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LIMITATION OF SHIPOWNERS' LIABILITY

by

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PREFACE

In May 1986 the South African Admiralty Court had occasion, for the first time since the Merchant Shipping Act No. 57 of 1951 came into force, to consider the interpretation and application of the provisions of the Act which embody the internationally accepted principle of a shipowner being able to limit his liability in respect of loss or injury resulting from the negligent navigation or operation of his ship.

The case was that of the ill-fated motor fishing vessel, The "SAINT PADARN" which having recently been acquired by South African fishing interests and whilst being towed by the German tug "LUNEPLATE" from the Dutch port of Ijmuiden to Bremerhaven for dry-docking and bottom survey, landed up high and dry on the island of Juist after first the main, and then the emergency, towing gear parted.

Whilst the proprietor of a nearby "gasthof" was delighted with this unexpected tourist attraction (the "SAINT PADARN" was destined to remain on his beach for some six weeks) not so the consortium of South African Marine Insurers who had underwritten the risk in the venture!

I was privileged to have been involved in this case from the outset which in due course concerned an attempt by Insurers to recover their outlay in respect of the grounding damage repair costs as well as salvage expenses (amounting in total to some R500 000,00) from the Owners of the "LUNEPLATE". Of relevance to this work is the fact that the tugowner *inter alia* pleaded the right to limit his liability to the sum of approximately R9 000,00 only being the "LUNEPLATE"'s tonnage limitation figure calculated in terms of s 261 of Act No. 57 of 1951.

This case being the first of its kind in South Africa was accordingly the inspiration for this work and my thanks and appreciation are extended to the Marine Underwriters concerned who, like me, lived through some anxious moments before the matter was successfully concluded. To them, must go the credit for being prepared in the absence of South African precedent to "make some law".

I have also been privileged over the past 20 years or so to represent the interests of various South African Shipowners, operators and salvors and it is in no small measure due to their support and encouragement over the years that in 1987 I was able to satisfy the Senate of the University of Cape town that I had perhaps attained a level of competence adequate for admission as a candidate for the degree of Master of Laws. I hope that in attempting to point those concerned in the direction of adopting the "new" law contained in the 1976 Limitation Convention, I may in turn have made a small contribution towards their interests.

Finally a sincere word of thanks to my partners and staff for the patient and understanding attitude over the past three years of study as well as to my dear wife Brenda and to my family who were very bemused by my decision to go back to school. Last but by no means least a special word of thanks to my Secretary, Melanie, who has painstakingly typed and re-typed, arranged and re-arranged this dissertation with never so much as an (audible) word of complaint.

ROGER FIELD

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SUMMARY OF CONTENTS

PART A: **Pages 1 to 20**

Consideration is given firstly to the origins of the principle of a shipowner being entitled to limit his liability to third parties who have suffered loss or injury as a result of the negligent navigation or management of his ship noting that the principle evolved as a matter of public policy designed to encourage shipping and trade.

The various attempts at reaching international unity are then reviewed by way of reference to the 1924, 1957 and 1976 Conventions on Limitation of Shipowners' Liability including comment on the separate limitation regimes introduced by the Hague and Hague-Visby Rules in respect of the carriage of goods by sea.

The adoption of the principle of limitation into the South African law with the coming into force as at 1960 of the Merchant Shipping Act is then considered, it being noted here that the relevant provisions of No. 57 of 1951 reflect, rather than repeat the (then) corresponding provisions in the English law following on the adoption and enactment by that country of the 1957 Limitation Convention.

The word reflect is used advisedly as South Africa is neither a signatory to nor has it adopted the 1957 Convention per se resulting in a measure of uncertainty and difficulty when it comes to the application of the relevant provisions of the Act.

These provisions viz. s 261 et seq are then dealt with in some detail with consideration being given to such matters as to who may limit their liability, what ships are subject to limitation, the amounts of limitation and how these are calculated with reference to a ship's tonnage etc.

Finally under this Part, the question of which claims are subject to limitation and which, by way of separate legislative enactment, are not subject to limitation, is examined.

PART B: **Pages 21 to 42**

This Part is devoted to the loss of the right to limit liability with an in-depth look being taken at the meaning of the words "actual fault or privity". Here particular attention is paid to the interpretation of the personalised requirement of s 261 (whose actual fault or privity are we concerned with etc.?) and what degree of culpability the words connote. Given the dearth of reported South African cases, the approach of van Heerden J in The "SAINT PADARN", 1986 (being the only South African case to date dealing with the subject) is followed by way of having regard to a number of the leading English cases commencing with Lennard's case of 1915 through the well known "LADY GWENDOLEN" case of 1965 and the "new approach" introduced by it and beyond to the House of Lords decision in The "MARION", 1984.

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A review of these cases reveals an ever increasing onus being placed by the Courts on the upper echelons (be this at director or below director level) of management in way of proper and effective supervision of the day to day activities of the ships under their control, be this as Owner, operator, manager or Charterer. It is noted here that under the "absence of actual fault or privity" regime presently reflected in our law it has become extremely difficult in fact for an Owner to prove an entitlement to limit his liability.

Finally brief reference is made to the official Findings of a number of South African Courts of Marine Enquiry where adverse findings by way of fault or default have been made against an Owner or Operator.

PART C: **Pages 43 - 56**

After referring to the 1974 Athens Convention which introduces a separate limitation regime in respect of the carriage of passengers by sea, a further look is taken at the 1976 London Convention on Limitation, this from the point of view of the "new" law and the material changes which it introduces. It is noted that whilst the amounts of limitation are substantially increased with the introduction of a 500 ton minimum limit followed by various bands or "slices" of tonnage, the "fault or privity" principle is done away with being replaced with a "deliberate action designed to cause loss" regime. The onus is now on the claimant to prove this as such rendering so it is submitted most of the limits "unbreakable". Highlighted is the fact that salvors are expressly included under the provisions of the Convention thereby overcoming the difficulties faced by the salvors in the "TOJO MARU" case of 1972. Special limits are also introduced in respect of passengers being indicative of the impact made by the earlier Athens Convention.

Examples are given as to how the new limits are calculated and how they compare with the limits under the present South African law.

PART D: **Pages 57 - 64**

Certain conclusions are drawn after taking a somewhat critical look at South Africa's approach thus far to the incorporation into our law of International Maritime Conventions generally and those dealing with limitation of liability in particular. Given that the South African maritime industry embraces most if not all of the disciplines dealt with by the 1976 Convention, a case is made out at the end of this Part for the need to give serious consideration to the adoption of those parts of the 1976 Convention directly relevant to South African law this by way of an amendment to the Merchant Shipping Act and the enactment of special provisions necessary to give effect thereto.

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LIMITATION OF SHIPOWNERS' LIABILITY

PART A:

1. The Legal Background

The principle of a shipowner being entitled to limit his liability to those who have suffered loss or injury through the negligent navigation or management of his ship, has a long tradition in international maritime law.

The concept of limitation originated from a shipowner's unwillingness to engage in the risky business of foreign trade without some way of knowing in advance his total exposure and the rules that would apply to the maritime adventure. This applied equally to those underwriting the risks in the adventure.

Legal regimes have varied according to time and place but historically have had two basic principles in common, viz.

(i) the limit of liability varies generally speaking with the size of the ship, and

(ii) the shipowner is not entitled to limit his liability if the loss or injury is attributable to his personal fault or neglect.

The adoption and application of the concept in Europe dates mainly from the 17th Century, with the first major codification of the law being found in the Maritime Ordinance of Louis XIV in 1681[1]. This Codification could be said to be an example of one of the first instances of State support for its Shipping industry.

The legal regime in South Africa is based on English law. Limitation was first introduced into English law in 1734 when by way of the Responsibility of Shipowners' Act of that year, a ship-

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owner's total liability for losses resulting from the theft of cargo by the Master and Crew, was limited to the value of the ship, her appurtenances and the freight for the voyage.

This Act was passed as a result of a petition to parliament by a shipowner whom the Court had held liable the previous year for the loss of a cargo of gold bullion shipped from Portugal and stolen by the Master[2] . In his petition, the shipowner stressed that unless some relief was afforded shipowners in these situations ".....trade and navigation will be greatly discouraged". The preamble to the Act makes it clear that the introduction of limitation of a shipowner's liability was regarded by the legislature as being a matter of policy aimed at the encouragement of shipping and trade.

In 1786, the right to limit was extended to cover losses resulting from theft in which the Master and crew were not involved[3] . In 1813 the principle was further extended[4] to include "any losses resulting from an act, neglect, matter or thing done, omitted or occasioned without the fault or privity of the shipowner to any goods carried in the ship, to any other ship or to goods carried in any other ship".

The limitation principle was preserved by the Merchant Shipping Act of 1854, which repealed the earlier enactments and extended the principle to include claims for loss of life or personal injury. In 1862 the relevant section was amended to include foreign ships and later that year an average value for all ships was introduced in order to simplify the calculation of the limitation "fund"[5] .

The limitation system, with minor changes, was carried over into the English Merchant Shipping Act of 1894, the provisions of which, more particularly s 503, were in due course reflected in the South African Merchant Shipping Act No 57 of 1951[6] .

Given the political motivation and the public policy considerations underlying the principle of a shipowner being able to limit his

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liability, the doctrine has not been a popular one (except perhaps with shipowners) and the Courts have for their part from time to time expressed their disapproval of the rule.

In the "AMALIA"[7] Dr Lushington stated for instance that:

> "The principle of limited liability, is that full indemnity, the natural rights of justice, shall be abridged for political reasons"

In the "BRAMLEY MOORE"[8] Lord Denning MR when considering the example of a small tug of comparitively low value and a correspondingly low measure of liability causing immense damage to a large ocean liner confessed that:

> "there is not much room for justice in this rule, but limitation of liability is not a matter of justice. It is a rule of public policy which has its origins in history and its justification in convenience"

In the "GARDEN CITY"[9] Staughton J commented that:

> "the historical reason for the introduction of limitation appears to have been to enable British ships to trade on equal terms with those of other nations."

The South African Courts for their part, have seldom been called upon to consider the question. To date there have in fact been two reported cases only and in neither did the Court express its disapproval of the rule. The first case in 1931, concerned the question of whether s 503 of the Merchant Shipping Act 1894 could be pleaded against the Crown[10]. Here de Villiers CJ held that

> "The policy which limited the liability (of a shipowner) to what must be considered to be an arbitrary figure, no doubt was the encouragement of shipping and of trade, in them-

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> selves laudable objects, but that is not sufficient to include the Crown in the provision"

The second case which is considered in more detail in PART B of this work, was decided in 1986[11]. Here van Heerden J, faced with an absence of any reported South African case in which the question of whether the claimants' loss was "caused without the actual fault or privity" of the shipowner[12] stated that

> "The reason for introducing a provision for such limitation in our legislation would appear to be the same as in the case of English law, namely to enable our ships to trade on equal terms with those of other nations, and there seems to be no valid reason why the similar provisions should not be construed in accordance with the English authorities on the subject".

2. Different Systems of Limitation and attempts at reaching International unity

Although, historically, limits based on the value of the ship long prevailed, a fundamental difference existed in the application of the principle. Many countries[13] based the limit on the value of the ship after the accident whereas under English law, the limit was based on pre-accident value, such limit being monetary with the value of the ship being used merely for calculation purposes.

To simplify the calculation, the legislation adopted in England in 1862[14] fixed the value of the ship at £8 per ton which was regarded at the time as being an average for a good English sailing ship. A passenger ship was regarded as having a higher value and their limit was fixed at £15 per ton of which £7 was reserved for personal claims. This priority pro-rata allocation of the limitation fund is still reflected in the current South African law[15].

A classic example which demonstrates the difference in the two systems is to be found in the claims that followed upon the loss of the "TITANIC" in April 1912[16] . The total personal claims amounted to some USD 22 million. The pre-loss value of the Titanic was in the order of USD 6 million. Under U.S. law, the limitation fund was however less than USD 100 000,00 made up of the value of salved lifeboats and advance passage monies etc. Under the English tonnage system on the other hand, the limitation fund would have been about USD 3.75 million.

The international character of shipping suggested that substantial differences between national laws on shipowners' liability was undesireable and attempts to reach uniformity, taken up initally by the Comite' Maritime International (CMI) at the beginning of this Century, have to date resulted in three international conventions.

1924 Brüssels Convention[17]

This Convention did not receive widespread acceptance primarily because it attempted a compromise between the existing systems in terms of which a shipowner had the right to limit his liability either to the value of the ship (and freight) after the collision or accident or to an amount of £8 per ton whichever was the lesser. An additional amount of £8 per ton being added to the limitation fund for claims arising out of death or bodily injury.

The Convention entered force on 2nd June 1931 and was implemented in some 15 countries[18] . It did not however achieve its objective notably (although the Convention incorporated elements of English law) because the United Kingdom did not accede to it.

1957 Brussels Convention[19]

In terms of this Convention, the English system for limitation of liability received full international recognition. Certain elements were however added to refine the system, the main purpose

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being to ensure that limitation of liability applied to all liabilities in respect of damage arising out of the operation of a ship.

The right to limit liability, previously enjoyed only by the owner of a ship, was extended to the Charterer, manager and operator of the ship as well as to the crew and other servants of the said Owner, Charterer etc. The effect was to introduce a system for global limitation in the sense that the limit of liability applies to the total of all liabilities on the part of the ship for damage caused by any one accident.

This Convention entered force on the 31st May 1968 and during the 1960-70s, the Convention was incorporated into the national law of some 45 countries, England for its part incorporating the Convention (in substance) into its law in 1958 by way of an amendment to s 503 of the Merchant Shipping Act of 1894[20]. In spite of the non-ratification of the Convention by a number of maritime countries notably Greece and the United States, the measure of uniformity achieved was impressive.

1976 London Convention

Mainly as a result of the adoption of a new Convention on Civil Liability for Oil Pollution Damage (CLC) in 1969, which vis a vis the 1957 Brussels Convention created inconsistencies both as to substance and form, and the fact that during the two decades following the adoption of the 1957 Convention, the real value of the limits under the Convention had been reduced by about 50%,due to the effects of world inflation a third Convention was adopted in 1976[21].

The changes which this Convention seeks to bring about to the limitation of liability regime as developed and contained in the 1957 Brussels Convention are considered in more detail later on in this work[22] it being considered convenient at this point to take a

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look at current South African legislation reflecting as it does Articles 1 and 3 of the 1957 Convention.

3. Merchant Shipping Act No. 57 of 1951 - s 261 et seq

Although this Act was assented to by the Governor-General of the Union of South Africa as it then was, on the 27th June 1951, the date of the commencement of the Act was 1st January 1960.

Prior to the coming into force of the Act, the provisions of s 503 of the English Merchant Act of 1894 (as amended) concerning limitation of liability applied in South Africa, witness the reference to this particular section by the Court in the Smiths' Coasters case of 1931[23].

The 1894 U.K. Act was repealed in its entirety by Act No 57 of 1951 and the South African law concerning the limitation of a shipowners' liability for loss or damage to property and/or in respect of loss of life or personal injury caused by his ship has since then been contained in sections 261, 262 and 263 of this Act as amended from time to time. As mentioned earlier in this work, it was suprisingly not until this Act had been in force for more than 26 years that our Courts had occasion for the first time to consider the application of the law[24].

3.1 Amounts of Limitation

These limits which are set out in s 261(1) (a), (b) & (c) of Act 57 of 1951[25] are as follows:

Claim Category

(a) in respect of claims relating solely to loss of life or personal injury (i.e. no property damage involved) liability is limited to an aggregate amount equivalent to 2 635 gold francs for each ton of the ship's tonnage;

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Claim Category (b) in respect of claims relating solely to loss of or damage to property (i.e. no loss of life or personal injury involved) liability is limited to an aggregate amount equivalent to 850 gold francs for each ton of the ship's tonnage and

Claim Category (c) in respect of Claims involving both loss of life or personal injury and loss of or damage to property, liability is limited to an aggregate amount of 2 635 gold francs for each ton of the ship's tonnage subject to the proviso that the claims in respect of loss of life or personal injury shall have priority over claims for loss of or damage to property to the extent of an aggregate amount of 1 785 gold francs for each ton of the ship's tonnage. As regards the balance of the aggregate amount of 2 635 gold francs (i.e. 850 gold francs for each ton of the ship's tonnage) any unsatisfied portion of the claims in respect of loss of life or personal injury shall rank pari passu with the claims in respect of loss of or damage to property.

s 261 (3) makes it clear that the provisions of S261 as a whole, apply in respect of a single casualty or accident only i.e. claims for damages arising out of two or more "distinct occasions" shall not be combined for the purposes of establishing the ship's limitation fund.

s 261 (4) states that for the purpose of the section, a gold franc shall be taken as a unit consisting of 65.5 milligrams of gold of millesimal fineness nine hundred.

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s 261 (5) provides that the Director General (i.e. of Transport/Water Affairs) may from time to time specify by notice in the Gazette, the amounts which, for the purposes of this section, shall be taken as equivalent to 2 635 and 850 gold francs respectively[26]

The limits referred to in categories (a), (b) and (c) above, have been amended from time to time initially but not latterly in keeping with developments internationally. The limits contained in Act No. 57 of 1951 in the form originally assented to as at 27th June 1951, were for instance the same as those contained in s 503 of the U.K. Merchant Shipping Act of 1894 as it then stood viz in respect of category (a) £15 (per ton), in respect of category (b) £8, and in respect of claims falling under category (c) £15 of which £7 (per ton) was allocated towards creating a preferrent fund in respect of claims for loss of life and/or personal injury.

In 1959, the limit of £15 in category (a) was substituted by a limit of 3 100 gold francs, the limit of £8 in (b) by 1 000 gold francs and the limits of £15 and £7 in category (c) by 3 100 and 2 100 gold francs respectively. At the same time, sub-sections 261 (4) and (5) referred to above, were added, sub-section (5) at this stage referring to 3 100 and 1 000 gold francs respectively[27].

These amendments reflected Art. 3 of the 1957 Brussels Convention.

In 1985, the limitation amounts as they presently stand, were introduced i.e. the existing limits were reduced as follows: in (a) from 3 100 gold francs to 2 635, in (b) from 1 000 gold francs to 850 and in (c) from 3 100 and 2 100 gold francs to 2 635 and 1 785 respectively[28].

The policy of reducing the per ton limit is not in accordance with the international trends since 1959 which, as evidenced by the 1976 London Convention[29] have been towards increasing the limits albeit as a quid pro quo making it more difficult as we shall see for a claimant to "break" the limitation fund.

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In the 1976 Convention, the gold franc as the measure of limitation is replaced by the unit of account or Special Drawing Right (SDR)[30] following the substitution in the 1970's of gold by the SDR as the basis for the international monetary system.

In 1979 a Protocol to the 1957 Brussels' Convention was agreed in terms of which the gold franc was similarly substituted by the unit of account 3 100, 2 100 and 1 000 gold francs being equal to 206,67, 140 and 66,67 units of account or SDRs respectively.

When amending its Merchant Shipping Act in 1985, South Africa did not follow the 1979 Protocol. In terms of the amendments, the gold franc is retained but the per ton limit is reduced. Had the 1979 Protocol been adopted, the limitation amounts under the Act, based for example on the Rand equivalent of an SDR at 13 June 1989[31] would as at that date have been:

Category (a) 206,67 x R3,461 = R715,28 per ton;
(b) 66,67 x R3,461 = R230,74 per ton;
and (c) R715,28 per ton with R484,54 per ton (i.e. 140 x R3,461) creating the preferent fund in respect of claims for loss of life and/or personal injury.

It will be readily appreciated that these figures are substantially higher than the limitation amounts based on the latest determination of the value of a gold franc under s 261 (4) of Act 57 of 1951[32]

i.e. Category (a) R432,00 per ton;
(b) R139,00 per ton;
and (c) R432,00 per ton with R293,00 per ton creating the preferent fund in respect of claims for loss of life and personal injury.

The reasoning behind the reduction in the gold franc per ton limit will become evident when turning as we now do, to consider how the tonnage figure for the purposes of limitation is arrived at.

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3.2 How the "limitation" tonnage is calculated:

Whereas a ton is a measurement of weight ashore, it has traditionally been a measurement of capacity at sea. The word in its maritime sense, derives from the word "tun" being a large cask in which wine was transported, one "tun" being equivalent to two pipes, four hogsheads or 252 old wine gallons. The measurement of a ship was accordingly in olden days, by "tunnage" or the number of "tuns" she could carry in her holds[33].

The "tunnage" (later to become tonnage) or cargo carrying capacity of a ship, was used inter alia to determine the charge for the hire of a ship and for calculating the harbour dues payable by a ship. Various formulae were adopted from time to time, to enable a ship's tonnage to be calculated quickly. It was found for instances that given the general design of ships in the early days that the vessel's length in feet x her maximum beam in feet x the depth of her hold below the main deck in feet ÷ 100 gave a reasonably accurate measurement of her (gross) tonnage[34].

The changes in ship design including the advent of the motor driven ship saw certain "non-revenue earning" spaces of a ship being excluded from gross tonnage measurement e.g. crew accommodation and engine room space resulting in the term "net" or, once ships came to be issued with Tonnage Certificates, "register" tonnage.

s 262 (1) of Act 57 of 1951 as originally promulaged provided that for the purposes of s 261, the tonnage used for limitation calculations for sailing ships, was the register tonnage. In the case of a motorship however, the calculation was more complicated by reason of having to add to the register tonnage any engine room space and/or "any space occupied by seamen or apprentice-officers and appropriated to their use"[35] that had been deducted in arriving at the register tonnage. This could in turn only be found by looking at the ship's Tonnage Certificate.

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The 1969 Convention on Tonnage Measurement of Ships came into force in 1983, from which date gross and net tonnage calculations are based on a logarithmic formula which does not record any engine space deduction (nor so it appears any crew accommodation space).

This Convention was incorporated into the South African law in 1985 by way of Schedule 6 to the Merchant Shipping Act[36]. In the same year s 262(1) of the Act was amended in terms of which, for the purposes of s 261, the tonnage of a ship became her gross registered tonnage with the reference to sailing ships being deleted[37]. In addition to overcoming the difficulties posed by the revised method of gross and net (register) tonnage calculation introduced by the 1969 Convention, this amendment reflects Art. 6(5) of the 1976 London Convention.

The retention however of s 262 (2) providing that "there shall not be included in such tonnage any space occupied by seamen or apprentice officers ...." constitutes an anomaly and appears to be an oversight.

The reduction in the gold franc per ton limit was introduced simultaneously with the adoption of gross register tonnage as the new criterion for arriving at a ship's tonnage limitation figure. To appreciate the reasoning behind the reduction, it is necessary to refer to Hansard (18th February 1985 at 1040) and to the Memorandum (green paper) attached to the relevant Merchant Shipping Amendment Bill 1985 as tabled wherein it is stated that as the adoption of gross register tonnage had the effect of increasing a ship's tonnage limitation figure (by an average of 15%) a corresponding downward adjustment of the gold franc per ton limit was necessary.

3.3 Persons entitled to limit liability

Prior to the adoption of the 1957 Brussels Convention, the right to limit liability was enjoyed only by the shipowner.

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In the Convention, this right was extended to include the Charterer, manager and operator of the ship and to the Master, members of the crew and other servants of the said Owner, Charterer, manager or operator acting in the course of their employment in the same way as the right applied to the Owner himself[38].

Under South African law, the right to limit remained until 1981, that of the shipowner alone (shipowner being defined as "any person to whom a ship or a share in a ship belongs") and by the "builders or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until the registration thereof under the provisions of this Act[39].

In 1981 this right was extended to "any Charterer, any persons interested or in possession of such ship, and a manager or operator of such ship"[40]. Although Master and/or members of the crew are not specifically referred to, the words "in possession of such ship" are wide enough to include Master or crew were they to be sued in their individual capacities - not so however other servants of the Owner or the servants of a Charterer, manager or operator[41].

3.4 Ships subject to limitation

The right of limitation in terms of s 261 of Act 57 of 1951 is available to the Owner, Charterer, etc. of a ship whether registered in the Republic of South Africa or not[42].

"Ship" is defined in s 2 of the Act as "any vessel used for transportation or for any other purpose on or under the surface of the water[43]".

"Vessel" in turn "includes any ship, or any boat, small vessel or other description of vessel used or designed to be used in navigation[44]".

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These definitions do not unfortunately make it clear whether certain modern structures such as jack-up oil rigs and offshore installations can be considered as ships for the purposes of limitation. The question is relevant in the South African context with a number of rigs presently operating off our Coast. For the purposes of the Merchant Shipping Act, these rigs are considered to be "ships" whilst being towed from one location to another but once anchored and operating, they become "mines" in terms of our mining laws[45].

It would seem to follow therefore that in the event of a rig being involved in a collision whilst being towed from position A to B, the Owners of the rig would be entitled to plead limitation but that no such plea would be available to the Owners in the event of a collision, whilst their rig is in situ and operating as a "mine". The same would apply to the Owner or operator of an offshore installation such as the SBM off Durban.

A more comprehensive definition of "Ship" is to be found in the 1983 Admiralty Jurisdiction Regulation Act in terms of which:

"Ship" means any vessel used or capable of being used on the sea or internal waters and includes any hovercraft, power boat, yacht, fishing boat, submarine vessel, barge, crane barge, floating crane, floating dock, oil or other floating rig, floating mooring installation or similar floating installation, whether self-propelled or not"[46].

The reference to a "floating installation" is wide enough to include an operating rig and no distinction is made between a rig being towed and a rig in situ.

Any claim relating to the limitation of the liability of the Owner of a ship or of any other person entitled to any similar limitation of liability constitutes a "maritime claim" under AJRA[47] and must in turn be proceeded with in a Court of competent Admiralty jurisdiction[48].

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As such, it is tempting to argue that the definition of "Ship" as contained in AJRA should prevail in cases where uncertaintity arises. However the right to limit liability derives not from AJRA but from the Merchant Shipping Act and until such time as the definition of "Ship" in this Act is amended to bring it in line with AJRA, the better view would , it is felt, be that the Owners, Charterers etc. of a rig in situ or a floating mooring or similar installation would not in the case say of a collision, be entitled to plead limitation.

3.5 Claims subject to limitation

In terms of s 261 of Act No 57 of 1951 (as amended) limitation may be pleaded in respect of claims for loss of life or personal injury to any person and in respect of claims for any loss of or damage to any property or rights of any kind, whether movable or immovable.

Questions of limitation occur most commonly where two ships collide or where a ship collides with a quay or harbour installation. Normally this will give rise to a liability in delict e.g. negligent navigation but the liability may also be contractual as in the case of the "ST PADARN" where a tug lost its tow[49].

Given the decision in the Smith's Coasters case and the fact that in South Africa most harbour installations are State owned, it is doubtful whether the Owner of a ship which damages such an installation could in fact plead limitation.

The liability of a shipowner in respect of the loss or damage to movable property in the form of cargo being carried on his own ship is also governed by international convention, the provisions of which are incorporated by reference in the Bills of Lading evidencing the Contract of Carriage between the Shipper and the Shipowner[50].

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These conventions, of which the 1924 Hague Rules and the Hague-Visby amendments of 1968 are presently in force, contain their own limitation provisions based on the so-called "per package" formula. These Rules provide however that the rights and obligations of the Carrier under any statute for the time being in force relating to the limitation of the liability of Owners of sea-going ships shall not be affected by the Rules[51].

In cases of the loss of or damage to high value cargo carried on ships of low tonnage, the question could arise as to whether the Shipowner would be entitled to rely on his ship's tonnage limitation as opposed to the "per package" limitation contained in the Hague or Hague-Visby Rules were this to be to his financial advantage?

Let us consider an actual example. During the early part of 1989, the Cypriot Flag motor vessel "DORTHE LEA" of some 2000 grt put into Cape Town to discharge a cargo of tens of thousands of cartons of tinned fish shipped "clean" on board at various South American ports pursant to the issuing of Bills of Lading incorporating the Hague-Visby Rules. Due to serious flooding of the ship's holds during the voyage, most of the cargo suffered damage to an extent that against a sound arrived value of approximately R5 million, the actual arrived value of the cargo was reduced to some R1 million.

Given the number of cartons/packages involved, the R4 million loss suffered by the Cargo Owner fell well within the 10 000 gold franc (approximately R1 640,00) per package limit under the Hague-Visby Rules. Had the shipowner/Carrier been able to prove however that the damage to the cargo had been caused without his "actual fault or privity" it would, it is submitted, have been open to him in the in personam proceedings which were brought in the South African Court, to have claimed the right to limit his total liability to R278 000,00 being the vessel's tonnage limitation fund (i.e. 2 000 x R139,00) in terms of s 261 (1) (b) of Act No 57 of 1951.

In the event given the Shipowner's parlous financial position i.e. as a "one ship brass plate" company and notwithstanding that the evidence available to the Cargo Owner showed that the Shipowner would have been hard pressed to prove an absence of fault or privity, the Cargo Owner had no option but to accept a compromise based on the forced sale value of the ship at Cape Town and the limit of third party (P & I) liability cover available to the Shipowner.

3.6 Claims that are not subject to limitation

s 9 (5) (a) of the Prevention and Combating of Pollution of the Sea by Oil Act No. 6 of 1981 expressly provides that where the Owner of any ship, tanker or offshore installation incurs a liability for any loss or damage by pollution resulting from the discharge of oil, the provisions of s 261 of the Merchant Shipping Act of 1951 shall not apply in respect of such liability.

Act 6/1981 replaced the earlier 1971 Act of the same title and reflects many of the provisions of the various international conventions on Oil pollution (prevention and liability in respect of) that followed upon the "TORREY CANYON" disaster of 1967[52].

The exclusion of the right to limit liability on the basis of tonnage is accordingly very much in keeping with international practice.

NOTES:

1. I J Donovan : "The Origins and Development of Limitation of Shipowner's Liability" (1979) 53 Tulane Law Review 999.

2. Boucher v Lawson (1734) Cas. Temp Hardw 85, 95 ER53

3. Responsibility of Shipowners Act 1786.

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4. Responsibility of Shipowners Act 1813.

5. Merchant Shipping Act of 1862 and s 54 Merchant Shipping Act (Amendment) Act of 1862.

6. s 261 et seq.

7. 1863 Br & Lush 151, 176 ER 323

8. 1964 P 200 (CA) 220

9. LLR 1982 (Vol.2) at 398

10. SAR v H v Smiths' Coasters 1931 AD 113 at 130

11. The "ST PADARN": Atlantic Harvesters of Namibia v Unterweser 1986 (4) SALR at 875

12. The Smiths' Coasters case did not deal with the question of "fault or privity"

13. notably Germany, the Scandanavian States, France and later the United States

14. see not 5 supra

15. see s 261 (1) (c) of Act 57/1951.

16. Oceanic Steam navigation Co. v Mellor 209 F Sol (2 Civ., 1913) 233 US 718 (1914)

17. Appendix I International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels: signed at Brussels, 25th August 1924. **Note:** not to be confused with the International Convention for the Unification of certain Rules of Law Relating to Bills of Lading: signed at Brussels on the same day and in terms of which the "Hague Rules" adopted in 1921 as the first set of uniform Rules for the carriage of goods by sea were accepted into international law.

18. Including Brazil and Russia where the Convention still forms the basis of the law in those countries.

19. Appendix II: International Convention relating to the Limitation of the Liability of Owners of Sea-Going ships: signed at Brussesl 10th October 1957.

20. Appendix III: Merchant Shipping (Liability of Shipowners and others) Act 1958.

21. Appendix IV: The Convention on Limitation of Liability for Maritime Claims: signed in London 19th November 1976.

22. refer PART C at page 44 et seq.

23. see not 10 supra

24. The "ST PADARN" 1986 (4) SALR at 875

25. Appendix V: Sections 261 et seq of Merchant Shipping Act No. 57 of 1951 (as amended)

26. The latest determination (by Government Notice 2515 contained in Gazette dated 25th November 1985) being R432,00 and R139,00 respectively.

27. see s 33 (a), (b), (c), (d) and (e) of Act No 30 of 1959.

28. see s 7 (a), (b), (c), and (d) of Act No 25 of 1985.

29. in force as at 1st December 1986.

30. An SDR being a unit of account whose value is determined and published daily by the IMF on the basis of a basket of currencies. Note: As at 13th June 1989, the Rand equivalent of an SDR was for instance 3,461.

31. see Note 30 supra.

32. see Note 26 supra.

33. see Kemp's "Oxford Companion to Ships and the Sea" page 876.

34. see "Ships Tonnage - A Historical Review" 1987 by Capt. Ken Lark then Chief Surveyor, Dept. of Transport (unpublished).

35. see s 262 (2).

36. Proclamation No R 162 of 1985.

37. see s 8 of Act No 25 of 1985.

38. Art. 6(2).

39. see s 261 (2).

40. s 263 (2) added by s 8 of Act 3 of 1981.

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41. In the 1976 London Convention, the right to limit liability is expressly also given to Salvors (Art. 1(1)). "Shipowner" means the Owner, Charterer, manager or operator of a sea-going ship and in terms of Art. 1 (4) the right to limit is extended to any person for whose act, neglect of fault the shipowner or salvor is (vicariously) liable.

42. It was by reason of this provision that the Owners of the German registered tug "LUNEPLATE" were able to plead limitation in the "ST PADARN" case. See note 6 of 6 supra.

43. Definition of "ship" substituted by s 1 (c) of Act 25 of 1985.

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44. Defintion of "vessel" substituted by s1 (f) of Act No 3 of 1981.

45. i.e. insofar as the Dept. of Transport is concerned vis a vis its administration of Act 57/1951.

46. see s 1 (1) AJRA 105/1983.

47. see s 1 (1) (t).

48. see s 7 (2).

49. see note 6 supra.

50. known as the Hague Rules 1924; the Hague-Visby Rules 1968 and the Hamburg Rules 1978; South Africa for its part having adopted the Hague-Visby Rules as at 4 July 1986 by way of the Carriage of Goods by Sea Act No. 1 of 1986. This Act repealed Sections 307 to 311 of the Merchant Shipping Act (Chapter VIII) which reflected the earlier Hague Rules.

51. see Art. 8 of the Hague Rules and Art. VIII of the Hague-Visby Amendments.

52. i.e. "CLC" 1969; "MARPOL" 1973 and the "INTERVENTION" Convention of 1975.

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PART B:

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4. Loss of the Right to Limit Liability

A shipowners' right to limit his liability under s 261 of Act 57 of 1951 is entirely dependent on there being an absence of "actual fault or privity" on his part. In the signed Afrikaans text, this is expressed as "sonder sy wesentlike skuld of medewete".

The term "actual fault or privity" derives from s 503 of the 1894 UK Merchant Shipping Act and is contained in Art. 1(1) of the 1957 limitation convention. Having pleaded the right to limit liability, the onus of proving an absence of fault or privity rests with the shipowner[53].

It is submitted that in the context of s 261, the meaning to be given to the words fault or privity does not present a difficulty. Fault (skuld) translates easily enough into negligence or culpa on the part of the shipowner whilst privity (medewete) as in the doctrine of privity of contract[54] suggests the shipowner being a party or privy to what occurred.

The difficulty which arises is in the application of the term "actual fault or privity" i.e.

(i) how, where the shipowner is not a private individual, to interpret the personalised requirement of s 261; and

(ii) what degree of culpability do the words connote?

4.1 The personalised requirement of s 261

As to the first question in most cases these days, the Owner of a ship is not in fact a private individual but a company. The company could as we have seen[55(a)] be a so-called "one-ship brass plate" concern on the one hand or a large highly decentralised public company on the other. Whose actual fault or privity are we

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therefore concerned with?

In the leading case of Lennard's Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.[55(b)] the shipowner sought to rely on s 502 of the 1894 Act which provided that where a shipowner was a corporation, it would be exempt from liability for fire provided that it showed that it resulted without the "actual fault or privity" of the person who was the "directing mind" of the corporation.

> Lennard's case concerned a ship which was sent to sea in an unseaworthy state (i.e with defective boilers) as a result of which she stranded and her cargo destroyed by fire. The vessel was owned by a limited company of which Lennard was a director. His name was registered in the ship's register and he took an active part in her management.
>
> Held by the House of Lords that Lennard (who was fully aware of the state of unseaworthiness of the vessel i.e. was privy to this fact) was the alter ego of the company and not merely a servant. There was accordingly a presumption that his action was the action of the company itself. The company could not therefore exclude its liability for the loss of the cargo by fire under s 502 as it had not shown that such loss had occurred "without its actual fault or privity".[56]

Lennard's case was used in a number of subsequent decisions in the English Courts as authority for the view that generally speaking, only a director could be said to be the alter ego of a company e.g.:

(a) The "CLAN GORDON" where a shipowning company failed in its attempt to limit liability under s 503 of 1894 Act for loss of cargo when the ship capsized and sank after the Master had de-ballasted two water tanks shortly after leaving the loading port - this in ignorance of the express written warnings/loading instructions issued by the shipbuilder following on the loss of a sister ship in similar conditions some years earlier. In this case, it was held that the Managing Director, one Barr, of Clan Line Steamers being privy to the said loading instructions was at fault, given their importance, in not personally ensuring that they were brought to the Master's attention i.e. he was not in the Court's view relieved of this responsibility by having delegated this duty to a subordinate in the person of the company's engineer, Mr Lyall. [57]

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(b) The "EMPIRE JAMAICA" where the Court of Appeal upheld the shipowner's right to limit liability of damage caused by their ship in collision with the M/V "GAROET". Although it was admitted by the Owners that at the time of the collision, the navigation of their vessel was in the hands of an uncertificated (but nonetheless competent) second mate, the Court held that the Managing Director, Mr Leung Yew in satisfying himself prior to the commencement of the particular voyage as to the competence of the "second mate" had assumed the responsibility which ordinarily attaches to that office and in the circumstances (viz. the serious shortage of certificated officers) had done what he reasonably ought to have done to have ensured that the ship was properly manned and had been granted official clearance to leave port - this notwithstanding that it was not the usual practice in Hong Kong for Managing Directors of shipping companies to attend at the opening of ship's articles[58].

(c) The "RADIANT" - where the shipowning company and its managing director in his personal capacity were sued by the former skipper of the vessel for damages resulting from serious injury suffered by the skipper during an attempt by a sister-vessel, the "MARGARET HAMILTON" to take the "RADIANT" in tow after she had broken down. The accident giving rise to the injury resulted inter alia from the fact that neither vessel was equipped with suitable towing gear, notwithstanding that a "sister-ship" tow was a fairly frequent occurrence within the fishing fleet. There was in addition evidence which pointed to causative defects in the towing winch and on absence of adequate deck lighting etc. The evidence also established that whilst the company had appointed an engineer fitter, one Lawson, to attend to the less serious defects which manifested themselves in the company's vessels from time to time, it was the M.D., one Bates who "ran the show". As such, Bates was held to be the alter ego of the owning company and in "sad dereliction" of his duty as Managing Director in that he knew or had the means of knowing of the serious defects (in both vessels) which had contributed to the accident. Defendant's claim to limitation under s 503 based on the "RADIANT"'s limitation tonnage alternatively the combined limitation tonnage of both vessels (35 tons x £15 per ton) was denied, the Plaintiff being awarded a total of £7 632,00 by way of damages.[59]

(d) The "NORMAN" a fishing trawler which sank with loss of life after she struck an uncharterd rock off the Danish coast at night in fog. Here the shipowning company sought to limit its liability to the dependants of those crew members who lost their lives on the grounds that the casualty had occurred without its fault or privity. The issue turned on whether or not the joint Managing Director of the company, having become privy, after the "NORMAN" had sailed for the fishing grounds off Greenland, to official corrections to the charts of the area which showed the hitherto uncharted rock in question, was at fault in not having conveyed these corrections to the vessel by radio instead, as was usual practice, of waiting the return of the vessel to its

home port. Questions of foreseeability on the part of the company e.g. that their vessel would be in the area in question, also arose. The Court a quo held in favour of the shipowner. This decision was reversed on Appeal. The House of Lords upheld the Appeal Court's decision, finding that there was a duty on the shipowner in the person of the Managing Director to have communicated the latest information that would assist navigation and that the failure to send on the new information, was a fault[60].

(e) The "ANONITY" where the admitted negligence of the crew in leaving an oil-burning galley stove burning while the vessel was alongside an oil jetty caused a fire which destroyed the jetty. Here in an action by the Owners of the ship to limit their liability, the Court of Appeal held that one Everard, a director of the ship owning company who took a very active and personal part in the running of the company's fleet of ships was at fault in having delegated to the company's marine superintendent the task of instructing crews that the use of galley fires was prohibited at oil berths. The Court held that a circular issued by the marine superintendent on the instructions of Everard viz. that galley fires were to be extinguished before berthing at any oil jetty was inadequate and that there ought to have been an instruction from the owners that some "arresting notice" prohibiting galley fires at oil berths be permanently displayed near the stove or near the feed valve to the stove to warn anyone so minded to use it or to light it, against doing so at oil jetties.[61]

In all of these cases, the company's main, if not sole, activity was that of owning and operating ships and in each instance it was a director, in some cases the Managing Director, who played an active and personal part in the running of the company's ships. As such, a director was in each instance regarded as being the "directing mind" of the company. It would seem to follow in the light of these cases that fault or privity on the part of a subordinate (i.e. someone below director level such as a manager or superintendant) would not be sufficient to breach the limitation fund?

The question arose whether this narrow interpretation was practical when applied to a decentralised corporate structure of a modern company where the ownership and operation of ships was but one (and not necessarily the main) of its business activities. A leading case in which this important question was considered was that of the "LADY GWENDOLEN" which came before the English Court of Appeal in 1965[62].

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The "LADY GWENDOLEN" whilst proceeding down the approach channel to the Mersey River at full speed and in dense fog, collided with and sank the motor vessel "FRESHFIELD" which was lawfully lying at anchor in the channel. The Owners of the "LADY GWENDOLEN" admitted liability (their Master being clearly guilty in several respects of negligent navigation) but sought to limit their liability under s 503. A number of factors distinguished this case from those which had preceeded it e.g.

1. The company's main activity was that of brewery owners. The owning and operating of three ships was to facilitate the transportation of the company's (well known) products and was ancillary to its main business.

2. The company's hierachy comprised a Managing Director assisted by three assistant Managing Directors, one of whom a Mr Williams who had previously been head brewer, being responsible inter alia for the company's ships.

3. Mr Williams was in charge of the company's traffic department whose function it was to manage and control the ships owned by the company for the purposes of distributing its products. A non-Director one Boucher, whose training and experience had not been with ships but with railways, was traffic manager assisted by a marine superintendent Mr Robbie, a former ship's engineer and the highest person in management who had any real knowledge of ships.

Had the evidence against the Owner been restricted to the Master's negligence (i.e. excessive speed, failure to monitor the ship's radar continuously etc.) this would have been a clear case for upholding the owner's right to limit liability. The evidence revealed however that the Master of the "LADY GWENDOLEN" had long been in the habit of proceeding at excessive speed in conditions of poor visibility, a fact which would have been readily apparent to the marine superintendent Mr Robbie, had he diligently perused the ship's previous voyage logs (deck and engine) as it was incumbent on him to do. This in turn should have led to his admonishing the Master and/or to his bringing this state of affairs to the attention of higher management i.e. to the attention of his immediate superior, Mr Boucher as traffic manager and through him to the responsible assistant managing director, Mr Williams. In the event upper management remained unaware of the Master's habit of proceeding at full speed in fog until the (inevitable) collision occurred.

Lord Justice Willmer at 343 appears to have accepted the argument that faulty supervision on the part of Mr Robbie would not have been sufficient on its own to involve the company in actual or privity since Mr Robbie was only a servant of the company for whose faults (in the same way as those of the Master) the Owners had merely a vicarious responsibility.

The Court then turned however to examine the role of Mr Boucher pointing out (at 345) that in the previous cases[63] neither the Court of Appeal nor the house of Lords had held that a person whose

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actual fault would be the company's actual fault must necessariy be a director. Whereas in the present case, a company had a seperate traffic department which assumed responsibility for running the company's ships, the Court saw no good reason why the head of that department even though not himself a director "should not be regarded as someone whose action is the very action of the company itself so far as concerns anything to do with the company's ships".

Inasmuch as it was admitted by Mr Boucher that he in fact never sought to interfere and indeed took little or no interest in the actual running of the ships notwithstanding that in addition to being the head of the department under which the ships fell, he was also the registered ships' manager - leaving this entirely to Mr Robbie, the Court found him to be at fault and (at 346) that this was sufficient in the particular circumstances of the case to constitute actual fault or privity of the company.

The Court did not however leave the matter there, proceeding to find that as the responsible member of the board, Mr Williams must also be regarded as guilty of actual fault in not ensuring vis a vis the business of shipowning that an efficient management system was in place i.e. one that did not leave everything to a marine superintendent whose only professional qualification was that of marine engineer.

The "LADY GWENDOLEN" is significant in two respects. Firstly it affords a more rational and realistic interpretation of the term "Owners" actual fault or privity as applied to the corporate shipowner. Secondly it provides authority for the proposition that whilst such fault or privity is still required to exist in the upper echelons of management, this need not be at director level. As to what constitutes the upper echelon of management must of course depend on the facts of each case.

4.1 What degree of culpability do the words "fault or privity connote?

As to the second question posed under this heading viz. what degree of culpability do the words "fault or privity" connote, it is clear from the case law that both terms are interpreted to require negligence i.e. a breach of a duty of care owed by the Owners of a ship to the injured party. Given the wording of s 261, such negligence must in addition have caused/contributed to the loss or damage complained of.

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It is also clear from the case law that given inter alia the considerable technological advances that have been made in ship to shore communication (many ships these days being fitted for example with telex and/or telefax machines in addition to short and long distance radio telephone) this duty of care has been extended over the years to include supervision of day to day activities. Gone are the days where the shipowner's responsibility was discharged merely by ensuring that his ship left port at the commencement of a voyage in a seaworthy condition and under the command of a competent Master to whom had been delegated all matters of navigation including the provision of charts, pilotage instructions etc. As was said by Sir Gordon Willmer in The "ENGLAND" (being one of the reviewed cases hereunder)

> **"It seems to me that it is no longer permissible for owners or managers to wash their hands so completely of all questions of navigation or to leave everything to the unassisted discretion of their Masters"[64].**

This extended duty of care involving the supervision and control by a shipowner/manager of the day to day activities of his ship has however a negative side, one which as far as can be ascertained, has not as yet come before a trial Court, viz. could the de facto situation not arise under certain circumstances where in the process of discharging the extended onus resting on it, a shipowner or manager assumes the responsibility, traditionally that of the Master, for the actual safety of the ship and its crew?

In this context it is for instance common cause that large cellular container ships are loaded and discharged strictly according to pre-prepared computer schedules for each port of call - matters of stability, drafts etc., traditionally the "on the spot" responsibility of the Chief Officer in consultation with the Master having been assumed by a programmer often based thousands of miles away from the loading port. Computers and/or their programmers are not of course infallible neither is the cargo information supplied

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to them and it has been known for such ships to have been "overloaded" in the sense that whilst their safety per se is not necessarily affected, they have been unable to enter a designated port of discharge by reason of being too deeply laden.

In a situation affecting the actual safety of the ship, the oil tanker "AMOCO CADIZ" in 1974 is a case in point. Here the Master who was at all material times being instructed in way of direct communication with his owners/managers, this whilst his fully laden and disabled ship slowly closed the Brittany coast, delayed accepting tug services until it was too late.

Nearer home in 1983, the deep-sea trawler "ST. GERARD" capsized and sank off the West coast with loss of life after being held stern on to a rising sea by her trawling gear for some 32 hours following a main engine breakdown which had taken the power off the trawling winch thus preventing the retrieval of the gear. The Master who was being advised by radio by his Owners' superintendents throughout most of this period (initially direct and later via a sister ship which was standing by) stated at the subsequent Court of Marine Enquiry held in terms of Act 57 of 1951, that he had been reluctant to cut away the (expensive) trawling gear until specifically instructed by his Owners to do so. Although advising the Master by radio on how to bouy off the gear prior to cutting the warps - this to facilitate the recovery of the gear, Owners strongly denied that any specific instruction from them was necessary - the decision to cut away being solely in the discretion of the Master given his ultimate responsibility for the safety of his ship and crew. In the event, as in the "AMOCO CADIZ" disaster, by the time the Master of the "ST GERARD" took the decision, it was too late to save his ship[65].

Would the Master in each case not perhaps have acted differently had he not had the "ear" of his Owner throughout?

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To revert to the case law. Most of the earlier cases, some of which have already been considered, in which an Owner was held unable to limit his liability, were concerned with the fault of the Owner leading to the ship itself or to its equipment (tackle) being unsafe in some way, eg.

1915 Lennard's case	-	defective boilers
1924 The "CLAN GORDON"	-	Master not furnished with vital loading instructions
1942 The "TEAL" 82 LLRep.414	-	failure to warn as to dangerous cargo
1957 The "HILDINA" 2 LLRep.247	-	dangerous mechanism
1958 The "RADIANT"	-	defective ropes, gearbox and lights
1960 The "NORMAN"	-	failure to pass on new information relating to inadequately charted waters off Greenland, becoming available only after the ship had sailed
1961 The "ANONITY"	-	failure to ensure conformity with the rule that naked lights not allowed when ship at oil terminal wharf.

Dating from the "LADY GWENDOLEN" (1965), the English Courts have imposed on Owners duties of supervision and control. In most cases, as in the case of the "LADY GWENDOLEN", the Owner had done little or nothing in this regard whilst in other cases such measures of supervision and control as had been introduced were found to be inadequate or ineffectively maintained eg.

(a) In the "ENGLAND"[66] the Court of Appeal in reversing the decision of the Court a quo held the managing Owner of the motor vessesl "ALLETTA" to have been at fault in not having ensured that there was a copy of the Port of London River By-Laws on board the vessel alternatively that he was in breach of his duty in not having instructed the Master that in trading to the Port of London, he must have available a copy of such by-laws.

The "ALLETTA" had been a regular caller to Dagenham out of the Dutch port Ijmuiden[67] for some two months when in the early hours of December 20 1963, she was involved in a collision with the "ENGLAND".

The "ALLETTA" had expected to complete loading at 06h00 that morning and had accordingly booked a pilot for that time. In the event loading was completed by 03h00 and her Master was urgently requested to move his ship from the berth to make

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room for another vessel. Being under 3 500 tons and engaged in the home trade, the "ALETTA" was not subject to compulsory pilotage in the River Thames. The Master believed that he was so subject but thought that he was free to move his vessel without a pilot for a distance of less than two miles.

The "ALLETTA" was facing down river with her port side to the jetty and on being requested to move the Master decided to turn across the river with a view to proceeding less than two miles up river to await the pilot. Without keeping a proper lookout and more particularly (through ignorance) without giving the single whistle signal required by the Port of London River by-laws before moving away from the jetty, he turned to starboard causing the "ALLETTA" to collide with the "ENGLAND" which was making her way down river. Thereafter there were collisions involving other craft.

In reaching its finding, the Court of Appeal rejected the Owners' contentions that they did not expect their Master (whose general competence was not in issue) to navigate in the River Thames without a pilot alternatively that they were entitled to foresee that the Master of his own volition would have familiarised himself with the relevant by-laws i.e. would have ensured that he had a copy on board or knew where to find them. The "LADY GWENDOLEN", The "NORMAN" and The "RADIANT" were referred to.

(b) In The "GARDEN CITY"[68] the Court upheld the right of the Owners of the Polish motor vessel "ZAGLEBIE DABROWSKI", which had collided with and sank the "GARDEN CITY", to limit their liability to the Owners of the "GARDEN CITY" and to the Owners of the cargo which she had on board.

The collision occurred in the North Sea at a time when visibility was restricted by fog. In opposing the right to limit the claimants sought to rely on the Owners alleged failure (A) to ensure that their vessel was manned by competent officers, (B) to ensure that there was a system providing for two officers to be on the bridge when the vessel was navigating in fog and (C) to supervise and check how their vessels were navigated, especially in fog, in regard to (i) speed and (ii) use of radar.

During the preceeding liability action, fault on the part of the Master and the Third Officer, one Osko, had been established.

In the limitation action the Court took an in-depth look at the structure of the state owned Polish Shipping company in question which was supervised by the Ministry of Shipping but headed and independently managed by a Director. Under him were seven deputy directors each heading up a seperate department, the department being most concerned with matters relevant to the case being that of "Technical and Investment Affairs".

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In the course of his summing up Staughton J stated (at 399) that given the precedent of the "LADY GWENDOLEN", the directing mind of the company was undoubtedly that of its Director one Kalger. However for the purposes of the present case he would be prepared to hold, if it were relevant, that fault on the part of the deputy director in charge of Technical & Investment affairs one Gasiorowski was actual fault on the part of the company.

In the event and after carefully examining the systems which the company had introduced in respect of training and the appointment of sea-going staff, its standing instructions in respect of navigating in conditions of restricted visibility and the monitoring of the performances of its sea-going personnel etc., the Court held that whilst there were "imperfections" in these systems and fault existed on the part of certain persons subordinate to the deputy director in question, this did not extend in effect to the upper echelons of management notwithstanding that the evidence had gone so far as to establish that neither the Master nor the Third Officer were in fact competent to hold these particular positions (p 395).

In essence the Court held that deputy director Gaziorowski was not told and therefore did not know that those under him were failing inter alia to detect instances of improper navigation revealed by log books and other records.

Note was taken of the fact that the company owned over 100 ships and had some 6000 employees of whom about 700 were employed ashore. Evidence was led of the extremely high standard of management set by other large fleets i.e. BP Tanker Co. and Shell Tankers (UK) but here the Court held that it would be wrong to assume that any shipowner who fell short of the standards shown by these companies was necessarily guilty of actual fault or privity. Lennard's case, The "NORMAN" and The "LADY GWENDOLEN" were referred to amongst others.

It might be useful at this point to briefly consider the procedures followed in the English Courts in this type of matter i.e. where following on a collision between two ships, multiple claims ensue. As a first step a liability action is usually brought to determine blame e.g. in the case of the "ENGLAND" blame was apportioned 80:20 against the "ALLETTA" and in the "GARDEN CITY" 60:40 against the "ZAGLEBIE DABROWSKI". Thereafter the limitation actions, reviewed above, followed with quantum being the subject of later agreement or ruling.

Whilst the occasion has not as yet arisen in our Courts, the machinery does exist under the Admiralty Jurisdiction Regulation Act No. 105/1983 to enable a collision case giving rise to multiple claims to be dealt with in a similar manner i.e. the liability

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action could conveniently be brought inter alia in terms of s 1 (1) (d) or (e) of the Act (damaged caused by/damage done to a ship by collision) whilst s 1(1) (t) for its part clearly envisages that a separate limitation action (maritime claim) could be brought by a shipowner. Similarly in a "DORTHE LEA" type situation[69] and assuming there to have been not one but a number of cargo interests involved, it would be convenient for the shipowner to initiate a limitation action in order to determine an entitlement to limit in terms of s 261 of Act 57 of 1951.

(c) In The "MARION"[70] the House of Lords, for the first time since the Lennard case of 1915, gave articulate guidance on the principles of a shipowners' right to limit his liability and in so doing imposing on Owners, duties of effective supervision and control.

On the 14th March 1977, the Liberian tanker "MARION" anchored off the Teeside Fairway near Hartlepool to await a loading berth. On the 18th March 1977, a berth became available and the "MARION" duly attempted to weigh anchor so as to proceed inward to that berth. Her efforts to do so however were unsuccessful in that her anchor had fouled the seabed pipeline which carried oil from the Ekofisk Field through Tees Bay to Teeside. As a result of the anchor so fouling the pipeline and the efforts to retrieve it after that had happened, the pipeliine was seriously damaged.

On the 27th September 1977, 13 claims were brought against the "MARION"'s Owners by various oil companies and associated concerns, the total of these claims being some USD 25 million. On 23rd July 1981, the Owners admitted liability for the fouling of the pipeline and the consequential damage done to it and the following day began an action of their own in the Admiralty Court against the 13 named claimants and all other persons having claims in respect of the damage to the pipeline, in which the Owners claimed a decree that they were entitled to have their total liability limited to some USD 1 million pusuant to the relevant provisions of the Merchant Shipping Acts 1894-1979.

The trial Court, after a hearing lasting 32 days, decided the action in favour of the Owners, granting them the decree of limitation which they had sought.[71] The claimants took the matter on appeal where the Court of Appeal unanimously reversed the decision of the Court a quo and refused leave to appeal to the HL.[72] Leave was however later given by the Appeal Committee.

It was not disputed that the immediate cause of the damage to the pipeline was the negligence of the Master of the "MARION" in navigating by reference to a long obsolete chart on which

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the pipeline was not shown, leading him to let go his anchor in a place where, if he had been aware of the presence of the pipeline, as he would have been if he had navigated by reference to an up-to-date chart, he would not have done.

It was also common cause that as the Owners of the "MARION" had delegated the management and operation of their ship wholly to an English company (F.M.S.L.) the person whose fault would constitute, as a matter of law, the actual fault of the Owners was that of the Managing Director of F.M.S.L. one Downward. It was also agreed, given the operating structure of F.M.S.L. that although it employed three other persons in a managerial capacity viz. an operations manager, an assistant operations manager and a superintendent (engineer) no faults of theirs, if they occurred, would constitute as a matter of law, the actual fault of the Owners.

The main arguments advanced by the claimants in contending that the Owners had failed to discharge the onus of proving an absence of fault on the part of Mr Downward were:

firstly that it had not been proved that Mr Downward had a proper system for ensuring that the charts and other nautical publications on board the "MARION" (a) were not obsolete or superceded or (b) if still current, were kept corrected up-to-date at all times and secondly it was said that the Owners had not proved that there had been no fault of Mr Downward in failing to ensure that there was brought to his notice, a document received by F.M.S.L. from the Liberian Marine Inspection some 11 months prior to the casualty, titled Safety Inspection Report, in which it was stated *inter alia* that ".....Navigational charts for trade of vessel corrections omitted for several years......"

Before turning to examine the evidence and the findings of the two Courts below with regard to these criticisms of Mr Downward, Lord Brandon (at p 4) referred to what he termed as the "relatively new approach" begun in The "NORMAN" in 1960 and continued by the subsequent decisions in the "LADY GWENDOLEN" in 1965 and in the "ENGLAND" in 1973, towards the extent of the managerial duties of Owners and managers generally and in particular in relation to the supply of navigational information and publications to their vessels concluding that this should now be regarded as the correct approach in law to the problem of actual fault of shipowners or ship managers in contested limitation actions.

As to the first critiscm referred to above, the evidence revealed that Mr Downward's system in regard to charts was to make the Master solely responsible for ensuring that with the aid of one or more of his deck officers, the charts on board were not obsolete or superseded and if still current were kept corrected up to date. To this end, it was left to the Master to request replacement charts from FMSL and to ensure that Admiralty Notices to Mariners, which were sent on to the vessel on a regular basis together with all chart correction tracings relating to Admiralty Charts, were noted and acted upon i.e. in regard to the latter that the charts on board were kept corrected up to date at all times.

As a matter of "considered policy" however Mr Downward deliberately did not either himself or through his operations manager or the assistant operations manager exercise any supervision whatsoever over the way in which the Master performed the responsibilities that had been assigned to him with regard to charts. As such, Mr Downward had no means of knowing whether those responsibilities were being properly discharged or not. In the event the evidence revealed the Master's "curious propensity" over a number of years for using out of date or uncorrected charts in preference to current and corrected charts a fact of which Mr Downward remained "blisfully unaware".

In finding at page 7, that this lack of system constituted fault on the part of Mr Downward, the Court upheld the view expressed by the Court of Appeal that the practice of leaving the correction of charts wholly to the Master without even knowing what if any system was in operation on board the ship and without any supervision by management was fraught with danger and not consistent with the "high standard of care" which the Courts had held was owed by shipowners in relation to charts.

This finding is not, it is submitted, limited to charts but could extend to lack of systems to ensure *inter alia* that standing instructions relating for example to the doubling of lookouts in conditions of poor visibility were being adhered to, similarly that laid down watch keeping procedures were being followed etc. In other words, it is clear that whereas it is no longer sufficient for an owner to provide a well found ship under the command of a competent Master, it is also no longer sufficient merely for an Owner to introduce e.g. by way of standing Orders/Instructions to their Master in respect of safe operating or navigational procedures, it being incumbent on such Owner to have an *effective system* in place for determining whether such procedures are being adhered to.

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As to the second critiscm of Mr Downward here the evidence revealed that the all important Safety Inspection Report issued to the Owners c/o FMSL by the Liberian authorities and drawing attention to the fact that their Master had not in fact been up-dating his charts, was not brought to Mr Downward's attention until after the casualty - he being absent from office on an extended business trip to Greece at the time of its receipt. The action taken by the assistant operations manager i.e. by way of a letter some 6 weeks after receipt of the Report, asking the Master to ensure that he had up to date/corrected charts on board and to requisition any new charts he might require and to advise progress made in rectifying the deficiencies referred to in the relevant Safety Inspection Report were held to be in effective e.g. the Master did not acknowledge receipt of the letter (by returning a signed copy as requested) nor did he furnish any progress reports on the up-dating of the ship's charts. He did however recquisition a substantial number of new charts and this led to the assistant operations manager to infer that the letter had in fact been received. During the following 9 months or so leading up to the casualty there was however no effective follow up by either the operations manager nor his assistant.

Again Mr Downward was found to be at fault for not having taken steps prior to his extended absence from office, which would have ensured that important matters, such as the Liberian Report, were brought to his attention there being no practical difficulty involved as Mr Downward had presumably been in frequent contact with his office by telex or telephone. Given the indadequacy of the instructions left by him as to what he required to be kept informed of during his prolonged absence, the Court concluded (at p.8) that it was at least, in part, Mr Downward's own fault that he was not told about the Liberian Report, this constituting as a matter of law, actual fault of the Owners. The decision of the Court of Appeal was accordingly upheld.

The House of Lords judgement in the "MARION" unlike in the earlier decisions, goes beyond the facts and set the current attitude of the English Courts to the right to limit, an attitude which may be said to be a somewhat hostile one towards the shipowner.

It is accordingly against the background of the "new approach" developed by the English Courts over the past 20 years or so, that we now turn to consider the only reported South African case to date dealing with the question of a shipowner's right to limit liability, a case in which the writer had the privilege of acting as attorney of record for the Plaintiff.

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4.3 The "ST PADARN"[73]

In terms of an oral agreement concluded on 28th October 1983 which by telexed reference incorporated Defendant's standard towage Conditions, Defendant, a Bremen based tug company, undertook to tow the unmanned motor-fishing vessel the "ST PADARN" recently acquired by South African interests, from the Dutch Port of Ijmuiden to Bremerhaven - a voyage under normal circumstances of some 36 hours duration.

Defendant's tug, "LUNEPLATE" commenced the towage on the 30th October 1983. When some 14 hours out from Ijmuiden and in deteriorating weather conditions (as forecast) the main towline parted. The "LUNEPLATE" thereafter effected a re-connection using the emergency towing line that had been rigged aboard the "ST PADARN" by the Master of the "LUNEPLATE" at Ijmuiden. The emergency gear however proved inadequate and soon parted, resulting in the "ST PADARN" being driven ashore on a rising tide on the island of Juist situated off the German coast roughly half-way between Ijmuiden and Bremerhaven.

Initial attempts by the Defendant (under a separate "daily hire" salvage contract) to refloat the "ST PADARN" proved unsuccessful with the vessel eventually being refloated by another salvage contractor some SIX weeks later - leaving her new Owners with a bill in respect of salvage and grounding damage repair costs of in excess of R500 000,00.

An in personam action was instituted in the Cape Provincial Division of the Supreme Court (sitting as a Court of Admiralty) by the South African based Owners of the "ST PADARN" - jurisdiction having been founded by way of an attachment of certain funds due to the Defendant by the Owners.

The matter came to trial on 13th May 1986 and after all the evidence had been heard as at 13th June 1986 three issues remained for decision by the Court:

(a) whether Defendant through its servants was in culpable breach of the towage agreement, or was negligent and whether such fault caused the loss sustained by Plaintiff;

(b) the validity according to German law (being the law governing the towage agreement) of the exclusion of liability clause 2 (b) of Defendant's standard towage conditions (it being common cause that if valid, it would defeat the whole of Plaintiff's claim) and

(c) whether the loss of the tow of the "ST PADARN" was caused without the actual fault or privity of the Defendant within the meaning of S 261 of the Merchant Shipping Act 57 of 1951 - which if proven would entitle Defendant to limit its liability to the sum of R9 051,68 only.

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Having found against the Defendant in respect of issues (a) & (b) van Heerden J then turned (at page 875 H) to consider the Defendant's right to limit its liability.

In this regard the Court accepted, based on the expert evidence led by the Plaintiff, that the 10 inch perlon "stretcher" which formed an inegral part of the main towing gear had failed due to its age and condition, resulting in a loss of tensile strength, and that it should not have been retained on board the tug as part of its towing equipment. As to the Tugmaster's use of an 8 inch polypropylene rope as an emergency towing line, Defendant conceded that, given its inherent unsuitability for ocean towage (lack of strength and elasticity etc.) it should not have been so used. Indeed the Court went so far (at page 877 J) as to find that by having this rope on board, Defendant had created the danger that it might be used by their Master for ocean towage and that the Master should accordingly have been specifically instructed as to its non-use in such circumstances.

Prior to considering whether there was fault or privity on the part of Defendant inter alia in regard to the retention on board their vessel of defective and/or unsuitable towing gear, the failure of such gear being the proximate cause of the casualty, it was necessary for the Court to deal with the management structure of the Defendant in order to determine the "directing mind and will"of the comapny.

Here the evidence revealed that the Defendant had two managing directors (neither of whom gave evidence) one being in charge of the ocean towage and salvage department and the other in charge of the harbour towage and salvage department as well as the finance, administration, legal and personnel department of the company. Immediately below them was a nautical superintendent, one Capt. Litwinski, a non-director who had given evidence before a commission in Hamburg appointed by the Court for that purpose - his age and ill heath some three years on dictating that Capt. Litwinski could not come to Cape Town to give evidence.

At this high level of responsibility it was Capt. Litwinski's duty to keep the company's ships running and more particularly to keep them properly supplied with towing equipment such as ropes, shackles, stretchers, etc. To this end, he visited each tug every three months in order inter alia to inspect and assess the towing gear, his assistant Capt. Sandersfield, attending on board each tug once a month for other purposes. Except when Litwinski himself found that a particular piece of equipment needed replacing, the decision as to whether or not a new rope or hawser etc. should be acquired, was left in most cases to the Masters of the tugs.

As to the perlon stretcher in question, Capt. Litwinski's method of inspection of the "LUNEPLATE"'s towing gear three months earlier i.e. in July 1983 was found to be totally indadequate as it should have revealed that this stretcher had come to the end of its life and should long since have been replaced. The evidence also revealed that the Tugmaster for his part, given his delegated responsibility vis a vis the renewing of towing gear etc., had not

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been properly instructed, if at all, as to what signs to look for regarding age, wear and tear and deterioration etc. in such gear. In this particular context the evidence revealed that information relative to the use of particular types of hawsers and ropes and the wear and tear thereof was made available to the tug industry on a regular basis through various publications and at annual tug conferences at which matters of this nature were discussed and debated.

The attendance records of a number of these conferences were produced by Plaintiff (together with copies of some of the papers that were read) revealing that Capt. Litwinski had indeed been present on behalf of the Defendant. He had not however, by all accounts. passed on any of the information gained at these conferences to any of the tugmasters falling under him.

As is customary in the tug/towage industry the Owners of the "LUNEPLATE" had insisted that a "towage approval" or seaworthiness certficate be issued in respect of the "ST PADARN" prior to the commencement of the tow and that prior to departure Capt Litwinski be notified by the tugmaster of the availability of such certificate and that any conditions or qualifications contained therein had been complied with. Also that their tugmasters report on weather conditions (p. 880 H).

On being notified in this instance by telephone that such a certificate would be forthcoming, Litwinski did not enquire of the Master of the "LUNEPLATE" as to whether it would be qualified in any way nor did he enquire as to prevailing and/or expected weather conditions albeit having been told by the Master that the latter was not happy with the fastening of the "ST PADARN"'s rudder and prpellor shaft. In the event the tow was commenced at or about 12 noon on 30 October 1983 in breach of the qualification in the relevant towage approval certificate that this was not to occur in weather conditions of Force 6 or more.

In denying the Defendant the right to limit its liability in terms of s 261 of Act 57 of 1951 van Heerden J held (at 881 c) as follows:

"On the evidence, I am satisfied that the grounding of the "ST PADARN" and the failure to deliver her at Bremerhaven was the result of the fault of the Master of the "LUNEPLATE". Having regard to where the onus of proof lies, I have not been persuaded on a balance of probabilities that the damage was caused to the "ST PADARN" without the actual fault or privity of the Defendant. On the contrary it seems to me that actual fault or privity on the part of the Defendant has been shown in regard to its lack of instruction and supervision concerning (i) the inspection of towing

stretchers; (ii) the fitness for use of towing stretchers; and (iii) the use of a polypropylene line as a towing line; its lack of instruction to its masters to report on and comply with any qualification attached to a seaworthiness certificate of the object being towed and its failure in appropriate circumstances to enquire as to the existence of any such qualification; its failure to prevent the commencement of the towage notwithstanding that the Master had failed to comply with his obligation to report on the prevailing weather conditions; and its failure in appropriate circumstances to enquire as to the weather conditions and the towing equipment being used in the circumstances."

In reaching its decision and in the absence of any reported South African case on the subject and given the origins of s 261 and the similarity of its provisions to the English law, the Court (at 875 I) saw no valid reason why the similar provisions should not be construed in accordance with the English authorities on the subject. In this regard the Court duly referred to and applied Lennard's case, the "LADY GWENDOLEN" and the "ENGLAND".

As such it can confidently be said that as our law stands at present, the South African Courts will expect of the shipowner the same degree of effective management (supervision and control) of his ship's day to day activities as has been laid down by the English Courts in recent times this before being prepared to accept an absence of fault or privity on the part of an Owner.

It is to be noted that in the latest English Court of Appeal decision viz. that of the "ERT STEFANIE"[74] the principles evolved in the "LADY GWENDOLEN" 1965 through to the "MARION" 1984 were again applied. The rather novel argument that a director could vis a vis being part of the governing mind and will of a company wear "two hats" i.e. in perfomring the functions of a director on the one hand where fault would be that of the company and those of a subordinate (in this case checking prior to the commencement of a

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voyage that hold ventilation was working and instructing the Master of the special requirements for the carriage of a very difficult cargo) on the other where fault would not be that of the company, being firmly rejected by the Court.

4.4 Courts of Marine Enquiry

Although the "ST PADARN" is presently the only reported South African case on the subject of a shipowners "fault or privity" within the context of s 261 of the Merchant Shipping Act, a useful source of reference as to what, in a given set of circumstances has been held to constitute negligence or default on the part of a shipowner or operator can be found in the Reports/Findings of the numerous Courts of Marine Enquiry which have been convened in terms of s 266 of that Act.

Albeit Courts of Marine Enquiry have no ordinary jurisdiction they are Courts of record and open to the public[75]. they may be presided over by a Judge or ex-Judge of the Supreme Court, a Magistrate or ex-Magistrate, an Advocate or an Attorney assisted by two or four other members having suitable nautical, engineering or other special skills, knowledge or experience including whenever possible at least one member in active sea-going service.

As such it might be said that an Owner, Operator, Master or other ship's officer who is declared a party to such an Enquiry (thereby having the right of legal representation and of calling witnesses etc.) is in a sense being judged by his peers. The Findings of these Courts serve as an indicator of the standards expected - be this in the management/the operation of a ship or in matters of seamanship/navigation. The evidence led at and the Reports/Findings of these Courts are a matter of public record and are readily accessible at the offices of the Department of Transport in Pretoria.

The writer has had the privilege of appearing before many of these

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Courts since the early 1970's (be this for Owners/operators, the Master or others) and Summaries of the Findings of a number of these Courts apposite to the question of a shipowner's fault, are included in this work by way of Appendix VI.

NOTES:

53. In the case of Standard Oil Company v Clan Line Steamers (1923) LLR 120 the effect of s 503 of the 1894 Act was considered by the House of Lords. At p.122 Viscount Haldane said:

> **"It is now well settled that those whose plead this section as a defence must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privy to what occurred".**

54. This doctrine being recognised in the S.A. Law of Contract - Christie The Laws of Contract in South Africa at 255.

55.(a) see reference to the "DORTHE LEA" in paragraph 3.5 supra.

55.(b) 1915 AC 705.

56. Viscount Haldane at 713.

57. Standard Oil Co. of New York and Clan Line Steamers Ltd. 1924 AC 100 : 1923 17 LLR 120.

58. LLr (1955) Vol. 2.

59. Yuille v B&B Fisheries (Leight) and Bates LLR 1958Z Vol.2.

60. Northern Fishing Company (Hull) Ltd. v Eddom & Others LLR 1960 Vol. 1.

61. FT Everard & Sons Ltd. v London and Thames Haven Oil Wharves Ltd. & Others LLr 1961 Vol. 2.

62. Arthur Guinness, Son & Company (Dublin) Ltd. v The "FRESHFIELD" (Owners) & Others 1965 LLR Vol. 1 335.

63. including those which have been reviewed supra.

64. This statement being quoted with approval by van Heerden J in the "ST PADARN" case at 881.

65. see Appendix VI at p.4.

66. Rederij Erven H Groen & Groen v The "ENGLAND" (Owners) and Others (1973) LL Rep Vol.1 373.

67. coincidentally also the home port of the "ST PADARN" - see below.

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68. (1982) LL Rep Vol.2 382.

69. refer para 3.5 supra.

70. Grand Champion Tankers Ltd. v Norpipe A/S (1984) LL Rep. Vol.2 page 1.

71. refer LL Rep (1982) Vol. 2 at 52.

72. refer LL Rep (1983) vol. 2 at 156.

73. Atlantic Harvesters of Namibia (Pty) Ltd. v Unterweser Reederei GmgH of Bremen 1986 (4) SALR at 865 CPD.

74. Societe Anonyme Des Minerais v Grant Trading Inc. LL Rep. (1989) Vol. 1 349.

75. see Bamford "The Law of Shipping and Carriage in South Africa" - 3rd Ed. at 150.

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PART C:

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5. The 1976 London Convention and the "new law"

Before turning to consider the 1976 (London) Convention on Limitation of Liabiliy for Maritime Claims in more detail and in particular the new regime which it seeks to introduce, it is necessary for the sake of completeness to refer briefly to one further convention which, rather in the same way as the Hague and Hague-Visby Rules operate as a separate regime for the carriage of goods by sea, creates a separate regime of liability and limitation for passenger carriage.

5.1 The Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974

This Convention, which entered force on the 28th April 1987 provides a limit of liability for death or personal injury of 46,666 SDRs per passenger[76]. As in the case of the Hague and Hague-Visby Rules, this operates as a first stage of limitation in relation to each contract of carriage (evidenced by the terms and conditions printed on the ticket issued to the passenger) before the question of global limitation is considered.

The Convention does not set an overall maximum limit of liability by reason of the fact that, as in the case of the Hague and Hague-Visby Rules, the Convention does not modify the rights or duties of the carrier provided for in international conventions relating to the limitation of liability of Owners of seagoing ships[77].

It follows that countries which have not adopted the 1924, 1957 or 1976 Limitation Conventions, would be advised not to ratify the Athens Convention unless they wished to have no maximum for passenger claims[78].

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Of interest is that Art. 13 (1) of the Convention replaces the "actual fault or privity" formula providing that in order to "break" the limitation, the claimant must prove his loss resulted from the personal act of the carrier committed with intent to cause such loss or recklessly with knowledge that such loss would probably result. This provision is mirrored in the 1976 Limitation Convention and will accordingly be considered in more detail later.

The Athens Convention has to date been ratified by the United Kingdom, the USSR and West Germany among others. Notable among the maritime states who have not ratified the Convention are the USA and Greece.

5.2 The Convention on Limitation of Liability for Maritime Claims, 1976

Notwithstanding the general acceptance of the limitation regime introduced by the 1957 Brussels Convention several factors had by the mid-1970's given rise to the need for change in substance form and drafting, the CMI for its part being of the view that such changes could only be adequately addressed within the framework of a new Convention[79].

The several factors supporting the case for a revision of the 1957 Convention included:

* the adoption in 1969 of a new Convention on Civil Liability for Oil Pollution (the CLC). This Convention conflicted with the principle of global limitation and in addition set a limit calculated on the basis of an amount per ton twice that contained in the 1957 Convention for all kinds of property damage including pollution claims[80]. The advent of the CLC also gave rise to the view that the existing global limitation system (unless revised) would be unable to resist future pressure in way of new demands for separate limits of liability for other types of claims for damage caused by commercial shipping and seaborne trade to non-commercial

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parties e.g. personal injuries or environmental damage other than pollution.

* the fact that in real terms the limits contained in the 1957 Convention had been reduced by about 50% due to the combined effects of world inflation and the prevailing policy of maintaining the official gold price in US dollars once fixed.

* the fact that the limits had become obsolete and that liability insurers would be able, without difficulty, to provide the cover required if the limits were to be substantially increased. In this context it was stated in the summary of the discussion which had taken place in the Legal Committee of the IMO and provided to the 1976 London Convention that:

> **"The earlier concept of limitation held that a shipowner should be able to free himself from liabilities which exceeded his total interest in a venture subject to marine perils. The more modern view is that the shipowner should be able to free himself from liabilities which exceed amounts coverable by insurance at reasonable costs".**

* the new role of the privity rule as laid down in the "LADY GWENDOLEN" and subsequent cases had led to what were considered in some quarters to be exceptionally harsh results giving rise in turn to considerable doubts (borne out by the "MARION") on the extent to which an independent shipowner trading for profit (as distinct from a major public shipowning corporation or a state owned company) would ever succeed in limiting his liability. This had become a major concern of P & I Clubs who by tradition insured the liability of their shipowning members without reference to specific insurance amounts. Given that it was only claims arising from the wilful misconduct of a member that were excluded from the P & I Cover, the Clubs had often had to pay unlimited claims[81].

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* the need to look into several legal problems of a more technical nature arising from the 1957 Convention, one such problem being, as we have seen, the new tonnage measurement formula adopted in the 1969 Tonnage Measurement Convention. Another, arising out of The "TOJO MARU" 1972, being the application (or otherwise) of the 1957 Convention to claims arising out of salvage operations[82].

The Convention on Limitation of Liability for Maritime Claims, 1976 (signed in London on 19th November 1976) entered force on 1 December 1986 on which date it was also incorporated into the English law by virtue of the Merchant Shipping Act 1979 (Commencement No. 10, Order 1986).

Earlier in this work, we looked at the current South African legislation under six main headings[83]. It might accordingly be convenient to consider the changes brought about by the 1976 Convention under these same general headings:

5.2.1 Amounts of Limitation

An important feature to note is that the 1976 Convention follows the "tonnage" system as opposed to the older methods calculated according to the extent of the shipowners interest in the adventure, mainly the value of his ship[84]. As mentioned earlier in order to avoid the problems with gold, the general limits of liability are expressed in units of accounts (Special Drawing Rights as defined by the International Monetary Fund)[85]. The uniform limit irrespective of the size of the ship has been replaced by a system of "slices" or "bands" of tonnage with differential limitation amounts for each. This overcomes the difficulty which Lord Denning had in the "BRAMLEY MOORE"[86] and recognises that it is difficult to argue that a ship of say 500 tons is only likely to cause one-tenth of the damage of a ship of 5 000 tons!

For the purpose of the Convention, a ship's tonnage is the gross (register) tonnage calculated in accordance with the rules contained in the Tonnage Measurement Convention, 1969[87].

The limits of liability are calculated as follows (Art. 6 (1) (a) & (b)).

Claim category: (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 of 500 tons the following amount in addition to that mentioned in (i):

for each ton from 501 to 3000 tons, 500 Units of Account
for each ton from 3001 to 30,000 tons, 333 Units of Account
for each ton from 30,001 to 70,000, 250 Units of Account
and for each ton in excess of 70,000 tons, 167 Units of Account.

Claim category: (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 of 500 tons, the following amount in addition to that mentioned in (i):

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for each ton from 501 to 30,000 tons, 167 Units of Account
for each ton from 30,001 to 70,00 tons, 125 Units of Account
and for each ton in excess of 70,000 tons, 83 Units of Account.

It is important to note that with a ship of say 90,000 grt there is no longer a single calculation as is the case under the 1957 Convention but, in the case of loss of life or personal injury claims, five calculations and in respect of other claims four calculations, each of the tonnage "slices" requiring to be calculated according to the SDR equivalent for that slice.

Example (a): "Personal" Claims alone
Assume 90,000 (limitation) ton ship

Tonnage Slices	Tons SDR Rate	SDR Total
0 - 500 t	(fixed slice)	333,000
501 - 3,000 t	2,500 t x 500 SDR	1,250,000
3001 - 30,000 t	27,000 t x 333 SDR	8,991,000
30,0001 - 70,000 t	40,000 t x 250 SDR	10,000,000
70,001 - 90,000 t	20,000 t x 167 SDR	3,340,000
		23,914,000 SDR

Assume : Conversion date - 13th June 1989
Conversion rate - 1 SDR = R3,461

Total limit: R82,766,000.00

Under the 1957 Convention, the limitation figure would be 90 000 x 206.67 SDRs (18,600,300 SDRs) and under the existing South African law 90 000 x R432,00 (R38,880,000) i.e. less than half of the new limit.

Example (b): "other claims" alone

Tonnage Slices	Tons SDR Rate	SDR Total
0 - 500 t	(fixed slice)	167,000
501 - 30,000 t	29,500 t x 667 SDR	4,926,500
30,001 - 70,000 t	40,000 t x 125 SDR	5,000,000
70,001 - 90,000 t	20 000 t x 83 SDR	1,660,000
		11,753,500 SDR

Assume: Conversion date - 13th June 1989
Conversion rate - 15 DR = R3,461

Total limit: R40,678,863.00

Under the 1957 Convention, the limitation figure would be 90 000 x 66,67 SDR (6,000,300 SDR) and under the existing South African law 90 000 x R139 (R12,510,000.00) i.e. less than one-third of the new limit.

The principle of a priority or preference in respect of loss of life or personal injury claims is maintained in that Art. 6 (2) provides that where the fund calculated in accordance with Art. 6 (1) (a) is insufficient to pay such claims in full, the amount/fund calculated in accordance with Art. 6 (1) (b) shall be available for payment of the unpaid balance of such claims with such unpaid balance ranking "rateably" with claims under Art. 6 (1) (b). Where there are no Art. 6(1) (b) claims and the fund calculated under Art. 6 (1) (a) is insufficient to meet loss of life or personal injury claims in full, there will accordingly be a higher fund available - i.e. on the basis of the examples given above R113,444,863.00 as opposed to R82,766,000.00.

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It will be readily appreciated that substantially higher limitation funds are created under the 1976 Convention. Whilst as has already been mentioned, the United Kingdom incorporated the convention into its law with effect from 1 December 1986, the USA for its part has taken the view that the limits are too low to justify ratification. Conversely Greece regards the limits as being too high. Neither country has accordingly ratified the convention.

Of interest is that in order to deal with a "TOJO MARU" situation, Art. 6 (4) provides that the limits of liabiity of a salvor not operating from any ship or 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. Applying the tonnage "slice" formula, the calculation would be as follows:

(a) "Personal" claims alone:

Tonnage slices	Tons SDR Rate	SDR Total
0 - 500 t	(fixed slice)	333,000
501 - 1500 t	10,000 t x 500 SDR	500,000
		833,000

Assume: Conversion date - 13 June 1989
Conversion rate - 15 DR = R3,461

Total limit: R2,883,013.00

(b) "other" claims alone:

Tonnage slices	Tons SDR Rate	SDR Total
0 - 500 t	(fixed slice)	167,000
501 - 1500 t	1000 t x 167 SDR	167,000
		334,000

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Assume: Conversion date - 13 June 1989
Conversion rate - 1 SDR = R3,461

Total limit: R1,155,974.00

5.2.2 How the "limitation" tonnage is calculated

Art. 6 (5) provides that for the purposes of the Convention the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annexure 1 of the International Convention on Tonnage Measurement of Ships, 1969. As has already been mentioned, this latter convention is part of South African law and s 262 of Act. no 51 of 1957 has been amended to provide gross register tonnage as the basis for the "limitation" tonnage calculation.

5.2.3 Persons entitled to limit liability

Art. 1 (1) provides that shipowners and salvors may limit their liability in accordance with the rules of the Convention.

Shipowner shall mean the Owner, Charterer, manager and operator of a sea-going ship. Salvor in turn is defined as meaning any person rendering services in direct connnection with salvage operations. In terms of Art. 1 (3) salvage operations would include:

* 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;

* the removal, destruction or the rendering harmless of the cargo of the ship and

* measures taken in order to avert or minimize loss for which the person liable may limit his liability and further loss caused by such measures.

It will be noted that the definition of "shipowner" is more circumscribed that in the 1957 Convention (Art. 6 (2)) the words "..... **and to the Master, members of the crew and other servants of the Owner, Charterer, manager or operator acting in the course of their employment** ......" having been deleted.

5.2.4 Ships subject to limitation

"Ship" is not defined other than by reference to it having to be "sea-going". The Convention does not apply in respect of air-cushion vehicles (e.g. hovercraft) or drilling platforms (Art. 15 (5)). In terms of Art. 15 (2) a State Party has the right to legislate in respect of ships intended for navigation on inland waterways and for ships of less than 300 tons.

5.2.5 Claims subject to limitation

Claims which are subject to limitation are set out in Art. 2 and include claims in respect of: death or personal injury; damage to property (including harbour works) on board or in direct connection with the operation of the ship or with salvage operations; loss of or delays in, the carriage of goods or passengers; infringement of other, non-contractual, rights; wreck raising; removal or destruction of cargo and efforts by third parties to minimize loss caused by the Defendant.

Art. 7 reflects the principle introduced by the 1974 Athens Convention and creates a special category of claims viz. claims for loss of life or personal injury to passengers of a

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ship carried in that ship under a contract of passenger carriage or who, with the consent of the carrier, are accompanying a vehicle or live animals which are covered by a contract for the carriage of goods. This latter provision presumably being designed to cover ferry operators.

The limit of liability (fund) is calculated by multiplying the number of passengers which the ship is licensed to carry (note: not the number of passengers it happens to have on board at the time) by 46,666 Units of Account subject to a maximum of 25 million Units of Account. This maximum would accordingly be available if only one passenger was a casualty.

5.2.6 Claims not subject to limitation

Art. 3 provides that the rules of the Convention shall not apply to claims for salvage or contributions in general average; oil pollution or nuclear damage and generally speaking claims by servants of the shipowner or salvor against their employer where the claimants duties are connected with the ship or the salvage operation. The non-application of the rules in this latter regard extends to heirs, dependants and other persons (e.g. an Executor or Curator) entitled to make such claims.

5.3 Loss of the Right to Limit

Art. 4 of the 1976 Convention introduces a significant change by doing away with the concept of "actual fault or privity". It replaces the former regime with a test which will make it much harder to "break" limitation. As a quid pro quo for a test which should make most of the limits unbreakable, Owners representatives (and their P & I insurers) were willing to accept higher limits of liability.

In order to deny an Owner the right to limit his liability it must now be proved that the loss resulted from the personal act or omission of the person seeking to limit, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Under this test the onus of proof is now on the claimant, meaning that, unlike in the past, if there is doubt about the personal misconduct of the Owner he will be entitled to limit.

As far as can be ascertained there are as yet no reported cases, certainly in England, in which Art. 4 has been put to the test. It is submitted however that a claimant will be required to satisfy a high degree of proof under the new law.

Deliberate actions designed to cause loss will be rare, and the claimant will have to show more than mere fault of the Owner (or other person seeking to limit). He will have to show "recklessness" which is a state of mind short of intention but beyond carelessness. An example would be doing an act which created an obvious risk or turning a "blind eye" to it - thus demonstrating a willingness to accept the risk.

This state of mind could certainly not be attributed to the ship managers in the "MARION", considered earlier, as although they were held to be careless, their intentions were always to run the ship as safely as possible. The same could be said of the Owners and marine superintendent of the "LADY GWENDOLEN". Her Master, though, knew full well the risk of navigating at full speed in fog with poor radar monitoring and was reckless.

However, under the new Art. 4 test the claimant must show not only recklessness but also "knowledge that such loss would probably result". The Master of the "LADY GWENDOLEN" presumably thought the action he was taking in breaking the Collision Regulations involved a small risk, not a probability, of loss. This "extra" element of

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the test will make it impossible to break the limits, except in the most blatant of cases.

NOTES:

76. see 1976 Protocol. At the 13th June 1989 Rand equivalent of 1 SDR (R3, 461). This would amount to R161,450.00 (approximately).

77. Art. 19. Note: the Hague/Hague-Visby Rules refer to any statute for the time being in force relating to the limitation of the liability of Owners of sea-going vessels (Art. 8).

78. This could apply to South Africa.

79. A draft being finalised by the CMI at is 1974 Conference in Hamburg : CMI Documentation 1974 at p.304 et seq.

80. The CLC provisions are not subject (unlike in the case of the Hague Rules etc.) to the conventions relating to the limitation of liability concerning sea-going ships : 2000 francs per ton subject to a maximum of 210 million francs.

81. In this context, the form of the words used in Art. 13 (1) of the Athens Convention 1974, replacing as they did the tried "fault or privity" formula, loomed large in the debate on the London Limitation Convention.

82. The Owners of the motor vessel "TOJO MARU" v NY Bureau Wijsmuller (1972) AC 242 (HL). In this case extensive damage was done to the salved vessel (a tanker) when one of the salvage contractor's divers, whilst working beneath the casualty, negligently fired a bolt from a "cox" bolt gun into the ship's shell plating causing an explosion. In claiming the right to limit their liability to the Owners of the "TOJO MARU", to a figure based on the tonnage of their tug, Salvors sought to rely on s 503 (1) (d) of the UK Merchant Shipping Act 1958 which provided that:

> " ...... where any loss or damage is caused to any property (other than any property mentioned in paragraph (b) of this section) or any rights are infringed through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship, or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkment of its passengers or through any act or omission of any person on board ship".

The Court found however, that as the damage was not caused "in the navigation or management of the Ship" nor, as the diver was not working on the salvage tug but beneath the casualty, was it caused "on board ship", salvors were not entitled to limit their liability.

83. Part A pages 7 to 17 inclusive.

84. This is essentially still the position in countries such as the USA, Greece and Italy where an Owner can satisfy a claim by abandoning the ship and its freight to the claimants.

85. Art. 6 and Art. 8 (1).

86. i.e. that of a small ship of low value and a correspondingly low measure of liability causing immense damage - see page 3, note 8.

87. Art. 6 (5).

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PART D

6. Conclusions

6.1 The incorporation into the South African law of the various Limitation Conventions

We have in the course of this work had occasion to consider, to a greater or lesser extent depending on their relevance, a total of seven international Conventions which have come into force between 1931 and 1986 relating to the limitation of a shipowners' liability. These are in chronological order:

1. The 1924 Brussels Convention on the Limitation of Liability of Owners of Seagoing vessels;

2. The 1924 Uniform (Hague) Rules relating to the Carriage of Goods by Sea;

3. The 1957 Brussels Convention on the Limitation of Liability of Owners of Seagoing ships;

4. The 1968 Amendments (Hague-Visby) to the Uniform Rules relating to the Carriage of Goods by Sea;

5. The 1969 Convention on Civil Liability for Oil Pollution Damages (CLC);

6. The 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and

7. The 1976 London Convention on Limitation of Liability for Maritime Claims.

As far as the South African maritime law is concerned, the policy

makers have been inconsistent in their approach to the incorporation of the provisions of the various international Conventions, in particular those relating to the limitation of liability, indicative perhaps of the lack of a "directing mind"? This can, and does, give rise to difficulties in determining whether, given the rules of international law which require substantial enactment of the terms of a Convention, South Africa has or has not adopted a particular international maritime regime.

For example, whilst the full text of six international Conventions relating to safety at sea, load lines, tonnage measurement, training and watchkeeping standards etc., have been incorporated into our law[88], when it comes to the international Conventions relating to the limitation of liability it is only in the case of the 1968 Hague-Visby Ruels that the full text has been enacted[89].

With the exception of CLC 1969, South Africa has neither signed nor acceeded to any of the Conventions in question. In the case of CLC 1969 the full text was published "for general information" in 1978[90] but when it came to incorporating its terms into our law i.e. through the medium of the Prevention and Combating of Pollution of the Sea by Oil Act (PACOPOSOA)[91], the full text was not adopted. This Act is an unhappy attempt at marrying the provisions of CLC 1969 and two other Conventions dealing with oil pollution[92] at the same time as incorporating additional domestic provisions which vis a vis CLC extend the scope of the Act beyond the terms of the Convention. The proposal of the Maritime Law Association sub-committee, on which I served, that to avoid uncertainty the Act should be drafted in two Parts, one of which containing the text of CLC in full, was not accepted. Highlighting the inconsistency of approach is the fact that subsequent to the passing of the Act, the other two pollution related Conventions referred to above have both been enacted in full[93]. This has given rise to an overlapping and a conflict with certain of the provisions of PACOPOSA which now needs to be revised. The provisions of the 1924 Brussels Limitations Convention and those of the 1974 Athens Convention are not reflected in our law at all.

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South Africa has however, by virtue of s 261 of the Merchant Shipping Act, adopted the principle of limitation of liability, the import of Articles 1 and 3 of the 1957 Brussels Convention being reflected in this section.

Poor drafting in an attempt to combine the two articles under one heading i.e. "When Owner not liable for whole damage", has however resulted in s 261 being far less circumscribed insofar as the causative requirements necessary to sustain the Owners limitation are concerned. References for instance to "on board the ship" and "in the navigaton or the management of the ship ...." contained in Art. 1 (a) and (b) do not appear in s 261, the "fault and privity" requirement being the sole determinant of an Owners' liability in terms of the section.

The question which thus arose was how in the absence of causation requirements to guide it, would the South African Court decide such an issue in relation to limitation of liability. Would it be guided by international Conventions (bearing in mind that South Africa has not acceeded to the 1957 Convention) or the English case law?

This question has now been answered by the findings of the Court in the "ST PADARN" 1986 where it was held that given the absence of any reported South African case and given in particular the similarity of the English and South African statues (as they then were), it was appropriate to have regard to the English case law.

s 261 differs from Art. 1 of the 1957 Convention in another respect in that it does not extend to claims arising in respect of the carrying out by an Owner of his obligations in respect of wreck removal notwithstanding that such obligations are imposed elsewhere in the Act[94].

Although the 1959 amendments to s 261 brought in the system of computation on the basis of the gold franc and caused the limits to

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be raised to accord with those set out in the 1957 Convention, South Africa has resisted the subsequent change from the gold franc to the unit of account or SDR[95] and has in fact, as we have seen, since reduced the per ton limit. This, as has been mentioned, coincided with the adoption of the gross register tonnage as the basis of the "limitation" tonnage calculation (reflecting Art. 6 (5) of the 1976 Convention). The questionable reasoning behind this being that as the new tonnage calculation had the general effect of increasing a ship's limitation tonnage by about 15%, a commensurate reduction in the limitation fund was called for! There is no precedent for this in recent international developments which in promoting changes have in fact raised the limits of limitation.

Another omission in s 261 is the lack of a minimum tonnage figure such a figure being contained in both the 1957 and 1976 Conventions[96].

6.2 Should South Africa adopt the new law introduced by the 1976 Convention

This question needs to be considered in the light of several factors. Whilst it might have been appropriate until recently to have said that because of the lack of case law since the Merchant Shipping Act came into force no attention has been drawn to the matter little indeed has been written on the subject[97], this is no longer the case. Since 1981, the relevant provisions of the Act have from time to time been the focus of attention by the legislature albeit that it cannot be said that the various amendments that have been introduced into our municipal law are indicative of an attempt to keep up to date with new developments.

What can be said however, is that arising from the decision in the "ST PADARN" in 1986, our Courts are likely to continue to apply the law as it presently stands in accordance with the approach developed and applied by the English Courts over the past two decades. This "new" approach as we have seen, can be regarded as

being a rather hostile one towards the shipowner. Whilst the present limits of liability are more favourable to a shipowner than in certain other jurisdictions, it is clear that a shipowner will need to prove that he runs a very "tight" ship indeed if he wishes to avail himself of these limits.

If one accepts that the reason for adopting the principle of limitation of liability was to enable South African ships to trade/operate on equal terms with those of other nations and at the same time to enable a shipowner/operator to determine (and insure) his third party liabilities in advance, then given that the present regime can no longer be said to attain this objective with any degree of certainty, a strong case can be made out for revising the present legislation in the light of international refinements of the concept.

The 1976 London Convention has been available for consideration for some 13 years (having been in force for nearly 3 years) and it is surprising that the question of change has not been the subject of debate and lobbying by the South African shipowner and his insurer. This the more so following on the decision in the "ST PADARN" case the impact of which does not as yet appear to have been fully appreciated by the shipping industry.

If one has regard to the fact that the South African shipping and offshore industry involves many of the disciplines and activities dealt with by the 1976 Convention, serious consideration to the adoption of the Convention makes even more sense, <u>for example:</u>

* As far as adopting a <u>minimum tonnage</u> for the purposes of limitation is concerned there are, according to the latest available statistics some 680 fishing vessels under 300 grt, 25 between 300 and 500 grt and 48 over 500 grt on the South African register[98]. These figures do not take into account the increasing number of larger fishing vessels operated by South African interests but owned and flagged offshore. In the case of those vessels presently flying the Cayman Islands

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flag for instance the 1976 Convention would already apply given the United Kingdom's enacted of the Convention as at 1 December 1986.

The figures also do not take into acccount the offshore supply boat fleet where many of the vessel's involved in this activity are licensed to carry both goods and passengers.

* As far as passengers are concerned, our national (coastal) carrier has recently expanded its cargo service to include the carriage of passengers between Durban and Walvis Bay. These passengers may accompany their vehicles (or vice-versa) but whether this includes their animals as well, is not clear!

* We have an active salvage, wreck removal and recovery industry to whom the provisions of the 1976 Convention should be of particular interest following on the decision in the "TOJO MARU" case which our Courts, given the precedent set by the "ST PADARN", are likely to follow if faced with a similar set of facts.

* There are a number of oil exploration rigs operating under charter to South African interests off our Coast. We also have two floating offshore mooring facilities off Durban and Oranjemund respectively. This was not the case when the Merchant Shipping Act was drafted and there is clearly a need to clarify their position vis a vis the right to limit liability under the Act. The 1976 Convention for instance applies to drilling rigs (Art. 15 (4)) unless a State's national legislation imposes higher limits of liability. These rigs/offshore facilities fall within PACOPOSOA 1981 but it is doubtful given the definition of "ship" whether s 261 of the Merchant Shipping Act applies to them.

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* Innovations to the industry could, from recent press reports, include the introduction of a hovercraft type passenger service as well as underwater (submarine) tours, neither of which activities are covered by the 1976 Convention. England has passed a separate Hovercraft (Civil Liability) Act No. 1305/1986 and if these activities become a reality in South Africa, timeous amendment of the Merchant Shipping Act alternatively separate legislation will be required.

There appears to be an acceptance on the part of the maritime authorities that our Merchant Shipping Act generally is much in need of revision and updating and it is submitted that as part of this exercise the policy makers should carefully consider whether s 261 et seq of the Act should not be replaced by a new limitation regime based on the 1976 Convention on Limitation of Liability for Maritime Claims 1976 providing as it does the scope for omitting parts which are not directly relevant to South African Law and for national legislation in the case for instance of vessel's under 300 tons, drilling rigs, etc.

Care should be taken not to adopt the same loose ad hoc drafting approach as before or to attempt to combine the provisions of the Convention together with domestic provisions as in the case of PACOPOSOA 1981. The U.K. amended its Act by incorporating those parts of the Convention directly relevant to British law in Part I of a Schedule to the Act with the special provisions necessary to give full effect to the Convention appearing in Part II[99]. The relevant section of the 1979 Act is headed "Liability of Shipowners and Salvors" which is more apposite with respect, than "When owner not liable for whole damage" with the section itself reading as follows:

> "17(1) The provisions of the Convention on Limitation of Liability for Maritime Claims 1976 as set out in Part I of Schedule 4 to this Act (hereinafter in this section and in Part II of that Schedule referred to as "the Convention") shall have the force of law in the United Kingdom.

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(2) The provisions of Part II of that Schedule shall have effect in connection with the Convention, and the preceding subsection shall have effect subject to the provisions of that Part".

NOTES:

88. i.e. by way of Schedules to the Merchant Shipping Act 1951.

89. i.e. by way of a Schedule to the Carriage of Goods by Sea Act No. 1 of 1986. This Act repealed Chapt. VIII of the Merchant Shipping Act wherein the provisions of the earlier Hague Rules had been substantially enacted albeit not in full or by name.

90. Government Gazette No 5867 dated 27 January 1978 (G.N. No 58).

91. Act 6 of 1981 which repealed the earlier 1971 Act of the same title.

92. i.e. the 1973 Prevention of Pollution Convention (MARPOL) and the 1969/1973 Intervention Convention.

93. see Acts No 2 of 1986 and 64 of 1987 respectively whose provisions conflict in several respects with those contained in the earlier Act 6 of 1981.

94. s 304 A of the Merchant Shipping Act.

95. see the 1979 Protocol to the 1957 Convention.

96. i.e. 300 and 500 tons respectively : Art. 3 (5) and Art. 6 (1).

97. see "The Existence and Extent of a Carrier's Right to Limitation of Liability in Collisions Involving Negligence" Brusser, Acta Juridica 1982 and S.A. Maritime Law and Marine Insurance - Selected Topics Chapt. 6 Dillon & van Niekerk 1982.

98. See SA Fishing Industry Handbook and Buyer's Guide 1989 19th Edition.

99. See Appendix

APPENDICES

I : International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-going Vessels, Brussels 1924.

II : International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels 1957.

III : U.K. Merchant Shipping (Liability of Shipowners and Others) Act 1958.

IV : The Convention on Limitation of Liability for Maritime Claims, London 1976.

V : Sections 261 *et seq* of Merchant Shipping Act No 57 of 1951 as amended.

VI : Summaries of Findings of Courts of Marine Enquiry.

VII : Schedule 4 (Parts I & II) U.K. Merchant Shipping Act 1979.

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INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE LIMITATION OF THE LIABILITY OF OWNERS OF SEAGOING VESSELS. SIGNED AT BRUSSELS, AUGUST 25, 1924.

Article 1.—The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of:

1) Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

2) Compensation due by reason of damage caused either to cargo delivered to the master to be transported, or to any goods and property on board;

3) Obligations arising out of bills of lading;

4) Compensation due by reason of a fault of navigation committed in the execution of a contract;

5) Any obligation to remove the wreck of a sunken vessel, and any obligations connected therewith;

6) Any remuneration for assistance and salvage;

7) Any contribution of the shipowner in general average;

8) Obligations arising out of contracts entered into or transactions carried out by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or transactions are necessary for the preservation of the vessel or the continuation of the voyage, provided that the necessity is not caused by any insufficiency or deficiency of equipment or stores at the beginning of the voyage.

Provided that, as regards the cases mentioned in Nos. 1, 2, 3, 4, and 5 the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage.

Article 2.—The limitation of liability laid down in the foregoing article does not apply:

1) To obligations arising out of acts or faults of the owner of the vessel;

2) To any of the obligations referred to in No. 8 of article 1, when the owner has expressly authorized or ratified such obligation;

3) To obligations on the owner arising out of the engagement of the crew and other persons in the service of the vessel.

Where the owner or a part owner of the vessel is at the same time master, he cannot claim limitation of liability for his faults, other than his faults of navigation and the faults of persons in the service of the vessel.

Article 3.—An owner who avails himself of the limitations of his liability to the value of the vessel, freight, and accessories of the vessel must prove that value. The valuation of the vessel shall be based upon the condition of the vessel at the points of time hereinafter set out:

1) In cases of collision or other accidents, as regards all claims connected therewith, including contractual claims which have originated up to the time of arrival of the vessel at the first port reached after the accident, and also as regards claims in general average arising out of the accident, the valuation shall be according to the condition of the vessel at the time of her arrival at that first port.

If before that time a fresh accident, distinct from the first accident, has reduced the value of the vessel, any diminution of value so caused shall not be taken into account in considering claims connected with the previous accident.

For accidents occurring during the sojourn of a vessel in port, the valuation shall be according to the condition of the vessel at that port after the accident.

2) If it is a question of claims relating to the cargo, or arising from a bill of lading, not being claims provided for in the preceding paragraphs, the valuation shall be according to the condition of the vessel at the port of destination of the cargo, or at the place where the voyage is broken.

If the cargo is destined to more than one port, and the damage is connected with one and the same cause, the valuation shall be according to the condition of the vessel at the first of those ports.

3) In all the other cases referred to in article 1 the valuation shall be according to the conditions of the vessel at the end of the voyage.

Article 4.—The freight referred to in article 1, including passage money, is deemed, as respects vessels of every description, to be a lump sum fixed at all events at 10 per cent. of the value of the vessel at the commencement of the voyage.

That indemnity is due even though no freight be then earned by the vessel.

Article 5.—The accessories referred to in article 1 mean:

1) Compensation of material damage sustained by the vessel since the beginning of the voyage, and not repaired;

2) General average contributions in respect of material damage sustained by the vessel since the beginning of the voyage, and not repaired.

Payments on policies of insurance, as well as bounties, subventions, and other national subsidies, are not deemed to be accessories.

Article 6.—The various claims connected with a single accident, or in respect of which, in the absence of an accident, the value of a vessel is ascertained at a single port, rank with one another against the amount representing the extent of the owner's liability, regard being had to the order of the liens.

In proceedings with respect to the distribution of this sum the decisions given by the competent courts of the contracting States shall be evidence of a claim.

Article 7.—Where death or bodily injury is caused by the acts or faults of the captain, crew, pilot, or any other person in the service of the vessel, the owner of the vessel is liable to the victims or their representatives in an amount exceeding the limit of liability provided for in the preceding articles up to 8 pounds sterling per ton of the vessel's tonnage. The victims of a single accident or their representatives rank together against the sum constituting the extent of liability.

If the victims or their representatives are not fully compensated by this amount, they rank, as regards the balance of their claims, with the other claimants against the amounts mentioned in the preceding articles, regard being had to the order of the liens.

The same limitation of liability applies to passengers as respects the carrying vessel but does not apply to the crew or other persons in the service of that vessel whose right of action in the case of death or bodily injury remains governed by the national law of the vessel.

Article 8.—Where a vessel is arrested and security is given for an amount equal to the full limit of liability, it shall accrue to the benefit of all creditors whose claims are subject to this limit.

Where the vessel is subsequently again arrested, the court may order its release, if the owner, while submitting to the jurisdiction of the court, proves that he has already given security for an amount equal to the full limit of his liability, that the security so given is satisfactory, and that the creditor is assured of receiving the benefit thereof.

If the security is given for a smaller amount or if security is required on several successive occasions, the effect will be regulated by agreement between the parties, or by the court, so as to insure that the limit of liability be not exceeded.

If different creditors take proceedings in the courts of different States, the owner may, before each court, require account to be taken of the whole of the claims and debts so as to insure that the limit of liability be not exceeded.

The national laws shall determine questions of procedure and time limits for the purpose of applying the preceding rules.

Article 9.—In the event of any action or proceeding being taken on one of the grounds enumerated in article 1, the court may, on the application of the owner of the vessel, order that proceedings against the property of the owner other than the vessel, its freight and accessories shall be stayed for a period sufficient to permit of the sale of the vessel and distribution of the proceeds amongst the creditors.

Article 10.—Where the person who operates the vessel without owning it or the principal charterer is liable under one of the heads enumerated in article 1, the provisions of this convention are applicable to him.

Article 11.—For the purposes of the provisions of the present convention, "tonnage" is calculated as follows:

In the case of steamers and other mechanically propelled vessels, 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.

In the case of sailing vessels, net tonnage.

Article 12.—The provisions of this convention shall be applied in each contracting State in cases in which the ship for which the limit of responsibility is invoked is a national of another contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the contracting States not to apply the provisions of this convention in favour of the nationals of a non-contracting State.

Article 13.—This convention does not apply to vessels of war, nor to government vessels appropriated exclusively to the public service.

Article 14.—Nothing in the foregoing provisions shall be deemed to affect in any way the competence of tribunals, modes of procedure, or methods of execution authorized by the national laws.

Article 15.—The monetary units mentioned in this convention mean their gold value.

Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of pound sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing at the dates fixed in article 3.

Article 16.—After an interval of not more than two years from the day on which the convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government, and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the powers who have signed this convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

Article 17.—Nonsignatory States may accede to the present convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Article 18.—The High Contracting Parties may at the time of signature, ratification, or accession declare that their acceptance of the present convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate, or territory excluded in their declaration. They may also denounce the convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate, or territory under their sovereignty or

Article 19.—The present convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the *procès-verbal* recording such deposit. As respects the States which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in accordance with article 18, it shall take effect six months after the notifications specified in article 16, paragraph 2, and article 17, paragraph 2, have been received by the Belgian Government.

Article 20.—In the event of one of the contracting States wishing to denounce the present convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States informing them of the date on which it was received.

The denunciation shall only operate in respect of the States which made the notifications, and on the expiration of one year after the notification has reached the Belgian Government.

Article 21.—Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should give one year advance notice of its intention to the other States through the Belgian Government, which would make arrangements for convening the conference.

Additional Article.—The provisions of article 5 of the convention for the unification of certain rules relating to collisions at sea, of September 23, 1910 (*British and Foreign State Papers*, Vol. 103, p. 434), the operation of which had been put off by virtue of the additional article of that convention, become applicable in regard to the States bound by this convention.

Done at Brussels, in a single copy, August 25, 1924.

PROTOCOL OF SIGNATURE

In proceeding to the signature of the International Convention for the unification of certain rules relating to the limitation of the liability of owners of seagoing vessels, the undersigned Plenipotentiaries adopted the present protocol which will have the same force and the same value as if the provisions were inserted in the text of the convention to which it relates:

I. The High Contracting Parties reserve to themselves the right not to admit the limitation of the liability to the value of the vessel, the accessories and the freight for damages done to works in ports, docks, and navigable ways and for the cost of removing the wreck, or the right only to ratify the treaty on those points on condition of reciprocity.

It is nevertheless agreed that the limitation of liability under the head of those damages will not exceed eight pounds sterling per ton of measurement, except as regards the cost of removing the wreck.

II. The High Contracting Parties reserve to themselves the right to decide that the owner of a vessel that is not used for the carriage of persons and measures not more than three hundred tons is liable as to claims arising from death or bodily injuries, in accordance with the provisions of the convention, but without there being occasion to apply to that liability the provisions of paragraph 1 of article 7.

Done at Brussels, in a single copy, August 25, 1924.

STATUS: Entered into force on June 2, 1931

RATIFICATIONS AND ACCESSIONS

Belgium	2. 6.30
Brazil	28. 4.31
Denmark	2. 6.30(1)
Dominican Rep.	23. 7.58
Finland	12. 7.34(1)
France	23. 8.35(2)
Hungary	2. 6.30
Malgache Republic	23. 8.35(3)
Monaco	15. 5.31(4)
Norway	10.10.33(1)
Poland	26.10.36
Portugal	2. 6.30
Spain	2. 6.30
Sweden	1. 7.38(1)
Turkey	4. 7.55

Note

(1) Convention denounced, with effect from June 30, 1963.
(2) Convention denounced, with effect from October 26, 1976.
(3) By the notification of France.
(4) Convention denounced, with effect from January 24, 1977.

INTERNATIONAL CONVENTION RELATING TO THE LIMITATION OF THE LIABILITY OF OWNERS OF SEA-GOING SHIPS. SIGNED AT BRUSSELS ON OCTOBER 10, 1957

THE HIGH CONTRACTING PARTIES

Have recognised the desirability of determining by agreement certain uniform rules relating to the limitation of the liability of owners of sea-going ships:

Having decided to conclude a Convention for this purpose, and thereto have agreed as follows:

Article 1

1. The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:

(*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 water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: Provided however that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers;

(*c*) any obligation or liability imposed by any 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 (including anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbour works, basins and navigable waterways.

2. In the present Convention the expression "personal claims" means claims resulting from loss of life and personal injury: the expression "property claims" means all other claims set out in paragraph (1) of this article.

3. An owner shall be entitled to limit his liability in the cases set out in paragraph (1) of this Article even in cases where his liability arises, without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership possession, custody or control of the ship.

4. Nothing in this Article shall apply:

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

(*b*) to 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 dependants, if under the law governing the contract of service between the owner and such servants the owner 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 3 of this Convention.

5. If the owner of a ship is entitled to make a claim against a 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.

6. The question upon whom lies the burden of proving whether or not the occurrence giving rise to the claim resulted from the actual fault or privity of the owner shall be determined by the *lex fori*.

Article 4

Without prejudice to the provisions of Article 3, paragraph 2 of this Convention, the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted.

Article 5

1. Whenever a shipowner is entitled to limit his liability under this Convention, and the ship or another ship or other property in the same ownership has been arrested within the jurisdiction of a contracting State or bail or other security has been given to avoid arrest, the Court or other competent authority of such State may order the release of the ship or other property or of the security given if it is established that the shipowner has already given satisfactory bail or security in a sum equal to the full limit of his liability under this Convention and that the bail or other security so given is actually available for the benefit of the claimant in accordance with his rights.

2. Where, in circumstances mentioned in paragraph 1 of this Article, bail or other security has already been given:

(*a*) at the port where the accident giving rise to the claim occurred;
(*b*) at the first port of call after the accident if the accident did not occur in a port;
(*c*) at the port of disembarkation or discharge if the claim is a personal claim or relates to damage to cargo;

the Court or other competent authority shall order the release of the ship, bail or other security given, subject to the conditions set forth in paragraph 1 of this Article.

3. The provisions of paragraphs 1 and 2 of this Article shall apply likewise if the bail or other security already given is in a sum less than the full limit of liability under this Convention: Provided that satisfactory bail or other security is given for the balance.

4. When the shipowner has given bail or other security in a sum equal to the full limit of his liability under this Convention such bail or other security shall be available for the payment of all claims arising on a distinct occasion and in respect of which the shipowner may limit his liability.

5. Questions of procedure relating to actions brought under the provisions of this Convention and also the time limit within which such actions shall be brought or prosecuted shall be decided in accordance with the national law of the Contracting State in which the action takes place.

Article 6

1. In this Convention the liability of the shipowner includes the liability of the ship herself.

2. Subject to paragraph 3 of this Article, the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or 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 in respect of personal claims and property claims arising on a distinct occasion shall not exceed the amounts determined in accordance with Article 3 of the Convention.

3. When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the master or member of the crew is at the same time the owner, co-owner, charterer, manager or operator of the ship, the provisions of this paragraph shall only apply where the act, neglect or default in question is an act, neglect or default committed by the person in question in his capacity as master or as member of the crew of the ship.

Article 2

1. The limit of liability prescribed by Article 3 of this Convention shall apply to the aggregate of personal claims and property claims which arise on any distinct occasion without regard to any claims which have arisen or may arise on any other distinct occasion.

2. When the aggregate of the claims which arise on any distinct occasion exceeds the limits of liability provided for by Article 3, the total sum representing such limits of liability may be constituted as one distinct limitation fund.

3. The fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

4. After the fund has been constituted, no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund if the limitation fund is actually available for the benefit of the claimant.

Article 3

1. The amount to which the owner of a ship may limit his liability under Article 1 shall be:

(*a*) where the occurrence has only given rise to property claims, an aggregate amount of 1,000 francs for each ton of the ship's tonnage;

(*b*) where the occurrence has only given rise to personal claims, an aggregate amount of 3,100 francs for each ton of the ship's tonnage;

(*c*) where the occurrence has given rise both to personal claims and property claims, an aggregate amount of 3,100 francs for each ton of the ship's tonnage, of which a first portion amounting to 2,100 francs 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 1,000 francs 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.

2. In each portion of the limitation fund the distribution among the claimants shall be made in proportion to the amounts of their established claims.

3. If before the fund is distributed the owner has paid in whole or in part any of the claims set out in Article 1 paragraph 1 he shall *pro tanto* be placed in the same position in relation to the fund as the claimant whose claim he has paid, but only to the extent that the claimant whose claim he has paid would have had a right of recovery against him under the national law of the State where the fund has been constituted.

4. Where the shipowner establishes that he may at a later date be compelled to pay in whole or in part any of the claims set out in Article 1 paragraph 1 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 the shipowner at such later date to enforce his claim against the fund in the manner set out in the preceding paragraph.

5. For the purpose of ascertaining the limit of an owner's liability in accordance with the provisions of this article the tonnage of a ship of less than 300 tons shall be deemed to be 300 tons.

6. The franc mentioned in this article shall be deemed to refer to a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amounts mentioned in paragraph 1 of this Article shall be converted into the national currency of the State in which limitation is sought on the basis of the value of that currency by reference to the unit defined above at the date on which the shipowner shall have constituted the limitation fund, made the payment or given a guarantee which under the law of that State is equivalent to such payment.

7. For the purpose of this Convention tonnage shall be calculated as follows:

—in the case of steamships or other mechanically propelled ships there shall be taken 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.

—in the case of all other ships there shall be taken the net tonnage.

Article 7

This Convention shall apply whenever the owner of a ship, or any other person having by virtue of the provisions of Article 6 hereof the same rights as an owner of a ship, limits or seeks to limit his liability before the Court of a Contracting State or seeks to procure the release of a ship or other property arrested or the bail or other security given within the jurisdiction of any such State.

Nevertheless, each Contracting State shall have the right to exclude, wholly or partially, from the benefits of this Convention any non-Contracting State, or any person who, at the time when he seeks to limit his liability or to secure the release of a ship or other property arrested or the bail or other security in accordance with the provisions of Article 5 hereof, is not ordinarily resident in a Contracting State, or does not have his principal place of business in a Contracting State, or any ship in respect of which limitation of liability or release is sought which does not at the time specified above fly the flag of a Contracting State.

Article 8

Each Contracting State reserves the right to decide what other classes of ship shall be treated in the same manner as sea-going ships for the purpose of this Convention.

Article 9

This Convention shall be open for signature by the States represented at the tenth session of the Diplomatic Conference on Maritime Law.

Article 10

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Government which shall notify through diplomatic channels all signatory and acceded States of their deposit.

Article 11

1. This Convention shall come into force six months after the date of deposit of at least ten instruments of ratification, of which at least five by States that have each a tonnage equal or superior to one million gross tons of tonnage.

2. For each signatory State which ratifies the Convention after the date of deposit of the instrument of ratification determining the coming into force such as is stipulated in paragraph 1 of this Article, this Convention shall come into force six months after the deposit of their instrument of ratification.

Article 12

Any State not represented at the tenth session of the Diplomatic Conference on Maritime Law may accede to this Convention.

The instruments of accession shall be deposited with the Belgian Government which shall inform through diplomatic channels all signatory and acceding States of the deposit of any such instruments.

The Convention shall come into force in respect of the acceding State six months after the date of the deposit of the instrument of accession of that State, but not before the date of entry into force of the Convention as established by Article 11, paragraph (1).

Article 13

Each High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. Nevertheless, this denunciation shall only take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all signatory and acceding States of such notification.

Article 14

1. Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Government that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Government extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.

2. Any High Contracting Party which has made a declaration under paragraph 1 of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Government that the Convention shall cease to extend to such territory. This denunication shall take effect one year after the date on which notification thereof has been received by the Belgian Government.

3. The Belgian Government shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this article.

Article 15

Any High Contracting Party may three years after the coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to this Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

Article 16

In respect of the relations between States which ratify this Convention or accede to it, this Convention shall replace and abrogate the International Convention for the unification of certain rules concerning the limitation of the liability of the owners of seagoing ships, signed at Brussels on the 25th of August 1924.

In witness whereof the Plenipotentiaries, duly authorized, have signed this Convention.

Done at Brussels, this tenth day of October 1957, in the French and English languages, the two texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

PROTOCOL OF SIGNATURE

1. Any State, at the time of signing, ratifying or acceding to this Convention may make any of the reservations set forth in paragraph 2. No other reservation to this Convention shall be admissible.

2. The following are the only reservations admissible:

(*a*) Reservation of the right to exclude the application of Article 1 paragraph 1 c);

(*b*) Reservation of the right to regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons;

(*c*) Reservation of the right to give effect to this Convention either by giving it force of law or by including in national legislation, in a form appropriate to that legislation, the provisions of this Convention.

STATUS: Entered into force on May 31, 1968

RATIFICATIONS AND ACCESSIONS

Algeria	18. 8.64
Australia	30. 7.80(1)
Bahamas	21. 8.64(1)(2)
Barbados	4. 8.65(1)(3)
Belgium	31. 7.75
Belize	21. 8.64(1)(3)
Denmark	1. 3.65(1)(5)
Dominican Rep.	4. 8.65
Fiji	10.10.70
Finland	19. 8.64(1)(5)
France	7. 7.59(1)(6)
German Dem. Rep.	14. 2.79
Germany, Fed. Rep.	6.10.72(1)
Ghana	26. 7.61
Grenada	4. 8.65(1)(2)
Guyana	25. 3.66(1)
Iceland	16.10.68
India	1. 6.71(1)
Iran	26. 4.66(1)
Israel	30.11.67(1)
Japan	1. 3.76(1)
Kiribati	21. 8.64(1)
Malgache Republic	13. 7.65
Mauritius	21. 8.64(1)
Monaco	24. 1.77
Netherlands	10.12.65(1)
Norway	1. 3.65(1)(5)
Papua New Guinea	14. 3.80
Poland	1.12.72
Portugal	8. 4.68(1)
St. Lucia	4. 8.65(1)(5)
St. Vincent Grenadines	4. 8.65(1)(3)
Seychelles	21. 8.64(1)(3)
Singapore	31. 5.68
Solomon Islands	21. 8.64(1)(9)
Spain	16. 7.59(1)
Sweden	4. 6.64(1)(5)
Switzerland	21. 1.66
Syrian Arab Rep.	10. 7.72
Tonga	13. 6.78
Tuvalu	21. 8.64(1)(3)
United Arab Rep.	7. 9.65(4)
United Kingdom	18. 2.59(1)(10)
Vanuatu	8.12.66(11)
Zaire	17. 7.67

Notes

(1) Declaration, reservation or statement issued at the time of deposit of the instrument of acceptance, the text of which may be found by reference to the *CMI Yearbook* (1984/1985) at pp. 91–95.
(2) Originally by the accession of the United Kingdom, subsequently by succession on becoming an independent state.
(3) By the accession of the United Kingdom.
(4) Egypt denounced the Convention, with effect from May 8, 1985.
(5) Denmark, Finland, Norway and Sweden denounced the Convention, with effect from April 1, 1985.
(6) Extended to New Hebrides from December 8, 1966.
(7) Including Berlin (West).
(8) Japan denounced the Convention on May 19, 1983, with effect from May 20, 1984.
(9) By succession, maintaining the reservations originally formulated by the United Kingdom, subsequently by independent accession on July 7, 1978.
(10) United Kingdom acceded on behalf of: Isle of Man, November 18, 1960; Bermuda, British Antarctic Territories, Falkland Islands and Dependencies, Hong Kong, Gibraltar, British Virgin Islands, August 21, 1964; Guernsey and Jersey, October 21, 1964; Cayman Islands, Montserrat, Turks and Caicos Islands, August 4, 1965.
(11) United Kingdom denounced the Convention with effect from December 1, 1986.
(12) Reportedly as a consequence of the extension to the New Hebrides (see n. 6 above).

PROTOCOL OF 1979 AMENDING THE INTERNATIONAL CONVENTION RELATING TO THE LIMITATION OF THE LIABILITY OF OWNERS OF SEA-GOING SHIPS. DATED OCTOBER 10, 1957. AGREED IN BRUSSELS DECEMBER 21, 1979

1. Article 3, paragraph 1 of the Convention is replaced by the following:

"1. The amounts to which the owner of a ship may limit his liability under Article 1 shall be:

(*a*) where the occurrence has only given rise to property claims an aggregate amount of 66·67 units of account for each ton of the ship's tonnage;

(*b*) where the occurrence has only given rise to personal claims an aggregate amount of 206·67 units of account for each ton of the ship's tonnage;

(*c*) where the occurrence has given rise both to personal claims and property claims an aggregate amount of 206·67 units of account for each ton of the ship's tonnage, of which a first portion amounting to 140 units of account 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 66·6 units of account 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."

2. Article 3, paragraph 6 of the Convention is replaced by the following:

"6. The unit of account mentioned in paragraph 1 of this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in that paragraph shall be converted into the national currency of the State in which limitation is sought on the basis of the value of that currency on the date on which the shipowner shall have constituted the limitation fund, made the payment or given a guarantee which under the law of that State is equivalent to such payment. The value of the national currency, in terms of the Special Drawing Rights, of a State 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 the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

"7. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of the paragraph 6 of this Article may, at the time of ratification of the Protocol of 1979 or accession thereto or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows:

(a) in respect of paragraph 1, a) of this Article, 1000 monetary units;

(b) in respect of paragraph 1, b) of this Article, 3100 monetary units;

(c) in respect of paragraph 1, c) of this Article, 3100, 2100 and 1000 monetary units, respectively.

The monetary unit referred to in this paragraph corresponds to 65·5 milligrammes of gold of millesimal fineness 900.
The conversion of the amounts specified in this paragraph into the national currency shall be made according to the law of the State concerned.

"8. The calculation mentioned in the last sentence of paragraph 6 of this Article and the conversion mentioned in paragraph 7 of this Article shall be made in such a manner as to express in the national currency of the State as far as possible the same real value for the amounts in paragraph 1 of this Article as is expressed there in units of account. States shall communicate to the depositary the manner of calculation pursuant to paragraph 6 of this Article or the result of the conversion in paragraph 7 of this Article, as the case may be, when depositing an instrument of ratification of the Protocol of 1979 or of accession thereto or when availing themselves of the option provided for in paragraph 7 of this Article and whenever there is a change in either."

3. Article 3, paragraph 7 of the Convention shall be renumbered Article 3, paragraph 9.

STATUS: Entered into force on October 6, 1984

RATIFICATIONS AND ACCESSIONS

Australia	30.11.83
Belgium	7. 9.83
Poland	6. 7.84
Portugal	30. 4.82
Spain	14. 5.82
United Kingdom	2. 3.82

(United Kingdom denounced Protocol with effect from December 1, 1986).

Merchant Shipping Act 1894, s.503

II. The 1958 Version

[Note: what remains of section 503 is set out in plain print; provisions substituted by the Merchant Shipping (Liability of Shipowners and Others) Act 1958 are shown in italics without square brackets; italics in square brackets denote, in the form of a paraphrase, the additions which the Act of 1958 has, in effect, made to section 503.][1]

s.503(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,)

(*a*) Where any loss of life or personal injury is caused to any person being carried in the ship;

(*b*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(*c*) *where any loss of life or personal injury is caused to any person not carried in the ship through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship*[2];

(*d*) *where any loss or damage is caused to any property (other than any property mentioned in paragraph (b) of this subsection) or any rights are infringed through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship, or in the*

[1] Reference should be made to the Act of 1958, *infra*, for its exact terms and it should be read in conjunction with s.503 paraphrasing from *Marsden, op. cit.*
[2] The 1958 Act, s.2(1).

loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship[2];

be liable to damages beyond the following amounts; (that is to say,)

(i) In respect of loss of life or personal injury, either alone or together with *such loss, damage or infringement as is mentioned in paragraphs (b) and (d) of this subsection,*[3] an aggregate amount not exceeding *an amount equivalent to three thousand one hundred gold francs,*[4] for each ton of their ship's tonnage; and

(ii) In respect of *such loss, damage or infringement as is mentioned in paragraphs (b) and (d) of this subsection,*[3] whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding *an amount equivalent to one thousand gold francs,*[5] for each ton of their ship's tonnage;

[*and the number by which the amount equivalent to three thousand one hundred gold francs mentioned in this section is to be multiplied shall be three hundred in any case where the tonnage concerned is less than three hundred tons.*].[6]

[*For the purposes of this section a gold franc shall be taken to be a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred.*][7]

[*The Minister of Transport may from time to time by order made by statutory instrument specify the amounts which for the purposes of this section are to be taken as equivalent to three thousand one hundred and one thousand gold francs respectively.*][8]

[*Where money has been paid into court (or, in Scotland, consigned in court) in respect of any liability to which a limit is set as aforesaid, the ascertainment of that limit shall not be affected by a subsequent variation of the amounts specified under the immediately preceding paragraph unless the amount paid or consigned was less than that limit as ascertained in accordance with the order then in force under that paragraph.*][9]

[*For the purposes of subsection (1) of this section where any obligation or liability arises—*

(*a*) *in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned or of anything on board such a ship, or*

(*b*) *in respect of any damage (however caused) to harbour works, basins or navigable waterways,*

the occurrence giving use to the obligation or liability shall be treated as one of the occurrences mentioned in paragraphs (b) and (d) of subsection (1) of this section and the obligation or liability as a liability to damages.][10]

[*The provisions of sub-paragraph (a) supra, relating to an obligation or liability arising in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned or of anything on board such ship shall not*

[2] The 1958 Act, s.2(1).
[3] *Ibid.*
[4] *Ibid.* s.1(1)(*a*).
[5] The 1958 Act, s.1(1)(*b*).
[6] The 1958 Act, s.1(1).
[7] *Cf. Ibid.* s.1(2).
[8] *Cf. Ibid.* s.1(3).
[9] *Cf. Ibid.* s.1(4).
[10] *Cf. Ibid.* s.2(2).

come into force until such day as the Minister of Transport may by order made by statutory instrument appoint.][11]

[The Minister of Transport may by order make provision for the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in accordance with sub-paragraph (a) supra, of amounts recoverable by them in respect of the obligations and liabilities mentioned in that paragraph, and to be maintained by contributions from such authorities raised and collected by them in respect of vessels in like manner as other sums so raised by them; and any such order may contain such incidental and supplementary provisions as appear to the Minister to be necessary or expedient.][12]

[The power to make an order under the preceding paragraph of this section shall include power to vary or revoke any such order by a subsequent order and any such power shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.][13]

[The application of this section to any liability shall not be excluded by reason only that the occurrence giving rise to the liability was not due to the negligence of any person.][14]

[Nothing in this section shall apply to any liability in respect of loss of life or personal injury caused to, or loss of or damage to any property or infringement of any right of a person who is on board or employed in connection with the ship under a contract of service with all or any of the persons whose liabilities are limited by that section, if that contract is governed by the law of any country outside the United Kingdom and that law either does not set any limit to that liability or sets a limit exceeding that set to it by that section.][15]

2. For the purposes of this section—

(*a*) The tonnage of a steam ship shall be her registered tonnage, with the addition of any engine room space deducted for the purpose of ascertaining that tonnage; and the tonnage of a sailing ship shall be her registered tonnage[16]:

Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto.

(*b*) Where a foreign ship has been or can be measured according to British law, her tonnage, as ascertained by that measurement shall, for the purpose of this section, be deemed to be her tonnage.

(*c*) Where a foreign ship has not been and cannot be measured according to British law, the surveyor-general of ships in the United Kingdom, or the chief measuring officer of any British possession abroad, shall, on receiving from or by the direction of the court hearing the case, in which the tonnage of the ship is in question, such evidence concerning the dimensions of the ship as it may be practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of the ship if she had been duly measured according to British law, and the tonnage so stated in that certificate shall, for the purposes of this section, be deemed to be the tonnage of the ship.

(3) *The limits set by this section to the liabilities mentioned therein shall apply to the aggregate of such liabilities which are incurred on any distinct occasion, and shall so apply in respect of each distinct occasion without regard to any liability incurred on another occasion.*[17]

The persons whose liability in connection with a ship is excluded or limited by Part VIII of the Merchant Shipping Act, 1894, *shall include any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship.*

In relation to a claim arising from the act or omission of any person in his capacity as master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owners or of any such person as is mentioned in subsection (1) *of this section,—*

(*a*) *the persons whose liability is excluded or limited as aforesaid shall also include the master, member of the crew or servant, and, in a case where the master or member of the crew is the servant of a person whose liability would not be excluded or limited apart from this paragraph, the person whose servant he is; and*

(*b*) *the liability of the master, member of the crew or servant himself shall be excluded or limited as aforesaid notwithstanding his actual fault or privity in that capacity, except in the cases mentioned in paragraph (ii) of section five hundred and two of the said Act of* 1894.[18]

[11] *Cf. Ibid.* s.2(5).
[12] *Cf. Ibid.* s.2(6).
[13] *Cf. Ibid.* s.2(7).
[14] *Cf. Ibid.* s.2(3).
[15] *Cf. Ibid.* s.2(4). Note the effect of Merchant Shipping Act 1979, s.35(1).
[16] As amended by the Merchant Shipping Act 1906, s.69.

CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976

The States Parties to this Convention,

HAVING RECOGNISED 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

Art. 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 Art. 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 connection with salvage operations. Salvage operations shall also include operations referred to in Art. 2, para. 1(d), (e) and (f).

4. If any claims set out in Art. 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 of 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.

Art. 2—Claims subject to limitation

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

(*a*) claims in respect of 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 connection 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 connection 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 para. 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 para. 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.

Art. 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 Nov. 29, 1969 or of any amendment or Protocol thereto which is in force;

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

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

Art. 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.

Art. 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.

Chapter II. Limits of Liability

Art. 6—The general limits

1. The limits of liability for claims other than those mentioned in Art. 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 Account; and
for each ton in excess of 70,000 tons, 167 Units of Account,
(*b*) in respect of any other claims,
(i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons,
(ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):
for each ton from 501 to 30,000 tons, 167 Units of Account;
for each ton from 30,001 to 70,000 tons, 125 Units of Account; and
for each ton in excess of 70,000 tons, 83 Units of Account.

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

3. However, without prejudice to the right of claims for loss of life or personal injury according to para. 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 para. 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 measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.

Art. 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 authorised 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.

Art. 8—Unit of account

1. The Unit of Account referred to in Arts. 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Arts. 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 application of the provisions of para. 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 Art. 6, para. 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 Art. 6, para. 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 Art. 7, para. 1, at an amount of 700,000 monetary units multiplied by the number of passengers which the ship is authorised to carry according to its certificate, but not exceeding 375 million monetary units.

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

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

4. The calculation mentioned in the last sentence of para. 1 and the conversion mentioned in para. 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 Arts. 6 and 7 as is expressed there in units of account. States Parties shall communicate to the depositary the manner of calculation pursuant to para. 1, or the result of the conversion in para. 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 Art. 16 and whenever there is a change in either.

Art. 9—Aggregation of claims

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

(*a*) against the person or persons mentioned in para. 2 of Art. 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 Art. 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 para. 2 of Art. 1 in respect of the ship referred to in Art. 7 and any person for whose act, neglect or default he or they are responsible.

Art. 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 Art. 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 Art. 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

Art. 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 Arts. 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 para. 1(*a*), (*b*) or (*c*) or para. 2 of Art. 9 or his insurer shall be deemed constituted by all persons mentioned in para. 1(*a*), (*b*) or (*c*) or para. 2, respectively.

Art. 12—Distribution of the fund

1. Subject to the provisions of paras. 1, 2 and 3 of Art. 6 and of Art. 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 para. 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 paras. 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.

Art. 13—Bar to other actions

1. Where a limitation fund has been constituted in accordance with Art. 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 Art. 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, or any security given, may be released by order of the court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:

(*a*) at the port where the occurrence took place, or, if it took place out of 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 rules of paras. 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.

Art. 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 connection 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. This Convention shall apply whenever a person referred to in Art. 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 Art. 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 Art. 6; or

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

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

5. This Convention shall not apply to:

(*a*) aircushion vehicles;

(*b*) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof.

Chapter V—Final Clauses

Art. 16—Signature, ratification and accession

1. This Convention shall be open for signature by all States at the headquarters of the InterGovernmental Maritime Consultative Organization (hereinafter referred to as "the Organization") from Feb. 1, 1977, until Dec. 31, 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").

Art. 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 12 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 90th day after the date of 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 90 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 Seagoing Ships, done at Brussels on Oct. 10, 1957, and the International Convention for the Unification of certain Rules relating to the Limitation of the Owners of Seagoing Vessels, signed at Brussels on Aug. 25, 1924.

Art. 18—Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right to exclude the application of Art. 2, para. 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.

Art. 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.

Art. 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 at 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.

Art. 21—Revision of the limitation amount and of unit of account or monetary unit

1. Notwithstanding the provisions of Art. 20, a Conference only for the purposes of altering the amounts specified in Arts. 6 and 7 and in Art. 8, para. 2, or of substituting either or both of the units defined in Art. 8, paras. 1 and 2, by other units shall be convened by the Organization in accordance with paras. 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.

Art. 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 Arts. 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 Art. 102 of the Charter of the United Nations.

Art. 23—Languages

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

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

N WITNESS WHEREOF the undersigned being duly authorised for
purpose have signed this Convention.

TUS: Entry into force on December 1, 1986 (2)

RATIFICATIONS AND ACCESSIONS

Bahamas	7. 6.83
Benin	1.11.85
Denmark	30. 5.84
Finland	8. 5.84
France	1. 7.81
Japan	6. 4.82
Liberia	17. 2.81
Norway	30. 3.84(3)
Poland	28. 4.86
Spain	13.11.81
Sweden	30. 3.84(3)
United Kingdom	31. 1.80(1)(3)
Yemen Arab Rep.	6. 3.79

Note

(1) Declaration, reservation or statement issued with reference to the Convention (IMO. Misc. 85(1), "Status of Conventions," at pp. 251–252).
(2) As a result of the ratification of Benin.
(3) Notifications issued at the time of deposit, the text of which follow the text of the reservations or statements issued at the same time.
(4) Ratification by the United Kingdom was declared to be effective also in respect of Jersey, Guernsey, Isle of Man, Belize, Bermuda, British Virgin Is., Cayman Is., Falkland Is., Gibraltar, Hong Kong, Montserrat, Pitcairn, Saint Helena and Dependencies, Turks & Caicos Is., and the U.K. Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus.

Belize has since become an independent state, to which it may be assumed the Convention will apply "provisionally," when it actually comes into force. Provisional application to Belize was not, however, explicitly referred to in the IMO "Status Report" to December 31, 1984

(*f*) which has fouled or done any damage to any harbour, dock or wharf or to any lightship, buoy, beacon or sea mark,

shall within twenty-four hours after the happening of the event, or as soon thereafter as possible, report it to the nearest proper officer in the form prescribed, stating the nature of the event and of the probable cause therefor, the name of the ship, her official number, the port to which she belongs, the place where the event occurred and the place where the ship then is, and giving all other available relevant information.

(2) Subsection (1) shall, subject to subsection (3), apply to every ship which is registered or licensed in the Republic or which is in terms of this Act required to be so registered or licensed and to or in respect of or on board of which any such event as is referred to in subsection (1) has occurred anywhere, and it shall apply to a ship registered in a country other than the Republic only while she is within the Republic or the territorial waters thereof and if any such event has occurred to or in respect of or on board of the ship during a voyage to a port in the Republic or within the Republic or the territorial waters thereof.

[Sub-s. (2) substituted by s. 21 of Act No. 42 of 1969.]

(3) Paragraph (*f*) of sub-section (1) shall not apply to any vessel belonging to the Railway Administration and used by that Administration in connection with the working of its harbours.

260. Notice to Director-General of loss of ship.—If the owner or the agent of the owner of a South African ship or of a ship plying between ports in the Republic or between a port in the Republic and any other port has reason, owing to the non-appearance of the ship or to any other circumstances, to believe or to fear that the ship has been wholly lost, he shall as soon as conveniently may be notify the Director-General in writing of the loss or the feared loss and of the probable occasion thereof, stating the name of the ship, her official number, the port to which she belongs, and giving all other available relevant information.

[S. 260 amended by s. 46 of Act No. 40 of 1963.]

261. When owner not liable for whole damage.—(1) The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity—

2635 francs = R432-00

(*a*) if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding an amount equivalent to two thousand six hundred and thirty-five gold francs for each ton of the ship's tonnage; or

[Para. (*a*) amended by s. 33 (*a*) of Act No. 30 of 1959 and substituted by s. 7 (*a*) of Act No. 25 of 1985.]

850 francs 139-00

(*b*) if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding an amount equivalent to eight hundred and fifty gold francs for each ton of a ship's tonnage; or

[Para. (*b*) amended by s. 33 (*b*) of Act No. 30 of 1959 and substituted by s. 7 (*b*) of Act No. 25 of 1985.]

2635 francs
1785 francs = R292-74.

(*c*) if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding an amount equivalent to two thousand six hundred and thirty-five gold francs for each ton of a ship's tonnage: Provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to one thousand seven hundred and eighty-five gold francs for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent to two thousand six hundred and thirty-five gold francs for each ton of the ship's tonnage, the unsatisfied portion of the first-mentioned claims shall rank *pari passu* with the last-mentioned claims.

[Para. (*c*) amended by s. 33 (*c*) and (*d*) of Act No. 30 of 1959 and substituted by s. 7 (*c*) of Act No. 25 of 1985.]

(2) The provisions of this section shall extend and apply to the owners, builders or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until the registration thereof under the provisions of this Act.

(3) The provisions of this section shall apply in respect of claims for damages in respect of loss of life, personal injury and loss of or damage to property or rights arising on any single occasion, and in the application of the said provisions claims for damages in respect of loss, injury or damage arising out of two or more distinct occasions shall not be combined.

(4) For the purposes of this section a gold franc shall be taken to be a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred.

[Sub-s. (4) added by s. 33 (*e*) of Act No. 30 of 1959.]

(5) The Director-General may from time to time by notice in the *Gazette* specify the amounts which for the purposes of this section shall be taken as equivalent to two thousand six hundred and thirty-five and eight hundred and fifty gold francs, respectively.

[Sub-s. (5) added by s. 33 (*e*) of Act No. 30 of 1959 and substituted by s. 7 (*d*) of Act No. 25 of 1985.]

262. Tonnage how calculated.—(1) For the purpose of section *two hundred and sixty-one*, the tonnage of a ship shall be her gross register tonnage.

[Sub-s. (1) substituted by s. 8 of Act No. 25 of 1985.]

(2) There shall not be included in such tonnage any space occupied by seamen or apprentice-officers and appropriated to their use which has been certified by a surveyor to comply in all respects with the requirements of this Act.

(3) The measurement of such tonnage shall be—

(*a*) in the case of a South African ship, according to the law of the Republic;

(*b*) in the case of a treaty ship registered elsewhere than in the Republic, according to the law of the treaty country where the ship is registered;

[Para. (*b*) amended by s. 51 of Act No. 69 of 1962.]

(*c*) in the case of a foreign ship, according to the law of the Republic, if capable of being so measured.

(4) In the case of any foreign ship, which is incapable of being measured under the law of the Republic, the Minister shall, after consideration of the available evidence concerning the dimensions of the ship, give a certificate under his hand stating what would, in his opinion, have been the tonnage of the ship if she had been duly measured according to the law of the Republic; and the tonnage so stated in such certificate shall, for the purpose of section *two hundred and sixty-one*, be deemed to be the tonnage of the ship.

263. Application of this Part to persons other than the owners.—(1) Any obligation imposed by this Part upon any owner of a ship shall be imposed also upon any person (other than the owner) who is responsible for the fault of the ship; and in any case where, by virtue of any charter or lease, or for any other reason, the owner is not responsible for the navigation and management of the ship, this Part shall be construed to impose any such obligation upon the charterer or other person for the time being so responsible, and not upon the owner.

(2) For the purposes of section 261 the word "owner" in relation to a ship shall include any charterer, any person interested in or in possession of such ship, and a manager or operator of such ship.

[Sub-s. (2) added by s. 8 of Act No. 3 of 1981.]

CHAPTER VI

SPECIAL SHIPPING ENQUIRIES AND COURTS OF ENQUIRY AND COURTS OF SURVEY

264. Preliminary enquiry into shipping casualties.—(1) The Director-General may, in his discretion, appoint any competent person to hold a preliminary enquiry—

SUMMARIES OF FINDINGS OF COURTS OF MARINE ENQUIRY

Courts of Marine Enquiry convened in terms of s 266 of Act 57 of 1951 are Courts of record and open to the public. In the summaries below, the date given is the commencement date of the proceedings. The Findings relating to fault on the part of the shipowner, manager or operator only are referred to.

1. **The "L.M. GEMSBOK"**
   Cape Town 8 July 1976

FACTS: On the 2 September 1975, the specially designed anchor-handling vessel, the "L.M. GEMSBOK" capsized and sank off Green Point lighthouse whilst engaged in transferring heavy chain and an anchor to a French tanker. For ease of operation and in order to accomplish the transfer in one trip the full length of chain had been stowed on deck along either side of the accommodation with the anchor suspended from the lifting "horns" in the bow. After the chain on the portside had been paid out the vessel took on a heavy list to starboard which put the deck edge underwater. The loose chain running across the foredeck onto the seabed and being hauled on board by the tanker then slid to starboard increasing the angle of heel dramatically. The increased weight of water on deck due to the vessel rolling into a slight swell and the kinetic force generated by the heavy chain sliding from port to starboard caused the vessel to turn turtle and sink.

Held that: The "L.M. GEMSBOK" had been permitted to leave port in an unseaworthy condition i.e. in a condition of inadequate stability, overloaded and with an unacceptable trim by the head due to the decision to stow the anchor from the "horns". The manager (who was also a director) of the ship's operators was found to be at fault in approving the planned operation without having done certain basic stability calculations which would according to the expert evidence before the Court, have revealed that the vessel would leave port with inadequate stability - a condition which would worsen during the transfer operation.

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2. The "KIYO MARU NO. 2"

Cape Town 29 August 1977

FACTS: After a long and arduous passage from Pireaus which had included a forced stop off Abidjan to effect (unaided) major engine repairs, the Japanese tug "KIYO MARU NO. 2" with two scrap (unmanned) tankers, the "ANTIPOLIS" and "ROMELIA", whose remains still adorn our coast, in tow finally arrived off Cape Town in late July 1977 and in deteriorating weather conditions to take on much needed bunkers and provisions and to check the towing gear.

Due to incompetence on the part of the Port Control officials in failing to log and pass on three radio calls made by the tugmaster as he approached Port limits, the convoy was not expected and no preparations had been made for its reception by the Port Authority (for which it was duly censured). This resulted in the convey being refused permission by the Port Captain to enter port limits and in being ordered to turn away.

In giving effect to this instruction, the tug attempted a 160° turn with the result that the tow wire to the "ANTIPOLIS" snagged on the seabed (one train of thought being that it had become entangled in the wreck of the "GEMSBOK") and parted resulting in the "ANTIPOLIS" being driven ashore at Oudekraal. After a futile attempt lasting some hours to retrieve and free the snagged wire which was holding the "KIJO MARU NO. 2" stern onto the sea and weather, this was cut. By now the "ROMELIA" had long since drifted ahead of the "KIYO MARU NO. 2" with her tow wire passing beneath the tug. Sometime later probably as the tug attempted to turn around after the "ANTIPOLIS" wire had been cut, this wire also parted. Attempts to put men on board the "ROMELIA" by helicopter as she drifted towards the coast proved impossible due to the prevailing weather conditions and what is left of her can still be seen at Llandudno to this day.

Held that: (in addition to the tugmaster and the Port Authorities) the Owners of the "KIYO MARU NO. 2" were at fault in having failed:

(i) to make any or adequate prior arrangements with the Port Authorities and/or their Cape Town agents for the reception of their tug on its tows;

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(ii) to notify the agents (the Port) that the tows were unmanned;

(iii) to provide their tug with a suitable powered service boat which would have enabled the crew to carry out periodic inspections of the tows and the towing gear.

(iv) to appoint a tug master well versed in the art of "tandem" towing and who had a reasonable command of the English language.

3. The MFV "RIJNMOND IV"
Cape Town 26 August 1980

FACTS: The motor fishing vessel "RIJNMOND IV" capsized and sank off Cape Point on 18 February 1980 whilst attempting to discharge a large quantity of fish from a net which had been hauled in board and which was suspended from a derrick in way aft starboard. The weight of the catch caused the vessel to heel over to starboard putting the factory deck offal chute outlet underwater. This outlet did not seal properly and failed to prevent the ingress of water into the factory space. The list was aggravated by a heavy blast freezer that had been contructed off-centre on the starboard side of the deck. The crew were unable to jettison the fish over the side by reason of the presence in the net of an illegal size liner, known as a "pantyhose", which prevented the operation of the quick release facility.

Held that: the previous owners of the vessel were at fault in:

(i) having added the on-deck blast freezer in contravention of the relevant Construction Regulations thereby reducing the vessel's stability;

(ii) having failed to effect repairs to the offal chute scupper outlet notwithstanding its lack of watertight integrity having been repeatedly brought to their attention;

The current owner was also held to be fault in (a) having failed to rectify (i) and (ii) above, (b) in permitting the use of an illegal fine mesh net liner and (c) in permitting the maximum licensed number of people on board to be exceeded.

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4. The MFV "SAINT GERARD"

Cape Town 14 May 1984

FACTS: On the 16 November 1983, the motor-fishing vessel, the "SAINT GERARD" capsized and sank some 29 miles west of Dassen Island after having lain stern on to a rising sea for many hours following on a main engine failure (more correctly due to the inability of the Chief Engineer to re-start the main engine after a deliberate but unneccesssary stoppage of the engine by him to check on certain repairs). This took all the power of the trawling winch and prevented the recovery of the vessel's heavy trawling gear. During this period the vessel had been taking in water through the fish hatch, which had been hammered closed against the hydraulics, situated at the top of the stern ramp. This caused her to become unstable - a fact not fully appreciated by the Master (and consequently the vessel's owners with whom he had been in direct and/or relayed radio contact on and off throughout) until the vessel's condition had become critical.

Held that: (in addition to the Master and the Chief Engineer) the Owners were at fault ("in default") through the persons initially of their shore-based Fishing Master and later their Marine Manager in not readily approving the abandonment of the vessel's trawling gear - this to permit the vessel to swing round into the wind and swell whilst attempts to re-start the main engine continued.

5. The "INTERWAVES"

Cape Town 4 February 1985

FACTS: The "INTERWAVES", a converted Class V passenger (cruising) vessel of some 242 grt sank off Hout Bay on 1 June 1984 in calm conditions after her engine room flooded. The exact cause of the flooding could not be established but based on an earlier incidence of flooding in the engine (some 4 months previous) the probable cause was thought to be the poor condition of the engine seawater cooling pipes. The engine room was unmanned when the flooding commenced. The vessel was not fitted with an automatic bilge alarm system and by the time the flooding was detected the water level prevented access to the sea-valves etc. and the vessel's pumps were unable to cope.

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Held that: the wrongful acts or defaults of co-owners, who were both on board at the time jointly caused or contributed to the loss of the vessel in that they:

(i) had allowed the vessel to sail without a (second) navigating officer (or mate) on board - this being a statutory requirement. This left the Master shorthanded when it came to taking steps to prevent further flooding of the vessel and rendered the vessel unseaworthy within the meaning of s 240 of the Merchant Shipping Act;

(ii) had failed to call for salvage services when it should have been foreseen by them at an early stage that assistance was required;

(iii) had failed to ensure that proper watchkeeping arrangements were in place - this with particular regard to the engine room. Apart from this being a statutory requirement, the age and condition of the sea water piping, the previous flooding/pipe fracture the absence of an automatic bilge alarm system and the fact that the "INTERWAVES" was a passenger vessel, dictated in the Court's view that the engine room of the vessel should not have been left unattended.

6. The MFV "HARVEST VIRGO"
Cape Town 3 December 1987

FACTS: At around midnight on 18th June 1987, the motor fishing vessel "HARVEST VIRGO" ran aground whilst making her way out of Saldanha Bay en route to the fishing grounds. A call for assistance was responded to promptly by the Port Authorities and the vessel was refloated with the aid of a harbour launch before she could settle on the sea-bed on the falling tide. It was common cause that, due to an administrative oversight earlier that evening when the crew list was being compiled, the vessel had sailed without a certficated Bosun on board. The evidence showed that the party who had sailed as "Bosun" had passed all but one of the necessary courses for his qualification and his general competence was not placed in issue.

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Held Having found that the grounding was due to the negligence of the Master and the Mate, the Court in answer to the question "Was the "HARVEST VIRGO" in all respect seaworthy when she sailed?", that the vessel was not seaworthy as the Bosun was not properly certificated which left the vessel not manned as required by s 73 of the Merchant Shipping Act.

The Owners regarded the finding of unseaworthiness in a serious light and duly took the matter on appeal to the Supreme Court (as provided for in s 292 of the Merchant Shipping Act) on the grounds that the "Bosun's" non-certification had nothing to do whatsoever with the grounding (Appeal No. 916/88). In this regard, the Owners relied inter alia on the definition of "unseaworthy" in s 2 of the Act viz.

> **"Unseaworthy used in relation to a vessel means that she:**
>
> **(a) is not in a fit state as to the condition of her hull, equipment or machinery, the stowage of her cargo or ballast or the number or qualifications of her Master or crew, or in any other respect, to encounter the ordinary perils of the voyage upon which she is engaged or is about to enter"**

In upholding Owners' argument that the evidence did not support a finding of "unseaworthiness" in this instance, the Court held that whilst the "Bosun's" non-certification amounted to a contravention of s 73 of the Act, it had not per se rendered the "HARVEST VIRGO" unseaworthy.

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Merchant Shipping Act 1979 (Extracts)

[Note: the 1979 Act contains the provisions to enact the 1976 Limitation Convention into English law (see Chapter 18, *supra*). Although the 1979 Act incorporates the Convention in Schedule 4, Pt. I, it should be noted that this part of the Schedule only contains those parts of the Schedule directly relevant to British law. This has meant omitting some parts of the Convention. Articles 6(3), 8, 10(1), 12(1), 15 and 16–23 of the Convention (the full text of which is reproduced in Appendix A4, *supra*) may be contrasted with the text of Schedule 4, Pt. I. Schedule 4, Pt. II contains the special provisions of British law necessary to give full effect to the Convention: accordingly, Pt. I must be read subject to Pt. II.]

Liability of shipowners and salvors

17.—(1) The provisions of the Convention on Limitation of Liability for Maritime Claims 1976 as set out in Part I of Schedule 4 to this Act (hereafter in this section and in Part II of that Schedule referred to as "the Convention") shall have the force of law in the United Kingdom.

(2) The provisions of Part II of that Schedule shall have effect in connection with the Convention, and the preceding subsection shall have effect subject to the provisions of that Part.

SCHEDULE 4

CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1976

PART I—TEXT OF CONVENTION

CHAPTER I. THE RIGHT OF LIMITATION

ARTICLE I

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 or operator of a seagoing 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 of 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.

NOTE: Hereafter follows the text of the Convention save for <u>Articles 6(3), 8, 10(1), 12(1), 15 and 16 - 23.</u>

PART II—PROVISIONS HAVING EFFECT IN CONNECTION WITH CONVENTION

Interpretation

1. In this Part of this Schedule any reference to a numbered article is a reference to the article of the Convention which is so numbered.

Right to limit liability

2. The right to limit liability under the Convention shall apply in relation to any ship whether seagoing or not, and the definition of "shipowner" in paragraph 2 of article 1 shall be construed accordingly.

Claims subject to limitation

3.—(1) Paragraph 1(*d*) of article 2 shall not apply unless provision has been made by an order of the Secretary of State for the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in consequence of the said paragraph 1(*d*), of amounts recoverable by them in claims of the kind there mentioned, and to be maintained by contributions from such authorities raised and collected by them in respect of vessels in like manner as other sums so raised by them.

(2) Any order under sub-paragraph (1) above may contain such incidental and supplemental provisions as appear to the Secretary of State to be necessary or expedient.

(3) If immediately before the coming into force of section 17 of this Act an order is in force under section 2(6) of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 (which contains provisions corresponding to those of this paragraph) that order shall have effect as if made under this paragraph.

Claims excluded from limitation

4.—(1) The claims excluded from the Convention by paragraph (*b*) of article 3 are claims in respect of any liability incurred under section 1 of the Merchant Shipping (Oil Pollution) Act 1971.

(2) The claims excluded from the Convention by paragraph (*c*) of article 3 are claims made by virtue of any of sections 7 to 11 of the Nuclear Installations Act 1965.

The general limits

5.—(1) In the application of article 6 to a ship with a tonnage less than 300 tons that article shall have effect as if—

(*a*) paragraph (*a*)(i) referred to 166,667 Units of Account; and

(*b*) paragraph (*b*)(i) referred to 83,333 Units of Account.

(2) For the purposes of article 6 and this paragraph a ship's tonnage shall be its gross tonnage calculated in such manner as may be prescribed by an order made by the Secretary of State.

(3) Any order under this paragraph shall, so far as appears to the Secretary of State to be practicable, give effect to the regulations in Annex 1 of the International Convention on Tonnage Measurement of Ships 1969.

Limit for passenger claims

6.—(1) In the case of a passenger steamer within the meaning of Part III of the Merchant Shipping Act 1894 the ship's certificate mentioned in paragraph 1 of article 7 shall be the passenger steamer's certificate issued under section 274 of that Act.

(2) In paragraph 2 of article 7 the reference to claims brought on behalf of a person includes a reference to any claim in respect of the death of a person under the Fatal Accidents Act 1976, the Fatal Accidents (Northern Ireland) Order 1977 or the Damages (Scotland) Act 1976.

Units of Account

7.—(1) For the purpose of converting the amounts mentioned in articles 6 and 7 from special drawing rights into sterling one special drawing right shall be treated as equal to such a sum in sterling as the

International Monetary Fund have fixed as being the equivalent of one special drawing right for—

(*a*) the relevant date under paragraph 1 of article 8; or
(*b*) if no sum has been fixed for that date, the last preceding date for which a sum has been so fixed.

(2) A certificate given by or on behalf of the Treasury stating—

(*a*) that a particular sum in sterling has been fixed as mentioned in the preceding sub-paragraph for a particular date; or
(*b*) that no sum has been so fixed for that date and that a particular sum in sterling has been so fixed for a date which is the last preceding date for which a sum has been so fixed,

shall be conclusive evidence of those matters for the purposes of those articles; and a document purporting to be such a certificate shall, in any proceedings, be received in evidence and, unless the contrary is proved, be deemed to be such a certificate.

Constitution of fund

8.—(1) The Secretary of State may from time to time, with the concurrence of the Treasury, by order prescribe the rate of interest to be applied for the purposes of paragraph 1 of article 11.

(2) Where a fund is constituted with the court in accordance with article 11 for the payment of claims arising out of any occurrence, the court may stay any proceedings relating to any claim arising out of that occurrence which are pending against the person by whom the fund has been constituted.

Distribution of land

9. No lien or other right in respect of any ship or property shall affect the proportions in which under article 12 the fund is distributed among several claimants.

Bar to other actions

10. Where the release of a ship or other property is ordered under paragraph 2 of article 13 the person on whose application it is ordered to be released shall be deemed to have submitted to (or, in Scotland, prorogated) the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached.

Meaning of "court"

11. References in the Convention and the preceding provisions of this Part of this Schedule to the court are—

(*a*) in relation to England and Wales, references to the High Court;
(*b*) in relation to Scotland, references to the Court of Session;
(*c*) in relation to Northern Ireland, references to the High Court of Justice in Northern Ireland.

Meaning of "ship"

12. References in the Convention and in the preceding provisions of this Part of this Schedule to a ship include references to any structure (whether completed or in course of completion) launched and intended for use in navigation as a ship or part of a ship.

Meaning of "State Party"

13. An Order in Council made for the purposes of this paragraph and declaring that any State specified in the Order is a party to the Convention shall, subject to the provisions of any subsequent Order made for those purposes, be conclusive evidence that the State is a party to the Convention.