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WORK PROGRAMME

Proposal to add a new output under the work programme on "Unified Interpretation on the test for breaking the owner's right to limit liability under the IMO conventions"

Submitted by Greece, the Marshall Islands, International Chamber of Shipping and International Group of Protection and Indemnity Associations

SUMMARY

Executive summary: The co-sponsors consider that there is a need to reaffirm the principles underlying the IMO liability and compensation conventions, particularly with respect to the shipowner's right to limit liability, given (a) the fundamental importance of this right, which underpins the conventions and (b) that the long-term sustainability of the liability and compensation system depends upon uniform implementation consistent with the intention of the conventions, rather than an application or interpretation that varies from country to country. The co-sponsors therefore propose that the Committee considers a new work output for the development of an aid to interpretation of one of the key principles underlying the system by means of a Unified Interpretation of the test for breaking the shipowner's right to limit liability. This would ensure consistency among States Parties while continuing to recognize that the courts in States Parties are ultimately the final arbiters.

Strategic direction, if applicable: 1 and 6

Output: Proposal for a new output

Action to be taken: Paragraph 26

Related documents: LEG.1/Circ.9; resolutions A.1110(30) and A.1111(30) and IOPC Fund resolution No. 8

Introduction and background

1 This document is submitted in accordance with paragraph 4.7 of the *Organization and method of work of the Legal Committee* (LEG.1/Circ.9) on the submission of proposals for new outputs, taking into account resolution A.1111(30) on *Application of the Strategic Plan of the Organization* and proposes a new output to develop a Unified Interpretation of the test for breaking the owner's right to limit liability in the 1992 CLC Protocol, the 2010 HNS Protocol and the 1996 LLMC Protocol.

2 The Legal Committee has developed, over time, a comprehensive framework of liability and compensation conventions for ship-source pollution damage and other maritime claims: the 1992 CLC Protocol and IOPC Fund Convention, on which subsequent conventions have been modelled; the 2001 Bunkers Convention; the 2007 Nairobi WRC; the 2010 HNS Protocol; and, in terms of limitation of liability, the 1996 LLMC Protocol (the "Conventions").

3 The Conventions (with the exception thus far of the 2010 HNS Protocol, which has not yet entered into force but is expected to do so shortly), are among the most successful IMO conventions in terms of achieving their objectives of providing an effective, responsive and fair compensation system to claimants and, with the large number of ratifications across all regions of the globe, they can be said to be a truly global regime. The regime has been successful because of the carefully negotiated compromise between all of the parties: governments, the shipping industry and the oil industry, balancing their obligations and interests into a coherent package.

4 The success of the Conventions regime as a whole is due to the radical measures contained within the model first established in the 1969 CLC and the 1971 Fund Convention, which were novel at the time of their adoption, to ensure prompt compensation of claimants without the need for legal recourse. The measures and compromises in those Conventions that are designed to achieve these objectives include the strict liability of the shipowner, the channelling of liability to the shipowner irrespective of fault and compulsory insurance backed by State certification. Underpinning these measures is the shipowner's right to limit liability as a quid pro quo for acceptance of strict liability, with the intention that such a right is virtually unbreakable and with the owner's insurer entitled to rely upon the limit of liability irrespective of a finding of "recklessness" and with material knowledge on the shipowner's part.

5 As with all international instruments, continuing success is dependent upon all States Parties implementing and applying the Conventions in a uniform manner that is consistent with the aims and objectives agreed at the time of adoption, in order to ensure that the system remains fair for all parties and, most importantly, that it is applied equally and equitably to all claimants.

6 This has been recognized by the Organization in the drafting of the Conventions. For example, the preamble to both the 1992 CLC and the 1992 Fund Convention expressly States:

"Desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases".

7 This intention was reinforced with regard to those particular instruments in 2003 in Fund resolution No. 8, adopted in May 2003 (Resolution on the Interpretation and Application of the 1992 CLC and 1992 Fund Convention), a copy of which is set out in annex 1. It confirms the importance of implementing and applying the regime uniformly in all States Parties for its proper and equitable functioning and to ensure that claimants are given equal treatment with regard to compensation. It also draws attention to the numerous decisions of the governing bodies of the IOPC Funds on the interpretation of the Conventions and emphasizes the importance of due consideration to these decisions by national courts.

8 Inconsistent application or interpretation, either through domestic implementing legislation or by decisions taken by national courts that differ in scope from the intention of the Conventions, could result in confusion and uncertainty as to the amounts payable under the Conventions and to an unequal treatment of claims. This would be highly undesirable for claimants seeking clarity and prompt compensation in the aftermath of an incident where damage has arisen as a result of ship-source pollution. A number of past cases would suggest

that this can also lead to protracted and unnecessary legal recourse, which is to the detriment of claimants and conflicts with the objectives of ensuring prompt payment of claims.

9 With a number of years of experience now in the application and interpretation of the Conventions since their entry into force, the co-sponsors believe that it is incumbent on the States Parties to collectively seek to ensure that such conflicts are avoided, to the extent possible and appropriate, through the work of the Legal Committee.

IMO's objectives

10 The Strategic Plan for the Organization for the six-year period 2018 to 2023 (resolution A.1110(30)) sets out the mission statement, which states that "The mission of the International Maritime Organization (IMO), as a United Nations specialized agency, is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO Instruments, with a view to their universal and uniform application." The proposed new output will contribute to achieving the goals and carrying out the mission of the Organization.

Need

11 The co-sponsors are of the view that a Unified Interpretation agreed by the Legal Committee on the test for breaking the owner's right to limit liability under the Conventions regime would greatly assist in ensuring the proper implementation and application of the Conventions and would also promote the equal treatment of claims in States Parties. While the Conventions have been developed on the basis of shared liability and insurance provisions, the co-sponsors believe that a focus on the test for breaking the owner's right to limit liability is relevant and timely, given that limitation provides the foundation of the Conventions and the recognition that limitation is inextricably linked to the insurability of an owner's liability.

12 The success of the Conventions is based on reciprocity, and reciprocal treatment can only be achieved against the background of harmony in the application and interpretation of the Conventions. Revisiting the intentions of the drafters of the Conventions of this fundamental principle and developing a Unified Interpretation, accordingly, would assist in ensuring the continuing success of the Conventions and the carefully negotiated compromise between all of the parties, which is the foundation of the regime and balances the obligations and interests of the various parties into a coherent package.

13 Furthermore, the co-sponsors believe that such a Unified Interpretation would assist regulators, drafters of legislation, claimants and national courts in the States Parties to the Conventions, given that several years have passed since the Conventions were adopted. The adoption of such a Unified Interpretation would not in any way fetter the decision-making authority of those courts but would assist in the implementation and application as originally intended by States. Clarifying and re-affirming the intention behind this fundamental principle can only be of benefit to all interested and concerned parties, including those claimants who suffer losses arising from ship-source pollution damage and for whom certainty and prompt payment of compensation is paramount.

Analysis of the issue

14 The shipowner is entitled to limit its liability under the Conventions (article V(1) of the 1992 CLC, article 6 of the 2001 Bunkers Convention, article 10(2) of the 2007 Nairobi WRC, article 9(1) of the 2010 HNS Protocol and article 1(1) of the 1996 LLMC Protocol). However, under the 1992 CLC Protocol, 2010 HNS Protocol and the 1996 LLMC Protocol, the shipowner may lose the right to limit liability if it is proved that:

"...the damage / loss resulted from his personal act or omission, committed with the intent to cause such damage / loss, or recklessly and with knowledge that such damage / loss would probably result."¹

15 It is noteworthy that the above-mentioned test for breaking the shipowner's right to limit liability, which was first introduced in the 1976 LLMC Convention, replaced the test of "actual fault or privity" in the earlier versions of the LLMC and CLC regimes, namely the 1957 Brussels Limitation Convention and the 1969 CLC. The previous test was found unsatisfactory by States, as it led more readily than was intended to litigation cases, with the accompanying costs for claimants, and denial of limitation.

16 In developing the current test for breaking the shipowner's right to limit liability, the Legal Committee was guided by two principal considerations: firstly, that due account should be given to the availability of insurance cover for the limits and, secondly, that those limits should not be easily "broken". The previous test of "fault or privity" had been problematic in some jurisdictions, creating uncertainty and consequential difficulty in obtaining insurance cover and it was readily accepted by States that the entitlement to limitation should be guaranteed save in the most extreme of cases. The current wording was also agreed on the basis that clearer language was necessary to avoid differing interpretations.

17 Ultimately, the current test was agreed on the basis of a number of assumptions, including that the limit would be virtually unbreakable and, therefore, references to fault and privity and also to "gross negligence" that had been proposed during negotiations could be deleted, and acknowledging the importance of aligning the right to limitation of the insurability of an owner's liability and thereby seeking to ensure, as far as possible, the continuing availability of insurance. It was recognized in the drafting of the test that conduct which denies the shipowner the right to limit liability could also entitle the shipowner's insurer to deny insurance cover (the "wilful misconduct" rule).

18 As a result, the conduct considered to meet the test for breaking the shipowner's right to limit liability should not be lower in culpability than that intended in the Conventions. In addition, it was not the intention of the drafters of the Conventions that different interpretations be given to the word "recklessly" or for there to be an inconsistent application of the totality of the requirements set out in the test, which requires the conduct to be accompanied by "knowledge" that such damage would occur as a result of the conduct. The conduct of parties other than the shipowner, for example the master or the crew, is irrelevant and should not be taken into account, as this would be contrary to the provisions of the Conventions.

19 Sight of these important principles may have been lost given the length of time that has passed since the initial adoption of the revised test in the 1976 LLMC Convention, which has since been replicated in the other Conventions. The co-sponsors are therefore of the view that the Committee is well placed to revisit the intention of the drafters of the Conventions on the shipowner's right to limit liability in order to re-affirm the objective of consistent and uniform

¹ Articles V(2), 9(2) and 4 of 1992 CLC, 2010 HNS and 1996 LLMC, respectively.

application, both in terms of application and interpretation of this fundamental right to limitation and the test for breaking the right to limit liability.

Analysis of implications

20 There would be no cost to the maritime industry or administrative requirements arising from this output. However, the consequences of not addressing the issues discussed above could threaten the long-term sustainability of the liability and compensation system and may lead to adverse impacts on all parties concerned, including governments and other third party claimants, shipowners, insurers and reinsurers. The checklist for identifying administrative requirements, as set out in annex 2, has therefore been completed on this basis.

Benefits

21 The proposed action would seek to reaffirm the principles underlying the IMO liability and compensation Conventions, particularly with respect to the shipowner's right to limit liability, given (a) the fundamental importance of this right, which underpins the Conventions, and (b) that the long-term sustainability of the liability and compensation system depends upon uniform implementation, consistent with the intention of the Conventions. A Unified Interpretation on the test for breaking the owner's right to limit liability would ensure consistency amongst States Parties to the benefit of all parties concerned, while recognizing that the courts in States Parties are ultimately the final arbiters.

Industry standards

22 There are no industry standards related to consistent interpretation and application of the Conventions. In May 2003, the IOPC Fund adopted Fund resolution No. 8, Resolution on the Interpretation and Application of the 1992 CLC and 1992 Fund Convention.

Output

23 The co-sponsors invite the Legal Committee to consider the issues raised in this document and to agree on a new output to develop a common understanding of the test for breaking the shipowner's right to limit liability by means of a Unified Interpretation of the shipowner's right to limit liability under the Conventions.

24 The proposed output would be: a Unified Interpretation on the test for breaking the owner's right to limit liability as contained in the Conventions.

Urgency

25 Two sessions are estimated to be necessary to complete the work. The co-sponsors consider that there is urgency in addressing the issue of inconsistent interpretation and application of the test for breaking the owner's right to limit liability by means of a Unified Interpretation. Therefore, it is proposed that the output should be placed on the 2018-2019 biennial agenda (and in due course the 2020-2021 biennium). The proposed date for completion of the output is 2021.

Action requested of the Committee

26 The Legal Committee is invited to:

- .1 take note of the information provided in this document; and
- .2 agree to include a new output on its work programme to develop a Unified Interpretation on the test for breaking the owner's right to limit liability under the Conventions.

ANNEX 1

RESOLUTION No. 8 ON THE INTERPRETATION AND APPLICATION OF THE 1992 CIVIL LIABILITY CONVENTION AND THE 1992 FUND CONVENTION (May 2003)

THE ADMINISTRATIVE COUNCIL, ACTING ON BEHALF OF THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND, 1992, SET UP UNDER THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1992 (1992 Fund Convention)

NOTING that the States Parties to the 1992 Fund Convention are also Parties to the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention),

RECALLING that the 1992 Conventions were adopted in order to create uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

CONSIDERING that it is crucial for the proper and equitable functioning of the regime established by these Conventions that they are implemented and applied uniformly in all States Parties,

CONVINCED of the importance that claimants for oil pollution damage are given equal treatment as regards compensation in all States Parties,

MINDFUL that, under Article 235, paragraph 3, of the United Nations Convention on the Law of the Sea 1982, States shall cooperate in the implementation of existing international law and the further development of international law relating to the liability for and assessment of damage caused by pollution of the marine environment,

RECOGNIZING that, under Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties 1969, for the purpose of the interpretation of treaties there shall be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,

DRAWING ATTENTION to the fact that the Assembly, the Executive Committee and the Administrative Council of the International Oil Pollution Compensation Fund 1992 (1992 Fund) and the governing bodies of its predecessor, the International Oil Pollution Compensation Fund 1971 (1971 Fund), composed of representatives of Governments of the States Parties to the respective Conventions, have taken a number of important decisions on the interpretation of the 1992 Conventions and the preceding 1969 and 1971 Conventions and their application, which are published in the Records of Decisions of the sessions of these bodies <2>, for the purpose of ensuring equal treatment of all those who claim compensation for oil pollution damage in States Parties,

EMPHASIZING that it is vital that these decisions are given due consideration when the national courts in the States Parties take decisions on the interpretation and application of the 1992 Conventions,

<2> IOPC Funds' website: www.iopcfunds.org

CONSIDERS that the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions.

ANNEX 2

CHECKLIST FOR IDENTIFYING ADMINISTRATIVE REQUIREMENTS

This checklist should be used when preparing the analysis of implications required in submissions of proposals for inclusion of outputs. For the purpose of this analysis, the term "administrative requirements" is defined in resolution A.1043(27), as an obligation, arising from a mandatory IMO instrument, to provide or retain information or data.

Instructions:

- (A) If the answer to any of the questions below is **YES**, the Member State proposing an output should provide supporting details on whether the requirements are likely to involve start-up and/or ongoing costs. The Member State should also give a brief description of the requirement and, if possible, provide recommendations for further work (e.g. would it be possible to combine the activity with an existing requirement?).
- (B) If the proposal for the output does not contain such an activity, answer **NR** (Not required).
- (C) For any administrative requirement, full consideration should be given to electronic means of fulfilling the requirement in order to alleviate administrative burdens.

1. Notification and reporting? Reporting certain events before or after the event has taken place, e.g. notification of voyage, statistical reporting for IMO Members	NR	<input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing
Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)		
2. Record keeping? Keeping statutory documents up to date, e.g. records of accidents, records of cargo, records of inspections, records of education	NR	<input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing
Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)		
3. Publication and documentation? Producing documents for third parties, e.g. warning signs, registration displays, publication of results of testing	NR	<input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing
Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)		
4. Permits or applications? Applying for and maintaining permission to operate, e.g. certificates, classification society costs	NR	<input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing
Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)		
5. Other identified requirements?	NR	<input type="checkbox"/> Start-up <input type="checkbox"/> Ongoing
Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)		