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The Unified Interpretations on the Test for Breaking the Shipowner‘s Right to limit Liability

2-3 June 2022

Agenda

1 Introduction to the Subject
2 Liability in European Inland Navigation
3 Limitation of Liability in European Inland Navigation
4 The Unified Interpretations
5 The Binding Effect
6 Relevance for CLNI?

Introduction to the Subject

Liability

- What is it?

- The obligation to rectify or compensate for a wrong occurred

- Can be moral or legal

- If legal: Exact content determined by law (contract, statute or courts)

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Introduction to the Subject

- Different aspects of liability:

  - Fault versus no-fault (strict liability)
  - Different grades of fault - from slight negligence to intent with all kinds of grade in-between
  - Unlimited – civil law standard
  - Limited liability – transport law standard
  - Limitable – standard for shipowner's global liability
  - Liability for oneself or for others (vicarious liability)

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Liability in European Inland Navigation

- Contractual versus non-contractual liability
- International Harmonization only for liability under Contracts of carriage → CMNI
  - Art. 16 CMNI: fault-based liability for damage to or loss of cargo
  - Art. 17 CMNI: Vicarious liability of the carrier for his servants and agents
  - Art. 25 CMNI: possible contractual exclusion of liability for error in navigation by master and crew
  - No mandatory insurance

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Liability in European Inland Navigation

- National law for damage caused by the operation of the ship, e.g. § 3 German Inland Navigation Act

- General national tort law, (§ 823 German Civil Code) including vicarious liability (§ 831 German Civil Code)

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Limitation of Liability in European Inland Navigation

- CNMI: „Per Package“ Limitation for contractual liability for loss of or damage to cargo

- CLNI: „Global“ Limitation for all kinds of liability of the shipowner:

Art. 1 (1) CLNI:

Vessel owners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.

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Art. 4 CLNI

Conduct barring limitation

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

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Art. 4 LLMC

Conduct barring limitation

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Convention on Limitation of Liability for Maritime Claims, 1976,

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The Uniform Interpretations

The Making of the Unified Interpretations

- *Unified Interpretation on the Test for Breaking the Owner's Right to Limit Liability under the IMO Conventions*

- Drafted in the Legal Committee of the International Maritime Organization (IMO)
- Why the IMO?
  - Because LLMC and CLC are IMO Conventions
- Purpose: Providing an authoritative interpretation of Art. 4 LLMC and Art. V CLC (Convention on Civil Liability for Oil Pollution 1992
- Resolutions by all member states to LLMC and CLC during the 32nd session of the IMO General Assembly in December 2021

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The Content

- 21 Recitals

- Only 3 paragraphs

- Paras. 2 and 3 dealing with circulation of the Resolutions by the IMO Secretary-General

- Only para. 1 with substantive content.

  ➢ 6 aspects

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The Content – Virtual Unbreakability

(a) as virtually unbreakable in nature i.e. breakable only in very limited circumstances and based on the principle of unbreakability;

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The Content – Virtual Unbreakability

- The Standard: Virtual Unbreakability
  (Principle of Unbreakability)

- Requires to look beyond the individual case in front of the Court

- Requires to consider whether breaking limitation on the facts of the case in Court would mean that breaking of limitation may occur so often that it is no more "*virtually unbreakable*"

- Germany: requires a new approach as the above test so far is not part of the considerations

The Content – more than Gross Negligence

(a) as virtually unbreakable in nature i.e. breakable only in very limited circumstances and based on the principle of unbreakability;

(b) to mean a level of culpability analogous to willful misconduct, namely:

(i) a level higher than the concept of gross negligence …

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The Content – more than Gross Negligence

- Check what your Courts say in respect of recklessness

- Any view that recklessness is equal to objective gross negligence no more sustainable

  - viz. Koller, Transportrecht, § 5b BinSchG and § 435 Rn. 6

  - Compare with v. Waldstein/Holland, Binnenschiffartsrecht, § 5b Rn. 5: “More than gross negligence”

The Content – Limitation and Insurance

(a) as virtually unbreakable in nature i.e. breakable only in very limited circumstances and based on the principle of unbreakability;

(b) to mean a level of culpability analogous to willful misconduct, namely:

(i) a level higher than the concept of gross negligence …

(ii) a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and

(iii) a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends;

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The Content – Limitation and Insurance

(ii) a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and

(iii) a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends

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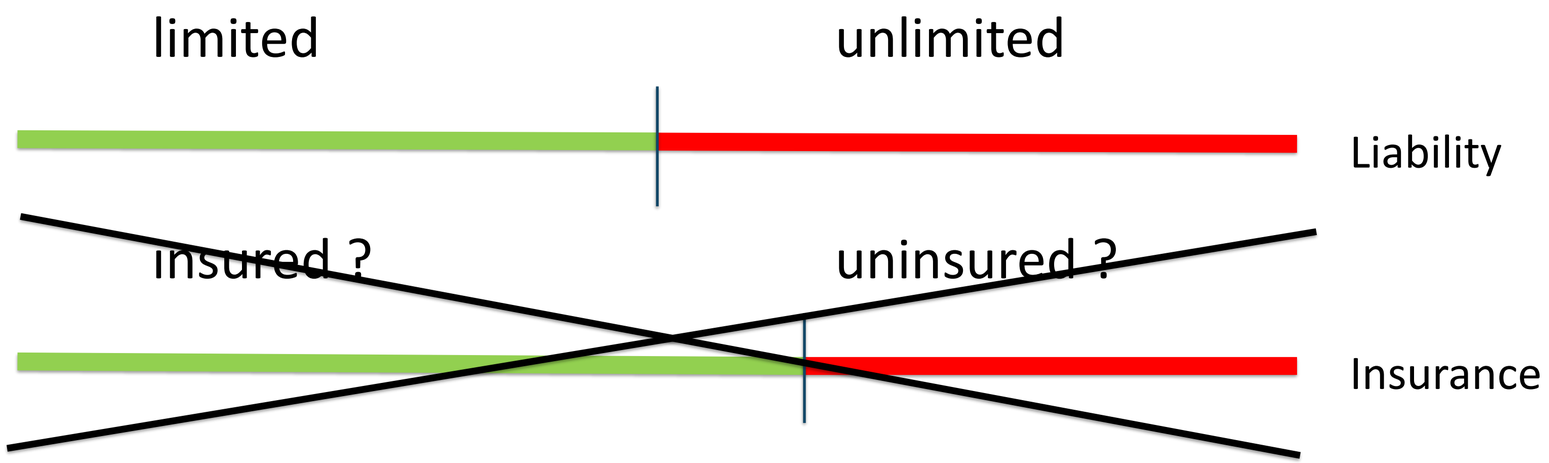
The Content – Limitation and Insurance

(ii) **a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy**; and

(iii) a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends

Effect of **subsection (ii)**:

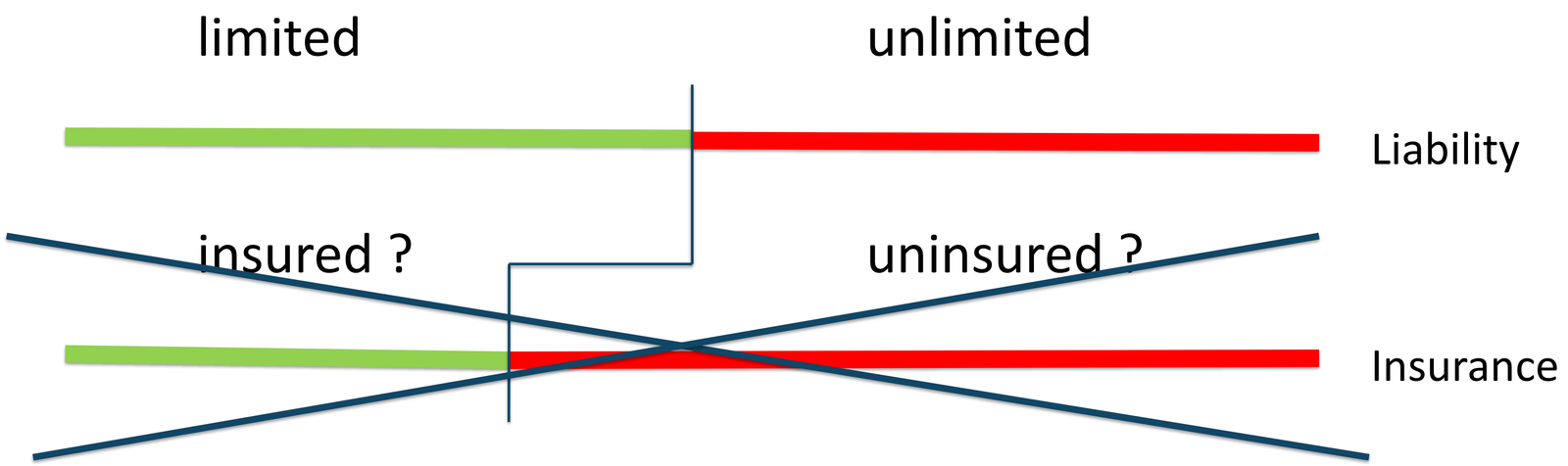


The Content – Limitation and Insurance

(ii) a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and

(iii) **a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends**

Effect of **subsection (iii)**:

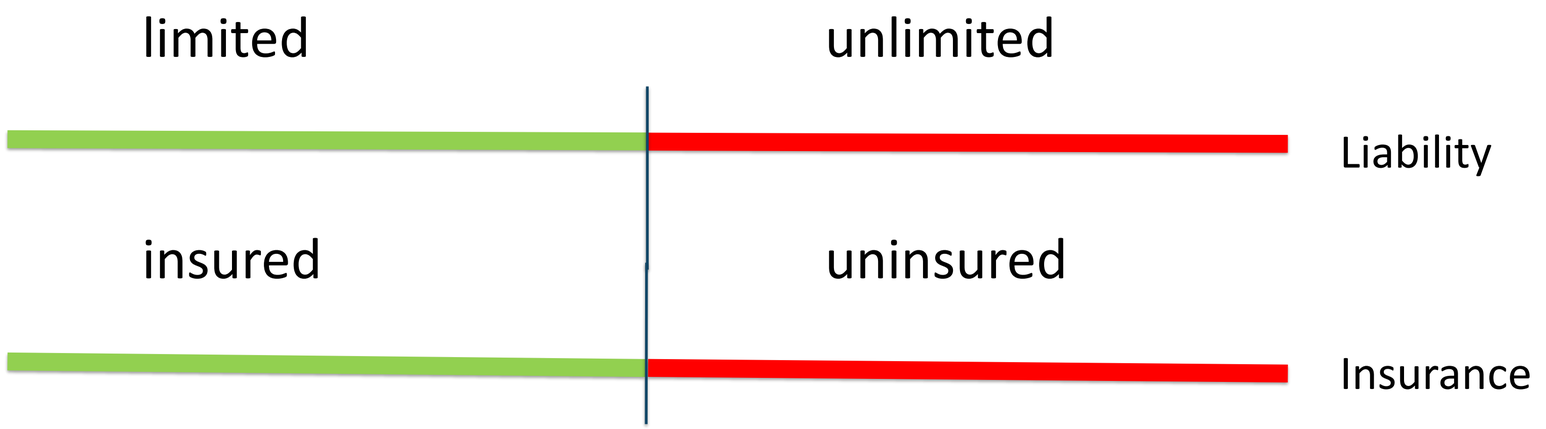


The Content – Limitation and Insurance

(ii) a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and

(iii) **a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends**

Effect of **subsection (iii)**:



The Content – Limitation and Insurance

Consequences:

- Any argument for unlimited liability will be an argument for loss of insurance cover

Think twice before you plead unlimited liability.

You might end up with a pyric victory:

you get a judgment on unlimited liability, but with no insurance to enforce it into

The Content – Limitation and Insurance

(a) as virtually unbreakable in nature i.e. breakable only in very limited circumstances and based on the principle of unbreakability;

(b) to mean a level of culpability analogous to willful misconduct, namely:

(i) a level higher than the concept of gross negligence … for Maritime Claims;
(ii) a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and
(iii) a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends;

(c) that the term "recklessly" is to be accompanied by "knowledge" … must be met in their combined totality and should not be considered in isolation of each other; and

(d) that the conduct of parties other than the shipowner, for example the master, crew or servants of the shipowner, is irrelevant and should not be taken into account when seeking to establish whether the test has been met.

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The Content – Para 1 (d)

The States Parties to the to the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, present at the thirty-second Session of the Assembly of the International Maritime Organization,

1 AFFIRM that the test for breaking the right to limit liability as contained in article 4 of the 1976 LLMC Convention is to be interpreted:

(d) that the conduct of parties other than the shipowner, for example the master, crew or servants of the shipowner, is irrelevant and should not be taken into account when seeking to establish whether the test has been met.

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The Binding Effect

The Binding Effect

- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986

- 116 ratifications

- Croatia and all countries of CLNI – subject to France – ratified

- Widespread view: The content of the Vienna Convention meanwhile reflects international customary law and, therefore, has effects also for states which have not ratified it

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The Binding Effect

- Article 31 General Rule of Interpretation

1. 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.

2. …

3. There shall be taken into account, together with the context:

   (a) **any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions**;

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The Binding Effect

International Court of Justice, *Whaling in the* Antarctic, at para. 83

> *First, many IWC resolutions were adopted* ***without the support of all States parties to the Convention*** *and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement … within the meaning of … paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.*

- As all state parties to the LLMC and CLC Conventions have passed the resolutions, the test is passed

→ Unified Interpretations bind the courts in all LLMC and CLC member states

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Relevance for CLNI?

Relevance for CLNI?

- No resolution by CLNI members states

→ No binding effect under Art. 31 Vienna Convention

- Identical wording?

- Genesis of the CLNI?

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Relevance for CLNI?

Nach der Ratifizierung des Londoner Übereinkommens von 1976 über die Beschränkung der Haftung für Seeforderungen, das ein Summenhaftungssystem vorsah, war dann auch das geltende Haftungsrecht in der Binnenschiffahrt zu andern, um Abweichungen zwischen See- und Binnenschiffahrtsrecht zu vermeiden und natürlich die im Seeschiffahrtsrecht eingeführten Verbesserungen zu übernehmen.

So wurde im Rahmen der Zentralkommission für die Rheinschiffahrt der Entwurf eines Strassburger Übereinkommens ausgearbeitet, in dem die der modernen und heutigen Konzeption besser angepassten Bestimmungen des Seeschiffahrtsrechts mit den notwendigen Änderungen übernommen werden. Das Strassburger Übereinkommen führt, zunächst zwischen den Mitgliedstaaten der Zentralkommission für die Rheinschiffahrt und Luxemburg, die Vereinheitlichung auf dem Gebiet der Haftunsbeschränkung der Eigentümer von Binnenschiffen herbei und ersetzt das für die Geschädigten oft wenig befriedigende System der Haftungsbeschränkung auf den Wert im Zeitpunkt des Ereignisses oder das aus dem Seerecht stammende Sachhaftungsrecht durch ein Summenhaftungssystem. Die Bestimmungen des Übereinkommens von 1976 wurden jedes Mal dann systematisch übernommen, wenn Eigenheiten oder besondere Belange der Binnenschiffahrt keine spezielle Regelung erforderlich machten.

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Relevance for other Conventions?

La Convention de Londres de 1976 sur la limitation de la responsabilité en matière de créances maritimes qui introduit un système forfaitaire de limitation ayant été ratifié, il importait de modifier également les règles en vigueur en matière de limitation de la responsabilité en navigation intérieure, afin de ne pas créer une rupture entre le droit maritime et le droit fluvial et d'incorporer naturellement les améliorations apportées en droit maritime.

C'est ainsi qu'a été mis au point dans le cadre de la Commission Centrale pour la Navigation du Rhin le projet de Convention de Strasbourg qui intègre "mutatis mutandis" les dispositions du droit maritime, plus modernes et plus adaptées aux conceptions actuelles.
La Convention de Strasbourg réalise l'harmonisation entre, dans un premier temps, les Etats membres de la Commission Centrale pour la navigation du Rhin et le Luxembourg, en matière de limitation de responsabilité des propriétaires de bateaux de navigation intérieure et substitue un système forfaitaire de limitation au système souvent peu satisfaisant pour les victimes de la limitation à la valeur réelle au moment de l'événement ou au système de l'abandon, hérité du droit maritime. Les dispositions de la Convention de 1976 ont été reprises systématiquement chaque fois que les particularités ou les exigences de la navigation fluviale n'imposaient pas des règles spécifiques.

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Relevance for CLNI?

Na de bekrachtiging van het Verdrag van Londen inzake beperking van aansprakelijkheid voor maritieme vorderingen van 1976, dat een forfaitair stelsel van beperking invoert, was het van balang ook de vigerende regels ter zake van de beperking van aansprakelijkheid in de binnenvaart te wijzigen, om niet een breuk tussen het zeerecht en het rivierrecht te doen ontstaan en natuurlijk om de verbeteringen te verwerken die reeds in het zeerecht waren aangebracht.

Aldus is in het kader van de Centrale Commissie voor de Rijnvaart het ontwerp-Verdrag van Straatsburg opgesteld, waarin "mutatis mutandis" de bepalingen van het zeerecht zijn opgenomen, die moderner zijn en beter aansluiten bij de huidige opvattingen.
In het Verdrag van Straatsburg krijgt de harmonisatie tussen - voorlopig - de lidstaten van de Centrale Commissie voor de Rijnvaart en Luxemburg op het gebied van de beperking van aansprakelijkheid van eigenaren van binnenschepen haar beslag en wordt een forfaitair stelsel van beperking in de plaats gesteld van het voor de slachtoffers vaak weinig bevredigende stelsel van beperking tot de reële waarde op het tijdstip van de gebeurtenis, dan wel van het stelsel van abandonnement, dat uit het zeerecht stamde. Telkens wanneer het bijzondere karakter of de behoeften van de binnenvaart geen specifieke regeling vergden, zijn de bapalingen van het Verdrag van 1976 overgenomen.

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Relevance for CLNI?

- Harmonization of maritime and inland navigation laws calls for taking over of the Unified Interpretations for CLNI

Seagoing vessels and inland vessels meet in seaports and estuary waterways, and seagoing coasters are constantly and increasingly taking part in traffic on inland waterways. A fundamentally uniform law, in particular with regard to the limitation of liability, is therefore necessary. It would hardly be tolerable if a seagoing vessel colliding with an inland waterway vessel were treated differently, or even if the inland waterway vessel had unlimited liability, while the seagoing vessel could invoke the limitation of liability under maritime law

(Müller, Probleme des Binnenschafffahrtsrechts V, 1988, p. 1039

→ Unified Interpretations to be taken into account for inland navigation

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Text of the Unified Interpretation

ANNEX 4

DRAFT RESOLUTION ON INTERPRETATION OF ARTICLE 4 OF THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976

THE STATES PARTIES TO THE PROTOCOL OF 1996 TO AMEND THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976, PRESENT AT THE THIRTY-SECOND SESSION OF THE ASSEMBLY OF THE INTERNATIONAL MARITIME ORGANIZATION,

RECALLING that the International Maritime Organization has adopted a comprehensive limitation, liability and compensation regime that seeks to ensure that claimants receive prompt and adequate compensation, without the need for legal recourse, and that this regime represents a carefully negotiated compromise that balances the obligations and interests of governments, claimants and industry,

RECALLING ALSO that this regime encompasses the International Convention on Civil Liability for Oil Pollution Damage, 1992 (the 1992 Civil Liability Convention), the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (the 2010 HNS Convention), the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the 2001 Bunkers Convention) and the Nairobi International Convention on the Removal of Wrecks, 2007 (the 2007 Nairobi Wreck Removal Convention) (together the Conventions),

RECALLING FURTHER that the Organization has adopted the Convention on Limitation of Liability for Maritime Claims, 1976 (the 1976 LLMC Convention), as amended by the Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, 1976 (the 1996 LLMC Protocol), that provides that the shipowner may limit liability for certain specific claims as prescribed in article 2 of that Convention,

RECOGNIZING that the effective operation of the regime is dependent upon a uniform implementation and application that is consistent with the aims and objectives agreed at the time of their adoption, and that will ensure the Conventions are applied equally and equitably to all parties and claimants,

RECOGNIZING ALSO the need to provide legal certainty in the interpretation and application of the Conventions and to assist present and future States Parties to the Conventions, the 1976 LLMC Convention and the 1996 LLMC Protocol to apply them in a uniform manner,

CONSCIOUS that the purpose and objectives of the Conventions, to ensure that claimants receive prompt and adequate compensation, are achieved through the mechanisms establishing strict liability of the shipowner, the channelling of liability to the shipowner irrespective of fault and a requirement to maintain insurance or other financial security,

CONSCIOUS ALSO that the Conventions, the 1976 LLMC Convention and the 1996 LLMC Protocol are underpinned by the right of the shipowner, their insurer or provider of financial security, to limit their liability, and that the nature of such a right is inextricably linked to higher limits of liability and the insurability of such liabilities,

CONSCIOUS FURTHER that the 1992 Civil Liability Convention, the 2010 HNS Convention and the 1996 LLMC Protocol all provide for increases to these limits of liability in prescribed circumstances,

NOTING that the right to limit liability is prescribed in article 1(1) of the 1976 LLMC Convention, article V(1) of the 1992 Civil Liability Convention and article 9(1) of the 2010 HNS Convention,

RECALLING the references to the right to limit liability under the 1976 LLMC Convention, as amended, in article 6 of the 2001 Bunkers Convention and article 10(2) of the 2007 Nairobi Wreck Removal Convention,

BEING AWARE that the 1976 LLMC Convention, the 1992 Civil Liability Convention and the 2010 HNS Convention provide that the shipowner shall not be entitled to limit its liability if it is proved that the pollution damage, damage or loss, resulted from his or her personal act or omission, committed with the intent to cause such pollution damage, damage or loss, or recklessly and with knowledge that such pollution damage, damage or loss would probably result (the test for breaking the right to limit liability),

BEING AWARE ALSO that the Conventions provide that, even if the shipowner is not entitled to limitation of liability, their insurer or provider of financial security may avail themselves of, or benefit from, the limits of liability prescribed therein,

RECOGNIZING that the test for breaking the right to limit liability was presented and adopted at the 1976 International Conference on the LLMC Convention as part of a package that was coupled with higher limits of liability (than the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, 1957),

CONSIDERING the difficulties which might arise from differing, and inconsistent, interpretations of the test for breaking the right to limit liability, and that without a Unified Interpretation of the test, eligible claimants may be deprived of prompt compensation,

CONCERNED that inconsistent application or interpretation of the test for breaking the right to limit liability that differs in scope from the intention could result in confusion and uncertainty and an unequal treatment of claimants,

ACKNOWLEDGING the importance of a Unified Interpretation of the test for breaking the right to limit liability to the long-term sustainability of the regime, and that the test can only operate and be effective if the States Parties affirm the meaning of the test in line with the principles which gave birth to it,

NOTING that the principles underpinning the test for breaking the right to limit liability are identified in the Travaux Préparatoires of the 1976 LLMC Convention,

DESIRING to reaffirm these principles by means of a Unified Interpretation,

UNDERSTANDING ALWAYS that the courts in States Parties are the final arbiters on the interpretation of the Conventions, the 1976 LLMC Convention and the 1996 LLMC Protocol, but that an affirmation of the test for breaking the right to limit liability in the form of a Unified Interpretation would assist courts, as well as governments, claimants, shipowners and insurers, in their interpretation and understanding of the test,

RECOGNIZING that, under 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."* (Article 31(1)) and that *"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 (…)"* (article 32),

HAVING CONSIDERED the recommendations made by the Legal Committee at its 108th session:

1 AFFIRM that the test for breaking the right to limit liability as contained in article 4 of the 1976 LLMC Convention is to be interpreted:

(a) as virtually unbreakable in nature i.e. breakable only in very limited circumstances and based on the principle of unbreakability;

(b) to mean a level of culpability analogous to wilful misconduct, namely:

(i) a level higher than the concept of gross negligence, since that concept was rejected by the 1976 International Conference on Limitation of Liability for Maritime Claims;

(ii) a level that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and

(iii) a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends;

(c) that the term "recklessly" is to be accompanied by "knowledge" that such pollution damage, damage or loss would probably result, and that the two terms establish a level of culpability that must be met in their combined totality and should not be considered in isolation of each other; and

(d) that the conduct of parties other than the shipowner, for example the master, crew or servants of the shipowner, is irrelevant and should not be taken into account when seeking to establish whether the test has been met.

2 REQUEST the Secretary-General of the International Maritime Organization to circulate copies of the present resolution to all States which have signed, ratified or acceded to the 1996 LLMC Protocol.

3 ALSO REQUEST the Secretary-General of the Organization to circulate copies of the present resolution to all Member States of the Organization.

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  Member IWG Autonomous Vessels
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