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Analysis on the Civil Liability of Third-Party Ship Management

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Abstract: Third-party ship management is the management of ships by professional companies independent of shipowners and charterers. It is the result of the mature development of the international shipping industry and the refinement of the division of labor in the industry. Since its emergence in the 1950s, it has played an increasingly important role in improving the flexibility of ship operations, reducing ship operating costs, and improving the level of professional services. In China, it has only been about 21 years since the first ship management company was born, and the whole industry is still in the process of exploration. The relevant legal provisions are not sufficiently clear. Theoretical studies on ship managers have also focused on management strategies and less on civil legal liability. To better understand the legal liability of ship managers, this paper identifies the concept and characteristics of ship managers based on the fundamental theories of civil law. The civil liability of ship managers is discussed in terms of breach of contract, tort, and contract negligence, taking shipping practice and standard agreements into account. According to the different legal provisions and judicial practice, it is proved that the liability of ship managers is becoming increasingly strict. They must be partially responsible for the safe and proper operation of the ship, and the legal status is not only as of the shipowner's agent. The paper also analyses the situations where the ship manager may not benefit from the limitation of liability and suggests that this should be considered in the management agreement or legal regime.

Keywords: Ship Management, Civil Liability, Breach of Contract, Tort

1. Introduction

The third-party ship management company is a new shipping service enterprise developed in recent decades. It is playing an increasingly important role in improving the flexibility of ship operation, reducing ship operating costs, and improving professional ship management services.

In contrast to the mature development in practice, the civil liability of ship managers is less clearly defined in law. At present, the relevant international conventions and industry agreements mainly regulate the ship management industry in terms of technical and management standards. Still, they do not give a clear status to ship managers from the legal perspective. The theoretical studies on ship managers generally focus on management strategies but less on their civil legal liability.

As an inclusive concept, ship management includes management services for various types of ships in all aspects of the operation. According to the different management subjects, ship management can be divided into three types: the shipowner manages the ship itself, which is called first-party ship management; the charterer manages the ship, which is called second-party ship management; and the independent professional company manages the ship, which is the third-party ship management to be discussed in this paper.

Different laws and doctrines have different definitions for the concept of third-party ship management, but the following characteristics are generally emphasized: firstly, professional,

which is the fundamental characteristic of the ship management industry; secondly, contractual, the specific content of ship management, which is the parties mutually negotiate; and finally, independent, the ship manager does not enjoy the ownership of the ship. Therefore, this paper defines a third-party ship manager as an independent company that provides professional ship management services for the shipowner, ship charterer, or ship operator according to the contractual agreement and does not enjoy the ship's ownership. [1]

2. Liability of the Ship Manager for Breach of Contract

Liability for breach of contract refers to the civil liability of the other party to continue to perform, take remedial measures or compensate for damages when one fails to perform its contract obligations or its performance does not conform to the contract agreement.

Liability for breach of contract has the following characteristics: (1) It is the responsibility arising from the breach of contract obligations by the parties to the contract; (2) It is relative and only occur between specific parties, the third party outside the contract relationship is not liable for breach of contract; (3) It is compensatory; (4) It is agreeable. According to the principle of voluntary contract, the parties can agree on the manner of liability for breach of contract, liquidated damages, etc. However, it does not negate the mandatory nature of liability for breach of contract, as such an agreement must be within the law.

2.1. Contract Relationship Between the Ship Manager and the Principal

A ship manager is an independent company that provides professional ship management services to the shipowner, ship charterer, or ship operator according to the agreement of the ship management agreement. The ship management agreement establishes a civil legal relationship between the manager and the principal, which specifies the rights and obligations of the ship manager and is the legal basis for its ship management.

A commission contract is an agreement between two parties whereby one party agrees to delegate matters to another, and the other agrees to do so for them. A ship management agreement fits this concept and is, therefore, a contract of commission. The principal may delegate one or more ship management matters to the ship manager or delegate all ship management matters to the ship manager in general.

According to the general commission theory, the ship manager has fundamental rights and obligations as the bailee.

(1) The principal shall pay the management fee on time by the commission agreement and prepay the expenses for handling the delegated affairs. The necessary costs prepaid by the ship manager shall be reimbursed by the principal with interest thereon.
(2) Performing obligations strictly by the commission agreement, including completing the commission, complying with the principal's instructions, personally executing the delegated affairs, and providing timely feedback on the delegated matters.
(3) Fulfilling the duty of loyalty, not harming the principal's interests, not taking advantage of the principal's position to gain unduly, etc.
(4) Properly performing financial management, strictly distinguishing the principal's property, managing the income and property obtained in the business, etc.

A ship management agreement is the product of the freedom of contract between the ship manager and principal, and the details may vary according to the requirements of both parties. The primary standard form for ship management agreements is SHIPMAN and CREWMAN, developed by BIMCO (Baltic Shipping Association). It was first developed in 1988 and comprehensively covers all aspects of ship management. The last update was in 2009. Several other standard third-party management agreements have been spawned in recent years, such as LAYUPMAN and SUPERMAN. Work has recently begun on another hybrid of SHIPMAN - a management agreement for autonomous ships - AUTOSHIPMAN.

The ship management agreement is a contract of commission, and the legal relationship between the ship manager and the principal is contractually agreed but subject to the relevant national laws and conventions.

2.2. Contract Relationship Between the Ship Manager and the Third Parties

The relationship between the ship manager and the principal in providing ship management services is relatively clear. In the event of liability for breach of contract, the contract between the parties can determine the attribution of liability. But the relationship between the ship manager and third parties is more complex.

In a commission contract, the ship manager is authorized by the principal to act as an agent. The nature of his agency determines the manager's rights and obligations towards third parties.

Under continental law, if the agent concludes a contract in the principal's name within the scope of the delegated authority. That is the direct agency, and the legal consequences arising are borne directly by the principal. Even beyond the scope of delegation, the legal matters are likewise taken by the principal if ratified. If the agent concludes a contract with a third party in his name for the principal's benefit, it is named indirect agency. The legal relationship between the third party and the principal is indirect. In this situation, the agent is firstly responsible for the legal consequences arising from the act, then transferred to the principal by the agency agreement.

In common law, the agency includes apparent and implied agency. The apparent agency is the equivalent of the direct agency in civil law. An implied agent acts in his name without disclosing he is an agent. The law provides different treatment depending on whether a third party knows and does not know the agency relationship between the agent and the principal.

Suppose the third party is aware of the agency relationship when concluding the contract. The implied agency produces the same legal effects as the apparent agency. The contract concluded between the third party and agent binds the principal and the third party unless conclusive evidence that the agreement binds only the agent and the third party.

Suppose the third party is not aware of the above relationship. In that case, the effect will differ depending on whether the principal exercises the right to intervene or the third party exercises the option right. Specifically, if the agent does not perform his obligations towards the principal for the reason of a third person, the third person shall be disclosed to the principal. The principal may therefore exercise the agent's rights against the third party. Conversely, if the agent does not perform his obligations to the third party for reasons attributable to the principal, the agent shall disclose the principal to the third party. The third party may thus choose the agent or the principal as a counterparty to assert its rights. However, the third party may not change the chosen opposite party once it has been selected.

Due to the different provisions of the two legal systems, whether the ship manager discloses the nominee and engages in civil activities in the name of the nominee directly affects the legal consequences of this act of agency and whether the ship manager must bear contract obligations with third parties. When the ship manager concludes a contract with a third party in the nominee's name, he may be exempted from liability for breach of contract to the third party, regardless of the country of the legal system.

2.3. Liability for Breach of Contract in the Specific Operations

Over the decades, the range of services offered by ship managers has been enriched and refined, and these can generally be divided into technical management, crew management, and business management.

2.3.1. Liability for Breach of Contract in Technology Management

The technical management of ships is one of the essential services provided by ship managers. It includes ship safety and quality management, supply of marine stores, ship maintenance and repair, cost budgeting and control, certificate management, and arrangement of ship insurance. The contract relation between the ship manager and third parties generally arises in the supply of materials, maintenance, and repair of the ship.

The supply of marine stores includes the supply of food, fresh water, fuel, fittings, and other consumables required for the daily operation of the ship. It is an essential part of ship management. In this process, two situations may arise. The ship manager acts as an agent to purchase the stores required for a particular ship from a supplier. In this case, rights and obligations between the ship manager and the supplier are determined based on the agency relationship. As discussed in the previous part, the type of agency of the ship manager will impact its liability and obligations in different legal systems. The second situation is where the ship manager enters a contract with a supplier in his name to procure all the stores required centrally and then distribute them among the ships under its management. The ship manager in this process can be regarded as a broker, which results in a sale and purchase contract relationship between the ship manager and supplier and a commission contract relationship with the shipowner. As these two contract relationships are independent of each other, the ship manager must independently assume obligations and rights by the contract's provisions. In the event of a breach of contract, the parties shall determine the liability by the contract agreement. [2]

When the ship manager arranges the ship repair, under the theory of agency, the ship manager enters a contract in the name of the shipowner's agent. The result of the act is attributed to the principal. The contract is binding on the shipowner within the authority of the ship management agreement. Suppose the ship manager enters a contract with the shipyard in his name. If the shipowner issues a power of attorney, the manager may be exempted from paying for the repairs. Otherwise, the manager cannot rely on the ship management agreement as a defense and is responsible for the management fee payment.

Under the ISM Code, safety and quality management can only be the sole responsibility of one party. Suppose the ship management agreement specifies that the safety and anti-pollution of the ship is the manager's responsibility. In that case, the ship manager must establish, implement, and maintain a safety management system and provide safe practices and a safe working environment for the ship's operation as required by the ISM Code. If the ship's safe operation is affected by the manager's negligence, resulting in loss to the shipowner, the manager is liable for breach of contract.

Similarly, in the management of certificates, arranging insurance, etc., the ship manager must fulfil its obligations by the requirements of the management agreement or be liable for breach of contract and compensation for damage caused to the shipowner.

2.3.2. Liability for Breach of Contract in Crew Management

Crew management is another primary service provided by ship managers, including selecting and employing qualified crew for ship owners, crew certification management, crew training, and arranging ship insurance. [3]

In this service, if the ship manager enters a contract with the crew in his name, forming an employment contract or labor contract relationship, the ship manager is in the position of an employer in this legal relationship and must assume the corresponding legal responsibilities and obligations under the contract. If the ship manager breaches his obligations under the contract or the law, he must be liable for the damage caused to the crew.

2.3.3. Liability for Breach of Contract in Business Management

Business management includes voyage management, chartering operations, ship financing, sale and purchase,

financial management.

When the ship manager is involved in the chartering and cargo shipping, the manager may establish a contractual relationship with the charterer, the time charterer, or with the bill of lading holder through the issuance of the bill of lading. In 1996, in a transportation dispute, the holder of the bill of lading relied on the bill of lading issued by the ship's master with the authority of the ship manager to claim liability for delayed delivery against the ship's owner and the manager. The court held that the ship manager had a contractual relationship with the plaintiff through the bill of lading, which in essence established the carrier's status, and therefore should bear the liability for damages arising from the delay in delivery. [4]

3. Tort Liability of the Ship Manager

Tort liability refers to the responsibility that a person shall bear according to law by infringing upon the person and property of others and causing damage. The tort is essentially a de facto act. Regardless of whose name the ship manager manages the ship, he should be held liable if his actions meet the elements of tort liability.

Torts can be divided into general torts and special torts. The general tort consists of four elements: the act of infringement, the fact of damage, the causal relationship, and fault. Special torts refer to special damages that lack the elements of general torts, such as industrial disasters, environmental pollution, product defects, traffic accidents, work accidents, medical accidents, accidents, etc.

Aggression is a wrongful act committed by the actor that aggravates the civil rights and interests of the victim. The damage fact is the adverse consequences to the person or property of the victim as a result of the aggressive act.

Regarding tort liability for ships, liability for ship collision and pollution are two more common types. Once tort liability is established, the aggrieved party must be liable to the injured party for tort damages. However, the ship itself is a thing and cannot be held responsible in tort, so who is accountable for tort damages?

3.1. Liability for Collision Damage

A ship collision is an accident in which a ship meets the sea or navigable waters connected to the sea, causing damage, which is a typical tort. With the separation of ownership and management of ships, there is still much debate about who should be the subject of liability for ship collisions.

International Convention for the Unification of Certain Rules of Law in Regard to Collisions, 1910 (*Collision Convention 1910*), is the only international convention currently in force concerning civil liability for ship collisions. The vast majority of shipping states are parties. As the action *in rem* is widely used in civil law and common law countries, the *Collision Convention 1910* also reflects this system. China has acceded to the Convention and transposed it into domestic law. The chapter on "Collision of Ships" of the China Maritime Law is based on the content of the Convention. For example, Article 168 provides that "in the event of a collision of ships caused by the fault of one ship, the ship which is at fault shall be liable for damages." In China, however, there is no action *in rem,* and the ship, as a thing, obviously cannot be the subject of liability. The lack of clarity in the law regarding liability has led to a significant controversy as to whether the shipowner or the third-party ship manager is liable in a ship collision.

The 1910 Collision Convention requires that the negligent ship itself be liable for damage caused by the collision. It does not cover the actual actor or interested party of the negligent ship. However, the term "owner" appears several times in the Convention to refer to the subject in actual control of the ship. Article 8 of the Convention states, "A breach of the above provisions does not of itself impose any liability on the owner of a vessel." Like this wording is the *International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957*, which only provides for the limitation of liability of the shipowner and does not include the ship itself. The *Convention on Limitation of Liability for Maritime Claims 1976* also limits the shipowner's liability and the salvor and does not include the ship itself. Therefore, the liability of the negligent ship is the liability of the shipowner, who should ultimately bear the tort liability. [5] However, the term "shipowner" cannot be understood as the ship's owner only because the ship's charterer is often considered to be the shipowner. Hence, the concept of "shipowner" has different extensions. As ship managers are new shipping subjects, most laws and regulations do not include them in "shipowner". Under the situation, can the ship manager be included in the concept of the "shipowner" to bear the responsibility of tort damages?

3.1.1. Vicarious Liability of the Ship Manager

Collision Negligence is the negligence that happens in the ship management or navigation, which is often caused by the crew when the ship is at sea and under the crew's control. According to the principle of fault-based liability and self-responsibility under tort law, the actual tort perpetrator (the crew) should be liable for compensation. In practice, however, it is rare for victims to sue directly against the crew at fault. They generally sue the owner or charterer of the ship, which is a manifestation of vicarious liability.

Vicarious liability is a liability of a vicariously liable person for a tort due to the relationship between himself and the tortfeasor. Employer's liability is a typical form of vicarious liability, which imposes liability on the employer for the consequences of damage to third parties caused by an employee while carrying out employment matters or activities for the employer's benefit. The legal regime of employers' liability has been established, not only in civil law but also in maritime law. For example, section 485 of the *German Commercial Code* provides that "the shipowner must be liable for damage to third parties caused by the negligence of the crew or pilot during the performance of his duties on board the ship. " In addition, Article 690 of the *Japanese Commercial Code*, Article 746 of the *Korean Commercial Code*, the *Greek*

Maritime Private Code, Article 84 of the *Swedish Maritime Law*, etc., all contain similar provisions. Chinese civil law and the Maritime Law do not explicitly provide for "vicarious liability" or "employer's liability", but only in some articles.

In ship management, crew management is one of the ship manager's services to select and employ a qualified crew. If the ship manager enters a contract with the crew in its name to form a contract of employment, then the ship manager is in an employer's position. Under the principle of employment liability, the ship manager is liable for tort damages in place of the negligent crew. In *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*, the court held that under the ship management agreement, the crew employment was the sole responsibility of the ship's manager and that if the manager had a duty to provide a competent crew but failed to do so, it should be held to be liable [6]. The failure to do so should be considered negligent and result in joint liability with the shipowner for cargo damage. The court in *Quinn v. Southgate Nelson Corporation* took the same view. [7]

If the ship manager acts only as a bailee and selects qualified crew for the shipowner, the employment contract is essentially concluded between the crew and the shipowner, then the employer's identity is that of the shipowner and not the manager. Therefore, after the ship collision damage occurs, the employer's liability is borne by the shipowner. If the manager, as a bailee, is at fault within the commission's scope, such as violating the ISM rules and causing the ship collision, it should also bear the responsibility according to the principle of self-responsibility.

However, the situation is different if the CREWMAN form contract is used between the ship manager and the shipowner. In CREWMAN A, the ship manager is a bailee and is not liable for the acts of the crew. In contrast, in CREWMAN B, the employment relationship is between the ship manager and the crew, contrary to the general theory of the employer's liability. However, in common law, the courts do not impose an employer's liability on the ship manager as an employer. The courts likely accept this wording if the contract expressly states that the ship manager is not liable for the crew employed. [8]

3.1.2. Exclusion of Liability of the Ship Manager

Can a ship manager, as a bailee of the shipowner, claim exemption from liability based on the relationship of commission and the fundamental principle of vicarious liability when causing tort damage to a third party?

The ship manager is generally regarded as the bailee of the shipowner, and the ship management agreement is a contract of commission that is the basis for all matters delegated to it, such as agency, brokerage, mediation, etc.

Due to the broad scope of the ship manager's business, the ship management agreement effectively mixes the content of a brokerage contract and an agency contract. It is even considered by some scholars to contain elements of a bespoke contract [9]. When engaging in different management actions, the legal status of the ship manager is accordingly transformed into that of a bailee, a broker, an intermediary, etc. Therefore, the management agreement is not a pure commission contract, and the liability of the ship manager cannot be determined solely based on the general principles of the committed relationship.

In *National Material Trading v. M/V Kaptan Cebi,* Pegasus Denizcilikas A. S. ("Pegasus") was the manager of the vessel "Kaptan Cebi", which was damaged during a voyage in bad weather [10]. The cargo owner (NMT) applied for the ship to be arrested in the destination port and brought proceedings against the owner and manager. The investigation proved that although the voyage was subject to bad weather, it was not an objective circumstance that could not be foreseen, avoided, or overcome. The defendant could not use this as a defense to claim exemption from liability. The ship's manager was negligent in ensuring the seaworthiness of the ship and in managing the cargo. Hence, the defendant had an inescapable responsibility for the damage.

Pegasus argued that it was merely the agent of the ship's owner and had previously disclosed the existence of the principal to the plaintiff, as an apparent agent, should not be independently liable for the cargo damage. But the plaintiff NMT argued that Pegasus, as the ship manager and operator, was at fault for the safe delivery of the cargo and therefore must be held fully liable for its negligent acts, even as an agent.

The court supported the plaintiff, holding that Pegasus, even though an apparent agent, had a duty to ensure the ship was seaworthy and failed to do so, then an independent cause of action was established. The victim could bring a separate action against it, and Pegasus could not claim immunity in its capacity as an agent.

In another ship collision dispute [11], the shipowner and the ship manager were jointly named defendants. The investigation proved that visibility was poor at the time of the accident, but the collision was caused by the failure of both vessels to use all effective means to maintain a regular lookout, to travel at a safe speed, etc., in breach of several rules in *The International Regulation for the preventing Collision at Sea*. The two vessels were at fault for each other, and the defendant's vessel was primarily responsible. The ship manager argued that it was not the vessel's owner and, as a bailee, should not be liable for the plaintiff's claim. However, the court did not accept this defense. It held that the ship manager directly controlled the vessel and exercised the property rights of the ship jointly with the owner. Therefore, the ship manager was ultimately held jointly and severally liable with the owner.

The current case shows that the courts are becoming more stringent in their requirements for ship managers and that requests for exemptions based on a principal-agent relationship are becoming challenging to accept.

Similarly, the principle of vicarious liability cannot be a basis for the ship manager to exclude liability. There are two types of vicarious liability, namely vicarious liability in persons and vicarious liability in rem. The former includes the liability of the State, legal persons in tort, employers, negligence order, and legal representative of an incapable

person with limited civil scope. The latter is a liability for damage to objects, liability for damage to animals, etc. [12]

The employment relationship is the basis of the employer's liability, which is usually determined by an employment contract. The ship management agreement is a commission contract. However, it is like the employment contract in that both are based on the payment of labor. The employer determines the employee's duties, and the employee has no independent control. The commission contract is based on handling the commissioned affairs, and the payment of labor is only a means but not an end. The principal may not give strict instructions on running these matters, and the bailee has a specific discretionary power. [13] Therefore, the contract of commission is different from the contract of employment. The relationship between the shipowner and manager is not an employment relationship. The manager cannot claim the shipowner is responsible for the employer's liability instead of himself.

In conclusion, with the development of the ship management industry, the situation where the ship manager is not liable for collisions has changed. On the one hand, the courts have become stricter in their requirements for ship managers, emphasizing the obligations that managers must assume for the safe and proper operation of ships and no longer limiting the legal status of managers to that of agents of ship owners. On the other hand, the business of ship managers has continued to expand and grow in strength, providing the necessity and feasibility for them to strengthen their liability.

3.2. Liability for Pollution Damage from Ships

3.2.1. Provisions of International Conventions

The prevention and control of marine pollution is a common concern of the international community. With the increase of crude oil, chemicals, and other toxic substances transported by large transport vessels, the marine environment faces excellent danger, and ships are gradually becoming an important source of pollution.

Ship pollution damage is a particular tort. To protect the environment, to confirm the liability and limitation of marine activities, international organizations have developed a series of relevant international conventions to promote the unification of civil law on ship pollution.

The leading international conventions on pollution damage from ships are the 1992 International Convention on Civil Liability for Oil Pollution Damage, the protocol of 1992 ("1992CLC"), the Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 ("1996HNS") and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 ("Bunker Convention").

The 1969 CLC provides that a shipowner's employee or agent may not be held liable for pollution damage to the ship. Although the ship's manager may be regarded as the shipowner's agent in external relations, the provision does not explicitly include the manager, and the legal status of the ship's manager is subject to specific management actions. Therefore, under the 1969 CLC, the ship's manager is not statutorily exempted subject to compensation for pollution damage.

The 1984 Protocol expressly extended the exemption to ship managers and their employees or agents for the first time, and this provision has been retained in the 1992 CLC (Article 3(4)). The shipowner would be the sole subject of liability under the CLC Convention, even if the oil pollution was caused by the ship on hire, the ship operator and manager's negligence, or the salvor's negligence during the salvage process. It effectively limits the avenues of recovery for pollution liability to a "back-to-back" approach, whereby victims cannot claim damages directly against anyone other than the shipowner, even under laws other than the Convention.

It should be noted that under the Convention, the ship manager is only not liable to the victim. If the manager is at fault for the pollution damage, the Convention does not prevent the shipowner from claiming compensation under the management agreement. Furthermore, the Convention also provides exceptions where the tort damage is caused by the ship manager's intention or reckless act or omission with the knowledge that damage may be generated. The victim may bring an action directly against the ship manager for the damage liability.

The 1996 HNS, like the CLC Convention, makes the shipowner the sole subject of liability under the Convention, and the ship manager is not directly exposed to a victim's claim unless they were intentionally or grossly negligent in causing the pollution damage.

The Bunker Oil Convention was drafted primarily based on the provisions of the 1992 CLC and the 1996 HNS Convention, and some of its main requirements are similar to these two conventions. However, the Bunker Oil Convention does not copy these conventions and has many new elements and unique features. The Bunker Oil Convention also makes the shipowner the subject of liability for bunker oil pollution damage. Still, it extends the scope of the shipowner to include the registered owner of the ship, the bareboat charterer, the operator, and the manager. (Article 1(3)) It also provides for strict and joint liability between them. Thus, under the Convention, the ship manager is liable for bunker oil pollution damage unless it can be proved that the pollution damage was caused wholly or partly by the victim's intentional acts or negligence.

3.2.2. Provisions of Oil Pollution Act 1990

In 1989, a series of major oil pollution damage incidents, represented by the oil spill from the oil tanker EXXON VALDEZ, caused severe damage to the marine environment. The cost of clean-up and compensation was enormous, causing a strong reaction in the United States, and the Oil Pollution Act of 1990 ("OPA90") was created in this context.

Compared to international conventions such as the CLC, OPA90 has a much broader scope of application. It attempts to impose liability on a wider range of interested parties, sets stringent conditions on the invocation of defenses, and establishes the highest limitation of liability for shipowners

and the more effective compensation mechanism for funds in the world. The law strengthened liability for oil pollution damage in all respects and significantly impacted the shipping community.

OPA90 is very broad in terms of who is responsible for pollution from a ship, including "any person who owns, operates or bare charters the ship." (Section 1001, paragraph 32). Concerning the scope of "operator", the USCG has a statement that any person, including but not limited to a shipowner, bare charterer, or contracting person responsible for the operation of a ship, who is responsible for the construction, repair, collision, or sale of a ship, is an operator. Ship operator and ship manager are two related but not identical concepts covered by the relevant international conventions but are not clearly defined. A ship operator is involved in the ship's management, including the shipowner, the bare charterer, and those who have a contractual relationship with him and are interested in part of the ship's management. Therefore, the ship manager is often not exempt from liability under OPA 90. [14]

The ability to control the ship is a central factor in identifying the responsible party. The ship manager involved in the ship's operation is responsible for the shipowner and the bareboat charterer. The US court in *United States v Mobil Oil Corporation* expressed that they (ship managers) should be liable for oil pollution damage. Because they could detect oil spills promptly and instruct persons in control of the oil pollution facilities, therefore, they could prevent or reduce oil pollution losses.

OPA90 provides defenses to liability for oil pollution for (1) acts of God, (2) acts of war, and (3) acts or omissions of third parties. The term 'third party' is also expressly defined as a person other than an employee or agent of the party responsible for oil pollution, except for a person in a contractual relationship with the responsible party. However, the ship manager must be free from negligence, even negligible, which is extremely difficult to achieve to invoke the defense. Therefore, it has also been argued that OPA 90 liability is unlimited. The ship's manager must be subject to a stricter and more demanding liability than other conventions or laws.

3.2.3. Provisions of Chinese Law

China does not currently have a specific law on oil pollution. In domestic law, the legal application of liability for oil pollution damage consists mainly of a combination of some provisions in the *Civil Code*, the *Marine Environmental Protection Law*, the *Maritime Law,* and other laws and regulations.

Article 1,229 of the *Civil Code* provides that: "Where damage is caused to others as a result of pollution of the environment or damage to the ecology, the tortfeasor shall bear the tort liability." Therefore, the ship oil pollution damage violates the national regulations on protecting the environment and preventing pollution, pollutes the marine environment, and causes damage to others, which is a kind of tort. The actor shall bear civil liability according to law.

The *Maritime Law*, which regulates maritime transport relations and ship relations, does not have specific provisions on liability for oil pollution damage.

The *Marine Environmental Protection Law* provides that the person responsible for causing damage to the marine environment shall remove the harm and compensate for the damage. If the damage to the marine environment is caused solely by the intention or negligence of a third party, the third-party shall do that. However, it is not clear who the "responsible person" is. [15]

China has acceded to the 1992 CLC, under which the person liable for oil pollution damage in foreign-related oil pollution cases is limited to the shipowner. Even if the foreign element is not included, some domestic legislation suggests that the shipowner is usually liable for oil pollution damage by default. Therefore, it can be argued that under existing Chinese legislation, the shipowner is the only person responsible for oil pollution damage. Still, if such damage is caused solely by the intentional or negligent actions of the ship manager, then the ship manager should also be liable. It is in line with Chinese judicial practice about oil pollution damage to ships, where the ship manager is often held jointly and severally responsible with the shipowner if he is at fault. However, in terms of legislation on bunker oil pollution and pollution by toxic and hazardous substances, the subject of liability should be clarified and brought into line with international conventions to meet the needs of marine pollution prevention and control.

3.3. Limitation of Liability of the Ship Manager

3.3.1. Different Regulations for the Limitation of Liability

Due to the specific business and legal status, the ship manager may have the legal risks arising from the shipowner for breach of contract, from the counterparty for lack of clarity of the agency principle, or even from third parties with no contractual relationship, such as the terminal or cargo owner. There is a massive imbalance in the assumption of liability between the shipowner and the manager in most ship management items. The maritime compensation is often so significant that the limited management fees do not allow the ship manager to assume liability. It is therefore essential that the ship's manager is given the right to limit his liability.

The limitation of liability is a unique legal regime of maritime law and distinct from civil law damages. When a ship in navigation has a significant loss of life and property as a result of a marine accident caused by the acts of the captain or crew or for other reasons, the responsible subject shall be compensated within a specific limit under the law.

The first issue to be considered in an application for limitation of maritime liability is whether the subject is qualified. Article 6 of the *International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957* ("1957Convention") provides that the subject of limitation of liability includes two categories of persons: one is the owner, charterer, manager, and operator of the ship; another is the master, crew, and other persons employed in the service of the owner, charterer, manager, and operator of the

ship. The provisions of the *Convention on Limitation of Liability for Maritime Claims 1976* ("LLMC 1976") further expand the scope of the subjects of limitation of liability. According to Article 2 of the Convention, "shipowner" means the owner, charterer, manager, or operator of a seagoing ship. Under the broad definition of the shipowner, the manager of a ship is still within the scope of the subjects to which liability may be limited. Therefore, under international conventions, the ship manager can apply to the court for limitation of liability for tort damages in the same way as the shipowner.

In common law practice, the traditional view is that ship managers are different from shipowners, bareboat charterers, etc. in the limitation of liability law and are not carriers under the U.S. Carriage of Goods by Sea Act (COGSA) and do not enjoy the limitation of liability rights under the law. However, ship managers have been pursuing such rights. They have won some of their lawsuits and lost some.

In re Petition of the United States is one of the critical cases [16]. In that case, the ship manager and the United States Government entered into a management agreement whereby the manager undertook to properly equip, manage and pilot the ship, and provide the necessary fuel, freshwater, stores, crew, etc. The shipowner reimbursed the manager for the related expenses and paid a fee. The contract also provided that the shipowner reserved the right to give direct instructions on the ship's operation. Based on the above facts, the court found the legal status of the ship manager was effectively the same as that of a bare charterer and therefore allowed his application for a limitation of liability.

In Birmingham Southeast v. M/V Merchant Patriot, the defendant, V. Ships, was the ship manager. On one voyage, a pipe ruptured, causing water to enter the cabin, and the crew shut down the main engine to repair the pipe. High winds and waves drove the cargo straps on the deck to come loose [17]. The main engine was restarted after the pipe was temporarily fixed, but the pipe ruptured again in the early morning. The water in the engine room caused contamination of the lubricating oil, preventing the main engine from starting. The captain finally ordered to abandon the ship. During the salvage, the deck cargo was found to have fallen into the sea or damaged.

V. Ships was the manager appointed by the owner during the accident and managed other vessels for the owner, but there was no management agreement between the parties for the ship in question, only an implied relationship of commission. There was much evidence, and the manager admitted that the pipes should have been replaced before sailing. So the court held that it was an accident caused by unseaworthiness and that the manager was therefore not exempt from liability. As to the limitation of liability, the court held that there was no management agreement between the ship manager and the owner. The ship manager did not have actual control of the vessel, and that its status and role could not be equated to that of a bareboat charterer. Therefore it could not be considered as a shipowner to benefit from the limitation of liability.

The courts are not unanimous on whether ship managers are entitled to a limitation of liability. The prevailing view, as expressed by Judge John F. Nangle in the M/V Merchant Patriot case, is that where there is a written management agreement between the manager and the shipowner, providing services to the owner for the operation and maintenance of the ship, having a contractual relationship with the crew as an employer, then the ship manager is equivalent to a bare charterer. The court may admit his right to a limitation of liability.

In addition, the ship manager and shipowner often agree in the management agreement that the ship manager may limit his liability for damage caused to the shipowner through fault, e.g., article 17(b) of the SHIPMAN 2009 form contract states that the ship manager's liability for each incident or series of incidents shall not exceed ten times the agreed annual management fee. Of course, such a provision only applies between the ship manager and the owner, not against third parties. The indemnity clause of SHIPMAN 2009 provides that the shipowner is obliged to indemnify the manager for damages and costs incurred in performing the management agreement. If the ship manager is thus liable to a third party, the shipowner shall compensate for the part of the loss over the agreed liability of the manager. Of course, the damage cannot be intentionally or knowingly caused by the ship manager.

Under the principle of "freedom of contract", such agreements are protected by law if they do not violate mandatory legal terms or regulations. However, not all management agreements are in a form similar to SHIPMAN 2009. In *Steel Coils v. Captain Nicholas*, the court held the ship manager was liable for damages for breach of contract or tort, regardless of whether there was a contract between him and the owner for the carriage of the goods [18]. The terms of the management agreement did not expressly entitle the manager to a limitation of liability. Therefore, the ship manager was not allowed to claim a limitation of liability and was held liable for the goods damage.

3.3.2. Loss of Limitation of Liability

The 1957 Convention sets out different conditions for the loss of the limitation of liability for the two categories of subjects. As a subject of the first category (shipowner, charterer, manager, operator), the right will be lost if the damage is caused by "actual fault or privity". However, suppose the accident that led to the damage was caused by "actual fault or privity" on the part of the second category of limitation of liability (the master, crew, and other employees). In that case, the first category may still limit liability. It is important to note that there is a "concurrence" between the two types of subjects. When the master or crew is also the ship manager, the protection of the limitation of liability is only available if the act, negligence, or fault is committed in the capacity of the master or crew of the ship.

LLMC 1976 provides that a responsible person is not entitled to a limitation of liability if it is proved that the damage was caused by his intention or reckless act or omission with knowledge. As article 1 of the Convention specifies the persons entitled to the limitation of liability, the ship manager falls within "responsible person". It is

emphasized the loss of limitation of liability depends on the conduct of the responsible person "by himself" and that the behavior of his agents and employees does not affect it. Likewise, the loss of the right of the accountable person himself does not necessarily lead to the loss of the right of other subjects to limit their liability. Therefore, in a specific accident, the existence of the right to limitation of liability of the ship manager does not affect the right to limitation of liability of other subjects, nor is it affected by other subjects.

However, the British courts have held that the negligence of the ship's manager may result in the loss of the limitation of the shipowner's liability because, in the separation of management and ownership, it is most reasonable to rely on the management actions to find actual negligence of the aggrieved party.

4. Liability for Contract Negligence

The so-called contract negligence liability refers to the civil liability of a party that violates the duty of good faith, intentionally or negligently violates the legal obligations, and causes losses to the counterparty. The nature of liability for contract negligence is neither a tort nor a breach of contract but an independent claim and cause of debt.

The subject of liability for contract negligence is the person who engages in contracting but is not limited to the parties to the contract. An agent without authority, a person who abuses his agency, or a person who conspires with the parties in bad faith can all be jointly and severally liable for contracting. Thus a ship manager may incur liability for contract negligence when contracting with the principal or a third party on the principal's behalf.

The ship manager is an agent delegated by the principal (shipowner) to enter a contract with a third party. The unauthorized agency is a common form of contract negligence and is generally manifested by (1) failure to be granted agency, (2) invalid or revoked act of authorization, (3) exceeding the scope of agency, and (4) extinguishment of the agency.

According to the General Principles of Civil Law, a contract concluded by the ship manager with a third party in the shipowner's name (as agent or himself) without authority to act is of uncertain validity. The ways to make the validity determined are (1) recognition by the shipowner; (2) non-validity by the refusal of recognition by the shipowner; (3) non-validity by the late response of the shipowner to the remainder of the contract counterpart, which is considered as a refusal of recognition; and (4) non-validity by the withdrawal of the counterparty.

An act of agency without the shipowner's ratification is not effective against the shipowner. The counterparty of the contract may hold the manager liable for unauthorized acting based on contract negligence. The fact that the ship manager agreed with the counterparty in the name of the shipowner shows that the manager was at fault in the process of concluding the contract, causing the counterparty to rely on the manager's authority to act, and the counterparty suffered a loss of reliance due to the agreement not being established or not being effective. Therefore, the counterparty may claim damages from the manager, which does not depend on the intention or negligence of the agent but is a kind of no-fault liability. Article 179 of the German Civil Code, Article 139 of the Swiss Code of Obligations, article 117 of the Japanese Civil Code, and article 171 of the Chinese Civil Code all provide for this. Thus, the ship manager without authority to act must be independently liable for the loss of the contractual counterparty to the extent of the actual loss. [19]

If the shipowner (principal) creates the illusion of agency by his act or omission and makes the counterparty reasonably believe that the ship manager has agency, an apparent agency is constituted in law. At this point, the counterparty can exercise the right to choose the obligor, either the shipowner or the ship manager, to be liable.

When the ship manager is entitled to act as agent, the shipowner and the manager shall be jointly and severally liable to third parties for contract negligence if the shipowner is at fault for the manager's bad faith negotiations, fraud and other acts contrary to the principles of good faith and credit.

It is important to emphasize that the counterparty must be in good faith in all of the above cases. Contract negligence does not exist if the counterparty conspires with the ship manager or concludes an agreement with the manager knowing or ought to have known that the agency was defective.

5. Conclusion

The ship management agreement is proof of establishing a civil legal relationship between the shipowner and the manager. It is essentially a commission contract and contains a brokerage contract, an intermediary contract, etc. The legal status of the ship manager also varies according to the different services. Therefore, between the ship manager and shipowner, the parties' liability for breach of contract is determined mainly based on the content of the ship management agreement, unless such freely concluded contract violates the mandatory provisions of the law. In the contractual relationship between the ship manager and a third party, the ship manager has the right to act externally based on the authority of the commission contract. Therefore, the ship manager is also considered to be the agent of the principal. The nature of its agency determines the manager's rights and obligations towards the third party.

In the case of tort liability for ship collisions, the ship manager must be held liable as an employer for damages caused by the crew's fault if he has entered an employment contract on behalf of himself. Moreover, the ship manager cannot claim exemption from liability based on the relationship of commission and the principle of vicarious liability. The international conventions on ship pollution generally consider that only the shipowner is solely liable for pollution damage. Meanwhile, US law believes that the ship manager controls the ship's operation and is responsible in tort for pollution. However, it is reasonably feasible to require the shipowner to be accountable for ship pollution damage, considering the capacity of the ship manager.

The ship manager provides extremely varied management and is exposed to no less risk than the shipowner. So, it is essential to give the ship manager the right to limit his liability. That is also the equivalence principle of risk and benefit embodied in international conventions.

In conclusion, in terms of management practices and the risks assumed, ship managers embody distinct marine peculiarities compared with ordinary civil subjects. Therefore, attention must be paid to the issue of their civil liability in conjunction with cases in practice and legal theory, and continue to explore it in depth.

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