Limitation of Liability for Maritime Claims

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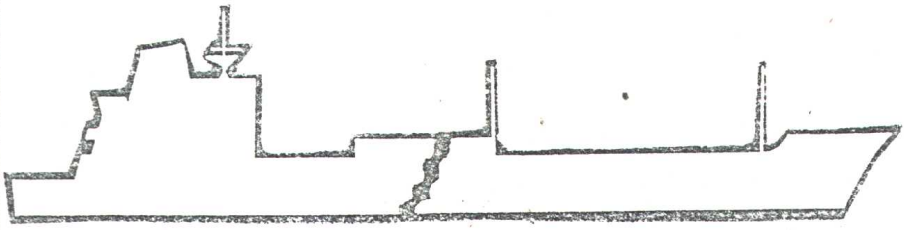

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Preface

Our thanks are due to Jeremy Farr, who assisted with the initial research and early drafts and to the Word Processing Department of Ince & Co., who regularly met unreasonable deadlines. Our thanks are also due to our wives who helped with the proof-reading, kept us supplied with coffee and generally put up with the domestic disruption caused by authorship. To clients who may have found us less attentive than usual we apologise and confirm that it is now "business as usual".

August 1986

P.J.S.G.
R.W.W.

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Introduction

The International Conference on the Limitation of Liability for Maritime Claims convened in London between 1 and 19 November 1976 under the auspices of the International Maritime Organisation (IMO). It was generally accepted by the participants that the rules relating to the limitation of liability for maritime claims enshrined in the 1924 and 1957 Limitation Conventions required updating. It was agreed by most participants that the limitation figures contained in the 1957 Convention needed to be increased and that in deciding new limitation figures a mechanism should be introduced which would cope with the problems of future worldwide inflation. It was also agreed that the circumstances in which the right to limit should be forfeit needed reviewing.

The preponderance of international opinion expressed at the conference was to the effect that the previous system had given rise to too much litigation and that this should be avoided in future. This body of opinion believed that a balance needed to be struck between the desire to ensure on the one hand that a successful claimant should be indemnified in real terms for any loss or injury which he had suffered and the need on the other hand to allow shipowners, for public policy reasons, to limit their liability to an amount which was readily insurable at a reasonable rate of premium.

The solution which was finally adopted to resolve the competing requirements of claimant and defendant was (a) the establishment of a limitation fund which was as high as a shipowner could cover by insurance at a reasonable cost, and (b) the creation of a virtually unbreakable right to limit liability such that shipowners would not feel obliged, as under the old limitation regime, to insure against the possibility that they would not be able to limit.

The text of the 1976 Convention finally adopted by the

conference therefore represents a compromise. In exchange for the establishment of a much higher limitation fund claimants would have to accept the extremely limited opportunities to break the right to limit liability. Thus the right to limit liability can no longer be lost as a result of negligence; under the 1976 Convention the right to limit liability is lost only when there is wilful intent or recklessness on the part of the defendant (Article 4).

International Conventions have no independent life of their own. They require adoption as part of the national law of participating countries before they become effective. The 1976 Convention itself provides that certain of its provisions are optional insofar as adoption is concerned. It follows that when problems of limitation arise in practice it will always be essential to consult the national legislation which gives domestic effect to the Convention in the country concerned.

Thus the 1957 Limitation Convention was given domestic effect in the United Kingdom by the Merchant Shipping (Liability of Shipowners and Others) Act 1958 (the 1958 Act). By virtue of section 17 of the Merchant Shipping Act 1979 (the 1979 MSA), the 1976 Limitation Convention (as set out in Schedule 4, Part I, of the 1979 MSA) will apply in the United Kingdom subject to the reservations mentioned in Part II of the same Schedule.

In accordance with the provisions of the Merchant Shipping Act 1979 (Commencement No. 10) Order 1986 the terms of the 1976 Limitation Convention will come into force in the United Kingdom on 1 December 1986. By virtue of section 19(4) of the 1979 MSA the new limitation regime will apply to liability arising out of post 1 December 1986 occurrences and by virtue of section 19(1) the provisions of six other statutes are amended as from 1 December 1986 in the manner specified in Schedule 5 to the 1979 MSA.

The purpose of this book is to compare the new limitation regime with the old by reference to the changes wrought by the 1976 Convention and to examine how the new regime applies in the United Kingdom.

History of Limitation in the United Kingdom

Earlier legislation in the United Kingdom relating to limitation of liability for maritime claims was drawn together in section 503 of the Merchant Shipping Act 1894. The United Kingdom was a signatory to the 1924 and 1957 International Limitation Conventions and adopted many of the provisions of those Conventions. This was done not by incorporating the Conventions *en bloc* into domestic legislation but by amending section 503 of the 1894 Act. Thus the Merchant Shipping (Liability of Shipowners and Others) Act 1958 incorporated into United Kingdom law many of the provisions of the 1957 Limitation Convention and this was achieved by amending section 503 of the 1894 MSA. This "patchwork" approach has produced a number of problems in the United Kingdom over the years because the amendments made to section 503 have not always accurately mirrored the Convention provisions on which they were based.

The *en bloc* adoption by the United Kingdom of the 1976 Limitation Convention to replace the much amended provisions of section 503 of the 1894 MSA should at least ensure that issues of limitation will, as between the United Kingdom and countries adopting the Convention, receive uniform treatment (subject to "reservations" which will be discussed and the probability that the courts of different countries will produce their own highly individual interpretations of the Convention wording).

The 1976 Limitation Convention

EXPLANATORY NOTE

There follows the full text of the 1976 Limitation Convention together with comments on each Article. The Convention itself is incorporated into the law of the United Kingdom by section 17 of the Merchant Shipping Act 1979 (the 1979 MSA) and the text of the Convention itself is set out in Part I of Schedule 4 to that Act. *However there are certain provisions in the Convention which do not appear in Schedule 4. The omissions are identified by marginal linings at the left-hand side of the page.* The text of the Convention is set in smaller type and is also indicated by marginal linings on the right-hand side of the page.

CHAPTER I—THE RIGHT OF LIMITATION

Article 1: Persons entitled to limit liability

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

2. The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship.

3. Salvor shall mean any person rendering services in direct connection 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.[1]

Comment follows below on the different categories of "persons" who are entitled to limit their liability under the 1976 Convention.

(a) Shipowners

Article 1(2) of the 1976 Convention provides that the term "shipowner" includes the owner, charterer, manager and operator of a ship, and in this respect does not differ from the equivalent provision in the 1957 Convention (Article 6(2)) and the 1958 Act (Section 3(1)).

(b) Salvors

The most significant innovation introduced by Article 1 of the 1976 Convention is the extension of availability of the benefit of limitation to salvors (Article 1(1) and (3)) and to any person for whom a salvor is responsible (Article 1(4)).

This extension was made in response to pressure from international salvage interests following the decision of the English House of Lords in *The "Tojo Maru"*.[2] In that case it was held that a salvor was not entitled to limit his liability in respect of damage caused by the negligent act of a diver who, although assisting in the salvage, was working away from the salvor's vessel at the time the damage occurred. The House of Lords held that the diver's negligent act was not an act done "in the management" of the salvor's tug nor an act done "on board" that tug.

By Article 1, the benefit of limitation is now conferred on salvors engaged in direct connection with salvage services, which services are defined in Article 1(3) as including in

1. See pages 56–57, below.
2. [1971] 1 Lloyd's Rep. 341.

addition to salvage as strictly defined, wreck or cargo removal or other services described in Article 2(1)(d)[3] (e) and (f).

(c) Seagoing ships[4]

Article 1(2) of the 1976 Convention is similar in effect to Article 1(1) of the 1957 Convention in that it confers the right to limit in respect of "a seagoing ship". However, section 503 of the 1894 MSA granted the right to limit in the United Kingdom to ships whether seagoing or not. In other words, the courts of the United Kingdom have since 1894, recognised the right of the owner of a ship, whether seagoing or not, to limit his liability.

Paragraphs 2 and 12 of Part II to Schedule 4 and section 17(1) of the 1979 MSA make it clear that in the United Kingdom the limitation provisions of the 1976 Convention are to continue to be applied in relation to any ship whether seagoing or not and that the word "ship" shall include "any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship".

(d) Other persons

Article 1(4) of the 1976 Convention extends the right to limit to "any person for whose act, neglect or default the shipowner or salvor is responsible".

This wording appears to extend the class of those entitled to limit liability. Whereas Article 6(2) of the 1957 Limitation Convention and section 3 of the 1958 Act afforded the right to limit to the "Master, members of the crew and other *servants* of the Owner . . . acting in the course of their employment", Article 1(4) of the 1976 Convention is apparently wide enough to encompass agents and independent contractors such as stevedores provided that the shipowner is responsible for their actions as a matter of law.

3. But see reservation in paragraph 3(1) of Schedule 4, Part II, of the 1979 MSA.

4. See pages 10 and 73, below.

It is by no means clear what is meant by the word "responsible". Given a restricted interpretation it could mean that, for example, a stevedore must show, contrary to *The "White Rose"*,[5] that he is a "servant" of the shipowner before he can establish an independent right to limit. Given a wider interpretation it may only be necessary for the stevedore to show that the shipowner was "responsible" for him being involved.

However, the wording of Article 1(4) may in one respect reduce the class of persons who were entitled to limit their liability under the 1958 Act. Thus section 3(1) of the 1958 Act refers to any "person interested in or in possession of the ship". Mortgagees in possession do not normally "operate" their ship and may not therefore, qualify under Article 1(2) of the 1976 Convention. Further, it is doubtful whether a shipowner could be said to "be responsible" for the acts of a mortgagee in possession within the meaning of Article 1(4). It may well be therefore, that, the mortgagee in possession has inadvertantly lost the right to limit under the 1976 Convention and the 1979 MSA.

(e) Owner/master

Article 6(3) of the 1957 Convention provides that, where the master or member of the crew is at the same time the owner, charterer, manager or operator of the vessel, such person will only be entitled to limit his liability if he commits the act, neglect or default in his capacity as Master or as a member of the crew.

This point arose in the United Kingdom in *The "Annie Hay"*.[6] The Owner of the *Annie Hay* was acting as master and in sole charge of navigation when the vessel was in collision with a yacht. The yacht was so damaged that it sank. There was no dispute that the cause of the collision was, in the main, the negligence of the owner/master.

5. [1969] 2 Lloyd's Rep. 52.
6. [1968] 1 Lloyd's Rep. 141.