

Limitation of Ship owners' Liability in Maritime Transport: the Question of its Prolonged Presence

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Abstract: The basis of remedy in civilian regime is characterized by the notion of restitution in integrum. The same concept or reaction is expressed in the common law by saying that the plaintiff or claimant should be put back into the same position as he would have been had he not suffered the loss, damage or injury inflicted on him by the defendant. The remedy of specific performance in contract perhaps best fits the notion described above. In the law of torts, a similar remedy is restoration which is now established to be an appropriate remedy for damage to the environment under the law of liability and compensation for marine pollution damage including the convention regime on the subject. Specific performance is known as an equitable remedy in Anglo – Saxon jurisdictions, that is; it has its roots in the law of equity. It is also referred to as an extraordinary remedy and is available in administrative law as well. The concept of limitation of liability is an antithesis to the principles of remedy articulated in the preceding lines of this article to wit: restitution in integrum, restoration and specific performance. The issue of limitation of shipowners' liability has been very much scrutinized but the question still continues as to the validity of its creeping and prolonged presence in shipping, maritime and trade. This article attempts to answer in a fresh and dynamic manner the question as to whether or not it is time for ship-owners and marine insurers to wean off the protection provided by limitation of liability regimes. Before this question can be answered, it is imperative that two areas be looked into, that is, the relevance of the ship owners' limitation of liability principle to the present and future and the foreseeable implications on the shipping and marine insurance industries if this principle should it be abolished.

Keywords: Maritime Transport, Liability Regimes and Maritime Claims/ injuries.

INTRODUCTION

The critical aspect of Limitation of liability of a shipowner is to hold the shipowner liable in principle but at same time reduce the said liability by limiting his total exposure[1]. The principle of limitation of liability in maritime law allow a shipowner with regard to liability arising from collision, allusion, grounding, cargo damage, death or personal injury, to claim a limit upon his defaults[2]. The right of Shipowners to limit their liability was conceived to serve the desires of maritime commerce and to promote shipping business. While the notion of limitation of liability evolved to this day, opponents are of the view that in modern time, the limitation of liability for shipowners has lived out its usefulness and should consequently be abolished at same stating that that there was no justification for the concept. Limitation of liability for shipowners has been described as an outdated concept "which should be relegated to the era of wooden hulls"[3]. On the other hand, some others believe that limitation of liability for shipowners is a balancing and thriving factor in international shipping and trade. At the inception and conceptualization of the principle of limitation of liability of ship owners within maritime law milieu, the

formulators of the policy and judges concerned did not contemplate the advancement of technology in shipping and the impact of insurance on shipping with regard to liability cover. The writer intends to introduce the principle of limitation of liability by way of a brief historical perspective and followed by an explanation of the workings of limitation of liability. A historical standpoint is especially important due to the fact that the limitation of liability principle came into being for historical and political reasons. An explanation on the workings of limitation is also important in order to put into perspective what limitation of liability means in figures so as to allow a full appreciation of the situations discussed later. A major part of this article is devoted to the debate between proponents and opponents of the abolishment of limitation. An equally significant portion of the discussion in this article is allocated to the foreseeable impacts from the removal of limitation. While analysis will be provided through out the discussion where relevant, the writer will provide a final analysis on the whole discussion in the conclusion section at the end of this article.

The main convention used to illustrate the concept of limitation of liability in this article is the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976). Discussions involving LLMC 1976 also applies to the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships 1957 and the Protocol of 1996 to amend the LLMC 1976. Other conventions cited are special limitation conventions such as the Civil Liability Convention 1969 (CLC), Hague Rules, Hague-Visby Rules, Hamburg Rules and the Rotterdam Rules. Municipal laws that contain similar ship owners' limitation of liability principles, such as the United States' (US) Limitation of Liability Act [4], will also be discussed. Since these laws are similar in concept to that of the LLMC 1976, discussions on the call to repeal them are relevant to this article. Areas outside the sphere of the shipping industry that had abolished their limitation of liability regimes will also be examined. Parallels will be drawn between this area and the shipping industry in order to apply the former's situation to the latter.

Concept of Limitation of Liability

At inception, Limitation of liability was considered a privilege because the concept was an exception to, and or variation of, the general rule of law that a successful party was entitled to be recompensed by the wrongdoer for the full amount of the loss, damage or injury suffered by the claimant or plaintiff[5]. Remedies are civil sanctions; or better stated, they are the private law equivalent of sanctions. The literal meaning of remedy is a cure. In other words, a judicial remedy is a cure given by the judicial tribunal to a successful plaintiff or claimant. In *The Bramley Moore*, Lord Denning MR (whom Professor Tetley has described as a great innovator[6] made a profound and thought provoking statements regarding limitation of liability. The eminent Jurist approved 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 origin in history and its justification in convenience'. This doctrine goes against the essence of *restitutio in integrum*, the primary guiding principle in compensation, as it denies rightful claimants what is due to them[7].

Historical Perspectives

The actual origin of limitation of liability in shipping is steeped in antiquity[8]. One of the earliest evidences of the doctrine being practiced, however, could be traced to pre-Crusades Italy. Ozcaryir is of the view that the Amphilia Tablets or tablets of Amalfi, which was written for the Republic of Amphilia in the present day Italy in the 11th century, is the earliest existing confirmation of a shipowner's right to limit his liability[9]. Sanborn, however, submits that the origins of a shipowner's right to limit his liability can be traced back to Mediterranean maritime practice around the 14th

century[10]. Notions of limitation of liability can be traced back to the Roman law[11]. The *noxal* action relating to damages suffered at the hand of animals allowed the owner of the animals to surrender the animal to the claimant in final settlement of damages[12]. But there is no indication of limitation of liability in maritime law until the records of early codes of the Mediterranean city states. And thus it was that the later law regulating the right of a shipowner to limit his liability was confirmed in the Barcellonian *Consols de la Mare*[13]. In terms of the *Consols de la Mare*, owners' and part owners' liability in respect of debts incurred by the master in obtaining ship's necessaries, or for cargo damage arising from improper loading, or from unseaworthiness was limited to the extent of their respective shares in the ship. Thus, it was provided in *Consols de la mare* :

But the managing owner of the ship is bound to replace and restore all those goods, which for the above reason have been lost or spoilt, or the value of them to the merchant to whom they shall belong. And if the managing owner of the ship of the ship has not the wherewithal to pay, he ought to sell the ship, which neither part-owner nor creditor nor anybody else can object to, nor ought to dispute for any reason, saving the mariners for their wages. And if the ship has not sufficed, and the managing owner of the ship has goods in another place, they ought to be sold so much of the same as will indemnify the merchant, but the part – owners are not liable except for as much as the part which they have in the ship shall be worth[14].

The relationship between the fault of the managing owner and a resultant inability to limit liability referred to in the *Consols de la Mare* prompts Sanbon to comment: "Here, as regards contract, we already have at the end of the 14th century , all the essential provisions of modern doctrine respecting limitation of liability"[15]. Thus the liability of the shipowner and the master was limited to the extent of their investment[16]. From there and as a result of the commercial revolution of the 16th and 17th centuries, the doctrine spread to France, Spain and the nation that would emerge at the front position of maritime nations, England[17]. Provisions relating to the privilege of a shipowner's limited liability were contained in almost all the respective civil codes of continental maritime powers of the time. Examples can be found in Statute of Hamburg (1607) and the Maritime Code of Charles II of Sweden (1667) which contained provisions' protecting a shipowner's other property from claims of creditors where such creditors had abandoned the ship[18]. Furthermore, in the Hanseatic Ordinances (1614 and 1644), the liability of a ship owner was limited to the value of his vessel, and the proceeds of sale of the vessel were to be the extent of the satisfaction of all claims[19]. The most significant of these civil codes was the maritime Ordinance of Louis XIV, compiled under the direction of

Minister Colbert in 1681, which constitute the first attempt to codify and systemize international maritime law in general and, more particularly, the rules relating to a shipowner's right to limit his liability[20] where it is declared that "the owners of ships shall be answerable for the deeds of the master, but shall be discharged, abandoning their ship and freight"[21]. The maritime Ordinance of Louis XIV was in turn, used as a model in the Netherlands, Venice, Spain, and Prussia[22]. Thus, as the Europeans began to explore the oceans in the quest to discover and conquer new worlds and trade routes, commerce naturally expanded seaward. Each state was anxious to guard its burgeoning fleet and trade. Accidents at sea could generate huge claims against the ship-owner who might have been deterred from further investing in the shipping industry, thus jeopardizing the state's economic well-being. As such, most maritime nations in those days began to give eminence to the principle of limitation of liability as a means to promote investment[23].

Today, the shipping industry has several limitation regimes, the most prominent being the LLMC 1976, which is based on tonnage limitation. This regime, alongside the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships 1957 and the Protocol of 1996 to amend the LLMC 1976, is also known as the global limitation regime[24]. Besides global limitation, there are specific limitation regimes such as the Rotterdam rules, the CLC, and Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974. Specific limitations that are based on package limitation are the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and Rotherdam Rules.

When a maritime claim arises, the relevant particular limitation regime will be invoked and given effect to. If there are unsatisfied claims having applied the specific limitation provision, global limitation may take effect. Any unsatisfied claims beyond the limit placed by global limitation may not be claimed from the ship-owner.

Calculation and Operational Framework of Limitation of Liability.

Article 6 of the LLMC 1976 sets out the formula for calculation of tonnage limitation as follows:

A. In respect of claims for loss of life or personal injury:

1. 333,000 Units of Account for a ship with a tonnage not exceeding 500 tons,
2. for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (1):
 - 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,

1. 167,000 Units of account for a ship with a tonnage not exceeding 500 tons,
2. 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.

Article 6 of the LLMC 1976 further provides that if claims for loss of life or personal injury exceeds the limit placed by Part A above, that is to say, the amount calculated based on Part A above is insufficient to satisfy the said claims, the unsatisfied amount shall be placed together with other claims in Part B above. The unpaid amount for claims of loss of life and personal injury then rank *pari passu* with other claims in Part B above.

If there are no claims other than for loss of life and personal injury, then both the portions of funds calculated under Part A and Part B above can be used to pay for claims for loss of life and personal injury. However, if there are no claims relating to loss of life and personal injury, the portion of the funds coming under the purview of Part A above may not be used to pay for other claims. How can a ship-owner lose the right to limit liability? Article 4 provides that it is only the personal act or omission of the defendant "committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". The burden to prove "the intent to cause such loss, or recklessly and with knowledge that such loss would probably result" lies with the plaintiff or claimant. The burden on the claimant is a difficult one and it like a sort of circuitously debarring the plaintiff from making any claim in the first instance.

Imagine an oil tanker running aground and spilling over 100,000 tonnes of crude oil, causing indescribable damage to the environment and marine life. Also visualize the process of cleaning up the devastation which will take years and several million dollars from public funds to accomplish. Nevertheless, when it comes to compensation, the court orders the tanker owner to pay a grand total of \$50. Indeed, truth is stranger than fiction, because, unfortunately, this scenario is far from being fictitious. It actually occurred in 1967 in the notorious *Torrey Canyon oil spill* case. The liability of the shipowner was held to be USD 50, whereas the clean – up cost to the governments of France and United Kingdom

was USD 18 Million[25] and, for many; it is the epitome of injustice brought about by the seemingly enduring doctrine of limitation of ship owners' Liability. Are they justified in their assertion? These arguments with its legalistic and legal – economic perspectives will be x-rayed in the preceding paragraphs of this Article .

Abolishing Limitation of Liability

Liability is 'a breach of standard of conduct, behavior or action', and the concept of limitation ought be properly expressed by the term "limitation of damages or compensations' rather than limitation of liability. Thus, the expression limitation of liability is misnomer. It is the quantum or amount of damages that is limited by the application of the principle of limitation[26]. One of the argument which the opposition to limitation regimes with respect to damages champions is the fact that there is 'no legal basis for the retention of the limitation of liability'[27]. The doctrine of limitation of liability is that the full indemnity, the natural right of justice, will be abridged for political reasons[28]. Thus, limitation of liability is 'a matter of public policy not law'[29]. Lord Blackburn seem to endorse the same idea when he held in the case of *Stoomvaart Maatschappij Nederland v Peninsula and Oriental Navigation Company* [30] that there appeared to be some injustice in reducing liability owed by those who are to blame to those who are not to blame. The debate on whether or not ship owners' limitation of liability should be abolished has been going on for decades. As early as 1625, the Dutch jurist, Grotius, had submitted that men would be deterred from employing ships if they lay under the perpetual fear of being answerable for the acts of their masters to an unlimited amount[31]. Generally, the opponents of the principle of limitation of liability argue that the principle affords shipowners a unique privilege with no economic justification or basis. The proponents however believe that one of the reasons for the retention of principle is a pragmatic one which relates to claims arising from the operation of a ship which may arise in any part of the globe. Another perspective in support of the retention of limitation regime anchors on historical justification, leaning on the principle associated with joint and common adventure and distribution of risks[32]. The doctrine's proponents' modern standpoint is best articulated by Steel who pontificated that 'it is better for the victim to have a limited claim which he can be certain that he can be paid than to have an unlimited claim against an insolvent party[33]. Opponents of this doctrine denounce it as 'an unjustly discriminatory attempt to subsidize the shipping industry at the expense of other interests'[34]. The argument is set out as seriatim:

Promotion of investment in shipping

Due to many uncontrollable conditions at sea, shipping has always been fraught with unknown risks. The unpredictability and fluctuation of earnings and asset

values of shipping companies, the volatility in trade patterns, and the cyclical nature of the demand for shipping services form the major risks in the shipping industry.

Even in the age of ultra modern technology that we live in today, the best of ships cannot be said to be immune to accidents. Proponents of the limitation of liability principle are quick to capitalize on this factor in supporting the retention of the principle. It is believed that if limitation of liability is abolished the shipping industry will be flooded by an avalanche of negative effects, which will be discussed in further detail in the subsequent paragraphs of this article, causing investors to quit the industry and ship-owners to wind up their shipping businesses[35].

However, to opponents of the principle of limitation of liability, the idea that it is needed to prevent investors from abandoning the shipping trade is no longer acceptable in a world where shipping is an entrenched feature affecting up to 95%[36] of world trade. The principle may have been justifiable centuries ago when the word "shipping" brought to mind a highly risky affair involving untold suffering and miserable death. Since a few decades ago, the same word is associated with super wealthy shipping magnates, state of the art ships and a wide variety of commercial activities. Thus, while it is true that technologically advanced ships are not infallible, they are certainly a lot safer than ships used to be in the 17th century[37]. Hence, it makes little sense to predict that investors and ship-owners who have built entire careers and fortune in shipping would abandon shipping business if limitation of liability is abolished.

Limitation of liability in return for ease of ship arrest

This argument centers on the fact that ship-owners are in fact sitting ducks as their ships are very visible assets making them easy to arrest[38]. In return for such ease, ship owners' liability should be limited. It is also true that if a ship is arrested, whether justifiably or otherwise, it could cause delays and other outcomes that are highly detrimental to the ship owner's business because time is of the essence in shipping business. This could possibly pressure the ship-owner to settle the claims as quickly as possible even if the claims are unjustifiable[39]. Proponents of limitation argue that claimants have more than enough doors through which they can satisfy their claims and ship-owners should be allowed to limit their liability.

Firstly, arrest of ship does not automatically mean that claimants will obtain what is entitled to him. Also there provisions for damages for unjustified arrest in the arrest regimes of various jurisdictions and in the Arrest conventions[40].The convention of 1999 gave powers to the arresting court to impose on the claimant

the requirement to provide counter security for losses that may be incurred by the defendant as a result of the arrest and for which the claimant may be found liable[41]. The court has jurisdiction to award damages for “wrongful” or “unjustified” arrest, or for “excessive security”[42]. Whether there is in fact any liability for loss occasioned by wrongful arrest is to be determined by the law of the place of arrest and by the court of the place of arrest[43]. It may therefore be safe to say that there will be complete uniformity of the law of arrest in this respect[44].

In an arrest of ship where there are many claimants, each claimant's right to the funds from the sale of ship depends on his ranking in the claims. Claimants could still find their claims left unsatisfied even after the sale of ship depends on his ranking in the claims. Claimant could still find their claims left unsatisfied even after the sale of the arrested ship[45]. Secondly, proponents of limitation are using as leverage the highly improper method of exploiting the arrest of a ship to pressure the ship-owner into settling claims. Technically, this dubious practice might not be illegal but it certainly carries the taint of lack of good business principle. Relying on this practice to claim the right to limit liability is to say that the practice is acceptable and should therefore be reciprocated with the right to limit liability. Such a suggestion is certainly disturbing and could be seen as encouragement for the exploitative methods to continue. In any case, it is improper for courts and legislative bodies to view ships as deep pockets from which claimants could seek to solve their problems[46].

The need to establish a truly universal limitation of ship owners' liability regime.

Advocates of limitation of ship owners' liability argue that far from abolishing Limitation, a truly global limitation needs to be established in order to create a genuinely level playing ground for all ship-owners[47]. In other words, it is unfair for certain ship-owners to have to face claims in a jurisdiction with less favorable limitation rules when other ship-owners are taking advantage from a more beneficial regime. For example, Buglass wrote in 1979 that the US Limitation of Liability Act[48] has provisions that allows for situations where ship-owners could escape without paying any compensation unlike the LLMC 1976[49]. Supporters of limitation of liability point out that the lack of uniformity is not good enough a ground to repeal the limitation of liability principle[50].

To begin with, this line of reasoning is flawed because in a debate where the issue is about whether protectionism should be removed in order to allow those outside the sphere of protection to receive what is rightfully theirs, the argument that a standardized protectionism needs to be put in place to allow protected parties to compete fairly with each other has obviously missed the point by a whole nautical mile. A rightfully

bewildered Gauci makes a case for a universal unlimited liability instead of a universal limitation of liability[51] but as Waite [52]pointed out, it would be a herculean task indeed to persuade all states to repeal their respective laws on limitation of liability, especially since not all states are keen to deprive themselves from their protectionist policies.

Ship-owners are not the only ones to enjoy limitation of liability

Supporters of ship-owners' limitation of liability often contend that ship-owners should not be made to give up their right to limit their liabilities since the shipping industry is not the only industry that allows this practice[53]. The aviation industry, too, observes the principle of limitation of liability. In fact, members of different professions have also tried to lobby for the right to limit their liabilities[54].

While it is true that other industries do have limitation of liability in place, it does not answer the issue of injustice faced by valid claimants. The fact that other industries are practicing it does not make it right for the shipping industry to do the same. In fact, there are many industries that have successfully operated without any limitation on liability. The US domestic flight market does not place any limitation on airlines' liability [55] and the market has not collapsed or suffered from a torrent of unmanageable claims. Professor Allan Mendelsohn of the Georgetown University Law School questioned as to why could the marine insurance industry not do the same, that is, to operate without limitation to their liabilities, ‘especially since ships are less likely to experience disasters with the number of fatalities that occur in the crash of a big plane’[56].

Parties using the service of ships should be aware of risks

This contention is known as the “‘we’ are all matured men and women here “type of argument[57]. Advocates for limitation of liability state that cargo owners, as businessmen who would know about the risks involved in a maritime adventure should have more business sense than to allow their cargo onboard a ship without proper insurance. It is in fact a common practice for cargo owners to insure their goods as they can conveniently place the value of the goods on the bill of lading and pay higher freight and receive a full refund should their cargo suffer any damage. Risk and costs for the parties involved in this straightforward procedure entail a mere simple assessment[58]. Thus, responsible cargo owners would not be affected by the perpetuation of the doctrine of ship owners' limitation of liability.

Opponents of limitation of liability disagree with this seemingly sturdy argument by the proponents. Gauci urges all and sundry to recognize the folly of this

argument. It is precisely because there are risks at sea that ship owners must increase safety at sea. Gauci suspects that sub-standard safety onboard a ship is the culprit causing more maritime accidents than there should be. The lifting of limitation of liability will remedy this problem to a large extent since ship owners will be forced to radically upgrade safety onboard[59].

One of the emerging argument against the limitation regime is that the shipowners are actually able to limit their liability by reducing or limiting their capital to what is called the “one ship Company”[60]. This reasoning is a well – founded argument since if the availability of corporate limitation was enough in protecting the shipowners, then such justification for limitation of liability, as an extended protection mechanism, will negative its logical base. However, it has been contended that this scheme is component of the general corporate law and is not in any way exclusive or peculiar to shipowners[61]. However, the same argument has been utilized to justify retention of the limitation of liability as a remarkable factor, since it has survived the development and ready availability of corporate limitation.[62] It is contended that by the universal use of the corporate device, limitation of liability is of much less economic importance than it was in the past. However, the fact remain that where a ship, or fleet of ships, is owned by a corporation, the privilege of limitation will shield the remaining corporate assets from claims for which they would if not be subjected to[63]. Limitation of liability has a direct connection with the corporation system, Sheen J. is of the view that parliament created corporation with limited liability, but judges had a limited scope to deal with that because they were protected by the law, but the introduction of “the sister ship arrest” was a mechanism to deal with such protection. The response of the shipping industry was the creation of the ‘one ship company’, provoking attempts to lift the corporate veil[64].

Implications From Abolishing Limitation of Liability

The battle over the removal of ship owners’ limitation of liability continues into the realm of foreseeable implications from the removal. The marine insurance industry, said to be the true beneficiary of the limitation of liability regime[65] is expected to bear most of the brunt of an abolished regime. Ideally, vessels should at least be insured for hull and machinery as well as protection and indemnity. The coverage provided by these insurance schemes include collision liability, wreck removal, oil pollution, claim for loss of and damage to cargo and loss of life and personal injury[66]. The abolishment of limitation of liability regimes could result in several consequences as will discussed below.

Rise in insurance premium leading to non-availability of insurance

If the right to limit liability is no longer available to ship owners, they become exposed to all risks, known and unknown, and both ship owners and insurers may enter into unchartered waters. Insurers of profit-making insurance schemes like hull and machinery insurance will logically wish to protect their business from unknown risks. Even non profit-making insurers such as P&I clubs will be extremely reluctant to issue a policy for unlimited liability. Insuring against an unknown risk with no ceiling in sight is an extremely tricky matter. How does the insurer determine the price of premium if he is unable to assess the risks involved?

Due to these uncertainties, once limitation of liability is abolished, the cost of insurance will rise. It should be noted that 95% of total world trade depends on shipping to function[67]. Clearly, increase in insurance premium will directly affect all forms of trade and, ultimately, consumers. An even worse outcome from the uncertainties created from abolishment of limitation of liability is the refusal of insurers to insure maritime adventures. Ship owners that have failed to get insured could resort to embarking on a voyage without insurance[68].

Is all hope is not lost? Even with the limitation of liability in place, several large ship owning companies had in the past voluntarily paid from their own funds when disaster struck such as in the Exxon Valdez oil spill. The Exxon Valdez was operated by Exxon Shipping Company, a \$100 million subsidiary of Exxon Corporation. The ship owner’s liability in this case was assessed to a tune of \$9 billion. Exxon Corporation could have limited its liability to \$100 million but it decided to assume responsibility for the liability because to do otherwise would have been counterproductive[69]. Obviously, in this case, whether or not the ship had insurance did not make any difference. Although the magnitude involved in this case is enormous, it illustrates that it is possible for companies with large enough funds to deploy their ships even without insurance. Moreover, it is highly unlikely that ship owners will face a \$9 billion claim on a daily basis. Nevertheless, this situation leads to the next question of what then happens to ship owners who cannot afford this option.

Unlimited liability coupled with limited insurance

Ship owners who are unable to create their own funds for claims to do away with insurance can rely on limited insurance. The ship owner who chooses this option could obtain a combination of coverage from several insurers. Waite is confident that the £14.4 billion Lloyd’s insurance market will be inclined to provide limited insurance rather than refuse to issue policies altogether[70]. In the US state of California where tanker

owners are not allowed to limit their liabilities with regards to clean up costs and damage to natural resources, insurers issue limited insurance[71]. With the rise of demand for more insurance to cope with unlimited liability, insurers would also need more reinsurers to distribute the risk. This will lead to the mushrooming of the reinsurer market.

Escalation in fraudulent practices

As with price hikes in petroleum products, negative activities related to that sector will increase as well. If prices of petroleum products increase, there could be a black market for petroleum products. Similarly, with the rising cost of insurance due to abolishment of limitation of liability, there could possibly be an escalation in insurance fraud. Although ships could choose to go without insurance, many ports require insurance to be taken by vessels before they could be allowed into the port. Thus, ship owners who are desperate for insurance could defraud their insurers to obtain coverage. Fraud could be committed by way of falsifying information provided to insurers in order to keep premium prices low. In this case, the fraudulent ship owner takes the hope that his ship will not meet with any disasters during the voyage. Should the ship meet with an accident that gives rise to claims, the fraud is very likely to be uncovered resulting in the insurance policy becoming void ab initio. The shipowner could then face criminal charges for his fraudulent conduct and will also be left to his own devices to settle the claims arising from the accident.

Lower investment income and increase in supplementary calls for insurance companies

The accounting year balance of a P& I club depends on 'advance calls' made for premium to be paid by ship owners and 'deferred calls' for premium to be collected at a later period when the club is able to ascertain the approximate amount of claims for that year. Out of the total premium collected, a certain percentage will be set aside for investments and income generated from such investments is known as 'investment income'. In the event of increase in the amount of money paid out to claimants due to the abolishment of limitation of liability, the percentage of investment income, if any, will also be substantially reduced. Balance in the annual accounts can only be achieved if outgoing expenses is equal to the actual income received. If outgoing expenses (paid out claims) amounts to more than the actual income, a 'supplementary call' will be made to all members for more premiums to be paid.

Abolishment of limitation regime could spell the end for many companies

One of the prophecies by proponents of limitation of liability regarding abolishment of limitation is that many companies would become insolvent as a

result of skyrocketing claims against ship owners after casualty[72]. However, others argue that most maritime accidents involve only minor damage and the number of claims that actually exceed the limit set by limitation regimes are few and far between. In fact, even when major disaster strikes, ship owners and investors could be saved from bankruptcy or winding up by incorporation and insurance. Investors are usually liable up to his percentage of ownership and investment in the company[73].

Statistics also show that in maritime liability history, only a few incidents exceed the amount of \$1billion[74]. like *Exxon vadex* oil spill discussed earlier in this article.

The shipping industry could turn into an oligopoly

If the abolishment of limitation of liability causes smaller shipping companies to become insolvent as discussed previously, at the end of a few decades, the world could find itself left with only a few large shipping companies. These are the companies that could afford to cope with all the claims and survived the onslaught of abolishment of limitation of liability. In an oligopoly, where the market is dominated by only a few ship owners, these few players could determine prices of freight and other aspects related to shipping. The world would probably witness a cartel in the shipping industry. This could lead to the ship owners' cartel passing back the cost to consumers, who are potential claimants. If this happens, the abolishment of limitation would have achieved justice for maritime claimants but would have failed in other aspects in that it had obliterated the perfect competition market or anything resembling it in the shipping industry.

CONCLUSION

Limitation of liability as it is today is nothing but a relic of the past which is built around a subsidy mentality that belongs to the era of colonialism and xenophobia. This relic of a doctrine has endured well into the 21st century and shows no signs of expiring anytime soon. It is submitted in this context that protectionism breeds incompetence and complacency. In the shipping industry, such attitudes spell trouble as they could translate into accidents, pollution and loss of life. Due to such policies, over the years, countless claimants have been denied their due right to be properly compensated. Naturally, where there is a complete right as in a contractual relation, there should correspond be a full remedy in the event of breach of that right.

However, it is also difficult to agree with the demand for the total removal of limitation of liability. There are several foreseeable adverse implications that its abolishment could bring about for smaller shipping companies and subsequently global economy. On one end, there is blanket protectionism that allows the strong to

oppress the weak. On the other extreme, lack of protection for those who really need it causes untapped potentials to wither away and paves the way for a lopsided playing field. It is vital therefore to achieve and maintain a delicate equilibrium.

As discussed earlier in this article, several large ship owning corporations have volunteered to make good' valid claims against them including some very expensive claims running into the billions of dollars even though they were entitled to invoke limitation of liability. This is a positive development as the parties who stand to benefit unjustly from the limitation scheme are beginning to show signs of restraint, sense of fair play, equity and good conscience. As leaders in the industry, they must spearhead the initiative to reform the doctrine of limitation of liability. In the premise of the preceding paragraphs, it is submitted that the doctrine needs a complete overhaul to transform into a need-based and not creed—based policy. In other words, it should not dish out subsidy to just any ship-owner including those who do not need it simply because they are ship-owners. Assistance should only be granted to ship-owners to whom limitation of liability could make a difference between insolvency and remaining in business. A mechanism to enable such a scheme must be drawn up as the first step towards a more sustainable and responsible shipping industry. For the mean time, however, the utopia of equilibrium that we are yearning for apparently needs some support.

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