, 575 (E.D. La. 1989); *in re Two "R" Drilling Co.*, 943 F. 2d 576, 577 (5 Cir. 1991); *Garvey Marine*, 1996 AMC at 1158 (N.D. I11. 1995).

330 *Dammers*, 836 F. 2d at 758 n. 7 (concurring that the condition (b) is not necessary, citing *Anderson v. Nadon*, 360 F. 2d at 58 n.8 (9 Cir. 1966)); *In re North Lubec Mfg & Canning Co.*, 640 F. Supp. 636, 640-41 & n.6 (D. Me. 1986); *Garvey Marine*, 1996 AMC at 1159 (same).

331 *Langnes v. Green*, 282 U.S. at 543-44 (1931).

332 *Luhr Bros.*, 1992 AMC at 600-601 (W.D. La. 1991) ("Because . . . the court may at any time reevaluate the sufficiency of the stipulation of value, it is nonsensical to insist that a Jones Act claimant concede the sufficiency of the stipulation in order to obtain a jury trial. . . . all issues relevant to limitation, including valuation, will be determined in this court sitting in admiralty.").

means that only the federal court has exclusive jurisdiction over limitation of liability.[333] If the claimant should concede even "the right to limit liability, the only remaining issue would be the amount of the limit on liability (the value of the ship and its freight)."[334]

In short, according to the majority opinion of the courts, the core of the claimants' stipulations is to concede the federal court's exclusive jurisdiction over the owner's all issues to limit liability and to waive any claim of *res judicata* of the state court's judgment relating to the limitation of liability.

### E. Comments

The above-mentioned trend of the U.S. federal courts as to limitation jurisdiction may be regarded as one of substantial steps towards a judicial defiance to Congress indifference to abolish or amend the Limitation of Liability Act.

First, the condition (d) of the four-part stipulations is in essence nothing but an unnecessary redundant admission of the statutory exclusive jurisdiction vested in the federal district courts over limitation actions. Is the owner's "right to litigate all issues relating to limitation in the limitation proceedings" conferred on him only when the claimant concedes it? The only court of exclusive jurisdiction over all issues relating to limitation is the federal district court in admiralty regardless of whether the claimant concedes it or not.[335]

Second, the claimant need not concede to waive any claim of *res judicata* of the state court judgment relevant to the issue of limited liability. As long as the owner has properly preserved his right of the limitation action, the state court has no jurisdiction to adjudicate any matter of limitation of liability, in breach of which the judgment is null and void to the extent of its lack of jurisdiction, thus having no *res judicata* relating to limitation of liability. Any enforcement of such *ultra vires* judgment can be barred by way of an injunction to be

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333 In *Two "R" Drilling*, despite the claimant's stipulations including the words reserving "the right to deny and contest in this Court" the limitation of liability, the Fifth Circuit affirmed the lift of injunction. 943 F. 2d at 577.

334 *North Lubec*, 1987 AMC at 1604 (D. Me. 1986).

335 2 Schoenbaum at 306 n. 4 ("The only court of competent jurisdiction is the district court in admiralty. . . The state courts accordingly do not have concurrent jurisdiction under the saving to suitors clause, 28 U.S.C. s. 1333.") (citing *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1872)). See also *Ex Parte Green*, 286 U.S. at 439-40 (1932) ("It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability. . . ").

issued by the limitation court. Thus, all the conditions of stipulations of claimants worked out and accepted by the federal courts are meaningless in the interpretation of the statutes concerned.

Third, the issue of limitation and those of liability are interrelated and difficult to be distinguished. For example, the issue of seaworthiness is related to both the owner's liability and limitation of liability. The facts on the owner's privity or knowledge may be directly or indirectly related to the owner's act or omission in connection with the operation of the ship in question. Hence, the jury's trial on the owner's liability may lead directly to the issues of the limitation of liability. Thus, it can be said that to remit the case to a state court is to substantially allow the jury to find the facts affecting the owner's limitation of liability.[336]

Fourth, the U.S. Supreme Court has not yet rendered a judgment so as to frustrate the statutory jurisdiction over limitation actions. In *Lake Tankers*,[337] the Court affirmed the lower courts' vacation of injunction where the claimants for death and bodily injury and property claims arising out of a collision between a pleasure yacht and the petitioner's tug reduced their claim amounts within the approved limitation fund, relinquishing all rights to any damage in excess of the reduced amounts in the limitation action. No problem was involved in this case because the claimants conceded the petitioner's limitation of liability. Nonetheless, the subsequent cases of lower federal courts have been developed to the situations where they gave up their statutory limitation jurisdiction by ruling arbitrary lifting of injunctions with meaningless stipulations accepted. In *Lake Tankers*, the dissenting opinion by three Justices (Harlan, Frankfurter and Burton) argued:

> At the time the limitation proceeding was commenced the total claims which had been asserted in the several state court actions far exceeded the value of both the vessels owned by the petitioner, and limitation proceedings were required. The steps subsequently taken by the claimants to limit their maximum recovery against the petitioner should no more be allowed to defeat or impair the full effectiveness of the limitation proceeding than would a subsequent reduction in the amount involved be

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336 E.g., In airplane accidents, juries are allowed to find the carrier's wilful misconduct. *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 37 F. 3d 804, 811 (2 Cir. 1994) ("[T]he jury found that the defendants engaged in wilful misconduct that led to this fatal crash."); *Ospina v. TWA*, 975 F. 2d 35, 36 (2 Cir. 1992) (same); *In re KAL Disaster of Sept. 1, 1983*, 932 F. 2d 1475 (D.C.C.),cert. den., 502 U.S.994 (1991) (same).

337 354 U.S. 147 (1957).

permitted to defeat a diversity jurisdiction which had initially been properly invoked. See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283.[338]

## 8. Recognition & Enforcement of Judgments on LLMC

### A. Positions of Limitation Conventions

Although the general aspects of the recognition and enforcement of foreign judgments[339] have been discussed extensively through many treatises[340] as well as in case law, the particular aspects of the same on the limitation of liability for maritime claims have not so much been introduced.[341]

The existing general Limitation Conventions (1957 & 1976 Conventions) do not contain the provisions for the recognition and enforcement of foreign judgments, notwithstanding that such provisions are provided not only in the special Limitation Conventions[342] but also even in the specific regional Conventions.[343] Until the adoption of 1957 Convention, not even a draft provision was reported to have been discussed in respect of the recognition and enforcement of foreign judgments. At the London Conference for the adoption of the 1976 Convention, Australia proposed a draft article, but there being no seconder it could not be debated further.[344] As with the other essential provisions in the Limitation Conventions, any provisions for the recognition and enforcement of judgments

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338 Id. at 154-155.

339 It is beyond this thesis to deal with such general aspects.

340 Generally see 1Dicey & Morris, *Conflicts of Laws* 453 *et seq.* (12th ed. 1993); Cheshire & North, *Private Int'l Law* 345 *et seq.* (12th ed. 1992); Jackson, supra n. 67, at 607 *et seq.*; Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 L. & Pol. in Int'l Bus. 325 (1987); Bishop and Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 Int'l Law. 425 (1982); von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and A Suggested Approach*, 81 Harv. L. Rev. 1601 (1968); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783 (1950).

341 As to brief comments, see Jackson at 539.

342 1962 Nuclear Convention, art. XI(4); 1969/1992 CLC, art. X; 1971/1992 FC, art. 8; 1996 HNS Convention, art. 40. But these arts. provide only for liability judgments (not for limitation decrees).

343 1968 Brussels/1988 Lugano Conventions, arts. 25 *et seq.*, upon which it was necessary to touch briefly under section 4 of this Chapter because the Conventions as non-Limitation Conventions particularly provide for limitation jurisdiction apart from 1976 Convention.

344 *Official Records 1976* at 93-96, 192 & 326-7. The features of the draft provisions were: (1) Only for the enforcement of liability judgments against the fund (without providing for recognition of a limitation decree); (2) Restriction of enforceable liability judgment court's jurisdiction to only two categories (submission to jurisdiction and defendant's residence or place of business); (3) Enumeration of enforcement refusal requirements; (4) To allow a new action if enforcement is refused; and (5) To mandate the States Parties to ensure the enforcement of liability judgments in national laws.

could not be adopted without initiative proposals or support of the major leading maritime countries. Their negative attitudes seem to have been closely interrelated not only to the non-adoption of direct limitation jurisdiction provisions in the Limitation Conventions but also to the difficulties of unifying the basic prerequisites for the recognition and enforcement of judgments to encompass heterogeneous personal claims to be covered by the general Limitation Conventions, as compared with the homogeneous oil pollution claims under the 1969 or 1992 CLC.[345]

However, first, whereas liability action jurisdictions have been agreed and regulated widely in international maritime Conventions, there was no reason why only global limitation jurisdiction could not be regulated within the framework of the Limitation Conventions if only the delegations of the developed maritime states had relinquished chauvinism at the International Diplomatic Conferences. Moreover, at the present day the anachronistic conception that the new maritime States Parties may not be allowed to constitute a limitation fund should no longer be maintained. They must be entitled to be trusted with ensuring proper limitation procedure. Particularly under the 1976 Convention, in view of the unbreakability of limitation in the application of the intent or recklessness test, the probability of different decrees of the fund courts between the developed and less developed maritime States Parties has been reduced.

Second, indeed it is conceivable that the more liability actions are raised separately, the more liability judgments may be irreconcilable, in particular, as to the heads and measure of damages to be determined by diverse jurisdictions. However, such inconvenience and inequity may not only be adjusted, as will be seen infra, by the doctrine of equity being the

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345 That is to say, first, as opposed to the restricted regional jurisdiction over liability and limitation actions under 1969/1992 CLC, the limitation jurisdiction under 1957 and 1976 Conventions is left open to national laws, wherefore the delegations of the developed maritime States Parties expressed doubt at the Diplomatic Conferences as to whether the new maritime states' courts could administer maritime cases fairly. Thus, they must have been reluctant to recognize such courts' limitation decrees indiscriminately. Second, maritime personal claims subject to limitation may be diversely determined according to jurisdiction, in particular, as to the heads and measure of damages because these aspects are generally governed by *lex fori.* Hence, such irreconcilable judgments might be an obstacle to be recognized and enforceable under the uniform prerequisites of the Limitation Conventions.

basic rule to be governed in limitation procedure, but also more fundamentally be avoided by the adoption of the international concourse scheme in the Limitation Conventions.[346]

Third, the recognition and enforcement of liability judgments against the limitation fund must be treated differently from the other general cases. In the apportionment and distribution of a limitation fund, the rule of equity governs amongst the multiple claimants, overriding the international comity[347] or the doctrine of obligation[348] as the rationale for the recognition and enforcement of foreign judgments. To ensure such equity the national law of limitation procedure may empower the Receiver or Registrar in charge of the apportionment and distribution of the fund and the competing claimants to interfere with or appeal any unlimited enforcement judgment or registration of foreign judgments in order to cut down or strike the balance of inequitable portions of the judgments to the extend that the fund court would have determined. Thus, any inequitable heads or measure of damages to be determined in foreign judgments *per se* may no longer be a ground of opposing to a provision for the recognition and enforcement of judgments in the Limitation Conventions.

Fourth, now that the 1968 Brussels and 1988 Lugano Conventions approved a wide range of liability and limitation action jurisdiction over diverse personal claims and also ensure the recognition and enforcement of judgments for such claims and further that the 1996 HNS Convention has adopted the owners' principal place of business for limitation action jurisdiction together with the provisions for the recognition and enforcement of judgments including HNS personal claims there are no longer any grounds to defer the amendments of 1976 Convention to include the provisions for the recognition and enforcement of judgments as well as for limitation action jurisdiction.[349]

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346 If the international concourse scheme is adopted, the uniform rules of the limitation court can be applied as to the heads and measure of damages of each claimant, thus enabling all the claimants to be treated equitably.

347 The traditional rationale for the enforcement of foreign judgments is the principle of comity. *Hilton v. Guyot,* 159 U.S. 113, 202-03 (1895) (Gray J); Westin, supra n. 340, at 328-32.

348 In English law the older ground of comity has been supplanted by "the doctrine of obligation" as the theory underlying the recognition and enforcement of foreign judgments. Cheshire & North at 346; 1Dicey & Morris at 455 (citation omitted).

349 See the draft provisions infra in the Final Remarks.

## B. Recognition & Enforcement of Liability Judgments Against the Fund

### (1) Limited or Unlimited Judgments

There are two kinds of liability judgments to be regulated by the Limitation Conventions or national limitation laws; a limited liability judgment and a full-amount (unlimited) liability judgment. The former, which has already applied the limitation of liability, may be recognized and enforceable pursuant to the general rules of recognition and enforcement of foreign judgments, thus being not necessarily required to be regulated by a particular provision for the recognition and enforcement in the Limitation Conventions[350] or national limitation laws. The latter is restricted by the relevant Limitation Conventions or national laws containing a judgment enforcement provision if any, being enforceable only against the fund so long as it is properly constituted in the enforcement State. Here, the latter judgments to be enforceable against the fund are discussed.

### (2) Between Non-Convention States

First, as between the non-Convention states, the general rules of the recognition and enforcement of foreign judgments would apply. Thus, *res judicata*, issue estoppel, reciprocity,[351] public policy, competent jurisdiction of the liability judgment court, fair notice of process, etc., would be applied by each national law.

Second, even if there is no provision for the recognition and enforcement of judments in the Limitation Conventions or national limitation law, however, the fund court of any state which adopts a system of shipowners' limitation of liability would in practice have discretion to *de facto* recognize and allow the proportional enforcement of foreign liability judgments

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350 *Cf.* The special (Liability &) Limitation Conventions cover the two kinds of liability judgments in their provisions for the recognition and enforcement of judgments. 1962 Nuclear Convention, art. XI(4); 1969/1992 CLC, art. X; 1996 HNS Convention, art. 40(1)(2).

351 Many countries maintain the principle of reciprocity in recognition and enforcement of foreign judgments: the UK Foreign Judgment (Reciprocal Enforcement) Act 1933; German Code of Civil Procedure (ZPO) s. 328; *In re Application for Enforcement of a Bosnian Judgment*, [1998] I.L.Pr. 124 (CA Cologne 1994); *Hilton v. Guyot*, 159 U.S. at 210-227 (enumerating states adopting reciprocity: France, Holland, Belgium, Denmark, Norway, Sweden, Germany, Switzerland, Russia, Poland, Roumania, Bulgaria, Italy, Spain, Portugal, Egypt, Mexico, Peru, Chile, Brazil and Argentina); Japanese Code of Civil Procedure, s. 200; Korean Code of Civil Procedure, s. 203. However, most states of the U.S. do no longer require reciprocity (except Ga., Mass., Ohio, Tex., etc.). Westin, supra n. 340, at 332. See also infra n. 357.

against the fund subject to the court's limitation procedure rules.[352] When such judgments become final and binding, they are in general respected to have *res judicata* as "a rule of evidence"[353] or at least "prima facie evidence",[354] so that they are *de facto* treated as recognized unless disproved or otherwise held not to be recognized pursuant to the *lex fori*.

Third, the above-mentioned situation would only occur where the judgment claimant voluntarily participates in the limitation proceeding, probably because neither security was given nor could any other assets of the liable parties be found in the states other than the fund court state. When the judgment claimant pursues any execution proceedings to enforce the judgment outside the fund court state (whether in the liability action state or in a third state), however, another question will be raised as to which *res judicata* between the liability judgment and the limitation decree should prevail.[355]

Fourth, between the non-Convention states, when the fund court does not admit the *res judicata* or prima facie evidence to a liability judgment because the limitation petitioner impeaches the judgment on grounds of errors or procedural defects such as judgment by default without the fair notice of process or competent jurisdiction or by fraud, etc.,[356] the judgment claimant may bring a new proceeding as allowed or take the formalities for the enforcement of judgment pursuant to the *lex fori*. When the claimant elects the latter summary proceeding may the enforcement of judgment be refused for lack of formal reciprocity,[357] unless otherwise impeachable? In view of the nature of maritime claims that

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352 The cases of *de facto* recognition and allowance of enforcement of foreign liability judgments against the limitation fund: *The Crathie* [1897] P. 178 (allowing the limitation petitioners' credit against the fund for the sums they had been paid out of the proceeds of the sale of their British ship by order of the Rotterdam Court with respect to a collision with a German ship); *The Coaster* (1922) 10 Ll. L.R. 592 (allowing the limitation petitioners' collision claims subrogated by payment to the opposing owners of the French judgment against the fund).

353 *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No 2)*[1967] A.C. 853, 933 (HL 1966) (Lord Guest); *Rep. of India v. India S.S. Co. (The Indian Grace)* [1993] A.C. 410, 422 (HL 1993) (Lord Goff: "[T]he principle of estoppel per rem judicatam is no more than a rule of evidence.").

354 *Hilton v. Guyot*, 159 U.S. at 180 & 185-7.

355 This matter is related to the recognition of a foreign limitation decree, which will be seen infra.

356 So far as the aspects of recognition and enforcement of foreign maritime judgments are concerned, as opposed to the other defences, the substantially impeachable defence is fraud. Public policy has little to do with maritime claims *per se*. Jurisdiction over maritime claims is widely allowed in international Conventions and national laws, and so are the ways of international service of process (e.g., 1965 Hague Service Convention). As to fraud, in the U.K. a foreign judgment obtained by fraud may be set aside by retrial on the merits without requirements of its being fresh evidence or of unavailability with due diligence in the foreign action. Administration of Justice Act 1920, s. 9(2)(d); *Owens Bank Ltd. v. Bracco* [1992] 2 WLR 621 (HL 1992).

357 In the U.K., unless specified by Order in Council, no foreign country is extended to have reciprocity with the U.K. Foreign Judgments (Reciprocal Enforcement) Act 1933, s. 1(1); *Perry v. Zissis* [1977] 1 Ll.R. 607, 614 (CA 1976) (Roskill LJ: "[T]he United States is not a country to which the Foreign Judgments

they are commonly governed by the uniform maritime law consisted of maritime usage, international maritime Conventions or similar municipal laws[358] and that maritime claims *per se* have almost nothing to do with public policy,[359] the principle of reciprocity should be flexibly applied[360] so that any foreign judgment on maritime claims can be recognized and enforceable against the fund but subject to the fund court's decision on the apportionment and distribution of the fund. Thus, even between the non-Convention states, a foreign maritime liability judgment must in principle be recognized and enforceable against the limitation fund subject to the fund court's limitation procedure rules.

### (3) Between 1957 or 1976 Convention States

As between the same 1957 and 1976 Convention States Parties, the recognition and enforcement of liability judgments rendered by any of the States Parties should be allowed against the limitation fund constituted in the court of the other States Parties even if neither of the Conventions contains a provision therefor. The reasons are: (1) the Conventions bar the claimants from their execution proceedings against any other assets of the owner or other liable party when a fund has been constituted;[361] (2) the Conventions provide for the discretionary or mandatory release of the arrest of any ship or other property or any security given, when a fund has been constituted;[362] and (3) the Conventions mandate the fund court to set aside a sufficient sum of the fund when any liable party may be compelled to pay at a

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(Reciprocal Enforcement) Act, 1933, has been applied by Order in Council. There is, therefore, no provision between our two countries for reciprocal enforcement."). On the contrary, however, most of the U.S. courts do not require reciprocity: *Tahan v. Hodgson,* 662 F.2d 862, 867 (D.C.C. 1981) ("It is unlikely that reciprocity is any longer a federally mandated requirement for enforcement of foreign judgments." citing many supporting treatises, comments & case law).

358 *Hilton v. Guyot,* 159 U.S. at 186 ("Hence the decree of an admiralty court abroad is equally conclusive with decrees of our admiralty courts [and] both courts . . . are governed by the same law - the maritime law of nations . . . which is the universal law of nations, except where treaties alter it.").

359 The provisions for recognition and enforcement of judgments on special maritime claims under 1962 Nuclear Convention (art. XI.4), 1969/1992 CLC (art. X), 1971/1992 FC (art. 8) and 1996 HNS Convention (art. 40) do not require the public policy prerequisite.

360 In Japanese and Korean laws, although the guarantee of reciprocity is one of the prerequisites in the Codes of Civil Procedure for the recognition and enforcement of foreign judgments, which are modelled upon the equivalents of the German Code of Civil Procedure, it is interpreted that the reciprocity need not necessarily be guaranteed by a treaty but may be impliedly guaranteed where the other country *would* most probably assure the recognition and enforcement of Japanese or Korean similar judgments in view of case law or commercial transactions. Young-Sub Lee, *et al., Annotated Code of Civil Procedure*, Vol. II 167 (Seoul 1980). See also *Tahan v. Hodgson,* 662 F.2d at 868 (D.C.C. 1981) (holding that even if reciprocity is required, its criterion is met "since Israel in all probability *would* enforce a similar American judgment" in view of the mutual relation having "a long and formal history of cooperation in commercial matters.") (Emphasis original).

361 1957 Convention, art. 2(4); 1976 Convention, art. 13(1).

362 1957 Convention, art. 5(1)(2); 1976 Convention, art. 13 (2)(3).

later date in whole or in part any amount of the relevant limitable claims by which he could enjoy a right of subrogation against the fund.[363] Such provisions purport that all the liability judgments should be enforced only against the single limitation fund upon the presupposition that such judgments are to be recognized and enforceable in the fund court State Party. Hence, as between the 1957 or 1976 Convention States Parties, any State may not refuse the recognition and enforcement of liability judgments laid down by the other States Parties on grounds of lack of reciprocity. Rather, it must be held that once a State Party has ratified or acceded to the Convention, the State has approved reciprocity by a treaty, provided that the other prerequisites and formalities for the recognition and enforcement of judgments are left to national laws.[364] However, in order to apply the uniform prerequisites, it is necessary to include in the Limitation Conventions the provisions for recognition and enforcement of judgments.

Even where a liability judgment of the Convention State court is allowed to be enforceable, such allowance must be subject to any decision of the fund court concerning the apportionment and distribution of the fund.[365] Further, although the 1957 and 1976 Conventions do not contain the provisions that the fund court have "exclusive jurisdiction to determine all matters relating to the apportionment and distribution of the fund,"[366] the fund court under 1957 or 1976 Convention should be construed as having the same jurisdiction. The doctrine that governs a limitation procedure is *equity*[367] and therefore the fund court should administer the apportionment and distribution of the fund amongst the multiple claimants under the principle that "equity prevails over comity or obligation". Thus, although the enforcement of foreign judgments is allowed against the fund, the fund court should be vested with discretion to cut down any inequitable heads and measure of damages determined in the foreign judgments in order to abide by the doctrine of *equity* between the foreign

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363 1957 Convention, art. 3(4); 1976 Convention, art. 12(4). See also *The Giacinto Motta* [1977] 2 L1.R. 221, 227 (QB Adm. 1977) (Brandon J: "The existence of this equitable right [to be given credit in the distribution of the fund], so far as payments in satisfaction of the judgment of a foreign court are concerned, has . . . been recognized and endorsed by the legislature in s.7 (1) of [M.S.A. 1958].").

364 In practice, however, as with the cases of enforcing a non-Convention state's judgment against the fund, a claimant of any Convention State's judgment would initially use the judgment as a prima facie evidence to support his claim filed against the fund, and only where it is impeached in the limitation proceedings would the judgment claimant take the formalities for the recognition and enforcement of judgment.

365 E.g., 1971/1992 FC, art. 8 and 1996 HNS Convention, art. 40(3) respectively allow the recognition and enforcement of any judgment given against the IOPC Fund or against the HNS Fund "Subject to any decision concerning the distribution referred to" in the relevant provisions relating to the manners of the fund distribution.

366 1996 HNS Convention, art. 38(5); 1969/1992 CLC, art. IX (3).

367 See supra at 128.

judgment claimants and the other claimants.[368] On the contrary, however, any heads and measure of damages which were dismissed or less awarded in a foreign judgment may not be claimed in the fund court because it may give rise to an issue estoppel and because the claimant elected to proceed with the foreign action instead of filing his claim with the fund court, thus being deserved to receive any resultant disadvantages.[369]

### C. Recognition of Limitation Decree

#### (1) Between 1957 or 1976 Convention States

In order to ensure the shipowners' limitation of liability substantially and equitably under the general Limitation Conventions, the recognition of a limitation decree is more essential than that of a liability judgment between the States Parties. Nevertheless, under the 1957 and 1976 Conventions, as opposed to the cases of recognition and enforcement of liability judgments, the recognition of a limitation decree may be discriminately dealt with according to the places where the limitation fund has been constituted; i.e., whether it is constituted in the specified places where the mandatory release provisions shall apply or in the other places where the discretionary release provisions apply.[370] As has been seen supra, such discriminate release provisions are not only meaningless in practice but also inconsistent with the governing law provisions[371] for limitation procedure rules including the places to constitute a limitation fund. It is clearly unfair not to recognize the limitation fund and the limitation decree based thereupon amongst the States Parties, notwithstanding that the fund

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368 For example, where a foreign judgment awarded the claimant damages for excessive loss of society, amenities or consortium, pain and sufferings in personal claims, punitive (exemplary) damages, wider economic losses, high judgment interest (rate and period), etc., such portions may be adjusted to the extent that other similar claimants have been or would have been allowed or awarded by the *lex fori*.

369 Moreover, he was attributable to the other claimants' inconvenience and delay of the limitation proceeding by maintaining a foreign action for his own advantage. And, the above-mentioned doctrine of *equity* also applies to the enforcement of judgments as between CLC or HNS Convention States.

370 In addition, the phrase "any person *having made* a claim against the fund" in art. 13(1) of 1976 Convention is also relating to the discretionary release provisions. However, no claimant would safely invoke the above-quoted option, because, first, if he does not file his claim with the fund court within the specified time limit, his claim shall be excluded from the limitation proceeding, and second, his alternative execution proceeding in any State other than the fund court State may also be barred by the enforcement court's discretionary release of the security upon the owners' motion of objection based upon the *res judicata* of the limitation decree. Thus, even if he maintains his liability action outside the fund court, it is safe for him to file his claim with the fund court as admonished but with protest against limitation (if necessary) and/or an application for the distribution of the fund for his claim to be reserved. See also *The Kronprinz Olav* [1921] P. 52 (CA 1920) (aff'ming the dismissal of claimant's application for an order to postpone the distribution of the fund without his claim filed pending the foreign collision liability actions).

371 1957 Convention, art. 4; 1976 Convention, art. 14.

has been constituted in the places provided for in the national laws as allowed by the Conventions, and in particular so when it is constituted in one of the natural forums such as the owners' principal place of business commonly recognized in national laws. Hence, despite the dichotomy provisions of discretionary and mandatory release of the arrest or security given, the courts[372] of the States Parties to the same Limitation Convention should in practice respect and recognize a limitation decree rendered by any one of them so far as the fund court's jurisdiction is competent under the *lex fori* and commonly approved internationally as well.[373]

### (2) Between Non-Convention States

The question whether as between the states with no Convention relation in connection with shipowners' limitation of liability system a foreign limitation decree (and its *res judicata*) should be recognized or not has not been settled, thus being very often confused in the conflicts of jurisdiction competition and forum shopping. Even amongst the courts of the U.K. and the U.S., it seems that no rule has been established in this matter. In general, the courts' position may be classified into two categories; some courts stand for a policy priority test, and some other courts apply a jurisdiction priority test.

First, under the policy priority test, any prior-pending foreign limitation jurisdiction and the limitation fund constituted therein would be disregarded in order to compel the liable parties to constitute another limitation fund in the domestic liability action court pursuant to the *lex fori* on the grounds that the foreign limitation law is contrary to the domestic policy on the limitation regime.[374] The policy priority test may ensure the claimants higher limitation,

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372 Here, the "courts" include not only the courts of the States Parties in which liability actions including execution proceedings are pending but also the courts of the third States Parties if the judgment claimant applies for the enforcement of the judgment against any other assets of the liable parties situated in such States.

373 The test of the commonly approved limitation jurisdiction should be at least the same as approved in the 1968 Brussels and 1988 Lugano Conventions.

374 *Beth. Steel Corp. v. St. Lawrence Seaway Auth. (The Steelton)*, 1977 AMC 2240 (Can. F.C. 1977) (limitation fund constituted in Can. Ct. : Can. $680,733.56 equivalent to US$691,761.44) and *In re Beth. Steel Corp. (The Steelton)*, 1977 AMC 2203 (N.D. Ohio 1976) (2nd limitation fund constituted: US$850,000); *The Titanic*, 233 U.S. 718, 732 (1914) (Holmes J: declining to apply foreign (British) limitation law on grounds of its being contrary to "the domestic policy"); *Caltex Singapore v. BP Shipping* [1996] 1 L1.R. 286, 299 (QB Adm. 1995) (Clarke J: emphasizing "English public policy" of 1976 Convention in denying FNC stay of the liability action competing with Singaporean limitation action).

whereas it has disadvantages that the conflicting policy of another state must be infringed and that it encourages forum shopping.

Second, under the jurisdiction priority test, where the fund court's jurisdiction over the limitation action was competent and the claimants submitted or obliged to submit thereto under the proper law of the claims or the commonly recognized jurisdiction rules of the *lex fori* or otherwise and further where the requirements of the fair service of limitation process and of the final and binding effect[375] of limitation decree are met, then the limitation decree and its *res judicata* may be recognized by the courts of any other courts. Under this test, a limitation decree, the limited amount of which is lower than that under the limitation law of the state where a liability action or execution proceeding is pending, may also be recognized to bar such proceedings.[376]

Of the above two tests, the latter is more logical and less encouraging forum shopping than the former, but much short of protecting the claimants and in particular so when personal claims not covered by insurance are involved. Moreover, even under the latter test the disputes of jurisdiction may always be raised between the liable parties and the claimants. Thus, so long as a uniformity of shipowners' limitation regimes is not realized towards the developed Limitation Convention, it is likely that the two tests would continue to be applied case by case. In particular, the policy priority test may not be completely ruled out, where the limitation amount in the limitation decree is remarkably insufficient to personal claims or where the 1976 Convention and its 1996 Protocol are adopted by the overwhelming majority

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375 The *res judicata* of a limitation decree has effect only when it becomes final and binding with no ordinary relief or appeal left under the law of the fund court state, whether it be issued by the limitation petitioner's ex parte application with the claimants' rights of objection given or upon the closure of ordinary hearings. Thus, it may take effect at different time to each claimant. For example, to a claimant who had not contested limitation, the *res judicata* may have effect upon the expiration of objection time limit or upon his receipt of notice or service of the limitation decree. The above aspects are common except for the issuing time of a limitation decree between the Continental practice and the Anglo-American practice in respect of limitation procedure.

376 *The Herceg Novi* [1998] LMLN 490 (CA 1998); *Alcoa S.S. Co. v. M/V Nordic Regent*, 1978 AMC 365 (SDNY 1978), aff'd, 1980 AMC 309 (2 Cir.), cert. den., 449 U.S. 890 (1980). These cases, though not being cases for the recognition of a limitation decree, were based upon the jurisdiction priority test in that the courts allowed FNC stay or dismissal of the liability actions to remit them to the competing foreign courts in which lower limitation law applied, on the assumption that such lower limitation decrees could also be recognized if applied in the liability action courts.

of the States Parties to the general Limitation Conventions as compared to the 1957 Convention States.[377]

[377] Meanwhile, between the special Limitation Convention States, the recognition of limitation decrees, though not provided directly, is ensured by the indirect provisions: (1) the express limitation jurisdiction provisions (1969/1992 CLC, art. V(3) each; HNS Convention, art. 9(3)); (2) the fund court's exclusive jurisdiction over the apportionment and distribution of the fund (1969/1992 CLC, art. IX(3) each; HNS Convention, art. 38(5)); and (3) the provisions barring claimants' execution proceedings against any other assets of the owners and the mandatory release of the arrest or security upon proof of the specified requirements after the limitation decree (1969/1992 CLC, art. VI each; HNS Convention, art. 10). To ensure certainty and uniformity, however, it would be better to amend the Conventions to provide for the recognition of limitation decrees too.

# CHAPTER 3

# FACTORS AFFECTING LIMITATION JURISDICTION

A limitation forum must in principle be congruous or concurrent with liability action forums, which are statutorily regulated for the convenience of the parties and the courts; such forums are called natural forums. Those which are provided in international maritime Conventions are the representative natural fora commonly recognized in the States Parties' national laws even if some Limitation Conventions indicate only indirectly and other Conventions provide for non-natural forums only for the convenience of claimants (e.g., forum by arrest of ship). These statutory liability and limitation forums are sometimes altered by some strong factors to be decided by the court or the parties: (1) applicable limitation law, (2) doctrine of *forum non conveniens* and (3) forum selection agreement. The first factor (governing law) would affect not only the parties (forum shopping) but also some courts which would apply domestic conflict of law rules to the applicable limitation law (analysis of substantive/procedural dichotomy) as a factor of proper jurisdiction or *forum non conveniens*.

## 1. Governing Law

Whenever a maritime accident occurs involving limitation issues, and where the gap between the claim amounts and the limits of liability is large, *a fortiori*, the claimants, "whether American or foreign", would seek to arrest or attach the ship or a sister ship to obtain jurisdiction and favourable remedies as well in a U.S. court, if only possible, rather than in a Limitation Convention State because the U.S. limitation law maintains the ship's value and monetary combined limitation regime, the privity or knowledge test, statutory imputation to owners of the privity of master, etc. of seagoing ships for personal claims (46 U.S.C.A. s. 183(e)), and exclusion from limitation of claims arising from the owner's personal contracts by case law. Then, how far is the U.S. law favourable to them?

### A. Comparison - Breakability of Limitation

Above all differences between the Limitation Conventions and the U.S. Limitation Act, the most attractive factor to claimants is that the latter not only maintains the privity or

knowledge test but also is applied in disfavour of the owners by the federal courts which either easily break the limitation of liability or remit the cases to state courts with appropriate stipulations submitted from claimants.

Under the intent or recklessness test of the 1976 convention, it has been very rare since its coming into force on December 1, 1986 that the limitation was broken in courts. Under other Conventions the same subjective test has been often contested but the limitation has been very rarely broken,[1] although wilful misconduct test under the Warsaw Convention has often been broken.[2] In non-maritime civil cases[3] or criminal cases[4] the recklessness of defendants has often been adjudged, but such precedents must be distinguishable from the application of shipowner's limitation of liability because the latter's recklessness test is added with "knowledge" test. *Albert E. Reed & Co. v. London & Rochester Trading Co.*[5] also may not be applicable to the recklessness test of 1976 Convention because in that case as opposed to the cases under the Convention the burden of proof on the absence of knowledge or recklessness was on the barge owner.

As to the confrontation of the objective or subjective test[6] in the application of the recklessness and knowledge requirement in art. 4 of 1976 Convention, the writer agrees to the objective test on the grounds that (1) the *actual* knowledge of the person liable is almost impossible to be proved unless he confesses, (2) the subjective test would frustrate the need to provide for the two distinguishable tests of *intent* or *recklessness and knowledge,* (3) the owner, etc, entitled to limitation should exercise due diligence to have the knowledge of his

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1 *The Lion* [1990] 2 Ll.R.144 (QB Com.) (recklessness not proved under 1974 Athens Convention); *Gurtner v. Beaton* [1993] 2 Ll.R.369 (CA 1992) (same in aircraft crash under 1955 Warsaw-Hague Convention); *Goldman v. Thai Airways Int'l Ltd.* [1983] 1 WLR 1186 (CA) (same); *Johnson Estate v. Pischke* [1989] 3 WWR 207 (Sask) (same). *Cf.* Reckless Admitted (Lim. Den.): *SS Pharmaceutical Co. v. Qantas Airways* [1991] 1 Ll.R. 288 (Aus. CA) (rain damage to cargo under Warsaw Convention); *Newell v. Canadian Pac. Airlines* [1976] 74 DLR (3d) 574 (dogs injured and died by air carriage).

2 *Swiss Bank Corp. v. Air Canada* [1982] 129 DLR (3d) 85 (Fed. Ct. T.D.), aff'd, [1988] 44 DLR (4th) 680 (CA) (theft by air carrier's employees); *Rustenburg Plantinum Mines Ltd. v. S. African Airways* [1979] 1 Ll.R.19 (CA 1978) (theft of platinum from aircraft).

3 *Herrington v. British Rys. Bd.* [1971] 2 Q.B. 107 (CA), aff'd, [1972] A.C. 877 (HL) (reckless admitted on a child's injury on the live rail); *Excelsior Wire Rope Co. v. Callan* [1930] A.C. 404 (HL) (same in children's injuries during movement of pulley block).

4 *R. v. Reid* [1992] 1 WLR 793 (HL) (reckless driving); *DPR v. K* [1990] 1 All ER 331 (QB 1989) (reckless injury); *Stephen Malcolm R.* (1984) 79 Cr. App. R. 334 (CA) (reckless arson; objective test adopted); *Elliott v. C.* [1983] 2 All ER 1005 (QB) (reckless arson); *R. v. Miller* [1983] 2 WLR 539 (HL) (same); *R. v. Pigg* [1982] 1 WLR 762 (CA) (reckless rape); *R. v. Caldwell* [1982] A. C. 341 (HL 1981) (reckless arson).

5 [1954] 2 Ll.R.463 (QB) (absence of recklessness held not proved in damage to cargo by water entering barge through a hole in the bottom plating).

6 Cheka, supra Introduction n. 11, at 495-97.

operating ship as much as an average operator or manager of a ship of the same kind and a person who has idled to exercise such due care need not be protected by limitation law, and (4) a judge who is to interpret and execute the law need not necessarily be bound by the intention of the drafters of statutes.

By contrast, under the U.S. Limitation Act, the "privity or knowledge" test has been operated flexibly to adapt to the concrete justice case by case just like "empty containers into which the courts are free to pour whatever content they will."[7] Thus, standing outside the Limitation Conventions, the U.S. federal courts stride independently exercising their arbitrary discretion under the banner of the protection of the injured the first and the insurability of ships the second. The "privity" means "some fault or neglect in which the owner personally participated" and the "knowledge" means "personal cognizance or means of knowledge of which the owner is bound to avail himself of its contemplated loss or condition likely to produce or contribute to the loss without adopting appropriate means to prevent it."[8] The "privity or knowledge" is essentially equivalent to the "design or neglect" in the Fire Statute[9] or the "actual fault and privity" contained in COGSA.[10] When the claimant has proved that either negligence of the owner or unseaworthiness of the vessel caused the alleged damage, the burden shifts to the owner to establish the lack of his privity or knowledge contributed to the damage so as to limit his liability.[11]

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7 Gilmore & Black at 877.

8 *The Chickie*, 54 F. Supp. 19 (W.D.Pa.1942). See also *Continental Ins. Co. v. Sabine Towing Co.*, 117 F. 2d 694 (5 Cir.), cert. den., 313 U.S. 588 (1941); *The Princess Sophia*, 278 F. 180 (W.D. Wash. 1921), aff'd, 61 F. 2d 339 (9 Cir 1932), cert. den., 288 U.S. 604 (1933); *Quinlan v. Pew*, 56 F. 111 (1 Cir. 1893); *Lord v. Goodall, Etc. Co.*, 15 F. Cas. 884 (No.8,506) (C.C.D.Cal.1877). *Cf.* The Eurysthenes [1976] 2 L1.R 171 (CA) (defining actual fault, privity and wilful misconduct).

9 46 U.S.C.A. s.182.

10 46 U.S.C.A. ss.1300-1315; Gilmore & Black at 878-79.

11 *In re F/V Gulf King 55*, 1995 AMC 232 (E.D.La. 1994) (*citing Brister v. A.W.I., Inc.*, 946 F. 2d 350 (5 Cir. 1991)); *Nelson v. Fairfield Ind.*, 1993 AMC 370 (D.Or.1992); *In re Farrell Lines Inc.*, 530 F.2d 7 (5 Cir. 1976); *In re Bogan*, 103 F. Supp. 755 (D.N.J. 1952); *Coryell v. Phipps*, 317 U.S. 406, 409 (1943): *The Silver Palm*, 94 F.2d 776, 777 (9 Cir. 1937).

The owner's limitation of liability was easily denied where the hull was unseaworthy on sailing,[12] or where any defect of ship's equipment or appurtenances caused damage to claimants.[13] Any incompetency of a master[14] or crew members[15] was easily imputed to the owner's privity. The same was also in cases of any defect of navigation equipment such as steering gear,[16] radar,[17] radio direction finder,[18] facilities of lights,[19] or radio reception set.[20] In *In re Texaco, Inc.*,[21] where an allison took place between a tanker and a partially completed oil and gas platform, the owner's limitation of liability was denied on the grounds that he failed to equip the ship with up-to-date navigational information that was contained on the Coast Guard's most recent Local Notice to Mariners No. 32-80 indicating the location of the platform.

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12 Rep. of Finance v. French Overseas Corp., 277 U.S.323 (1928) (Stone J); *Lasseigne & Sons V. Bacon*, 1987 AMC 2251 (D. Or. 1987) (capsizing of fishing vessel presumed unseaworthy); *Horton & Horton, Inc. v. T/S J.E.Dier*, 1971 AMC 995(5 Cir. 1970) (unseaworthy barge); *McNeil v. Lehigh Valley R.R. Co.*, 387 F. 2d 623 (2 Cir. 1967) (same); *W.R.Grace & Co. v. Charleston Lighterage & Transfer Co.*, 193 F.2d 539 (4 Cir. 1952) (same). Contra: *Standard Wholesale, Etc., Inc. v. Chesapeake L.& T. Co.*, 16 F.2d 765 (4 Cir. 1927) (limitation allowed to unseaworthy barge); *Pocomoke Guano Co. v. Eastern Transp. Co.*, 285 F.7 (4 Cir. 1922) (same).

13 *Brister v. A.W.I.*, 946 F.2d 350 (5 Cir. 1991) (defective mats); *Verdin v. C & B Boat Co.*, 860 F.2d 150 (5 Cir. 1988) ( defective safety chain of barge); *Verrett v. McDonough Marine Serv.*, 705 F.2d 1437 (5 Cir. 1983 (insufficient mooring lines); *China Union Lines v. A.O. Anderson & Co.*, 364 F.2d 769 (5 Cir. 1966) (defective steering gear); *The Inga*, 33 F. Supp. 122 (SDNY 1940) (defective gas system). Contra: *In re Bankers Trust Co.*, 651 F. 2d 160 (3 Cir. 1981), cert. den., 455 U.S. 942 (1982) (defective guardian astern valve): *The Rambler*, 290 F. 791 (2 Cir. 1923) (explosion of boiler).

14 *In re Warrior & Gulf Nav. Co.*, 1997 AMC 1432 (S.D. Ala. 1996) (sinking of 4 barges under towing); *Joice v. Joice*, 975 F. 2d 379 (7 Cir. 1992) (negligent entrustment of pleasure boat); *In re Armatur, SA*, 1990 AMC 557 (D.P.R. 1988) (grounding due to master's disability); *In re Waterstand Marine, Ltd.*, 1991 AMC 1784 (E.D.Pa.1988) (master not trained in the use of ARPA); *In re Ta Chi Nav. (Panama) Corp.*, 728 F. 2d 699 (5 cir. 1984) (collision held due to master's incompetence); *Harbor Towing Corp. v. Parker*, 1949 AMC 17 (4 Cir. 1948 ) (same).

15 *In re Sause Bros. Ocean Towing*, 1991 AMC 1242 (D. Or. 1991) (tug not manned with certified crew); *In re Southwind Shipping Co.*, 1989 AMC 1088 (SDNY 1989) (stranding due to unlicensed watch officer); *In re Seiriki K.K.*, 1986 AMC 913 (SDNY 1986) (collision due to unlicensed 3rd officer); *In re Hercules Carriers, Inc.*, 768 F. 2d 1558 (11 Cir. 1985) (collision to bridge by unlicensed officers); *In re Theisen*, 349 F. Supp. 737 (EDNY 1972) (accident of a boat entrusted to unlicensed 16 years old son); *Rowe v. Brooks*, 329 F. 2d 35 (4 Cir. 1964) (similar); *In re Pac. Mail S.S. Co.*, 130 F. 76 (9 Cir. 1904) (loss of passenger lives by vessel stranding and sinking due to crew incompetence and insufficiency).

16 *In re Thebes Shipping Inc.*, 486 F. Supp. 436 (SDNY 1980) (defects of gyrocompass and radio direction finder caused grounding); *In re Marine Nav. Sulphur Carriers, Inc.*, 1980 AMC 983 (E.D.Va, 1978), aff'd, 610 F.2d 812 (4 Cir. 1979) (malfunction of port steering gear); *The Rep. De Colombia*, 1979 AMC 156 (SDNY 1977) (collision due to defective steering gear); *Midwest Towing Co. v. Anderson*, 1963 AMC 2376 (7 Cir. 1963) (same).

17 *The Grace Moran*, 1982 AMC 2311 (2 Cir. 1982) (dredge-tow sank due to worn-out radar).

18 *Waterman S.S. Corp. v. Cottons*, 414 F.2d 724 (9 Cir. 1969).

19 *American Dredging Co. v.* Lambert, 1996 AMC 2929 (11 Cir. 1996) aff'g In *re American Dredging Co.*, 1994 AMC 2833 (S.D. Fla. 1994) (breach of regulations for lighting the lines of a dredge); *Archer Daniels Midland Co. v. M/V Freeport*, 909 F.2d 809 (5 Cir. 1990) (improper towing lights); *The Argent*, 1940 AMC 508 (SDNY 1915) (improper anchor light).

20 *In re Eastern Transp. Co.*, 1932 AMC 1169 (2 Cir. 1932).

21 1985 AMC 1650 (E.D. La. 1983).

A collision attributable to pure navigational fault of the master or officers is not imputed to the owner's privity.[22] However, by virtue of 46 U.S.C.A. s. 183 (e) providing for the imputation of "the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof" to the owner's privity or knowledge, the courts are inclined to rely on the provision in easily denying the owner's limitation claim even in cases of apparently navigational fault.[23] In cases of the master's fault in the management of vessel, it could more easily be imputed to the owner's privity. A tug master's failure to inspect the tow (house boat) before towing was imputed to the owner's privity for water damage to the tow during the towing.[24] Further, where a ship became entangled in a steel cable hanging from a drilling rig, sinking directly beneath the rig, the master's managerial fault was imputed to the owner's privity on the grounds that the owner authorised the master completely as to the operation of the ship.[25] Where the master was a co-owner of the ship, the owners were all denied the limitation of liability.[26] While in some cases the privity of a corporate owner's representative or president or managing officer was directly imputed in denying limitation of liability,[27] the negligence or privity of a superintendent or port engineer or work manager or other like agent was mostly imputed to the owner's

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22 *In re Kristle Leigh Ent., Inc.*, 1996 AMC 697 (5 Cir. 1996): *In re Hellenic Lines, Ltd.*, 813 F.2d 634 (4 Cir. 1987); *In re State of La.*, 1982 AMC 301 (E.D. La. 1978); *In re MAC Towing Inc.*, 670 F.2d 543 (5 Cir. 1982); *In re the U.S. (The Friar Rock)*, 1947 AMC 80 (SDNY 1947).

23 *In re Potomac Transport, Inc.*, 909 F.2d 42 (2 Cir. 1990) (master's failure of due diligence in selecting, training or supervising crew members whose navigational faults contributed to collision was held imputable to the owner's privity); *Empresa Lineas v. U.S.*, 1983 AMC 2668 (D. Md. 1982), aff'd, 730 F.2d 153 (4 Cir. 1984) (collision held due to the C.G. super officer's awareness of the captain's poor health and limitation denied); *Oregon v. Tug Go-Getter*, 299 F. Supp. 269 (D. Or. 1969) (tug master's fault in collision between barge and bridge was imputed to owner's privity).

24 *In re Tug Beverly, Inc.*, 1994 AMC 2437 (E.D. Pa. 1994).

25 *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5 Cir. 1983).

26 *In re G & G Shipping Co.*, 1994 AMC 170 (D.P.R. 1991); *In re Falkiner*, 716 F. Supp 895 (E.D. Va. 1988)

27 *Brunet v. United Gas Pipeline Co.*, 1994 AMC 1565 (5 Cir. 1994) (managing officer knew the towing in high winds); *Pennzoil Producing Co. v. Offshore Exp., Inc.*, 943 F.2d 1465 (5 Cir. 1991) (vice-president knew master's vessel operation in fog); *In re Tweed Towing, Inc.*, 1992 AMC 37 (N.D. Cal. 1991) (president failed to monitor weather broad casts before towing); *In re Harrison Boat House, Inc.*, 1980 AMC 2383 (E.D. Va. 1979) (same); *In re Ocean Foods Boat Co.*, 1989 AMC 579 (D. Or. 1988) (vice-president's knowledge of the master's selecting incompetent deckhand contributing to boat's collision); *In re Allied Towing Corp.*, 409 F. Supp. 180 (E.D. Va. 1976) (Vice-president's failure of cautionary maintenance of barge to avoid its explosion); *Shaver Transp. Co. v. Chamberlain*, 1968 AMC 2031 (9 Cir. 1968 ) (general manager's knowledge of unseaworthiness); *Weisshaar v. Kimball S.S. Co.*, 128 F. 397 (9 Cir. 1904) (president's acquiescence of overloading); *The Republic*, 61 F. 109 (2 Cir. 1894) (president's failure to discover ship's defective condition).

privity.[28] Any failure of the owner to take immediate sue and labour measures to prevent further damage could be a ground to deny limitation of liability.[29]

A ship's unreasonable deviation precluded the carrier from his limitation of liability for loss or damage to the cargo arising from the deviation.[30] In cases of overloading, the carrier's limitation of liability for cargo claims was denied where the carrier's vice president and the master knew the overloading,[31] but in cases of personal injury claims for overloading the master's knowledge was enough to be imputed to the owner's privity although cargo claims could be limited liability.[32] Where the owner or its president personally operated a boat or was on board the ship, his privity or knowledge could easily be presumed or imputed.[33]

In cases of governmental ships any privity of an officer given sufficient authority in charge of a ship could be imputed to the Government.[34] Some courts simply rejected the owner's petition for limitation of liability where the unseaworthiness of the ship was only presumed. For example, where the ship mysteriously or unexplainably disappeared during

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28 *PG & E v. Zapata*, 1994 AMC 2447 (S.D. Tex. 1994) (shore-based operation manager); *Zeringue v. Gulf Fleet Marine Corp.*, 1988 AMC 1694 (E.D. La. 1986) (port engineer); *In re Patton-Tully Transp. Co.*, 797 F.2d 206 (5 Cir. 1986) (manager of log operations); *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d 455 (5 Cir. 1982) (managing agent of vessel operation); *In re Leader Marine Co.*, 1982 AMC 2068 (N.D. Cal. 1981) (port engineer); *In re Meljoy Transp. Co.*, 1974 AMC 1293 (N.D.W. Va. 1974) (port captain); *In re Canal Barge Co.*, 323 F. Supp. 805 (N.D. Miss. 1971) (same); *In re Henry Du Bois' Sons Co.*, 189 F. Supp 400 (SDNY 1960) (shore superintendent); *States S.S.Co. v. U.S.*, 259 F.2d 458 (9 Cir. 1958) (port engineer); *The Cleveco*, 154 F.2d 605 (6 Cir. 1946) (marine superintendent); *N.Y. & Cuba Mail S.S. Co. v. Cont. Ins. Co.*, 117 F.2d 404 (2 Cir. 1941) (same); *The James Horan*, 78 F.2d 870 (3 Cir. 1935) (oil plant superintendent); *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502 (1932) (works manager); *The Vestris*, 60 F.2d 273 (SDNY 1932) (same); *In re Pa. R. Co.*, 48 F.2d 559 (2 Cir. 1931) (marine superintendent); *Parsons v. Empire Transp. Co.*, 111 F. 202 (9 Cir. 1901) (barge superintendent); *The Benjamin Noble*, 244 F. 95 (6 Cir. 1917) (ship manager); *Boston Towboat Co. v. Darrow-Mann Co.*, 276 F. 778 ( 1 Cir. 1921) (assistant manager).

29 *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908 (1 Cir. 1987) (engineer's slip injury after oil spilt on the floor of engine room); *The Santa Rosa*, 249 F. 160 (N.D. Cal. 1918) (delay of salvage after stranding of passenger ship).

30 *The Pelotas*, 66 F.2d 75 (5 Cir. 1933); *The Frederick Luckenbach.*, 15 F.2d 241(SDNY 1926).

31 *In re Long*, 1969 AMC 152 (SDNY 1968), aff'd, 439 F.2d 109 (2 Cir. 1971).

32 *Moore-McCormack Lines v. Armco Steel Corp.*, 272 F.2d 873 (2 Cir. 1959).

33 *In re Marine Sports, Inc.*, 1994 AMC 1678 (D. Md. 1993) (president's personal operation of boat); *In re Ingoglia*, 1990 AMC 357 (C.D. Cal. 1989) (owner's personal operation of pleasure boat); *In re Tittle*, 544 F.2d 752 (5 Cir. 1977) (owner conned his sport fishing boat); *Nuccio v. Royal Indemnity Co.*, 415 F.2d 228 (5 Cir. 1969) (owner was on board); *In re H. & H. Wheel Serv.*, 1955 AMC 1017 (6 Cir. 1955) (president was in charge of navigation). Discord: *In re M/V Sunshine II*, 808 F.2d 762. 765 (11 Cir. 1987) (holding that the "owner at the helm" doctrine was a useful tool but not a talisman); *Polly v. Carlson.*, 1994 AMC 2878 (E.D. Mich. 1994) (holding that owner's being aboard not necessarily precludes limitation).

34 *U.S. v. Standard Oil Co. of Cal.*, 495 F.2d 911 (9 Cir. 1974); *In re the U.S. (CG-95321).*, 255 F. Supp. 737 (D. Mass. 1966).

the voyage, the unseaworthiness and accordingly the owner's privity were presumed, leading to the court's denial of limitation of liability.[35] Whatever grounds to blame the owner to prevent maritime casualty could simply be connected and imputed to the owner's negligent supervision or management or directives to the master and seamen directly or through hierarchy.[36] Thus, if the courts thought it unjust to allow the owner' limitation of liability, they could first conclude to break limitation and then constitute the reasoning to deduce the owner's privity or knowledge.

Even in the interpretation of the wilful misconduct test under the Warsaw Convention, the U.S. federal courts have too easily broken the carrier's limitation of liability. Although under the 1976 Convention the recklessness and knowledge test to break limitation applicable only to the liable person's *personal* act or omission and therefore is narrower in the breakability of owner's limitation of liability than under the Warsaw Convention, the U.S. courts interpret the concept of "wilful misconduct" of the Warsaw Convention, art, 25, as equivalent to the words "recklessly and with knowledge" of 1976 Convention, art. 4.[37] Under this interpretation,[38] some courts easily admitted the carrier's wilful misconduct upon return of jury verdict, denying its limitation of liability.[39] Although in many other cases, of course,

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35 *In re Tecomar SA*, 1991 AMC 2432 (SDNY 1991) (cargo ship disappeared after sailing from Bremen for Mexico); *In re New England Fish Co.*, 465 F. Supp. 1003 (W.D. Wash 1979) (fish tender disappeared); *The Marine Sulphur Queen.*, 312 F. Supp. 1081 (SDNY 1970) (holding that petitioners failed to prove the absence of privity for the disappearance of ship); *The Barcelona*, 1968 AMC 331 (S.D. Fla. 1967) (same). *Cf. Merrill Trust Co., Extr. v. Bradford, Extr.*, 1974 AMC 1660 (D. Me. 1974) (decreed exoneration of boat owner for lack of claimant's first step burden of proof); *Flat-Top Fuel Co. v. Martin*, 85 F.2d 39 (2 Cir. 1936) (limitation allowed in unexplained capsizing of barge).

36 See e.g. *Furka v. Great Lakes D. & D. Co.*, 1984 AMC 349 (D. Md. 1983) (holding that the managerial and supervisory personnel's failure to deal with adverse weather conditions contributed to death of a seaman); *Red Star Towing & Transp. Co. v. The Ming Giant*, 1983 AMC 305 (SDNY 1982) (tug owner's failure to train crew in rescue operation was held privity); *Monsanto Co. v. Port of St. Louis Inv't*, 350 F. Supp. 502, 519 (E.D. Mo. 1972) (owner's failure to order the master to inspect the mooring lines was held privy); *The Silver Palm*, 94 F.2d 776 (9 Cir. 1937)(owner's failure to inform the master of the effective reversing period for reverse manoeuvring was held privity).

37 *In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F. 3d 804, 812 (2 Cir. 1994) ("Wilful misconduct under the Convention means that a carrier must have acted either 1) with knowledge that its actions would probably result in injury or death, or 2) in conscious or reckless disregard of the fact that death or injury would be the probable consequence of its actions", citing *Ospina v. TWA*, 975 F.2d 35, 37 (2 Cir. 1992), cert. den., 113 S. Ct. 1944 (1993)); *In re KAL Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1479 (D.C. Cir. ), cert. den., 112 S. Ct. 616 (1991)).

38 Such interpretation of "wilful misconduct" is clearly the objective test rather than the subjective one.

39 *In re KAL Disaster*, 704 F. Supp. 1135 (D.C. 1988), aff'd, 932 F.2d 1475 (D.C. Cir), cert. den., 112 S. Ct. 616 (1991); *Buttler v. Aeromexico*, 774 F.2d 429 (11 Cir. 1985); *KLM v. Tuller*, 292 F.2d 775 (D.C. Cir.), cert. den., 368 U.S. 921 (1961); *Saba v. Cia. Nat. Air France*, 866 F. Supp. 588 (D.C.1994) (air cargo claim); *Merck & Co. v. Swiss Air Transp. Co.*, 19 Avi. 18,190 (SDNY 1985) (same); *Tarar v. Pakistan Int'l Airlines*, 554 F. Supp. 471 (S.D. Tex. 1982) (same); *Bank of Nova Scotia v. PAW Airways*, 16 Avi. 17,378 (SDNY 1981). See also Acosta, *Wilful Misconduct under the Warsaw Convention: Recent Trends and Developments*, 19 U. Miami L.Rev. 575 (1965); Bechky, *Mismanagement and*

the wilful misconduct test has not been broken, the above illustration shows how liberally the U.S. courts have exercised their discretion to break the owner's or carrier's limitation of liability so that claimants may favour the U.S. jurisdiction.

### B. Substantive/Procedural Dichotomy

Maritime claimants' choice of the U.S. jurisdiction relating to shipowner's limitation of liability presupposes that the U.S. courts apply the U.S. Limitation of Liability Act. This question has been discussed in terms of whether the governing law on the owner's limitation of liability should be decided by virtue of the analysis upon the conflicts of law, and if affirmative, whether the limitation of liability should be governed by the *lex loci (or lex loci delicti)* or the *lex fori.*

#### (1) Measure of Damages

It is well settled in international private law that the substantive rights are governed by the *lex loci* or *lex delicti* and the procedural matters by the *lex fori.*[40] It is said as also settled that the measure or quantification of damages (as opposed to remoteness of damage being substantive) is procedural matters to be governed by the *lex fori.*[41] However, since there is no exact and authoritative definition of the boundary between substantive law and procedural law,[42] the scope of the measure of damage to be applied by the *lex fori* is not definitely settled.

In *Livesley v. Horst Co.*, [43] Canadian Supreme Court held that damages either by breach of contract or by tort are governed by the *lex loci.* By contrast, in English leading case, *Chaplin v. Boys,*[44] where a road accident injury occurred in Malta between English

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*Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation*, 60 J. Air L. & Com. 455 (1994-5).

40 Cheshire & North, *Private International Law* 74 (12th ed. 1992); 1 Dicey & Morris, *The Conflict of Laws* 169 (12th ed. 1993). As to arguments on the necessity of the substantive/procedure dichotomy, see Ailes, *Substance and Procedure in the Conflict of Laws*, 39 Mich. L. Rev. 392 (1941).

41 Cheshire & North at 95; 2 Dicey & Morris at 1531; Tetley, *Shipowner's Limitation of Liability and Conflicts of Law: The Properly Applicable Law*, 23 J. Mar. L. & Com. 585, 591 n. 18 (1992) (citing many authorities); Schmitthoff, *The English Conflict of Laws* 405-407 (3d ed. 1954).

42 *Chaplin v. Boys* [1971] A. C. 356, 395 (HL 1969).

43 (1925)1 DLR 159 (Can. S. Ct. 1924).

44 [1971] A.C. 356 (HL 1969). See also *Kohnke v. Karger* [1951] 2 K.B. 670 (applying the *lex fori* in assessing the damages for auto accident in France).

subjects, it was held that not only the quantum but also the heads of damages (the injured's own pain and suffering) could be recovered by the *lex fori* as procedural despite that under the Maltese law only financial loss of wages, etc. could be claimed.[45] In Australia, until recently the measure of damages in tort of traffic accidents was held to be a question of substantive law,[46] but in *Stevens v. Head*[47] the High Court of Australia followed the English *Chaplin* rule by the majority of 4:3 by holding that the Motor Accident Act 1988 (NSW), s.79, provides only for the quantification (limits) of non-economic loss (specific heads of damage) without touching what heads of liability might be awarded.

In the United States, in 1891 the Court of Appeal of N.Y. held that the N.Y. statute limiting the amount of recovery for death of railroad accident occurred in Pennsylvania was a remedy to be applied by the *lex fori* as public policy.[48] In 1916 the Supreme Court also held that the measure of damages for death by railway accident should be determined by the *lex fori*.[49] Further, on the occasion of *Babcock v. Jackson*,[50] the "interest analysis" approach was adopted to apply the *lex fori* in the measure of damages arising from an extraterritorial tort relating to the guest statute.

### (2) Applicability to Global Limitation

However, the rule of substantive/procedural dichotomy is not so much applied or settled in the conflicts of shipowner's limitation law as in the above-mentioned nonmaritime measure of damages.

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45 However, Lord Guest held that compensation for the injured's pain and suffering was not a *head* of damage apart from patrimonial loss but was merely an *element* in the quantification of total damages, which was a question for the *lex fori*. Id. at 381-82.

46 *Breavington v. Godlman* (1988) 62 ALJR 447, (1988) 169 CLR 41 (HCA); *Ferrett v. Robinson* (1988) 169 CLR 172 (HCA).

47 (1993) 67 ALJR 343 (HCA) (Mason CJ; Deane & Gaudron JJ Dissenting: citing *The Restatement, Second, Conflicts of Law*, ALI 1971, s. 171 providing for the application of the *lex causae* to the measure of damage including any limitations imposed upon the amount recoverable).

48 *Wooden v. Western N.Y. & P.R. Co.*, 26 N.E. 1050 (1891). Accord: *Kilberg v. Northeast Airlines*, 172 N.E. 2d 526 (CANY 1961) (rejecting the application of Mass. statute limiting death claims in air crash to $15,000); *Pearson v. Northeast Air Lines*, 309 F.2d 553 (2 Cir. 1962) (same).

49 *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485 (1916).

50 12 N.Y. 2d 473 (CANY 1963) (rejecting to apply the *lex loci* of Ontario, by which a driver was not liable to a guest). Accord: *Griffith v. United Air Lines*, 203 A. 2d 796 (S.C. Pa. 1964); *Clark v. Clark*, 222 A. 2d 205 (S.C.N.H.1966) (not applying Vt. Guest statute); *Miller v. Miller* 237 N.E. 2d 877 (CANY 1968) (applying the *lex fori* to the limits of recovery in auto accident); *Tooker v. Lopez,* 24 N.Y. 2d 569 (CANY 1969) (not applying Mich. guest statute); *Rosenthal v. Warren*, 475 F.2d 438 (2. Cir.), cert.den., 414 U.S. 856 (1973) (not applying Mass. wrongful death statute limiting recovery); *Labree v. Major*, 306 A. 2d 808 (S.C.R. I.1973) (not applying Mass. guest statute).

In the United Kingdom, prior to the M.S.A. 1862 the application of British Limitation Act to collision on the high seas was rejected.[51] As to the collision within the British territorial seas, the Act was denied to be applied to a foreign ship.[52] However, since the 1862 Act and since *The Amalia*[53] it was settled that the Act was applicable equally to a foreign ship whether she was the wrongdoer or the injured and whether the collision took place in British waters or not.[54] Although the M.S.A.1979, s.17 (replaced by M.S.A.1995, s. 185) incorporating the 1976 Convention, does not expressly include the words "whether British or Foreign", it is taken for granted that English courts would always apply the *lex fori* (1976 Convention).[55] As to whether English limitation statutes are substantive or procedural, it can not be said as settled to date. In *The Penelope II*,[56] Brandon CJ (dissenting) stated a *dictum* that s. 503 of the 1894 Act was "the substantive provisions" and s. 504 "procedural only" though it was not a case on the conflicts of limitation law. In *Caltex Singapore Pte. Ltd. v. BP Shipping Ltd.*,[57] where a British ship *British Skill* collided with a *Caltex* jetty in Singapore and the owners commenced a limitation action in Singapore under the 1957 Convention while applying for a stay of the English court liability action brought by the claimants, Mr. Justice Clarke held that s. 503 and the Singaporean MSA 1970, s. 272 (same as s.503) were procedural and not substantive because they were "not to qualify the substantive right of the claimant . . . but to limit the extent to which that right can be enforced against the limitation fund" and that the English court would apply the *lex fori* (1976 Convention) and not the Singaporean limit.[58] This holding was followed more recently in *The Happy Fellow*.[59]

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51 *The Wild Ranger* (1862) 1 Lush. 553 (collision between British and American ships on the high seas); *Cope v. Doherty* (1858) 4 K. & J. 367 (collision between foreign ships on the high seas); *The Zollverein* (1856) SW.96 (collision between British and Prussian brigs).

52 *The Carl Johan* (1834) 3 Hagg. 186-187.

53 (1863) 1 Moo. N.S.471 (collision between British and Belgian ships on the high seas).

54 Temperley at 173 n. 3.

55 Tetley, supra n. 41, at 591, states that the M.S.A.1979 adopting the 1976 Convention vervatim "would apply to questions of limitation no matter where the collision took place (including the high seas) and whether it was between British or Foreign ships." Accord: Jackson, Ch. 2 n. 67, at 538. Details: Tetley, *Int'l Conflict of* Laws 41, 102, 131, 514-17 (1994).

56 [1980] 2 L1.R. 17, 21 (CA 1979).

57 [1996] 1 L1.R. 286 (QB Adm. 1995) (Clarke J).

58 Id. at 293-294 & 298. Clarke J further articulated: "The United Kingdom is a party to the 1976 Convention and has enacted it as part of English law. It seems to me that it can fairly be regarded as part of *English public policy* which the Courts should take into account and that for that reason it is objectively desirable that the provisions of the 1976 Convention should apply where possible. I should add in this regard that that Convention represents a balance between the interested parties." Id. at 299.

59 [1997] 1 L1. R.130, 134-135 (Longmore J) (holding that the owner's right to limit is procedural under the 1976 Convention as well). He further held that the English limitation action was at once narrower and wider than the French liability actions; "narrower, because the right to limit is merely procedural and does not affect the substantive rights of the French claimants and wider, because the English proceedings

In Australia, by contrast, the shipowner's right to limit liability is interpreted as a substantive right.[60] In *Victrawl Pty. Ltd. v. Telstra Corp.*,[61] where a ship damaged a communications cable about 1.5 months before the coming into force of the 1976 Convention on June 1, 1991 by virtue of the Limitation of Liability for Maritime Claims Act 1989, it was questioned whether the Convention was substantive or procedural because if it were procedural it could be applied retrospectively to the owner's application for limitation of liability under the Convention. The High Court of Australia held that the 1976 Convention would "affect the pre-existing substantive rights and liabilities" significantly in terms of the differences of the limitable claims, the amounts of limitation and the conducts barring limitation, etc. between the 1976 Convention and the 1957 Convention.[62] Thus, while this case was not related to a conflict of limitation laws, the Australian authority made it clear that the 1976 Convention was substantive not only in the right to limit liability but also in the amount of limits. In the meantime, in Canada, non-Contracting State of either the 1957 Convention or the 1976 Convention,[63] it is introduced that the right to limit is substantive and the amount of limitation is procedural.[64]

However, the courts of the States Parties to the 1957 or 1976 Convention should note that it contains a special provision for the scope of application. The art. 7 of 1957 Convention and the art. 15 of 1976 Convention provide respectively that the Convention "shall apply whenever" any person liable invokes limitation of liability before the Court of a State Party unless each State Party regulates in national law to exclude the specified persons of non-Contracting States. Thus, the above provisions of the Conventions must be interpreted as mandating the Court of each State Party to apply the corresponding Convention necessarily and always without any need to make recourse to domestic conflicts of law rules on

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purport to invoke a right which is good against all possible claimants (viz. the world) whereas the French proceedings seek only to invoke rights between the parties to those proceedings" and that "art. 21 of [1968 Convention] has, therefore, no application." The Court of Appeal, however, though having upheld this conclusion, did not refer to the substantive/procedural dichotomy. *The Happy Fellow* [1998] 1 L1. R. 13, 17 (CA 1997).

60 *James Patrick & Co. v. Union S.S. Co.*, (1938) 60 CLR 650, 673 (H.C.Aus.).

61 *The Loran Dorn (Victrawl v. Telstra)* (1995) 183 CLR 595 (H.C. Aus.), Noted, Davies, *Australian Maritime Law Decisions 1995*, [1996] LMCLQ 379.

62 Id. at 616-19.

63 RMC at I.2-79 & 89. As introduced supra, however, Canada had already incorporated the contents of 1957 Convention into its national law while recently transferring to 1976 Convention.

64 Tetley, supra n. 41, at 591. According to this theory the categories of limitable claims and the parties entitled to limitation would be governed by the *lex loci delicti* and only the limitation fund, the *lex fori.* However, the provisions of the limitation amount affects the right to limit to a certain extent (i.e., deprive the claimants of the right to full recovery to the extent of exceeding the limited amount) and therefore the judgment of the Austrian *Loran Dorn* is better opinion.

shipowner's limitation of liability regardless of the place of accidents, ship's flag, nationality of the parties, any interests of the forum and the parties in the case, etc.[65] It follows that the substantive/procedural dichotomy in the conflicts of limitation law might be necessary only in the non-Contracting States (to 1957 or 1976 Convention) such as the United States.

In the United States, in 1881 the controversy on the choice of limitation law first arose in *The Scotland*,[66] where a collision occurred on the high seas between the American and British ships. The Supreme Court held that, without distinguishing between liability law and limitation law, (1) if a collision occurred in British waters between British ships, British law could apply, (2) a collision occurred on the high seas between common flag ships could be governed by the flag law, (3) a collision occurred on the high seas between different flag ships belonging to different law states should be governed by the *lex fori*, and (4) a foreign shipowner also could invoke the U.S. Limitation Act.[67] Thus, the court partly reversed the case so as to apply the Act, while not precluding the application of the conflicts of law rules on shipowner's limitation of liability. However, in *The Titanic*,[68] where the British ship collided with an iceberg on the high seas and sank with losses of many lives and properties, the Supreme Court held that although the foundation for a recovery upon a British tort was an obligation created by British law, the laws of the forum may decline or limit to enforce that obligation "on the ground that it is contrary to the domestic policy" and that the U.S. Limitation Act "does not impose but only limits the liability - a liability assumed already to exist on other grounds."[69] Thus, the purport of the *Titanic* Court was that the U.S. Limitation Act as the *lex fori* should apply on the two grounds that (1) the Act was to announce the domestic policy and (2) it provided for only the remedy, irrespective of whether the limits of liability under foreign limitation law was higher or lower than those under the *lex fori*.[70]

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65 Accord: Berlingieri, supra Ch. 2 n. 69, at 435. Contra: *The Stilt*, 28 Feb. 1992, Hoge Raad (Dutch S. Ct., holding that shipowner's liability and limitation thereof should be governed by the same law, *lex loci)*.

66 *Nat'l Steam Nav. Co. v. Dyer (The Scotland)*, 105 U.S. 24 (1882) (Bradley J).

67 Id. at 29-30, 33 & 36.

68 *Oceanis Steam Nav. Co. v. Mellor (The Titanic),* 233 U.S. 718 (1914) (Holmes J).

69 Id. at 732-33. Followed: *Royal Mail Steam Packet Co. v Cia. De Nav. Lloyd Brasileiro*, 31 F. 2d 757, 758 (EDNY 1928), aff'd w/o, 55 F.2d 1082 (2 Cir.), cert, den., 287 U.S. 607 (1932) (holding that the weight of authority in the courts was that while the rights and liabilities of the parties could be determined by foreign law, the right to limit liability would be governed by the U.S. statute also to foreign ships and foreign collisions); *The Mandu*, 1939 AMC 287, 293 (2 Cir. 1939) ("But on limitation of liability in maritime cases the statutes permitting limitation are regarded as relating to remedy, and the law of the forum controls.").

70 Rickard, *A New Role for Interest Analysis in Admiralty Limitation of Liability Conflicts*, 21 Tex. Int'l L.J. 495, 503 (1986).

In conjunction with the sec. 411 of *The First Restatement, Conflict of Laws*[71] providing the *lex fori* for the limitation of maritime liability, the rule of *The Titanic* was deemed to be the law for 35 years until *the Norwalk Victory.*[72] A collision occurred in Belgian waters between the U.S. owned ship and a British ship and the latter sank with her cargo and chief steward drowned. The U.S. Government and the charterer petitioned for limitation of liability with a bond of only $325,000 under the Belgian limitation law (1924 Brussels Convention) instead of $1,000,000 under the U.S. law. The district court (EDNY) dismissed the petition in breach of the U.S. limitation fund provision and the Second Circuit affirmed. The Supreme Court reversed and remanded the case with instructions to examine whether the Belgian limitation law was substantive or procedural, holding that if it "attaches to right" of recovery it is substantive and should be applied, but if it "merely provides for procedural machinery by which claims otherwise created are brought into concourse and scaled down to their proportionate share of a limited fund, we would respect the equally well settled principle that the forum is not governed by foreign rules of procedure."[73] The scope of modifications to the rule of *The Titanic* is interpreted as that the upper limit of liability and policy considerations were not modified from the rule of *The Titanic,*[74] and consequently only where the foreign limitation fund is lower than the U.S. limitation fund should the substantive/procedural analysis be required.[75] However, as the court left open the clear-cut standard to the substantive/procedure distinction on foreign limitation law, the lower courts again fell into confusion, as expected by Jackson J dissenting.[76]

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71 A.L.I. (1934). Sec. 411 provided: "The limitation of liability in a maritime cause of action is determined by the law of the forum, irrespective of the law which created the cause of action." However, this provision was deleted in *The Second Restatement, Conflict of Laws*, A.L.I. 1969 (1971), in which s. 145 providing for the general tort governing law to be the local law of the state having *the most significant relationship* to the issue and s. 171 providing for the measure of damages to be subject to the same rule of s. 145 cover the conflicts of limitation law too.

72 *Black Diamond S.S. Co. v. Stewart & Sons (The Norwalk Victory)*, 336 U.S. 386 (1949) (Frankfurter J) (dissenting: Jackson, Reed, Douglas, Rutledge JJ).

73 Id. at 395-96.

74 Id. at 396.

75 Rickard, supra n. 70, at 504. Since 46 U.S.C.A. s. 183 (a) provides expressly that "[t]he liability of the owner of any vessel, *whether American or foreign, . . . shall not . . . exceed* the amount or value of the interest of such owner in such vessel, and her freight then pending", the upper limit may not be replaced by foreign limitation law.

76 336 U.S. at 399. There were no subsequent reports of the case as the parties negotiated a settlement. Baer, supra Ch.1 n.57, at 340; Gilmore & Black at 942 (commenting Justice Frankfurter's hypotheses as "baffling"); Volk & Cobbs, *Limitation of Liability,* 51 Tul.L.Rev. 953, 981-82 (1977) (criticising *The Norwalk Victory* as "hopelessly confused the choice-of-law rules to be applied in Limitation Act proceedings").

Since then, except only one case, *The Yarmouth Castle*,[77] the lower courts have not applied foreign limitation law higher than the U.S. law. In *The Western Farmer (Kloeckner v. A/S Hakedal)*,[78] Hand J followed the Titanic rule, holding that "it is necessary to say no more than that *The Titanic* . . . finally settled it for us that such statutes [Limitation Act] are part of the remedy, and that the law of the forum applies." In *The Steelton,*[79] where the American ship collided against a lift bridge in Canada, it was held that under the substantive/procedural dichotomy as mandated by *The Norwalk Victory, s.* 647 (2) (a) (b) (c) & (d) of the Canada Shipping Act (1970) "[qualified] the rights created by the Act by specifically limiting the claimants' recovery," thus being related to "heads of damage" and substantive but that s. 647 (2) (e) & (f) "merely [quantified] the limit of that fund," thus being procedural and not attaching to "the rights created by the Act" and therefore that the limitation should be governed by the *lex fori*, the U.S. Act.[80] However, this last holding that the rights were "created by the Act" was with respect in error in that the list of claims subject to limitation as provided in s. 647(2) (a) (b) (c) & (d) was nothing but the enumeration of limitable claims which were founded otherwise than by the Act. Further, in view of the purport of *The Norwalk Victory* which did not distinguish between the right to limit as substantive and the amount of limitation as procedural, it cannot be said that the *Steelton* court correctly applied the rule of *The Norwalk Victory* in interpreting the Canada Shipping Act.[81] As to the nature of the limitation provisions in Canada Shipping Act, also in *The Artic Explorer*,[82] McDonald J held that the provisions as to the time charterer's right to limit

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77 *In re Chadade S.S. Co. (The Yarmouth Castle)*, 1967 AMC 1843 (S.D. Fla. 1967). Where the Panamanian cruise ship burned and sank on the high seas and 440 claims were filed, Mehrtens J held that the art. 1078 of Panamanian Commercial Code (providing: "Each ship is considered to be an entity with limited responsibility as to its patriomony. The indemnification of the insurance is part of the patrimony of the vessel") was substantive since it "attaches specifically to the right" and ordered to deposit a stipulation and bond with surety in a sum equal to the full insured amount much higher than the fund under the U.S. Limitation Act. However, this holding was criticised as not the law: Gilmore & Black at 944 (denying its precendential value); *In re Ta Chi Nav. (Panama) Corp.*, 1976 AMC 1895, 1907 (SDNY 1976) (disregarding *Chadade* as not law and following the *Titanic* rule, applied the U.S. Limitation Act where a Panamanian flag ship was totally lost by an explosion and fire on the high seas).

78 *Kloeckner, Etc., GmbH v. A/S Hakedal (The Western Farmer)*, 1954 AMC 643, 647 (2 Cir. 1954).

79 *In re Beth. Steel Corp. (The Steelton),* 1977 AMC 2203 (N.D. Ohio 1976), aff'd, 1980 AMC 2122 (6 Cir. 1980), cert.den., 450 U.S. 921 (1981).

80 Id. at 2208-9. However, the Sixth Circuit affirmed only the conclusion that Canadian limitation law was procedural without referring to substantive or procedural distinction between the provisions of s. 647 (2) (a) to (f). 1980 AMC at 2128.

81 In the trial the experts' opinions were split on the nature of the Canada Shipping Act. Foster, Note, *Demystifying the Application of Foreign Law in A Maritime Limitation Proceeding: In re Beth. Steel Corp.*, 12 Toledo L. Rev. 719, 741-42 (1981).

82 *In re Geophysical Serv,. Inc. (The Artic Explorer)*, 1984 AMC 2413 (S.D. Tex. 1984). In interpretation of Canada Shipping Act, R.S.C. 1970, c. S-9, s. 649(1) providing that ss. 647 & 648 apply to "(a) the charterer of a ship;" McDonald J held: "Upon thorough review of Section 649(1) (a) and (b) . . . the Court finds . . . that the above provision . . . is substantive and attaches to the rights created by that Act [and that]

liability in the Act was substantive, thus denying the claimants' motion to dismiss American time charterer's limitation action arising from sinking of the Canadian flag ship in Canadian waters,[83] though he granted the *forum non conveniens* dismissal. *The Steelton* and *The Arctic Explorer* raised a question whether the courts could borrow Canadian rules on the conflict of limitation law that the right to limit is substantive whereas the amount of limitation is procedural, instead of applying the forum's domestic conflict of law rules.

As to whether the 1957 Convention is substantive or procedural, as opposed to the *The Steelton* supra, the court of *The Cimadevilla*[84] held that even though Spanish substantive law should apply to the collision occurred in Spanish waters between the Spanish ship and a Panamanian ship *Crusader*, the *lex fori* (the U.S. Limitation Act) should apply to the limitation of liability because the 1957 Convention ratified by Spain merely provided a procedural method of measuring damages and did not attach to the right of recovery pre-existed as early as 1810 and continued to exist pursuant to the Commercial Code. [85]

The lower courts' wandering was still continuing. In *In re K.S. Line Corp. (The Swibon)*,[86] where two Korean flag ships, *Swibon* and *Pan Nova* collided on the high seas whereby the latter sank with her cargo, but the former could continue its voyage to the U.S. and Canada, it was held that Korean limitation was substantive on the grounds that the arts. 843-846 of Book V, Ch. 6, of the Commercial Code "were intended to create liability for ship collisions at high sea" and the provisions of Book V, Ch. 2, were to implement the 1924 Brussels Convention but without the procedural rules enacted and therefore that the limitation provisions attached to the right.[87] However, the *Swibon* court failed to examine Korean law correctly and fully because in Korea the right to recover any loss or damage by a collision existed prior to the adoption of 1924 Brussels Convention in the enactment of the new

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[s]ince the provision is part of the substantive law of Canada, the Court also finds that the Canadian Limitation Statute should govern the instant action." Id. at 2429.

83 Id. at 2429. *Cf. The Torrey Canyon* 409 F.2d 1013 (2 Cir. 1969) (holding that a time charterer was not entitled to invoke the U.S. Limitation Act, where the conflict of limitation law was not argued despite that the accident occurred in British waters and at the material time British M.S.A.1958 allowed any charterer to invoke the Act).

84 *In re Cia. Gijonesa De Nav. SA (The Cimadevilla),* 1985 AMC 1469 (SDNY 1984).

85 Id. at 1471-74. This holding seems to have faithfully applied the criterion of substantive/procedural distinction in *The Norwalk Victory* to a foreign limitation law apart from whether the distinction by the "attach to the right to recover" test is correct and reasonable or not.

86 596 F. Supp. 1268 (D. Alaska 1984).

87 Id. at 1272-73. In addition, the court applied the interest analysis on the case to supplement the grounds of interpreting Korean limitation law as the proper law applicable to the limitation in question. Id. at 1274.

Commercial Code in 1962.[88] The situation where the 1957 or 1924 Limitation Convention was incorporated into national laws either by ratification or rewriting of the Convention was similar between Spain in *The Cimadevilla* supra and Korea in *The Swibon*, in spite of which the holdings of both the courts were completely contrary to each other. This aftermath was because the courts were mandated to maintain the "baffling" substantive/procedural dichotomy, the criterion of which was not firmly established. Now that the *Swibon* court found that Korean courts would be "clearly the optimum forum from the standpoint of judicial economy" and by virtue of the *Lauritzen* criteria and the interest analysis, it would have been better if the court had invoked *forum non conveniens* dismissal.[89]

Meanwhile, the Ninth Circuit rendered a different ruling in the conflict of Korean and U.S. limitation law in *The Korean Wonis One*,[90] where the incursion of seawater into one of the ship's holds in Pasan, Korea damaged cargo in containers shipped on board in Taiwan, Hong Kong and Singapore and destined for Los Angeles and the same owners as in *The Swibon* invoked Korean limitation amount ($420,000) by citing the *Swibon* ruling. However, the court, affirming the district court's dismissal of the limitation action for lack of subject-matter jurisdiction on the grounds of the U.S. limitation fund $1,320,000 exceeding the total claim amount $1,200,000, held that "the parties have agreed [by the bills of lading] that COGSA, a U.S. law of substantive liability, governs the rights of the parties [and that] [t]here is no need to go further to see if Korean limitation law "attaches" to the law of substantive liability, because there is no substantive Korean liability law to which Korean limitation law could attach."[91] This was an arbitrary decision to suggest another new ground to apply the U.S. Limitation Act wherever cargo claims occur in voyages to and from the ports of the U.S. in foreign trade to which U.S. COGSA is always forced to apply compulsorily.[92]

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88 The arts. 843-846 quoted in the judgement are nothing but the incorporation of the major articles of 1910 Collision Convention mainly purported to adopt the comparative fault doctrine in collision liabilities. In Korea, before the new Commercial Code (Law No. 1000, Jan. 20, 1962), the right of recovery from a collision as a tort was allowed by the art. 690 of the previous Commercial Code as well as by the art. 750 of the Civil Code.

89 The reason why the limitation action for a collision occurred on the high seas between Korean flag ships was proceeded in the U.S. was that the claimants initiated suit in the U.S. in expectation of the application of the U.S. limitation fund ($9,000,000) instead of Korean limitation fund ($250,000) at that time.

90 *In re Korea Shipping Corp. (The Korean Wonis One),* 1991 AMC 499 (9 Cir. 1990), cert. den., 499 U.S. 961 (1991).

91 Id. at 504. See also *In re Bowoon Sangsa Co.*, 1984 AMC 97, 102 n.5 (9 Cir. 1983) (holding that *The Norwalk Victory* rule was inapplicable where the limitation petitioner agreed that American law, not foreign law, should be applied to determine the liability resulting from the stranding of its ship).

92 46 U.S.C.A. s.1312. As to the critique to the decision, see Tetley, supra n.41, at 595.

Under these circumstances of confusion in the U.S. courts as to the conflicts of limitation law, some commentators propose to apply the interest analysis rather than the substantive/procedural dichotomy.[93] However, even if the U.S. courts apply such methodology, it would be doubtful whether the uniform, consistent and reasonable application of proper limitation law could be accomplished. In light of the origins and development of the limitation systems and the compromised adoption of the Limitation Conventions in the balance between the conflicting interests, the limitation statutes of each country represent such strong national policy that no private international law rules could intervene to rule out such policy. As such, if the States Parties stick to the mechanical application of the specific Limitation Convention, why should the U.S. only remain isolatedly in the confusion of the unsuitable substantive/procedural dichotomy? If an exception to the policy-based application of domestic limitation law should be necessary, the doctrine of *forum non conveniens* could be invoked.

## 2. Forum Non Conveniens

### A. English Courts

The doctrine of *forum non conveniens* (FNC) is defined as the principle that "a court may resist imposition upon its jurisdiction even when jurisdiction is authorised by the letter of a general venue statute."[94] The term originated in Scotland in the late 1800's as the plea of *forum non competens*.[95] However, in the U.S. the similar rule was invoked earlier in an independent development in suits between aliens on foreign causes of action.[96] English courts adopted the FNC doctrine much later from the early 20th century.[97]

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93 Tetley, supra n. 41, at 603; Rickard, supra n. 70, at 527.

94 *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. Mar. L. & Com. 185 (1987).

95 Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909 (1947); Barrett, *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 386 (1947); *Macmaster v. Macmaster* 11 S. (1833) S.C. 685 (No. 280); *Williamson v. North-Eastern Ry. Co.*, 11 R. (1884) S.C. 596 (No. 115).

96 Barrett, supra, at 387 (citing *Robertson v. Kerr* (1793), reported in a note to *Rea v. Hayden* (1807) 3 Mass. 24, 25). See also Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty,* 35 Corn. L.Q. 12, 13 (1949) (citing *Willendson v. Forsoket*, 29 F. Cas. 1283 (No. 17,682) (D. Pa. 1801) dismissing an admiralty action between foreigners).

97 Barrett at 388 citing *Logan v. Bank of Scotland (No. 2)* [1906] 1 K.B. 141 (CA 1905) (applying FNC in staying the action as vexatious and oppressive and abuse of the process of the Court because the cause and parties were based in Scotland except only one branch of the defendant bank in London).

In *Société du Gaz de Paris v. Armateurs Français*[98] where a French charterer arrested a sister ship of the French owner's in the Sheriff Court for cargo claims arising from the sinking of the ship on the high seas, the House of Lords upheld the FNC dismissal of the Second Division on the grounds that, despite the real pursuers being British underwriters, in the interests of the parties and for the ends of justice the case would be more suitably tried before a French tribunal. Another similar case between foreigners was *The Atlantic Star*,[99] where a collision occurred in Belgian waters between the Dutch ship and a Dutch motor barge *Bona Spes* whereby the barge and another moored Belgian barge sank with cargo. The Belgian barge interests commenced an action in the Antwerp court against the owners of *Atlantic Star*, and the Dutch barge owner brought an *in rem* action in the Admiralty Court and an *in personam* action in the Antwerp court. The House of Lords reversed the lower court's denial to stay the action, taking into account both parties' advantage and disadvantage in addition to the criterion "vexatious" or "oppressive" to the defendant and the *lis alibi pendens* between both courts.

In *Rockware Glass Ltd. v. MacShannon*,[100] the House of Lords held two conditions to stay actions on grounds of FNC : (a) the positive condition that the defendant must prove another forum to be amenable at substantially less inconvenient and expense and (b) the negative condition that the stay would not deprive the plaintiff of a legitimate personal or juridical advantage available from the English court but it was not necessary that the continuance of the action should be oppressive or vexatious.[101] This holding was reaffirmed in *The Abidin Davor*,[102] where as to a collision occurred on the high seas between the Turkish ship and a Cuban ship, after the latter was arrested in Turkey at the suit of the defendant, the Cuban owners brought an *in rem* action against a sister ship of the defendant. Lord Diplock's ruling in the *The Abidin Daver* is summarised by a commentator as the following four propositions : (1) the existence of another more convenient forum; (2) plaintiff's availability of any legitimate personal or judicial advantage from English court; (3)

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98 (1926) S.C. (HL) 13.

99 [1974] A.C. 436 (HL 1973), Noted, Smith, *Conflict of Laws - Forum Shopping - Forum Conveniens*, 52 Can. B. Rev. 315 (1974).

100 [1978] 2 WLR 362 (HL 1978) (rev'g the lower courts' denial to stay the actions brought by 4 Scotsmen against English companies for personal injuries occurred in Scotland).

101 Id. at 367-68. See also Edinger, *The MacShannon Test for Discretion : Defence and Delimitation*, 64 Can. B. Rev. 283 (1986); Schuz, *Controlling Forum-Shopping : The Impact of MacShannon v. Rochware Glass Ltd.*, 35 ICLQ 374 (1986).

102 *The Abidin Davor* [1984] 1 A.C. 398 (HL 1984) (allowing the stay by rev'g the judgement of the Court of Appeal having rev'd the first instance which has followed the *MacShannon* rule).

in case of no such advantage, justice demands the stay; and (4) in case of such advantage being available, a balance has to be struck between the plaintiff's advantage and the defendant's disadvantage.[103] However, in *The Spiliada*,[104] where the Liberian owners sued the shipper of Vancouver for corrosion damage to the ship allegedly due to the wet cargo bulk sulphur during the voyage for India, the House of Lords, allowing the appeal and restoring Staughton J's denial of setting aside the writ and of FNC stay, held that "[t]he basic principle is that a stay will be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice" by cutting down the prominence given by Lord Diplock in *The Abidin Daver* to "a legitimate personal or judicial advantage" of the plaintiff.[105]

Nevertheless, English courts have been inclined to be reluctant to allow FNC stay in actions between foreigners on various grounds rather than strictly balancing the above-mentioned criteria. The FNC stay was denied where the proceedings would be delayed too long in foreign natural fora,[106] or where the foreign natural forum was not expected to apply the contractual proper law,[107] or where a FNC stay was alternatively applied on grounds of the forum selection clause in B/L in an action between foreigners.[108]

In *The Adhiguna Meranti*,[109] the ship grounded in Taiwan waters during her voyage from Keelung to Indonesia. The cargo actions were brought in Hong Kong court against the owners, but the FNC stay was denied on grounds that the Hong Kong limitation amount was much higher than that of Indonesia. Also in *The Vishva Abha*,[110] where a collision occurred in the Red Sea between foreign ships and German cargo owners brought an *in rem* action in English court against the sister ship *Vishva Abha* of the non-carrying colliding ship while the

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103 Briggs, *The Staying of Actions on the Ground of "Forum Non Conveniens" in England Today*, [1984] LMCLQ 227, 230.

104 [1987] A.C. 460 (HL 1986) (Lord Goff).

105 Id. at 475-76. See also 1 Dicey & Morris at 399.

106 *The Vishva Ajay* [1989] 2 L1.R.558 (QB Adm.) (denying FNC stay where a collision occurred in India between foreign ships); *The Sidi Bishr* [1987] 1 L1.R.42 (QB Adm. 1986) (same where a collision occurred in Alexandria between foreign ships); *The Jalakrishna* [1983] 2 L1.R.628 (QB Adm.) (same in an Indian seaman's personal injury occurred aboard Indian ship on the high seas).

107 *Banco Atlantico SA v. British Bank of the Middle East* [1990] 2 L1.R.504 (CA).

108 *The El Amria* [1981] 2 L1.R. 539 (QB Adm.).

109 [1988] 1 L1.R. 384 (HKCA 1987).

110 [1990] 2 L1.R.312 (QB Adm.) (Sheen J).

owners had commenced the *in rem* action against the other vessel in South Africa where 1957 Convention was in force. The court denied the defendant's FNC stay on grounds that the limitation fund was £367,500 in South Africa whereas the fund in England was £1.5 million under 1976 Convention, the result of which would be "a great injustice to deprive them [plaintiffs] of their right to litigate in this country." Further, in *The Hamburg Star*,[111] where in respect of container cargo claims arising from the voyage between Rotterdam and Hamburg, several actions were pending in Cyprus and England and the owners brought a limitation action in Cyprus, the court refused the owner's application for a FNC stay, holding that the higher limitation under the 1976 Convention available in English court than in Cyprus was the plaintiffs' legitimate judicial advantage. As mentioned supra, however, in view of *The Herceg Novi* (CA 1998) the above cases denying FNC stay in order to remit the case from the higher limitation jurisdiction to any lower one would not necessarily be upheld.

The reason of *lis alibi pendens* does not necessarily mandate English courts to grant a FNC stay.[112] In *The Tillie Lykes*,[113] a collision occurred on the high seas between American and Panamanian ships. After the American owners first commenced suit in a U.S. district court, the other owners brought an *in rem* action in England. The application for a stay on grounds of *lis alibi pendens* and FNC was refused on the simple reasoning that the mere existence of a multiplicity of proceedings was not to be taken into account as a disadvantage to the defendant. By contrast, the Gibraltarian Court of Appeal left a contrary precedent respecting international comity in *Aldington Shipping Ltd. v. Bradstock Shipping Corp.*[114] A collision occurred in the River Elbe between the Panamanian flag (German-owned) *Brady Maria* and the Gibraltarian flag *Waylink* on January 3, 1986 before coming into force of 1976 Convention. The Gibraltarian defendant (Aldington) first brought liability and limitation actions in the Hamburg court and then the plaintiff commenced this action in Gibraltar. The defendant's application for a stay of the Gibraltarian action was refused but it was reversed by the Court of Appeals holding that even if the onus of proof on the actual fault or privity test under the 1957 Convention was different between German and English laws,

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111 [1994] 1 L1.R.399 (QB Adm. 1993) (Clarke J).
112 *E.I. Du Pont v. Agnew* [1987] 2 L1.R.585 (CA).
113 [1977] 1 L1.R.124 (QB Adm. 1976) (Brandon J).
114 [1988] 1 L1.R.475 (Gibr. CA 1987).

the German court was the appropriate and natural forum with no further evidence enough to deprive the plaintiffs of the advantage of Gibraltarian discovery procedure.[115]

Lastly, in the cases where the 1968 Brussels Convention and 1988 Lugano Convention apply, it is disputed whether the application of the FNC doctrine is restricted despite the s.49 of the 1982 Act.[116] After the case of *In re Harrods (Buenos Aires) Ltd.* (CA 1991), however, the Court of Appeal (Evans LJ) reaffirmed its *Re Harrods* decision in *Sarrio v. KIA*[117] on the one hand and further held on the other that even where the defendant is not domiciled in a Contracting State, the Convention including arts. 21 and 22 does not apply by virtue of art. 4 but instead the FNC principles should apply, while nevertheless he reversed the lower court's stay order on other grounds that the English and Spanish actions were not "related" for the application of art. 22. *The Sarrio* holding was however overruled by the House of Lords which allowed the appeal on the grounds that art. 22 should have applied with "a broad common-sense approach . . . refraining from an over-sophisticated analysis of the matter" and that since "the Spanish Court permits the consolidation of related actions and [since] that Court has jurisdiction over both actions" the English action should have been "declined" instead of being "stayed".[118]

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115 Id. at 482.

116 Morgan, *Discretion to Stay Jurisdiction*, 31 ICLQ 582, n.4 (1982); Stone, *The Civil Jurisdiction and Judgements Act 1982: Some Comments*, 32 ICLQ 477, 496 (1983); *S & W Berisford v. New Hampshire Ins. Co.* [1990] 1 L1.R.454 (QB Com. 1989) (holding that the 1968 Brussels Convention left no room of the court's discretion to FNC stay even if there were proceedings already pending before the courts of a non-Contracting state); *Arkwright Mutual Ins. Co. v. Bryanston Ins. Co.* [1990] 2 L1.R.70 (QB Com.) (same). Criticised : Collins, *Forum Non Conveniens and* the Brussels Convention, 106 LQR 535 (1990); Briggs, *Spiliada and the Brussels Convention*, [1991] LMCLQ 10. These two decisions of the Commerical Court were overruled by the Court of Appeal in *In re Harrods (Buenos Aires) Ltd.* [1991]3 WLR 397, [1992] Ch.72 (CA) (holding that although FNC will not apply when the other forum is that of another Contracting State, it is not inconsistent with the Convention to exercise the discretion of FNC stay by virtue of the 1982 Act, s. 49, to remit the case to non-contracting state), Commented, Briggs, *Forum Non Conveniens and the Brussels Convention Again*, 107 LQR 180 (1991) (Opposing to the second half).

117 *Sarrio SA v. Kuwait Investment Authority* [1996] 1 L1. R. 650 (QBD Com. 1995) (Mance J) (staying action by applying art. 22 to the English and Spanish actions between the same parties), rev'd, [1997] 1 L1.R.113 (CA 1996) (Evans LJ) (holding that the two actions were not "related" because the "primary" or essential facts were not the same), rev'd again, [1998] 1 L1.R.129, 134 (HL 1997) (Saville L) ("[T]o adopt the suggested limitation would in truth be to give the phrase "related actions" a special "English" meaning, which would be contrary to what the [European] Court decided in The Maciej Rataj.").

118 [1998] 1 L1.R. at 135. Thus, the House of Lords made it clear that art. 22 should apply even where the defendant is not domiciled in a Contracting State. Such a position is consistent with the decision of the ECJ in *Overseas Union Ins. Ltd. v. New Hampshire Ins. Co.* [1991] ECR I-3317, 3348 (ECJ 1991) ("[Article 21] together with Article 22 . . . intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom [and therefore that] Article 21 must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts in Contracting States, *irrespective of the parties' domicile*.").

Nonetheless, where arts. 21 and 22 of 1968 Convention do not apply, the FNC doctrine may operate again by virtue of s. 49 of CJJA 1982. In this connection, before the Court of Appeal's *Sarrio* decision, Mr. Justice Clarke held in *The Xin Yang*[119] that where the defendant is domiciled in a Contracting State there is no room to apply FNC but "where [he] is domiciled outside a Contracting State the Court which would otherwise be first seized is entitled to decline to exercise jurisdiction on the ground of *forum non conveniens* whether the alternative forum is within a Contracting State, as in this case, or outside a Contracting State as in *In re Harrods (Buenos Aires)*." The conclusion of this judgement that the FNC doctrine was applied to a liability action competing with a limitation action was correct but its reasoning was not.

### B. American Courts

#### (1) General Test

In the United States, different approaches have been developed in respect of the FNC test. In *Gulf Oil Corp. v. Gilbert*,[120] where a Virginia warehouse owner sued a Pa. defendant supplier of gasoline in New York (SDNY) for an explosion and fire accident to the warehouse, the Supreme Court held that "unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed" but that a district court may dismiss an action on FNC grounds on the balance of the following private and public interest factors:

Private factors include: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expectitious and inexpensive" plus "the enforceability of a judgement."

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[119] See supra Ch. 2 n. 231, *The Xin Yang* [1996] 2 L1.R.217, 222 (QBD Adm. 1996).
[120] 330 U.S. 501 (1947) (Jackson J).

Public factors include: administrative difficulties of courts' congested dockets; jury duty not to be imposed on the people of different community; local interest in having localised controversies decided at home; and the difficulty of applying foreign law.[121]

A similar test was codified in 1948 at 28 U.S.C. s.1404 (a) providing: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." However, it did not constitute a codification of the FNC rule but instead it granted the courts a broader discretion than that possessed by them under that rule.[122]

The *Gilbert* rule was reaffirmed in *Pipe Aircraft Co. v. Reyno*,[123] where an air crash occurred in Scotland and the administratrix of the estates of five passengers killed brought wrongful death actions in a California court against the U.S. manufacturers of the plane and its propellers. The district court to which the suit was transferred granted the FNC dismissal after balancing private and public interest factors, which was reversed by the Third Circuit. However, the Supreme Court reversed again, holding that the district court did not clearly abuse its discretion on weighing the private and public interests.[124]

### (2) Applicability to Admiralty & Limitation Actions

Some commentators argue that the *Gilbert* interest factors of FNC should not be applied to international maritime collision context on grounds that "the *Gilbert-Koster* Court probably did not intend that its FNC standards apply to U.S. plaintiffs in international

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121 Id. at 508-9. See also *Koster v. Lumbermens Mutual Cas. Co.*, 330 U.S. 518 (1947) (Jackson J) (one of the twin cases by the same Justice applying FNC).

122 *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

123 454 U.S. 235 (1981) (Marshall J).

124 *Gilbert - Reyno* Progenies (FNC All'd) : *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) (applying private and public interests in FNC dismissals of product liability actions by many foreigners injured by nematocide while working on farms in 23 foreign countries); *McCracken v. Eli Lilly & Co.*, 494 N.E. 2d 1289 (Ind. CA 1986) (same in personal injury actions by U.K. citizens by ingestion of a drug Opren); *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11 Cir.), cert.den., 474 U.S. 948 (1985) (same in the actions of Costa Rican farm workers sterilised by exposure to certain pesticides); *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6 Cir. 1984) (same in Britons' birth defects actions resulting from ingestion of Debendox). FNC Den'd : *Lony v. E.I. Du Pont*, 935 F.2d 604 (3 Cir. 1991) (rev'g the district court's FNC dismissal for abuse of discretion in balancing private/public interests); *Lacy v. Cessna Aircraft Co.*, 932 F.2d 170 (3 Cir. 1991) (same); *R. Maganlal & Co. v. M.G. Chemical Co.*, 942 F.2d 164 (2 Cir. 1991) (same); *Homes v. Syntex Labs. Inc.*, 202 Cal. Rptr. 773 (Cal. App.1984) (same); *Macedo v. Boeing Co.*, 693 F.2d 683 (7 Cir. 1982) (same).

admiralty cases."[125] However, although some lower courts have not necessarily followed the *Gilbert-Reyno* test, the Supreme Court's same test is still relied on as far as applicable even in the international maritime actions, provided that in Jones Act actions by foreign seamen the test is modified with the application of choice of law rules.[126]

In *Alcoa S.S.Co. v. M/V Nordic Regent*,[127] the Liberian ship rammed Alcoa's pier in Trinidad causing damage of $8,000,000. A N.Y. company, Alcoa sued the ship *in rem* and the owners *in personam*, against which the owners moved a FNC dismissal. Affirming the SDNY's granting the motion, the Second Circuit held that the admiralty action or the American citizenship of the plaintiff did not justify creating a special rule of FNC different from the *Gilbert* standard.[128] The controlling motivation of the defendant's motion for FNC dismissal was that under the Trinidadian limitation law 1894 the owner's limit of liability was $570,000 as compared to the U.S. limitation amount $3.5 million.[129] This case was primarily related to which limitation law the court was to make applicable. The court weighed the factors that the claimant based its chartering business in Trinidad and that the accident occurred there in direct connection with the local business. Consequently, a FNC dismissal may be granted even where an American citizen suffers damage by a foreign ship in foreign waters.[130]

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125 Dennard, Note, *Forum Non Conveniens in International Maritime Collision Litigation in the Federal Courts : A Suggested Approach*, 16 Cornell Int'l L.J. 121, 139 (1983).

126 Edelman, *Forum Non Conveniens : Its Application in Admiralty Law*, 15 J. Mar. L. & Com. 517, 524 (1984).

127 1980 AMC 309 ( 2 Cir. en banc 1980), cert.den., 449 U.S. 890 (1980).

128 Id. at 313 (citing collection of cases following *Gilbert* test). See also *Atalanta Corp. v. Polskie Linie*, 1988 AMC 2871, 2878 (SDNY 1988) ("Neither plaintiffs' American citizenship, Alcoa, 1980 AMC at 318-9 ... nor the fact that evidence of their damage is situated here, is sufficient to overcome the overwhelming public and private inconvenience of proceeding in this forum.")

129 Volk, *Forum Non Conveniens: Two Views on . . . Alcoa S.S v. Nordic Regent,* 12 J. Mar. L. & Com. 123, 124, 126 n. 16 (1980). As to the limitation amount the court articulated: "The primary concern of appellant in resisting trial in Trinidad is that it may recover only $570,000 rather than $8,000,000 . . . It is abundantly clear, however, that the prospect of a lesser recovery does not justify refusing to dismiss on the ground of *forum non conveniens*. . . Moreover, it is not at all unfair for appellant to recover the lesser amount. Its pier was in Trinidad. It was not likely to go travelling. As long as it did not, Trinidad's damage limitation law governed. It would be far more unfair to impose an additional recovery against appellee when appellant, fully familiar with the law of the place where it maintained a permanent business, could have insured its additional risk in a prudent fashion." *Alcoa S.S. Co.,* 1980 AMC at 327-328.

130 A similar case was held similarly by the same district court 3 years ago in *Texaco Trinidad, Inc. v. Astro Exito Nav. SA*, where a Panamanian ship struck a jetty in Trinidad owned and operated by the plaintiff causing damage of $5,000,000. Applying the *Gilbert* test of private and public interests, the SDNY granted the defendant's FNC dismissal conditionally, holding that plaintiff's citizenship was not controlling and that the alternate forum law might "be less favourable to plaintiff's choice of recovery" (citing *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 453 (2 Cir. 1975)). 437 F. Supp. 331 (SDNY 1977).

The more prudent courts would follow not only the *Gilbert-Reyno* interest analysis but also the *Lauritzen/Rhoditis* choice of law rules in applying the FNC doctrine to admiralty actions, though they are not Jones Act actions. In *Lauritzen v. Larsen*,[131] where a Danish seaman (Larsen) who signed ship's articles including Danish proper law in New York, was injured aboard a Danish ship in Havana and brought a Jones Act action in the SDNY, the Supreme Court reversed the lower court's application of the Jones Act for the plaintiff, holding that the Danish law rather than the U.S. law was favoured by the overwhelming preponderance of the following 7 factors : (1) place of the wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of contract, (6) inaccessibility of foreign forum, and (7) law of the forum.[132] In *Hellenic Lines, Ltd. v. Rhoditis*,[133] a Greek seaman who signed a contract in Greece containing Greek proper law was injured aboard a Greek ship in New Orleans. He brought a Jones Act action in the S.D. Fla. against the managing Greek corporation whose 95% of the stock was owned by a U.S. domiciliary as a Greek citizen and managed in New York and New Orleans. Affirming the lower courts' holdings that the defendant Hellenic Lines was an "employer" under the Jones Act, the Supreme Court added the 8th factor "the shipowner's base of operations" in addition to the *Lauritzen* 7 factors.[134]

While it has been very rare that a limitation action brought in a U.S. district court was dismissed on grounds of FNC, *The Arctic Explorer*[135] was an exception. The Canadian flag ship was time chartered to Geophysical Service, Inc.(GSI), a subsidiary of Texas Instruments, Inc. (TI), both of which were Delaware corporations, but GSI was doing business in Canada. The ship was an oceanographic research vessel and during the voyage sank within Canadian waters for unknown reasons, claiming the lives of 13 persons aboard the ship. GSI and the Canadian owners filed a limitation action with the Federal Court of Canada which ordered the

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131 345 U.S. 571 (1953) (Jackson J).

132 Id. at 583-590. This holding was reaffirmed in *Romero v. Int'l Term. Op. Co.*, 358 U.S. 354, 381-84 (1959).

133 398 U.S. 306 (1970) (Douglas J).

134 Id. At 309. Followed (FNC Dismissal) : *Saroza v. Royal Caribbean Corp.*, 1992 AMC 428 (C.D. Cal. 1991) (Philippine seaman); *Damigos v. Flanders Comp. Nav. SA*, 1990 AMC 656 (SDNY 1989) (Greek seaman); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5 Cir. 1988) (Brazilian seaman); *Gonzalez v. Naviera Neptuno AA*, 832 F.2d 876 (5 Cir. 1987) (Peruvian seaman).
FNC Denial Cases by *Lauritzen/Rhoditis* Test: *Zipfel v. Halliburton Co.*, 1987 AMC 2642 ( 9 Cir. 1987) (American seaman); *In re Ocean Ranger Sinking*, 589 F.Supp. 302 (E.D. La. 1984) (same); *Rode v. Sedco, Inc.*. 394 F.Supp. 206 (E.D.Tex. 1975) (German seaman); *Grammenos v. Lemos & Nile Shipping Co.*, 1972 AMC 608 (2 Cir. 1972) (Greek seaman).

135 *In re Geophysical Serv., Inc. (The Arctic Explorer)*, 1984 AMC 2413 (S.D. Tex.1984).

petitioners to deposit the Canadian limitation fund. Apprehending 20 different suits in the U.S. federal and state courts, GSI and TI filed a petition for exoneration from or limitation of liability in the S.D.Tex. to satisfy the 6 months time limit with *ad interim* stipulation of $275,000. As to the petitioner's motion to dismiss all claims on grounds of FNC and the claimants' cross-motion to dismiss the limitation action for lack of jurisdiction over time charterers under the U.S. Limitation Act, the court held that s. 649 (1) of Canada Shipping Act extending the right to limit liability to "the charterer of a ship" was substantive and should be applied in the U.S. court, but on balancing the *Lauritzen/Rhoditis* factors as well as the *Gilbert/Reyno* private/public interest factors, it further held that Canada was a more appropriate forum, thus granting the FNC dismissal on the conditions that the petitioners were to (1) submit to service of process in the Canadian court within 90 days; (2) waive any time bar defence; and (3) agree to satisfy any judgement rendered by the Canadian court.[136]

In collision cases between foreign ships, the traditional attitude of the U.S. courts was that the exercise of jurisdiction was a matter of discretion.[137] Thus, there is no uniform rule on the application of FNC to collisions between foreign ships.[138] In cases of *lis alibi pendens* with foreign forum, the applicability of FNC is discretionary.[139] The jurisdiction in an *in rem*

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136 Id. at 2428-34. It is to be noted in this case that although it was held that "the presence of an American claimant is not in and of itself sufficient to bar this Court from dismissing a case on the grounds of *forum non conveniens*", id. at 2434 (all the 20 claimants were foreigners except only one), as the petitioners were time charterers without the owners joined, under the U.S. law their limitation jurisdiction might be reversed and dismissed on appeals, and further that it would be questioned whether the time charterers were liable for the sinking of the ship because it was operated by the owners. In this sense, this case was not a true transfer to a foreign court of a U.S. limitation action based upon the unambiguous existence of limitation jurisdiction. The Canadian owners must not have felt any need to join the U.S. limitation action because not only the personal jurisdiction could not be vested in the U.S. over the owners but also nor was any *in rem* action apprehended.

137 *The Belgenland*, 114 U.S. 335 (1885); *The Attualita*, 238 F.909 (4 Cir. 1916); *Canada Malting Co. v. Paterson S.S. Ltd.*, 285 U.S. 413 (1932) (aff'g FNC dismissal); *The Kanto Maru*, 112 F.2d 564 (9 Cir. 1940) (same but conditional); *The Harfry*, 39 F.Supp. 893 (D.N.J. 1941).

138 *The Sunny Prince*, 1957 AMC 57 (5 Cir. 1956) (holding that jurisdiction in a collision between foreign ships on the high seas should be taken unless injustice involves); *Iberian Tankers Co. v. Terminales Maracaibo CA*, 322 F.Supp 73 (SDNY 1971) (FNC dismissal for lack of minimum contacts in N.Y. of the collision between foreign chips on the high seas).

139 *The Texaco Caribbean*, [1976] 1 L1.R.565 (2 Cir. 1975) (conditional FNC dismissal for *lis alibi pendens* in a collision on the high seas between foreign ships). Contra: *Damodar Bulk Carriers, Ltd. v. A/S Det Dansk-Franske D/S*, 1981 AMC 1734 (S.D. Tex. 1979).

collision action between foreign ships is in principle entertained in the U.S. courts,[140] because the rule of *Shaffer v. Heitner*[141] does not apply to admiralty *in rem* jurisdiction.[142]

In *Cliffs-Neddrill v. M/T Rich Duke*,[143] a Bahamian tanker *Rich Duke* navigating for Delaware and a Dutch drillship *Neddrill 2* collided in Aruban territorial waters. Just before the former entered Delaware, its owner filed a limitation action in the Netherlands, the latter owner's home country, ostensibly for the latter's convenience sake and in order for the former not to be arrested elsewhere.[144] Upon arrival in the territorial waters of Delaware, however, the *Rich Duke* was arrested in an *in rem* action against it and an *in personam* action against its owners and managers. The defendants moved a FNC dismissal, which was however denied on balancing private/public interest factors. In particular, in weighing the local interest of the *Gilbert's* public factors, the court stressed that "Delaware is interested in ensuring that businesses . . . operating within its borders abide by the law."[145] This holding illustrates that a U.S. federal court would exercise the maritime *in rem* jurisdiction notwithstanding that it has no relation with the specific case and that the owners had taken a pre-emptive strike elsewhere in jurisdiction competition whereby the U.S. court's exercise of such jurisdiction would result in *lis alibi pendens*.[146]

Also denied was the motion for a FNC dismissal in *In re Maritima Aragua, SA*,[147] where a Venezuelan ship and a Panamanian-flag but Greek-owned ship collided in Venezuelan waters and the former owner filed a limitation action in the U.S. court while the

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140 *Poseidon Schiffahrt v. M/S Netuno*, 1973 AMC 1180 (5 Cir. 1973); *The Sunny Prince*, 1957 AMC 57 (5 Cir. 1956). *Cf. Perusahaan Umum v. M/V Tel Aviv*, 1985 AMC 67 (5 Cir. 1983) (FNC dismissal of an high-seas collision action between foreigners pursuant to *Gilbert* factors).

141 433 U.S. 186 (1977) (holding that a state court could not exercise jurisdiction over a defendant based upon the presence of his property within the state unless the minimum contacts test of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) was satisfied).

142 Kalo, *The Meaning of Contact and Minimum National Contacts: Reflections on Admiralty in Rem and Quasi in Rem Jurisdiction*, 59 Tul. L. Rev. 24 (1984).

143 1990 AMC 1583 (D.Del. 1990).

144 However, the collision occurred on January 21, 1990 while in the Netherlands the 1976 Convention came into force on Sept. 1, 1990 after the collision. RMC I.2-89. It was indicated in the judgement that the limitation fund in the Netherlands could be as great as $10 million, id. at 1586 n.3, but it is uncertain whether it was based upon 1957 Convention or 1976 Convention.

145 Id. at 1593 (quoting *Lony v. E.I. Du Pont*, 886 F.2d 628, 642 (3 Cir. 1989)).

146 *Cf. Empresa Lineas Maritimas v. Schichau-Unterweser*, 955 F.2d 368 (5 Cir. 1992) (aff'g the FNC dismissal, where after American consignees' cargo actions against German owners and Argentinean time charterers had been settled in the owners' limitation action, the time charterers filed a third party action against Dutch manufacturer of the auxiliary diesel engine of the German ship sunk off Bermuda during the voyage bound for the U.S. ports, on grounds that the Netherlands afforded an adequate forum on balancing the *Gilbert's* test).

147 1993 AMC 2584 (SDNY 1993).

latter owner and its claimants were proceeding actions in London under the choice of forum agreement. The court reasoned in denying the latter owner's motion of FNC dismissal that "[g]iven the presumption that a U.S. citizen's or resident's choice of forum is entitled to deference by this court, the balance of both private and public interest factors under *Gulf Oil* suggests that this court should retain jurisdiction over the cargo claims as long as the Limitation Action filed by the Maritima, S.A., is before this Court."[148] The above survey shows well how the U.S. federal courts are inclined reluctant to apply FNC dismissals as long as a limitation action is pending therein, while they are more or less liberal in granting motions to transfer limitation actions between the U.S. courts.[149]

### C. FNC and Limitation Jurisdiction

Unless and until an international concourse scheme is provided in Limitation Conventions, the proper utilization of *forum non conveniens* would greatly contribute to resolve international conflicts of limitation jurisdiction.

(1) Between the same Limitation Convention States a proper application of FNC doctrine would result in judicial economy and in the interests of the parties. If two liability actions based upon one incident are pending in different courts and the defendant pleads limitation defence in each action, the courts will meet difficulties in making decisions and even if they do, the judgments will be inevitably irreconcilable. And, if the defendant should file a limitation action with the court he selected, the two or at least one claimant would have to elect whether to make his claim against the limitation fund or proceed with the liability action. Even if he proceeds with the action, he will meet difficulties in executing the judgment when the limitation decree shall be final and binding under the same Limitation Convention, in which case he might lose all rights to exercise against other assets of the defendant. Thus, if adequate security were given, the claimant would have no merits of

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148 Id. at 2596.

149 *In re American River Transp. Co.*, 1995 AMC 705 (E.D. La. 1994) (transfer to the S.D.Tex.); *In re St. George Packing Co.*, 1990 AMC 2848 (E.D.La. 1990) (transfer to the M.D.Fla.); *In re Bankers Trust Co.*, 1986 AMC 67 (E.D. Pa.1985)(transfer to the N.D. Cal.); *In re Far Eastern Shipping Co.*, 460 F. Supp.107 (SDNY 1978) (transfer to the W.D. Wash.); *In re the U.S.(CG-95321)*, 221 F.Supp. 163 (D.N.H. 1963) (transfer to the D. Mass.); *In re Clipper Fishing Corp.*, 1959 AMC 1986 (SDNY 1958) (same); *In re Texas Co.*, 116 F. Supp. 915 (SDNY 1953) (transfer to the E.D. Va.). *Cf.* Transfer Denied: *In re AWI Drilling & Workover, Inc.*, 1991 AMC 2334 (E.D.La. 1991); *In re C.F. Ind., Inc.*, 1981 AMC 1589 (M.D. La. 1980); *F/V Fenwick Island*, 1971 AMC 1273 (E.D.N.C. 1971); *In re Alamo Chemical Transp. Co.*, 323 F.Supp. 789 (S.D.Tex. 1970); *Humble Oil & Refining Co. v. Bell Marine Serv.*, 1964 AMC 315 (5 Cir. 1963) (aff'g denial of transfer).

maintaining his liability action in cases of the owner's pleading limitation of liability. Here, a FNC stay of a liability action may be used effectively whether the defendant only pleaded limitation defence in both actions or constituted the limitation fund with one of the courts.

(2) Where a limitation fund has been established with the alternative forum in one of the same Limitation Convention States, a related liability action must in principle be stayed if applied for on grounds of FNC so far as the limitation jurisdiction is competent within the ambit of the Convention. As compared with the general application of FNC, where the alternative forum is a competent limitation forum, the relevant provisions of the applicable Limitation Convention must be weighed significantly.[150] In *The Waylink*,[151] the C.A. of Gibralter reversed the trial court's denial of FNC stay, but weighed its reasoning on the German limitation court's being natural and appropriate forum based upon the general factors of FNC doctrine rather than weighing much on the 1957 Convention grounds.

(3) Between the courts of 1968 Brussels or 1988 Lugano Convention States, the opinions are split and confused on whether under art. 22 the court may apply the doctrine of FNC. The Jenard Report annotates that "[w]here actions are related, the first duty of the court is to stay its proceedings."[152] This opinion seems to regard art. 22 as a mandatory provision irrespective of its discretionary expression. The Second opinion is to see art. 22 as a discretionary provision literally.[153] The third opinion is that art. 22 allows the court to apply the FNC doctrine.[154] In view of the different requirements of stay and the priority of the first seized court, art. 22 *per se* does not allow the court wide FNC discretion but falls within a class of the "doctrine of first seisin."[155] Thus, art. 22 allows the court much more

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150 E.g., art. 5 of 1957 Convention; art. 13 of 1976 Convention; art. VI of 1969 or 1992 CLC; art. 10 of 1996 HNS Convention.

151 *Aldington Shipping v. Bradstock Shipping (The Waylink & The Brady Maria)* [1988] 1 L1.R. 475 (Gibr. CA 1987).

152 Genard, supra Ch. 2 n. 135, at 79/41.

153 Kaye, supra Ch. 2 n. 143, at 1236 ("In all events, in view of the discretionary nature of the power of stay under Article 22, para. 1 and of the absence of any Convention recognition refusal ground on the basis of irreconcilable Contracting State's judgments, courts should be impressed with the desirability of staying where possible in favour of foreign related actions."); O'Malley & Layton, supra Ch. 2 n. 146, at 640 ("In the exercise of its discretion, the court will, of course, weigh the relative advantages and disadvantages of a stay, and consider the extent to which the two actions related.").

154 Blackburn, supra Ch. 2 n. 177, at 98 ("[I]f Art. 22 applies, it is certainly arguable that the court is entitled to exercise its discretion to stay the proceedings pursuant to the principles enunciated in the *Spiliada* case, so long as to do so is not inconsistent with the Jurisdiction Convention.").

155 Reed & Kennedy, *Forum Non Conveniens and the Brussels Convention*, (1995) NLJ 1697, 1698 n. 6 ("In this regard note the *lis alibi pendens* conditions imposed by Arts 21 to 23 applying *the doctrine of first seisin*.").

restricted discretion than the traditional FNC doctrine. For example, where two related liability actions are pleaded with limitation defence respectively, art. 22 must operate as if it were a mandatory provision because, as mentioned above, each court may be unable to apply the relevant limitation provision (e.g., art. 10 of 1976 Convention) without consolidating those actions.

However, as stated supra, the doctrine of first seisin (arts. 21 & 22) may not apply between a limitation action and liability actions because the limitation jurisdiction provided for by Limitation Conventions or national laws as allowed by the Conventions to regulate has precedence over the provisions of 1968 Convention (art. 57) and because by providing for the bar of claimants' exercising their rights against other assets of the owner after the constitution of a limitation fund, the Limitation Conventions make it clear that the fund once constituted may not in principle be transferred to any other court earlier seized of a liability action. Now that arts. 21 & 22 do not apply, the FNC doctrine should operate to stay the liability actions to remit them to the fund court with the factors of the Limitation Conventions greatly weighed.

The "limitation-related factors" to be considered in the application of FNC doctrine must be: (a) the nature of limitation proceedings requires a concourse of all related claims; (b) Limitation Conventions provide for the limitation court priority principles that once a limitation fund has been constituted, any claims against other assets of the owner are barred; (c) where the plaintiff maintains concurrently both the liability action and filing the same claims against the fund (with reservation or not) he would be given the remedies in the limitation proceedings to contest limitation or prove his claims, in which case irreconcilable decisions between the fund and nonfund courts may be made; (d) even if the plaintiff disregards the limitation proceedings, the limitation decree will have *res judicata* and must be recognised in the same Limitation Convention States and the 1968 Convention States as well (art. 26 *et seq.*); and (e) even if the limitation court reserves the distribution for a claimant who is proceeding with his liability action, equity mandates that opportunities be given to other claimants to contest the plaintiff's claim amount in the limitation proceedings rather than in the foreign liability action because it affects the distribution of the fund.

In view of such unique characteristics of limitation procedure, the courts between the same Limitation Convention States, whether they are between the 1968 or 1988 Convention States or not, irrespective of the parties' domiciles and regardless of the order of the court's

seizure of the actions between a liability action and a limitation action, are in principle required to stay liability actions upon application on grounds of FNC doctrine. In this sense, the grant of the defendants' motion to stay the English liability action on the FNC grounds in *The Xin Yang* was an exemplary proper disposition[156] despite its seizure of the action earlier than that of the limitation action in the Dutch court, although its reasoning could not be upheld.

(4) By contrast, however, there has been taken for granted that a stay on grounds of FNC could not be granted between the courts of different Limitation Convention states. In particular, where the stay of a liability action is likely to deprive the plaintiff of the legitimate judicial advantage of higher limitation (e.g., 1976 Convention) than in the alternative limitation forum (e.g., 1957 Convention), the motion for a stay of the liability action on FNC grounds has been repeatedly denied,[157] though such trends are modified most recently. On the other hand, in the U.S. a claimant's forum shopping for a higher limitation of liability was not necessarily regarded as a judicial advantage, and despite the existence of such an advantage the court dismissed the liability action on grounds of FNC to remit the case to the natural foreign forum in which the lower limitation law governed.[158]

(5) As discussed supra, a limitation action may not be stayed on grounds of FNC so long as its jurisdiction is competent.[159] The only exception was *The Happy Fellow*,[160] though its ground were not FNC but art. 22 of the 1968 Convention. As commented supra, however, the reasoning was not rightful in that the English jurisdiction over the limitation action based upon the post-incident forum change agreement made only between the owners and the T/C charterers was not valid as against the 7 French collision liability claimants who

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156 Contra: Newton, *Forum Non Conveniens in Europe (Again)*, [1997] LMCLQ 337, 342-44. Misguided by the Schlosser Report, the commentator stated that by virtue of art. 57 of 1968 Convention, the 1952 Arrest Convention superceded art. 4 of 1968 Convention and that "[t]here should have no discretion to order a stay, as none existed in the Arrest Convention itself." However, the FNC doctrine as a part of English national law is not excluded from application because the Arrest Convention itself does not prohibit its application, nor is art. 57 what he called a "pure Convention" jurisdiction provision because art. 57 *per se* does not create specific jurisdiction.

157 *Caltex Singapore Ltd. v. BP Shipping Ltd.* [1996] 1 L1.R. 286 (QBD Adm. 1995) (Clarke J); *The Kapitan Shvetsov* [1998] 1 L1.R. 199 (HK CA 1997); *The Herceg Novi* [1998] 1 L1.R. 167 (QBD Adm. 1997) (Clarke J), but rev'd, [1998] LMLN 490 (CA) (higher limitation held not to be a decisive factor of FNC).

158 *Alcoa S.S. Co. v. M/V Nordic Regent*, 1978 AMC 365 (SDNY 1978), aff'd, 1980 AMC 309 (2 Cir. 1980), cert. den., 449 U.S. 890 (1980).

159 *The Falstria* [1988] 1 L1.R. 495, 497 (Sheen J) ("It is a surprising proposition that a limitation action can be stayed on the application of one of the defendants who is, ex hypothesi, a claimant.").

160 Supra Ch. 2 n. 233, *The Happy Fellow* [1997] 1 L1.R. 130 (Longmore J), aff'd, [1998] 1 L1.R. 13 (CA 1997) (Saville LJ).

had already commenced liability actions in the French court, that it was not clear whether the T/C charterers' premature English action against the T/C owners was grounded upon any limitable claims arising out of the collision apart from the pure T/C contractual claims,[161] and that, as stressed supra, art. 22 of the 1968 Convention could not apply between a limitation action and liability actions.[162] In the U.S., *The Arctic Explorer*[163] was the only exception that a limitation action was dismissed on grounds of FNC, which was effectively used with injunction to stop all relevant actions pending in the U.S. federal and state courts and to remit them to Canadian limitation court. However, the above two exception cases were anomalies commonly involving defects in limitation jurisdiction.

(6) The applicability of FNC doctrine to a liability action competing with a limitation action must be the same to liability actions under the 1969 or 1992 CLC and the 1996 HNS Convention because the relation between liability and limitation actions is not different and because the transfer of liability actions can be made within the ambit of the statutory exclusive jurisdiction. Such applicability of FNC doctrine should be distinguished from its inapplicability to oil pollutions or HNS liability actions to remit them to any alternative forums other than the exclusive jurisdiction as provided for in the 1969 or 1992 CLC (art. IX each) and the 1996 HNS Convention (art. 38).[164] The question remains, however, whether the FNC doctrine may be invoked to a general limitation action competing with a special limitation action, where both actions based upon one incident are pending in different courts of the same general and special Convention States. When the 1996 HNS

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[161] The T/C charterers' premature action after the forum change agreement was only to give a pretence to the owners to avoid French natural jurisdiction over all liability and limitation actions. The T/C charterers' claim, if any, against the owners would have been founded only on the breach of T/C without any indemnity from the collision itself. Mr. Justice Longmore wrote that the T/C charterers, "apparently regretting their earlier agreement for English jurisdiction", also issued a summons to stay the limitation action. [1997] 1 L1.R. at 132.

[162] Both judgments are based upon common grounds that the French court "will regard itself as seized of limitation" or "it could and should deal with limitation." Id. at 136; [1998] 1 L1.R. at 18. However, even if these assumptions were correct, the French court could not decide limitation issues nor could its liability judgment have *res judicata* or issue estoppel with respect to limitation issues unless the defendants did plead limitation as a defence.

[163] *In re Geophysical Serv., Inc. (The Arctic Explorer)*, 1984 AMC 2413 (S.D. Tex. 1984). But, this case involved a problem of governing law (whether the U.S. or Canadian limitation law) on the T/C charterers' right to limit.

[164] As for the more widely optional exclusive jurisdiction provisions of the 1929 Warsaw Convention (art. 28), the Courts of Appeal held that art. 28 left no scope to apply FNC doctrine. *Milor Srl v. British Airways* [1996] I.L.Pr. 426 (CA 1996) (Phillips LJ). Noted: Carr & Grief, *Forum Non Conveniens and the Warsaw Convention*, [1996] JBL 518. *Cf. In re Air Crash Disaster Near New Orleans, LA. on July 9, 1982*, 821 F.2d 1147, 1162 (5 Cir. 1987) (aff'g denial of motion for FNC dismissal but holding that "article 28(1) of the Warsaw Convention does not prevent a district court from considering and applying the doctrine of *forum non conveniens*."), vacated on other grounds, 490 U.S. 1032 (1989).

Convention comes into force, this question will be posed in the affirmative direction as a means of consolidating a general limitation action into an HNS limitation action.

## 3. Forum Selection Clause

### A. General Survey

In the civil-law countries the concept of prorogation derived from the Roman law and has generally been established as valid.[165] Thus, the party exclusion of domestic jurisdiction has also been admitted in many countries.[166] By contrast, in Anglo-American courts a choice of forum clause was for long treated as contrary to public policy or illegal and void to be repugnant to the Constitution.[167]

The courts' hostility to forum selection clauses contained in maritime contracts such as bills of lading has been notoriously pervaded not only in English courts[168] but also in the U.S. courts.[169] In particular, where any deference to a forum clause in the bill of lading would result in lessening the carrier's liability as compared with the U.K. COGSA[170] or the U.S. COGSA,[171] such a forum clause was held null and void.

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165 Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreement"*, 15 Rutgers L. Rev. 414 (1961).

166 Id. at 419-20 enumerates the countries giving effect to the party exclusion of domestic jurisdiction : Austria, Belgium, Brazil, Denmark, France, Germany, Greece, Norway, Poland, Sweden, and Switzerland.

167 Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. Mar. L. & Com. 17 (1970); Reese, *The Contractual Forum: Situation in the United States*, 13 AJCL 187 (1964); *Kill v. Hollister* (1746) 1 Wills. K.B. 129; *Horton v. Sayer* (1859) 4 H & N 643; *Evans Marshall & Co. v. Bertola* SA [1973] 1 WLR 349 (CA 1972); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874); *Mutual Res. Fund Life Ass'n v. Cleveland Woolen Mills*, 82 F.508 (6 Cir. 1897); *Krenger v. Pa. R. Co.*, 174 F.2d 556 (2 Cir. 1949).

168 *Thompson v. Charnock* (1799) 8 T.R. 139 (disregard of forum clause in C/P); *The Athenee* (1922) 11 L1.L.R. 6 (CA) (disregard of forum clause in B/L); *The Fehmarn* [1957] 2 L1.L.R.551 (CA) (same); *The Adolf Warski* [1976] 2 L1.R.241 (CA) (same); *The El Amria* [1981] 2 L1.R.119 (CA) (same); *The Frank Pais* [1986] 1 L1.R.529 (QB Adm.) (same); *The Al Battani* [1993] 2 L1.R.219 (QB Adm.) (same); *The Humber Bridge (Citi-March v. Neptune)* [1997] 1 L1.R. 72 (QB Adm.) (Colman J) (denying motion to set aside action despite the Singaporean exclusive forum clause in B/L); *The M C Pearl* [1997] 1 L1.R. 566 (Adm. 1997) (Rix J) (denying motion to stay action despite Seoul court exclusive forum clause in B/L).

169 *Prince S.S. Co. v. Lehman*, 39 F.704 (SDNY 1889) (disregard of C/P forum clause); *The Etona*, 64 F.880 (SDNY 1894) (disregard of B/L forum clause); *U.S. Asphalt Ref'g Co. v. Trinidad Lake Petr. Co.*, 222 F.1006 (SDNY 1915) (disregard of C/P London arbitration clause); *SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959) (holding that the B/L forum clause did not apply in an *in rem* action on grounds that it did not include action against the ship itself); *Aetna Ins. Co. v. The Satrustegui*, 1960 AMC 891 (D.P.R. 1959) (same); *Ins. Co. of N. Am. v. N.V. Stoomvaart*, 201 F.Supp. 76 (E.D. La. 1961) (B/L forum cl. held contrary to public policy).

170 *The Hollandia* [1982] 3 All ER 1141 (HL) (holding that the B/L forum clause was null and void because the B/L incorporated 1924 Hague Rules instead of 1968 Hague-Visby Rules).

171 *General Motors Overseas Corp. v. SS Goettingen*, 225 F.Supp. 902 (SDNY 1964) (disregard of German forum clause in B/L); *Indussa Corp. v. SS Ranborg*, 377 F.2d 200 (2 Cir. 1967) (invalidation of

On the other hand, however, on the proposition that it is the court's inherent discretion[172] whether it would respect the parties' choice of forum agreement, in many cases the courts have been liberal in validating forum selection clauses in view of international comity and reciprocity not only in the U.K.[173] but also in the U.S. where there is no or only slight contact with the U.S.,[174] though upon general review and comparisons of the recent trends in admiralty cases, the U.K. courts still maintain their conservative position whereas the U.S. courts have much advanced to respect forum selection clauses.

## B. Relation to Limitation Action

### (1) Single Claimant

In *M/S Bremen v. Zapata Off-Shore Co.*,[175] a towage contract containing a London forum clause was made in 1967 between a German shipowner and an American corporation (Zapata) to tow the off-shore drilling rig *Chaparral* from Louisiana to Adriatic Sea off Italy.

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Norwegian forum clause in B/L on grounds of its effectively lessening the cargo claims that could be recovered under the U.S. COGSA); *Northern Assur. Co. v. M/V Caspian Career*, 1977 AMC 421 (N.D. Cal. 1977) (invalidating Tokyo forum clause in B/L on the same grounds); *M.G. Chemical Corp. v. M/V Sun Castor*, 1978 AMC 1756 (D. Alaska 1977) (same).

172 *The Tricolor*, 65 F.2d 392 (2 Cir. 1933) (aff'g the dismissal of action on grounds of B/L forum clause between foreigners).

173 *The Cap Blanco* [1913] P. 130 (CA) (conditional stay of action by validating B/L forum clause); *The Media* (1931) 41 L1.L.R.80 (Adm.) (same); *The Eleftheria* [1970] P. 94 (staying action for lack of "good cause" to disregard B/L forum clause); *The Sindh* [1975] 1 L1.R.372 (CA 1974) (staying action by French forum clause in B/L): *The Makefjell* [1976] 2 L1. R.29 (CA) (same for lack of "sufficiently strong reason" to disregard Oslo forum clause in B/L); *The Kislovodsk* [1980] 1 L1.R.183 (QB Adm. 1979) (same as to Russian forum clause in B/L); *The Indian Fortune* [1985] 1 L1.R.344 (QB Adm.) (same in B/L forum clause of carrier's principle place of business); *The K.H. Enterprise* [1994] 1 L1.R.593 (PC 1993) (aff'g the stay on grounds of sub-bailee's B/L forum clause); *The Benarty* [1984] 2 L1.R. 244 (CA) (staying action on conditions of waiving package limitation defence in Indonesian forum in B/L clause).

174 *The Iquitos*, 286 F.383 (W.D. Wash. 1921) (respecting B/L forum clause between Perubians); *Murillo Ltda. v. The Bio Bio*, 127 F.Supp. 13 (SDNY 1955) (same in disputes between foreigners); *Wm. H. Muller & Co. v. Swedish Am. Line*, 224 F.2d 806 (2 Cir. 1955) (respecting the Swedish forum clause in B/L; but this was overruled by *Indussa*, 377 F.2d 200 (2 Cir. 1967)); *Nieto v. The Tinnum*, 170 F.Supp. 295 (SDNY 1958) (respecting German B/L forum clause in an *in rem* action where there was no contact in the U.S. except arrest of ship); *Takemura & Co. v. The Tsuneshima Maru*, 197 F.Supp. 909 (SDNY 1961) (respecting Japanese B/L forum clause in cargo between Japanese); *American Ind., Inc. v. The Pantum*, 1967 AMC 96 (D.S.C. 1966) (respecting German B/L forum clause despite that libellant was a U.S. consignee and the actions were *in rem* and *in personam*); *Mitsui & Co. (USA), Inc. v. M/V Mira*, 1997 AMC 202 (E.D. La. 1996) (holding that the consignee accepted the B/L forum clause by receiving the B/L); aff'd, 1997 AMC 2126 (5 Cir. 1997); *Seven Seas Ins. Co. v. Danzas SA*, 1997 AMC 961 (S.D. Fla. 1996) (dismissed action for breach of B/L forum clause without respect to time bar); *Talatala v. N.Y.K.*, 1997 AMC 1398 (D. Haw. 1997) (holding B/L forum cl. to be "mandatory").

175 407 U.S. 1 (1972) (Burger CJ). Commented: Juenger, *Supreme Court Validation of Forum Selection Clauses*, 19 Wayne L. Rev. 49 (1972); Collins, *Choice of Forum and the Exercise of Judicial Discretion - The Resolution of an Anglo-American Conflict*, 22 ICLQ 332 (1973); Maier, *The Three Faces of Zapata : Maritime Law, Federal Common Law, Federal Courts Law*, 6 Vand. J. Tr. L. 387 (1973); Nadelman, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 Am. J. Comp. L. 124 (1973).

During the towing in the Gulf of Mexico, the rig was seriously damaged in a severe storm, and towed to Tampa, Fla., where Zapata sued the ship *in rem* and her owner *in personam* in the M.D.Fla. seeking $3,500,000 damages. The owner moved to dismiss for lack of jurisdiction on grounds of the forum clause or alternatively to stay the action on grounds of FNC and thereafter sued Zapata in the High Court of Justice in London seeking damages for breach of the towage contract, while filing a limitation action in the Fla. Court because of the six-month time limit but moving to stay the limitation action pending the English action. Meanwhile, the High Court refused Zapata's jurisdiction objection, which was affirmed on appeal on grounds that the London forum clause was valid.[176] The Fla. Court also denied not only the owner's jurisdiction objection but also its motion to stay the limitation action while granting Zapata's motion to restrain the owner from prosecuting the English action, all of which rulings were affirmed in the Fifth Circuit.[177] However, vacating the lower court's rulings, the Supreme Court held that (1) "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here [the record here refutes any notion of overweening bargaining power], should be given full effect" and (2) the filing of a limitation action could not preclude the owner from relying on the forum clause because it "had no other prudent alternative but to protect itself by filing for limitation of its liability."[178] This holding is of the utmost significance not only in the validity of a forum clause in maritime contracts but also in determining a limitation jurisdiction.

First, it is to be noted that the *Bremen* Court articulated that where a shipowner was sued in the U.S. court in breach of a choice of forum agreement and was forced to file a limitation action because of the six-month time limit but with reservation of contesting jurisdiction, such filing could not fall within a submission to the jurisdiction because such filing "was a direct consequence" of the claimant's failure to abide by the agreement.[179]

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176 *Unterweser Reederei GmbH v. Zapata Off-Shore Co. (The Chaparral)*[1968] 2 L1.R.158 (CA).

177 407 U.S. at 7; In re Unterweser Reederei, GmbH, 428 F.2d 888 (5 Cir. 1970), aff'd on reh'g en banc, 446 F.2d 907 (1971), rev'd, *sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

178 Id. at 13-14, 19-20. However, Douglas J, dissenting, argued that the doctrine of *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) should apply to the towage contract. Id. at 23.

179 Id. at 19-20

Second, the *Bremen* ruling is regarded as held that the forum clause[180] in the contract should apply not only to the *in personam* action against the owners but also to the *in rem* action against the ship. Nevertheless, by further holding that "but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the Carbon Black case[181] have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans",[182] the Court cast a question whether it overruled *Carbon Black.* While a commentator is of the affirmative opinion,[183] both cases must be distinguishable in that the *Carbon Black* Court held that "[w]e find ourselves in agreement with the views of the Court of Appeals below that this clause[184] should not be read as limiting the maintenance of an action *in rem* . . . we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have."[185] Thus, where a B/L forum clause provides comprehensively for a specific forum in respect of any and all actions arising in connection with the contract without specifically omitting an action against the ship itself, it should apply to an *in rem* action as well pursuant to the *Bremen* rule.[186]

Third, if the shipowner or carrier wanted to escape from the application of the U.S. Limitation Act and jurisdiction as well by virtue of the forum clause in a maritime contract, not only should it include in the B/L or other contract the complete forum clause encompassing any and all actions including *in rem* actions whatsoever found in contract or in tort arising out of the contract,[187] but also they must reserve their right to contest jurisdiction

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180 The forum clause in *The Bremen* provided: "Any dispute arising must be treated before the London Court of Justice." Id. at 2.

181 *SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959) (the specific forum clause in the B/L held not to apply to the *in rem* action), cert. dism'g *Carbon Black Export, Inc. v. SS Monrosa*, 254 F.2d 297 (5 Cir. 1958).

182 407 U.S. at 9.

183 Delaume, *Choice of Forum Clauses and the American Forum Patriae; Something Happened on the Way to the Forum: Zapata and Silver*, 4 J. Mar. L. & Com. 295, 298 (1973) (stating that "Zapata overrules Carbon Black").

184 The forum clause in B/L provided: "27. - ALSO, that no legal proceedings may be brought against the Captain or Shipowner or their Agents in respect to any loss of or damage to any goods herein specified except in Genoa . . . " *SS Monrosa*, 359 U.S. at 182.

185 Id. at 182-83. However, this B/L forum clause must have in fact been purported by the Italian owner to include all actions whatsoever its mode might be, although the words "against the ship" was inadvertently omitted. Nonetheless, such defect of language gave the U.S. courts an excuse of the *in rem* jurisdiction.

186 Accord: *Industria, Etc. SA v. MV Jalisco*, 1996 AMC 769, 770 (S.D.Tex. 1995) (holding that Mexican forum clause in B/L includes all actions . . . "whether the dispute is characterised as a common law, statutory, admiralty, *in personam* or *in rem*").

187 In the countries such as Korea and Japan which have not ratified the 1968 Hague-Visby Rules, the Korean or Japanese governing law and forum clauses in a B/L may be contested on whether they should apply only to contractual cargo claims or to tort claims as well.

whenever they are forced to file a limitation action because filing such action is considered to be a "claim of owner" relating to the merits of the plaintiff's claims. Consequently, a "claim of owner" without reservation or assertion of jurisdiction defence is regarded as an unqualified pleading on the merits, thus being deemed to have waived the defence of jurisdiction.[188] The owner's reservation of all objections and defences must be stated against both the *in rem* and *in personam* actions, and if it is directed only to the *in rem* action upon filing a "claim of owner", the objection to the personal jurisdiction may be held waived.[189]

Fourth, a forum clause can not bar an attachment on a ship by a claimant to obtain security for claims.[190] Also in cases of attachment, if the owner appeared and pleaded on the merits of the claim, the personal jurisdiction defence may be deemed waived.[191]

Fifth, *The Bremen* did not overrule *Indussa,* leaving a *dictum* that the "lessening of liability" provision of COGSA, 46 U.S.C. s. 1303 (8), was applicable to *Indussa.*[192] Since *The Bremen,* however, while a part of the lower courts still often followed *Indussa,*[193] the majority courts have held the foreign forum clauses in B/L valid even if COGSA were applicable to them.[194] At last, the Supreme Court overruled *Indussa* in *Vimar Seguros v. M/V*

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188 *U.S. v. Rep. Marine, Inc.*, 1988 AMC 2507 (7 Cir. 1987) (holding that the owner waived the defence of the *in rem* jurisdiction upon his general appearance by filing answer to cross-claim); *Cactus Pipe & Supply Co. v. M/V Montmartre*, 1985 AMC 2150 (5 Cir. 1985) (holding that the owner's filing a notice of claim without challenging the *in rem* jurisdiction constituted a waiver of the jurisdiction defence even before the actual arrest of the ship) (dissenting: Higgingbottom CJ; Owen, *Jurisdiction in Rem : Presence of Vessel within the district held unnecessary*, 17 J. Mar. L. & Com. 133 (1986)).

189 *Sembawang Shipyard v. Charger, Inc.*, 955 F.2d 983 (5 Cir. 1992).

190 *Polar Shipping Ltd, v. Oriental Shipping Corp.*, 1982 AMC 2330 (9 Cir. 1982) (holding that despite a forum clause in tanker C/P the U.S. court has discretion to allow the Rule B attachment on ship for security); *Staronset Shipping Ltd. v. North Star Nav. Inc.*, 1987 AMC 1932 (SDNY 1987) (same); *The Lisboa* [1980] 2 L1.R. 546, 548 (CA 1980) (Denning MR) (holding that London exclusive forum cl. in B/L did not extend to proceedings to enforce a judgment or award or to obtain *security*).

191 *Pollard v. Dwight*, 4 Cranch 421(1808); FRCP Supp. Rule E(8) (Restricted Appearance) reads: "Appearance to defend against . . . process *in rem*, or process of attachment and garnishment . . . , may be expressly restricted to the defence of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served."

192 *The Bremen*, 407 U.S. at 10 n.11; Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation,* 6 Vand. J. Tr. L. 365 (1973); Note, *Forum Selection Clauses - M/S Bremen v. Zapata Off-Shore Co.*, 13 Va. J. Int'l L. 272 (1972).

193 *Mitsui & Co. v. M/V Glory River*, 1979 AMC 2287 (W.D. Wash. 1978) (invalidating Tokyo forum clause in B/L under COGSA); *Fireman's Fund Ins. Co. v. MV DSR Atlantic,* 1996 AMC 878 (N.D. Cal. 1995) (Korean forum clause in B/L held invalid under COGSA), but rev'd, 1998 AMC 583 (9 Cir. 1997).

194 *Roach v. Hapag-Lloyd, AG*, 1973 AMC 1968 (N.D. Cal. 1973) (German forum clause under COGSA-applicable B/L held valid); *Zima Corp. v. M/V Roman Pazinski,* 1980 AMC 1552 (SDNY 1980) (same); *Pasztory v. Croatia Line*, 1996 AMC 1189 (E. D. Va. 1996) (Croatian forum clause in COGSA-applicable B/L held valid).

*Sky Reefer*,[195] affirming the Fifth Circuit's ruling that the Tokyo arbitration clause in the B/L was valid. The Court held that "but we cannot endorse the reasoning on the conclusion of the *Indussa* rule itself" and that "[t]he liability that may not be lessened is "liability for loss or damage . . . arising from negligence, fault, or failure in the duties or obligations provided in this section" [and that] [t]he statute [46 U.S.C. s. 1303 (8)] thus addresses the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability."[196]

Meanwhile, the forum clauses contained in the tickets of passenger ships were often held to be invalid,[197] but have been widened their validity by the majority of recent decisions.[198]

### (2) Multiple Claimants

In the marine casualties of the same forum clause group claimants, the shipowner or other carrier may avail itself of the same forum and shall file a limitation action in the forum when it is apprehended that the total claim amount would exceed the limitation fund. To the contrary, however, where non-contractual claims are involved, the forum clause made only with a part of claimants would not necessarily be invoked so easily.

In *The Quarrington Court*,[199] where the ship sank in the Red Sea with her cargo and the cargo interests brought suit in the SDNY against the owner and time charterer. The owner

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195 515 U.S. 528, 1995 AMC 1817 (1995). Comment: Sturley, *B/L Forum Selection Clauses in the United States: The Supreme Court Charts A New Course (The Sky Reefer)*, [1996] LMCLQ 164.

196 Id. at 1821. Followed: *Kanematsu Corp. v. M/V Gretchen W*, 1995 AMC 2957 (D. Or. 1995) (London arbitration clause in B/L held not contrary to COGSA); *Lucky Metals Corp. v. M/V Ave*, 1996 AMC 265 (SDNY 1995) (London arbitration clause in a specific-dated C/P incorporated in B/L held valid); *Tradearbed, Inc. v. M/V Agia Sophia*, 1997 AMC 2838 (D.N.J. 1997) (Dismissal of action by applying *Sky Reefer* to Seoul court forum clause in B/L).

197 *Corna v. Am. Hawaii Cruises*, 1992 AMC 1787 (D. Haw. 1992) (Cal. forum clause in ticket held invalid because of too short cancelling date and forfeiture of entire fare on cancel); *Effron v. Sun Line Cruises*, 1994 AMC 2726 (SDNY 1994) (Greek forum clause in ticket held invalid for hardship), rev'd, 1996 AMC 253 (2 Cir. 1995).

198 *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 1991 AMC 1697 (1991) (Fla. Forum clause in ticket held valid); *Chan v. Society Expeditions, Inc.*, 1994 AMC 2642 (9 Cir. 1994) (validating Wash. forum ticket); *Thomas v. Costa Cruise Lines*, 892 S.W. 2d 837 (Tenn. App. 1994) (same for Fla. forum clause ticket); *Melnik v. Cunard Line*, 875 F.Supp. 103 (NDNY 1994) (same for SDNY forum clause ticket); *Lee v. Regal Cruises* 1995 AMC 782 (SDNY 1995) (same for N.Y. forum clause ticket); *Effron v. Sun Line Cruises*, 1996 AMC 253 (2 Cir. 1995) (same for Athens forum clause ticket); *Bounds v. Sun Line Cruises*, 1997 AMC 25 (C.D. Cal. 1996) (same); *Trott v. Cunard Line*, 1997 AMC 1873 (SDNY 1996) (same); *Gomez v. Royal Caribbean Cruise Lines*, 1997 AMC 2159 (D.P.R. 1997) (same for Miami forum clause ticket). *Cf.* The 1974 Athens Convention, art. 17 (a), allows only an after-incident choice of forum.

199 1939 AMC 421 (2 Cir.), cert. den., 307 U.S. 645 (1939).

filed a limitation petition but the time charterer filed a third party action against the owner in breach of a London arbitration clause in the C/P. Filing an amendment to the injunction, the owner moved to stay the time charterer's action pending the arbitration, which motion was granted. However, the Second Circuit reversed and held that "[w]here the proceeding may result in the limitation of claimants to a single fund, it seems to us desirable to preserve the uniformity of administration which would result from the adjudication of all the claims by a single tribunal" and that "we can see no reason for exercising judicial discretion to permit an owner to require arbitration of the rights of one of several claimants."[200]

However, in cases of a single claimant, there is no need to disallow arbitration proceedings in that the interests of claimants are not confronted. In *The Barge Ben*,[201] a barge sank with cargo and the owner filed a limitation petition in breach of New York arbitration clause in the C/P. The court granted the charterer's motion to stay the action pending the arbitration proceeding but with the reservation of the court's exclusive cognisance of the issue of limitation of liability. Also in *In re Bartin Deniz Nakliyati*,[202] the ship sank in the Atlantic Ocean with two types of cargo and two cargo suits were brought, both of which were consolidated. The owner filed a limitation action in one suit, while seeking an order to compel arbitration in the other pursuant to the London arbitration clause in the C/P. The former claim having been settled, the latter only remained. Despite the charterer's objection on grounds of the owner's having waived the right to arbitrate, Ross, Mag., recommended that the motion be granted on the conditions that the parties agree to escrow the limitation fund as security or the court retain jurisdiction over the fund.[203]

By contrast, in *In re Ballard Shipping Co.*,[204] where in a voyage charter the cargo was damaged due to the ship's grounding off Rhode Island, the cargo underwriter filed an *in rem* subrogation suit and the owner filed a claim of ownership and an answer pleading arbitration defence while on the same day initiating a limitation action. The owner's complaint of

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200 Id. at 426. In this case the time charterer excepted against the owner's motion because if cargo libellants were entitled to recover against the time charterer, it should be entitled to full indemnity from the owner. Id. at 422.

201 *In re Postal S.S. Co. (The Ben)*, 1943 AMC 662 (E.D. La. 1943).

202 1990 AMC 161 (EDNY 1989).

203 Id. at 190, 187-88 (citing *Groeneveld Co. v. M/V Nopal Explorer*, 587 F.Supp. 136 (SDNY 1984) (permitting the requested arbitration to proceed simultaneously with the limitation proceeding)). In this case, however, the owner's pursuance to compel arbitration seems to have been its apprehension that the limitation would be broken due to the unseaworthiness of the barge.

204 1991 AMC 727 (D.R.I. 1990).

limitation included also a prayer to issue an order of monition, in accordance of which the court entered the order and the claimant filed its claim in the limitation proceeding. Against the subsequent motion to stay the claimant's action and to compel arbitration, the court held that (1) the owner "waived its right to compel arbitration by engaging in activity inconsistent with its right and by delaying its request" and (2) compelling arbitration "would frustrate the congressional concern for uniformity and judicial economy firmly rooted in the limitation action."[205] However, the reasoning seems erroneous. First, the owner pleaded arbitration defence in its first answer which should have been held to have reserved the defence of lack of jurisdiction, and the inclusion in the complaint of a prayer for the court's order of monition was nothing but one of formalities in filing the complaint of limitation. Second, in the absence of other conflicting interested parties involved in the same proceeding, the party autonomy to settle commercial disputes out of judicial jurisdiction must be respected and further any arbitration agreement should be interpreted as including also the disputes of statutory limitation of liability.

However, where despite a B/L arbitration clause the owner filed a limitation action without reservation of jurisdiction contest, such filing may be held to have waived a later defence of lack of jurisdiction. In *In re Deleas Shipping Ltd.*,[206] the owner time chartered the ship to Hyundai Merchant Marine Co., which received many cargoes from Hong Kong, Taiwan and Korea bound for the U.S. During the voyage a fire broke out off Alaska, causing serious damage to the cargo. The owner filed a limitation action,[207] in which more than 300 cargo claims (over $17 million) were filed and Hyundai also was sued by some claimants, the two cases being consolidated. Against Hyundai's filing its claim in the limitation action the owner cross-claimed against Hyundai. However, the owner and Hyundai jointly moved to dismiss all cargo actions pursuant to the Seoul Court forum and Korean law clauses in the Bs/L issued by Hyundai. Denying this motion, however, the court held that "a forum selection clause will be deemed waived if the party invoking it has taken actions inconsistent

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205 Id. at 738. See also *DVA v. Voest Alpine* [1997] 1 L1.R. 179 (QB Com. 1996) (Morison J) (granting anti-suit injunction), aff'd, [1997] 2 L1.R. 279 (CA 1997), where despite London arbitration clauses in T/C and V/C involving two different cargo (steel & cotton) interests, the owners invoked a limitation action against all claims by fire during the voyage from Brazil to Thailand (the limitation jurisdiction was not at issue), but only the steel cargo interests launched cargo actions before a Brazilian court..

206 *In re Deleas Shipping Ltd. (The Hyundai Seattle)*, 1996 AMC 434 (W.D. Wash. 1995) (Dyer J).

207 The Judgement does not state that the owner prayed for "exoneration" from liability pursuant to the Fire Statute, nor does it state the cause of fire whether it occurred from a cargo hold or from the hull.

with it, or delayed its enforcement, and other parties would be prejudiced."[208] The court denied also Hyundai's motion to compel London arbitration with the owner pursuant to the T/C arbitration clause on grounds that to lift the injunction to allow arbitration between the owner and T/C charterer separately would be contrary to the Limitation Act's purpose of resolving all claims to the limitation fund in a single proceeding.[209] It is arguable, however, that the court held that "[w]hen there are multiple claimants and the total of their claims exceed the value of the limitation fund, courts will not lift an injunction to allow a single claimant to proceed with liability and damages issues outside the limitation action." If only the limitation petitioner agrees to a specific claimant's out-of-limitation proceedings, there would be no reasonable ground to disallow to modify the injunction because the result would rather be beneficial to the remaining claimants in that the *pro rata* distribution to each from the fund would be increased.[210]

### C. Limitation Forum Agreement

Although there seems no reported case where a specified limitation forum or governing limitation law was particularly agreed between the parties before or after a limitation incident, such an agreement may be possible practically as well as theoretically.

(1) Even if a forum selection and/or governing law clause is contained in a maritime contract without reference therein to any limitation jurisdiction and/or a specified limitation law or Limitation Convention, such a clause must in principle be construed as

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208 Id. at 436. The court reasoned the absence of the owner's reservation of jurisdiction contest; belated motion (9 months after the filing of limitation action); extensive discovery conducted; and the owner's seeking to retain limitation action; Hyundai's action inconstant with arbitration clause; and severe prejudice to claimants if arbitration is enforced. Any omission of reservation of the B/L forum clause in filing the limitation action must be attributable to the attorneys' intent or wilful negligence in order to maintain the proceedings in Alaska. This case is categorised as one of "the same B/L forum group claimants." While the judgement did not analyse whether the B/L was binding on the owner as was in cases of a T/C- incorporating B/L, the relation between the owner and the B/L holder also could be bound by the B/L forum clause. Then, *The Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995) could have been applied to this case if only the defence of the B/L forum had been reserved.

209 Id. at 437 (citing *The Quarrington Court*, 1939 AMC at 425). It is to be noted, however, that the court denied Hyundai's motion to allow arbitration even where the other party (owner) did not except against the motion.

210 *Groeneveld Co. v. MV Nopal Explorer*, 587 F. Supp. 136 (SDNY 1984). Due to the ship's capsize with cargo in the Domican waters, the cargo claimants filed an action *in rem* and *in personam* against the owner and the charterer. The owner filed a limitation action against which the charterer also filed its claims. Upon the owner's motion to stay the charterer's claims pending arbitration pursuant to the C/P, the court held: "There is no reason why arbitration to determine the relative liability between [the owner and the charterer] cannot proceed simultaneously with this [limitation] action." Id. at 139.

meaning that the agreed forum and/or governing law should also include the limitation forum and/or the limitation law or Limitation Convention in force under the agreed governing law to apply to all disputes relating to the contract. Thus, not only in cases of a single claimant but also even in cases of multiple claimants, provided that (1) all claimants based upon a distinct occasion are subject to the same forum and/or same governing law clauses with no non-contracting parties involved, or (2) even though any non-contracting parties are involved, their claims are only derivative claims subrogating the contract parties' claims, or (3) the non-contracting parties' claims having been settled, only contract parties' claims subject to the same forum and/or same governing law clauses remain, such forum and/or governing law clauses must be respected by any court other than the agreed forum unless the clauses or agreements are waived or otherwise avoided, whether the agreed forum and/or governing limitation law would allow higher or lower limitation than that to be applied by the other court.[211] In other cases of multiple claimants involving contracting and non-contracting parties, the forum and/or governing law clauses shall be subordinated to the natural limitation forums and/or the national limitation law or Limitation Convention in force in the natural limitation forum States.

(2) In cases where the parties agreed a specified limitation forum and/or specified limitation law or Limitation Convention applicable to a particular contract or incident apart from the liability forum and/or governing liability law, such an agreement should also be respected so far as the disputes between the same parties arising from or in connection with the contract or incident are concerned, unless any non-agreement parties' tortious claims are concurrently involved. Thus, the court other than the agreed limitation forum should decline any limitation action filed therewith for lack of proper limitation jurisdiction whether the agreed limitation forum would apply the higher or lower limitation than that to be applied by the court so long as the claimants contest the limitation jurisdiction.[212] Where the owners

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[211] Such is the basic principles of *M/S Bremen v. Zapata* Off-Shore Co., 407 U.S. 1 (1972).

[212] *Cf.* Jackson, supra Ch. 2 n. 67, at 533-34 & n. 63 stating that since the application of the 1976 Convention in its contracting State is "mandatory as the Hague-Visby Rules were held to be in *The Morviken* [1983] 1 Lloyd's Rep. 1", "a contracting State would not uphold such an agreement if the selected jurisdiction imposed a lower limit of liability." However, first, as opposed to the mandatory provision, art. 3(8) of the Hague Rules, the Limitation Conventions do not provide for any equivalent thereto expressly invalidating any agreement of limitation lower than that of the Conventions, although art. 7 of the 1957 Convention and art. 15 of the 1976 Convention provide for obligatory application of the respective Conventions, which do not, however, go as far as to invalidate even the doctrine of party autonomy. Second, the public policy purported by the Hague Rules is to regulate the minimum duty of care and obligations of common carriers by sea whereas the domestic policy by the Limitation Conventions is to protect merchant shipping and the interests of shipowners by regulating their maximum liability limitation, thus the shipowners'

brought their limitation action in a higher limitation State contrary to the limitation forum agreement, it could be regarded as waived their rights to invoke the forum agreement unless the claimants raised jurisdiction objection, provided however that in cases of other non-agreement claimants are involved, the limitation forum agreement could no more be respected.

(3) Where only a specified governing limitation law or Limitation Convention has been agreed between the parties without reference to limitation jurisdiction, though very rare, how to deal with such an agreement would depend on the national law or practice of the court as to whether to apply or disregard the agreed governing limitation law. However, a better disposition would be to respect such an agreement unless detrimental to non-agreement claimants, or otherwise to invoke the doctrine of *forum non conveniens* rather than to enforce the forum's limitation law by invalidating such agreed different (in particular, lower) limitation law.

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private interest factors being weighed much more than the public interest factors which are not so strong as to exclude party autonomy from its application to shipowners' global limitation of liability. Third, in view of the difference of the conduct barring limitation between the Limitation Conventions or national limitation regimes, a lower limitation regime or Limitation Convention (e.g., 1957 Convention) is not necessarily more unfavourable to the claimants than the higher Limitation Convention (e.g., 1976 Convention). E.g., *Ultisol v. Bouygues* [1996] 2 L1. R. 140 (QBD Adm. 1996).

# FINAL REMARKS

## 1. Urging Efforts for Uniformity

The heart of shipowners' limitation of liability for multiple maritime claims is to accomplish the concursus of all the claims into one limitation court. Without realisation of this jurisdictional mechanism the purpose of limitation of liability cannot but be cut down despite the strong domestic policy to protect the investment and international competitiveness of merchant shipping. Given that an International Convention is essentially a product of compromise and harmonisation of national and international conflicting interests, it goes without saying that mutual concession and co-operation are the basic requirements in order to achieve the international uniformity of shipowners' limitation of liability system. The modern concept of shipowners' limitation of liability is understood to be based upon international shipping policy instead of parochial domestic policy. The purport that the M.S.A. 1862, s. 54, provided that the owners of any ship, "whether British or foreign", should be entitled to limitation was to make it clear that "protectionism was no longer a dominant consideration."[1] Then, what was the real purpose of inserting the words "whether American or foreign" in sec. 1[2] of the 1935 Amendment Act? Was it only to vest limitation jurisdiction over foreign owners in the U.S. courts? In view of the U.S. courts' application of the Limitation Act to foreign owners, the same purport as that of the British 1862 M.S.A. to cease protectionism in the application of the Limitation law must have been implicated. This principle of equal protectionism in the application of limited liability to foreign as well as domestic shipowners is traced to the primary policy to place the American marine upon an "equal footing" with the English marine. Thus, the basic stream of policy in shipowners' limitation of liability was never to be isolated or alienated from international "equal footing".

Given the common understanding that the limitation of shipowners' liability is a system of convenience or shipping policy rather than that of justice, there may exist no eternally just and reasonable policy transcending any specific era and state. So long as the U.S. Limitation Act was not the U.S. own creature but a transplantation from its ancestors' system of law which was again derived from the Continental maritime custom in the Middle Ages, despite some modifications in the course of copying the statutes of other maritime

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1 Lord Mustill, *Ships Are Different - Or Are They?*, [1993] LMCLQ 490, 498.

2 Revised Statutes s. 4283, currently codified at 46 U.S.C.A. s. 183 (a).

states, the essential elements of the limitation system are not greatly different from each other, in particular, between the current U.S. law and the 1976 Convention. It may never be averred that one of these two systems is predominantly reasonable or preferable to the other. Each has the advantage and disadvantage respectively.[3] First of all, the comparison of both systems shows that the monetary limitation amount for personal claims except passengers' personal claims in the 1976 Convention is higher than that of the U.S. law,[4] provided that the value of the ship plus the pending freight is lower than the monetary fund based upon $420 per gross ton. It follows that only where in a distinct occasion the after-accident value of the ship plus the pending freight is higher than the monetary fund under the 1976 Convention may the claimants take the advantage of invoking the U.S. jurisdiction if the limitation is not breakable.

In the meantime, by virtue of the 1996 Protocol to the 1976 Convention, the provisions of the limits of liability were amended to increase about twice on average as much as those of the 1976 Convention, although in cases of small ships the extent of increase is much higher. Since the 1996 Protocol allows a State Party to regulate the limits of liability for passenger personal claims in national law,[5] one obstacle for the U.S. to participate in the 1976 Convention as amended was excluded. The only remaining barrier for the U.S. is the intent or recklessness test on the owners' conduct barring limitation of liability. Unfortunately, at the Diplomatic Conference for the 1996 Protocol to 1976 Convention the issues of amendment were focused mainly on the increase of the limits of liability and the 1996 HNS Convention without any co-operation of the participating states to reconsider the basic barriers preventing non-Party States from participation in the 1976 Convention. The

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3 The controversies on which law is better between the different limitation regimes are not necessarily confined between the 1976 Convention and the representative non-Convention state's limitation law (the U.S. Limitation Act). Those controversies between 1976 Convention and 1957 Convention are even at present seriously argued on the occasions of sitting in the Admiralty Courts inappropriately through the judgments reported in the Law Reports. *The Kapitan Shretsov* [1998] 1 L1.R. 199, 211 (HK CA); *The Herceg Novi* [1998] 1 L1.R. 167, 174-75 (QBD Adm.). Nevertheless, the confrontation between the two Conventions is not so much serious as that between the Convention limitation regime and the U.S. limitation regime because the former is tentative on a small scale as compared with the latter in view of the international trends of transferring from 1957 Convention to 1976 Convention with the passage of years.

4 The comparison of monetary limitation fund for loss of life or personal injury (in case of no property claims) between the 1976 Convention and the U.S. Limitation Act is as follows (applying the rate of 1 SDR : $1.6):
500 g/t (500,000 SDR under 1976 Conv. : 131,250 SDR under U.S. Act); 2,000 g/t (1,500,500 SDR : 525,000 SDR); 10,000 g/t (5,667,500 SDR : 2,625,000 SDR); 30,000 g/t (15,667,500 SDR : 7,875,000 SDR); 70,000 g/t (30,667,500 SDR : 18,375,000 SDR); 100,000 g/t (38,167,500 SDR: 26,250,000 SDR); 200,000 g/t (63,167,500 SDR: 52,500,000 SDR); 300,000 g/t (88,167,500 SDR: 78,750,000 SDR).

5 The 1996 Prot. art. 6.

leading States Parties might not have considered any concession of their already won insurability (100%) requirements at the sacrifice of human dignity of individual sufferers of marine casualty attributable to shipowners' actual fault or privity, or even to their wilful misconduct or gross negligence. Insurance may never be given priority to the paramount proposition of the utmost happiness of the utmost majority of human beings. Since the phrase "without the fault or privity of such owner" appeared in the 1813 Act, s. 1, for more than 170 years the British system of shipowners' limitation of liability was operated well as a harmonising mechanism of the conflicting interests concerned in marine accidents. So far as the loss of life or personal injury is concerned, the intent or recklessness test must be held excessive and exacting to the individual sufferers in maritime accidents and must be reconsidered so as to be retreated to its predecessor or compromised wilful misconduct or gross negligence test. Against this test, the shipping economists and marine liability insurers may rebut that the U.S. courts have easily broken limitation of liability of air carriers under the Warsaw Convention. However, such judicial trend was in part clearly attributable to the carriers' reluctance or idleness in amending the limits of their liability for long. Both group states defending the privity or knowledge test and the intent or recklessness test shall be expected to take positive mutual co-operation to achieve the uniformity of an amicable Limitation Convention acceptable to both of the two group states. More important is to resurrect the uniformity of shipowners' limitation of liability regime, which has been split since the 19th century, than to argue the merits of each split regime, given that whichever be taken, it could not be a system of justice but only stay as that of convenience. In this sense, to achieve the purpose of uniformity, it will be easier for the non-Convention states to participate in the developed Limitation Convention being adopted by the majority of developed counties. Failing to accomplish this uniformity, it would be difficult for them to prevent the parties from forum shopping for limitation jurisdiction and jurisdictional competition between the courts as well.

## 2. Proposals to Amend Limitation Conventions

### A. Equality of Jurisdiction

Next, as has been discussed supra, the 1976 Convention should have provided expressly for the limitation jurisdiction including the court for the principal place of business of the owner or operator of the ship. Between or among the States Parties to the Convention, the equality of choosing jurisdiction between the claimants and the limitation petitioner must be ensured by virtue of the provisions of the Convention itself. At the 1976 London Conference there was no reasonable reason to reject to add a further item in art. 13 (2) proviso of the 1976 Convention the principal place of business of a limitation petitioner where he could constitute a limitation fund, despite the item (d) of the same para. allowing the claimant to arrest the ship anywhere. Although the correct interpretation of the Convention does not prohibit to constitute a limitation fund in the natural forum of the owner pursuant to national law as is regulated in those of the leading States Parties, a direct and express provision is necessary to be contained in the Convention because the misunderstanding has already appeared as regards art. 11 (1) as if it allowed the constitution of a fund only with the court in which a liability action is instituted. If there existed any need for the Member States of the 1968 Brussels Convention and the 1988 Lugano Convention to include art. 6a for limitation of liability jurisdiction, the same need should be extended to other States Parties to the 1976 Convention because there is no ground to differentiate the application of the same 1976 Convention between the former and the latter Contracting States. The amendment of the 1976 Convention in this respect is to be recommended.

### B. Concursus Between States Parties

Under the current 1976 or 1957 Convention there is no provision to realise the international concursus between or among the States Parties to the same Convention. Thus, even if a limitation proceeding is pending in a State Party, the claimant may commence or proceed with an *in personam* action against a liable party in other State Party. Art. 13 (2) of the 1976 Convention or art. 5 of the 1957 Convention does not make liability actions be stayed on the grounds that a limitation action is pending in other State Party. Even if the doctrine of *forum non conveniens* may be invoked to stay a liability action, the uniform application of the doctrine is not expected because the Continental States Parties would not

follow it. Thus, the Convention itself should contain the provisions to ensure an international concourse scheme. There may be two alternatives to realize this purpose: one is to extend the validity of injunction issued by the limitation court to restrain the foreign claimant from prosecuting other actions in the other States Parties except filing the claim with the limitation court; and the other alternative is to provide in the Convention that the court seized of the liability action shall stay the action on application of the limitation petitioner by showing that the limitation fund has been constituted. The latter is better because the former may not be provided for in a Limitation Convention in view of the principle that an injunction does not have a binding effect upon an alien beyond the territorial area. Thus, the 1976 Convention should be amended to realise the latter alternative. In this connection, it is also preferable to provide for in the Convention the recognition of a foreign limitation court's judgment so that it may not be contested again on the merits in other States Parties. The above mechanisms are essential to realise the concursus of the multiple claims involving the limitation of liability at least among the States Parties to the same Limitation Convention although where a liability action is pending in a non-Contracting State, that portion may remain to be resolved separately or upon application of the petitioner an estimated proportional distribution may be reserved from the limitation fund. In the same vein, similar amendments to the special Limitation Conventions are also recommended.

### C. Some Draft Provisions for Revision

In order to help to realize the above-mentioned purposes the following draft provisions are hereby proposed.

#### (a) 1976 Convention

Art. 11 shall be amended as follows:

(1) For the first sentence of para. 1 there shall be substituted:

> "1. Any person alleged to be liable may constitute a fund only with the Court of any State Party:
> (a) where the harmful event occurred; or
> (b) where the ship is registered; or

(c) where the principal place of business, or in its absence the domicile, of the owner, bareboat charterer or salvor exists; or

(d) where legal proceedings are brought."

(2) The second and third sentences of para. 1 are renumbered para. "2".

(3) Paras. 2 and 3 are renumbered "3." and "4." respectively.

Reasons of Amendment: Now that art. 6a of the 1968 and 1988 Conventions widened the limitation jurisdiction and further that by virtue of art. 14 of the 1976 Convention national laws of the States Parties do not restrict the limitation jurisdiction as directed by the Convention, there is no ground to maintain the first sentence of art. 11 which is disputed as to whether it restricts limitation jurisdiction or not. The words "harmful event" is modelled on art. 5(3) of the 1968 Convention because art. 6a thereof confers limitation jurisdiction on "the court for the place where the harmful event occurs." The draft (b) is modelled on art. 38 (2) (a) of the 1996 HNS Convention. Moreover, the national laws of major Continental States Parties confer limitation and liability jurisdiction similarly. The draft (d) covers arrest proceedings and action *in personam* as well. The first calling port after the incident, the port of disembarkation or discharge, etc. are covered by the draft (a).

Art. 13 shall be amended as follows:

(1) For the words "any person having made a claim against the fund" there shall be substituted the words "any person having a claim against the fund".

(2) For para. 2 there shall be substituted:

"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 *or seized* within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, *shall* be released by order of the Court or other competent authority of such State."

(3) After para. 3 there shall be added:

"4. Where a limitation fund has been constituted in accordance with Article 11, any action based upon the same cause of action shall be stayed upon application pending the limitation proceedings, whether it was first seized or not."

Reasons of Amendment: As discussed supra, when a limitation action is properly pending, all claims and or contestation against limitation, if any, should be consolidated in the limitation court because such a concourse would contribute to judicial economy and the protection of common interests of the parties and further because even if a separate liability action were to proceed, no opportunity would be given to other claimants to contest the claim amount nor would it possible to execute the judgment which would conflict with the limitation decree. The reason why the present proviso of para. 2 must be deleted is that now that the limitation jurisdiction is provided for in art. 11 (1) as drafted above, there is no need to maintain both the discretionary and mandatory release provisions according to the places where the limitation fund has been constituted.

After art. 14 art. 14 *bis* shall be added as follows:

"Article 14 *bis*

Recognition and enforcement

1. Any judgment given in a State Party on the cases to apply this Convention which is no longer subject to ordinary forms of review shall be recognized in the other States Parties except:

   (a) where the judgment was obtained by fraud; or
   (b) where the defendant or respondent was not given reasonable notice and a fair opportunity to present the case.

2. Subject to any decision of the limitation court on the apportionment and distribution of the fund, a judgment recognized under paragraph 1 shall be

enforceable against the fund as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened."

Reasons of Amendment: Compared with the 1969/1992 CLC, art.X each and the 1996 HNS Convention, art.40, this draft is to cover the recognition and enforcement of liability judgments and limitation decrees as well. The jurisdictional requirements need not be included here because any objection against jurisdiction could have been raised in the substantive proceedings.

**(b) 1969 & 1992 CLC**

After para. 2 of art. VI the following para. 3 shall be added:

"3. Where the owner has constituted a fund in accordance with article V, any action based upon the same cause of action shall be stayed upon application pending the limitation proceedings."

Reasons of Amendment: Same as those in the draft provisions to amend art. 13 of the 1976 Convention.

Art. X (Recognition and Enforcement of Judgments) shall be amended as follows:

(1) In para. 1, for the words "in accordance with article IX which is enforceable in the State of origin" there shall be substituted the words "under this Convention".

(2) In para. 2, for the words "A judgment recognized under paragraph 1 of this article" there shall be substituted the words "Subject to any decision on the apportionment and distribution of the fund, if any, a judgment recognized under paragraph 1 and enforceable in the State of origin".

Reasons of Amendment: The para. 1 is to cover the recognition of limitation decrees too, and the para. 2 is to give the fund court (if any) discretion on equitable distribution of the fund between the judgment claimants and the others.

### (c) 1996 HNS Convention

After para. 2 of art. 10 the following para. 3 shall be added:

> "3. Where the owner has constituted a fund in accordance with article 9, any action based upon the same cause of action shall be stayed upon application pending the limitation proceedings."

Art. 40, paras. 1 & 2, also shall be amended in the same words as drafted above on art. X of 1969/1992 CLC.

## 3. To U.S. Courts

As has been seen supra, the U.S. federal district courts are inclined to exercise jurisdiction over all limitation actions filed therewith even when the case has no interests with the forum or the U.S.[6] or where the Seoul Court forum clause in the bills of lading had binding effect on all the parties.[7] If the court should maintain the jurisdiction arbitrarily and proceed with the trial in the participation of the attorneys of both parties who are not competent enough to prove foreign laws correctly, the ensuing judgment would also result in erroneous finding based upon the misunderstood foreign laws unless the judge is versed in the foreign laws, leaving an indelible disgrace in the Law Reports while wasting time and efforts in foreign disputes, which should have been expended for the benefits of national interests. In respect of such cases, the U.S. federal district courts are with respect recommended to restrain themselves from inducing forum shopping of foreign litigants by widely applying the doctrine of *forum non conveniens* and by faithfully following the Supreme Court's *Sky Reefer* ruling.[8]

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6 *In re K.S. Line Corp. (The Swibon)*, 596 F. Supp. 1268 (D. Alaska 1984) (collision between two Korean ships on the high seas. Of the claimants the only one U.S. shipper, Hyundai Pipe of America, Inc., was a complete subsidiary of Korean Hyundai group and moreover was only a nominal cargo owner).

7 *In re Deleas Shipping Ltd. (The Hyundai Seattle)*, 1996 AMC 434 (W.D. Wash. 1995).

8 *Vimar Seguros Y Reaseguros, SA v. M/V Sky Reefer*, 115 S. Ct. 2322, 1995 AMC 1817 (1995).

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