

Part I Historical Background

§ 2 Limitation of Liability and Wilful Misconduct

Although liability under general tort and contract law principles is not limited to a certain amount, liability arising under a carriage contract is limited by the majority of international transport conventions and national legislatures. Undoubtedly, limitation of liability is one of the most important elements of shipping law since, today, the carrier's liability insurance system is based exclusively upon it¹. However, it is also said that the limitation of liability is like "smoking" for the legislators, "difficult to justify, but also difficult to quit"². It is rightfully stated that the limitation of liability, which is nowadays considered to be a basic right rather than a privilege³, is not a matter of justice, but merely a matter of public policy⁴. Nevertheless, there are certain reasons given to justify the "essential departure from the current rules of civil law"⁵; and this chapter will outline those reasons, together with their criticism and the reasons for breaking those limits.

¹ Cleton, p. 16; Hodges/Hill, pp. 152-153; Mandaraka-Sheppard, p. 863; Buglass, 1364; Haak, 163; see also *Place v. Norwich & New York Transp. Co.* 118 U.S. 468, 495 (Supreme Court of the US, 1886).

² Røsæg, 294.

³ Gaskell, *Hamburg Rules*, p. 161.

⁴ *The Bramley Moore* [1963] 2 Lloyd's Rep. 429, 437 (CA); *Caltex Singapore Pte. Ltd. and Others v. BP Shipping Ltd.* [1996] 1 Lloyd's Rep. 286, 299 (QBD); *Place v. Norwich & New York Transp. Co.* 118 U.S. 468, 495 (Supreme Court of the US, 1886); *Polish Steam Ship Co. v. Atlantic Maritime Co. (The Garden City (No. 2))* [1984] 2 Lloyd's Rep. 37, 44 (CA) *per* Justice Griffiths: "The right of shipowners to limit their liability is of long standing and generally accepted by the trading nations of the world. It is a right given to promote the general health of trade and is in truth no more than a way of distributing the insurance risk."; *Gold/Chircop/Kindred*, p. 718; Mandaraka-Sheppard, p. 863; *Killingbeck*, 2; *Makins*, 653-654.

⁵ Milde, p. 42.

A. Unlimited Liability

I. General Principle

A party who commits a tort or who fails to properly perform a contract is liable for the damage he caused under tort or contract law principles. The person liable might be required to specifically perform the contract or to pay some designated amount in order to compensate for the damage he caused. Most broadly, the courts impose liability up to a specific amount of compensation. Under every legal regime, there are certain principles to determine the extent of this liability. The person liable can be required, *e.g.* to compensate the full amount of the object which was the subject of total loss, or to compensate the difference between the former and the present value of the goods which suffered damages, or even to compensate the pure economic loss in some cases. In the event of physical injury to or death of a person, again, there are certain principles for remunerating the injuries, disadvantages or losses sustained by the injured person or his relatives.

In all these cases, there is no cap on the amount of the compensation. The wrongdoer is obliged to pay the full amount of damages he caused, once those damages have been assessed⁶. The damages are to be assessed irrespective of whether the liability is a strict one or a fault-based liability. Similarly, it is also of no importance whether damages were caused by intentional wrongdoing or negligence. The wrongdoer should restore the aggrieved party to its former state, as if he had not broken the contract or committed a tort⁷. This principle is known as “*restitutio in integrum*”.

II. Exceptions

There are some legal exceptions to the principle of unlimited liability. Limitation of liability for certain assets is the first example of such an exception. Under inheritance law principles, heirs inherit both rights and obligations of the deceased. However, under German law, their liability for these obligations is legally limited to the rights and assets they inherited if certain conditions are met. So, if the financial amount of obligations is higher than the rights and assets being inherited, heirs are not obliged to fulfil the obligations in the excessive amount⁸. Similarly, under Turkish law, the Turkish State is responsible for the obligations of the deceased only up to the amount of the totality of the rights and assets in the inheritance, should the Turkish State be the heir where the deceased has no other heirs at all⁹.

⁶ Griggs, *Limitation*, 369; Killingbeck, 2.

⁷ Palandt/Sprau, Einf v § 823 Rn. 17; Markesinis and Deakin, p. 951; Williams/Hepple, pp. 15, 28; Winfield & Jolowicz, para. 22-16; MünchKommBGB – Oetker, § 249 Rn. 98; Larenz, pp. 424-425.

⁸ § 1975 BGB.

⁹ MK Art. 501, 631.

It is also legally possible to limit the liability which may arise from a contractual relationship by way of contractual clauses. Such a limitation depends solely on the will of the parties to the contract. Parties can agree to limit the liability to certain assets or up to a certain financial amount. Nevertheless, such a limitation is not applicable if the liable party has broken the contract through grossly negligent, reckless or intentional conduct. There are also strict rules regarding consumer contracts and general terms and conditions¹⁰.

Liability can also be limited up to a certain amount, which is the case under transport law. However, this was not the case at the beginning of the development of transport law principles. Thus, the historical development of the limited liability in transport law should be briefly considered.

B. Limited Liability in Transport Law

I. Historical Development

1. Carriage by sea

a) First appearance

Limitation of liability was first seen in maritime carriage¹¹, since carriage by sea was the first means of cargo carriage. Nevertheless, it is unknown when the limitation of liability was first applied in a maritime law case and what its origin is. Although it is possible to find principles regarding the vicarious liability of ship-owners pertaining to contractual obligations and tort under Roman law, there is no clear principle as to the limitation of this liability¹². Nonetheless, the inspiration might be the *noxae deditio* principle under Roman law, which is the first general principle of limitation of liability. Under this principle, the owner of property could satisfy a claim by surrendering the property which occasioned the loss¹³. The principle was generally applied in cases where an animal or a slave caused damage. Nevertheless, it is rightfully stressed that there is no apparent reason for the principle not to be applied to seagoing ships. Therefore, under the principle a shipowner was able to abandon his ship, or the ship and freight, or even the ship, freight and cargo on board; thus limiting his liability¹⁴.

¹⁰ See e.g. UK Unfair Contract Terms Act 1977; §§ 276, 277, 305 *et seqq* BGB; BK (1926) Art. 99 and BK (2011) Art. 20-25 (Turkish Code of Obligations of 2011 will enter into force on 1st July 2011), 115; Tüketicinin Korunması Hakkında Kanun (Turkish Consumer Protection Act of 1995).

¹¹ For a detailed examination of the development of shipping law see Edgar *Gold*, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law*, Toronto 1981.

¹² See the references given in *The Rebecca* Fed. Cas. 20 (1895), 373, 376 (DC Maine, 1831).

¹³ *Donovan*, 1000; *Kierr*, 639.

¹⁴ *Grime*, 1976 *Limitation Convention*, p. 306. However see William *Lewis*/Emil *Boyens*, *Das deutsche Seehandelsrecht*, Leipzig 1897, pp. 183 *et seqq*.

A special type of contract, *contrat de commande*, developed before the twelfth century, can also be the source of the limitation of liability. Under this type of contract, it was possible for an investor to use his capital together with a merchant or a mariner, and be entitled to receive a proportion of the profits. However, the key point was that the investor was never to be held liable for more than the amount he invested into the venture¹⁵. This type of contract also developed close cooperation between investors and mariners; and the *société en commandite*, a type of limited partnership, finds its roots in this cooperation¹⁶.

Nonetheless, it is believed that the limitation of liability specifically for maritime carriage was first developed in Italy in the eleventh century. The commercial code adopted for the Republic of Amalphia in Italy, the Amalphitan Table, adopts a system of a common fund, which is the money contributed to the ship's voyage¹⁷ and in certain cases orders respective claims to be made against this common fund¹⁸. Moreover, the Table has provisions regarding the limitation of part-owners' liability¹⁹.

Similarly, the *Consolat de Mar* of Barcelona²⁰ had express provisions on limitation. Pursuant to these rules, shipowners' liability arising out of cargo damage or

¹⁵ *Donovan*, 1001; *Jefferies*, 274-275; *Haddon-Cave*, p. 235; *Staring*, 322; *The Rebecca* Fed. Cas. 20 (1895), 373, 378-379 (DC Maine, 1831).

¹⁶ *Kierr*, 639; *The Rebecca* Fed. Cas. 20 (1895), 373, 379 (DC Maine, 1831).

¹⁷ See Amalphitan Table Art. 1 and the explanations in the Black Book of the Admiralty, V. 4, p. 3 fn. 3.

¹⁸ *E.g.* Art. 45.

¹⁹ Art. 8: "if any of the part-owners do not wish to risk their share which they have in the vessel, in any particular voyage, and the master of the vessel sails with his adventure, and the vessel suffers shipwreck or incurs some disaster, the aforesaid vessel ought to be sold, and together with what remains of the adventure ought to be divided in shares proportionate to their respective ventures amongst those persons who risked their property in the ship; and those part-owners, who did not wish to risk their shares in that voyage, ought to have recourse against the other property of the master, who has acted against their wishes, *and they have no action against the ship or the part-owners, who have shared in the common adventure*" (Emphasis added); Art. 62: "[...] and if the shares of the owners do not suffice to pay the aforesaid debts, [...]", for the original Italian text and the translation, see Black Book of the Admiralty, V. 4, pp. 8-9, 46-49.

²⁰ Reprinted in English in Stanley S. Jados, *Consulate of the Sea and Related Documents*, Alabama 1975. See especially ch. 34 (Which of the creditors has the legal priority to a claim when a vessel is sold after completing its first voyage): "[...] If the equity of the patron of the vessel who had arranged these loans is insufficient to satisfy the claims of the creditors, the difference will be met by the guarantors if they had guaranteed that the patron would repay these loans; otherwise they will not be held responsible for the repayment of these loans [...]", ch. 186 (Cargo damages aboard the vessel): "[...] The shareholders in the vessel are responsible to the degree of their investment in the vessel.", ch. 227 (Damage caused to a vessel due to lack of proper equipment aboard): "[...] The shareholders of the vessel shall not be required to share in the payment of these damages beyond the amount they had invested in the vessel.", ch. 239 (Purchase of essential provisions and equipment for the vessel): "[...] If no profit had been made, but rather a loss incurred,

the masters' transactions for ship supplies was limited to their shares in the ship in order to encourage investment in shipping²¹.

Thereafter, the idea of the limitation of liability spread from Italy and Spain, throughout Europe through the Statutes of Hamburg of 1603, the Hanseatic Ordinances of 1614 and 1644, the maritime codes of Sweden dated 1667, the Marine Ordinance of Louis XIV dated 1681 and the 1721 Ordinance of Rotterdam. Under all these acts, it was possible for the shipowner to limit his liability up to the ship's full amount or to abandon his ship to satisfy the claims, so that his other property was exempt from respective claims unless the shipowner had agreed otherwise²². The incorporation of the French Ordinance of 1681 – which itself has been a model for regulations in countries such as the Netherlands, Spain and Prussia²³ – into the *Code Napoléon* (1807) played a vital role in spreading the limitation of liability throughout Europe and Latin America²⁴. Finally, limitation of liability for maritime claims reached England in the eighteenth century²⁵ and the USA in the nineteenth century²⁶.

every shareholder is bound to reimburse the patron the amount due from him, dependent upon the amount of his investment in the vessel”.

²¹ *Donovan*, 1001-1002; *Özçayır*, p. 300; *Sprague*, 568-569; *Staring*, 323; *The Rebecca* Fed. Cas. 20 (1895), 373, 376 (DC Maine, 1831).

²² *Özçayır*, p. 300; *Kierr*, 640; *Donovan*, 1003; *Griggs, Limitation*, 370; *Puttfarken*, Rn. 870; *Stachow*, p. 44; *Staring*, 323; *The Rebecca* Fed. Cas. 20 (1895), 373, 376-377 (DC Maine, 1831); *The ‘Scotland’* 105 U.S. 24, 28 (Supreme Court of the US, 1882) *per* Justice Bradley. According to the 1681 Ordinance Title Fourth (II), “the owners of the ship shall be answerable for the deeds of the master; but shall be discharged, abandoning their ship and freight” (reprinted in English in Fed. Cas. 30 (1897), 1203), see also *Donovan*, 1004; *Seward*, p. 162; *Chen, Limitation*, p. xiv; *Sprague*, 569; *The Rebecca* Fed. Cas. 20 (1895), 373, 377 (DC Maine, 1831). It should also be remembered that persons contracting with the master for the ship's expenditure were provided with bottomry, see *Sprague*, 570; *The Rebecca* Fed. Cas. 20 (1895), 373, 376 (DC Maine, 1831).

²³ *Griggs, Limitation*, 370; *Killingbeck*, 2; *Sprague*, 570; *The Main v. Williams* 152 U.S. 122, 127 (Supreme Court of the US, 1894) *per* Justice Brown.

²⁴ *Donovan*, 1003-1004; *Özçayır*, p. 300.

²⁵ For more information see *infra* B I 1 b.

²⁶ Limitation of Liability Act, 1851, see *Angino*, 725. Before the federal statute, some states already passed acts regarding limited shipowners' liability modelled on the corresponding English provisions, see *Donovan*, 1009-1010; *Kierr*, 640-641; *Chen, Limitation*, p. xiv; *Jefferies*, 277; *Sprague*, 574-577. For more information on the historical background and the federal statute see *Donovan*, 1011 *et seq.*; *Kierr*, 641-643; *Chen, Limitation*, p. xiv; *Buglass*, 1365-1367; *Jefferies*, 277 *et seq.*; *Rein*, 1263-1264; *Sprague*, 577 *et seq.*; Walter W. Eyer, Shipowners' Limitation of Liability – New Directions for an Old Doctrine, (1963-1964) 16 Stanford Law Review 370.

b) England

The Rules of Oleron, dated 1150, which are a source of English admiralty law, make no mention of limitation of shipowner's liability²⁷. The enactment regarding limitation of liability in England is, in fact, the result of a theft. In a case where the master of the ship stole the Portuguese gold carried on board, the court ruled that the shipowner was personally liable for the full amount²⁸.

Shipowners, being very unhappy about the outcome of the judgement, subsequently addressed a petition to the English Parliament, stating that they did not expect to be exposed to such a risk, or to any greater liability than the amount of the ship and freight together, when they became shipowners. They complained that such a liability is insupportable and unreasonable and that no shipowner in other nations is subject to such a liability. Further, they stated that if they were to be held liable even if they are not personally at fault, this would discourage trade and navigation²⁹.

Thereupon, in 1734, the English Parliament passed an act to determine the extent to which shipowners shall be responsible for the acts of masters and crew. The Act is known shortly as the Responsibility of Shipowners Act, 1734³⁰. By virtue of this Act, it was allowed for the shipowners to limit their liability to the value of the ship and freight in case of theft by master or crew. Clearly, the Act was adopted to promote the development of the merchant fleet and to encourage the investment in the shipping business despite the perils of the sea³¹.

After another case³², where it was discussed whether the wording of the Act was broad enough to also cover cases where the theft was not committed by master or crew, but the necessary intelligence for the robbery was given by a member of the crew, shipowners again petitioned the English Parliament. Subsequently, the extent of the Responsibility of Shipowners Act was broadened in 1786. It was adapted that shipowners are not liable provided that the act or omission by the master or crew occurred without the privity of the shipowner³³. The "privity of the shipowner" principle was accepted gladly and therefore remained in the Act. Further legislation concerning the extent of the limited liability followed; e.g. in 1813 it was extended to cover collision cases³⁴. Finally, by virtue of the Merchant Ship-

²⁷ *Donovan*, 1005; *Özçayır*, p. 305; *Jefferies*, 276; *Sprague*, 569. Reprinted in English in Fed. Cas. 30 (1897), 1171 and in the Black Book of the Admiralty, V. 1, pp. 88 *et seqq.*

²⁸ *Boucher v. Lawson* 95 E.R. 53 (KBD, 1733).

²⁹ *Donovan*, 1007; *Coghlin*, pp. 236-237; *Mustill*, 496; *Özçayır*, pp. 313-314; *Thomas*, *British Concepts*, 1205-1206; *Griggs*, *Limitation*, 370; *Haddon-Cave*, p. 235.

³⁰ 7 Geo. II, Ch. 15. The exact name of the act is "Act to settle how far Owners of Ships shall be answerable for the Acts of the Masters or Mariners".

³¹ *Donovan*, 1007-1008; *Özçayır*, p. 299; *Thomas*, *British Concepts*, 1206; *CMA CGM S.A. v. Classica Shipping Co. Ltd.* [2003] 2 Lloyd's Rep. 50, 52 (QBD).

³² *Sutton v. Mitchell* 99 E.R. 948 (KBD, 1785).

³³ 26 Geo. III, Ch. 86. *Griggs/Williams/Farr*, p. 5; *Brice*, pp. 18-19; *Özçayır*, p. 315; *Thomas*, *British Concepts*, 1207; *Griggs*, *Limitation*, 371.

³⁴ 53 Geo. III, Ch. 159.

ping Act 1894 § 503, earlier legislation regarding limitation of liability was consolidated.

2. Carriage by land

Limitation of liability in the carriage other than by sea first appeared with the carriage by rail in the 18th century. A declaration of the value of the goods by shippers was mandatory due to the variety of the goods carried. However, the increase in the amount of goods carried by rail resulted in the classification of the goods, which subsequently resulted in shippers' declaring merely the type of the goods. This, however, caused a lack of information on the value of the goods, and therefore, carriers were not able to assess the risk they have been taking. As a form of protection, they started to insert liability clauses into their general terms where they fixed the financial amount payable in case of damage or loss. Nevertheless, shippers had the option to declare the value of the goods in which case the carrier would be held liable for the full amount. Limited liability turned to be the general practice, and the option of declaring the value of the goods the exception. This system, afterwards, has been adopted by international conventions on the carriage of goods³⁵.

II. Motives behind the Limitation of Liability

Limitation of liability finds its roots in history. Together with its historical development, there have been several grounds to support it. With the technological development in recent centuries, new motives developed. Although most of the motives for limiting liability in shipping law are valid for every means of transportation, only some of them are peculiar to a certain type of carriage.

Nevertheless, it is highly controversial today whether limitation of liability is still necessary. Nowadays, it is considered by many to be an archaic and anachronistic institution³⁶. Criticism against the limited liability system in transport law will also be addressed here next to the motives behind it.

1. General

a) Protection of an industry

As the historical background highlights, the first and most basic reason for accepting limited liability in certain matters was the need to support merchants in their investments. Carriage by sea, as the first means of transport where limited liability was accepted, was a risky, but also an important business. Generally, the perils and dangers of the sea are acknowledged. Shipowners, whether or not simultaneously acting as masters, were at risk of losing more than they had in-

³⁵ Basedow, *Transportvertrag*, pp. 408-410; Kadletz, pp. 106-107. See also Basedow, *Common Carriers*, 276-278.

³⁶ Gauci, *Limitation*, p. 68; Puttfarken, Rn. 873; Chen, *Limitation*, p. xv. For an overview see Basedow, *Transportvertrag*, p. 505.

vested, risking even bankruptcy, when, for example, they were held personally liable to cargo owners in case of a ship sinking³⁷. Also, the possibility that a ship would be lost without any further trace, with the cargo on board becoming a total loss was far from minimal.

Moreover, shipowners did not have any control over their ships. No matter how careful they were in choosing the master and crew, not all seamen were trustworthy. It is a known fact that, due to its dangerous nature, seamanship was not a preferred profession, and, therefore, it was generally chosen by people who had no other choice³⁸. It was also not possible to control the ship or the crew due to the lack of any means of communication. Consequently, when they left the shore, the destiny of the ship and cargo was in the hands of the master and the crew³⁹ who were by no means under the shipowners' control.

Despite these risks, shipping needed to be encouraged and supported. Carriage by sea was in some traffic relation the only means of transport, and in others a feasible alternative to the often impracticable carriage by land. Therefore, it was necessary to encourage and support shipping despite its risky, adventurous and dangerous nature (*navigare necesse est*)⁴⁰. Today, the importance of the maritime industry lies in its economic capacity. Although the reasons for supporting the industry have changed, the policy considerations in favour of support have not. Consequently, the limitation of liability has, almost without exception, been accepted under every national and international regime in order to support the shipping industry and to encourage investment⁴¹.

The risks involved in the aviation industry and the sector's economic importance is parallel to the maritime industry. When the Warsaw Convention was adopted in 1929, aviation industry was in its infancy: technically undeveloped and financially weak⁴². It was not possible for the industry to carry the entire financial

³⁷ Seward, pp. 161-162.

³⁸ Cleton, pp. 15-16.

³⁹ Gold/Chircop/Kindred, p. 718; Mustill, 492.

⁴⁰ Rein, 1259; Hill, p. 394; Mustill, 493; Killingbeck, 5; McGilchrist, *Limitation*, 259; Steel, 79; Staring, 326-327.

⁴¹ Davies/Dickey, p. 452; Mandaraka-Sheppard, p. 863; Schoenbaum, V. II, p. 136; Angino, 722, 725; Gaskell, *Athens 1974*, 384; Steel, 80-81; Lannan, 903. See also the preamble of the Responsibility of Shipowners Act, 1734 (7 Geo. II, Ch. 15): "Whereas it is of the greatest consequence and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein: and whereas it has been held, that in many cases owners of ships or vessels are answerable for goods or merchandize shipped or put on board the same, although the said goods and merchandize, after the same have been so put on board, should be made away with by the masters or mariners of the said ships and vessels, without knowledge or privity of the owner or owners by means whereof merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom".

⁴² Basedow, *Haftungshöchstsummen*, 353; Clarke, *Carriage by Air*, p. 24; Strock, 291; Drion, p. 15; Basedow, *Common Carriers*, 329. See also the facts given in the

burden of a catastrophic accident⁴³, namely the loss of the substantial amount of money invested as well as the compensation to be paid⁴⁴. It was also considered that any person choosing travelling by air is familiar with the risks involved⁴⁵. Therefore, protection was provided by means of limited liability in order to support the industry⁴⁶. Although catastrophic aviation accidents have not ceased to exist, the liability regime in respect of the carriage of passengers has been changed radically. Today, there is no limitation cap on the compensation amounts to be paid to passengers⁴⁷.

The idea of promoting an industry through means of a limited liability system is highly challenged. It is said that a sea voyage is not as adventurous as it used to be due to the technological developments and advanced means of communication⁴⁸. The same reasoning is rendered from the date of the argument of the uncontrollability of the crew on board⁴⁹. Investment in shipping is also satisfactorily widespread so that the shipping industry does not require any special treatment⁵⁰. Even if there is need for support, government subsidies are a better way to support an industry than the utilisation of the limitation system⁵¹; what might in other words be labelled “subsidies paid by injured persons”⁵² or “at the expense of other interests”⁵³. It is believed that, today, by means of limitation of liability, the shipping industry is escaping the consequences of its activities⁵⁴.

Report, Warsaw, 255-256; *McGilchrist, Limitation*, 259; *Kilbride*, p. 183. For a discussion see *Taylor*, 118-119.

⁴³ *Meyer*, pp. 148-149; *Matte*, p. 17. For the counterview see *Taylor*, 119; *Milde*, pp. 42-43; *Tobolewski*, pp. 86-88; for the discussion of the issue in light of surface damage caused by aircraft see *Drion*, pp. 17-20.

⁴⁴ *Report, Warsaw*, 256; *Taylor*, 115; *Kreindler*, p. 10-4.

⁴⁵ *Taylor*, 115; *Schobel*, p. 8. In fact, in the early stages of air carriage, passengers were left to obtain personal accident insurance themselves, see *Kilbride*, p. 183.

⁴⁶ *Ruhwedel, Montrealer Übereinkommen*, 189; *Taylor*, 116; *Kreindler*, p. 10-4; *Tobolewski*, pp. 80-85; *Vlacic*, 449; *Basedow, Transportvertrag*, p. 463; *Schobel*, pp. 8, 106-114; *Drion*, pp. 15-17; *Milde*, p. 42; *Georgiades*, p. 44 (last five writers do not accept this motive as a justification for limited liability in aviation law); *In re Korean Air Lines Disaster of September 1, 1983* (CA, 1991) 932 F.2d 1475, 1484; *In re Air Disaster at Lockerbie, Scotland on December 21, 1988 & In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986* (CA, 1991) 928 F.2d 1267, 1270-1271, 1287.

⁴⁷ For more information see *infra* § 4 C. For an analysis of the limited liability system in the carriage of passengers by air see *Sven Brise, Some Thoughts on the Economic Significance of Limited Liability in Air Passenger Transport*, in: *Arnold Kean (Editor), Essays in Air Law*, The Hague 1982, p. 19.

⁴⁸ *Gold / Chircop / Kindred*, p. 720; *Chen, Limitation*, p. xv; *Eyer*, 372.

⁴⁹ *Chen, Limitation*, p. xv. Strongly opposing to the idea that the nautical fault defence is an anachronism *Makins*, 659.

⁵⁰ *Gauci, Limitation*, p. 66; *Haddon-Cave*, p. 241.

⁵¹ *Chen, Limitation*, p. xv.

⁵² *Maryland Casualty Company and Others v. Gertrude Picard Cushing and Others* (Supreme Court of the US, 1954) 1954 A.M.C. 837, 858 *per* Justice Black.

⁵³ *Gauci, Limitation*, p. 66. See also *Eyer*, 389-390.

⁵⁴ *Røsæg*, 295.

It is also asserted that limitation of liability is not necessary anymore since it is a system which was created when the means of corporate law were still unknown. Today, the same result as the limitation of liability can be achieved through limited liability corporations⁵⁵. Moreover, carriage by air, sea, rail and road are classified by some as public services. Accordingly, it has been said that a public service needs to serve the interests of the public. Thus, a public service provider should not be allowed to limit his liability if he does not perform the service in question properly or at all⁵⁶.

Not surprisingly, the arguments against the limitation of liability were objected to as well. It has been asserted that limitation of liability provides support not only to shipowners: it is the limitation of liability system which allows shipowners to have larger fleets, thus increasing the need for a larger workforce not only on ships, but also in the industries providing services to shipping, such as insurance. Hence, the limited liability system is not only advantageous to a commercial minority but also to the community at large⁵⁷. Asserting that the limitation of liability serves in the advantage of the community at large is, clearly, too far reaching.

b) Joint adventure

Another idea lying behind the limitation of liability is that carriage was a joint adventure. Initially, this idea was born in maritime carriage as concerns the carriage of cargo. By sending his ship to the sea, the shipowner was risking his valuable asset, and by sending his cargo on board that ship, the cargo-owner was risking his cargo. They were, so to speak, “participants in a common adventure”⁵⁸. If the ship reached her destination, this provided a common benefit for both parties; however, if the ship, for one reason or another, was not able to arrive at the port of discharge, the risk was placed solely on the shipowner which created an unreasonable burden on the shipowner. Thus, by means of limitation of liability, risk was distributed between all parties to the contract of carriage. This concept has its roots in the general average idea⁵⁹.

It is very doubtful whether carriage by any means of transport can be seen as an adventure today as it was hundreds of years ago. The idea of joint adventure has lost its justification from an economic point of view as well. When there was no means of insurance, the risk must have been shared between different parties to a maritime adventure, which serves as a micro economic solution. However, today,

⁵⁵ *Puttfarken*, Rn. 873; *Chen*, *Limitation*, p. xv; *Killingbeck*, 13; *Eyer*, 372; *Billah*, 312 *et seq.* For the counterview see *Staring*, 328-330.

⁵⁶ *Georgiades*, pp. 47-48.

⁵⁷ *Mandaraka-Sheppard*, p. 864; *Seward*, pp. 166-167. Similarly *Schobel*, pp. 8-9.

⁵⁸ *Mustill*, 492; *Grönfors*, 696.

⁵⁹ *Mustill*, 492; *Killingbeck*, 5.

by means of insurance, any risk can be spread on a macro economic scale⁶⁰ which renders the risk allocation on a micro economic scale unnecessary⁶¹.

However, the joint adventure idea still stands behind the compensation regime set for the carriage of oil by sea. By virtue of relevant international conventions⁶², damage and loss is compensated by two industries, namely the shipping industry and the oil industry. A similar scheme has been drawn for the carriage of dangerous goods by sea by virtue of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996; however, that Convention has not entered into force yet.

c) High value cargo

In ancient times, it was only sailing ships which carried the goods, and, except for relatively rare situations, goods carried on board were not of high financial value. Together with industrialization and parallel developments in the shipping industry, a large variety of goods of increasing size started to be carried on board ships. Most of those goods were generally delivered to the carrier in packed form. Even if they were not, it was not possible for the carrier to be familiar with each and every good and their exact financial value⁶³.

Against the danger of being held liable for amounts they could not financially support⁶⁴, carriers sought protection in contractual clauses, although subsequently the clauses served as protection against more than just liability for highly valuable cargo. Nevertheless, one of the basic reasons behind the limitation of carriers' liability in the carriage by sea was the protection against liability for goods of excessively high value⁶⁵.

Although the reason is explained in relation to carriage by sea, it is also valid for other means of transportation. Additionally, when carriage by containers is taken into account, it is not wrong to say that the logic behind this reasoning remains actual as it relates to the limitation of liability. Nonetheless, it is not the function and responsibility of private law to protect certain parties in a market against liability for high amounts. Every diligent businessman should agree only

⁶⁰ See Richter-Hannes, *Vereinheitlichung*, pp. 96-99; Rodopoulos, pp. 35-42.

⁶¹ Lopuski, 182; Haddon-Cave, p. 242. For the counterview see Makins, 656-657 (The author defends that the joint adventure motive is still valid, since maritime casualties with burdensome economic consequences still occur; and, therefore, there is still need for the risk allocation based on the joint adventure criterion.).

⁶² International Convention on Civil Liability for Oil Pollution Damage, 1992, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, and the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.

⁶³ Herber, *Überblick*, 94-95.

⁶⁴ Mustill, 492.

⁶⁵ Herber, *Überblick*, 95; Girvin, para. 29.02; International Law Association, Report of the Thirtieth Conference (held at The Hague between 30th August – 3rd September 1921), V. II: Proceedings of the Maritime Law Committee, London 1922, pp. 178 *et seqq.* See also Diplock, 529; Lannan, 903 *et seq.*



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