

When Conventions Collide: Conflict of Laws and Maritime Limitation of Liability

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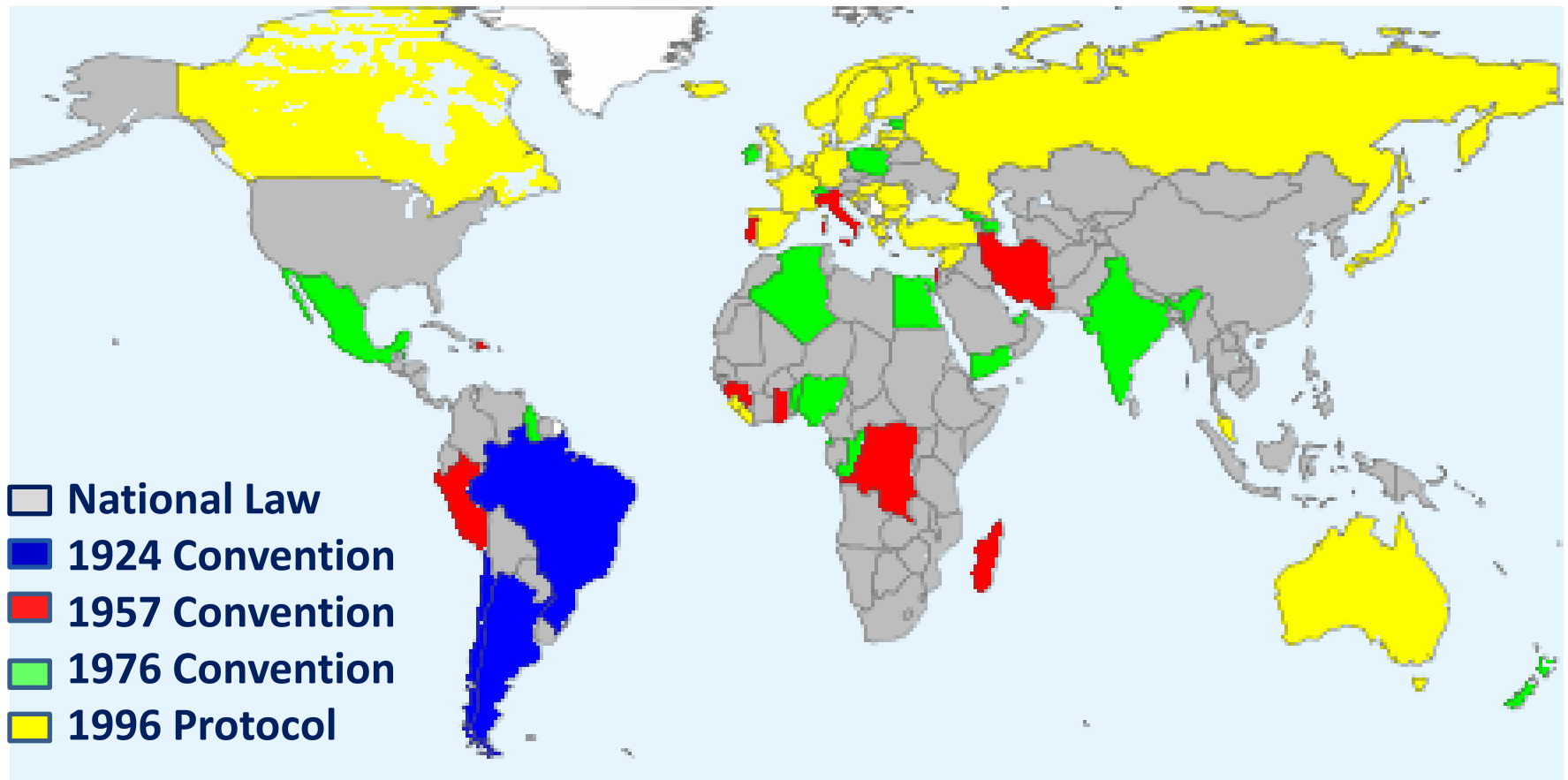
“[I]t is very ill done of the Roman Laws, to make every Man of the Ship become Responsible for whatever the Master does. ... Insomuch that in Holland, where Merchandize has of late mightily flourished, this Roman Law, neither formerly, nor now, is of any Force. **Nay, on the contrary it is order’d, that the whole Company in general shall be answerable no farther, than for the Value of the Ship, and of the Goods that are in it.**”

(2.11.13, *De Jure Belli ac Pacis*, Morrice (trans), London, 1715)

Types of limitation regime

- **Domestic limitation statutes** (eg USA, South Africa).
- **International Conventions:**
 - International Convention for the Unification of Certain Rules relating to the Limitation of Liability of the Owners of Sea-going Vessels (**Brussels, 1924**).
 - International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships (**Brussels, 1957**).
 - Convention on Limitation of Liability for Maritime Claims (**London, 1976**).
 - Protocol to amend the Convention on Limitation of Liability for Maritime Claims 1976 (**London, 1996**).

Spread of limitation regimes



Basic types of limitation regime

- **1924 and 1957 Conventions:**
Limitation calculated on gross tonnage. Lower limitation thresholds but much easier to break limitation – onus on shipowner.
- **1976 Convention and 1996 Protocol:**
Limitation calculated on gross tonnage. Higher limitation thresholds but virtually “unbreakable” – stiff onus on claimant.
- **US Code 46 § 183:**
Limitation calculated on total value of vessel after incident.

Anglo-Common Law: Characterisation of limitation issues

1. Underlying liability claim

Substantive issue to be dealt with in terms of the lex causae (governing law) > conflicts rules on maritime torts, with potential contract conflicts overlay in eg carriage and seafarer cases.

2. Right to limit liability

3. Constitution and distribution of limitation fund

Separate procedural issue or integral to determination of underlying substantive rights and liabilities? Lex fori or lex causae?

Anglo-Common Law: Proceduralism triumphant?

- **The right to invoke limitation: Art 10.3 of the 1976 Convention:**

“Questions of procedure ... shall be decided in accordance with the national law of the State Party in which action is brought.”

- **Constitution and distribution of fund: Art 14 of the 1976 Convention:**

“Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted.”

Anglo-Common Law: Proceduralism triumphant?

English courts: **BOTH limitation AND fund issues ARE procedural > governed by the internal lex fori:**

“The effect of the Convention ... is not to qualify the substantive right of the claimant against the shipowner but to limit the extent to which that right can be enforced against the limitation fund.”

Caltex Singapore Pte Ltd v BP Shipping Ltd [1996] 1 LI Rep 286; *The Happy Fellow* [1997] CLC 1391; *The Western Regent* [2005] 2 Lloyd's Rep 359 (EWCA).

Anglo-Common Law: Proceduralism triumphant?

Obiter doubts expressed in *Strong Wise Ltd v Esso Australia Resources Pty Ltd* 2010 FCA 240:

“The right to make a claim on the fund may be a matter of substantive, not procedural, law. ... [T]he procedural law of the place of the fund could not be used to frustrate claimants’ substantive legal rights to recover in the place of the occurrence.”

See also *The New World* [1998] INSC 230 (Supreme Court of India).

Anglo-Common Law: Proceduralism triumphant?

Effect of lex fori approach:

- Forum shopping and multiplication of proceedings.
- Proliferation of jurisdictional challenges and forum non conveniens analyses.
- Potential disjunct between underlying claim and limitation proceedings.
- Dépeçage of underlying substantive liability, limitation of liability, and fund issues.
- Complexity, time and cost.

Anglo-Common Law: Jurisdiction – underlying claim

- Jurisdiction can be established either by claimant's action in rem or in personam, or by shipowner's submission to the jurisdiction.
- Effect of exclusive foreign jurisdiction or arbitration clauses on the underlying claim/
exploitation by shipowner:
The ICL Vikraman [2004] 1 All ER (Comm) 246.

Anglo-Common Law: Jurisdiction – action to limit liability

Action to limit liability:

- “Free-standing” right of shipowner, not linked to the underlying liability claim, constitution of a limitation fund or (perhaps) admission of substantive liability on the underlying claim: *Vessel SA v SP Ships (UK) Ltd* [2005] 2 All ER (Comm) 47; *The BOS 400*; *Caltex v BP*.
- Shipowner can pre-emptively secure its limitation forum by submitting to the jurisdiction.

Anglo-Common Law: Jurisdiction – fund issues

Constitution of fund:

- “Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation” (Art 11, 1976 Convention)
 - What does “legal proceedings” mean?
 - Instituted by whom?

Anglo-Common Law: Jurisdiction – fund issues

- Fund need not be constituted in the jurisdiction in which the underlying claim is brought, or where the application is made to limit. Also a “free-standing” right of the shipowner.
- Risks/complications involved in tactical jurisdiction splitting when constituting a fund:
 - Release of vessels/security.
 - Recognition/enforcement of foreign limitation decree in fund jurisdiction.

Anglo-Common Law: Jurisdiction – forum non conveniens

Forum non conveniens in limitation proceedings:

- **Earlier approach: “British is best”**
 - *The Vishva Abha* [1990] 2 LI Rep 312.
 - *Caltex Singapore Pte Ltd v BP Shipping Ltd*.
 - *The Kapitan Shvetsov* [1997] HKCU 908 (majority HKCA).
 - *The BOS 400* litigation.

Anglo-Common Law: Jurisdiction – forum non conveniens

Forum non conveniens in limitation proceedings:

- **Current approach: “abstract justice”**
 - *Herceg Novi v Ming Galaxy* [1998] 2 Lloyd’s Rep 454 (EWCA).
 - *The Western Regent* (Clarke LJ recants).
 - *The Peng Yan* CACV 269-270/2008 (HKCA glosses over *The Kapitan Shvetsov*).

Anglo-Common Law: Jurisdiction – anti-suit injunctions

Anti-suit injunctions in limitation proceedings:

- To be used sparingly: *The Western Regent*.

“The purpose of an injunction is not to ensure that an English [limitation] judgment is recognised by a friendly foreign state but to **prevent unconscionable conduct**. ... [I]t is especially necessary to have regard to matters of international comity and to be very cautious about granting an anti-suit injunction in support of the English judgment. ... **There is nothing exceptional in the facts of this case to suggest that those arguments cannot properly be left to Judge Kent [in Texas].**”

Anglo-Common Law: Jurisdiction – anti-suit injunctions

An aside: the perils of international comity



19/06/2009 WASHINGTON — The House on Friday impeached a federal judge imprisoned for lying about sexual assaults of two women in the first such vote since impeaching former President Bill Clinton a decade ago. **The impeachment of U.S. District Judge Samuel Kent of Texas sets up a trial in the Senate. Kent is the first federal judge impeached in 20 years.**

The House approved four articles of impeachment against Kent accusing him of sexually assaulting two female employees and lying to judicial investigators and Justice Department officials. All four articles passed unanimously.

Anglo-Common Law: Jurisdiction – anti-suit injunctions

Anti-suit injunctions in limitation proceedings:

- Procedural characterisation and dépeçage of issues means that a finding of unconscionability is unlikely unless there has been a clear abuse of process: see eg *The Ever Glory* [2004] 2 SLR 457:

“[W]hilst the defendants arrested *Ever Reach* in Belgium as of right, their **conduct was ... an invasion or attack on the plaintiffs’ rights** with the consequence that the plaintiffs were **vexed and oppressed** by the defendants’ conduct thereby creating the equity and justifying the grant of the injunction.”

US Law: A retreat from proceduralism?

- Initial characterisation of limitation issues as **procedural**: *The Titanic* 233 US 718 (1914).
- Later **qualified** by the US Supreme Court: if 1) the underlying liability claim is governed by foreign lex causae AND 2) lex causae regards limitation as substantive > foreign limitation regime applies; lex fori relegated to “procedural machinery” issues: *The Norwalk Victory* 336 US 386 (1949).

US Law: A retreat from proceduralism?

- **Subsequent US cases are, predictably, a mixed bag:**
 - *The Yarmouth Castle* 266 F Supp 517 (SDFla 1967) – Panamanian limitation law is substantive > applied instead of US limitation statute.
 - *The Steelton* 631 F 2d 441 (CA 6th Circ 1980) – Canadian law sees limitation as procedural > US limitation applied.
 - *The Cimadevilla* 590 F Supp 241 (SDNY, 1984) – the 1957 Convention, as applied in Spain, is procedural > US limitation applied.

Conclusion:

Paths out of the conflicts quagmire?

- **Greater integration with underlying liability claim:** procedural characterisation of limitation proceedings is unsustainable.
- **Maritime torts conflicts rules** in need of reform.
- Does forum non conveniens provide a sufficient jurisdictional discipline on the **shipowner's right to constitute a fund?**
- **Conflicts minimisation devices** should be included in future Protocols to the 1976 Convention.