LLMC 1996: Living with Limitation of Liability

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Contents

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[1] It is a privilege to have been asked to deliver the Dethridge lecture at the 47th National Conference of the Maritime Law Association of Australia and New Zealand in Brisbane on 13 October 2022. I have been fortunate in having attended and spoken at many MLAANZ conferences since my first in 1983 and (following the Welcome to Country) I pay my respects to Australian maritime lawyers, past, present and emerging. The present paper is an extended version of the address that I gave in Brisbane and is something of a swan song!

1. Introduction

Maritime limitation of liability is a subject that has attracted interest and controversy throughout its existence. It still attracts judicial and international consideration from bodies such as CMI and IMO, as well as academic and practitioner commentaries.[2] For my entire career, limitation has formed a backdrop to my own study (and limited practice) of maritime law.

The subject is fascinating, both intellectually and historically, but I have tried to avoid the temptation to write a complete A-Z lecture on limitation.[3] I will assume that the reader has a general familiarity with the law on limitation generally, and the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 and 1996 in particular. For present purposes, the LLMC 1976 and LLMC 1996 allow shipowners and others to limit liability according to the tonnage of the ship for a very wide variety of 'maritime claims': including personal injury and death claims as well as 'property' claims (including cargo loss, collision damage, wreck removal, and some environmental damage). I have always referred to the LLMC type of limitation as 'global', referring not to some geographic notion, but the systems of maritime limitation of liability that in essence aim (with varying degrees of success) to apply a unified single limit to a wide variety of maritime claims from different sources. I contrast 'global' limitation systems[4] with 'contract' limitation systems, ie those that apply by reference to carriage contracts for cargo[5] or passengers.[6] In some circumstances, both global and contract systems can apply to the same set of events, thereby providing a double limit.[7]

My own interactions with the concept of global limitation have made me aware of how limitation affects so many different interests and people, not simply as victims (for personal injury/death, property and environmental claims) or beneficiaries (shipowners and liability insurers), but also as those in the maritime law world who have to 'live with' limitation, including legal practitioners, governments (including those of Australia and New Zealand) and international bodies (such as the CMI and IMO). In this paper I wanted to reflect a little on these different

[2] The continuing literature is so extensive that it cannot be cited in full here; I confess I have contributed to this literature, and this paper is replete with self-serving citations! Among the notable book analyses are: P Griggs, R Williams, and J Farr, *Limitation of Liability for Maritime Claims* (Informa, 4th ed, 2004); B Reynolds and M Tsimplis, *Shipowners' Limitation of Liability* (Wolters Kluwer, 2012); N Martinez Gutierrez, *International Maritime Conventions* (Routledge, 2011). For a recent academic article, see A Tzima and P Morgan, 'Justifying Global Limitation of Liability for Maritime Claims in the Modern Business Environment', [2022] *Lloyd's Maritime and Commercial Law Quarterly* 292.

[3] Although I also confess that this paper developed a 'life' of its own! My experience in presenting the subject for practitioners or LLM students is that four hours barely scratches the surface.

[4] Including those represented by international conventions such as the LLMC 1976/1996 itself and the earlier International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels 1924 [1924 Limitation Convention] and the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships 1957 [1957 Limitation Convention].

[5] Eg the Hague Rules 1924 and Hague-Visby Rules 1968.

[6] Eg the Convention Relating to the Carriage of Passengers and their Luggage by Sea [Athens Convention] 1974 and 2002.

[7] Eg where a contract limit is applied per unit of cargo (under the Hague-Visby Rules), or per passenger (under the Athens Convention 1974/2002). See also 2, below.

perspectives. Part One considers my own perspectives on the LLMC as an academic lawyer, as well as those of others who practice maritime law. Part Two considers national Government perspectives, particularly the choices facing Australia in adopting conventions that have limitation implications. Part Three focuses more on the LLMC at the international level and, in particular, on recent significant developments at the IMO.

PART ONE: LAWYERS LIVING WITH LIMITATION

2. My own 'living with limitation'

My own interest was developed and stimulated by two events that impacted on my academic life. The first was the coming into force of the LLMC 1976 in 1986. To highlight the significant changes that were to be made to the established law of limitation, I had organised a conference at Southampton in September 1984, as it was expected that the convention would shortly enter into force.[8] I was able to persuade Sir Henry Brandon (then Admiralty judge, later a Law Lord) to chair the conference that drew a large audience of London practitioners who had been very familiar with the UK Merchant Shipping Act (MSA) 1894 s 503, but somewhat ignorant of its relationship with the 1957 Limitation Convention (to which the UK was then a party).

I produced an edited volume of the proceedings[9] that included some (probably my only) original empirical work,[10] as well as 12 international contributions. The latter introduced me to the nightmare 'herding cats' exercise of being an editor, but also to the very different perspectives of civil lawyers and common lawyers.

The second event that impacted me was the *Herald of Free Enterprise* disaster in 1987, when I somewhat naively contacted the BBC to alert its News Room that the passengers faced a potential problem of limitation of liability from the LLMC 1976, but also from the Athens Convention 1974. This led to a rather scary interview on the nightly 6.00 pm BBC TV News.[11] Shortly after, I received a bemused but somewhat aggressive phone call from a partner in a well-known (but non-maritime) personal injury firm of solicitors who challenged my conclusion that there could be a double limitation with both an Athens per passenger limit applying first and then, theoretically, a further potential limit applying globally under the LLMC 1976.[12] As an academic I then felt compelled to write a series of articles explaining the limitation position for passengers.[13]

3. History of living with limitation: Titanic and amount of limits

The history of limitation dates back in England to 1733, with later developments throughout the 19th Century.[14] Under the *Responsibility of Shipowners Act 1813*, the Court of Chancery had been given jurisdiction under the Act, not the High Court of Admiralty. According to Wiswall,[15] this was probably because it could enjoin multiple proceedings in other courts. He also noted how there was later some confusion caused by Sir Francis Jeune's

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[8] In fact, the necessary number was achieved in 1985, enabling the LLMC to enter into force internationally on 1 December 1996. This was itself an early lesson the difficulties of bringing into force international legislation. My later attendance, over some 15 years, at various IMO legal negotiations (including the LLMC 1996) taught me also about the problems of actually agreeing the content of maritime law conventions and the implications of limitation on that process.

[9] Institute of Maritime Law (N Gaskell, ed), *Limitation of Shipowners' Liability: The New Law* (Sweet & Maxwell, 1986). I was in Australia as a visiting lecturer at Monash University in 1986 and the final editing work had to be done remotely, including by telex and fax—before the days of email attachments!

[10] See N Gaskell, 'The Amount of Limitation' in *Limitation of Shipowners' Liability: The New Law*, Ch 3, where I was able to highlight that the 1976 limits would be increased significantly by the LLMC's change to using gross tonnages under the 1969 Tonnage Convention. This work involved collaboration with Lloyd's Register to show examples of ships that had been measured under the old and new tonnage systems—a change which itself usually produced greater limitation tonnages (even before the LLMC 1976 increases). I have periodically updated these detailed tables (with new calculations and examples) in what is now N Gaskell, 'Limitation of Liability and Division of Loss in Operation' in S Gault (ed), *Marsden and Gault on Collisions at Sea* (Sweet & Maxwell, 14th ed., 2016) Appendix 4, pp. 973-1020 (assisted in that edition by Nicholas Derrington). This updating has involved a great deal of work for no reward with, I suspect, relatively few readers!

[11] Had I given the wrong opinion, scaring relatives and victims?

[12] In fact, it was clear from Art 18 of the Athens Convention that it had left unaffected the limits under limitation conventions such as the LLMC. The same double limit can apply under the Hague/Hague-Visby Rules Art VIII.

[13] N Gaskell, 'The Zeebrugge Disaster: Application of the Athens Convention 1974' (1987) 137 New Law Journal 285-8; N Gaskell, 'The Athens Convention 1974 and Limitation of Liability, II' (1987) 137 New Law Journal 322-3; N Gaskell, 'The Athens Convention 1974: The Concept of Limitation'(1987) 137 New Law Journal 383-6.

[14] See eg *Responsibility of Shipowners Act*, 7 Geo 2, c 15 (1733); R. Merkin, *Marine Insurance: A Legal History* (Edward Elgar, 2021), paras 2.55, 7.91, 14.161; 16.177. See also, J Donovan, 'The Origins and Development of Limitation of a Shipowner's Liability' (1979) 53 Tulane Law Review 999, 1031; A Rein, 'International Variations on the Concept of Limitation of Liability' (1979) 53 Tulane Law Review 1059.

[15] F Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (CUP, 1970) 22.

"fateful decision" in *The Dictator*[16] in which Wiswall claims[17] that Jeune really confused two issues: the age-old principle that a shipowner could not be liable in an *action in rem* beyond the value of the *res* (ship and freight), and the 19th century statutes allowing a shipowner to limit liability.

In its earliest inception, limitation was calculated by reference to the value of the wrongdoing ship. This was consistent with principles underlying the *action in rem*; it also reflected a close connection between the total investment of the shipowner in the maritime adventure and his liability. The valuation method was broadly that adopted by many countries, but was calculated in different ways.

After the *Titanic* sinking, there were civil claims brought by the passengers, many of which were litigated in the USA.[18] The shipowner asserted that it had contractual defences to cargo and passenger claims, but it in fact successfully petitioned to limit its liability under US law[19] to only US$97,772 (plus interest of $119,525).[20] This was because the US then operated a limitation system based on the value of the ship, but calculated after the casualty. Although such a system represented in some measure the shipowner's investment in the maritime adventure, the US *Titanic* litigation showed its drawbacks as the only property saved consisted of 14 lifeboats and some advance freight.[21]

The *MSA 1854* (UK) s 504[22] had also based limitation on the value of ship and freight, but for injury and death cases prescribed a *minimum* limit of £15 per registered ton. The *Merchant Shipping Act Amendment Act 1862* (UK)[23] took this further by scrapping the valuation criterion completely and *definitively* fixing *maximum* limits based on the tonnage of ships.[24] The limits were set at £8 per ton for property claims or £15 per ton for injury and death claims. In fact it seems that these figures were set at the then average values of general cargo ships (£8 per ton) or passenger ships (£15 per ton).[25] Had the *Titanic* claims been subject to UK law, the shipowner would have been entitled to limit under the *MSA 1894* s 503 (which re-enacted in substance the 1862 tonnage approach), to an amount I have estimated at about £549,839 (US$2,675,793).[26]

After 1862, any linkage of limitation to values became lost—at least in the UK system—and the fixing of limits at the IMO in the LLMC 1996 is based on largely political and economic grounds unrelated to ship values, even where very high value ships are involved in incidents.[27]

It is tempting to suggest there ought to be a reversion to the 1854 limitation based on post-accident values, with the tonnage calculation being an alternative minimum not a maximum, but there appears to be no advocate for this solution. Using pre-accident values would be difficult where the ship was a total loss, so that no expert valuation was possible, and where insured values might be unreliable evidence.[28]

Limitation is an entitlement but not a duty. In 1914, the liner RMS *Empress of Ireland* sank after a collision with the collier *Storstad* and the latter was adjudged to be 100% at fault for the great loss of life and property. The defendant owners of the *Storstad* were entitled to limit liability under the MSA 1894 (UK) s 503 to about £82,350 (Can$400,221) and could have availed themselves of this defence by establishing a limitation fund, given that the total claims were in excess of Can$3 million, but they chose another course of action. They did not appeal the

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[16] [1892] P 64.
[17] *The Development of Admiralty Jurisdiction and Practice Since 1800*, 178-180.
[18] See eg, N. Gaskell, 'Empress of Ireland and Mont Blanc Collisions Then and Now' in C Mitchell and S Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart, 2020) 2.
[19] See N Gaskell, 'The Amount of Limitation' in *Limitation of Shipowners' Liability: The New Law*, 34.
[20] Ibid. The US courts rejected the argument that there was unlimited liability for foreign ships and applied US limitation law: see *Oceanic Steam Navigation Co v Mellor* 209 F 501 (1913, Holt DJ), affirmed, 233 US 718 (1914).
[21] The USA did provide a minimum limitation tonnage for personal claims in 46 USC s l84(b), but only after the later disaster to *The Morro Castle* in 1934. There the owners received US$2.1 million from the hull insurers, but were obliged only to establish a limitation fund of US$20,000 for *all* the claims against the vessel: see J Donovan, 'The Origins and Development of Limitation of a Shipowner's Liability' (1979) 53 *Tulane Law Review* 999, 1031.
[22] 17 & 18 Vic c 104. For the history of the provision, see Gaskell, 'The Amount of Limitation' in *Limitation of Shipowners' Liability: The New Law*, 34, fn 7 and *Cail v Papayanni* (*The Amalia)* (1863) Brown & Lush 151, 158, 15 ER 778.
[23] (25 & 26 Vict c 63), s 54.
[24] For the evolution of the concept of limitation tonnage, see Gaskell, 'The Amount of Limitation' in *Limitation of Shipowners' Liability: The New Law*, 45-49.
[25] Ibid, 34, fn 8.
[26] N Gaskell, 'Empress of Ireland and Mont Blanc Collisions Then and Now' in C Mitchell and S Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose*, 3.
[27] See further 5.4.1 and 12, below.
[28] The *Titanic* apparently had hull and machinery insurance cover for £1 million, although her pre-accident value of the vessel was £1.5 million: see C. Hewer, *A Problem solved: A History of the ILU 1884-1984* (1984), 29.

judgment in an *action in rem* against the ship, but merely allowed the *Storstad* to be sold by court order. She fetched only Can$175,000 and was actually bought by her previous Norwegian owners. The question was who was entitled to this money?

Perhaps out of sympathy with the personal claimants a deputy registrar allocated the Can$175,000 pro rata in favour of the life claims so far as such funds were sufficient, and excluded all other claimants from participation in the distribution.[29] In effect, he was trying to distribute the money in court as if there was a limitation fund. This approach was upheld on appeal to the Exchequer Court[30] and (with some variation) in the Supreme Court of Canada, ie that s 503 expressed a positive statutory preference in favour of the personal claimants.[31]

The Privy Council overruled this decision in a brutally short couple of pages.[32] Limitation of liability was the creature of statute and only gave rights to claimants where a shipowner had elected to establish a limitation fund. The life claimants had to share the sale proceeds *pro rata* with all the property claimants.

The *Empress of Ireland* litigation is a prime and early example of the limits of an *action in rem* against an owner with no assets other than the ship in the jurisdiction and of the effectiveness of the single ship owning structure in isolating shipowners from liabilities. The claimants could have elected to proceed in Norway in a liability action against the shipowning company *in personam*.[33] Here, they may have found the Norwegian courts less willing to exonerate the *Empress of Ireland*,[34] but would still have been faced with a single ship company with no assets. Such difficult jurisdictional choices confront litigators today, but that is why the IMO has moved in the last half century to create liability regimes[35] which include compulsory insurance and direct action against an insurer (albeit with a cap on the insurer's liability).

4. Legal practitioners 'living with limitation'

4.1. Practising maritime lawyers

4.1.1. Limitation jurisdiction procedure: establishment of a limitation fund

In practice, enforcement issues often need to be considered before a detailed analysis of substantive liability law.[36] This forms part of an initial assessment of the overall worth of a claim. The *Empress of Ireland* litigation shows how jurisdictional choices may be important and, like pre-trial security, one of the first issues that maritime claimant lawyers need to address is whether or not a shipowner (or eg a charterer) can limit—and where. Thus, in a collision case, an initial assessment of who will be a net claimant or defendant may determine a search for an appropriate forum (eg one applying higher or lower limits, or different standards for breaking limitation[37]). Limitation forum shopping[38] is controversial and may become more so as States become party to the Wreck Removal Convention 2007.[39] Practitioners will be far more aware than me of practical procedural issues, eg in establishing a limitation fund; there may be opportunities for game playing in limitation battles, but also traps. Thus, the LLMC 1976/1996 does not expressly provide whether limitation is to be applied before or after the set-

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[29] See *Canadian Pacific Railway v SS 'Storstad' and Aetna Assurance Co. and Other Intervenants and Claimants* (1917) 16 Ex. C.R. 472 [2], 34 D.L.R. 1.
[30] *Canadian Pacific Railway v SS 'Storstad' and Aetna Assurance Co. and Other Intervenants and Claimants* (1917) 16 Ex CR 472, 34 DLR 1.
[31] *Canadian Pacific Railway v SS 'Storstad' and Aetna Assurance Co* (1918) 40 DLR 615, 56 SCR 324.
[32] *Canadian Pacific Railway Company v. Steamship 'Storstad' and others* (1919) 1 Ll L Rep 416-417.
[33] Ibid, 417 (per Lord Sumner).
[34] There were suggestions that the formal investigation into the collision and the trial court judgment were unduly favourable to a major British shipowner, Canadian Pacific Line—so shortly after the *Titanic* disaster: see Gaskell, 'Empress of Ireland and Mont Blanc Collisions Then and Now' in *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose*, 3-4.
[35] Eg for claims for pollution by oil cargoes (the International Convention on Civil Liability for Oil Pollution Damage [CLC] 1992); by bunkers (International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 [Bunker Pollution Convention 2001]); by HNS (International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea [HNS Convention] 2010); or for wreck removal [Nairobi Wreck Removal Convention 2007]; or for passenger claims [Athens Convention 2002].
[36] I was inspired by my former colleague Professor David Jackson's view of enforcement, eg in D Jackson, *Enforcement of Maritime Claims* (4th ed, LLP, 2000), 1. There he pointed out that that the common lawyers' view of the *action in rem* ran together three aspects of enforcement that the civilians often treated as logically separate; namely (i) the provisional remedy aspect (eg arrest); (ii) the jurisdictional aspect (eg which court has jurisdiction over the merits of a dispute); and (iii) the security aspect (eg priorities).
[37] See 11.3, below.
[38] For a recent example, see eg *Pusan Newport Co Ltd v The Owners and/or Demise Charterers of the Ships or vessels Milano Bridge, CMA CGM Musca and CMA CGM Hydra* [2022] HKCA 157, [2022] 1 Lloyd's Rep 441 (HKCA).
[39] See 9.3, below, for the 'Isle of Man' defence.

off of liabilities, and this is one of those areas where national law will apply. The practice is generally to apply a single liability principle—ie set off before limits[40]—but care must also be taken to ensure that the net claimant is not time barred under the Collision Convention 1910.[41]

4.1.2. Substantive limitation checklist

Maritime practitioners will focus on the limitation legislation in their own countries,[42] but in a general sense, the biggest issue with limitation is what are or should be its boundaries? Ie how far should it apply both geographically and conceptually? The practitioner's perspective has often been focussed on those boundaries and the battle for loopholes; the legislators may then be pressured to close or widen apparent 'gaps'. These issues are resolved by a detailed consideration of all of the specific articles of the LLMC, which I do not propose to examine here; but a checklist of relevant substantive limitation issues broadly includes questions such as:

- For which craft is limitation available? The LLMC applies to "seagoing ships"[43] which covers wide varieties of commercial vessels, but care needs to be taken with small ships[44] and pleasure craft.[45] Uncertainty can exist about unusual species of craft, eg a Floating Drilling Production Storage and Offloading unit (FDPSO), Floating Production Storage and Offloading unit (FPSO), Floating Storage and Offloading unit (FSO) or Floating Storage Unit (FSU).[46]
- Where can you limit? Eg does the legislation apply in all geographical areas, including inland waters, rivers and lakes, as well as the high seas?[47]
- Who may limit? Originally only shipowners could limit, but other categories were added over the years.[48] Included now are charterers; these include demise, voyage and time charterers, and even slot charterers,[49] but apparently there are restrictions about how far charterers can limit when sued under the charter by their shipowner.[50] Issues of interpretation occur in relation to identifying "operators" within the LLMC Art 1(2)[51] and this difficulty presents itself in the context of autonomous craft (MASS).[52]
- Which claims are subject to limitation? Most *maritime* claims are listed in Art 2 of LLMC with some exceptions in Art 3.[53]
- Amount of Limitation: how are the limits calculated?[54]
- Loss of right to limit—breaking limitation.[55]

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[40] *The Stoormvaart Maatschappy Nederland v Peninsular and Oriental Steam Navigation Company (The Voorwaarts and The Khedive)* (1880) 5 App Cas 795.
[41] See *The Caraka Jaya Niagra III-11* [2021] 2 Lloyd's Rep 549 (HC Sing).
[42] Eg LLMC enacting national legislation such as the *Limitation of Liability for Maritime Claims Act 1989* (Cth); the *Maritime Transport Act 1994* Part 7 (NZ); and the *MSA 1995* (UK) s 185 and Sch 7.
[43] See Art 1(2). The concept is far too vague for use in practice: see eg N Gaskell, C Forrest C, *The Law of Wreck* (Informa Law from Routledge, 2019), 79, 97, 449-450; also below, 8.3 (fn 159), 9.4, 10.2 (fn 249), 12, 13.1. The UK has bypassed the difficulty by applying the LLMC (as a matter of national law) to "ships whether seagoing or not": see the MSA 1995 Sch 7 Part II para 2.
[44] Note eg the minimum tonnage limits in LLMC Art 6 (and also Art 15(2)): see 5.4.1, below.
[45] See the difficulties in Australia for *non*-seagoing ships: eg *Smith v Parese* [2006] NSWSC 288 and *Laoulach v El Khoury* [2010] NSWSC 1009: M Davies and M Dickey, *Shipping Law* (Thompson Reuters, 4th ed, 2016) 633-634. See also 9.4, below for the complexities of applying conventions to the many Australian DCVs and pleasure craft. Cf the UK approach in the *MSA 1995* Sch 7 Part II para 2, above, which still requires a pleasure craft to pass the test of being a "ship": cf *Steedman v. Scofield* [1992] 2 Lloyd's Rep 163.
[46] See the discussion of the CMI Draft OGA Convention: 10.3, below.
[47] The LLMC itself applies widely, eg even to the Antarctic (see 10.2 below). The LLMC is restricted in its scope of application more by reference to vessel type (eg seagoing ships), although Art 15 to some extent enables States to restrict the application of the LLMC in inland waters (but for vessels only designed for inland navigation). See also the Strasbourg Convention: 10.2, below.
[48] See now LLMC Art 1(1), 1(2). States may extend limitation as a matter of national law. In the UK, the owners of docks, harbours and marinas can also limit *their* liability *to* shipowners: see eg *Holyhead Marina Ltd v Farrer* [2021] 1 Lloyd's Rep 221 (EWCA) [61]. These odd provisions exist under the MSA 1995 s 191, and are separate from the LLMC, being based on the *Merchant Shipping (Liability of Shipowners and Others) Act 1900* (an Act long since repealed in Australia).
[49] See eg *The MSC Napoli* [2009] 1 Lloyd's Rep 246; Gaskell and Forrest, *The Law of Wreck*, 105.
[50] Despite the clear wording of Art 2(2) allowing claims to be subject to limitation even if brought by way of contract. In *The Ocean Victory* [2017] 1 Lloyd's Rep 52, 1, the UK Supreme Court somewhat surprisingly held that a time or voyage charterer cannot limit for damage *to* the ship as a result of nominating an unsafe port. This was justified as a result of the peculiar wording of the LLMC 1976/1996 Art 1(1) and (2), which provides a compendious definition of "shipowner" to include charterers etc, rather than listing them in their own right. The court's approach is hard to justify on a 'plain meaning' interpretation and it remains to be seen if such an admittedly influential decision is followed elsewhere.
[51] As to the meaning of "operator" (in the context of associated companies) in LLMC Art 1(2) see *The Stema Barge II* [2022] 1 Lloyd's Rep 170 (EWCA): 13.3.3, below.
[52] See 13, below.
[53] For wreck and cargo removal, see 9, below.
[54] Art 6 of LLMC sets out the calculations based on tonnage: see further 5.4.1, 12.1 below.
[55] Art 4 sets out the test for breaking limitation: see further 11.1, below. The possibility of breaking limits is actually one that should be considered at the initial stage of any action, along with enforcement (see 4.1.1, above), but is listed here for convenience.

4.2. Judges living with limitation

The experience of judges 'living with' limitation will probably vary between different countries, depending on the level and frequency of maritime law cases and the ensuing experience of judges.

In England, judges dealing with limitation will normally have practised maritime law at the Bar and will regard limitation as part of the normal commercial matrix of claims. Moreover, it is probably true to some extent that English law has been historically sympathetic to defences (such as limitation) relied on by shipowners and insurers. The latter have not only been major UK industries, but also important clients for the legal profession, and certainty, rather than fairness, has been a touchstone of English maritime law. It is no surprise that English courts have interpreted the LLMC strictly, eg in recognising that that the limits are in practice unbreakable.[56]

By contrast, in States with little or no maritime expertise or tradition (often, but not necessarily, developing States), it would not be surprising for a judge to be faced with very large claims and low limits and to see this as a restriction on the provision of justice to local claimants—especially where the defendant is a foreign shipowner (or insurer). It is therefore tempting for such judges to favour interpretations of law or fact that that would avoid limitation. Thus, it is apparent that judges in some jurisdictions (unfamiliar with, or hostile to, limitation) have been prepared to find that a lower standard was enough to break limits.[57]

In Australia, there is sometimes a tension between the British maritime legal heritage and a desire not always to be beholden to it. An example is perhaps the judgment of Rares J in *Strong Wise Limited v Esso Australia Resources Pty Ltd*,[58] developing the concept of 'splitting' the "distinct occasion" in Art 6(1). This is the provision that allows one set of limits to be applied to an event such as a collision occurring at the start of a voyage, but a second set of limits to apply to a separate collision at the end of the voyage. The *Strong Wise* decision is potentially controversial, if widely (and uncritically) followed, as it opens the way to undermine LLMC limits[59] by encouraging arguments about having, in effect, multiple limitation funds through sub-dividing what would normally be considered a single casualty into a series of causative "occasions".[60] The idea of sub-apportioning liability, ie dividing up liability stages, has judicial support from Brandon J in *The Calliope*.[61] In that case he sub-apportioned liability, but did not have to consider how this would affect "distinct occasions" for limitation purposes; ie if they were causally linked did that means that there was one or two limitation "occasions"?[62]

5. Shipowners' and Insurers' justifications for 'living with limitation'

I do not propose to discuss all the potential justifications for limitation, which have changed over time, but will examine briefly the trade and insurability arguments.

5.1. Shipping investment and trade enhancement

An English 21st Century perspective is that "the purpose or object of granting shipowners the right to limit was, in 1733, to promote the increase in the number of ships…and that the purpose of the modern Limitation Conventions was to promote trade by international carriage".[63] Actually, this is only partially true. The English 18th Century legislation was introduced as part of a somewhat mercantilist reaction to French legislation that granted limitation rights to French shipowners; in other words, it was partly a trade *protection* measure.

It is also too simplistic to describe conventions such as the LLMC as designed to 'promote international trade', unless that notion is unpacked. The LLMC itself is the result of a series of international compromises, which represent an insistence by shipowner interests that their longstanding protections be reinforced and sometimes extended. The history of legislative developments in limitation shows how 'gaps' in that protection have been

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[56] See eg *Holyhead Marina Ltd v Farrer* [2021] 1 Lloyd's Rep 221 (EWCA) [61]. In my view a strict interpretation of Art 4 is essentially justifiable, but needs close examination of issues of attribution: see further 11.1, 11.3, below.
[57] See 11.3.1, below and note the apparent change of approach of French courts in the *Heidberg* litigation, 11.3.3, below.
[58] [2010] FCA 240, [2010] 2 Lloyd's Rep 555.
[59] See N Gaskell, 'Compensation for Offshore Pollution: Ships and Platforms' in M. Clarke (ed) *Maritime Law Evolving* (Hart, 2013) 74.
[60] The evidence may not easily support such an allegation, as appeared to be the case in the *Shen Neng 1* litigation, which settled in 2016 (perhaps in part because of this difficulty). See 12.3, below and N Gaskell, 'Liability and Compensation Regimes: Pollution of the High Seas' in R Beckman, M McCreath, J Roach and Z Sun (eds), *High Seas Governance: Gaps and Challenges* (Brill/Nijhoff, 2018) 240.
[61] [1970] 1 Lloyd's Rep 84.
[62] For the real complications in limitation calculation caused by sub-apportionment, see Gaskell, 'Limitation of Liability and Division of Loss in Operation' in *Marsden & Gault Collisions at Sea*, Example 16, 1013-1020.
[63] *Holyhead Marina v Farrer* [2022] 1 Lloyd's Rep 463, [8] (EWCA), citing Teare J, [2021] 2 Lloyd's Rep 221 [16] and *The CMA Djakarta* [2003] 2 Lloyd's Rep 50 [14]; [2004] 1 Lloyd's Rep 460 [11].

recognised, with attempts (not always successful) to fill them. In negotiations about limitation, the supporters of limitation have to balance their desire to fill gaps and maintain limits with the risk that non-shipowning States will suddenly revolt and question the whole basis of maritime limitation.[64]

5.2. Insurability justification for 'living with limitation'

By the time of the negotiations that led to the LLMC 1976, "the generally accepted point of departure was that the limit should be the maximum that was insurable at reasonable cost".[65] In those 1976 negotiations there was a wide range of opinions as to what costs were reasonable and what the cost effects would be as to any changes.[66] Those debates have continued thereafter and it is hard to avoid Selvig's perception that that their resolution depended on "the extent to which the various delegations wanted to protect their shipping interests by keeping liability and insurance costs low".[67] This difficulty is reinforced by the particularly strong voice of shipowning interests at the IMO.[68]

It is hard for anyone outside of the insurance industry, and the P&I Clubs in particular, to assess the availability of liability reinsurance and its costs. The annual renewal of the reinsurance for the International Group of Protection and Indemnity Associations (International Group of P&I Clubs) is complex[69] and intimately affected by world economics and disaster claims, in particular.[70] The experience with recent wreck removal claims[71] shows that there are very real reinsurance concerns with liabilities and it is difficult to say that the Clubs are 'crying wolf'. Still, the persistent position of the Clubs that limitation is vital should always be open to challenge, both in relation to individual claimants and particular types of claim.[72]

In my view, the existence of the International Group is generally a force for good for the international community, but it should not be ignored that there are other *non*-International Group insurers, eg fixed premium insurers, who may not be so reliable.[73] This is a particular risk for Governments, in particular, who have to rely on insurance certificates issued in contracting States to the liability conventions such as the CLC 1992, the Bunker Pollution Convention 2001, the Wreck Removal Convention 2007, the Athens Convention 2002 and (when in force) the HNS Convention 2010. So, it can be argued that encouraging or preserving the use of International Group insurance is a legitimate aim when considering principles such as limitation, even if that may appear to conflict with competition principles which might boost undercutting by non-International Group insurers.

Two features can be observed about the development of maritime limitation in relation to its purpose and insurance cover: the fragmentation of limitation regimes (eg when they are *not* linked to the LLMC) and the effect of applying limits to small ships.

5.3. Clubs and fragmentation of limitation regimes

What distinguishes LLMC limitation from the single 'contract' regimes (eg the Hague/Visby Rules or Athens Convention 2002), is that it aims to apply universally, ie to a wide variety of maritime claims; in that sense it is 'global'.

The catastrophically expensive claims in the last 50 years have primarily been environmental (eg pollution) and this led to the carve out of oil pollution from the LLMC limitation regime.[74] The reason was that States (ie not

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[64] See also 14.3, below.
[65] E Selvig, 'An Introduction to the 1976 Limitation Convention' in *Limitation of Shipowners' Liability: The New Law*, 11. See also E Selvig, 'The limitation regimes for maritime claims' [2022] *MarIus* 565.
[66] Ibid. See also the Australian position in 12, below.
[67] Ibid.
[68] From flag States who contribute the bulk of the IMO's income, to influential observers such as the International Chamber of Shipping (ICS) and the International Group of P&I Clubs. As an observer, the International Group does not have a vote, but the dynamics of negotiations about liabilities often revolve around whether the Clubs will be able or willing to foot the bill. For the dynamics more generally, see N Gaskell, 'Decision Making and the Legal Committee of the IMO' (2003) 18 *International Journal of Marine and Coastal Law* 155.
[69] For the 2022/23 policy year arrangements, see <https://www.igpandi.org/reinsurance/>.
[70] The Clubs were forecast to return a combined underwriting loss in 2021/22, with the majority increasing 'calls' ahead of the 2022/23 policy year: see K Baker, *P&I clubs likely to make underwriting loss in 2021/22: AM Best* (Web Page, 17 February 2022) <https://www.reinsurancene.ws/pi-clubs-likely-to-make-underwriting-loss-in-2021-22-am-best/>.
[71] See eg the "Large Casualty Working Group" Review paper in the context of reinsurance for wreck removal: Gaskell and Forrest, *The Law of Wreck*, 32-33, 197-198, 511-512; also 12.4.1.
[72] See also 14.1, below.
[73] See 5.4.2, below.
[74] See LLMC 1976/1996 Art 3(b), which was necessary because there is no carve out from previous limitation regimes such as the 1957 Limitation Convention.

normal commercial interests) affected by pollution were not prepared to accept historic limitation levels or to share them with other claimants, eg after a collision. Part of the oil pollution compromise solutions of the CLC 1969 was that the shipowners were not to be alone in bearing the costs of oil pollution incidents, but that (in effect) oil companies as importers had to contribute what was often the lion's share (especially with small tankers), and sometimes all.[75]

When the HNS Convention 1996 was being negotiated, the shipowners and Clubs were very keen to link HNS liabilities to the LLMC regime[76]—in the name of a form of uniformity but, in reality, to reduce liabilities. States eventually rejected such attempts at the 1996 diplomatic conference and robustly followed the CLC/Fund model with standalone limits for ships carrying HNS.[77] In fact the Clubs can be happy with the resulting delays in entry into force of the HNS Convention 1996 and that of 2010,[78] as the existing LLMC 'property' limits would apply to most current HNS claims.[79]

By contrast, the shipowners and Clubs were able to persuade IMO States that bunker pollution liability[80] and wreck removal claims[81] were to be linked to the LLMC, albeit in different ways. The Bunker Pollution Convention 2001, in particular, was a generally favourable outcome for the Clubs (in limitation terms), especially where smaller ships are concerned.[82] The International Group has recently been encouraging the IMO Legal Committee to create a claims manual for the Bunker Pollution Convention 2001, although the draft is rather coy about the effects of LLMC limitation.[83]

Other examples of fragmentation (or 'living with limitation' overlap) can be found in relation to inland vessels,[84] offshore craft[85] and the Antarctic.[86]

5.4. Small ships, LLMC and insurance

5.4.1. Small ship limits

Small ships may not cause catastrophic billion-dollar claims, but the effect of linking limits to the size of ships, through tonnage measurement, means that limits can apply with disproportionate effect where smaller ships are involved.[87]

The LLMC 1976 first dealt with this by abandoning the 1957 Limitation Convention approach (of limits increasing in a straight line according to tonnage) by introducing: (i) a minimum (fixed slice) limitation amount for ships or 0-500 gt;[88] and (ii) different bands of tonnage with graduated limits so that there is a bigger weighting for small ships through having bands of tonnage with higher limits per gt in the lower bands. This means you need a spreadsheet to do the calculations, also using the daily IMF special drawing right (sdr) rates [89]

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[75] Through the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund) 1992.
[76] I spent many hours in a private IMO committee room as part of a small informal group examining if such a link could be drafted.
[77] See the HNS Convention 1996/2010 Art 9 and the HNS Convention reservation in the LLMC 1996 Art 18(1)(b) (inserted by the LLMC Protocol 1996).
[78] Estonia ratified the HNS Convention 2010 on 2 January 2022 making six contracting States, four of which had more than 2 million units of gt each. Six more States with the required contributing cargo are needed. See LEG 109/16/1, 7 April 2022, para 3.2. Belgium and the Netherlands are working to ratify simultaneously with Germany. France aims to ratify in 2023 and Philippines is in the final stages of ratifying: see para 3.6.
[79] Eg "other claims" within LLMC 1996 Art 6: see eg N Gaskell, 'Compensation for Offshore Pollution: Ships and Platforms' in M. Clarke (ed) *Maritime Law Evolving*, 78. Note that the Wreck Removal Convention 2007 may allow for some HNS removal claims to be recovered under its provisions: see Gaskell and Forrest, *The Law of Wreck*, 147, 488-490, 520 For examples of LLMC 'property 'limits see 9, below.
[80] See Gaskell and Forrest, *The Law of Wreck*, 143; N Gaskell. 'The Bunker Pollution Convention 2001 and limitation of liability' (2009) 15 *Journal of International Maritime Law* 477; for the Australian position see N Gaskell, C Forrest, 'Marine Pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003' (2008) 27 *University of Queensland Law Journal* 103 and 7, below.
[81] See Gaskell and Forrest, *The Law of Wreck*, 102, 114, 503-504 and the Australian ratification issues in 12 below.
[82] See 5.4.1, below.
[83] See 7, below.
[84] See the Strasbourg Convention on the Limitation of Liability in Inland Navigation 2012: and 10.2, below.
[85] See the CMI's draft OGA Convention for MODUs: 10.3 below.
[86] See 10.2, below.
[87] Cf also the right to exclude certain small craft under 20 metres under the Strasbourg Convention on the Limitation of Liability in Inland Navigation 2012: also 10.2, below.
[88] The LLMC 1976/1996 Art 15(2) gives States an option to have lower limits for ships of less than 300 gt; for instance, the UK has taken advantage of this option in the MSA 1995 Sch 7 Part II, para 5 (as amended).
[89] Great care is needed in 'living with limitation' if one is mathematically challenged or reading the IMF tables in a hurry. The official IMF website tables now show "Sdrs per currency unit" *before* "Currency Units per sdr (eg for 30 September 2022); it is too easy to use the

The LLMC 1996 increased the minimum tonnage for small ships to 2,000 gt[90] The LLMC 1996 (as tacitly amended in 2012 with effect from 2015)[91] increased the overall limits by 51%.

The following are examples of limits for small ships[92] using the sdr rate for 30 September 2022[93] and the limits under the LLMC 1996 (as amended from 2015).[94]

2000 gt SHIP	**Tonnage**	**SDR rate**	**SDR Total**	**LLMC 1996/2015 AU$ limit**
Personal Claims only	0-2000 gt	Fixed slice	3,020,000	**$5,944,689**
Other Claims only	0-2000 gt	Fixed slice	1,510,000	**$2,972,344**
Total Fund Available	0-2000 gt	Fixed slice	4,530,000[95]	**$8,917,033**

5000 gt SHIP	**Tonnage**	**SDR rate**	**SDR Total**	**LLMC 1996/2015 AU$ limit**
Personal Claims only	0-2000 gt 3,000 x	Fixed slice 1,208 sdr per gt	3,020,000 3,624,000 6,644,000	**$13,078,315**
Other Claims only	0-2000 gt 3,000 x	Fixed slice 604 sdr per gt	1,510,000 1,812,000 3,322,000	**$6,539,158**
Total Fund Available	0-2000 gt 3,000 x	Fixed slice 1,812 sdr per gt	4,530,000 5,436,000 9,966,000	**$19,617,473**

It is important to note that the "other claims" row (eg property damage) would have to cover collision damage, cargo loss and also bunker pollution, eg under the Bunker Pollution Convention 2001.[96]

When the CLC and Fund oil pollution liability regime limits were being re-negotiated in the 1990s, the influence of small ship incidents involving low limits (under the CLC 1992, not the LLMC) threatened the delicate balance of compensation contribution between tanker owners and oil companies. A solution was found not through increasing the small ship CLC limits, but through voluntary undertakings by the insurers/Clubs, to reimburse the IOPC Fund 1992 in certain cases where there were large IOPC Fund liabilities. The Small Tanker Oil Pollution Indemnification Agreement (STOPIA, as amended 2017) is a voluntary agreement between owners of small tankers (i.e. 29,548 gt or less) and their insurers, under which the maximum amount of compensation payable by

former when we should refer to the latter. For my 1986 Southampton conference, I learned almost by accident to use the correct conversion; even so, my initial quick calculations for this paper were on the incorrect basis (ie using Au$0.508016)—a considerable difference from the correct rate (AUS$1.96844)! In the 1980s it was more difficult to find IMF data, eg requiring a search for print journals, such as the Financial Times, that bothered to record such arcane material now instantly available on the web.

[90] While leaving to States the original option to have different smaller limits for ships of 0-300 gt.

[91] See 12.3, below.

[92] For more examples and tables showing respective limits of different sized ships, see Gaskell, 'Limitation of Liability and Division of Loss in Operation' in *Marsden and Gault on Collisions at Sea*, Appendix 4.

[93] SDR rate of 1 sdr=AUS$1.96844 (30 September 2022). The limitation totals look much smaller if US$ are used instead of Au$, ie at 1 sdr=US$1.27988—a 65% difference. For convenience, this date and rate will be applied to calculations throughout this paper.

[94] See 12.3, below.

[95] The respective LLMC 1996 limits for a 2000 gt ship were 2,000,000 sdrs ($3,936,880); 1,000,000 sdrs ($1,968,440); 3,000,000 sdrs (**$5,905,320**). The original LLMC 1976 figures were much lower as the minimum tonnage fixed slice was 500 gt, but for a 2000 gt ship were 1,083,000 sdrs ($2,131,821); 417,500 sdrs ($821,824); 1,500,500 sdrs (**$2,953,644**). The UK still has lower LLMC limits for ships of 0-299 gt, as allowed by LLMC 1976/1996 Art 15(2): see the MSA 1995 Sch 6 Part II. The 1957 Limitation Convention limits were not graduated to give higher relative limits for small ship and used a different, lower, tonnage measurement system: these limits would now be 140 sdrs ($551,163); 66.67 sdrs ($262,472); 206.67 sdrs ($813,635).

[96] See N Gaskell, 'The Bunker Pollution Convention 2001 and limitation of liability' (2009) 15 *Journal of International Maritime Law* 477, 481. Until the HNS Convention 2010 enters into force, the LLMC 1976/1996 limits could also apply to HNS claims, eg for chemical pollution.

owners of small tankers is increased to 20 million sdrs (Au$39,368,800).[97] It applies to all small tankers entered in a P&I Club that is a member of the International Group, and reinsured through the pooling arrangements of the Group.[98]

These were arrangements that avoided making actual changes to the structure of the small ship limits in the CLC 1992, but STOPIA does *not* apply to non-International Group insurers. No such readjustment is available under the Bunker Pollution Convention 2001 where bunker pollution occurs and the LLMC applies,[99] or with the Wreck Removal Convention 2007 where the compulsory insurance is related to the LLMC 1996 limit.[100] Nor does STOPIA apply to ordinary 'property' claims, eg cargo loss, collision damage, or damage to pipelines, or chemical pollution (eg from pesticides).

5.4.2. Insurer reliability

A related feature of small ship incidents is that of insurer reliability. Delegations at the April 2018 session of the Executive Committee of the 1992 IOPC Fund raised concerns relating to the financial losses in incidents involving such insurers, and this issue was considered by the IOPC Fund's Audit Body between 2018-20. The October 2018 IOPC Audit report[101] recorded that of the 147 incidents involving the IOPC 1971 and 1992 Funds, insurers were identified in 103 incidents (20 of which involved *non*-IG insurers); the other 44 had either no insurer, or the insurer was unidentified. Of those 103 incidents most (68) were caused by smaller vessels; all of the *non*-International Group incidents were of vessels below 5,000 gt and 70% were below 1,000 gt; of the International Group insured vessels about 58% were below 5,000 gt of which 43% were below 1,000 gt.[102] The number of non-International Group incidents was increasing, albeit that the total amounts involved were relatively small.[103]

A 2020 update by the IOPC Audit Body looked in more detail at the problems in dealing with non-International Group insurers,[104] eg their use of non-standard compulsory insurance certificates, and the issuance by member States of certificates that may not be quality assured. The Audit Body actually emphasised that the IOPC Funds were not a charity and recommended that the IOPC Funds should not cover insurance gaps[105] under the IOPC Fund Convention 1992 Art 4 without an express judgment in a member state.[106] But there were still examples where some non-International Group insurers sought to rely on defences not permitted under Art VII(8) of the CLC 1992 (eg beyond wilful misconduct or policy defences); nor were they bound by MOUs (like the International Group members), or by STOPIA or TOPIA. The Audit Body specifically raised the idea of raising the CLC limits, but was keen to find ways that did not involve amending the CLC 1992.[107]

In these IOPC discussions, the context is that where CLC 1992 limits apply, it is the IOPC Funds that may have to pay the remainder of claims—up to the Funds' limits. This safety net will often be huge. What is hidden in the IOPC study is the effect of small ship limitation under the LLMC 1976/96, ie where there is *no* backup Fund.[108]

The small ship limits illustrate a consequence of the changes introduced first in the UK in the 1860s, ie from a valuation method of limitation to the tonnage measurement system. Small ships might have values today which are considerably greater than their tonnage limits. Nobody has suggested a complete return to the valuation system, but is there some merit in considering the LLMC 1996 Art 6 limits for small ships as a *minimum*, but with an *alternative* limit based on valuation?[109] In any event, it is not clear to me that the small ship limits represent the

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[97] By way of example, a 5000 gt tanker (eg 7500 dwt) would have a limit of Au$8,877,664 and a 20,000 gt tanker (eg 30,000 dwt) would have a limit of Au$27,508,949; these represented, respectively, a 440% increase and a 140% increase on the limits otherwise applicable under the CLC 1992.

[98] See IOPC Explanatory Note July 2022, 7-8. TOPIA is a similar agreement for the Supplementary Fund 2003, but the reimbursement is 50% of compensation payments made by the 2003 Fund.

[99] See 7, below.

[100] See 9.3, below.

[101] See *Record of Decisions*, IOPC/APR 18/9/1, section 3, "Incidents involving the IOPC Funds and the debate in connection with the Nesa R3, Agia Zoni II and Alfa 1 incidents; also LEG 108/5, 20 April 2021, with links, where the Legal Committee was asked to comment.

[102] IOPC/OCT18/5/5/1, para 2.4.

[103] £8.26 million, equivalent to 1.2% of total compensation amount paid by the IOPC Funds to 2018 (i.e. £674 million); ibid, para 2.5.

[104] IOPC/NOV20/5/5/1, 21 August 2020.

[105] Ie "when there is a contradiction between the statement of the CLC certificate or blue card (a document issued by the insurer certifying the evidence of the insurance cover required by the 1992 CLC) and the statement of actual insurance coverage under the insurance policies.": IOPC/NOV20/5/5/1, 21 August 2020, para 3.2.1.

[106] See para 3.3.3-4.

[107] See para 3.5.5. Japan later objected to this suggestion: see LEG 18/6/1, Annex 9, p 2.

[108] See 12, below, for the Australian experience of increasing limits.

[109] This has some similarities with the US limitation system for personal claims introduced in 46 USC s 184(b) after *The Morro Castle* disaster in 1934: see J Donovan, 'The Origins and Development of Limitation of a Shipowner's Liability' (1979) 53 *Tulane Law Review* 999, 1031; A Rein, 'International Variations on the Concept of Limitation of Liability' (1979) 53 *Tulane Law Review* 1059.

maximum that is insurable on the market (or at reasonable cost). Ironically, those lower limits may be likely to favour the sort of non-International Group fixed premium insurers whose reliability may be of concern to Governments and claimants.

PART TWO: LIVING WITH LIMITATION AND AUSTRALIA

6. Governments 'living with limitation' and the LLMC

6.1. National perspective on convention negotiations

When dealing with treaties, Government authorities face quite different problems to those of private practitioners. Prior to negotiations on a new instrument, they have to look internally to national interest groups, but more importantly to political priorities and practical constraints, both financial and in terms of administrative resources. During treaty negotiations they also have to face outwardly to take into account the views of other States. At the IMO, compromises are encouraged, even sometimes if this involves leaving ambiguities in texts as a deliberate 'too-hard' basket to be left for national courts. Once States have participated in a treaty negotiation there is some pressure from the IMO for them to take an active position in at least considering ratification. One practical difficulty is that national departmental personnel often change, so that after many years of enthusiastic negotiation by them of a maritime law convention they retire, or are move on to other departments. I have seen in the UK and Australia that this can result in a loss of institutional knowledge and impetus, without even taking into account changes in Government and competing priorities.

MLAANZ officers and members have made determined endeavours to keep alive some of the IMO private law conventions. When CMI President, Stuart Hetherington led efforts, eg in 2016, to encourage Australian consideration of some of the key maritime law liability conventions supported by the CMI, including the Wreck Removal Convention 2007, the Athens Convention 2002, the HNS Convention 2010, the Rotterdam Rules 2008. As part of such MLAANZ efforts, meetings were held in particular with the Federal Department dealing with shipping policy[110] to provide some background to potential adoption of the conventions.[111]

Even when departmental officials are persuaded about the merits of a convention, and can get ministerial support, there are still many hurdles, including public consultation. In a federal system there is also a particular need to consider the constitutional rights of States and territories, as well as the jurisdictional and procedural implications for courts. In maritime liability issues, it is hard to avoid the implications of the LLMC, and my own responses to consultations have thrown up examples of where the LLMC is a complicating factor.[112]

The officials, including Parliamentary drafters, will also need to decide how far to reproduce the wording of a convention in the national enactment. Experience in the common law world is mixed. It is generally better to include as much of the convention text in its original wording—each word having been carefully considered at the IMO over many years—but drafters like to reword text into national drafting usage (sometimes producing unintended consequences). Australian incorporation of private law maritime conventions varies, sometimes with partial reproduction of convention text.[113] The LLMC is fairly clear, fortunately, as the Limitation of Liability for Maritime Claims Act 1989 (Cth), as amended, s 6 gives the force of law to the main operative provisions.

Even when the drafting of national legislation is completed, the officials still need to coordinate national ratification with international obligations under a relevant treaty such as the LLMC.[114]

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[110] Whose current title is the Department of Infrastructure, Transport, Regional Development, Communications and the Arts: sometimes rather unkindly known as the Department of Everything (or Everything Else)! AMSA has enormous expertise and experience in maritime law matters, but is more operationally focussed.

[111] See further, 8.3, below (Athens Convention 2002) and 9.4, below (Wreck Removal Convention 2007).

[112] Ibid.

[113] See eg the Salvage Convention 1989 in the *Navigation Act 2012* (Cth), s 241 (and *Navigation Regulations 2013*, reg 17); the CLC 1992 in the *Protection of the Sea (Civil Liability) Act 1981* (Cth). Arguably more problematic in terms of transparency of reproduction of convention text is the Bunker Pollution Convention 2001 in the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth): see N Gaskell and C Forrest, 'Marine Pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003' (2008) 27 *University of Queensland Law Journal* 103.

[114] Examples include notifying IMO Secretary-General about: ratifications (Art 16); declarations about reservations (Art 18); the exercise of options in LLMC 1996, eg about passengers (Art 15(3)bis) or drilling ships (Art 15(4)); denunciations (Art 19). Things can go wrong with such notifications: see eg 6.2, 9.2, below.

6.2. Remaining party to the old LLMC 1976

Art 9 of the 1996 Protocol allows States to ratify the Protocol only, in which case they are bound by the LLMC 1996 *to* other LLMC 1996 States but the trap is that, if they are already party to the LLMC 1976, ratification of the 1996 Protocol does not affect the continuing obligations to LLMC *1976* States who are not party to the 1996 Protocol. New Zealand, denounced the LLMC 1976 only on 1 Oct 2017, following the *Rena* disaster.[115] Although the LLMC 1996 has been ratified by neighbouring island States (such as Cook Islands, Nauru, Palau, Tonga and Tuvalu), many island States are parties to the LLMC 1976: eg Cook Islands, Kiribati, Marshall Islands, Niue, Samoa, Tonga, Tuvalu, Vanuatu. This is not without significance as LLMC 1976 Flag States include the Bahamas, Cyprus, Greece, India, France, Poland, and Turkey. It also appears that some island States may also still be party to the 1957 Limitation Convention (eg Fiji, Kiribati, Mauritius, PNG, Solomons, Tonga, Tuvalu, Vanuatu), as are some flag States (eg India, Poland, Switzerland, St Vincent & Grenadines).[116]

The exposure of such States to the lower limits of older limitation conventions can be unfortunate, eg in relation to wreck cases,[117] but in part represents a tension between such island States wanting to be flag registries (friendly to shipowners) and yet having protection from environmental disasters.[118] The risk is that the immediate commercial attractions of the former are likely to outweigh the less immediate threats of the latter. This tension is also important in the context of voting at the IMO, eg for possible increases in the LLMC limits. The increases have been a particular concern of Australia and will be considered later.[119]

7. Australia, LLMC and Bunker Pollution Convention 2001

In Australia, the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth), as amended, gives effect to the Bunker Pollution Convention 2001.[120]

The Bunker Pollution Convention 2001 Art 6 preserves limits such as the LLMC:

> "Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended."[121]

For a Bunker Pollution Convention 2001 claim, the limits of about Au$6 million for a 2,000 gt ship, or Au$13 million for a 5,000 gt ship[122] would not be particularly high. These limits would, in addition to any bunker pollution claim, also have to cover any "other claims" in LLMC 1996 Art 6(1)(b), eg the consequences of collision, explosion,[123] cargo damage (including loss of HNS).[124] The LLMC 1996 Art 6(1)(b) limits would also be the compulsory insurance caps under the Bunker Pollution Convention 2001.[125]

This LLMC bunker linkage is very bad for claimants and should never have been accepted. Indeed, it would be better now to amend the LLMC 1996 by a Protocol to exclude the Bunker Pollution Convention 2001 and, if necessary, to insert new limits—either in this new LLMC Protocol or in an amended Bunker Pollution Convention 2001.[126] Given that the sort of pollution claim is very similar to those in the CLC, any limits should be aligned with the CLC. Even better, the Bunker Pollution Convention 2001 should be linked to the IOPC Fund. However,

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[115] See also 9.2 for difficulties for New Zealand and Pacific States in relation to the opt-out for wreck and cargo removal.
[116] The Official depository of the 1957 Limitation Convention is Belgium, whose website is perhaps not as clear as that of the IMO, eg as to reservations and denunciations: see eg the 1957 Limitation Convention and its 1979 Protocol.
[117] See 9.1 and 9.2.
[118] The Marine and Shipping Law Unit within the TC Beirne School of Law at the University of Queensland has participated in seminars on maritime conventions for the Secretariat of the Pacific Regional Environment Programme (SPREP), supported by the Australian Government, but ratification decisions are obviously for the sovereign States themselves.
[119] See 12, below.
[120] Although it only gives the force pf law directly to Articles 3, 5 and 6, paragraph 10 of Article 7, and Article 8. Art 7(1)) is dealt with in an administrative context of certificates in s. 19. See Gaskell and Forrest, 'Marine Pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003' (2008) 27 *University of Queensland Law Journal* 103.
[121] Emphasis added.
[122] See 5.4.1, above and 12.4.2, below.
[123] Eg the disastrous 2017 explosion of the *Mont Blanc* in Halifax, Nova Scotia, killing about 2,000 and injuring 9,000: see Gaskell, 'Empress of Ireland and Mont Blanc Collisions Then and Now' in C Mitchell and S Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose*, 11-18.
[124] Eg containers with pollutants lost from the *Rena* off New Zealand in 2011 or from *X-Press Pearl* off Sri Lanka in 2021. The limits would be even more restrictive where the LLMC 1976 applied: the bulk carrier *Wakashio* sunk off Mauritius in 2020 had an LLMC 1976 limit of about Au$25,085,516 (about US$16.8 million).
[125] And the Wreck Removal Convention 2007: see 9.3, below.
[126] See also 14.2, below.

it seems highly unlikely that there would be an appetite at the IMO for such a Protocol. States like Australia will have to live with the linkage, but should continue to press for the increase in LLMC limits under the 1996 Protocol Art 8.[127]

In 2020, the International Group introduced a seemingly innocuous proposal to create a claims manual for the Bunker Pollution Convention 2001.[128] This was to be modelled on the highly useful and informative "IOPC Fund Claims Manual",[129] which is an excellent guide to States and claimants about bringing claims against the IOPC Fund 1992 (and shipowners under the CLC 1992). An informal correspondence group worked in 2021 on a Bunker Pollution Convention 2001 Manual and a draft was presented.[130] A finalised "Claims Manual For The International Convention On Civil Liability For Bunker Oil Pollution Damage, 2001" was issued for public release on 15 December 2022, prior to the 110th Session of the Legal Committee in 2023.[131] Assuming that the text is approved at that meeting, the Manual will probably be issued as circular of the Legal Committee, inviting member States to use it.[132]

Interestingly, the Claims Manual has a section on limitation,[133] but seemingly from a shipowner's perspective.[134] The draft presented reads like a document saying what insurers and shipowners are prepared to pay. There is no attempt to highlight how low the limits might be in some cases, eg by way of examples of different types of ship under eg LLMC 1976 or 1996, or how vulnerable States may be with a limitation fund that may have to be shared with claimants (eg collision claimants, or cargo owners)![135] Although member States have been able to comment on the Manual, there is no doubt that the proposal is being driven by shipowners and insurers in the IMO; by contrast, the IOPC Claims Manual is produced by the separate IOPC Fund—a body that was specifically set up by States to *pay* claims, unlike the approach of most insurers which is to *minimise* payments. The draft highlights none of the nuances or difficulties of bunker claims, nor does it give practical advice to claimants about being caught by time bars. It seems as if parts of this draft are a "Uniform Interpretation" in disguise and may be rushed through in 2023 with relatively little critical oversight from the perspective of victims, or commitment to revision.

8. Australia, passenger limits and the Athens Convention 2002

Carriage of passengers in Australia is currently governed by a confusing mixture of contract and tort law with some assistance from the Australian Consumer Law (ACL).[136] It is arguable that it is inadequate to deal with international carriage, eg where Australian passengers fly abroad for cruises. By contrast, the comprehensive Montreal Convention 1989 (to which Australia is a party since 2009)[137] has long applied to carriage by air. Both air and sea carriage are subject to limits of liability:[138] in the maritime context, this primarily arises from the LLMC 1996, but Australia has recently had to consider whether or not to adopt the Athens Convention 2002 which also has limits.

8.1. LLMC 1996 passenger limit

The LLMC 1996 Art 6(1)(a) sets out the general limits for death and personal injury (eg where a tanker collides with another ship and there are casualties among *that* ship's crew and passengers). The LLMC 1996 Art 7 carves out a *separate* limit for passengers who are being carried under a contract of carriage (eg on a cruise ship). This Art 7 limit is 175,000 sdrs [Au$344,477] per the ship's *certified carrying capacity*; it is not a limit that applies per passenger *actually* carried. Thus, it provides a *single* overall limit for all passenger claims; eg a ship with a

[127] See 12.4.2, below.
[128] See LEG 107/17, 26 October 2020; LEG 108/13/1, 23 April 2021 and LEG 108/16/1, 25 August 2021.
[129] Currently the 2019 edition.
[130] See LEG 109/8, 7 January 2022, Annex.
[131] See LEG 110/8, 15 December 2022.
[132] Ibid, para 2.
[133] Ibid, Annex Section Two a(i).
[134] Eg by adding (currently in square brackets for decision at LEG 110, in 2023) "In accordance with the Resolution adopted by the IMO Assembly at its 32nd session, the States Parties present at that session have agreed that the shipowners right to limit their liability is virtually unbreakable", and noting that limitation can be broken in "very rare cases". On this 'breakability' interpretation issue, see 7.3, below.
[135] See 5.4.1, above.
[136] Enacted in the *Competition and Consumer Act 2010* (Cth), Sch 2; and see eg *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; see also K Lewins, *The International Carriage of Passengers by Sea* (2016, Sweet & Maxwell).
[137] See the *Civil Aviation (Carriers' Liability) Act 1959*, as amended by the *Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Act 2008* (Cth), which gave the Convention the force of law.
[138] The Montreal Convention 1989 has no limit on the fault liability of an air carrier, but enforcing unlimited liability may not be easy; and the compulsory insurance cover is only 260,000 sdr (without the express possibility of direct action). There is a $925,000 per passenger limit for domestic air carriage in Australia under the *Civil Aviation (Carriers' Liability) Act 1959* (as amended), with minimum (but outdated) mandatory insurance requirements; and see 8.2, below.

certified passenger capacity of 1,000 would have an LLMC 1996 Art 7 limit of Au$344,477,000 which would be applicable whether there were one or 1,000 claimants.[139] However, as personal limits are so controversial, the LLMC 1996 Protocol introduced a new LLMC 1996 Art 15(3)bis whereby a State could make a provision in its national law to have higher (or no) LLMC passenger limits.[140] The UK has exercised this option,[141] but not Australia or New Zealand.

8.2. Athens Convention 2022 limits

The Athens Convention 1974 (with a 1976 Protocol) was enacted to try to overcome the sort of anti-consumer provisions then found in international passenger tickets, eg with wide exclusions of liability. That mischief has long been met through more widely applicable consumer protection laws.[142] The 1974 Convention entered into force on 28 April 1987, just after the *Herald of Free Enterprise* disaster in the UK.[143]

A further Protocol was agreed in October 2002 and produced the "Athens Convention 2002".[144] This takes most of the text of the 1974 Convention but increases the limits of liability considerably and adds boilerplate provisions on compulsory insurance and direct action against the insurer. The convention is in force internationally and now operates throughout the EU (and UK).

The Athens Convention 2002 also introduced a rather complicated strict liability regime for shipping incidents (eg collisions) up to 250,000 sdrs [Au$492,110].[145] There is a fault based regime (with the burden on the passenger) for non-shipping incidents (eg food poisoning). Under Art 7, the Athens Convention 2002 provided for limits of 400,000 sdrs [Au$787,376] per individual passenger claim,[146] although under a revised Athens Convention 2002 Art 7(2) States can elect to have unlimited liability.[147] However, the cap on insurer's *direct* liability was 250,000 sdrs [Au$492,110].[148]

8.3. Australian consultations on ratifying Athens

In July 2015, Matthew Harvey, then President of MLAANZ, wrote to the Department of Infrastructure etc, encouraging Australia to ratify the Athens Convention 2002.[149] MLAANZ offered to meet in Canberra or to organise a seminar and speakers. In August 2016 Stuart Hetherington and I met in Canberra with representatives of the Attorney-General and the Department of Infrastructure etc (and later with Treasury), to provide a briefing on a suite of maritime law conventions that should be ratified, including the Athens Convention 2002 and the Wreck Removal Convention 2007. In October 2016, Kate Lewins and I gave papers on Athens at the MLAANZ annual conference, which a Departmental representative attended; later that month we drafted some specific issues for the Department to consider in any public consultation.[150] We noted, in particular, difficult choices about how far to apply the Convention provisions to domestic travel, overlaps with the ACL[151] and State and Territory tort law, eg the Civil Liability Acts (CLA), and the need to enact careful anti-avoidance provisions.

We also highlighted some difficult choices about limitation of liability. The Athens Convention 2002 Art 19 would leave unaffected any global passenger limitation under the LLMC 1996 Art 7, eg in Australia under the *Limitation*

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[139] Obviously, the limit would only 'bite' when there was a major disaster.
[140] Shipowners and insurers, in particular, dislike such provisions as the undermine the universality of global limits.
[141] See N Gaskell, 'New Limits for Passengers and Others in the United Kingdom' (1998) *Lloyd's Maritime and Commercial Law Quarterly*, 312; Gaskell, 'Limitation of Liability and Division of Loss in Operation' in *Marsden & Gault Collisions at Sea*, 981 (Table 3.1), 987 (Example 7).
[142] Eg the ACL Sch 2, Part 2-3 and Part 3-2.
[143] See 2, above. The UK had chosen in 1981 to give interim effect to the Convention, under the MSA 1979 s 16, so its limits applied to the disaster. The UK has also continued to apply the Athens Convention (now 2002) to domestic as well as international carriage, in part through EU derived legislation: See Gaskell and Forrest, *The Law of Wreck*, 80-82.
[144] See generally, Gaskell and Forrest, *The Law of Wreck*, 77-90.
[145] This figure is not a limit in the strict sense, but a cap on the strict liability component of overall liability.
[146] This is similar to the $925,000 per passenger limit for domestic air carriage in Australia, see 8.1, above.
[147] In the original Athens Convention 1974, the liberty could only be exercised for carriers that were nationals of the State concerned. was only available for
[148] In the absence of a specific terrorism defence in the Athens Convention 2002, there were concerns about how far the Clubs could get reinsurance cover to enable then to issue Convention compulsory insurance certificates. A set of "Guidelines for Implementation" were eventually drafted for the IMO in 2006. In effect, this is an amendment to the Protocol dressed up as guidelines and enables States to ratify the 2002 Convention but make reservations as to the insurance cover acceptable for certain war and terrorist risks: see Gaskell and Forrest, *The Law of Wreck*, 88.
[149] Ie after the terrorism issue had been resolved, see previous fn.
[150] Gaskell and Lewins, "Consultation Issues for Australian implementation of Athens Convention 2002" [unpublished].
[151] At this stage the High Court's decision in *Moore v Scenic Tours Pty Ltd* [2020] HCA 17 had not been given. There was uncertainty about the extent to which the ACL applied to cruises applying overseas.

of Liability for Maritime Claims Act 1989 (Cth). That meant that there could be *two* limits that applied; ie the Athens Convention 2002 per passenger limit and then, in a big disaster, the overall LLMC 1996 Art 7 limit.[152] Adoption of the Athens Convention 2002 therefore required Australia to make a choice about which, if any, passenger limits should apply[153] for Athens and/or LLMC. We were clear that no more than one limit should apply, eg under Athens or LLMC, or under the Civil Liability Acts. We considered that there were several possible options:

> a. No limit under Athens, only global limitation under LLMC 1996 (under the *Limitation of Liability for Maritime Claims Act 1989*, as amended). This was the simplest option and arguably the fairest to passengers. It could involve excising passenger claims from the CLA.
>
> b. Allow carriers to use the Athens Art 7 per passenger sdr limit. Remove the limit now under LLMC 1996 Art 7, as allowed under LLMC 1996 Art 15(3bis).[154] Again, excise sea passenger claims from the CLA on the basis that only one quantum limit should operate.
>
> c. Allow carriers to limit under Athens Art 7 but impose a higher limit as permitted by the Art 7(2) of Athens. Again, excise sea passenger claims from CLA on the basis that only one quantum limit should operate.
>
> d. Another option would be to excise passenger claims from LLMC and CLA, allow carriers to limit under Athens but create an exception to permit unlimited recovery for economic loss for the more serious claims, eg catastrophically injured plaintiffs.[155] It would be very rarely used but might make the limit more defensible.

On 30 November 2017, the Department issued a public Discussion Paper[156] inviting comments on whether Australia should ratify the Athens Convention 2002 and how it could be implemented. In particular, it asked for views on whether to (1) use the passenger limits under both LLMC 1996 Art 7 and the Athens Convention 2002; (2) maintain the LLMC Art 7 global limit and opt-out of the Athens Art 7 limits; (3) adopt the Athens Art 7 limits and renounce the LLMC Art 7 global limits; (4) renounce the LLMC Art 7 global limit but set higher limits under Athens.[157] There were five responses: myself, Kate Lewins, MLAANZ, Royal Caribbean and Carnival.[158] The cruise lines were rather non-committal, but we others were all in favour of ratification. The problem for us was which model to choose?

Kate and I independently rejected the double limitation in the Department's Option (1). In my own response on 22 December 2017, I noted that, as far as I was aware, most States ratifying/acceding to Athens (eg in the EU) had done so without using the Athens opt-out (in Option (2)); ie they adopted Option (3)[159] or versions of it.[160]

Still, I believed that there was merit in considering Option (2), or variations of it, ie only having the LLMC Art 7 global limit. In this scenario, passengers may face no limit at all depending on the theoretical (not actual) carrying capacity of the ship and the number of claimants. Thus, a ship such as the Queen Mary 2 is apparently licensed to carry 2,620 passengers. That would mean that the sum of 458,500,000 sdrs (175,000 sdrs x 2620) would be available to the claimants as a group; that is about Au$854 million. Assume that there was a casualty but only, say, 100 passengers were killed or seriously injured. On any analysis, Au$854 million would be more than sufficient to compensate those passenger claims in full. In this sense Option (2) gives a better result for passengers than Option (3).

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[152] See also the discussion of the 1987 *Herald of Free Enterprise* disaster in 2, above.
[153] The choices arose because of the passenger limit opt-out available in each of the LLMC 1996 (Art 15(3)bis) and the Athens Convention 2002 (Art 7(1)): see above.
[154] This was, in effect, the UK approach that had been repeated in a recent consultation.
[155] This is defined in motor vehicle legislation and is designed to capture spinal and brain injuries given the high cost of care for such patients.
[156] Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Carriage of Passengers and their Luggage By Sea: The Athens Convention', *Claims for passenger injury and damage to luggage* (Web Page, November 2017) <https://www.infrastructure.gov.au/infrastructure-transport-vehicles/maritime/maritime-business/maritime-liability-insurance/claims-passenger-injury-damage-luggage>.
[157] See para 5.2.
[158] All available from the link above.
[159] The UK chose Option (3) for *seagoing* ships, but for *non*-seagoing ships (to which the Athens Convention 2002 does not apply), the UK applies, a sui generis national law limit of 175,000 sdrs *per passenger*. This shows the complexity of Governmental decisions: see Gaskell and Forrest, *The Law of Wreck*, 83-85.
[160] Sweden appears to have adopted a version of Option (3) whereby it has exercised the LLMC 1996 opt-out but instead of having unlimited LLMC 1996 liability, it has replaced the LLMC 1996 Art 7(1) limit of 175,000 sdr per certificated passenger (se 11.1, above) by one of 250,000 sdr per certificated passenger.

Where there is a major disaster, though, in which, say, all the passengers are killed or injured, then obviously all the claims will come up against that LLMC 1996 global limit (in theory, if all the claims are equal, at 175,000 sdrs per passenger; ie about Au$326,000). It is in such a major disaster that Option (3), applying only the Athens Art 7 limit of 400,000 sdrs (about Au$787,376), has the advantage; each passenger would have access in theory to these amounts (assuming that the shipowner was solvent and noting that the compulsory insurance is only for 250,000 sdrs).

The choice between Option (2) and Option (3) therefore depended upon the mischief that it is sought to avoid. The Option (2) approach meant that most 'occasional' deaths and injuries aboard large cruise ships would not be met by any limit at all.[161] Option (2) therefore gets closer to making the full amount of the ship's insurance available for claimants.[162] My suspicion was that personal injury lawyers may vary between those who have represented individual claimants (who may prefer Option (2)) and those who are more familiar with large class actions (who may instinctively prefer Option (3)). In any event, my view was that even if Option (2) or (3) were selected, the enacting legislation should allow some flexibility so that powers be retained in legislation so that in future the opt-outs could be exercised to alter the applicable limits in either the LLMC 1996 or the Athens Convention 2002.[163] I described this as an Option (5)! In true academic fashion (sitting on the fence?) I also set out possible additional variations on Options (2), (3) and (4).

What was the result of the consultation? In November 2020 a notice appeared on the Departmental website:[164]

> "The Department has consulted with stakeholders and finalised a Regulatory Impact Statement (RIS)[165] on the possible accession by Australia to the Athens Convention. The RIS concludes that whilst there are benefits to passengers if Australia were to accede to the Athens Convention, there is no strong or urgent case for Government action. Except in the event of a catastrophic incident, passengers have access to greater amounts of compensation under the current system.
>
> The former Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Michael McCormack MP decided Australia would not accede to the Athens Convention at this time. The Department will continue to monitor the situation in case circumstances change."

On re-reading my own submissions, at least, I can see that there were too many complicated choices about limitation—to add to the constitutional and administrative problems.[166] My feeling is that Athens has been put in the 'too hard basket' until there is a big disaster. Until then, Australian cruise ship passengers will face an LLMC 1996 Art 7 limit in Australian law of 175,000 sdrs multiplied by the certified passenger list.[167] Those of us who book a foreign cruise from a foreign port may find that the contract is subject to passenger terms incorporating the Athens Convention 2002, and subject to foreign law and jurisdiction clauses. The enforceability of a claim against a foreign shipowner or carrier will depend on contract case law, eg on notice of unusual terms,[168] and the applicability of the ACL.[169]

But what about wreck? Once again there are difficult choices about insurability, limits and the intersection of State and federal law.

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[161] In the *Costa Concordia* sinking in Italy in 2012, there were luckily only 32 passenger deaths (although presumably there were many claims for minor injuries and mental stress).
[162] This was US$2 billion, although that is not the same as the direct liability of the insurer.
[163] This would be subject to any constitutional restrictions.
[164] Kate and I were not notified directly as consultees, but David Goodwin on behalf of MLAANZ received notification on 13 November 2020.
[165] As far as I am aware, this RIS was not published; cf 9.4, below.
[166] Eg with overlaps to State and Territory tort laws (and their CLAs) and consumer law (eg the ongoing review of the ACL by Consumer Affairs Australia and New Zealand, as well as the impending High Court decision in *Moore v Scenic Tours Pty Ltd*).
[167] See 8.1, above. This may well be adequate for most claims, but for a modern cruise ship with a 200 passenger capacity the LLMC Art 7 limit of Au$68,895,400 would not be very much if all were killed or seriously injured. Research at the time of the Athens Convention 2002 negotiations indicated that in many States, it was relatively 'cheap' to kill the young or the very old (as they had few financial dependents); by contrast, death or serious injury to married doctors or lawyers with children was likely to be expensive! In the latter case, even the Art 7 limits could be stretched. For that reason Australia needs to keep the LLMC 1996 Art 15(3)bis option under review: see 8.1, above.
[168] Including eg *Baltic Shipping v Dillon (Mikhail Lermontov)* (1991) 22 NSWLR 1; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197.
[169] See *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 1; *Moore v Scenic Tours Pty Ltd* [2020] HCA 17.

9. Australia and the Wreck Removal Convention 2007

Australia is actively considering adopting the Wreck Removal Convention 2007[170] and limitation issues will be highly relevant.

9.1. Wreck Removal Convention 2007 and LLMC limits

Craig Forrest and I addressed limitation and wreck in *The Law of Wreck*[171] and noted that in "the negotiations for the Wreck Removal Convention 2007 there appear to have been no serious proposals to create stand-alone limits to mirror those in the CLC 1992 and HNS Convention 1996 [and 2010]. Part of the reason was undoubtedly the existence of the LLMC Art 18 power of reservation in relation to wreck and cargo removal claims.[172] As with the Bunker Pollution Convention 2001,[173] the Wreck Removal Convention 2007 Art 10(2) is linked to existing limitation regimes:

> "Nothing in this Convention shall affect the right of the registered owner to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended."

Therefore, the Wreck Removal Convention 2007 itself provides no limit of liability for shipowners, but instead refers the issue to national law, or any limitation convention to which a State may be party. It follows that States like Australia that are considering the adoption of the Wreck Removal Convention 2007 need to ensure that their general limitation law is appropriate.[174]

9.2. The LLMC 1996 wreck removal reservation(s)

The default position under the LLMC 1996 Art 2(1)(d) and (e) is to include wreck and cargo removal claims[175] as being subject to limitation,[176] but Art 18(1) of the LLMC 1996 allows a State to make a reservation (ie an opt-out) in relation to these paragraphs.[177] States such as Australia have taken advantage of this right[178] to ensure that the shipowners will be liable for the full cost of wreck or cargo removal claims.

It is necessary to ensure that the power given by the reservation has been fully exercised internationally as well as implemented into national law.[179] If Australia accedes to the Wreck Removal Convention 2007, it should preserve its double opt-out, given the costs of cargo removal.[180]

Curiously, on 12 September 2022, the Russian Federation withdrew its reservations for LLMC 1996 Art 2(1)(d) and (e).[181] This is the only example I can find of that. One can only speculate that it is related to possible wreck removal claims and its invasion of Ukraine in 2022. It seems unlikely that it would want to allow foreign shipowners to limit liability for their wrecks in Russian waters. Perhaps it has to do with possible Ukrainian claims

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[170] See 9.4, below.
[171] See eg 102-105, 114-131 and 490-491.
[172] Ibid, at 490.
[173] Ibid, 143, and see 7, above.
[174] Eg the extent to which it makes use of the LLMC 1996 Art 18 reservations: see 9.2, below.
[175] Including, eg, the costs of recovery of containers, whether washed overboard or lost from the ship after it sank. Removal of oil cargo from a tanker would be excluded from LLMC 1996 limitation by Art 3 as claims would be covered by the CLC 1992 and its limit. If the HNS Convention 2010 enters into force, claims for the clean-up of chemicals (including those in containers) will similarly be excluded from the LLMC 1996 if States make a reservation under LLMC 1996 Art 18(1)(b). For a detailed discussion about what is covered by the wording of Art 2(1)(d) and (e) see Gaskell and Forrest, *The Law of Wreck*, 102-105.
[176] Ibid.
[177] Suggestions that the Wreck Removal Convention 2007 itself should prevent States from using the opt-out were not accepted: see LEG 75/6/1, 14 February 1997.
[178] See IMO, *Status of Multilateral Conventions* (2022) and the Limitation of Liability for Maritime Claims Act 1989 (Cth) s 6.
[179] New Zealand became a party to the LLMC 1976 and, in 2014 (after *Rena*), to the LLMC 1996, but maintained provisions in its national law disallowing limitation for wreck removal. Unfortunately, the reservation was not made in international law to the IMO and New Zealand only notified the IMO about the opt-out with effect from 15 October 2018. Arguably, until that date there was an international obligation to apply limits to wreck and cargo removal from the *Rena*. It appears that this influenced the settlement of the Government *Rena* claims. Island States such as Cook Islands, Kiribati, Marshall Islands, Niue, Samoa, Tonga, Tuvalu, Vanuatu appear not to have made the reservation either—despite the experience of another island State, Mauritius, with the wreck of the *Wakashio* in 2020. This emphasises the need for States to take an integrated view of the interaction of limitation of liability and wreck removal.
[180] Cf the UK which made the reservation in respect of wreck removal under Art 2(1)(d) and not cargo removal under Art 2(1)(e): see Gaskell and Forrest, *The Law of Wreck*, 115.
[181] LLMC.3/Circ.62, 12 September 2022.

for removal of vessels sunk by Russia, or for indemnity claims by Ukraine where it is obliged to remove Russian wrecks. Russia is a party to the Wreck Removal Convention 2007, but Ukraine is not.

Where the Wreck Removal Convention 2007 applies, the effect of the LLMC 1996 opt-out may be complicated, particularly for direct action claims against the insurer.[182]

9.3. LLMC 1996 and compulsory insurance under Wreck Removal Convention

Even if a reservation is exercised in relation to wreck and cargo removal, the LLMC 1996 Art 6(1)(b) limits[183] are relevant to the Wreck Removal Convention 2007 as they are used to calculate the maximum direct liability of the shipowner's insurer under the Wreck Removal Convention 2007 Art 12(10).[184]

Two separate limits are relevant. First, the shipowner will have a potential limit of liability under the LLMC 1996 Art 2(1)(d) and (e), but that liability will be unlimited where States have exercised the LLMC Art 18 opt-out.[185] Secondly, if the compulsory insurer is sued directly under Art 12(10) of the Wreck Removal Convention 2007, its liability is capped[186] by Art 12(10) at the applicable *LLMC 1996 limit* as set out in the Wreck Removal Convention 2007 Art 12(1). This was thought necessary to avoid potentially unlimited liability of the insurer under the certificate.

The *Baltic Ace* litigation[187] indicates that shipowners and Clubs may well seek to use limitation forum shopping to take advantage of States that are party to the LLMC 1976 or 1996, but have not made the wreck removal opt-out. Some care is needed when enacting Art 12(10) as there may be differences of interpretation about what is the "*applicable* national or international regime". This would seem to include those limits under the limitation law of an Affected State[188] that it wanted to apply to the wreck removal claim, eg Australia if it enacted the Wreck Removal Convention 2007.[189] The differences of interpretation relate to whether it is necessary to apply and recognise the limitation law of the flag of the sunken ship.[190]

I take the rather robust view that, so far as international law allows, Australia would be entitled to restrict recognition of foreign limitation laws that had *not* made the Art 18 reservation,[191] although that would probably not affect the insurer's direct liability cap. Australia ought also to clarify that the calculation of the cap in Art 12(1) refers to the LLMC 1996 as amended from time to time.[192]

To the surprise of some, the Wreck Removal Convention 2007 has been adopted by significant open registry (or flag of convenience) States including Liberia, Panama, Cyprus and the Bahamas. This perhaps shows that shipowners and insurers see advantages in the Wreck Removal Convention 2007, partly because of the requirements that removal claims must be reasonable and proportionate,[193] but also because claims against single ship companies could sometimes be restricted in practice to the sums that the insurers will directly pay out under Art 12(10).[194]

For States, the choice will be whether it is better to have a bird in the hand (ie compulsory insurance and direct action) than two in the bush (ie successful recovery with unlimited liability). The linkage of the Wreck Removal Convention 2007 insurance liability to the LLMC 1996 means that the levels of the general LLMC 1996 Art

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[182] See Gaskell and Forrest, *The Law of Wreck*, 490-491, 502-514: also 9.3, below.
[183] See eg 5.4.2, above and 12.4.2, below.
[184] See Gaskell and Forrest, *The Law of Wreck*, 502-514.
[185] See 9.2, above. This is the significant difference between limitation linkage in the Wreck Removal Convention 2007 by comparison with the Bunker Pollution Convention 2001 which has no opt-out from limitation linkage: see 7, above.
[186] We prefer to use the expression "cap" in relation to a direct action against the insurer as it is not a "limit [of liability]" strictly so called, ie under a global limitation convention: see Gaskell and Forrest, *The Law of Wreck*, 503.
[187] See Gaskell and Forrest, *The Law of Wreck*, 119-122, also 9.4, below.
[188] Ie the State "in whose Convention Area the wreck is located": see the Wreck Removal Convention 2007 Art 1(1).
[189] See Gaskell and Forrest, *The Law of Wreck*, 504-508 for the view that one should look to limitation law of the Affected State.
[190] Cf *Berlingieri, International Maritime Conventions Vol III* (Informa, 2017), 88 for the view that one should look to the limitation law of the flag State. *Berlingieri* is entitled to the highest respect, but his view may have been influenced by Art. 7 of the Italian Code of Navigation where limitation of a shipowner's liability is expressly governed by the law of the flag State: see Italian MLA response to the 2020 CMI Questionnaire on Unified Interpretation of LLMC Art 4 (and 11.3.3, below).
[191] In our response to the consultation documentation, Craig Forrest and I emphasised that Australian enacting legislation needs to cover this issue: see 9.4 below.
[192] Gaskell and Forrest, *The Law of Wreck*, 508-510.
[193] See Art 2(2) and 2(3); Gaskell and Forrest, *The Law of Wreck*, 441-443.
[194] See also Gaskell and Forrest, *The Law of Wreck*, 511-514.

6(1)(b) figures are even more important than before.[195] This also emphasises that a key to the successful working of the Wreck Removal Convention 2007, as well as the Bunker Pollution Convention 2001, is to agree the methodology for increasing LLMC 1996 limits.[196]

9.4. Australian consultation on Wreck Removal Convention 2007

As part of its advocacy for Australia to adopt the latest maritime liability conventions,[197] MLAANZ pressed for consideration of the Wreck Removal Convention 2007. Perhaps this lobbying had some influence, as on 7 August 2020 the Department of Infrastructure etc issued a Discussion Paper "Australia's accession to the Nairobi International Convention on the Removal of Wrecks 2007".[198] There were nine public responses to the Discussion Paper,[199] including those from MLAANZ; Craig Forrest and I commented on it in September 2020.[200]

In September 2021, the Department issued a draft Regulatory Impact Statement (RIS) examining accession to the Wreck Removal Convention 2007 and set out a number of options. In particular, it recommended ratification of the Convention, rather than merely updating the Navigation Act 2012, and also that the option should be exercised to extend the Wreck Removal Convention 2007 from the EEZ into territorial waters.[201] The draft RIS 2021 also involved the possibility of applying the Wreck Removal Convention 2007 provisions to domestic commercial vessels, while postponing its application to recreational vessels.[202]

Craig and I also commented in detail on the draft RIS 2021 in September 2021,[203] agreeing in general while indicating that "great care will be needed with the enacting legislation, both as to the method of enacting the Convention options,[204] but also in relation to related matters such as limitation of liability."[205] We specifically agreed with the proposal to extend the Convention into territorial waters as this would achieve uniformity in Australian maritime law, and sympathised with the idea to apply the convention to domestic commercial vessels (DCVs) but not recreational vessels.[206] However, we had some doubts about whether the Wreck Removal Convention 2007 itself allowed such a distinction to be made, ie the extent to which Australia can ratify the Wreck Removal Convention 2007 (eg with an extension to territorial waters) but apply its own national law to different types of Australian vessels.[207] In any event, it is clear that application of the Convention to DCVs and recreational vessels raises issues involving the Offshore Constitutional Settlement.[208]

In relation to limitation, we had made two points in our 2020 submission. First, we stated that one possible practical disadvantage that might apply if the Wreck Removal Convention 2007 were extended to territorial waters was that insurers might take a more restrictive approach to cost payments than in cases such as *Rena* and *Costa Concordia*.[209] An insurer may respond to future major incidents by willingly and quickly providing security or funds up to its direct action cap under the Wreck Removal Convention 2007 Art 12 (ie calculated under the LLMC

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[195] See 12, below.
[196] See 12.4.1, below.
[197] See 6.1 and 8.3, above.
[198] Probably more influential for the Government was the loss of 81 containers overboard into Australian Commonwealth waters from the *YM Efficiency* in June 2018 and the subsequent difficulties of cost recovery. See Australian Maritime Safety Authority, *Operational updates – YM Efficiency* (Web Page, 8 May 2020) < https://www.amsa.gov.au/news-community/campaigns/operational-updates-ym-efficiency>.
[199] See Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Claims for Wreck Removal* (Web Page, August 2020) <https://www.infrastructure.gov.au/infrastructure-transport-vehicles/maritime/maritime-business/maritime-liability-insurance/claims-wreck-removal>.
[200] See Gaskell and Forrest, "Submission in Response to Discussion paper: Australia's accession to the Nairobi International Convention on the Removal of Wrecks 2007" (September 2020) [2020 Submission].
[201] This was Option 3B of the draft RIS 2021, 16.
[202] See draft RIS 2021, 22-23, noting that most recreational vessels are under 300 gt (ie for Wreck Removal Convention 2007 insurance purposes) but that such vessels are normally registered by length and not gross tonnage. There was obviously some concern that additional costs on recreational vessel owners might be burdensome (ie politically unpopular!). State and Territory law largely governs abandoned recreational vessels and this could therefore continue.
[203] Gaskell and Forrest, "Submission in Response to draft Regulatory Impact Statement (RIS): Australia's accession to the Nairobi International Convention on the Removal of Wrecks 2007" (September 2021) [RIS Submission 2021]. This does not appear to be on the Departmental website.
[204] See also Gaskell and Forrest, *The Law of Wreck*, 530-534, dealing with "Accession choices for States" (including a checklist for drafting implementing legislation).
[205] See also Gaskell and Forrest, 2020 Submission: answer to Q4 (Disadvantages) of the Department's 2020 Discussion Paper. Note also our comments on "Loss of containers", below.
[206] Sometimes abbreviated as "RVs" but not to be confused with RAVs, ie Regulated Australian Vessels (eg Australian flagged and registered merchant ships).
[207] See eg paras 19-23 of our RIS Submission 2021.
[208] See M White and N Gaskell, 'Australia's Offshore Constitutional Law: Time for Revision?' [2011] 85 *Australian Law Journal* 504.
[209] On these cases see Gaskell and Forrest, *The Law of Wreck*, 19-29.

1996).[210] That could leave a State with the decision whether to incur itself any extra wreck raising costs above that limit and to seek to recover them from the shipowner (which may be an insolvent single ship company). There is no present indication that the International Group would take such an approach, but it may be more likely from a fixed premium insurer.[211]

Secondly, in our 2020 submission, we also considered that implementing legislation (both for the EEZ and any extension to territorial waters) should ensure (so far as possible) that Australia's *Limitation of Liability for Maritime Claims Act 1989* (Cth) is amended to protect against limitation forum shopping; ie in order to protect Australia's existing LLMC 1996 provisions opting for unlimited liability of *shipowners* for wreck removal.[212] As noted above, the problem could occur if shipowners seek to establish limitation funds in LLMC 1996 States that themselves have not opted for such unlimited liability.[213] Australia is entitled under the LLMC 1996 to have such unlimited liability and may need to strengthen its LLMC legislation so that there is no obligation to recognise a foreign fund that seeks to defeat that choice.[214]

On 18 March 2022, the Department sent out a revised draft RIS 2022, still supporting ratification[215] but recognising that "inclusion of DCVs and recreational vessels in a [Wreck Removal Convention 2007] framework could no longer be considered separately, but rather as part of each accession option".[216] In the draft Revised RIS 2022,[217] the recommended option is a revised Option 3, ie this time proposing only that Australia accedes to the Wreck Removal Convention 2007 and applies it to all ships in the EEZ.[218] This recommendation is despite the fact that 20 countries have assented to the territorial sea extension, including Canada, Denmark, Finland, France, Panama, Sweden and the UK, and that most consultation responses seemed to have favoured it.

It seems clear that the Department was worried about the implications of including all seagoing vessels[219] in the Wreck Removal Convention 2007.[220] The draft Revised RIS 2022 offered what it termed as an "Option 4"; this appears to be the old Option 3B from the draft RIS 2020, ie to accede to the Wreck Removal Convention 2007 and apply it to all ships in the EEZ and territorial sea.[221]

There were some concerns that this extension inwards "would affect existing Australian, State and Territory Government responsibilities for wreck removal in the territorial sea".[222] However, the Department did "not believe governmental responsibilities would be impacted or altered under this option, as no amendments would be proposed to the scope of the *Navigation Act 2012* (Cth). The *Navigation Act* would continue to apply to foreign vessels and RAVs in the territorial sea". Nor did it seem that there would need to be changes to the Great Barrier Reef Marine Park Authority legislative framework; a case-by-case choice could be made between the latter and Commonwealth legislation.[223]

A similar pragmatic approach could be taken in relation to State and Commonwealth frameworks. Indeed, this is what happens in the UK, where port authorities and General Lighthouse Authorities (such as Trinity House) retain wreck raising powers,[224] but the Department of Transport has overall responsibility and power[225] to give directions to these local authorities, eg in smaller cases where it is more efficient for them to mark and raise wrecks, while

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[210] See 9.3, above.
[211] See also 5.4.2, above.
[212] See 9.2, above.
[213] See 9.3, above. We refer to this as an 'Isle of Man' defence, as occurred in litigation there involving the wreck of the *Baltic Ace* in 2012: see Gaskell and Forrest, *The Law of Wreck*, 119-124.
[214] See further Gaskell and Forrest, *The Law of Wreck*, 128-131.
[215] And noting that "78 per cent of global shipping tonnage is flagged in countries that are a State Party to the Nairobi Convention, which is approximately 89.9 per cent of all ships coming to Australia based on ships that paid the Protection of the Sea Levy": draft Revised RIS 2022, 7.
[216] draft Revised RIS 2022, 24.
[217] On its Wreck Removal Convention 2007 website the Department states that "In November 2022, the Regulatory Impact Assessment considering accession to the Nairobi Wreck Convention was assessed by the Office of Impact Analysis as providing an exemplary level of analysis. The RIA will soon be made available on the Office of Impact Analysis' website and on this webpage". At the time of writing this final version was unavailable, so references here are to the draft Revised RIS 2022.
[218] See draft Revised RIS 2022, 37-38. What is now "Option 3" was originally "Option 3A" in the draft RIS 2021, whereas "Option 3B" (as recommended in 2021) was for application in the EEZ and territorial sea. This is somewhat confusing, as there appears to be some minor inconsistency in usage (see Revised RIS 2022,20).
[219] See the Art 1(2) definition of "ship".
[220] The sheer number of coastal craft is huge. AMSA estimates that as at October 2020 there were 27,000 DCVs in operation in Australia, with an estimated 866,808 recreational vessels: see draft Revised RIS 2022, 15.
[221] Draft Revised RIS 2022, 13, 21-23.
[222] Ibid, 22, 26.
[223] Ibid, 26.
[224] Under the MSA 1995 (UK) s 252-253.
[225] Under a new MSA 1995 (UK) s 253C.

leaving major wrecks to be coordinated by the national body.[226] Australia's size and constitutional structure is quite different, however, and the large States have established regulatory structures and responsibilities.

The draft Revised RIS 2022 concluded that "[i]n order to include all ships within the [Wreck Removal Convention 2007], the Commonwealth would need to either: supersede State and Territory law, or implement an applied law scheme similar to the National Law that would implement a specific DCV and recreational vessel framework in State and Territory law".[227] In any event, the tenor of the draft Revised RIS 2022 is that Commonwealth and State/Territory legislation can coexist and that difficulties can be overcome after stakeholder consultation when the Department enters "the change and implementation phases" and can determine if difficult issues can be mitigated further.[228]

Despite the impression that the drafters of the RIS were really in favour of the original proposal to extend the Convention into territorial waters, the conclusion was that Option 4 was thought to be too complex and to have too great an impact on regulators.[229] It is almost as if the 2022 choice of Option 3 is yet another example of putting the alternative into a 'too hard basket'[230]—at least for now—although there is to be a review five years after accession to the Wreck Removal Convention 2007.[231] What the draft Revised RIS 2022 does state is that after Australia accedes for the EEZ under Option 3:

> "Australia will then look to implement the requirements of the Nairobi Convention in the territorial sea for foreign vessels and RAVs only through Commonwealth legislation but without accession. After Option 3 has been implemented, Australia can revisit if there is an additional need or desire to expand accession into the territorial sea."[232]

In other words, it may apply Wreck Removal Convention 2007 type provisions to DCVs but apparently not recreational vessels.

Craig and I responded to this March 2022 Revised RIS [233] by stating that choice of Option (3) "somewhat reduce[s] the protections that might be available to Australia—in particular the access to compulsory insurance (and, with it, direct action against a foreign insurer) in respect of wrecks of foreign ships in the Australian territorial sea." Still, the Option (3) choice is an understandably pragmatic one, if there is a real follow up eventually to move to an Option (4), but care will still be needed in drafting, in particular to avoid some of the limitation issues which have been highlighted.

The Department considered that "the simplest and clearest way to implement the obligations under the [Wreck Removal Convention 2007] would be through new, dedicated legislation or amendments to Chapter 7 of the *Navigation Act*".[234] It also expects that there will be a 12-month transition period after the legislative amendments come into force, in particular to allow for shipowners to arrange appropriate insurance.[235]

PART THREE: LIVING WITH LIMITATION INTERNATIONALLY

10. International organisations 'living with limitation': IMO and the LLMC

10.1. Treaty law issues

In the course of drafting a maritime law convention, officials have to be aware of general treaties, such as UNCLOS 1982 and the Vienna Convention on the Law of Treaties 1969, as well as wider general principles of public international law.[236] These all frame the course of negotiations, although the strictness with which States insist on strictly following international law procedures can vary, particularly when it suits their policy objectives.

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[226] See Gaskell and Forrest, *The Law of Wreck*, 557-8. There is also an MOU to govern the division of UK responsibilities, perhaps similar in some ways to the Offshore Constitutional Settlement in Australia: see also M White and N Gaskell, 'Australia's Offshore Constitutional Law: Time for Revision?' [2011] 85 *Australian Law Journal* 504.
[227] Ibid, 23.
[228] Draft Revised RIS 2022, 26.
[229] Ibid, 38.
[230] Yet again, the academic input may have identified too many complexities!
[231] Draft Revised RIS 2022, 41.
[232] Ibid, 37.
[233] See Gaskell and Forrest, "Submission in Response to March 2022 draft Regulatory Impact Statement (RIS): Australia's accession to the Nairobi International Convention on the Removal of Wrecks 2007".
[234] Draft Revised RIS 2022, 40.
[235] Ibid.
[236] Including decisions of the ICJ and academic writings.

For instance, in the limitation context, Japan cautioned the IMO Legal Committee about Australia trying to undermine the treaty procedures for amending the LLMC 1996 limits,[237] but in relation to the attempt to agree a uniform test for breaking LLMC 1996 limits,[238] Japan was happy (as a procedural compromise) for this to be achieved not by treaty amendment but through an IMO Assembly resolution.[239]

In practice, contentious issues that cannot apparently be resolved before the starting deadline of a diplomatic conference may be grouped together by the Chair in a series of packages or compromises. These will often be hammered out—not on the floor of the conference—but in private meeting rooms (for selected groups), or even over coffee. It is sometimes difficult to piece together the *real* course of negotiations years after the event.[240] Collective memories soon fade as civil servants frequently change jobs, and the documentary *travaux préparatoires* may be sparse, obscure or unhelpful sometimes because of a reluctance to highlight conflicts.

10.2. 'Living with' the LLMC as an existing convention

A problem for all international organisations in drafting new treaties is that they have to 'live with' existing conventions, both politically and legally. It takes a huge amount of time to negotiate a convention and to bring it into force, so there is little appetite for making amendments—with all the ensuing complications of trying to achieve uniformity when there is inconsistency in later ratifications. Politically, it is also difficult to persuade governments that there has been an omission, as opposed to changing needs over time; and that applies even when it is the same organisation, like IMO, that has produced the convention. Not only are there potential inter-organisation rivalries on maritime matters (eg between UNCITRAL and UNCTAD; IMO, ILO and UNEP) but, as noted, in the background there is also the law of the sea, and treaty law generally (including the Vienna Convention 1969).

Fragmentation of limitation regimes has already been mentioned in the context of the Clubs' position,[241] but it sometimes causes difficulties in drafting at the IMO. The LLMC 1976 provided an exclusion for CLC claims but made no provision for a future Salvage Convention, or an HNS Convention. When the HNS Convention was first agreed in 1996, it was necessary also to agree changes to the LLMC 1976 through the 1996 Protocol to the LLMC 1976[242]—in fact both the HNSC 1996 and the LLMC 1996 Protocol were concluded at the same diplomatic conference. The decision to have simultaneous discussions on two instruments was easier to agree as it was recognised that more than one LLMC change was needed, ie there needed to be explicit carve-outs for Art 14 of the Salvage Convention 1989 and the HNS Convention 1996, along with higher LLMC limits generally and a new rapid amendment procedure for increasing limits.[243]

When the Bunker Pollution Convention 2001 was being negotiated, there was no appetite for yet another LLMC protocol to exclude bunker pollution claims from the LLMC, so as to have stand-alone bunker pollution limits.[244] The Wreck Removal Convention 2007 also has some rather awkward cross-references to the LLMC 1996.[245]

When the Antarctic Treaty "Liability Annex VI"[246] was being negotiated (not at the IMO), it was realised only late in the day that there might be an overlap with the LLMC and a rather untidy work-around was agreed.[247] There was to be liability of an "operator" that carries out activities in the Antarctic Area. Liability Annex VI Art 9(1) sets out limits for emergencies *not* involving ships at 3 million sdrs. For ships, there is a limit expressed as identical to the "other claims" limits[248] in Art 6(1)(b) of the LLMC 1996 (but *before* the 2015 increases). There is a saving provision in Art 9(2) of the Liability Annex for the application of any applicable limitation treaty, ie including the 1957 Limitation Convention or the LLMC 1976. It does try to say that these applicable limits should

[237] See 12, below and LEG 108/16, 25 August 2021, para 15.
[238] See 11.3.3, and 12.4.1, below.
[239] Ibid.
[240] Although it is possible to trace detailed proposals and conclusions in the IMO Legal Committee documents, especially the final Report of the Committee's work after each session: see eg the discussion in 7-9, above and 11.3.2, 12.4, and 13 below. For the LLMC, see also F. Berlingieri (ed), *Travaux Préparatoires of the LLMC Convention, 1976, and of the Protocol of 1996* (CMI, 2000).
[241] See 5.3, above.
[242] Which produced what we now call the "LLMC 1996".
[243] Increases in limits can now be agreed more quickly—but not quickly or high enough for Australia: see 12, below.
[244] See 7, above and N Gaskell, 'The Bunker Pollution Convention 2001 and limitation of liability' (2009) 15 *Journal of International Maritime Law* 477; Gaskell and Forrest, *The Law of Wreck*, 143.
[245] See 9.1, above and Gaskell and Forrest, *The Law of Wreck*, 490-491, 114-116.
[246] See the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty (in force 1998); Annex VI Liability Arising From Environmental Emergencies, adopted in 2005, but yet to enter into force.
[247] See N Gaskell, 'Liability and Compensation Regimes: Pollution of the High Seas', in R Beckman, M McCreath, J Roach, and Z Sun (eds), *High Seas Governance: Gaps and Challenges* (Brill/Nijhoff, 2018), 254-259.
[248] Ie the claims that I describe generally as 'property' claims, rather than the injury/death claims in Art 6(1)(b): see eg 5.4.1, above and 12.4.2, below.

not be less than those (in effect) in LLMC 1996, but it is not clear how that would work as between States Parties to LLMC 1976.

In order to avoid conflict with the LLMC 1996, overlap provisions were also needed in the Strasbourg Convention 2012 on the Limitation of Liability in Inland Navigation, which applies to commercial inland navigation vessels operating on inland waterways and lakes (eg the Rhine).[249]

10.3. CMI Draft OGA Convention 2022 and LLMC 1996

An example of how the LLMC needs to be taken into account was to be raised at the October 2022 CMI Assembly in Rotterdam. One agenda item was a draft "International Convention on Liability and Compensation for Transboundary Pollution Damage in Connection with Offshore Oil and Gas Activities" (OGA), contributed to by Rares J among others. It aims to deal with some of the *consequences* for States exposed to incidents similar to the *Montara* or *Deepwater Horizon* spills, but at present is drafted to provide for pollution only from offshore "*craft*", eg MODUs (Mobile Offshore Drilling Units), rather than fixed platforms. "Craft" are defined in draft Art 1.1 to mean "any waterborne craft of any type whatsoever constructed or adapted for any offshore activities regardless of whether it is engaged in such activities and includes all types of MODUs, offshore rigs, whether fixed or mobile and storage units for oil or gas".[250]

The draft proposes strict liability of an "operator", backed by compulsory insurance, but under Art V with the right of the operator to limit liability to an amount yet to be agreed. Art V has many similarities with the LLMC, eg Art V.2 is borrowed from the LLMC Art 4,[251] as is Art XX (replicating the LLMC 1996 rapid amendment procedure).[252]

This shows another feature of international maritime law negotiations at the IMO—use boilerplate text if you can, as it saves time and can be justified on the basis that the issue has been thought through before (even if hardly any thought had been given to it the first time around![253]).

It was presumably hoped to avoid overlap with the LLMC 1996, because Art 15.5(b) of the LLMC 1996 makes it clear that the LLMC does not apply to "[f]loating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof".[254] The LLMC 1976/96 Art 15(4) also excludes drilling ships from the scope of application, but only in certain circumstances, eg where state law has a higher limit or when a state is party to a convention regulating liability of drilling ships. If the draft OGA Convention were adopted, States would have to inform the Secretary-General of the IMO as required by draft Art 14(4)—yet another administrative task for state authorities. It is not entirely clear to me that there is no overlap in the two definitions, in the LLMC and OGA; eg are all OGA "storage units" within the LLMC Art 15.5(b) exclusion? Moreover, the person liable (the operator, ie licensee) might well be an owner or charterer within the LLMC.

A drafting technique to avoid such overlap issues is a more general "without prejudice" provision in a convention, often listing specific conventions to avoid doubt,[255] but I cannot see one in the draft OGA Convention. This is an ambitious exercise,[256] especially as the IMO has previously rejected the idea of producing such a convention

[249] See Art 1. Nb the Strasbourg Convention 2012 can apply to limit claims against a salvor where services are applied to a seagoing vessel in inland waters: see Art 15. The overlap question is complicated by the fact that the Salvage Convention 1989 can apply in "all waters whatsoever". By contrast, the LLMC Art 1(2) has no such geographical restriction, but does apply only to seagoing ships; the LLMC Art 15(2) does, however, allow States to apply national law to inland navigation vessels (presumably those that are not seagoing). See also 4.1.2, above.

[250] A footnote adds "These crafts may include the whole group of exploration and detection vessels and devices such as those that place underwater pipelines, Floating Drilling Production Storage and Offloading unit (FDPSO), Floating Production Storage and Offloading unit (FPSO), Floating Storage and Offloading unit (FSO) or Floating Storage Unit (FSU) whether purpose-built, or converted or adapted from seagoing vessels constructed for the carriage of oil."

[251] See further 7, below.

[252] For which, see 9.3, below.

[253] Eg the question of whether a crew member is a "third party" under the CLC 1992 and Wreck Removal Convention 2007: see *The Law of Wreck*, 458.

[254] The UK MSA 1995 does not even include this para expressly, leaving doubt about how far it has been given the force of law, or whether the drafter hoped to rely on a narrow definition of the "ship".

[255] As appears in those conventions giving priority to existing limitation conventions: eg the Athens Convention 2002 (see 8, above), the Bunker Pollution Convention 2001 (see 7, above), the Wreck Removal Convention 2007 (see 9.2, above) and the Antarctic Liability Annex (see 10.2, above).

[256] Especially the potential creation of an OGA Fund Art IX allowing high seas claims to be brought, eg by the International Seabed Authority and giving jurisdiction inter alia to the International Tribunal of the Law of the Sea

covering fixed platforms.[257] It seems unlikely that the IMO, UNEP or UNCITRAL would be attracted to this narrower project (ie for offshore craft not platforms),[258] although I consider it worthwhile and necessary.

My point is that the LLMC continues to influence the drafting of other conventions.[259]

11. International interpretation: breaking LLMC limitation

Few maritime *public law* disputes are litigated or end up before national courts, so judicial interpretation of conventions such as SOLAS and MARPOL is rare, partly because the language is often technical yet phrased generally.[260] By contrast, litigation involving the maritime liability conventions is more common.

Interpretation of such liability conventions has both an international and national aspect, especially as every expression will have been considered in detail in discussions in the drafting stage at the IMO. Ultimately, though, the final word (even on CLC 1992 and 1992 Fund disputes) will be for national courts. What happens if national and international interpretations differ, or where those who were involved in the original drafting consider that national courts have gone wrong?[261] This becomes particularly acute where there is a perception that national courts have bent the interpretation to suit national[262] or other[263] interests. In 2019, the CMI instituted an International Working Group (IWG) on Unified Interpretation on the test for breaking limitation[264] and its work was passed on to the IMO.

11.1. Tests for breaking limitation

As is well known, the *MSA 1862/1894* s 503 allowed claimants to break limitation if there was "actual fault or privity" of the owner. The same formula was adopted in the 1957 Limitation Convention. There was nearly a century of UK litigation on the meaning of the phrase with the practical result that shipowners often had a difficult burden of showing the absence of causative fault on the part of management.

In the debates before and at the 1976 LLMC diplomatic conference, a major change was introduced through Art 4 of the LLMC, whereby a:

> "person liable 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".

The introduction of the intention or recklessness test, instigated by shipowners and Clubs, not only raised the level of 'misconduct' or 'wrongdoing' that was necessary to deprive the shipowner of LLMC limits but, also, the burden of showing that misconduct was transferred to the claimant/victim.[265] This 'tightening' was supposedly to be in exchange for the higher limits that were being considered. Selvig noted[266] that there were debates at the diplomatic

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[257] For attempts from 1977-2017 within the CMI and IMO to produce a Convention on offshore mobile craft and platforms, see N Gaskell, 'Compensation for Offshore Pollution: Ships and Platforms' in M. Clarke (ed) *Maritime Law Evolving*, (Hart, 2013) 80-85; Gaskell, 'Liability and Compensation Regimes: Pollution of the High Seas' in *High Seas Governance: Gaps and Challenges*, 238-240.

[258] Draft OGA Art 1.13 leaves open the potential depository, but lists as possibles the IMO, UNEP or UNCITRAL. The CMI's IWG reported to the CMI's Antwerp Conference 2022 that UNEP was not interested but that it was proposed to work with UNCITRAL: see Agenda 9(g).

[259] The boilerplate approach can even apply to conventions adopted by different international organisations, eg the Strasbourg Convention 2012: (see 10.2, above), whose depository is the Secretary General of the Central Commission for the Navigation of the Rhine.

[260] The detail is then created in national law enactments of the generalised convention obligations. Criminal prosecutions, or administrative challenges, are usually based on interpreting this law: cf *Yamba Shipping Pty Ltd v Australian Maritime Safety Authority* [2022] FCA 1124.

[261] The late Geoffrey Brice QC considered that, in *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, the courts had misunderstood the CMI 1991 Montreal Compromise that led to the Salvage Convention 1989. My own view was that this was more a case of him knowing what he had intended when leading CMI drafting discussions but that the final wording of the IMO's Convention did not reflect that. See also the *Prestige* litigation in the Spanish courts and 11.3.1, below.

[262] Eg with the *Nissos Amorgos* where there were Venezuelan judgments against the CLC 1969 and the IOPC Fund 1971. The claims were widely considered to have gone beyond the wording of the Fund Convention 1971 and were effectively stifled by the winding up of the 1971 Fund and the defeat of claims in the UK courts: see *Assuranceforeningen Gard Gjensidig v. The International Oil Pollution Compensation Fund 1971* [2014] 2 Lloyd's Rep 219.

[263] The CJEU effectively avoided the CLC 1992 limits in the post *Erika* litigation thereby giving effect to the EU Waste Directive liabilities in addition to the CLC liability: see *Commune de Mesquier v Total* [2008] 2 Lloyd's Rep 672; Gaskell and Forrest, *The Law of Wreck*, 689.

[264] With members from France, Greece, Ireland, Spain, United Kingdom, United States and Venezuela. The CMI also supported the work of the Legal Committee on producing a Unified Interpretation of Art 4 of LLMC: see 11.3.2, below and LEG 107/9/1, LEG 108/16/1 Annex 9, 7. See also CMI website for the 2020 questionnaire subsequently distributed.

[265] *The Capitan San Luis* [1993] 2 Lloyd's Rep. 573.

[266] Selvig, 'An Introduction to the 1976 Limitation Convention' in *Limitation of Shipowners' Liability: The New Law*, 16.

conference about whether a 'safety valve' should be provided if limits ultimately settled were too low, but this was never agreed.

The idea that the LLMC Art 4 test was in effect one of wilful misconduct (not mere negligence) was apparently understood at the time and is reasonably clear from the English text. English decisions have strongly reinforced the position that the test was designed to be practically unbreakable.[267] Still, there are continued problems with the test, both of drafting and interpretation.

The drafting omission concerns identifying or attributing the person whose misconduct will deprive the corporate shipowner of limits. The interpretation question is as to the meaning of "intention" and "recklessness" and how far it extends beyond fault. Taken together these issues go to the heart of whether the LLMC really is practically unbreakable. If it is unbreakable, that puts even more emphasis on the level of limits.[268]

11.2. Whose misconduct?

A major omission in the LLMC Art 4 test is that it nowhere specifies *whose* intent or recklessness (misconduct) is to be evaluated in the context of a *corporate* shipowner; Art 4 merely refers to the person entitled to limit. That person should be relatively easy to identify where there is an individual owner-master, but the text is completely silent as far as companies are concerned. Of course, if *anyone* employed by the company is guilty of intent or recklessness, it could be said that the company could not limit. This does not follow for two reasons.

The first is that the LLMC is really a linear successor to the 1957 Limitation Convention under which mere fault would be enough to lose limitation rights. But up to 1957 (and later) the basis of most liabilities was fault; strict liability internationally only became an international reality with the CLC in 1969. If fault of anyone in the shipowning company's employ could deprive the company of limits, then limitation would *never* have been possible. Indeed, for that reason English courts developed a principle of attribution, specifically in maritime law, but also as a consequence of their development of company law principles generally.

Secondly, the intent/recklessness test openly used wording that was found in the Warsaw-Hague Convention 1955 (as amended) on air transport,[269] where crucially an aircraft operator was deprived of limits if it "or its servants or agents" were guilty of the intent or recklessness:

> Article 25
>
> The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.
>
> Article 25A
>
> 1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.
>
> 2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.
>
> 3. The provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Art 25 dealt with claims against the carrier, Art 25A dealt with claims directly against the servant or agent. What is clear is that the provision was mostly concerned with employees, eg the reference to "scope of employment". What is less clear is what is meant by "agent" here, ie does it include independent contractors, such as repairers? In the later IMO debates, most of the focus has been on the master and crew.

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[267] See eg *The Leerort* [2001] 2 Lloyd's Rep 291; *The CMA Djakarta* [2003] 2 Lloyd's Rep 50; *Holyhead Marine v Farrer* [2022] 1 Lloyd's Rep 463, 465.
[268] See 12, below.
[269] Art 25, since replaced by the Montreal Convention 1999.

The maritime version of what became the LLMC Art 4 test was first used in the CMI's International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea 1961,[270] Art 7.[271] This deliberately omitted the wording "or its servants or agents" and the words were also deliberately omitted[272] from the LLMC test.[273]

It must follow as a matter of interpretation that it is not enough to identify misconduct on the part of 'mere' servants or agents (eg employees) but, as shipowning companies must act through humans,[274] for there to be intent or recklessness there must be a need to identify those whose misconduct *is* treated as that of the company. The English case law on attribution is quite sophisticated and involves consideration of questions such as "governing mind and will", and whose actions would be considered as those taken by an individual owner.[275]

If there is a single "directing mind and will" then that person's conduct will suffice.[276] If there is the necessary misconduct by a board of directors, then that is probably high enough to be attributed to the company.[277] It is where there is misconduct below this level that there are difficulties. Who in effect is performing the functions of an individual (ie non-corporate) shipowner? English law has long accepted that if the functions of a shipowner (ie the top decision-making functions) are delegated to a firm of ship managers then one looks to that company (eg to its board of directors).[278] In *Meridian Global Funds Management Asia Ltd v. Securities Commission*,[279] the need to look at functional equivalence was reaffirmed. The mere recklessness of a junior manager or ship superintendent may not be high enough, but if the shipowners have devolved all decision-making powers to that person then the shipowners risk that conduct being attributed to them.[280]

It by no means follows that every jurisdiction would take an approach that looks, eg, at Board of Director's level. There is some Korean Supreme Court case law that indicates that in a shipping company with a small or rather informal management structure it may be much easier to look down the corporate ladder.[281] The *Meridian Global* litigation also hints that if key functions are delegated (eg to a marine superintendent) then it may be possible to look to that person below Board level. The point is that the LLMC is silent on this issue and there is great scope for differences in approach particularly in non-common law jurisdictions—especially where maritime law is not a specialism.

11.3. Seriousness of misconduct: "Unified Interpretation" of LLMC Art 4

11.3.1. Concern at IOPC Fund

Shipowners and insurers have been concerned about how States have applied IMO liability conventions, especially the CLC. There were concerns that some States were in effect cheating by allowing additional claims outside the convention—ignoring agreed insurer limits in CLC Art VII(8). These concerns were expressed in more diplomatic language in 2016 IOPC debates,[282] and the consistent application of the 1992 Conventions was more

[270] The 1961 Convention (with contemporaneous protocol of signature) covered death and personal injury only. It actually came into force in 1965, but eventually only attracted seven contracting States and was in effect superseded by the Athens Convention 1974 which covered both passengers and luggage.
[271] "The carrier shall not be entitled to the benefit of the limitation of liability provided for in Article 6, if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result."
[272] Proposals to include servants of the carrier, the master or other crew members were rejected at the 1976 diplomatic conference: see eg LEG 107/9, 10 January 2020, para 7.9.6.
[273] And also from other maritime conventions, eg the Hague-Visby Rules 1968, the CLC 1992, the HNS Convention 2010, the Bunkers Convention 2001, the Athens Convention 2002.
[274] For MASS, see 13.3.5, below.
[275] See Gaskell and Forrest, *The Law of Wreck*, 112-114.
[276] *Lennards* v. *Asiatic Petroleum* [1915] AC 705.
[277] See eg *Societe Anonyme des Minerals v Grant Trading Inc (The Ert Stephanie)* [1989] 1 Lloyd's Rep 349.
[278] See eg *Lennards* v. *Asiatic Petroleum* [1915] A.C. 705; *Grand Champion Tankers c Norpipe AS (The Marion)* [1984] 2 Lloyd's Rep 1, 3; *The Star Sea* [1997] 1 Lloyd's Rep 360, 375 (on appeal, [2001] 1 Lloyd's Rep. 389, 395, 414); *Peracomo Inc v TELUS Communications Co* [2014] 2 Lloyd's Rep 315 (SC Can).
[279] [1995] 2 AC 500, albeit holding that special rules of attribution are required to decide whose act (or knowledge or state of mind) was *for this purpose* intended to count as the acts of the company.
[280] Cf *The Marion* [1984] 2 Lloyd's Rep 1 and *Arthur Guinness Son & Co Ltd v Owners of the MV Freshfield (The Lady Gwendolen)* [1965] P 294, [1965] 1 Lloyd's Rep 335.
[281] See *Maralunga* [1995] Int ML 176 and a later decision of 26 October 2006.
[282] See IOPC/APR16/9/1 and IOPC/OCT16/11/1.

formally raised by the International Chamber of Shipping (ICS) and the International Group at the IOPC Fund Assembly in April 2017.[283]

They gave as an example the *Prestige* litigation involving major oil pollution off the Spanish and French coasts, where:

> "the Spanish Supreme Court—overturning an acquittal decision of the trial court—held that the master was guilty of the crime of reckless damage to the environment and that as a result the master and shipowner were not entitled to limit their liability under the CLC. The shipowner's insurer, the London P&I Club, was also held directly liable above the CLC limit for up to US$1 billion (the limit of cover provided by International Group clubs for oil pollution damage), irrespective of Article VII(8) of the 1992 CLC, which expressly provides that the insurer may avail himself of the limits of liability prescribed in Article V(1), even if the owner is not entitled to limit his liability according to Article V(2)." [284]

The International Group and ICS suggested that further study was needed and that a "common understanding" of the CLC and Fund Conventions be developed.[285]

The Governing Bodies of the IOPC Funds[286] considered a wide range of views about implementation and interpretation, including Spain which was concerned that there was an attempt to "strip national courts of any margin of appreciation to apply and interpret the rules".[287] By contrast, IUMI pointed out rather pithily that:

> "Marine liability insurers, whose national member associations are represented by IUMI remain extremely concerned by the continuing and growing uncertainties resulting from actions of certain States in relation to pollution cases… [R]ecent decisions threaten to undermine the established Conventions. This is exemplified by the huge amounts at issue in ongoing litigation, currently totalling over €2.3 billion but which could reach €4.4 billion. No insurer can be expected to foresee that claims of this magnitude can be made in a case that was closed off over 10 years ago."[288]

It was eventually decided[289] that the Director of the IOPC Funds would present a document for the next session in October 2017.

This document[290] noted that questions of interpretation of the CLC 1992 were a matter for the IMO Legal Committee, not the IOPC Funds, and outlined six options. Option 1 was a non-binding "guidance document" on interpretation of the 1992 conventions that could be issued by the IOPC Funds Secretariat which, if agreed by the IOPC Fund Governing Bodies, could constitute "subsequent practice in the application of the Conventions under the Vienna Convention on the Law of Treaties" [1969]."[291] The most powerful option (Option 4) was of course to amend the CLC and Fund Conventions, but an alternative "Option 3" was "to agree a unified interpretation of the Conventions, adopted either by the IMO Legal Committee or the IMO Assembly".[292]

It was decided that Option 4 was not acceptable, but overall there was no consensus as to the way forward, so it was left to delegations to take matters forward.[293]

11.3.2. IMO Legal Committee: need for unified interpretation of LLMC Art 4?

Although the IOPC proposals had been instigated by two NGOs, ICS and the International Group, initiation of new agenda proposals needs the support of Member States. The next move occurred at the 106th Session of the IMO Legal Committee in 2019, when Greece and the Marshall Islands (ie two flag States), combined with ICS

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[283] See IOPC/APR17/4/6, 30 March 2017.
[284] Ibid, para 3.5. There is a persuasive view that the Spanish decision was a clear breach of the CLC 1992, see M Jacobsson, 'Compensation for non-economic damage caused by pollution of the marine environment' (2020) 26 *Journal of International Maritime Law* 396, at section 7. See also Gaskell and Forrest, *The Law of Wreck*, 13, and 12.3, below.
[285] Ibid, para 4. The idea of a "Common Understanding" was used in the Final Act of the diplomatic conference that agreed the Salvage Convention 1989, but not as part of the convention's text; see the *Navigation Regulations 2013* (Cth), Sch 1). This was, in effect, a last-minute proposal that was too late to be fully negotiated and whose status can only be persuasive rather than binding.
[286] Ie the 1992 Fund Administrative Council and Supplementary Fund Assembly.
[287] IOPC/APR17/9/1, 28 April 2017, 32.
[288] IOPC/APR17/9/1, 28 April 2017, 34.
[289] IOPC/APR17/9/1, 28 April 2017, 28.
[290] IOPC/OCT17/4/4, 13 October 2017.
[291] Para 3.2. See further, 11.3.3, below.
[292] Ibid.
[293] IOPC/OCT17/11/1, 2 November 2017, para 4.5.23.

and the International Group to make a proposal[294] for a "Unified Interpretation on the test for breaking the owner's right to limit liability under the IMO conventions".[295] Again, the complaint was about the possibility of "[i]nconsistent 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".[296] No specific examples were given in the three paragraphs dealing with the "need" (said to be "urgent"), although the paper was keen to emphasise the connection between insurability[297] and unbreakable limitation.

It can be seen that the original proposal to the IOPC had been *narrowed* to refer only to breaking of limitation of liability, but *widened* to include a number of IMO liability conventions. This perhaps served to move away from an explicit emphasis on *Prestige* (and thereby reduce the immediate opposition of Spain or France). Although no amendment was proposed to the conventions such as the LLMC 1996, "unified interpretations were a relatively common occurrence in both the Maritime Safety Committee and Marine Environment Protection Committee at IMO, but less so in the IMO Legal Committee".[298]

It was argued that the Unified Interpretation would "ensure consistency" (not quite explaining how) but "recognizing that the courts in States Parties are ultimately the final arbiters".[299] Despite the unusual nature of the proposal, and the fact that it had not previously appeared in its work programme, the Legal Committee agreed to consider a "new output" and invited concrete proposals for LEG 107.[300] This perhaps reflects the influence of shipowning interests at IMO in having their concerns considered. By contrast, except for environmental claims (where States have suffered), there is not always a natural voice at IMO for victims in a general sense.

Before LEG 107 in 2020, 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) joined the International Group and ICS in two intersessional discussions on the intention and objectives of Art 4 of the LLMC 1976.[301] These reviewed the *travaux préparatoires*, both from the CMI meetings to revise the 1957 Limitation Convention and those at the IMCO (later, IMO) Legal Committee. A report on the work was presented by Canada, Greece, Italy, Malta, Poland along with ICS and International Group.[302] It noted, in particular, the change from the simple negligence 1957 test, which encouraged costly litigation, and the "recklessly and with knowledge" element that came near to "wilful misconduct" in the Marine Insurance Act 1906 (UK), so that if insurance cover remained intact there would be a right to limitation. The Legal Committee's 23rd Session in 1974 had included "or from his own gross negligence" in square brackets at the end of the draft text, but that less strict formulation was rejected at the 1976 Diplomatic conference.[303] The 2020 report came to the general conclusion that six principles it identified showed that "the test was drafted in order to present a *virtually unbreakable* right of the owner to limit liability", and recommended that they be reflected in a Uniform Interpretation.[304]

The informal group did not discuss the mechanism by which any Uniform Interpretation could ultimately be agreed by the IMO, so the IMO Secretariat itself presented some options for LEG 107.[305] It noted the importance of Arts 31-33 of the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention), eg that 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".[306] Moreover, account shall be taken of "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[307]

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[294] See LEG 106/13, 11 January 2019.
[295] Under the 1992 CLC Protocol, the 2010 HNS Protocol and the 1996 LLMC Protocol.
[296] LEG 106/13, 11 January 2019, para 8.
[297] See also 5.2, above.
[298] See the advice from the IMO's Director of Legal Affairs and External Relations of IMO to the Funds' Governing Bodies in IOPC/OCT17/11/1, 2 November 2017, para 4.5.7. The Director added that although unified interpretations were generally decided in the Committee and published in a Circular to Member States, a unified interpretation required adoption by a Resolution to give it more legal weight. The CMI noted that an example of a unified interpretation was the International Labour Organisation (ILO) and IMO "Guidelines on the fair treatment of seafarers" which had subsequently been adopted in almost identical Resolutions by the respective bodies: see IOPC/OCT17/11/1, 2 November 2017, para 4.5.19.
[299] LEG 106/13, 11 January 2019, para 21.
[300] See LEG 106/16/1, 13 May 2019, para 13.4. Significantly, the International Group offered to coordinate informal discussions.
[301] The CMI also circulated a questionnaire on 19 February 2020, to which 13 national MLAs replied
[302] LEG 107/9, 10 January 2020.
[303] The 1961 formulation had been adopted also by IMCO in the Athens Convention 1974. See also 7.2, above.
[304] LEG 107/9, 10 January 2020, para 9.
[305] LEG 107/9/2, 24 January 2020.
[306] Art 31(1).
[307] Art 31(3).

The International Law Commission (ILC) had produced conclusions and commentaries on paras (a) and (b) and these had been adopted by the UN General Assembly in December 2018.[308] "For a "subsequent agreement" under article 31, paragraph 3 (a), the parties must intend, possibly among other aims, to clarify the meaning of a treaty or how the treaty is to be applied. This presupposes a deliberate common act or undertaking by the parties to interpret the treaty".[309] The commentary to ILC conclusion 11 explains that "interpretative resolutions by Conferences of States Parties can be subsequent agreements or subsequent practice if there are sufficient indications that that was the intention of the parties at the time of the adoption of the decision or if the subsequent practice of the parties establishes an agreement on the interpretation of the treaty".[310]

The IMO Secretariat paper also noted that practice in the Marine Environment Protection Committee (MEPC) and Maritime Safety Committee (MSC) on Uniform Interpretations was to use them where technical requirements contained vague expressions. "There had been some examples of interpretations of treaties developed by the Legal Committee, to provide harmonized implementation of these instruments"[311] all of which had been adopted in IMO Assembly Resolutions. Most of these Resolutions, in my view, tended to deal more with administrative matters rather than liability directly.[312] Nor do they use "declaratory interpretative language and never clearly indicate that they express the agreement of the parties or that they are adopted by them".[313] The key therefore would be to satisfy these latter requirements to fall within Art 31(3). A resolution adopted by a Conference of States Parties, eg held in conjunction with a session of the Legal Committee, "would have more legal weight than an Assembly or Committee resolution."[314] If the resolution did not indicate that it embodied the common understanding and the agreement of the parties, it may only have legal weight based on subsequent practice,[315] ie that would be much more difficult to compile and show.

11.3.3. Drafting and form of the Unified Interpretation 2020-2021

There was then extensive discussion about the draft Uniform Interpretation at LEG 107 in December 2020.[316] The content of the draft document, ie the expression of intention, was relatively uncontroversial—being based as it was on the *travaux préparatoires*—but one open question was how far it went beyond a general principle of virtual unbreakability and, eg, covered questions of *attribution*.[317]

The form of any Uniform Interpretation was more problematic, eg if there was to be a resolution of a conference of States Parties (where the Legal Committee transitioned into a separate conference of the parties), what would be the legal effect for States Parties that did not agree with the resolution? Given the difficulties posed by COVID-19, it was agreed at LEG 107 to set up a remote intersessional group, coordinated by Georgia, to develop the text of a draft Uniform Interpretation and also to consider the best vehicle for its adoption.[318]

In April 2021, the intersessional Correspondence Group reported to LEG 108[319] that it had considered questions of drafting the Uniform Interpretation and also the best vehicle for its adoption (eg resolutions of the Legal Committee, or Assembly, or Conference of States Parties). On the vehicle question, a majority preferred an Assembly Resolution,[320] It based itself on two key drafting principles:

- the wording to be used was to be based on the principle of "unbreakability" and to be intended to comprise a virtually unbreakable test; and

[308] Resolution A/RES/73/202 adopted by the United Nations General Assembly on 20 December 2018.
[309] LEG 107/9/2, 24 January 2020 para 9.
[310] Ibid, para 14.
[311] Ibid, para 17.
[312] See eg A.1028(26) on Issue of Bunkers certificates to bareboat-registered vessels, A.1055(27) on Issue of Bunkers certificates to ships that are also required to hold a CLC certificate and A.1124(30) on Delegation of authority to issue certificates of insurance or other financial security required under the 1992 Civil Liability Convention and the 2010 Hazardous and Noxious Substances Convention.
[313] LEG 107/9/2, 24 January 2020, para 17.
[314] Ibid, para 19.
[315] Ibid.
[316] LEG 107/18/2, 11 December 2020.
[317] See 11.2, above.
[318] LEG 107/18/2, 11 December 2020, para 9.15.
[319] LEG 108/8, 23 April 2021. The Group included Australia and New Zealand, but with many shipowner States in addition to the NGOs such as ICS, INTERTANKO, IUMI and the International Group.
[320] Ibid, para 21.

- proposals discussed at the LLMC 1976 diplomatic Conference to extend the test to include servants of the carrier, the master or other crew members[321] were rejected and, as a result, the Group were mindful to reflect this in the wording of the Unified Interpretation.

The Group prepared a draft Uniform Interpretation,[322] although there was internal disagreement on aspects of it.[323] The operative paragraphs 1(a)-(c) contained what most common lawyers would agree is an accurate description of the Art 4 test, ie

- being "virtually unbreakable" (para 1(a));
- rejecting gross negligence (para 1(b)(i));
- assimilating the test to wilful misconduct in marine insurance so that loss of the limit begins where "insurability ends" (paras 1(b)(ii) and (iii)); and
- emphasising the linkage of "recklessness" with "knowledge" and "probability" (para 1(c)).

There was unanimous Group support for all of these,[324] except (b)(ii) and (iii).[325]

There was "strong [not "unanimous"[326]] support within the Group for operative paragraph 1(d)", but that sub-paragraph was perhaps a little disingenuous:

> "(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."

Of course, this question of attribution was clear as to the master and crew, but what did it mean in relation to "servants" or agents in the light of the UK *Meridian Global* approach?[327] As already noted, the LLMC is silent as to which humans in the corporate shipowning structure should be identified as those whose misconduct can deprive the shipowner of limits; and no Uniform Interpretation could really provide a definitive answer—as to do so would come close to amending the LLMC. So, the Uniform Interpretation itself contained an ambiguity in this sub-para (d). The Netherlands also pointed out that while the actions of the crew should be ignored, the draft should make clear that the shipowner's conduct in engaging such a crew should be taken into account.[328]

Later in 2021, a majority of the Legal Committee at its 108th Session agreed that the text of the draft Uniform Interpretation was acceptable, including operative paragraphs 1(b), (ii) and (iii) *and* 1(d),[329] although France supported by others commented on "the rigidity of the proposed interpretation of the test".[330] It seems that this statement in the Report of the Legal Committee reflected an earlier unattributed comment that the test "introduced criteria which were relatively rigid and more normative than interpretive, and which would ultimately not facilitate implementation of the law by the competent jurisdictions".[331] It is difficult to understand this objection without more detail, but it may have reflected a concern that the Uniform Interpretation was trying to amend the test rather than interpret it and, possibly, a civil law unwillingness to recognise that the original text did not give room for leeway.[332]

After what appeared to be considerable debate, albeit online, a majority of the Legal Committee agreed that the Assembly was the best forum for the adoption of the Uniform Interpretation, probably because (as a governing body) it might appear to carry more weight than the Legal Committee. Separate resolutions[333] were to be needed

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[321] Ie to make it easier to break limitation: see 11.2, above.
[322] LEG 108/8, 23 April 2021, Annex.
[323] Ibid, para 16.
[324] Ibid, para 15
[325]Ibid, para 16.
[326] Ibid, paras 17-18. Presumably, the Netherlands was a doubter: see also LEG 108/16/1, 25 August 2021, para 8.7.
[327] [1995] 2 AC 500, 11.2 above. Moreover, how far were the shipowners and insurers looking forward to autonomous liabilities and wanting to pre-empt the possibility of remote MASS operators or suppliers of equipment being persons who could deprive the shipowner of limitation? See 13.3.5, below.
[328] LEG 108/8, 23 April 2021, para 18. This was surely a correct observation even if not expressly backed by others in the documentation.
[329] LEG 108/16/1, 25 August 2021, para 8.13.
[330] Ibid, para 8.14.
[331] Ibid, para 8.12.9.
[332] While negotiations at IMO often reflect heavily on English wordings, there are other equally authentic languages where, perhaps, there are more nuances than apparent in typical detailed common law drafting. It appears that French judicial interpretations of Art 4 may have become less "claimant-friendly" following the 2013 judgment of the Court of Appeal in Bordeaux in the Heidberg case: see Holman Fenwick Willan, 'Limitation of Liability: Landmark Decision in France', *Shipping Briefing* (Web Page, January 2013) <https://www.hfw.com/Limitation-of-Liability-French-Judgment-Jan-2013>.
[333] A Drafting Group led by Greece was tasked with adjusting the wording of the draft Uniform Interpretation accordingly: see LEG 108/16/1, 25 August 2021, para 8.19.

for each of the liability conventions with limitation breaking provisions (ie LLMC 1976, LLMC 1996 and the CLC 1992).[334]

The reports of the LEG 107 and LEG 108 were circulated to all IMO Member Governments and were subsequently considered by the Council at its 125th regular session[335] and submitted to its 34th extraordinary session.[336]

The IMO Assembly met remotely by KUDO in December 2021 and considered the various reports with the draft resolutions.[337] It seems that much of the work was a formality and it is hard to find any indication of further debate or comment.[338] Committee 1 considered the three Legal Committee limitation Resolutions and recommended to the Plenary that "States Parties to the [LLMC 1976] [LLMC 1996] [CLC 1992] present at this session of the Assembly adopt the proposed resolution as contained in [annex 3] [annex 4] [annex 5]".[339] The Plenary then adopted[340] Resolution A.1163(32) [LLMC 1976], Resolution A.1164(32) [LLMC 1996] and Resolution 1165 [CLC 1992].

The Recitals of the Resolutions occupy over two pages by comparison with the handful of 'operative' paragraphs that I have already considered. Those recitals contain all the caveats about the status of the Uniform Interpretation that were raised throughout the negotiations, in particular that:

- the courts in States Parties are the final arbiters on the interpretation of the Conventions 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;
- 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

As to who adopted the Resolutions, the "relevant States Parties present at this session of the Assembly also adopted their resolutions".[341] The published list of participants shows, on my calculations, that of the 63 States Parties to the LLMC 1996 only three were not present[342] (ie a 95% acceptance rate).

As to the status of the Resolutions on Unified Interpretation, it may be that the 5% is significant, if Japan's statement at LEG 108 is a correct summary of international law:

> "The International Court of Justice had decided that the interpretation of a convention without the support of all States Parties did not constitute a subsequent agreement. However, it was also important to adopt the Unified Interpretation quickly and the proposal stipulated in paragraphs 19 and 20 of LEG 108/8/1 to adopt the Unified Interpretation via a resolution by the State Parties of relevant conventions present at the Assembly can be supported as a compromise to adopt it in a swift manner while keeping in line with the pronouncement of the International Court of Justice."[343]

It is hard to believe that a 95% acceptance rate will not be of some influence particularly where there are inexperienced courts or lawyers, although it remains to be seen how it may be viewed in those legal systems at

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[334] Except, for the moment, the HNS Convention 2010 as it was not yet in force: para 8.16. Curiously, I can find no mention in any of the IMO documentation on the Uniform Interpretation about the Athens Convention 1974/2002 Art 13 where the test is essentially the same. It may be that shipowner and insurer interests recognised that the slightly different reference to the "carrier" (rather than "shipowner") might have raised more openly some of the difficult attribution issues to which I have referred in 11,2, above. The Hague-Visby Rules 1968, Hamburg Rules 1978 and Rotterdam Rules 2008 (also 'contract' conventions) apply similar tests but have different depositaries to the IMO.
[335] C 125/10, C 125/D.
[336] C/ES.34/7.
[337] A 32/13, 5 October 2021.
[338] See A 32/28, 14 January 2022, para 1 where it was noted that in accordance with the agreed virtual procedure, all draft resolutions had been circulated on IMODOCS by 15 January 2022 whereafter the Assembly was reconvened by correspondence of at least 10 working days so that comments could be received. By 28 January "No comments have been received on the resolutions", so that the Resolutions were adopted: see A 32/28/1, 31 January 2022, paras 3, 5.
[339] A 32/7(b), 14 December 2021: see paras 13-14.
[340] See A 32/28, 14 January 2022, para 13.2, Annex 1, page 6.
[341] See A 32/28, 14 January 2022, para 13.2, with its fn 7 referring to paras 7(b).2(v) to (viii) (ie Resolutions adopted by the Assembly upon the recommendation of Committee 1 or by "relevant state parties" present at the 32nd Assembly Session).
[342] These were Niue, Samoa, and Syrian Arab Republic: see A 32/INF.1, 17 January 2022. It may be that virtual attendance had enabled an increase in those "present"!
[343] See LEG 108/16, 12 August 2021, para 15, LEG 108 16/1, Annex 9, p 6.

which it was probably aimed (eg France and Spain).[344] As an explanation of the *travaux préparatoires*, or as a subsequent agreement, I assume that it would be admissible in a common law court and persuasive.

11.3.4. Breaking limits in the future?

Intentional harm (eg deliberate ramming in fishing disputes) will be relatively rare, and scuttling is notoriously difficult to prove.[345] Moreover, the detailed explanation of recklessness, the combination of "probable" and not merely 'possible', the reference in Art 4 to "such loss" and the reverse burden of proof inevitably support the conclusion that, since the LLMC 1976, the Art 4 test means that limitation is a right not a privilege, ie that limitation really is virtually unbreakable.

To that extent, I am in general agreement with the substance of the Uniform Interpretation (ie the strictness of what must be proved under Art 4), but I still have some reservations about how far it provides conclusive guidance as to all questions of *attribution*, eg *within* a corporate structure. While the intent/recklessness of mere "servants" was never intended to deprive the shipowner of the limits,[346] it will still be necessary to investigate questions of function in the corporate hierarchy, as well as delegation (or abnegation) of those functions (particularly in a small company structure).

Assuming that this attribution investigation has identified suitable persons, the Netherlands' intervention shows that a decision by such persons to employ (or to continue to employ) a master who is known to navigate contrary to the key provisions of the Collision Regulations[347] could nevertheless be routed to the corporate employer; however, assuming that there was recklessness, the 'knowledge' and 'probability' criteria would still need to be satisfied.[348]

If the actions of ship managers of single ship companies to whom key functions are delegated can be considered as those of the shipowner,[349] what of other delegated functions? Operative para (d)[350] only expressly says to ignore "for example….servants" (but not "agents" as in the Warsaw-Hague Convention 1955).[351] Ie what other third parties are to be considered? This will be especially relevant for MASS.[352]

The success of shipowners and Clubs in achieving the Uniform Interpretation may have closed off (or restricted) one tactic to avoid limits,[353] but it again puts even more focus on the *level* of limits.[354]

12. Australia and increasing the LLMC 1996 limits

12.1. Level of limits in LLMC 1976 and LLMC 1996

The level of limits has been a constant issue, especially in an era of inflation from the 1970s. The LLMC 1976 itself effected a considerable increase in limits over those under the 1957 Limitation Convention. Changes to calculation methods (and tonnage measurement) mean that it is not possible to give a simple percentage increase figure between 1957-1976. My own calculations show that small ship limits (eg for tugs) might have been increased by up to 700%, while others varied from eg 200-400%.[355] Even in 1986 when the LLMC 1976 came into force it was recognised that by then inflation had eroded the limits.[356] The LLMC 1996 Protocol increased the LLMC 1976 limits considerably, varying from eg 200-500% depending on the size of ship.[357]

It usually requires a long time for amendments to conventions (eg by Protocol) to be agreed and then to come into force. The LLMC 1976 Art 21 provided that a Conference to revise limits (only) could be convened by IMO, but

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[344] Both of whom were "present".
[345] Wilful misconduct will usually invalidate insurance claims.
[346] See 11.2, above.
[347] Cf *The Saint Jacques II* [2003] 1 Lloyd's Rep 203.
[348] It is significant that an attempt to use undermanning to break limits ultimately failed in the *Heidberg* case (albeit some 22 years after the original incident!): see Holman Fenwick Willan, 'Limitation of Liability: Landmark Decision in France', (Web Page, January 2013).
[349] Cf *Grand Champion Tankers v Norpipe AS (The Marion)* [1984] 2 Lloyd's Rep 1.
[350] See 11.3.3, above.
[351] See 11.2, above. I hope that in years to come it will not be necessary to analyse so closely the *travaux préparatoires* of the Uniform Interpretation itself!
[352] See 13.3.5, below.
[353] Cf the attempt to use multiple "distinct occasions": 4.2, above.
[354] See 12, below.
[355] See Gaskell, 'Limitation of Liability and Division of Loss in Operation' in *Marsden & Gault Collisions at Sea*, 984-6 (Tables 4 and 5).
[356] Selvig, 'An Introduction to the 1976 Limitation Convention' in *Limitation of Shipowners' Liability: The New Law*, 16.
[357] Gaskell, 'Limitation of Liability and Division of Loss in Operation' in *Marsden & Gault Collisions at Sea*, 984 (Table 4)

it needed a request from "not less than one fourth of the States Parties". Moreover, an alteration of the amounts could be made only because of "a significant change in their real value". Decisions to alter the amounts needed a two thirds majority of the States Parties present and voting in such a full diplomatic conference. Instead of this LLMC 1976 Art 21 limited conference, there are more advantages to adopt a new Protocol, though, as it can consider issues other than limitation amounts.[358] This is one reason why the 1996 Protocol was agreed; yet the Protocol came 20 years after the LLMC 1976, and only entered into force in 2004, ie 28 years from the original convention.

12.2. 'Rapid' Amendment to LLMC 1996

The 1996 LLMC Protocol Art 8 introduced the (relatively) rapid or tacit amendment procedure for limits, modelled on that first enacted in the CLC 1992.[359] Instead of reconvening a diplomatic conference (which is expensive and slow), a request to increase limits could be made to and decided within the Legal Committee, which already meets at least once a year.

In fact, experience showed that Art 8 is not that rapid and will require States like Australia to go through quite a few time-consuming hoops for any change in 2023, or later. These steps can be summarised as:

1. Starting amendment process. A proposal to amend the limits needs at least one half (but in no case less than six) of the States Parties to the 1996 Protocol.[360] On 22 September 2022, there were 63 State Parties to the Protocol, so 32 would be needed. On my calculations (i) at least 12-15 of those were major flag States (such as Japan and Greece), or flag of convenience States (eg Liberia, Marshall Islands) known to be resistant to higher limits; (ii) up to 23 other States rarely attend the Legal Committee,[361] eg African States such as Congo, or small island States such as Tonga or Tuvalu. On that basis, without a great deal of lobbying, it could be a struggle to get 32 supporters to start the process.[362]
2. Time to consider. A proposed amendment that is circulated by the IMO cannot be considered by the Legal Committee until at least 6 months after circulation.
3. Criteria. The Legal Committee is required to "take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance".[363]
4. Amount of increase. There is a maximum increase in limits:[364]
    a. 1996 limits[365] increased by 6% per year calculated on a compound basis from the date on which the Protocol was opened for signature (1 October 1996); but
    b. Not exceeding an amount which corresponds to the original LLMC 1996 limit[366] 'multiplied by three'.[367] On my calculations, applying the measure of 6% pa, the maximum would have been reached by 2015.[368]
5. Voting. Any amendments will be voted on in the Legal Committee, provided:
    a. there is a "two-thirds majority" of the LLMC 1996 Contracting States "present and voting in the Legal Committee"; ie at least 42 States if everyone attended but at LEG 109 in 2022, 15/63 did not attend the meeting. On that experience, if 48 attended 32 would again be needed for a two thirds majority.[369] It would be tight;
    b. But Art 8(4) also requires that "at least one half" of the LLMC 1996 Contracting States "shall be present at the time of voting". Ie there needs to be a minimum of 32 present at the Legal Committee, even if they do not vote.

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[358] See also 10.2, above, for the simultaneous HNS and LLMC discussions.
[359] And has subsequently been repeated in the HNS Convention 2010 and the Athens Convention 2002.
[360] Art 8(1); ie not the parties to the LLMC 1976 itself.
[361] And see eg my calculations in "Voting", para 5a, below, based on LEG 109 in 2022.
[362] Presumably more than a mere request for an increase is needed, and politically a simple statement like "increase by inflation of [x%] might not carry as much weight as a more detailed justification—knowing that counter proposals can be made.
[363] 1996 Protocol Art 8(5).
[364] 1996 Protocol Art 8(6).
[365] Not including the 2012/2015 increase, see 12.1, above and 12.3 below.
[366] Again, without the 2012/2015 increase, see 12.1 above, and 12.3 below.
[367] Not to "exceed an amount which corresponds to the limit laid down in the Convention as amended by this Protocol multiplied by three". Ie when it gets to that stage there should be a new Protocol altogether.
[368] See 12.3, ie the date the 2012 amendments came into force.
[369] Attendance at the IMO Assembly 32 in 2021 was better: see 11.3.3, above.

6. Time limit between amendments.[370] "No amendment may be considered"[371] by the Legal Committee until not less than:
    a. [five years after LLMC 1996 opened for signature on 1 October 1996, ie by 1 October 2001];
    b. "five years from the date of entry into force of a previous amendment"[372]].
7. Time limit after Agreement.
    a. IMO to notify contracting States;[373]
    b. Amendments are deemed accepted 18 months from notification;
    c. *Unless* not less than one-fourth of the States that were Contracting States at the time of the adoption of the amendment object to IMO;[374]
    d. Entry into force 18 is months from the deemed acceptance.

The 1996 Protocol entered into force on 13 May 2004 and has been used once so far—in 2012.[375].

12.3. Australian experience of LLMC 1996 limits in 2012

Once bitten by limitation, Governments have more of an incentive to seek for those limits to be increased. After the *Pacific Adventurer* casualty in 2009,[376] the shipowners established an LLMC 1996 limitation fund of about Au$17.5 million (including interest), while facing possible Queensland Government clean-up claims of around A$30 million (not including economic loss claims from the fishing and tourism industries). A settlement at up to Au$25 million was agreed, but the impact of the limits prompted Australia to start the process to increase the 1996 limits using the LLMC 1996 Protocol's tacit amendment procedure.[377]

Of course, if States agree internationally to limits, how reasonable is it for their Governments to complain later when these limits apply? The *Shen Neng 1* grounding in 2010 gave rise to Australian claims (mostly not covered by any liability convention) that were put as high as Au$194 million.[378] The shipowner's Club resisted political pressure and ultimately succeeded in relying on the LLMC 1996 limit of Au$39 million. Bargaining with a foreign Club is not easy for Governments or practitioners. It is also a lot harder for under-resourced developing States with little maritime law experience, eg in a case involving pollution by bunkers or HNS where the alternative to accepting the limits of liability might be for the shipowner (and insurer) to rely on the "pay to be paid" clause[379] or to resist enforcement generally.[380]

Following the *Pacific Adventurer* casualty, in 2010 Australia aired the need to raise the LLMC 1996 limits at the IMO Legal Committee's 97th Session where the matter was put on the work programme.[381] For the 98th Session in 2011, Australia pressed the IMO for an increase in the limits.[382] At the IMO Legal Committee in April 2011, there was "wide agreement on the need to review the limits",[383] but there was obviously going to be less agreement on the extent of those limits. The Australian proposal,[384] backed by a detailed report by KPMG, would have used the maximum increase allowed under the LLMC 1996, i.e. the 6% p.a. compounded.[385] The main opposition to using the maximum increase came from Japan,[386] which proposed a more "modest" increase on the basis that there had been inflation at 45% between 1996-2010. The methodology adopted by Japan in calculating inflation (and

[370] 1996 Protocol Art 8(6).
[371] Art 8(3) refers to "the proceedings of the Legal Committee for the consideration and adoption of amendments".
[372] The last was on 19 April 2015 (see 12.4, below) so new amendments could be considered after 19 April 2020.
[373] This can now be done quickly, see eg the communication of the Assembly Resolutions that occurred in January 2022: 11.3.3, above.
[374] Eg 16 States, but that could be the shipowner's group!
[375] See 12.3, below.
[376] See N Gaskell, 'Pacific Adventurer Loss of Containers and Spill on 2009' in A. Chircop, N. Letalik and T. McDorman (eds), *The Regulation of International Shipping: International and Comparative Perspectives: Essays in Honor of Edgar Gold* (Martinus Nijhoff, Leiden, 2012) 379-385 and Gaskell, 'Compensation for Offshore Pollution: Ships and Platforms' in *Maritime Claims Evolving*, 74-77. The incident happened five days before Australia's ratification of the Bunker Pollution Convention 2001 took effect.
[377] See 12.2, above.
[378] See Gaskell, 'Liability and Compensation Regimes: Pollution of the High Seas' in *High Seas Governance: Gaps and Challenges*, 240-241.
[379] See Gaskell and Forrest, *The Law of Wreck*, 201-204.
[380] Although in the EU system of jurisdiction and judgments this may be harder as is shown by the ongoing litigation following the *Prestige* disaster in 2002: see 11.3.1, above, and eg *London Steamship Owners' Mutual Insurance Association v Kingdom of Spain* [2022] 1 Lloyd's Rep 539 (EWCA), *London Steamship Owners' Mutual Insurance Association v Kingdom of Spain* [2022] 1 Lloyd's Rep 286 (CJEU).
[381] See LEG 97/15, 1 December 2010, paras 8, 13.2 and Annex 6.
[382] See IMO LEG 98/7, 16 February 2011, building on an earlier document submitted at the 97th Session in 2010.
[383] See Report of the Legal Committee on the work of its 98th Session, LEG 98/14, 18 April 2011, para 7.5.
[384] LEG 99/4, 11 October 2011, submitted with 19 other States.
[385] I.e. a 147% increase: see 12.1, above.
[386] LEG 99/4/1, 10 February 2012.

its transparency) was the basis of strong criticism from Australia,[387] and perhaps an unspoken feeling about unfair lobbying.[388] Nevertheless, the IMO Legal Committee, on 19 April 2012, decided to adopt the Japanese proposal adjusted to 2012, which gave an increase of 51%.[389] These increases in limits came into force on 19 April 2015.

12.4. Australia and raising LLMC 1996 limits: 2020-2023

12.4.1. Australian proposals on methodology and data

Australia had stated during the 2019 LEG 106 discussions on a Uniform Interpretation on breakability[390] that it had concerns "on the lack of transparency of data and the difficulty this creates for assessing the adequacy of current liability limits".[391] In January 2020, while attention was still focussed on the creation of the Uniform Interpretation, Australia and France foreshadowed an intention to propose amendment of the actual limits themselves.[392]

This was an early riposte to the flag States and in the 2020 document France joined with Australia in raising the question of whether "the broader limitation of liability regime addresses the collective needs of all parties, and community expectations that the 'polluter pays'".[393]

While accepting that "liability limits must be at levels that make incidents insurable, to provide certainty for all parties involved" they "must strike a fair balance between the total costs incurred in responding to incidents and the amount recoverable".[394] The paper pointed out that wider access to "data in relation to all incidents that fall within the scope of claims subject to limitation, and all costs arising therefrom, is required".[395] This would include: data on relevant incidents; damages (including clean-up costs); independent analysis of the data (eg by an IMO appointed consultant).

The 2020 paper also returned to the 2012 debates by noting that the LLMC 1996 did not specify the means for assessing "changes in monetary value". In 2012, Japan and Australia had put forward two different models for this purpose, and so the 2020 Franco-Australian suggestion was that the Committee should develop "an agreed methodology for such assessment".[396] The paper went further by suggesting "the establishment of a data collection system that would contribute to evidence-based decision making on liability matters" that could be modelled on the IMO Ship Fuel Oil Consumption Database.[397]

It might be thought that this is rather a different type of data and is relatively technical. The detail of claims settlements is closely held, for the very reason that insurers do not want claimants in general to have much information about settlements in case that acts as an encouragement. Is there a way of enhancing the data, but preserving commercial confidentiality?

The call for transparency and access to information, to allow open and informed decision-making, was considered only briefly at LEG 107 in 2020, but was noted in the Uniform Interpretation discussions.[398]

In April 2021, Australia returned to the fray by formally proposing a new Legal Committee work item, somewhat pointedly titled "Proposal to add a new output under the work programme on the development of measures to *transparently* assess whether there is a need to amend liability limits".[399] It emphasised that Art 8.5 of the 1996 LLMC Protocol stated that:

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[387] Report of the Legal Committee on the work of its 99th Session, LEG 99/14, 24 April 2012, Annex 3.
[388] Cf China's effective lobbying against the UN's Human Right Council examining alleged abuses against Uighurs, with a 17-19 vote and 11 abstentions: Australian 8 October 2022, 13.
[389] LEG 99/14, para 4.15-4.16, and Annex 2.
[390] See 11.3, above.
[391] See LEG 107/6/1, 10 January 2020, para 2.
[392] See LEG 107/6/1, 10 January 2020. It will be recalled that the earliest an amendment could be adopted was 19 April 2020: see 12.2, above.
[393] This is a welcome attempt to represent victims, but is still concentrated on environmental claims, not injury/death.
[394] LEG 107/6/1, 10 January 2020, para 5.
[395] Ibid, para 8.
[396] See LEG 107/6/1, 10 January 2020, para 10.
[397] Ibid, paras 11-12.
[398] LEG 107/18/2, para 9.8 and Annex 3 to the report for the French statement endorsing LEG 107/6/1. See 11.3.2, 11.3.3, above.
[399] LEG 108/13, 23 April 2021 (emphasis added).

> "the Legal Committee shall take into account the experience of incidents and, in particular, the amount of damage resulting therefrom, changes in monetary value and the effect of the proposed amendment on the cost of insurance",

but argued that there was no agreed methodology to assess these matters. It proposed a Legal Committee Resolution be developed with seven possible elements:

1. Requesting relevant "experience of incident" data be captured by Contracting States and other interested parties (which may include P&I Clubs and other insurers, IOPC Funds Secretariat, shipowners and IMO observer delegations), and be reported periodically to the Committee to support any formal review or informal appraisal of liability limits;
2. Setting out the content of, and procedure for, the above reporting;
3. Articulating the agreed method for calculating changes in monetary value to be used for the purpose of any formal review or informal appraisal of liability limits;
4. [Determining the use to which incident data and changes in monetary value calculation is to be put for the purpose of any formal review or informal appraisal of liability limits];
5. [noting][recalling] that any subsequent formal proposal to amend Limitation Convention limits must take into account the effect of the proposed amendment on the cost of insurance;
6. Recognizing the need to keep the limits of liability under regular consideration; and
7. Requesting the Committee undertake [five] yearly "informal appraisals" of the Limitation Convention liability limits [commencing in 2024] unless a formal review proposal had been considered in that period.[400]

In addition, to provide a "source of consistent, transparent, evidence-based data for the informal appraisal contemplated" in point 7, Australia also proposed that a standing item be added to the agenda of the Committee entitled "Consideration of Limitation Convention matters", effective for LEG 109 in 2022. "The purpose of this agenda item is to allow for the submission of reports to the Committee setting out the periodic incident data and assessment of changes in monetary value, and discussion of other matters related to the Limitation Conventions".[401]

At the ensuing Legal Committee's 108th Session, in August 2021, it was noted that the Australian proposal did not yet propose any amendments to the limits. It was agreed that the "development of measures to assess the need to amend liability limits" was an issue that needed to be addressed and further agreed to include it in the 2022-2023 biennial agenda as a new output, with a target completion year of 2023.[402] Concrete proposals were invited for LEG 109, which was to meet from 21 March to 5 April 2022. It is clear that, in 2021, serious reservations were already being raised.[403] These included:

1. it would be potentially challenging to collect insurance data from insurers that were not members of the P & I Clubs;
2. there was no methodology provided on how to determine currency fluctuations which could vary from year to year;
3. although it was stated in the proposal that the tacit amendment procedures in relevant conventions would be followed, it was unclear whether the proposal could lead to a regular review of liability limits, which would pose an undue burden on countries that would then have to change domestic legislation on a regular basis; and
4. there were concerns about aspects of the "polluter pays" principle, and the proposal should not unintentionally result in tacit amendment of liability limits.

Japan also insisted that the Legal Committee Report specifically record its concerns about how some of the Australian suggestions might seem informally to undermine the specific tacit amendment procedure of the LLMC Protocol 1996 Art 8.[404] In particular, Japan asserted that:

- points 3 and 4 "would lead to a de facto pre-emption of decisions of the State Parties in the procedure under Article 8";

[400] Ibid, para 45.
[401] Ibid, para 45.2.
[402] See LEG 108/16/1, 12 August 2021.
[403] Ibid, para 13.4.
[404] See LEG 108/16, 12 August 2021, para 15 (and LEG 109/16/1, 7 April 2022). Ironically, it was in the same document at para 11 Japan urged the quick adoption of the Uniform Interpretation on breaking limits by way of a compromise procedure: see 11.3.3, above.

- points 6 and 7 "ignored the difference between LLMC and other liability regimes that explicitly provided for regularly review of the limitation amount";
- the "standing agenda item" proposed in paragraph 45.2 could be "overly inclusive".[405]

Australia and the Republic of Korea submitted a report[406] on informal intersessional work undertaken by interested parties to progress the work item and address concerns raised at LEG 108. In a further document, Australia, Mexico, New Zealand and the UAE proposed the establishment of a formal intersessional correspondence group and other intersessional work.[407]

The 110th Session of the IMO Legal Committee will take place from 27-31 March 2023 and provisional Agenda item 7 is "Measures to assess the need to amend liability limits".[408] On 20 December 2022, Australia submitted a "Report of the Correspondence Group on Measures to transparently assess the need to amend liability limits".[409] 13 States and NGOs joined the Group to develop principles and policy considerations that would need to be decided by the Committee in order to finalize the methodologies for increasing limits, including those or collection and periodic reporting of experience and damage. It seems that there was support to develop agreed methodologies to assess the experience of incidents and changes in monetary value:

> "There was broad agreement that basic data, including the date/year of the incident, jurisdiction of case, tonnage of the vessel(s) involved, total value of admissible claims, and applicable liability limit was needed. Participants also agreed that the total number of incidents over the agreed reporting period and number that exceeded the liability limit should be reported.[410]

In particular, the International Group offered to provide five year analyses of LLMC 1996 claims data,[411] including where admissible claims exceeded LLMC limits.[412] This seems to be a very constructive suggestion, as it specifically includes claims limited under the Bunker Pollution Convention 2001 and Wreck Removal Convention 2007.[413] The Club offer does specifically "exclude data that is subject to a confidentiality agreement".[414] At one level this is not surprising, but there really needs to be good faith on the part of the Clubs here and perhaps an express undertaking that they will use best endeavours to persuade shipowners to release the information. A slightly worrying view expressed by some participants in the discussions was that information about specific types of claims, such as personal injury (or I might add, bunker pollution) was not required as the 1996 Protocol "does not allow for anything but all limits (and therefore for all types of claims as per article 2 of LLMC) to be increased".[415]

The IMO Secretariat provided a very helpful analysis of how other international bodies assessed changes in monetary values in liability regimes,[416] but the Group did not appear to make much progress on currency questions. Issues such as the use of the Consumer Price Index (CPI) or Gross Domestic Product (GDP) will need to be considered by the Legal Committee at LEG 110 in 2023.

The main result of the Group's work was that 12 principles were set out in Annex 1 of the Report, the first seven of which were fully supported by the Group, while principles 8-12 "required further discussion" in the view of some:[417]

> 1 It would be beneficial for the Legal Committee to have agreed methodologies for States Parties to use to assess experience of incident data and changes in monetary value under the LLMC Convention.
>
> 2 Use of the methodologies by States Parties in their own assessments is voluntary and does not exclude the use of other methodologies.

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[405] These concerns were reproduced in the final Report See LEG 109/16/1, 7 April 2022, para 13.5.
[406] LEG 109/7, 10 January 2022.
[407] LEG 109/7/1, 14 January 2022.
[408] LEG 110/1/Rev.1, 14 September 2022.
[409] LEG 110/7, 20 December 2022 (issued as a Pre-session public release).
[410] Ibid, para 9.
[411] A draft "Experience of Incident Data" form was produced in LEG 110/7, 20 December 2022 Annex 2.
[412] LEG 110/7, 20 December 2022, para 10.
[413] See my critical comments in particular about the effects of limits on bunkers claims in 5.3, 5.4.1, 6.2 and 7 above.
[414] LEG 110/7, 20 December 2022, para 10.5.
[415] Ibid, para 11 and principle 10, listed below. If this view is correct, the only way forward for differential changes would be to agree a new Protocol. See also 7, above and 14.2, below.
[416] Ibid, para 13 and Annex 3. This also summarised the different approaches of Japan and Australia in 2012: see also 12.2, above. There is an inference that the Japanese approach was closer to that adopted in other conventions, particularly the influential Montreal Convention 1999.
[417] Ibid, para 4.

3 The methodologies should be rigorous and repeatable but not onerous.

4 Relevant data should be accepted from relevant sources, and it is important to consider data not only from insurance companies, but also from coastal States. Data should be submitted by a Member State or organization with status at IMO.

5 In the interest of operational efficiency, data should be provided in an agreed format. However, there should be flexibility to accept data in other formats if needed.

6 Data is indicative and need not be audited. The source of data should be provided for transparency and to allow the Legal Committee to form a view on its reliability.

7 Findings from application of the methodologies will not mandate pre-determined outcomes and will not trigger tacit amendment procedures.

8 The Legal Committee should apply the methodologies at agreed intervals to informally appraise LLMC limits.

9 The Legal Committee should set a maximum/minimum period between informal appraisals of liability limits.

10 Data could identify the type of incident and damage within the scope of article 2 of the LLMC Convention, eg loss of life and personal injury, property damage, pollution.

11 Changes in monetary value should be assessed by reference to economic indicators like CPI or GDP.

12 Changes in monetary value should be assessed in the same manner as is used by like organizations, where possible.

Of course, casualty and claims settlement data go to the heart of Club commercial confidentiality as to when and how limits are applied. The International Group provides consolidated statistics when it suits them,[418] but the Franco-Australian 2020 paper recognised that there "needed to be a means to address related commercial concerns that may be raised by ship owners and insurers in supplying such data" and this is reflected in the Report of the Correspondence Group on methodologies.[419]

Australia is to be commended for pushing for greater clarity and some progress has been made to try to avoid a selective presentation of data, but it remains to be seen whether the shipowning and insurance interests will try to undermine efforts to agree a reasonable and achievable set of methodologies. The devil will be in the potential delay in collecting data about claims experience and the detail of the inflationary calculations.

Surely, the burden has to be on the insurers (not victims) to prove with data what limits are necessary for certainty and insurability? Now the burden is very much the other way round, with individual States having their own limited experience and the Clubs having the global view. The position is clearer under the CLC 1992 because the IOPC Fund acts as a data collector for oil tanker pollution claims and is able to demand data from the Clubs. The Bunker Pollution Convention 2001 has no such international oversight.[420]

12.4.2. Actual increase in limits?

Australia obviously felt that it needed to sort out the methodology and data issues before giving Japan and others the chance to refight the battle on 2012 lines, but a decision on methodology will then require a period of data collection. This will certainly delay the substantive discussion on higher limits until 2023-2024 at the *earliest*, so actual increases in limits before 2029-30 are also unlikely. If the current financial situation is anything to go by then there will be a great deal of inflation. It will take a great deal of lobbying (or more bad state experience) for there to be agreement on any increase at all.

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[418] Eg during the 2012 LLMC amendment discussions: see 5.4.2, above. Oil pollution claims information was also made available by the International Group at the time of the STOPIA and TOPIA discussions in the IOPC in 2005 and in later amendments: see N Gaskell and C Forrest, 'Marine Pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003' (2008) 27 *University of Queensland Law Journal* 103, 123-125. Cf the figures in the "Large Casualty Working Group" Review paper concerning wreck removal costs: Gaskell and Forrest, *The Law of Wreck*, 32-33.

[419] See LEG 107/6/1, 10 January 2020, para 9, and 12.4.1, above.

[420] See also the discussion on the Bunkers Claims Manual: 7, above.

However, on my calculations, the maximum increase under the 1996 LLMC Protocol Art 8,[421] would be about double that of the existing LLMC 1996/2015 figures.

LLMC 1996 unamended	**LLMC 1996**		**LLMC 1996/2015**	**LLMC Max increase**
Personal Claims only	**Tons x**	**SDR Rate**	**SDR Rate**	**SDR Rate**
0-2000gt	[Fixed Slice]	2,000,000	3,020,000	6,000,000
2001-30000gt		800	1,208	2,400
30001-70000gt		600	906	1,800
70001-		400	604	1,200
Other Claims only				
0-2000gt	[Fixed Slice]	1,000,000	1,510,000	3,000,000
2001-30000gt		400	604	1,200
30001-70000gt		300	453	900
70001-		200	302	600
Total Fund Available				
0-2000gt	[Fixed Slice]	3,000,000	4,530,000	9,000,000
2001-30000gt		1,200	1,812	3,600
30001-70000gt		900	1,359	2,700
70001-		600	906	1,800

[421] See 12.2, above.

Using the small ship tables,[422] the maximum increase in Au$ would be to:

2000 gt SHIP	**LLMC 1996/2015 AU$ limit**	**LLMC 1996 Max increase**
Personal Claims only	**$5,944,689**	**$11,815,364**
Other Claims only	**$2,972,344**	**$$5,907,682**
Total Fund Available	**$8,917,033**	**$17,723,046**

5000 gt SHIP	**LLMC 1996/2015 AU$ limit**	**LLMC 1996 Max increase**
Personal Claims only	**$13,078,315**	**$25,983,408**
Other Claims only	**$6,539,158**	**$12,991,704**
Total Fund Available	**$19,617,473**	**$38,975,112**

30,000 gt SHIP	**LLMC 1996/2015 AU$ limit**	**LLMC 1996 Max increase**
Personal Claims only	**$72,525,203**	**$144,089,808**
Other Claims only	**$36,262,602**	**$72,044,904**
Total Fund Available	**$108,787,805**	**$216,134,712**

To take a *Rena* equivalent of 37,209 gt the maximum would be:

37,209 gt *Rena*	**LLMC 1996/2015 AU$ limit**	**LLMC 1996 Max increase**
Personal Claims only	**$85,381,782**	**$169,632,679**
Other Claims only	**$42,690,891**	**$84,816,340**
Total Fund Available	**$128,072,673**	**$254,449,019**

The tables show that there is potential for doubling of limits, and this gives room for a significant increase in the limits for small ships, particularly in the bunker pollution and wreck removal context. Higher LLMC limits for small ships, in particular, might actually reduce the influence of *non*-International Group insurers if they were unwilling to bear heavier losses, and this could increase the coverage of the International Group Clubs.[423]

Moreover, it seems likely that State pushes to increase the general LLMC limits are largely being driven by the linkages to LLMC in the Bunker Pollution Convention 2001[424] and the Wreck Removal Convention 2007[425]—

[422] See 5.4.1, above, but simplified by removing the tonnage figures.
[423] Although it is in the Bunker Pollution Convention 2001 and Wreck Removal Convention 2007 context of compulsory insurance that there is any form of control over the certificates issued by such non-International Group insurance companies: see also 5.4.2, above.
[424] See 10, below. The "other claims" limits shown in the tables also have to share with ordinary property claims: see 5.4.1.
[425] Wreck and cargo removal claims at least are subject to the LLMC Art 18 opt-out: see 12, below.

combined with the relatively low limits for small ships. Ironically, these linkages may come back to bite the Clubs if States feel that their own environmental claims are being unfairly treated. Here, the chickens are coming home to roost.

It might have been better to recognise that stand-alone bunker limits (in particular) would have been better: that points towards a new LLMC Protocol,[426] as bunker pollution claims cannot be removed from the LLMC 1996 using the LLMC 1996 Protocol Art 8.

13. 'Living with limitation' and Autonomous Craft: MASS

13.1. Developments in autonomous shipping

In 2000, I examined some of the legal implications of the use of civil autonomous underwater vehicles (AUVs),[427] and how far existing laws and conventions applied to autonomous craft. Much of that early analysis depended on questions of definition, eg was an AUV a "ship" under many conventions, each of which had their own wide or narrow definitions (eg as to submarine craft). For the LLMC 1996, the question was whether the craft was a "seagoing ship", eg if unmanned, or (for torpedo shaped AUVs) to be considered as part of the equipment of a mother ship. My general conclusion was that there was a great deal of uncertainty in applying the conventions and I am relieved that subsequent developments have at least proved me right about that![428]

Since then, technologies have developed massively, particularly in AI and its application to surface civil craft. A whole series of craft have been planned and extensive trials are underway.[429] These craft have now been given the broader generic title of "Maritime Autonomous Surface Ships" (MASS), ie ships which, to a varying degree, can operate independently of human interaction. There is already a burgeoning academic literature.[430]

In 2015, the CMI established an International Working Group on Unmanned Ships (IWG); in 2016 the IWG produced a Position Paper[431] and in 2017 it distributed a Questionnaire to member associations;[432] a summary of which was presented to the IMO's MSC in 2018.[433]

Indeed, MSC's 98th Session in 2017 had already agreed to undertake a scoping exercise about the need amend the regulatory framework for MASS, focussing on safety and the environment.[434] It soon became clear that the implications of MASS affected the work of all of the IMO's main Committees.[435] Thus, in 2018 the Legal Committee also agreed to a scoping exercise about MASS and the 'legal' conventions (including the LLMC 1996), and measures to address MASS are targeted for completion by 2025.[436] Eventually, by 2022, the MSC,[437] the Facilitation Committee[438] and the Legal Committee[439] approved the establishment of the Joint MSC-LEG-FAL Working Group on MASS (MASS-JWG) in order to address the common issues identified by the three Committees in their respective regulatory scoping exercises (RSE).[440] It was not intended that the MASS-JWG would "oversee, monitor or supervise" the MASS work of the IMO, but give advice to the Committees.[441] It seems therefore that the key work will still be in those Committees.

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[426] See also 13.3.6 and 14.2, below.
[427] See E Brown and N Gaskell, *The Operation of Autonomous Underwater Vehicles: Volume Two Report on the Law* (Society for Underwater Technology, 2000); E Brown and N Gaskell, *The Operation of Autonomous Underwater Vehicles: Volume Three The Law Governing AUV Operations-Questions and Answers* (Society for Underwater Technology, 2000).
[428] See 13.3, below.
[429] See eg B Eder, 'Unmanned vessels, challenges ahead' [2019] *LMCLQ* 47.
[430] See eg H Ringbom, E Røsæg and T Solvang (eds), *Autonomous Ships and the Law* (Routledge, 2023); B Soyer and A Tettenborn (eds), *New Technologies, Artificial Intelligence and Shipping Law in the 21st Century* (Informa Law, 2020); B Soyer and A Tettenborn (eds), *Artificial Intelligence and Autonomous Shipping Developing the International Legal Framework* (Hart, 2021).
[431] CMI International Working Group Position Paper on Unmanned Ships and the International Regulatory Framework (2016).
[432] See generally, <https://comitemaritime.org/work/mass/> for the text of the questionnaire, individual responses (including Australia's) and a summary.
[433] See MSC/99, 13 February 2018.
[434] MSC 98/20/2, 27 February 2017; MSC 98/23, 28 June 2017, 79.
[435] MSC, MEPC, Facilitation Committee and Legal Committee.
[436] See LEG 105/11/1, 19 January 2018; LEG 105/14, 1 May 2018, 20; LEG 109/16/17 April 2022, para 13.9.
[437] At its 105th session in 2022: see MSC 105/20.
[438] At its 46th session in 2022: see FAL 46/24, 25 May 2022.
[439] At its 109th session in 2022: see LEG 109/13/3, 14 January 2022; LEG 109/16/1, 7 April 2022, para 13.14.
[440] See MASS-JWG 1/2, 8 July 2022.
[441] Ibid, para 8.

The MSC has agreed to develop a non-mandatory goal-based MASS Code to address the role of the master, crew, remote control centre/operator for the purpose of the regulatory instruments under the purview of the MSC.[442] This might assist, eg. in operational interactions with non-autonomous craft and systems and might ultimately become mandatory, but perhaps is less useful in the context of the liability conventions, including the LLMC 1996.

13.2. IMO Scoping Exercises for MASS

The Legal Committee at LEG 106, in 2019, approved the framework for its Regulatory Scoping Exercise (LEG RSE) and a plan of work and procedures.[443] Reports were presented at LEG 107 in 2020 from many States[444] and CMI submitted a "CMI Consolidated Analysis of IMO LEG Conventions as Summarized in IMO Document LEG 107/8".[445] The latter is a highly impressive spreadsheet[446] and has a tab for each convention including the LLMC 1996, analysing the implications of MASS for each relevant article. COVID-19 delayed work but LEG 108, in 2021, finalised and approved the *Outcome of the Regulatory Scoping Exercise and Gap Analysis of Conventions emanating from the Legal Committee with respect to Maritime Autonomous Surface Ships (MASS)*.[447] This "LEG RSE" 2021 provides "an overview of the extent to which the existing regulatory framework under the purview of the Committee might require amending or interpreting to address MASS operations".[448]

Four gaps and themes have been found to be common across MSC, LEG and FAL instruments[449] and the LEG RES 2021 added an additional item relevant to the Legal Committee conventions:[450]

- the role and responsibility of the master and crew;
- the role and responsibility of the remote operator;
- *questions of liability*;
- definitions/terminology of MASS; and
- certificates and other documents.

Following the lead of MSC, the LEG RES 2021 organized the degrees of autonomy as follows:

- **Degree one**: Ship with automated processes and decision support: Seafarers are on board to operate and control shipboard systems and functions. Some operations may be automated and at times be unsupervised but with seafarers on board ready to take control.
- **Degree two**: Remotely controlled ship with seafarers on board: The ship is controlled and operated from another location. Seafarers are available on board to take control and to operate the shipboard systems and functions.
- **Degree three**: Remotely controlled ship without seafarers on board: The ship is controlled and operated from another location. There are no seafarers on board.
- **Degree four**: Fully autonomous ship: The operating system of the ship is able to make decisions and determine actions by itself.

An initial review of each article or sub-paragraph of each instrument was undertaken and, for each degree of autonomy, one of the following answers was allocated to each provision:

- **A** apply to MASS and prevent MASS operations; or
- **B** apply to MASS and do not prevent MASS operations and require no actions; or
- **C** apply to MASS and do not prevent MASS operations but may need to be amended or clarified, and/or may contain gaps; or
- **D** have no application to MASS operations.

[442] See MASS-JWG 1/2, 8 July 2022, para 7.
[443] See LEG 106/16, 13 May 2019, Annex 3.
[444] Some 18 submissions were received from States and NGOs, eg LEG 107/8/1- LEG 107/8/18.
[445] See LEG 107/8, 13 December 2019; LEG 107/8/Corr.1, 4 February 2020 linking to the CMI website at <https://comitemaritime.org/work/mass/>.
[446] Undated (but presumably from 2020).
[447] See LEG 18/16/1, 25 August 2021, 20-22, and Annex 2, later issued as LEG.1/Circ.11, 15 December 2021.
[448] LEG.1/Circ.11, 15 December 2021, para 1.2.
[449] See MASS-JWG 1/2, 8 July 2022, 2.
[450] See LEG.1/Circ.11, 15 December 2021, para 5.1 and shown in italics in the list.

A second step analysed and determined the most appropriate way of addressing MASS operations, taking into account the human element, by:

- **I** developing interpretations; and/or
- **II** amending existing instruments; and/or
- **III** developing new instruments; or
- **IV** none of the above as a result of the analysis.

In general, the LEG RSE concluded that in general MASS could be accommodated within the existing regulatory framework of LEG conventions without the need for major adjustments, but particular conventions might require additional interpretations or amendments to address the common potential gaps and themes.[451]

13.3. MASS and LLMC 1996

13.3.1. LLMC amendments needed

The following extract shows the LEG RES 2021 findings for the LLMC 1976 and 1996, indicating how far amendments are needed according to the various degrees of autonomy (as described above):

IMO instruments	**Degrees of Autonomy**			
	1 Seafarers on board	**2 Remotely controlled ship with seafarers on board**	**3 Remotely controlled ship without seafarers on board**	**4 Fully autonomous ship**
LLMC 1976	**IV** (none)	**II** (amend)	**II** (amend)	**II** (amend)
LLMC PROT 1996	**IV** (none)	**II** (amend)	**II** (amend)	**II** (amend)

[451] LEG.1/Circ.11, 15 December 2021, para 4.2-4.3.

These results were summarised in more detail later in LEG RES 2021, showing the most appropriate ways of dealing with MASS issues for the LLMC:[452]

Degree of autonomy	**The most appropriate way(s)**	**Reason for selecting the most appropriate way(s) of addressing MASS operations**	**Potential gaps/themes that require addressing**
DEGREE ONE	**IV**	All of the MASS applications at degree one are categorized as "B", which means that it requires no actions.	
DEGREE TWO	**II**	In particular, there is ambiguity about the remote operator. Some provisions (e.g. articles 1(2), 1(4)) may need to be amended or clarified, and/or may contain gaps.	-It is necessary to clarify whether the remote operator might fall within the scope of "manager and operator", or the definition of "any person". -There is no definition of "ship" in the Convention. -A definition might be preferable to remove doubt over whether a MASS at degrees 3 and 4 is a ship.
DEGREE THREE	**II**	In particular, there is ambiguity about the remote operator. Some provisions (e.g. articles 1(2), 1(4)) may need to be amended or clarified, and/or may contain gaps.	-It is necessary to clarify whether the remote operator might fall within the scope of "manager and operator", or the definition of "any person". -There is no definition of "ship" in the Convention. A definition might be preferable to remove doubt over whether a MASS at degrees 3 and 4 is a ship.
DEGREE FOUR	**II**	In particular, there is ambiguity about the manufacturer or other programmers. Some provisions (e.g. articles 1(2), 1(4)) may need to be amended or clarified, and/or may contain gaps.	-It is necessary to clarify whether a manufacturer or other programmers of a MASS at degree 4 might fall within the scope of "operator", or the definition of "any person". -There is no definition of "ship" in the Convention. A definition might be preferable to remove doubt over whether a MASS at degrees 3 and 4 is a ship.

The detailed analyses by the volunteering Member States of the instruments reviewed in the course of the LEG RSE 2021 (including the LLMC) and all comments made by IMO Members, have been recorded in the MASS

[452] Ibid, Annex, 32-33`.

module of GISIS but this part of the web platform is apparently not available in the public access portal.[453] Limitation in respect of MASS will raise many familiar questions,[454] but in a new context.

13.3.2. MASS and seagoing ships under LLMC 1996

Assuming that the craft in question was a "seagoing" ship within LLMC 1996 Art 1(2),[455] all of the degrees of autonomy 1-4 would be satisfied, except perhaps for some of the small torpedo-like AUVs.[456] The question of interpretation of "ship" would be the same as raised with other unusual craft, such as with back-hoe barges and jet skis.[457] The LEG RES 2021 noted the absence of the definition of "ship" in the LLMC and stated that "definition might be preferable to remove doubt over whether a MASS at degrees [of autonomy] 3 and 4 is a ship".[458] The calculation of tonnage would again seem to present few problems for most "ships" carrying cargo, but States might need to legislate nationally for ships that did not have such tonnage.

13.3.3. MASS and persons entitled to limit: LLMC 1996 Art 1(2)

With MASS, there will be "new actors, eg remote operators, remote control centres/stations, providers of network or computer systems, or system developers".[459] In this list, it seems that there is a distinction between the first group, ie those with some direct and immediate connection with the operation of the ship, and the second group which consists essentially of suppliers of hardware or software. For the liability conventions, there will be questions as to channelling,[460] but for limitation will the persons listed in either group be entitled to limit as falling within LLMC Art 1?

Under the LLMC 1996 Art 1(1) and (2) the "shipowner" entitled to limit "shall mean the owner, charterer, manager and operator of a seagoing ship". The key words will be "manager and operator".

It is necessary to clarify the role and responsibility of the "remote operator"? Is this real or legal person to be treated as a servant (or agent?) of the shipowner, for whom the latter is responsible, or as a sui generis independent contractor?[461]

LEG RES 2021 recognised that there "might be uncertainty about whether the manufacturer or programmer of a MASS or its components would fall within the scope of "manager and operator" or "any person"",[462] eg on the assumption that these persons supplied the hardware or software to a traditional shipowner or operator. Rather like a shipbuilder or equipment supplier (or classification societies), it is difficult to see that the IT supplier or developer would fall *directly* within Art 1(1) or (2) in their own right.

Would a remote operator fall within the scope of "manager" or "operator"?[463] Typically, 'managers' have been meant to include professional firms of ship managers, or in-house corporate entities, that have performed shipowning functions for shipowners (especially for single ship companies). Those functions would normally include decisions about the general running of the ship (ie commercial, technical and crewing), rather than a single function such as remote control of navigation.

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[453] See International Maritime Organization, *Global Integrated Shipping Information System* (Web Page, 2023) <https://gisis.imo.org/Public/Default.aspx>. Although some LEG Com documents record views of States on particular instruments (eg LEG 107/8/9 where China and Korea comment on Bunker Pollution Convention 2001 I could not find equivalent comments for the LLMC1996 apart from the CMI "Consolidated Analysis". The analysis that follows is my own impression of some of the LLMC issues.

[454] See eg 4.1.1, 4.1.2, above.

[455] See Gaskell and Forrest C, *The Law of Wreck*, 79, 97, 449-450; also 4.1.2, above.

[456] See 13.1, above and E Brown and N Gaskell, *The Operation of Autonomous Underwater Vehicles: Volume Two Report on the Law*, 84-96, 133, 176-177.

[457] Cf *Steedman v. Scofield* [1992] 2 Lloyd's Rep 163; *The Von Rocks* [1998] 2 Lloyd's Rep 198.

[458] LEG.1/Circ.11, 15 December 2021, Annex, 32.

[459] LEG.1/Circ.11, 15 December 2021, para 5.5.

[460] Eg under the CLC 1992 Art III(4), assuming that there would be no need for new persons to be added to the person liable, ie under Art 1(3) the registered owner. The existence of compulsory insurance of the latter means that there is no real need to expand the definition under the CLC 1992, or under the HNS Convention 2010, particularly given the availability of second tier of CLC Fund or HNS Fund. By contrast, the Bunker Pollution Convention 2001 has no second tier and the liability under 1(3) attaches not only to the registered owner but also to the "bareboat charterer, manager and operator of the ship".

[461] LEG.1/Circ.11, 15 December 2021, para 5.4.

[462] Ibid, para 5.6.

[463] The origins of these expressions go back to a BMLA submission to the CMI Madrid conference in 1955 which led to the 1957 Limitation Convention Art 6(2), whose wording also specifically included "servants or agents of shipowners, charterers and operators": see N Gaskell, 'The Amoco Cadiz II: Limitation and Legal Implications' (1985) 4 *Journal of Energy and Natural Resources Law* 225, 230-234.

This seems to be consistent with how the expression "manager and operator" is translated into the equally authentic French text of the LLMC as "l'armateur et l'armateur-gérant", and seems more usually to refer to "l'exploitant", ie the person who exploits the vessel, eg where the ship is run in the name of this person.[464]

In *ASP Ship Management Pty Ltd v Administrative Appeals Tribunal*,[465] the Full Federal Court held that, to decide whether a ship was "operated by" a person,[466] the question was whether an entity had sufficient management and control of a ship, as a chattel and as an operating enterprise, such that it can be said that the ship is operated by that entity, albeit in connection with another party. The context directed attention away from the person who physically attends to the working of the ship and rather to a more abstract management and control: which entity or person has the commercial disposition of the ship or the final authority on operational matters?

This interpretation of "operator", looking at the higher level of abstraction, was followed in the recent UK case of *The Stema Barge II*.[467] Here, Stema A/S was a charterer of a barge and clearly entitled to limit under Art 1 after the barge dragged its anchor off Dover and damaged a cable. A claim was made against a related company, Stema UK, and the question was whether it could limit as an "operator". Stema UK was a receiver of cargo from the unmanned barge and did not have a formal role in respect of the barge's management or operation, but its personnel did operate machinery of the barge off Dover and were involved in monitoring the weather as well as in the decision to leave the barge at anchor in a storm. Teare J, at first instance, held that Stema UK was an "operator" at the relevant time, albeit not a "manager".[468] This decision was reversed on appeal, where it was held that the term "operator" entailed more than the mere operation of the machinery of the vessel, or providing personnel to operate that machinery. Stema UK did not have management or control of the vessel, but was merely assisting Stema A/S in its operation. The court added that the position was no different because the vessel was unmanned, rejecting the first instance generalisation that those who cause such a vessel to be physically operated have some management and control of it. This would have potentially expanded the protection of limitation to "large classes of analogous service providers notwithstanding that they were intended to be excluded from the protection of the [LLMC]".[469] All decisions are fact sensitive and the court pointed out that Stema UK was merely assisting the real operator of the barge (its owner and Stema A/S), rather than being a second or alternative operator or manager.

In relation to MASS, the remote operator would be accepting the functions of navigation, but not other higher functions such as crew employment, provisioning etc. On the basis of the origins of the expression "manager and operator" in the 1957 Limitation Convention, and of the recent decisions, I consider it unlikely that a corporate MASS remote operator (or navigator) would fall within the definition—although this might be different if it had real management functions in whole or in part. In terms of corporate structures, it might make sense for a remote operator to be a joint venture with the shipowner, or be engaged by it on a suitable ship management contract (such as an amended BIMCO's Shipman).[470]

It might also be difficult to describe an individual human remote operator with a joystick and a screen as a "manager", even if that single person might literally be 'operating' the ship. Again, the case law indicates that the expressions "manager and operator" are more appropriate for corporate entities, although it is faintly conceivable that in a small-scale operation such a person might fall within the definition. If the individual operator is employed directly by the shipowner or a corporate charterer, manager or operator, *that* company could limit.

A separate, if related, question is then whether the right to limit of that owner, charterer, manager or operator could be lost as a result of intent or recklessness of the remote operator, or supplier of equipment or software.[471]

13.3.4. MASS operators as employees of shipowner: Art 1(4)

It is possible that some "new actors" such as individual remote operators might be entitled to limit themselves under LLMC 1996 Art 1(4) as falling within the expression "any person for whose act, neglect or default the

[464] Ibid, 231.
[465] [2012] FCAFC 23 [94]-[98], [106], [109]-[110].
[466] For the purposes of the then *Navigation Act 1912* (Cth) s 10, in a case about residency for crew compensation claims.
[467] [2022] 1 Lloyd's Rep 170 (EWCA).
[468] [2021] 2 Lloyd's Rep 307.
[469] Ibid [55], also [58].
[470] The 2009 version is under revision, eg to include a manager's right to subcontract to affiliated companies: Christian Hoppe, 'SHIPMAN revision well underway', *Baltic and International Maritime Council* (Web Page, 13 December 2022) <https://www.bimco.org/insights-and-information/contracts/20221213-shipman-revision>. Such a subcontract would not of *itself* convert a remote operating affiliate into an "operator" under the LLMC.
[471] I will consider that in the context of breaking the shipowner's limit, 13.3.5, below.

shipowner … is responsible". That category was mainly designed for the master and crew sued individually,[472] but is more difficult to apply to independent contractors (eg companies offering remote operation services). In *The Stema Barge II*,[473] the court noted that the 1976 diplomatic conference rejected extending the protection to "all persons rendering services in direct connection with the navigation, management or the loading stowing, or discharging of the ship".[474] This showed that it was not intended that service providers who fell outside Art 1(2)[475] could nevertheless automatically gain protection under Art 1(4).[476]

The word "responsible" is still open to interpretation, however, and the position is slightly clouded by the rejection at the same 1976 diplomatic conference of a proposal to replace the expression by the phrase "legally liable at law in the absence of a contract".[477] This phrase may have been intended to prevent shipowners extending protection to other persons by contract, but its rejection may leave open that possibility as well as a need to look at general principles of vicarious liability under the general law.[478] Vicarious liability is different to a non-delegable duty, though, and that might be more relevant in the context of the shipowner's *own* right to limit.[479] The better view is perhaps that the rejected wording may have been thought unnecessary so that independent contractors who supply services do not fall within Art 1(4), and it should not be possible to bring them within it merely by use of a contract under which the shipowner has "responsibility" for them. It follows that such service providers, IT suppliers (and their insurers) face a possibility of unlimited liability (assuming causative negligence).[480]

The CMI "Consolidated Analysis" 2020 on Art 1(4) stated that "the meaning of "responsible" should be clarified, if [we] want to ensure international harmonisation in general and in particular in relation to "new" actors performing MASS related tasks. [The] answer is currently largely dependent on national rules on vicarious liability etc. with varying results".[481] Of course, a clarification would need a positive decision about who *ought* to fall within Art 1(4). The international community might be persuaded that, in order to promote modern shipping and trade, the protection of limitation should be extended to "new actors". The difficulty then is to justify why 'old actors' should not also be protected, including shipbuilders, classification societies and the suppliers of existing equipment or bunkers.

13.3.5. MASS and loss of right to limit: Art 4

In regard to LLMC Art 4,[482] the CMI "Consolidated Analysis" 2020[483] noted first, that concepts such as intent and recklessness are human features, so that a decision taken by a machine cannot be intentional or reckless. Secondly, "with an increasing number of operational and navigational decisions taken by the ship, even to the extent human acts or omissions can be identified as potential causes, they are likely to be located further back in time and space from the ship and incident (eg in selecting, installing and maintaining equipment). This will generally make it more difficult to establish causation". Thirdly, "the circle of persons whose actions or omission are to be put on par with the "personal act or omission" of the shipowner may need clarification in view of new actors performing MASS related tasks such as remote control centres. Also, the extent of the shipowner's organizational duty in relation to independent contractors providing equipment or rendering services to the ship may require clarification for the sake of international harmonisation".

The key questions will relate to attribution,[484] ie (i) who is to be treated as the person(s) whose misconduct will deprive the shipowner of the right to limit; and (ii) how far will the Unified Interpretation provide an answer (especially its operative para 1(d))?[485]

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[472] Presumably this category extends to a pilot (someone for whom shipowners *are* responsible under general maritime law).
[473] [2022] 1 Lloyd's Rep 170, 13.3.3, above.
[474] Ibid [16].
[475] See 13.3.3, above.
[476] [2022] 1 Lloyd's Rep 170, [58]
[477] Ibid [17].
[478] Including pilots.
[479] Ie whether the acts of a sub-contracted supplier are to be attributed to the shipowner: see 7.2, above.
[480] Moreover, any contractual recourse claim that they may have against the shipowner under the supply contract might be limitable by the shipowner if the latter is itself liable to third parties for a claim otherwise falling generally within Art 2: see Art 2(2).
[481] See spreadsheet LLMC Tab, column E row 26.
[482] See 11.2, above.
[483] See LLMC Tab, Column E, rows 54-56.
[484] See 11.2, above.
[485] See 11.3.3-11.3.4, above.

An individual remote controller in category 2[486] might simply be treated as an additional navigating officer (or master if there was no effective control on board).[487] A master's misconduct should not deprive the shipowner of limits. Would it be different in category 3,[488] where complete control is with the remote operator? Again, it is arguable that this person could be treated in the same way as the master or navigating officer. Operative para 1(d) of the Unified Interpretation of Art 4 certainly confirms that individuals such as the master, crew and "servants" cannot deprive the shipowner of limits.[489] It is rather disingenuous, though, in referring more generally to "conduct of *parties other* than the shipowner", as it leaves open the possibility that this could include independent contractors.[490] In any event, with category 4,[491] there is no immediate individual "person" that might be responsible, eg for negligent navigation, so the attribution question might depend on issues of delegation.

In all of these categories, it might still be theoretically possible to break limitation on existing principles, eg by showing causative intent or recklessness of the shipowner itself in employing unreliable and incompetent personnel or contractors.[492] The burden of proving this would be difficult. In category 4, in particular,[493] a shipowner's board might argue that in an emerging new field they had employed reputable and reliable software (and hardware) engineers, so that the board members themselves could not be guilty of intent or recklessness. However, where there is a fully autonomous ship it is arguable that on *Meridian Global* functional attribution principles,[494] the shipowning board has in effect delegated a key shipowning function (navigational operating procedures) in a similar manner to where it may delegate control to a ship management company.[495] On that basis, if there is a causative software problem the person or persons to look to for attribution purposes would be the board of the sub-contractor that provided the service (rather than its individual software or hardware employees).

That is not the end of the matter, though. It would still be necessary for any claimant to show that the board members of the sub-contractor[496] were themselves guilty of intent or recklessness. It would be highly unlikely that such persons would intend to cause harm (unless part of a scuttling plan). Their recklessness ("*and* with knowledge…") would also be difficult to prove, unless it could be shown that they were operating way beyond their expertise and closed their eyes to potential problems, eg with software already supplied to other shipowners that had encountered faults.

Experience with autonomous cars shows that designers would be aware that unforeseen events can occur; eg if the navigational identification system did not properly recognise movements of other ships, or if there was a satellite failure. If hackers, ie malicious third parties, took over control of the ship (or impeded remote or full autonomous control) it would be hard to find intent/reckless on the part of the boards of the shipowner, or the sub-contractor. Even here, though, a proper IT design must surely make allowance for breakdowns whether caused by accidents, weather or malicious actors. It might be reckless to fail to make any allowance in the software, eg for immobilisation and stabilising the ship's position until external assistance (eg tugs) were available.

Of course, it may be that any claimant would prefer to sue the sub-contractor directly on the basis that it cannot limit within Art 1(2) or 1(4).[497]

13.3.6. MASS and future LLMC amendments?

LEG RES 2021 has already indicated that amendments or clarifications are needed to the LLMC 1996.[498] But what form should they take? The mechanism for MASS-linked amendments is still under discussion. Should there be a single instrument with a list of changes to multiple conventions, or a list of separate MASS protocols that

[486] Ie "Remotely controlled ship with seafarers on board", 13.3.1, above.
[487] Rather like a pilot (someone for whom shipowners are responsible under general maritime law.
[488] Ie "Remotely controlled ship without seafarers on board", ibid.
[489] 11.3.3, above. The natural interpretation of "servants" is 'employees'.
[490] The Unified Interpretation is not a convention to which rules of interpretation, eg *ejuisdem generis*, must be applied. It is submitted that any attempt to use operative para 1(d) to mean that an independent contractor cannot deprive the shipowner of limits would be contrary to existing case law and a proper reading of Art 4.
[491] Ie, "Fully autonomous ship", ibid.
[492] See eg the Netherlands example in relation to the Unified Interpretation, 11.3.3, 11.3.4, above.
[493] Perhaps less so in categories 1-3?
[494] See 11.2, above.
[495] Cf *Grand Champion Tankers v Norpipe AS (The Marion)* [1984] 2 Lloyd's Rep 1 and 11.3.4, above. If the functional test is the correct one it requires a much narrower search than that the wider management and control required in the search for an "operator" under Art 1(2): see 13.3.3, above. The functional test looks to key *individual* functions of a notional ship-owner, eg control over particular systems.
[496] Assuming that it was a corporation with such a structure. It is conceivable that a much smaller specialist partnership or group of engineers could be entrusted with the task or programming remote systems, eg where MASS becomes more widespread and smaller shipowners look for cheaper solutions from smaller providers. In such a case attribution might be focussed on key individuals.
[497] See 13.3.3, 13.3.4, above.
[498] See 13.3.1, above.

have to be applied to all as a package? Should there be a new sui generis strict liability regime for MASS, linked to the LLMC (like the Bunker Pollution Convention 2001) or having separate stand-alone limits of liability. The latter would certainly require an exclusion of such claims in an amended LLMC 1996 Art 3.

I have already indicated that it may be difficult to make a special case to give the "new actors", such as IT suppliers, the protection of limitation through amendments to Art 1(2) or 1(4); it would be hard to distinguish them from shipbuilders and other suppliers of equipment and services.[499] Further, any change or clarification of Art 4 would require a fuller articulation of the attribution principle, and that might already be controversial. The effect of allowing the new actors to limit under LLMC would be to pass the risk of MASS and AI failures on to other sea users. This would be particularly onerous where MASS is used with small ships—a not unlikely scenario as MASS develops.

LEG RES 2001 strongly points to the need for a new LLMC protocol, but the danger (particularly for shipowners) is that this might open a can of worms—ie by raising demands for other substantive amendments of LLMC, including higher basic limits.[500] I imagine that there would be strong pressure in IMO to avoid an extensive revision of LLMC, unless there is near unanimity on those changes; ie many will want any MASS protocol package to be seen as uncontentious and restricted in its application. However, politically it might well be an appropriate time to have on the normal agenda (in parallel) the need to raise the limits under the rapid amendment procedure,[501] so that there is not seen to be wholesale revision that would affect a MASS package.

MASS is set down as Agendum 11 for the 110th Session of the IMO Legal Committee in March 2023.

14. Conclusions

14.1. Re-examining justifications for LLMC?

The existence of limits in 'pure' property claims can be justified on the basis of easing the settlement of claims, particularly between rival property insurers, and the ensuing reduction in legal costs.[502] In straightforward collision claims, for instance, this is an argument largely of convenience rather than one of main principle. Otherwise, it could be applied to all land-based property claims as well; but even on land, liability claims are often influenced by the known limit on the other side's insurance policy. In maritime law, the convenience of practically unlimited liability in Club cover is merely tempered by an additional internationally agreed limit.

Moreover, limitation is not unique to maritime law. It can be found in a variety of liability contexts, eg carriage by air internationally and nationally. The aviation context is different in many ways, but there is no apparent ability for a telecoms provider to be able to limit liability for potential losses affecting millions of customers caused by a hack into its systems.

The big increase in claims in my lifetime has been in environmental claims. Initially, the focus was on oil pollution, now wreck raising (including recovery of containers). As the *Rena*, *Costa Concordia* and *Sheng Neng 1* show, the extent of clean-up and restoration is scientifically almost limitless. We support the idea of the polluter paying, but how far can we expect the international insurance industry to be able to respond—especially in times of recession and increasingly expensive natural disasters such as hurricanes (whether caused by climate change or not)? My own view is that the Clubs (and their reinsurers) have largely (if sometimes reluctantly) stepped up to the plate in relation to wreck removal, but we should not be too complacent—even with compulsory insurance. Insurers want to keep some control on costs by any means, even if that means using a combination of potential defences: eg the ability to rely on limits in chemical pollution cases, or indirectly to use the single ship company, or to insist on the "pay to be paid" principle.

By contrast, I have long had concerns about how far it is justifiable for limitation to be applied to maritime personal injury and death claimants. Hardly anybody speaks up for them at the IMO, although I do not have any data to suggest how often shipowners and insurers actually rely on the death and injury limits in LLMC Art 6(1)(a). The potential is there for a Halifax 1917 type of catastrophic explosion in a port situated in a heavily populated area[503]

[499] See 13.3.3, 13.3.4, above.
[500] See 12, above and 14.2, below.
[501] See 12, above.
[502] This has always been an argument when the balance between cargo and shipowning interests is considered under the Hague/ Hague-Visby Rules.
[503] Cf the massive explosion of fertiliser in the port of Beirut on 4 August 2020, albeit while it was being stored in a warehouse not on board a ship.

or a cruise ship disaster on the high seas with 5,000 passengers killed or injured.[504] Shipowners could still claim to limit liability (eg under the LLMC 1996), even for personal injury or death in circumstances that would not apply to the owner of a factory, warehouse or hotel on land. Insurability really *is* the key to limitation, but exactly what does that mean when we talk of availability and reasonable cost?

14.2. New LLMC Protocol?

We will probably have to continue living with limitation, as the alternatives may be little better, but what should be the extent of that limitation under the LLMC 1996? The MASS debate is likely to mean that some sort of amendment to the LLMC 1996 will be needed fairly soon. It remains to be seen how much progress Australia makes on creating a sound methodology for increasing LLMC limits[505] and then actually achieving some increases in the substantive limits.[506] Concessions by shipowners and insurers could be seen as part of a wider compromise of which the Uniform Interpretation 2021 was a part. Although MASS will probably require a new LLMC protocol, States such as Australia should be bold in arguing that such a protocol should not simply be restricted to MASS issues but could be used to cure some of the other defects or omissions in drafting.[507] The highly restrictive LLMC 1996 Protocol Art 8 could be eased through altering the inbuilt restrictions on rate increases. I would like to see stand-alone limits for bunker claims,[508] although this radical proposal would also require a protocol to the Bunker Pollution Convention 2001.[509]

14.3. Denouncing LLMC 1996

If States such as Australia are unhappy with the LLMC 2012/2015 limits, there is a policy option for them to denounce the LLMC, but to re-enact many of its principles in national law outside of the convention.[510] This would not necessarily be very radical. The LLMC 1976 and LLMC 1996 have not achieved the same sort of international acceptance as have the CLC 1992 and Fund Convention 1992. Major States are not party to the LLMC; eg the USA, Panama, China and Italy[511] are non-parties and the insurance system has not collapsed, although they all have national limitation laws. China, for example, has adopted limitation of liability principles in its national Maritime Code which are similar to the LLMC, although it is not a party to it.

A denouncing State would be able to make modest changes to the LLMC scheme, while broadly keeping in conformity with it. One example would be to create a provision setting wholly stand-alone limits of liability for bunker pollution, while increasing the limits by the methodology originally proposed by Australia in 2012.[512]

States considering denouncing the LLMC because of the risk of unmet bunker pollution claims should not naively think that if they enacted unlimited liability this would solve all of their problems. Under the Bunker Pollution Convention 2001 Art 12, the insurers would not have a direct liability greater than the limit under the LLMC 1996, as amended. A shipowner might have assets but, even if the ship does not sink, the single shipowning company structure would effectively restrict what might be available. Given that there is no international uniformity and a wide variety of limitation regimes already available, it seems unlikely that the Clubs or other insurers would restrict cover to a State that denounced the LLMC, while introducing its own principled limits. If there was a widespread series of denunciations, and in effect a move towards unlimited liability, the reaction of the Clubs and other insurers might be to impose policy limits, eg based on the LLMC 1996 limits. If developing States, eg in the Pacific, started to denounce the LLMC would shipowners be discouraged from trading to such islands, or would freight rates be affected by increased insurance premiums?

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[504] See also 8, above.
[505] See 12.4.1, above.
[506] See 12.4.2, above.
[507] Eg closer control of forum shopping and the recognition of foreign limitation judgments: see 9.3, above. See also Martinez Gutierrez, *International Maritime Conventions* (2011) for reform suggestions.
[508] See 7, above.
[509] MASS would probably require amendments in any event to Art 3 of the Bunker Pollution Convention 2001: see the CMI Consolidated Analysis 2020, Bunker tab, column E, rows 82-84.
[510] See Gaskell, 'Compensation for Offshore Pollution: Ships and Platforms' in *Maritime Claims Evolving*, 76-77.
[511] Italy has not ratified the LLMC 1996: and see the Italian MLA response to the CMI Questionnaire, p 3. This states that Legislative Decree (L.D.) 28.06.2012 No. 111–implementing Directive 2009/20/EC of 23 April 2009 on insurance of shipowners for maritime claims–is an attempt to adapt Italian legislation to the LLMC standards. It introduced a new system of limitation for ships over 300 gt was introduced in Italy which substantially reproduced the text of LLMC 1996 provisions.
[512] See 12.4.1, and 7, above.

Whether we like it or not, there are not unlimited pots of money and I suspect that limitation of liability under the LLMC 1996 (with amendments) will live with us for a long time.