COMPARISON OF SHIPOWNERS' LIMITATION OF LIABILITY SCHEMES

LLOYD'S MARITIME TRAINING PROGRAMME

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I. ORIGINS OF THE CONCEPT OF LIMITATION

The concept of limitation of liability is a well-entrenched principle among maritime nations. Scholars have traced the genesis of limitation to the Amalphitan Table in Italy during the 11th Century although the concept is believed to have originated as early as 454 A.D.[1] The concept of limitation was frequently utilized in the 16th and 17th centuries. Grotius discussed the doctrine of limited liability as early as 1625. Additionally, the Marine Ordinance of Louis XVI also contained a provision for limitation.[2] The Maritime Law of England is believed to have originated in the Rules of Oleron roughly in 1150 A.D. although the right to invoke limitation of liability was not available until 1734 when the English Parliament passed a statute providing for a shipowner's limitation of liability in response to a lobbying effort by shipowners.[3]

In the United States, the earliest limitation statutes were introduced in the form of state legislation in Massachusetts in 1819 and Maine in 1821. Both state statutes were very similar to the 1734 British statute.[4] In 1851, the United States Congress enacted the Limitation of Liability Act codified in Title 46 U.S.C. §§ 181-189. This legislation was prompted after a fire aboard the LEXINGTON resulting in loss of the vessel, considerable loss of life and destruction of cargo. A shipper of cargo of a wooden crate containing $18,000 in commercial paper from New York

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[1] James J. Donovan, "The Origins and Development of Limitation of Shipowners' Liability," 53 Tul. L. Rev. 999, 1001 (1979). The Tables of Amalfi were a commercial code compiled for the free and trading Republic of Amalfia, Italy containing *"the earliest extent evidence of the shipowner's right to limit his liability."* Id.; *see also* Xia Chin, Limitation of Liability for Maritime Claims, Kluwer Law International 2001. This treatise contains an intensive study of U.S. law, Chinese law and the international conventions.

[2] Xia Chin, Limitation of Liability for Maritime Claims, Kluwer Law International 2001, at p. xiv.

[3] *See* Boucher v. Lawson, 1734 Cas. Temp. Hardw. 85. *See also* Michael Thomas, *"British Concept of Limitation of Liability,"* 53 Tul. L. Rev., 1205, 1205-1209 (1979); Responsibility of Shipowner's Act, 1733, 7 George II, Ch. 15 (1734).

[4] Xia Chin, Limitation of Liability for Maritime Claims, Kluwer Law International 2001

banks filed suit on the contract of affreightment against the carrier. The owners of the LEXINGTON sought limitation of liability which was denied by the United States Supreme Court as a result of finding of comparable misconduct of the vessel owner.[5]

The International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships, October 10, 1957 ("1957 Convention"), was ratified by eight of the world's largest maritime nations in terms of tonnage.[6] The 1957 Convention contains several fundamental differences from procedures utilized in the United States. For example, in the 1957 Convention, the amount of the limitation fund is calculated in Poincaré francs according to the tonnage of the vessel and is based upon the pre-casualty value of the vessel rather than the post casualty value of the vessel. Several bills sponsoring the adoption of the 1957 Convention had been unsuccessfully introduced into the United States Congress.[7]

The Comite Maritime International ("CMI") initiated a movement to conduct an analysis of the 1957 Convention and propose a new international protocol for limitation of liability. The CMI Committee presented the drafts prepared by the International Subcommittee to the Hamburg Conference in 1974 which approved the drafts for submission to the IMCO. The Legal Committee of the IMCO produced a slightly different draft which was submitted to the Diplomatic Conference held in London in November 1976.[8] The Convention on Limitation of Liability for Maritime Claims, 1976 ("1976 Convention") was incorporated into United Kingdom law by the Merchant Shipping Act 1995, Section 185, and Schedule 7.[9] The 1976

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[5] New Jersey Steam Navigation Co. v. Merchants Bank of Boston (LEXINGTON), 46 U.S. (6 Howe) 344 (1848).
[6] The 1924 Convention is not discussed in this paper.
[7] S. 556, 88th Cong., 1st Sess. (1963); H.R. 149 & 1069, 88th Cong., 1st Sess. (1963); S. 2314, 87th Cong., 1st Sess. (1961). *See* Harold K. Watson, *"The 1976 IMCO Limitation Convention, A Comparative View,"* Houston L. Rev., Vol. 16, No. 3, January 1978, p. 249.
[8] Id., p. 250.
[9] Additional contracting states are Australia, the Bahamas, Benin, Barbados, Belgium, Croatia, Egypt Equitorial Guinea, Denmark, Federal Republic of Germany, Finland, France, Georgia, Germany, Greece, Guyana, Ireland,

Convention expanded the category of individuals who are entitled to the remedy of limitation, increased the probability of limitation and substantially increased the limitation fund which in some instances could potentially be four times as high as the 1957 Convention.[10]

An effort to achieve international uniformity and balance competing interests resulted in the 1996 Protocol to Amend the Convention on Limitation of Liability for Maritime Claims, 1976 ("1996 Convention").[11] This Convention is open to signature and has been ratified by Finland, Norway, the United Kingdom and the Russian Federation.

II. OVERVIEW OF THE 1957 and 1976 CONVENTIONS

A. CRITICAL POINTS

Nearly all maritime nations, with the exception of the United States, have ratified either the 1957 or 1976 Conventions. Both the 1957 and 1976 Conventions provide for calculation of the limitation fund based upon the vessel's tonnage.[12] Other similarities are that both Conventions allow limitation for wreck removal and breach of contract.[13] Both Conventions grant the right of limitation to a broad class of individuals and entities including charterers, managers and operators of seagoing vessels.[14]

Jamaica, Latvia, Marshall Islands, Mexico, Netherlands, Sierre Leone, Switzerland, United Arab Emirates, Vanuatu, Japan, Liberia, Norway, Poland, Spain, Sweden and Yemen.

[10] Martin Davies, *"Limitation of Liability and International Carriage of Goods,"* Law Institute Journal, Nov. 1992, p. 984.

[11] Xia Chen, Limitation of Liability for Maritime Claims, Kluwer Law International, 2001, p. xviii.

[12] The 1976 Convention provides for calculation of the limitation fund in Special Drawing Rights calculated by the International Monetary Fund based upon certain major currencies.

[13] *See* Article I of 1957 Convention and Article 2 of 1976 Convention.

[14] 1957 Convention, Article 6.

B. SIMILARITIES AND DISTINCTIONS OF THE 1957 AND 1976 CONVENTIONS

Several notable distinctions exist between the 1957 and 1976 Conventions.[15] The most critical differences between the Conventions are contrasted below:

1. WHO MAY LIMIT?

The 1957 Convention in Article 6(2) grants owners, charterers, managers, operators, masters and members of the crew acting in the course and scope of their employment to seek limitation of liability arising out of each distinct occasion. The 1976 Convention provides in Article 1 that the right to limit liability extends to shipowners, salvors, owners, charterers, managers and operators of seagoing ships and any claims against masters and members of crew against any person *"for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in the Convention."*[16] Accordingly, potential liability of the owner for the cause of the loss is the condition precedent to a master and crewmember seeking limitation. Any claim which does not arise out of or invoke the potential liability of the vessel owner is of a master and crewmember is not subject to limitation under the 1976 Convention. Individuals who simply load or unload a vessel are not entitled to limit liability under the Convention. The 1976 Convention also extends the right of limitation to salvors. Article 1(6) provides that insurers may limit stating that "*an insurer of liability for all claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured*

[15] *See* Harold K. Watson, *"The 1976 IMCO Limitation Convention, A Comparative View,"* Houston L. Rev., Vol. 15, No. 2, January 1978; Patrick Griggs and Richard Williams, Limitation of Liability for Maritime Claims, LLP, 1998, 3rd Ed.
[16] Article 1, ¶ 4.

himself."[17] Because the limitation fund created pursuant to the 1976 Convention is not limited to the post-accident value of the vessel, hull insurance proceeds may not be excluded from the limitation fund.

2. SEAGOING VESSELS

Both of the Conventions apply to seagoing vessles.[18] In Article 15(5), the 1976 Convention excludes air cushion vessels or floating platforms for exploration or exploitation of natural resources of the seabed or subsoil from its ambit. On the other hand, Article 15(4) of the 1976 Convention excludes application of the Convention to certain types of vessels only upon certain conditions. For example, the Convention may be applicable if a state party is not a party to an international convention governing drilling vessels and does not have national legislation for that purpose.[19] Additionally, Member States may exclude the application of the Convention to ships of less than 300 tons.

3. CLAIMS SUBJECT TO LIMITATION

Both the 1957 Convention, Article 1(1)(b) and the 1976 Convention, Article 2, 1(a) provide for limitation of liability of personal injury and property claims arising out of each distinct occasion during the operation of a seagoing vessel. The 1976 Convention provides that such claims shall be subject to limitation regardless of whether there is recourse under indemnity. The 1976 Convention also provides for claims regarding delay of cargo, passengers or their luggage, claims resulting from infringement of rights occurring in connection with the operation of the ship, claims regarding removal of destruction or rendering harmless the cargo of

[17] The thrust of this section is to extend protection to insurers who would otherwise be amenable to liability under a direct action statute. Additionally, this article extends protection to P&I club arrangements. Harold K. Watson, *"The 1976 IMCO Limitation Convention: A Comparative View,"* Houston L. Rev., Vol. 15, No. 2, January 1978, p. 259; *see also* Kierr, *"The Effect of Direct Action Statutes on P&I Insurance on Various Other Insurance of Maritime Liabilities and on Limitation of Shipowner's Liability,"* 43 Tul. L. Rev. 638, 657-64 (1969).
[18] Article 1, 1957 Convention.
[19] Xia Chin, Limitation of Liability for Maritime Claims, Kluwer Law Intn'l, 2001, p. 27.

the ship and claims of a person to minimize or avert the loss. Consequential damages are also within the ambit of the 1976 Convention. The 1957 Convention also allows limitation for claims for infringement of indemnity rights. Both the 1957 Convention in Article 1(c)[20] and the 1976 Convention in Article 2, 1(d)(e) allow for wreck removal.

4. CLAIMS EXCLUDED FROM LIMITATION

Both the 1957 Convention, Article 1(4)(a), and the 1976 Convention, Article 3(a) exclude claims for salvage[21] and general average from the ambit of permissible limitation of liability claims. The 1976 Convention, in Article 3(c) and (d) excludes liability for oil pollution and nuclear damage. Claims for oil pollution are subject to the International Convention on Civil Liability for Oil Pollution Damage 1969 and its amendments or protocols. Article 3(b) of the 1976 Convention provides that it shall not apply to any liability within the CLC 1969 Convention. Additionally, the 1976 Convention excludes servant's claims for personal injury from limitation.[22]

5. ACTIONS PRECLUDING LIMITATION

The 1957 Convention grants a vessel owner the right to limit "*unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner*."[23]

The 1976 Convention provides a substantial departure from this standard and greatly increases the prospects of limitation. Article 4 of the 1976 Convention provides as follows:

> A person shall not be entitled to limit his liability if it is proved that the loss resulted **from his personal act or omission committed with the intent to cause**

[20] The 1957 Convention does not specifically provide for delay damages although such damages may be encompassed within Article I(1) of the 1957 Convention. *See* Griggs, Patrick and Williams, Richard, Limitation of Liability for Maritime Claims, London LLP, *see* 1998 at p. 17.

[21] The 1996 Convention also excludes claims for special compensation under Article 14 of the International Convention on Salvage, 1989.

[22] This is a marked difference from United States scheme, codified in 46 U.S.C. §§ 183-189 which allows limitation for personal injuries to Jones Act seamen.

[23] Article 1(1).

such loss, or recklessly and with knowledge that such loss would probably result.

This provision of the 1976 Convention is extremely significant because it extends additional insulation to the owner by requiring proof of:

(i) actual intent or reckless conduct which is a higher degree of fault than privity or knowledge,

(ii) a personal act or omission excluding vicarious conduct of servants.

The 1976 Convention places the burden of proof on the claimant or party attempting to break limitation.[24] Accordingly, unless the vessel owner or other party entitled to limit has been proven liable for conduct of reckless indifference or intentional acts, the party will be entitled to limit liability.[25] This standard creates a very high threshold to successfully break limitation.

It is also noteworthy that under the 1957 Convention, the burden of proof is upon the shipowner to prove absence of his actual fault or privity with respect to loss or damage. Additionally, under the 1957 Convention, proof that the vessel owner did not have actual fault or privity despite the negligence of a lower echelon employee may allow the vessel owner to limit liability.

6. THE CEILING OF LIABILITY

(a) 1957 Convention. As stated earlier, the 1957 Convention utilized the Poincaré gold franc as the measure of liability. Fluctuations of gold and currency markets prompted the IMCO to adopt the special drawing right of the International Monetary Fund and the Special Drawing Right is determined daily. In the event that a state is not a member of the

[24] This is contrary to the Shipowners' Limitation of Liability Act, 46 U.S.C. §§ 181-189 which places the burden of proof upon the vessel owner.

[25] *See* Xia Chin, Limitation of Liability for Maritime Claims, Kluwer Law Intn'l, 2001, pp. 75-79 (discussing standards of willful misconduct under the Warsaw Convention on air carriage prior to the 1955 Hague Protocol and the Oil Pollution Act of 1990.

IMF and is unable to convert to the Special Drawing Right, the Poincaré franc may be utilized in the calculation of the limitation fund. Article 8(4).

Under the 1957 Convention, the vessel's tonnage is calculated on the basis of the Moorsam System. Using this process, the weight is the net tonnage with the addition of the amount deducted from the gross tonnage on account of the engine room for the space of ascertaining the net tonnage for purposes of calculating the tonnage of steamships or other mechanically-propelled ships. The net tonnage for all other ships shall be the basis for calculating the limitation fund. *See* Article 7, 1957 Convention.

(b) The 1976 Convention. The 1976 Convention in Article 6(5) calculates tonnage as the gross tonnage in accord with the provisions in Annex I of the International Convention on Tonnage of Measurements of Ships of 1969.

7. SIZE OF THE LIMITATION FUND

(a) 1957 Convention

Article 3(1) of the 1957 Convention creates a two-tier system for the treatment of personal injury, death and property claims. Under the 1957 Convention, when a marine casualty results only in property claims, a limitation fund is set at 1,000 G.F. per ton. On the other hand, when only personal claims are involved the fund is 3,100 G.F. per ton. When both personal and property claims exist, the total fund is set at 3,100 G.F. of which 2,100 G.F. are to be exclusively utilized to satisfy personal claims and any balance of the personal claims will share the remaining 1,000 G.F. ton pro rata with the property claims. One criticism of the 1957 Convention is that the limitation fund is merely based upon the size of the vessel's tonnage, and due to inflation, funds may be small in contrast to the damage sustained.

(b) 1976 Convention

The 1976 Convention substantially increases the limitation fund generated by the 1957 Convention. The 1976 Convention provides for bands of tonnage with different limitation amounts for each.[26] There is a substantial minimum tonnage and a graded sliding scale, thus ensuring that the limitation fund of smaller ships is relatively higher than that for larger ships (unlike the 1957 Convention). This change is based on the practical reasoning that the small size of a ship does not directly relate to its capacity for doing damage.

The 1976 Convention sliding scale for the calculation of limitation funds is as follows:

Property Claims Alone		
Tonnage not exceeding 500 tons		167,000 SDR (334 SDR per ton)
For each ton	501 - 30,000	167 SDR per ton
For each ton	30,001 - 70,000	125 SDR per ton
For each ton	70,001 – upwards	83 SDR per ton

Loss of Life and Personal Injury Claims		
Tonnage not exceeding 500 tons		333,000 SDR (666 per ton)
For each ton	501 – 3,000	500 SDR per ton
For each ton	3,001 – 30,000	333 SDR per ton
For each ton	30,001 – 70,000	250 SDR per ton
For each ton	70,001 – upwards	167 SDR per ton

The 1957 Convention figure for property damage alone was the equivalent of 66.67 SDR per ton and for personal injury and property damage combined 206.67 SDR per ton. Thus, for a ship of 15,000 "limitation" tons, the property limit has increased by 2.59 times from 1,000,050 SDR to 2,588,500 SDR and the combined property and personal injury limit by 2.63 times from

[26] *See* Nicholas Gaskell, *"The Amount of Limitation"* in The Limitation of Shipowner's Liability: The New Law, London: Sweet & Maxwell, Institute of Maritime Law, 1986, at p. 42.

3,100,050 SDR to 8,167,500 SDR. Additionally, Article 9 provides for the aggregation of claims according to each distinct occasion.[27]

(c) 1996 Convention

The 1996 Convention has only been ratified by four of the ten necessary states. This Convention contains modified limits as follows:

> Article 3
>
> Article 6, paragraph 1 of the Convention is replaced by the following text:
>
> 1. The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:
>
> (a) in respect of claims for loss of life or personal injury,
>
> (i) 2 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
>
> (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
>
> for each ton from 2,001 to 30,000 tons, 800 Units of Account;
> for each ton from 30,001 to 70,000 tons, 600 Units of Account; and for each ton in excess of 70,000 tons, 400 Units of Account,
>
> (b) in respect of any other claims,
>
> (i) 1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,

[27] P. Griggs and R. Williams, *Limitation of Liability for Maritime Claims,* 3d Ed. (LLP, 1998), 38, suggests that the intention of the committee was to allow the balance of death or personal claims to the extent that they exceeded the fund available in Article 6(1)(a) to be levied against the fund for "other claims" in Article 6(1)(b) only where the occurrence has given rise to both death and personal injury claims and other claims. However, Grahame Aldous, *"Claims by Personal Injury and Fatal Accident Claimants on Property Funds and Limitation Proceedings,"* Lloyd's Maritime and Commercial Law Quarterly, 2000, p. 150, has a contrary position as follows:

> A person who has a personal injury or fatal accident claim against a shipowner who is entitled to limit his damages under the Limitation Convention 1976 can claim against both the 'personal injury fund' and the 'property fund' under the Convention even if there are no property claims. Although the contrary argument has at times been raised in the past, it cannot be supported by either the plain words of the Convention or by looking at the intention behind the Convention. The travaux preparatories for the Convention make it plain that it was intended that both funds be available.

Id.

(ii) for a ship with a tonnage in excess thereof, the following addition to that mentioned in (i):

for each ton from 2,001 to 30,000 tons, 400 Units of Account;
for each ton from 30,001 to 70,000 tons, 300 Units of Account; and
for each ton in excess of 70,000 tons, 200 Units of Account

Article 4

Article 7, paragraph 1 of the Convention is replaced by the following text:

1. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.

8. DISTINCT OCCASION THEORY

In both the 1957 and 1976 Convention, limits of liability apply *"to the aggregate of all claims which arise on any distinct occasion."* Article II of the 1957 Convention; Article 9 of the 1976 Convention. In other words, two successive events have been held as distinct occasions requiring the vessel owner to create two separate limitation funds.[28]

9. PROCEDURE FOR LIMITATION

Article 2 of the 1957 Convention does not require establishing a limitation fund as a condition precedent to claim the right to limitation of liability. Similarly, the 1976 Convention provides in Article 10(1)(3) that establishment of a fund is not a prerequisite to limitation. On the other hand, the 1976 Convention provides that a concursus is available only by establishment of a limitation fund. Article 11(1). Moreover, Article 11(3) provides that if any person entitled

[28] *See* Schwan (THE ALBANO), [1892] P. 419(C)(A) in which the court held that the opportunity between two successive collisions to correct the improper way of navigating were distinct occasions. Compare THE RAIATH, L.R. 3 ADM. & ECCL., 539 (1872) in which two collisions solely is the result of one error of navigation were held as one distinct casualty. Note that in the United States, generally, limitation arises out of one voyage.

to limit his liability establishes a fund, all other persons so entitled are deemed to have established a fund in accord with the aggregation provision. Article 12(1) provides for distribution of the fund in accord with the category of claim as passenger claims, personal injury and death claims.

10. WORLDWIDE RECOGNITION OF THE CONCURSUS

Both the 1957 Convention in Article 5 and the 1976 Convention in Article 13(1) provide that a concursus shall be given worldwide recognition among contracting states. Accordingly, the 1976 Convention provides in Article 13(1) as follows:

> Any person having made a claim against the fund from exercising any right in respect to such claim against other assets of a person by or on behalf of whom the fund has been constituted.

The effect of this language is that once a claimant has asserted a claim in the concursus, he is precluded from seeking relief in other jurisdictions. Additionally, once a fund has been constituted in one forum, courts may order the release of assets arrested or attached in other forums. Article 13(2). The limitation preceding is granted comity or recognition by all other states to the Convention. In the event the concursus or fund is not recognized by a state that is not a party to the 1976 Convention, a court may offset any damages paid from the limitation fund for those amounts.[29]

11. STATUTES OF LIMITATION

Both the 1957 and 1976 Conventions, with few exceptions, provide that procedural matters relating to limitation issues shall be governed by the national law of a contracting state.[30]

[29] *See* Article 2, ¶¶ 2, 4.
[30] Xia Chin, Limitation of Liability for Maritime Claims, Kluwer Law Intn'l, 2001, p. 115.

III. FEDERAL LIMITATION OF SHIPOWNERS' LIABILITY ACT: SUBSTANCE AND PROCEDURES

A. INTRODUCTION

Congress enacted the Federal Limitation of Shipowners' Liability Act in 1851 in an effort to promote investment in ships, encourage shipbuilding, stimulate commerce and compete with other maritime nations.[31] At the time of the passage of the United States Limitation Act, the concept flourished in England and Europe. The Act in its present form[32] has been modified very few times since its original enactment. Currently, there is a movement to modernize the Act, although the Maritime Law Association Limitation of Liability Committee is opposed to drastic changes in the language which may have the unintended effect of changing the law. Despite its many detractors throughout the years, the doctrine of limitation of a shipowner's liability remains a viable component of modern admiralty law in the United States.

B. 46 U.S.C. § 183 and § 186: WHO MAY LIMIT AND WHY:

The United States severely restricts the eligible parties who may avail themselves of the benefit of the statute. Any **owner**[33] or **owner pro hac vice**[34] ***of any vessel*** may petition the court for the right to limit its liability. Time charterers and voyage charters[35] as well as officers,

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[31] *See* Cong. Globe, 31st Cong., 2nd Sess., 331-32, 713-20, 776-77 (1851). "*It is simply placing our mercantile marine upon the same footing as that of Great Britain*." Id. at 714 (Statement of Sen. Davis). *See generally* 3 Benedict on Admiralty, §§ 6-7 (Aileen Jenner, et al. Eds., 7th Ed. 1992).

[32] The Act is codified in 46 U.S.C. §§ 181-189. *See* Antonio Rodriguez and Paul Jaffee, *"An Overview of U.S. Law of Shipowners' Limitation of Liability",* MLA Report, Doc. No. 691, Oct. 31, 1991 for a succinct outline of United States limitation.

[33] 46 U.S.C.§ 183.

[34] 46 U.S.C. § 186.

[35] *See* In re Barracuda Tank Corp. (S/T TORREY CANYON), 409 F.2d 1013 (2d Cir. 1969) ; In re Amoco Transp. Co. (AMOCO CADIZ), 467 F. Supp. 181 (N.D. Ill. 1979).

masters and crew[36] are not entitled to the remedy of limitation or exoneration from liability.[37] *Any vessel*[38] has been construed to embrace both American and foreign vessels.[39]

The remedy of limitation may be sought by the **owner** for (1) any embezzlement, loss or destruction by any **property, goods or merchandise shipped aboard the vessel,** (2) **loss, damage or injury by collision,** or (3) thing, loss, damage, or forfeiture done **without the privity or knowledge** of the owner or owners by filing an action in the United States federal court. With the exception of the *Sirovitch Amendments* in § 183 (b), the limit of the owner's liability is the **post-casualty value of the vessel and her pending freight.**

It is relatively burdensome for an owner pro hac vice or a vessel owner to limit its liability in the United States. Proof of the **privity and knowledge of the cause of the loss by the vessel owner or bareboat charterer** will result in a denial in limitation by the court. This is primarily a factual determination by the trier of fact. Examples of conduct by an owner which will be deemed **privity and knowledge** (i) are a failure to maintain the vessel in a seaworthy condition, (ii) a lack of proper navigational aids, (iii) an unseaworthy crew, (iv) violation of a safety statute including and (v) an ISM Code violation including non-compliance with the safety management system may invoke the Pennsylvania Rule creating a presumption of negligence. The presumption may only be rebutted by a demonstration that the violation **did not cause the loss and *could not have been* the cause of the loss**. With the exception of the application of the *Sirovitch Amendments*, the privity and knowledge of the master at the inception of the voyage is

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[36] 46 U.S.C. § 187.

[37] Actions against masters, officers and seamen are deemed third party actions and are handled separately from the limitation action because these parties are not entitled to limit their liability under the Act. 46 U.S.C. § 187.

[38] *Vessel* has been construed to include pleasure craft by a number of courts. *See* Complaint of Sisson, 1990 A.M.C. 1801 (1990).

[39] The Scotland, 105 U.S. 24 (1881) held that the United States limitation of liability part was an available remedy to a British shipowner.

not always enough to deny limitation.[40] A corporate owner may be prevented from limiting its liability by the acts of its managing agents when "the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred."[41]

C. NON-APPLICABILITY OF THE LIMITATION ACT

The Limitation Act does not apply to Oil Pollution Act of 1990, 33 U.S.C. § 2701, Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., or 33 U.S.C. § 409, known as the Wreck Act. These matters may not be limited under the Limitation of Liability Act.

D. THE LIMITATION FUND

The amount of the limitation fund or the upper-limit of the vessel owner's liability is the **post casualty value of the vessel at the end of the voyage and all pending freight**.[42] Hull insurance proceeds are not included in the limitation fund.[43] After the MORRO CASTLE disaster, Congress enacted § 183 (b)-(f) of the Act which are known as the **Sirovitch Amendments** in 1935.[44] These sections apply to all **seagoing vessels**.[45] Section (b) creates a supplementary fund for the benefit of personal injury and death claimants when the amount of the general limitation fund is inadequate to satisfy their claims. The fund is increased to a sum

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[40] *But see* Ocean Foods Boat Company v. M/V TOSCA, 692 F. Supp. 1253 (D.Ore.1988).

[41] The ISM Code's requirement of a Designated Person ("DP") as liaison between certain vessels and the shore-based corporate officers will likely increase the vessel owners' burden of limitation. *See* Matison & Black, *"Ramifications of the ISM Code on United States Maritime Law,"* Shipping & Transport Lawyer Int'l, 1998; Coryell v. Phipips (THE SEMINOLE), 317 U.S. 604 (1943); Spencer Kellogg & Sons v. Hicks (THE LINSEED KING), 285 U.S. 502 (1932); Continental Oil v. Bonanza Corp., 706 F.2d 1365 (5th Cir. 1983); Waterman S.S. Corp. v. Gay Cottons, 414 F.2d 724 (9th Cir. 1969).

[42] *See* In re Caribbean Sea Transport v. Russo, 748 F.2d 622 (llth Cir. 1984) for the differing interpretations of the value of pending freight.

[43] Place v. Norwich & N.Y. Transport. Co. (The CITY OF NORWICH), 118 U.S. 468 (1886).

[44] In 1934, 135 people perished as a result of the fire aboard the MORRO CASTLE, and the owners sought to limit their liability to $20,000.00.

[45] 46 U.S.C. § 183(f) excludes fishing vessels and pleasure yachts. *But see* THE J.H. SENIOR (S.D.N.Y. 1947).

of $420.00 per ton of the vessel's tonnage and is available **only** for personal injury and death claims. The tonnage is calculated in accord with section 183 (c). Privity and knowledge of the master at the **inception** of the voyage will be **imputed** to the owner and prevent limitation with respect to qualified claims pursuant to the Sirovitch Amendment. § 183(e). The effect is that personal injury and death claimants will receive a greater pro-rata share of the fund than property claimants from the same voyage.

E. THE CONCURSUS AND THE SAVINGS UNTO SUITORS CLAUSE

The method of marshaling all the claims arising out of the voyage into one jurisdiction and proceeding in federal court is known as the **concursus**. Often this conflicts with the *Savings Unto Suitors Clause*.[46] There are two exceptions to the concursus. They are: (1) the **single-claim-inadequate fund** exception[47] and (2) the **multiple-claim-adequate fund** exception.[48] In both instances, the federal court retains jurisdiction over the limitation proceeding pending the outcome of the state action.

F. FIRE LOSSES: § 182: THE FIRE STATUTE

This section exempts a vessel owner for all fire damage or loss to **goods** aboard a vessel, unless the damage was caused by the **design or neglect of the owner**. In the Ninth Circuit, the vessel owner must first prove that he provided a seaworthy ship before he is entitled to the protections of the fire statute. [49]

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[46] 28 U.S.C. § 1333 provides: "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." (emphasis added) For a detailed discussion of the balancing of the concursus and the Savings Unto Suitors Clause, *see* 53 Tul. L. Rev. 1158.

[47] Langes v. Green, 282 U.S. 531 (1931).

[48] Lake Tankers Corp. v. Henn, 354 U.S. 147 (1957). The Court retains jurisdiction over the matter and the parties enter into written stipulations and agree not to execute beyond a certain amount.

[49] Westinghouse Electric Corp. v. M/V LESLIE LYKES, 734 F.2d 199 (5th Cir. 1984). *Compare* Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd., 603 F.2d 1012 (9th Cir. 1979).

G. PROCEDURAL ASPECTS OF LIMITATION:

The procedural requirements of a limitation action are embodied in Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. These rules should be read in conjunction with 46 U.S.C. § 181-189.

1. RULE F(1) AND § 185

It is important to note that both F (1) and § 185 have a **jurisdictional** time bar of **six months** for the filing of a limitation petition after the vessel owner receives **written notice** of a claim arising out of the voyage. The claim must demonstrate that it is *reasonably possible* that the damages will exceed the value of the vessel.[50] The petition must be filed within the **federal** district court which has exclusive jurisdiction. A shipowner can not rely upon an affirmative defense of limitation of liability asserted in a state court action to toll the six month time bar.[51]

2. VENUE: RULE F(9)

The limitation action must filed in the federal district court:

(i) where the vessel has been attached or arrested to answer for any claim for which limitation is sought; or

(ii) if the vessel has not been attached or arrested, in the district where the owner has been sued with respect to such a claim; or

(iii) if neither (i) nor (iii) have occurred, where the vessel is located; or

(iv) if the vessel is not located within a district, then the complaint may be filed within any district. Therefore, if neither (i), (ii), or (iii) have occurred, the vessel owner can wait for the vessel to sail to a foreign country and then file in the district of his choice. However, Rule F (9)

[50] *See* Complaint of Okeanos Research Foundation, Inc., 704 F. Supp. 412 (S.D.N.Y. 1989).
[51] Cooper v. Allison, 243 Or. 179, 412 P.2d 356 (1966); Cincinnati Gas & Elec. Co. v. Abel, 533 F.2d 1001 (6th Cir.), *cert. denied* 429 U.S. 858 (1976).

has provisions allowing the court the power to transfer the case to another district for the convenience-of parties and witnesses.

3. SECURITY: F(1) AND § 185

Both Rule F and § 185 require the owner to post a cash or provide a bond or requisite security with the court. Courts have allowed a letter of Undertaking from a vessel owner's P&I club as security.[52] Security shall provide for **annual** interest at the rate of **6%**. Whether the owner elects to post security, cash or a letter of undertaking, the amount must equal the **value of the vessel and all pending freight** and all amounts that the court may from time to time order. The vessel owner may also, at his option, transfer to a trustee his interest in the vessel and pending freight, plus provide for cash or security all amounts for the supplemental Sirovitch fund.

4. RULE F(2): MATTERS CONTAINED IN THE PLEADING

Rule F(2) requires that the complaint for limitation contain certain matters. They are:

(i) the facts upon which the owner is entitled to limit;

(ii) all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited;

(iii) the grounds of exoneration as well as limitation;

(iv) the voyage sought to be limited;

(v) date and place of the limitation of the voyage;

(vi) the amount of all demands, including all unsatisfied liens, or claims of liens, in contract or tort arising out of that voyage and whether any actions or proceedings thereon;

[52] M/V JABLANICA, 1987 AMC 2209 (W.D. Mich 1987).

(vii) the state of the vessel, whether wrecked or abandoned and if wrecked the value of her wreckage and where it is located;

(viii) the value of any pending freight.

If the limitation owner elects to give the vessel to a trustee, the complaint must show:

(i) the paramount liens;

(ii) voyages or trips the vessel has made and any existing liens arising upon any such subsequent voyage or trip, with the names and addresses of the lienors;

(iii) and whether the vessel sustained any injury upon a subsequent voyage.

5. RULE F(3) AND THE § 185 MONITION

Both Rule F (3) and § 185 provide that after the plaintiff fulfills the requirements of F(l) and F(2), the federal district court will issue an injunction or **monition**, staying all other proceedings against the owner in all **other forums** arising out of the voyage sought to be limited.[53] However, it is important to note here that § 187 states that "*nothing in the preceding sections shall affect any remedy of any party against the* ***master, officer or crew"*** *of the vessel*.[54] Therefore, it is quite possible that issues central to the limitation proceeding may be adjudicated collaterally in another forum in actions filed against the master, officer of crew.

6. RULE F(4) NOTICE TO CLAIMANTS

The court must issue a notice to all known claimants arising out of the voyage, instructing them to file their claim with the clerk of court and to file a notice of the claim with the attorney of the plaintiff. The claimants shall have at least **thirty** days from the date of the claim to file their notice. Additionally, the notice shall be published in a paper or newspaper as the court

[53] It is important to note that the injunctive power of the court does not have **international** effect and the vessel owner may be compelled to cope with pending actions in other countries.

[54] *Compare:* In the Matter of Paradise Holdings, 795 F.2d 756 (9th. Cir. 1986) and Zapata Haynie v. Arthur, 926 F.2d 484 (5th Cir. 1991).

directs for once a week for **four successive weeks** prior to the date fixed for filing claims. Also, the limitation petitioner, after the **second** date of publication, must mail a copy of the notice to **every person known to have made a claim** arising out of the voyage. In the event that a death has occurred, notice shall be mailed to the decedent at his last known address and to any person known to have made a claim upon his behalf.

7. RULE F(5) CLAIMS AND ANSWER

All claims must be **filed** and **served** in accord with the notice. Each claim must specify: (i) the facts upon which the claimant relies in support of the claim, (ii) the items thereof, (iii) the dates upon which the same accrued. In the event that the claimant desires to content the right of limitation, he **shall** file an answer.

8. RULE F(6) INFORMATION TO BE GIVEN TO CLAIMANTS

Within **thirty** days after the date of filing claims, or the date specified by the court, the vessel owner must mail to the attorney for each claimant:

(i) the name of each claimant;

(ii) the name and address of claimant's attorney, if known;

(iii) the nature of the claim: i.e.: personal injury or cargo;

(iv) the amount of the claim.

It is also recommended that at the termination of the claim period, that the limitation plaintiff file a motion with the court seeking to bar and default all untimely claims. Depending upon the equities of the case and the state of the proceedings, a court may or may not allow the filing of an untimely claim.

9. RULE F(7) THE INSUFFICIENCY OF BOND

This provision allows a claimant to submit a motion with the court for re-evaluation of the bond or security. The court may conduct an appraisal and either reduce or increase the bond or other security to protect the integrity of the limitation proceedings.

10. RULE F(8) OBJECTION TO CLAIMS: DISTRIBUTION OF FUND

This section, along with § 184, provides for the controversy regarding the claims. Additionally, these sections state that the fund, if limitation is granted, is to be distributed pro rata in accord with the respective losses of the claimants.

11. BURDEN OF PROOF

The Claimants have the burden of proving a condition of unseaworthiness or act of negligence causing the accident or the loss.[55] The vessel owner has the burden of proving that he did not have privity or knowledge as to the cause of the loss.[56]

H. CONFLICTS OF LAWS.

The Supreme Court of the United States has held in THE TITANIC that the United States Limitation Act is *procedural*.[57] The Titanic occurred upon the high seas and was a disaster involving only one vessel. However, the situation becomes more complicated when two different flag ships are involved in a collision. If the collision occurs in foreign territorial waters, the court, in determining which limitation law to apply will inquire whether or not *the law attaches to the right and not to the remedy*.[58] As a general rule, when two flag ships have a collision upon the high seas and both are signatories to the same Convention or are of the same

[55] In re Farrell Lines, 530 F.2d 7 (5th Cir. 1976).
[56] M/V SUNSHINE, II, 808 F.2d 762 (llth Cir. 1987).
[57] 233 U.S. 718 (1914).
[58] *See* Black Diamond S.S. Corr). v. Robert Stewart & Sons, Ltd. (S.S. NORWALK VICTORY), 336 U.S. 386 (1949).

flag, the court will apply the law common to both. Otherwise, the court will apply the law of the forum.