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The IMCO Convention on Limitation of Shipowners' Liability: Should the United States Ratify?

TIMOTHY F. BURR*

I. INTRODUCTION

The general legal principle which provides the basis for all limitation of liability laws, allows a shipowner to limit his aggregate liability to all claimants arising out of a marine casualty.¹ The United States law on limitation of liability has gradually spawned some serious conflicts. These problem areas include:

- (1) The allowance of direct action against insurance companies;
- (2) the availability of limitation to pleasure craft owners;
- (3) diverse pronouncements on the standard for privity or knowledge; and
- (4) a lack of international uniformity.

Resolution of these conflicts does not, however, appear forthcoming from the judiciary. The Supreme Court has been recently reviewing approximately two admiralty cases per year. The few cases that it decided often led to further confusion.² In November, 1976, the Inter-Governmental Maritime Consultative Organization (IMCO)³ drafted a "Convention on Limitation of Liability for Maritime Claims, 1976."⁴

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1. That principal was stated in 1681, in the French Ordonance de la Marine: "The proprietors of vessels shall be responsible for the acts of the master, but they shall be discharged by abandoning the ship and freight." For a general discussion of limitation of liability and its history, see *The Rebecca*, 20 F. Cas. 373, 376 (D.Me. 1831); see also *The Main v. Williams*, 152 U.S. 122 (1894).

2. See, e.g., *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972) (Maritime tort jurisdiction); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409 (1954) (Allowance of direct action against insurance companies after limitation proceedings); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) (Insurance as "maritime but local").

3. IMCO is an agency of the United Nations.

4. 1977 A.M.C. 1607; 8 J. MAR. L. & COM. 533 (1977) [hereinafter cited as *Convention*]. The IMCO Convention originated with the *Comite Maritime International (CMI)*. CMI Documentation 1974-I-III. For a general discussion of the formulation of the IMCO Convention and its previous drafts, see Owen, *Limitation of Liability, Dynamic Aspects of Marine and Offshore Liabilities* 1 (1978).

This article will begin by tracing the development of both United States limitation laws, and the problem areas mentioned above. The article will then discuss the IMCO Convention, and analyze what the possible effects on each problem area would be were the United States to ratify the IMCO proposal. Finally, the article will examine, from the perspective of divergent groups interested in maritime law, whether the United States should support and ratify the IMCO Convention.

II. BACKGROUND—U.S. LIMITATION LAW

One of the earliest limitation of liability statutes whose principles are closely aligned with modern law was the British Act of 53 George III, formulated in 1813.⁵ In 1848, the Supreme Court raised the issue of the need for United States legislation on limitation of liability in *The Lexington*.⁶ In that case, the Court held that the shipowner was liable for \$18,000 worth of coins lost when the ship burned as a result of the crew's negligence. The holding underscored the United States shipowner's risks.

Perhaps both to stem what would otherwise have been a deterrent to the growth of the United States shipping fleet, and to equalize competition with British shipowners, Congress passed the Limited Liability Act in 1851.⁷ The Act allowed a United States shipowner to limit liability for acts of negligence, of which he was without privity or knowledge, to an amount equal to his interest in the vessel. That interest was specifically defined as the value of the vessel plus her pending freight. This very general rule lay fallow for twenty years until *Norwich Co. v. Wright*⁸ added essential refinements: (1) that the Act applied to collision as well as cargo damage, (2) that the value

5. For a discussion of the history of limitation of liability, see Ray, *Maritime Limitation of Liability—Jurisdictional and Venue Aspects*, 1966 INS. C.J. 588.

6. *New Jersey Steam Navigation Co. v. Merchant's Bank (The Lexington)*, 47 U.S. (6 How.) 343 (1848).

7. Act of March 3, 1851, Ch. 43, 9 Stat. 635. 46 U.S.C. §§ 181-189. The Act favored the U.S. shipowners more than did the British Act. "For example, an American owner was and still is permitted to deny all liability while pleading limitation of liability in the alternative. English law did not give owners that option. Also, the Supreme Court rejected the English rule that limitation applied to the value of a vessel *before* the casualty and adopted the French rule that valuation was taken *after* the casualty meaning that in the case of a total loss, there was for all practical purposes no liability at all." Owen, *supra* note 4, at 2.

8. 80 U.S. (13 Wall.) 104, 122-24 (1871). For a general discussion of the case's impact on limitation law, see GILMORE & BLACK, *THE LAW OF ADMIRALTY*, 818-20 (2d ed. 1975).

of the vessel was to be measured after the collision, and (3) that pending freight was the amount collected for the carriage of goods.⁹ The amount collected from passengers was added to this total in *The Main*.¹⁰

Shortly after the *Norwich Co. v. Wright* decision, the Supreme Court issued "Supplementary Rules of Practice in Admiralty."¹¹ Those rules are now included in Supplemental Rule F, of the Federal Rules of Civil Procedure.¹²

The first substantial amendment to the Limitation Act was the Sirovich Amendment of 1936.¹³ That Amendment was drafted in response to the Morro Castle disaster, which demonstrated a fundamental inequity in the Act's underlying concept: that claims for personal injury and wrongful death could end up pursuing a worthless fund, if the offending vessel were lost. One hundred and thirty-five people died when the S.S. Morro Castle burned off the New Jersey coast. The owners sought to limit their liability to \$20,000.¹⁴ Although the case was eventually settled, Congress acted to protect subsequent claimants in similar situations.¹⁵ The Amendment states:

In the case of any sea-going vessel, if the amount of the owner's liability as limited under sub-section (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect to loss of life or bodily injury is less than \$60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$60 per ton, to be available only for the payment of losses in respect to loss of life or bodily injury.¹⁶

In every case of limitation, if the owner is found to have had privity with, or knowledge of the cause of the casualty at bar, he may not limit his liability.¹⁷ This cornerstone of the Act and of Rule F, has been subject to varied interpretations as to when those factors

9. 80 U.S. (13 Wall.) at 122-24.

10. *The Main v. Williams*, 152 U.S. 122 (1894).

11. Supreme Court's General Admiralty Rules 54-57 (1950) as amended by Admiralty Supplemental Rule F, 28 U.S.C. (1960).

12. *Id.*

13. 46 U.S.C. § 183(b) (1960).

14. For a discussion of this incident and its effects that led to the Amendment, see GILMORE & BLACK, *supra* note 8, at 919-20.

15. 46 U.S.C., *supra* note 13.

16. *Id.*

17. 46 U.S.C. §§ 183(a)-183(f) (1960); Admiralty Supplemental Rule F, 28 U.S.C. (1960).

will be imputed to the vessel owner.¹⁸ This disparity of the decisional law is treated as a "problem area" and will be discussed more fully below.

Throughout the evolution of the basic procedures, provisions, and definitions of the Act, collateral issues arose which further served to complicate a body of law that was becoming unwieldy on its own. Insurance was one such issue. *The City of Norwich*¹⁹ is a landmark case in this area. The issue in that case was whether the owner's hull insurance was to be included in the limitation fund as part of "the value of the vessel." In a 5-4 decision, the Court held that hull insurance was a "collateral contract, personal to the insured,"²⁰ and was not to be included in the fund. This case did not decide the issue of the availability of protection and indemnity insurance.²¹ That coverage, as it relates to the limitation laws, became fraught with conflicts because its availability to claimants by direct action or joinder is largely a question of state law. As such, it also will be explored more fully below.

The Limitation Act and its subsequent amendments led to substantial amounts of litigation because of statutory inequities and inconsistencies that seemed better explained by Congressional oversight than by legitimate policies. Despite the fact that the Limitation Act had been formulated to protect the interest of commercial shipowners, private pleasure craft owners were allowed to limit liability as well. Moreover, that privilege was only afforded those owners who were sufficiently provident and affluent to have a professional captain navigate their craft. Finally, the Sirovich Amendment, when read in conjunction with other relevant provisions of the statute, limited the applicability of those Amendments to sea-going and not to inland vessels.²²

18. For a general discussion of privity or knowledge, see, Mouldeoux, *The Role of Privity and Knowledge in the Shipowner's Limitation of Liability Act*, 23 LOY. L. REV. 480 (1977).

19. 118 U.S. 468 (1886). This case was a subsequent appeal in the same litigation as *Norwich Co. v. Wright*, *supra* note 8.

20. *Id.* at 495. This case was one of three decided before the Supreme Court on the issue of insurance. See also *The Scotland*, 118 U.S. 507 (1886), and *The Great Western*, 118 U.S. 520 (1886).

21. See Kierr, *The Affect of Direct Action Statutes on P & I Insurance*, 43 TUL. L. REV. 638 (1969).

22. Compare 46 U.S.C. § 183(b) (1960), 46 U.S.C. § 183(f) (1960) and Admiralty Supplemental Rule F, *supra* note 17, with 46 U.S.C. § 188 (1960).

In promulgating the limitation law as it exists today and in resolving (while in many cases creating) conflicts, the Supreme Court was struggling with difficult policy determinations.

The truth is that the whole question after all, comes back to this: Whether a limited liability of shipowners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question.²³

Sixty-eight years later, that policy was not so clear:

Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevailed and later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.²⁴

The economics of the shipping industry that led to the original formulation of the Act have changed. Those changes, coupled with growing conflicts seemingly incapable of swift judicial resolution, lead one to examine the limitation law closely, and to compare it with recent international developments. This is especially true where those developments, such as the IMCO Convention, and perhaps our participation in them, might solve many of the problems and conflicts that characterize the present state of our limitation law.

III. THE IMCO CONVENTION—POSSIBLE SOLUTIONS TO UNITED STATES PROBLEMS

A. *The IMCO Convention*

The format of the IMCO proposal is markedly different from U.S. property damage limitation law because the value of the fund

23. *The City of Norwich*, 118 U.S. 468, 495 (1886).

24. *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 437 (1954). Three opinions were written in the case. Justice Frankfurter wrote an opinion for four of the Court's members. They argued that the claims should be dismissed because if the direct actions were allowed after the claimants recovered from the insurance companies, there would be nothing left for the owner. Therefore the owner would have been deprived of the benefits of his insurance. Justice Black also wrote for four members of the Court, but expressed the opinion that direct action should be allowed. Justice Clark had a unique view. His opinion was that direct action against the insurance company should be stayed until the limitation proceedings had been concluded. In that way, the owner would be assured of collecting his insurance in order to satisfy claims against the limitation fund, while still satisfying the purposes of the direct action statute and allowing a subsequent claim directly against the owner's insurance company. "[I]n order to breach the deadlock . . . and to enable the majority to dispose of this litigation," the Frankfurter group agreed to remand the case in accordance with Justice Clark's opinion.

does not depend on the value of the vessel after the casualty—which could, in many cases, be zero. Rather, the size of the fund is measured by the vessel's gross tonnage, multiplied by a specified number of units of account.²⁵ This latter system is used in Britain and by other parties to the 1957 Brussels Convention.²⁶ The fund is broken down into allotments for two types of interests:

(1) The death/personal injury fund is approximately two-thirds of the fund—passenger claims for the above are made against a separate fund, computed in terms of the number of passengers that the ship is certified to carry;²⁷ and

(2) the property damage fund is equal to the remaining approximate one-third.

COMPARATIVE LIMITATION FUNDS
UNDER THE IMCO CONVENTION
AS OF MARCH 22, 1978²⁸

Size of Vessel (Gross Tons)	Death/Personal Injury Fund	Property Damage Fund	Total
500 & Under	\$ 409,092	\$ 205,161	\$ 614,253
1,000	\$ 716,218	\$ 307,740	\$ 1,023,958
5,000	\$ 2,726,905	\$ 1,128,380	\$ 3,891,285
20,000	\$ 8,899,278	\$ 4,205,575	\$13,104,853
50,000	\$19,132,713	\$ 9,328,640	\$28,461,353
100,000	\$31,430,032	\$15,458,872	\$46,888,904

Passenger Claims

(\$30,712,586 Maximum)

Authorized No. of Passengers	Limitation Fund
20	\$ 1,146,587
100	\$ 5,732,935
500	\$28,664,670
1,500	\$30,712,586

25. Convention 4 at Art. 6. Also called Special Drawing Rights; 1 SDR=\$1.2285. See generally Status Report on Limitation Liability Project, Mar. Law Assoc. Doc. No. 612 pp. 6812-15 (March 27, 1978) [hereinafter cited as Status Report].

26. Merchant Shipping Act, 1894, Section 503; Merchant Shipping Act, 1958; as amended, (1977); 1957 Brussels Convention on the Limitation of the Liability of the Owners of Seagoing Ships, reproduced at 1957 A.M.C. 1971.

27. Convention at Art. 7.

28. Status Report at 6816. Amounts for 3, 10, 30 and 70 thousand gross tons and under are omitted from this graph. Note that while under the present U.S. system,

The Convention is very thorough in defining its terms and providing for procedures, while allowing for a great deal of flexibility by specifying that parties to the treaty, may prescribe for local court procedures,²⁹ vessels on inland waterways,³⁰ vessels of less than 300 tons,³¹ and harbor facilities.³² An important exception to the Convention's coverage is damage done by oil pollution.³³

B. *Effects on U.S. Limitation Law*

The Maritime Law Association³⁴ is a member of the committee³⁵ that drafted the 1976 proposal. It is not surprising, therefore, that many of the problems that have evolved in U.S. limitation law have been met squarely by specific provisions of the IMCO Convention.

1. *Direct Action*

At common law, a right of action against an insurer was based on privity of contract. This usually meant that the only possible plaintiff was the assured himself. Moreover, contracts often contained a "no action" clause which meant that the assured could only sue if he had paid a judgment entered against him. The "no action" clause was struck down by most states as against public policy, and what had been an indemnity policy quickly became a liability policy.³⁶ Third party claimants could sue an insurer directly if: (1) a final judgment had been obtained and, (2) the insured was insolvent. This two-step process of first obtaining a judgment and then proceeding against the insurance company led to the development of direct action, in order to promote judicial economy.³⁷

small craft can limit liability for personal claims to a few hundred dollars or less, under the Convention, vessels of 500 tons or less provide a fund over \$400,000. This will be discussed more fully below.

29. Convention at Art. 10(3).

30. *Id.* at Art. 15(2)(a).

31. *Id.* at Art. 15(2)(b).

32. *Id.* at Art. 6(3).

33. *Id.* at Art. 3(b). See International Convention on Civil Liability for Oil Pollution Damage, 9 I.L.M. 45, reproduced at 1 J. MAR. L. & COM. 373-85 (1969).

34. The MLA is a private association of admiralty practitioners.

35. Status Report at 6812.

36. See Kierr, *supra* note 19, at 41.

37. Only two jurisdictions allow almost unconditional direct action. Those are Louisiana, 22 L.A. REV. STAT. ANN. § 655 (1968), and Puerto Rico, P.R. LAWS ANN. Tit. 26, § 2001 (1958). Others that allow limited forms of direct action are Arkansas, Rhode Island, Wisconsin, and Florida. In Florida, the Supreme Court in *Bussey v. Shingleton*, 211 So. 2d 593 (Fla. 1968) construed FLA. R. CIV. PRO. 1.210(a) and

Most of the controversies surrounding the relationship between limitation of liability and direct action stem from broad direct action statutes in jurisdictions such as Louisiana and Puerto Rico. This controversy is illustrated by the Supreme Court's plurality opinion in *Maryland Casualty Co. v. Cushing*.³⁸ Five seamen drowned when their tug collided with a bridge. The value of the tug after the allision was \$25,000. The owner and charterer sought to limit their liability to that amount.³⁹ The representatives of the seamen brought a direct action against the insurer in the same court claiming \$600,000 in damages. Justice Clark broke a 4-4 deadlock, opining that while direct action under the Louisiana statute was allowable, the limitation proceedings should be held first. Claimants could subsequently bring an action against the insurer to recover any amount due, that was more than the owner's limited liability. The Court's rationale was based both on protecting the shipowner's property rights⁴⁰ and deferring to a state statute⁴¹ in what was admittedly a close question.

This case changed at least two fundamental aspects of the limitation proceedings. First, because the Supreme Court upheld the right to proceed directly against the insurer pursuant to a state statute, a plaintiff's potential recovery was supplemented from the amount of the limitation fund, to the value of the owner's protection and indemnity policy (P&I) coverage. Secondly, before *Maryland Casualty*, the plaintiff had been forced to litigate exclusively in the admiralty forum, as a claimant in the limitation proceeding.⁴² After *Maryland*, issues bearing on a recovery of an amount greater than the value of the fund could be tried in the forum of the plaintiff's choosing—including state court.

allowed the joinder of a liability insurer and its insured. Subsequently two statutes enacted by the Florida Legislature have overruled the Bussey decision. Fla. Stat. Section 627.7262 disallows the joinder of a motor vehicle liability insurer with its insured, in an action to determine the latter's liability. Section 768.045 is a general bar to the right to join the liability insurer with an insured to determine the issue of liability. The Supreme Court has yet to give those statutes either a clear interpretation or a judicial imprimatur.

38. 347 U.S. 409 (1954). See note 24 *supra*.

39. \$25,000 represented the value of the vessel. The \$60 per ton Sirovich Amendment does not apply to tow boats. 46 U.S.C. §§ 183(b)-183(f) (1960).

40. 347 U.S. at 425.

41. The Court noted that the vessel was owned by a Louisiana corporation. All parties except one were from there. Moreover, the tort occurred there. 347 U.S. at 425.

42. The exception to this is the single claimant situation. In that case, the plaintiff/claimant generally cannot be deprived of his right to a jury trial in either state or federal court. *Ex Parte Green*, 286 U.S. 437 (1932).

The decision carefully guarded the shipowner's interest. The concursus of the owner's limitation proceeding was upheld, which both allowed the owner to satisfy his liability out of the P&I proceeds before they became vulnerable to attack by the claimant, and allowed the issue of liability to be decided in a single proceeding. Only the insurers seemed hurt by the decision, although presumably they would pass their cost on to the consumer.

The availability of the privilege of limitation was not extended to the owner's insurer when, in 1970, the Fifth Circuit, in *Olympic Towing Corp. v. Nebel Towing Corp.*, held that "the possibility of higher premiums was an insufficient basis for permitting an insurer to limit its liability" where an insurer was sued pursuant to Louisiana's direct action statute.⁴³ The holding was based on the rationale that any conflict between direct action and limitation was insignificant, as the possibility that direct action might deplete the insurance proceeds before the owner was able to apply them to his limitation fund was obviated by the mandate that the limitation action proceed first. In any case, insurers were not "vessel owners" and therefore, the court held, they were not able to limit their liability.⁴⁴

Direct action amounts to a limited loop-hole in the U.S. limitation law which results from and adds to a lack of uniformity in this aspect of the federal maritime law. As such, it is available only in those forums that have statutes permitting direct action.⁴⁵ As indicated by the holding in *Maryland Casualty*, while Rule F and the Act allow any vessel owner to limit its liability, the term "owner" is restricted. The term does not extend to insurers; they cannot limit liability, and consequently become open to direct attack after the limitation proceedings, over and above the size of the limitation fund.

The IMCO Convention would close the loop-hole by simply expanding the definition of vessel owner. Article I., subsection 6 states that, "An insurer of liability for claims subject to limitation in accordance with the rules of this convention shall be entitled to the benefits of the convention to the same extent as the assured himself."⁴⁶ If the United States adopted the IMCO Convention, direct action would become a thing of the past. Because the insurer would be al-

43. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969).

44. "We therefore hold that limitation of liability under the Federal statute is a personal defense which cannot be availed of by an insurer under Louisiana law." 419 F.2d at 238.

45. See notes 36 & 37 *supra*, and accompanying text.

46. Convention at Art. 1(6).

lowed to limit its liability to the prescribed amount, the concursus of the limitation proceeding would settle the matter. There would be no other funds available for a subsequent attack.

2. *Pleasure Craft Owners*

After the enactment of §188 of the Act⁴⁷ and the formulation of Rule F,⁴⁸ it was clear that pleasure craft owners could limit liability.⁴⁹ In *Coryell v. Phipps*⁵⁰ the Supreme Court gave that result a judicial imprimatur, and also gave its last favorable ruling for a shipowner in a limitation case.

Courts have expressed dissatisfaction with this rule because the policy behind the limitation act was to assist the shipowner in commercial competition. That policy does not favor extending the privilege to pleasure craft.⁵¹ Moreover, the ability to limit is confined to those owners who can afford professional skippers, for if the casualty occurs with the owner aboard, there is no hope of showing that the owner was without privity or knowledge.⁵²

At the outset, we acknowledge that contemporary thought, finds little reason for allowing private owners of pleasure craft to take advantage of the somewhat drastic—for the injured claimants—provisions of the Limitation Act. Nevertheless, the cases, as well as Congress, have spoken with a clear voice.⁵³

The IMCO proposal would, in effect, though not by specific proscription, eliminate limitations for pleasure craft, because the minimum fund that an owner could establish would amount to over \$400,000.⁵⁴ It is important to note, however, that the Convention specifically provides that each party would be free to legislate both for inland vessels, and those under 300 gross tons.⁵⁵ In evaluating the efficacy of the Convention generally, that freedom will be explored more fully below.

47. See, e.g., *Coryell v. Phipps*, 317 U.S. 406 (1943); *Giboney v. Wright*, 517 F.2d 1054, 1057 (5th Cir. 1970); 46 U.S.C. § 188 (1970).

48. Admiralty Supplemental Rule F, note 16 *supra*.

49. See note 47 *supra*.

50. 317 U.S. 406 (1943).

51. See *Pleasure Boat Tort Liability in Admiralty: An Examination of the Limited Liability Act and a Proposal for Reform*, 50 SO. CAL. L. REV. 549 (1977).

52. See text accompanying notes 56-68 *infra*. See also Owen *supra* note 4, at 1-2; and GILMORE & BLACK, *supra* note 8, at 883.

53. *Giboney v. Wright*, 517 F.2d 1057, 1059 (5th Cir. 1970).

54. Convention at Art. 6(1)(a)(i); Status Report at 6816.

55. Convention at Art. 15(1)(b).

3. Privity or Knowledge

It is generally recognized that the requirement that an owner be without "privity or knowledge"⁵⁶ stems from a desire to protect an owner in the event of negligence on the part of his crew, with which he had no complicity.⁵⁷ In the case of a corporate shipowner, privity or knowledge with the negligent causation of the casualty on the part of management is sufficient to bar the owner from the right to limit liability.⁵⁸

Much of the diversity in the decisional law concerning whether an owner has privity or knowledge centers around the fundamental requirement of seaworthiness.⁵⁹ The general rule was that an owner was required to exercise "due diligence" to furnish a seaworthy ship.⁶⁰ That duty was closely connected to the "duty to control." In *Spencer Kellogg & Sons, Inc. v. Hicks*,⁶¹ the corporation/vessel owner was in the practice of ferrying employees to and from New York City, across the Hudson. When winter came, and ice formed in the river, the vessel was unseaworthy for running the river, and the corporate manager informed the ferry's master never to operate in ice. One day, contrary to those instructions, the ferry proceeded to cross the icy river when it hit a floe, sank and caused considerable loss of life. Despite the fact that the master had acted on his own, in direct contravention of management's instructions, the court held that the owners were not entitled to limit their liability. The rationale in *Spencer* was that unlike a situation where the master's negligence causes loss of life at sea, the owners of the ferry company were in a position to control the movements of the ferry by first ascertaining the conditions of the river. That doctrine was developed further by the Fifth Circuit, in *Avera v. Florida Towing Corp.* "We also agree with the statement that 'the proposition that the duty to control increases along with the possibility of control. . . .'"⁶² The Ninth Circuit, on the other hand, has rejected this approach in favor of a test based on whether the negligence or lack of due diligence was on the part of a

56. See note 18 *supra*.

57. See note 6 *supra*, and accompanying text.

58. See *Coryell v. Phipps*, 317 U.S. 406, 410-12 (1943).

59. See generally GILMORE & BLACK, *supra* note 8, at 877-95.

60. For an analysis of the distinction between "due diligence" or "privity and knowledge," in COCSA or The Harter Act, compare GILMORE & BLACK, *supra* note 6, at 879-80, with Wood, *Limitation of Liability*, 5 WILLAMETTE L.J. 393 (1969).

61. 285 U.S. 502 (1932).

62. 322 F.2d 155 (5th Cir. 1963) quoting GILMORE & BLACK, *THE LAW OF ADMIRALTY* (1st ed. 1947).

managerial or a non-managerial employee, regardless of the possibility of control.⁶³

There is also a lack of judicial uniformity concerning whether, and to what degree, the seaworthiness duty is delegable. The Fourth Circuit has held that if due diligence has not been used to make a vessel seaworthy, and if that unseaworthiness was a causal factor in the ensuing casualty, the shipowner could not limit liability.⁶⁴ A more widely held view is:

If the owner delegates the duty to maintain his vessel to a qualified independent agency or to a qualified employee who does not have managerial capacity, the 'privity or knowledge' of that agency or of the minor employee is not that of the vessel owner within the meaning of the limitation statute.⁶⁵

The law is also somewhat unclear as to when each party has the burden of proof on the issue of privity or knowledge. The general rule is that the shipowner has the burden of establishing his lack of privity or knowledge. The issue becomes less clear, however, in cases where the vessel in question has disappeared. A leading case is *In re: Marine Sulphur Queen*,⁶⁶ wherein a converted sulphur carrier disappeared in the Gulf of Mexico. The Second Circuit affirmed the district court's denial of the owner's limitation petition, because the conversion of the ship had weakened the vessel's stress resistance, making it "unseaworthy." The court used a two part test: (1) that the claimant establish causation between negligence or unseaworthiness and the accident, and (2) that the owner then establish lack of privity or knowledge. In *Marine Sulphur Queen*, the claimant established the necessary causation and thus met his burden as to the first part of the test. The petitioner was unable to establish lack of privity or knowledge, however, because the vessel owner had approved the conversion plans. In disappearance cases, therefore, much of the proof concerning whether the owners may limit liability is based on speculation and inference—because there is no sure method of reconstructing the casualty to determine causation, and the privity or knowledge standard is very flexible.

63. See Mouldoux, *supra* note 18, at 495-97.

64. *Id.*; See also note 60 *supra*. That proposition is cited in GILMORE & BLACK as generally representative of the law of the land. Several cases and comments have taken issue with that statement of the law. See generally notes 60 & 63 *supra*.

65. Wood, *supra* note 60, at 398.

66. 460 F.2d 89 (2d Cir. 1972).

In short, the establishment of privity or knowledge on the part of the vessel owner, as a bar to limitation, has resulted in a lack of uniformity in several areas. First, the circuits are split as to whether the duty to provide a seaworthy vessel increases with the possibility of control. Secondly, courts and commentators disagree as to whether the duty to furnish a seaworthy ship is in fact delegable at all. Thirdly, the determination of privity or knowledge is a flexible one which, in the case of disappearances, is especially fraught with peril. Finally, not only is there a lack of uniformity among the various judicial circuits, but within each region further differences may exist based on the equipment and technology with which each owner operates.⁶⁷ For example, if the duty to control increases with the possibility of doing so, then a corporate shipowner might in fact be penalized for equipping his vessel with the latest communications equipment. Courts might hold that that ability should impose a higher duty to control the vessel's at-sea operations.

The IMCO Convention would radically change this aspect of limitation law. Article 4. states:

A person liable shall not be entitled to limit his liability if it is proved the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

The requirement of intent shifts the burden of establishing lack of privity or knowledge from the owner to the claimant in determining whether the petitioner⁶⁸ had intentionally or recklessly caused the loss.

4. *Lack of International Uniformity*

Presently, there is a decided lack of uniformity in the international rules of limitation of liability. The only moderately successful international agreement in this area has been the Brussels Convention of 1957.⁶⁹ That Convention was ratified by most of the major maritime powers of Western Europe (including Great Britain), and

67. See, e.g., Wood, *supra* note 60.

68. Under the Convention, the following may limit liability: (1) owners, charterers, managers, and operators, at Art. 1(2); (2) salvors, at Art. 1(3); and (3) insurers, at Art. 1(6). Status Report at 6814. The intent standard increases the possibility that the above will be able to limit liability. The Convention balances higher funds against this relaxed standard. See text accompanying notes 88-114, *infra*.

69. 1957 Brussels Convention on The Limitation of the Liability of the Owners of Seagoing Ships, reproduced at 1957 A.M.C. 1971.

has been in force among them since the late 60's.⁷⁰ The Convention did not spark uniformity, however, because most of the major shipping powers were not signatories.⁷¹ The United States was one such power.⁷² Consequently, there is a strong potential for forum shopping between the nations of Western Europe on the one hand, and the United States on the other. This potential is spurred by the basic structural differences between the two legal systems.

The Brussels Convention, like IMCO's, is based on a fund that is determined by the vessel's tonnage. In the United States, on the other hand, the amount of the limitation fund is determined by the value of the vessel after the casualty, except in the event of personal injury or death, where the value of the vessel is less than sixty dollars per ton. In this instance, a fund based on the vessel's tonnage is used. For personal claims in a Brussels Convention signatory, the value is over eighty dollars per ton.⁷³ Given the substantial differences between the two systems, the strategies of the petitioner and claimant would lead them to different forums to litigate the right to limit liability. Unless the value of petitioner's vessel were greater than eighty dollars per ton, he would probably choose a United States forum to file for limitation; there, for property damage claims he could limit his liability to nothing. For personal injury/wrongful death claims, he could limit that liability to sixty dollars per ton. On the other hand, plaintiffs would prefer to litigate the issue of limitation in Europe, where the minimum value of the limitation fund would be over eighty dollars per ton, unless the value of the vessel after the casualty was worth more than that amount.

Furthermore, there is a basic difference between the two legal systems with respect to establishing "actual fault or privity." The U.S. rules concerning privity or knowledge, with its variations, as discussed above, present a comparatively liberal view with respect to the owner's right to limit liability. The British rule, on the other hand, imposes duties on the owner to do all that he possibly could have, to be sure that the particular casualty did not occur.⁷⁴ This

70. For a discussion of this convention from the United States' perspective, see Hearings on S.3600 and S.3602 (1969); see also Owen, *supra* note 4, at 1-18.

71. Greece, Italy, Liberia, Panama, The United States, and The U.S.S.R. never signed.

72. Note 70 *supra*. See also GILMORE & BLACK, *supra* note 8, at 823.

73. Merchant Shipping Act, 1958 (as amended 1977).

74. Compare *The Anonity*, C.A. (1961) 2 Lloyd's Rep. 1177; and *The Dayspring*, (1968) 2 Lloyd's Rep. 204, with *Complaint of Farrell Lines, Inc.*, 378 F. Supp. 1354 (S.D. Ga. 1974), *rev'd*, 530 F.2d 7 (5th Cir. 1976).

difference, while seemingly subtle, might lead the parties to prefer different forums in which to press their claims.

United States courts have evidenced a lack of clarity in their approach to the conflicts of laws problem. An early case that went a long way towards clouding the issue was *Oceanic Steamship Navigation Co. v. Mellor* (The Titanic).⁷⁵ In that case, the Court applied the substantive/procedural dichotomy test to the international choice of laws problem. There were three issues before the Court:

- (1) Whether the owners of the British vessel, liable for a disaster which occurred on the high seas and killed hundreds of foreign nationals, could limit liability in a U.S. court,
- (2) whether U.S. procedural rules would apply, and
- (3) whether the amount of the owner's liability would be governed by the British rather than the U.S. law.

The Court answered both of the first two questions in the affirmative. The third issue turned on whether the issue was substantive or procedural. The Court, treating the amount of the owner's liability as a procedural matter, held that in U.S. courts it was within Congressional power to prescribe that U.S. procedural rules should apply.⁷⁶ The Court then heralded what was to follow from that holding: "We see no absurdity in supposing that if the owner of the Titanic were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case."⁷⁷

Black Diamond S.S. Corp. v. Robert Stewart & Sons,⁷⁸ involved a collision that took place in Belgian waters. Under Belgian law,⁷⁹ the limitation fund would have been \$325,000. If measured by U.S. law, the fund would have been \$1,000,000 which was the value of the vessel. The case was remanded for a determination of which law applied, but was eventually settled, leaving that question unanswered. The Court had set a framework for the district court to follow on remand, however, which clarified the expansive ruling in *The Titanic*. The Court treated the degree of recovery as substantive and directed that should the degree vary as a matter of which law applied, then probably Belgian law would apply under the principle that "the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred."⁸⁰ The distinction be-

75. 233 U.S. 718 (1914).

76. *Id.* at 733.

77. *Id.* at 734.

78. 336 U.S. 386 (1949).

79. See Ray, *supra* note 5, at 390-91.

80. 336 U.S. at 391.

tween the two cases would seem to rest less on substantive/procedural dichotomy (for both cases evince that the substantive factors probably outweighed the procedural), than on their facts. In *The Titanic*, the casualty occurred on the high seas, whereas in *Black Diamond*, the tort occurred in Belgian waters.⁸¹

The rule seemed to have come full circle in *The Mandu*.⁸² In that case, where Brazilian and German vessels collided in Brazilian waters, the Second Circuit Court of Appeals held that under *The Titanic*, the procedural/substantive dichotomy applied even though the tort occurred within territorial waters of a foreign state. While the issue of liability would be determined under Brazilian law, the limitation statute of the forum would control, because those statutes relate to the remedy rather than to the right.

When presented with similar issues, however, the Southern District of Florida decided that the law of Panama and not that of the United States should control the limitation issue.⁸³ The court noted that the fund would differ in size depending on which law applied. The court distinguished *The Titanic*⁸⁴ and held that where the amount of the fund would so vary, the controlling law would be substantive and therefore the maxim *lex loci delicti* would apply.⁸⁵

It is hard to predict what effect United States ratification of the IMCO Convention would have on international forum shopping; that would naturally depend on the number of countries that adopted the Convention. Given the likelihood that Brussels Convention signatories will ratify it,⁸⁶ conflicts between European and U.S. forums would be virtually eliminated. Considering the international popular-

81. See Ray, *supra* note 3, at 390-91.

82. 102 F.2d 459 (2d Cir. 1939).

83. Petition of Chadade Steamship, Co., 266 F. Supp. 517 (S.D. Fla. 1966). The Yarmouth Castle was a Panamanian cruise ship operated between Miami and ports in the Bahamas. In the early morning hours of November 13, 1965, the vessel burned and sank on the high seas. The vessel was owned by a Panamanian corporation and flew the Panamanian flag. The passengers were primarily U.S. nationals. The crew and officers were citizens of various foreign countries.

84. Note 75 *supra*.

85. The Second Circuit, in *In re: Ta Chi Navigation Corp., S.A.*, 416 F. Supp. 371 (S.D.N.Y. 1976), reached a contrary conclusion. The court held that the U.S. Act would apply to the petition of a Panamanian vessel owner whose vessel exploded on the high seas en route from Japan to various U.S. ports. See also *In re: Bloomfield S.S. Co.*, 422 F.2d 728 (2d Cir. 1970), and *Complaint of Bethlehem Steel Corp.*, 435 F. Supp. 944 (N.D. Ohio 1976).

86. See Owen, *supra* note 4, at 1-18.

ity of both U.S. and British courts for litigating admiralty claims,⁸⁷ that reconciliation would be a significant goal.

IV. MERITS OF ADOPTION

Whether or not to adopt the IMCO proposal is largely a subjective issue, with as many facets as there are special-interest groups who might be affected by a change in the present limitation of liability structure. Those interest groups include: (a) vessel owners, (b) tort claimants, (c) insurers, and (d) the federal government. In evaluating from their perspectives the providence of adopting the IMCO Convention, reference will be made to the proposal's effects on the areas of limitation discussed above.

A. *The Vessel Owners*

The interests of the vessel owner are paramount to a formulation of the limitation of liability rules. Indeed, those interests were the driving force behind the formulation of the Limitation Act. It would seem extremely difficult, however, to arrive at a consensus as to whether vessel owners as a class would prefer the U.S. or IMCO limitation rules, given the wide spectrum of views that "vessel owners" could express.

Owners of vessels that are engaged in commercial carriage (common and private), would either favor the proposal or not, based on the value of their ships. Carriers who operate modern containerized fleets might favor the proposal because the amount suggested might be less than the value of the vessel after a minor casualty.⁸⁸ On the other hand, small pleasure craft owners would provide a fund that would represent many times the value of their vessel. The IMCO provision that allows member states to legislate locally for vessels under 300 tons⁸⁹ would mitigate the anxiety of small craft owners. Moreover, it would aid implementation of the Convention domestically, as millions of constituent boat owners might otherwise oppose ratification through their representatives in Washington.⁹⁰ There is still, however, that class of vessels, between 300-500 tons, whose minimum liability under the Convention would

87. See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The court discussed this popularity in upholding a London forum selection clause in a towage contract.

88. Containerized vessels are often substantially under-rated on tonnage. At least two layers of containers are often carried on deck. This amounts to effective carrying capacity with no countervailing burden of additional registered tonnage.

89. Convention at Art. 15(2)(b).

90. Cf. Status Report at 6815, para. 9.

be \$409,092. Owners of vessels in that class, as above, would favor the proposal or not depending on the market value of their vessels.⁹¹

A second variable that would affect the choice of whether to adopt a proposal is the degree of damage that the casualty incurred. Given the basic structural differences between the sets of laws, an owner who is liable for property damage, and who had lost his ship in the disaster, would be much better off under the present U.S. system. His liability would be zero. For loss of life, the value per ton is substantially lower under the U.S. system than IMCO's proposal.⁹² On the other hand, if the vessel suffers minimal damage, then the vessel owner would probably prefer the IMCO Convention, depending on the vessel's value as described above.⁹³

Thirdly, an obvious variable, is whether the vessel owner happens to be a plaintiff (as in a collision case) or a defendant in the action. Each party would naturally take opposing sides to this broad limitation issue.

A final variable, however, would decidedly tip the scales in favor of vessel owner support of the IMCO proposal; that variable is privity or knowledge. The Convention requires that the claimant establish intent or recklessness on the part of the owner, in order to defeat his right to limit.⁹⁴ That standard, as discussed above, is much more difficult for a claimant to meet than is the present one which places a heavy burden on the owner of proving a lack of privity or knowledge. Moreover, for small craft owners, the Convention would diminish a present inequity in the law that allows a pleasure craft owner with a negligent professional skipper to limit his liability, practically barring that opportunity from a negligent self-operator.⁹⁵ The Convention would allow owners in both cases to limit, absent intent or recklessness.

91. There is often little correlation between size and value. This is further complicated by doctrines such as the "flotilla doctrine" which may include or exclude some kinds of tows from "value of the vessel" computations. For a general discussion of that doctrine, see *Liverpool Steam Nav. Co. v. Brooklyn E. Dis. Ter.*, 251 U.S. 48 (1919).

92. The U.S. value is sixty dollars per ton. 46 U.S.C. § 183(b) (1960). Under the Convention, the lowest value is approximately \$468 per ton, and the highest value is approximately \$1,228 per ton. These values are computed for the total fund, not limited to the personal injury and death provisions.

93. See text accompanying notes 88-91, *supra*.

94. Convention at Art. 4.

95. Status Report at 6815, para. 9.

B. *Tort Claimants*

“The U.S. delegation to the IMCO Conference declined to sign the Convention because it thought that the limits of liability were too low. However, the Delegation’s report concludes with this statement:

‘The Delegation believes that the limitation requirement established by the new Convention is technically sound, and provides a good model if new U.S. legislation on limitation is undertaken. Of course, the legislation would have to provide high enough limitation amounts to effect a fair balancing of the interest of ship owners and claimants.’”⁹⁶

There has long been an interest in revising the amounts available under U.S. limitation law.⁹⁷ Tort claimants would naturally favor no limitation at all. Inasmuch as the IMCO proposal would increase the amount available for them,⁹⁸ it can be safely assumed that given a choice between the present system and IMCO’s, tort claimants would favor the Conference proposal.

Balanced against this analysis is the significant difference in the burdens for establishing “privity or knowledge” under each system. Under the Convention, the burden shifts to the claimant to establish the owner’s intent or recklessness as a causation of the casualty. Putting both factors together, the result under IMCO would probably mean:

- (1) An increase in the number of cases in which an owner could limit,⁹⁹
- (2) an increase in the amount of the limitation fund, and
- (3) an end to the possibility of property claimants being faced with a literally worthless limitation fund in the event that the offending vessel is lost.

The U.S. Delegation and Maritime Law Association would both support the IMCO Convention were the limitation amounts higher.¹⁰⁰ Given that those amounts are presently higher than the allowable limits under the U.S. system, both groups would seemingly favor the

96. *Id.* at 6812-13.

97. See note 70 *supra*; In re: Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968) (*The Torrey Canyon*). The owners petitioned in New York District Court to limit their liability to fifty dollars. This case was eventually settled after another of the owner’s vessels was attached in France.

98. See note 92 *supra*.

99. This would be because the Convention would replace the “privity or knowledge” standard with an “intent” standard. Convention at Art. 4.

100. Status Report at 6812-13; Owen, *supra*, note 4 at Appendix II.

IMCO Conference proposal over the present system, were the choice simply between those two.¹⁰¹

C. Insurers

Insurers have been given "owner" status by the Convention;¹⁰² if IMCO's proposal were adopted, insurers could limit their liability. Inasmuch as that novation would obviate the direct-action loop-hole, the interest of insurers would probably favor adoption of the IMCO Convention.

Secondly, not only would an owner's intent or recklessness bar his right to limit under IMCO, but such conduct would also probably forfeit his insurance coverage.¹⁰³ That standard ensures that an owner's incentive to protect his insurance coverage, will also safeguard the insurer's derivative right to limit liability.

D. Federal Government

The interest of the federal government can best be viewed in terms of what has recently emerged as the National Transportation Policy.¹⁰⁴ That policy involves safeguarding twin public aims: commerce and national defense.

Promoting seaborne commerce was a major factor in the formation of limitation of liability rules.¹⁰⁵ Developments since that period, if not outdating the Act's purposes, have at least undercut the need to sustain limitation of liability as a major part of assisting maritime commerce. The means available to U.S. carriers to compete with foreign flag carriers in both foreign and domestic commerce have grown with an increase in the following: (1) government subsidies,¹⁰⁶ (2) the development of corporate structures,¹⁰⁷ and (3) the use of insurance.¹⁰⁸ Moreover, there is "a basic hostility to the special

101. See text accompanying note 116 *infra*. For a general discussion on the advantages of compromise, see Martucci, *The Maritime Law Association's Proposed Statute on Shipowners' Limitation of Liability: A Practical Alternative to the IMCO Convention*, 10 LAW AM. 839 (1978).

102. Convention at Art. 1(6).

103. For a general discussion of the "commercial insurability approach," see Owen, *supra* note 4, at 1-10-11.

104. 49 U.S.C. § 1; Inter-State Commerce Act Section 15(a)(3).

105. See notes 5 & 6 *supra*, and accompanying text.

106. Two major government subsidies are (1) the construction differential subsidy, and (2) the operating differential subsidy.

107. See Hearings, *supra* note 70.

108. See Kierr, *supra* note 19, at 643-45.

privilege of limitation of liability granted to ship owners by the Act of 1851. This is a privilege not enjoyed by the railroads, truckers, bus operators or airlines (except with respect to international passengers)."¹⁰⁹

Despite what some might term "economic obsolescence,"¹¹⁰ Congress has ascertained that limitation of liability is vital to the interest of U.S. carriers in competing with foreign shipping.¹¹¹ Given that the maintenance of a strong merchant fleet is in the best interest of national commerce, abolition of the right to limit liability seems highly unlikely. The solution, therefore, calls for balancing commerce interests in subsidizing the U.S. fleet through the limitation privilege, against the interests of both tort claimants and domestic competitors. The IMCO proposal would improve the lot of each of these latter groups by increasing the available fund.¹¹² At the same time carriers are provided benefits in the "intent" standard.¹¹³

The same analysis would apply to the second prong of the National Transportation Policy—national defense. The underlying rationale is that the greater the number of ships owned by U.S. citizens, the larger the fleet from which to draw ships in the event of a national emergency.¹¹⁴ Therefore, inasmuch as limitation favors U.S. shipowners, it will strengthen national defense.

In sum, the IMCO Convention would improve the state of U.S. limitation of liability law for each of several major interest groups: (1) Owners would only be denied the privilege if a claimant could prove intent or recklessness; (2) tort claimants would usually have a larger fund to claim against, and would never face a worthless fund; (3) insurers would be granted the privilege of limiting liability; and (4) the national interest of fostering commerce and defense would benefit because (a) the system would conform more closely to the present state of the industry, quelling much of the criticism of the U.S. law, and (b)

109. Hearings, *supra* note 70. It is important to note that shipowners aren't the only group afforded the limitation privilege in the United States. In addition to international air carriers (Warsaw Convention of 1929), nuclear equipment operators and distributors (42 U.S.C. § 2210 (1976)) and shipyards (liability generally limited by contract to \$300,000) may limit liability.

110. GILMORE & BLACK, *supra* note 8, at 822-23.

111. "The American Merchant Marine, already hard-pressed by foreign competition, would be struck a severe blow if repeal of our limitation statute forced it to stand alone among the major maritime powers of the world in this respect." Hearings, *supra* note 70.

112. See text accompanying notes 89-111, *supra*.

113. Convention at Art. 4.

114. 46 U.S.C. §§ 1241-16 (1970).

carriers would still receive what amounts to a substantial subsidy—essential to the maintenance and development of a strong merchant fleet.

V. CONCLUSION

The United States limitation of liability law is fraught with ambiguity and disharmony among the judicial circuits. This lack of uniformity fosters both a basic sense of unfairness in the system, and an incentive for forum shopping. The limitation law is grounded on policies which developments in corporate structures and government subsidies have, to a large degree, outdated. As outlined above, the IMCO Convention could solve many major problems in our current system.

The general sentiment of the United States Delegation is that while both the basic structure and specific provisions of the Convention are acceptable, the amounts of limitation are too low.¹¹⁵ Given the relative affluence of the United States, however, any amount intended to be a compromise for all shipping nations will necessarily fall below our own standards. A domestic compromise solution that favored the interests of tort claimants by providing higher amounts would have corresponding negative effects. First, higher amounts would dilute the limitation privilege to the point of being a nominal benefit at best. Second, such a domestic compromise solution would block progress towards international uniformity.

The value of international uniformity includes curbing incentives to forum shop, obviating the need for shipowners to post multiple bonds,¹¹⁶ and increasing the predictability with which shippers, insurers, and investors can approach maritime commerce. Limitation should not be treated as a distinct sphere of so-called private international law to be legislated domestically, but should be internationally uniform in order to promote industry stability.¹¹⁷ The prevalent usage of U.S. ports and admiralty courts compels United States ratification of the IMCO Convention as a necessary step in that stabilization process.

115. Status Report at 6812-13.

116. Convention at Art. 13.

117. Cf. The Carriage of Goods by Sea Act of 1936, 46 U.S.C. §§ 1300-1315 (1970)—the United States implementing legislation of the International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, *done* Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155. For an excellent general discussion of uniformity in international commerce, see Berman &

The Maritime Law Association has recently proposed a limitation of liability statute based on the IMCO Convention.¹¹⁸ While the proposal may improve many salient aspects of the IMCO Convention, the United States should not readily undertake unilateral domestic legislation. If Congress favors the MLA proposal over the Convention, and if the Convention fails to receive a sufficient number of ratifications to enter into force, it is submitted that the interests of both the United States, and maritime commerce in general, would benefit from negotiation of a suitable limitation system in a subsequent international forum.

Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978).

118. The proposal was circulated prior to the November MLA meeting at Freeport, Bahamas. During that meeting the Joint Committees of the Comité Maritime International and the Limitation of Liability conducted an open panel discussion on the proposed statute. For an examination of that statute, see Martucci, *supra* note 101.

APPENDIX A.

CONVENTION ON LIMITATION OF LIABILITY
FOR MARITIME
CLAIMS, 1976*

The States Parties to this Convention,

HAVING RECOGNIZED the desirability of determining by agreement certain uniform rules relating to the limitation of liability for maritime claims;

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

CHAPTER I. THE RIGHT OF LIMITATION

*Article 1**Persons entitled to limit liability*

1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.

2. The term shipowner shall mean the owner, charterer, manager and operator of a sea-going ship.

3. Salvor shall mean any person rendering services in direct connexion with salvage operations. Salvage operations shall also include operations referred to in Article 2, paragraph 1(d), (e) and (f).

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

5. In this Convention the liability of a shipowner shall include liability in an action brought against the vessel herself.

6. An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.

7. The act of invoking limitation of liability shall not constitute an admission of liability.

*The text was approved and deposited with the Secretary General of IMCO on November 19, 1976.

*Article 2**Claims subject to limitation*

1. Subject to Article 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) claims in respect to loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;

(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

2. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraphs 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

*Article 3**Claims excepted from limitation*

The rules of this Convention shall not apply to:

(a) claims for salvage or contribution in general average;

(b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage,

dated 29 November 1969 or of any amendment or Protocol thereto which is in force;

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

(d) claims against the shipowner or a nuclear ship for nuclear damage;

(e) claims by servants of the shipowners or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6.

Article 4

Conduct barring limitation

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Article 5

Counterclaims

Where a person entitled to limitation of liability under the rules of this Convention has a claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Convention shall only apply to the balance, if any.

Article 6

The general limits

1. The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:

- (a) in respect of claims for loss of life or personal injury,
 - (i) 333,000 Units of Account for a ship with a tonnage not exceeding 500 tons.
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each ton from 501 to 3,000 tons, 500 Units of Account;
 - for each ton from 3,001 to 30,000 tons, 333 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 250 Units of Accounts; and
 - for each ton in excess of 70,000 tons, 167 Units of Account,
- (b) in respect of any other claims,
 - (i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons.
 - (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):
 - for each ton from 501 to 30,000 tons, 167 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 125 Units of Account; and
 - for each ton in excess of 70,000 tons, 83 Units of Account.

2. Where the amount calculated in accordance with paragraph 1(a) is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with paragraph 1(b) shall be available for payment of the unpaid balance of claims under paragraph 1(a) and such unpaid balance shall rank rateably with claims mentioned under paragraph 1(b).

3. However, without prejudice to the right of claims for loss of life or personal injury according to paragraph 2, a State Party may provide in its national law that claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have such priority over other claims under paragraph 1(b) as is provided by that law.

4. The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons.

5. For the purpose of this Convention the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage mea-

surement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.

Article 7

The Limit for Passenger claims

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

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

(a) under a contract of passenger carriage, or

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

Article 8

Unit of Account

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

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the appli-

cation of the provisions of paragraph 1 may, at the time of signature without reservation as to ratification, acceptance or approval or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as follows:

- (a) in respect of Article 6, paragraph 1(a) at an amount of:
 - (i) 5 million monetary units for a ship with a tonnage not exceeding 500 tons;
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each ton from 501 to 3,000 tons, 7,500 monetary units;
 - for each ton from 3,001 to 30,000 tons, 5,000 monetary units;
 - for each ton from 30,001 to 70,000 tons, 3,750 monetary units; and
 - for each ton in excess of 70,000 tons, 2,500 monetary units; and
- (b) in respect of Article 6, paragraph 1(b), at an amount of:
 - (i) 2.5 million monetary units for a ship with a tonnage not exceeding 500 tons;
 - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each ton from 501 to 30,000 tons, 2,500 monetary units;
 - for each ton from 30,001 to 70,000 tons, 1,850 monetary units; and
 - for each ton in excess of 70,000 tons, 1,250 monetary units; and

(c) in respect of Article 7, paragraph 1, at an amount of 700,000 monetary units multiplied by the number of passengers which the ship is authorized to carry according to its certificate, but not exceeding 375 million monetary units.

Paragraphs 2 and 3 of Article 6 apply correspondingly to subparagraphs (a) and (b) of this paragraph.

3. The monetary unit referred to in paragraph 2 corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of this sum into the national currency shall be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 shall be made in such a manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 6 and 7 as

is expressed there in Units of Account. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1, or the result of the conversion in paragraph 3, as the case may be, at the time of the signature without reservation as to ratification, acceptance or approval, or when depositing an instrument referred to in Article 16 and whenever there is a change in either.

Article 9

Aggregation of claims

1. The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:

(a) against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible; or

(b) against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or

(c) against the salvor or salvors who are not operating from a ship or who are operating solely on the ship to, or in respect of which, the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.

2. The limits of liability determined in accordance with Article 7 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against the person or persons mentioned in paragraph 2 of Article 1 in respect of the ship referred to in Article 7 and any person for whose act, neglect or default he or they are responsible.

Article 10

Limitation of Liability without constitution of a limitation fund

1. Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. However, a State Party may provide in its national law that, where an action is brought in its Courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of

this Convention or is constituted when the right to limit liability is invoked.

2. If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.

3. Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

CHAPTER III. THE LIMITATION FUND

Article 11

Constitution of the fund

1. Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

2. A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.

3. A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.

Article 12

Distribution of the Fund

1. Subject to the provisions of paragraphs 1, 2 and 3 of Article 6 and of Article 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

2. If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to

the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

3. The right of subrogation provided for in paragraph 2 may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

4. Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs 2 and 3 had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

Article 13

Bar to other actions

1. Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.

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

(a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or

(b) at the port of disembarkation in respect of claims for loss of life or personal injury; or

(c) at the port of discharge in respect of damage to cargo; or

(d) in the State where the arrest is made.

3. The rule of paragraphs 1 and 2 shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and the fund is actually available and freely transferable in respect of that claim.

Article 14
Governing law

Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connexion therewith, shall be governed by the law of the State Party in which the fund is constituted.

CHAPTER IV. SCOPE OF APPLICATION

Article 15

1. The Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State. Nevertheless, each State Party may exclude wholly or partially from the application of this Convention any person referred to in Article 1, who at the time when the rules of this Convention are invoked before the Courts of that State does not have his habitual residence in a State Party, or does not have his principal place of business in a State Party or any ship in relation to which the right of limitation is invoked or whose release is sought and which does not at the time specified above fly the flag of a State Party.

2. A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are:

- (a) according to the law of that State, ships intended for navigation on inland waterways;
- (b) ships of less than 300 tons.

A State Party which makes use of the option provided for in this paragraph shall inform the depositary of the limits of liability adopted in its national legislation or of the fact that there are none.

3. A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to claims arising in cases in which interests of persons who are nationals of other States Parties are in no way involved.

4. The Courts of a State Party shall not apply this Convention to ships constructed for, or adapted to, and engaged in, drilling:

(a) when that State has established under its national legislation a higher limit of liability than that otherwise provided for in Article 6; or

(b) when that State has become party to an international convention regulating the system of liability in respect of such ships.

In a case to which sub-paragraph (a) applies that State Party shall inform the depositary accordingly.

5. This Convention shall not apply to:

(a) air-cushion vehicles;

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

CHAPTER V. FINAL CLAUSES

Article 16

Signature, Ratification and Accession

1. This Convention shall be open for signature by all States at the Headquarters of the Inter-Governmental Maritime Consultative Organization (hereinafter referred to as "the Organization") from 1 February 1977 until 31 December 1977 and shall thereafter remain open for accession.

2. All States may become parties to this Convention by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General of the Organization (hereinafter referred to as "the Secretary-General").

Article 17

Entry into force

1. This Convention shall enter into force on the first day of the month following one year after the date on which twelve States have

either signed it without reservation as to ratification, acceptance or approval or have deposited the requisite instruments of ratification, acceptance, approval or accession.

2. For a State which deposits an instrument of ratification, acceptance, approval or accession, or signs without reservation as to ratification, acceptance or approval, in respect of this Convention after the requirements for entry into force have been met but prior to the date of entry into force, the ratification, acceptance, approval or accession or the signature without reservation as to ratification, acceptance or approval, shall take effect on the date of entry into force of the Convention or on the first day of the month following the ninetieth day after the date of the signature or the deposit of the instrument, whichever is the later date.

3. For any State which subsequently becomes a Party to this Convention, the Convention shall enter into force on the first day of the month following the expiration of ninety days after the date when such State deposited its instrument.

4. In respect of the relations between States which ratify, accept, or approve this Convention or accede to it, this Convention shall replace and abrogate the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, done at Brussels on 10 October 1957, and the International Convention for the Unification of certain Rules relating to the Limitation of Liability of the Owners of Sea-going Vessels, signed at Brussels on 25 August 1924.

Article 18

Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right to exclude the application of Article 2 paragraph 1(d) and (e). No other reservations shall be admissible to the substantive provisions of this Convention.

2. Reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Any State which has made a reservation to this Convention may withdraw it at any time by means of a notification addressed to the Secretary-General. Such withdrawal shall take effect to the date the notification is received. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein,

and such date is later than the date the notification is received by the Secretary-General, the withdrawal shall take effect on such later date.

Article 19

Denunciation

1. This Convention may be denounced by a State Party at any time after one year from the date on which the Convention entered into force for that Party.

2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General.

3. Denunciation shall take effect on the first day of the month following the expiration of one year after the date of deposit of the instrument, or after such longer period as may be specified in the instrument.

Article 20

Revision and Amendment

1. A Conference for the purpose of revising or amending this Convention may be convened by the Organization.

2. The organization shall convene a Conference of the States Parties to this Convention for revising or amending it as the request of not less than one-third of the Parties.

3. After the date of the entry into force of an amendment to this Convention, any instrument of ratification, acceptance, approval or accession deposited shall be deemed to apply to the Convention as amended, unless a contrary intention is expressed in the instrument.

Article 21

Revision of the limitation amounts and of Unit of Account of monetary unit

1. Notwithstanding the provisions of Article 20, a Conference only for the purposes of altering the amounts specified in Articles 6 and 7 and in Article 8, paragraph 2, or of substituting either or both of the Units defined in Article 8, paragraphs 1 and 2, by other units shall be convened by the Organization in accordance with paragraphs 2 and 3 of this Article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. The Organization shall convene such a Conference at the request of not less than one-fourth of the States Parties.

3. A decision to alter the amounts or to substitute the Units by other units of account shall be taken by a two-thirds majority of the States Parties present and voting in such Conference.

4. Any state depositing its instrument of ratification, acceptance, approval or accession to the Convention, after entry into force of an amendment, shall apply the Convention as amended.

Article 22

Depositary

1. This Convention shall be deposited with the Secretary-General.

2. The Secretary-General shall:

- (a) transmit certified true copies of this Convention to all States which were invited to attend the Conference on Limitation of Liability for maritime Claims and to any other States which accede to this Convention;
- (b) inform all States which have signed or acceded to this Convention of:
 - (i) each new signature and each deposit of an instrument and any reservation thereto together with the date thereof;
 - (ii) the date of entry into force of this Convention or any amendment thereto;
 - (iii) any denunciation of this Convention and the date on which it takes effect;
 - (iv) any amendment adopted in conformity with Articles 20 or 21;
 - (v) any communication called for by any Article of this Convention.

3. Upon entry into force of this Convention, a certified true copy thereof shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

*Article 23**Languages*

This Convention is established in a single original in the English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT LONDON this nineteenth day of November one thousand nine hundred and seventy-six.

IN WITNESS WHEREOF the undersigned being duly authorized for that purpose have signed this Convention.

APPENDIX B.

46 U.S.C. § 183. *Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."*

(a) 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, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than \$60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$60 per ton, to be available only for the payment of losses in respect of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section 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.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, 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 as used in section 188 of this title. R.S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.