

RETENTION OF LIMITATION OF LIABILITY IN MARITIME CLAIMS IN MODERN BUSINESS ENVIRONMENT IN UK, USA AND NIGERIA

***Uju Obuka, Ndubuisi Nwafor**

Faculty of Law, University of Nigeria

Abstract

This paper examines the relevance of limitation of liability in maritime claims in today's business environment in UK, USA and Nigeria. The paper finds that the concept is well entrenched in the legislation of many countries especially the ones under review. The authors contend that given the development of modern technologies that greatly reduce the risks inherent in maritime business, the advent of insurance and the corporate form of ownership of ships which provides ship owners with additional ways to insulate their investments from risk, limitation of liability for maritime claims should be consigned to the dust bin of history.

Key words: Relevance, limitation of liability, maritime claims, modern business environment.

1. Introduction

Generally, every commercial undertaking carries with it concomitant rights and obligations. These rights and obligations may be designed by the parties or stipulated by the statute governing such transaction. In every business undertaking, breach of any contractual obligation or tortious wrong entitles the injured or aggrieved party to a claim for damages or compensation. The amount of damages payable in each case depends on the degree of injury sustained as well as the court's perceived intent of the contract breaker or tortfeasor, and once assessed, payment must be made in full. Because there is an element of risk inherent in most business undertakings, limitation of liability clauses are common in all areas of contract law.

A limitation of liability clause is an item in a business agreement that stipulate the amount and the extent of the liability of a party in the event of breach of any terms or conditions of the contract by

* Corresponding author; e-mail: ndubuisi.nwafor@unn.edu.ng The authors are lecturers in the Faculty of Law, University of Nigeria, Enugu Campus, Nigeria.

the party. It actually limits the amount and types of damages the aggrieved or the injured party could recover from the defaulting party.

Limitation of liability in maritime claims is a concept that permits parties to maritime undertaking, especially ship owners and their agents to limit their liability whenever there is a loss or injury to persons or properties caused by or on board a ship.¹ At its inception, the concept of limitation of liability in maritime claims was aimed at encouraging investment in trade and commerce when shipping business was at its lowest ebb. The general notion then was that limiting the liability of the major key-holders in the maritime industry will encourage investment in that area of business considered precarious. Trade and commerce is continually evolving and with advancement in shipping technology, corporate form of ownership of companies and the development of complex maritime insurance which ensures maximum protection for all the parties involved in maritime adventure, limitation of liability may no longer be required. This paper therefore discusses the continued retention of the concept of limitation of liability in maritime claims in modern business environment in UK, USA and Nigeria and contends that the original consideration for the development of the doctrine no longer exist in modern business environment and therefore should be discontinued.

2. Historical Development of the Concept of Limitation of Liability

2.1 Europe

¹ S. Killingbeck, "Limitation of Liability for Maritime Claims and its Place in the Past, Present and Future: How can it Survive?" *Southern Cross University Law Review*, (1999) Vol. 3, No 1, pp. 1-29.

The concept of limitation of liability for maritime claims dates back to the 17th century following the commercial revolution of that century. As originally conceived, it was more of a continental European tradition.² The concept, as it were, allowed ship owners to limit their liability to the value of the ship plus her freight in the event of maritime disasters. The rationale for the development of the concept was to stimulate investment in the shipping industry and encourage trade and commerce.

The earliest forms of limitation provisions could be found in codes of Hamburg 1603, Hanseatic Ordinances 1614 and 1644 and in the Maritime Code of Sweden of 1677.³ The French Marine Ordinance of Louis XIV of 1681 stood out amongst all these codes as the most important by providing that ship owners shall be liable for the acts of the master but will be absolved from liability if he abandons his ship and the freight.⁴ This was latter referred to as the French abandonment system for limitation of liability.⁵ Thus, in continental Europe, a ship owner can limit his liability if he agrees to abandon his ship and the freight. In the UK, no law existed on limitation of liability for maritime claims until 1733 when the Responsibility of Ship Owners Act (RSOA) was enacted. The enactment of the RSOA was necessitated by the petition of ship owners following the ruling in *Boucher v Lawson*⁶ where the court found the vessel owner wholly liable for the loss of a cargo of gold bullion which was stolen by the master of his ship. Under the RSOA, the ship owner was permitted to limit his liability in respect of theft by the master or crew to the tune of the value of the ship and her freight. This was later expanded in 1786 by the Merchant Shipping

² *Ibid.*

³ See P. Griggs, "Limitation of Liability for Maritime Claims, the Search for International Uniformity" *Lloyds Maritime and Commercial Law Quarterly* (1987) 369 at 370.

⁴ Lin Zou, "Limitation of Liability for Maritime Claims," Proetschrift tot behalen, *Universiteit Gent Academiejaar* 2007-2008, 2 *Lloyds Rep.* 429 CA.

⁵ *Ibid.*

⁶ [1733] Cas.1 Hard 85.

Act of that year to cover all actions or inactions of the master or mariners done without the actual knowledge or privity of such owner or owners.⁷ The Merchant Shipping Acts of 1854 and 1894 respectively⁸ consolidated the right of a ship owner to limit his liability for loss of life or personal injury, or loss or damage to property which took place without his actual fault or privity. Under the UK system therefore actual fault or privity on the part of the ship owner disentitles him from limiting his liability. It is worth noting that the continental European concept which allowed a ship owner to limit his liability to the tune of the value of his ship plus the freight was equally adopted by the UK. Perhaps the principle behind such a formulation was that of apportioning risk. Thus, if the cargo owner fully aware of the risk involved in maritime business decides to undertake the risk and transport his cargo by sea, then the ship owner who was equally ready to bear the risk to his vessel should stand to lose only the value of his vessel and nothing more.⁹ From the foregoing, it could be seen that the concept of risk sharing was the best approach at that time when insuring maritime risk was not specifically common.¹⁰ This augured well for ship owners and that propelled maritime nations around the world to adopt it in order to place their merchant marines on the same pedestal with their foreign counterparts.

2.2 United States of America

In the United States, the concept of limitation of liability was not well received until early 19th century when limitation of liability laws were enacted by Massachusetts and Maine.¹¹ These laws were invariably fashioned out of the UK statute of 1733.¹² It was only after the Supreme Court's

⁷ This Act again followed the petition of ship owners that recent court cases had put them at risk of greater liability in case of loss or damage to the goods. See Section 1 of that Act.

⁸ See s. 503 of the 1894 Act which applied to both British and foreign ships.

⁹ Griggs (note 3 above).

¹⁰ *Ibid.*

¹¹ See Limitation of Liability Law 1819 of Massachusetts and Limitation of Liability Law 1821 of Maine.

¹² Zou, (note 4 above).

decision in *New Jersey Steam Navig. Co. v The Merchants Bank of Boston (The Lexington)*¹³ that a federal law was enacted on limitation of liability for maritime claims. Congress was propelled to enact the Limitation of Liability Act in 1851 following the aftermath of the decision in the *Lexington* and the need to put America on the same footing with other trading nations. The original intendment of the Act was to apply only to ocean-going commercial vessels but in 1886, the Act was amended and its application expanded to accommodate sea-going vessels and all other vessels used on lakes, rivers, or inland navigation including canal boats, barges and lighters. The Act was later expanded in its application to commercial vessels on inland waters.¹⁴ In 1935 and thereafter in 1936, section 183(b)-(f) was introduced into the Act to provide for supplemental limitation fund for personal injury and death claims. A further amendment to section 183(b) was undertaken in 1984 to increase the supplemental limitation fund from \$60 to \$420 per ton.

2.3 International Unification of the Rule

Apart from the United States and UK, other maritime nations around the world were compelled to enact limitation of liability legislation because of the enormous advantages attendant with the system. This move gave rise to steps towards international uniformity..¹⁵ The International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea Going Vessels 1924 (Limitation Convention 1924) was the first attempt towards international unification of the rule. This Convention as expected did not go down well with some maritime nations because of its obvious low limits and only a handful ratified the Convention. The

¹³ 47 U.S (6 Hon) 344. 1 (848). Despite the fact that the vessel was wholly destroyed by fire and that the agreement provided that the carriage is the risk of the shipper, the owner was held full liable for the loss of a cargo with \$18,000 gold and silver. It seems that the court came to that conclusion because of the seemingly culpable conduct on the part of the ship owner.

¹⁴ Zou (note 4 above).

¹⁵ *Ibid.*

second attempt at international unification of limitation of liability came in 1957 with the Limitation of Liability Convention of that year. The Convention entered into force on 31 May 1968. The limits set by that convention was equally criticized by ship owners and claimants due to inflation and depreciation of monetary values.¹⁶ Whereas ship owners complained of the seamless way the convention broke their right to limitation of liability on grounds of actual fault or privity, claimants on the other hand complained of the low amount provided as the limit of liability of the ship owners. There was therefore need for another convention that will achieve the desired compromise and take care of the concerns of the interested parties. That convention came in 1976 and entered into force on 1st December 1986.

The 1976 Convention was remarkable for the numerous changes it brought to the limitation of liability concept. It achieved the compromise lacking in the previous conventions. The 1976 Convention not only established much higher limits but also gave ship owners an unbreakable right to an insurable limited liability that is widely acceptable at the insurance market.¹⁷ This position was succinctly captured by Mr. Justice Sheen in the *Bowbelle*,¹⁸ wherein he posited that the consequence of the 1976 Convention was to give ship owners an unquestionable right to limit their liability. In spite of its achievements, the 1976 Convention suffered the same fate as its predecessors. It failed to provide an informal way of amending the limits in the convention without summoning a diplomatic colloquium. It was therefore not surprising that the convention is no longer acceptable to many states. In 1996, the convention was amended by the Terms of a Protocol to amend the Limitation Convention 1976 (1996 Protocol). The Protocol came into force on May 13 2004. The focal point of the protocol is the increase in the amount that ship owners may limit

¹⁶ The Convention on Limitation of Liability for Maritime Claims 1976. (Limitation Convention 1976) it came into force on 1 December 1986.

¹⁷ Zou (note 4 above).

¹⁸ [1990] 1 Lloyd's Rep 532.

and the incorporation of a better method of amending the amount that the ship owners may limit in the future..¹⁹

2.4 Nigeria

Limitation of liability for maritime claims is part of Nigerian law. The first legislation providing for limitation of liability for maritime claims in Nigeria was the Merchant Shipping Act of 1963. The law was amended in 2007. Nigeria adopted the International Convention for the Limitation of Liability for Maritime Claims 1976 (The 1976 Convention) and its amendment protocol (1996 Protocol) by virtue of section 336(1) (f) of the Merchant Shipping Act of 2007. Therefore the entire provisions of the 1976 Convention and its protocol are part of the Nigerian law and are applicable and enforceable in Nigeria as such.

3. Historical Justification for Limitation of Liability

The historical justification for limitation of liability invariably was to encourage investment in the shipping industry. The notion was that the precarious nature of marine adventure would encourage key holders in maritime business to invest in the business of shipping if their liability is limited..²⁰ This on the other hand would boost the influence and wealth of the trading nations..²¹

Lord Mustill²² advanced some arguments as justification for limitation of liability. According to him, the nature of maritime business with its attendant risks and benefits makes it inequitable for only one party to the venture to bear the entire brunt of the adventure. He relied on the decision in *Lawson v Boucher*²³ which was the earliest decision of the court lending credence

¹⁹ Zou (note 4 above).

²⁰ Killingbeck (note 1 above).

²¹ *Ibid.*

²² Lord Mustill, "Ships are Different - or are they?" [1993]*Lloyd's Maritime and Commercial Law Quarterly* 490, cited in Killingbeck (note 1 above).

²³ Note 6 above.

to the concept of limitation of liability in the UK as a basis for his argument. Another argument put forward by Mustill as justification for the concept of limitation of liability was that at the time when the concept was developed, the value of the cargo far outweighs the value of the ship. It would consequently be unconscionable to subject the ship owner to a risk quite above the extent of his contribution to the undertaking. The only rational thing to be done in that event would be for each party to the transaction to bear the cost of his investment into the enterprise..²⁴ Another justification for the concept is that since maritime disasters may not strictly be attributable to any fault of the ship owner, it will be unjust to force the ship owner to pay for what occurred without his actual fault. It was equally thought that by limiting liability to the cost of the ship and her freight, investment in shipping will be developed, more finance will be attracted to develop national merchant marine which will in turn help in expanding the wealth and influence of the trading nations.²⁵ Furthermore, another justification for limitation of liability is to protect the carrier and beneficiaries of his services from large claims which has the potential of driving carriers out of business, reducing choice and competition and invariably affecting price..²⁶ Again, the high risk exposure prevalent in maritime business will hike insurance premiums payable by carriers which will in turn increase freight rates so as to cover the high cost on the carriers. ²⁷

Going by the justification for the concept of limitation of liability, it is unarguable that the concept runs afoul of the basic contractual principle of *restitutio in integrum*.²⁸ This was aptly captured by Lord Blackburn in *Stoomvaart Maatschappij Nederland v Peninsula and Oriental*

²⁴ Mustill (note 23 above).

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.* This principle aims at restoring an injured party to the position he would have been in if the damage did not occur. It connotes that once the level of damages has been assessed and ordered, settlement should be in full.

Navigation Company,²⁹ where he postulated that the principle of limitation of liability is clearly an unjust principle in so far as it tends to limit the liability of the wrong doer as against the injured.

Lord Denning equally agreed that there is no justice in the concept of limitation of liability in

*Bramley Moore*³⁰ where he opined that:

The principle underlying limitation of liability is that the wrong doer should be liable according to the value of his ship and no more. A small tug has comparatively small value and it should have a correspondingly low measure of liability even though it is towing a great liner and does great damage. I agree 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 origins in history and its justification in convenience.

Thus the only historical justification for the concept of limitation of liability was to encourage investment in shipping which will in turn boost trade and commerce.

4. Persons and Claims Subject to Limitation of Liability

4.1 Under International Conventions

Traditionally, only ship owners were entitled to limit their liability. In order to accommodate advancements in shipping industry, International conventions extended the class of persons entitled to limit their liability to charterers, salvors (salvagers), their employees and agents as well as liability insurers. For instance under the Limitation Convention 1924, only ship owners were allowed to limit their liability. The class of persons entitled to limit their liability was later extended by the Limitation Convention of 1957 to include charterers, manager and operator of the ship, master, members of the crew and other servants of the owner, manager or operator acting in the course of their employment in the same way as they apply to an owner himself. This followed the development of the shipping industry and to forestall attempts by claimants to circumvent the effect of limitation of liability by claiming against other persons other than the ship owner.

²⁹ [1882] 7 A.C 795

³⁰ [1964] 1 All ER 105 at 109 (CA).

In a bid to stimulate the salvage industry and after careful analysis of the effect of the insurance industry on limitation of liability, the right to limit liability was further extended to salvagers and liability insurers under the 1976 Convention and its 1996 Protocol.

It is clear from the conventions that originally, for any person to be entitled to limit his liability, such a person must have interest in the vessel and must exercise sufficient control and management of the ship.³³ Thus, the tonnage of the whole ship is used in calculating the limit of their liability.³⁴ With time however, the concept of limitation of liability grew very rapidly to allow anybody who would likely incur liability directly from the operations of the ship the right to limit his liability. .³⁵

Having examined the persons that are entitled to limitation of liability, it is also pertinent to examine claims that are subject to limitation of liability. Just like only few persons are entitled to limit their liability with respect to maritime claims, it is not every maritime claim that is subject to limitation of liability.³⁶ In all the conventions three major claims are subject to limitation of liability. They are claims for loss of life, personal injury and loss or damage to property which occurred on board or in direct connection with the operation of the ship.³⁷ Of all these claims, it is worth noting that limiting liability in respect of death and personal injury has been severally

³¹ See art. 6 (2).

³² Zou (note 4 above).

³³ See *Re Oil Spill* 954 F.2d 1279 1992 AMC 913 (7th Cir. 1992), where the court held that under s. 183 of the Limitation Act, only the owner of the tanker; Amoco Cadiz which was involved in an oil spill off the coast of France could claim protection under that section. =

³⁴ Zou (note 4 above).

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ See art. 1 of the 1957 Convention and art. 2 of the 1976 Convention.

condemned as irrational and unjust, ³⁸ but in spite of all the criticisms, the concept still holds sway in most jurisdictions of the world. However, personal injury and death claims are given preferential treatment over other claims.³⁹ This preferential treatment has the potential of increasing the likelihood of the victims being fairly compensated⁴⁰

4.2 Persons and Claims Subject to Limitation of Liability in Europe

In Europe just like under the conventions, only ship owners were allowed to limit their liability originally. This could be seen in the early codes of Hamburg 1603. Hanseatic Ordinances 1614 and 1644 and in the Maritime Code of Sweden of 1677 and the French Marine Ordinance of Louis XIV of 1681. This was adopted by the UK in 1733 when it enacted the Responsibility of Ship Owners Act (RSOA). The persons entitled to limit their liability were further extended by subsequent enactments to include salvors, master, member of the crew or servant, part owner of a ship, charterer, manager or operator of the ship.⁴¹

As for claims subject to limitation of liability, national legislation adopted almost the same claims subject to limitation under the conventions. Thus, claims for loss of life, personal injury to passengers of the ship, loss or damage to property which occurred on board or in direct connection with the operation of the ship are limited.⁴²

4.3 Persons and Claims Subject to Limitation of Liability in USA

³⁸ Zou (note 4 above).

³⁹ See art. 3 of the 1957 Convention, art. 6 of the 1976 Convention and art. 3 of the 1996 Protocol to the 1976 Convention.

Zou (note 4 above).

⁴¹ See for instance section 4 of the Merchant Shipping (Convention on Limitation of Liability for maritime Claims) (Amendment) Order 1998 –SI 1998/1258.

⁴² See UK Merchant Shipping Act 1894.

In the United States, the Limitation of Liability Act 1851⁴³ allowed vessel owners to limit their liability for maritime claims where accidents resulted in personal injuries or other losses which occurred on navigable waters of the United States. The language of the Act says any owner or owner *pro hac vice* of any vessel.⁴⁴ The claims that are subject to limitation of liability under the US law are any embezzlement, loss or destruction of any property, goods or merchandise shipped aboard the vessel, loss, damage or injury by collision, or thing, loss or damage or forfeiture --done without the privity or knowledge of the owner or owners. The liability is limited to the post casualty value of the vessel and her pending freight.

4.4 Persons and Claims Subject to Limitation of Liability in Nigeria

Nigeria being a state party to the 1976 Convention and its Protocol adopted all the provisions of the convention and as such, persons and claims subject to limitation of liability under the conventions are equally applicable in Nigeria.⁴⁵ Thus, ship owners and salvors broadly defined to include charterers, manager and operator of the ship, master, members of the crew and other servants of the owner, manager or operator acting in the course of their employment in the same way as they apply to an owner himself, salvagers and liability insurers are entitled to limit their liability for maritime claims under Nigerian law.⁴⁶ The claims that are subject to limitation include: claims in respect of loss of life or personal injury, or loss of or damage to property occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom.⁴⁷

⁴³ The Act is presently codified in 46 U.S.C 30505 §181-189.

⁴⁴ U.S.C §183 and 186.

⁴⁵ See s. 336(1) (f) of the Merchant Shipping Act 2007.

⁴⁶ Section 352 (1) (2) Merchant Shipping Act 2007.

⁴⁷ Section 353 Ibid.

5. Conduct Barring Limitation of Liability

For any person to be able to rely on the privilege of limitation of liability, such a person must first of all fall within the categories of persons entitled to that privilege and the particular occurrence or loss must be shown to be subject to limitation of liability. Two tests were formulated by national legislation and international conventions for determining conduct barring limitation. These are the old test and the new test. The old test could be found under the Limitation Convention 1957 and the United States Limitation of Liability Act 1851.⁴⁸ Under this Act and the Convention, ship owners are entitled to limitation of liability in respect of certain claims except where the loss or damage resulted from the actual fault or privity of the owner. In other words, if it was the act of the owner that gave rise to the loss or injury, that fact disentitles the owner from relying on the privilege. The Limitation Convention 1976 and the UK maritime legislation reflect the new test.⁴⁹ Under the Convention and the legislation, for a person to be barred from relying on the privilege of limitation of liability, the loss or damage must have resulted from the personal act or omission of the person and must have been committed with the intent to commit such loss or recklessly and with knowledge that such loss would probably result. Here, a person is barred from relying on this privilege if the person knowingly and callously committed the act that gave rise to the loss or injury. The position in Nigeria is on all fours with the position in UK. Thus, under section 354 of the Merchant Shipping Act 2007, a person shall not be entitled to limitation of liability if it is

⁴⁸ S. 183(a). The only difference between the wordings of the convention and the U.S Act is that the Convention uses the word “actual fault or privity” whereas the Act uses the word “privity or knowledge”.

⁴⁹ See art. 4, Limitation Convention 1976 and the UK Merchant Shipping Act 1894.

proved that the loss or damage resulted from his personal act or omission, or the act or omission of his servants or agents acting within the scope of their employment, committed with the intent to cause such loss or damage, recklessly and with knowledge that such loss would probably result. An interesting area of divergence between the old and the new test is that the new test places an onerous burden on the claimant to prove wilful conduct and actual knowledge on the part of the vessel owner whereas the old test places the burden of proving lack of actual fault or privity on his part on the vessel owner

The implication of the bar to the claim for limitation of liability in maritime claims is- that the ship owner or any other person to whom the privilege extends cannot take advantage of the privilege where he was responsible for the loss or injury or failed to take necessary steps to circumvent the disaster.⁵⁰ To absolve himself or herself from liability, the ship owner must ensure efficient management and control of the ship at all times.⁵¹

Although these tests may appear incontrovertible, the fact that the courts are always willing to interpret the statutes in their own way shows that the tests are not unassailable.. For as Gilmore and Black⁵² put it, the lack of satisfactory and suitable mechanism for their legal interpretation has made the tests formulated for determining conducts barring limitation of liability a somewhat loosely defined concept, as there is no generally acceptable rule for their interpretation by the

⁵⁰ See *The Eurysthenes* [1976] 2 Lloyd's Rep. 171 as cited in Zou (note 4 above). In *Asiatic Petroleum Co v Lennard Carrying Co. Ltd* [1915] AC 705, the court interpreted actual fault or privity to mean negligence on the part of the owner as opposed to fault or actions of his servants or agents.

⁵¹ In *The Garden City*, [1982] 2 Lloyd's Rep. 382, cited in Zou (note 4 above), the right to limit liability was granted to the owners of the vessel since they had adequately employed means of superintendence.

⁵² See G. Gilmore & C. Black, *The Law of Admiralty*, 2nd edn. (London: Foundation Press, 1975) pp. 10 – 20.

courts The U.S. judiciary has been very hostile to the limitation regime and the courts are always eager to deny this privilege to those entitled by applying these tests.⁵³

6. Calculating the Quantum of Damages under Limitation of Liability

6.1 Europe

Two major systems were developed in Europe for calculating the limitation fund. These were the value-based system and the tonnage system.⁵⁴ The value-based system was developed originally to encourage ship owners to invest in the risky maritime business. The system provided for the liability of the ship owner to the tune of post-casualty value of the vessel in addition to the freight. The value based system continued to be the global European system of limitation of liability mainly obtainable under the French abandonment system and German maritime lien.

The tonnage of the vessel was originally developed in the UK as a basis for the calculation of the limitation fund. Although the Responsibility of Ship Owners Act 1733 provided for the liability of the ship owner to tune of the value of his ship plus the freight, however, unlike its European forerunners, the English version of limitation fund used the value of the vessel before the casualty as the basis for calculating the limitation fund.⁵⁵ The Merchant Shipping Act of 1854 introduced the calculation of limitation fund according to the tonnage of the vessel and a minimum of fifteen pounds per ton of the vessel's tonnage was set as a limit for personal injury claims. This Act was amended in 1894. In addition to retaining the fifteen pounds limit for personal injury claims, the Act also set an eight pounds limit per ton for damage claims. The Act also incorporated

⁵³ In *Pettus v Jones & Loughlin Steel Corp*, 322 Fed. Supp. (1972) 1078 for instance, the court declined application of the doctrine and regarded the concept as archaic and contrary to the well-known principle of securing comprehensive compensation. Similarly in *Complaint of Hercules Carriers Inc. v Claimant State of Florida* 768 F. 2d 1588 (11th Circuit 1985), the court held that Congress should re-visit the policies that gave rise to the enactment of the Limitation of Liability Act and amend the law. s

⁵⁴ Zou (note 4 above).

⁵⁵ *Ibid.*

other types of claims such as loss or damage to property and loss of life.⁵⁶ Calculation of limitation fund on the basis of the value of the vessel was removed as the ceiling under the new Act and that marked the departure of English law from the calculation of limitation of liability on the basis of the value of the ship. Until this day, the tonnage system has been adopted as the basis for calculating limitation of liability in subsequent legislation in UK..⁵⁷

6.2 Calculation of Limitation Fund in United States of America

In the US, the pre-casualty value of the vessel was used initially to calculate the limitation fund. In 1851 Congress enacted a federal legislation⁵⁸ making it possible for the liability of a ship owner to be calculated based on the value of the vessel after the disaster in accordance with what obtains in other European trading nations. A further amendment of the Act provided for the calculation of limitation of liability in line with the tonnage of the vessel.⁵⁹

6.3 Calculation of Limitation Fund under International Conventions

The tonnage system was adopted at the international level by the limitation conventions. Both the 1957 Convention and the 1976 Convention recognize calculation of limitation fund on the basis of the tonnage of the vessel. But whereas the 1957 Convention had provided that the amount of the limitation fund should be based on the pre-casualty value of the vessel rather than the post-casualty value of the vessel, the 1976 Convention provided for post casualty value of the vessel as the basis for calculation of the limitation fund. Another remarkable difference in the conventions is that the 1957 Convention provided a uniform rate for each of the vessels tonnage while the 1976

⁵⁶ S. 503 of the Act allowed limitation of liability for loss of life or personal injury or loss or damage to property that took place without the owner's privity or fault.

⁵⁷ Zou (note 4 above).

⁵⁸ Limitation of Liability Act 1851.

⁵⁹ See the Limitation of Liability (Amendment) Act 1936.

Convention provided for varying degrees of limitation which is solely dependent on the tonnage of the vessel.⁶⁰ The tonnage system has been adopted by most maritime nations of the world. This is because of the obvious advantageous nature of the tonnage system to claimants, since it often provide higher limits than the value based regime where claimants run the risk of almost not getting anything in the event of serious destruction of the ship.

6.4 Calculation of Limitation Fund in Nigeria

In Nigeria, since the provisions of the 1976 Convention and its Protocol are made applicable to Nigeria by virtue of the Merchant Shipping Act 2007, the limitation fund as obtainable under the convention is obtainable in Nigeria. The limitation fund is calculated on the basis of the tonnage of the vessel.⁶¹ The tonnage of the vessel being the gross registered tonnage.

7. Retention of Limitation of Liability in Modern Maritime Business Environment

It is unarguable that the concept of limitation of liability was applicable in the shipping industry as a commercial stimulus for apportioning the risks involved in maritime disaster and encouraging ship owners and other stake holders in maritime business to invest in the perilous business of shipping.⁶² This concept flourished at that time because the business of shipping was regarded as a low investment which needed a lot of encouragement. Today, one wonders if those original justification that gave impetus to the doctrine can still be justified in the face of modern advancement in technology that ease trade and commerce, complex maritime insurance that affords greater protection to the parties in maritime adventure and the latest form of incorporation of companies in which the corporation is distinct from its members.

⁶⁰ See Zou (note 4 above).

⁶¹ See section 356 (b) Merchant Shipping Act 2007.

⁶² Zou (note 4 above).

Opinions are divided as to the continued retention of the concept of limitation of liability in modern maritime business environment. On one divide are proponents like Steel,⁶³ Zou,⁶⁴ Donaldson,⁶⁵ and Macdonald⁶⁶ who believe that limitation of liability should be retained. They put forward several reasons why limitation of liability should be retained in the maritime industry. Steel for instance posit that even though the original consideration for the concept of limitation of liability was to encourage trade and commerce and maintain the development of shipping, there is now a paradigm shift from those original considerations to that of limiting likely insurance payoff.⁶⁷ Continuing, Steel maintains that removing limitation of liability will not augur well for the shipping industry as ship owners may likely engage in sharp practices aimed at cutting cost and maximizing profit. Furthermore, vessel owners will reduce the number of available fleets for maritime adventure to avoid the likelihood of other assets of the ship owner being attached to satisfy a judgment debt, and also there will be hike in freight rates due to high premiums.⁶⁸ Steel believes strongly that limitation of liability still has a place in the modern maritime industry and is the best approach for victims of maritime disaster who are sure to get compensated under the scheme than under unlimited claim.⁶⁹

Steel's arguments were supported by Donaldson Report⁷⁰ which in addition to supporting limitation of liability for maritime claims advocated for increased safety and accountability on the part of ship owners. The report notes that there is need for all the stake holders in the shipping

⁶³ See D. Steel, "Ships are Different: the Case for Limitation of Liability", (1995) *Lloyd's Maritime and Commercial Law Quarterly*, 77.

⁶⁴ Zou (note 4 above).

⁶⁵ See Donaldson Report "Safer Ships and Cleaner Seas", HMSO, London, 1994 Report of Lord Donaldson's inquiry into the prevention of pollution from merchant shipping, cited in Killingbeck (note 1 above).

⁶⁶ See Macdonald Denning's evidence before the U.S. congress cited in Steel (note 64 above).

⁶⁷ Steel, (note 64 above).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*,

⁷⁰ Donaldson (note 66 above).

industry to join hands together and create an enabling environment for safe marine adventure in the form of persuading the insurance of only sea worthy vessels which will invariably reduce maritime disasters. Donaldson agrees with Steel that removing limitation of liability will instead of improving shipping standards encourage reckless behavior on the part of ship owners.⁷¹

It is also the contention of proponents of limitation of liability that the concept has the potential of not only reducing risk exposure to the key players in the industry under international conventions or national legislation in the case of non- state parties, but also simplifies the procedure for claimants. They equally contend that limitation of liability makes room for steady insurance with reasonable compensation that dissuades forum shopping and encourages settlement.⁷² For Macdonald,⁷³ limitation of liability with fixed rates in accordance with the tonnage of the ship guarantees some level of certainty for a fair distribution to claimants and affords ship owners some level of protection in the event of unforeseen disasters.

Lin Zou has equally advocated for the retention of limitation of liability for maritime claims. He opines that:

Obtaining insurance coverage for claims which are not protected by limitation of liability will be very difficult. Underwriters enter into marine liability policies on the understanding that ship owners are entitled to limit their liability which will invariably be of immense benefit to the underwriters. Thus, there is need for the concept of limitation of liability to be preserved so as to ensure that the liabilities of ship owners are within a reasonable limit while at the same time ensuring that a fund is available to claimants in all cases of maritime disasters occasioning loss and damage to property. Removing limitation of liability for maritime claims will increase insurance costs and subject ship owners, cargo owners and eventually consumers of goods and services to higher freight rates. It would be very difficult to obtain any insurance coverage in respect of claims which are not protected by limitation of liability. Marine liability policies are written on the general premise that ship owners have the right of limitation and that such limitation will indirectly benefit underwriters. Thus when injury and damage are incurred in connection with the operation of ships particularly in cases of maritime disasters, it is of the

⁷¹ Killingbeck (note 1 above).

⁷² *Ibid.*

⁷³ See Macdonald Denning's evidence before the U.S. congress cited in Steel (note 63 above).

greatest importance that some form of limitation be preserved to keep ship owners liabilities within economically insurable limits and thereby to ensure that a fund is available to claimants in all cases. Any withdrawal of the protection of limitation of liability would inevitably increase insurance costs to the detriment of not only ship owners but also shippers of cargo by higher freight rates and ultimately the potential consumers.⁷⁴

Zou summed up his position by stating that removing the right to limit liability is not the best option because of the inevitable consequences to claimants.. Limitation of liability is in consonance with the realities of commerce and gives room for some measure of certainty in computing the risk involved in any adventure for the purpose of providing for insurance. ⁷⁵

Similar to Zou's contention that withdrawal of limitation of liability will impact greatly on insurance costs, Kein⁷⁶ posits that limitation of liability has the potential of increasing ones opportunity of getting sufficient insurance thereby reducing the cost of the said insurance. Starring⁷⁷ has equally stated that another reason for retaining limitation of liability is to maintain a common ground in proceedings for limitation of liability since all claims are brought together against the same limitation fund so as to achieve a fair tonnage. Hughes⁷⁸ is advocating for the retention of the concept of limitation of liability for maritime claims because of the opportunity it affords claimants of having one forum for the determination of all claims arising from maritime disaster.

On the other side of the divide are the United States judiciary and proponents like Lord Mustill⁷⁹ and Gauci⁸⁰ that believe that limitation of liability is no longer relevant in the current

⁷⁴ Zou (note 4 above).

⁷⁵ *Ibid.*

⁷⁶ See A. Rein, "International Variations on Concepts of Limitation of Liability," (1979) 53 Tul. L. Rev. 1259, 1272.

⁷⁷ See G. S. Starring, "Limitation Practice and Procedure," (1979) 53 Tul. L. Rev. 1134.

⁷⁸ See L. N. Hughes, "The Ship Owners' Right to a Limitation of Liability, A Drift on a Sea of Tort Changes," (1988) L. M. C. L.Q. 517, 525.

⁷⁹ See Mustill (note 21 above).

⁸⁰ Gotthard Gauci, "Limitation of Liability in Maritime Law: An Anachronism" (1995) Vol. 19 (1) Marine Policy 65-74.

economic and business environment. Mustill advances some argument in support of his contention. He believes that the original economic realities that led to the development of the concept of limitation of liability in shipping industry can no longer be justified in the modern business environment. Continuing, Mustill observes that the only thing remaining is to encourage shipping organizations to continue with the business for the interest of the society. The principle of law as enunciated in the *Amalia* case that limitation of liability is justified on political grounds can no longer be justified in today's maritime business. The principle may have thrived then when it was absolutely necessary to use that as a tool of expanding international commerce. Such 19th century reasoning can no longer be supported in the present day business environment. The key holders in shipping industry and their counterparts in insurance industry should not expect that the discussion to limit the liability of ship owners will continue to be domiciled with the IMO or other government conventions. Other interest groups are becoming interested in what is happening in their environment and are interested in knowing how businesses are run and they are also a formidable interest group to reckon with.⁸¹

Lord Mustill is not comfortable with the disorganized manner in which the doctrine of limitation of liability is implemented. He notes that the form of transportation, the origin and terminal of a journey determines the mode of application of the doctrine. To support his assertion, he cited the dissimilarity in the rights of claim for passengers on board an aircraft and those on board a ship. Lord Mustill sees this as gambling and irrational. The insurers are the ones enjoying the system since they can always spread their risk and limit their exposure to risk unlike the injured parties who are at the receiving end of such a system with uncertain regime of compensation. Clearly, the situation is well known within the shipping and insurance industry but yet to be

⁸¹ Mustill (note 21 above).

grasped outside the industry.⁸² Lord Mustill notes that other interest groups outside the shipping and insurance industry are now uncomfortable with the rules and are beginning to ask questions and demand for accountability. Presently, the current public interest is that governments should ensure that businesses are held accountable for their actions and inactions.⁸³

Finally, Lord Mustill frowns at the unjust nature of limitation of liability and contends that even if there are some merits in limiting compensation payable and bringing in some level of sanity to the amount of claims, there should a balanced regime that will cater for all those who are susceptible to unlimited liability. Although Lord Mustill recognizes the obvious problem of attracting new businesses, insurers and lawyers if liability is not limited, but states that it is most unfair that only a small segment of the society is enjoying the rule to the detriment of other people who are exposed to the same risk. Lord Mustill summarized his stance by saying that notwithstanding what the society, the law and the politicians think, ships are no longer different from other means of transportation and as such, are not entitled to more protection than others.⁸⁴

Gauci⁸⁵ believes that limitation of liability for maritime claims should be jettisoned in this century because apart from being obsolete, it is an unfair concept aimed at supporting the shipping industry at the detriment of other stakeholders in the industry.

The American judiciary equally thinks that limitation of liability no longer has a place in the contemporary business environment and has consistently shown manifest antagonism to the continued application of the doctrine. In *Maryland Casualty Co. v Cushing*,⁸⁶ for instance, the court held that it is inappropriate in this age for the judiciary to expand the Limitation of Liability

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Gauci (note 83 above).

⁸⁶ 347 U.S 409 (1954).

Act. No doubt most of the considerations that gave impetus to the enactment of the Act by Congress in 1851 are no longer relevant. And with time, when Congress saw the need to fund the shipping industry, it provided for funding from the public treasury instead of funds paid by injured persons. Similarly in *Baldassano v Larson*,⁸⁷ the court held that it is obvious that those for whom the Act was enacted are not the main beneficiaries, instead insurance companies who are in a position to collect their premiums and at the same time are able to limit their liability to the value of the ship are the biggest beneficiaries of the rule. Equally in the *Complaint of Hercules Carriers Inc. v Claimant State of Florida*,⁸⁸ the court held that Congress should revisit the policy considerations that gave rise to the enactment of the law because the Limitation of Liability Act is an archaic statute. In *Keys Jet Ski Incorporated v Keys*⁸⁹ the court made it clear that the only reason it supported the concept of limitation of liability was because it was enacted by parliament. The court in *Pettus v Jones & Laughlin Steel Corp*⁹⁰ described the concept of limitation of liability as an antiquated phenomenon which is contrary to the well-known policy of obtaining full compensation.

We align ourselves with the views expressed by the U.S. judiciary, Gauci and Lord Mustill above and contend that limitation of liability has outlived its usefulness and can no longer be justified in the modern business environment. The newest trend in technology which has improved businesses tremendously, the ever growing insurance schemes that afford maximum protection to all the parties and the concept of companies having distinct personality from the individuals that constitute it have made it possible for investors in companies to be liable only to the extent of their investment and that being the case, it is no longer the case that a vessel owner will lose all his

⁸⁷ 580 F. Supp. 415 (1984).

⁸⁸ Note 45 above.

⁸⁹ 893 F. 2d 1235 (11th Circuit 1990)) at 1228-29.

⁹⁰ *Pettus v Jones & Laughlin Steel Corp*

investment in the event of a maritime mishap. The business of shipping has evolved and it is still evolving. Past decision makers would clearly not have enacted legislation limiting liabilities of ship owners and others to whom the privilege extends if they had envisaged the present day shipping industry which involves many parties other than a single owner, sophisticated communication technology and modern insurance scheme that provide for overall protection and constant contact with the vessels and their cargos. ⁹¹ Moreover, the fact that the concept is applicable only to shipping industry makes it somewhat unfair. Other means of transportation of goods and services are equally exposed to the same type of risk as marine transport. There is definitely no reason why the doctrine should continue to apply only to maritime business. Besides, the evolution of liability insurance has to a reasonable extent ameliorated the burden hitherto borne by ship owners alone. The basic principle behind limitation of liability in today's maritime business should lean towards justice to claimants and provision of adequate insurance for vessel owners.

8. Conclusion

The foregoing discourse has demonstrated that the concept of limitation of liability as originally contrived is no longer justifiable in modern business environment. The shipping business has come a long way with modern and sophisticated advancements in technology and insurance that assist exploration and offer utmost protection. Besides, the way companies are run now is such that an individual is no longer liable for all the debts of the company except as remaining unpaid when a call is made upon him. The implication therefore is that the original justification for the concept has been dissipated. The current economic climate is such that governments should be more inclined towards ensuring that businesses are held accountable to the society they serve. To this

⁹¹ Killingbeck, (note 1 above).

end, government should ensure a level playing ground for all the interest groups in marine adventure.