
LIMITATION OF MARITIME LIABILITY A STUDY OF 1976 CONVENTION AND KUWAIT MARITIME LAW^(*)

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Abstract:

Limitation of liability for maritime claims is an important system for the shipping industry. The original rationale for such a system is to encourage the shipping enterprise. Operating a ship is a risky business. A shipowner is not only exposed to the perils of the sea, but also vulnerable to the negligence of the master and crew members under the doctrine of respondeat superior, which holds the shipowner vicariously liable for the negligence of his employees. Maritime damage may give rise to liability of immense proportions, many times the value of the ship and its cargo. Third party liability alone in such a casualty may lead to extremely large claims. By setting up certain limits, the system alleviates the shipowner's burden of liability, which provides an important incentive for people to stay in the shipping industry.

Because of the advantages which the limitation regime brought about to shipowners, maritime nations around the world felt compelled to adopt it in order to place their own merchant marines on an equal footing with their foreign counterparts.

This article attempts to explore various issues within the limitation system itself in the context of *1976 Convention* and *Kuwait Maritime Law*.

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INTRODUCTION

One of the unique features of maritime law is the shipowner's right to limit his liability for loss or damage resulting from negligent navigation or management of his ship. Originating in the nineteenth century, the limitation rule is one of the first examples of protectionism in the form of state support for the shipping industry. The rationale behind it was that the shipowner undertook great risks in the maritime adventure and was not necessarily in control over what happened to the ship and cargo at the hands of the master and crew:

“...the limitation of liability provisions...are expressly designed for the purpose of encouraging shipping and affording protection to shipowners against bearing the full impact of heavy and perhaps crippling pecuniary damage sustained by reason of the negligent navigation of their ships on the part of their servants or agents.”⁽¹⁾

Historically two main rules of limitation of liability have developed over the years. The early rule allowed the shipowner to limit liability to the value of his ship and freight in cases of cargo theft. Eventually the application of the rule was extended to include collision liability and a tonnage formula was used.⁽²⁾

Because of the advantages which the limitation regime brought about to shipowners, maritime nations around the world felt compelled to adopt it in order to place their own merchant marines on an equal footing with

(1) In *British Columbia Telephone Co. v. Marpole Towing Ltd.*, [1971] S.C.R. 321 per Ritchie J., at p. 338.

(2) Clyde J. in *Vancouver v. Rhodes*, [1955] 1 D.L.R. 139 at p. 140, explained: “[b]efore the first limitation Act was passed in England in 1734 it was possible for a shipowner to sustain ruinous losses because of the acts of the master in some remote part of the world where the shipowner was unable to exert any actual control and, as a matter of policy to encourage and maintain shipping, it was deemed advisable to limit the liability of the owner to the value of the ship and her freight where there was theft of cargo by the master and crew. By successive statutes the right to limitation was extended to other cases until it has reached its present form”.

their foreign counterparts.⁽³⁾ At the international level, the concept of limitation of liability was approved and adopted in order to unify limitation law on the international scene, the Committee Maritime International adopted three Conventions: *International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea-Going Ships, 1924*⁽⁴⁾ the *International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships, 1957* (*1957 Convention*⁽⁵⁾) as amended by the protocol of 1979,⁽⁶⁾ and *Limitation of Liability for Maritime Claims Convention 1976* (hereinafter referred to as *1976 Convention*⁽⁷⁾) as amended by the *Protocol of 1996*⁽⁸⁾ Kuwait is not a party to any of these conventions, although it had given effect to the provisions of *1957 Convention* through the *Kuwait Maritime Law of 1980*⁽⁹⁾.

This article attempts to explore various issues within the limitation system itself in the context of *1976 Convention* and *Kuwait Maritime Law*. It will cover the following issues:

- (1) The right to limit liability.
- (2) Claims subject to limitation.
- (3) Claims not subject to limitation
- (4) Conduct barring limitation.
- (5) Limitation fund.

(3) See the *Explanatory Note to the Draft of the Kuwait Maritime Law*, article 90, where it pointed out that the reason for introducing a provision for such limitation in the *Kuwait Maritime Law* was to enable Kuwait ships to trade on equal terms with those of other nations. See also Sarkho Y., *Commentary on the Kuwait Maritime Law 1980*, 4th ed, (2001), at p. 184.

(4) Adopted 25 August 1924, and into force as of 2 June 1931.

(5) Adopted at Brussels, 10 October 1957, and in force as of May 31, 1968.

(6) Protocol Amending the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 21 December 1979, 1412 U.N.T.S. 73 (entered into force 6 October 1984). This protocol raised limitation amounts and substituted the unit of account for the SDR.

(7) Adopted at London, November 19, 1976 and in force as of December 1, 1986.

(8) Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, 1976, 3 May 1996, 35 I.L.M. 1406 (entered into force 13 May 2004). The protocol substantially increases the amount of compensation available and introduces a tacit acceptance procedure for further increases in liability limits. The latter will enable future increases in the limits to account for inflation.

(9) See the *Explanatory Note to the Draft of Kuwait Maritime Law* at p. 178.

1. RIGHT OF LIMITATION

1.1. Persons entitled to limit liability

Limitation of liability for maritime claims is often referred to as limitation of shipowners' liability. Although it was originally designed for the benefit of shipowners,⁽¹⁰⁾ the group of persons protected by the limitation system has not been limited to shipowners. Under various legal regimes around the world, the right to limitation has been granted to persons other than shipowners, such as charterers, ship managers or operators, master and crew members, salvors and insurers.⁽¹¹⁾

1.1.1. Shipowners

Shipowners are the first claimants of the right of the limitation of liability. Article 1(1) of the *1976 Convention* provides that "Shipowners..., as hereinafter defined, may limit their liability...." The *Convention* does not provide any clear definition of the term "shipowner". It merely states that the term "shipowner" shall mean the owner, charterer, manager and operator of a sea-going ship⁽¹²⁾

(10) For example, in England, Part VIII of the *1894 Act* originally provided that the protection of limited liability was only enjoyed by the owner of the ship; see Chorley & Giles' *Shipping Law*, 8th ed, at p. 396.

(11) See for example, *1976 Convention*, article 1(1) and (6). In *1957 Convention* only the shipowner, the charterer, the manager and operator of the ship, the master, the crew, and other servants were entitled to limit their liability; see article 1(1) and article 6(2).

(12) Article 1 of the *1976 Convention* provides that:

1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.
2. The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship".

In United States, under the *Limitation of Shipowners' Liability Act of 1851*, sections 183(a) and 186, only an owner or charterer of a ship may file a complaint for limitation of liability arising from its loss or other casualty. Section 183(a) provides that:

"The liability of the owner of any ship, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such ship, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not... exceed the amount or value of the interest of such owner in such ship, and her freight then pending."

Though the 1976 Convention is aimed primarily at owners of “seagoing” ships, member states may cover owners of inland ships or may vary the liability of ships of less than 300 tons.⁽¹³⁾

In Kuwait, article 91 of the *Kuwait Maritime Law*, entitles the shipowner to limit liability.⁽¹⁴⁾ No definitive description of shipowner for purposes of limitation of liability is provided in the *Law*. However, in Kuwait law the term “shipowner” seems to have a narrow meaning. It is limited to those with legal title of ownership.⁽¹⁵⁾

= Section 186 provides:

"The charterer of any ship, in case he shall man, victual, and navigate such ship at his own expense, or by his own procurement, shall be deemed the owner of such ship within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of ships..."

Thus, in order to avail himself of the rights granted by the statutes, a shipowner must bring himself within the terms set forth in the statutes. In *American Car & Foundry Co. v. Brassert*, 289 U.S. 261, 53 S.Ct. 618, 77 L.Ed. 1162 (1933), it was held that the manufacturer of a ship was not entitled to limitation of liability because he did not have any control of the ship at the time of the accident even though he was the vendor of the ship and still retained the title to the ship for purpose of securing the purchase price of the ship. Since the manufacturer had no control over the operation of the ship whatsoever and was not responsible for any acts of the master and crew members on board the ship, he was not able to confer upon himself an owner's status for the sake of seeking limitation of liability. In addition, the court noted that manufacture of ships was not a maritime activity intended to be protected by the limitation of liability regime; see also *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 644 (9th Cir. 1961) (only owner or charterer may petition for limitation); *Shamrock Towing Co. v. Fichter Steel Corp.*, 155 F.2d 69, 72 (2d Cir. 1946) (non-owner cannot avail himself of limitation).

(13) Article 15/2 (a),(b) of the 1976 Convention. *The Baltic and International Maritime Conference ("BIMCO")* construed that “inland waterways” included the Great Lakes and the St. Lawrence River. See *Official Records of the International Conference on the Limitation of Liability for Maritime Claims 1976*, p. 120.

(14) Article 91/1 of the *Kuwait Maritime Law* provides that:

"يجوز لمالك السفينة أن يحدد مسؤوليته..."

(Free translation) The owner of the ship may limit his liability..".

(15) In U.S. the term “owner” has been given a fairly broad definition by the courts. The Supreme Court has declared in *Flink v. Paladini*, 279 U.S. 59, 1929 AMC 327 (1929) that the limitation of liability provision should be given a broad construction so as to achieve Congress' purpose of inducing and encouraging investment in shipping:

The purpose of the [limitation of liability] Act of Congress was “to encourage investment by exempting the investor from loss in excess of the fund he is willing to risk in the enterprise”. We are of the opinion that the words of the Acts must be taken in a broad and popular sense in order not to defeat the manifest intent”.

1.1.2. Charterers

Under the *1976 Convention*, it has been generally acknowledged that all types of charterers are covered,⁽¹⁶⁾ although no definition for the term “charterer” can be found.⁽¹⁷⁾ The international consensus, however, was not reached without debate. In the process of drafting the convention, there were attempts to exclude certain types of charterers’ liabilities. It was suggested that although charterers might incur the same kind of liabilities as shipowners, there existed certain liabilities that may be incurred only by charterers as cargo owners but not by charterers qua carrier.⁽¹⁸⁾ Liabilities similar to or the same as those of shipowners’ might arise when charterers are acting in the capacity of carriers. But, a charterer may also be the owner of a defective or inherently dangerous cargo causing injury to third parties. Obviously, the protection of cargo owners’ interests is not the purpose of the limitation system. Therefore, it seems that charterers as cargo owners should not be given the benefit of limited liability. In other words, if charterers should be protected at all, the protection should only be available to those acting in the capacity of carriers. However, such a proposal was not accepted by the international convention regime for the reason that it would be cumbersome for the courts around the world to determine whether the liability was incurred by a particular charterer in his capacity as a cargo owner or a carrier on a case-by-case basis for purposes

(16) Geoffrey Brice, *The Scope of the Limitation Action*, in N. Gaskell, ed., *The Limitation of Shipowners’ Liability: The New Law*, 1986, at p. 29.

In United States, a charterer must prove that he is an actual charter, and by virtue thereof he actually “mans, victuals and navigates” the ship before he may avail himself of the *Limitation of Liability Act*, section 186 (see *Diamond S.S. Transp. Co. v. People Savings Bank and Trust Co.*, 152 F.2d 916, 921 (4th Cir. 1945), cert. denied, 328 U.S. 853 (1946). In other words, under the *Limitation of Liability Act* “so-called bareboat or demise charterers may petition for limitation, but time charterers or voyage charterers may not”(see *In re Barracuda Tanker Corp. (The Torrey Canyon)*, 281 F. Supp. 228 (S.D.N.Y. 1968), rev’d on other grounds, 409 F.2d 1013 (2d Cir. 1969).

(17) Article I (2) of the *1976 Convention* provides: “[t]he term shipowner shall mean the owner, charterer, manager and operator of a sea-going ship”. It should be brought to attention that the United States delegation to the Convention attempted to narrow the definition of “charterer” by preceding it with “demise”. But the Convention did not accept it partly due to an apparent misunderstanding of the word “demise”. See Harold K. Watson, “The 1976 IMCO Limitation Convention: A Comparative View”, 15 *Houston Law Review* 249,258 (1978) and accompanying note 23.

(18) Harold K. Watson, *ibid.*

of applying limitation benefit.⁽¹⁹⁾ As a matter of fact, distinction between various charterers' liabilities incurred in their different roles is unnecessary when the pattern of insurance coverage for charterer's liabilities is examined. Same coverage is generally available to charterers no matter whether they are likely to incur liability as carriers or cargo owners.⁽²⁰⁾

Under *Kuwait Maritime Law*, the charterer may limit his liability.⁽²¹⁾ In the case of a bareboat charter,⁽²²⁾ the charterer will be entitled to limitation as a consequence of his status as "owner *pro tempore*". Independently of this, time and voyage charterers are also entitled to limit liability. This would apply, for example, if an entire cargo were lost in an accident and the bills of lading imposed liability on the time charterer as carrier. The charterer's right to limit liability is also important in relation to claims arising between owner and charterer. A time charterer can therefore limit his liability in connection with damage inflicted on a time-chartered ship.⁽²³⁾

(19) Ibid.

(20) See also, Palmer, "Liability 'As Owner of the Ship Named Herein': Coverage of Liability of Non-Owners", 43 Tul. L. Rev. 481, 482-84 (1973).

(21) Article 97/1 of the *Kuwait Maritime Law*, provides:

"تسري أحكام تحديد المسؤولية على... المستأجر...".

(Free translation) The provisions of the limitation of liability shall apply to the charterer."

(22) Article 149 of the *Kuwait Maritime Law* defines the bareboat charterparty as:

١. تأجير السفينة غير مجهزة عقد يلتزم بمقتضاه المالك بتمكين المستأجر من الانتفاع بسفينة معينة دون أن يجهزها بمؤن أو لوازم أو بحارة.

٢. وتكون للمستأجر إدارة السفينة من الناحيتين الملاحية والتجارية".

(Free translation)

1. A bareboat charter is a contract whereby the owner undertakes to enable the charterer to benefit from a specified ship without supplying her with supplies or crew.
2. The charterer shall have the right to manage the ship from the navigational or commercial aspects".

(23) See *CMA CGM SA v. Classica Shipping Ltd* [2004] 1 Lloyd's Rep 460, where the English Court of Appeal rejected the argument that the protection of limitation under the 1976 *Convention* was only available to such charterers acting in a manner equivalent to that of a shipowner, and held a charterer was entitled to limit his liability, not only when acting *qua* shipowner, but also when acting in his normal capacity as a charterer, e.g. when defending a claim by shipowner for breach of charterparty. In the case in question fire and explosions aboard a vessel resulted in its abandonment. Ship and cargo were subsequently salvaged and the vessel required substantial repairs. The shipowners sought compensation claiming that the fire and explosions resulted from the shipment of dangerous cargo in breach of the

1.1.3. Managers or Operators

Another person entitled to the right of limitation under *1976 Convention* and *Kuwait Maritime Law* is the manager or operator. The *Kuwait Maritime Law* does not define the term “manager” or “operator”.⁽²⁴⁾ However, the legislative history of *1976 Convention* may be of some help in determining the scope of managers or operators. Originally, the Working Group of the International Subcommittee of the CMI proposed to extend limitation to “any person rendering service in direct connection with the navigation, management, or the loading, stowing or discharging of the ship”, in addition to the owner, charterer, manager and operator.⁽²⁵⁾ This would include persons such as pilots, shoreside personnel coordinating berthing operations, those rendering services in direct connection with navigation, stevedores engaged in the loading and unloading process.⁽²⁶⁾ However, such a proposal was rejected in the final draft of the *1976 Convention*. It has been suggested that it would be a reasonable inference that the *Convention* did not intend to include persons merely rendering services of loading and unloading a ship.⁽²⁷⁾ Thus, stevedores are likely to be excluded from the province of limited liability when they are providing loading and unloading services.

= charterparty, whereupon the charterers sought to limit their liability under the *1976 Convention*. The Court of Appeal saw no objection to a charterer invoking the *Convention* limitation against a claim by his shipowner, provided that the particular claim fell within those listed in Art 2. In the words of Longmore LJ, ‘a charterer’s ability to limit will depend upon the type of claim that is brought against him rather than the capacity in which he was acting when his liability was incurred’ (at p. 469). In the event the court held that liability to indemnify for cargo claims discharged by the shipowners fell within article 2, whereas claims in respect of loss of or damage to the ship did not. The latter were accordingly not subject to limitation.

(24) Article 97(1) of the *Kuwait Maritime Law*, merely provides that:

”تسري أحكام تحديد المسؤولية على مجهز السفينة غير المالك... والمجهز المدير...”

(25) (Free translation) The provisions of the limitation of liability shall apply to the operator of the ship other than the owner and managing operator.”.

1972 CMI Documentation 14, at p. 42.

(26) Harold K. Watson, *supra*, note 17, at p. 257.

(27) *Ibid*.

In other words, managers or operators are only those who directly contributed to the management or operation of the ship.⁽²⁸⁾

1.1.4. Master and Members of the Crew

Shipowners can be held vicariously liable for the negligence of master and crew members within the scope of their employment. At the same time, master and crew members can also be held liable for their own negligence. While shipowners may be entitled to limitation of liability in spite of vicarious liability, there is no consensus on whether master and crew members are likewise entitled to limitation of liability in their own right. However, it has been pointed out the necessity and importance for master and crew members to be entitled to limitation in their own right. Since shipowners are vicariously liable for the negligence of master and crew members within the scope of their employment, liability on the part of master and crew members would more often than not fall upon the shoulder of shipowners. If the right to limitation is available to one but not to the other, an anomaly that shipowner's vicarious liability is limitable and not limitable at the same time would be inevitable because there are plenty of ways to shift liability from master and crew members to shipowners. For instance, master

(28) An example of the manager or operator is a company which does not charter or own the ship, but arranges management and operation of the ship. In the English case of the *Ert Stefanie* [1989] I Lloyd's Rep. 349, the ship *Ert Stefanie* was owned by a Panamanian company whose sole proprietor was Mr Sorensen. It was managed by Sorek Shipping Limited which was also under the control of Mr Sorensen. Mr Baker, a director of Sorek, ran the technical side of the business, which included responsibility for the maintenance of the ship. The Charterers' cargo claim succeeded against the Shipowners in arbitration because the ship was unseaworthy. One issue raised in the Court of Appeal, was whether the Shipowners could limit liability under section 503 of the Merchant Shipping Act 1894. The Shipowners argued that the 'alter ego' of the managers and shipowners was Mr Sorensen alone and since he was not to blame, there was no actual fault or privity. The faults of Mr Baker had to do with functions which, if the company had been larger, would have fallen to employees at a comparatively subordinate level such as that of a marine superintendent. *Held* (Court of Appeal): that the constitution of Sorek entrusted the management and control of the company to the board of directors *en bloc*. The board of directors of a corporation might not always comprise the whole of the group of people who together constitute the governing mind and will of the corporation. Nevertheless any director must necessarily be a member of the group unless he is dis-seized of responsibility. Mr Baker was a director and was responsible for operational matters. He was in charge of the aspects of the company's business which went wrong. He was personally at fault and the shipowners had no right to limit liability.

and crew members may have negotiated an indemnification clause or insurance coverage in their contract with the shipowner so that they can seek indemnity from the shipowner or insurer when they are sued directly and held liable for damages arising out of their negligence.⁽²⁹⁾ The consequence of the exception of master and members of the crew from the limitation regime would defeat the very purpose of the limitation system of protecting the interests of shipowners and promoting the shipping industry. Even though the goal of the limitation system is not to protect such individuals as master and crew members, “it may be desirable to include them in order to ensure protection of the parties for whom protection was designed”.⁽³⁰⁾

The *1976 Convention* has addressed the issue of the application of limitation of liability to master and members of the crew and Article 1(4)⁽³¹⁾ provides that a relevant claim against a person for whose act, neglect or default the shipowner is responsible gives that person a right to limit liability. This is an important issue as a claim against a master, deck officer or engineer of a ship, when such person is acting in the course of his duty, should give rise to a right to limit liability in the same way as the right lies for the shipowner or operator. The effect of this provision in the *1976 Convention* seems to be, therefore, that an employee (servant) or agent, or any other person for whose “act, neglect or default the shipowner or salvor is responsible”, may have the benefit of the limitation provisions.⁽³²⁾

(29) Donald C. Greenman, “Limitation of Liability: A Critical Analysis of United States Law In An International Setting”, 57 *Tulane Law Review* 1139,1159 (1983).

(30) *Ibid.*, at p. 1160.

(31) Article 1(4) of the *1976 Convention* provides that:

If any claims set out in Article 2 are made against *any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself to the limitation of liability* provided for in this Convention. (emphasis added).

(32) In U.S. law, section 187 of the *Limitation of Liability Act* provides that master and crew members are not entitled to limitation of liability as follows:

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the *master, officers, or seamen*, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any ship, or on account of any negligence, fraud, or other malversation of *such master, officers or seamen*, respectively, nor to lessen or take away any responsibility to which any *master or seaman* of any ship may by law be liable, notwithstanding such *master or seaman* may be an owner or part owner of the ship.” (emphasis added)

The difficulty that ensues from this provision is very unique to the American judicial system. In the United States, limitation of liability is within the exclusive jurisdiction of federal admiralty courts. Therefore, as excluded from the limitation regime, master and crew

Kuwait Maritime Law extends the limitation to any person for whom the shipowner, manager, operator or the charterer is vicariously liable. All persons who can be said to be members of the crew are entitled to limit their liability. However, for employees to obtain the protection they must have been acting at the material time in the course of their employment.⁽³³⁾ Where the master or a member of the crew is at the same time the owner, co-owner,⁽³⁴⁾ charterer, manager or operator of a ship, the provisions of article 97/2 of the *Kuwait Maritime Law* shall only apply where such occurrence resulted from fault committed by the master or as the case may be, the member of the crew in his capacity as master or as the case may be, as a member of the crew”.⁽³⁵⁾ The words “in his capacity” were clearly intended to prevent a master-owner from limiting his liability qua owner when the loss or damage occurs owing to his fault in respect of some matter for which the owners are normally responsible. The crucial question for determining the claimant’s right to limitation in the case of master-owner will be whether at the time of occurrence giving

= members are liable to be sued in any court. For example, in *In re Brent Towing, Inc.*, 414 F.Supp. 131 (N.D. Fla. 1975), the claimants in the limitation proceeding sought the dissolution of a monition preventing them from seeking relief against the master, officers and crew members in a separate action. The court held that claimants could proceed against those parties and they did not need to seek a leave of the federal district court entertaining the limitation action in order to proceed with their separate action. Closely following the letters of law, the court held that Section 187 of the *Limitation of Liability Act* preserved any remedy against the master and crew members.

(33) Article 97(1) of the *Kuwait Maritime Law* provides that:

”تسري أحكام تحديد المسؤولية على... الربان والبحارة، كما تسري على التابعين الآخرين للمالك أو المجهز أو المستأجر أو المجهز المدير وذلك فيما يتعلق بتأدية وظائفهم وبذات الشروط التي تسري على المالك، على أن لا تتجاوز مسؤولية المالك ومسؤولية الأشخاص المذكورين عن الحادث الواحد الحدود المبينة في المادة ٩٤.”

(Free translation) the provisions of limitation of liability shall apply to the... master, members of the crew and other servants of the owner, operator of the ship, charterer, managing operator acting in the course of their employment, in the same way as they apply to an owner himself: Provided that the total limits of liability of the owner and all such other persons arising on a distinct occasion shall not exceed the amounts determined in accordance with article 94.”

See also Sarkho Y., *supra*, note 3, at p.182.

(34) *Coldwell v. Horsfall v. West Country Yacht Charter Ltd.*: *The Annie Hay* [1968] P 341; [1968] 1 Lloyd’s Rep 141.

(35) Article 97/2 of the *Kuwait Maritime Law*. See *The Alastor* [1981] 1 Lloyd’s Rep 581 (CA).

rise to the claim he was wearing owner's bowler or master's cap. In the latter event only will he be entitled to limit his liability.⁽³⁶⁾

1.1.5. Salvors

One of the more important changes introduced by the 1976 Convention is the extension of the benefit of limitation to salvors. Article 1(3) extends the right of limitation to salvors, who constitute 'any person rendering services in direct connection with salvage operations'. Servants or agents of the salvors, for whose acts or omissions the salvor would otherwise be liable, may similarly claim the benefit of limitation if they are sued personally.⁽³⁷⁾ When a salvor is not operating from a salvage

(36) See the English case of *The Annie Hay* [1968] 1 Lloyds Rep. 141 Due to negligent navigation by a ship's master, who also happened to be the owner of the ship, a collision occurred. It was held that the master was entitled to limit his liability because under the provisions of the *Merchant Shipping Act 1958*, s. 3(2) the right to limit is allowed in respect of an act or omission of any person in his capacity as the master or a member of the crew and the relevant wording of the relevant section of the *Act* was broad enough in scope to cover a ship's master who happens also to be the owner of the ship. In *The Hans Hoth* [1952] 2 Lloyd's Rep. 341, a collision took place in broad daylight and in fine weather between a British ship and the ship *Hans Hoth* at the entrance to Dover harbour. Blame was attributed to the *Hans Hoth* in that the master should have followed the signals which were given by the port authority. The particular issue in the case was that the master was part owner of the ship and the point for decision was whether he was personally at fault in regard to the limiting of his own liability. *Held*: that in the special circumstances, the master's duty did not extend to the knowledge of the local signals and that he could thus limit his liability. *Held*: that the master was entitled to limit his liability.

(37) Article 1(4). Prior to 1976 Convention salvors were entitled, along with other shipowners, to limit their liability in respect of claims arising from the navigation or management of their ships, but not for claims resulting from acts or omission of persons either not on board the tug or not involved in its management See for example the case of the *Tojo Maru* [1972] AC 242, where the court decided that the salvor was not entitled to limit liability for the negligence of the salvor's diver who -after he had left the ship- shot a bolt into the hull of the salvaged ship. In that case, a salvage services were given to the ship *Tojo Maru* and in the course of the performance of the services a diver employed by the salvage company whilst performing underwater work fired a bolt through the shell plating into a tank which had not in fact been gas-freed. There was a resulting explosion and £330,000-worth of additional damage was done to the *Tojo Maru*. There were resulting cross-actions, one by the owners of the *Tojo Maru* against the salvors alleging negligence and seeking damages, and the other a claim for salvage reward by the salvors against the owners of the *Tojo Maru*. The salvors attempted to limit their liability in accordance with the provisions of the *Merchant Shipping (Liability of Shipowners and Others) Act 1958*, which incorporated the provisions of the 1957 *International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships*.

ship, he is treated as if he were operating from a ship of 1,500 tons.⁽³⁸⁾

Salvors around the world will benefit not only from the *1976 Convention* where applicable, but also from the incorporation of the Convention provision in salvage contracts. For example, the widely used Lloyd's Form of Lloyd's Salvage Agreement (LOF 80) contains a clause providing that salvors can limit liability under the *1976 Convention*⁽³⁹⁾. Thus, salvors' right to limitation can be invoked not only by operation of law, but also by the terms of a contract.

In *Kuwait Maritime Law*, salvors are excluded from the province of limited liability. Salvor is defined as "any person rendering services in direct connection with salvage operations"⁽⁴⁰⁾. Salvage operations shall include, according to *1976 Convention* "raising, removal, destruction or the rendering harmless" of a ship which is "sunk, wrecked, stranded or abandoned";⁽⁴¹⁾ and in respect of the "removal, destruction or the rendering harmless of the cargo" of such a ship.⁽⁴²⁾ So, under Kuwait law a salvor may not claim the benefit of limitation in rendering services directly connected with salvage operations. However, "raising, removal, destruction or the rendering harmless..." of a ship which is "sunk, wrecked, stranded or abandoned" are very wide words when applied to salvage as there are many operations which involve aspects which come within their meaning. It seems that the court would have to read them down and may even have to decide if some of the salvage operations can be severable from other parts of the operations. For instance, a salvor will often, in ordinary salvage operations, raise and remove a ship which

= Held: that the negligent act of the diver was not an act of a person in the course of the management of the ship and that therefore the salvors could not limit their liability.

(38) Article 6 (4) of the *1976 Convention*.

(39) Clause 21 of Lloyd's Form of Salvage Agreement (LOF 80).

(40) Article 1(3) of the *1976 Convention*.

(41) The International Association of Ports and Harbors argued that limitation should not be allowed to a contractor who deals with a wreck which has already been accepted as a total loss. This is because such work is not a matter of rescue but a task of an engineering nature entailing obligations which are regulated common law. See, *Official Records, supra*, note 13, at p. 168.

(42) Article 2(1)(d),(e) and (f) of the *1976 Convention*.

has been sunk, wrecked or stranded. This is the whole purpose of salvage operations in many cases. Further, a salvor is encouraged under article 14 of the *1989 Salvage Convention* to protect and preserve the marine environment, and is entitled to a salvage claim for it even if there is no success so the fact that a ship has been sunk, wrecked, stranded or abandoned should be no bar to salvage operations giving a right to a limitation decree.

1.1.6. Insurers

Kuwait Maritime Law does not include insurers as an independent category to be protected by the limited liability regime. Therefore, they are not entitled under *Kuwait Maritime Law* to limit their liability.

Insurers' right to limitation has, however, become increasingly important, particularly so because in some jurisdictions, P & I insurance policies allow a claimant to bring a direct action against P & I insurers.⁽⁴³⁾ The rationale is that the claimant stands in the shoes of the insured shipowner and thus can be indemnified by the P & I insurer in the same way as the insured. In turn, most P & I policies provide limitation to the insurer when the insured may limit.⁽⁴⁴⁾ Basically, direct actions against the insurer are intended to provide the claimant rapid and full compensation. If direct actions are allowed, the claimant can recover from the insurer up to the amount of the policy as well as recover from the shipowner the limitation

(43) For instance, in the United Kingdom, a direct action can be brought in certain circumstances by a third party against the insurer by virtue of the *Third Parties (Rights Against Insurers) Act 1930*.

(44) R.C. Seward, *The Insurance Viewpoint*, in N. Gaskell, ed., *Limitation of Shipowners' Liability: The New Law*, 1986, at p. 178 (1986). There exist two kinds of P & I policies: a liability policy and an indemnity policy. "The insured shipowner's liability to the victim arises at the time of the accident. The liability policy covers such liability. But the rights of the victim against the insurer do not arise at that time. The indemnity policy provides that 'the insurer indemnifies the insured against all sums which the insured becomes legally liable to pay.' Thus, the indemnity policy covers the insured's liability to the victim only if such liability has been ascertained by the court or by agreement." *Ibid.*, at 177.

amount. Once the insurer pays all of the insurance to the claimant, the shipowner cannot be indemnified by his insurer.

Targeted exactly at problems with respect to direct actions, the *1976 Convention* expressly provides that insurers are entitled to limitation of liability. Under the *1976 Convention*, the P & I insurer can limit to the same extent⁽⁴⁵⁾ as the insured shipowner.⁽⁴⁶⁾ This provision is intended only for those nations where direct action against the P & I insurer is allowed and only if the insured could limit. The P & I insurer cannot limit, if the insured is refused limitation. On the other hand, at the conference, the *Baltic and International Maritime Conference* ("*BIMCO*") suggested allowing the P & I insurer to limit even when the insured was refused limitation.⁽⁴⁷⁾ This argument stems from article 7 (8) of the *International Convention on Civil Liability for Oil Pollution Damage, 1969* (the "*CLC 1969*"), which provides that the insurer may limit even when the damage resulted from the wilful misconduct of the insured shipowner. However, the BIMCO proposal was rejected because the P & I insurer could protect itself by setting a limit in the policy in case the insured will be refused limitation.⁽⁴⁸⁾ In general, the delegates to the conference felt that claimants should not be allowed to circumvent the shipowner's limitation by claiming unlimited liability against insurers of the shipowner. In most contracting states, there is no such possibility, because if the insurer is directly sued he can limit as his insured can.

1.1.7. Independent Contractors

It is unclear whether the *1976 Convention* or the *Kuwait Maritime Law* extends the right to limit to independent contractors such as stevedores, ship repairers, shipyard managers and pilots. Some com-

(45) It is not clear from the words of article 1(6) of *1976 Convention* as to whether the words 'to the same extent' implied that the insurer may not be entitled to limit his liability and may have to pay the claim of the suing third party in full if the assured had been denied his own right to limit. See Christopher Hill, *Maritime Law*, 5th ed (1998), at p. 396.

(46) Article 1 (6) of the *1976 Convention*.

(47) Official Records, *supra*, note 13, at p. 118.

(48) *Ibid*.

mentators argue that independent contractors may limit provided that the shipowner is responsible for their act.⁽⁴⁹⁾ However, it seems that the drafters of the *1976 Convention* intended to deny limitation to independent contractors. This conclusion is supported by the fact that the proposal of the Polish and Irish delegates to allow limitation to “any person rendering services in direct connection with the navigation or management of the ship” was rejected at the conference. The Polish and Irish delegates specifically aimed at ship repairers and compulsory pilots.⁽⁵⁰⁾ Such proposal was rejected on the basis that limitation should not be granted to all kinds of people who rendered services to the ship.⁽⁵¹⁾

1.2. Ships

Not all ships are within the protection of the limitation system. The definition of ship for purposes of limitation is another important aspect to consider before the right to limitation may be determined.

Under the *1976 Conventions*, article 1(2), the right to limit exists in respect of claims relating to seagoing ships.⁽⁵²⁾ Seagoing ships, however,

(49) Griggs & Williams, *Limitation of Liability for Maritime Claims*, (1986), at pp.7-8; Greenman *supra*, note 29, at pp. 1160-1161; J.F.Wilson, *Carriage of Goods by Sea*, 6th ed (2008) at p. 278. According to these commentators, “if the term ‘responsible’ is strictly construed, independent contractors must show that they are ‘servants’ of the shipowner in order to limit. Broadly construed, they merely have to show that the shipowner is liable for their involvement.” See Griggs and Williams, *supra*, at 8.

(50) Official Records, *supra* note 13, at p. 219. It may be argued that a pilot should be given the right to limit his liability regardless of his being a compulsory pilot or not. The pilot does not supersede the master in the command of a ship, but acts as his adviser. Still he is an adviser whose advice must be followed because he has the knowledge of the locality of the port area. Since the pilot has the principal control, he will be liable to the ship and to its owners for failure to exercise reasonable care, skill and prudence. Having regard to the substantial damage which might follow a pilot’s negligent navigation, it is but desirable that he should be allowed to limit his liability.

(51) *Ibid.* at 220. Watson also denies limitation for stevedores; see Harold K. Watson, *supra*, note 17, at p. 257.

(52) Article 1 (2) of the *1976 Convention* provides as follows:
The term “shipowner” shall mean the owner, charterer, manager and operator of a *sea-going ship*.” (emphasis added).

are not defined. The *Convention* has left the contracting States the option to exclude the application of the Convention to any ships of less than 300 tons and to regulate by specific provisions of national law the system of limitation of liability to be applied to such ships.⁽⁵³⁾

If a State acceded to or ratified either Convention, its seagoing ships are therefore subject to the provisions of the Convention. However, there is no restriction for a State to extend the application of the Convention to its non-seagoing ships if it so wishes.⁽⁵⁴⁾

In addition to the above-mentioned options with respect to the applicability of the Convention, the 1976 Convention contains express provisions on non-applicability of the Convention under certain circumstances. Article 15(4) provides that the *Convention* shall not apply to ships constructed for or adapted to, and engaged in, drilling.⁽⁵⁵⁾ The *1976 Convention* also expressly excludes its application to air-cushion vehicles and floating platforms constructed for special purposes, such as

= In the International Conference on the *Convention*, there has been a fierce debate over the Swedish delegate's proposal to delete the word "seagoing" in order to apply the *Convention* to all ships. The Swedish delegate feared that the *Convention* would not apply to a seagoing ship it was used on inland waterways, with the result that, if an accident occurred while it was on inland waterways, the shipowner could not limit. However, the proposal was rejected because: (a) the *Convention* was concerned with maritime navigation; applying the *Convention* to inland navigation was an unduly extension; and (b) the Convention applies to seagoing ships wherever they might be. *Official Records, supra*, note 13, at pp. 221,225

(53) Article 15 (2) (b) of the *1976 Conventions*.

(54) In U.K., *The Merchant Shipping Act 1995*, Schedule 7 Part II para 2, makes it clear that the *1976 Convention* is continue to be applied to any ship whether seagoing or not. It provides that "the right to limit liability under the Convention shall apply in relation to any ship whether seagoing or not, and the definition of "shipowner" shall be construed accordingly". The *Act* goes further in Part II para 12, to include in the term "ship" "any structure, whether completed or in the course of completion, launched and intended for use in navigation as a ship or part of a ship". See Christopher Hill, *Maritime Law, supra*, note 45, at pp. 377-378; J.F. Wilson, *supra*, note 49, at p.279.

(55) The *Convention* does not apply to drilling ships only while they are engaged in drilling operations, thus, a ship en route to the place where drilling operations are being carried out is subject to the Convention; see *Official Records, supra*, note13, at p. 358.

exploring or exploiting the natural resources of the sea-bed or the subsoil of the sea-bed.⁽⁵⁶⁾

Under *Kuwait Maritime Law* for the purpose of limitation, “ship” means “any structure which is seaworthy by itself and which is normally working or prepared to be working in maritime navigation....”⁽⁵⁷⁾ The definition includes ships under construction from the moment they are capable of floating. Air-cushion vehicles and floating platforms constructed for natural resource utilization are allowed to limit their liability. Further, ships constructed for, or adapted to, and engaged in drilling are governed by the *Kuwait Maritime Law*⁽⁵⁸⁾

(56) Article 15(4) of the 1976 Convention provides as follows:

5. This Convention shall not apply to:

(a) air-cushion vehicles;

(b) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof”.

(57) Article 1 of the *Kuwait Maritime Law* provides that:

"السفينة... هي كل منشأة صالحة بذاتها للملاحة تعمل عادة أو تكون معدة للعمل في الملاحة البحرية ولو لم تستهدف الربح."

(58) In the United States, in its original form, the *Limitation of Liability Act of 1851* did not apply to “any canal boat, barge, or lighter, or to any ship of any description whatsoever, used in rivers or inland navigation” (see Act of Mar.3,1851,ch.43,s7,9 Stat.635). But, as early as in 1886, the *Limitation Act* was extended to apply to “all seagoing ships, and also to all ships used on lakes or rivers or inland navigation, including canal boats, barges and lighters” (see 46 U.S.C. 188). In addition to this provision, U.S. courts have relied upon the general definition of ship as contained in other statutory language which defines “ship” as to include “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water” (1 U.S.C. 188). Under this definition, U.S. courts have generally found most watercraft, as long as they are considered as ships for purposes of general maritime law, are also ships within the meaning of the *Limitation of Liability Act* (see *In re Sedco, Inc. (Sedco 135)*, 543 F.Supp. 561 (S.D. Tex. 1982). See also, *Complaint of Three Boys Houseboat Vacations U.S.A.. Ltd.*, 878 F.2d 1096,921 F.2d 775 (9th Cir. 1990), where the court held that the *Limitation Act* applies only to casualties occurring on waters considered "navigable" for purposes of admiralty jurisdiction).

The key to consider a particular piece of watercraft as ship is the phrase "capable of being used as a means of transportation on water". In other words, if a structure is being used to transport things or persons from place to place on water, it would probably be regarded as ship. In contrast, if a structure is floating on water but permanently fixed to the seabed, it may not be considered as such. The design of a structure, its purpose and its function at the time of the incident are some of the factors to be considered (see *Dresser Industries, Inc. v. Fidelity & Cas. Co.*, 580, 1978 AMC 2588 (5th Cir. 1978) where the court held that a jack-up drilling rig with its legs resting on the floor of the ocean was not a ship. Because of its permanent location, it was a fixed object).

Warships and state owned ships allocated to public service are immune from arrest and enforce proceedings.⁽⁵⁹⁾ Nonetheless, claims for damages can be pursued against the state owned ships.⁽⁶⁰⁾ This raises the question of whether the authorities are entitled to invoke the limitation rules. An argument against such entitlement is that the state will generally be able to cover the liability in full, making the limitation rules unnecessary. Nevertheless, it has been clear for some time that liability for damage caused by warships etc. can be limited. However, warships should not be considered as merchant ships in all respects. The minimum liability applicable in the case of certain state owned ships is higher than

= Only "seagoing ships", however, are covered by the special tonnage limitation applicable in the United States to claims for bodily injury and death. Sec. 183(f) of the *Limitation of Liability Act* specifically defines the scope of seagoing ships as follows:
As used in subsection (b), (c), (d) and (e) of this section and in section 183(b) of this Appendix, the term "seagoing ship" shall not include pleasure yachts, tugs, towboats, towing ships, tank ships, fishing ships or their tenders, self-propelled lighters, nondescript self-propelled ships, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled ships, even though the same may be seagoing ships within the meaning of such term used in section 188 of this title".

(59) Article 1 of the *Kuwait Maritime Law* provides that:

"لا تسري أحكام قانون التجارة البحرية المرافق على:
١. السفن الحربية.

٢. السفن المملوكة للحكومة أو أحد الأشخاص العامة والتي تخصصها لمرفق عام غير تجاري".
(Free translation) The provision of the (Maritime Law) shall not apply to:

- 1- Warships.
- 2- State owned ships allocated to public service"

Article 2 of the *Kuwait Maritime Law* provides that:

"لا يجوز أن تكون محلا للحجز أو الضبط أو الاحتجاز السفن التي تستأجرها الحكومة أو أحد الأشخاص العامة... متى كانت مخصصة لمرفق عام غير تجاري...".

(60) Article 3 of the *Kuwait Maritime Law* provides that:

"استثناء من أحكام الفقرتين من المادة الأولى لذوي الشأن أن يرفعوا على الحكومة أو الأشخاص العامة - دون أن يكون لها التمسك بحصانتها - الدعاوى التالية:

- أ) الدعاوى الناشئة عن التصادم البحري وغيره من حوادث الملاحة البحرية.
- ب) الدعاوى الناشئة عن أعمال المساعدة والانقاذ وعن الخسارات البحرية المشتركة.
- ج) الدعاوى الناشئة عن الاصلاحات أو التوريدات وغيرها من العقود المتعلقة بالسفينة.

(Free translation) Exempted from the provisions of paragraphs one and two of Article One hereof are those concerned who may file the following law-suits against the government or public bodies, which shall have no right to exercise their relevant immunity:

1. Actions arising from maritime collision and other navigation accidents.
2. Actions arising from the acts of aid, rescues and joint salvage losses.
3. Actions arising from repairs or supplies and others of the ship pertinent contracts."

for other ships. Moreover, the limitation rules do not apply at all if damage results from a type of action that is peculiar to a warship. For example, it is not considered reasonable for the state to be able to limit liability if a ship is torpedoed by accident.

2. CLAIMS SUBJECT TO LIMITATION

Having identified the persons who may claim a right to limit liability, it is now appropriate to consider the types of claims which may give rise to such right. The following claims are subject to limitation:

- i) Claims regarding loss of life or personal injury and loss of or damage to property.
- ii) Claims for damage to harbor works, basins and waterways and aids to navigation.
- iii) Claims regarding losses resulting from delay.
- iv) Claims regarding losses resulting from infringement of rights.
- v) Claims regarding costs of wreck removal.

2.1. Death or Personal Injury and Property Claims

2.1.1. Kuwait Maritime Law

Article 91 of the *Kuwait Maritime Law* provides that:

“The shipowner is entitled to limit his liability in respect of claims arising from

- a) loss of life of, or personal injury⁽⁶¹⁾ to, any person being carried in the ship, and loss of, or damage to, any property on board the ship.
- b) loss of life of, or personal injury to, any other person, whether on land or on sea, loss of or damage to any other property or infringement of any rights caused by the fault of any person whether on board the ship or not for whose fault the owner is responsible provided that the fault occurs in the navigation or the management of the ship or in the loading, carriage or discharge of

(61) In the United States, claims for personal death and injury have been consistently held subject to limitation by U.S. courts (see *Craig v. Continental Insurance Co.*, 141 U.S. 638, 12 S. Ct. 97, 35 L. Ed. 886 (1891) limitation was allowed of liability for the death of an engineer who had gone on board a stranded ship and was assisting in salvage operations and in the *Albert Dumois* 177 U.S. 240, 28 S. Ct. 664, 44 L. Ed. 751 (1900), limitation of liability for loss of life of passengers was granted).

its cargo or in the embarkation, carriage or disembarkation of its passengers...”.⁽⁶²⁾

For the purposes of legal analysis, it is more convenient to distinguish between claims occurring on board the ship and claims occurring elsewhere.

i. Claims occurring on board

Under article 91/1(1) of the *Kuwait Maritime Law*, personal claims which may be limited cover claims brought by crew members, passengers, visitors, persons working onboard other than crew. It also probably includes a person who falls from the gangway while boarding or leaving a ship.⁽⁶³⁾ The words “on board the ship” have been held not to include the acts of a salvor’s diver who negligently fired a bolt into a tanker, so as to deprive the salvor of the right to limit.⁽⁶⁴⁾

Although article 91 provides that claims for loss of life or personal injury may be subject to limitation proceedings, article 93 has a very wide exception to this, so that in most cases claims by the master, by members of the crew, by any servants of the owner on board the ship or by

(62) Article 91/1(1), (2) of the *Kuwait Maritime Law* provides that:

- أ. يجوز لمالك السفينة أن يحدد مسؤوليته بالقدر المبين في المادة 94 فيما يتعلق بالالتزامات الناشئة عن أحد الأسباب الآتية:
 - أ. وفاة أو إصابة أي شخص يوجد على ظهر السفينة بقصد نقله وكذلك ضياع أو تلف أي مال يوجد على السفينة.
 - ب. وفاة أو إصابة أي شخص آخر على البر أو في البحر وكذلك ضياع أو تلف أي مال آخر أو اعتداء على أي حق إذا كان الضرر ناشئاً عن فعل أو خطأ أي شخص يكون المالك مسئولاً عنه سواء وجد هذا الشخص على ظهر السفينة أو لم يوجد. وفي هذه الحالة الأخيرة يجب أن يكون الفعل أو الخطأ متعلقاً بالملاحة أو بإدارة السفينة أو بشحن البضائع أو نقلها أو تفريغها أو بصعود المسافرين أو نقلهم أو نزولهم...

It should be noticed here that the right to limit liability must be seen as a privilege and consequently there is reason to interpret the rules strictly (as opposed to allowing limitation in situation which are similar to those expressly listed). This does not mean, however, that only liability for the immediate and direct claims mentioned above can be limited. Both recourse actions and claims for consequential damages may be subject to limitation; see the *Explanatory Note to the Draft of the Kuwait Maritime Law*, article 91.

(63) *Moore v. Metcalf Motor Coaster Ltd* [1958] 2 Lloyd's Rep 179. The phrase "carried in the ship" appeared in the *Merchant Shipping Act 1894 s 503(1)(c)*.

(64) *The Tojo Maru* [1972] AC 242 (HL); [1969] 3 WLR 903.

servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives or dependents, cannot be limited.

Similarly, an owner may limit his liability for any loss or damage to “any goods, merchandise or other things whatsoever” on board the ship.⁽⁶⁵⁾

Difficulty with respect of claims for loss or damage to cargo may arise in deciding whether a particular cargo claim is subject to limitation of liability. Because under *Kuwait Maritime Law* cargo claims are not only subject to the general limitation of liability regime, but also subject to the limitation regime with respect to carriage of goods by sea (i.e. per package or kilo limitation). Per package limitation and limitation amounts under the regime of limitation of liability are very different from each other. The per package limitation under carriage of goods by sea provides a minimum (rather than a maximum) level of responsibility, which carriers may not reduce by contract, in respect of claims for loss or damage to cargo carried under a contract of carriage not a charter-party.⁽⁶⁶⁾ The general limitation of liability regime sets a ceiling on the amount of damages recoverable by claimants against the ship for damage to cargo.⁽⁶⁷⁾ The *Maritime law* tries to solve the relation between the two sets of provisions by providing that where the cargo carried under contract of carriage then the per package limitation under carriage of goods by sea shall apply.⁽⁶⁸⁾

(65) Under U.S. law claims for loss of or damage to property are in general subject to limitation of liability; see *Butler v. Boston & S.S.S. Co.*, 130 U.S. 527, 9 S.Ct. 612, 32 L.Ed. 1017 (1889); *Richardson v. Harmon*. 222 U.S. 96, 32 S.Ct. 27, 56 L.Ed. 110 (1911).

(66) See article 193 of the *Kuwait Maritime Law* which provides that:

"وفي جميع الأحوال لا يلزم الناقل بسبب الهلاك أو التلف الذي يلحق بالبضائع أو التأخير في تسليمها بمبلغ يزيد على مائتين وخمسين ديناراً عن كل طرد أو وحدة أو على سبعمائة وخمسين فلساً عن كل كيلوجرام من الوزن الإجمالي للبضائع أي التحديدين أكبر...".

"(Free translation) The liability of the carrier for loss or damage to the goods shall be limited to a sum not exceeding two hundred and fifty Dinars per package or unit or seven hundred and fifty fils per kilogram per gross weight of the goods, whichever is the higher limit".

(67) See article 94 of the *Kuwait Maritime Law*.

(68) See article 91/1(2) of the *Kuwait Maritime Law*.

ii. Claims occurring elsewhere than on board the offending ship

According to article 91/1(2) of the *Kuwait Maritime Law* the owner of a ship may limit his liability in respect of claims arising from loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the fault of any person whether on board the ship or not for whose fault the owner is responsible provided that the fault 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. A careful reading of the preceding sentence will reveal why it is necessary to distinguish between incidents occurring on board the limiting ship and incidents occurring elsewhere. In the former case, the owner may be entitled to limit his liability whatever the nature of the act or omission giving rise to liability, and whether the person primarily at fault was on board the ship or elsewhere. But in the latter case, if the act or omission was otherwise than in the navigation or management of the ship, in the loading, carriage, or discharge of its cargo, or in the embarkation, carriage, or disembarkation of its passengers, the owner cannot limit his liability unless the person primarily at fault was on board his ship.

It is usually a straightforward matter to decide whether or not the act or omission was in the loading, carriage, or discharge of cargo or the embarkation, carriage, or disembarkation of passengers, but the meaning of "navigation or management of the ship" has given rise to some difficulty. There have been no court decisions -as far as the writer aware- concerning the meaning of the word "navigation" in the context of article 91/1(2) of the *Kuwait Maritime Law*. Therefore, it may be relevant to refer to cases decided in other jurisdictions, in particular United Kingdom jurisdiction, in order to clarify the meaning of "navigation". In English case of *The Ferro*⁽⁶⁹⁾ Sir Francis Jeune accepted the definition of "navigation" as "something affecting the safe sailing of the ship." Bailhache J., expressed a similar view in *Lord v. Newsum*⁽⁷⁰⁾ and held

(69) [1893] P. 38.

(70) [1920] 1 K.B. 846.

that "navigation" referred to the time when a ship was in motion, or being cast off, and the word consequently did not cover an error by the master whilst in port as to the route he should take to the port of discharge. In *The Warkworth*⁽⁷¹⁾ a collision occurred because the negligence of persons ashore, employed by the owners to superintend the ship's machinery, resulted in the failure of the steam steering gear to act at the critical moment. The granting of a limitation decree was opposed on the ground, *inter alia*, that "improper navigation" referred only to something done in directing the progress of the ship and did *not* apply to a mishap arising from the negligence of the owner's servants ashore. In rejecting this argument, Lord Brett, Master of the Rolls, said:

"To say that the statute does not apply to negligence on shore is true if it has no effect on the navigation on the water. You must assume that the negligence on shore had its effect on the water, and had an effect on the ship. The negligence in the present case consisted in putting a screw wrongly or carelessly into the steam steering gear.... It was the act of a person for whose care and skill the owner was responsible, and it has been held that the negligence was the *causa causans* of the collision.... Although the negligence occurred before the ship started, its effect was continuous and operated while the ship was on her voyage.... The case falls within this proposition—all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action of the ship by which the damage is done is due to the negligence of any person for whom the owner is responsible, is comprised within the statute."⁽⁷²⁾

The phrase "management of the ship" is also ambiguous and equivocal. Despite many court decisions on the matter, the authorities are not in a very satisfactory condition and it is still very hard to define the meaning of the words clearly and accurately.

(71) 9 P.D. 145 (C.A. 1884).

(72) *Ibid.*, at p. 147.



It is, however, generally admitted that if the negligent act or default relates solely to care of cargo, and no part of the ship's apparatus is concerned, the management of the ship is not in question, and the shipowner is therefore liable. On the other hand, if the act or default has reference to some part of the ship unconnected with the cargo, it is conceded that the management of the ship is clearly in issue, and the shipowner is exempt. Thus in *Gosse Millard v. Canadian Government Merchant Marine*⁽⁷³⁾, a ship which had been loaded with a cargo of tin plate, had to proceed to Liverpool for repairs. While the repairs were executed, the ship's hatches were left open for purposes of convenience. Rain water got into the holds and damaged the tin plates. The damage could have been avoided had tarpaulins been used to cover the hatches.

The House of Lords, having reversed the decision of the Court of Appeal (Greer L.J., dissenting), held that this was not negligence 'in the management of the ship', against which the carrier protected. The dissenting opinion of Greer L.J., in the Court of Appeal appears to explain the law on the point fairly clear, *viz*:

"These words (management of the ship) refers to matters affecting the ship as a ship, for instance, its safety, which might incidentally affect the cargo, such as improper opening sea connections, so as to prejudice the ship's safety while also damaging the cargo...The words,... if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo,...In my judgment, the reasonable interpretation...is that there is a paramount duty imposed to safety carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act of neglect, which can be described as either (1) negligence in caring for the safety of the cargo; (2) failure to take care to prevent damage to the ship or some part of the ship; or (3) failure in

(73) (1929) A.C.223.



the management of some operation connected with the movement or stability of the ship, or otherwise for the ship's purpose. "(74)

The judgment of Greer L.J., was endorsed by Lord Sumner in the House of Lords and the distinction propounded by Sir Jeune in *The Glenochil* was supported by Lord Hailsham, when he said:(75)

“My Lords, in my judgment, the principle laid down in *The Glenochil* and accepted by the Supreme Court of the United States in cases arising under the American Harter Act, and affirmed and applied by the Court of Appeal in *The Hourani* Case under the present English Statute, is the correct one to apply. Necessarily, there may be cases on the borderline, depending upon their own particular facts; but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of ship indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not be very great difficulty in arriving at a proper conclusion.”

In *The Tojo Maru*.(76) The tanker *Tojo Maru* had been substantially damaged by an explosion that occurred when a diver employed by

(74) (1928) I K.B. 717 at pp. 741-744. See *The Athelvector* (1945) 78 Lloyd's Rep. 529 Three sea valves had been negligently left open to the tanker *Athelvector* after cargo discharge. On the next voyage the ship sailed to Lagos and, as a result of the negligence, approximately 60 tons of petrol escaped from the ship and a fire occurred. In turn, as a result of the fire, there were explosions which caused damage to trawlers and other shoreside property. People were killed or died ashore or were less seriously injured. The owners of the *Athelvector* sought to limit their liability, arguing that the losses and damages were directly caused by the improper navigation of the ship within the meaning of section 503 of the Merchant Shipping Act 1894. They argued, alternatively, that if such losses were not caused by negligent navigation they were caused by improper management of the ship within the meaning of the *Act*. The counter-argument was that the losses were caused by the improper management of the cargo. *Held*: that (1) liability could not be limited because the failure to close the valves could certainly not be deemed improper navigation. (2) Under the provisions of the Merchant Shipping Act 1900, where appliances are fitted which cover both the management of the ship and the management of the cargo, the party applying to limit liability may be entitled to regard the appliances as being ship-managing rather than 'cargo-managing'. They were therefore entitled to limit liability.

(75) (1929) A.C. 223, at p. 233.

(76) [1969] 2 Lloyd's L.R. 193 (C.A.), appeal allowed, [1971] 1 Lloyd's L.R. 341 (H.L.).

salvors, having descended from the latter's tug, negligently fired a bolt through plating into a tank that had not been gas-freed. The salvors contended that the diver's act was one in the "management" of the tug, because the bolt gun was an appliance of the tug, and "management of the ship" included management of its appliances. This argument was rejected, upon the ground that the bolt gun was not an "appliance of the ship," in the sense that it was not used in the running of the ship. Thus Lord Reid said:

“If some part of its equipment, fixed or moveable, is being used for the conduct of the ship's affairs or in the running of the ship, then... that part is being used in the management of the ship. No doubt the bolt gun was part of the tug's equipment. But it seems to me to involve a non sequitur to say... that the tug was there for the purposes of salvage, the gun was being used for the purpose of salvage, therefore the gun was being used in the running or management of the tug.”⁽⁷⁷⁾

The alternative argument, that the diver's act fell within the category of “any other act or omission of any person on board the ship,” also failed, on the ground that the act was not that of a person “on board the ship.” At first instance it was held that “on board” meant “physically on board,” and in the Court of Appeal it was conceded that these words had this meaning.⁽⁷⁸⁾ However, one member of the House of Lords thought this was too narrow an interpretation and would not allow an owner to limit his liability in a case where, for example, the act or omission was that of a member of the crew over the side in a cradle.⁽⁷⁹⁾

2.1.2. 1976 Convention

Article 2/1(a) of the *1976 Convention* allows the shipowner to limit his liability against personal injury claims or property claims occurring

(77) The *Tojo Maru* [1971] 1 Lloyd's L.R. 341, 348 (H.L.).

(78) The *Tojo Maru* [1969] 2 Lloyd's L.R. 193 (C.A.) (first instance).

(79) [1971] 1 Lloyd's L.R. at 359 (per Viscount Dilhorne).

on board or in direct connection with the operation of the ship.⁽⁸⁰⁾ For example, a ‘shipowner may limit his liability for damage occurring when where a ship is actually ‘out of navigation’ in dock, e.g. undergoing repairs, and somebody for whom the shipowner is responsible commits a negligent act in connection with the operation of the ship, which is quite likely, that person perhaps not even being on board the ship himself such as a bunker supplier.

A mere breach of contract is not “in direct connection with the operation” of the ship. If, for example, in breach of his contract with a terminal owner, the tanker owner does not call at the terminal as promised so that the terminal owner sustained consequential financial loss, the tanker owner may not limit. The term "operation" is close to "navigation or management," and relates to physical use rather than to purely commercial use. Suppose that ship A sank, and later ship B collided with the wreck of ship A. Because physical operation of ship A has ceased once it sank, the owner of ship A cannot limit against claims of ship B.

It is generally understood that under the *1976 Convention*, claims, whether grounded in torts or contracts, are limitable. The phrase “whatever the basis of liability may be”⁽⁸¹⁾ has been submitted to have

(80) Longmore LJ in *CMA v Classica* ([2004] 1 Lloyd’s Rep 460 at p. 467) interpreted Art 2(1)(a) of the *1975 Convention* to include three types of claims being subject to limitation: first, loss of life or personal injury; second, loss of or damage to property occurring on board; and, third, loss of or damage to property ‘occurring... in direct connection with the operation of the ship’; he suggested that the most obvious reason for including this third category of claim was to cater for cases of collision with another ship. Loss of or damage to that other ship (or its cargo) would not be loss of or damage to property ‘occurring on board’, but it would be loss of or damage to property ‘occurring in direct connection with the operation of the ship’. Thomas J in *The Aegean Sea* ([1998] 2 Lloyd’s Rep 39) further opined, although he did not have to decide the following points, that the loss of bunkers being on the ship is within the wording of article 2(1)(a), as it happens in direct connection with the operation of the ship. As regards freight, if the freight was earned, it would be due and owing in full without limitation of liability. If it was not earned but due, then the owners of the ship should have a claim in damages. Since the loss of freight, however, was consequential to the loss of the ship (the subject of the damage), the judge thought it was not within the meaning of article 2(1)(a).

(81) Article 2(2) of the *1976 Convention*.

not only reinforced the former practice of subjecting claims resulting from both negligence and breach of contracts to limitation under the *1957 Convention*, but also embraced the application of limitation to claims on the ground of absolute liability imposed irrespective of fault.⁽⁸²⁾

2.2. Claims for Damage to Harbor Works, Basins and Waterways and Aids to Navigation

Limitation under *1976 Convention* is extended against damage to harbor works, basins, waterways and aids to navigation.⁽⁸³⁾ At the conference, shipping interests argued that if damage to harbor works were excluded from the Convention, such damage would have to be insured on an unlimited liability basis, resulting in lowering the overall *Convention* limits. On the other hand, harbor interests preferred imposing unlimited liability for damage to harbor works and bridges,⁽⁸⁴⁾ on the basis that harbor works are indispensable to navigation. As a compromise, France proposed allowing claims for damage to harbor works to have priority over other property claims; however, this proposal was rejected because other property claimants would be at a disadvantage.⁽⁸⁵⁾ The Convention finally allowed limitation against claims for damage to harbor works, but compromised by allowing member states to give such claims priority over other property claims.⁽⁸⁶⁾

Under Kuwait law, there is no provision in the *Kuwait Maritime Law* which entitles the shipowner to limit its liability with respect of

(82) See generally Geoffrey Brice, *supra*, note 16.

(83) Article 2 (1)(a). The term “aids to navigation” was inserted upon the request of the International Association of Lighthouse Authorities. Lighthouses and buoys are included in the term. See, *Official Records, supra*, note 13, at 112,479.

(84) *Ibid.*, at pp. 147,235.

(85) *Ibid.*, at pp.75-76,215. To abolish the disadvantage of other property claimants, East Germany proposed dividing the fund for property claims into two parts, one for claims for damage to harbor works, and one for other property claims (*ibid.* at p. 234). Although damage to harbor works generally occurred to the exclusion of any other type of damage, such proposal was not accepted. On the other hand, West Germany suggested establishing a convention which would cover damage to public works of all kind. *Ibid.*

(86) Article 6(3) of the *1976 Convention*. Member states may not grant priority to such claims over personal injury claims. New Zealand law confers unlimited liability for damage to harbor works, basins and waterways. See *Official Records, supra*, note 13, at p.108.

obligations relating to claims for damage to harbour works, basins and waterways and aids to navigation.⁽⁸⁷⁾

2.3. Delay Damage

Under *1976 Convention*, article 2(1) provides that limitation of liability is available to claims with respect to loss resulting from delay in the carriage by sea of cargo, passengers or their luggage. It is submitted that this provision envisages the kind of situations, e.g., where the shipowner carried some perishable goods and delayed in arrival so that cargo owners suffered from both damage to the perishable cargo itself and financial loss due to market fluctuations. While a shipowner/carrier may not be exonerated from his liability for the delay under the law of carriage of goods by sea, this provision entitles him to limit his liability.⁽⁸⁸⁾ It is worth noting that the delay damages covered under this provision are those not only arising out of carriage of cargo but also from carriage of passengers and their luggage.⁽⁸⁹⁾

Under *Kuwait Maritime Law* there is no statutory language expressly providing for limitation in claims for delay damages.

2.4. Claims for loss from Infringement of Rights

Both the *1976 Convention*⁽⁹⁰⁾ and the *Kuwait Maritime Law*⁽⁹¹⁾ provide for limitation of liability as applicable to a type of claims known

(87) In the United States, by virtue of the *Rivers and Harbors Act of 1899* (33 U.S.C. 403-415), claims for damage to government works cannot be limited. For example, in *U.S. v. Federal Barge Lines, Inc.*, F.2d 993, 1978 AMC 2308 (8th Cir. 1978), the right to limitation was denied with respect to claims for damage to governmental works. It is of interest to note, however, that the "government" means only the U.S. federal government. U.S. jurisprudence shows that claims brought by state or local governments for such damages are subject to the global limitation under the *Limitation of Liability Act of 1851*; see *In re Harbor Towing Corp.*, 335 F.Supp. 1150, 1972 AMC 597 (D. Md. 1971); *The Central States*, 9 F.Supp. 934, 1935 AMC 461 (E.D.N.Y. 1935).

(88) At the conference, shipping interests argued that if unlimited liability were imposed for loss resulting from delay, the cargo owner whose cargo had been delayed would be in a better position than the owner of cargo which had been destroyed (see *Official Records*, *supra*, note 13, at p. 113).

(89) For example, if a passenger has to go ashore before reaching his intended destination because the ship has grounded, his claim for lodging, meals etc. will be subject to limitation.

(90) Article 2(1)(c) of the 1976 Convention provides:
the following claims, whatever the basis of liability may be, shall be subject to limitation of liability
c. claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations."

(91) Article 91/1(2) of the *Kuwait Maritime Law* provides:
"يجوز لمالك السفينة أن يحدد مسؤوليته أيا كان نوعها...الناشئة عن... اعتداء على أي حق..."
(Free translation) The owner of the ship may limit its liability in respect of (claims arising from)...infringement of any right"

as claims for loss resulting from infringement of rights. However, the true meaning of the terminology of infringement of rights is not really clear. The *1976 Convention* has certainly done a better job than the *Kuwait Maritime Law* by phrasing such claims as resulting from “infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations”. Yet, still not very much can be understood by merely looking at the wording under the *1976 Convention*. It has been suggested that the loss resulting from infringement of rights is certainly not the following: (1) The expression “other loss” resulting from infringement of rights used in article 2(1)(c) of the *1976 Convention* indicates that such loss does not refer to the classes of loss as referred to in the preceding paragraph of the same article, i.e., damage to property, consequential loss, delay damages, etc. (2) Claims resulting from infringement of rights cannot be referred to those for wreck removal that might be brought by harbor authorities, for the subsequent paragraph of the same Article specifically provides with respect to that type of claims. (3) Claims must not be contractual as clearly stated in article 2(1)(c) of the *1976 Convention*⁽⁹²⁾ It has been suggested that situations anticipated and covered under this provision will probably be those in which, e.g., damages occurred as a result of the ship’s blocking of the entrance to a harbor, or a sunk ship’s interference with the right to engage in off-shore exploration of minerals in an area under lease.⁽⁹³⁾

2.5. Claims for Costs of Wreck Removal

Claims for costs for wreck removal are often brought by governments.⁽⁹⁴⁾ A government is usually most concerned with wreck removal because it has the responsibility to make sure that public waterways are safe for navigation. There is no consensus whether this

(92) For example, unlimited liability is imposed for claims by the seller or lessor of containers or radar equipments for purchase price, rent or damage, because such claims are founded on a contract between the seller or less or and the shipowner.

(93) See Harold K. Watson, *supra*, note 17, at p. 265. Geoffrey Brice, *supra*, note 16, at p. 24.

(94) See for example *Canadian Navigable Waters Protection Act, 1985*, ss. 16 and 18.

kind of claims should be subject to limitation of liability.⁽⁹⁵⁾ On the one hand, it is argued that government's claims for wreck removal costs should not be subject to limitation because any expenses for purposes of wreck removal for the public good will be incurred out of the public purse. In order to maintain the integrity of public resources, the wrongdoer should be held fully liable for the consequence of his wrong doing and the government should be able to fully recoup the costs incurred for wreck removal.⁽⁹⁶⁾

The other side of the argument is, however, more concerned with the well-being of the shipping industry. It is pointed out that costs for wreck removal usually would run prohibitively high and liability without limit would subject shipowners to extreme financial stress in particular and frustrate the shipping industry in general. Only the government is in the best position to absorb such costs. Given the overall purpose of the limitation system, claims for wreck removal costs should be subject to limitation. In addition, from the perspective of insurance, limitation of liability in such claims may also be well justified.⁽⁹⁷⁾

Article 2/1(d) of the *1976 Convention* allows for limited liability for claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.⁽⁹⁸⁾

(95) In United Kingdom, the *Merchant Shipping Act 1995* excluded claims in respect of raising, removal or destruction of a ship which is sunk, wrecked, stranded or abandoned since the British Government never in fact brought that particular paragraph into statutory effect.

(96) See generally, William Tetley, "Emerging Issues in Maritime Law: A Symposium: Article: Special Legislative Rights and Wreck Removal", 55 La. L. Rev. 861 (1995).

(97) Greenman, *supra*, not 29, at p. 1170.

(98) At the conference, shipping interests opposed exclusion of wreck removal claims from limitation on the basis that insurance for unlimited liability would not be available. According to shipping interests, a harbor authority seldom gives unlimited recovery to shipowners when a pilot damages a ship; the loss is usually borne by hull insurers. Thus, if a ship is damaged when approaching a harbor, it is inequitable that the port authority - which most benefits from having the fairways clear - bears no responsibility for clearing them. (31) On the other hand, claimants' interests (e.g., the U.S. and Canada) have supported imposing unlimited liability upon wreck removal done by public authorities for the safety of navigation or for public health (see Official Records, *supra*, note 13, at pp. 113, 233, 148, 154. The Convention compromised these conflicting interests by allowing member state to exclude application of the Convention regarding wreck removal Claims.

However, article 2(2) of the *1976 Convention* limits the scope of the application of the limitation system to wreck removal claims by providing that wreck removal claims shall not be subject to limitation if they relate to any remuneration under a contract with the person liable.¹⁰⁸ This provision is an exception to the Convention's application to claims on "whatever the basis of the liability" provided in article 2(1) with regard to claims subject to limitation of liability.⁽⁹⁹⁾

Under Kuwait law, the public authorities have the power to remove obstructions to navigable waters caused by wreck, sinking, lying ashore, and grounding of ships, and any expenses incurred are recoverable.⁽¹⁰⁰⁾ In contrast to *1976 Convention* where these claims are subject to limitation, *Kuwait Maritime Law* has retained unlimited liability for wreck removal.⁽¹⁰¹⁾

(99) Doubt may be cast upon what is exactly meant by article 2(2) of the Convention. Yet, it may be inferred that with respect to wreck removal claims, on the one hand, those grounded in torts or arising pursuant to statutory requirements may be subject to limitation of liability, and, on the other hand, those arising out of contractual right/duty may not, e.g., if the shipowner hired a contractor to remove wrecks, the shipowner cannot limit against removal claims made by his contractor.

(100) Costs so incurred give rise to a maritime lien that ranks above all other claims; see *Kuwait Maritime Law*, articles 47/1 and 56.

(101) In United States, the law has been influenced by conflicting policies of the *Limitation of Liability Act of 1851* and the *Rivera and Harbors Act of 1899* (the "*Rivers Act*") (33 U.S.C. 403-415). The policy of the *Limitation Act* is to allow limitation against wreck removal claims, whereas the policy of the *Rivers Act* is to impose the cost of removal upon the owner of the wreck. From 1899 to 1967, the *Limitation Act* prevailed; the owner of the wreck could limit liability by abandoning his wreck (33 U.S.C. section 409).

On the other hand, since 1967, the policy of the *Rivers Act* has prevailed. The turning point was the case of *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 19 L.Ed. 2d 407, 88 S.Ct. 379 (1967) in which the U.S. Supreme Court held that under section 15 of the *Wreck Act*, the United States government could recover the full costs incurred for wreck removal from the shipowner whose negligence was the cause of the sinking of the ship and the negligent owner of the wreck could not merely abandon the sunk ship without being held liable *in personam*. Although the court did not squarely address the shipowner's right to limit its liability under the *Limitation Act* or the relationship between the *Limitation Act* and the *Wreck Act*, the decision of the *Wyandotte* was interpreted as having effectively ousted any application of the *Limitation of Liability Act* in claims for wreck removal costs; see *United States v. Blaha*, 1989 AMC 642 (W.D.N.Y. 1989), the court held that the *Limitation Act* did not limit liability under the *Wreck Act*. Therefore, the defendant who knowingly purchased the wreck for one dollar was not able to limit himself against the government's 5.5 million dollar claims for raising the wreck under the *Wreck Act*.

3. CLAIMS EXCEPTED FROM LIMITATION

Not all maritime liabilities of the shipowner, charterer, manager, operator and salvor are subject to the limited liability. The following claims are specifically excluded from limitation:⁽¹⁰²⁾

- i) Claims for salvage rewards and contribution in general Average.
- ii) Oil pollution and nuclear damage claims.
- iii) Servants claims.

3.1. Claims for Salvage Rewards and Contribution in General Average

The *1976 Convention* denies limitation against salvage and general average claims.⁽¹⁰³⁾ One of the reasons for the exclusion is because of the

Even having admitted the applicability of the *Limitation of Liability Act*, some courts developed a line of reasoning that since wreck owners had a statutory duty to remove the wreck, failure to exercise such a duty was always a fault or negligence within the privity or knowledge of the owner. Therefore, the right to limitation would invariably be lost because the owner could not possibly prove an absence of privity or knowledge of such failure. For example, in *In re Chinese Maritime Trust, Ltd.*, 361 F.Supp. 1175 (S.D.N.Y. 1972) the court held that the owner's obligation and liability to remove the wreck was within its privity or knowledge and no limitation could be allowed. See also, e.g., *Hebert v. Exxon Corp.*, 659 F.Supp. 130 (E.D. La. 1987), held that failure of the shipowner to comply with the obligations under the Wreck Act precluded it from limiting its liability for damages resulting from such failure.

- (102) The *1976 Convention*, article 3 excepts the following claims from the application of the convention:
- (a) claims for salvage or contribution in general average;
 - (b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force;
 - (c) claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;
 - (d) claims against the shipowner of a nuclear ship for nuclear damage;
 - (e) claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6.
- (103) Opponents of denying limitation to salvage and general average claims argue that when these claims arise in conjunction with other claims, the aggregate claims may exceed the limitation found. Furthermore, they argue, "because salvage and general average are unpredictable events for which insurance must be procured," limitation should be allowed against such claims (see Harold K. Watson, *supra*, note 17, at p. 267). However, because the size of these claims by their nature is not substantial, there is no need for limitation. The *1996 Protocol*, article 2, amending article 3(a) of the *1976 Convention*, also excludes claims for special compensation under article 14 of the *Salvage Convention 1989*.

self-limiting nature of such claims which makes the limitation regime unnecessary. Under the marine salvage regime, salvage rewards are limited to the *res*⁽¹⁰⁴⁾ salvaged. Similarly, claims for general average contributions are limited to the value of the ship salvaged through the general average acts, i.e., general average sacrifice or general average expenditure.⁽¹⁰⁵⁾

Another reason for the exclusion is to preserve the integrity of the rules for procedural matters in such claims. For example, claims for salvage rewards are customarily handled through arbitration in accordance with the well-known Lloyd's Open Form 1980 (LOF 80).⁽¹⁰⁶⁾ It is submitted that the expeditious proceedings of arbitration enjoyed by claims for salvage rewards should not be restrained or frustrated by limitation actions.⁽¹⁰⁷⁾ Similarly, general average contributions are usually adjusted in accordance with the rules of general average adjustment by established services of adjusters.

The exclusion of limitation applies only to direct claims for a salvage award or for a contribution in general average and would not apply, for example, where cargo interests have paid their salvage or general average contributions, but subsequently have tried to claim back what they have paid from the shipowner on the basis that the ship has been found unseaworthy and there has been a fundamental breach of the contract of carriage by the shipowner. This would, so far as the cargo interests' claim against the shipowners is concerned, be a claim in damages and would be subject to limitation.⁽¹⁰⁸⁾ This is illustrated by the English case of *Breydon Merchant*⁽¹⁰⁹⁾ A ship (*Breydon Merchant*) suffered a serious fire in her engine room and salvors were engaged. The shipowners sought a decree limiting their liability under the 1976 Convention. Cargo owners argued that the ship was unseaworthy and their claim for damages, including a salvage contribution, was not subject to limitation because salvage claims were excluded by Article 3.

(104) For general discussion on marine salvage, see Geoffrey Brice, "Maritime Law of Salvage", 4th ed, 2003.

(105) See generally, D.J. Wilson, "The Law of General Average and the York-Antwerp Rules", 12th ed., 1997.

(106) The major clauses contained in Lloyd's Open Form are usually incorporated in similar contractual arrangements for salvage operations even if LOF80 is not actually in use.

(107) Greenman, *supra*, note 29, at p. 1174.

(108) See Christopher Hill, *supra*, note 45, at pp. 399

(109) [1992] 1 Lloyd's Rep. 373.

Held: that cargo owners' claim was not one for salvage but for damages for breach of contract.

One element in the assessment of damages would be cargo's contribution to salvage. Article 2 of the *Convention* provides that shipowners can limit their liability for various claims, including loss of or damage to property occurring on board, and consequential loss 'whatever the basis of liability may be'. It did not matter whether shipowners' liability arose in contract, tort or by statute. The shipowners could limit

Under *Kuwait Maritime Law*, salvage claims, other than claims resulting from the salvor's negligence, are excluded.⁽¹¹⁰⁾ Remuneration for such claims is based on contractual stipulation.⁽¹¹¹⁾

(110) Article 93/2 of the *Kuwait Maritime Law* provides that:

"لا يجوز تحديد المسؤولية... (عن) الالتزامات الناشئة عن المساعدة والانقاذ أو المساهمة في الخسائر المشتركة."

(Free translation) The liability may not be limited with respect of obligations arising from assistance and salvage or contribution in general average."

Under U.S. law, claims arising out of voluntary salvage are subject to limitation of liability; see *The San Pedro* 233 U.S. 365 (1912). In contrast, claims arising out of contractual salvage are likely to be held not limitable, the reason being that contracts for salvage operations may be considered as personal contracts. Under the doctrine of personal contracts, claims arising out of the contracts binding on parties personally are not subject to limitation of liability. For example, in *Great Lakes Towing Co. v. Mills Transp. Co.*, 155 F. II (6th Cir. 1907), the salvage claims were treated as arising out of a personal contract. As a result, limitation of liability was denied. Although the U.S. court decisions in this respect hinged upon the distinction between voluntary salvage and contractual salvage when determining whether the right to limitation should be granted, there has not been any case addressing squarely the differences between the two (see Rae M. Crowe, "Kinds of Losses Subject to Limitation: the 'Personal Contract' Doctrine", 53 Tulane Law Review 1087, 1103 (1979)). Therefore, difficulty may arise as to the definition of a particular salvage as contractual or voluntary. As a practical matter, the line between the two is often blurred. A voluntary salvage may well be involved with salvage agreements.

With respect to claims for general average contributions, although there has been no significant litigation, U.S. jurisprudence does indicate that such claims are not subject to limitation of liability (see. Rae M. Crowe, "Kinds of Losses Subject to Limitation: the 'Personal Contract' Doctrine", 53 Tulane Law Review 1087, 1103 (1979)). In *The Rapid Transit*, 52 F. 320 (D.Wash. 1892), a ship laden with lime and other cargo suffered damage by fire. The city authorities scuttled the ship to extinguish the flames. Although the lime cargo was destroyed, it was the only method of preventing a total loss of the ship and other cargo. After a failure to sustain their original claims for the full value of the lime cargo based on a breach of contract of affreightment, the owner of the lime cargo claimed to recover their losses upon a basis of general average. The district court allowed the owner of the lime cargo to recover contribution in general average without limits.

(111) *Kuwait Maritime Law*, article 240.

Claims for contribution in general average are likewise excluded⁽¹¹²⁾, since such claims are addressed by a specialized regime.⁽¹¹³⁾ General average has a different liability basis. All those interests that benefit from the intentional sacrifice or expenditure have to contribute proportionately to those that suffer the loss. In a sense, the contribution is a contingent expense of the carriage for ship and cargo owner alike; however, a claim in damages - as distinct from the contribution - against the negligent shipowner for causing the loss leading to a general average contribution is not necessarily excluded from this class of claims (e.g., where the carrier provides an unseaworthy ship).

3.2. Oil Pollution and Nuclear Damage Claims

It has long been recognized that separate limitation of liability regimes other than the general limitation system need be established in certain claims involving oil pollution or nuclear damage. This is because oil pollution or damage caused by carriage of nuclear materials would bring about enormous adverse impact on the environment. Therefore, the liability regimes for such damage should be more stringent.

3.2.1. Oil Pollution Damage Claims

The *Torrey Canyon* disaster⁽¹¹⁴⁾ in 1967 inspired establishment of the *International Convention on Civil Liability for Oil Pollution Damage, 1969* (the "CLC 1969").⁽¹¹⁵⁾ Thereafter, the *International Convention on the*

(112) See article 93/2 of the *Kuwait Maritime Law*.

(113) The rules of contribution in general average are set out in the *Kuwait Maritime Law*, articles 244-266.

(114) On 18 March 1967, owing to a navigational error, the *Torrey Canyon* struck Pollard's Rock in the between the Scilly Isles and Land's End, England. She was the first of the big supertankers, carrying a cargo of 120,000 tons of oil. The oil leaked from the ship (31,000,000 gallons) and spread along the sea between England and France, killing most of the marine life it touched along the whole of the south coast of Britain and the Normandy shores of France, and blighting the region for many years thereafter.

(115) 29 November 1969, 973 U.N.T.S.3 (entered into force 19 June 1975; as amended by *Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969*, 19 November 1976, 1225 U.N.T.S. 356; *Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969*, 25 May 1984, 23 I.L.M. 177; *Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969*, 27 November 1992, U.K.T.S. 1996 No. 87. The is accompanied by a second tier of

Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (the "*Fund Convention 1971*") was established to compensate victims not fully compensated under the *CLC1969*.

At the conference on the *1976 Convention*, the claimants' interests prevailed over the shipping and insurance lobbies with respect to oil pollution. First, the shipping interests wanted the *1976 Convention* to cover oil pollution and to provide a global system. However, the claimants' interests wanted oil pollution covered by a separate convention, which resulted in imposing upon shipowners an additional liability over the *1976 Convention* limits. Second, the original draft of the *1976 Convention* prepared by the CMI, representing the shipping interests, excluded only oil pollution damage claims arising in member states.⁽¹¹⁶⁾ But, the final language of the *Convention* (article 3 (b)), reflecting interests of the claimants, extended the exclusion in the country concerned whether or not *CLC 1969* had entered into force there.⁽¹¹⁷⁾ The claimants' interest further opposed the limits on pollution and hazardous cargo in the *1976 Convention*.⁽¹¹⁸⁾ Such efforts failed because of shipping opposition.

compensation through the International Convention on the Establishment of an *International Fund for Compensation for Oil Pollution Damage*, 18 December 1971, 1110 U.N.T.S. 57 [FUND 1971] (entered into force 16 October 1978; ceased to be in force 24 May 2002) as am. by protocols of 1976, 1984, and 1992: *Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of December 18 1971*, 19 November 1976, 16 I.L.M. 621; *Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971*, 25 May 1984, 23 I.L.M. 195; and *Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971*, 27 November 1992, 1996 A.T.5. 3.

(116) Official Records, *supra*, note 13, at p. 70, 321.

(117) Article 3 of the *1976 Convention* provides that the *Convention* shall not apply to the following:
(b) claims for oil pollution damage within the meaning of the international Convention on Civil Liability for Oil Pollution Damage, dated 29 November, 1969 or of any amendment or Protocol thereto, which is in force.

(118) *Ibid.*, at p. 251, 387. Conflicting interests exist between developed countries and developing countries. Because pollution is a by-product of industrialization, developed countries prefer broad definition of pollution. On the other hand, developing countries, concerned with rapid industrialization, have fewer resources for information and research on pollution, and are less concerned about pollution. Thus, developing countries tend to define pollution narrowly. See, Note, International Liability for Nuclear Pollution, 11 *Suffolk Transnational LJ* 75, 100 (1987);

The *CLC 1969* applies only to pollution damage caused by tankers. Assume that a cargo ship collides with a laden tanker causing oil pollution damage, the pollution damage claim against the cargo ship does not fall within the *CLC 1969*, and the owner of the cargo ship may limit under the *1976 Convention*⁽¹¹⁹⁾ If an accident results in both oil pollution damage claims and other claims, the shipowner becomes liable for two funds, one under the *CLC 1969*, and one under the *1976 Convention*. For example, because the *CLC 1969* does not apply to “damage caused by a fire resulting from an oil spill, or contamination damage caused by detritus from a fire,”⁽¹²⁰⁾ in the event of a spill followed by a fire, damage subject to the *CLC 1969* should be distinguished from other damage.

The *CLC 1969* require owners of tankers carrying more than 2,000 tons of oil to maintain insurance. The claimants may directly claim against the insurer.⁽¹²¹⁾ Although the insurer may limit liability, the direct action benefits victims. The *CLC 1969* limits per incident, as amended by the *1976 Protocol*, are 133 SDR (approximately \$190) per ton of the

(119) The *CLC 1969*, articles. 1(1),(3), and 3 (1). See, Brice, *supra* note 16, at 27-28. The difference between the *CLC 1969* and the *1976 Convention* are: (a) under the *CLC 1969*, limitation is barred by the shipowner’s actual fault or privity, whereas under the stricter *1976 Convention* standard (Article 4), limitation is denied only by his intent or recklessness; (b) the *CLC 1969* limits are determined by the net tonnage of the ship, whereas the *1976 Convention* limits (article 6 (5) are determined by the gross tonnage; (c) the *CLC 1969* (article 5(5),(8) allow the shipowner to make a claim against the fund for expense he reasonably incurred to prevent damage, whereas the *1976 Convention* does not. Thus, if both conventions apply to an accident, preventive measures taken by the owner to prevent oil pollution damage must be distinguished from measures taken to prevent other damage; and (d) “because the *1976 Convention* does not have jurisdictional rule over claims, the establishment of a limitation fund does not give the court in question exclusive jurisdiction, whereas under the *CLC 1969* (Article 9(3), the court in which the fund is constituted can exclusively determine distribution of the fund.” See Dykes., *Limitation and Oil Pollution*, in N. Gaskell, ed., *Limitation of Shipowners’ Liability: The New Law*, 1986, p.146 (1986).

(120) Harold K. Watson, *supra*, note 17, at pp. 268.

(121) The *CLC 1969*, Article 7 (1), (8).

ship's tonnage, or 14 million SDR (approximately \$20 million) whichever is lower.⁽¹²²⁾

3.2.2. Nuclear Damage Claims

Article 3 of the 1976 *Convention* excludes nuclear damage claims from limitation.⁽¹²³⁾ The original draft of the convention excluded "claims subject to any international convention or national law governing liability for nuclear damage."⁽¹²⁴⁾ However, shipping interests succeeded in restricting the exclusion to the cases when any convention or

(122) Ibid. Article 5(1), (9). *The 1984 CLC 1969 Protocol* (Article 6) raised the limits: (a) 3 million SDR (approximately \$5 million) for a ship not exceeding 5,000 ton; (b) for each additional ton, 420 SDR (approximately \$550) in addition to the amount mentioned in (a); and (c) the aggregate amount does not exceed 59.7 million SDR (approximately \$80 million). In the conference on the 1984 Protocol, the developing countries, Japan and the U.S.S.R. wanted the maximum liability not to exceed \$30 million. In contrast, the U.S. and France wanted very high limits. The U.K. and Sweden attempted to achieve a compromise, proposing the maximum liability on the level of \$50 million. See, Brodecki, *Compensation in the Light of the 1984 Protocols to revise the 1969 CLC and the 1971 Fund Conventions*, in *YEARBOOK MARITIME LAW* 1984 106 (1986).

(123) Article 3(c) and 3(d) of the 1976 *Convention* provides that the Convention shall not apply to the following:

(c) claims subject to any international convention or national legislation governing or prohibiting limitation of liability of nuclear damage;

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

There exist several international conventions on nuclear damage: the *Convention on the Liability of Operators of Nuclear Ships, 1962* (the "Nuclear Ships Convention"), the *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971* (the "Nuclear Material Convention"), the *Convention on Third Party Liability in the Field of Nuclear Energy, 1960* (the "Paris Convention") and the *Convention on Civil Liability for Nuclear Damage, 1963* (the "Vienna Convention").

Schemes of these conventions are similar. Rather than establishing state liability for nuclear accidents, they impose liability on the operator of the ship or installation. By requiring member states to enact legislation following criteria set forth in the conventions, they harmonize various domestic laws. The nuclear operator is strictly liable. Each convention provides for upper limits, leaving member state to set the exact limit. Member state must require nuclear operators within their jurisdictions to carry insurance; if the insurance is insufficient, states must ensure payment of claims up to the limit. (See *The Nuclear Ships Convention*, article 3(2); the *Paris Convention*, article 10(a); the *Supplementary Convention*, article 3(b) (ii); the *Vienna Convention*, article 7(1).

The nuclear conventions ensure redress for victims. The victims need not prove fault of the operator; there are no residential restrictions on access to courts; all liability is imposed on the operator; the victims may directly claim rather than through the state; and the liability of operators must be insured.

On the other hand, the defect of these conventions are that they do not apply to non-contracting states, thereby leaving many victims without a remedy, and that their limits are too low.

(124) 1972 *Comite Maritime Documentation* 44.

national law treats limitation against nuclear damage claims, either by providing limits or by prohibiting limitation. If the convention or national law does not do so, the *1976 Convention* applies to such claims.

Of the two kinds of nuclear damage possible - by nuclear ships or by nuclear cargo - the original draft of the *1976 Convention*, representing the shipping interests, excluded only claims against nuclear ships on the ground that damage by nuclear cargo was not so enormous that such damage could be covered by the *Convention*.⁽¹²⁵⁾ Of course, the purpose was to lessen additional financial burden of shipowners with respect to nuclear cargo. However, the overwhelming majority of delegates, bearing in mind environmental protection, decided to exclude both kinds of nuclear damage because: (a) damage by nuclear cargo on ordinary ships can be tremendous and should be fully compensated; (b) including damage by nuclear cargo within the coverage of the *Convention* would induce shipowners to carry nuclear cargo; and (c) nuclear cargo is not protected by ordinary insurance.⁽¹²⁶⁾

Under *Kuwait Maritime Law*, although there is no statutory language expressly excluding claims for oil pollution damage or claims for nuclear damage from limitation, nevertheless, these claims should not be subject to limitation because of the enormous oil pollution or nuclear damage.

3.3. Employments Claims

The *1976 Convention* expressly excludes limitation of liability with respect to contracts of employment. Article 3(e) provides that the rule of the *Convention* shall not apply to “claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependents or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or

(125) Official Records, *supra*, note 13, at p. 477.

(126) *Ibid.*, at pp. 252-253, 439,478. Assume that an ordinary ship collided with a nuclear ship or a ship carrying nuclear cargo, and that the collision resulted from the fault of the ordinary ship; the owner of the ordinary ship is unlimitedly liable. *Ibid.*

salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6.”

Such a provision is based upon the belief that the *Convention* regime should not interfere with the well-established compensation schemes under national laws of the contracting States governing the employment of seamen or any other maritime employees in the service of a ship.⁽¹²⁷⁾

In Kuwait, article 93(3) of the *Kuwait Maritime Law* provides that “(free translation) the limitation of liability may not be invoked... with respect of (claims) by the master, by members of the crew, by any servants of the owner on board the ship or by servants of the owner whose duties are connected with the ship, including the claims of their heirs.”⁽¹²⁸⁾

It is not entirely clear what types of claims relating to contracts of employment are envisaged under this provision of the *Kuwait Maritime Law*. Presumably, claims for wages may be excluded. Claims for maintenance and cure may also be excluded. Tort-based claims for personal injury and death are obviously not.⁽¹²⁹⁾ In this respect, an American case may provide some guidance. In *Murray v. New York Central Railroad*⁽¹³⁰⁾ the court held that the seaman’s claim for personal injury arising under the *Jones Act* was subject to limitation. But, in

(127) Harold K. Watson, *supra*, note 17, at pp. 269-70.

(128) Article 93/3 of the *Kuwait Maritime Law* provides that:

”لا يجوز تحديد المسؤولية... عن (حقوق الريان والبحارة وكل تابع اخر لمالك السفينة موجود عليها أو يتعلق عمله بخدمتها وكذلك حقوق ورتتهم وخلفائهم“.

Under U.S. law, the crews’ personal injury claims are subject to limitation, because they are general tort claims; whereas their claims for wages, maintenance and cure are not subject to limitation (see 46 U.S.C.A. Sec. 189 (West 1958 & Supp.1990); Tetley, The lack of uniformity and the very unfortunate state of maritime law in Canada, the United States, the United Kingdom and France, (1987) 2 LMCLQ 340,345.) While the 1985 Merchant Marine Subcommittee Draft impliedly allowed limitation against claims of crews for maintenance and cure, earned wage and accrued fringe benefit, the 1987 Merchant Marine Subcommittee Draft expressly denied limitation against such claims; see H.R. 277, Sec. 4; H.R. 3135, Sec. 5 (6), (7).

(129) Article 91/1(1) of the *Kuwait Maritime Law*.

(130) *Murray v. New York Central Railroad*, 171 ESupp. 80 (S.D.N.Y. 1959), *aff’d*, 287 E2d 152 (2d Cir.), *cert. denied*, 366 U.S. 945 (1961).

contrast, the claim for maintenance and cure was not because it related to a personal contract between the shipowner and the seaman. The court noted that the union contract in question contained specific clauses concerning the per diem rate of payment for maintenance and such a contract was an incident of the employment relation, "sufficiently contractual" to be within the scope of the personal contract doctrine.⁽¹³¹⁾ Accordingly, limitation of liability was not available. In another American case, *Brister v. A. WI., Inc.*⁽¹³²⁾ the court held that medical expenses, representing maintenance and cure, were not subject to limitation.

4. LOSS OF THE RIGHT TO LIMIT

Even when a claim is subject to limitation of liability, the shipowner's right to limitation may still be denied. One important factor determining the shipowner's right to limitation is his own conduct. For example, the *1976 Convention* provides that the person liable (i.e. shipowner) shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission.⁽¹³³⁾ Similarly, under the *Kuwait Maritime Law* the shipowner is not allowed to limit liability if the occurrence giving rise to the claim resulted from his personal fault.

4.1. The 1976 Convention

4.1.1. *Personal Act or Omission*

The *1976 Convention* denies limitation to a person liable only when it is proved that the loss resulted from his personal act or omission,

(131) Ibid., 171 F.Supp. 80, 81. See also, e.g., *Hugney v. Consolidation Coal Co.*, 345 F.Supp. 1078, 1081 (1974); *In re Oskar Tiedeman & Co.*, 236 ESupp. 895,911-13 (D. Del. 1964), rev'd on other grounds, 367 E2d 498 (3d Cir. 1966).

(132) 946 F.2d 350 (5 th Cir. 1991).

(133) Article 4 of the *1976 Convention* provides that: "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result".

committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.⁽¹³⁴⁾

A “person liable” can be the shipowner, charterer, manager, operator, salvor, P & I insurer, or any person for whose act the shipowner is responsible.⁽¹³⁵⁾

“The personal act of anyone of these persons will prevent him from limiting his own liability in the event of a claim against him, but will not necessarily deny limitation of any other persons in the event of a claim against them. If, for example, a loss arose as a result of the personal act of a ship’s manager, he cannot limit in the event of a claim against him; but the shipowner can limit because the act is not personal to him.”⁽¹³⁶⁾

By inserting the word “personal” before “act or omission”, the *1976 Convention* effectively preserves the shipowner’s right to limitation despite of vicarious liability, and also makes it difficult to impute the

(134) Article 4 of the *1976 Convention*; these words were used in article 13 (1) of the *Athena Convention relating to the carriage of Passengers and Their Luggage by Sea, 1974*, which heavily influenced the *1976 Convention*. Similar language was used in the *1955 Hague Protocol (article 13) to the Warsaw Convention on carriage by Air, 1929* (Article 25), the *United Nations Convention on the carriage of Goods by Sea, 1978 (the Hamburg Rules)* (Article 8 (1)), the *Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1968 (the Hague-Visby Rules)* (article 4(5) (e)), and the *United Nations Convention on International Multimodal Transport of Goods, 1980* (article 21).

Such acts or omissions involve, on the part of the “person liable”, either: a) the deliberate causing of the loss or damage; or b) recklessness (i.e. running an obvious risk either consciously or with indifference to its existence), coupled with the anticipation that damage will result from such conduct (see *Goldman v. Thai Airways International Ltd.*, [1983] 1 E.L.R. 1186 at p. 1194). Negligence or carelessness - even if “gross” - is not recklessness and therefore does not suffice to preclude the right to limit (see *Bayside Towing Ltd. v. Canadian Pacific Railway Co.*, [2000] 3 F.C. 127 at pp. 137-138).

Under the 1957 Convention, a shipowner claiming limitation of liability could do so, provided the loss did not occur with his or her actual fault or privity which was interpreted so restrictively that limitation of liability was rarely granted. Moreover, the shipowner had the burden of proof of showing that he or she was not in actual fault or privity. Fault barred limitation.

(135) Griggs & Williams, *supra*, note 49.

(136) *Ibid.*

act or omission of the shipowner's employees or agents to that of the shipowner himself.⁽¹³⁷⁾

“A failure to act by the shipowner is a “personal omission.” However, personal omission does not exist when there is no legal power to act or when it is unreasonable to expect action. In such cases, the requisite intent or recklessness must also be proved.”⁽¹³⁸⁾

In the case of a sole proprietorship, the owner is not difficult to identify. But where a corporation is involved, difficulties arise in determining which errors are to be considered as those of “the liable person”. The *1976 Convention* does not provide a solution to this problem of privity, leaving it to domestic law.

Generally speaking, there are two differing approaches that have been applied by different courts. The representative jurisdictions for these two approaches are the United Kingdom and the United States respectively. The line of English cases indicates that the title or position of an individual in the executive hierarchy of a corporation is usually an important determinative factor. For example, in *Lennard's Carrying Co. v. Asiatic Petroleum Co.*⁽¹³⁹⁾ the court stated:

“(A company) is an abstraction. It has no mind of its own..., its active and directing will must consequently be sought in

(137) At the conference on the Convention, West Germany proposed allowing the shipowner to limit if he himself was the master and if he committed fault in his capacity as master, (see the *Official Records, supra*, note 13, at p. 105) but this proposal was not accepted. The proposal intended to protect owners of small coasting ships, however, such an exception should not be allowed, because it would prevent adequate compensation to victims injured by small ships. Moreover, it is not desirable to let victims' recovery depend upon whether the shipowner's fault was committed in his capacity as master, because it is often difficult to distinguish the shipowner's fault in his capacity as master from that in his capacity as owner.

(138) R. Grime, *The Loss of the Right to Limit*, in N. Gaskell, ed., *Limitation of Shipowners' Liability: The New Law*, 1986, p.109.

(139) [1915] A.C. 705. In this case, the actions of the directors of Lennard's Carrying Company - who duly sent out circulars containing maritime safety rules to their crews, but did not impress upon them the need for strict compliance - resulted in their company being found guilty of 'actual fault or privity'. The court regarded the directors of the company as the alter ego of the company itself, in whom reposed the 'directing mind' of the company itself.

the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.”⁽¹⁴⁰⁾

The actual fault or privity that can be attributed to a shipowning company must be the “actual fault or privity” of somebody who is not merely a servant or agent for whom the company is liable upon the footing of *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company.⁽¹⁴¹⁾ The type of people who may be considered as the very *ego* and centre of the personality of the company has been described as follows:

“That person may be under the direction of the shareholders in general meeting, that person may be the board of directors itself, or it may be... that person has authority to coordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.”⁽¹⁴²⁾

(140) In *Tesco Supermarkets Limited v Nattras*, (1924) AC 100 (HL), Lord Diplock, in relation to whether or not a company had committed a criminal offence through the action of its directors, found:

[The answer] to the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business... is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.”

(141) Ibid.

(142) Ibid. See also *The Ert Stefanie* [1989] 1 Lloyd’s Rep. 349, a ship *Ert Stefanie* was owned by a Panamanian company whose sole proprietor was Mr. Sorensen. It was managed by Sorek Shipping United which was also under the control of Mr. Sorensen. Mr. Baker, a director of Sorek, ran the technical side of the business, which included responsibility for the maintenance of the ship. The Charterers’ cargo claim succeeded against the Shipowners in arbitration because the ship was unseaworthy. One issue raised in the Court of Appeal, was whether the Shipowners could limit liability under section 503 of the *Merchant Shipping Act 1894*. The Shipowners argued that the ‘alter ego’ of the managers and shipowners was Mr. Sorensen alone and since he was not to blame, there was no actual fault or privity. The faults of Mr. Baker had to do with functions which, if the company had been larger, would have fallen to employees at a comparatively subordinate level such as that of a marine superintendent.

In contrast, U.S. cases indicate that the emphasis is often placed upon the actual power and responsibility of an individual in overseeing

= Held (Court of Appeal): that the constitution of Sorek entrusted the management and control of the company to the board of directors en bloc. The board of directors of a corporation might not always comprise the whole of the group of people who together constitute the governing mind and will of the corporation. Nevertheless any director must necessarily be a member of the group unless he is dis-seized of responsibility. Mr. Baker was a director and was responsible for operational matters. He was in charge of the aspects of the company's business which went wrong. He was personally at fault and the shipowners had no right to limit liability.

However, in *The Lady Gwendolen*, and *The Marion* cases, the English courts found the "alter ego" of the company at a lower level in the management structure of the company. In *The Lady Gwendolen* [1965] 1 Lloyd's Rep. 335, CA., 25 a collision occurred due to a ship being sailed at full speed in thick fog. The radar was switched on, but the master only glanced at it intermittently. The shipowners' marine superintendent had failed to examine the ship's log whereby he could have found out about the master's propensity for excessive speed. He had also failed to draw the master's attention to a Ministry of Transport notice urging ships, even those equipped with radar, to reduce their speed in conditions of poor visibility. The fault of the marine superintendent on its own would not have been sufficient to amount to that of the shipowners, as he was too far down the corporate hierarchy for his acts to be identified with that of the owning company. However, the fault of the marine superintendent had become that of the company because of the failure of its managing director and traffic manager to take any interest in navigational matters. The shipowners therefore lost their right to limit.

In *The Marion*, [1984] 2 Lloyd's Rep. 1, the Master of a Liberian tanker anchored at Harlepool to wait for a berth and when he dropped the ship's anchor it fouled an undersea pipeline. Oil companies who had an interest in the pipeline sued the ship's owners, claiming \$25 million damages (direct and consequential losses). The owners admitted liability but sought to limit under the existing law claiming that the Master had negligently used an out-of-date chart which did not have the pipeline marked on it. The owners had long since delegated the operation and management of the ship to English ship managers who had supplied charts to the ship. The Admiralty judge hearing the application to limit initially granted limitation on the ground that the provision and maintenance of the charts was the sole responsibility of the Master and it was his negligence in using an out-of-date chart which was the sole cause of the damage/losses. The Court of Appeal reversed this decision on the ground that it was the ship managers' duty to ensure that there was an effective and properly supervised system of chart provision and maintenance and such a system was absent in this case. This lack of adequate system was emphasized by the fact that a Liberian inspectorate report, issued over a year before the pipeline incident and which drew particular attention to the lack of correct updating of charts, had gone unheeded and unacted upon. This failing upon the part of the ship's managers was considered by the House of Lords to be directly causative of the oil companies' losses, and, furthermore, the owners in turn were to be held legally responsible for the negligence of their managers. Thus the owners were personally at fault and were denied the right to limit.

the management and control of the ship. As a result, “privity or knowledge” is often found at a much lower level in the company’s hierarchy.⁽¹⁴³⁾ For example, in *Continental Oil Company v. Bonaza Corporation*,⁽¹⁴⁴⁾ the ship’s captain was found being more than the master because his responsibility was not just for the operation and maintenance of the ship. Instead, he was the corporation’s managing agent as he was granted much autonomy in the management of the ship. He was found in virtually full charge of the maritime venture of the corporation which was principally engaged in land-based operations. His duties clearly revealed his actual power in overseeing the operation and management of the ship, including maintenance of the ship in a seaworthy condition, recruitment of crew members, and arrangement of the charters all without supervision from the corporate officers although subject to their approval. Furthermore, it was found that the captain was paid a portion of the ship’s profits, instead of a fixed salary. In short, expansive authority was delegated to this individual by the corporation. Therefore, his privity or knowledge was imputed to that of the corporation.

Similarly, in *Illinois Constructors Corp. v. Logan Transp., Inc.*,⁽¹⁴⁵⁾ the court held that in the case of a corporate shipowner, “privity or knowledge” of the shipowner is that of his employees vested with supervisor, or discretionary authority, such as maritime superintendents. In *American Dredging Co. v. Lambert*,⁽¹⁴⁶⁾ the court stated that when a shipowner was a corporation, privity or knowledge of the corporation was that of its managing agent, officer, or supervisory employee.

The 1976 Convention allows direct actions against a P & I insurer, and he may limit only if the insured could limit. Accordingly, limitation of the P & I insurer is broken not so much by his personal misconduct as by his insured’s personal misconduct. The shipowner, demise charterer and manager frequently become members of P & I insurance with respect

(143) R.C. Seward, *supra*, note 44, at p.173.

(144) 706 F.2d 1365 (5th Cir. 1983).

(145) *Illinois Constructors Corp. v. Logan Transp., Inc.*, 715 F.Supp. 872 (N.D.III. 1989).

(146) *American Dredging Co. v. Lambert*, 81 F.3d 127 (11 th Cir. 1996).

to the same ship. Thus, it may be that one insured can limit whereas another cannot. Thus, limitation of the P & I insurer depends on which member is sued.⁽¹⁴⁷⁾

4.1.2. Intention and Recklessness

To deny limitation to a shipowner, it must be proved that the shipowner's personal act or omission resulting in loss or damage was done "with intent to cause such loss or recklessly and with knowledge that such loss would probably result"

It must be proved that the shipowner had the subjective intent to cause the loss. It is "insufficient to prove that a reasonably competent person could conclude that his act or omission would cause the loss."⁽¹⁴⁸⁾ The shipowner himself must have intended the loss.⁽¹⁴⁹⁾ This subjective test narrow the circumstance in which limitation may be lost, because the shipowner may "intend or be reckless about the act but be legitimately neutral about the consequences of that act."⁽¹⁵⁰⁾

The shipowner's personal act or omission must have been done recklessly. "Recklessness" means more than gross negligence because recklessness implies a higher degree of carelessness, bordering on a semi-intentional act. The requirement of "recklessness" is further coupled with knowledge of the probable result of loss or damage.⁽¹⁵¹⁾ The emphasis is laid upon the knowledge of the consequence of a reckless act or omission.

(147) Griggs & Williams, *supra*, note 49, at p. 30.

(148) *Ibid.*, at p. 32.

(149) *Ibid.*

(150) See *The Leerort*, [2001] 2 Lloyd's Rep 291 at pp. 294-295 (C.A.). See also Griggs & Williams, *supra*, note 49, at pp. 29-30.; R. Grime, *supra*, note 137, at p. 110.

(151) In *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693 (C.A.), a case concerning the Warsaw Convention, the English Court of Appeal said that the word 'recklessly' had to be construed in Article 25 of the Warsaw Convention along with the words 'and with knowledge that damage would probably result'. Eveleigh LJ stated at page 700 that: "An act may be reckless when it involves a risk, even though it cannot be said that the danger envisaged is a probable consequence. It is enough that it is a possible consequence, although there comes a point when the risk is so remote that it would not be considered reckless to take it. We look for an element of recklessness which is perhaps more clearly indicated in the French term "*temerairement*". Article 25 however, refers not to possibility, but to the probability of resulting damage. Thus something more than a possibility is required. The word "probable" is a common enough word. I understand that to mean

In other words, limitation is barred only if the type of loss intended or envisaged by the shipowner is the actual loss that occurred.⁽¹⁵²⁾ Thus, limitation is not lost “simply because the shipowner was aware of the risk of some damaging consequences if the result that actually occurred was not considered.”⁽¹⁵³⁾ The claimant seeking to break limitation bears the burden of proving the shipowner’s intent or recklessness; thus, it becomes more difficult for the claimant to break limitation.⁽¹⁵⁴⁾ This reflects a

something is likely to happen. I think that that is what is meant in Article 25. In other words, one anticipates damage from the act or omission.”

In *Goldman v. Thai Airways International Ltd*, the plaintiff was a passenger aboard an aircraft owned by defendant. Before departure, the pilot was provided with a weather chart forecasting moderate air turbulence. The defendant’s manual contained instructions for the “fasten seat belt” sign during flying in turbulent air and when turbulence could be expected. The pilot failed to illuminate the sign when the aircraft entered an area for which air turbulence had been forecast. When severe turbulence was encountered, the plaintiff, whose seat belt was not fastened, was thrown from his seat and injured. The plaintiff sued the defendant under Article 25 of the Hague-Warsaw Convention, which barred limitation if the damage resulted from intent or recklessness of the carrier. The trial court held that the pilot had deliberately disregarded the instruction, and that it amounted to recklessness. Thus, limitation was denied. The defendant appealed. The Court of Appeal held that the test of recklessness was subjective. The court could not attribute to the defendant knowledge which another person in the same situation might have possessed or which he ought to have possessed. In order for the pilot’s omission to amount to recklessness, it must be shown not only that prudent flying required him to illuminate the sign but also that he had knowledge that injury would probably result from his omission. Because it was shown, limitation was allowed. 14. at 703-704.

(152) Actual knowledge therefore differs from "imputed" or "background" knowledge (the knowledge which the limitation claimant, given his background, training, skill and experience, would have had or ought to have had if he had thought about his conduct before engaging in it). See *The Mosconici*, [2001] 2 Lloyd’s Rep. 313 at pp. 317-318, citing with approval *Goldman v. Thai Airways International Ltd.*, [1983] 3 All E.R. 693, [1983] 1 W.L.R. 1186 (CA) and *Nugent v. Michael Goss Aviation Ltd.*, [2000] 2 Lloyd’s Rep. 222 (C.A.), air law decisions requiring proof of recklessness with "actual knowledge" of the probable damage in order to break the air carrier’s limitation under article 25 of the Warsaw Convention. See also *The MSC Rosa M.*, [2000] 2 Lloyd’s Rep. 399 at p. 401, insisting on the need to prove "actual", as opposed to "constructive" knowledge (what the relevant person should have known).

(153) R. Grime, *supra*, note 137, at p. 111.

(154) See Christopher Hill, *supra*, note 45, at p. 401: “Whatever the nature of the test, objective or subjective, quite clearly it is going to be far harder under the 1976 Convention to ‘break’ limitation because the instances of recklessness or intention to cause loss must by their very nature be more scarce than the old idea of personal fault, negligence or privity”.

belief that “limitation is a right rather than a privilege.”⁽¹⁵⁵⁾ At the conference, Canada proposed switching the burden of proof to the shipowner, but withdrew it because the proposal did not have much support.⁽¹⁵⁶⁾ Nevertheless, because the shipowner has all the information about navigation and the accident, it is justifiable to force the shipowner, who benefits from limitation, to prove his absence of intent or recklessness.

4.2. Kuwait Maritime Law

Kuwait Maritime Law denies limitation much more easily than the *1976 Convention*: the shipowner is denied limitation when the loss results from his personal fault.⁽¹⁵⁷⁾ The shipowner is deemed at fault when he

(155) Seward, *supra*, note 44, at p. 182.

(156) Official Records, *supra*, note 13, at p.155,269.

(157) Article 93/1 of the *Kuwait Maritime Law*.

In France, The Court of Appeal of Aix-en-Provence held that the actual fault of the shipowner has to be appreciated according to the practical circumstances, in a concrete case. The Court did not consider as an actual fault the collision of the ship with a wharf which was damaged, The owner of the wharf alleged a fault in the manoeuvre of the ship, saying that she was unable to navigate in a channel with the necessary precision because her steering equipment did not work properly; the ship was therefore unseaworthy and her owner had to be prevented from pleading the limitation of his liability. The appeal was dismissed on the ground that, in the Court’s opinion, the shipowner proved that he had exercised due diligence in making the ship seaworthy and so maintaining her and, consequently, he had to be allowed to plead the limitation of his liability (C. App. Aix-en-Provence, March 18, 1977 (*The Beni Saf*), D.M.F. 1979, pp.72-77).

The Court of Appeal of Rouen likewise held that a shipowner may not be deprived of the limitation of his liability on the assertion only that the master and officers of his ship were incompetent, and that the actual fault of the owner was therefore proven (C. App: Rouen, August 1, 1979, (*The Ifni*), D.M.F. 1980. pp. 200-204). Following a collision at sea in which one of the ships was at fault, her owner pleaded limitation; the owner of the opposing ship claimed there was actual fault or privity arguing the incompetence of the master, first mate and officers of the ship at fault, their lack of experience and the excessive speed of the ship at the time of the collision. The Court considered that in fact no proof of a fault or of negligence of the shipowner, related with the collision, had been found by the experts appointed by the Court.

It seems that French Courts seldom decide to deprive the shipowner of the right to limit liability on the basis of evidence of his actual fault or privity.

In United States, U.S. law bars limitation when the loss is incurred with privity or knowledge of the shipowner (see *The Limitation of Liability Act*, section 183 (a)). “Privity or knowledge” =

has failed to exercise due diligence to maintain seaworthiness of his ship, or to carry cargo. For example, limitation will be barred: when the shipowner does not notify the master of the unique structure of his ship or appointed inexperienced master⁽¹⁵⁸⁾; when the shipowner fails to install safety devices on a winch; when he lets the ship set sail at night on extremely rough seas; or when he fails to telex updated navigational information to his ship on the sea; or when the shipowner overloads or loads cargo on deck. In contrast with the *1976 Convention*, the shipowner must prove absence of his conduct barring limitation under Kuwait law.⁽¹⁵⁹⁾

= means personal participation of the shipowner in some fault or negligence causing the loss, or some personal knowledge of a contemplated loss without taking appropriate preventive measures. It does not include fault of the shipowner's employ or agents. In *Lord v. Goodall, Nelson & Perkins S.S. Co.*, "privity" under the *Limitation Act* was defined as:

... personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself or a contemplated loss, or a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it."

If an employee (a crew member) made the fault which triggered liability and such fault was serious enough to bar limitation, the crew member will lose his right to limit liability, but the shipowner's liability can still be limited. In such a case, the injured party might theoretically be better off suing the employee rather than the shipowner, but the poor prospects of recovering damages will generally make this alternative impractical.

(158) The Court of Appeal of Montpellier decided on a loss of the right to limit liability in a case where, during a sailing trip, a passenger was killed after the sailing boat capsized ((C. App. Montpellier, October 7, 1982 (*Sailing boat Corail 7*), D.M.F. 1984, pp. 397-406). The Court considered that the master was inexperienced and that the sailing school, the owner of the boat, had acted with negligence by authorising the master to undertake a sailing initiation cruise in spite of the alarming weather forecasts. The owner of the sailing boat was therefore held fully liable for its punishable abstention.

(159) Chorley & Giles' Shipping Law, supra, note 10, at p. 411:

(The Claimant must prove).....that the loss resulted from the personal act or omission of the person seeking to limit (e.g. the shipowner), committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

.the burden of proof is on the *claimant*. This means that - unlike before - if there is doubt about the personal misconduct of the owner he will be entitled to limit. One might say that the 'privilege' has become a right.

The claimant must also satisfy a high degree of proof under the new test. Deliberate actions designed to cause loss will be rare, and the claimant will have to show more than mere fault of the owner (or other person seeking to limit). He will have to show 'recklessness' which is a state of mind short of intention but beyond carelessness".

Where a corporation is involved, difficulties arise in determining which error committed by one of the company's decisions-making bodies (general assembly, board of directors, or a manager) will clearly be considered as conduct barring limitation. It is probably necessary to go even further in equating actions of employees with those of the shipowner himself ("identification"). This applies generally to shipowning entities, not just to limited companies or corporations. *The 1976 Conventions* - as it is mentioned above- does not provide a solution to this problem. The position under *Kuwait Maritime Law* is unclear, partly because (as far as the writer aware) there is no court decision in this area. However, it is probably safe to say that a Kuwait court would be more cautious in establishing grounds for identification. The prevailing view is that identification would result if the error were committed by management personnel within the shipowning company with a fairly significant level of responsibility⁽¹⁶⁰⁾ Thus if a technical inspector were to be at fault, this might be considered as barring limitation.

5. AMOUNT OF LIMITATION

As mentioned above, the purpose of limitation of liability regime is to protect the ship from excessive liability. The rules are therefore structured to prevent limitation taking effect before liability arising from a particular incident has reached a pre-determined ceiling - the amount of the limitation fund. If the total claims exceed this amount, the various creditors will only be able to split the fund. Payments to individual creditors will therefore decrease as the sum of the claims increases.

(160) In the English case of *Tesco Supermarkets Limited v Natras*, (1924) AC 100 (HL), Lord Diplock, in relation to whether or not a company had committed a criminal offence through the action of its directors, found:

[The answer] to the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business... is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company."

The limitation fund in most maritime nation is tied to the ship's tonnage⁽¹⁶¹⁾ as it seems impossible to devise another formula in which the various factors⁽¹⁶²⁾ which are relevant in determining the amount are given their proper weight. The limitation is applied to the tonnage of the wrongdoing ship.

5.1. The 1976 Convention

The *1976 Convention* makes provision for the calculation of the fund as follows:

Article 6. The General Limits

“1 - The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows.”⁽¹⁶³⁾

(161) Historically speaking, the value of ship is the measure of shipowner's limitation of liability. Shipowner's ship is known as “not only the source, but the limit of liability” as well. One theory traces the practice of limitation of shipowner's liability to the Roman legal principle of *noxae deditio*, that is, the liability of an owner for damage caused to others by his property can be discharged by his surrendering the offending instrumentality (see James J. Donovan, “*The Origin and Development of Limitation of Shipowners' Liability*”, 53 Tul. L. Rev. 999, 1000 (1979).

(162) A uniform financial unit for calculating per ton value of ship and its level of stability are two of the important factors in an international system of limited liability.

(163) The *1996 Protocol* (article 3) amending article 6(1) of the *1976 Convention* raises the base tonnage from 500 to 2,000 tons and further increases the limits of liability as follows:

A. Claims for personal injury and death

1. Ships not exceeding 2000 tons: 2 million SDR
2. Ships exceeding 2000 tons: 2 million SDR
plus for each ton from 2001 to 30,000: 800 SDR
plus for each ton from 30,001 to 70,000: 600 SDR
plus for each ton exceeding 70,000: 400 SDR

B. Other Claims

1. Ships not exceeding 2000 tons: 1 million SDR
2. Ships exceeding 2000 tons: 1 million SDR
plus for each ton from 2001 to 30,000: 400 SDR
plus for each ton from 30,001 to 70,000: 300 SDR
plus for each ton exceeding 70,000: 200 SDR

Note also that the *1976 Convention* (article 8(2)) contains provisions on the monetary limitations for States which are not members of the International Monetary Fund and whose law does not permit the use of S.D.R.'s. These limitation amounts, like the old *poincare* gold francs, are expressed in “monetary units” corresponding to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. See *1976 Convention*, article 8(3). These limitation amounts are also increased by the *1996 Protocol* (article 5, amending article 8(2) of the *1976 Convention*),

-
- (a) in respect of claims for loss of life or personal injury,
- (i) 333,000 Units of Account for a ship with a tonnage not exceeding 500 tons,
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
for each ton from 501 to 3,000 tons, 500 Units of Account; for each ton from 3,001 to 30,000 tons, 333 Units of Account; for each ton from 30,001 to 70,000 tons, 250 Units of Account; and for each ton in excess of 70,000 tons, 167 Units of Account,
- (b) in respect of any other claims,
- (i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons,
 - (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):
for each ton from 501 to 30,000 tons, 167 Units of Account; for each ton from 30,001 to 70,000 tons, 125 Units of Account; and for each ton in excess of 70,000 tons, 83 Units of Account.
- 2 - Where the amount calculated in accordance with paragraph 1(a) is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with paragraph 1(b) shall be available for payment of the unpaid balance of claims under paragraph 1(a) and such unpaid balance shall rank rateably with claims mentioned under paragraph 1(b).
- 3 -
- 4 - The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons.”

It may be seen from the wording of article 6/1(a) that claims for loss of life or personal injury, other than those relating to passengers, are to be calculated as to 333,000 Units of Account for a ship with a tonnage

not exceeding 500 tons, and increasing with the tonnage on a sliding scale thereafter. For claims other than those relating to loss of life or personal injury, the number of Units of Account are less, as set out in article 6/1(b). Discussion of these calculations, limitations on them and the circumstances in which they may be applied are set out below.

5.1.1. Calculation of Tonnage

The calculation of the tonnage with which to calculate the amount of the Limitation Fund is important and disputes as to such tonnage occur from time to time.

Under *1976 Convention*, the calculation of the tonnage of the ship which caused the claim is to be the gross tonnage⁽¹⁶⁴⁾ of the ship which tonnage should be calculated in accordance with the tonnage measurement rules contained in Annex 1 to the *International Convention on Tonnage Measurement of Ships, 1969*.⁽¹⁶⁵⁾ Under this tonnage measurement Convention, every ship will have a gross tonnage, representing its actual size, and a net tonnage, indicating its general earning capacity.⁽¹⁶⁶⁾ All ships should have in their papers a certificate which shows the tonnage, the International Tonnage Certificate. It is usual practice for the parties to accept the accuracy of the ship's certificate in limitation actions. However, if the circumstances of the case warrant it then the amount of the tonnage can be put in issue and be subject to evidence given to the court in the usual way. Where more than one ship is involved, especially in a towing situation, the relevant tonnage that is

(164) By Art 6(5) of the *1976 Convention* the tonnage for calculation is to be the gross tonnage, as opposed to the net tonnage, and this is to be calculated in accordance with the Tonnage Convention 1969, see under. Article 6 (5) provides that "For the purpose of this Convention the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969."

(165) The *International Convention on Tonnage Measurement of Ships, 1969* entered into force on 18 July 1982.

(166) Under the Convention, gross tonnage and net tonnage are respectively determined according to the formulas as provided under Regulations 3 and 4.

used to calculate the limit of liability is that of the total tonnage of the several ships that caused the damage.⁽¹⁶⁷⁾

Kuwait Maritime Law adopts completely different system for tonnage measurement. Under article 94, for purposes of limitation fund, a ship's tonnage shall be calculated on the basis of the net tonnage with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage.⁽¹⁶⁸⁾ This formula applies to steamships or other mechanically propelled ships. For all other ships, the net tonnage shall be taken as the basis for calculating limitation fund.⁽¹⁶⁹⁾

(167) The Rhone and Peter AB Widener [1993] I Ll R 600, a decision of the Canadian Supreme Court. In the case of towage collision, a crucial question arises in determining the relevant tonnage? Should it be the tonnage of the tug or of the tow or of both? English jurisprudence answered the question as follow: (1) Where the tug and tow are in different ownership, if negligence occurred on board both the tug and tow, the owner of the tug is entitled to limit on the tonnage of the tug and the owner of the tow is entitled to limit on the tonnage of the tow respectively; if negligence occurred on board the tug or tow alone, the owner of the tug or tow is entitled to limit on the tonnage of the tug or tow alone; (2) Where the tug and tow are in the same ownership, if negligence occurred on board both the tug and tow, the owner may limit his liability on the basis of combination of the tonnage of both the tug and tow; if negligence occurred on board the tug or tow alone, the owner is entitled to limit on the basis of the tonnage of the tug or tow alone. In *The Bramley Moore*, [1964] 2 Lloyd's Rep. 429, CA., for example, Lord Denning, Master of the Rolls, held that although a person was guilty of negligence in the navigation of the tug which was towing something, since the only causative negligence was that of the tug, limitation fund may be based upon the tug alone. This case involved different ownership of the tug and tow, but the decision was followed in cases where the tug and tow were in the same ownership. For example, in *The Sir Joseph Rawlinson*, [1972] 2 Lloyd's Rep. 437, where the tug and tow were in the same ownership, the court felt that it was bound by the reasoning of *The Bramley Moore* and held that in the absence of any negligence of anyone on board the tow, the owner could limit its liability based on the tonnage of the tug alone where negligence occurred. In short, it seems that the combined tonnage of the tug and two is required only when there is combined negligence collectively contributing to the loss or damage.

(168) Under U.S. law, the tonnage of a seagoing steam or motor ship shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing ship shall be her registered tonnage: provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(169) Article 95 of the *Kuwait Maritime Law* provides that:

"تحسب حمولة السفينة في تطبيق المادة السابقة بالكيفية الآتية:
أ. بالنسبة إلى السفن ذات المحرك على أساس الحمولة الصافية للسفينة مضافا إليه الفراغ الذي تشغله الآلات والمحركات.
ب. بالنسبة إلى السفن الشراعية على أساس الحمولة الصافية للسفينة".

5.1.2. Passenger Claims

Special provision is made in the *1976 Convention* for claims by passengers who have suffered personal injury or for claims where passengers have lost their lives.⁽¹⁷⁰⁾ Article 7 provides that the limit is to be the product of 46,666 Units of Account and the number of passengers which the ship is authorised to according to the ship's certificate. But this amount is subject to an upper limit of 25 million units of account (which amounts to an upper limit for the calculation of approximately 535 passengers).⁽¹⁷¹⁾ It is to be noted that the provision relates to the number of passengers which the ship is authorised to carry, not to the number who were killed or injured or the number who were onboard at the time of the incident which led to the claim.

The definition of who should be deemed to be a "passenger" is that it should be a person who was carried onboard at the relevant time and who was under a contract of passenger carriage, or who was, with the

(170) Generally speaking, the purpose of a separate limitation fund for passenger claims is to ensure that such claims do not have to compete with other claims to share the global limitation fund. As a general rule, claimants will fare much better under a limitation fund specifically set up for passenger claims. However, though rare, it may happen, especially in cases where large ships are involved and there are no other personal injury and death claims present, separate limitation fund for passenger claims may be smaller than the global limitation fund. See in general Nicholas Gaskell, *supra*, note 168.

(171) Article 7 (1) provides: "1. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 46,666 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate, but not exceeding 25 million Units of Account".

The *1996 Protocol* increases this global passenger limitation to 175,000 S.D.R.'s, multiplied by the number of passengers the ship is certified to carry, while also eliminating the 25 million S.D.R. ceiling (1996 Protocol, article 4, amending article 7 of the 1976 Convention).

The *1996 Protocol* also permits States Party, by national law, to establish their own systems of liability for passenger injury or death, provided that the limits of liability are no lower than those prescribed by the *Protocol* (1996 Protocol, article 6, amending article 15(3) of the *1976 Convention*).

consent of the carrier, accompanying a vehicle or live animals which were covered by a contract for carriage.⁽¹⁷²⁾

It is to be noted from this definition of a passenger that persons carried onboard who are not the subject of a contract of carriage, or who are not accompanying a vehicle or animals the subject of such a contract, are not covered under the limitation provisions for passengers. Examples of such persons are crew, for whom special provision is made, and stowaways, who would appear to come under article 6 of the *Convention* (the general limits).⁽¹⁷³⁾

5.1.3. Limitation by a Salvor

Where a salvor is operating from a ship then the normal limitation provisions apply. Often, however, the salvor will be operating from the damaged ship itself or from shore. In these cases no tonnage can be attributed for the calculation of the amount of the limitation by the salvor. This problem of what tonnage to attribute to the calculation where the salvor is not operating from a ship or from shore was resolved by attributing an arbitrary tonnage. In the *1976 Convention* it was 1500 tons.⁽¹⁷⁴⁾

(172) Article 7 (2) provides: "2. For the purpose of this Article "claims for loss of life or personal injury to passengers of a ship" shall mean any such claims brought by or on behalf of any person carried in that ship:

- a. under a contract of passenger carriage, or
- b. who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.

(173) Generally speaking, passengers shall not include crew members and those working on board the ship under contracts of employment with the owner or carrier. It shall also exclude visitors, guests or stowaways from the category of passengers. However, since the Convention does not specify any formal requirement in order for a particular contract to be valid, it is suggested that in the case of certain visitors, courts may imply simple contracts of carriage. Passengers who are accompanying a vehicle or live animals under a contract of carriage are considered within the meaning of passenger under the Convention. In such a case, however, the shipowner's or carrier's consent is required. If no express consent is found, courts may imply consent in certain circumstances. See in general Nicholas Gaskell, "*The Amount of Limitation*", *supra*, note 168, at pp. 55-57.

(174) Article 6(4) provides: "4. The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1500 tons".

5.1.4. Units of Account and Special Drawing Rights

Under the *1957 Convention* the calculation of the amount of national monies was reckoned by reference to the gold franc. However, with most of the international community moving off the gold standard it became more convenient to refer to some other reference point. In the case of the *1976 Convention*, as for some other international conventions,⁽¹⁷⁵⁾ use was made of the Special Drawing Rights (SDRs). The SDRs had been established in 1946, after World War II, under the provisions of the International Monetary Fund. Under the *1976 Convention* the Unit of Account is defined as an SDR.⁽¹⁷⁶⁾

The *Convention* provides for a State Party to the International Monetary Fund (IMF) to calculate the national SDR in accordance with the method established by the IMF. The effect of this is that each country has an exchange rate for an SDR, in much the same as it has an exchange rate for any other currency. However, provision had to be made for those nations which were not in the IMF, and this was done in the *1976 Convention* in two steps. For those countries that were not members of the IMF and whose law permitted them to do so, then the rate was to be in accordance with the provisions of their own domestic law. For those countries who were not members of the IMF and whose law did not so

(175) The *Warsaw Convention*, relating to limitation provisions for carriage by air, is one; see *supra*, note 204.

(176) Article 8(I), which provides that:

I. The Unit of Account referred to in Articles 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Articles 6 and 7 shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment. The value of a national currency in terms of the Special Drawing Right, of a State Party which is a member of the International Monetary Fund shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right, of a State Party which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State Party”.

permit, then the Convention set out a series of calculations based on the monetary unit.⁽¹⁷⁷⁾

5.2. Kuwait Maritime Law

Under *Kuwait Maritime Law* the maximum liability of the shipowner is always limited to 75 Dinars for each ton of the ship's tonnage when the claim subject to limitation.⁽¹⁷⁸⁾ The *Kuwait Maritime Law* created a two-tier fund system in order to ensure adequate satisfaction of personal claims. By virtue of article 94/1, where only property claims are involved, the limitation fund is set at 25 Dinars for each ton of the ship's tonnage. In contrast, where only personal claims are involved, the fund is at 50 Dinars for each ton of the ship's tonnage. Furthermore, where both personal and property claims are involved, the total fund is set at 75 Dinars per ton, of which 50 Dinars are to be used exclusively to satisfy personal claims and any balance of the personal claims will share the remaining 25 Dinars per ton *pro rata* with the property claims.

Article 95(3) of the *Kuwait Maritime Law* provides that the minimum limit of net tonnage of the ship shall be deemed to be three hundred (300) tons even if its tonnage is less than that⁽¹⁷⁹⁾

(177) Articles 8(2)-(4) make provision for those States that are not parties to the *IMF Convention*.

(178) The value of the ship and pending freight (46 U.S.C. Appx. 183(a)) constitutes the limitation fund in American law, and this value is determined at the end of the voyage after the casualty; see *Norwich & New York Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871), reprinted 1998 AMC 2061. The value of the ship includes all tackle, apparel, appurtenances, and furniture other than cargo (see *The Main v. Williams*, 152 U.S. 122 (1894)). Pending freight, however, is part of the value of the ship, and this term includes the total earnings of the ship for the voyage - passage money, as well as sums paid for the carriage of goods. Prepaid freight may be included in the calculation, if the agreement between shipper and carrier provides that the carrier may retain the freight so paid even where the voyage is not completed; see *Complaint of Caribbean Sea Transport Ltd.*, 748 F.2d 622 at p. 626, 1985 AMC 1995 at pp. 1999-2000 (11 Cir. 1984), amended in part 753 F.2d 948, 1985 AMC 1995 (11 Cir. 1985). American law also requires the shipowner to constitute an additional limitation fund of up to \$420 U.S. per ton, if the initial fund based on the ship's value after the occurrence is insufficient to cover all personal injury and death claims arising out of that occurrence (46 U.S.C. Appx. 83(b)). This special fund need be constituted only with respect to "sea going ships" (46 U.S.C. Appx. 83(b)), but must cover each "distinct occasion" (46 U.S.C. Appx. 83(d)).

(179) Article 95/3 of the *Kuwait Maritime Law* provides that:

"ويعتبر الحد الادنى للحمولة الصافية للسفينة ثلاثمائة طن ولو كانت حمولتها تقل عن ذلك ."

6. CONCLUSION

The rationale for letting shipowners limit their liability was no longer as valid as it had been in the past. In the early days of shipping, a shipowner often did not hear of his ship's whereabouts for months at a time; hence, the shipowner had little or no control over his ship. Then, it would have placed a heavy burden on shipowners to make them liable for the acts of their ships on the other side of the world. Today, however, communication has advanced to the point where shipowners can be in almost constant contact with their ship. Therefore, many of the conditions which rendered limitation necessary no longer exist.

However, if we cannot repeal limitation regime, then those who can limit should be restricted to the owners or those who stand temporarily in the posture owners in order to guarantee adequate compensation for victims. Limitation should be denied to the master, crew and independent contractors. Further, allowing the claimants to bring direct actions against insurers as well as denying limitation for insurers may contribute to obtaining sufficient recovery by victims., at least limitation should not be extended to insurers.

The *1976 Convention* and *Kuwait Maritime Law* allow limitation against all maritime and nonmaritime claims for "personal injury...-damage to...property". Limitation, however, should be denied against personal injury claim by crew or their families unless the shipowner has purchased insurance for his crew. Limitation should also be denied against claims resulting from delay occurring outside the ship. Further, claims with respect to damage to harbor works, bridges, waterways and aids to navigation should not be subject to limitation, because these are important for public safety.

The *Kuwait Maritime Law* should provide special rules for oil pollution and for nuclear damage. Pollution and nuclear damage to the environment may amount to billions of Dinars in one incident.

Claimants should not be required to prove the relationship between the loss intended by the shipowner and the actual loss suffered by claimants. The shipowner's limitation should be denied if claimant

proves intent or recklessness of shipowner's servants. Finally, the burden of proving absence of the shipowner's conduct barring limitation should be imposed upon the shipowner.

The *Kuwait Maritime Law* has some serious shortcomings as far as limitation fund is concerned. One major problem is that the limits provided thereunder have been increasingly eroded by inflation and there is no mechanism in the *Kuwait Maritime Law* itself to deal with it. This inherent disadvantage has given rise to a general dissatisfaction with the Kuwait law.

Another major weakness of the *Kuwait Maritime Law* is that it provides a one-size-fits-all type of limitation fund on the basis of a ship's tonnage. In other words, the more tonnage of a ship, the higher the limitation fund. As a consequence, smaller ships will carry smaller funds. But, small ships may cause tremendous loss or damage and carry considerable value. Because limitation fund is increased in proportion to the increase of ship's tonnage, small ships with high value may benefit from setting up a small limitation fund while claimants against them would be helplessly prevented from reaching the available resources of these small ships of no small value.

The *Kuwait Maritime Law* should follow the *Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, 1976 Convention* and amends the limitation fund in order for its limitation regime to be in line with present reality of the shipping industry and in balance with various interests of the parties involved.⁽¹⁸⁰⁾

(180) Sarkho Y., *supra*, note 3, at p. 190 (1).

