

Neutral Citation No. [2003] EWHC 2320 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 October 2003

Before :

THE HONOURABLE MR JUSTICE COLMAN

Between :

ICL SHIPPING LIMITED AND STEAMSHIP MUTUAL **Claimant**
UNDERWRITING ASSOCIATION (BERMUDA) LTD

- and -

CHIN TAI STEEL ENTERPRISE CO LTD AND OTHERS **Defendant**

Mr Nigel Teare QC and Mr Nigel Jacobs (instructed by **Ince & Co**) for the Claimants
Mr Lionel Persey QC and Mr Michael Davey (instructed by **Howard Kennedy**) for the
Defendants

Hearing dates : 15 and 21 July 2003

Judgment

Mr Justice Colman:

Introduction

1. The applications now before the court raise points of wide-ranging importance as to the effect of the Convention on Limitation of Liability for Maritime Claims 1976. The provisions of that Convention are incorporated in substance into English law by the Merchant Shipping Act 1995.
2. The underlying facts are as follows.
3. The United Kingdom is a party to the 1976 Convention. Singapore is not. It is instead a party to the predecessor to that Convention, namely the 1957 Convention. There are numerous differences between the two conventions but the most important substantive difference is that, whereas under the 1957 Convention (Article 1.1) a shipowner is entitled to limit his liability for specified areas of liability, including cargo damage unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner, under the 1976 Convention entitlement to limit liability is barred (under Article 4) if it is proved that the loss resulted from the owner's "personal act or omission, committed with the intent to cause such loss, recklessly and with knowledge that such loss would probably result".
4. The First Claimants ("ICL") were the owners of the ICL VIKRAMAN. The First Defendants ("Chin Tai"), a Taiwan corporation, were holders of a bill of lading dated Hamburg 10 August 1997 issued by ICL under which ICL acknowledged receipt for shipment of 10,078 mt of casting billets for carriage on ICL VIKRAMAN from Poland to Taiwan. Tragically, on 26 September 1997 the vessel collided with the MOUNT 1 in the Malacca Strait and sank with the loss of 26 lives and all the cargo.
5. Chin Tai arrested a sister ship – the ICL RAJA MAHENDRA – under proceedings commenced in Singapore in April 1998: Admiralty in Rem No. 236 of 1998. The parties were not able to agree as to the terms of security for the release of that vessel. Negotiations took place between Ince & Co, in London, acting for the Second Claimants, ICL's P & I Club, and Daire O'Keefe & Co in Newry, Northern Ireland, acting for cargo interests. Singapore law firms Khattar Wong (for the Club) and Joseph Tan Jude Benny & Scott (for cargo) were also involved. The Club's letter of undertaking was accepted by Cargo under protest and the sister ship released. The point of disagreement related to the identification of the amount covered by the letter – "any sum found to be due to you for damages, interest and costs in a court or tribunal of competent jurisdiction". The ship interests wanted the letter to make express reference to such amount as should be found due in the Singapore proceedings or in London arbitration. The reason for the insistence on wording to cover London arbitration was that the bills of lading expressly incorporated a London arbitration clause to be found in the underlying charterparty. In the event the issue as to the wording was referred to the Singapore Court where it was decided and confirmed on appeal that the letters of undertaking ("LOU") should as far as material be in the following form:

"we hereby undertake to pay you on demand any sum found to be due to you for damages, interest and costs in Admiralty In Rem No. 236 of 1998 in the High Court of The Republic of Singapore or on appeal thereon or by

arbitration in London in accordance with the Arbitration Clause incorporated in the bill of lading, or as may be agreed in writing between the parties hereto to be recoverable from the owners of the 'ICL VIKRAMAN' in respect of your claims provided that our total liability hereunder shall not exceed the sum of US\$4,500,000.00. (United States dollars four million five hundred thousand) inclusive of interest and costs.

We hereby confirm that we are informed by the said shipowners that the said vessel was not on demise charter at the material time.

This undertaking is to be governed by and construed in accordance with English law and we further agree to submit to the jurisdiction of the English High Court of Justice for the purpose of any process for the enforcement hereof and confirm that our registered office is situated at Clarendon House, Church Street West, Hamilton, Bermuda.

Any demands or notices or requests under this letter of undertaking and any originating process or other legal documents in connection with it may be served by letter or fax at our address stated above, or at such other business address in London as we may advise to you in writing from time to time."

6. The function of that court in determining the wording was as a matter of procedure a necessary part of its approval of the release from arrest of the sister ship.
7. On 16 December 1998 the Club's London office sent to Dolphin Maritime Services Ltd, the agents for the cargo interests, a signed top copy of the LOU. The agents' address was in Stanmore, Middlesex.
8. It is be observed that the LOU contained no restriction by reference to tonnage limitation. The club also provided to other cargo interests another LOU in respect of eight other bills of lading. However, there had been no further arrest of any sister ship.
9. The claim by Chin Tai for loss of the cargo was referred to arbitration in London together with claims under eight other bills of lading. On 9 April 2003 an Interim Final Award was published which concluded that Chin Tai's claim succeeded on the basis that the shipowners, in breach of their duty under the Hague Rules, had failed to exercise due diligence to make the vessel seaworthy at or before the commencement of the voyage. Chin Tai were awarded US \$ 2,696,127.15 plus interest.
10. Meanwhile, between the end of the hearing of the arbitration and the publication of the award, the Club and ICL came to appreciate that, if an award were made in favour of cargo, Chin Tai would be able to draw down on the LOU without regard to the application of the Limitation Convention. There were several other cargo claimants in addition to Chin Tai.
11. Accordingly, on 18 March 2003 ICL issued a limitation claim form and established a limitation fund in England under CPR 61.11(18) and Article 11 of the 1976 Convention by making a payment into court of £6,265,288.77. It is said by the claimant's solicitor that Chin Tai's share of that fund amounts to about £1,068,097 (equivalent to US\$1,687,593) which is substantially less than the amount of the arbitration award.

12. On the following day ICL applied to the Admiralty Court in London for:
- (i) an order pursuant to Article 13(2) of the 1976 Convention for the release of the LOU, or alternatively
 - (ii) an injunction restraining the plaintiffs in the Singapore action in rem and in particular Chin Tai from presenting the LOU to the Club.
13. On 21 March 2003 Moore-Bick J., after a hearing ex parte on notice, made an order for an injunction against Chin Tai and for permission to serve the Limitation Claim Form on Chin Tai in Taiwan.
14. Chin Tai now applies to set aside service upon it of the Limitation Claim Form and/or the injunction. In substance, it is contended that Chin Tai, having arrested the sister ship in Singapore and security having been provided there for its release, unlimited by reference to limitation under the 1976 or any other Convention, is not subject to or bound by the establishment of the limitation fund in London or the limitation proceedings commenced here and that accordingly the English courts have no jurisdiction over it in relation to limitation under the 1976 Convention.
15. ICL's application is for release and return of the LOU under Article 13.2 of the 1976 Convention.

The 1976 Convention

16. In the context of these applications the key provisions of the 1976 Convention are as follows:

Article 11

“Constitution of the Fund

1. Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.
2. A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.
3. A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.”

Article 13

“Bar to other actions

1. Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such a claim against any other assets of a person by or on behalf of whom the fund has been constituted.
2. After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:
 - (a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
 - (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or
 - (c) at the port of discharge in respect of damage to cargo; or
 - (d) in the State where the arrest is made.
3. The rules of paragraphs 1 and 2 shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and the fund is actually available and freely transferable in respect of that claim."

Article 14

"Governing law

Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted."

Article 15

"This Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State."

17. Schedule 7 Part II of the 1995 Act entitled "Provisions having effect in connection with Convention" provides by paragraph 8(3):

"Where a fund is constituted with the court in accordance with article 11 for the payment of claims arising out of any occurrence, the court may stay any proceedings relating to any claim arising out of that occurrence which are pending against the person by whom the fund has been constituted."

The Submissions of the Parties

18. Mr Lionel Persey QC, on behalf of Chin Tai, submits as follows.

19. The English Admiralty Court did not have jurisdiction over Chin Tai or over the limitation claim in these proceedings. The main purpose of the Limitation Convention is to regulate the enforcement of claims against the assets of a shipowner where the latter has set up a limitation fund in a state which is a party to the Convention (a “State Party”). However, the scope of its regulatory regime is limited to State Parties and it therefore only provides protection against such enforcement in the courts of State Parties. Consequently, it is not part of the function of the Convention to prevent cargo interests from obtaining and enforcing security in a jurisdiction which is not a State Party. The effect of Article 11.1 is to provide for a limitation fund facility available to a shipowner against whom a relevant claim has been brought against the property of a shipowner in the jurisdiction of a State Party. This has the consequences that where such a claim been brought against the shipowner in the jurisdiction of a State that is not a party to the 1976 Convention there is no mechanism in the Convention for preventing such a claim being pursued.
20. Under Article 14 all rules of procedure in connection with a limitation fund are to be governed by the law of the State Party in which the fund is constituted. Hence, if a fund is constituted in a State Party the jurisdiction of the courts of that State with regard to claimants against the shipowner will be regulated by the procedural rules of that State. In this connection, therefore, the Convention does not create jurisdiction, it merely provides for the constitution of a limitation fund and for an enforcement regime which it is open to State Parties to effectuate by their rules of procedure, including their rules of jurisdiction. As regards English procedure, the scope of jurisdiction of the Admiralty Court in relation to limitation claims is prescribed by CPR 61.11(5) which provides as follows:

“The claim form may not be served out of the jurisdiction unless-

- (a) the claim falls within section 22(2)(a), (b) or (c) of the Supreme Court Act 1981;
- (b) the defendant has submitted to or agreed to submit to the jurisdiction of the court; or
- (c) the Admiralty Court has jurisdiction over the claim under any applicable Convention; and

the court grants permission in accordance with Section III of Part 6.”

21. I interpose that section 22(2)(a), (b) and (c) of the Supreme Court Act 1981 has no relevance to the claim of Chin Tai in this case. Nor has Chin Tai submitted or agreed to submit to the jurisdiction of the English courts. Accordingly, the only possible basis for jurisdiction in this case would be if the Admiralty Court had “jurisdiction over the claim under any applicable Convention” within the meaning of CPR 61.11(5)(c).
22. It is argued on behalf of Chin Tai that sub-paragraph (5)(c) cannot refer to the 1976 Convention itself, first because the only Convention to which the United Kingdom is a party which relates to limitation is the 1976 Convention itself and therefore applicability must refer only to the underlying claim where several conventions may be relevant to jurisdiction, rather than to the right to limit by setting up a fund, and second because the 1976 Convention contains no provision as to the jurisdiction of

the courts of the state where the fund has been constituted, Article 11 not having that effect. Mr Persey argues that “any applicable Convention” refers to a convention conferring jurisdiction over the underlying claim, for example the Brussels Regulation No. 44/2001. Article 7 of that Regulation provides that where courts of Members States have jurisdiction in actions relating to liability from the use or operation of a ship, that court also has jurisdiction over claims for limitation of such liability.

23. An alternative argument is advanced on behalf of Chin Tai. Even if Article 11 of the 1976 Convention does confer jurisdiction and the 1976 Convention is an “applicable Convention” within CPR 61.11(5)(c), Article 11 cannot apply to the present case because no “legal proceedings” have ever been instituted in the English courts in respect of claims subject to limitation. All that has happened is that an arbitration has been held in London. Chin Tai has never submitted disputes under the bill of lading contract to the jurisdiction of the English courts. Nor has it commenced legal proceedings in England to secure its underlying claim by arresting a ship here or to enforce the arbitration award. Arbitration proceedings are not included in Article 11.1, the purpose of the Convention being to prevent enforcement of underlying claims against assets of the shipowner other than the limitation fund. Consequently, the “Court or other competent authority” with which the limitation fund is permitted to be constituted is the same court or other competent authority in which legal proceedings leading to enforcement of the underlying claim have been constituted. Had it been intended to include arbitration proceedings Article 11 would have had to be worded differently.
24. It is further argued on behalf of Chin Tai that, even if Article 11 does cover arbitration proceedings, Article 13 does not confer on the English court jurisdiction to order the release of the LOU. That is because the arrest of the sister ship took place and the security was given in Singapore which is not a State Party. It is only if the arrest occurs in a State Party and security is given there that release of the vessel or property or security may be ordered by the court or other competent authority of that State Party. Mr Persey QC supports this submission by reference to Article 15 of the 1976 Convention which describes the scope of the Convention by reference to the defendant to the underlying claim seeking to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of a State Party. Although the LOU was sent by the Club’s London representative office to the agents of ICL in England, the terms having been negotiated partly by the respective English solicitors, the LOU was part of the consequence of the Singapore proceedings and indeed the wording had to be expressly approved by the High Court of Singapore as a necessary part of the proceedings for the release of the vessel in that court. Accordingly, the security was provided in Singapore and not in England and was therefore outside Article 13(2) because Singapore was not a State Party.
25. For these reasons the English court had no jurisdiction to order an injunction interfering with enforcement of the LOU.
26. Finally it is submitted on behalf of Chin Tai that even if Article 13(2) might apply to the LOU on the basis that it was given in England, its application was excluded by Article 13(3) because the fund set up in the English court was not “actually available” at the relevant time. ICL had not obtained a limitation decree at the time when the injunction was granted. Therefore no injunction should have been ordered.

27. On behalf of ICL Mr Nigel Teare QC submits as follows.
28. Jurisdiction was established under CPR 61.11(5)(c). That Rule was to be construed by reference to Article 11.1 of the 1976 Convention. If under that Article ICL was entitled to set up a limitation fund in England, it must follow that the English court had jurisdiction in respect of claims on that fund because under CPR 61.11(5)(c) the 1976 Convention was an “applicable convention” and it was jurisdiction over “the claim” to limit, as distinct from the underlying claim, that was relevant. In this Convention Article 11.1 should be construed as covering proceedings by way of arbitration, as well as proceedings in court. Arbitration proceedings could aptly be described as “legal proceedings” because they were pursued for the purpose of giving effect to a legal entitlement to the claim. That the 1976 Convention was intended to cover such proceedings was supported by the fact that it was entitled “The Convention on Limitation of Liability for Maritime Claims” and one of the most common maritime claims was one brought by means of arbitration. Further support was to be derived from the wide wording of Article 8(3) of Part II which gave the English courts power to stay any proceedings relating to any claim arising out of the same occurrence pending against the person who had set up the limitation fund. These words were wide enough to cover a claim by means of a reference to arbitration.
29. Mr Teare strongly emphasised the extent to which the right of shipowners to limit would be restricted if the facility were confined to court proceedings. Although it would be open to a shipowner to plead limitation by way of defence where one claim was brought in arbitration and this would be an available defence even where no limitation fund was created under Article 11, where, as frequently happened, there were multiple cargo claims by different interests all bound by arbitration clauses and the cumulative value of the claims exceeded the limitation amount, the shipowner could not restrict his aggregate liability to the limitation amount because of the lack of any facility for consolidating arbitrations.
30. This argument was also supported by the fact that under the 1957 Limitation Convention a shipowner was entitled to limit his liability in relation to the underlying claim even if brought by arbitration, as illustrated by The Penelope II [1980] 2 Lloyd’s Rep 17. It would be very surprising if this entitlement had been removed in the case of a multiplicity of claims by arbitration, while the entitlement to raise limitation by way of defence to a single claim had been retained. Further, that “legal proceedings” had a wide meaning was illustrated by the decision of the Dutch Supreme Court in The SHERBRO, referred to in Griggs & Williams: Limitation of Liability for Maritime Claims, 3rd Edn p50 n 112 where the application by cargo for the French Court to appoint a judicial expert/surveyor was held to be “legal proceedings”.
31. Reference was also made to the decision of the Court of Appeal in The Merak [1965] p223 that “Suit” under Article III rule 6 of the Hague Rules included arbitration and in particular, by way of analogy with “legal proceedings”, to a passage from the judgment of Davies LJ. at page 257.
32. As to the proper construction of CPR 61.11(5)(c), on each occasion on which the word “claim” is used in CPR 61.11 it means a claim to limit, except under CPR 61.11(5)(a). Were it confined in meaning in (c) to the underlying claim, it would

have no application for there were no applicable conventions except that relating to limitation. In particular it could not refer to the EU Regulation 44/2001 because under CPR 6.19 the court's permission for service out of the jurisdiction is not needed, whereas under CPR 61.11(5), it is a condition for service out of the jurisdiction that the court has given permission in accordance with CPR 6 Section III. There was no other possible convention.

33. Further, the original text of CPR 61.11(5)(a) which had been enacted in parallel with the present wording of CPR 61.11(5)(c) had the word "case" instead of "claim" and was only amended in December 2001 to "claim" by the Civil Procedure (Amendment No.5) Rules 2001. That amendment could not have changed the meaning of (c) from its original meaning. Therefore the approach to the construction of "claim" in (c) had to be on the basis that the word in (a) was "case". ICL relies in this connection on the comment of Lord Phillips MR in The Leerort [2001] 2 Lloyd's Rep 291 at page 302-3 where he indicated that the Rules Committee was currently in the process of drafting rules to reflect the limitation regime under the 1976 Convention.
34. There were other strong reasons for concluding that the CPR 61.11.5(c) covered jurisdiction under the 1976 Convention. If its scope was such as to cover that Convention, the latter would not necessarily always be applicable when CPR 61.11.5(c) was invoked, for the jurisdictional requirements of Article 11 would have to be satisfied. Secondly, if "any applicable Convention" referred only to EU Regulation 44/2001, a claimant would never be able to serve limitation proceedings out of the jurisdiction in respect of arbitration proceedings unless the claim also fell within CPR 61.11(5)(a) or (b) because although Article 7 of the Regulation provided for jurisdiction in respect of limitation claims, it did so only if the "court of the Member State has jurisdiction in actions relating to liability from the use or operation of a ship". Since arbitration was expressly excluded by Article 1 from the jurisdictional regime of the Regulation, there would be no jurisdiction conferred by the Regulation concerned with the right to limit in respect of arbitration claims. Further, if Article II covered arbitration proceedings, there could be no logical basis for there being limitation jurisdiction in respect of domestic arbitration claims but not for arbitration claims brought by foreign claimants.
35. As to Article 13(2), its purpose was to facilitate the release of all security once a limitation fund had been constituted. The approach taken by the English Court in relation to the 1957 Convention, cf The PUTBUS [1969] 1 Lloyd's Rep 253, had encountered problems under section 5 of the Merchant Shipping Act 1958, identified in The WLADYSLAW LOKIETEK [1978] 2 Lloyd's Rep 520, and the effect of Article 13(2) was to resolve these difficulties. The particular problem was that under the section 5 regime it had been held that in order to be entitled to release from arrest or of security it was not enough to show that the shipowner had a reasonably arguable case on absence of actual fault or privity on his part; he had the greater burden of establishing that there was no serious issue to be tried on that question. As Sheen J. put it in The BOWBELLE [1990] 1 WLR 1330 at page 1335:

"It appears to me that article 13 of the Convention of 1976 was drafted with the intention of overcoming the effect of that decision and of ensuring that shipowners would only be compelled to provide one limitation fund, in respect of any one incident giving rise to claims."

36. In Article 13(2) the words “any security given” were not geographically restricted by reference to the arrest or attachment of a ship or other property. This was not surprising in view of the fact that in most cases security was put up voluntarily and without an arrest or attachment and therefore without reference to the jurisdiction of a court of arrest or attachment. The words “or any security given” were purposely left unrelated to a place of arrest or attachment within the jurisdiction of a State Party since the setting aside of security unrelated to an arrest could not impinge on the jurisdiction of a foreign court so that there would be no need to confine the security to what was put up in a State Party.
37. It is submitted that in Article 13.2 the Court entitled to release the arrest, attachment or security is the Court which is administering the limitation fund. The reference back to Article 11 indicated that “the court of such State” must refer to the same court and State Party as that in which the fund had been constituted.
38. Further, where security was voluntarily put up, no court would be concerned with it except the Court where the limitation fund had been constituted. Hence “the Court or other competent authority” of such State could refer only to that court.
39. Given that construction, Article 13.2 would reflect the basic purpose of the Convention which was to ensure that shipowners were able to confine their exposure to one limitation fund and that the Court administering that fund would have control over all other attempts by those with relevant underlying claims to provide themselves with security outside the fund.
40. If Article 15 imposed a geographical limit on the security which could be released under Article 13.2, in the present case the security was given in England where the fund was constituted and was therefore within the scope of control imposed by Article 15. The second LOU was given in London and not Singapore.
41. As to the argument on behalf of Chin Tai that the effect of Article 13.3 is that the limitation fund is only “actually available” if a limitation decree has already been made by the Admiralty court, it was submitted that this was not the effect of the Convention. In The BOWBELLE, supra, Sheen J. put forward the procedure by caveat against arrest (now called a caution and repeated in CPR 61.7(2)(b)) which operates without a prior decree of limitation and thereby gives effect to Article 13(2) by preventing the arrest of vessels to provide further security in addition to the fund. The mere existence of the fund together with the undertaking to acknowledge service of the claim form is sufficient in English procedure to found a request for a CPR 67.7 caution without a prior decree. In so far as the judgment of Sir John Knox in The BOS 400 [1998] 2 Lloyd’s Rep 461 at 473L suggested the contrary it was wrong and was in any event obiter.
42. On the question of the residual discretion preserved by Article 13.2, since there had been no challenge by Chin Tai to the right of ICL to limit if English jurisdiction were established, there was no reason for exercising the court’s discretion against the shipowners. Further, since the parties had agreed to a London arbitration, on the evidence the parties were aware of the shipowners’ intention to rely on limitation as early as the time when the security was negotiated and subsequently during the arbitration hearing and the Club did not make express reservation of the owners’ right to limit in their letters of undertaking because such right would be imposed as a

matter of law in any event, there were added reasons why the court should make an order enforcing Article 13.2.

Discussion

43. When the 1976 Convention was in the course of being negotiated there existed no uniform international limitation regime. Whereas there were numerous states parties to the 1957 Convention, there were also parties to the 1924 Convention and some states which were party to neither. A limitation fund set up in a state party to the 1924 Convention but not to the 1957 Convention was not subject to the latter. This was hardly surprising because the 1957 Convention was binding only on the states parties to it. The wording of the 1976 Convention does not suggest any different approach. Indeed Article 15 identifies in very clear language the scope of application of the 1976 Convention. It is concerned with two matters:

- (i) the bringing of limitation proceedings (and necessarily the constitution of a limitation fund) before the court of a State Party and
- (ii) obtaining the release of a ship or other property or the discharge of any security given within the jurisdiction of a State Party.

44. Seeing that its overriding purpose is to provide for the quantification of a shipowner's maximum liability in respect of a particular occurrence and for the enforcement of that liability against a single source of security, its geographical scope is confined to State Parties both in relation to the constitution of the limitation fund and in relation to the release of additional security (in the form of a ship or other property arrested or attached or any security given) which is "within the jurisdiction of a State Party".

45. Consistently with this basic foundation, Article 11 provides for the constitution of a limitation fund in any State Party in which legal proceedings are instituted in respect of an underlying claim and Article 13 both prohibits the exercise by a person who has already claimed against the fund of any right against any other assets of the person who set up the fund and provides for the release of other assets and security within the jurisdiction of a State Party. The purpose of Article 13 is thus to protect the person who has properly constituted a limitation fund in any State Party from the enforcement of a claim in respect of the same occurrence against his ships, his property or such security as he may have given which are subject to the jurisdiction of the same or any other State Party or parties.

46. Under Article 11 the entitlement of a shipowner to constitute a limitation fund is conditional upon "legal proceedings" having already been instituted against that person in the State Party in which he is to constitute the fund.

47. The words "legal proceedings" do not in their ordinary sense at first suggest the commencement of an arbitration. To refer to a person as having commenced legal proceedings does not obviously suggest that an arbitration has been commenced, even although its purpose is to obtain an award as to the relevant legal rights of the parties. Legal proceedings in the ordinary sense of that phrase more obviously refers to proceedings in a court of law.

48. However, as is clear from The PENELOPE II supra, the 1957 Convention was construed as covering claims brought by way of arbitration as well as claims brought

by court proceedings. But it did not contain the words “legal proceedings”. That Convention referred only to “claims”, which is clearly capable of including claims by means of arbitration. There is, however, nothing in the travaux préparatoire in relation to the 1976 Convention which refers to the adoption of the apparently narrower “legal proceedings” or which suggests that it was thought necessary to make the establishment of a limitation fund dependent upon prior proceedings in court rather than upon proceedings by way of arbitration, albeit there must have been a common perception that the mere advancement of a claim should not be sufficient.

49. Further, it is pertinent to ask whether the pursuit of a claim by way of arbitration as distinct from its pursuit by court proceedings would involve any difference relevant to the underlying purpose of the Convention. Article 11 ties the entitlement to constitute a limitation fund to the commencement of legal proceedings in order to provide certainty as to the venue of the fund, rather than leaving it to the shipowner to constitute the fund in a jurisdiction chosen by him. He is to be confined to a State Party in which such proceedings have already been commenced. Clearly, it is not materially more difficult to identify the venue of arbitration proceedings than of court proceedings.
50. Given that the Convention is specifically concerned with preservation of the exclusivity of the fund as security for claims, it is right to ask whether that purpose could in any way be prejudiced if “legal proceedings” extended to arbitration proceedings. For this purpose, it is necessary to compare the position that arises where a fund is created within a particular jurisdiction following the commencement of an arbitration raising the underlying claim and having its seat in the same jurisdiction with that which arises where there are pre-existing proceedings in court raising the same claim. In both cases any issue as to the entitlement to limit would have to be determined in the limitation proceedings, assuming there was more than one claimant. Neither a judgment obtained in the original court proceedings nor an arbitration award could be enforced against any security in any State Party. Nor would the pre-existence of arbitration proceedings impede the setting up of a limitation fund in the same jurisdiction.
51. Where the too narrow construction of words in an international convention has suggested the exclusion of arbitration proceedings from proceedings in general and such exclusion would be unjustifiable in view of the general practice of the shipping industry, the English courts have been ready to accord to the convention that meaning wide enough to be consistent with the general practice of the industry. The notable example is the construction of “unless suit is brought” in Article III rule 6 of the Hague Rules arrived at by the Court of Appeal in The MERAK [1965] p223. The reasoning is instructive. At p252 Sellers LJ. said this:

“The Hague Rules, or more strictly the Carriage of Goods by Sea Act, 1924, which gives statutory effect to them, in article III, rule 6, provide clearly to discharge the shipowner from liability after a period of 12 months, but I can see no reason for assuming that the rule was tying the parties to any particular form of litigation. The Convention referred to in the preamble to the Act dealt with responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading and on the face of it the method of settling disputes would not seem to be germane.

I can see no good reason for giving the word ‘suit’ in this context the limited meaning which has been advanced. The Hague Rules are of international application, arbitration has long been a method of settling disputes agreed by parties to contracts for carriage by sea, and whilst it was agreed that there should be a period of limitation there is nothing to indicate that a step in an arbitration would not be as effective as a writ in an action unless ‘suit’ can only have the meaning in our courts of an action. I do not find any authority which requires us so to hold. In their context I think the words mean ‘unless proceedings are brought within one year,’ and that the commencement of arbitration proceedings would meet the requirement.”

52. At p257 Davies LJ. observed:

“The Hague Rules have been, as they were intended to be, adopted by a large number of countries, both without as well as within the Commonwealth. There are no doubt many different procedures for initiating proceedings in these various countries and it is to be supposed that the rules were drafted in the widest possible terms to cover all such various modes of procedure. The word ‘suit’ in English does not appear to have any precise connotation nor does it seem to point at all clearly to an action at law as opposed to an arbitration. Both are means of enforcing rights under a contract; and an award in an arbitration is, of course, capable, at any rate in this country, of being enforced in the courts. It may be that arbitrations under bills of lading are not as common as those under other commercial contracts; but if ‘suit’ excludes arbitration, then the Hague Rules would seem to discourage, if not actually to prevent, the inclusion of an arbitration clause in a bill of lading.”

53. And at p261 Russell LJ. said:

“This rule derives from an international code designed in part to safeguard holders of bills of lading. It provides a short period of limitation. The field in which it operates is one in which resort to arbitration was and is a very common method of pursuing claims against the carrier. The English statute is applicable to outward bills of lading, and the phrase ‘suit is brought’ is referable to something which may happen in many different jurisdictions with varying methods of moving to enforce contractual claims. To take the first step – for example by appointing an arbitrator – under an arbitration clause is to set in motion proceedings designed to obtain a decision, and which will, if pursued, inevitably lead to a decision, with resort at all stages to a court of law to ensure this. In my judgment the phrase should be construed as extending to and embracing such a step, and not limited to the initiation of proceedings in an ordinary court of law. I would not follow the decision in the Son Shipping case in the United States of America.”

54. Thus, where the words in question have a range of possible meanings within which one meaning less obvious than another is more consistent with the context and purpose with which the words are used, it may be appropriate to apply that less obvious construction. Just as the commencement of “suit” does not immediately suggest the commencement of an arbitration but points to proceedings in court – as held by the United States court in Son Shipping Co Inc v. De Forse & Tanghe, Solel Bond Ltd (1952) AMC 1931 – but yet was held in The MERAK to attract a wider

construction more consistent with the practicalities of the shipping industry so here also, in my judgment, “legal proceedings” should be construed consistently with those practicalities.

55. More importantly, although bills of lading often do not incorporate arbitration clauses, such clauses are by no means uncommon. It would be distinctly unsatisfactory if a shipowner’s ability to limit his liability to more than one bill of lading holder depended on whether the bills of lading incorporated an arbitration clause. The shipowner could not stop the advent of arbitration and force court proceedings on cargo: he would be bound to participate in the arbitration and so disable himself from constituting a limitation fund in that same jurisdiction. This would inevitably deter the use of arbitration to resolve cargo claims. It must have been obvious to those concerned with the drafting of the 1976 Convention that if “legal proceedings” were confined to proceedings in court, that would be the effect. That presents itself to me as an extremely improbable purpose of Article 11.1.
56. In these circumstances I conclude that the institution of “legal proceedings” under Article 11.1 of the Convention includes the commencement of arbitration. I am not persuaded that the wording of paragraph 8(3) of Part II of Schedule 7 of the Merchant Shipping Act 1995 leads to any different conclusion. It is true that “stay” more aptly refers to proceedings in court than to arbitrations, but, like “legal proceedings”, it is not so exclusive a term of art that it is incapable of a wider meaning, capable of referring to arbitrations. Whereas, if it covered international arbitrations it would be inconsistent with the New York Convention and to that extent inoperable, it would not be a legitimate exercise in construction of the 1976 Convention to deploy the limited scope of this legislative accretion in UK legislation to restrict the meaning of Article 11.
57. It follows that ICL was entitled to constitute a limitation fund in respect of Chin Tai’s cargo claim in this case.
58. The question then arises whether the Admiralty court had jurisdiction to give permission for service out of the jurisdiction of the limitation claim form. That depends on the scope of CPR 61.11(5).
59. In construing that Rule it has to be assumed that the Rules Committee had in mind the correct construction of the 1976 Convention: cf The LEERORT, referred to above. The wording of the Rules was thus specifically approved by both Lord Phillips and a senior judge of the Admiralty Court.
60. There can be no reasonable doubt that the “claim form” referred to in CPR 61.11(5) is one claiming a limitation decree or any ancillary relief. By CPR 61.11(4) that form has to be served on all the defendants named in the form and on those requesting service and may be served on additional defendants. All those defendants will not necessarily have launched proceedings against the shipowner in England. Indeed, if a limitation fund has not yet been constituted at the time of issue of the limitation claim form, none of the defendants may yet have launched proceedings in this country. Under CPR 61.11(5) provision is made for service of a limitation claim form out of the jurisdiction against defendants who have raised claims in respect of collision where the claimant or the cause of action fall within section 22(2)(a)(b) or (c) of the Supreme Court Act 1981 and where therefore the Admiralty Court has extra-territorial jurisdiction over the underlying claim. This indicates an intention to match extra-

territorial jurisdiction in respect of limitation with extra-territorial jurisdiction over the underlying claim. As to (b), the reference to “the defendant” must be to the defendant to the limitation claim so one has moved away from the jurisdiction matching concept to circumstances specific to the claim to limit.

61. Then one comes to (c), which at first sight appears to refer to the claim to limit rather than to an underlying claim, consistently with the title to the Rule and with CPR 61.11(1) – “This rule applies to limitation claims”. However, there are only two conventions which could be said to relate to limitation claims. There is first the 1976 Convention itself. In relation to this, the difficulty is that although Article 11 identifies the permissible venue for constituting the limitation fund, it does not on the face of it include any provision for according jurisdiction to the courts of that venue over parties who have raised claims against the shipowner as distinct from claims against the fund itself. In other words, it is silent on what is to happen where one claimant has started proceedings against a shipowner within the jurisdiction in response to which the shipowner has constituted a fund, but where there are other claimants against the shipowner, as distinct from the fund, outside the jurisdiction, who can only be bound by a limitation decree and restricted to enforcement against the fund if they are joined in the limitation claim. The only very broad sense in which in such a case it could be suggested that the 1976 Convention conferred jurisdiction over the claim to limit would be that where a fund had been constituted by identifying the permissible venue of the fund and by vesting in the courts of that jurisdiction control over claims upon that fund, the Convention had vested in the court jurisdiction over those who had relevant underlying claims which would form a basis for claims on the fund.
62. The only other convention under which there is jurisdiction over limitation claims, which counsel or I have been able to discover is the Brussels Convention, as it was called at the time when this rule was being drafted and EU Regulation 44/2001 as it has now become, Article 7 provides as follows:

“Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.”

63. This is substantially the same as Article 6A of the Brussels Convention. It will at once be seen that there is once again a matching of jurisdiction over claims for limitation with claims relating to the underlying claim against the shipowner. Accordingly, if English jurisdiction can be founded over an underlying claim by reason of, for example, the effect of Article 1 (domicile) or Article 5 (place of performance of the relevant contractual obligation) of the Regulation, the jurisdiction of the English court is automatically engaged over any claim by a relevant claimant to limit. That means or ought to mean that the shipowner does not need to obtain permission to serve outside the jurisdiction on a defendant domiciled in an EU Regulation state or who otherwise comes within CPR 6.19(1) or (1A). In such a case, therefore, the requirement in CPR 61.11(5) that one of the pre-requisites for service of a limitation claim outside the jurisdiction is that the court grants permission would, as regards (c), be inconsistent with CPR 6.19. Moreover, the same is true whether the word “claim” in (c) refers to the underlying claim as distinct from the claim to limit.

64. Further, if one construes the “claim” as the claim to limit and “any applicable Convention” as including the 1976 Convention, there would always be jurisdiction over defendants to claims to limit once a fund had been constituted within the jurisdiction and that would be so whether or not the EU Regulation regime applied. The alternative construction which would exclude the 1976 Convention on the basis that it did not expressly confer any jurisdiction and which would give to “claim” the meaning of underlying claim, as distinct from claim to limit, would lead to the result that the only possible defendants available for extra-territorial jurisdiction under (c) would be those over whom there was jurisdiction by reason of the EU Regulation. I am bound to say that it is very hard to believe that this was the intended purpose of the rule. There seems to be no obvious reason why non-European defendants should be wholly excluded from the extra-territorial regime in respect of limitation claims. Indeed, such defendants would be as much necessary or proper parties within CPR 6.20(3) as would those within Regulation 44/2000.
65. Indeed, whatever meaning one gives to CPR 61.11(5)(c) there appear to be unavoidable problems of inconsistency with CPR 19 and to problems of commonsense and practicality in the context of limitation claims. This being so, I have come to the conclusion that the latter, if not the former, can best be avoided if “claim” is construed as meaning “claim to limit” and “any applicable convention” is construed as covering the 1976 Convention.
66. It follows that in the present case, once ICL had established the limitation fund, there was jurisdiction to give permission to serve the limitation claim out of the jurisdiction on Chin Tai. Chin Tai has therefore effectively been made party to the limitation claim. Further, there is, in my judgment, no basis for suggesting that Moore-Bick J. exercised his discretion to give permission to serve out the limitation claim form on a wrong basis.
67. The order made by Moore-Bick J. for an injunction in effect restraining Chin Tai from making a demand under the LOU for the purpose of enforcing the arbitration award was founded on Article 13.2 of the 1976 Convention set out at para (16) above.
68. I have already described one of the main underlying purposes of the 1976 Convention as being to provide from one available source of security to a value sufficient to protect claimants against whom the shipowner can establish entitlement to limit (see para (44) above). The Convention gives effect to this purpose by Article 13 which bars enforcement of a claim against other assets of the person who has already constituted the fund. There is, in my judgment, no doubt whatever that the protection provided by Article 13.2 works only by reference to the jurisdiction of the State Party within which a ship or other property has been attached or some other form of security has been given. This provision is directed to the power of a State Party to prevent the utilisation as further security for the claim of a vessel or other property or security within its jurisdiction. The concept of the further security being within the jurisdiction and not outside the jurisdiction of the State Party in question is practically important, for it is the courts of that jurisdiction which have the power to release the additional security in question.
69. I am quite unable to accept the submission on behalf of ICL that “such State” at the end of the first sentence of Article 13.2 is capable of referring to the state where the limitation fund has been constituted regardless of the jurisdiction in which the vessel

has been arrested or within which the security has been put up. Such construction is inconsistent with the words used, for such state must refer back to the State Party in whose jurisdiction the attempt has been made to create additional security. Further, the Convention cannot be construed so as to create a power in the courts of one State Party to interfere by order with the disposition of property or other security within the jurisdiction of a state that is not a party. The security regime provided by the Convention is clearly confined to States that are party to it.

70. The next question is therefore in which jurisdiction the security given by the Club and represented by the LOU is located. Contrary to what has been assumed in the submissions of counsel on both sides, it is far from obvious that this question turns on identifying the country in which a document evidencing the Club's irrevocable undertaking was physically delivered by it or its agent to the representative of the claimant. If one compares the provisions in relation to arrest of a ship or attachment of other property, it is obvious from the wording that the release, whether mandatory or non-mandatory, under 13.2, can only be effected by that State Party which is seized of the arrest or attachment. It is therefore necessary to identify the analogous nexus between the security that has been given and a particular jurisdiction. No doubt in many cases this jurisdiction will be that in which the security is physically located. Such a case would arise where a vessel was released from arrest against a local bank deposit being made or against the provision of a bond payable at a local bank. Security, however, can take many different forms, albeit nowadays the most common is probably a Club letter of undertaking. However, in my experience it is not unusual for security to be put up by a Club without any actual arrest or attachment having taken place at any particular port. It would be surprising if in such a case the effect of the Convention was to confine the duty or power of release to the Courts of that State Party where the document evidencing the contractual undertaking happened to be handed over, regardless of where that contract could be enforced by the beneficiary.
71. In the present case, the first provisional LOU was provided by the Club in order to procure the release from arrest of the ICL RAJA MAHENDRA in Singapore and the substitute LOU was provided in a form prescribed by the Singapore High Court as a sequel to the release proceedings. That LOU continues to stand as the only security in the pending action in rem in Singapore. The LOU therefore currently stands in the place of the released vessel as security in those proceedings in rem. Although there has been an arbitration award in London, the proceedings in rem in Singapore remain alive and have not been discontinued. Thus, although the LOU was expressed to be to pay on demand any sum found due in those proceedings or in the arbitration or by agreement, since the Singapore Court is still seized of the proceedings, it is that court in that jurisdiction which has immediate control over the security. Unless the parties agreed that the security should cease to secure the claim in the Singapore action and consented to the release of the LOU as such security, I infer that it could be released only by order of the Singapore court. It is accordingly in that jurisdiction where the security represented by the LOU can be released. It is therefore in my judgment in that jurisdiction that the security given by the Club is located for the purposes of Article 13.2.
72. In view of the way in which this issue was presented in argument on this application it is right that I should comment briefly on the location of the security if, contrary to my judgment, that depends upon where it was provided in a sense different to that which I have described above. I would hold that the relevant test would be the place where it

was deployed for the purpose of procuring the release of the ship under arrest. The fact that the Club submitted to the non-exclusive jurisdiction of the English courts and agreed to accept any demand in London indicates that although the purpose of the LOU was to operate as security in respect of the claim in Singapore its physical and substantive location was in London and not Singapore.

73. I therefore conclude that by reason of the fact that Singapore is not a State Party to the 1976 Convention, there is no basis for the operation of Article 13.2. It follows that this provision cannot provide the basis for restraining Chin Tai from making demand under the LOU.

Article 13.3

74. In case this conclusion is wrong, it is necessary to consider Article 13.3. The issue is whether a limitation fund which has already been constituted is “actually available” before a limitation decree has been made and liability has been admitted or determined.

75. These words were also to be found in a similar context in Article 2(4) of the 1957 Convention. In Polish Steam Ship Co v. Atlantic Maritime Co [1985] QB 41, the Court of Appeal had before it the issue whether compound interest which had accumulated on a payment into court as a limitation fund of the limitation amount plus simple interest prior to a decree should be paid out to the shipowner or should be available for distribution to claimants. For the purpose of resolving this issue, Eveleigh LJ. considered whether it could be said that a shipowner who constituted a limitation had any continuing interest in that fund. In holding that he did, Eveleigh LJ. with whose judgment Griffiths LJ. agreed, said this at p52:

“For reasons which I have already stated I see no obligation on the plaintiffs to pay in a sum of money in respect of interest in order that the payment in might be treated as effective for determining the date of the conversion rate when the limitation figure has to be ascertained. Furthermore, I do not regard the amount paid in as constituting immediately a limitation fund which is to be dealt with in the same way as the fund ultimately brought into court following a decree. The payment in provides money from which such a fund may be constituted if and when the limitation figure is determined. I therefore cannot accept the contention that section 1(4) of the Act of 1958 provides a mechanism for payment into court (prior to a limitation decree) of a “limitation fund” which can be treated as though it were the fund constituted after decree. It provides a person who wishes to pay into court with the means of determining the amount which he may effectively pay in.

The Convention applies, according to article 7, whenever it is sought to limit the liability before the court of a contracting state or to procure the release of a ship or other property arrested or the bail or other security given within the jurisdiction of a contracting state. There are thus two aspect of the Convention, namely the limitation of liability and the release of arrested property or security. The provisions as to release which are contained in article 5 operate when

‘a shipowner is entitled to limit his liability ... and If it is established that the shipowner has already given satisfactory bail or

security in a sum equal to the full limit of his liability under this Convention and that the bail ... so given is actually available for the benefit of the claimant in accordance with his rights.’

There may be many claimants. It could be that a limitation action has begun in this country, and there has been a payment into court but the defendants (who may not include the arresting party) dispute the right to limit. It could not in such a case be said that the money in court was ‘available’ for the benefit of the arresting party. The words ‘entitled to limit his liability’ in article 5 must be read as meaning where such entitlement has been established.

By article 2 of the Convention it is provided that the limit of liability shall apply to the aggregate of the claims which have arisen on any distinct occasion. In respect of those claims the total sum may be constituted as one distinct limitation fund. Once that fund has been constituted

‘no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant;’ article 2(4).

Again the fund cannot be said to be actually ‘available’ for the benefit of the claimant, at least where there is more than one, until the right to limit has been established or at least accepted. These provisions seem to indicate that the sum of money paid into court is not to be treated as a limitation fund belonging to the claimants.”

76. Neither Griffiths LJ. nor Kerr LJ. expressly dealt with the meaning of “actually available” in Article 2(4), the provision which had a function similar to Article 13.1 of the 1976 Convention. It was submitted on behalf of ICL that these remarks were obiter because there was no application for relief under section 5 of the Merchant Shipping Act 1958 which reflected Article 5 of the 1957 Convention which was the predecessor of Article 13(2) of the 1976 Convention. Although it is true that there was no application for such relief, the analysis of the meaning of the 1957 Convention by Eveleigh LJ. was for the purpose of testing his construction of provisions of the 1958 Act which was an integral part of his reasoning in arriving at his decision on the central issue on that appeal. The remarks, therefore, although technically obiter must be accorded great weight in construing the 1976 Convention if the 1957 Convention contains no material differences from 1976 Convention. However, Article 5(1) of the 1957 Convention was prefaced by the words “When a shipowner is entitled to limit his liability under this Convention”, as distinct from Article 13.2 of the 1976 Convention – “where a limitation fund has been constituted in accordance with Article 11”. This difference in wording is clearly at least relevant to the construction of the words “actually available”.
77. In The BOWBELLE, supra, Sheen J., who was an expert on the procedure of the Admiralty Court, observed at pages 1335-1336:

“I return to consider the Convention of 1976, under which shipowners agreed to a higher limit of liability in exchange for an almost indisputable right to limit their liability. The effect of articles 2 and 4 is that the claims mentioned in article 2 are subject to limitation of liability unless the person making the

claim proves (and the burden of proof is now upon him) that the loss resulted from the personal act or omission of the shipowner committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This imposes upon the claimant a very heavy burden.

But regardless of whether a claimant contends that he can prove that the shipowner was guilty of conduct barring limitation, the combined effect of articles 2 and 13 is that a shipowner can only be compelled to constitute one fund in accordance with article 11. Article 2 sets out the categories of claims which are subject to limitation of liability. The claims against the owners of the *Bowbelle* come within paragraph (a). I turn now to article 13. It is clear that any claimant may bring a claim against the limitation fund in court. Therefore by virtue of paragraph 3 the rules set out in paragraph 1 and 2 apply. Paragraph 1 makes it clear that any person who has made a claim against the fund in court is not entitled to arrest any ship in the same ownership as the *Bowbelle*.

Any person who has a claim against the owners of the *Bowbelle* (but has not yet made a claim against the fund) has “a claim which may be raised against the fund”. The fund has been constituted in London which is “the port where the occurrence took place.” Accordingly, if one of the ships named in the praecipe were to be arrested the court would be bound to order its release. The fund has been constituted by the owners of the *Bowbelle* in accordance with article 11 in “respect of claims subject to limitation”. Those last six words clearly refer to the categories set out in article 2. The draftsman has omitted the words “which appears to the court to be founded on a liability to which a limit is set” which led to the decision in *The Wladyslaw Lokietek* [1978] 2 Lloyd’s Rep 520. The court is not required to investigate the question whether the shipowner has been guilty of conduct barring limitation. In these circumstances commonsense dictates that there should be some machinery by which warning can be given to would-be arresters that they should not arrest any of the ships belonging to the owners of the *Bowbelle*. The current Rules of the Supreme Court have not made provision for this situation. Until such provision is made shipowners, who wish to provide some protection against unnecessary dislocation of trade caused by the arrest of their ships, should file in the Admiralty and Commercial Registry a praecipe which must be signed by their solicitors who must undertake to acknowledge service of the writ in any action which may be begun against the owners of the ship in question and state that a limitation fund in respect of damage arising from the relevant incident has been constituted by payment into court of the appropriate amount.

Any person who has a claim arising out of the same incident and who wishes to contend that the conduct of the shipowner bars his right to limitation may nevertheless pursue that allegation but he will not have the security provided by the arrest of ship.”

78. Thus, as from the date of that decision, the procedure of the Admiralty Court was such that effect was given to Article 13 by means of the procedure proposed by Sheen J. in the last two paragraphs, the point of central importance being that the 1976 Convention having not only imposed a lower fault threshold for the shipowner’s

entitlement to limit but also reversed the burden of proof in respect of that threshold, once a limitation fund had been established, the accumulation of additional security by claimants against the shipowner was barred unless and until disentitlement to limit was established. In other words in so far as English Admiralty procedure was concerned, the absence of a limitation decree was not treated as a bar to the operation of Article 13.1 and 13.2. Hence “actually available” in Article 13.3 was implicitly construed as meaning that the limitation fund should at the relevant time be in place in accordance with the procedure of the English or other court and should be ultimately available to secure the claimant’s claim subject to limitation.

79. The introduction of the CPR 67.7(2)(b) caution procedure has given continuing effect to this procedure and continues to reflect the construction of Article 13(3) exemplified in The BOWBELLE.

80. In The BOS 400 supra, the issue arose whether there was as a matter of jurisdiction a bar to the grant of a limitation decree unless the underlying liability had first been established by admission or finding. In support of the proposition that it was not, reliance was placed on Article 13 and it was argued that

“if it were open to a shipowner to obtain a limitation decree before liability was admitted or established, the bars contained in article 13.3 and the release of the shipowner’s arrested vessel would not be available even though a limitation decree had been obtained.”

The scheme of 1976 Convention therefore required liability to be established before a limitation decree was granted.

81. In testing this argument Sir John Knox considered the meaning of Article 13. He did so on the assumption that the Polish Steam Ship Co Case, supra, was directly relevant to the construction of Article 13.3 and, apparently, that there was no material distinction in wording between 1957 and the 1976 conventions. In rejecting the argument he said this, at page 473L:

“What does appear from the Polish Steam Ship case, if authority is needed for the proposition, is that until both liability is established and a limitation decree granted, the mechanism in the 1976 Convention for protecting shipowners entitled to limit their liability thereunder does not become operational. There is nothing extraordinary in this. No one suggests that a shipowner gets the benefit of the bar on other actions and the release of arrested ships provided for by article 13.1 and 13.2 until a limitation decree has been granted but it is common practice to constitute the limitation fund well before that decree. So there is, so to speak, a hold-up in the availability of the remedies to shipowners pending the grant of the limitation decree. I am unable to see that there is any fatal infringement of the scheme of the 1976 Convention if there is a further hold-up of the availability of those remedies during such period (if any) as elapses between the grant of the limitation decree and the establishment by admission or determination of the shipowner’s liability. That further delay would be the price of the shipowner paid for continuing to contest liability.”

82. This observation was clearly obiter. Further, the decision of Sheen J. in The BOWBELLE, supra, was surprisingly not cited.

83. In determining how, before this court, effect should be given to Article 13.3 I must have regard to the English procedural structure in place and to the foundation for it. In so doing, I have no doubt that it is correct to approach Article 13 in the manner of Sheen J. in The BOWBELLE and not as indicated by Sir John Knox in The BOS 400. The correct construction of Article 13.3 is thus that a limitation fund established in this country is actually available to a given claimant notwithstanding there being no limitation decree at the material time. That availability continues unless and until a claimant discharges the burden of proving that the shipowner is not entitled to the decree.
84. Accordingly, I conclude that, if I am wrong in concluding that there is no bar in respect of the LOU under Article 13, the absence of a limitation decree at this stage would not be a ground for refusing the release of that security.

Conclusion

85. I have held that:

- (i) the shipowners, ICL, were entitled to constitute a limitation fund in England and
 - (ii) the effect of Article 13 is such that security located in Singapore does not fall within that Article and is not required by it to be released.
86. Argument as to whether, if I am against ICL on jurisdiction, the injunction should be discharged has been reserved. However, no argument has been addressed as to how my discretion should be exercised on the basis that there is jurisdiction but that there is no bar to the enforcement of the LOU. It is appropriate that the parties should have the opportunity of such further argument at an early date following the handing down of this judgment.