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"Young MLAANZ" Case Note – Chanté Fourie

Charting the Sea of Limitation: The IMO Unified Interpretation on the Test to Break a Shipowner's Right to Limit Liability

The privilege conferred upon shipowners to limit liability for claims is an idea born of commerce[1]. The underlying rationale being the encouragement of investment in trade and the insurability of risk[2]. For potential claimants, this limit is balanced by enhancing the prospect of recovery and securing expedient payment of compensation[3].

In this exchange, *balance* is the operative term; the international maritime liability and compensation regime is a carefully negotiated compromise, the most recognisable characteristic of which is the shipowner's virtually unbreakable right to limitation as the quid pro quo for strict liability claims.

However, recent decisions have threatened to undermine this bargain, necessitating the development of the Unified Interpretation on the Test for Breaking the Shipowner's Right to Limit Liability (UI), affirmed at the thirty-second session of the International Maritime Organization (IMO) General Assembly on 15 December 2021.

The UI clarifies that the test to break a shipowner's right to limitation is:

(1) "virtually unbreakable"

(2) assessed at a level of culpability above gross negligence

(3) that the conduct of persons other than the shipowner are irrelevant to the assessment.

Context

A shipowner's right to limitation is principally established under two conventions: the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC), and the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC) (collectively, the Conventions), both of which are subject to the near identical exclusion below:

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

Test

The Test was deliberately configured to ensure a shipowner's right to limitation could only be broken in exceptional circumstances[4]. However, recent decisions indicate an increased willingness to break a shipowner's right to limitation in circumstances arguably not originally intended.

The most notable example is the 2016 decision in the *Prestige*[5], which involved a catastrophic oil spill off the coast of Spain. The Spanish Supreme Court found the shipowner acted with negligence sufficiently serious to support the conclusion it had acted recklessly and with knowledge that the damage would probably result, breaking its right to limitation under the CLC. Additionally, the shipowner's P&I Club was held directly liable for amounts above the CLC limit (which capped liability at €22,777,986) by application of Spain's domestic laws, warranting a finding of liability up to the policy limit of US$1 billion.

The decision is criticised as a misapplication of the Test, with "serious" negligence considered a standard of culpability short of the "virtually unbreakable" threshold required to break a shipowner's right to limitation. In respect of the P&I Club, the judgment appears to contradict the express wording of article 7.8 of the CLC which entitles an insurer to avail itself of limitation even if its insured is not so permitted, as well as seemingly circumventing the limits set out in the CLC in preference of Spain's own domestic legislation.

Bio

Chanté is a solicitor at Hesketh Henry, having joined its litigation team in 2021. She has experience in a range of civil matters, with a focus on charterparty disputes, subrogated recoveries, and insolvency actions within Hesketh Henry's trade and transport practice.

Chanté completed Degrees in Law (Honours) and Commerce (Accounting and Economics) at the University of Auckland. She is published in the *New Zealand Law Journal* for her take on force majeure in the context of New Zealand's most widely used standard form construction contract, NZS3910, and won first place for her work on the same in the Society of Construction Law's 2022 essay competition. Chanté is also featured by the Comité Maritime International (CMI), having come runner up in the yCMI essay prize 2023, as well as in various other publications including *Build Law Magazine* and the *Employment Law Bulletin*.

The UI

The UI was developed in response to the *Prestige* and decisions of a similar nature[6], which appeared to move away from the fundamental principles underpinning the Conventions.

The UI clarifies that in respect of the LLMC, CLC and LLMC Protocol of 1996, the Test is to be interpreted:

a. as virtually unbreakable in nature

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

   i. a level higher than the concept of gross negligence, since that concept was rejected by the 1976 Conference on the LLMC

   ii. a level that would deprive the shipowner of the right to be indemnified under the marine insurance policy

   iii. a level that provides that a 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" and that these terms establish a level of culpability that must be met in their combined totality

d. that the conduct of parties other than the shipowner (eg, master and crew among others) is irrelevant and should not be factored.

In developing the UI, significant import was placed on the Travaux Préparatoires of the LLMC and the meeting reports of the CMI at which the draft amendments to the 1957 Limitation Convention (which would inform LLMC) were discussed[7]. The objective being that the UI carefully reflects the intention of member states at the time the Test was first configured, as opposed to imposing a new interpretation which would more properly be incorporated by way of an amendment to the Conventions.

Comment

The UI having been adopted under the auspices of the IMO is a highly persuasive interpretive instrument. However, perhaps ironically, it appears to have limitations of its own.

For one, the UI cannot influence how a state will approach its international obligations where a conflict arises between the relevant convention and its domestic law.

The way a convention applies within a state will depend on how the state approaches its international obligations[8]. In the *Prestige*, the Supreme Court had a choice; strictly adhere to the limits of the CLC and contravene its own domestic legislation, which entitles a third-party claimant a right of direct action against an insurer for amounts above the convention limit, or vice versa. In choosing the latter the Supreme Court's decision can be said to be one of policy. It chose to give preference to its own domestic legislation, prioritising compensation for third party victims rather than the commercial interests of shipowners and insurers pursuant to the CLC.

The UI does not address this issue, although this is no oversight. The UI is simply an instrument incapable of doing so, as such matters exist outside the parameters of the Conventions in the first place. All the UI can do is advise on matters *within* the Conventions; it cannot influence conflicts of law that exist externally.

Additionally, the meaning of the phrase "recklessly and with knowledge" may remain a topic of contention. While the UI makes clear that the Test is to be interpreted at a level above gross negligence, it does little to establish what this might look like for member states (often in civil law jurisdictions) that do not have an equivalent standard for "reckless" in their domestic law. This may limit the UI's ability to achieve its primary objective; consistent application of the Test by member states.

Insight can be gleaned from a questionnaire distributed by the CMI in 2020 asking national maritime law associations to comment on how "reckless" is interpreted by their national courts (CMI Questionnaire). Notable observations include:

a. civil law jurisdictions interpreted the standard in a broad manner, from mere *culpa* (negligence)[9] through to *dolus directus* (direct intent) in the second degree[10]

b. in Greece "recklessness" translates to "indifference" which "is not known to Greek law"[11]. As a result, the approach has been variable including to construe the term as gross negligence, between gross negligence and indirect intent, as well as direct intent in the second degree. This variability is somewhat alarming considering Greece is the largest shipping nation in the world[12], yet is beholden to an international framework not readily reconcilable with its own domestic legislation, yielding unpredictable outcomes. Italy, also comprising a sizable maritime presence, describes similar challenges

c. only two[13] of the 12 member states that responded to the CMI Questionnaire can comfortably be said to consistently apply the standard of recklessness as intended by the Conventions and described by the UI

d. half of participants expressed the test for recklessness as "gross negligence" either as the exclusive standard, or as one of several standards that have been applied by domestic courts.

Evidently, gross negligence has been a popular substitute for "reckless" where a state is without this terminology. For civil law jurisdictions that have routinely imputed "gross negligence" as the standard to apply, the question becomes: what will replace it? This question remains unanswered.

As a final note, not all member states party to the Conventions were in attendance at the IMO General Assembly at which the UI was adopted. Accordingly, it is unclear the degree to which it can be classed as a "subsequent agreement" under the Vienna Convention on the Law of Treaties, leaving the door open for member states to argue that the UI is not binding unto them.

With the UI's salt yet to be tested, it is difficult to anticipate to what degree it will resolve the lack of international uniformity made prevalent by the *Prestige* and recent decisions of similar ilk. Undoubtedly it is vulnerable to circumvention, particularly regarding conflict of law issues that the UI is unable to address. This may be the UI's most significant weakness, which also happens to represent the greatest threat to P&I Clubs who play a critical role in the in the effective operation of the international limitation regime. Whether this and the dichotomy between civil and common law approaches to "reckless" make any practical difference to the way in which the UI is received by national courts remains to be seen.

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1. James J Donovan 'The Origins and Development of Limitation of Shipowners' Liability' (1979) 53 Tul.L.Rev.999 <www.tulanelawreview.org/pub/volume53/issue4/the-origins-and-development-of-limitation-of-shipowners-liability> accessed 23 March 2023.

2. D.C. Jackson, *Enforcement of Maritime Claims* (2nd edn, LLP Limited, 1996) 515.

3. Ibid 515.

4. Ibid 515.

5. *The Prestige* STS 11/2016, ES.TS.2016.11.

6. See for example: *The Erika* Court of Cassation, Criminal Chamber, 25 September 2012, Appeal No:10-82.938, and the Greek decision of the Piraeus Court of First Instance, decision number 1291/2018.

7. Canada, Greece, Italy, Malta, Poland, International Chamber of Shipping and International Group of Protection and Indemnity Associations, Intersessional Work Report on the Unified Interpretation on the Test for Breaking the Owner's Right to Limit Liability Under the IMO Conventions (LEG 107/9, 10 January 2020) para 4.

8. Patrick Butchard 'Principles of International Law: a Brief Guide' (House of Commons Library, Briefing Paper 9010, 21 September 2020) <https://researchbriefings.files.parliament.uk/documents/CBP-9010/CBP-9010.pdf> accessed 26 March 2023.

9. Columbia.

10. Greece.

11. Greece MLA reply to CMI Questionnaire <https://comitemaritime.org/wp-content/uploads/2017/07/United-interpreration-for-rules-of-brearking-liability-Greek-MLA-reply.pdf> accessed 20 March 2023, para 10.

12. Frank Holmes Ranked: Top 10 Countries with the Largest Shipping Fleets (14 April 2021) <https://www.usfunds.com/resource/top-10-countries-with-the-largest-shipping-fleets/> accessed 20 March 2023.

13. Germany and Switzerland.