The IMO's unified interpretations of the LLMC and CLC Conventions clarify the right to limit liability

A challenge for shipowners and their insurers engaged in international trade is to ensure that a common set of guidelines or standards for ship related liabilities apply across the different trading nations. Several IMO liability and compensation conventions require the shipowner and their insurers to accept strict liability, irrespective of fault, and with mandatory insurance cover in exchange for the right to limit liability to an amount set by the convention. The IMO's clarification underlines there is a 'virtually unbreakable' right to limit. This is reflected in the adoption of the IMO's unified interpretation by the relevant participating states.

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Limitation – theory and practice

The sea is inherently perilous and commercial maritime adventure is to be encouraged. With this in mind, the Convention on Limitation of Liability for Maritime Claims (LLMC) of 1976, the LLMC Protocol of 1996, and the Civil Liability Convention (CLC) of 1992 all serve to limit a shipowner's liability for a wide range of maritime liabilities, and in the case of the CLC, oil pollution damage.

Limitation of liability under each is, however, subject to a materially identical exception: the shipowner may not limit his liability if it is proved that the loss or pollution damage resulted from the shipowner's own personal act or omission, either committed with the intent to cause such damage, or committed recklessly, and with knowledge that such damage would probably result.

For example, Article 4 LLMC sets out the only ground where limitation is not available:

"A person 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".*

When this limited exception was introduced in the LLMC Convention of 1976, it was intended to be virtually unbreakable, thereby enabling the insurance market to continue to provide cover for the relevant liabilities, without becoming exposed to the risk of unlimited liability.

In recent years there has been concern amongst shipowners and insurers of an increasing willingness from national courts to 'break' the shipowner's limitation of liability by triggering the exceptions contained within the conventions. A notable example of this is the 2016 Spanish Supreme Court ruling over the 2002 *Prestige *oil spill. Here, the Spanish courts found criminal misconduct on the part of the master and held that he had acted recklessly and with knowledge that the loss caused would probably result. This was held sufficient to trigger the exception to limitation under Article V(2) of the CLC – a surprising decision for many, not least given that the express wording of Article V(2) requires personal wrongdoing on the part of the shipowner. A more recent example occurred before the Greek courts where the reckless act of the master was treated as breaking the owners' right to limit.

In light of these concerns, extensive work was undertaken by the International Group of P&I Clubs and the International Chamber of Shipping to promote certainty. At the thirty-second session of the IMO General Assembly on 15 December 2021, by way of three separate resolutions by the state parties to those conventions, it was affirmed that the test for breaking the right to limit liability as contained in Article 4 of the LLMC 1976 and 1996 Protocol, and Article V of the CLC, was to be interpreted:

- as virtually unbreakable in nature ie breakable only in very limited circumstances and based on the principle of unbreakability;
- to mean a level of culpability analogous to wilful misconduct, namely:
    - a higher culpability than gross negligence;
    - a level of culpability that would deprive the shipowner of the right to be indemnified under their marine insurance policy; and
    - a level that provides that the loss of entitlement to limit liability under the conventions should correlate with the loss of the shipowner's insurance cover;

- 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 from one another; and

- 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 determining whether the test has been met.

These affirmations, referred to by the IMO as ‘unified interpretations’, have binding effect under the Vienna Convention on the Law of Treaties which, under Article 31(3), requires state parties to the Vienna Convention to ‘take into account’ any subsequent agreement between the parties regarding the interpretation of a treaty or the application of its provisions.

The unified interpretations were prepared following an extensive review of the contemporary discussions and *travaux préparatoires* accompanying the adoption of each convention and are drafted to reflect the intentions and understanding of the state parties to those conventions at the time they were adopted. The unified interpretations should not therefore be considered an update or a reframing of the conventions, but rather a clarification as to how the conventions were always intended to be applied by the national courts of all state parties.

Conclusion

The unified interpretations will go some way towards reducing the risk of national court decisions like the *Prestige* which focus on the master’s (rather than the shipowner’s) conduct.

As the intention is for the exceptions to apply to uninsurable conduct only, there may be less incentive for claimants to try to break the shipowner’s right to limit liability in the first place. A finding that a shipowner’s conduct has broken limitation under a convention will also have implications for that shipowner’s insurance cover which, in turn, may affect the extent to which an award of damages can in fact be recovered.

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