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Agenda item 9

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**UNIFIED INTERPRETATION ON THE TEST FOR BREAKING THE OWNER'S RIGHT TO
LIMIT LIABILITY UNDER THE IMO CONVENTIONS**

Intersessional work report

**Submitted by Canada, Greece, Italy, Malta, Poland, International Chamber of Shipping
and International Group of Protection and Indemnity Associations**

SUMMARY

Executive summary: This document reports on the intersessional work since LEG 106 on the development of a Unified Interpretation on the test for breaking the owner's right to limit liability under the IMO conventions (the test), and the review of the Travaux Préparatoires of the IMO liability and compensation conventions and other related historical papers and documents that have identified the virtually unbreakable nature of the test. The full research report is included in document LEG 107/INF.5. A summary of that work is included in this document.

Strategic direction, if applicable: 6

Output: 6.20

Action to be taken: Paragraph 11

Related documents: LEG.1/Circ.8; A.1111(30); IOPC Fund Resolution No. 8; LEG 106/13, LEG 106/16 and LEG 107/INF.5

Introduction

- 1 At its 106th session, the Legal Committee agreed to:
 - .1 include a new output on "Unified Interpretation on the test for breaking the owner's right to limit liability under the IMO conventions" in the 2020-2021 biennial agenda of the Legal Committee, with a target completion year of 2021;

- .2 invite concrete proposals to LEG 107 on the scope of the work on the new output; and
- .3 include the item in the provisional agenda for LEG 107.

2 At LEG 106, the International Group of Protection and Indemnity Associations (P & I Clubs) offered to coordinate the intersessional work, and this was subsequently undertaken jointly with the International Chamber of Shipping (ICS) with an informal grouping of Member States that included the Governments of Australia, Bahamas, Canada, Finland, France, Ghana, Greece, Italy, Malta, Poland, South Africa and Spain.

Intersessional work and findings

3 The informal group undertook two substantive rounds of work to examine the intentions and objectives of the drafters at the time of the adoption of the test when it was first included in the IMO limitation, liability and compensation conventions, namely article 4 of the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976). Said test has been adopted in all subsequent IMO liability and compensation conventions.

4 The informal group focused its work on the historical records of the discussions leading to the adoption of LLMC 1976, because sight of the important principles agreed by the drafters, and which were the reasons and the basis of the test, may have been lost given the length of time that has passed since the adoption of LLMC 1976. The informal group agreed that such an objective and impartial review would assist a proper understanding as to the meaning and intent of the wording in the test. This work was undertaken by means of an extensive review of:

- .1 the Travaux Préparatoires (TP) of LLMC 1976 and the documents submitted to, and discussed at, the Legal Committee meetings in the years leading up to the 1976 international conference on LLMC 1976 (first tranche of research work); and
- .2 the reports of the meetings of the Comité Maritime International (CMI) at which the draft amendments to the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, 1957 (1957 Convention) were discussed in advance of submission to the Legal Committee for consideration of a revised LLMC Convention (that was ultimately LLMC 1976 as adopted), plus a further review of the TP with regard to the proposed alternative article 4 wordings that were submitted to and ultimately rejected by the 1976 international conference on LLMC Convention (second tranche of research work).

5 In order to ensure transparency during this process, the first tranche of research work (representing the most substantive work undertaken by the informal group) was shared with the IMO Secretariat. In addition, all relevant views, statements, comments and positions identified from the discussions at the time that the test was negotiated and adopted were referenced as per the submissions, reports and documents from which they were taken.

6 The informal group did not discuss the mechanism by which any Unified Interpretation (UI) could ultimately be agreed by the Organization, given that it was premature to have such a discussion.

7 The full research report that reflects the outcome of the work of the informal group has been submitted separately in document LEG 107/INF.5. A summary of that research work is as follows:

- .1 Preparatory work on the LLMC 1976 and the development of the test was undertaken in the initial stages by CMI. This work commenced in 1972 after it had been included on the agenda of IMO (then IMCO) and in anticipation that CMI would be invited to present its views. Subsequently, CMI agreed, at IMCO's request, that it would act as a "working party" for IMCO in carrying out the preparatory work for the presentation of a first draft of a revised Convention.
- .2 Discussions within CMI favoured a test of the type that was ultimately adopted in LLMC 1976 (and found at the time in the 1961 Passenger Convention) rather than the simple negligence provisions in the 1957 Convention.
- .3 In favouring such a revised test from the 1957 Convention (which would strengthen the test for conduct barring limitation), CMI noted that when the right of limitation can be lost by simple negligence, claimants are tempted to endeavour to "break the limitation" although they have no indication of blameworthiness, hoping that something will turn up during the litigation, resulting in numerous and costly litigation and thereby defeating the purpose of the principle of limitation.
- .4 The draft wordings for a revised LLMC regime as prepared by CMI were then submitted to the Legal Committee of IMCO for consideration at its twenty-third session (LEG 23) in June 1974. In the accompanying report, CMI observed that the submitted test (that is now replicated in the other IMO liability and compensation conventions) was designed to remove uncertainty, which had arisen as to the effect of the threshold test for breaking limitation contained in the 1957 Convention that was based on "actual fault or privity".
- .5 CMI also explained that the words "recklessly and with knowledge that such loss would probably result" came very near to the English term "wilful misconduct" as contained in the 1906 Marine Insurance Act and that it implied that (i) if insurance cover remained intact there would be a right of limitation and (ii) making limitation unbreakable to this extent should make possible a significant increase of the limits of liability.
- .6 The informal group identified also that in the discussions that subsequently took place at the Committee prior to the 1976 International Conference on the LLMC Convention, it was the view of a number of Government delegations that it was necessary to adopt language that was clear and not subject to differing interpretation in different jurisdictions and, for this reason, it was the view of many delegations at the time that the wording submitted by CMI be adopted in the LLMC 1976. The informal group further identified that the Committee was guided by two main considerations at the time, namely:
 - .1 that due account should be given to the availability of insurance cover for the limits foreseen in article 6, and
 - .2 that the provision should be such that those limits should not be easily broken.

- .7 The text of the test for breaking the owner's right to limit liability that was subsequently recommended by the Committee to the International Conference on Limitation of Liability for Maritime Claims in 1976 was the present wording, but with the following additional wording also included in square brackets at the end of the draft text: "or from his own gross negligence".
- .8 In terms of the review of the TP of the 1976 International Conference on LLMC Convention itself, the informal group focused on both the intention and objectives of Governments in the adoption of the test. The informal group also reviewed the proposals for alternative wordings for the test that were ultimately rejected by the International Conference, in order to understand what the adopted and existing wording was not intended to cover.
- .9 The informal group identified the following consistent themes and principles from the International Conference as to the test that was finally adopted:
- .1 the wording was based on the principle of "unbreakability";
 - .2 the wording was intended to comprise a virtually unbreakable test;
 - .3 it was presented and adopted as part of a package that was coupled with higher limits of liability (than the 1957 LLMC Convention);
 - .4 it was linked to the insurability of the risk at reasonable cost and it was designed to link to the conduct of the shipowner under his insurance policy ("wilful misconduct") that would deprive him of the right to be indemnified under the insurance policy;
 - .5 it did not constitute a threshold of "gross negligence", since that concept was rejected for inclusion by States at the international conference; and
 - .6 proposals discussed at the diplomatic conference to extend the test to include servants of the carrier, the Master or other crew members were rejected and, as a result, the behaviour of such parties was not considered to be relevant for the purposes of applying the test.

8 The informal group was careful not to review the positions of States in terms of preferences of options submitted in the course of the negotiations, but to establish the intended meaning of the test as adopted in accordance with the views of States. As noted above, a number of important principles as to the basis of the test and its intended meaning have been identified by means of this research.

9 These principles are reflected throughout the discussions on a revised LLMC Convention at the 1976 International Conference, the preceding LEG meetings and the initial CMI meetings and serve to highlight that the test was drafted in order to present a virtually unbreakable right of the owner to limit liability under LLMC 1976 and the subsequent conventions adopted by the Organization. It is the view of the co-sponsors that such principles are fundamental to the operation of the conventions and that it would be beneficial to all concerned parties that these are reflected in a UI in order to provide certainty and uniformity where the conventions are in force.

10 The co-sponsors therefore recommend that this work is taken forward to LEG 108 and that the informal group, with any other interested delegation, develops a draft Unified Interpretation on the test for consideration by LEG 108.

Action requested of the Committee

11 The Legal Committee is invited to:

- .1 take note of the information contained in this document and the work of the informal group undertaken in the intersessional period since LEG 106, as fully reflected in LEG 107/INF.5;
 - .2 consider the recommendation that this work is taken forward to LEG 108 and that the informal group, with any other interested delegation, develops a draft Unified Interpretation on the test for consideration by LEG 108; and
 - .3 agree that such a draft Unified Interpretation is based on the principles agreed by the drafters of LLMC 1976 and identified in the research report in LEG 107/INF.5, as summarized above in paragraph 7.9.
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