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Limitation of liability : the developments, problems and future

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WORLD MARITIME UNIVERSITY
Malmö, Sweden

Limitation of Liability
The Developments, Problems and Future

By

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A dissertation submitted to the World Maritime University in partial
Fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

in

SHIPPING MANAGEMENT

2000

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

Title of Dissertation: **Limitation of Liability: The Developments, Problems and Futures**

Degree: **MSc**

The dissertation is a study of regimes of limitation of liability for maritime claims. Tentative efforts are made in examining the relationship among different limitation of liability regimes, figuring out the trends presented in the development of those regimes and the potential problems in applying them co-operatively to claims arising out of one incident and seeking the future solutions to these problems.

Three phases of development of limitation of liability are identified. They are the ship value system, the monetary system - both of which belong to the global regime of limitation of liability, and the separate regime of limitation of liability. Each of these three phase developments is examined carefully by giving the characters of these systems or regimes and trends presented in the development.

Because of the existence of the separate limitation of liability regimes, several limitation regimes may have to work together on claims arising out of one incident. The dissertation examines the provisions in different regimes carefully and figures out the gaps among these regimes, the weakness of provisions of the current conventions and potential problems in applying them together to claims arising out of one incident. The reasons that result in these difficulties are also given in this dissertation.

For overcoming these difficulties, three alternative solutions – unlimited liability regime, a comprehensive convention applying to all maritime claims and the solution of establishing “linkage” between conventions, are examined. The solution of establishing a comprehensive convention is recommended with a detailed discussion on the possibility of this solution.

KEYWORDS: Limitation of liability, Development, Problem, Future.

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LIST OF ABBREVIATIONS

CLC	International Convention on Civil Liability for Oil Pollution Damage, 1969, and its amendments
CMI	Comité Maritime International
EEC	Exclusive Economic Zone
HNS	hazardous and noxious substance
IMO	International Maritime Organization
IOPC Fund	International Oil Pollution Compensation Fund
OPA 1990	Oil Pollution Act, 1990 (U.S.A.)
OSLTF	Oil Spill Liability Trust Fund, U.S.A
SDR	Special Drawing Right

Chapter One

Introduction

In maritime law a shipowner has been historically permitted to limit his liability to provide compensation for personal or property damage. The origins of shipowners' limitation of liability are uncertain. One author, Donovan, J. J. in his article¹, assumed that limitation of shipowner's liability appears to have first developed in Italy at some time between the fall of the Western Roman Empire (454 AD) and the Crusades (1096 – 1291 AD), and then to have spread to some other European countries. The commercial revolution of the 16th and 17th centuries saw the adoption and spread of the privilege of shipowners' limited liability to almost all of the continental maritime jurisdictions.

Although regimes of limitation of liability have varied with time and place, the following principles are in common:

- (1) The legal limit of liability varies, generally speaking, with the size of the ship, and
- (2) The shipowner is not entitled to limit his liability if the damage is attributable to certain degree of his personal fault or neglect².

Limitations of liability regimes, from the author's point of view, have passed through three phases. Within the regimes of limitation of liability during the first phase, the limits of liability were based on the value of the ship and the pending freight. Therefore, they are called the ship value system. The limitation of liability in

¹ Donovan, J. J., "The Origins and Development of Limitation of Shipowners' liability", *Tulane Law Review* 53 (1979) 999

² Selvig, E. "An Introduction to the 1976 Convention", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 3.

the regimes of the second phase is linked to monetary figures that are based on the tonnage of the ship and is called the monetary system or the tonnage system. The ship value system and the monetary system provide shipowners the privilege of discharging all liabilities to the claims arising out of one voyage or one distinct occurrence, subject to the exemptions provided by law. In this respect, both these systems are referred to as the global limitation of liability regime (hereinafter referred to as the global regime). The third phase of evolution of limitation of liability regime is referred to the appearance of legislation which provides for separate limitation of liability for certain types of claims, such as the CLC and HNS Conventions and the relevant national legislation in many countries. Such a limitation of liability regime, in this dissertation, is called the separate limitation of liability regime (hereinafter referred to as the separate regime).

Because the separate regime applies only to certain type of claims, in most of cases, it has to work together with the global regime. It is the author's intention, in this dissertation, to examine the relationship among individual conventions under these regimes to see what problems might occur in implementing them and how to solve these problems based on the current trends and developments in the law of limitation of liability.

Chapter Two

Evolution of limitation of liability regimes -- the three phase developments

Section 1

The Global Regime (1) ---- The Ship Value System

Historically, the ship value system within which the limits of liability were based on the value of the ship and the pending freight prevailed for a long time. There used to be two systems of limitation of liability in use. One was the execution system which was used by countries like Germany and Scandinavian states, etc. In this system, the shipowner had no personal liability for limitable claims. Such claims were enforceable only against the ship and freight; but as a counterpart they had, by virtue of a maritime lien, a priority right of recovery from such assets. The second system is the abandonment system which was used by France and later the United States. The shipowner was personally liable for the limitable claims, but he was entitled to avoid or limit his liability by abandoning the ship and freight to the claimants with the consequence that claimants were only entitled to recover by enforcing their maritime liens in these assets³. The above two systems generally provided that a shipowner would be liable for no more than the value of his ship and

³ See Donovan, J. J., "The Origins and Development of Limitation of Shipowners' liability", *Tulane Law Review* 53 (1979) 999, and also Selvig, E. "An Introduction to the 1976 Convention", in the

freight which was to come due from the voyage in question. The thinking behind this was that of shared risk. As Grigg said:

If the owner of the cargo was prepared to hazard his goods upon a maritime adventure with the very real prospect of losing them, the shipowner who was prepared to hazard his valuable ship upon the maritime adventure should equally stand only to lose the value of his vessel and no more.⁴

Besides the above-mentioned general principles that prevailed in all the limitation regimes, some additional principles were presented in this ship value system. The first one is that the liability of a shipowner was linked to a particular ship and the amount of liability was limited to the value of the ship. When the ship was totally lost or transferred to others for any reason, in theory, the shipowner would discharge his liability. The second one is that the limit of liability did not apply to each claim, but to the aggregate amount of claims having accrued up to the time when limitation was invoked⁵. The purpose of this principle is to provide an entire limit to all the liability of the shipowner for the voyage within which the incident occurred. This principle conforms to a theory that allows an owner to limit his liability according to his interest in the adventure, namely the particular ship on a particular voyage. The third one is that the limitation amount was to be distributed among the claimants according to the priority rules for maritime liens. Finally, of course the person entitled to limit liability could only be the owner of the ship. Compared to other systems or regimes which will be discussed later, one can easily find that the ship value system is the most favourable regime for shipowners. The advantage of this system, in the author's opinion, is that by linking the liability to a unique ship, this system could strongly force claimants to settle their claims in one single proceeding.

Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 3.

⁴Griggs, P. "Limitation of liability for maritime claims: the search for international uniformity" [1997] LMCLQ 371

The value of the ship on which the system was based, in most countries, was the salved value of the ship, so the actual limits vary with the extent of damage to the ship itself. It, therefore, favored the owners of old, poorly maintained ships and if the vessel sank after a collision the limit would be next to nothing. The greater the catastrophe, the less compensation the victims could get. One example is the accident of *Torrey Canyon* which caused about £7.70 million (\$ 18 million) worth of pollution damage in 1967, “(perhaps) for the first time in maritime history ... substantially exceeded the value of the ship and cargo.”⁶ But the owners claimed to limit \$50 for a single salved lifeboat⁷. Another example is the *Titanic* disaster. The total personal claims in that disaster was \$22, 000, 000. The ship had a pre-accident value of about £1,500,000. Under the British tonnage system her limit would have been about \$3,750,000 at that time. However, the limitation proceeding was taken in the U.S. Under the U.S. ship value system, her actual limit was \$91, 805.⁸ Considering that shipowners in most cases can get back their losses from their hull and machinery insurers, the drawbacks of this system are quite apparent. One of examples is the disaster of *the Morro Castle* in 1934. There the owners received \$2.1million from the hull insurer, but were obliged to establish a limitation fund of \$200,000 for all the claims against the vessel.⁹ Nowadays most countries in the world, except the U.S. and a few other countries, have abolished this system in their national legislation.

⁵ Selvig, E. “ An Introduction to the 1976 Convention”, in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners’ Liability: The New Law*, (London: Sweet & Maxwell, 1986) 3, 4.

⁶ Burrows, Rowley and Owen, “The Economics of Accidental Oil Pollution by Tankers in Coastal Waters”, (1974) *Journal of Public Economics* 3, 258, cited in M’Gonigle, R. M., Zacher, M. W., *Pollution, Politics, and International Law- Tankers at Sea*, (University of California Press, 1979) 144.

⁷ See Gaskeel, N. “The Amount of Limitation”, in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners’ Liability: The New Law*, (London: Sweet & Maxwell, 1986) 34 .

⁸ *Ibid*, footnote. Also see *Oceanic Steam Navigation Co. v. Mellor* 209 f. 501 (2 Cir., 1913), 233 US 718 (1914).

⁹ *Ibid*. footnote

Section 2

The Global Regime (2) -- The Monetary System

2.2.1 General Description

This system was developed in England during the 18th and 19th centuries¹⁰. The English system introduced several principles which are still in use in the modern limitation regime. Firstly, the monetary limit, which is calculated on the ship's tonnage, was adopted. Although at that time the value of the ship was still recognized by the English law, it was used merely for calculation purposes. The monetary approach provides a fix limit that is easier for the shipowner and insurer to assess the risk to which the ship would be exposed and encourages the insurer to provide insurance for the ship. Secondly, the limitation is restricted to claims arising out of one distinct occasion, not all the claims accrued up to the end of a period of time. Therefore, if in one voyage two or more incidents occurred, each of the incidents would have its own limit. Thirdly, a separate limit is reserved for personal injury. Finally, the limitation amount is distributed among claimants in proportion to their claims and not according to the priorities of maritime liens. Actually the last principle was a natural result of the monetary approach. By this approach claims are brought against the monetary fund, not the ship to which a maritime lien can be attached. Thus the distribution of the fund does not follow the priority of the maritime lien. In English system, there was a restrictive approach to the number of limitable claims compared to the other two systems existing at that time.

The change from the ship value system to the monetary system resulted in the weakness in control of the multiply lawsuit in different jurisdictions. At the international level it is always possible to constitute multiply limitation fund in multiply jurisdictions.

¹⁰ Selvig, E. "An Introduction to the 1976 Convention", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 4.

Modern limitation of liability regimes have been developed on the basis of the English system. Attempts to produce uniformity in international law have resulted in three international conventions; the 1924 International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-going Vessels (the 1924 Convention), the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships 1957 (the 1957 Convention), and the International Convention on the Limitation of liability for Maritime Claims 1976 (the 1976 Convention).

2.2.2 The 1924 Convention

The 1924 Convention reflects what has been termed the option-system because the shipowner may limit his liability to the value of ship and freight or to an amount of £8 per ton. In either case an additional amount of £8 per ton is reserved for personal claims. Thus, the monetary limits were equivalent to those originating in the English legislation from the 1850-60s. Even in other respects the Convention incorporated elements of English law. The 1924 Convention has been ratified or acceded to by 15 states, of which 6 subsequently denounced in favor of a subsequent Convention. Several countries, including Poland, Portugal, Spain and Belgium have adopted subsequent limitation conventions but have not denounced the 1924 Convention¹¹. The data on ratification and accession, mentioned above, is unsatisfactory. It is evident that the Convention did not receive widespread acceptance.

2.2.3 The 1957 Convention

In the 1950's the Comité Maritime International (CMI) began to revisit the subject of limitation of liability. This effort produced the 1957 Convention. The 1957 Convention sets a limitation of liability for property claims at the rate of 1,000 francs (or 66.67 Special Drawing Right—SDR) per ton of limitation tonnage (the net tonnage plus engine room space) and 3,100 francs (206.67 SDR) per ton for loss of

life and personal injury either alone or together with property damage claims. For a combination of personal and property claims, the aggregate of 3, 100 francs per ton, is divided into two portions: a first portion of 2,100 francs/ton for personal claims and a second portion of 1, 000 francs/ton for property claims.

The persons entitled to limit liability not only includes the owner of the ship but also charterers, managers, operators, shipbuilders and repair yards, or mortgagers because of their ‘ownership, possession, custody or control’ (art.1 (3)) of the ship, provided that there is no “actual fault or privity” attributable to them. The master and members of the crew are also entitled to limit their liability even if the damage was caused by their own negligent acts. According to article 1 of that Convention, the owner is entitled to limit the liabilities in respect of claims for loss of life or personal injury suffered by any person on board the ship and any property on board the ship, and claims for loss of life or personal injury to any other person, or loss of or damage to any other property or infringement of any right caused by the act, neglect or default of any person for whom the owner is responsible. If the person for whom the owner is responsible is not on board, the owner shall only be entitled to limit his liability when the act, neglect or default is one which occurs 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.

Limitation of liability shall not apply to the claims for salvage or contribution in general average, or claims by the master, members of the crew or any servant of the owner on board the ship or servants of the owner whose duties are connected with the ship, if under the law governing the contract of service between the owner and such servants the owner is not entitled to limit his liability or is entitled to a higher amount. The claims for pollution damage caused by a ship could be applied to this Convention, but not if another pollution convention is applicable for purposes of limitation such as CLC¹².

¹¹ Griggs, P. “Limitation of liability for maritime claims: the search for international uniformity” [1997] LMCLQ 372.

¹² *Ibid* at p.373.

This Convention was ratified or acceded to by 46 states, of which 11 have since denounced in favor of a subsequent Convention¹³. It is noted that the development of limitation of liability at this stage was still confined to provide shipowners (and some other persons mentioned above) a unified limitation package for all liabilities raised in one incident.

2.2.4 The 1976 Convention

A remarkable feature of the 1957 Convention is that the limitation essentially reflects the same monetary limits as those once fixed by the then 100 years old English statutes drafted for sailing ships¹⁴. In any event the inadequacy of that convention became evident when the Torrey Canyon disaster occurred in 1967 which brought to public attention the realization that international shipping represented substantial risks of oil pollution and other types of catastrophic damage to non-maritime, uninsured interests. In 1976, a new convention -- the 1976 Convention, was adopted. Unlike the 1957 Convention which, although based on the English approach, adopted a formula in order to calculate the limitation fund of a ship. This formula was intended to produce a figure which was equal to the commercial value of the vessel. The 1976 Convention now abandons this concept and fixes the limitation fund at a figure in respect of which insurance is readily available. The figure, compared to the previous conventions, is relatively high. In exchange for this high limitation, the Convention makes limitation virtually unbreakable. Under the 1924 and 1957 Conventions the shipowner is barred from limitation of liability if there is "actual fault and privity" on his part. The burden of proof rests on the shipowner. This has been deemed to be easier for claimants to bar the shipowner from invoking the privilege of limitation. The 1976 Convention contains the wording "personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result", instead of

¹³ *Ibid.* at p.372.

¹⁴ Selvig, E. "An Introduction to the 1976 Convention", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 6.

“actual fault or privity”. It shifts the burden of proof from shipowners to claimants. Succeeding the trend developed by previous conventions and other legislation, the 1976 Convention continues to expand the scope of persons entitled to limit liability and claims subject to limitation. Except those included in the 1957 Convention, salvors and insurers are now entitled to limit liability. It seems that the 1976 Convention is intended to provide a unified regime to all persons who might be sued for any limitable claims in whatever form, either in tort, or contracts, or in recourse action against them. Another critical change is that claims for oil pollution damages within the meaning to CLC are excluded from this Convention. This change is, of course, necessary because CLC had been adopted and entered into force, which provided an exclusive limitation for claims in respect of oil pollution damages.

The 1976 Convention entered into force on 1st December 1986, and has been ratified or acceded to by 35 states. It is again interesting to note that, of the 35 states, several states still appear to apply the 1957 or the 1924 Conventions, which they have not denounced¹⁵.

2.2.5 The 1996 Protocol

It should be noted that the drafting of the HNS Convention was done in parallel with the drafting of the Protocol to the 1976 Convention. It followed the initiative of the IMO Legal Committee (the Legal Committee) trying to ‘link’ the limitation of liability under the HNS Convention to those under existing regimes of limitation of liability. It was apparent that, if the limits of the HNS Convention were to be linked in some way to the existing 1976 Convention limits, then it would be necessary to increase those limits considerably in order to take account of the new liabilities which were to be created in respect of hazardous and noxious substances. Although the initiative failed and these two instruments were decoupled with each other, a new Protocol to the 1976 Convention was thought to be justified because the limits under the 1976 Convention were considered too low.

¹⁵ IMO, “Summary of Status of Convention - as at 31 May 2000”, IMOs web site.

The figures under the 1996 Protocol increase the 1976 figures by about 250%. The lowest limitation band now starts at 2000 gross tons rather than 500 gross tons. So for small ships, the limitation figures increased dramatically. Another substantial change is to make it clear that there should be no limitation of liability for claims for special compensation under art. 14 of the 1989 Salvage Convention. The Protocol has inserted a new article which now allows states to make a reservation, excluding it from limitation under the 1976 Convention claims falling within the HNS Convention.

For passenger claims, the 1996 Protocol makes three major changes to the 1976 Convention. Firstly, the 25 million SDR ceiling on such passenger claims has been removed. Secondly, the maximum limit of liability for passenger liabilities has been increased to 175,000 SDR multiplied by the certificated passenger carrying capacity of the ship. Thirdly a provision is inserted into the amended convention which allows states to provide for even higher passenger limits under the amended convention in their own national law.

The Protocol has also introduced a rapid amendment procedure to allow for more speedy updating to limits.

Section 3

The Separate Regime

2.3.1 General Description

At the international level before 1969, shipowners had a unified limitation of their total liability, according to either the 1924 Convention or the 1957 Convention. However in 1967, the *Torrey Canyon* disaster happened. The supertanker, carrying 119,328 tons of Kuwaiti crude oil, ran aground off the coast of Cornwall with 35 million gallons of heavy black oil spilled out and spread over a hundred miles of

British and French beaches in Cornwall, Normandy and Brittany. Media coverage was given worldwide to a new-type of man-made spectacle, the environmental disaster. According to the estimation of some researchers, the quantifiable costs of the incident were £14.24 million. Excluding the ship and the cargo losses, The prevention and control cost alone were estimated to have been about £7.70 million (\$ 18 million) which “(perhaps) for the first time in maritime history ... substantially exceeded the value of the ship and cargo.”¹⁶ The inappropriateness of the system of limitation of a shipowner’s liability was highlighted. On November 10, 1969 the International Legal Conference on Marine Pollution Damage was held in Brussels. At that Conference the International Convention on Civil liability for Oil Pollution Damage, 1969 (CLC 1969) was adopted, which presented a departure for the first time from the global regime. In 1971, a supplementary convention to the CLC was also adopt that was the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the 1971 Fund Convention). In 1996, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention) appeared, within which a new separated limitation of liability regime together with a new fund system – HNS fund was established. Besides the effort to adopt an international convention to cope with the need for dealing with the potential pollution catastrophe, steps have also been taken by the individual countries. The most important one is the passage of the Oil Pollution Act of 1990 (OPA 1990) in the U.S., the effect of which strongly influenced the relevant international legislation.

2.3.2 The CLC and Fund Conventions

CLC 1969 was designed to provide a separate liability system which applied exclusively to oil pollution damage in the territory including the territorial sea of the Contracting State. However, the Convention applies to a ship carrying oil as cargo.

¹⁶ Burrows, Rowley and Owen, “The Economics of Accidental Oil Pollution By Tankers in Coastal Waters”, (1974) *Journal of Public Economics* 3, .258. cited in M’Gonigle, R. M., Zacher, M. W., *Pollution, Politics, and International Law - Tankers at Sea* (University of California Press, 1979) 144.

The “oil” is defined as “any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship”.¹⁷ Therefore bunker oil from a laden tanker will be covered by the Convention. Except for a separate limitation of liability regime being established in that Convention, some other important principles were established:

- (a) the Convention changes the basis of liability for pollution damage from fault liability to strict liability;
- (b) it channels liability to the shipowner who was defined as the registered owner or, in the absence of registration, the person or persons owning the ship;
- (c) it imposes on the shipowner the obligation to maintain compulsory insurance or other financial security in the amount that is equal to the limit of liability in accordance with that Convention;
- (d) claimants for compensation for pollution damage are entitled to take direct action against the insurer or the guarantor. In the meantime the insurer or the guarantor is entitled to invoke limitation of liability with a limited defence.

In 1971, the Fund Convention was adopted. It entered into force on 22 November 1994. The provisions of the 1971 Fund Convention are directly tailored to supplement those of CLC 1969, so that wherever possible, the same definitions are adopted, and the principle on which the provisions proceed is, generally speaking, that where CLC liability ends, and Fund liability begins. The International Oil Pollution Compensation Fund (IOPC Fund), which was established according to the Fund Convention, provides second tier compensations (subject to a maximum limit) to plaintiffs for pollution damage that they have suffered but for that they have been unable to recover fully and adequately under CLC 1969 for specified reasons and to a certain extent to reimburse shipowners for their voluntary clean-up expenses. According to art. 5 of the Fund Convention, the IOPC Fund also indemnifies the owner of the ship and his guarantor for the portion of the aggregate amount of

¹⁷ Art. I (5) of CLC 1969

liability under CLC 1969 between 1,500 and 2,000 francs per ton for the purpose of releasing the shipowner of the additional financial burden imposed by the CLC. The IOPC Fund raises money from the contributions levied based on the amount of crude oil and fuel oil received by persons in the territory of Contracting States of the Fund Convention. It is in this way that the Fund Convention distributes the overall burden of pollution damage between the shipowner and cargo interests.

In 1992, both CLC 1969 and the 1971 Fund Convention were amended. In CLC 1992, the limits are raised to a substantial high level. The geographical scope is extended to the exclusive economic zone of the contracting state. The definition of “ship” is amplified to include tankers in ballast. A long list of persons other than the shipowner is inserted into art. III (4) of the new Convention to bar action against them for compensation for pollution damage. A rapid amendment procedure was inserted into that Convention to entitle the Legal Committee to increase the limits in that Convention without convening a diplomatic conference to amend the Convention. In respect of the 1992 Fund Convention, most of the changes made were intended to cope with the changes made in CLC 1992. However art. 5 of the 1971 Fund Convention was deleted in the 1992 Fund Convention. That Convention entered into force on 30th of May 1996.

2.3.3 The HNS Convention

Similar or identical provisions to the CLC 1992 are inserted into the HNS Convention, which applies exclusively to pollution damage caused by hazardous and noxious substances carried by ship. The one significant difference between the CLC and the HNS Convention is that the HNS Convention contains both the liability and limitation provisions and provisions for establishment of the HNS fund. In this respect it might increase difficulties for some countries to ratify this Convention, because thousands of substances have been included in the definition of “hazardous and noxious substances” which will lead to tremendous difficulties in the establishment and management of the fund as well as the implementation of the other part of that Convention.

2.3.4 OPA 1990

OPA 1990 is a domestic law of the U.S. but has a strong influence on international legislation. In respect of limitation of liability, OPA 1990 provides for the “responsible party” the right to limit their liability. For tankers of 3,000 gross tons or less, liability will not exceed the greater of \$1,200 per gross ton or \$2 million. For tankers greater than 3,000 gross tons, the liability will not exceed the greater of \$1,200 per gross ton or \$10 million; for vessels other than tankers, liability will not exceed the greater of \$ 600 per gross ton or \$ 500,000. If the responsible party is entitled to limit liability, then the Oil Spill Liability Trust Fund (OSLTF), which was established under the Act, will meet the claims which exceed the above limits.

However, Liability cannot be limited if spill proximately caused by

- (a) the gross negligence of wilful misconduct, or
- (b) the violation of an applicable Federal safety, construction or operating regulation.

The right to limit liability is also denied if the responsible party falls afoul of the Act by failing or refusing

- (a) to report an incident as required by law, or
- (b) to provide all reasonable co-operation and assistance as requested by a responsible official in connection with removal costs, or
- (c) to comply with a variety of statutory orders without cause.

Even worse, the Act allows states of the U.S. to impose unlimited liability in their local laws and several states have done so.

The “responsible party” for a vessel is defined as “any person owning, operating or chartering by demise, the vessel”. Similar to the CLC and HNS Conventions, the limitation regime in OPA 1990 is backed with the imposition of strict liability and compulsory insurance.

Given the high standard of diligence expected by the U.S. courts with regard to wilful misconduct, and the range of persons who are required to comply with Federal regulations as well as the imposition of unlimited liability under the local law

of the states, the risk of unlimited liability for the responsible parties is a very real one. Thus the term “unlimited liability” is universally associated with OPA 1990¹⁸.

2.3.5 The Characters of the Separate Regime

From the above introduction, the characters of the separate regimes can be figured out as follows: Firstly, the limitation of liability is exclusively provided for claims for a certain type of damage or costs. It is assumed that persons protected by the regime are the innocent third party, i.e. the public as well as the state. It is noted that claimants may sustain many different types of damage and losses in one incident. In this case the global regime and the separate regime have to work together to settle all claims arising out of that incident. Unfortunately it is quite possible that the claims subject to the global regime are settled in one jurisdiction and the pollution damage subject to the separate regime is settled in another jurisdiction. The effort on control of a multitude of lawsuit in multitude jurisdiction is further weakened. Secondly, The limitation of liability is always backed by the imposition of strict liability and compulsory insurance and the entitlement of direct action against insurers or other guarantors. Thirdly, in so far as the CLC and HNS Conventions are concerned, the regime is always complemented with the fund contributed by the trader of that kind of cargo. Fourthly, this regime, by requiring the evidence of insurance or other financial security, is always backed by the regime of port state control which may force many countries ratifying or acceding the relevant conventions. Thus conventions under this regime are easier to be widely accepted.

¹⁸ Wood, P. J. “OPA 90” MARIT. POL. MGMT. 22 (1995) 204.

Section 4

The Proposed Conventions: Trend of merging the two regimes

2.4.1 Introduction

By the time of writing this dissertation, two proposed conventions and one protocol are being discussed in the Legal Committee of IMO. They are the draft International Convention on Civil Liability for bunker Oil Pollution Damage (hereinafter referred to as the Bunker Convention), the Draft Convention on Wreck Removal (hereinafter referred to as the Wreck removal Convention) ¹⁹and The Protocol to Amend the Athens Conventions relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (hereinafter referred to as the Protocol to Athens Convention). All of them focus only on specific types of injury or damage or cost.

The limitation of liability in the two proposed conventions in relation to the damage or costs defined in those conventions are provided by reference to the applicable international conventions or national law. In this respect, they should be contained into the concept of the global regime. However the facts of the form of the instrument, specific application to specific type of damage and cost and, the imposition of strict liability and compulsory insurance make them look like the conventions in the separate regime. In fact, to a large extent, they are modelled along the lines of the CLC and HNS Conventions and, probably will create similar problems in practice after they have been adopted and enter into force.

Regarding the Protocol to the Athens Convention, the limitation of liability set in the original Athens Convention is compatible with the global regime. The global regime provides a cap over the limit set in the Athens Convention. In this

¹⁹ As discussed in the subsection 2.4.2, in the new version of the draft text of the Wreck Removal Convention prepared by the Corresponding Group, the relevant articles regarding to financial liability, including the provision of limitation and compulsory insurance had been deleted. However the delegates in the Committee has not reached an agreement on this deletion. It is still open for debating.

respect, the limitation regime in the Athens Convention has the same nature as the package regime in the Hague - Visby Rules or Hamburg Rules. So in this dissertation the author do not intend to put a lot of attentions on this protocol. However so far as it presents some trends in the development of limitation of liability regime, a brief introduction and relevant discussion will be given in this Chapter as well as in Chapter Three.

2.4.2 *The Bunker Convention*

The draft text of this Convention²⁰ discussed in the 81st session of the Legal Committee largely modelled the final text of CLC 1992 with some important diversification. This Convention will apply exclusively to pollution damage caused by bunker oil from "any sea-going vessel and seaborne craft, of any type whatsoever"²¹. However pollution damage as defined in the CLC 1992, whether or not compensation is payable in respect of it under the CLC 1992, are excluded. The owner of the polluting ship is imposed with strict liability which is identical to CLC 1992 but have the right "to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended"²². In the 80th session, after a considerable debate the definition of "shipowner" was enlarged to include the registered owner, bareboat and demise charterer, manager and operator of the ship, which are identical to the relevant definition of the 1976 Convention.²³ The provisions of compulsory insurance are almost the same as that in CLC 1992. Despite the enlarged definition of "shipowner", the obligation to maintain compulsory insurance is imposed only on the registered owner.

The Convention, in art. 3 (2) of the draft text, provides that where more than one person is liable who are included in the definition of shipowner, their liability should be joint and several. Unlike CLC 1992, the list of persons exempted from

²⁰ International Convention on Civil Liability for Bunker Oil Pollution Damage LEG 81/4

²¹ Art. 1 (2), LEG 80/4/1

²² Ibid., art. 6.

²³ See "CMI News: IMO Legal Committee -79th Session" [2000] IJOSL 68-69.

being sued at the hands of claimants as provided in art III (4) of CLC 1992 are not included in this Convention,²⁴ simply because a wide range of persons are included in the definition of shipowner, and also there is no fund available for the claimants especially in the event that no liability can be found.

The Convention will supersede any convention in force or open for signature, ratification or accession at the date on which this Convention is opened for signature. The IMO Assembly has approved the convening of the diplomatic conference to consider this Convention in the 2000-2001 biennium of IMO.

2.4.3 The Wreck Removal Convention

The situation of this Convention is not very clear. In the original version of the draft text²⁵, there were provisions regarding the financial liability of the owner of the wreck for location, marking and removing wrecks. However, since the 79th session of the Legal Committee, for the purpose of ensuring quick progress and on the understanding that some issues will be governed by national law, a shortened version has been introduced by the Correspondence Group to the Legal Committee. Within that version the provisions regarding the financial liability of the owner of the wreck and compulsory insurance were deleted.²⁶ It is not clear now whether the Legal Committee will finally agree to this deletion.

Nevertheless, this Convention is intended to apply to wrecks located beyond the territorial sea within the exclusive economic zone of the contracting state. The state whose interests are the most directly threatened by the wreck will be responsible for determining whether a hazard exists and mark the wreck. The shipowner has the obligation to remove a wreck determined to constitute a hazard within the deadline set by the state. If he does not remove the wreck within the deadline the state may undertake the removal or marking of the wreck by the most practical and expeditious means available. The financial liability of the shipowner for

²⁴ See “CMI News: IMO Legal Committee-79th Session” [1999] IJOSL 262-264.; “CMI News: IMO Legal Committee-80th Session” [2000] IJOSL 68-70; LEG 80/4/1.

²⁵ See LEG 80/INF.2.

²⁶ See LEG 80/5.

the cost of marking and removal of the wreck are now left blank. It may be left to national law or provided in this Convention as had provided in the original draft text. In the original draft text, the shipowner was imposed on strict liability and at the same time entitled to limit his liability according to the applicable national or international law. The shipowner was also required to maintain compulsory insurance or other financial security. Claimants are entitled to take direct action against the insurer or guarantor. However the shipowner will not be liable in respect of the removal of the wreck for pollution damage as defined in the CLC or HNS Conventions and for nuclear damage as defined in the relevant conventions.

2.4.4 The Athens Convention and its Amendments

The full name of the Athens Convention is the Athens Convention relating to the Carriage of Passengers and their luggage by Sea, 1974. The main function of this Convention is to regulate the contractual relationship between carriers and passengers. A separate liability regime is established in this Convention, which is calculated on the basis of per capita with a ceiling for per voyage. However, “this Convention shall not modify the rights or duties of the carrier, the performing carrier, and their servants or agents provided for in international conventions relating to the limitation of liability of owners of seagoing ships.”²⁷ In 1990 the Convention was amended to update the limitation amount in that Convention from 833 SDR for personal injury to 1,800 SDR.

The drafting of the Protocol to the Athens Convention was started in 1997 under the heading of provision of financial security in the Legal Committee’s agenda. The purpose of this Protocol is “to provide for enhanced compensation, to establish a simplified procedure for updating the limitation amounts and to make insurance for the benefit of passengers compulsory”²⁸. From the draft text, one may find similar compulsory insurance provisions as in CLC have been put into the draft. The basis of liability might be changed and the limit of liability probably will be

²⁷ Art.13 of the Athens Convention.

increased substantially. Although it is not clear what kind of liability will be imposed, a suggestion in respect of a so-called “two-tier system liability”, which is a combination of limited strict liability and unlimited fault liability, has been made to the Legal Committee.

2.4.5 Trends Presented in the Process of Drafting New Conventions

Some issues are noteworthy in the above-mentioned recent law-making process. First, specific concerns to certain types of claims are still prevailing in the Legal Committee. This is probably because of the difficulties in drafting a comprehensive convention which will raise too many issues needed to be compromised among delegates in the Legal Committee. Second, many delegates in the Legal Committee are reluctant to give separate limitation to more claims. They prefer to link those claims to the global regime and let remain as many claims as possible under that regime. Third, there is a strong intention to extend the compulsory insurance to the claims in the global regime which may lead to some critical changes to that regime.

Section 5

Conclusion of this Chapter

In so far as what have been discussed, a general description to the development of limitation of liability can be given.

Lord Mustill has identified, in his address delivered to the British Maritime Law Association in 1992²⁹, three broad categories of situations in which the right to

²⁸ The preamble of the protocol to the Athens Convention, LEG 81/5/1.

²⁹ Lord Mustill, “Ships are different --- or are they?” [1993] LMCLQ 490-501

limit liability could arise: the “closed” situation, the “partly closed” situation and the “open” situation. The terms “closed” situation refers to “those situations where the risk is by its nature to be distributed between a limited number of persons who voluntarily assume their share.”³⁰ Persons included in this situation are a pre-established group of participants, among whom a single risk of loss or damage to cargo is distributed by a network of contracts entered into by choice. They include the shipowner and cargo owner involved in a contract of carriage at sea, as well as the charterers, purchasers of the goods afloat, insurers, etc. The effect of limitation regime to this situation, in the short term, will diminish the amount those people could recover in the event of loss or damage, however in the long term, serves their interests, because the existence of the right to limit will encourage the shipowner to remain in business and enables him to charge a lower rate of freight. The second situation includes a large group of people who, while engaged in closed situations from time to time, have no sufficient continuity of interest to enable the more long-term benefits to be appreciable, such as passengers, etc. The participants in open situations are not members of a predetermined group. They have not chosen to run the risk, and are linked to the risk-creating situation only by virtue of the fact that the manifestation of the risk happens to subject them to adverse consequences.

Comparing these situations to the global regime, one can find that, generally speaking, all the claims involved in the first and second situations and some involved in the third situation are subject to the global regime. The basis of liability for these claims, which are governed by other conventions or national laws, is normally fault liability. From the introductions in Section 1 and 2 of this Chapter, the developments of the global regime in relation to those claims can be summarised as follow:

First, the basis of limits have been moved from the value of the ship to a fixed monetary figure which is, on the one hand, easier for the owner or insurer to ascertain their potential risk exposed in the adventure at sea, on the other hand, devalue from time to time. The need to update the amount of limits, as the main reason, produced more new conventions which brought variations and jeopardise the

³⁰ Ibid at p.493

uniformity of international law in this field. The insertion of a rapid amendment procedure in the 1996 Convention hopefully will overcome this loophole.

Second, insurance is playing a more and more important role in the development as well as the implementation of limitation of liability regime. The figures of the limit of liability for the 1976 Convention and the later conventions are no longer related in any fashion at all to the value of the vessel. "It is common knowledge that the figure chosen for the basis of the limit was not related to the value of the ship, but to the level of insurance capable of being sustained by the liability market"³¹.

Third, despite the judicial attitudes which have come to be more and more hostile to limitation of liability regime, the rules have been changed so as to make it more difficult for the claimant to break the limit. This new regime is satisfactory for the insurers, but not perhaps for the other interests.

Fourth, more and more persons involved in the shipping industry are being entitled to invoke limitation of liability. It seems to make the limitation fund to be the only source of compensation for all limitable claims arising out of the same incident. However, as mentioned above the change from the ship value system to the monetary system weaken the control on multiply lawsuit in multiply jurisdictions.

Contradictory to the development mentioned in the preceding paragraph, broadly speaking, more and more claims involved in the "Open" situations have departed from the global regime and formed the separate regime. From the author's point of view, the notion of the separate regime is based on the ideas that, it is always assumed that certain types of activities are much more dangerous than others. They may cause catastrophes which will bring immense damage to mass innocent people - the public. The damage would probably be extremely high that the current global regime will not be able to provide adequate compensation. In this respect, the separate regime providing the exclusive fund for the injured party is reasonably necessary. In designing this regime, the weight is more or less on the claimant's side

³¹ Lord Mustill, "Ships are different --- or are they?" [1993] LMCLQ 499

for providing him adequate compensation under an efficient, convenient and secured liability system.

However, in recent development, principles prevailed in the separate regimes are moving to apply to those claims involved in the third situation and still remain them in the global regime.

It seems to the author that the driving force behind the development of limitation regimes, including the appearance of the separate and the recent propose changes, is that concerns of the public for the open situation are more and more strongly. The victims involved in that situation are thought to be more innocent and weaker than people in other situations, and that more protections should be provided for them by statutes.

Chapter Three

Procedure Aspect of Limitation

Section 1

Introduction

As mentioned in Chapter One, the separate regime was derived from and largely modelled on the global regime. Basic elements in the global regime can be mostly traced in the separate regime. However, because of the exclusive application to certain types of damage, the imposition of strict liability and requirement of compulsory insurance, significant differences can be found in these regimes. A simplified comparison under the heading of the 1976 Convention can show some important similarities and differences in conventions of the separate regime with the 1976 Convention:

- (1) no specific provisions relating to the claims subject to and excepted from limitation because they apply only to the certain type of claims;
- (2) similar provisions relating to conduct barring limitation either with the 1957 Convention or the 1976 Convention;
- (3) no counterclaims provision and aggregation of claims provision because of the imposition of strict liability and channelling liability to the shipowner;
- (4) similar but simplified provisions relating to the limitation fund.

Since various types of claims might arise in one accident and they might be brought to different jurisdictions, problems and difficulties might arise when applying these regimes together to claims arising out of one incident.

In this Chapter the author will analyse the relevant provisions in separate regimes together with those in the global regime, to examine the relationships among

them and the difficulties in implementing them, especially when applying them to claims arising out of one incident.

Section 2

Concursus and Jurisdiction

3.2.1 The Concept of Concursus

'Concursus' is a legal concept mainly used in the U.S. It is "the rule that after a shipowner's limitation fund (infra) has been duly constituted, other legal proceedings in respect of the casualty concerned must be stayed and all claims resulting from the casualty must be filed against the limitation fund and disposed of in a single 'limitation proceeding'"³². It appears that the core of concursus procedure is to grasp all claimants to establish their claims arising out of the same incident in a single limitation proceeding. For achieving this purpose, it requires the follows:

- (1) The limitation fund must have been duly constituted;
- (2) The constitution of the fund results in the stay of proceedings which have already begun in respect of the casualty concerned.
- (3) All claimants have to establish their claims in a single proceeding.
- (4) It gives the limitation court the power both to fix the amount of liability and to allocate the resources of the single limitation fund among the various claimants in that proceeding.³³

The rule of concursus achieves several objectives. Robert Force gives us the following advantages of this rule on shipowners' part³⁴. First, by requiring all claims

³² Tetley, W. "Tetley's Glossary", <http://www.Admiraltylaw.com/tetley/I-L.htm>

³³ Also see *Force, R., and Gutoff, J. M.*, "Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus", *Tulane Maritime Law Journal* 22 (1998) 340

³⁴ *Ibid* at pp.334, 335

to be asserted in a single action, it assures that the owner's liability will not exceed the limitation amount. It is apparent that, if no such rule is there, the owner of the ship in question would be obliged to constitute a limitation fund in every court if there was a lawsuit arising from the same casualty. The aggregate limitation amount would balloon with every new claim filed in a different court. Second, *concursum* avoids the possibility of inconsistent verdicts not only on the issue of the shipowner's liability but also on the issues of the right to limit, the limitation amount, priority among claimants in case of insufficiency of the fund, etc. If claims arising in one casualty were dealt with in different courts, different results might be brought to the same issues in the merit of the case. Third, the right to *concursum* means that an owner can avoid the expense of defending a multitude of claims in a multitude of courts. In case of a large casualty, more than 100 lawsuits might be brought in many different courts. Finally, there are some other possible benefits for shipowners as well. In U.S., probably also in some other jurisdictions, the limitation of liability proceeding is one way of avoiding a jury trial that is always disliked by the defendants in tort cases. On the other hand it is also important to claimants for there to be a procedural device that assures that each of them has a fair chance to recover at least their pro-rata share of the pie.

Another advantage which is not given by Robert Force is that the rule of *concursum* "ensur[ing] the prompt and economical disposition of controversies in which there are often a multitude of claimants."³⁵ In the *concursum* procedure, once the complaint of a claimant has been filed and the limitation fund established, the court would issue an injunction staying all actions against the owner arising out of the casualty or during the voyage. The court will order the plaintiff to send notices to all claimants informing them of the district in which the claims should be filed and the date by which all claimants must file their claims at the risk of default. If a claimant files his claims outside of the period, the court will have the discretion to determine whether or not the claim should be allowed by prolonging the period.³⁶

³⁵ *Maryland Cas. v. Cushing*. qtd in Kimball J. D. "U.S.A", collected in Griggs and Williams, *Limitation of Liability for Maritime Claims* (3ed) (London: LLM, 1998).

³⁶ *Ibid.*

Through this procedure, the settlement of disputes will be definitely much faster than in a multitude of lawsuits.

It is not difficult to find that the concursus rule represents the genuine spirit of the original concept of limitation of shipowners' liability. The requirement of a single proceeding is not merely a convenient or logical way of implementing the right to limit; it is the only way of assuring that limited liability does not become unlimited liability through a multitude of otherwise independent lawsuits.

Both of the concept and the term 'limitation' of liability' inherently include the concursus procedure as a necessary and indispensable ingredient. The relationship between concursus and limitation of liability is predicated on the practical reality that limitation of liability cannot be achieved without concursus or some other comparable procedural device which avoids multiplicity of separate and independent actions³⁷.

Although above quotations are mainly in the U.S. context, Professor Tetley, by giving the definition mentioned above, also gave us some references to international conventions and legislation in other jurisdictions, including art. 2 (4) of 1957 Convention, art.13 (1) of 1976 Convention as well as the relevant legislation in France and Canada. It is apparent that in his mind there are concursus rules in those conventions and legislation.

On analyzing those relevant conventions for the purpose of figuring out what sort of concursus rule has been provided, several questions will be answered: (1) Do provisions under those conventions link the limitation action proceedings to the proceedings of claims on the merits and give the limitation court the exclusive power to determine all the claims arising out of the same incident? (2) If it does not, do those provisions have some sort of similar effect on control of the proliferation of lawsuits?

³⁷ Force, R., and Gutoff, J. M., "Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus", *Tulane Marime Law Journal* 22 (1998) 342.

Because the 1924 Convention is not widely accepted, for the purpose of simplification, the author will stay out of it in the following discussion.

3.2.2 Proceedings of Limitation Action and of Claims on the Merits under the 1957 and 1976 Conventions

The 1957 Convention contains few provisions about how the principles embodied in that Convention should be applied in practice. Art. 5 of that Convention provides that whenever a shipowner is entitled to limit his liability, the court or relevant authority shall order the release of the asset of the owner of the ship in question which has been arrested, or bail or other security given to avoid such arrest. Art. 4 of the Convention expressly states the constitution and distribution of limitation fund and rules or procedure shall be governed by the national law of the state in which the fund is constituted. This provision has led to wide variations of practice between states which the 1957 Convention has been ratified. The 1979 Convention on the other hand contains in art. 10, 11,12, and 13 some detailed provisions.

In many jurisdictions such as in England, the right of limitation of liability might be invoked by the institution of a limitation action independently of any claim on the merits. In theory, at least, it is possible to commence a limitation action in a jurisdiction in which no proceedings have been brought against the limiting party. For example, if a legal action on the merits has been commenced in one jurisdiction it is still possible for the defendant to commence a limitation action in another jurisdiction in respect of the same distinct occasion³⁸. There is no provision in the 1957 Convention linking jurisdiction over limitation proceedings to jurisdiction in liability proceedings. This issue can only be provided in the national law of the contracting states according to the art. 4 of that Convention. However, the 1976 Convention, in art. 11 (1), provides that " any person alleged to be liable may constitute a fund with the court or other competent authority in any State party in

³⁸ Shaw, R., " Practice and Procedure", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 3. 119-120.

which legal proceedings are instituted in respect of claims subject to limitation." Although on a literal reading the phrase " legal proceedings ... instituted in respect of claims subject to limitation" is not very clear and it is arguable that whether the commencement of a limitation action in a jurisdiction like England would itself be sufficient to fall within that phrase. It is agreed that the real intention of that paragraph is that the limitation fund should only be constituted in a jurisdiction where a claimant has already instituted legal proceedings against the limiting shipowner. The effect of this provision is to give the claimant the opportunity to choose the jurisdiction in which to pursue his claim and prevent the shipowner forcing a claimant into one particular jurisdiction by setting up a fund, unless another claimant starts proceedings there. Nevertheless the provision itself does not give the limitation court any exclusive jurisdiction over the claims on the merits.

In fact, a court has a jurisdiction over one claim does not necessarily have jurisdictions over other claims. The jurisdiction of a court is given by its national law. Some international conventions have jurisdiction clauses and provide the exclusive jurisdiction over certain types of claims to the court of some specific contracting states. For example, CLC 1969/1992 provides the contracting state or states within whose territory including territory sea and EEC, the pollution damage is caused, have the exclusive jurisdiction over claims for oil pollution damage defined under that Convention. However, limitation of liability is regarded as the procedure issue, so in either the 57 Convention or the 1976 Convention, there is no provision governing the jurisdiction over the merit of claims. Therefore, although some claims have been brought before a court against the liable person and he has been entitled the right of limitation or the limitation fund has been constituted before that court, it does not necessarily mean that such court have the jurisdiction over all claims arising of one distinct occurrence. This loophole jeopardises the position of limitation court in applying the concursus rule to put all claims into a single proceeding.

3.2.3 Control of the Proliferation of Lawsuits under the Global Regime

As mentioned above, art. 5 (1) of the 1957 Convention provides the mandatory release of the arrested asset of the shipowner when he is entitled to limit his liability under that Convention. A similar provision can be found in art. 13 (2) of the 1979 Convention. It provides that –

After a limitation fund has been constituted in accordance with Article 11, and ship or other property, belonging to a person on behalf of whom the fund has been constituted which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:

- (a) at the port where the occurrence took place, or, if it took place out of the port, at the first port of call thereafter; or
- (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or
- (c) at the port of discharge in respect of damage of cargo; or
- (d) in the State where the arrest is made.

Compare those provisions to the concursus procedure in the U.S.³⁹, the difference is apparent. There is no indication in the above provisions intending to restrict the jurisdiction over the merits of claims and, therefore it is open for a national law which gives jurisdictions to other courts on the basis, for example, arrest of ship in accordance with the Ship Arrest Convention of 1952 or 1999⁴⁰. However these provisions do limit the ability of claimants to claim independently out of the jurisdiction where the fund has been constituted, and then really control the multiple proceedings. A claimant in a court other than one specified in the above articles and in which the fund is established runs the risk because of lack of security.

³⁹ See the section 185 of the Limitation of Vessel Owner's Liability Act and the Supplemental Rule F of the Federal Rules of Civil Procedure.

⁴⁰ The International Convention for the Unification of Certain Rules relating to Arrest of Seagoing Ships, 1952 (Brussels), and the International Convention on Arrest of Ships, 1999.

Furthermore, to any jurisdiction of a court founded on arrest, such jurisdiction would be removed by releasing the security.

One critical difference between these two conventions in this issue is that in the 1976 Convention the constitution of a limitation fund is the prerequisite for the mandatory release while in the 1957 Convention the prerequisite is that limitation of liability has been entitled to the shipowner. In some jurisdictions, for example in England, shipowners can invoke limitation of liability in two different ways. One is “pleaded by way of defense in an action”. In such a case it is necessary for any limitation fund to be constituted before judgement. Griggs and Williams pointed out that –

The reason for this is that, if the person liable is adjudged entitled to limit his liability, the judgement does not establish his right to limit as regards all claims in respect of that occurrence but merely establishes his right against the plaintiff in that particular action.⁴¹

Another way is by commencing a limitation action, "which action, if successful, entitles the person liable to limit his liability against ‘all and every person or persons whatsoever claiming or being entitled to claim in respect of damage or loss’ resulting from the particular incident."⁴²

In the first approach no fund has been established, the art.13 (2) of the 1976 Convention will not apply in this case. But under the 1957 Convention, if the shipowner was entitled to limitation of liability, the mandatory release provision (art. 5 (1)) would apply. However, the provision in the 1957 Convention on this issue is confusing. On the one hand the constitution of the limitation fund does not necessarily mean the right to limitation of liability has been established. Before the 1976 Convention entered into force in England, a mere deposit of the amount of the limitation fund (it might be sufficient in some jurisdictions to be the constitution of the limitation fund) did not produce the effect of releasing the ship from arrest. The shipowner had to prove his right to limit (i.e. absence of fault and privity) to the

⁴¹ Griggs and Williams “Limitation of Liability for Maritime Claims” (3rd ed) (London: LLM, 1998)

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⁴² Ibid.

satisfaction of the court.⁴³ On the other hand, as mentioned above, sometimes when the shipowner is entitled to limitation of liability, no limitation fund is constituted. In both situations, it might happen that the fund is constituted in one jurisdiction and the entitlement to limitation of liability established in another where no fund is constituted. Claimants may not know where to file their claims in this scenario.

Nevertheless it is clear that the provisions in these two conventions do affect the establishment and exercise of jurisdiction over claims arising out of one casualty. In the 1976 Convention, by linking the limitation fund to the proceeding of claims on the merits, a court where a claim had been filed and the limitation fund established consequently, may have the power, though neither the exclusive power nor an overall power⁴⁴, to fix claims on the merit and determine the distribution of the fund. With the mandatory requirement on releasing all arrested assets and tendered securities, most of the claims are hoped to be attracted or forced into that jurisdiction. Although the provisions under the 1957 Convention are not as clear as those under the 1976 Convention, art. 5 of 1957 Convention still gives the court where there is entitlement to limitation of the shipowner's liability, a similar effect as that under the 1976 Convention.

However the author would like to repeat here, none of these conventions give any court where the limitation fund is established or there is right of limitation, the exclusive power or to fix all the claims arising out of one occurrence in one single proceeding. By running his own risk on lack of security, it is always possible for any claimant to sue shipowners in a jurisdiction other than where the fund has been established or there is entitlement to limitation. It is also noteworthy that the limited number of contracting states limits the effects of these provisions in relevant conventions.

⁴³ The *Wladyslaw Lokietek*, [1978] 2 Lloyd's Rep. 520.

⁴⁴ See *supra*. p.29. Both of the 1957 and 1976 Conventions do not give the limitation court the overall jurisdiction over all claims.

3.2.4 Provisions in the Separate Regime

Art. IX (3) of CLC 92 provides that 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. Art. V (3) provides that the owner shall constitute a fund with the court in which legal action is brought. The Convention also requires all Contracting States to ensure that their courts have jurisdiction to entertain a claim made under it, regardless of the state in which the cause of action occurred. In the third paragraph of art. IX, it provides that once a limitation fund has been established the court in question has exclusive power to determine all matters in relation to the apportionment and distribution of the fund. Similar and sometimes more precise provisions can also be found in HNS Convention.⁴⁵

Because the jurisdiction provided in CLC and in the 1976 and 1957 Conventions in which the two limitation funds are to be established are different.

it is perfectly possible, and indeed quite usual, for a CLC limitation fund to be established in one country and other claims against the shipowner in respect of other matters arising out of the same incident – for example, cargo loss – to be brought in another jurisdiction, in which a conventional limitation fund would be established.⁴⁶

Imagine the situation at the time all conventions have been adopted and entered into force, there would be more funds to be constituted and more choice of jurisdiction in existence. The *de facto* concursus achieved in an individual convention will be devastated at a larger scale. If the limited application of conventions and the variations in national laws which are allowed by relevant Conventions is considered, the chaos is even serious.

From the above analysis, one can find that, provisions in both the global regime and the separate regime directly or indirectly provide the concursus rules. But

⁴⁵ See art. 9, 10, 38, 40 of HNS Convention.

⁴⁶ Dykes, A., "Limitation and Oil Pollution", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 146.

the effect of these rules has been weakened by the various provisions of national laws and the limited application of those conventions. Furthermore, the increasing separate limitation regimes are leading to a chaotic situation in the field of limitation of liability for maritime claims.

Section 3

Application of Conventions

3.3.1 General Argument

In the shipping industry, "forum shopping" has been in vogue for a long time. Because of the existence of several different limitation systems in international conventions and domestic law, lawyers on behalf of their clients always intend to choose the jurisdiction where the highest limitation applies, to arrest the liable ship for the purpose of establishing jurisdiction there. On the other hand shipowners always intends to constitute the limitation fund or take a limitation action before a court where the lowest limit of liability applies. By choosing the right jurisdiction, the most favourable law for the plaintiff or shipowner applies. Despite the undesirable reality, in theory, people should be treated equally anywhere. The damage or jury they sustained should be identified and remedied in the same way before any court in any jurisdiction. However the existence of different treatments in different jurisdictions leads to unfair and unjust. One of the significant purposes of unification of law at the international level is to harmonize those different treatments. The appearance of the separate regime, on the one hand provides better protection for the claimants for certain type of damage, on the other hand, amplified the discrimination between claimants, especially in the case where there are different

types of claims arising out of the same incident. The unfair and unjust led by the difference between the global regime and the separate regime and also among those conventions in the separate regime are more serious. In the following part of this section, the author will analyze the possible different treatments in the above-mentioned convention to the claims arising out of the same incident.

3.3.2 Sphere of Application

Art. II of CLC 1969 provides " this Convention shall apply exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage." In CLC 1992, the geographical scope of the convention extends to EEC. In the HNS Convention, there is an exactly same provision as CLC 1992. It means CLC apply only to pollution damage defined in art. I (6). The losses of the ship and cargo and other losses which are not included in that definition will not be applied to by CLC. Such loss or damage, in respect of limitation of liability, will fall within the scope of the global regime. The application of CLC is also restricted to the geographical scope of it.

Besides the above restriction, the application of CLC 1969 is constrained by the definition of pollution damage, oil and ship in art. I. In art. I (6), "pollution damage" is defined as

loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.

As Abecassis said: –

There are, therefore, three separate elements to the definition: (1) loss or damage by contamination, (2) costs of preventive measures and (3) further loss or damage caused by preventive measures.⁴⁷

However except the costs of preventive measure or the further loss by it, other pollution damage has been confined by the reference of contamination. It is clear that damage caused by the oil subsequently igniting, or exploding is not caused by contamination, and so is excluded from the convention. This kind of damage will therefore be recoverable only under the *lex fori*. It is the same in CLC 1992. To the preventive measure, according to the definition in art. I (7), it should only be taken "after an incident has occurred". Hence it does not apply to measures taken for the threat of pollution. The "Ship" in this convention is defined as " any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo" (art. I (1)). This includes combination carriers laden with bulk oil cargo, but excludes them when they are carrying oil only in the form of slops. Thus, where a combination ship has changed from an oil cargo to a dry cargo and has retained oil residues on board in a slop tank, any subsequent escape of oil from the slop tank or bunker tanks would not be covered⁴⁸. The "oil" means "any persistent oil such as crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether carried on board a ship as cargo or in the bunkers of such a ship" (art. I (5)). Because of the wording of "whether carried on board a ship as cargo or in the bunkers of such a ship", it is not clear whether slop and bilge oils are included. If it is interpreted narrowly, this kind of oil will be excluded from CLC 1969⁴⁹.

CLC 1992 amplifies the definition of "pollution damage" contained in CLC 1969. While the basis of the definition remains the same, specific reference is now made to "environmental damage". However, CLC 1992 also expand its application by amplifying the definition of "ship" which now means –

⁴⁷ Abecassis, D. W. " the Law and practice relating to Oil Pollution from Ship" (London: Butterworths, 1978) 184.

⁴⁸ Ibid at pp.173, 174.

⁴⁹ Ibid at pp.175, 176.

any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

It is clear that oil tankers no matter whether they are laden or in ballast are covered under this Convention. The slop and bilge oils contained in combination ships following the voyage carrying oil as cargo will also be included in this Convention. It is also noted that CLC 1992 also amplifies the definition of "incident" to include the "occurrence or series of occurrence which creates a grave and imminent threat of causing such damage." Hence the preventive measures in CLC 1992 apply to measures taken for the threat of pollution. The definition of "pollution damage" in HNS Convention is similar to that in CLC 1992, but it restricts this definition by a reference to "contamination" only in the case of loss or damage to the environment. This means that except for loss or damage to the environment, damage is not linked to contamination. As a result, it is possible that where non-environmental damage is caused by igniting or explosion as a result of the escape or discharge of hazardous and noxious substance, the HNS Convention will provide the remedy to the victims⁵⁰.

Because of the restriction of application of these Conventions, in case of a collision accident where there are losses and damage to hull of the ship and cargoes and also pollution damage, several conventions may apply to the claims arising out of this accident simultaneously. Each of them will apply to certain types of damage. Although there are superseding provisions and exclusion provisions in these conventions to keep them mutually exclusive, as will see in the following discussion, gaps between these conventions do exist.

⁵⁰ Gauci, G., "The International Framework for Remedies for Oil Pollution" unpublished lecture handout (Would Maritime University 1999) 4

3.3.3 Application of the Global Regime and the Separate Regime to Pollution Damage

For the purpose of the following analysis, it is important to draw a distinction between (1) claims for compensation for pollution damage actually subject to the limitation under the CLC and HNS Conventions and (2) claims for pollution damage within the meaning of (or defined by) those conventions. The former category of claims includes those within the scope of the relevant conventions and is subject to the limitation regime under such conventions. The claims, for example in terms of the CLC 1969, within this category are those based on the damage caused on the territory of a Contracting State, and the actions for compensation for such damage are brought in a Contracting State where pollution damage has been so caused and a limitation fund is constituted in a state where such an action has been brought⁵¹. The second category of claims includes all the claims for pollution damage which are within the meaning of the definition in the relevant convention. Claims in this category include claims in the first category and those other claims for oil pollution damage as defined in the relevant convention.

Professor Selvig, in his article⁵², analysed the wording of the exclusion article of the 1976 Convention (art. 3 (b)) which provides that the Convention does not apply to "the claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution, dated 29 November 1969". He pointed out that there are mainly two situations in which claims for oil pollution damage defined in CLC 1969 will not be subject to limitation under that Convention: (1) the most obvious case is where the pollution damage has not been caused on the territory of a State party to the CLC 1969, namely either on the territory of another State or on the high seas; (2) the claim for compensation for pollution damage subject to the 1969 Convention is sought to be enforced in a State which is not a party to that convention. "The courts of such a state will most probably not apply the provisions of a convention to which such State is not a party, and the system for limitation of liability of the 1969 Convention will then fail." He gave an example of

⁵¹ also see art.II, IX and V(3) of CLC 1969

the legal action in the *Amoco Cadiz* case which was brought by the French Government in the United States⁵². A third situation which was not considered by Prof. Selvig is that of claims brought against the operator, manager or charterer as well as other persons who actually control the ship except the servant or agent of the owner. Because of these, gaps can be found between these regimes. However, because of the differences in the provisions of these conventions, the precise relation among each of them should be analysed individually.

The CLC 1969/1992 provides in art. XII that: -

this Convention shall supersede any International Convention in force or open for signature, ratification or accession at the date on which the Convention is opened for signature, but only to the extent that such Conventions would be in conflict with it.

A similar article can be found in HNS Convention. In terms of limitation of liability, since separate limitations have been set in these conventions, the provisions in the CLC and HNS Conventions will override the provisions in other limitation conventions. Art. III (4) of CLC 1969 provides that "no claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention...." Similar provision can also be found in the CLC 1992 and HNS Convention.

From the reading of these provisions, one question arises: whether the 1957 Convention will conflict with CLC if it applies to claims for pollution damage which are not caused in the geographical scope of CLC or is brought into the court of a state which is not a party to CLC. It is apparent that if the claims brought to the court of a non-contracting state, and it is not referred to CLC as the applicable law by the rules of conflict of laws in that state, the provision of CLC will not bind that court. There is no doubt that the 1957 Convention or other conventions, if applicable, can be applied to the case. In the case that the damage is caused outside the scope of the convention, it seems to the author that the convention will not apply and therefore

⁵² Selvig, E., "The 1976 Limitation Convention and oil pollution damage" [1979] LMCLQ 22.

⁵³ *Ibid* at pp.21, 22.

art. III will not apply to those claims. Hence, for pollution damage which is not actually governed by CLC, other limitation convention, such as the 1957 Convention, will apply.

A Similar result can be drawn with respect to the relationship between the HNS Convention and other limitation conventions. However when examining the relationship between the 1976 Convention and CLC, the situation will be different. As mentioned above, the 1976 Convention contains an exclusion provision (art. 3 (b)) which provides that the Convention does not apply to "the claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution, dated 29 November 1969". As Prof. Selvig pointed out, even for claims for the damage defined in the CLC, there are mainly two situations in which claims for oil pollution damage will not be subject to limitation set by CLC. However since claims in these situations have also been excluded by the 1976 Convention, if these claims were brought before the court of a state which is a party to the 1976 Convention, the applicable law would be its national law, which might provide unlimited liability or much lower or higher limit compared to either the 1976 Convention or CLC.

Considering the situation between the 1976 Convention or the 1996 Convention⁵⁴ and HNS Convention, the result will be the same as that between the 1957 Convention and CLC. However it is interesting to note that, in the HNS Convention, there is an exclusion provision (art.4 (3) (a)), similar to the exclusion provision of the 1976 Convention, which exclude claims for damage defined in CLC. So the situations similar to what has happened to the 1976 Convention relevant to CLC will happen between HNS Convention and CLC.

The difference in channeling of liability provisions in each convention also affects the application of these conventions to pollution damage. By art. III (1) of CLC 1969, it is the owner of the ship who is liable. Owner is defined in art.I.3 as –

⁵⁴ It worth to note that although the 1996 Protocol of Revision of the 1976 Convention was adopted at the same Diplomatic Conference in 1996 with HNS Convention, it does not exclude the claims for pollution damage defined in HNS Convention.

... the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which is that State is registered as the ship's operator, 'owner' shall mean such company.

It is therefore clear that the Convention places no liability upon any other person. The owner is liable irrespective of his residence or domicile, or of the state in which his ship is registered. In art. III (4), the Convention provides that –

No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.

The first sentence of this provision states that for a person who has suffered pollution damage within the meaning of the Convention must rely only on the convention for his remedy against the owner, even if the Convention exempts the owner from liability for one reason or another in respect of that claim. However if the damage suffered is out of the meaning given in the Convention the victim is not deprived of any remedies which may be available to him under the *lex fori*. The second limb of this provision excludes all claims against the servants or agents of the owner if such claims are for pollution damage as defined in the Convention, whether or not the incident is covered by the Convention. There are, however, no provisions of a similar nature relating to other persons such as charterer, salvor or operator or to others in control of the ship who might under the law of a particular state be liable for pollution damage. Hence, where such a person is responsible for the spill of oil, the claimant will have a claim against both the owner (under the convention) and such person (under the *lex fori*).

One example is the case of *Amoco Cadiz* where an action was also brought against a ship-management company. The court held that there was nothing in CLC 1969 which would bar an action against the ship-management company⁵⁵.

It is notable in this context that under the CLC 1992 and HNS Convention, all persons including the servants or agents of the owner as well as pilot, charterer, manager or operator of the ship, salvor and any person taking preventive measures are liable but the threshold for conduct leading to liability are much higher: this is evident from art. III (4) which provides as follow: –

... Subject to paragraph 5 of this Article no claim for compensation for pollution damage under this Convention or otherwise may be made against ... unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.⁵⁶

In case of an accident involving a combination ship which has residual oil on it from last voyage and carries hazardous and noxious substances on board, if the 1976 Convention, CLC 69 and HNS Convention apply, inconsistency between these conventions is apparent. In case there is no intention or wilful misconduct, Claimants for pollution damage caused by hazardous and noxious substances can only bring an action against the owner. However the claimants for pollution damage caused by oil can bring actions against either the owner of the ship or other persons involved in this incident. If claims were brought against the person other than the owner of the ship, the claims might not be limitable according to the *lex fori*.

Compared to the concept of “responsible party” in OPA 1990, The channeling liability provision of CLC 1992 has been criticized by some authors. Dr. Gauci said: "OPA 1990 is evidently preferable because of the possibility of deeper pockets being available from a whole list of individuals being jointly and severally

⁵⁵ See Gauci, G., “The International Framework for Remedies for Oil Pollution” unpublished lecture handout (Wollongong Maritime University 1999) 28, and also [1984] 2 Lloyd’ Rep. 304.

⁵⁶ Art.III.(4) of CLC 1992.

responsible for an oil spill from a vessel and this list could well include a charterer"⁵⁷.

3.3.4 The Incident Involving Two or More Ships

The inconsistency revealed above does not mean that it was not conceived at the time of drafting the wording of the art.3 of the 1976 Convention or the wording of the art.4 (3) (b) of the HNS Convention. In fact a suggestion had been made to change the wording of the art.3 (b) during the drafting process but it was not accepted at that time⁵⁸. It seems to the author that the intention of the legislator to have such wording is to prevent another inconsistency from occurring in recourse actions.

Under the 1976 Convention, limitation of liability is provided for all the claims arising out of one distinct occurrence against shipowners or salvors, except those excluded by the Convention. Shipowners in that Convention means the owner, manager and operator of a seagoing ship. Under the CLC and HNS Conventions, the owner of the ship causing the accident will only be liable for pollution damage " caused by *the ship* as the result of the incident"⁵⁹. However, In case of two or more ships involved in one incident, both the CLC and HNS Conventions do not bar the innocent ship which has strict liability to pollution damage but actually the accident was caused with the fault of other ship, to take recourse action against the ship in fault. If the innocent ship was an oil tanker, recourse action might be take by the owner of that ship for the losses due to the compensation to a third party for pollution damage cause by his ship. If the recourse claim is limitable he may not be able to recover all his losses even if he was 100% innocent.

For better understanding the relationship among those conventions, let us consider the following scenarios. Suppose ship A collided with ship B, with 100%

⁵⁷ Ibid at p. 27.

⁵⁸ Selvig, E. " An Introduction to the 1976 Convention", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 10,11.

⁵⁹ Art.III of CLC 1992 or art. of HNS Convention. However the wording of art.III of CLC 1969 is that "caused by oil which has escaped or been discharged form the ship as a result of the incident."

fault of ship A. The collision occurred in the territorial sea of state C where the 1976 Convention and CLC 1992 applied. All claims arising out of the collision were brought before the court of State C. Assuming ship A was an oil tanker, ship B was a general dry bulk vessel. By the collision the oil of ship A escaped and caused pollution damage to party P. Ship A will be liable for all the damages to and losses of ship B and its cargo as well as cargoes on board ship A. All these claims are subject to the limitation under the 1976 Convention. Ship A will also be liable for the pollution damage suffered by party P according to CLC 1992 as well as the Fund Convention if necessary.

However assuming ship A was a general cargo ship and ship B was an oil tanker, the claims under 1976 Convention are the same but the owner of ship B should be liable for the pollution damage suffered by party P according to CLC 1992. The owner of ship B may take a recourse action for such losses against ship A. According to art.2 (2) of the 1976 Convention, the claim retains its character as pollution damage and therefore is excluded by art.3 (b) of the 1976 Convention. So the claim in a recourse action will not be limitable under the 1976 Convention. If in the case that all the ships involved in the collision were oil tankers, the results are similar, except that the owner of ship A should also be liable for the pollution damage caused by ship A. In the case that the pollution damage caused by ships A and B is not reasonably separable, according to art. IV of CLC 1969/1992⁶⁰, the owners of ships A and B will be jointly and severally liable for such pollution damage. The owner of ship B will take recourse action for his losses against the owner of ship A. Again such claim is not limitable under 1976 convention.

These three conventions work well in the above scenarios. However in the following situation, because there is no similar provision in the 1976 Convention to exclude the claims for pollution damage as defined in HNS Convention, difficulties and inconsistency appear. If in the above example ship A is an oil tanker and ship B is the ship subject to HNS Convention. The HNS Convention will apply to the pollution damage caused by a hazardous and noxious substance defined in that

⁶⁰ See art.IV of CLC 1969/1992.

Convention. The chains of liability in this scenario are almost the same as that in the scenario of collision between two oil tankers, except that the recourse action against ship B by ship A is limitable in accordance of the 1976 Convention. It means the owner of ship B probably can not recover all his losses even if he is totally innocent. Another difficulty in this scenario is that, in case of that pollution damage is not reasonably separable, no joint and several liabilities are imposed to them in accordance with either Convention. It is left to the *lex fori*.

Similar problems remain in the situation where the 1957 Convention applies. Let us change the supposition in the above example that, it is the 1957 Convention not the 1976 Convention apply to country C. Because there is no exclusion provision in the 1957 Convention, the recourse action in all the scenarios mentioned above will be subject to the limit under the 1957 Convention. The owner of ship B, though he has no fault, can not recover all the losses back from ship A. A similar situation is that the recourse action between the owner of ship A and a charterer or someone else who is in control of the ship A except a servant or agent of the owner, is subject to the limit under 1957 convention.

3.3.5 The Amount of Compensation

Because of the existence of several mutually exclusive liability and limitation regimes which may apply simultaneously to the claims arising out of one incident, claimants are treated differently in different regimes. The most apparent different treatment is that the amount of compensation they can get from the person liable might be quite different even if the damage they suffered is in the same amount. In this respect, the principle of distributing the compensation sum among the claimants in proportion to their established claims, which is established in the global regime as well as in the individual conventions under the separate regimes, are broken. It is no doubt that this is unfair and unjust for the persons who are discriminated due to the differences in the law.

Section 4

Financial Responsibility

3.4.1 Provisions in Relevant Conventions

One of the main characters of the separate regimes is the imposition of compulsory insurance. The CLC 1969/1992 requires the owner of the ship which carrying more than 2,000 tons of oil in bulk as cargo to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in that Convention. Any sums provided by insurance or by other financial security maintained in accordance with those conventions are available exclusively for the satisfaction of claims under the relevant Convention. (art.VII, para. 9 of CLC 1969/1992) A certificate attesting that insurance or other financial security is in force in accordance with the provisions of the Convention must be issued and carried on board the ship and a copy must be deposited with the authorities who keep the record of the ship's registry. A Contracting State shall not permit a ship under its flag to which the Convention applies to trade unless a certificate has been issued. CLC 1969/1992 buttresses the imposition of compulsory insurance by a requirement that –

... each Contracting State shall ensure, under its national legislation, that insurance or other security to the extent specified... is in force in respect of any ship, wherever registered entering or leaving port in its territory, or arriving at or leaving an off-shore terminal in its territorial sea, if the ship actually carries more than 2,000 tons of oil in bulk as cargo.⁶¹

Similar provisions can be found in art.12 (1) of HNS Convention.

Compulsory financial security can be justified for a variety of reasons, -

⁶¹ Art. VII (11)

one of which is that the attachment of a maritime or statutory lien is unlikely to provide sufficient security in the circumstances accompanying an oil spill where a ship is seriously damaged or wrecked. Moreover, without compulsory insurance, a victim of oil pollution may simply be faced with an insolvent defendant.⁶²

So far as compulsory financial security together with the direct action against the insurer or guarantor is provided, the claimant under the CLC or HNS Conventions has three tier securities provided by the conventions for his claim. These securities include:

- (a) limitation fund which as a prerequisite to invoke limitation,
- (b) compulsory insurance or other financial security, and
- (c) IOPC Fund or HNS Fund.

The IOPC Fund and HNS Fund not only provide for the claims the second tier compensation but also, according to art. 4 (1) of the Fund Convention and art.14 (1) of HNS Convention, pay compensation to him when –

- (a) no liability for the damage arises, or
- (b) the owner liable for the damage is financially incapable of meeting the obligations to compensation him up to the first tier limit under the relevant convention, or
- (c) any financial security does not cover or is insufficient to satisfy the claims for compensation for damage.

By contrasting the above with the claimants under the 1976 Convention, the only security provided for them is the limitation fund which is not compulsorily required except if the national law does so. One author has argued that " a defendant in a CLC action is treated more harshly than a defendant in any other action."⁶³

⁶² Gauci, G., "The International Framework for Remedies for Oil Pollution" unpublished lecture handout (World Maritime University 1999) 41

⁶³ Dykes, A. "Limitation and Oil Pollution", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 150.

3.4.2 Direct Action against Insurance or Other Guarantors

In most cases the compulsory insurance is provided by P & I clubs. The insurance cover provided by the clubs, although often termed as "liability insurance", has in fact traditionally been that of "indemnity insurance". A liability insurer is obligated to provide insurance against liabilities. The policy of this type insurance does not require the assured to discharge his liability first as the condition of payment by the insurer. However an indemnity insurer is required to indemnify the assured in respect of the discharge of those liabilities. So payment by the assured is necessary before the insurer is involved. This principle has been described as the rule of "pay to be paid". Consequently the "pay to be paid" rule has prevented direct action by third parties against the insurer. However In most jurisdictions there are insurance provisions which provide for a direct action against the insurer in cases where the shipowner assured goes bankrupt.

The principle is that the third party 'stands in the shoes of' the assured and can recover from the insurer the same amount as the assured himself would have received. The insurer can therefore avail himself of all the terms of the policy, including deductibles and policy conditions.⁶⁴

Both in the CLC and the HNS Convention, the "pay to be paid" rule and the principle of "stand in the shoes of the assured" are broken. These two conventions entitle claimants to take direct action against insurers or other guarantors without any precondition. They further provide that –

In such case the defendant may, even if the owner is not entitled to limit his liability... avail himself the limits of liability prescribed in ... He may further avail himself of the defenses (other than the bankruptcy or winding up of the owner) which the owner himself of the defense that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defense which he might have been entitled to invoke in proceedings brought by

⁶⁴ Seward, R., C. "The Insurance Viewpoint", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 176.

the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings.⁶⁵

According to this provision, the insurer, in the proceeds of the direct action, can not invoke some defences provided by its policy or national law. One important defence thus excluded is that the ship concerned was sent to sea in an unseaworthy state with the privity of the assured. This defence is implied by statute into all time policies subject to English law, and is often inserted into policies not so covered as an express clause.⁶⁶

At the practical level, inconsistency is apparent. Although most sea-going ships maintain liability insurance, except in respect of a claim covered by the CLC and HNS Conventions, claimant for other claims do not have the right to take direct action against the person liable.

3.4.3 Additional Problems in Implementing the HNS Convention

Problems which will be encountered once the Convention is implemented are the identification of hazardous and noxious substances which are within its scope and how the maintenance of insurance or other financial security by the authorities at port of call can be monitored. A very complicate definition of "hazardous and noxious substances" which includes thousands of substance has been given in HNS Convention⁶⁷. Though a suggestion has been made for making a complete list of substances, the Diplomatic Conference for adopting the Convention as well as the later special consultative meeting to discuss the HNS Convention were reluctant to do so because it was thought "it would not be practicable, because of the vast number of substances covered by the Convention"⁶⁸. It seems the accurate identification of the substances is left to the Contracting State. The United Kingdom inserted a provision in the Merchant Shipping Act 1995 under section 14 of the Merchant

⁶⁵ Art. VII (8) of CLC 1992.

⁶⁶ Abecassis, D. W. "the Law and practice relating to Oil Pollution from ship" (london: Butterworths 1978) 208, 209.

⁶⁷ According to "The Hazardous and Noxious Substance Convention: a new horizon in the regulation of marine pollution", by Lillte, G., approximately 6,000 substance fall within the definition of HNS Convention.

shipping and Maritime Security Act 1997, for the certification of the substances by the Secretary of State⁶⁹. However if the identifications by different countries are different, ships might be detained at the port in a country of which the list is different with the one of the flag state. Even if a list is provided, it is also a heavy burden on shipowners to determine whether or not a particular cargo carried falls within the definition of hazardous and noxious substances and whether he should maintain the relevant insurance. The Same difficulties exist for the relevant authorities at the port the ship calls to determine whether or not the ship arrived is a ship subject to the HNS Convention. The uncertainty of the authorities whether the cargo carried on board is the hazardous and noxious substance will affect their ability to implement the Convention and probably delay ships arriving or leaving the port. However the most difficult issue is establishing and monitoring the contribution system for the purpose of collecting contribution for the HNS Fund.

Another problem relating to the separate regime is that insofar separate certificate attesting the insurance or other financial security is required by both the CLC and HNS Conventions. If considered, the proposed Bunker Convention, Wreck Removal Convention and the Protocol to the Athens Convention will create too more certificates which will have to be carried by the ship and issued by the relevant authority of flag state who will have to ensure that there is compliance into the compulsory insurance provisions before issuing the certificate. It is a heavy burden for both authorities and shipowners.

⁶⁸ LEG 80/10/2.

⁶⁹ Lillte, G., "The Hazardous and Noxious Substance Convention: a new horizon in the regulation of marine pollution" [1998] LMCLQ 556.

Section 5

The Proposed Conventions and Protocol

It is impossible to discuss all the details of the draft texts of the proposed conventions and protocol, however, main issues arising in those documents which relates to the topic of this dissertation will be discussed in this section.

3.5.1 The Law Relating to Limitation of Liability and Compulsory Insurance

In the consideration of the Bunker Convention and Wreck Removal Convention, delegates in the Legal Committee are reluctant to establish independent limitation regimes in these conventions. Instead of that, the draft texts of these conventions entitle the shipowner the right to limitation of liability by reference to the applicable national or international regime.⁷⁰ This applicable law should be the *lex fori* or the national or international law referred to by the rule of conflict law of the country of the court dealing with the claims.

In respect of compulsory insurance, the two draft texts require registered shipowner to maintain insurance or other financial security to cover liability under the relevant convention. In the Wreck Removal Convention no express insurance amount is indicated. It is submitted that the insurance amount should be as much as the limits of liability under the applicable national or international limitation regime in order to satisfy the requirement to cover the liability under that Convention. However in the Bunker Convention, the amount is expressly required to be "equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the

⁷⁰ Art.5 of the draft text of the Bunker Convention, LEG 81/4.
Art.VIII(2)of the current draft of the Wreck Removal Convention at the 79th session, LEG 80/2.

Convention on Limitation for Maritime Claims, 1976, as amended"⁷¹. It seems that the applicable national or international law has a different meaning with that mentioned in the last paragraph. To the authority of a flag state who will determine the compliance of insurance and the issue the certificate, the applicable law can only mean their national law or international convention effective in that country. On the other hand, to the authority of a port state who would inspect the certificate may find it is very difficult for them to accept a certificate attesting a insurance with which the amount is substantially lower than that required by the their national law or the international convention effective in the port state. This difficulty arises from the compromising positions of the delegations in IMO. On the one hand they are reluctant to establish new separate limitation regimes because of substantially increasing the burden of shipowners, their insurers and relevant authorities of contracting states. On the other hand they have a strong intention to impose compulsory insurance with respect to certain types of claims. The imposition of compulsory insurance requires a clear limit for the insurance cover that can be accepted by both the flag state and the port state. The existence of a multitude of limitation regimes makes it difficult to combine these two positions together.

3.5.2 Compulsory Insurance: only for Certain Types of Claims or for all Claims

Unlike the CLC or HNS Conventions, there are no provisions in these two conventions relating to the exclusive use of insurance payments to compensate claims under such conventions. It is not unreasonable in the case where no separate limitation regime is established in them. However compulsory insurance is required "in an amount equal to the limits of liability under the applicable national or international limitation regime"⁷². It seems that the imposition of compulsory insurance in any of these conventions has the effect of imposition compulsory insurance for the whole global regime, especial when considering the fact that all ships have bunker oil and the possibility to be a wreck when unpredicted accident happens.

⁷¹ Art. 7 of the Bunker Convention.

Section 6

Conclusion of this Chapter

The separate regime, as mentioned in the Chapter One, focuses on the protection on the third parties that have never been involved in the process of transportation. It provides better protection for claimants by provision of higher limitation, imposition of strict liability on shipowners together with compulsory insurance and, for the claimants for pollution damage, provisions of second tier compensation from funds which are collected from the receiver of cargo oil or hazardous and noxious substance. However the separate regimes apply exclusively to certain types of claims. By attracting certain claims from the global regime, it increases segmentation in the field of limitation of liability. It –

appears that, despite the purpose of International Conventions being to produce uniformity in the law, there remain areas in which the various Conventions supposed to operate in conjunction with each other are inconsistent and areas in which practical difficulties will occur when an incident gives rise to claims under both regimes.⁷³

From the examination in the above sections, the area of inconsistency and difficulties can be summarised in the following paragraphs.

Although individual conventions in both the global regimes and separate regimes provide some sort of concursus rules which can only bind the contracting states, the departure of the separate regimes from the global regimes provide more choice for claimants and their lawyers to avail themselves of "forum shopping". This will definitely increase the possibility of multiple lawsuits in a multitude of jurisdictions. To this extent the effort of unification of international rules on limitation of liability is jeopardized.

⁷² Art. 7 of the Bunker Convention.

⁷³ Dykes, A. "Limitation and Oil Pollution", in the Institute of Maritime Law, University of Southampton (ed), *Limitation of Shipowners' Liability: The New Law*, (London: Sweet & Maxwell, 1986) 151

Because of the wording of art 3 of the 1976 Convention as well as the similar wording of art.4 (3) (a) of HNS Convention, in some situations, claims for pollution damage defined by CLC might not be limitable even though an owner or charterer has no fault of his own. These conventions fail to dovetail exactly together to provide a "seamless web".

In case of incident involving two or more ships, sometimes recourse actions against the liable ship is limitable which might be unfair to the innocent claimants. In case pollution damages caused by oil and hazardous and noxious substances are not reasonably separable, no joint and several liability is imposed on shipowners.

The differences of all those conventions create unreasonable differentiation among claimants for compensation for damage arising out of the same incident. Generally speaking, claimants under the separate regime have more of a privilege than claimants under the global regime even if all of them are innocent. This discrimination to some claimants seems unfair and unjust.

Thousands of hazardous and noxious substances defined by the HNS Convention create dramatic difficulties in implementing it, both on the commercial as well as the administration side.

Evidenced in the process of drafting the Bunker Convention and Wreck Removal Convention, the existence of a multitude of limitation regimes leads to difficulties in the efforts of linking a specific liability regime backed by the compulsory insurance to global regimes. No unified limit could be provided as the least limit for insurance amount. The sum of insurance payment is impossible to be used exclusive to the specific type of claims. Thus it results in the fact that compulsory insurance required in the liability regime turns out being compulsory insurance for all claims under the global regime.

It is submitted that, although separate regimes cope with the requirement of the modern society to provide fully and adequate protection for victims and the principle of "polluter should pay", it devastates the effort of uniformity of international law in the field of limitation of liability. It is the failure of this effort that actually results in all the difficulties discussed in this section.

Chapter Four

The Futures

The underlying reasons for the difficulties discussed in Chapter Two are two-fold. First, uniformity of international law in this area has not been achieved, and second, the inherent links between the global regime and the separate regime are cut by separate conventions. Though efforts have been made to solve some of those difficulties, from the author's point of view, the entire solution cannot be sought within the current framework. The only possible way is to put all claims arising out of one incident into one single solution; either an unlimited liability regime or a more comprehensive global regime which will deal with all limitable claims in a unified regime. The way of establishing "linkage" between the separate regime and the global regime could also be a middle-of-the-road solution before any entire solution has been achieved. However, extreme difficulties in establishing such "linkage" have been evidenced during the drafting of the HNS Convention.

Section 1

Possibility of Abolishing Limitation of Liability Regimes

Many debates have been conducted on the grounds of limitation of liability. The author does not intend to review and reopen all the arguments on this topic. The concern of the author here will focus on the practical possibility of abolishing limitation of liability regimes.

Limitation of liability services a multitude of purposes. At the practice level, three functions have been linked to this legal regime. Firstly, it provides a way of dispersing risks at sea. The shipowner or other liable persons will be liable for the compensation up to the limits; claimants will retain the residual losses. Secondly, the limit of liability provides a ceiling of insurance that will help insurers as well as shipowners to ascertain their risk and keep the premium at a reasonable level. In case of compulsory insurance, almost every convention requires shipowners to maintain compulsory insurance in the amount equal to the limits of liability. Thirdly, it encourages settlement of disputes and discourages “forum shopping”.

The merits of the first function of limitation of liability have been subjected to debate for a long time. It has been stated by Gotthard Gauci recently that “limitation of liability is an unjustly discriminatory attempt to subsidise the shipping industry at the expense of other interests.”⁷⁴ The author agrees with the idea that victims, whether in the “closed” situation, the “partly closed” situation or “open” situation, should be fully and adequately compensated. The question concerned is, how the full and adequate compensation to victims can be achieved.

Compared to the situation of 200 years ago, almost every one should admit that ships today are much safer than sailing ships of that age. However, the potential danger of ships today to third parties and the environment seems much greater than before because of the huge size of ships and large amount of hazardous cargoes carried on board. This phenomenon is a result of the increasing demand of transportation of goods and competition between carriers. The whole of society creates the demand and benefits from the satisfaction of this demand by transporting goods with ships. Moreover, in many cases, the increased danger of ship to third parties and the environment does not actually attach to the ship; in fact it attaches to the cargoes carried on board. The nature of the cargo decides the existence and scale of the danger. It is then unjust for shipowners to be solely responsible for all the losses caused by this additional danger without any protection. The second tier compensation mechanism established in the CLC and HNS Conventions evidences

⁷⁴ Gauci, G. “Limitation of liability in maritime law: an anachronism?” *Maritime policy* 19 (1995) 66

this recognition. It seems to the author that, not only limitation of liability and the secondary compensation mechanism are reasonable and necessary, in case both first and second tier compensation systems are insufficient to provide full and adequate compensation to victims, other alternatives should also be sought to provide more sources of compensation to victims. Many suggestions have been made on this issue. One of these suggestions is to create a fund which will constitute a second or third tier of liability to which all parts of society, *i.e.* all partaking in an industrial era, will contribute.⁷⁵

In respect of the second function, limitation of liability, on the one hand, provides a ceiling for insurers to ascertain their risk and protect them from unpredicted heavy loss. On the other hand, in case of compulsory insurance, a fixed limit provides a minimum insurance obligation to shipowners in terms of the insurance amount that is acceptable at the international level.

In the author's opinion, liability of shipowners should be backed with insurance. Unlimited liability that is not backed with proper insurance will lead to a very difficult situation for shipowners and will pressure them to take preventive and protective measures.

Quite apart from its effect on insurance, will lead to increased use of flags of convenience, proliferation of one-ship companies, self 'insurance' and higher freights. This is all the more undesirable when we have reached an era where much of the world's tonnage needs replacing⁷⁶.

On the other hand the uninsured liability provides no guarantee for victims. They may not be able to get adequate compensation from shipowners or other liable persons.

There was universal recognition that the underlying approach to the question as to whether limitation was desirable should be simply those

⁷⁵ Gauci, G. "OIL POLLUTION AT SEA – Civil Liability and Compensation for Damage" (John Wiley and Sons, 1997) 232

⁷⁶ Steel, D. "Ships are different: the case for limitation of liability" [1995] LMCLQ 81

to insurability and cost of insurance. Owners must be able to obtain insurance cover and claimants must get adequate compensation.⁷⁷

If the insurance market is able to provide insurance cover for unlimited liability at the reasonable premium, it will be possible and also reasonable to abolish the current limitation of liability regime. The problem is that the actual situation seem does not likely that it will happen. Today the cost and availability of insurance varies according to the levels of limitation. David Steel, in his article⁷⁸, has considered the question whether the insurance cover would remain available at an acceptable cost if limitation were not available. At least in most jurisdictions, his answer is: “ I personally do not know. But, given that existing cover is clearly and firmly predicated on the availability of limitation. I accept that there is a serious risk it will not.” He then illustrates this risk by pointing to the following events in the insurance market:

- (a) the limited interest in the P & I Group reinsurance and heavy reliance on the Lloyd’s market;
- (b) the existing restrictions on oil pollution cover imposed by P & I clubs;
- (c) imposition of insurance limits in the field of employers compensation because of the very heavy losses;
- (d) the reaction of the P & I Group to the financial responsibility requirements of OPA 90.

It seems to him that the insurance markets are already at the margins of available insurance cover for shipowner’s liability.

A suggestion has been made to decouple the limit of liability and insurance limit. Gottard Gauci stated recently that “ there is nothing to prevent the underwriter from protecting himself by inserting in the insurance policy a ceiling beyond which claims cannot proceed.”⁷⁹ He then suggested that “ a solution which to a certain extent, may be acceptable would involve the imposition of strict and unlimited

⁷⁷ Steel, D. “Ships are different: the case for limitation of liability” [1995] LMCLQ 79

⁷⁸ *Ibid*, p.82

⁷⁹ Gauci, G. “Limitation of liability in maritime law: an anachronism?” Maritime policy 19 (1995) 66

liability accompanied by compulsory insurance up to a specific amount”⁸⁰. This sort of solution has been applied in the field of liability for nuclear damages in Swiss Law and for oil pollution damage in a number of states in the U.S. In the view of this author, it is doubtful that the uninsured part of liability can be enforceable. The reason is that in a spill of mammoth proportions, many shipowners are likely to become insolvent unless some preventive and protective measures as mentioned above have been taken by them.

The third function of limitation of liability is to control the proliferation of lawsuits in a multitude of jurisdictions. As mentioned in Chapter Two, at the international level, the problem of multiple litigation is controlled by depriving all the security available at normal situation and let the limitation fund to be the only source of security for all claims. By doing so, all claims will be forced to a limitation court. If a limitation of liability regime does not exist, nothing can be used to deter “forum shopping”. Claimants will be able to arrest the liable ship or a sister ship and excuse maritime liens and enforce mortgages at anytime and anywhere in the world. For shipowners and their insurers as well as claimants themselves, this chaotic situation will be undesirable. “It does need saying, and saying loudly, that unlimited liability leads to unlimited or at least undisciplined claims. The U.S. experiment is a warning to us all, not a system to adopt”⁸¹.

There is a supplementary function of limitation of liability in case of pollution damage; that is to provide a starting point for the IOPC Fund and HNS Fund for a secondary compensation. If no limitation of liability will be available, the existing mechanism for secondary compensation will probably not be able to continue. It would be a pity for both shipowners as well as victims because even under Dr. Gauci’s solution - the unlimited liability supported by a limited amount of compulsory insurance, it is possible that full compensation will not be available.

⁸⁰ Gauci, G. “Limitation of liability in maritime law: an anachronism?” *Maritime policy* 19 (1995) 66

⁸¹ Steel, D. “Ships are different: the case for limitation of liability” [1995] *LMCLQ* 82.

Even if all the reasons justify the unlimited liability, it seems that there is no means of forcing all contracting state of various conventions to denounce those conventions and adopt the concept of unlimited liability.

Section 2

A Comprehensive Convention

In case limitation regimes can not be abolished or can not be abolished within a reasonable time, other alternatives should be sought. A comprehensive convention to cover all sort of maritime claims, including those under the current global regime and the separate regime seems a possible way. However this comprehensive convention should achieve all the reasonable targets set by the relevant individual conventions and overcome the difficulties mentioned in Chapter Two or at least reduce those difficulties and not impose any other new problem.

It is admitted that many difficulties might arise in drafting such a multi-purpose convention. It is impossible for the author to identify and discuss all such problems in this dissertation. However, brief discussions on some important issues for ascertaining the possibility of such comprehensive convention are necessary.

4.2.1 Targets of the Convention

The basic idea of this comprehensive convention is to provide a platform to locate all limitation issues in regard to all limitable maritime claims within a unified legal framework. Based on this idea and those targets that have been set in the current conventions, the targets of this Convention are identified as follows:

- (1) This Convention should provide unified rules covering all limitable maritime claims which have been included in current relevant conventions;
- (2) All limitable maritime claims should be settled in a single set of proceedings;
- (3) Claimants suffered same losses should be treated equally;

A question relating to the targets is whether strict liability and compulsory insurance should be included in this Convention. It seems that if there is only one limitation regime, then all limitation of liability can be determined by reference to that umbrella regime, both strict liability and compulsory insurance can be regulated in different conventions. In the convention where liability and compulsory insurance are provided for, the amount of insurance necessary can be determined by reference to the umbrella limitation regime. But if many limitation conventions exist as happens in the current situation, such a reference would be very difficult to be made.

One option is that in the liability convention, reference will only be made to one of those existing limitation conventions. It means that in order to ratify the liability convention, a country must be the contracting state to the relevant limitation convention to which it refers. If that country is a member state of another limitation convention, that country must denounce such limitation convention and ratify the convention referred to by the liability convention. However, it is admitted that it would be very difficult to pressure countries to do so.

Another option is that, in the liability convention, reference will be made to all the international conventions and applicable national laws just as what has been done in the text of the Bunker Convention. However, this approach will result in uncertainty in respect of the insurance amount that is required by both flags states and port states. It seems that such an option is impractical.

The possible solution, which is suggested by the author, is to include limitation of liability, strict liability and compulsory insurance into one convention.

4.2.2 Claims and Persons Applicable to the Convention.

To accomplish the first target, all limitable claims and persons entitled to the limitation of liability under the 1976 Convention should be included in this convention. However, in respect of strict liability and the obligation to maintain compulsory insurance, only registered shipowners should be included. The reasons will be discussed under the relevant sub-headings below.

4.2.3 Strict Liability

Strict liability means the causal link between the liability and the person liable will not be based on the fault of that person but only on the fact that damages or losses are caused due to the act or omission committed by that person. Even if that person had no fault, he would still be liable if strict liability is imposed on him. Limited exemption might be given to that person by statutes. Therefore, this liability regime is mostly restricted to apply only to activities which have a hazardous feature which is harmful to the public or to persons in a relatively weak position, such as passengers on board a ship. The main advantage of this regime is to simplify and speed up the proceedings against a liable person, so that interests of third parties can be protected. But to persons on whom this type of liability is imposed, it seems arbitrary and cruel in many respects.

Compared to limitable claims under the 1976 Convention, one may find that in respect of cargo claims, collision claims and many other claims, parties involved have an equal position. They are, in most cases, involved in the “closed” situation or the “partly closed” situation. Therefore, it is unreasonable to impose strict liability in respect of all maritime claims. It is necessary to restrain the application of a strict liability regime only to certain types of claims, such as claims for pollution damage and personal injury.

In respect of persons on whom strict liability is to be imposed, from the author’s point of view, it should only be the registered shipowner but not a group of persons. If a group of persons are subject to strict liability, victims could get

compensations from many “pockets” and the possibility of obtaining full compensation of victims would increase. However claims arising out of one incident would be dispersed to several sources, so the limitation regime established in this convention would be bypassed. Imposition of strict liability on many persons among whom some may be innocent, would mean transferring losses from one innocent person to another innocent person. This is of course undesirable. Since in any case there should be a registered shipowner (including the actual owner if no registration exists regarding this ship, or if it is a state owned shipping company if the ship operated by it belongs to a country), it is safe to impose strict liability to this person.

In case that strict liability applies only to registered shipowners, to avoid dispersing claims arising out of one incident to other sources, a channelling clause such as that in CLC 1992 or HNS Convention should be inserted into this Convention to bar any actions against other persons. If the registered shipowner is innocent, he will take recourse action against the person at fault. However, if the person at fault is entitled to invoke limitation of liability under this Convention, and there are some other claims against that person, especially for pollution damage, it is quite possible that the registered shipowner will not be able to recover all the losses he has suffered. It is unjust for him but it is strict liability that would prevail and that limitation regime would apply. Imposition of strict liability on him would mean that he should retain the loss suffered by victims first with the possibility that this loss can not be recovered. The limitation regime on the other hand means victims can not always fully recover their losses from the person at fault.

4.2.4 Compulsory Insurance or Other Financial Securities

It seems that no special problem will arise if compulsory insurance is imposed in this Convention to the extent where strict liability applies.

However, considering the possibility of adoption and entry into force of the Bunker Convention or the Wreck Removal Convention and given that the majority of ships are insured with P & I clubs, which provide a comprehensive liability insurance, it seems possible to impose compulsory insurance in respect of all

maritime claims. This alternative can eliminate the unequal treatment of claimants under current conventions due to the fact that some claims are secured by compulsory insurance and others are not. It is assumed that the main objections to this alternative will come from the insurance industry and will focus on entitlement of direct action against insurers or other guarantors. Insurers have already strongly defended any effort to enlarge this entitlement.

Nevertheless, as mentioned before, from a practical point of view, the obligation of maintaining insurance or other financial security should only be imposed on the registered shipowner.

4.2.5 Limits of Liability in the Convention

Because of the large difference in the size of damage, it seems that a dedicated portion of a limitation fund should be reserved for pollution damage. That means that the limitation fund under this Convention should have three separate parts, each of which should have its own limit. The first part of the fund should be for personal claims; the second for pollution damage claims and the third for claims for other property damage. However, personal injury caused by oil or a hazardous and noxious substance, which used to be included in the CLC and HNS Conventions, should now be included in the part reserved for personal claims. If this part of the fund does not satisfy all personal claims in full, the residual damage can enter into other parts. Which parts will be entered into will depend on the causality of the damage. That means personal injury claims caused by a polluting substance will enter into the part reserved for pollution damage; other personal injury claims will enter into the part for other property damage claims. If it is too difficult to do so, another option would be to split the residual claims into proportion according to the ratio between limits of these two parts.

The relation between the parts for pollution damage and for other property damage can be in two forms, either mutually exclusive; or one category of damage can overflow into the part for another category of damage. The author, at present, prefers the mutually exclusive approach, because it looks fairer for claimants if a proper difference between these two limits can be given, while the other alternative

seems to discriminate against victims suffering property damage other than pollution damage. Another reason is that, given that the P & I Group has set a ceiling for pollution damage liability and a general ceiling for other liabilities, this approach would seem to match the current of practice of P & I insurance. Fewer changes in practice will be needed.

The rapid amendment procedure as in the 1996 Protocol to the 1976 Convention and CLC 1992 should be provided in this Convention in order to update the monetary figures of the limits set therein.

4.2.6 Jurisdiction

One of the advantages of this proposed Convention will be that only one limitation fund will be needed in respect of all maritime claims. However, as mentioned in Chapter Two, under the current global regime the constitution of limitation fund does not necessarily mean that the limiting court has the jurisdiction to hear all limitable maritime claims. In fact, some maritime claims, according to other international conventions or national laws, are specified to some special jurisdictions.

To avoid the situation of multiple lawsuits in multiple jurisdictions, provisions similar to the 1976 Convention should be provided in this convention. In addition, a provision giving the limitation court the jurisdiction to all limitable maritime claims is also necessary in this Convention. If possible, exclusive jurisdiction for all claims arising out of one incident could be given. That will be more effective for the purpose of controlling multiple proceedings in different jurisdictions. In case pollution damage is involved, it is obvious that only the court of the contracting state or states who suffered the damage or treated the damage would be proper to deal with claims arising out of the pollution incident. Therefore, it will be necessary to provide that the limitation fund, in this case, can only be constituted in such court.

4.2.7 The IOPC fund and HNS fund

As discussed before, it is fair to require cargo owners contributing to a fund which will provide a second tier of compensation in respect of damage caused due to

the nature of certain kinds of cargo. In relation to whether the two tiers of compensation should be provided in a single convention or in two separated conventions, two models have been provided by the CLC/Fund Convention system and the HNS Convention system. In the CLC/Fund Convention system, CLC only focuses on first tier compensation. Second tier compensation and the establishment of the IOPC Fund are provided in a separate convention – the Fund Convention. However in the HNS Convention system, both the first and second tier compensations are provided in the same convention.

It is, of course, possible to follow any of the models in this Convention. However, there are a lot of difficulties in establishing such a second tier compensation fund because receivers of thousands of substances have to be identified that make the contribution system of the second tier fund very complicated⁸². Therefore, if the model given by HNS Convention is followed, it seems that this Convention will take a long time to enter into force.

The author prefers to follow the CLC/Fund Convention model. This approach is more flexible. Countries can ratify this convention without ratifying the fund convention simultaneously. This approach also reserves room for delegates of member countries of IMO to create other alternative solutions instead of the current fund systems and leave this liability and limitation convention intact.

⁸² See LEG 80/10/2 and LEG 81/7

Section 3

Linkage

When the idea of a HNS Convention was first mooted, the problem of linking that convention to the existing limitation regimes arose. The insurance industry in particular, argued that linkage was necessary in order to make full use of the insurance market capacity. They pointed out that it was all very well to create supplementary funds to augment existing liability regimes but it was quite a different proposition to introduce completely new funds which would stand beside. They urged the Legal Committee to make the HNS fund a supplementary fund sitting on top of existing limitation funds.⁸³ The lack of international uniformity in relation to the underlying right to limit made this work very difficult.

As far as the HNS Convention is concerned, the supplementary fund sitting on top of the global regime, may let the claimants for HNS damage share the global fund first with all the claimants for the claims arising out of one incident. Claimants for HNS can also take the advantage to share the supplementary fund among them. The total compensation would be less than the aggregate of two separate limits because claims, in the former situation, are slimmed first within the first limit. It seems that this solution can be achieved in the situation that all the contracting states adopt a similar limitation regime, for instance the 1976 Convention. Problems are generated due to the lack of uniformity in international law. Patrick Griggs has pointed out a gap in a scenario⁸⁴ relating to the contracting states of the proposed HNS Convention, who have moved from the 1957 Convention to the 1976 Convention and did not denounce the 1957 Convention. Various solutions have been suggested to solve this problem, none of them being satisfactory. The political and legal complications involved in this problem were so great that many delegates in the

⁸³ Griggs, P. "Extending the frontiers of liability—the proposed Hazardous Noxious Substances Convention and its effect on ship, cargo and insurance interests" [1996] LMCLQ 151.

Legal Committee lost their confidence to establish such a 'linkage'. Therefore, it was agreed that the HNS limits would be free-standing.

Since HNS has been adopted, it seems that there is no need to discuss this problem any more. However, from the author's point of view, "linkage" is not a concept exclusively used in the HNS Convention context. It should refer to any approach designed to link one separate convention to the current global regime. Therefore, whenever a new convention within which limitation of liability is proposed, linkage will always be a way to reduce variation in terms of limitation of liability. The proposed Bunker Convention and Wreck Removal Convention have actually been proposed to link to the current global regime.

Nevertheless, it seems that "linkage" can only be a method to reduce further variation of limitation regime but is not able to solve existing problems in current conventions. Therefore it is only a middle-of-the-road solution. From the author's point of view, the final solution can only be a comprehensive convention as discussed in section 2.

⁸⁴. Ibid at p. 152

Chapter Five

Conclusion

As introduced at the beginning of this dissertation, the author is concerned with the relationship among different limitation regimes under various conventions and explores the prospects for development in this regard. Three phases of the development of limitation regime were identified, i.e., the development of the ship value system and the monetary system, both of which belong to the global regime, and the development of the separate regime.

The privilege of limitation of shipowner's liability was adopted and was wide spread in the 16th and 17th centuries with the form of the ship value system. This development represented the recognition at that age on special risks to shipowners and the importance of the shipping industry to the whole community. The ship value system matched the requirements of the society at that time. It was characterised by the facts of simple social relationships, poor communications and very important role of shipping in the expansion of society. In most cases, accidents at sea at that time only involved "closed" or "partly closed" situations. The main sources of liability of shipowners were cargo liability and collision liability. However, when ships began to get larger in size, heavy losses occurred. Modern business created new types of commercial relationships, especially insurance, in the shipping business. A new system of limitation of liability - the monetary system- appeared and replaced the ship value system as the main form of limitation regime worldwide. This system encourages insurers to provide adequate insurance for shipowners. In turn, the involvement of insurance has been driving the limits of liability to higher levels.

One of the main advantages of the global regime is to provide a unified rule to multiply types of claims arising out of one incident and force them to be settled in

a single proceeding. Another advantage is that victims under this regime are treated more equally because they are compensated in proportion to their claims in a single proceeding, regardless of the types of claims. However, because of the existence of a multitude of conventions with each of them having only limited members; as well, because of the weak provisions in relation to the concursus rule in these conventions compared to those under national law, the ideal advantage of the global regime has never been achieved. In the mean time, continuous devaluation of various currencies and the increasing sizes of damage and losses caused in maritime transport, require this regime to be updated continuously. Various criticisms and attacks have been leveled at this regime.

The separate regime appeared due to the increasing concerns of the public to the new-type, man-made spectacle - the environmental disaster, which to a large extent injures people in the “open” situation. The degree of concern of people in the “open” situation is still increasing. Attacks from various sources are attempting to shake the fundamental basis of limitation of liability. It seems to the author that the situation in the U.S. has made unlimited liability almost the norm. However, as discussed in Chapter Three, abolishing the limitation of liability regime will probably create difficulties in relation to the availability of insurance to ships and secondary compensation to victims. The possible pro-protect actions taken by shipowners and the loss of control of multiple lawsuits will lead to chaotic situations which are undesirable for both shipowners and potential victims. Another argument given by the author in this dissertation is that the increasing dangers of shipping to the environment and third parties are contributed by the increasing demand of transporting large amounts of goods, among which some are extremely hazardous. If the danger is dividable, some of the danger of ship is actually imposed by goods carried on board the ship. The goods are consumed by whole of the society. Thus, it seems unreasonable for shipowners to be solely responsible for all the losses.

In recent years, delegates of member countries of IMO have realised that increasing separate regimes might impose heavy burdens on shipowners, insurers as well as relevant administrative authorities. Therefore, they are reluctant to create any

new separate regime. Recent legislative activities in IMO evidenced that they prefer to reserve the remaining claims under the global regime and impose strict liability and compulsory insurance to some claims under that regime. Efforts to establish “linkage” between the global regime and other conventions where limitation of liability has to be considered were made during the drafting of HNS Convention. Although the effort failed, the development of the Bunker Convention as well as the Wreck Removal Convention seems to indicate that “leakage” is still a possible way to combine the efforts of giving special concerns continuously to some claims; in the meantime, keeping them under the global regime. However, this approach is only a middle-of-the- road solution but not a final one.

Current problems under the global regime and the separate regime have been discussed in Chapter two⁸⁵. The main underlying reasons of these problems are that uniformity of international law in this area has not been achieved and inherent links between the global regime and the separate regime were cut by separate conventions. Therefore, the entire solution to all these problems can only be sought within a single legal framework. Since an unlimited liability regime is not a proper one from the author’s point of view, it seems to the author that the only proper solution to these problems is to draft a comprehensive convention to allocate limited liabilities to all claims. In Chapter Three, the author has discussed the possibility of drafting such a convention. It is submitted that drafting such a comprehensive convention will be a difficult and time-consuming task. Too many issues have to be compromised among delegates of member countries of IMO.

It is contended that, in this dissertation, the author does not object to the principle that victims should be fully and adequately compensated. What the author objects to is the unequal treatment between victims. Victims should be compensated fully, but it does not mean the concept of limitation of liability is anachronism. Additional compensation should also be sought from other sources.

⁸⁵ A summary of these problems can be seen on page p.52 - 54

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