

Charting the Sea of Limitation: Analysis of the IMO Unified
Interpretation on the Test for Breaking the Shipowner's Right to
Limit Liability

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Abbreviations

Conventions	
1957 Limitation Convention	International Convention Relating to the Limitation of the Liability of Owner of Sea-Going Ships, and Protocol of Signature, 1957
1969 CLC	International Convention on Civil Liability for Oil Pollution Damage, 1969
1969 Vienna Convention	Vienna Convention on the Law of Treaties, 1969
1976 LLMC	Convention on Limitation of Liability for Maritime Claims, 1976
1992 CLC	International Convention on Civil Liability for Oil Pollution Damage, 1992
1996 LLMC Protocol	Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976
Maritime Bodies	
CMI	Comité Maritime International
IMO	International Maritime Organisation
ICS	International Chamber of Shipping

Preliminary Note:

The 1996 LLMC Protocol amended the 1976 LLMC to increase limits. For the purpose of this paper these are consolidated into “**1976 LLMC**” unless otherwise specified.

Additionally, not all states party to the 1969 CLC have ratified the 1992 CLC which necessitates denunciation. For completeness, while the 1992 CLC is the focus of this work, the 1969 CLC also forms part of the limitation framework even if not expressly addressed throughout.

1. Introduction

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

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

However, a string of recent decisions has threatened to disrupt the status quo. The most notable, the *Prestige*⁴, concerned an oil tanker sinking off the coast of Spain resulting in one of the most catastrophic ecological disasters in modern history⁵. In a controversial decision, the Spanish Supreme Court held the shipowner and its P&I Club liable for amounts above the 1992 CLC limit, in what is widely considered to be an impermissible interpretation of the convention.

The decision prompted immediate action from various maritime bodies, resulting in the Unified Interpretation on the Test for Breaking the Shipowner's Right to Limit Liability (**UI**), affirmed at the thirty-second session of the IMO General Assembly on 15 December 2021 (**General Assembly**). The UI confirms the test is (1) "virtually unbreakable", (2) assessed at a level of culpability above gross negligence, and (3) that the conduct of persons other than the shipowner are irrelevant.

The purpose of this paper is to analyse the UI through the lens of its primary objective; achieving consistent application of the test among member states.⁶ It examines the way in which the UI as a matter of construction, cannot adequately respond to a conflict of law arising between a member state's domestic legislation and its international obligations. It further considers the differences between civil and common law jurisdictions and how these might influence the relevance of the UI, which by and large reflects common law standards of culpability. Thirdly, questions of attribution are addressed, particularly regarding the "personal acts" of a corporate shipowner and how far the UI goes to clarify the position. Finally, the significance of the 1969 Vienna Convention is discussed, with a focus on the UI's status as a "subsequent agreement". Ultimately, this paper concludes that while the UI is a great step forward, certain constraints exist that may undermine its effectiveness.

2. The Limitation Framework in the Maritime Context

The limitation regime for maritime claims is extensive, and difficult to succinctly summarise in a few short paragraphs. Accordingly, the comments below are restricted to essential features of the 1976 LLMC and 1992 CLC, intended to provide broader context to the issues that are the subject of this discussion.

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

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

³ *Ibid* 515.

⁴ *The Prestige* STS 11/2016, ES.TS.2016.11.

⁵ National University of Singapore 'The Prestige' (CaseID:CMI1141) <<https://cmicmidatabase.org/prestige-0>> accessed 19 March 2023.

⁶ As set out in Resolutions A/RES/1163, A/RES/1164, and A/RES/1165 adopted by the IMO General Assembly on 15 December 2021.

The 1976 LLMC

The 1976 LLMC is a “global” regime, intended to cover all claims arising from a single incident or occurrence save where a particular scheme applies to account for exceptional risk (for example, oil pollution or nuclear damage)⁷. It allows significantly higher limits of liability for a shipowner compared to its predecessor, the 1957 Limitation Convention. In exchange it gives the shipowner a virtually unbreakable right to limit liability⁸. This right is subject to article 4 as follows:

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 intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

The meaning of “intent” in article 4 is relatively uncontroversial. It is interpreted subjectively, requiring the person liable to themselves have intended the loss⁹. Conversely, the meaning of “recklessly” has been the subject of much dispute, owing to differences in the standard of culpability applied by the national courts of member states. This is precisely the issue the UI seeks to resolve and is the subject of further analysis at paragraph [5] below.¹⁰

The Liability and Compensation Regime for Pollution Damage

In contrast to a “global” regime are “contract” limitation systems,¹¹ such as the liability and compensation regime for pollution damage. At its heart is the 1992 CLC which regulates liability and compensation for oil and pollution damage. It incorporates the following measures, designed to expedite the establishment of liability and payment of claims¹²:

- a. Strict liability of the shipowner¹³.
- b. A virtually unbreakable right for the shipowner to limit liability¹⁴. The test to break limitation at article 5.2 of the 1992 CLC is in substance identical to article 4 of the 1976 LLMC described above¹⁵.
- c. Claims are channeled through the shipowner, irrespective of which party is at fault excepting where the damage resulted from the personal act or omission of persons listed at article 3.4 (which include the master and crew), provided the conduct of such persons is of the same standard required to deny the owner limitation¹⁶.
- d. The shipowner is required to maintain insurance or financial security in an amount equal to its liability exposure under the Convention¹⁷.
- e. A claimant is entitled to bring an action directly against the shipowner’s insurer. In return, the insurer is entitled to limit liability even if its insured is not so permitted¹⁸.

⁷ Jackson (n 2) 515.

⁸ Maja Radunovic, ‘Law on Limitation of Liability for Maritime Claims’ (LL.M. thesis, Legislation Drafting Project of International Maritime Organisation 2019) [2.1] < <https://imli.org/wp-content/uploads/2020/12/MAJA-RADUNOVIC-DRAFT-PROJECT.pdf> > accessed 18 March 2023.

⁹ Patrick Griggs and others *Limitation of Liability for Maritime Claims* (4th edn, LLP Limited, 2005) 37.

¹⁰ International Chamber of Shipping and the International Group of P&I Association ‘Compensation Matters – Consistent Application of the 1992 Conventions’ (IOPC/APR17/4/6, 30 March 2017) [3.4].

¹¹ Nicholas Gaskell ‘LLMC 1996: Living with Limitation of Liability’ (2022) 36(2) ANZ Mar LJ, 2.

¹² IOPC/APR17/4/6 (n 10) [2.1].

¹³ Art 3.1.

¹⁴ Art 5.2.

¹⁵ Excepting that “damage” is contemplated in the former, “loss” in the latter.

¹⁶ Art 3.4.

¹⁷ Art 7.1.

¹⁸ Art 7.8.

As the test to break limitation under the 1992 CLC and 1976 LLMC are effectively identical, where expedient they will be jointly referred to as the **Conventions**.

3. The Prestige

In 2002, the oil tanker “Prestige” sank off the coast of Spain, spilling 63,000 tons of fuel and polluting an estimated 2,980km of Spanish and French coastline¹⁹. The incident is infamous, but perhaps equally so is the controversial judgment of the Supreme Court of Spain (**SC**) in holding the shipowner and its P&I Club liable for amounts over the 1992 CLC limit. In doing so the judgment challenged the international limitation regime and arguably undermined the commercial certainty the regime provides.

The Judgment

Spain and France appealed to the SC for a reversal of the decision of the trial court which had acquitted the Master, first engineer, and General Director of Merchant Marine of Spain of all charges for criminal damage to the environment. They further sought civil compensation from the Master, Mare Shipping Inc as shipowner (**Shipowner**), the London Steamship Owners Mutual Assurance Association (**London P&I Club**), and the International Oil and Pollution Compensation Fund.

The SC allowed the appeal in respect of the Master who was subsequently charged with an aggravated crime of damage to protected natural areas. Notably, under the Spanish Criminal Code the finding of criminal liability also incurs civil liability²⁰. The SC further concluded the Master had acted recklessly and with knowledge that such loss would probably result and so triggered the exception of article 5.2 of the 1992 CLC, breaking his right to limitation²¹. The Shipowner was similarly unable to rely on article 5.2, as it was deemed to have known of the vessels poor condition and continued the voyage with “deliberate disregard for the serious risks”²².

The London P&I Club’s liability under the 1992 CLC was capped at €22,777,986 in accordance with article 5.2. However, the SC then held it directly liable for amounts above this limit pursuant to the Spanish Criminal Code and the Spanish Insurance Contract Law, warranting a finding of liability up to the maximum limit set by its policy of US\$1 billion²³.

Criticisms

The judgment has been heavily criticised as non-conformant with the 1992 CLC. The key concerns are as follows:

- a. The test to break liability under article 5.2 is contingent on the conduct that led to the damage being intentional or reckless accompanied by the requisite level of knowledge. However, the SC considered the threshold had been met upon its conclusion the Master caused “reckless damage”²⁴. That is to say, the extent of the damage (pollution) was interpreted as being determinative of recklessness.
- b. The standard for “recklessness” under the 1992 CLC was seemingly interpreted in light of the Spanish Criminal Code, imputing criminal liability where there had been “serious negligence”. This arguably does not meet the standard required to defeat the “virtually unbreakable” right to limitation at article 5.2.

¹⁹ *Prestige* (n 3) [1].

²⁰ Art 109.

²¹ *Prestige* (n 3) [64].

²² *Ibid* [67].

²³ *Ibid* [69].

²⁴ *Ibid* [37].

- c. With respect to the London P&I Club, the judgment appears to contradict the express wording of article 7.8 which entitles an insurer to avail itself of liability pursuant to article 5.2 even if its insured is not so entitled. Whilst the SC observed the 1992 CLC limit in the strict sense, it nevertheless found the London P&I Club directly liable above this limit in reliance on its domestic laws, effectively circumventing the 1992 CLC limits.

Implications

For the international liability and compensation regime to be effective, member states must apply it in a uniform and consistent manner²⁵. The *Prestige* highlighted growing concerns that the Conventions were being applied inconsistently among member states. However, the *Prestige* should not be considered in isolation. The *Erika*²⁶ and a recent decision of the Piraeus Court of First Instance²⁷ are further examples of potentially flawed applications, exposing defendants to liabilities that were arguably impermissible under the Conventions.

For shipowners and insurers in particular, such decisions are alarming. The Conventions are designed to operate as a coherent whole and any threat to undermine its carefully balanced interests are likely to have far reaching implications.

For instance, an insurer that cannot be confident of its maximum exposure will price risk accordingly. Alternatively, the market may simply refuse to provide insurance cover for certain specified risks or cannot do so at commercially acceptable rates. As a consequence, some shipowners may simply choose to carry on business uninsured, leaving an innocent third party who has suffered loss little to no recourse unless the shipowner has sufficient assets to meet the entirety of the claim.

4. The Unified Interpretation

Extensive work was undertaken by prominent maritime bodies including the International Group of P&I Clubs, the ICS, and the CMI to establish a mechanism that would facilitate consistent application of the Conventions amongst member states. These efforts culminated in the UI, consisting of three separate resolutions²⁸ clarifying how the test to break liability under the 1976 LLMC, the 1992 CLC and the 1996 LLMC Protocol are to be interpreted.

The UI confirms:

- a. That breaking limitation has a deliberately high threshold and requires a level of culpability analogous to willful misconduct, namely:
 - i. A level higher than the concept of gross negligence;
 - ii. A level that would deprive the shipowner of the right to be indemnified under the marine insurance policy; and
 - iii. A level that provides that a loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends.
- b. That the term “recklessly” is to be accompanied by “knowledge” and that these terms establish a level of culpability that must be met in their combined totality²⁹; and

²⁵ IOPC/APR17/4/6 (n 12) [1.2]. See also A/RES/1163, A/RES/1164, and A/RES/1165 (n 5).

²⁶ Court of Cassation Criminal Chamber, 25 September 2012, Appeal No:10-82.938.

²⁷ Piraeus Court of First Instance, decision 1291/2018.

²⁸ A/RES/1163, A/RES/1164, and A/RES/1165 (n 5).

²⁹ Dieter Schwampe “Unified Interpretation of the Test for Breaking the Shipowner’s Right to Limit Liability” (LSLC Webinar, London, 23 January 2023).

- c. That the conduct of parties other than the shipowner (e.g., master and crew among others) is irrelevant and should not be taken into account.

In developing the UI, significant importance was placed on the Travaux Préparatoires of the 1976 LLMC and the meeting reports of the CMI at which the draft amendments to the 1957 Limitation Convention (which would inform 1976 LLMC) were discussed³⁰. The objective being that the UI carefully reflects the intention of member states at the time the test to break a shipowner's right to limitation was first adopted, as opposed to imposing a new interpretation which would more properly be incorporated by way of amending the Conventions.

Finally, and perhaps most importantly, the UI is said to be a "subsequent agreement" which is given binding affect by article 31 of the 1969 Vienna Convention³¹.

5. Analysis

The UI is a significant and necessary response to the developing case law moving away from the fundamental principles undermining the Conventions. It provides meaningful guidance that is underpinned by historical and contextual evidence, leaving little doubt as to the interpretive intentions of assenting parties at the time the test was first adopted. The result is a document that should influence member states, it doing no more than describing a position to which they have already subscribed. However, just because a thing *should* happen does not mean it will. As this segment explains, the UI has its limitations. Each are discussed below.

Conflicts of Law

In the *Prestige*, liability of the London P&I Club under the 1992 CLC was not at issue. The controversy stemmed from non-CLC claims originating in Spanish domestic legislation that had the effect of holding the London P&I Club liable for damages over the Convention limit. There is plainly no purpose in imposing a limit on liability if it can be avoided through other legislative means. The UI does not address this issue, although this is no oversight. The UI is simply an instrument incapable of doing so, as such matters exist outside the parameters of the Conventions in the first place.

To elaborate, the way a convention applies within a state will depend on how the state approaches its international obligations³². In the *Prestige*, the SC had a choice; strictly adhere to the limits of the 1992 CLC in contradiction of its own domestic legislation, which entitled a third-party claimant a right of direct right action against the insurer for amounts above the convention limit, or vice versa. In choosing the latter the SC's decision can be said to be one of policy. It chose to give preference to its own domestic legislation, prioritising compensation for third party victims rather than the commercial interests of shipowners and insurers (which is arguably what the limits in the 1992 CLC aim to protect).

That is not to say the SC's approach is correct in the legal sense, noting a basic principle of international law is for a state party to an international convention to ensure its domestic laws are consistent with it³³. However, it would be disingenuous to categorise the decision as wrong; this is too simplistic. There is a raft of considerations when discussing third party rights of direct action, and

³⁰ LEG 107/9, 10 January 2020) [4].

³¹ LEG 108/8, 23 April 2021 [7].

³² Patrick Butchard 'Principles of International Law: a Brief Guide' (House of Commons Library, Briefing Paper 9010, 21 September 2020) <<https://researchbriefings.files.parliament.uk/documents/CBP-9010/CBP-9010.pdf>> accessed 26 March 2023.

³³ United Nations 'Chapter Five: National Legislation and the Convention – Incorporating the Convention into Domestic Law' www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-five-national-legislation-and-the-convention.html> accessed 26 March 2023.

while such issues are outside the scope of this work, it can certainly be noted that the victim centric approach adopted by Spain has its own supporters³⁴.

This notwithstanding, a major shortcoming of the UI is that it cannot influence how a state will approach its international obligations where a conflict arises with its domestic law. Achieving harmony in this respect is essential if consistency of outcome is the aim. All the UI can do as a matter of construction is advise on matters *within* the convention. This is perhaps the most foundational issue arising out of the *Prestige*, of which there is no readily apparent solution.

Approaches to “Recklessly”

The primary focus of the UI is to clarify how “recklessly” is to be interpreted; the trend seemingly being that civil law courts are more ready to break limitation by applying a lesser standard of culpability than their common law counterparts. Where this occurs, it is often followed by a raft of criticisms that need be considered in the context of the international limitation framework, which plainly prefers common law ideals.

Such ideals are evidenced in various ways, including by use of the tonnage rather than value system for limitation, as well as the nexus between the loss of insurance and the loss of limitation developing from “willful misconduct”, deliberately incorporated into the 1976 LLMC as a nod to the English Marine Insurance Act 1906³⁵. Indeed, “recklessly and with knowledge that such loss / damage would probably result” is very near the threshold to avoid cover in the aforementioned statute³⁶; a plain indication that common law values are intended to govern the application of the Conventions, at least in so far as the test for breaking limitation is concerned.

The below is an analysis of the civil law approach to recklessness, ultimately concluding that while the UI clarifies what recklessness is not, it does not offer a suitable alternative familiar to civilian courts, which may ultimately undermine its effectiveness. It should be noted that to suggest the UI could ever hope to reconcile these positions is unrealistic; the issue is a fundamental one, ultimately attributable to a divergence between legal regimes that have developed over millennia. This notwithstanding, it is useful to consider the competing frameworks to appreciate where the issues lie.

As a start, common law recklessness typically requires the actor to have been subjectively aware of the risk of a particular consequence arising, but nevertheless deciding to act and take the risk in circumstances where it is unreasonable to do so³⁷. This is to be compared to the civil law approach that considers “recklessness” through the comparatively binary lens of *culpa* (negligence) and *dolus* (intent). *Dolus* and *culpa* are broken into further subcategories, summarised in the table below.

Terminology	Mental State
Direct Intent (<i>dolus directus</i>) - first degree	A person acts with the goal of bringing about the harm ³⁸ .
Direct Intent (<i>dolus directus</i>) - second degree	A person does not desire the harm to occur but knows that it will as a consequence of their conduct ³⁹ .
Indirect Intent (<i>dolus eventualis</i>)	A person acts accepting / indifferent that there is an unjustifiable risk ⁴⁰ .

³⁴ For example, the Court of Justice of the European Union characterises the issue through the lens of the Brussels I Recast which adopts a policy of protecting the weaker party (insureds and beneficiaries) in the insurance relationship.

³⁵ LEG 107/9, (10 January 2020) [5].

³⁶ Ibid [5].

³⁷ Lexis Nexis Legal Guidance <www.lexisnexis.co.uk/legal/glossary/recklessness> accessed 26 March 2023.

³⁸ Luis E. Chiesa, ‘Mens Rea in Comparative Perspective’ (2018) 102 Marquette Law Review 576 [583].

³⁹ Ibid 583.

⁴⁰ Ibid 583.

Negligence (<i>culpa</i>) - conscious / gross	A person acts aware that their conduct creates a risk of harm, but believes / hopes that the harm will not eventuate ⁴¹ .
Negligence (<i>culpa</i>) - unconscious / simple	The failure to use ordinary care ⁴² .

The tests expressed above are indicative only, noting that there is a degree variation both between and within civil law states as to the standard applied. For example, lines are occasionally blurred between gross negligence and *dolus eventualis*, even between courts of the same jurisdiction, depending on the circumstances of the case⁴³.

In 2020 the CMI distributed a questionnaire to all National Maritime Law Associations (**NMLA**) for the purposes of developing the UI (**CMI Questionnaire**)⁴⁴. While only thirteen NMLA's responded, much insight can be gleaned from the sample. A table is produced at **Annexure A** summarising the answers given by member state NMLA's⁴⁵ as to how "recklessness" is interpreted by their national courts. The findings are as follows:

- a. Civil law jurisdictions interpret the standard in a broad manner, covering almost the entire spectrum of terminology described in the table above. From mere *culpa* (negligence)⁴⁶ through to *dolus directus* (direct Intent) in the second degree⁴⁷.
- b. Greece and Italy both acknowledge the concept of recklessness is not defined in their national law⁴⁸. Each state gave examples of judgments where the test for "recklessness" has been inconsistently applied by their own national courts. For example, in Greece "recklessness" translates to "indifference" which "is not known to Greek law". As a result, the approach has been variable including to construe the term as gross negligence, between gross negligence and indirect intent, as well as direct intent in the second degree⁴⁹. This variability is particularly alarming given Greece is the largest shipping nation in the world⁵⁰, yet is beholden to an international framework not readily reconcilable with its own domestic legislation, yielding unpredictable outcomes. Italy, also comprising a sizable maritime presence⁵¹, describes similar challenges.

⁴¹ Ibid 583.

⁴² Ibid 583.

⁴³ See for example see Spanish MLA response to CMI Questionnaire [8] <file://hhfile03/profiles\$/CF/Downloads/Spain-Responses-AEDM-to-CMI-questionnaire-limitation-190520%20(8).pdf> accessed 20 March 2023. Gross negligence in the *Prestige* was equated with *dolo eventual*, but in a judgment of the Court of Appeal of Baleares gross negligence was equated to a standard of culpability lower than *dolo eventual*.

⁴⁴ See Questionnaire on Breaking Limitation Corrected <<https://comitemaritime.org/work/unified-interpretation-on-the-test-for-breaking-the-owners-right-to-limit-liability-under-the-imo-conventions/>> accessed 20 March 2023.

⁴⁵ US MLA excluded as not member to Conventions.

⁴⁶ Columbia.

⁴⁷ Greece.

⁴⁸ Greek MLA response to CMI Questionnaire [10] <hhfile03/profiles\$/CF/Downloads/United-interpretation-for-rules-of-brearking-liability-Greek-MLA-reply%20(7).pdf> accessed 20 March 2023.

⁴⁹ Ibid [10].

⁵⁰ Frank Holmes 'Ranked: Top 10 Countries with eh Largest Shipping Fleets' (14 April 2021) <www.usfunds.com/resource/top-10-countries-with-the-largest-shipping-fleets/> accessed 20 March 2023.

⁵¹ For example, Italy was the main short sea shipping country in the EU in 2021. Eurostat 'Maritime Transport Statistics – Short Sea Shipping Goods' (January 2023) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Maritime_transport_statistics_-_short_sea_shipping_of_goods#:~:text=Italy%20was%20the%20main%20short,EU%20short%20sea%20shipping%20tonnage.> accessed 26 March 2023.

- c. Only two⁵² of the twelve member states that responded to the CMI Questionnaire can confidently be said to consistently apply the standard of recklessness as intended by the Conventions and described by the UI.
- d. Half of participants⁵³ expressed the test for recklessness as “gross negligence” either as the exclusive standard, or as one of several standards that have been applied by domestic courts.

It should be noted at this juncture that the application of the Conventions is entirely within the prerogative of the national court of any given member state; this analysis is no criticism of their competency. More so it is an observation that a civil law court is often left to apply a test formulated on a legal regime for which there is no clear equivalent in its national law.

Turning to the UI, gross negligence, the most popular substitute for recklessness, is expressly excluded. For civil law jurisdictions that have routinely imputed “gross negligence” as this standard to apply, the question becomes: what will replace it? The UI does not address this. Moreover, the stipulation that recklessness is at a level of culpability analogous to “willful misconduct”, including “a level that would deprive the shipowner of the right to be indemnified under their insurance policy” and “a level that provides that the loss of entitlement to limit liability should begin where the level of culpability is such that insurability ends” is equally unhelpful. This verbiage is derivative of English statute and insurance policy formulation, all simply reinforcing the existing common law approach.

Attribution

Article 4 of the 1976 LLMC refers to persons entitled to limit. However, it is silent as to whose conduct is evaluated where the shipowner is a company, giving rise to questions of attribution. In common law jurisdictions it is generally accepted that the conduct of mere servants or agents are not considered the “personal conduct” of the shipowner⁵⁴. The question is instead who constitutes the “governing mind and will” of the company⁵⁵. Other jurisdictions approach the question differently. For example, the Korean courts appear more willing to look down the corporate ladder particularly for companies with small or informal management structures⁵⁶ when determining whose actions are those of the corporation.

Notably absent from the UI is clarification of this issue. Arguably this is because to do so comes uncomfortably close to an amendment of the 1976 LLMC⁵⁷. Additionally, while the UI stipulates that the actions of the master and crew should not be considered, it has perhaps missed an opportunity to clarify that the shipowner’s conduct in its choice of master and crew is still relevant⁵⁸.

Looking forward, it will be interesting to see how far the UI will extend to guide questions of attribution in the case of autonomous craft. For example, a fully autonomous ship (with no remote controller), has no immediate individual “person” for whose acts the shipowner is responsible. This may require an inquiry further back to decisions of selection and installation of equipment⁵⁹. With developing technologies, the question of attribution will undoubtedly become increasingly complex. It is unclear the degree in which the UI can assist.

The Unified Interpretation as a “Subsequent Agreement”

The UI is said to constitute a subsequent agreement⁶⁰ pursuant to article 31(3)(a) of the 1969 Vienna which provides that when interpreting a treaty “there shall be taken into account, together with the

⁵² Switzerland and Germany. Discussed further at [6] below.

⁵³ China, Norway, Spain, Italy, Germany, Greece.

⁵⁴ Gaskell [n 11] 27.

⁵⁵ Ibid 27.

⁵⁶ Ibid 27.

⁵⁷ LEG 108/8 (n 31) [18].

⁵⁸ Identified by the Netherlands in LEG 108/8 (n 30) [18].

⁵⁹ Gaskell (n 11) 48.

⁶⁰ LEG 108/8 (n 31) [7].

context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.

The words “between the parties” are generally accepted to mean all parties to the convention⁶¹. It should be noted that 60 of the 63 States party to the 1976 / 1996 LLMC (95%)⁶² and 135 of the 146 States party to the 1992 CLC (92%)⁶³ attended the General Assembly, none of which objected to the UI. This is however not all member states. The question then becomes whether “agreement” includes the silence of the states that did not attend. According to the commentaries on the International Law Commission Conclusions on Subsequent Agreements and Practices in Relation to the Interpretation of Treaties, “agreement is only absent to the extent the position of the parties’ conflict”,⁶⁴ indicating tacit agreement is acceptable. However, this is anything but clear, and leaves the door open for a member state to argue that the UI while persuasive, is not a “subsequent agreement” and therefore not binding unto them. Although should the court of a state in attendance take such a stance in order to depart from the UI, it would undoubtedly be met with raised eyebrows.

As a final point, the UI can only take the form of a “subsequent agreement” if it reflects the existing intention of the parties⁶⁵. However, the States party to the 1976 LLMC and the 1992 CLC are not homogenous. Yet, the UI is said to apply equally seemingly having not given any consideration to the intention of the parties of the 1992 CLC independently. It’s possible that even though the wording of articles 4 and 5.2 are effectively identical, the intention of parties to those conventions differed. As a matter of principle this is worthy of note, however the success or failure of the UI is unlikely to turn on this rather academic observation.

In summary, the legal weight of the UI is potentially vulnerability to challenge. The more authoritative method of securing the desired interpretation is to amend the Conventions through a protocol adopted by a Diplomatic Conference convened under the auspices of the IMO. This was one of several options considered⁶⁶ but ultimately not progressed.

6. Practical Considerations

Despite the foregoing considerations, in practice the UI may have precisely its intended effect as a highly persuasive and authoritative instrument of the IMO, especially considering very few states were absent at the General Assembly when it was agreed.

The influence of international opinion can be observed in a decision of the Court of Appeal of Balears⁶⁷, which specifically referred to CMI guidance before concluding that despite finding the captain criminally liable of “reckless imprudence”, the conduct did not meet the requirements to break liability under the 1976 LLMC because it was closer to gross negligence than “*dolus*” or “willful misconduct”.

This illustrates the considerable influence that international bodies such as the CMI wield. The UI, having gone through a robust evaluative process involving various member states is likely to have significant standing to bring about its objectives, irrespective of technicalities under the 1969 Vienna Convention should they arise.

⁶¹ See International Law Commission Conclusions and Commentaries on Subsequent Agreements and Practices in Relation to the Interpretation of Treaties (*ICL Conclusions and Commentaries*). Resolution A/RES/73/202 adopted by United Nations General Assembly on 20 December 2018.

⁶² Gaskell (n 11) 32.

⁶³ Calculated from List of Participants: A 32/INF.1 (17 January 2022).

⁶⁴ ICL Conclusions and Commentaries (n 61) 76.

⁶⁵ ICL Conclusions and Commentaries (n 61) 92.

⁶⁶ The IOPC, ICS, and International Group of P&I Associations contributed in consultation with IMO to submit document on options available to facilitate consistent application of conventions: IOPC/OCT17/4/4 (13 October 2017) [1.4] and [3.5].

⁶⁷ Referred to in Spanish MLA response to CMI Questionnaire (n 43) 6.

Additionally, while the issue of recklessness is complex, there is certainly scope for civil law courts to adjust their existing approach under national law to accommodate the member state's international obligations. **Annexure A** details two examples where this is already evident:





- a. Germany regards recklessness as equivalent to gross negligence. However, in the context of the LLMC / CLC, the term is not used in isolation. When coupled with "knowledge that such damage would probably result" it forms an independent legal term which may rank between gross negligence and intent. Between gross negligence and intent is likely compliant with the interpretation described by the UI.
- b. Despite being a civil law state, Switzerland has formulated the test for recklessness as "willful misconduct", precisely the test under the UI.

While it is ultimately the prerogative of domestic courts to interpret and apply the Conventions, the UI guides member states toward an approach consistent with their international obligations. As evidenced by Germany and Switzerland, the differences between civil and common law approaches are not irreconcilable and the UI can be of significant assistance in this respect.







7. Conclusions



With the UI's salt yet to be tested, it is difficult to anticipate to what degree it will resolve the challenge to international uniformity prevalent in the *Prestige* and recent decisions of similar ilk. Undoubtedly it is vulnerable to circumvention, particularly regarding conflict of law issues that the UI is unable to address. This is the UI's most significant weakness, which also happens to represent the greatest threat to P&I insurers who play a critical role in the effective operation of the international limitation regime. Whether this and the dichotomy between civil and common law approaches to "recklessness" make any practical difference to the way in which the UI is received by national courts remains to be seen. One can only hope that the costly lessons from the *Prestige* are not to be repeated.

Annexure A⁶⁸

State	Party to 1976 LLMC	Party to 1992 CLC	Interpretation of “Recklessness”
China 	No	Yes	<p>Equivalent to gross negligence.</p> <p>Described as a threshold lower than intention but higher than simple negligence.</p>
Columbia 	No	Yes	<p>Local Courts have not determined the meaning.</p> <p>Likely amount to “culpa” or negligence.</p>
Germany 	Yes	Yes	<p>Equivalent to gross negligence.</p> <p>Described as “an act or omission that infringes fundamental and obvious duties of care and constitutes a serious violation of standards of safety”.</p> <p>In the context of the LLMC / CLC, the term is not used in isolation. When coupled with “knowledge that such damage would probably result” it forms an independent legal term which may rank between gross negligence and intent.</p>
Greece 	Yes	Yes	<p>Translates to indifference. “Concept of indifference is not known to Greek law”</p> <p>Courts have approached in various ways, including:</p> <ul style="list-style-type: none"> - “Somewhere between <i>dolus eventualis</i> and gross negligence.” - “Gross (<i>conscious</i>) negligence.” - “Second-grade <i>dolus directus</i>.” - “similar to either <i>dolus</i> (without specifying what type) and gross conscious negligence, or only <i>dolus eventualis</i> but not conscious negligence.”

⁶⁸ Comité Maritime International ‘Unified Interpretation on the Test for Breaking the Owner’s Right to Limit Liability Under the IMO Conventions’ <<https://comitemaritime.org/work/unified-interpretation-on-the-test-for-breaking-the-owners-right-to-limit-liability-under-the-imo-conventions/>> accessed 30 March 2023.

<p>Italy</p> 	No	Yes	<p>“There are no Italian precedents directly addressing the notion of ‘recklessness’”.</p> <p>A number of Italian precedents try to allocate recklessness as per the Hague Visby Rules in national law classifications with different outcomes:</p> <ul style="list-style-type: none"> - “<i>Dolo eventuale</i>” intentional behavior accompanied by the acceptance that the risk, although not aimed at causing damage, would likely cause it. - “<i>Colpa cosciente</i>” described as a negligent behavior accompanied by the effective awareness of the likely occurrence of a harmful event as a consequence of the action (or omission) carried out. - “Gross negligence” described as a conduct carried out disregarding the most elementary rules of diligent behavior.
<p>Mexico</p> 	Yes	Yes	<p>Described as “when the responsible person did not want to commit damage, but causes damage by not fulfilling the duty of due diligence and to act in a dangerous manner”.</p>
<p>Norway</p> 	Yes	Yes	<p>Equivalent to gross negligence.</p> <p>Described as a “significant discrepancy between the care exercised and the care / action that can be objectively described as justifiable”.</p>
<p>Singapore</p> 	Yes	Yes	<p>No clear meaning identified. Negligence of crew in <i>Sunrise Crane</i> [2004] 4 SLR(R) 715 held to be sufficient.</p>
<p>Spain</p> 	Yes	Yes	<p>Equivalent to “<i>dolo eventual</i>” (indirect intent).</p> <p>Described as an “imprudent or thoughtless omission carried out without intent but aware consciously of a harmful result”.</p>
<p>Switzerland</p> 	Yes	Yes	<p>Equivalent to willful misconduct.</p> <p>Described as a standard above gross negligence.</p>
	Yes	Yes	<p>Evaluated as “negligence of recklessly conduct”.</p>

<p>Turkey</p> 			<p>Described as an ultimate breach of due diligence (objectively assessed) with awareness that the damage will probably occur (subjectively assessed).</p>
 <p>Uruguay</p>	<p>No</p>	<p>Yes</p>	<p>No case law. Unable to provide comment.</p>