A SUMMARY OF THE PAST, PRESENT AND PROPOSED LAWS RELATING TO THE LIMITATION OF THE LIABILITY OF SHIP-OWNERS INSOFAR AS THEY RELATE TO THE COMMONWEALTH OF AUSTRALIA AND THE AUSTRALIAN STATES

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THE HISTORY OF THE RULES

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

At all times prior to 1734, English shipowners were subject to unlimited liability for torts committed by their Masters and others for whom they were responsible.

By a Statute enacted in 1734 this ancient common law principle was altered to provide that shipowners' liability for losses by embezzlement and theft by the master and mariners was limited to the value of the ship and the freight for the voyage. (ii). Since then, despite some criticism, considerable inroads have been made on the principle of unlimited liability. (iii).

How did this change come about?

There was no common law right of limitation in English law and this right does not appear to have existed in the Law Maritime on the Continent of Europe.

The concept cannot be found in early Roman Law or in the early Mediaeval Codes. (iv)

Indeed the two great Sea Codes of the early Middle Ages, the Laws of Oleron and the Consolato del Mare explicitly state that the wrongdoer at sea shall pay the damages in full which he inflicts by or in connection with his ship. (v). Similarly, the Northern Codes such as those of Wisby,

Hamburg, Gotland and Flanders all contain expressions quite irreconcilable with any notion of limitation of a wrongdoer's liability. (vi)

In 1734 the concept of limitation was, however, not novel. It is suggested that it can be traced back to the ancient association or joint maritime adventure between shipowners and merchants common in the Mediterranean in the early Middle Ages in relation to liability for contract as distinct from tort. (vii). By 1734, in relation to torts, Dutch and perhaps other Continental shipowners enjoyed limitation of liability to the value of their ship and freight. In the case of the Netherlands the principle can be traced back as far as the sixteenth century and perhaps earlier. (viii).

It has been pointed out that in its original form the doctrine was not that the damages for which a shipowner might be made liable for the fault of his servants in charge of his ship were limited to the value of the ship and freight but that he could, in certain circumstances, divest himself of any liability by abandoning the ship and freight to those who had claims against him in respect of the casualty. (ix)

But whatever the origin of the principle, the reason for its introduction into the laws of England and previously into some Continental laws, is clear. It was a political step for the protection and encouragement of shipping.

English shipowners were concerned about liabilities for which they were responsible but over which they did not have, and usually could not have, any control. It seems that in the late fifteenth or early sixteenth

century a group of shipowners petitioned the United Kingdom Parliament for an alteration of the common law rule of unlimited liability. It was not successful. Alarmed by a decision in Boucher v. Lawson (x) in 1733 which held shipowners liable for the loss of a cargo of bullion taken on board in Portugal and afterwards stolen by the master, a further petition was prepared. This petition, presented to the House of Commons, complained that they (the shipowners) -

> "When they become owners of ships, did not apprehend themselves exposed to such hazard, or liable as owners to any greater loss than that of the ships and freight; and of the unsupportable and unreasonable hardships to which our laws in this case subject them; and to which no owners of ships are exposed in other trading nations"

and they represented to the House -

> "That unless some provisions be made for their relief, trade and navigation will be greatly discouraged since owners of ships find themselves without any fault, on their part, exposed to ruin, etc. etc." (xi)

The Imperial Parliament reacted to this with speed and little debate (xii) and by the Act (Responsibility of Shipowners) of the following year, the first inroad on the principle of unlimited liability was made. Then in 1786 a further Act (Responsibility of Shipowners) was passed by which the relief afforded by the previous Act was extended to cases of theft by persons other than the crew and to cases of loss by fire.

In 1813 yet another Act (Responsibility of Shipowners) made a significant further inroad. This Act, confined to seagoing British ships, permitted a shipowner to limit his liability in cases of collision with other ships both in relation to damage caused to the other ship

and to the cargo in either of the two ships in collision. No attempt was made to hide the political considerations behind its enactment. Its preamble recited that it was expedient to encourage the owning of British ships. (xiii) The limit of the wrongdoers' liability was the value of the ship sued and the freight she was carrying or was under contract to earn.

This legislation proved a fruitful source of litigation. Questions arose as to whether prepaid freight or freight never in fact earned was to be computed in the limitation fund and as to the date at which the ship had to be valued for that purpose. Also many questions arose as to the assessment of the value of the ship and her appurtenances.

By the middle of the nineteenth century the advent of the steamship resulted in a growth in the size and complement of ships and an increase in passenger trade and this made it expedient that the principle of limitation be applied to liability for loss of life or personal injury. This provision was made in the Merchant Shipping Act of 1854. The 1854 Act provided that the value of the ship should not be assessed at less than £Stg.15 per ton.

Litigation over the value of the ship and freight continued. To obviate this and also that old and inferior ships should not have an advantage over good and valuable ships in the case of collision, the Merchant Shipping Amendment Act, 1862, was enacted.

Under this Act the measure of limitation was fixed at £Stg.8 per ton for loss of or damage to property and at £Stg.15 per ton if there was loss of life or personal injury, whether accompanied by loss of or damage to property or not. This was supposed to represent a rough average value

for all the vessels of the British Mercantile Marine converted into Pounds Sterling per ton. This Act, which applied to foreign as well as British ships, provided for limitation where there occurred, without the actual fault or privity of the owner -

1. Loss of life or personal injury caused to any person carried in the ship.
2. Loss of or damage to cargo carried in the ship.
3. Loss of or damage to cargo carried in any other ship in respect of which the owner seeks to limit his liability.
4. Loss of life or personal injury to any person carried in any other ship caused by the improper navigation of the ship in respect of which the owner seeks to limit his liability.

These provisions were re-enacted in substance in the Merchant Shipping Act, 1894.

THE PRESENT LAWS RELATING TO LIMITATION OF LIABILITY IN THE COMMONWEALTH AND THE AUSTRALIAN STATES

> "The principle underlying limitation of liability is that the wrongdoer should be loaded according to the value of his ship and no more ... I agree there is not much room for justice in the rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience" (xiv)

So far as the Commonwealth of Australia and the Australian States are concerned, the law relating to the limitation of liability of shipowners and others is contained in the provisions of Part VIII of the Merchant Shipping Act, 1894 and the 1900 and 1906 amendments thereof, viz the Merchant Shipping (Liability of Shipowners) Act, 1898, the Merchant Shipping (Liability of Shipowners and others) Act, 1900 and The Merchant Shipping Act, 1906.

On 10th September 1975 the New South Wales Court of Appeal, upholding the judgment of Samuels J. (as he then was) in Rokov & ors. v. Bistricic (xv) held that the Merchant Shipping (Liability of Shipowners and others) Act, 1958, does not apply to the States of Australia. On 14th April 1976 the High Court of Australia reserved judgment on an appeal from the judgment of the Court of Appeal. (xvi)

The 1958 Act can have no application to the Commonwealth of Australia by reason of the provisions of Section 4 of the Statute of Westminster.

It may be of assistance to summarize the more important provisions of the Merchant Shipping Acts 1894-1906 so far as the persons entitled to limit liability, the claims subject to limitation and the limits of liability are concerned. Procedural matters can then be briefly mentioned.

A passing reference is made to some decided cases.

By Section 502 of the Principal Act, the owner of a British sea-going ship shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely where any goods on board his ship are lost or damaged by reason of fire on board the ship or when any gold, silver, diamonds, watches, jewels or precious stones on board his ship, the true nature and value of which has not, at the time of shipment, been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof.

By Section 503 of the Principal Act, the owners of a ship, British or foreign, shall, where all or any of the following occurrences take place without their actual fault or privity, be entitled to limit their liability to damages to the extent specified in the Section, viz -

(a) where any loss of life or personal injury is caused to any person being carried in the ship (This includes a member of the crew) (xvii);

(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 carried in any other vessel by reason of the improper navigation of the ship;

(d) where any loss or damage is caused to any other vessel or to any goods, merchandise or other things whatsoever on board any other vessel by reason of the improper navigation of the ship.

The Merchant Shipping (Liability of Shipowners) Act, 1898 extends the provisions of Part VIII of the Principal Act to the owners, builders or other parties interested in any ship built at any port or place in her Majesty's dominions from and including the launching of such ship until the registration thereof under Section 2 of the Principal Act, provided always that such owners, builders or other parties interested aforesaid shall not benefit under the Section for a period beyond three months after the launching of such ship.

The Merchant Shipping (Liability of Shipowners and others) Act, 1900, Section 1, extends the limitation set by Section 503 in respect of loss of or damage to vessels, goods, merchandise or other things by applying it to all cases where (without the owners' actual fault or privity) any loss or damage is caused to property or rights of any kind whether on land or on water or whether fixed or movable by reason of the improper navigation or management of the ship.

There are a large number of decisions relating to the meaning of the word "ship" to which reference is made in the authoritive text books.

In one instance the House of Lords regarded a ship broken in two, with the parts remaining severed for months as a ship.

> "It is interesting to note that such is the vitality of modern ships that a ship may remain for a time thus severed and it apparently retain its existence as a ship so as to be held not to be an actual total loss" - per Lord Atkin (xx)

The extent to which damages may be limited is found in Section 503(1) of the Merchant Shipping Act, 1894, viz -

(i) In respect of loss of life or personal injury either alone or together with loss of or damage to vessels, goods, merchandise or other things an aggregate amount not exceeding £Stg.15 for each ton of the ship's tonnage;

(ii) In respect of loss or damage to vessels, goods, merchandise or other things whether there be in addition loss of life or personal injury or not an aggregate amount not exceeding £Stg.8 for each ton of the ship's tonnage.

The reference to tonnage means the registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage (Merchant Shipping Act, 1906, Section 69).

So far as procedure is concerned, Section 504 of the Principal Act provides that where any liability is

The 1900 Act, Section 2, provides that the owners of any dock or canal or a harbour authority or a conservancy authority as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity, any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding £Stg.8 for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of 5 years previous thereto has been, within the area over which such dock or canal owner, harbour authority, or conservancy authority performs any duty or exercises any power.

The term "owners" includes equitable owners (xviii) and demise charterers (Merchant Shipping Act, 1906, Section 71). It also includes a person who has immediate and exclusive possession of a ship either indefinitely or for a term and has the responsibility of its control and management by himself and his servants (xix).

As to the expression "ship", this is defined by Section 742 of the Merchant Shipping Act, 1894 to include "every description of vessel used in navigation not propelled by oars" and extended, by the Merchant Shipping (Liability of Shipowners) Act, 1898, Section 4, to include, for the purposes of that Act, "whether completed or in course of completion or construction".

The word "includes" necessarily implies that the definition is not exhaustive; thus the expression "ship" may, in a given case, relate to a vessel which is at times propelled by oars or a vessel which is not used in navigation.

alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury or loss of or damage to vessel or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply to the Courts specified therein and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants.

The Court also has power (inter alia) to stay any proceedings pending in any other Court in relation to the same subject matter and to require security from the owner.

It has been held that an owner can claim a limitation of his liability before admitting liability. (xxi). On the other hand, before a decree can be obtained in the limitation proceedings, liability must be admitted or determined. (xxii). However a qualified admission of partial blame will be sufficient to entitle a shipowner to a limitation decree before a final apportionment of blame has been made. (xxiii).

Actions of limitation of liability are not, in ordinary cases, instituted until after proceedings have been commenced to recover damages from the persons who seek to limit their liability and where this is the case, those who have taken such proceedings should be named in the Writ of Summons as Defendants in the limitation action. The Court in which the limitation suit is commenced will not exercise its powers under Section 504 to stay the other proceedings until such time as liability in the limitation suit has been admitted or determined. (xxiv).

Quaere, whether, under the Judicature system the Admiralty Division has power to stay proceedings in the Common Law Division of the same Court in the light of the reference in Section 504 to "any other Court".

The International Convention relating to the limitation of the liability of owners of sea-going ships was signed at Brussels on 10th October 1957 (xxv). Australia was not a signatory to this Convention, and has not since ratified it.

The United Kingdom was a signatory and pursuant to the Convention, passed the Merchant Shipping (Liability of Shipowners and others) Act, 1958. The provisions of this Act came into force in the United Kingdom on August 1, 1958.

As stated earlier, subject to the High Court reversing the New South Wales Court of Appeal, this Act does not apply to the States of Australia and it does not apply to the Commonwealth of Australia by reason of the Statute of Westminster.

The main alterations to the United Kingdom law made by the 1958 Act are conveniently summarized by Temperley as follows:

"(i) The limits set to liability by s.503 of M.S.A. 1894, and s. 2 of M.S.A. 1900, are increased from £15 to an amount equivalent to 3,100 gold francs, and from £8 to an amount equivalent to 1,000 gold francs. The Minister of Transport is empowered to declare the sterling equivalents of these amounts. Where there are claims against the larger fund, the amount specified must be multiplied by 300 wherever the tonnage of the ship concerned is less than 300 tons (s.1).

(ii) The right to limit liability for loss of life or personal injury has been extended to claims of persons not on board the limiting ship, and the right to limit liability for loss or damage to property or rights has been extended to claims in respect of any property or rights wherever situated (s.2(1)).

(iii) It is no longer necessary that loss of life or personal injury, or damage to property or rights in respect of which limitation is claimed, should have been caused by reason of the improper navigation or management of the ship. Nor is the right to limit excluded by reason only that the occurrence giving rise to the liability was not due to negligence. It is sufficient if the occurrence was caused 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 loading, discharging, or embarkation and disembarkation of passengers or through any other act or omission of any person on board the ship (s.2(1) and (3)).

(iv) The liability to "damages" (to which limitation was confined by s.503 of M.S.A. 1894) now includes any liability arising in respect of any damage caused to harbour works, basins or navigable waterways and, when the necessary statutory instrument is made, will include any 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 a ship. There is power to set up a fund to compensate harbour authorities for loss consequent upon bringing into force limitation of liability for wreck-raising charges (s.2(2)(5)(6)(7)).

(v) The benefit of the right to limit has been extended to any charterer and to any person interested in or in possession of the ship, and to any manager or operator of the ship, and to any employer of a person who by s.3(2) is entitled to limit his personal liability (s.3(1)(2)). Further, the master and members of the crew have been given the right to limit their personal liability. This right is irrespective of their actual fault or privity, except in respect of the loss of or damage to undeclared valuables in circumstances of dishonesty (s.3(2)).

(vi) For the purposes of limitation, the definition of "ship" has been extended to include any structure, whether completed or in the course of construction, launched and intended for use in navigation as a ship or part of a ship, and the limitation provisions apply to a British ship whether or not it has been registered (s.4(1)(2)).

(vii) Restrictions are imposed upon the enforcement of judgments in respect of liabilities for which limitation may be claimed after adequate security has been given (s.6).

(viii) Contingent claims before a foreign court may now be taken into consideration in the distribution of a limitation fund, and liens no longer affect the proportions in which distribution is to be made (s.7).

(ix) In certain cases, ships or property that have been arrested in connection with a claim founded upon a liability which may be limited, may be entitled to be released after adequate security has been given. In certain circumstances, the Court will be obliged to order release but these provisions are subject to the Brussels Convention coming into force by sufficient ratification (s.5)." (xxvi)

The Australian Government prepared a Bill for an Act to amend the Navigation Act, 1912-1973, which was presented and read a first time in the House of Representatives on 2nd October, 1975. It has not gone beyond this stage.

The Bill proposed to deal with the question of limitation of liability in the following manner -

(1) by the approval to the ratification by the Commonwealth of Australia of the 1957 Convention,

(2) by the repeal of Part VIII of the Merchant Shipping Act, 1894 (as amended), and

(3) subject to one immaterial exception, the provisions of the 1957 International Convention (supra) would assume the force of law in Australia.

The Bill proposed that where a claim or claims were made or apprehended against a person in respect of any liability of that person which he might limit in accordance with the provisions of the Convention, the person may apply to the High Court, to the Supreme Court of a State or to the Supreme Court of a Territory, to determine the amount of that liability and the Court might determine the amount of that liability and make such order or orders as it thought appropriate with respect to the constitution, administration and distribution in accordance with the provisions of the Convention as so in force of a limitation fund for the payment of claims in respect of which the person was so entitled to limit his liability. However, an application could not be made to the Supreme Court of a State or Territory in respect of any liability of a person which he might limit in accordance with the provisions of the Convention as in force as part of the law of the Commonwealth unless proceedings to enforce a claim in respect of that liability had been instituted in that Court or in another Court in that State or Territory, whether or not judgment had been given in the proceedings.

The Bill also proposed that the following non sea-going ships should, for the purposes of the limitation provisions, be treated as if they were sea-going ships, viz:

A ship, not being a sea-going ship, that -

(a) is engaged in trade or commerce with other countries or among the States or with or among the Territories or, being a ship in the course of construction, is intended for use in trade or commerce with other countries or among the States or with or among the Territories;

(b) belongs to, or is in the control of, Australia (including a ship that belongs to an arm of the Defence Force) or an authority established by or under an Ordinance of a Territory or, being a ship in the course of construction, that does not belong to, or is not in the control of, Australia or such an authority, is being built by, or on behalf of, or to the order of, Australia or such an authority;

(c) is in the Australian coastal sea; or

(d) is in waters referred to in Section 14 of the Seas and Submerged Lands Act, 1973 that are used by sea-going ships or by ships of a kind referred to in paragraph (a) or (b).

It is convenient here to summarize the circumstances under which an owner might limit his liability if the 1957 Convention were to have the force of law in the Commonwealth.

The right to limit would be available where a claim arose from any of the following occurrences if there were no fault or privity on the part of the owner, viz:

(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.

An owner would be entitled to limit his liability in the cases set out above, even in cases where his liability arose without proof of negligence on the part of the owner or persons for whose conduct he was responsible by reason of his ownership, possession, custody or control of the ship.

The right to limit does not arise in the case of claims for salvage or claims for contribution not generally

available or 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 the Convention.

Subject to certain qualifications, the provisions of the Convention are available 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.

In 1971 an important judgment relating to the limitation of liability and salvage was delivered by the House of Lords. (xxvii)

The tanker "Tojo Maru" was involved in a collision with another ship and sustained extensive damage. It was necessary for the salvage contractors to cover the aperture left by the collision with a 35' wide plate. The plate had to be bolted to the hull by firing bolts from a bolt gun. The contractors' chief diver, contrary to orders which he had received, attempted to bolt the plate into place by firing the bolt gun before the adjoining tank had been freed of gas. The result was an explosion which caused extensive damage to the tanker. The gun had been prepared and loaded on board the contractors' tug. The contractors made a claim for salvage and the owners counter-claimed for the damage caused by the admitted negligence of the contractors'

diver. The agreed damages exceeded the amount of the remuneration to which the contractors would have been entitled but for their negligence.

PROPOSED NEW INTEPNATIONAL CONVENTION ON LIMITATION OF LIABILITY

> "It has been said that statutory provisions providing for the limitation of ordinary common-law liability should be construed strictly. But I would not approach the construction of sect. 503 of the Merchant Shipping Act, 1894, in that way. Its provisions must have been based on public policy that there should be no unnecessary discouragement of the operation of small vessels by companies of limited financial resources, by subjecting them to the risk of crippling damages if a large vessel should sustain extensive damage by reason of the negligent navigation of one of their vessels by their employees. Presumably, it was thought that the owners of large vessels could protect themselves by insurance. Subsequent amendments of those provisions widening their scope appear to me to confirm that view. I would therefore apply these provisions to all cases which can reasonably be brought within their language. But it will require further legislation if they are to be applied to cases, probably unforeseen, which may be thought to be within the spirit of these provisions but which cannot reasonably be brought within their language. The Courts must take these provisions as they find them." (xxviii)

In 1972 an International Sub-Committee of the C.M.I. was set up and charged with the task of studying the Limitation of Liability Convention of 1957, and reporting to C.M.I. on the question of a possible revision.

Thereafter the Committee appointed a working group and, on the 22nd June 1973, the Chairman of the Committee accepted, on behalf of C.M.I., that C.M.I. should act as a working party for I.M.C.O. in the carrying out of the preparatory work for the presentation of a first draft for the revision of the Convention.

Ultimately a draft International Convention on Limitation of Liability for Maritime Claims was submitted to I.M.C.O. in the latter part of 1975.

The legal committee recommended that the text of the draft International Convention on Limitation of Liability for Maritime Claims, as set out in annexure 1 to the report of the legal committee on the work of its 28th Session dated 12th December 1975, together with comments and observations thereon, be circulated to governments and interested organizations for consideration; the conference to be convened by I.M.C.O. from 1 to 19 November 1976, with a view to the adoption of a new Convention on this subject.

A brief summary of the most important provisions of the draft are set out hereunder.

As to the persons entitled to limit liability, it is proposed by Article 1 that both shipowners and salvors may limit their liability. The term "shipowner" includes the owner, charterer, manager and operator of a sea-going ship. The term "salvor" shall mean any person rendering service in direct connection with salvage operations. The persons entitled to limit liability include persons for whose act, neglect or default the shipowner or salvor is responsible.

Further, an insurer of liability for claims subject to limitation in accordance with the rules of the Convention shall be entitled to the benefits of the Convention to the same extent as the assured himself. It is also provided that the act of invoking limitation of liability shall not constitute an admission of liability.

Article 2 sets out the claims subject to limitation and it will be observed how wide-ranging an ambit the claims cover. They are -

"1. Subject to Articles 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), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

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

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

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

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

(f) claims 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 the preceding paragraph shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise."

It will be observed that it includes claims in respect of loss resulting from delay in the carriage of cargo, passengers or their luggage on board the ship and other aspects which hitherto have not been the subject of claims subject to limitation.

In Article 3 the claims excepted from limitation are detailed as follows -

"The rules of this Convention shall not apply to:

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

(b) claims subject to the provisions of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969, or to national legislation giving effect to that Convention;

(c) claims against the operator of a nuclear ship in respect of damage caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, such ship;

(d) 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 claim, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6 of this Convention."

Article 4 is of interest as it departs from the well-known concept of fault or privity being the conduct barring limitation. The draft Convention proposes that a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Article 5 provides that where a person entitled to limitation of liability under the Rules of the 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 deals with the limits of liability. The most interesting aspect here is that the unit of account referred to for the purpose of calculating limits of liability, is the special drawing right as defined by the International Monetary Fund. The limiting factor is still proposed to be the ship's tonnage.

Article 10 proposes that limitation of liability may be invoked, notwithstanding that a limitation fund has not been constituted. However, a contracting state may provide in its national law that, where an action is brought in its court 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 the proposed Convention, or is constituted when the right to limit liability is invoked.

REFERENCE INDEX

(i) Per Dr. Lushington in The "Amalia" 1863 L.J. Ad. 191 at 192.

(ii) 7 Geo. 2, C.15.

(iii) See for instance Lord Denning in The "Bramley Moore" (1964) 1 All E.R. 105 at 109, The "Andalusian" (1878) 3 P.D. 182; and The "Dundee" (1823) 1 Hag. Ad. 109.

(iv) Paper by Mr. Dawson R. Miller published in the Annual Report of the Association of Average Adjusters for 1953.

(v) Miller, p. 5.

(vi) Miller, p. 5.

(vii) See Marsden "Collisions at Sea" 11th Edition at p. 129

(viii) See Singh & Colinvaux "Ship Owners" p. 159

(ix) Miller p. 6.

(x) Cas. temp. Hardw. 85.

(xi) See Marsden pp. 131-132

(xii) See Marsden pp. 132

(xiii) See Marsden p. 132

(xiv) Per Lord Denning M.R. in The "Bramley Moore" 1964 P. 200 at 220.

(xv) (1974)2 N.S.W.R. 143

(xvi) (1975)2 N.S.W.R. 201

(xvii) Innes v. Ross 1957 S.L.T. 121

(xviii) The "Spirit of the Ocean" 1865 B. & L. 336

(xix) McIlwraith McEacharn Ltd. v. Shell Co. of Australia Ltd. 70 C.L.R. 175

(xx) British S.S. Owners Association v. Chapman & Son (1935) 52 Ll.L.Rep. 169 at 171.

(xxi) The "Amalia" 1863 Br. and L. 151
The "Sisters" 1876 2 Asp. 589.

(xxii) Hill v. Audus 1855 24 L.J.Ch. 289.

(xxiii) Commonwealth of Australia v. Asiatic Steam Navigation Co. Limited & ors. 96 C.L.R. 397 at 408

And generally see

Temperley 6th Edition at p. 335
Roscoe 5th Edition at p. 236
James v. The London South Western Railway Co. (1872) Law Reports 8 Chancery 241

(xxiv) Avis Rent-a-Car System Pty. Limited v. Bill & ors. Macfarlan J. Supreme Court of New South Wales in Admiralty, 21 of 1972, June, 1972 as yet unreported.

(xxv) Marsden: Vol. 4, British Shipping Laws, para. 1286 et seq.

(xxvi) Temperley: Vol. 11, British Shipping Laws, para. 1749

(xxvii) The "Tojo Maru" (1971)1 Lloyds Rep. 341

(xxviii) (ibid) Per Lord Reid at p. 347.