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Jurisdiction holds key to security terms under Limitation Convention

Recent case outlines difficulties associated with effecting an arrest, writes Ardna Delissen-Curran*

Mr Justice Colman's recent decision in the Commercial Court in the case of *ICL Shipping v Chin Tai Steel* makes interesting reading for both cargo claimants and ship owners alike.

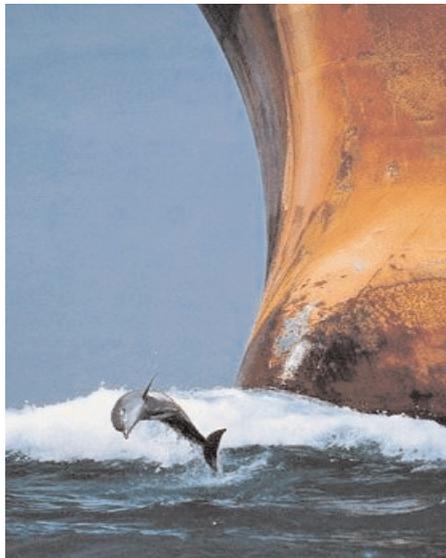
It will undoubtedly be the subject of further argument in subsequent cases for years to come.

Dolphin Maritime has been involved in this case from the outset following the tragic collision between the *ICL Vikraman* and the *Mount I* in the Malacca Straits in September 1997 in which the lives of 29 of those on board the *ICL Vikraman* were lost.

It acts as the recovery agent for a number of cargo interests and their insurers, including Chin Tai Steel, the defendants in the Colman decision. Chin Tai was the holder of a bill of lading in respect of 10,078 tonnes of steel casting billets for carriage from Poland to Taiwan on board the *ICL Vikraman*. All cargo carried on board the vessel was lost in the collision.

Dolphin arrested a sister ship of the *ICL Vikraman*, the *ICL Raja Mahendra*, in Singapore in April 1998 in Admiralty in Rem No.236 of 1998. Singapore is a party to the 1957 Limitation Convention. Security was posted under protest, there being a disagreement between ourselves and the owners as to its terms. The vessel was released.

Thereafter ICL applied to the Singapore High Court and ultimately the Singapore Appeal Court to have the wording varied and the varied security was provided in a Letter of Undertaking (LoU) by ICL's P&I Club, The Steamship Mutual Underwriting Association (Bermuda) Ltd, on December 16, 1998. In the LoU, the club undertook to pay on demand any sum due in damages, interest and costs



under arbitration in London provided that its total liability did not exceed \$4.5m.

The LoU was not subject to the owner's right to limit as the owners had wanted. **Dolphin's** understanding was that the Singapore court would not order such a restrictive wording.

As recorded in the judgment of Colman J, Chin Tai subsequently pursued its claim in arbitration in London.

On April, 9, 2003, an interim final award was published which concluded that Chin Tai's claim succeeded against the carrying vessel *ICL Vikraman* on the basis that the ship-owners had failed to exercise due diligence to make the vessel seaworthy at or before in the commencement of the voyage. Chin Tai was awarded the sum of \$2,696,127.15 plus interest.

Shortly before the award was published, as recorded in the judgment of Mr Justice Colman, ICL and the Club came to appreciate that if, as proved

to be the case, Chin Tai was successful in the arbitration, they could draw on the LoU without regard to the application of the 1976 Limitation Convention.

Accordingly, on March, 18, 2003, ICL and the club issued a limitation claim and established a limitation fund in England by making a payment into court of £6,265,288.77.

Chin Tai's proportion of this fund was calculated to be £1,068,097 (\$1,687,593) a sum significantly less than the sum awarded by the tribunal. ICL also obtained ex parte, an injunction from Moore-Bick J preventing **Dolphin's** client from making any demand on the LoU as well as an order permitting service of the claim form in the Limitation proceedings out of the jurisdiction.

Chin Tai, having arrested in a jurisdiction which is party to the 1957 convention and having been provided with security in that jurisdiction, found itself faced with an injunction preventing it from calling on that security because ICL commenced limitation proceedings in a state which is party to the 1976 convention.

ICL's concern, no doubt, was to avoid having to limit in a jurisdiction where it would have the burden of proving the loss of cargo occurred without its actual fault or privity.

Accordingly, Chin Tai applied to the High Court to have service of the limitation action against it set aside (an application which was denied) and to have the injunction of Moore-Bick J set aside. ICL applied for release of the LoU under Article 13.2 of the 1976 Convention.

Other issues involved in the case were whether the term "legal proceedings" in Article 11 of the Convention included the commencement of arbitration. Article 11.1 provides that the entitlement of a shipowner to constitute a limitation fund is conditional upon "legal proceedings" having

been instituted against that person in the state party in which the fund was to be established.

Another issue was whether the application under Article 13.2 was excluded by Article 13.3 because the fund set up in England was not "actually available" as required by Article 13.3, given that ICL had not at that time obtained a limitation decree. Colman J ruled that the institution of legal proceedings included arbitration and that a limitation fund is "actually available" in the absence of a limitation decree.

The most interesting aspect of this case is undoubtedly that resting on the interpretation of Article 13.2, namely whether owners are entitled to the return of the LoU upon establishment of the limitation fund. Article 13.2 of the 1976 Limitation Convention provides as follows:

"...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..."

ICL argued, among other things, that the purpose of Article 13.2 was to facilitate the release of all security once a limitation fund had been established and that the jurisdiction of the court to release any security given was not restricted or limited in any way in that the 1976 convention provides no geographical limit in relation to the security which can be released by Article 13.2.

It was submitted that the court administering the fund was the court with power to release pre-existent security.

It also argued that if Article 15 (see below) did impose a geographical limit on the security which could be released under Article 13.2, that in the present case the security was given in England where the fund was established and therefore within the scope of control imposed by Article 15.

It was argued on behalf of Chin Tai that Article 13.2 does not confer jurisdiction on the English court to release the LoU and that on the true construction of Article 13.2, the court has no jurisdiction to order the release or return of security provided in order to obtain the release of a vessel arrested in a jurisdiction that is not a State



Sinking after collision: 'shipowners and P&I clubs should be more dedicated to agreeing security terms, rather than leaving it in the hands of a foreign court.'

Party to the 1976 Limitation Convention.

It was further argued that the 1976 convention cannot be given such a draconian effect over security obtained in jurisdictions which are not party to the convention and that the true construction of the convention advocated by Chin Tai is made clear by Article 15, which describes the scope of the Convention as follows:

"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..."

Chin Tai's argument quite simply is that as the security was given in Singapore, which is not a state party, the court does not have the power under Article 13.2 or otherwise to require Chin Tai to give it up.

Colman J ruled that the security regime provided by the convention is clearly confined to states that are party to it and that the convention cannot be construed as to create a power in courts of one state party to interfere by order with the jurisdiction of a non-state party.

He found that the security given in the present case was given in Singapore as security in a pending in rem action following the arrest of an ICL vessel.

He concluded therefore 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 and that the said article cannot provide the basis for restraining Chin Tai from making demand under the LoU. He further concluded that the LoU could only be released by the Singapore court.

The application for the release of the injunction was reserved. Mediation was ordered and the matter has subsequently been settled.

This case would undoubtedly have produced more interesting debate and argument on the appeal and cross appeals which would have ensued had the matter not been resolved.

As it stands the decision provides food for thought for those operating in the industry and will make those involved more acutely aware of the strategy in effecting an arrest and the wider implications of the terms of an LoU ordered by a court who is not party to the 1976 convention.

It may make owners and clubs more dedicated to agreeing security issues rather than leaving it in the hands of foreign courts.

1. ICL Shipping Ltd and anor v Chin Tai Steel case no 2003 folio 268.

* Ardna Delissen-Curran is managing director of Dolphin Maritime. Chin Tai was legally represented in this matter by Daire O'Keefe & Co (English solicitors operating out of Northern Ireland) using Howard Kennedy as the London agents. Counsel for Chin Tai were Lionel Persey QC and Michael Davey. Ince & Co represented ICL and The Steamship Mutual Underwriting Association (Bermuda) Ltd. Counsel were Nigel Teare QC and Nigel Jacobs.



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