

Resolution A.1165(32) Adopted on 15 December 2021 (Agenda item 13)
INTERPRETATION OF ARTICLE 6 OF THE PROTOCOL OF 1992 TO AMEND THE INTERNATIONAL
CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, 1969 AMENDING ARTICLE V(2)
OF THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY
FOR OIL POLLUTION DAMAGE, 1969

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LIABILITY FOR OIL POLLUTION DAMAGE, 1969**

THE STATES PARTIES TO THE PROTOCOL OF 1992 TO AMEND THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE, 1969, 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 in 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 6 of the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 amending article V(2) of the International Convention on Civil Liability for Oil Pollution Damage, 1969 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 Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969;

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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