



LIMITATION OF LIABILITY - PART II

THE 1976 REGIME: SUITABLE FOR NIGERIA & SOUTH AFRICA?

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Abstract

Part II

Some of the shortcomings of the 1976 limitation regime are considered, inter alia in relation to jurisdiction, the conflict of laws, forum shopping and multiple funds.

Limitation is viewed in the context of the criteria of other international regimes such as the HNS/Oil Pollution/Carriage conventions.

In the light of these shortcomings the question is asked "Does the 3rd millennium require a re-think?"

Tentative suggestions are offered for Nigeria (and South Africa) - follow the herd (back) to 1976 or voyage over the horizon?

The 1976 Convention, jurisdiction and the conflict of laws - forum shopping and multiple funds

One of the most difficult problems facing lawyers seeking to establish a limitation fund is where that fund should be. The general principle is that limitation is determined by the law where the limitation fund is situated. Whilst there are still two possible international limitation regimes applicable - and indeed the 1976 Convention makes provision also for jurisdictions not members of the IMO to set their own non-SDR limits - there will always be the possibility of forum shopping. A case in point is the loss of the rig crane barge BOS 400 off Cape Town in the 1980's. The crane was being towed by a Russian tug. The tug was chartered to a French operator. When the tow broke in a fierce storm off the Cape, the barge ran aground and was a total loss. At issue was the amount of limitation: if limitation was sought in the South African courts, the 1957 regime would apply: small tug, low tonnage and therefore a correspondingly low limitation fund. But the 1957 regime is notoriously easy to break. All the claimant needs to establish is *actual fault or privity* of the defendant. And that, in the circumstances of the Bos 400, was considered relatively easy. So the claimant would take the

chance of a low limit, in exchange for the (better) chance of breaking limitation altogether.

The defendant shipowners and charterers however, did all in their power to get the case heard by the English court. In the UK, the 1976 regime would make it all but impossible for the claimants to break limitation. They would have to rely on the cause of the loss of the Bos 400 being the defendants' *personal act or omission, committed with the intent to cause such loss, and with knowledge that such loss would probably result.*

The burden of proof is also a material factor in choosing the forum: the 1957 Convention places the burden on the **shipowner** who pleads limitation as a substantive defence to prove also that the loss did not result from its *actual fault or privity*. The 1976 Convention shifts that burden to the **claimant** who, to break limitation, must itself prove that the intent, recklessness and knowledge of the defendant shipowner or charterer caused the loss.

To an extent therefore, it can be said that the 1957 regime is more cargo/shipper-friendly than the 1976 Convention. Since the British court decisions making the proof of actual fault or privity relatively easy, a claimant under the 1975 system can more often than not break limitation. Perhaps this is an expression of the latent distrust with which many courts view limitation.

From the shipper/consignee's point of view, the 1976 package has only one real advantage, and that is that there is certainty of a considerably larger payment. Attempts to break limitation are generally futile.

Choice of law

Most jurisdictions regard the issue of limitation as one of procedural rather than substantive law. This would mean that the law of the forum would apply to limitation - rather than the proper law of the contract or of the tort. Hence the issue of forum shopping to find the forum with the limitation regime that suits the case of either claimant or defendant. But how does the forum establish the liability of the defendant in order to apply the limitation? May it recognize foreign judgements or even settlements made by the parties in accordance with the law applicable to the merits?

The issue arose in the English case of *The Giacinto Motta*¹ In which Brandon J refused to allow a USA determination of liability following a collision case, applying instead the English limitation of approximately half of the adjudged US liability because the fund was established in the UK, and English law thus determined the amount of limitation.

The Dutch court in *The Sylt* took a contrary view in what has been described as a "dangerous" decision in finding that the same law should apply to both the issue of liability on the merits and the limitation of that liability. In so finding, it deferred limitation to the law of Sierra Leone, as the proper law of the contract, rather than applying Dutch law (the ship that provided the fund having been arrested in Rotterdam).

Prof Francesco Berlingieri writes of the approach of the Dutch Court:²

¹ *The Giacinto Motta* [1977] 2 Lloyd's Rep 221.

² [1993] 4 LMCLQ at 433.

..there is no sound reason why, once a claim has been established under the law applicable to the contract or tort which has given rise to such claim, the global limitation of liability of the debtor should be subject to the same law.

The subordination of the uniform rules to the domestic rules of private international law is a total heresy. The purpose of uniform substantive rules is precisely that of ensuring the application of such rules to all the situations governed by the Convention, without any need to make recourse to domestic private international law rules. The provision on the scope of application has precisely the purpose of establishing in which situations a Convention applies.

It is also problematic to decide how to fit settlements and judgements (especially default judgements) into the limitation equation. Art 12.2 deals with settlements, though this is confirmed by the French text to mean payments, not compromise. The British courts take the view that only liabilities that would be recognized as to amount and legal basis in terms of English law may enter the limitation equation. The 1976 Convention makes no reference to the recognition of foreign determining the quantum of the claim on the merits, and it would seem that the question remains open.

Limitation and the ranking of claims

Most admiralty jurisdictions establish a ranking of competing claims against a fund. In English Law, ranking is, in theory at least, left to the courts, but there is a well-established hierarchy of claims from which a court would not lightly deviate. Other systems provide a statutory ranking.³

Under both conventions, only some and not all claims may be limited. Thus, for example, neither regime allows the limitation of salvage nor general average claims.

It is a complex equation to try to determine ranking when there is a plea of limitation. One needs to separate the claims subject to limitation from those unlimited. The final ranking, it is submitted, would comprise the order of claims provided by the law of the forum, with the quantum of those claims subject to limitation being reduced by the factor of that limitation. Neither convention should affect the ranking order of the claims under the law of the forum. Only the amounts of the claims subject to limitation will be affected.

Limitation and release from arrest: full security or only the limitation fund?

Where a ship is arrested and a limitation fund is established, the question is then whether the full value of the vessel (or of the claim in regimes where attachments *in personam* require the full value of the claim rather than the value of the vessel to be lodged as release security) or rather the lesser limitation fund should be lodged as release security.

In the 1957 Convention, the defendant shipowner or charterer would have to prove absence of causative actual fault or privity. This the English courts at least, required him to do at the stage of establishing security. The rationale was that the claimant may be able to break limitation, and that in that situation, security less than the value of the vessel or claim (as the case may be) would leave the claimant under-secured. In South Africa, a similar approach would probably be followed, though the

³ For example the South African Admiralty Jurisdiction Regulation Act, 1983, sec 11.

point has not been tested. Invariably security to the full value of the vessel (if the action is *in rem*) or of the claim (if the action is *in personam*) is lodged, usually by Club letter of undertaking.

The 1976 Convention, in Art 13, appears to adopt a different approach. First, there is no obligation to disprove recklessness or intent (that being a burden falling on the claimant rather than the defendant) in order to set up a fund. And once the fund is "constituted" in terms of Art 11 by depositing cash or guarantee, the fund takes the place of the ship or other asset arrested and two consequences flow: first, claimants suing the fund are barred from proceeding against any other assets of the defendant who set up the fund. Second, the arrested property must be released.

What is unresolved is what happens about claims which are not subject to limitation. What of mortgage claims, or salvage claims, or crew claims where there is an agreement not to limit (and which then fall out of the limitation fund)? It would appear that there would be two levels of security: first, security in the amount of the limitation fund, and second, security for any other claimant whose claim is not subject to limitation.

In practice, this is difficult. Often there are one or two arrests, in respect of which a defendant shipowner may establish a limitation fund. Then the ship must, in terms of Art 13, be released. It should be understood that with the ship gone, the limitation fund stands only for the claims to be limited. It would be unlikely that a mortgagee, or perhaps a salvor, would be able then to claim against the fund.

Limitation in context - the criteria of other international regimes such as the HNS/Oil Pollution/Carriage conventions

There is little doubt that, in the imperfect system that is limitation of liability, *personal acts or omissions committed with recklessness or intent with knowledge that loss will probably result* has become the currency of limitation. Thus we find the same or similar wording in the Warsaw Convention on Carriage by Air, the Athens Convention for the Carriage of Passengers and their Luggage by Sea, the Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, and indeed in The Hamburg Rules. With this new wording, *actual fault or privity* as disappeared from the statute books of most of Nigeria's and South Africa's trading partners. It remains only in those countries still adhering to the CLC oil pollution regime.

All of these conventions provide set and all but unbreakable limits of liability. All provide a trade-off of higher compensation in exchange for unbreakability. The theory is that the joint venture that is shipping predicates its freight rates on shared risk. The Clubs accept the new regimes, and underwrite the carrier's liabilities under them. Cargo insurance accepts the new regime, and underwrites the balance of risks not covered by carrier's liabilities (and thus underwritten by the Clubs). The theory is that all parties should be happy.

The lawyers are generally not happy. Cynics may ask why, and may find an answer in the fact that litigation under the 1976 limitation regime is few and far between. It is not worth challenging limitation because it is almost impossible in all but the most extreme cases, to prove that the carrier was reckless - and more so that it acted with intent. A dispute over whether or not a carrier acted

(through its various employees at varying levels of authority) in actual fault or privity is likely to be a lawyer's jamboree.

But there is more to the issue than legal fees. The industry in which we as maritime lawyers operate needs as much certainty as we can realistically provide as a platform on which maritime business is to be conducted. And maritime lawyers generally subscribe to the general of harmony in domestic laws and uniformity in those laws where appropriate. That is the aim of the Comité Maritime International of which Nigeria is an active supporter.

Does the 3rd millennium require a re-think?

The 1996 Protocol came into effect on May 13th 2004 after ratification by Malta as the 10th state party. As we have seen, it has significantly increased levels of compensation, but it has not addressed many of the problems which remain in the field of limitation. Most of these problems are not created by the 1976 convention itself, but are issues (such as ranking, release of arrested property, jurisdiction, and conflict of laws) which the 1976 convention did not address at all.

Patrick Griggs, in writing about the 1996 Protocol concludes:

The authors feel that an opportunity has been missed to review and amend other provisions of the 1976 Convention. May of the defects in the Convention remain.

It is suggested that the 3rd millennium does call for a rethink. The world of today is a far cry from that of 1976. It is a far cry even from 1996. The more one studies limitation, the more one becomes convinced that it is indeed justified mainly by convenience, but that it is sullied with difficulties of implementation. It is surprising that there are not more cases worldwide dealing with these essentially procedural difficulties. Perhaps claimants, faced with limitation, settle rather than fight?

In arguing the case for limitation, David Steel QC, now the Admiralty Judge in the UK, writes⁴

..There is much to be said for the continuing availability of limitation:

- (a) It still has a role to play in the encouragement of investment worldwide;*
- (b) It helps ensure a level playing field for international competition;*
- (c) It affords a considerable degree of comfort to the insurance industry that the catastrophic exposure will be capped;*
- (d) It tends to impose a discipline on claimants and discourages the developments of a system of recovery based on punishment rather than compensation.*

There is nothing to be ashamed about in repeating and acting on the truism that it is better for the victim to have a limited claim which he can be certain that can be paid than to have an unlimited claim against an insolvent party.

Tentative suggestions for Nigeria (and South Africa) - follow the herd (back) to 1976 or voyage over the horizon?

⁴ *Ships are different: The case for limitation* [1995] LMCQ 77.

Both Nigeria's and South Africa's major trading partners have adopted the 1976 Limitation regime. The following are some of the main state parties:

Australia	Belgium
China	Denmark
Egypt	Finland
France	Germany
Greece	Japan
Ireland	Netherlands
New Zealand	Norway
Spain	Sweden
Switzerland	Turkey
UAR	United Kingdom

The only major trading partner which retains *actual fault or privity* is the USA which requires fault plus *privity and knowledge* to break liability. It is probably fair to say that the USA limitation regime leaves a lot to be desired.

For this reason, and provided that it does not do injury to domestic law, it is probably prudent to go the limitation route of the 1976 Convention, and then if one does not like aspects of that regime, try to work from within to change them for the better. The ideal forum in which to seek change is the CMI, through the auspices of which the 1924, 1957 and 1976 Conventions were prepared.

South African maritime lawyers have shared your quandary. The South African Maritime Law Association has recently asked the government to amend the Merchant Shipping Act tonnage limitation provisions first to take into account the different measurement of tonnage now required by the International Tonnage Convention, 1969; second to increase the levels of compensation to those of the 1976 Convention (but not the Protocol); third, to replace the *actual fault or privity* requirement with that of *recklessness and intent* as provided by the 1976 Convention, and last, by shifting the onus from the carrier to the claimant. The net result will be that South Africa, as an interim measure, will adopt the limits of 1976, but will hopefully exclude some of the problems associated with other aspects of the Convention. The South African MLA has indicated a wish to work with the CMI in seeking a review of the 1976 regime.

Nigeria is shortly to bring the Hamburg Rules into effect.⁵ Under Article 8 of the Hamburg Rules, the carrier loses the benefits of the limitation of liability if the claimant proves that its loss 'resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would

⁵ The limits of the Hamburg Rules are equivalent to 835 SDR's per package or 2,5 SDR's per kilogram of gross weight of the goods lost or damaged, whichever is the higher. Liability for delay is limited to the total freight payable, and the container as a package is generally deemed one shipping unit.

probably result'. This proviso applies equally to the carrier servants or agents. The criteria are thus on all fours with the 1976 Convention.

It may be that Nigerian maritime lawyers could also consider amending the Nigerian Merchant Shipping Act in the same manner as has been proposed by the South Africans - thus taking the certainties of the 1976 Convention (though one should clearly now aspire to the higher limits of the Protocol) but leave aside the uncertainties of the 1976 Convention. This would make your cargo limitation criteria identifiable with those of your global tonnage limitation. Much would depend upon the attitude of the Nigerian shippers, who are in all likelihood a stronger lobby than the Nigerian shipowners and charterers. It would appear to an outsider that the shippers' lobby would be attracted to a Hamburg Rules limitation, coupled to the higher limits of global tonnage limitation of the 1996 Protocol, with the 1976 Convention criteria. To attempt a fusion of the 1996 higher limits with the fragile *actual fault or privity* limitation regime of the 1957 Convention would be to seek the best of both worlds. This would undoubtedly be frowned upon by the international freight and insurance markets. And there is now a measurable standard in the ISM Code against which the 1976 Convention's recklessness may be measured. 1976 should, in the zero-tolerance of sub-standard ships which has undoubtedly taken hold in the shipping industry, not be a limit cast in stone.

What may be helpful to Nigeria is to consider the adoption of the SDR as the unit of account, rather than the gold franc. The local Naira value of the gold franc is required to be enacted from time to time and will not easily keep track of inflation. The SDR is almost universally accepted as a unit of account, partly because (at least in theory) it is supposed to reflect the changing purchasing power of the world's currencies, and partly because it is so easy to ascertain.⁶

With South Africa and Nigeria in similar though not identical situation (especially once the Hamburg Rules come into force in Nigeria), and with both having a stronger shipper than carrier lobby, co-operation between our respective Maritime Law Associations, in consultation with the CMI would appear to be sensible. It may well be that a general review of limitation of liability would be a most suitable topic to undertake as one of the leads in the CMI Colloquium that has been convened in Cape Town for February 2006.

⁶ What the 1976 Convention does not determine is the date to be sued for the SDR conversion. In the absence of directive, the date of payment of the claim would probably be the most commonly applied date. The South African amendment seeks to clarify this aspect also.