

LIMITATION OF SHIPOWNERS' LIABILITY
A COMPARATIVE STUDY

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INTRODUCTION

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.

"... the limitation of liability provisions...are expressly designed for the purpose of encouraging shipping and affording protection to ship owners 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⁾

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 United Arab Emirates law (U.A.E. law) and United State law (U.S. law). It will cover the following issues:

- (1) Persons and vessels entitled to limit liability.
- (2) Claims subject to limitation.
- (3) Claims excepted from limitation.
- (4) Conduct barring limitation.
- (5) Limitation fund.

1. WHO IS 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,⁽²⁾ the group of persons protected by the limitation system has not been limited to shipowners. Under various legal regimes around the world, the right

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

⁽²⁾ E.g., 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.

to limitation has been granted to persons other than shipowners, such as charterers, manager or operator, master and crew members, salvors and insurers.⁽³⁾ In addition, vessels involved must be within the protective scope of the system. Determination of whether a particular piece of water-borne craft is a vessel for purposes of limitation of liability can be very complex. A maritime structure may be deemed as a vessel for one purpose but not for another.

The following section will discuss both persons and vessels for purposes of limitation of liability.

1.1. Persons Entitled to Limitation

1.1.1. Shipowners

Shipowners are the first claimants of the right of the limitation of liability. Article 138 of the U.A.E. Maritime Code of 1981 (the *U.A.E. Maritime Code*), entitles the shipowner to limit liability.⁽⁴⁾ No definitive description of shipowner for purposes of limitation of liability is provided in the *Code*. However, in U.A.E. law the term 'shipowner' seems to have a narrow meaning. It is limited to those with legal title of ownership.

The liability of the shipowner includes liability in an

(3) See e.g., International Convention on Limitation of Liability for Maritime Claims 1976.

(⁴) Article 138/1(a) of the *U.A.E. Maritime Code* provides that:

"يجوز لمالك السفينة أن يحدد مسئوليته أيا كان نوعها"

“(Free translation) The owner of a ship may limit his liability of whatever basis of liability....”

action brought against his vessel. Assume that the shipowner would be liable in an action *in personam* in negligence for collision; he may obtain a limitation decree if an action is brought against the vessel *in rem*.

In United States, under the *Limitation of Shipowners' Liability Act of 1851*, sections 183(a) and 186, only an owner or charterer of a vessel may file a complaint for limitation of liability arising from its loss or other casualty.⁽⁵⁾ 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.⁽⁶⁾ In *American*

⁽⁵⁾ 46 U.S.C. section 183(a) (1976) provides as follows:

"The liability of the owner of any vessel, 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 vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Ibid. Section 186 provides:

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

⁽⁶⁾ 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 =

Car & Foundry Co. v. Brassert,⁽⁷⁾ it was held that the manufacturer of a vessel was not entitled to limitation of liability because he did not have any control of the vessel at the time of the accident even though he was the vendor of the vessel and still retained the title to the vessel for purpose of securing the purchase price of the vessel. Since the manufacturer had no control over the operation of the vessel whatsoever and was not responsible for any acts of the master and crew members on board the vessel, 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 vessels was not a maritime activity intended to be protected by the limitation of liability regime. In *Marine Recreational Opportunities v.*

= 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".

Cf. 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); In *re Independent Towing Co.*, 242 F. Supp. 950, 954 (E.D. La. 1965) (insurer of owner cannot avail itself of limitation in direct action suit). But see *In re Barracuda Tanker Corp.*, 281 F. Supp. 228, 230 (S.D.N.Y. 1968) (liberal approach in determining who is entitled to limitation), *rev'd*, 409 F.2d 1013 (2d Cir. 1969).

⁽⁷⁾ 289 U.S. 261, 53 S.Ct.618, 77 L.Ed. 1162 (1933).

Berman,⁽⁸⁾ the court held that the company that sold pleasure craft was no longer "owner" of the craft for purposes of limitation of liability since it had complete absence of title and practical control over it at the time of the accident. In *Complaint of Chesapeake Shipping, Inc.*,⁽⁹⁾ the contractor retained by the shipowner merely to man the vessel was held not to be an "owner" and not to be entitled to limitation of liability.

2.1.1. Charterers

In U.A.E. law, the charterer may limit his liability.⁽¹⁰⁾ In the case of a bareboat charter,⁽¹¹⁾ 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

⁽⁸⁾ 15 F.3d 270 (2d Cir. 1994), AMC 1288.

⁽⁹⁾ 778 F.Supp. 153 (S.D.N.Y. 1991).

⁽¹⁰⁾ Article 145/1 of the *U.A.E. Maritime Code*, provides:

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

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

⁽¹¹⁾ Article 252 of the *U.A.E. Maritime Code*, provides:

تأجير السفينة غير مجهزة عقد يلتزم بمقتضاه المؤجر نظير أجر بأن يضع تحت تصرف المستأجر لمدة محددة سفينة معينة بدون طاقم وبدون أي تجهيز مادي أو بتجهيز غير تام."

"(Free translation) Bareboat charter is a contract whereby the (owner) is obliged to place for a specified period at the disposal of the charterer a specified vessel without crew, supplies or partially supplies."

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 vessel.⁽¹²⁾

In United States, a charterer must prove that he is an actual charter, and by virtue thereof he actually "mans, victuals and navigates" the vessel before he may avail himself of the *Act*.⁽¹³⁾ A mere bailment is not enough.⁽¹⁴⁾ 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

⁽¹²⁾ In the English case of *The Aegean Sea*, [1998] 2 Lloyd's Rep. 39, Thomas J held that the reference to "charterer" in the definition of "shipowner" did not entitle a charterer to limit in respect of claims brought against it under the charterparty by the shipowner. This was because a single fund was constituted in respect of any particular incident and therefore to allow charterers to limit their liability in respect of such claims would diminish the amount of the fund available to other claimants. The reference to "charterer" was intended to allow the charterer to limit in respect of claims made against it by holders of charterers' bills of lading. See, too, *CMA CGM SA v. Classica Shipping Co Ltd* [2003] EWHC 642 (Comm); [2003] 2 Lloyd's Rep 50, QB, where charterers were held not to be entitled to limit in respect of claims made against them by the shipowner in respect of exposure to cargo claims and general average following an explosion and fire on board the vessel.

⁽¹³⁾ 46 U.S.C. section 186.

⁽¹⁴⁾ *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); *Jones and Laughlin Steel Co. v. Vang*, 73 F.2d 88, 91 (3d Cir. 1934), appeal dismissed, 294 U.S. 735 (1935).

not”.⁽¹⁵⁾ This led to grief for Union Oil Company in the *Torrey Canyon* litigation.⁽¹⁶⁾ When the *Torrey Canyon* grounded off the south-western tip of England and spilled her nearly 119,328 dead-weight tons of crude oil into the sea, both Barracuda Tanker Company, as owner, and Union Oil Company of California petitioned for exoneration from or limitation of liability, surrendering the sum of \$50, representing a lone salvaged lifeboat. The United Kingdom of Great Britain and Northern Ireland (despite the fact that RAF bombers had bombed and sunk her), the Republic of France, and the States of Guernsey duly filed claims in the proceedings--but against Union Oil Company only. The claimants’ contentions were that Union was not entitled to limit since the agreement with Barracuda was merely a time charter and not a bareboat or demise charter. The claimants pointed out that the charter party between the owner and Union did not require that Union “man, victual and navigate” the vessel at its own expense or procurement. The charter also included the following provisions: (1) The Master, officers, and crew of the vessel remained the servants of Barracuda; (2) the crew was to navigate and work the vessel on behalf of Barracuda; (3) Barracuda was to provide and pay for all ship's provisions and stores, and the wages of the crew; (4) Barracuda “shall have the benefit of all limitations

⁽¹⁵⁾ *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).

⁽¹⁶⁾ *In re Barracuda Tanker Corp (The Torrey Canyon)*, 281 F. Supp. 228 (S.D.N.Y. 1968).

of, and exemptions from liability accorded to owners or chartered owners of vessels by any statute or rule of law”; and (5) that “nothing herein contained shall be construed as creating a demise of the vessel to charterer.”⁽¹⁷⁾

The Second Circuit held that Union was neither an “owner” nor a “charterer” within the meaning of the *Limitation Act* and therefore was not entitled to the Act's benefits. In so holding the court had noted:

“... No case has been cited to us which supports the contention of Union that, as a time-charterer, it may be an "owner" within sec.183, even though it is not a "charterer" within sec.186. "It seems quite plain that time charterers . . . are not entitled, as such, to take any benefit of the limitation of liability statutes”.⁽¹⁸⁾

3.1.1. Managers or Operators

Another person entitles to the right of limitation under U.A.E. law is the manager or operator. The *U.A.E. Maritime Code* does not define the term 'managers' or 'operators'.⁽¹⁹⁾ However, it is submitted that the term 'managers' or 'operators' covers only those who directly contributed to the management or

⁽¹⁷⁾ *Ibid.* at 230-31.

⁽¹⁸⁾ *Ibid.* at 1015.

⁽¹⁹⁾ Article 145/1 of the *U.A.E. Maritime Code*, merely provides :

” تسري أحكام تحديد المسؤولية على مجهزة السفينة... والمجهز

المدیر...”.

operation of the vessel.⁽²⁰⁾

The *Limitation of Liability Act* of the United States does not expressly indicate whether “managers” or “operators” are entitled to limitation of liability. It is maintained that ship managers and operators, together

⁽²⁰⁾ 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] 1 Lloyd's Rep. 349, the vessel *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 vessel. The Charterers' cargo claim succeeded against the Shipowners in arbitration because the vessel 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.

with time and voyage charterers, are not entitled to any benefits of the *Limitation Act*.⁽²¹⁾ However, U.S. jurisprudence shows that managers or operators could be granted owner *pro hac vice* status under certain circumstances so that limitation of liability would be available to them under Section 186 of the *Limitation Act*.⁽²²⁾ In *In re United States*,⁽²³⁾ a government vessel was operated by MTI. After a collision, both the government as owner and MTI as operator petitioned for limitation of liability. There was no express charterparty of any kind between the government and the MTI. But MTI was in actual control of the vessel in that it equipped, manned, victualled and navigated the vessel. In addition, all the officers and crew members were subjected entirely to MTI's orders and were considered as its employees. The court held that MTI was, in effect, an owner *pro hac vice* and accordingly granted the same right of limitation to MTI as it would to a shipowner.

However, although jurisprudence indicates that managers or operators may be brought within the meaning of owner *pro hac vice* and entitled to limitation of liability, whether managers or operators as a class of persons should be granted the right to limitation is nebulous under U.S. law. Parties, at the time of entering into a particular contractual arrangement, may not have

⁽²¹⁾ Benedict on Admiralty, 7th ed., v.3, chap. 5, section 45, at 5-37.

⁽²²⁾ 46 U.S.C. 186.

⁽²³⁾ *In re United States*, 259 F.2d 609, 1959 AMC 982 (3rd Cir. 1958).

taken the issue of limitation of liability into consideration so that the person in charge of management or operation of the vessel may later be considered as owner *pro hac vice* for purposes of limiting liability. As a consequence, managers or operators not qualified as owner *pro hac vice* would be excluded from the limitation regime.

4.1.1. Master and Members of the Crew

U.A.E. law extends the limitation to any person for whom the shipowner or the charterer is vicariously liable.⁽²⁴⁾ All persons who can be said to be members of the crew are entitled to limit their liability. However,

⁽²⁴⁾ Article 145/1 of the *U.A.E. Maritime Code* provides that:

تسري أحكام تحديد المسؤولية على مجهزة السفينة والمستأجر والمجهز المدير والريان 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 وعلى أن لا تجاوز مسؤولية المالك ومسئولية الأشخاص المذكورين عن الحادث للوحد الحدود المبينة في المادة (١٣٨).

“(Free translation) the provisions of limitation of liability shall apply to the operator of the ship, charterer, managing operator, 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 138.”

for employees to obtain the protection they must have been acting at the material time in the course of their employment. Where the master or a member of the crew is at the same time the owner, co-owner,⁽²⁵⁾ charterer, manager or operator of a vessel, the provisions of article 145/2 of the *U.A.E. Maritime Code* 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.⁽²⁶⁾ 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 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.

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,*

⁽²⁵⁾ *Coldwell v. Horsfall v. West Country Yacht Charter Ltd: The Annie May* [1968] P 341; [1968] 1 Lloyd’s Rep 141.

⁽²⁶⁾ Article 145/2 of the *U.A.E. Maritime Code*. See *The Alastar* [1981] 1 Lloyd’s Rep 581 (CA).

for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, 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 vessel may by law be liable, notwithstanding such *master or seaman* may be an owner or part owner of the vessel.⁽²⁷⁾ (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 members are liable to be sued in any court. For example, in *In re Brent Towing, Inc.*,⁽²⁸⁾ claimants in

⁽²⁷⁾ 46 U.S.C. App. 187. Compare with English law. In *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 vessel, a collision occurred. 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 vessel *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 vessel 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.

⁽²⁸⁾ *In re Brent Towing, Inc.*, 414 F. Supp. 131 (N.D. Fla. 1975)

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. In *Zapata Haynie Corp. v. Arthur*,⁽²⁹⁾ which involved the lifting of a stay against the master of the vessel, the court was adamant in holding that the stay provisions of the Limitation Act applied solely to shipowners. Since master and crew members are not shipowners, they do not fall within the meaning of Section 187 of the Act. In *In re Ingram Barge Co.*,⁽³⁰⁾ following the *Zapata* decision, the court refused to extend a stay to a suit against a master.

In the United States, independent actions against master and crew members other than limitation actions are further complicated by the situation where the master's knowledge or privity of the damage or loss can be imputed to that of shipowners. Section 183(e) of the *Limitation of Liability Act* provides that the privity or knowledge of the master of a seagoing ship shall be deemed conclusively the privity or knowledge of the owner of such vessel in personal injury and death.

⁽²⁹⁾ *Zapata Haynie Corp. v. Arthur*, 926 F.2d 484 (5th Cir. 1919)

⁽³⁰⁾ *In re Ingram Barge Co.*, 167 F.3d 538 (5th Cir. 1998).

cases.⁽³¹⁾ Since the determination of knowledge or privity is a matter exclusively within the jurisdiction of a federal admiralty court, a stay of any action other than the limitation proceeding becomes necessary.

5.1.1. Salvors

In U.A.E. law, salvors are excluded from the province of limited liability. Salvor is defined as “any person rendering services in direct connection with salvage operations”⁽³²⁾. So, under U.A.E. law a salvor may not claim the benefit of limitation in rendering services directly connected with salvage operations.

U.S. law denies limitation to salvors. With respect to salvaging vessels, salvors may be able to bring themselves within the category of owner or owner *pro hac vice*. But, if damage occurred while salvage services were conducted in such a manner that they were not directly related to navigation or management of the salvaging vessel, the issue as to whether salvors are entitled to limitation can be problematic, although it has not been litigated. Given the general judicial hostility towards the existing limitation system and restrictive interpretation of the Limitation Act, it is reasonable to predict that the right to limitation would probably be denied.⁽³³⁾ However, although the issue appears to be unsettled, it is agreed that “on reason, the benefit of the [Limitation] Act should be extended” to salvors.⁽³⁴⁾

⁽³¹⁾ 46 U.S.C. App. 183(e).

⁽³²⁾ Article 1(3) of the Limitation of Liability for Maritime Claims Convention 1976

⁽³³⁾ Harold K. Watson, *supra*, note 23, at p. 258.

⁽³⁴⁾ 3 Benedict on Admiralty, chap. 5, s.45, at 5-37 (7th ed. 1993).

6.1.1. Insurers

U.A.E. law does not include insurers as an independent category to be protected by the limited liability regime.

In the United States, because no rule on direct actions against insurers has been established, such actions are governed by the individual states.⁽³⁵⁾ At present, a few states including Louisiana and Puerto Rico allow direct actions against the P & I insurer. In these direct action states, the P & I insurer cannot limit, on the basis that limitation is a personal defense available only to the shipowner.⁽³⁶⁾ In *Maryland Casualty Co. v.*

⁽³⁵⁾ See Tetley, "Protection and Indemnity Club Rules and Direct Action by Third Parties", 17 JMLC, 427, at pp. 429-430 (1986).

⁽³⁶⁾ For example, in *Olympic Towing Corp. v. Nebel Towing Corp.*, 419 F.2d 230 (1969), cert. denied, 397 U.S. 989 (1970), defendant's westbound ship, in holding up its movement to allow plaintiff's eastbound ship to pass, permitted her barges to swing beyond midchannel, thus forcing the plaintiff's ship to leave channel to avoid collision. The plaintiff's ship hit an underwater object and sank. The plaintiff sued the defendant and its insurer for damage pursuant to Louisiana's direct action statute. The district court held that the defendant was not entitled to exoneration but was entitled to limit, but denied limitation to the insurer on the basis that limitation is a personal defense available only to the shipowner. The defendant and the insurer appealed. The Court of Appeals affirmed holding that the policy underlying the concursus under federal law is not so strong as to abrogate rights under the direct action statute, and held that the conflict between the direct action statute and the federal law is insignificant. Further, the court rejected the contention that higher premiums would result if the insurer is denied limitation, on the basis that the influence of limitation upon premiums in ==

Cushing,⁽³⁷⁾ an owner of a ship, which collided with a pier and capsized in Louisiana, petitioned to limit his liability to the ship's salvage value of \$25,000. Claims of widows of the seamen against the shipowner totalled \$600,000, and the shipowner had a P & I policy in the amount of \$180, 000. If the claimants' direct action against the insurer is allowed and if the action results in a judgment equalling \$180,000, the insurer would be exonerated of any further obligation to indemnify the shipowner. The shipowner is additionally liable to pay his limited liability, i.e., \$25,000, to the claimants. Thus, the claimants can recover \$205,000 ($180,000 + 25,000 = 205,000$). On the other hand, if direct action is denied, the claimants can only recover \$ 25,000 from the

= = questionable and that the maritime industry benefits from full recovery despite higher premiums.

On the other hand, the dissenting opinion emphasized that the insurer stand. in the shoes of the insured. The P & I policy expressly provides that the insurer pays such sums as the insured will become legally liable to pay. Further, limitation does not inhere in the "person" of the shipowner; it inheres in the transaction giving rise to the underlying obligation. Thus, the dissenting opinion argued to allow limitation to the insurer.

The Supreme Court, in *Maryland Casualty Co. v. Cushing*, also denied limitation to the insurer on the basis that the Limitation Act was not designed for the benefit of the insurer. 347 U.S. at 421-422.

⁽³⁷⁾ 347 U.S. 409 (1954). The district court issued an injunction prohibiting suit against the shipowner elsewhere. Subsequently, the representatives of the deceased seamen filed a suit against the P & I insurer of the owner. The claimants relied on a Louisiana statute which authorizes direct action against the P & I insurer. The district court dismissed the direct action, but the Court of Appeals reversed. The Supreme Court reversed.

shipowner. The shipowner, in turn, can be indemnified \$25,000 from his insurer. Therefore, direct actions benefit the claimants, while it might prejudice the shipowner as well as his insurer. Injustice to the claimants becomes worse if the shipowner's liability is nil because his ship sank. Then, the claimants cannot recover at all unless they can file a direct action against the insurer; because the insurer needs not pay a penny without direct actions, he is unfairly enriched to the extent premiums exceed the real risk. The Supreme Court was divided as to whether the direct action statute violated the federal limitation statute. The majority opinion argued that the direct action statute conflicted with the Limitation Act for marshalling all claims arising from an accident. In contrast, the concurring opinion as well as minority opinions found such statute not to conflict with the Limitation Act. To reconcile direct actions with the limitation proceeding, the concurring opinion suggested to conclude the limitation proceeding first. Then, the shipowner can establish the limitation fund, and can be indemnified by his insurer. If there remains coverage of the policy, the claimants might bring direct actions against the insurer. The concurring opinion intended to protect the shipowner's position of benefiting fully from his insurance, before the insurance proceeds were attacked in a direct action. To avoid a deadlock of 4-1-4, the Court followed the concurring opinion.⁽³⁸⁾

⁽³⁸⁾ Note, Direct Action against Insurer under State Statute - Conflict with Unlimited Liability Act., 29 Tul. L. Rev. 139, at pp. 140-141 (1954); Note, Suit under Louisiana "Direct Action" = =

Although P & I policies usually contain an indemnity or pay-first clause providing that the insurer pays only the amount which the shipowner has become liable to pay and has paid, U.S. courts reject such clauses because they give the insurer an unfair advantage "if the shipowner is bankrupt or has disappeared."⁽³⁹⁾ Nevertheless, such a clause effectively precludes direct actions in states that do not have the direct action statutes.

7.1.1. Independent Contractors

It is unclear whether the U.A.E. law extends the right to limit to independent contractors such as stevedores, ship repairers, shipyard managers and pilots. Some commentators argue that independent contractors may limit provided that the shipowner is responsible for their act.⁽⁴⁰⁾

= = Statute Continued until after Determination of Insured Shipowner's and Charterer's Liability in Federal Limitation Proceedings, 40 VA.L.REV. 621, at p. 622 (1954).

⁽³⁹⁾ Kierr, *"The Effect of Direct Action Statutes on P & I Insurance, on Various other Insurances of Marine Liabilities, and on Limitation of Shipowners' Liability"*, 43 Tul.L.Rev. 638, at pp. 669-670 (1969). Direct action states have established the principle that "a state may impair the contractual relationship between the insurer and the insured by permitting direct actions." See Dougherty, *The Impact of Member's Insolvency or Bankruptcy on a Protection & Indemnity Club*, 59 Tul. L. Rev. 1466, at p. 1481 (1985).

⁽⁴⁰⁾ Griggs & Williams, *supra*, note 2, at pp.7-8; Greenman, *"Limitation of Liability; A Critical Analysis of United State Law in an International Setting"*, 57 Tul.L.Rev. 1139, at pp. 1160-1161 (1983). According to these commentators, "if the term = =

1.2. Vessels subject to Limitation

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

Under U.A.E. law for the purpose of limitation, "ship" means "any structure which is normally working or prepared to be working in maritime navigation irrespective of its power, tonnage or the purposes for its navigation."⁴¹ The definition includes ships that are stranded, wrecked,⁽⁴²⁾ or sunk, including parts of a ship. Air-cushion vehicles and floating platforms constructed

= = '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.

(⁴¹) Article 11 of the *U.A.E. Maritime Code* provides:

"السفينة هي كل منشأة تعمل عادة أو تكون معدة للعمل في الملاحة

البحرية وذلك دون اعتبار لقوتها أو حمولتها أو الغرض من ملاحظتها."

(⁴²) In relation to the possibility of an owner pleading the limitation of his liability in cases where he owns a wreck that caused damages, the following distinction has been suggested:

- (i) where the owner is liable for damages caused by his ship before she sinks and becomes a wreck he may plead the limitation of his liability and constitute a limitation fund;
- (ii) where the ship has become a wreck and causes damages thereafter one of the conditions required for the constitution of a limitation fund does not exist and the owner may not plead the limitation of his liability as the damages have not been caused by a ship.

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 *U.A.E. Maritime Code*.

Warships and state owned ships allocated to public service are immune from arrest and enforcement proceedings.⁽⁴³⁾ Nonetheless, claims for damages can be pursued against the state owned ships.⁽⁴⁴⁾ 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.

⁽⁴³⁾Article 81 of the *U.A.E. Maritime Code* provides:

"لا تجوز أن تكون (السفن الحربية والسفن الحكومية غير الحربية التي تملكها أو تستغلها أو تديرها الدولة أو إحدى هيئاتها أو مؤسساتها العامة وتكون مخصصة للخدمة العامة) محلا للحجز... ولا أن تكون محلا لأي إجراء قضائي آخر."

"(Free translation) (Warships and state owned ships allocated to public service) shall not be subject to arrest...or to any other judicial procedure."

⁽⁴⁴⁾ Article 82 of the *U.A.E. Maritime Code* provides:

"...لايجوز للدولة...التي تملك السفينة أو تستغلها أو تديرها التمسك بقاعدة حصانة السفينة إذا تقدم ذوو الشأن في أي من الحالات التالية بمطالباتهم أمام المحاكم المختصة في الدولة:
(أ) الدعاوى الناشئة عن التصادم البحري وغيره من حوادث الملاحة.
(ب) الدعاوى الناشئة عن أعمال المساعدة والانتقاذ وعن الخسائر البحرية المشتركة...".

can be limited. However, warships should not be considered as merchant vessels in all respects. The minimum liability applicable in the case of certain state owned ships is higher than for other vessels. 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 accident.

In the United States, in its original form, *Limitation of Liability Act of 1851* did not apply to canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation".⁽⁴⁵⁾ But, as early as in 1886, the *Limitation Act* was extended to apply to "all seagoing vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal boats, barges and lighters".⁽⁴⁶⁾ In addition to this provision, U.S. courts have relied upon the general definition of vessel as contained in other statutory language which defines

"(Free translation)...it shall not be permissible for the state, its organs or public agencies owing, operating or managing the vessel to rely on the principle of immunity of the vessel if claims are made before the competent courts...in any of the following circumstances:

- a) claims arising out of a collision at sea or other navigational accident.
- b) Claims arising out of acts of assistance, salvage and general average".

⁽⁴⁵⁾ Act of Mar. 3, 1851, ch. 43, s 7,9 Stat. 635.

⁽⁴⁶⁾ 46 U.S.C. 188.

“vessel” as to include “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water”.⁽⁴⁷⁾ Under this definition, U.S. courts have generally found most watercraft, as long as they are considered as vessels for purposes of general maritime law, are also vessels within the meaning of the *Limitation of Liability Act*.⁽⁴⁸⁾

The key to consider a particular piece of watercraft as vessel 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 vessel. 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.

Only “seagoing ships”, however, are covered by the special tonnage limitation applicable in the United States to claims for bodily injury and death.⁽⁴⁹⁾

⁽⁴⁷⁾ 1 U.S.C. 188.

⁽⁴⁸⁾ 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.

⁽⁴⁹⁾ Determination of a given vessel as seagoing is of particular significance in personal injury and death claims. Sec. 183(b) of the *Limitation of Liability Act* provides for the establishment of a minimum limitation fund to satisfy personal injury and death claims. A prerequisite to applying this special provision is that a seagoing vessel be involved. The Act, section 183(f) = =

Government ships may limit their liability. Marine structures not intended for navigation as a means of transportation, however, are not considered to be vessels⁽⁵⁰⁾ and are therefore excluded from limitation under U.S. law, particularly where they are permanently attached to the seabed.⁽⁵¹⁾

= = specifically defines the scope of seagoing vessels 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 vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term used in section 188 of this title.

⁽⁵⁰⁾ In *Evansville & Bowling Green Packet Co. v. Chero Colar Bottling Co.*, 271 U.S. 19 (1926), the court found that a wharfboat used as an aid to river traffic was not a vessel within the scope of the Limitation of Liability Act because the wharfboat was not used to carry freight from place to place as a means of transportation, and it did not encounter the perils of navigation. Whether the wharfboat had the potential capability of being used as a means of transportation did not really matter. What was significant was whether at the time of the incident, the wharfboat was functioning as a means of transportation. Since it was not, the right to limitation of liability was not available to its owner.

⁽⁵¹⁾ In another case, *Dresser Industries, Inc. v. Fidelity & Cas. Co.*, 580, 1978 AMC 2588 (5th Cir. 1978) the court held that a jack-up drilling rig with its legs resting on the floor of the ocean was not a vessel. Because of its permanent location, it was a fixed object.

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 that right. The incidents with regard to which an owner may limit his liability are as follows:

- i) Claims regarding loss of life or personal injury and loss of or damage to property.
- ii) Claims regarding losses resulting from infringement of rights.
- iii) Claims regarding losses resulting from delay.
- iv) Claims regarding costs of wreck removal.

1.2. Personal or Property Claims

1.1.2. U.A.E. law

In U.A.E. law, article 138 of the *U.A.E.*

Maritime Code provides:

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

- a) loss of life of, or personal injury 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 its cargo or in the embarkation, carriage or disembarkation of its passengers.”⁽⁵²⁾

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

i. Incidents on board

Under article 138/1(a) of the *U.A.E. Maritime Code*, personal claims which may be limited cover claims brought by crew members (but see under), passengers, visitors, persons working onboard other than crew and, presumably, stowaways and other persons onboard unlawfully.⁽⁵³⁾ It also probably includes a person who falls from the gangway while boarding or leaving a

⁽⁵²⁾ Article 138/1(a),(b) of the *U.A.E. Maritime Code* provides that:

١- يجوز لمالك السفينة أن يحدد مسئوليته أيا كان نوعها بالقدر المبين في المادة (١٤١) وذلك 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 ظهر السفينة.

ب- وفاة أو إصابة أي شخص آخر على البر أو في البحر وكذلك ضياع أو تلف أي مال أو اعتداء على أي حق إذا كان الضرر ناشئا عن خطأ أي شخص يكون المالك مسئولاً عنه سواء وجد هذا الشخص على ظهر السفينة أو لم يوجد، وبشرط أن يكون الخطأ متعلقاً بالملاحة أو بإدارة السفينة أو بشحن البضائع أو نقلها أو تفريغها أو بصعود المسافرين أو نقلهم أو نزولهم.”

⁽⁵³⁾ See *Innes v Ross* [1957] SL T 121.

ship.⁽⁵⁴⁾ 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⁽⁵⁵⁾.

Although article 138 provides that claims for loss of life or personal injury may be subject to limitation proceedings, article 140 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 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.⁽⁵⁶⁾ In *The Stella*,⁽⁵⁷⁾ it was argued on behalf of a passenger whose luggage had been lost when the vessel sank that the *eiusdem generis* rule of construction ought to be applied and that accordingly the meaning of the words “or other things whatsoever” ought to be restricted to things similar to goods or merchandise. This argument was rejected.⁽⁵⁸⁾

Difficulty with respect of claims for loss or damage

⁽⁵⁴⁾ *Moore v Metcalf Motor Coaster Ltd* [1958] 2 Lloyds Rep 179. The phrase “carried in the ship” appeared in the *Merchant Shipping Act 1894* s 503(1)(c).

⁽⁵⁵⁾ *The Tojo Maru* [1972] AC 242 (HL); [1969] 3 WLR 903.

⁽⁵⁶⁾ Merchant Shipping (Liability of Shipowners and Others) Act, 1958, 6 & 7 Eliz. 2, c. 62, § 503(1)(b).

⁽⁵⁷⁾ [1900] P. 161.

⁽⁵⁸⁾ *Ibid.* at 165-66.

to cargo may arise in deciding whether a particular cargo claim is subject to limitation of liability. Because under U.A.E. 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 law of limitation of liability are very different from each other. The per package limitation 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 charterparty.⁽⁵⁹⁾ The general limitation of liability regime sets a ceiling on the amount of damages recoverable by claimants against the ship for damage to cargo.⁽⁶⁰⁾ There is no mention of the relationship between the two sets of provisions in the *Maritime Code*. This lapse may give rise to conflict of law problems.

⁽⁵⁹⁾ See article 276 of the *U.A.E. Maritime Code* which provides:

"تحدد مسئولية الناقل في جميع الأحوال عن الهلاك أو التلف الذي يلحق بالبضائع بما لا يجاوز عشرة آلاف درهم عن كل طرد أو وحدة اتخذت أساساً في حساب الأجرة أو بما لا يجاوز ثلاثين درهماً عن كل كيلوجرام من الوزن الإجمالي للبضاعة ويؤخذ بالأعلى من الحدين".

"(Free translation) The liability of the carrier for loss or damage to the goods shall be limited to a sum not exceeding AED10,000 per package or unit taken as a basis in computing the freight or not exceeding AED 30 per kilogram per gross weight of the goods, whichever is the higher limit".

⁽⁶⁰⁾ See article ١٤١ of the *U.A.E. Maritime Code*.

ii. Incidents occurring elsewhere than on board the offending vessel

According to article 138/1(b) of the *U.A.E. Maritime Code* 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.

2.1.2. U.S. law

In the United States, as early as in 1889, in *Butler v. Boston & Savannah S.S. Co.*,⁽⁶¹⁾ when challenged by claimants that the Limitation Act did not apply to personal injury actions at all, the court stated that "[w]e think that the law of limited liability applies to cases of personal injury and death as well as to cases of loss of or injury to property"⁽⁶²⁾. Claims for personal death and injury have been consistently held subject to limitation by U.S. courts.⁽⁶³⁾

Under U.S. law claims for loss of or damage to property whether arising out of torts, contracts or otherwise are all subject to limitation of liability. There have been less controversies with tort claims than with contract claims, though. Claims arising from collisions, stranding, sinking, etc. are generally subject to limitation. Section 183 of the Limitation of Liability Act provides that claims for any loss, damage or injury by collision are subject to limited liability.⁽⁶⁴⁾ U.S. case law reflects the same principle. For instance, damages

⁽⁶¹⁾ *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527, 9 S.Ct. 612, 32 L.Ed. 1017 (U.S. Mass., 1889).

⁽⁶²⁾ *Ibid.* 130 U.S. 527, 552 (1889).

⁽⁶³⁾ In *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 vessel 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. See Rae M. Crowe, "Kinds of Losses Subject to Limitation: the 'Personal Contract' Doctrine", 53 Tul. L. Rev. 1087, 1117 (1979).

⁽⁶⁴⁾ 46 U.S.C. 183.

resulting from stranding were held to be limitable.⁽⁶⁵⁾ Damages caused by collisions with bridges⁽⁶⁶⁾ were also held to be subject to limitation of liability.⁽⁶⁷⁾ In short, claims resulting from collisions specifically and torts generally are subject to limitation of liability under U.S. law. In contrast, the situation in the area of contracts is less straightforward. In particular, U.S. courts have developed a theory known as the doctrine of "personal contracts", which requires courts to look into the nature and terms of a given contract and determine whether it is personally binding on the parties having entered into the contract. If a contract is found as personal, claims arising therefrom are non-limitable.

The difficulty in determining whether cargo claims are subject to limitation of liability is mostly encountered under the U.S. legal regime because of the application of the doctrine of personal contracts. In other words, whether particular cargo claims are subject to limitation depends upon the type of contracts out of which such claims arose. Cargo claims arising out of charterparties are usually not limitable because charterparties are considered as personal contracts. It is believed that parties, having knowingly entered into such contracts and willingly accepted full responsibility thereunder, shall not later be seen attempting to limit

⁽⁶⁵⁾ *Butler v. Boston & S.S.S. Co.*, 130 U.S. 527, 9 S.Ct. 612, 32 L.Ed. 1017 (1889).

⁽⁶⁶⁾ See e.g., *Richardson v. Harmon*. 222 U.S. 96, 32 S.Ct. 27, 56 L.Ed. 110 (1911).

⁽⁶⁷⁾ See generally, Rae M. Crowe, *supra*, note 87, at p. 1119 (1979).

their liability they previously promised to take. In *Cullen Fuel Co. v. W.E. Hedger, Inc.*,⁽⁶⁸⁾ the U.S. Supreme Court held that the charterparty in question was a personal contract and the parties to such a contract were precluded from limiting their liability.⁽⁶⁹⁾

Interestingly, while charterparties are consistently considered as personal contracts and the right to limitation for the claims arising out of them is invariably denied, U.S. courts have also been consistent in granting limitation of liability to cargo claims arising out of bills of lading. For example, in *Earle & Stoddart v. Ellerman's Wilson Line*,⁽⁷⁰⁾ the court held that bills of lading were not personal contracts (even when they were signed personally by the shipowner) so that the shipowner was entitled to limitation of liability.⁽⁷¹⁾

2.2. Claims for Costs of Wreck Removal

Under the *U.A.E. Maritime Code*, wreck removal claims are subject to limitation of liability. Article

⁽⁶⁸⁾ *Cullen Fuel Co. v. W.E. Hedger, Inc.*, 290 U.S. 82, 54 S.Ct. 10, 78 L.Ed. 189 (U.S.N.Y., 1933).

⁽⁶⁹⁾ See also, *Capitol Transp. Co. v. Cambria Steel Co.*, 249 U.S. 334 (1919); *Luckenbah v. W.J. McCahan Sugar Ref Co.*, 248 U.S. 139 (1918); *Pendleton v. Benner line*, 246 U.S. 353 (1918). For general discussion, see Rae M. Crowe, "Kinds of Losses Subject to Limitation: The Personal Contract Doctrine", 53 Tul. L. Rev. 1087, 1094 (1979).

⁽⁷⁰⁾ *Earle & Stoddart v. Ellerman's Wilson Line*, 287 U.S. 420, 53 S.Ct. 200, 77 L.Ed. 403 (U.S.N.Y. 1932)

⁽⁷¹⁾ See also, e.g., *Americana Tobacco Co. v. Goulandris*, 173 F.Supp. 140 (S.D.N.Y. 1959), aff'd 281 F.2d 179.

138/1(c)⁽⁷²⁾ provides that “the shipowner may limit its liability with respect of any obligation imposed by the law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned.”

As far as claims for cargo removal costs are concerned, article 138/1(c) of the *U.A.E. Maritime Code* provides that “limitation of liability is applicable to claims in respect of the removal, destruction or the rendering harmless of anything which may be on board such ship”. This provision may be interpreted to include the cargo of the ship. A problem may arise in determining the scope of “cargo” in the reality of cargo removal. It has been suggested that “cargo” does not include stores or bunkers. It only refers to goods carried as cargo in a ship.⁷³ Yet, as a practical matter of cargo removal, stores or bunkers on board the vessel are often the target of removal as part of salvage operations.⁷⁴ It is certain, however, that nuclear materials as cargo are not envisaged under this provision, for nuclear materials damages are excluded from the ambit of limitation of liability under the *U.A.E. Maritime Code*.⁽⁷⁵⁾ For the

⁽⁷²⁾ Article 138/1(c) provides:

”يجوز لمالك السفينة أن يحدد مسؤليته أيا كان نوعها ...التشئنة
عن كل التزام يفرضه القانون ويكون متعلقا برفع الحطام أو
تعويم أو رفع أو تحطيم سفينة غارقة أو جاتحة أو مهجورة بما في
ذلك ما يوجد على ظهرها.”

⁽⁷³⁾ Geoffrey Brice, *supra*, note 7.

⁽⁷⁴⁾ *Ibid*.

⁽⁷⁵⁾ Article 140(d) of the *U.A.E. Maritime Code*.

same reason, oil is not within the meaning of cargo under this provision.

Claims for cargo removal costs are not subject to limitation if they relate to remuneration under a contract with the person liable. Therefore, if a shipowner had to remove a charterer's cargo because of the breach of a charterparty by the charterer, the shipowner may claim damages for such a breach and the claim will not be subject to limitation of liability, for such a claim relates to remuneration under a contract, i.e., charterparty.

U.S. 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*").⁽⁷⁶⁾ 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.⁽⁷⁷⁾

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*,⁽⁷⁸⁾ 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 vessel and the negligent owner of the

⁽⁷⁶⁾ 33 U.S.C. 403-415.

⁽⁷⁷⁾ *Ibid.* section 409.

⁽⁷⁸⁾ *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 19 L.Ed. 2d 407, 88 S.Ct. 379 (1967)

wreck could not merely abandon the sunk vessel 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.⁽⁷⁹⁾

⁽⁷⁹⁾ Following the precedent of the *Wyandotte*, in *Hines, Inc. v. United States*, 551 F.2d 717 (6th Cir. 1977) for example, the court held that the United States government's claim for damages and penalties pursuant to the *Wreck Act* was not subject to limitation. Similarly, in *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*.

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.

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

Article 138 1(c) of the *U.A.E. Maritime Code* provides that "the shipowner may limit its liability with respect of any obligationrelating to claims for damage to harbor works, basins and waterways navigation". The term "damage to property" is broad enough to include any damage to harbor works, etc.

In the United States, by virtue of the *Rivers and Harbors Act of 1899*,⁽⁸⁰⁾ claims for damage to government works cannot be limited.⁽⁸¹⁾ For example, in *U.S. v. Federal Barge Lines, Inc.*,⁽⁸²⁾ 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*.⁽⁸³⁾ Similarly interesting, claims for damage to foreign harbor works, etc., if brought before U.S. courts, are subject to

⁽⁸⁰⁾ 33 U.S.C. 403-415.

⁽⁸¹⁾ See generally Arthur J. Blank "Wreck Removal; Statutory Restrictions; The Rivers and Harbors Act", 53 Tul. L. Rev. 1299 (1979).

⁽⁸²⁾ *U.S. v. Federal Barge lines, Inc.*, 537 F.2d 993, 1978 AMC 2308 (8th Cir. 1978).

⁽⁸³⁾ See, e.g., *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).

limitation under the *Limitation of Liability Act*.⁽⁸⁴⁾

3. CLAIMS EXCEPTED FROM LIMITATION

We now come to the circumstances in which the persons in control of ships can plead the limitation. Liability can be limited in respect of the following claims:

- i) Claims for salvage rewards and contribution in general Average
- ii) Servants claims

1.3. Claims for Salvage Rewards and Contribution in General Average

In U.A.E. law, claims for salvage rewards and general average contributions are not subject to limitation of liability. Such claims are clearly exempted from the limitation regime under article 140 (b) of the *U.A.E. Maritime Code*.⁽⁸⁵⁾

However, it seems that when read together with some other provisions of the *Code*, the provision on salvage and general average claims may create some inconsistency or anomaly. For example, salvage claims may fall under the category of “obligation in respect of

⁽⁸⁴⁾ Donald C. Greenman, *supra*, note 36, at p. 1170 .

⁽⁸⁵⁾ Article 140 (b) of the *U.A.E. Maritime Code* provides:

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

“(Free translation) The owner may not limit its liability ...with respect of obligations arising from assistance and salvage or contribution in general average.”

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". Thus, if salvage of wreck is involved, salvage claims would be considered as subject to limitation under one provision, but not under the other.

Under U.S. law, claims arising out of salvage may be subject to limitation of liability. However, U.S. jurisprudence seems to indicate that the availability of limitation of liability hinges upon the type of salvage involved. Generally speaking, claims arising out of voluntary salvage are subject to limitation of liability.⁽⁸⁶⁾ For example, the Supreme Court in *The San Pedro*⁽⁸⁷⁾ held that salvage claims were subject to limitation of liability. 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.⁽⁸⁸⁾ For example, in *Great Lakes Towing Co. v. Mills Transp. Co.*,⁽⁸⁹⁾ the salvage claims

⁽⁸⁶⁾ Rae M. Crowe, "Kinds of Losses Subject to Limitation: the 'Personal Contract' Doctrine", 53 Tul. L. Rev. 1087, 1102 (1979).

⁽⁸⁷⁾ *The San Pedro*, 233 U.S. 365 (1912).

⁽⁸⁸⁾ See George D. Gabel, Jr., "Maritime Law and Practice", [sec. 10.15], 2d ed., the Florida Bar Continuing Legal Education.

⁽⁸⁹⁾ *Great Lakes Towing Co. v. Mills Transp. Co.*, 155 F. II (6th Cir. 1907). See also *In Re California Navigation & Imp. Co.*, 110 F. 678 (N.D.Cal.1901), where a steamer collided with another vessel. Various claims were presented against the owner of the =

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.⁽⁹⁰⁾ 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.⁽⁹¹⁾

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.⁽⁹²⁾ In *The Rapid Transit*,⁽⁹³⁾ 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

= steamer: (1) cargo claims; (ii) passengers' personal injury claims and property claims; (iii) damage claims of the other vessel; and (iv) salvage claims of a salvage company which towed the steamer to a drydock for repairs. The court held that the salvage claims were entitled to a preference over other claims. *Ibid.* at 680).

⁽⁹⁰⁾ Rae M. Crowe, "Kinds of Losses Subject to Limitation: the 'Personal Contract' Doctrine", 53 *Tulane Law Review* 1087, 1103 (1979).

⁽⁹¹⁾ See Christopher Hill, *supra*, note 7.

⁽⁹²⁾ Rae M. Crowe, *supra*, note 87, at p. 1115-1116 (1979). See e.g., *The Rapid Transit*, 52 F. 320 (D.C. Wash., 1892); *The Roanoke*, 46 F. 297 (E.D. Wis., 1891), *affd.*, 59 F. 161 (7th Cir. 1893).

⁽⁹³⁾ *The Rapid Transit*, 52 F. 320 (D.Wash. 1892)

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 clubs 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.

2.3. Employments Claims

In U.A.E. law, article 140(c) of the *U.A.E. Maritime Code* provides that "the shipowner may not limit its liability 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."⁽⁹⁴⁾

It is not entirely clear what types of claims relating to contracts of employment are envisaged under this provision of the *U.A.E. Maritime Code*. 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.⁽⁹⁵⁾ In this respect, an American case may provide

⁽⁹⁴⁾ Article 140 (c) of the *U.A.E. Maritime Code* provides:

"لا يجوز للمالك تحديد المسؤولية... (عن) حقوق الريان والبحارة وكل تابع اخر لمالك السفينة موجود على ظهرها أو يتعلق عمله بخدمتها وكذلك حقوق وراثتهم".

⁽⁹⁵⁾ Article 138/1(a) of the *U.A.E. Maritime Code*.

some guidance. In *Murray v. New York Central Railroad*,⁽⁹⁶⁾ the court held that the seaman's claim for personal injury arising under the *Jones Act* was subject to limitation. But, in 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.⁽⁹⁷⁾ Accordingly, limitation of liability was not available. In another American case, *Brister v. A. WI., Inc.*,⁽⁹⁸⁾ the court held that medical expenses, representing maintenance and cure, were not subject to limitation.

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.⁽⁹⁹⁾ While the 1985

⁽⁹⁶⁾ *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).

⁽⁹⁷⁾ *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).

⁽⁹⁸⁾ 946 F.2d 350 (5 th Cir. 1991).

⁽⁹⁹⁾ 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. .

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.⁽¹⁰⁰⁾

4. CONDUCT BARRING LIMITATION

1.4. Introduction

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, under the *U.S. Limitation of Liability Act of 1851*, it provides that the liability of the owner of a vessel for certain loss or damage, done without the "privity or knowledge" of such owner, shall not exceed the amount or value of the interest of such owner in such vessel and her pending freight.

U.A.E. law adopted this new approach in article 140 (a) which states that the shipowner is not allowed to limit liability if the occurrence giving rise to the claim resulted from his personal fault

2.4. U.A.E. law

U.A.E. law denies limitation when the loss results from the shipowner's personal fault.⁽¹⁰¹⁾ The shipowner is deemed at fault when he or his crews have failed to

⁽¹⁰⁰⁾ H.R. 277, Sec. 4; H.R. 3135, Sec. 5 (6), (7).

⁽¹⁰¹⁾ Article 140/ (a) of the *U.A.E. Maritime Code*.

exercise due diligence to maintain seaworthiness of his vessel, 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; 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. The shipowner's limitation may even be barred by his simple negligence. In contrast with the Convention, the shipowner must prove absence of his or his crew's conduct barring limitation under U.A.E. law.

The position under U.A.E. law with respect to corporate shipowner is unclear, partly because there are no decisions in this area. However, it is probably safe to say that a U.A.E. 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.⁽¹⁰²⁾ Thus if a technical inspector were to

⁽¹⁰²⁾ 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 = =

be at fault, this might be considered as barring limitation.

U.S. law bars limitation when the loss is incurred with privity or knowledge of the shipowner.⁽¹⁰³⁾ “Privity or knowledge” 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.*,⁽¹⁰⁴⁾

== company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.”

⁽¹⁰³⁾ *The Limitation of Liability Act*, section 183 (a).

⁽¹⁰⁴⁾ *In Goldman y. Thai Airways International Ltd.*, [1983] 3 All.E.R. 693 (C.A.). In this case a 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 Art. 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 ==

“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.”

In determining whether the shipowner is guilty of “actual fault or privity” or “knowledge or privity”, his conduct is to be judged objectively. The conduct of a particular shipowner is measured up to the standards of reasonably prudent comparable shipowners in the management and control of their vessels.⁽¹⁰⁵⁾ In other words, the test is not to see whether the shipowner was actually aware of any misconduct, but rather to consider what a prudent shipowner in a comparable situation should reasonably be aware of in the management and control of his vessel.

As far as knowledge is concerned, it need not be “actual knowledge” it can be “constructive” which means something which that person ought to have known, even if he did not in fact know it. “Constructive knowledge” is sufficient to meet the requirement of “knowledge” under this rule.⁽¹⁰⁶⁾ For example, in

= = 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.

⁽¹⁰⁵⁾ R.C. Seward, *supra*, note 57, at p. 169.

⁽¹⁰⁶⁾ Christopher Hill, *supra*, note 7, at p. 379.

Brister v. A.W.I., Inc.,⁽¹⁰⁷⁾ the court stated that demonstrating lack of actual knowledge by vessel owner did not meet owner's burden in limitation proceeding to show lack of "privity or knowledge". This is because "privity or knowledge" does not necessarily require showing of actual knowledge and it is deemed to exist if the shipowner has means of obtaining knowledge or if he would have obtained the knowledge by reasonable inspection. In other words, "knowledge" is not only what the shipowner knows, but what he is charged with discovering.⁽¹⁰⁸⁾

American courts have expressed their dislike of limitation by expanding the concept of privity or knowledge so as to bar limitation, especially in cases involving personal injury claims. For example, in *Complaint of Hercules Carriers, Inc.*,⁽¹⁰⁹⁾ a master

⁽¹⁰⁷⁾ *Brister v. A.W.I., Inc.*, 946 F.2d 350 (5th Cir. 1991).

⁽¹⁰⁸⁾ See also, *Pennzoil Producing Co. v. Offshore Exp., Inc.*, 943 F.2d 1465 (5th Cir. 1991); *Verdin v. C & B Boat Co., Inc.* 860 F.2d 150 (5th Cir. 1988); *Federal Barge Lines, Inc. v. Mission Ins. Co.*, 862 F.2d 874; *Complaint of Patton-Tully Transp. Co.*, 797 F.2d 206 (5th Cir. 1986), rehearing denied 800 F.2d 262; *Hammersley v. Branigar Organization, Inc.*, 762 F.Supp. 950 (S.D. Ga 1991).

⁽¹⁰⁹⁾ *Complaint of Hercules Carriers, Inc.*, 566 F. Supp. 962 (1983). See also *The Mormackite*, 272 F.2d 873 (2d Cir. 1959), a vessel was rendered unseaworthy due to improper stowage. The improper stowage was determined to be within the knowledge of the master of the vessel, but beyond the privity or knowledge of the shipowning company. The court granted the right to limitation to the shipowning company in the cargo damage claims, but denied the same in the personal injury and death claims. Similarly, in *Matter of Hechinger*, 890 F.2d 202 ==

was negligent in allowing a ship to proceed at speeds ordered by the compulsory pilot, rather than observing appropriate speeds. The ship collided with a bridge, killing 35 persons. Limitation was denied on the basis that the master had not been adequately instructed on his responsibility. The company manual was clear, but the court found that it was not followed. It was held that the shipowner had a duty not only to issue adequate instructions, but to ensure that they were followed. The shipowner violated his non-delegable duty to provide a competent master, because the master was negligent and therefore not competent.

3.4. U.S. law

U.S. law deems the privity or knowledge of the master as the privity or knowledge of the owner, with respect to personal injury claims, but not to property claims. This is advantageous for personal injury claimants, because they may deprive the shipowner's right to limit on the basis of privity or knowledge of his master.

Under U.S. law, in the case of a corporate shipowner, privity or knowledge of employees who are at a fairly high level in the executive hierarchy (e.g., managing officer, managing agent or plant manager) is deemed privity or knowledge of the shipowner because such

= = (9th Cir. 1989), the master's privity to or knowledge of the unseaworthy conditions of the vessel at or prior to the commencement of voyage was also deemed conclusively that of the owner of the vessel when such conditions caused personal injury and death.

persons have managerial authorities.⁽¹¹⁰⁾ The American concept of “managing officer” has been expanded to “marine superintendents, port engineers and even ship’s officers who are entrusted with supervisory duties.”⁽¹¹¹⁾ The test seems to be not the position held by the individual, but the scope of his authority. Therefore,

⁽¹¹⁰⁾ For example, in *Spence Kellogg & Sons, Inc. v. Hicks (The Linseed King)*, 285 U.S. 502, 52 S.Ct. 450, 1932 A.M.C. 503 (1932), a corporation operated a launch across a river as a ferry for its employees. The executive officers had instructed the works manager not to run the launch because the launch was unseaworthy when ice had formed in the river. Nevertheless, the launch was operated and sank. The works manager did not know that the launch would be operated and had not been consulted by the master. The Court held that the conditions could have been ascertained if the works manager had used reasonable diligence. Because the negligence of the works manager caused the disaster, it was deemed within the corporate shipowner’s privity or knowledge.

Moreover, employees, whose privity or knowledge is imputed to the shipowner, must have effective control over the phase of the business out of which the casualty occurred. The duty to control increase with the possibility of control. See Note, *The Continuing Conflict; between United states and English admiralty Law on Limitation of Liability; Whose Privity Binds the Corporate Shipowner?* 10 *Fordham Int’l L.J.*, 38,342,346 (1986).

⁽¹¹¹⁾ In *Illinois Constructors Corp. v. Logan Transp. Inc.*, 715 F.Supp. 872 (N.D. Ill. 1989), 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*, 81 F.3d 127 (11th Cir. 1996), 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.

American courts reveal their dislike of limitation both by enlarging the shipowner's duties and by lowering the level of corporate employees whose privity or knowledge may bind the shipowner. For example, in *Continental Oil Company v. Bonaza Corporation*,⁽¹¹²⁾ the vessel's captain was found being more than the master because his responsibility was not just for the operation and maintenance of the vessel. Instead, he was the corporation's managing agent as he was granted much autonomy in the management of the vessel. 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 vessel, including maintenance of the vessel 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 vessel'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.

Actual fault or privity of the shipowner alone does not necessarily deprive him of the protection of limitation. A causal relationship between the actual fault or privity and the damage or loss must be present. Many U.S. cases indicate that causation is required

⁽¹¹²⁾ *Continental Oil Company v. Bonaza Corporation*, 706 F.2d 1365 (5th Cir. 1983).

before limitation of liability may be denied. For example, in *Tug Sea Hawk v. Sococo, Ltd.*,¹¹³ the court felt that it had to determine what acts of negligence or conditions of unseaworthiness had caused the accident and must then determine whether the shipowner had knowledge of or privity to the same acts of negligence or conditions of unseaworthiness before deciding whether the shipowner should be granted the right to limitation.

Under U.S. law the burden to prove lack of privity or knowledge as to the cause of the loss or damage falls upon the shipowner petitioning limitation.¹¹⁴ In order to disprove privity or knowledge as to the cause of loss or damage, the shipowner must show the cause which actually brought about the loss or damage. If the cause cannot be determined, it would be very difficult for the shipowner to establish the absence of privity or knowledge as to the unexplained cause. In *The S.S. Hewitt*,¹¹⁵ the court stated:

“[T]he owner must necessarily show either just how the loss did occur, or, if he cannot, he must exhaust all possibilities, and show that as to each he was without privity.”⁽¹¹⁶⁾

Similarly, in *Terracciano v. McAlindn Constr.*

⁽¹¹³⁾ *Tug Sea Hawk v. Sococo, Ltd.*, 707 F.Supp.1306 (S.D. Fla. 1988).

⁽¹¹⁴⁾ See e.g., *Coleman v. Jahncke Service, Inc.*, 341 F.2d 956 (5th Cir. 1965); *In re Farrell lines, Inc.*, 530 F.2d 7 (5th Cir. 1976).

⁽¹¹⁵⁾ *The S.S. Hewitt*, 284F. 911 (S.D.N.Y. 1922).

⁽¹¹⁶⁾ *Ibid.*, at p. 912.

Co.,⁽¹¹⁷⁾ the court noted that the shipowner "made no effort to explore and exhaust all possibilities as to the cause of the accident and show lack of privity and knowledge as to each [possibility]". Therefore, the right to limitation was denied. In *Martin & Robertson Ltd. v. The Barcelona*,⁽¹¹⁸⁾ the court required the shipowner exhaust all the possibilities as to the cause of the loss or damage. It stated, *inter alia*:

"[T]he cause of the loss of the S.S. Barcelona (the vessel) not having been established, it cannot be found that the loss of the S.S. Barcelona was from a cause without the actual fault and privity of the owner and/or charterer."

The burden of proof is especially difficult for shipowners to sustain when there is a presumption of unseaworthiness. Under the doctrine of presumption of unseaworthiness, if the cause of loss or damage is not ascertainable, the vessel is presumed to be unseaworthy. Although such a presumption is rebuttable, the shipowner would yet have to exhaust all possible causes to prove that as to each of those causes there was a lack of privity or knowledge on his part.

In short, once the claimant satisfies the burden of proving negligence and causation, the shipowner may limit his liability if he can prove that negligent acts were not within his "privity or knowledge".⁽¹¹⁹⁾

⁽¹¹⁷⁾ *Terracciano v. McAlindn Constr. Co.*, 485 F2d 304 (2d Cir. 1973)

⁽¹¹⁸⁾ *Martin & Robertson Ltd. v. The Barcelona*, 1968 AMC 331 (S.D. Fla. 1967).

⁽¹¹⁹⁾ See e.g., *Illinois Constructors Corp. v. Logan Transp., Inc.*, 715 F.Supp. 872 (N.D. Ill. 1989).

5. LIMITATION FUND

As mentioned above, the purpose of limitation of liability regime is to protect the shipowner 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.

The limitation fund in most maritime nation is tied to the vessel's tonnage⁽¹²⁰⁾ as it seems impossible to devise another formula in which the various factors⁽¹²¹⁾ which are relevant in determining the amount are given their proper weight. The limitation is applied to the tonnage of the wrongdoing vessel.

U.A.E. law adopts completely different system for tonnage measurement. Under article 142/1 of the *Maritime Code*, for purposes of limitation fund, a

⁽¹²⁰⁾ Historically speaking, the value of vessel is the measure of shipowner's limitation of liability. Shipowner's vessel 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)).

⁽¹²¹⁾ A uniform financial unit for calculating per ton value of vessel and its level of stability are two of the important factors in an international system of limited liability.

vessel'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. 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.⁽¹²²⁾

Under U.S. law, the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel 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.

1.5. U.A.E. law

Under U.A.E. law the maximum liability of the shipowner is always limited to AED 750 per ton when the claim subject to limitation. The *U.A.E. Maritime Code* created a two-tier fund system in order to ensure adequate satisfaction of personal claims. By virtue of article 141/1 of the *Code*, where only property claims are involved, the limitation fund is set at AED 250 per

(¹²²) Article 142/1 of the *U.A.E. Maritime Code* provides that:

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

ton. In contrast, where only personal claims are involved, the fund is at AED 500 per ton. Furthermore, where both personal and property claims are involved, the total fund is set at AED 750 per ton, of which AED 500 are to be used exclusively to satisfy personal claims and any balance of the personal claims will share the remaining AED 250 per ton pro rata with the property claims.⁽¹²³⁾

(¹²³) Article 141/1 of *U.A.E. Maritime Code* provides:

"يكون تحديد مسؤولية المالك بالكيفية والقدر الآتيين:

- أ- بمبلغ قدره ٢٥٠ (مائتان وخمسون) درهما عن كل طن من حمولة السفينة إذا لم ينتج عن الحادث إلا أضرار مادية .
- ب- بمبلغ قدره (٥٠٠) (خمسمائة) درهم عن كل طن من حمولة السفينة إذا لم ينتج عن الحادث إلا أضرار بدنية.
- ج - بمبلغ قدره ٧٥٠ (سبعمائة وخمسون) درهما عن كل طن من حمولة السفينة إذا نتج عن الحادث أضرار مادية وأضرار بدنية معا. ويخصص من المبلغ المذكور ٥٠٠ درهم عن كل طن للتعويض عن الأضرار البدنية و ٢٥٠ درهم عن كل طن للتعويض عن الأضرار المادية فإذا لم يكف المبلغ المخصص للأضرار البدنية للوفاء بها كاملة اشترك الباقي منها مع ديون الأضرار المادية في المبالغ المخصصة للتعويض عن هذه الأضرار الأخيرة."

“(Free translation) The amounts to which the owner of a ship may limit his liability under Article 138 shall be:

- (a) where the occurrence has only given rise to property claims an aggregate amount of AED250 for each ton of the ship's tonnage;
- (b) where the occurrence has only given rise to personal claims an aggregate amount of AED 500 for each ton of the ship's tonnage; = =

Article 142/2 of the *U.A.E. Maritime Code* provides that ships of less than 300 tons shall be deemed to be of 300 tons.⁽¹²⁴⁾

2.5. U.S. law

The value of the ship and pending freight⁽¹²⁵⁾ constitutes the limitation fund in American law, and this

= = (c) where the occurrence has given rise both to personal claims and property claims an aggregate amount of AED 750 for each ton of the ship's tonnage, of which a first portion amounting to AED 500 for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to AED 250 for each ton of the ship's tonnage shall be appropriated to the payment of property claims: Provided however that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the second portion of the fund."

¹²⁴ Article 142/2 of the *U.A.E. Maritime Code* provides:

" ويعتبر الحد الادنى للحمولة الصافية للسفينة ٣٠٠ (ثلاثمائة) طن
ولو كانت حمولتها تقل عن ذلك."

(¹²⁵) 46 U.S.C. Appx. 183(a). *In re Zebroid Trawling Corp.*, 428 F.2d 226 at p. 228 (1 Cir 1970); *The Pelotas* 21 F.2d 236 at p. 239, 1927 AMC 1347 at p. 1353 (E.D. La. 1927), establishing that gross value is the value used. "Pending freight" is broadly construed as meaning the earnings of the voyage: *The Main v. Williams*, 152 U.S. 122 at pp. 129-133 (1894). It includes pre-paid freight, passage money and unpaid charter hire: *C.F. Coughlin*, 25 F. Supp. 649, 1939 AMC 228 (W.D.N.Y. 1938); *In re Barracuda Tanker Corp. (The Torrey Canyon)*, 281 F. Supp. 228 at p. 232, 1968 AMC 1711 at p. 1717 (S.D.N.Y. 1968), rev'd on other grounds, 409 F.2d 1013, 1969 AMC 1442 = =

value is determined at the end of the voyage⁽¹²⁶⁾ after the casualty.⁽¹²⁷⁾ The value of the ship includes all tackle, apparel, appurtenances, and furniture other than cargo,⁽¹²⁸⁾ Pending freight, however, is part of the value of the vessel, and this term includes the total earnings of the vessel 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.⁽¹²⁹⁾

American case law does not include owner's hull insurance proceeds within the value of the ship after the disaster. Thus, in *The City of Norwich*,⁽¹³⁰⁾ a steamer collided with a schooner, causing the schooner to sink. The steamer also sank, and its value after the collision was \$2,500. Because the steamer was insured, its owner

= = (2 Cir. 1969). See also Schoenbaum, Admiralty and Maritime Law, 3 Ed., 2001, vol. 2 at p. 348.

⁽¹²⁶⁾ *Norwich & New York Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871), reprinted 1998 AMC 2061; *Place v. Norwich & New York Transp. Co. (The City of Norwich)*, 118 U.S. 468 at pp.491-492(1886); Schoenbaum, *supra*, note 260, at p.348, note 3.

⁽¹²⁷⁾ See also *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); Schoenbaum, *supra*, note 260 at p. 348, note 4.

⁽¹²⁸⁾ *The Main v. Williams*, 152 U.S. 122 (1894); Schoenbaum, *supra*, note 260. 348, note 4.

⁽¹²⁹⁾ See also *Complaint of Caribbean Sea Transport Ltd.*, *supra*, note 115; Schoenbaum, *supra*, note 260 at p. 348.

⁽¹³⁰⁾ *Place v. Norwich & New York Transp. Co. (The City of Norwich)*, 118 U.S. 468, S.Ct. 1150 (1886).

recovered \$50,000 from the insurer. By 5-4 majority, the Supreme Court held that the owner's right to insurance proceeds (\$50,000) is not his interest in the ship, but is a collateral contract guaranteeing him protection against loss of the ship. Thus, the insurance proceeds are not part of the limitation fund, even though the ship was lost because of owner's fault. The Court stressed that the shipowner is under no obligation to insure his ship; thus, if he chooses to insure, he should have the benefit of the insurance proceeds.⁽¹³¹⁾ The claimants could also protect themselves by purchasing insurance. Depriving the shipowner of the insurance proceeds would discourage him from purchasing insurance and also discourage investment in the shipping business.⁽¹³²⁾

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 vessel's value after the occurrence is insufficient to cover all personal injury and death claims arising out of that occurrence.¹³³ This special fund need be constituted

⁽¹³¹⁾ 118 U.S. at 495.

⁽¹³²⁾ *Ibid.* at 485,504-505. The Supreme Court construed the Limitation Act to be, -not a device to limit the owner's loss to his stake in the venture, but rather one to protect the owner's investment." See, Comment, Shipowners' Limitation of Liability -- New Direction for an Old Doctrine, 16 STAN.L.REV.370,375 (1964).

⁽¹³³⁾ 46 U.S.C. Appx. 83(b). See also Schoenbaum, *supra*, note 260 at p. 350. Prior to 1984, this limit was \$60 per ton. This limit was required after a 1936 disaster aboard the cruise ship MORRO CASTLE.

only with respect to "sea going vessels",⁽¹³⁴⁾ but must cover each "distinct occasion".⁽¹³⁵⁾

6. CONCLUSION

The U.A.E. law, unlike U.S. law, extended the scope of limitation to cover all those likely to be taking part in a maritime venture. This is a triumph of the shipping lobby as shipowners prefer that all those engaged in the operation of ship be entitled to limit, because shipowners may be responsible for their acts. However, such an expansion of scope at this time is inappropriate, because many of the conditions which rendered limitation necessary no longer exist. 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. Specifically, because the 1976 Convention and the U.A.E. law did not expressly refer to pilots, they should not be able to limit. 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. If we cannot repeal limitation immediately, at least limitation should not be extended to insurers.

The U.A.E. law allow limitation against all maritime and nonmaritime claims for "personal injury...damage to...property". Limitation, however, should be denied

⁽¹³⁴⁾ 46 U.S.C. Appx. 183(b). See also Schoenbaum, *supra*, note 260, at pp. 350-351.

⁽¹³⁵⁾ 46 U.S.C. Appx. 183(d).

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 U.A.E. law should provide special rules for oil pollution and for nuclear damage. Pollution damage to the environment may amount to billions of dollars 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 U.A.E. 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 *U.A.E. Maritime Code* itself to deal with it. This inherent disadvantage has given rise to a general dissatisfaction with the U.A.E. law.

Another major weakness of the U.A.E. law is that it provides a one-size-fits-all type of limitation fund on the basis of a vessel's tonnage. In other words, the more tonnage of a vessel, the higher the limitation fund. As a consequence, smaller vessels will carry smaller funds.

But, small vessels may cause tremendous loss or damage and carry considerable value. Because limitation fund is increased in proportion to the increase of vessel's tonnage, small vessels 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 vessels of no small value.

