SHIPOWNERS' LIMITATION OF LIABILITY FOR MARITIME MISADVENTURE

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1. INTRODUCTION

- Generally, the legal position is that when damages have been occasioned by a wrongdoing, compensation should be in full.
- However, the concept of limitation of liability cloaks shipowners and their representatives with immunity from full exposure to the ruinous damages flowing from the wrongdoing arising in the course of their marine adventure.
- Marine adventure in this respect is not just with reference to when the ship is at sea, but applies wholly to marine activities.
- Thus, shipowners are able to limit their liability for oil pollution, cargo loss or damage, claims from loss of life, claims arising from hazardous and noxious substances, and general contractual and delictual claims.
- However, while the right of limitation is available to shipowners, it is surprising that an appreciable number of Nigerian shipowners are neither aware of this right nor know how it operates.

- It is this unawareness of the right to limit liability that has prompted the need for this discuss.

- However, it must be noted that criticism has been directed towards the shipowner's right to limit his liability, given the denial of full damages to the aggrieved victim of the shipowner's wrongdoing.

- On the other hand, the proponents of limitation of liability continue to argue for its continued existence and operation.

- Irrespective of the arguments on either side of the divide, limitation of liability continues to remain a core and special element of maritime commerce that does not appear ready to take its leave anytime soon.

2. ORIGIN OF LIMITATION OF LIABILITY

- The origin of the concept of limiting a shipowner's liability is not entirely clear, however, the earliest evidence of the concept appears to have been traced to the 14th Century.

- It is a rule of public policy which has its origin in history and its justification in convenience. *The Bramley Moore* [1964] P 200 at 220.

- Concept was originated in order to ensure that losses arising from maritime incidents which could often be monumental did not discourage shipping merchants.

3. LIMITATION OF LIABILITY CONVENTIONS

(A). International Convention on the Limitation of Liability 1924

- The 1924 Limitation Convention was, an international adoption of s 503 of the English Merchant Shipping Act of 1894.
- The Convention provided for limitation of liability for loss of life and personal injury or loss of or damage to property that took place without the owner's fault or privity.
- The Convention was a compromise between the English and French systems.
- However, the convention was not a very successful convention as only 15 states ratified it, which mean that it did not go far in harmonizing the international law in this area.
- Consequently, the Comite Maritime International (CMI) took steps in reviewing the concept of limitation of liability and originated the Convention Relating to Limitation of Liability of the Owners of Seagoing Ships 1957.

(B). International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (1957 Brussels Convention)

- The convention applies not only to shipowner, but extends to charterers, master, manager, operators of the ship, and members of crew.
- The convention increased the limits of liability for claims in respect of property damage and loss of life and personal injury, which provided a larger fund for distribution amongst victims of the loss or damage resulting from the accident.
- Limitation of liability was extended to the expenses and charges of wreck raising, considering that the cost of removal of a sunken vessel could far exceed the value of the vessel itself.
- The method for calculating the limitation fund was the Poincare gold franc, as its unit of account. However, as a result of fluctuations in its value, the gold franc method of calculation became increasingly inconvenient.

- However, the low limits of the 1957 Brussels Convention created a dissatisfaction with the convention.

- Appreciable difficulty was also experienced with seeking to establish a currency equivalent of the gold franc.

- Furthermore, whilst the 1957 convention had over 50 parties, several of the major maritime nations failed to ratify the convention. The inconsistency of the International Convention on Civil Liability for Oil Pollution Damage 1969 with the 1957 Brussels Convention also accelerated the need for revising the 1957 Convention.

- The revision subsequently led to the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC) which came into force on 1 December 1986.

(C). Convention on Limitation of Liability for Maritime Claims (LLMC) 1976

- The Convention created a limitation fund that was as high as possible, whilst remaining insurable at a reasonable cost.
- The method for calculating the limitation fund is the (Special Drawing Right (SDR) of the IMF, which replaced the gold franc as the unit of account in order to overcome the problems associated with the gold franc.
- Unlike the 1957 Brussels Convention, art 2 (1) of 1976 LLMC provides that limitation is available to claims irrespective of the basis of liability.
- By art 2, the claims covered by the LLMC are loss of life or personal injury; damage to property; wreck removal claims; cargo removal or destruction claims; delay in the carriage of goods or passengers or their luggage; third party damage control claims.
- By art 3, the LLMC did not apply to claims for salvage, claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage; claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage; and claims against the shipowner of a nuclear ship for nuclear damage.

(D). International Convention on Civil Liability for Oil Pollution Damage 1992 (1992 CLC) and 1992 Fund Covention

- First major oil tanker disaster of *Torrey Canyon* triggered need to introduce measures for compensating oil pollution victims.
- The International Convention on Civil Liability for Oil Pollution Damage 1969 (1969 CLC) created to deal with civil liability of shipowners for pollution damage caused by oil tankers, but liability limits too low.
- Consequently, International Convention on Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention) established to provide more compensation.
- However, need for even higher liability limits resulted in the 1992 protocols known as the 1992 CLC and 1992 Fund Convention.
- The 1992 CLC and 1992 Fund Convention provides for two levels of compensation.
- By art V (1) of 1992 CLC, a shipowner is entitled to limit his liability. The method for calculating the limitation fund is the (Special Drawing Right (SDR) of the IMF, which represents the unit of account.

(E). International Convention On Civil Liability For Bunker Oil Pollution Damage 2001 (Bunkers Convention 2001)

- Drawback of the 1992 CLC and Fund Convention was that only oil pollution damage from tanker vessels were dealt with thereby excluding any application to oil pollution from non-tanker vessels.
- By art 9 (a), oil pollution damage occasioned by the escape of bunker oil from a ship is covered under the convention.
- By art 1 (1), the convention is applicable to all seagoing vessels and waterborne craft thereby ensuring that all categories of vessels fall within the ambit of the convention,but does not extend to tankers covered under the CLC.
- The shipowner will not be liable for oil pollution damage, if it arises from an act of war, act of God, or natural phenomenon; or the damage was caused by malicious intent of a third party; or negligence or wrongful act of Government or any other authority responsible for maintenance of lights or navigational aids. Art 3 (3).

4. LIMITATION OF LIABILITY UNDER NIGERIAN LAW

❑ MERCHANT SHIPPING ACT (MSA) 2007

- Section 335 of MSA 2007, renders the LLMC 1976 applicable in Nigeria. Therefore, it is not surprising that the MSA provisions on limitation of liability largely mirrors the LLMC 1976.
- Section 351-353 of MSA 2007 expressly provides for a shipowner's right of limitation of liability in Nigeria.
- Shipowner means the owner, charterer, manager and operator of a ship.
- Notably, a marine insurer is entitled to the benefits of limitation to the same extent as the shipowner. s 351 (5).
- The invocation of the right to limit liability by a shipowner in a suit does not amount to an admission of liability. s 351 (6).
- By s 358, the method for calculating the limitation fund is the (Special Drawing Right (SDR) as defined by the International Monetary Fund and in the absence of agreement between the parties concerned as to the applicable currency, the amounts mentioned in the said sections shall be converted into Naira at the date the limitation fund shall have been constituted.

- By s 352 (1) of MSA 2007, the claims that are subject to limitation are the following:

- claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation);
- claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship ;
- claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this part of this Act, and further loss caused by such measures;
- claims in respect of floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof;
- claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.

- By s353 (a) – (e) of MSA 2007, the right to limitation of liability under the MSA is not applicable to the following claims:
  - claims for salvage or contribution in general average;
  - claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage or of any amendment thereto which is in force;
  - claims subject to any International Convention or national legislation governing or prohibiting limitation of liability for nuclear damage;
  - claims against the shipowner of a nuclear ship for nuclear damage;
  - claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servant the shipowner or salvor is entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in section 357 of this Act.

5. EXCEPTIONS TO SHIPOWNERS' RIGHT TO LIMITATION OF LIABILITY

A). EXCEPTION UNDER 1957 BRUSSELS CONVENTION

- Art 1 (1) provides that 'The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner…'
- The primary exclusion of the right to limit liability under the Convention is where the shipowner is found to have acted with causative 'actual fault or privity'.
- The shipowner's right of limitation under the convention is easy to break as reflected in a number of English decisions wherein the shipowner was deprived of the right under various circumstances.
- In *Lennards Carrying Company v Asiatic Petroleum Company* [1915] AC 705, the directors of Lennards Carrying Company sent circulars containing maritime safety rules to their crew, but failed to advice them on the need for strict compliance. The company was found guilty of actual fault or privity, as the directors were regarded as the directing minds who exercised the powers of the company.

- However, guilt for actual fault or privity was extended from the boardroom to management in *The Norman* [1960] 1 Llodys Report 1 (HL), wherein the master had been informed by the owners about the uncharted hazards that he would confront in the course of a fishing expedition off the coast of Greenland and had been warned not to fish in Greenland's territorial waters. When the owners were informed about an unchartered rock in the said waters, they failed to inform the master, who ran into the rock off the coast of Green land and loss of lives ensued. The owners were absolved of any actual faut or privity at the lower court, but the decision was reversed on appeal.
- See also the cases of *The Marion* [1982] 2 Lloyds Rep 52 (Adm Ct); on appeal in[1984] 1 Lloyds Rep (HL); *The Lady Gwendolen* [1964] 2 Lloyds Rep 99;on appeal in [1965] 1 Lloyds Rep 335 (CA), wherein the shipowners were found guilty of actual fault or privity.
- The ease at which the shipowner's limitation of liability could be broken under the Brussels convention warranted the need to give the shipowner a stronger shield, which was reflected in the 1976 LLMC.

B). EXCEPTION UNDER 1976 LLMC

- **By art 4 of 1976 LLMC, the** shipowner's right to limitation will only be removed "if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result"

- The effect of the LLMC provision is to remove actual fault or privity as the criteria upon which the shipowner may be deprived of his ability to limit liability.

- Consequently, the shipowner's right to limitation of liability is almost impossible to break.

❑ Limitation of liability still relevant in maritime commerce:

- No nation can afford unilaterally to raise the liability ceiling or abrogate limitation entirely because of the competitive disadvantage that would accrue to the local maritime industry.

- Concerning insurance, P & I insurance market for the shipping industry is limited, and that it would be technically impossible to insure to the maximum extent **of** potential liability. Even if it were technically possible, the cost would be unbearably high.

- Without limitation, the P & I insurers would charge higher premiums because they would have to reimburse the shipowner the full amount **of** proven claims. This would result in higher costs to the shipowner, which would result in higher freight charges to shippers. This would eventually hurt consumers in the form **of** higher prices.

- It is submitted that the position of the proponents of the continue existence of limitation are well founded. This is because the issue of limitation of liability affects everyone in maritime commerce.
- This is so considering that the shipowner would have structured its capital expenditure upon the acceptance of certain maximum liabilities in the event of disaster.
- Furthermore, shipowners calculate their freight rates for carriage of cargoes upon firm estimates of their potential liability as carrier.
- Upon the same estimates, the shipowner will be provided with rates for marine insurance cover.
- Consequently, the principle of limitation of liability cannot be extinguished in maritime practice.

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