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at the University of Hamburg

Duygu Damar

# Wilful Misconduct

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*Edited by*

Duygu Damar

# Wilful Misconduct in International Transport Law

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*To my family*

# Preface

For the preparatory work on the new Turkish Commercial Code of 2011, the question of how to translate the common law legal term "wilful misconduct" into Turkish should have been clarified. Dr. *iur*. F. Kerim Atamer, who was the member of the Commission in charge of the preparation of the Draft of the Code, attracted my attention to the problem, thus providing the starting point of this work. Upon having been accepted as a scholar at the International Max Planck Research School for Maritime Affairs (IMPRS), I conducted this study under the supervision of Prof. Dr. Dr. *h.c.* Jürgen Basedow, LL.M. (Harvard), Director of the Max Planck Institute for Comparative and International Private Law. I am most grateful for his support, encouragement and detailed advice, without which this work would not have been completed. I would also like to thank Prof. Dr. Ulrich Magnus, Director of the Seminar of Foreign and Private International Law of the Faculty of Law at the University of Hamburg and Judge at the Hanseatic Court of Appeal, for the timely submission of the second opinion on my thesis. I am also thankful to Prof. Dr. Dr. *h.c.* Peter Ehlers, former Director of the Federal Maritime and Hydrographic Agency of Germany, and to Prof. Dr. Rainer Lagoni, Managing Director of the Institute of Maritime Law and the Law of the Sea at the University of Hamburg, for their informative seminars on the law of the sea which helped me foster a wider view and a better understanding of how maritime law and the law of the sea interlink.

I wish to express my particular gratitude to two individuals. Firstly, I am grateful to Dr. *iur*. F. Kerim Atamer, Director of the Dr. Nüsret-Semahat Arsel Research Center for International Business Law and Associate Professor for Maritime, Insurance and Transport Law at the Koc University in Istanbul, who has always fully supported and encouraged me in my career, especially in becoming a scholar at the IMPRS, from whom I have learned a great deal and, who invested much time and effort into my personal development as a research fellow in maritime, insurance and transport law. Secondly, I am grateful to Dr. *iur*. Yeşim M. Atamer, Associate Professor for Civil Law and Comparative Civil Law at the Istanbul Bilgi University, for her support and encouragement in general and specifically as regards my application to the IMPRS.

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I should not forget to thank all my close friends for supporting and encouraging me. However, I am above all deeply grateful to my family: to my father Dr. *med.* Hüseyin Damar, my mother Ayhan Damar, my sister Sevgi Damar and my brother H. Selim Damar, for their endless love, support, encouragement and understanding, without which no single achievement in my life would have been possible.

Duygu Damar
Hamburg, May 2011

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# Abbreviations and Citations

| | |
|---|---|
| A.C. | Appeal Cases |
| AcP | Archiv für die civilistische Praxis |
| AG | Amtsgericht |
| AL | Air Law |
| Air & SL | Air & Space Law |
| Air LR | Air Law Review |
| AJIL | American Journal of International Law |
| ALR | Archiv für Luftrecht |
| A.M.C. | American Maritime Cases |
| Am. J. Comp. L. | American Journal of Comparative Law |
| Anm. | Anmerkung |
| Annals Air & Space | Annals of Air and Space Law |
| Art. | Article / Artikel |
| Atl. 2d | Atlantic Reporter 2nd |
| Aufl. | Auflage |
| AS | Amtliche Sammlung der Bundesgesetze und Verordnungen |
| Batider | Banka ve Ticaret Hukuku Dergisi (Banking and Commercial Law Journal) |
| Bd. | Band |
| BGB | Bürgerliches Gesetzbuch |
| BGBl. | Bundesgesetzblatt |
| BGE | Entscheidungen des Schweizerischen Bundesgerichts |
| BGH | Bundesgerichtshof |
| BGHZ | Entscheidungen des Bundesgerichthofes in Zivilsachen |
| BIMCO | Baltic and International Maritime Council |
| BK (1926) | 1926 tarihli Borçlar Kanunu (Turkish Code of Obligations of 1926) |
| BK (2011) | 2011 tarihli Borçlar Kanunu (Turkish Code of Obligations of 2011) |
| Bus. LR | Business Law Review |
| c. | cilt |
| CA | Court of Appeal(s) |
| Ch. | Chapter |
| CITEJA | Comité international technique d'experts juridiques aériens |

| | |
|---|---|
| C.L.R. | Commonwealth Law Reports |
| CMI | Comité Maritime International |
| Com. Cas. | Commercial Cases |
| DC | District Court |
| DenizHD | Deniz Hukuku Dergisi (Maritime Law Journal) |
| DePaul Bus. L. J. | DePaul Business Law Journal |
| Dir. Mar. | Il Diritto Marittimo |
| Diss. | Dissertation |
| DLR | Dominion Law Reports |
| DVIS | Deutscher Verein für Internationales Seerecht |
| Ed. | Edition |
| EJCCL | European Journal of Commercial Contract Law |
| E.R. | The English Reports |
| ETL | European Transport Law |
| EWHC | High Court of England and Wales |
| Exch. | Exchequer Reports |
| F.2d | Federal Reporter 2nd |
| F.3d | Federal Reporter 3rd |
| Fed. Cas. | Federal Cases |
| fn. | footnote |
| FCR | Federal Court Reports (1982 - …) (Australia) |
| F.R.D. | Federal Rules Decisions |
| F.Supp. | Federal Supplement |
| F.Supp.2d | Federal Supplement, Second Series |
| Hansa | Zeitschrift für Schiffahrt, Schiffbau, Häfen |
| HansOLG | Hanseatisches Oberlandesgericht |
| HmbSeeRep | Hamburger Seerechts-Report |
| HmbSchRZ | Hamburger Zeitschrift für Schifffahrtsrecht |
| HD | Hukuk Dairesi (Civil Law Division) |
| HGB | Handelsgesetzbuch |
| HGK | Hukuk Genel Kurulu (Turkish Court of Cassation, Appellate Division for Civil Law Matters) |
| HL | House of Lords |
| Hou. L. R. | Houston Law Review |
| Hrsg. | Herausgeber |
| ICLQ | International and Comparative Law Quarterly |
| IJIL | International Journal of Insurance Law |
| IJOSL | International Journal of Shipping Law |
| Int. I.L.R. | International Insurance Law Review |
| Int.M.L. | International Maritime Law |
| IPRax | Praxis des internationalen Privat- und Verfahrensrechts |
| İÜHFM | İstanbul Üniversitesi Hukuk Fakültesi Mecmuası (Istanbul University Faculty of Law Journal) |
| J. Air L. | Journal of Air Law |
| J. Air L. & Com. | Journal of Air Law and Commerce |

| | |
|---|---|
| J.B.L. | Journal of Business Law |
| J. Mar. L. & Com. | Journal of Maritime Law and Commerce |
| JIML | Journal of International Maritime Law |
| JPIL | Journal of Personal Injury Litigation |
| JuS | Juristische Schulung |
| JZ | Juristenzeitung |
| K.B. | Law Reports, King's Bench Division |
| KBD | King's Bench Division |
| LG | Landgericht |
| L.J. (N.S.) | Law Journal Reports, New Series |
| L.J. (Q.B.) | Law Journal Reports (Queen's Bench Division) |
| L.T. | Law Times Reports |
| Ll. L. Rep. | Lloyd's List Law Reports (1919-1950) |
| Lloyd's Rep. | Lloyd's Law Reports |
| LMCLQ | Lloyd's Maritime and Commercial Law Quarterly |
| Mar. Policy | Marine Policy |
| McGill L. J. | McGill Law Journal |
| MDR | Monatsschrift für deutsches Recht |
| MIA | Marine Insurance Act |
| MK | Türk Medeni Kanunu (Turkish Civil Code) |
| MLAANZ Journal | Maritime Law Association of Australia and New Zealand Journal |
| MLR | Modern Law Review |
| MSA | Merchant Shipping Act |
| NLJ | New Law Journal |
| NJW | Neue Juristische Wochenschrift |
| NJW-RR | NJW-Rechtsprechungs-Report Zivilrecht |
| NSWSC | Supreme Court of New South Wales Decisions |
| N.Y.S.2d | New York Supplement 2nd |
| NYU L. Rev. | New York University Law Review |
| N.Y.U.L.Q. Rev. | New York University Law Quarterly Review |
| OGH | Oberster Gerichtshof der Republik Österreich |
| OLG | Oberlandesgericht |
| Ox. J. Leg. Stud. | Oxford Journal of Legal Studies |
| para. | paragraph |
| PDAD | Probate, Divorce and Admiralty Division |
| Pol. Y.B. Int'l L. | Polish Yearbook of International Law |
| Q.B.D. | Law Reports, Queen's Bench Division |
| QBD | Queen's Bench Division |
| RabelsZ | Rabels Zeitschrift |
| RGBl. | Reichsgesetzblatt |
| RIW | Recht der internationalen Wirtschaft |
| Rn. | Randnummer |
| RRa | ReiseRecht aktuell |
| S.C. | Session Cases |
| S. Cal. L. Rev. | Southern California Law Review |

| | |
|---|---|
| S.Ct. | Supreme Court Reporter |
| SCULR | Southern Cross University Law Review |
| SDR | Special Drawing Right |
| So.2d | Southern Reporter, Second Series |
| SOLAS | International Convention for the Safety of life at Sea |
| Stan. L. Rev. | Stanford Law Review |
| Stat. | United States Statutes at Large |
| Tex. Int. L.J. | Texas International Law Journal |
| TranspR | Transportrecht |
| TTK (1956) | 1956 tarihli Türk Ticaret Kanunu (Turkish Commercial Code of 1956) |
| TTK (2011) | 2011 tarihli Türk Ticaret Kanunu (Turkish Commercial Code of 2011) |
| Tul. L. Rev. | Tulane Law Review |
| Tul. Mar. L. J. | Tulane Maritime Law Journal |
| UK | United Kingdom |
| ULR | Uniform Law Review |
| UNCITRAL | United Nations Commission on International Trade Law |
| US | United States |
| U.S. | United States Reports |
| U.S.F. Mar. L.J. | University of San Francisco Maritime Law Journal |
| USAvR | United States Aviation Reports |
| US&CAvR | United States and Canadian Aviation Reports |
| V. | Volume |
| Va. L. Rev. | Virginia Law Review |
| Vill. L. Rev. | Villanova Law Review |
| VersR | Versicherungsrecht |
| VVG | Versicherungsvertragsgesetz |
| WL | Westlaw Citations |
| W.L.R. | Weekly Law Reports |
| Yale LJ | Yale Law Journal |
| YD | Yargıtay Dergisi (Journal of Turkish Jurisprudence) |
| YKD | Yargıtay Kararları Dergisi (Journal of Turkish Court of Cassation Jurisprudence) |
| ZEuP | Zeitschrift für europäisches Privatrecht |
| ZHR | Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht |
| ZIEV | Zeitschrift für den internationalen Eisenbahnverkehr (Bulletin des transports internationaux par chemins de fer) |
| ZLW | Zeitschrift für Luft- und Weltraumrecht |
| ZStW | Zeitschrift für die gesamte Strafrechtwissenschaft |

# § 1 Introduction

A person liable is not entitled to limit his liability, "if it is proved that the damage resulted from an act or omission of [the person liable][1] done with intent to cause damage or recklessly and with knowledge that damage would probably result". This provision, though sometimes with small but important differences, is an invariable and indispensable part of almost every international regime with regard to the carriage of goods and passengers. It adopts the principle that liability cannot be limited in case of a certain type of faulty conduct, which is known as wilful misconduct.

Breaking the liability limits in case of wilful misconduct is almost as old as the concept of limitation of liability. Limitation of liability has been the most important privilege adopted for carriers and shipowners. The roots of, and policy behind, the limitation of liability can be found in its historical development, which will be explained briefly in chapter 2 of this work. It is essential to understand the policy behind the limitation of liability which has been harshly criticized in recent years and to understand why limitation of liability cannot be sustained in cases of wilful misconduct.

Naturally, under modern transport law regimes, wilful misconduct is not the only situation whereby the carrier or shipowner loses his right to limit. For example, Art. 4 (4) of the Warsaw Convention stipulates that an air carrier is not entitled to limit his liability if he does not issue a luggage ticket for every piece of luggage he accepts. Similarly, in carriage by sea, a carrier cannot avail himself of the provisions which limit his liability if he has issued an *ad valorem* bill of lading (Art. IV (5)(a) of the Hague/Visby Rules). There are also some doctrines where unlimited liability has been based on a substantial breach of the carriage contract. Nevertheless, this study will concentrate only on wilful misconduct, since examination of other provisions and doctrines where carrier cannot limit his liability would be beyond the scope of this work. However, where necessary, those provisions and doctrines will be mentioned briefly.

Wilful misconduct is a term of common law. The first appearance of the degree of fault with regard to admiralty law can be traced back to the UK's Merchant Shipping Act of 1894, but the first literal use of the term with regard to transport law was in the carriage by rail cases, again in the UK. The first act which mentions the term wilful misconduct literally is the UK's Marine Insurance Act of 1905. Chapter 3 is devoted to this historical development and the meaning of the term in English law. The explanation for causation and procedural law issues will be explored within the same chapter since they only involve the explanation of English law.

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[1] Due to the complex legal relations in transport law, the variety of persons legally responsible can range from servants and agents to carriers or shipowners. Depending on the international regime applicable to legal dispute, a carrier might also be vicariously liable for his servants' and agents' conduct, which gives rise to unlimited liability.

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The first adoption of the term wilful misconduct in an international convention was with the Warsaw Convention regarding carriage of goods and passengers by air in 1929. The Convention has been adopted officially in the French language (Art. 36), and in order to break the air carrier's liability, the carrier should have been guilty of *dol*, or an equivalent degree of fault (Art. 25). The term wilful misconduct is used in the provision's English translation. When the Convention was amended by the Hague Protocol in 1955, the provision regarding breaking the liability limits was also amended; and it was decided to define the degree of fault which gives rise to unlimited liability, instead of using national legal terms to refer to certain degrees of fault. Thereby, the definition adopted by almost every transport law convention came into existence.

In this study, chapter 4 is devoted to a detailed examination of the historical development of the definition adopted by the Hague Protocol and the examination of the requisites of the degree of fault adopted by that definition. Chapter 5 will provide a detailed study of unlimited liability within the international maritime conventions, which have invariably adopted the unlimited liability principle so long as the carrier or shipowner is personally at fault. Due to the fact that, today, almost every carrier or shipowner is a corporation, attribution of grave fault to a corporation and the effect of the ISM Code on the attribution of fault will also be examined in detail within the same chapter.

The situation in international regimes with regard to carriage by road, rail, inland waterways and multimodal transport will be discussed briefly in chapter 6. Thereafter, causation, together with the burden and standard of proof issues under relevant international conventions will be examined in chapter 7.

In discussing the problems which have arisen under the international transport law regimes, it is of great importance to find the correct meaning of legal provisions, which can be done by using the rules of interpretation. According to the Vienna Convention on the Law of Treaties 1969, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Art. 31). Nevertheless, preparatory work on the treaty and the circumstances of its conclusion may be used as supplementary means of interpretation in order to confirm the result gathered from the general rule of interpretation, or to determine exactly the meaning of the provision, if its meaning is ambiguous (Art. 32). Taking into consideration these universally accepted rules of interpretation, the *trevaux preparatoires* of the relevant international conventions constitute an important part of this study.

Most of the issues regarding wilful misconduct have been resolved in the course of the development of international transport law. For instance, it was previously disputed whether the term "the carrier" under the Hague/Visby Rules Art. IV (5)(e) refers only to the carrier himself, or includes servants and agents of the carrier as well. Art. 4 of the 1976 London Convention and Art. 61 (1) of the Rotterdam Rules put an end to the debate by referring explicitly to a "personal act or omission".

Nonetheless, there is still an unresolved issue with regard to wilful misconduct: To which degree of fault does the term wilful misconduct refer under civil law?

There are different answers to this question, which generally refer either to *dolus eventualis* or advertent gross negligence. Chapter 8 will try to ascertain the equivalent degree of fault to wilful misconduct under the continental law system, by defining the degrees of fault and comparing the prerequisites of wilful misconduct with prerequisites of different degrees of fault under civil law.

However, difficulty emerges with such a comparison as the degrees of fault have not been defined and studied in a detailed manner in private law, since it has been unnecessary. On the other hand, degrees of fault have been examined in a detailed manner under criminal law, when criminal liability is at stake. Thus, in trying to ascertain the equivalent degree of fault to wilful misconduct under civil law, the criminal law degrees of fault will also be taken into consideration.

The last point that is worth emphasizing is the spelling of the term "wilful". The term in its modern usage is "wilful"; however it used to be spelled also as "willful". In this work, the modern usage of the term is preferred. In direct quotations, however, the usage in the quoted text has not been changed.

# 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 it[1]. 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 privilege[3], is not a matter of justice, but merely a matter of public policy[4]. 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.

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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.

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## 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 assessed[6]. 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 tort[7]. 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 amount[8]. 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 all[9].

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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 conditions[10].

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 carriage[11], 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 shipowners pertaining to contractual obligations and tort under Roman law, there is no clear principle as to the limitation of this liability[12]. 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 loss[13]. 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 liability[14].

---

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 venture[15]. This type of contract also developed close cooperation between investors and mariners; and the *societé en commandite*, a type of limited partnership, finds its roots in this cooperation[16].

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 voyage[17] and in certain cases orders respective claims to be made against this common fund[18]. Moreover, the Table has provisions regarding the limitation of part-owners' liability[19].

Similarly, the *Consolat de Mar* of Barcelona[20] had express provisions on limitation. Pursuant to these rules, shipowners' liability arising out of cargo damage or

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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 shipping[21].

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 otherwise[22]. The incorporation of the French Ordinance of 1681 – which itself has been a model for regulations in countries such as the Netherlands, Spain and Prussia[23] – into the *Code Napoléon* (1807) played a vital role in spreading the limitation of liability throughout Europe and Latin America[24]. Finally, limitation of liability for maritime claims reached England in the eighteenth century[25] and the USA in the nineteenth century[26].

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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 seqq.*; *Kierr*, 641-643; *Chen, Limitation*, p. xiv; *Buglass*, 1365-1367; *Jefferies*, 277 *et seqq.*; *Rein*, 1263-1264; *Sprague*, 577 *et seqq.*; 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 liability[27]. 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 amount[28].

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 navigation[29].

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, 1734[30]. 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 sea[31].

After another case[32], 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 shipowner[33]. 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 cases[34]. Finally, by virtue of the Merchant Ship-

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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 goods[35].

## *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 institution[36]. 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-

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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.