IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB Insurance Company
Plaintiff
v
Eleni Martime
Defendant

Civil Case No. 2014-050

**CERTIFICATE OF SERVICE**

I, Tanya Lomae, Asst. Clerk of the Courts, hereby certify that on 7/27/17

I served the Scheduling Order Regarding Discovery And Dispositive Motions Concering Liability

filed 07/27/2017 in the above captioned matter on:

1. Dennis Reeder by ☑ Email ☐ Fax ☐ Personal Hand Delivery
2. Tatyana Cerullo by ☑ Email ☐ Fax ☐ Personal Hand Delivery
3. David Lowe by ☑ Email ☐ Fax ☐ Personal Hand Delivery
4. _____ by ☐ Email ☐ Fax ☐ Personal Hand Delivery

Attached is a copy of my ☒ Sent Email / ☐ Fax Confirmation.

Tanya Lomae
Asst. Clerk of the Courts
Marshall Islands Judiciary

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# HC CA -2014-050, 2015-110, and 2015-195

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**Dennis Reeder**
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**Marshall Islands Judiciary** <marshall.islands.judiciary@gmail.com> 12
to Dennis, Tatyana, David

Iakwe Counsel,

Please view file-stamped copies of the above filing and the Scheduling Order Regardi
Concerning Liability in CA 2014-110, 2014-050, and 2015-194, and kindly confirm rec

Kommol,
Tanya

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ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*

**Plaintiffs,**

**v.**

ELENI Maritime Limited *in personam* and Empire Bulkers Limited

**Defendants**

**H.Ct. Civil No. 2014-110**
**H.Ct. Civil No. 2014-050**
**H.Ct. Civil No. 2015-194**

~~**JOINT PROPOSED**~~ **SCHEDULING ORDER REGARDING DISCOVERY AND DISPOSITIVE MOTIONS CONCERNING LIABILITY**

**JOINT PROPOSED SCHEDULING ORDER REGARDING DISCOVERY AND DISPOSITIVE MOTIONS CONCERNING LIABILITY**

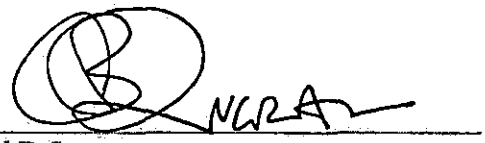
Pursuant to the Court's instructions during the status conference of July 14, 2017 (Majuro Date), the parties have agreed to the following Joint Proposed Scheduling Order (all Honolulu/New Orleans dates) regarding Discovery and Dispositive Motions concerning Liability only:

- **15 September 2017** - deadline for completion of liability discovery;
- **20 September 2017** - simultaneous deadline to file dispositive liability motions;
- **11 October 2017** - simultaneous deadline for oppositions to dispositive liability motions;
- **18 October 2017**- simultaneous deadline for reply memoranda regarding dispositive liability motions;
- **25 October 2017** - hearing in Majuro, Republic of the Marshall Islands, on dispositive liability motions.

The above deadlines shall apply **only** to issues of liability/fault, and shall not apply to issues of quantification of damages and/or limitation of liability, which shall be subject to a separate scheduling order to be entered in due course.

Any non-liability discovery regarding damage quantification/limitation issues propounded by the parties shall be subject to the Marshall Islands Rules Of Civil Procedure (eff. May 18, 2017).

DATE: July 27, 2017 (Majuro Date)



Carl B. Ingram
Chief Justice, High Court

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JUL 27 2017
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REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*

**Plaintiffs,**

v.

ELENI Maritime Limited *in personam* and Empire Bulkers Limited

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**JOINT PROPOSED SCHEDULING ORDER REGARDING DISCOVERY AND DISPOSITIVE MOTIONS CONCERNING LIABILITY**

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JUL 27 2017

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*

**Plaintiffs,**

**v.**

ELENI Maritime Limited *in personam* and Empire Bulkers Limited

**Defendants**

**H.Ct. Civil No. 2014-110**
**H.Ct. Civil No. 2014-050**
**H.Ct. Civil No. 2015-194**

**JOINT PROPOSED SCHEDULING ORDER REGARDING DISCOVERY AND DISPOSITIVE MOTIONS CONCERNING LIABILITY; CERTIFICATE OF SERVICE**

Plaintiffs, by and though Dennis J. Reeder and James Roussel and Christopher Hannan, *pro hac vice*; together with Defendants, by and through Tatyana Cerullo and David Lowe; respectfully submit the attached Joint Proposed Scheduling Order regarding Discovery and Dispositive Motions concerning Liability pursuant to the Court's instructions during the status conference of July 14, 2017 (Majuro Date).

7/27/17

Dennis Reeder — Majuro Date
Attorney for Plaintiffs

Tatyana Cerullo

July 27, 2017

Tatyana Cerullo — Majuro Date
David Lowe
Attorneys for Defendants ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED

**-OF COUNSEL-**
BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, PC
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channan@bakerdonelson.com

Any non-liability discovery regarding damage quantification/limitation issues propounded by the parties shall be subject to the Marshall Islands Rules Of Civil Procedure (eff. May 18, 2017).

DATE: July 27, 2017 (Majuro Date)

Carl B. Ingram
Chief Justice, High Court

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JUL 27 2017
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REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*

**Plaintiffs,**

**v.**

ELENI Maritime Limited *in personam* and Empire Bulkers Limited

**Defendants**

**H.Ct. Civil No. 2014-110**
**H.Ct. Civil No. 2014-050**
**H.Ct. Civil No. 2015-194**

**CERTIFICATE OF SERVICE**

## CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, Majuro date, a true and correct copy of the Joint Proposed Scheduling Order was served on Tatyana Cerullo and David Lowe, Attorneys for Defendants, by sending to them via email transmission in pdf format to:

TC.LAW.llc@gmail.com and TC.LAW.llc@gmail.com and davidloweesq@gmail.com.

Dated: 7/27/17 (Majuro date).

Dennis Reeder
Attorney for Plaintiffs

**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

| | |
|---|---|
| CHUBB INSURANCE (CHINA) COMPANY LTD, ET AL.,<br><br>plaintiffs,<br><br>v.<br><br>ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED,<br><br>Defendants. | CIVIL ACTION No. 2014-050 |
| CHUBB INSURANCE (THAILAND) COMPANY LTD, ET AL.,<br><br>plaintiffs,<br><br>v.<br><br>ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED,<br><br>Defendants. | CIVIL ACTION No. 2014-110 |
| FEDERAL INSURANCE COMPANY KOREA, ET AL.,<br><br>plaintiffs,<br><br>v.<br><br>ELENI MARITIME LIMITED in personam and EMPIRE BULKERS LIMITED,<br><br>Defendants. | CIVIL ACTION No. 2015-194<br><br>**SUMMARY OF CONSULTATIONS ON SCHEDULING** |

FILED
JUL 24 2017
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REPUBLIC OF THE MARSHALL ISLANDS

TO: Dennis Reeder, counsel for plaintiffs
David Lowe, counsel for the defendants

Having consulted with counsel, the Court on July 14, 2017, calendared motions in this matter for argument on October 25, 2017, at 9:00 a.m.. Counsel were to agree to a briefing schedule and confirm the hearing date.

In this connection, the Court attempted to contact counsel earlier today for a conference call. The Court was unable to reach defendants' counsel, Ms. Cerullo or Mr. Lowe. However, the Court belatedly recalled that today is not a business day in the United States. At any rate, the Court was able to reach Mr. Reeder, who advised the Court that the parties are indeed working on a stipulated briefing schedule.

The Court is pushing for confirmation, as over the past several months the Court has experienced an increase in the filing of complex nonresident-corporation cases. With this increase in cases has come an increase in the High Court's workload. To avoid any unnecessary delay, the undersigned would appreciate counsel's confirming the briefing scheduling and the proposed hearing date as soon as convenient. The Court recognizes counsel's efforts to move this case forward.

Entered and dated: July 24, 2017.

Carl B. Ingram
Chief Justice, High Court

Dennis J. Reeder
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P.O. Box 601
Majuro, MH 96960
Telephone: +1-692-625-3602
808-352-0749
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Attorney for Plaintiffs

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JUN 06 2016
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REPUBLIC OF THE MARSHALL ISLANDS

IN THE
HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

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|---|---|
| Chubb Insurance (China) Company Ltd., et. al.,<br><br>Plaintiffs,<br><br>vs.<br><br>Eleni Maritime Limited, in personam, and Empire Bulkers Limited<br><br>Defendants. | CIVIL ACTION NO. 2014-050<br>CIVIL ACTION NO. 2014-110<br>CIVIL ACTION NO. 2015-194<br><br>**Opposition to Motion For Summary Judgment, Exhibits A through E, Certificate of Service** |

The Plaintiffs, through counsel, respectfully submits its Opposition to Defendants Motion for Summary Judgment, with attached Exhibits A through E, and a Certificate of Service.

6/3/16

DENNIS J. REEDER Date

Dennis Reeder (Marshall Islands Bar Certificate No. 80)
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Majuro, MH 96960
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Attorneys for Plaintiffs

**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

| | |
|---|---|
| Chubb Insurance (Thailand) Company Ltd, Tok Marine & Nichido Fire Insurance Co Ltd, *et al.*<br><br>**Plaintiffs,**<br>**v.**<br><br>ELENI Maritime Limited *in personam* and Empire Bulkers Limited<br><br>**Defendants** | **H.Ct. Civil No. 2014-110**<br>**H.Ct. Civil No. 2014-050**<br><br>**MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; CERTIFICATE OF SERVICE** |

## OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The ELENI Defendants[1] commence their Motion for Summary Judgment ("ELENI MSJ") with strongly worded *ad hominem* bluster about "empty rhetoric," supposedly "irrelevant facts,"[2] *ipse dixit* statements about what they perceive to be "conjecture about international law"[3] and sophomoric references to pigs and truffles.[4] These philippics have no place in this Court, and are

[1] This Memorandum will use all shorthand terms as previously defined in Cargo Plaintiffs' December 9, 2014 Motion for Declaratory Judgment ("Clash of Conventions Motion").

[2] This suggestion is ironic, given that the ELENI Defendants themselves have pointed this Court to *objectively inapplicable* treaties to which the RMI *is not even a party* (*see* ELENI Defendants' Reply in Support of Motion to Dismiss for FNC, p. 10, referencing 1969 Vienna Convention on the Law of Treaties, to which the Marshall Islands is not a party); and made the *objectively inaccurate* statement that "[n]o other Asian jurisdiction, except Japan, has adopted" the 96 Protocol (*id.* at p. 5), which is wrong given that (at the time of their Reply) India, Mongolia, Malaysia, Palau, Tonga, Tuvalu, and Niue (all Asian/Asian-Pacific countries) had signed the 96 Protocol, and Hong Kong itself had (at least by domestic legislation) adopted the 96 Protocol as well. *See* https://imo.amsa.gov.au/public/parties/ll-mc96protocol.html (summarizing country-by-country ratification information); *see also* Hong Kong SAR Legislative Council Paper No. LS22/04-05 (Feb. 4, 2005) (summarizing bill to adopt 96 Protocol limits), *available at* http://www.legco.gov.hk/yr04-05/english/hc/papers/hc0204ls-22e.pdf. This is also ironic given the ELENI Defendants' inequitable conduct in this case. *See* Cargo Plaintiffs' April 22, 2016 Supplemental Reply, at pp. 9-10.

[3] ELENI Defendants' unfounded assertion that Cargo Plaintiffs have merely offered "conjecture about international law" (p. 1) is demonstrably wrong in light of the numerous treatises, articles, statutory provisions, legislative documents, academic references, and drafting materials (from various entities responsible for drafting maritime law conventions). In any event, the three expert declarations offered as exhibits to this Opposition (and further materials referenced therein) definitively prove that Cargo Plaintiffs' positions in this case are NOT mere conjecture.

[4] This is an unfortunate turn in rhetoric by the ELENI Defendants, given the Court's prior commendation and recognition to all parties that "the moving papers and counsel's argument [were] excellent - very lucid and complete"

merely an attempt to distract from what has been (from the outset when the ELENI Defendants *themselves first raised issues of limitation* in their initial FNC pleading, through their *continued pursuit of limitation to this day* in the very motion before the Court) the clearly defined, precisely framed issue concerning the plain terms of M.I. Rev. Code Title 47, chapter 5 ("LLMCA"): is this Court bound under the law of the RMI – a strictly, constitutionally **dualist** jurisdiction[5] – to recognize the 76 Convention and defer to the HK Limitation Suit, or does the express language of the RMI LLMCA require the ELENI Defendants to constitute 96 Protocol fund (if they wish to limit liability at all)?

And on this exact "Clash of Conventions" issue, the Court need look no further than the plain language of the LLMCA, and the **identical** circumstances of the Bombay Decision, where the ELENI Defendants tried to make the **identical** arguments they are making in this Court. The India Court rejected their arguments and held that in India, a dualist jurisdiction that remains a party to both the 76 Convention and the 96 Protocol *just like the RMI*, but whose domestic enactment of the 96 Protocol effectively nullifies any effect of the 76 Convention *just as in the RMI*, the HK Limitation Suit **has no effect at all**.[6] The same analysis applies under RMI law.

Cargo Plaintiffs hereby adopt, and incorporate as if copied herein *in extenso*, all their prior arguments, briefing and authorities regarding the "Clash of Conventions" issue.[7] And to be clear,

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during the prior FNC Motion proceedings, which to a large extent involved the same "Clash of Convention" issues currently before the Court. Cargo Plaintiffs have endeavored in all submissions to provide the Court clear and concise argument, supported by definitive and comprehensive sources and authorities.

[5] *See* Constitution of the Republic of the Marshall Islands, Article V, Section 1(4) ("No treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this Constitution shall, of itself, have the force of law in the Republic."). To summarize, there are two jurisdictional theories as to how international conventions may have effect domestically in state parties. In "monist" systems, international treaties and conventions are deemed to have the force of law domestically upon accession. In "dualist" systems, however, "international and national law exist separately and cannot purport to have an effect on or overrule, the other," such that rights and obligations in international treaties and conventions "have no effect in domestic law *unless legislation is in force to give effect to them*." *See generally* Exhibit B, ¶12; Exhibit C, ¶8.

[6] Exhibit 1 to Cargo Plaintiffs' April 22, 2016 Supplemental Reply, Bombay Decision, ¶¶28-29

[7] Specifically, (1) December 9, 2014 Clash of Conventions Motion; (2) April 21, 2016 Reply Memorandum; (3) April 22, 2016 Supplemental Reply (per Court Order of April 21, 2016). Cargo Plaintiffs likewise incorporate herein all

the ELENI Defendants' contention (through Prof. Davies) that this case does not involve a "clash of conventions" is demonstrably and practically nonsense: "If that were so [there would be no need for the various] expert opinions [submitted to] this Court."[8] Rather, "[d]ue to the separate nature of both treaties, where their provisions are not compatible or where the parties are not the same, there is a 'clash of conventions' just as there was between"[9] the 76 Convention and the prior 1957 Convention as discussed in the Best Admiralty Bargain article.

Further, Cargo Plaintiffs include with this Opposition the expert declarations of John D. Kimball (expert regarding United States general maritime law, "US GML," issues); Prof. Norman Augusto Martínez Gutiérrez (expert regarding international convention/domestic law implications of the 76 Convention and 96 Protocol in the RMI); and Prof. Edward T. Swaine (expert regarding general principles of interpretation of international conventions viz. domestic enactment in dualist jurisdictions like the RMI) in response to the declarations offered by the ELENI Defendants.[10] To be clear Cargo Plaintiffs *do not and have never* considered this to be a case requiring expert testimony, as the issues implicated by the "Clash of Conventions" issue are pure issues of RMI law that this Court is wholly capable of determining without the input of legal expertise. Indeed, jurisprudence is clear that "legal experts" purporting to instruct a court on application of the law are inherently improper.[11] Nonetheless, Cargo Plaintiffs are compelled to respond to the

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points and authorities bearing on the "Clash of Conventions" issue raised during oral argument of the ELENI Defendants' previously denied FNC Motion.

[8] Exhibit A, ¶18(h).

[9] Exhibit B, ¶20.

[10] *See* Exhibits A-C (expert declarations with *curriculum vitae* information required by MIRCP Rule 26(b)).

[11] "Courts have consistently been reluctant to permit legal experts to testify as to matters of domestic law." *Woodard v. Andrus*, 2009 WL 140527 (W.D. La. Jan. 20, 2009). And "[t]he principle that legal opinion evidence concerning the law is inadmissible is so well-established that it is often deemed a basis [sic] premise or assumption of evidence law - a kind of axiomatic principle." *The Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005). Thus, "courts typically prohibit lawyers, professors, and other [purported legal] experts from interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case." *Id.* at 1042. Cargo Plaintiffs reserve the right pursuant to M.I. Rev. Code Title 29, §140, to seek recovery of the costs of retaining these responsive experts.

inaccuracies in the purported expert declarations of Prof. Martin Davies (whose independence is questionable given his status as a retained consultant for ELENI Defendants' Hong Kong counsel)[12] and A.T. Chenault (whose declaration is notably lacking citation of authorities for the majority of its broad-ranging statements purporting to comment on international treaty law, for which he *has no demonstrable expertise* per his own C.V.), and believe that doing so through independent opinions is the best way to refute these declarations.

In short, Cargo Plaintiffs' position is now, as it has been all along, very simple in its essence: the RMI LLMCA statutes **only recognize** a 96 Protocol fund, and the ELENI Defendants' 76 Convention fund in Hong Kong has no bearing and no effect on this case under the express and unambiguous terms of the LLMCA. Moreover, to allow the ELENI Defendants (which are RMI-incorporated entities operating an RMI-flagged vessel) to force Cargo Plaintiffs into the 76 Convention HK Limitation Suit, which is fundamentally contrary to the public policy of the RMI pursuant to the Nitijela's enactment of the 96 Protocol into RMI law, would render the Nitijela's adoption of the 96 Protocol meaningless, as any RMI shipowner would simply be able to retreat to a lower limit jurisdiction in avoidance of RMI law. For all these reasons, the ELENI MSJ fails as a matter of law.

In addition to this dispositive result via the straightforward application of the LLMCA, there are numerous other factors - both legal and equitable - that support Cargo Plaintiffs' position on the "Clash of Conventions," refute the ELENI Defendants arguments and those of their experts, and preclude dismissal of Cargo Plaintiffs' claims as requested in the ELENI MSJ.

## I. LAW AND ARGUMENT IN OPPOSITION TO ELENI MSJ

### A. Responsive Statement of Contested/Uncontested Facts

[12] *See* http://www.nortonrosefulbright.com/people/46220/martindavies.

Cargo Plaintiffs submit a Responsive Statement (Exhibit E) to the 44-paragraph Statement of Undisputed Facts and Applicable Law included at pp. 1-5 of the ELENI MSJ.

**B. The Provisions of the LLMCA as Enacted by the Nitijela preclude any Effect of the HK Limitation Suit or the 76 Convention on these Proceedings.**

Before responding to the various sections of the ELENI MSJ, Cargo Plaintiffs must reiterate the overarching, eminently simple and straightforward basis for the Clash of Conventions motion, and for the fundamental irrelevance and lack of effect of the HK Limitation Suit that is the entire foundation of the ELENI MSJ: **the RMI is a strictly dualist jurisdiction, and the Nitijela has enacted positive, domestic statutes in the LLMCA that are antithetical to, and thus render inapplicable, the 76 Convention in any proceedings before this Court.**

This conclusion, originally explained at pp. 11-22 of the Clash of Conventions Motion, derives from the plain language of numerous provisions of the LLMCA; no expert opinions can further elucidate the simple, plain-reading of the words the Nitijela has enacted into RMI law.

**1) The RMI is a Dualist Jurisdiction**

And because the RMI is a strictly and expressly dualist jurisdiction pursuant to Article V, Section 1(4) of the RMI Constitution (as even the ELENI Defendants' do and must concede through Prof. Davies), **the LLMCA statutes are the only thing that matters:**

> Under a dualist approach, the rights and obligations created by [treaties] have no effect in domestic law *unless legislation is in force to give them effect to them*. . . . Because dualist constitutions deny a privileged or special status to treaties, the provisions of a treaty that have been incorporated into domestic law have the status only of domestic law, and can be amended or repealed by later legislation. If such action were to result in a breach of the treaty, there would be *no* remedy in domestic law since there would have been no violation of it.
>
> * * *
>
> Whether the [RMI] has implemented relevant provisions of the [76] Convention and the [96] Protocol in its domestic law is decisive, in [a] dualist system, of the question whether those provisions provide a domestic court with a source of law it may apply to a suit properly before it. [And just as the Indian court (another dualist jurisdiction) in the Bombay Decision, refused to apply the 76 Convention in the face of domestic legislation in India, another dualist jurisdiction], the position of

. . . the [RMI] [is] comparable.[13]

In fact, there is a well "established principle that dualist countries can and often do deviate in their domestic legislation from the terms of international treaties they may have entered, **which is precisely what the [RMI] Nitijela has done in enacting the [96] Protocol in the LLMCA, to the exclusion of the prior [76] Convention.**"[14]

Recognizing this fact, a working group of the Comite Maritime International (the drafting entity of both the 76 Convention and 96 Protocol) has noted this "established principle" in the particular context of the limitation conventions:

> [Upon review of the domestic enactments of various] the individual articles of the [76] Convention have been implemented practically without any change by certain countries, while they have been implemented with more significant changes or their implementation has been omitted by other countries. . .
>
> If . . . methods [other than verbatim enactment of a Convention] are chosen, such as that of adaptation of the text of the Convention to the structure of the national maritime or commercial code, **there will always be a risk of discrepancies between the Convention and the text adapted to the national codes of the States Parties as well as the risk that the international origin of domestic provisions be ignored and that the domestic provisions be interpreted under the background of the general national law rather than [the Convention].**[15]

In short, pursuant to the express mandate of dualism under RMI Constitution Article V, Sec. 1(4), which binds this Court,[16] the 76 Convention has no effect in these proceedings:

> The LLMCA, as amended, expressly incorporates the provisions of the [96] Protocol to the deliberate exclusion of the [76] Conventio[]n . . . Therefore the [76] Convention must be regarded as an unimplemented treaty that cannot create legal effects under national [RMI] law, and "*cannot prevail over statutes* . . . ."[17]

In other words, the "Clash of Conventions" inquiry **begins and ends with the LLMCA.**

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[13] Exhibit C, ¶8, ¶15 (citations omitted).

[14] Exhibit B, ¶24 (emphasis added). *See also* Best Admiralty Bargain, at p. 154.

[15] Comite Maritime International, Yearbook/Annuaire 200, pp. 437, 444 (emphasis added) *available at* http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook+2000.pdf.

[16] *See* Constitution of the Marshall Islands, Art. I, Sec. 1 ("This Constitution shall be the supreme law of the Republic of the Marshall Islands; and all judges and other public officers shall be bound thereby.").

[17] Exhibit B, ¶18.

## 2) Article 9(4) of the 96 Protocol is NOT Part of RMI Domestic Law

The lone basis for the ELENI MSJ's argument for dismissal in favor of the 76 Convention HK Limitation Suit - namely the provisions of Article 9(4) of the 96 Protocol - **fails as a simple matter of law because Article 9(4) has not been enacted by the Nitijela in any provision of RMI domestic law.** Moreover, the *exclusion* of Article 9(4) fits precisely with the Nitijela's enactment of the 96 Protocol as the **sole limitation regime** in the RMI:

> [T]he move away from the [76] Convention was a deliberate action by the Nitijela which, pursuant to the state's most recent international commitments [viz. the 96 Protocol], decided to repeal the [76] Convention and enact the [96] Protocol. Moreover, to avoid confusion as to the applicable rules under domestic law, the Nitijela purposely omitted from the LLMCA Article 9(4) of the [96 Protocol] ... This deliberate omission, not only leaves Article 9(4) outside the scope of national law, but clearly establishes the intention that the Nitijela wished to implement the [96] Protocol to the exclusion of the [76 Convention].[18]

Neither the ELENI Defendants nor their experts, dispute that the RMI is a dualist jurisdiction, or that Article 9(4) appears *nowhere* in the RMI statutes. Thus, it is effectively undisputed that Article 9(4) **has no relevance whatsoever in these proceedings.**[19]

And while the ELENI Defendants (through Prof. Davies and Mr. Chenault) argue that the RMI may have *international* obligations to Hong Kong as a result of the RMI's status as a party to both the 76 Convention and the 96 Protocol, any such *international obligations* implicate matters of diplomacy for the *executive branch* that have no bearing in these *judicial* proceedings.[20] This Court is constitutionally bound to apply *only the domestic law of the RMI*, and specifically in this case the statutory provisions of the LLMCA. "It is . . . clear that in a dualist State, Courts should not be asked to enforce international treaties when there is specific national legislation on the

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[18] Exhibit B, ¶21. *See also* Exhibit A, ¶18(b); Exhibit C, ¶¶12-15.

[19] Further, because Article 9(4) *does not apply in the RMI*, which in turn means that the *76 Convention does not apply* in the RMI, all the US GML cases cited in the Clash of Conventions Motion (i.e. *Perforaciones et al.*) are directly applicable and preclude any extraterritorial effect of the HK Limitation Suit. *See, e.g.*, Exhibit A, ¶¶3-18.

[20] *See* Exhibit C, ¶16. *See also* Constitution of the Marshall Islands, Art. V, Sec. 3(d) ("[T]he Cabinet shall be responsible for conducting the foreign affairs of the Republic, whether by treaty or otherwise[.]").

relevant subject, particularly when the legislation is *contrary* to the international treaties . . . [and] when the language of legislation implementing a treaty is unambiguous, [a court] will not look behind the legislation at the treaty."[21] Thus, again, the dualist nature of the RMI renders the ELENI Defendants' resort to principles of *international* law completely irrelevant; and their request that this Court "implement the [76] Convention is asking this Court to usurp the power of the Nitijela to legislate"[22] and to undermine the express public policy of the RMI in exclusively enacting the 96 Protocol.

Moreover, the ELENI Defendants' irrelevant reference to *international* concerns in the *judicial* proceedings before this Court is misplaced - even if considered in diplomatic terms - for another eminently practical reason: **there is not now, and effectively never has been, a policy difference between the Hong Kong SAR and the RMI with respect to the superiority of the 96 Protocol.** As mentioned in the Responsive Statement of Contested/Uncontested Facts and in the Clash of Conventions Reply Memorandum, *Hong Kong itself* domestically legislated more than a decade ago to adopt the 96 Protocol as being consistent with the "highest international standards." And perhaps more importantly, the PRC (after inexplicable delay prompting formal inquiry by the Hong Kong legislature, *see* Exhibit E ¶33) has since the commencement of this case *deposited the instrument of accession* for the Hong Kong SAR, such that Hong Kong *is now a 96 Protocol state*. And so, even if diplomatic concerns were implicated here (they aren't), *there is not now and effectively has never been a conflict* between the RMI and Hong Kong:

> The question of the law applicable within the [RMI] is distinct, it should be stressed, from whether the [RMI] owes obligations to another State [i.e. Hong Kong] as a matter of international law. It may be that failure to abide by Article 9(4) of the [96] Protocol, through the application of [RMI] law notwithstanding that provision, is inconsistent with obligations that the [RMI] owes to China [via the Hong Kong SAR] under international law - because . . . China is a State that had not (at the relevant time) ratified the [96] Protocol. Any such inconsistency, however, is a matter resolved between sovereign States on the international plane . . . . In this

[21] Exhibit B, ¶¶44-45.

[22] *Id.* at ¶11.

> regard, it is notable that China ratified the [96] Protocol (with respect to the Hong Kong [SAR]), with entry into force as of 2015. This followed the initial adoption by the Hong Kong [SAR] of the necessary legislation [in 2005 domestically enacting the 96 Protocol] albeit with what proved to be delayed effect caused by the timing of accession. These actions suggest that Hong Kong and ultimately China agreed with the . . . [96] Protocol and, derivatively, with the policy adopted by the [RMI] in [the LLMCA].[23]

Again, the ELENI Defendants reliance on the *un-enacted* provisions of Article 9(4) have no bearing on the judicial proceedings before this Court; the "Clash of Conventions" inquiry **begins and ends with the LLMCA.**

### 3) The Plain Language of Multiple Sections of the LLMCA NULLIFIES any Effect of the 76 Convention and the HK Limitation Suit

With this background established, Cargo Plaintiffs summarize the provisions of the LLMCA that nullify the 76 Convention, and render the HK Limitation Suit irrelevant to these proceedings, thus defeating the ELENI MSJ as a matter of pure statutory law:

- LLMCA §510 - Enacts the higher 96 Protocol monetary limits as the sole basis for limitation in the RMI - *to the exclusion* of the 76 Convention limits. These higher limits were enacted by amendment to the LLMCA - without repealing it entirely as it existed under the 76 Convention - for the express public policy purpose of "ensuring continuing compliance with relevant international conventions."[24]

- LLMCA §524 - Provides that "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 civil procedure law of Marshall Islands." Notably, this statute **differs critically** from the analogous provision of the 76 Convention (Article 14) from which it derives. Specifically, Article 14 provides that rules of constitution/distribution will be governed by the law of the "State Party **in which the fund is constituted**"; however, §524 provides that *regardless of where a fund is constituted*, to the extent issues of limitation arise in a court of the RMI, questions of constitution/distribution "shall be governed by the . . . law of the [RMI]." Thus, regardless of the Hong Kong court's own decision on jurisdiction in the HK Limitation Suit, **it is for this Court to decide, under RMI law, whether the HK Limitation Suit was properly "constituted"** in Hong Kong for purposes of determining whether an how the ELENI Defendants can claim limitation *in these RMI proceedings*. And because the HK Limitation Suit resulted in a *76 Convention* fund, that fund cannot be deemed "constituted" under RMI law *because only a 96 Protocol limit fund* has any effect in the RMI pursuant to §510 and (as discussed below) 521.

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[23] Exhibit C, ¶16.

[24] *See* Maritime Act (Amendment), 2006; Exhibit B, ¶¶21-22, 25-26.

- LLMCA §521 – Relatedly, this section provides that "[a]ny person alleged to be liable may constitute a fund with the Court [defined at LLMCA §508(a) as a court in the RMI or a foreign "court of competent maritime jurisdiction"] in respect of claims subject to limitation…in the…amount set out in [§] 510 [i.e. 96 Protocol limits]." Thus, under §521 no fund, inside or outside the RMI, can be deemed "constituted" for purposes of invoking limitation in an RMI Court *unless it is a 96 Protocol fund*.

    - It also bears noting here with respect to the issue of preemptive limitation (discussed further *infra*) that §521 **excludes pertinent language** in Article 11.1 of the 76 Convention from which it derives. Article 11.1 provides that a shipowner may constitute a fund in any state "in which legal proceedings are instituted in respect of claims subject to limitation," and some British courts have held that this provision allows a shipowner to constitute limitation anywhere it chooses (because the limitation proceeding itself would qualify as a "legal proceeding instituted *in respect of claims* subject to limitation"). However, **§521 does not include the phrase "in which legal proceedings are instituted,"** which is the basis for the British decisions sanctioning preemptive limitation.

- LLMCA §520 – Allows shipowners to invoke limitation as a defense in proceedings before an RMI Court, even without a fund constituted in the RMI; but also provides that if limitation is invoked without an RMI-constituted fund, "the provisions of [§522, requiring a 96 Protocol fund, see below] shall apply correspondingly."

    - Further, the ELENI Defendants argument (based on Prof. Davies' and Mr. Chenault's declarations) that a shipowner has an unfettered right to choose the jurisdiction for limitation, and can do so preemptively before any claims are filed against it, **fail under the plain language of LLMCA §520**, which is *critically different* from the language of Article 10.1 of the 76 Convention from which it derives. Specifically, Article 10.1 allows for limitation to be "invoked notwithstanding that a limitation fund has not been constituted." However, §520 provides that a defense of limitation can only be "invoked **in defense of an action**" when a limitation fund has not been constituted (and then, as explained above, only if a 96 Protocol fund has been constituted *somewhere*). Thus, the LLMCA – contrary to the 76 Convention – **requires an existing claim against a shipowner** before it can invoke limitation.[25] The ELENI Defendants reliance on jurisprudence allowing for preemptive limitation to validate the HK Limitation Suit (which is inconsistent with leading scholarship,[26] and distinguishable on its own in any event, as explained below and at pp. 5-6 of the Clash of Conventions Reply) **is totally irrelevant** because it conflicts with the positive statutory provisions of the LLMCA. And because LMCA §524 requires that RMI law alone will determine whether a fund has been "constituted "in a "court of competent maritime jurisdiction," the fact that the preemptive HK Limitation Suit *was not jurisdictionally proper* from the standpoint of the RMI under LLMCA §520 precludes any effect of the HK Limitation Suit in this Court (separate and apart from the fact that the HK Limitation Suit also has no effect here because *it did not*

[25] *See* Exhibit B, ¶31.

[26] *Id.* at ¶¶29-38.

*result in a 96 Protocol fund*).

- LLMCA §522 - In turn, §522 provides that *even when limitation is invoked as a defense* without constitution of an RMI limitation fund, "the provisions of [§510]" still apply - i.e. those requiring constitution of a 96 Protocol limits fund. This effectively means that *even to invoke limitation as a defense* before an RMI Court, a shipowner **must constitute a 96 Protocol fund** (in the RMI or somewhere else).

    - It must be noted here that Article 10.1 of the 76 Convention (which was unaffected by the 96 Protocol) **expressly allows a state party the option in its domestic law to restrict a shipowner's right to claim limitation as a defense solely if the shipowner has constituted a proper fund:**

      > [A] State Party may provide in its national law that, where an action is brought in its Courts to enforce a claim subject to limitation, a person liable ay only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or is constituted when the right to limit liability is invoked.[27]
      >
      > The RMI originally took advantage of this reserved right provided at Article 10.1 of the 76 Convention by enacting LLMCA §522, which cross-references §510 and thus makes a *defense* of limitation contingent on "constitution" of a fund **in accordance with §510**. The combination of these provisions *under the prior LLMCA* (based on the 76 Convention) would have served to prevent a shipowner from trying to establish a smaller limitation fund in some lower limit jurisdiction (i.e. a 1957 Convention jurisdiction) and then asserting limitation as a defense in a liability action in the RMI. And when the Nitijela amended the LLMCA to enact the 96 Protocol limits, *§522 remained untouched.* Thus, the current versions of LLMCA §§510 and 522 **require "constitution" of a 96 Protocol fund *somewhere* before a shipowner can invoke limitation as a defense in the RMI, precisely as Article 10.1 of the 76 Convention/96 Protocol allows.**

- LLMCA §523 - This section, perhaps most simply, provides that other actions against a shipowner will only be "barred" " when a limitation fund **has been constituted in accordance with [§]521" - i.e. *with the 96 Protocol limits* required by §521.** Again, the ELENI Defendants contention that the *76 Convention* fund in Hong Kong can have any "barring" effect in this Court is squarely foreclosed by this provision.

Every argument in the ELENI MSJ fails in the face of the plain, express terms of the LLMCA. Once again, the "Clash of Conventions" inquiry **begins and ends with the LLMCA.**

**C. Further Specific Responses to the ELENI MSJ**

[27] Exhibit 1 to Clash of Conventions Motion, 76 Convention, art. 10.1.

Every argument in the ELENI MSJ fails in light of the above, straightforward application of the solely applicable LLMCA. Nonetheless, Cargo Plaintiffs address the main points of the ELENI Defendants arguments on their own here:

- ELENI Defendants preposterously continue to assert that they "have not sought to limit liability" (p. 7) in this Court. **This is blatantly disingenuous and wrong.** They have raised limitation *since their first pleading* (the FNC Motion), and are *currently asserting limitation in the very ELENI MSJ* currently before the Court. And if they are not serious about not raising limitation, Cargo Plaintiffs would welcome that decision without objection, as the ELENI Defendants would then be obligated to pay 100% of Cargo Plaintiffs' damages pursuant to the US GML "innocent cargo" rule.

- ELENI Defendants contend that "a second limitation fund in the [RMI] would directly conflict with Article 9(4) of the [96] Protocol" (p. 8). However, as explained above, Article 9(4) *has not been enacted* in the RMI, and is totally irrelevant here.

- ELENI Defendants suggest (relying on the Chenault Declaration) that Cargo Plaintiffs "cannot simply opt out of [the HK Limitation Suit] . . . to assert claims [in the RMI]" (p. 8). This however, **is totally inconsistent with US GML principles of limitation** (on which Mr. Chenault is incorrect[28]), reflected in myriad jurisprudence (which Mr. Chenault ignores), given the inapplicability of Article 9(4) and the resulting lack of extraterritorial effect of any orders in the HK Limitation Suit.[29]

- ELENI Defendants contend that the HK Limitation Suit was procedurally proper under Hong Kong law (p. 9). Cargo Plaintiffs do not argue otherwise. However, the Hong Kong Court's decision as to its own jurisdiction **has no bearing at all** on whether the HK Limitation Suit can be deemed *under the provisions of LLMCA* §524 (requiring that RMI limitation law determines issues of limitation in an RMI court) to have been "brought in a court of competent maritime jurisdiction" (as required by LLMCA §521/508) and/or whether the Hong Kong limitation fund can be deemed "constituted" pursuant to LLMCA §521/522.

- ELENI Defendants suggested "[t]here is no such thing as 'de facto' denouncing a Convention," citing the Chenault Declaration (p. 10). This is not true in dualist jurisdictions like the RMI where "the established principle [is that such countries] can and often do deviate in their domestic legislation from the terms of international treaties they may have entered;"[30] just as the RMI did by enacting the 96 Protocol by amendment to the LLMCA, to the exclusion of the 76 Convention. Mr. Chenault is frankly unqualified to offer opinions regarding international treaty law, as indicated by his total lack of any analysis or supporting authority for his *ipse dixit* statements.

- ELENI Defendants suggest (again relying on the incompetent Chenault Declaration)

[28] Exhibit A, ¶18(i)-(j) ("Mr. Chenault's contention [at Para. 15] that Cargo Plaintiffs were bound to assert their claims in the HK Limitation Suit] is not correct.").

[29] *See* Exhibit A, ¶¶4-9; 17-18. *See also* Best Admiralty Bargain at p. 158-59.

[30] Exhibit B, ¶24; Exhibit C, ¶15.

that "[t]he Court simply cannot (or should not) disregard [purported] international obligations" deriving from the 76 Convention (p. 10). **This is precisely backwards;** this Court is *bound* under the RMI Constitution's dualist mandate *to only apply the domestic law of the RMI,* regardless of any potentially inconsistent un-enacted international treaty provisions. **This is exactly what the Indian Court did in the Bombay Decision** (which ELENI Defendants and their experts totally ignore) **in precisely the same legal and factual circumstances** (i.e. with India a dualist party to the 76 Convention and 96 Protocol, but with only the latter domestically enacted).

- ELENI Defendants reprise their objectively absurd argument that they have "not sought to limit [their liability] before this Court" (p. 11) in order to argue that the LLMCA *in its entirety* has not been triggered, and thus Article 9(4) of the 96 Protocol is the only default provision that can apply to this case. Again, the ELENI Defendants have unerringly sought to invoke limitation as a defense *in every single thing they have filed with this Court*, and the LLMCA has definitely been triggered. And, as explained *ad nauseam* above, Article 9(4) *is not applicable in any circumstance* in this Court because it is not enacted in RMI law.

- Finally, the ELENI Defendants re-asseit (*see* Opposition to the Clash of Conventions Motion) a series of British cases (or derivatives thereof) for the proposition that preemptive limitation in a jurisdiction of the shipowner's choice is appropriate (pp. 12-14). These cases are inapplicable **because they are inconsistent with LLMCA §520, which prohibits preemptive limitation** (as allowed under Article 10.1 of the 76 Convention itself).[31] Further, **these cases are all distinguishable** because the shipowners all filed for limitation **in the undisputed natural jurisdiction most closely factually linked to the casualty**.[32] Indeed, the Bombay Court rejected the ELENI Defendants' identical efforts to bind the Indian court and "parties world over" by the HK Limitation Suit, recognizing that the same decisions and authorities cited in the ELENI MSJ (i.e. *Herceg Novi*, *Western Regent*, the latter of which *refused to enjoin* foreign liability proceedings in the face of a 76 Convention fund) **were not relevant** due to India's domestic enactment of the 96 Protocol alone, as well as the fact **that Hong Kong *is not the natural jurisdiction*** viz. the Collision.[33] Also, the ELENI Defendants **ignore numerous international decisions** (including the Bombay Decision *in this same dispute*) that allow for parallel limitation funds **in identical circumstances** when a vessel owner has forum shopped in a non-natural jurisdiction with no link to the underlying casualty.[34] Lastly, this British jurisprudence **is at direct**

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[31] Exhibit B, ¶31.

[32] *See, e.g., The Herceg Novi and Ming Galaxy* [1998] 2 Lloyd's Rep. 454 (Queen's Bench Division (Admiralty Court) (collision in Singapore (57 Convention signatory), limitation and liability actions first filed in Singapore, later-file arrest/liability action in United Kingdom (76 Convention signatory) with no substantive link to the casualty; British action stayed); *Evergreen International S.A. v. Volkswagen Group Singapore Pte Ltd* [2004] 2 S.L.R. 457 (Singapore High Court) (collision in Singapore, first-filed limitation and liability actions in Singapore, later-filed liability/arrest action in Belgium (76 Convention signatory) with no substantive link to casualty; Belgian action enjoined); *CMA CGM S.A. v. Ship Chou Shan* (2014) 224 F.C.R. 384 (Federal Court of Australia) (collision in China, first-filed limitation action under Chinese law (no convention) and liability/arrest in China, which the court held was the natural jurisdiction; later-filed arrest in Australia (96 Protocol signatory); Australian action stayed).

[33] Bombay Decision, ¶29; ¶¶42-48 (acknowledging that Hong Kong is not a natural forum viz. the Collision).

[34] *The KAPITAN SHVETSOV*, [1998] 1 Lloyd's Rep. 199 (Hong Kong Court of Appeal) (collision in Phraya River in Thailand between KAPITAN SHVETSOV and NANTA BHUM; owners of the latter arrested sister ship in Singapore

**odds** with leading international scholars, and the *drafters of the conventions themselves*.[35]

- Cargo Plaintiffs note that they raised all the above jurisprudential arguments in their April 22, 2016 Supplemental Reply Memorandum, filed more than a week before the ELENI MSJ - *and yet the ELENI Defendants have not even attempted* to address or refute any of these points.

## II. CONCLUSION

The "Clash of Conventions" inquiry **begins and ends with the LLMCA**; the Court need look no further than these statutes and the *directly analogous* Bombay Decision to deny the ELENI MSJ. The ELENI Defendants reliance on un-enacted convention provisions and diametrically opposed foreign caselaw cannot change the black and white terms of the LLMCA as enacted by the Nitijela; and the Bombay Decision *has already rejected these arguments in identical circumstances*. Thus, the 76 Convention and the HK Limitation Suit have no bearing whatsoever on Cargo Plaintiffs' claims in this Court. Likewise, the ELENI Defendants as RMI-incorporated entities should not be allowed to enjoy the rights that come along with RMI citizenship while at the same time shirking the RMI's express public policy requiring a 96 Protocol fund in order to invoke limitation. And if the ELENI Defendants are serious in their contention that they have not invoked limitation in this Court (or if their disingenuous contention can be construed as a waver of the right to limit) Cargo Plaintiffs will simply move for summary judgment for 100% of their damages pursuant to the US GML "innocent cargo" rule based on the *res judicata* effect of the Hong Kong Court's ruling of 70% fault allocation to the ELENI in the Collision. Otherwise, if the ELENI Defendants are invoking limitation, they must constitute a 96 Protocol fund as required

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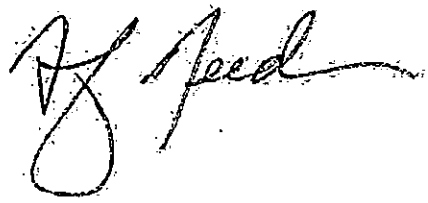
and filed for limitation under the 57 Convention; owners of the former arrested sister ship in Hong Kong; the court allowed the Hong Kong action to proceed parallel to the Singapore actions); *Atlasnavios Navegacao, LDA v. the Ship XIN TAI HAI*, [2012] FCA 1497 (Federal Court of Australia) (collision in Straits of Malacca between B OCEANIA and XIN TAI HAI; first-filed limitation action by the XIN TAI HAI interests in China (non-convention state), as well as liability claims; B OCEANIA interests later arrested the XIN TAI HAI in Australia, a 96 Protocol state; the court allowed Australian action to proceed given B OCEANIA's "seek[ing] the benefit of the legitimate advantages of... a larger limitation fund," particularly when XIN TAI HAI interests had faced B OCEANIA interests with "a sword of Damocles" decision to continue in the Chinese limitation or seek greater relief abroad).

[35] *See* Exhibit B, ¶¶29-38; Clash of Conventions Motion at pp. 31-33 (nn.42-49).

by the LLMCA.



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IN THE HIGH COURT OF THE

REPUBLIC OF THE MARSHALL ISLANDS

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|---|---|
| Chubb Insurance (China) Company Ltd., et. al., Plaintiffs, v. Eleni Maritime Limited, *in personam* and Empire Bulkers Limited, Defendants. | H. Ct. Civil Action No's. 2014-110, 2014-050, 2015-194<br><br>CERTIFICATE OF SERVICE. |

I hereby certify that on Friday, June 3, 2016 (Majuro Date), a true and correct copy of the Plaintiffs Opposition to Defendants Motion for Summary Judgment, with attached Exhibits A through E, was served on Tatyana Cerullo, Attorney for Defendants, by sending to her via email transmission in pdf. format to:

TC.LAW.llc@gmail.com

Dated: Friday, June 3, 2016 (Majuro Date)

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IN THE HIGH COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

| | |
|---|---|
| Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, et al., | H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2014-050 |
| **Plaintiffs,** | |
| **v.** | **DECLARATION OF JOHN D. KIMBALL; EXPERT OPINION** |
| ELENI Maritime Limited in personam and Empire Bulkers Limited, | |
| **Defendants.** | |

## DECLARATION OF JOHN D. KIMBALL – EXPERT OPINION

I, John D. Kimball, submit this expert opinion in the form of a Declaration based on facts and documents provided to me and my personal knowledge, experience and expertise.

1. The undersigned was retained by Plaintiffs' counsel to provide my opinion on certain legal issues which have arisen in this case. In particular, the undersigned has been requested to give an expert opinion on the question of whether plaintiffs are barred from bringing this action because defendants filed a limitation of liability action in Hong



EXHIBIT A

Kong. The undersigned also has been asked to comment on certain points raised in the declaration of A. T. Chenault dated 28 April 2016.

2. The undersigned is qualified to provide an expert opinion in this case concerning the general maritime law of the United States, which applies here as the surrogate maritime law of the Republic of the Marshall Islands ("RMI") under M.I. Rev. Code Title 47, Sec. 113. A copy of my curriculum vitae is attached as Ex. 1 and also is available at www.blankrome.com. Let me highlight the following points:

   a. I am a partner in the United States law firm of Blank Rome LLP and co-chair our maritime law practice group. I have been in private practice since 1975 and specialize in admiralty and maritime law. I have handled many collision and limitation of liability cases, including matters in which there were multiple limitation of liability cases arising from the same incident. One example is *In re Otal Investments Ltd.*, a case discussed below.

   b. I am admitted to the bar of the State of New York and also am admitted to the United States Supreme Court and the United States Courts of Appeals for the Second, Third, Fourth, Fifth, Seventh and Eleventh Circuits.

   c. I have been an Adjunct Professor at New York University Law School since 1986 and teach the course on Admiralty Law. The topics covered in the course include limitation of liability.

   d. My publications include a chapter on United States law concerning limitation of liability in a book titled Limitation of Liability for Maritime Claims (4th ed. 2005), which is part of the Lloyd's Shipping Law Library.

e. My expert testimony on the maritime law of the RMI was accepted by the Wuhan Maritime Court in China in a case titled Jiangsu Province Light Industry Merchandise Export & Import Co. Ltd. v. Brilliant International Corp. which was decided in 1999.

3. For the reasons stated below, my opinion is the Hong Kong limitation of liability proceeding brought by defendants does not bar plaintiffs from proceeding with their claims against defendants before this Honorable Court.

4. The orders issued by the Hong Kong court do not have extra-territorial effect upon a foreign party which chose not to file claims against the fund constituted there. Indeed, this position is supported by the express wording of the 1976 Limitation of Liability Convention ("76 Convention"), which states in Article 13, section 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 claim against any other assets of a person by or on behalf of whom the fund has been constituted. (Emphasis added)

5. Under Article 13, only persons who have filed claims against the fund are barred from bringing proceedings elsewhere. In the present matter, plaintiffs did not file claims against the fund in the Hong Kong case and are free to pursue defendants in other jurisdictions, including this Honorable Court.

6. As discussed below, the approach United States' courts have taken with respect to limitation of liability fully supports this view. Although U.S. and foreign ship owners are permitted to commence limitation of liability proceedings in United States courts, our courts do not compel foreign claimants to file their claims in U.S. limitation of liability

proceedings. Instead, our courts recognize the right of foreign parties to sue the responsible parties in other countries if they prefer to do so.

7. It is well settled that the right to limitation of liability under the 76 Convention is a procedural right governed by the law of the forum where the fund has been constituted. Determinations by the Hong Kong courts on procedural matters, however, are not binding on this or any other court.

8. In this case, Plaintiffs were not required to file their claim in Hong Kong and the Hong Kong court has no jurisdiction to enjoin them from suing here or any other court.

9. Equally, this Court has no obligation as a matter of comity to bar plaintiffs from proceeding against defendants before this Court. As applied under the general maritime law of the United States, comity refers to "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[1] (emphasis added). "Comity is neither concrete law nor abstract legal theory; it is "more than mere courtesy and accommodation, [though] comity does not achieve the force of an imperative or obligation."[2] Comity represents a nation's understanding and respect for foreign sovereigns and their courts, as well as considerations of expediency and the rights of citizens.[3] It serves to promote uniformity in decisions, conserve judicial resources and enforce finality in matters which have been litigated in a court of competent jurisdiction.[4]

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[1] *Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895).
[2] *Somportex Ltd. V. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971).
[3] *Id.* ("[Comity] is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.").
[4] *Cunard S.S. Co. v. Salen Reefer Services A.B.*, 773 F.2d 452, 457 (2d Cir. 1985).

10. Foreign decisions found unfair[5] or to violate U.S. public policy[6] are not granted comity. As a general rule, U.S. courts extend comity to foreign decisions unless there is a compelling reason not to do so.

11. It is well established, however, that comity does not require this Court to enforce orders issued in a foreign limitation of liability proceeding or to compel parties to file their claims in such proceedings.

12. *In re Otal Investments Ltd.*,[7] is a good example of how United States courts address this issue. There, the United States court in which collision damages claims were asserted considered whether it was bound to give effect to orders issued in a case filed in the Netherlands under the 76 Convention which arose from the same collision. The court wrote as follows:

> Clary Interests argue that the Court should employ equity and comity to recognize and give effect to the 1976 Convention and dismiss the in rem claim in this jurisdiction. But equity as well as case law allow for a different result when the issue is the extraterritorial effect of a convention to which the United States is not a signatory.
>
> International comity has been described by the Supreme Court as the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and other rights of its own citizens or of other persons who are under the protection of its laws." *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A.*, 2005 U.S. App. LEXIS 11966 at *11 (2d Cir. June 22, 2005) (citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). Under the principles of international comity, United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United Stets. *See, e.g., Cunard Steamship Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 456-60

[5] *See Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (French court judgment not recognized because obtained by fraud).

[6] *See Pravin Banker Assocs. V. Banco Popular Del Peru*, 109 F.3d 850 (2d Cir. 1997) (Peruvian court's debt negotiations not recognized because contrary to U.S. public policy).

[7] 2005 WL 1588986 (S.D.N.Y. 2005) *aff'd in pertinent part sub nom. Otal Investments Ltd. v. M.V. Clary*, 494 F.3d 40, 63 (2d Cir. 2007).

> (2d Cir. 1985). Courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States. *See Allied Bank Int'l v. Banco Credito Agricoloa de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985). This doctrine does not create "an imperative obligation of courts but rather is a discretionary rule of practice, convenience and expediency." *JP Morgan Chase Bank*, 2005 U.S. App. LEXIS 11966 at *12. Here, comity will not be invoked since the United States has chosen not to adopt the 1976 Limitation Convention but rather to enact its own statute.

Otal arguably is different from the present case in that the United States has never been a signatory to the 76 Convention. However, although RMI is a signatory to the 76 Convention, it subsequently adopted the 96 Protocol which now controls in this area and supersedes the 76 Convention, resulting in the same effective scenario before the court in Otal.

13. Similarly, in *In Re Bowoon Sangsa Co.*,[8] the United States Court of Appeals for the Ninth Circuit stated with respect to a foreign limitation of liability action: "Because a decree in limitation normally receives only domestic recognition, 'the courts of each country will apply only local law on the question of limitation; no country will give effect to a foreign limitation decree as barring further suit.'" (Quoting Gilmore & Black, The Law of Admiralty 945 (2d ed. 1975)).

14. Further, in *Perforaciones Exploracion y Produccion v. Maritimas Mexicanas, S.A.*,[9] the United States Court of Appeals for the Fifth Circuit noted:

> Additionally, MarMex has failed to cite any case where a U.S. court has deferred to a foreign limitation proceeding on international comity grounds. Limitation proceedings commenced under U.S. law only receive domestic recognition, *Otal Invs., Ltd. v. M.V. Clary*, 494 F. 3d 40, 63 (2d Cir. 2007); *[In Re] Bowoon Sangsa Co.*, 720 F.2d 595, 599 (9th Cir. 1983) ("Because a decree in limitation normally receives only domestic recognition, 'the courts of each country will apply local law on the

[8] 720 F.2d 595, 599 (9th Cir. 1983).
[9] 356 Fed. Appx. 675, 2010 A.M.C. 578 (5th Cir. 2009)

> question of limitation; no country will give effect to a foreign limitation decree as barring further suit.'" (Internal brackets removed) (quoting GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 945 (2d ed. 1975)), and although the 1976 Convention requires its signatories to defer to certain limitation proceedings abroad, the United States has not adopted the Convention. 2 SCHOENBAUM, supra § 15-1 n. 7. Given these considerations, the district court's decision not to defer to the Mexican limitation proceeding on comity grounds does not rise to being an abuse of discretion.

15. In *Perforaciones*, claims arose from a maritime casualty when a supply vessel hit a mobile operating drilling unit at a location about 45 miles off the Mexican coast. Both vessels were under the Mexican flag. The owner of the supply vessel commenced a limitation of liability action in Mexico under the 76 Convention and posted a limitation fund. The owner of the mobile operating drilling unit did not file a claim in the Mexican limitation proceeding, however, and, instead, filed suit in federal court in Texas. The United States court rejected the argument that the 76 Convention limits applied to the U.S. case and further rejected the contention that the U.S. case should be dismissed out of respect for international comity:

> We conclude that the cap on liability created by the 1976 Convention does not attach to the right of recovery created by Article 1913 of the Mexican Civil Code. The 1976 Convention does not create a right of recovery, but only limits the recovery available under Article 1913 and other sources of liability. See 1976 Convention art. 2, supra, 1456 U.N.T.S. at 223 ("[T]he following claims, whatever the basis of liability may be, shall be subject to limitation of liability ...." (Emphasis added)). We find the reasoning in *Matter of Bethlehem Steel Corp.* persuasive, where a district court held that a cap on liability established by the Canada Shipping Act should not be applied in U.S. court, as the cap did not "limit the individual claimant's right to recover certain categories of damages," but instead served "only to measure or quantify damages." 435 F. Supp. 944, 948 (N.D. Ohio 1976); *aff'd*, 631 F.2d 441 (6th Cir. 1980) Additionally, the cap on liability established by the 1976 Convention is not "substantive" because it is not so integral as to follow liability under Article 1913 in all maritime cases, as an absolute cap on recovery would. The 1976 Convention provides only that "[l]imitation of liability may be invoked" by a shipowner, not that it must be applied by a court as an absolute limit to liability. 1976

Convention art. 10 *supra*, 1456 U.N.T.S. at 227 (emphasis added). As a result, the limits established by the 1976 Convention are not substantive—liability under Article 1913 in a maritime case could exceed the cap established by the 1976 Convention. *Cf. The Norwalk Victory*, 336 U.S. at 395, 69 S.Ct. 622 (suggesting that "if it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of *683 1924," then the Convention's limit on liability would be substantive). The district court did not err in finding the Mexican limit on liability inapplicable in this case.

16. Another notable United States' case is *In re Kreta Shipping, S.A.*,[10] holding that a foreign party who has not filed claims in a US limitation of liability action is not barred from suing the responsible party in a separate suit in a foreign court.

17. As all of the cases cited above show, it is very clear that under the general maritime law of the United States, orders issued by the Hong Kong court concerning the limitation fund constituted there are not binding on plaintiffs. Since the general maritime law of the United States applies here as the surrogate maritime law of the RMI pursuant to M.I. Rev. Code Title 47, Sec. 113), the result should be the same.

18. The undersigned has reviewed the declaration of A.T. Chenault dated 28 April 2016 and has the following comments:

    a. The statement made by Mr. Chenault in paragraph 5 that both Hong Kong and the Marshal Islands adopted the 1976 Limitation Convention is accurate. It also is true the RMI has not deposited an instrument denouncing the 76 Convention. However, the RMI's domestic enactment of the 96 Protocol has superseded the 76 Convention, and a 76 Convention proceeding cannot be brought in the RMI under the express terms of the RMI limitation statutes. See M.I. Rev. Code Title 47, §510 (establishing and requiring 96 Protocol limits for limitation in the RMI); §520 (requiring by cross-reference to §522 and 510, constitution of a 96 Protocol

[10] 1997 WL 115428, 1997 A.M.C. 1676 (S.D.N.Y. 1997).

limit fund in order to assert a defense of limitation in the RMI); §521 (requiring constitution of a 96 Protocol limits fund for invocation of limitation in the RMI); §524 (providing that the issue of "constitution" of a limitation fund "shall be governed" by RMI law).

b. Mr. Chenault's statement in paragraph 6 that the Marshall Islands still has international obligations under the 76 Convention is not accurate insofar as it relates to this Court's obligation to apply the limitation statutes passed by the Nitijela domestically enacting the 96 Protocol as the law of the Marshall Islands. The RMI is a constitutionally dualist jurisdiction with respect to the effect of customary international law ("CIL") and/or treaties. This means that CIL/treaties have no effect in the RMI unless and except to the extent that they are positively enacted into domestic law by the Nitijela. The RMI has enacted the 96 Protocol into its domestic law in such a way that the 76 Convention no longer governs limitation of liability proceedings in the RMI.

c. Mr. Chenault's statement in paragraph 7 concerning the Hong Kong limitation fund also bears comment. The RMI's limitation statutes provide that "the rules relating to the constitution . . . of a limitation fund, and all rules of procedure in connection therewith, **shall be governed by the civil procedure law of the [RMI].**" M.I. Rev. Code Title 47, §524 (Emphasis added.) Thus, the law of the RMI will determine whether a foreign fund is "constituted" for purposes of RMI law and proceedings. The undersigned's understanding is that plaintiffs do not challenge the Hong Kong court's determination of its own jurisdiction under Hong Kong law; that is not the issue which is to be decided here. Rather, the

question before this court is whether the Hong Kong Limitation fund bars this suit from proceeding. As indicated above, it is the opinion of the undersigned that it does not.

d. I disagree with Mr. Chenault's statement in paragraph 8 that U.S. courts do not look favorably upon the situation where a party deliberately forfeits an available alternative forum in order to seek a larger recovery in a limitation proceeding. The United States cases cited above in this declaration show the opposite is true. Mr. Chenault cites *Compania Naviera Joanna SA* v. *Koninklijke Boskalis Westminster NV* to support his argument. But that decision is inapposite and can have no bearing on plaintiffs' right to sue here. The claimants in that case knowingly went outside of the natural jurisdiction of the casualty (China) where a limitation proceeding was pending in an attempt to obtain a larger limitation fund under US law, which was equivalent to the 76 Convention limits. The claimant also admittedly ignored the monition date in the Chinese limitation as part of its effort to obtain higher limits. The claimant also commenced 16 consecutive Rule B vessel attachments in the US to obtain security for its claims. At that point and to avoid further attachments, the owner filed for limitation under US law and then immediately moved to have its own limitation proceeding dismissed on grounds of forum non conveniens. Notably, the court in *Compania Naviera* stated in its ruling that the US had no link whatsoever to the casualty, that "none of the parties [were US] entit[ies] or citizen[s]", and "[n]either vessel [in the collision] was registered in the [US]." The facts are very different here because the ELENI Defendants are RMI entities and the ELENI is flagged in the RMI. Finally,

although the court in *Compania Naviera* ultimately dismissed the US limitation case on *forum non conveniens* grounds in favor of the Chinese limitation proceeding, it did so only on the condition that the owner would not argue that the claimant's claims were time-barred in China, notwithstanding that the monition date had passed and the claimant had deliberately not filed timely.

e. Mr. Chenault's statement in paragraph 10 that the Marshall Islands must give effect to the Hong Kong limitation proceeding is not accurate. Under RMI law, international treaties have effect only to the extent they are implemented by domestic law. RMI's limitation statutes do not provide for recognition of a 76 Convention proceeding and do not bar plaintiffs from suing here.

f. Mr. Chenault refers to Article 9(4) of the 96 Protocol and his statement is accurate as far as it goes. But nothing in Article 9(4) requires this Court to bar plaintiffs from pursuing their claims against defendants outside the Hong Kong limitation fund. Moreover, the RMI has not domestically enacted Article 9.4 of the 96 Protocol and, therefore, it can have no effect in this matter.

g. Mr. Chenault's statement in paragraph 11 concerning the requirement that the party state give effect to *limitation proceedings initiated* in other party states is not accurate for strict dualist jurisdictions like the RMI. There is no such requirement as a matter of comity or RMI law; and the 76 Convention itself (Article 10.1, which remains in force viz. the 96 Protocol) expressly contemplates a state party's right to prohibit limitation *by provisions of its domestic law* when a party commences limitation in a lower limit jurisdiction.

h. I disagree with Mr. Chenault's statement in paragraph 12 that there is no fundamental clash between the 76 Convention and the 96 Protocol. If that were so, neither he nor the undersigned would be submitting expert opinions to this Court. The simple fact is the 96 Protocol fundamentally altered the 76 Convention and was always intended to do so.

i. Paragraphs 11-13 of Mr. Chenault's declaration raise a false argument. Plaintiffs were not required to file their claims against the Hong Kong limitation fund and are not precluded by the orders of that Court from suing here. Equally, plaintiffs have no right or obligation to establish a 96 Protocol limitation fund with respect to the claims they assert against defendants.

j. I have been asked to consider whether, as discussed by Mr. Chenault in paragraph 15, Plaintiffs were entitled to opt out of the limitation proceeding brought by defendants in Hong Kong even if it was properly constituted there. As already noted above, the undersigned's opinion is that plaintiffs were fully entitled to do so and Mr. Chenault's contention to the contrary is not correct.

k. I have been asked to consider whether, as stated by Mr. Chenault in paragraph 16, the broad venue rules under U.S. law for commencing a limitation proceeding contemplate that a ship owner may choose to commence a limitation proceeding before being sued by a claimant. This is true and, indeed, common practice in the United States. However, the procedural venue rules for U.S. limitation proceedings have no bearing in these proceedings, which are procedurally governed by the RMI limitation statutes at M.I. Rev. Code §§501 *et seq.*

1. I have been asked to consider whether, as stated by Mr. Chenault in paragraph 17, international law supports the conclusion that a ship owner may choose the limitation forum. From the perspective of United States, that principle is expressly stated in the venue provision of Rule F(9) of the Supplemental Rules for Admiralty or Maritime Claims of the Federal Rules of Civil Procedure, which allows the owner a broad choice of venue options if the ship has not been arrested or attached, or if no suit has been filed in connection with the incident. But, again, the U.S. procedural rules have no bearing here, and foreign claimants are not bound by the ship owner's choice of forum and may sue outside the United States if they prefer to do so.

19. For all of these reasons, it is the opinion of the undersigned that under the general maritime law of the United States, plaintiffs were not required to file their claims against defendants in the Hong Kong limitation fund. As a result, Plaintiffs were fully entitled to bring this separate action against defendants in this Honorable Court.

20. The undersigned would be most pleased to respond to any questions this Honorable Court may have about the opinions set out in this declaration.

Dated: New York, New York
May 31, 2016

JOHN D. KIMBALL

# EXHIBIT 1

BLANK ROME LLP
COUNSELORS AT LAW

# CURRICULUM VITAE

## JOHN DEVEREUX KIMBALL

| | |
|---|---|
| Birth: | Orange, New Jersey, March 18, 1949 |
| Education: | Georgetown University Law Center (J.D. 1975)<br>Duke University (B.A. 1971); |
| Occupation: | Partner, Blank Rome LLP, New York City (2006 – present);<br>Adjunct Professor, New York University Law School (September 1986 - present)<br>Chairman, Healy & Baillie, LLP, New York City (1987-2006); |
| Court Admissions: | United States Supreme Court<br>United States Court of Appeals for the Second, Third, Fourth Fifth, Seventh and Eleventh Circuits<br>State of New York<br>United States District Court for Connecticut<br>United States District Court for the Southern District of Texas<br>United States Court of Claims |
| Outside Director: | Director, Christiania Re (1995-1996) |
| Books: | Co-author, Time Charters (7th Ed. 2014);<br>Co-author, Voyage Charters (4th Ed. 2014);<br>Co-author, The Law of Salvage, 3A Benedict on Admiralty (2015 revision); and<br>Editor, The Healy Lectures, 1992-2002 (LLP 2005)<br>Editor, The Healy Lectures, 2005-2015 (2016) |
| Chapters In Books: | "Termination Rights Under Time Charters," in Thomas (ed.), Legal Issues Relating To Time Charter Parties (2008)<br><br>"United States Law" in Griggs & Williams, Limitation of Liability for Maritime Claims (4th Ed. 2005); |

"United States Law", 29 Moore's Federal Practice, (3d Ed. 1997) § 707.05 "Charter-Party Disputes"

Selected Papers:

The Central Role of P&I Insurance in Maritime Law, 87 Tulane Law Rev. 1147 (2013)

Raise High the Silver Oar! Teaching Admiralty Law 55 St. Louis University Law Journal 657 (2011)

*The Mainstreams of American Maritime Law*, 23rd Donald O'May Lecture in Maritime Law Institute of Maritime Law, University of Southampton, November 16, 2005 published in 12 Journal of International Maritime Law 112 (March-April 2006);

*Shipping and the Fight Against Terrorism*, Fifth Cadwallader Annual Memorial Lecture The London Shipping Law Centre, October 24, 2002 Published in 9 Journal of International Maritime Law 65 (Jan-Feb 2003);

*Miles: "This Much and No More . . ."*, presented at MLA Meeting in Bermuda, October 26, 1993, reprinted in 25 J. Mar. L. & Comm. 319 (1994) and in Jarvis, An Admiralty Law Anthology (Anderson 1995);

Associations:

- Titulary Member, Comite Maritime International
- Maritime Law Association of the United States [Executive Committee 1990-1993 and Board of Directors 2006-2009]
- House of Delegates, American Bar Association (as representative of the Maritime Law Association
- Admiralty Committee, Association of the Bar of the City of New York
- Member, Fellows of the American Bar Foundation
- Phi Beta Kappa

Associate Editorships:

- Board of Editors, Journal of Maritime Law & Commerce (1977 - present) and Case Editor (1977-1988);
- Editorial Board, The International Journal of Shipping Law (1998 - 2000);
- Member, Executive Board and case and Note Editor, Law and Policy in International Business (1974-1975)

Recognition:

- Chambers, Global Ranked in Band 1, Shipping Litigation (2016)

- Chambers Award for Excellence as the Leading Lawyer in Shipping Litigation in the United States (6/2/06)
- Listed in: *Who's Who in the World*, *Who's Who in America* and *Who's Who in American Law*, *New York Superlawyers*
- Euromoney, *The Best of the Best*
- Pro Bono Panel, U.S. Court of Appeals for the Second Circuit
- John W. Sims, Distinguished Admiralty Practitioner in Residence, Tulane University Law School (November 2003)
- Member of United States Delegation, the Meetings of Governmental Experts concerning negotiation to Convention on the Protection of Underwater Cultural Heritage, July 2000 and July 2001
- Lecturer, Shanghai Maritime University, Winter 1988

Expert Witness:

- Animalfeeds International Corp. et al. v. Stolt-Nielsen S.A., et al., Washington, D.C., November 21, 2005 cited by the United States Supreme Court at 130 S.Ct. 1758, 1769 n.6 (2010);
- King v. Brandywine Reinsurance Company; High Court of Justice, Queen's Bench Division, Commercial Court; (2004);
- Jiangsu Province Light Industry Merchandise Export & Import Co. Ltd. v. Brilliant International Corp.; Wuhan Maritime Court, (1999) Wu Maritime Law Ning Shang Zi No. 80;
- Ocean Merchant; High Court of Justice, London, England, Oct. 1997;
- Cascade Pacific Marine, Inc. v. Sea-Land Service, Inc., et al. (United States District Court for the District of Washington) November 18-19, 1993;
- Stena Concordia (London Arbitration) - December 14, 1992.

Volunteer Activities:

- Board of Directors, New York Maritime, Inc.
- Board of Directors, Madison Area YMCA
- Advisory Board, North American Maritime Ministry Association (2005-2009)
- Trustee, Kent Place School, Summit, NJ (1987-1999);
- Elder and Trustee, Presbyterian Church, Madison, NJ (1993-1995)

Clubs: Baltusrol Golf Club, Springfield, New Jersey USA

Partial List Of Articles: Case Note, R.M.S. Titanic, Inc. v. Haver, 30 J. Mar. L. & Comm. 691 (1999);

*"The United States Legal System: Better and Less Crazy Than You Might Think!,"* 1998 Bimco Review 148 (1998);

"Choice of Law Issues in Contracts for the International Sale of Goods: Getting What You Bargained For in the Courts in the United States" 1 Int'l Trade Law Quarterly, 28 (Nov. 1997) (with Simon Harter);

"Developments in United States Maritime Law, 1995-1996," XIV Anuario de Derecho Maritimo (with E. Fitzgerald);

"The Sky Reefer: Foreign Arbitration Clauses in Bills of Lading are Enforceable," 1 Int'l J. of Shipping Law 51 (1996);

"Developments in United States Maritime Law 1994-1995," XIII Anuario de Derecho Maritimo (co-author with E. Fitzgerald);

"United States Maritime Law 1988," VIII Anuario de Derecho Maritimo (1990);

"United States Maritime Law 1987," IV Yearbook of Maritime Law (Kluwer 1990);

"The Validity of Letters of Indemnity Given for the Issuance of Clean Bills of Lading," in Miscellanea of Maritime Law (Athens 1988);

"New Developments in United States Maritime Law 1986," III Yearbook Maritime Law (Kluwer 1988);

"New Developments in United States Maritime Law 1985," II Yearbook Maritime Law (Kluwer 1987);

"New Developments in United States Maritime Law 1984," I Yearbook Maritime Law (1984);

"Protecting Against Maritime Liens for Supplies and Services on Chartered Ships Calling at United States Ports," (with John D. Love) 1984 Lloyd's Mar. & Com. L.Q. 290, May 1984;

"Developments in United States Law 1982-1983," III Anuario de Derecho Maritimo 453 (1985);

"Vacating Maritime Arbitration Awards: Is it really possible?," 13 J. Mar L. & Comm. 71 (1981);

"Shipowner's Liability and the Proposed Revision of the Hague Rules," 7 J. Mar L. & Comm. 217 (1975);

NOTE: Ray v. Atlantic Richfield Company, II Diritto Maritimo (1979);

NOTE: *"Shipowner's Liability Not Limited By Limitation of Liability Act,"* 6 J. Mar. L. & Comm. 661 (1975);

NOTE: *"Letter of Credit Automatically Renewable Beyond One Year Held To Be Valid,"* 10 J. Mar. L. & Comm. 270 (1978);

NOTE: *"Shipowner's Liability on Pollution Removal Expense Under a State Statute Limited By Federal Limitation Act But Not Limited by Federal Water Pollution Control Act,"* 10 J. Mar. L. & Comm. 393 (1978);

NOTE: *"Pre-emption of State Laws,"* 10 J. Mar. L. & Comm. 289 (1979);

NOTE: *"Taxation of Foreign-Owned Containers by State Government Unconstitutional,"* 11 J. Mar. L. & Comm. 145 (1979);

NOTE: *"Arbitration: Appearance Of Bias Is Not A Basis For Vacating An Award,"* 12 J. Mar. L. & Comm. 407 (1981);

NOTE: *"Arbitration: Arbitrators Do Not Have Power To Award Attorney's Fees Unless The Arbitration Agreement So Provides,"* 14 J. Mar. L. & Comm. 370 (1982).

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Attorneys for Plaintiffs

**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

| | |
|---|---|
| Chubb Insurance (Thailand) Company Ltd, Tok Marine & Nichido Fire Insurance Co Ltd, *et al.*<br><br>**Plaintiffs,**<br>**v.**<br><br>ELENI Maritime Limited *in personam* and Empire Bulkers Limited<br><br>**Defendants** | **H.Ct. Civil No. 2014-110**<br>**H.Ct. Civil No. 2014-050**<br><br>**DECLARATION OF AUGUSTO MARTÍNEZ GUTIÉRREZ; EXPERT OPINION** |

## DECLARATION OF NORMAN AUGUSTO MARTÍNEZ GUTIÉRREZ

I, Norman Augusto Martínez Gutiérrez, make this expert opinion in the form of a Declaration based on my personal knowledge and experience.

1. I have been retained by the Plaintiff's counsel to provide my opinion in relation to several issues regarding limitation of liability for maritime claims and the relationship between international conventions. I am retained by Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, one of the law firms acting for the plaintiffs, but I honestly hold the views set out in this Declaration, which are correct to the best of my knowledge and belief.
2. I am competent to make this Declaration based on my understanding of international maritime law, to which I have dedicated the last twenty years of my life teaching, researching and publishing in a number of intricate disciplines of this field of law.

EXHIBIT B

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3. I was awarded a first Degree in Law with a specialization in public international law (*Licenciado en Ciencias Jurídicas y Sociales con Orientación en Derecho Internacional*) by the National Autonomous University of Honduras in 1996 (in which year the Faculty of Laws of said University awarded me a "Diploma of Academic Excellence". In 1998, I was awarded by the International Maritime Law Institute (IMLI, an institute established under the auspices of the International Maritime Organization (IMO) a specialized agency of the United Nations) the Degree of Master of Laws (LL.M.) in International Maritime Law with Distinction and my research was rewarded with the "IMO Secretary General's Prize for Best Dissertation". Later, in May 2010, IMLI conferred upon me the Degree of Doctor of Philosophy (Ph.D.) in International Maritime Law *cum laude* (this was the first, and only time so far, that the Institute awarded the Ph.D. degree *cum laude*).
4. I am Associate Professor of International Maritime Law at IMLI, which is based in Malta.
5. I have been teaching at IMLI since 1999 in different subjects of private law, public international law and international maritime law (covering both shipping law and the law of the sea). The taught subjects include, but are not limited to: International Institutions; Law of Contracts; Law of Torts; Law of Maritime Pilotage; Law of Maritime Towage; Charterparties; Maritime Legislation Drafting; Law of Marine Insurance; Law of Maritime Safety; Arrest of Ships; Carriage of Passengers and their Luggage by Sea; Limitation of Liability for Maritime Claims; Relationship between Global Limitation of Liability Conventions and Particular Liability Regimes; Archipelagic States; International Straits; Marine Scientific Research and the Development and Transfer of Marine Technology; The International Seabed Area and the Common Heritage of Mankind; Settlement of Disputes; International Maritime Security Law; and Marine Environmental Law.

6. I am the author of a book entitled *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes*, published by Routledge in London and New York in 2011, and I am co-author with Professor Osvaldo Agripino de Castro Junior of a book entitled *Limitação da Responsabilidade Civil no Transporte Marítimo*, published by Editora Renovar in Rio de Janeiro in 2016. I am the Editor of the books *Serving the Rule of International Law: Essays in Honour of Professor David Joseph Attard*, published by Mare Nostrum Publications in Malta in 2009 and *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard*, published by Routledge in London and New York in 2010. I am also co-editor of a three-volume collection entitled *The IMLI Manual on International Maritime Law*, published by Oxford University Press in Oxford in 2014-2016.

7. I have written various chapters in books published in Italy, Portugal, Spain, and the United Kingdom, as well as a number of articles published in journals and legal magazines such as *Anuario de Derecho Marítimo*, *Benedict's Maritime Bulletin*, *Commonwealth Law Bulletin*, *International Community Law Review*, *Journal of International Maritime Law*, *Journal of Maritime Law and Commerce*, *Journal of the Malta Maritime Law Association*, *Novos Estudos Jurídicos*, *Ocean and Coastal Law Journal*, *Revista de Direito Aduaneiro, Marítimo e Portuário*, *Revista Eletrônica Direito e Política*, and *Shipping and Transport International*. The above publications deal with various aspects of international maritime law and many, if not most, deal with intricate issues of limitation of liability for maritime claims and, as my book, study the different conventions that are under the scrutiny of this Court.

8. My *curriculum vitae* is included as an Annex to this Declaration.

9. I have been asked for my opinion as to whether, in the case before the court, there is indeed a "clash of the Conventions" and whether the Court should recognize the applicability of the 1996 Protocol to Amend the Convention on Limitation of Liability for Maritime Claims, 1976 (1996 LLMC Protocol) instead of the Convention on Limitation of Liability for Maritime Claims, 1976 (1976 LLMC Convention); and more specifically, whether Plaintiffs' claims before this Court are preempted or otherwise precluded by Defendants' constitution of a 1976 LLMC Convention fund in the Hong Kong High Court, or whether Defendants' (if they wish to invoke the right to limitation in this Court) must constitute a fund in this Court with the limits required by the 1996 LLMC Protocol and Marshall Islands law.

10. In my opinion, in determining the case, the court must first distinguish between the alleged international obligations which arise directly from the conventions in question and the national law which effectively regulates matters of limitation of liability for maritime claims in the Republic of the Marshall Islands to determine which is the applicable law that the Court may implement. Secondly, the Court must analyze the independent nature of the 1976 LLMC Convention and of the 1996 LLMC Protocol as distinct international legal instruments which are subject to separate implementation, which in this case indeed leads to a "clash of conventions". Thirdly, upon considering the clash between these two conventions, and in light of the relevant national enactments, determine which, between the international agreements or national law will prevail.

***The Conundrum between International and National Law***

11. I feel that the Court should not have been put in this unnecessary position of deciding which international convention applies when it is clear from national law that the Nitijela has

deliberately chosen to implement the 1996 LLMC Protocol in the Marshall Islands Maritime Act 1990, Limitation of Liability for Maritime Claims Act, Marshall Islands Revised Code Title 47, Chapter 5, §§501 *et seq.* ("LLMCA"); and asking the Court to implement the 1976 LLMC Convention is asking the Court to usurp the power of the Nitijela to legislate, which is not its role. The only question open for the Court is that of the just interpretation of the LLMCA. This preliminary statement arises from recognizing that the dichotomy between monism and dualism lies in determining whether international law and national law operate in the same or distinct legal orders and in cases of conflict which one will reign supreme.

12. Without entering into a longwinded discussion about these two doctrines, it suffices to say that monism presupposes that national and international law operate in the same plane and thus in monist countries international law can be applied directly within the national legal order. Dualism on the other hand stresses the fact that international law and national law "exist separately and cannot purport to have an effect on or overrule, the other".[1] In the following comments I bear in mind the pure dualist nature of the Republic of the Marshall Islands, as expressly provided at Article V, Section 1(4) of the Constitution of the Republic of the Marshall Islands, which has been properly recognized at Paragraph 12 of Prof. Davies' Declaration, and which reads:

> No treaty or other international agreement which is finally accepted by, or on behalf of the Marshall Islands on or after the effective date of this Constitution shall of itself have force of law in the Marshall Islands.

13. Brownlie explains that "[d]ualism emphasizes the *distinct and independent* character of the international and national legal systems. International law is perceived as a law between

[1] Malcolm N. Shaw, *International Law*, seventh edition, Cambridge University Press, 2014, p. 93.

States whereas national law applies within a state, regulating the relations of its citizens with each other and with that state. Neither legal order has the power to create or alter the rules of the other. *When international law applies in whole or in part within any national legal system, this is because of a rule of that system giving effect to international law.*"[2]

14. While the position of states may vary in this respect, an analysis of state practice on this point sheds light on the fact that dualist states like the Marshall Islands, many of them formerly British dependent territories, follow the approach of requiring legislative action implementing a treaty before private rights are affected and recognizing that a statute will prevail even if in conflict with a treaty.[3] In fact, Jennings and Watts explain that "*[a] national law which is in conflict with international law must in most states nevertheless be applied as law by national courts,* which are not competent themselves to adapt the national law so as to meet the requirements of international law".[4]

15. According to Jennings and Watts, "... *treaties which are binding on the United Kingdom in international law do not as such affect or form part of the law of the land; they may not be invoked directly by individuals as a basis for legal rights or obligations to be asserted before the courts...*".[5] This statement is supported by Bronwlie who explains that in dualist states

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[2] James Crawford, *Brownlie's Principles of Public International Law,* eighth edition, Oxford University Press, Oxford, 2012, p. 48 (emphasis added). Similarly, Jennings and Watts explain that "to the extent that in particular instances rules of international law may apply within a state they do so by virtue of their adoption by the internal law of the state, *and apply as part of that internal law and not as international law.*" (emphasis added). Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law,* ninth edition, Oxford University Press, Oxford, 1996, volume I, p. 53.

[3] *Oppenheim's International Law,* pp. 77-80. For a similar approach see Anthony Aust, *Modern Treaty Law and Practice,* second edition, Cambridge University Press, Cambridge, 2007, p. 188.

[4] *Oppenheim's International Law,* p. 84 citing *Officina Meccanica Gorlese v Burgsmüller* (1971), ILR,70 pp. 428, 432 (emphasis added).

[5] *Oppenheim's International Law,* pp. 59-60.

"where the conclusion [or denunciation] of a treaty is an executive act, it will be *for the legislature* [not the courts] to implement the treaty as part of domestic law–insofar as this may be required. In such a system the treaty is applied by the courts *as mediated by legislation, and legislation will prevail*, again unless the issue can be resolved by interpretation."[6]

16. Furthermore, in *Thomas v Baptiste* the Privy Council held that:

> Their Lordships recognize the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty ... is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. *When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty.*[7]

17. In *Maclaine Watson v Department of Trade and Industry* Lord Oliver explained that

> "Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights ... *it is outside the purview of the Court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.*"[8] It

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[6] Brownlie, p. 57. In this respect see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 104 ILR 460, 471 (Mason CJ & Deane J).

[7] [2000] 2 AC 1 (PC), 23 (Lord Millet), ibid 31-33 (Lords Hoffmann & Goff, diss) (emphasis added).

[8] [1990] 2 A.C. 418 at 500 HL (emphasis added) cited in David Harris, *Cases and Materials on International Law*, seventh edition, Sweet & Maxwell / Thomson Reuters, London, 2011, p. 77.

therefore follows that the courts "*have no power to enforce treaty rights and obligations* at the behest of a sovereign government or *at the behest of a private individual*".[9]

18. In the present case, defendants request the Court to recognize the rights granted by the 1976 LLMC Convention (via their constitution of a 76 LLMC Convention fund in Hong Kong). However, the 76 LLMC Convention does not form part of Marshall Islands legislation anymore. The LLMCA, as amended, expressly incorporates the provisions of the 1996 LLMC Protocol to the deliberate exclusion of the 1976 LLMC Convention's provisions which were incompatible with it. Therefore the 1976 LLMC Convention must be regarded as an unimplemented treaty that cannot create legal effects under national law, and "*cannot prevail over statutes,*" and thus its infringement, if any, by the Republic of the Marshall Islands would be domestically without legal effect and should not be a consideration for the Court.[10]

***The Clash of Conventions***

19. The 1976 LLMC Convention and the 1996 LLMC Protocol are separate and distinct international legal instruments and they should not be confused. The 1976 LLMC Convention was deemed to be a landmark development at the time of its adoption. This treaty gained much more recognition than its predecessors. However, seventeen years after its adoption it was found that the limits of liability it had prescribed had been eroded by inflation and the IMO embarked on a revision project. The resulting 96 LLMC Protocol not only

[9] *Maclaine Watson v Department of Trade and Industry* [1989] 3 All ER 523, 526 (emphasis added).

[10] In relation to the United Kingdom Brownlie explains that "as a strongly dualist system, English law will not ordinarily permit unimplemented treaties to be given legal effect by the courts." Brownlie, p. 63.

increased the limits of liability, but provided for a simplified method of maintaining the limits up to date, and took into consideration recent developments to cater for new claims to be excluded from limitation (some automatic and some by means of a reservation).[11] Notwithstanding this, IMO did not wish to embark in a full discussion of the whole existing 76 LLMC Convention to avoid reopening negotiations on articles which the Parties had already agreed upon (fearing that doing so may have an adverse effect) and focused on areas which needed to be changed or updated. The result of this was that the drafting of the 1996 LLMC Protocol was done as an "amendment" to the 1976 LLMC Convention, but that should not be construed as confusing the two; the later 1996 LLMC Protocol remains an autonomous and separate international treaty.

20. Due to the separate nature of both treaties, where their provisions are not compatible or where the parties are not the same, there is a "clash of the conventions" just as there was between the 1976 LLMC Convention and the 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships. Dissenting from this view, Defendants in the present case argue that there is no clash of conventions and that provisions of the LLMCA are contrary to the 1976 LLMC Convention.

21. It must be asserted that the move away from the 1976 LLMC Convention was a deliberate action by the Nitijela which, pursuant to the state's most recent international commitments, decided to repeal the 1976 LLMC Convention and enact the 1996 LLMC Protocol. Moreover, to avoid confusion as to the applicable rules under domestic law, the Nitijela purposely omitted from the LLMCA Article 9(4) of the 1996 LLMC Protocol which could

[11] See Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes*, Routledge, London/New York, 2011, Chapter 3.

have created some confusion. This deliberate omission, not only leaves Article 9(4) outside the scope of national law, but clearly establishes the intention that the Nitijela wished to implement the 1996 LLMC Protocol to the exclusion of the 1976 LLMC Convention.

22. The manner of drafting (as amendment, rather than complete repeal and re-enactment) was due to legislative economy due to the few amendments necessary to transform national law to abide by the 1996 LLMC Protocol, but should not be confused as merging both systems. This legitimate action is supported by Aust who affirms that "the provisions of a treaty ... can be amended or repealed by later legislation. *If such action were to result in breach of treaty, there would be no remedy in domestic law since there would have been no violation of it.*"[12] Moreover, Aust recognizes that "even if [treaties] been incorporated [into domestic law], Parliament ... can enact legislation which is inconsistent with treaty obligations."[13] On this point, the principle *lex posterior derogat priori* takes effect and thereby a treaty may repeal a statute and a statute may repeal a treaty.[14]

23. There are several examples in other countries where national legislation is at odds with the text of the 1976 LLMC Convention and/or the 1996 LLMC Protocol including Kenya (which, although a party to 1996 LLMC Protocol, has enacted it domestically in such a way

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[12] Anthony Aust, *Modern Treaty Law and Practice*, second edition, Cambridge University Press, Cambridge, 2007, p. 192 (emphasis added).

[13] Aust, Anthony, p.188.

[14] See *Secretary of Justice v. Lantion, et al., G.R. No. 139465, 18 January 2000* where the Philippines court also held that in a situation where a conflict between international law and national law "is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts (*Ichong vs. Hernandez,* 101 Phil. 1155 [1957]; *Gonzales vs. Hechanova,* 9 SCRA 230 [1963]; *In re: Garcia,* 2 SCRA 984 [1961]) for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances (*Salonga & Yap, op. cit.*, p. 13). The fact that international law has been made part of the law of the land does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere..." <http://sc.judiciary.gov.ph/jurisprudence/2000/jan2000/139465.htm>.

that (1) non-contractual salvage claims **are not** subject to limitation (which is not what the 1996 LLMC Protocol provides) and (2) the general limits of liability (other than those for passengers) are still subject to the limits of the 1976 LLMC Convention, not the 1996 LLMC Protocol); the United Kingdom (which, although a party to the 1996 LLMC Protocol and despite including a reservation in its instrument of accession to exclude salvage claims and and cargo removal claims from limitation, has failed to enact a domestic exclusion for cargo removal claims, such that those claim *are in fact* subject to limitation despite the international treaty accession of the United Kingdom); and Canada (which, although a party to 1996 LLMC Protocol, has enacted a different definition of the term "ship" and "shipowner" in its domestic limitation legislation, and has also expressly provided that its domestic statutes shall prevail in the event of any inconsistency with the 1996 LLMC Protocol).

24. These other countries exemplify the established principle that dualist countries can and often do deviate in their domestic legislation from the terms of international treaties they may have entered, which is precisely what the Marshall Islands Nitijela has done in enacting the 1996 LLMC Protocol in the LLMCA, to the exclusion of the prior 1976 LLMC Convention.

***The Drafting by the Nitijela to Incorporate the 1996 LLMC Protocol Evidences an Intention to Move Away from the 1976 LLMC Convention***

25. The drafting of the 2006 Amendment to the LLMCA demonstrates that the Marshal Islands Nitijela made use of Article 9(1) of the 1996 LLMC Protocol which provides that "[t]he [1976] Convention and this [1996] Protocol shall, as between the Parties to this [1996] Protocol, be read and interpreted as one single instrument".

26. In the same line, when the Nitijela was to incorporate the 1996 LLMC Protocol in the Republic of the Marshall Islands, it found it unnecessary to repeal the whole Chapter 5 of the Marshall Islands Maritime Act 1990 (i.e. the LLMCA), as amended; and instead "in order to ensure continuing compliance with relevant international conventions",[15] the Nitijela adopted the same approach as the 1996 LLMC Protocol. However, with these amendments, the Nitijela was effectively repealing in national law the provisions of the 1976 LLMC Convention and replacing them with the provisions of the 1996 LLMC Protocol. Should the Nitijela intend to remain bound by the 1976 LLMC Convention and, in full knowledge of the provisions of Article 9(4) of the 1996 LLMC Protocol, when incorporating the new limits of liability, it would have left the previous limits (i.e. the 1976 LLMC Convention limits) in force and would have added a new paragraph including the new limits (i.e. the 1996 LLMC Protocol limits) with a phrase something to the effect that "as between the Parties to the Protocol to Amend the Convention on Limitation of Liability for Maritime Claims, the limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows..." and would have added the new limits leaving also in force the previous limits of liability. Instead, the Nitijela chose the clear approach of "repealing" the earlier limits of liability and giving exclusive force of law to the limits of liability of the 1996 LLMC Protocol.

27. The approach taken by the Nitijela is in line with German delegation's option expressed during the adoption of the 1996 LLMC Protocol. This delegation noted that:

> "... In fact it is difficult to understand, at least from the point of view of this delegation, that you in your internal law apply different figures, so that you have different limits of

[15] Nitijela of the Marshal Islands, 27th Constitutional Regular Session, 2006, Bill No. 88, Public Law 2006-53.

liability apply in the same situation. ... We only deal with the relationship between the original Limitation of Liability Convention of 1976 and the Amendment Protocol. It is my understanding that once you want to ratify the Amendment Protocol you are happy with the limits which are fixed here in the Amendment Protocol. You want to apply those. ..."

***The Vienna Convention on the Law of Treaties and National Law***

28. Notwithstanding the justifications stated above for the Court to disregard Article 9(4) of the 1996 LLMC Protocol, which clearly does not form part of Marshall Islands national law, Defendants have also previously contended in their FNC Motion (although they have not done so in the context of this "Clash of Conventions" motion) that this Article should be inferred into national law by using Article 30 of the 1969 Vienna Convention on the Law of Treaties (VCLT). It is the undersigned's opinion that the Court should disregard this Article for the very same reasons explained above as the Republic of the Marshall Islands is not a Party to the VCLT, nor is any analogous principle of the VCLT enacted in Marshall Islands domestic law, thus making it inapplicable.[16]

[16] To the extent Defendants may attempt to argue that the *underlying principle* of Article 30 of the VCLT constitute customary international law, and thus should apply in this case as a result, this argument would also fail for essentially the same reason: it has been recognized that when there is a possible conflict between customary international law and national law courts, "[consider that] an extant statute will prevail over a rule of customary international law if no reconciliation is possible by way of interpretation. Brownlie, p. 57. See also *Yong Vui Kong v Public Prosecutor* [2015] SGCA11 where the Singapore Court of Appeal held that where customary international law is concerned, it would not form part of the law of Singapore unless (1) it is positively enacted by the legislature or (2) "until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court" (para. 29). The Court also held in this case that "... valid domestic statutes would in any case prevail in the event of any inconsistency with a rule of [customary international law] citing as *locus classicus* for this principle the case of *Chung Chi Cheung v The King* [1939] AC 160 (para. 32).

*Constitution of a Fund before a Competent Court*

29. Article 11(1) of the 1976 LLMC Convention, as amended, provides that "[a]ny 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." Basing their arguments on (*inter alia*) *The Western Regent* [2005] 2 Lloyd's Rep. 359, Defendants argue that "the shipowner may constitute a limitation fund in a country of its own choosing by instituting limitation proceedings there". They recognize that this "interpretation of Art. 11(1) is not universally accepted", and whilst they argue that "it is neither idiosyncratic nor obviously wrong", they admit that "some distinguished commentators would agree that limitation proceedings should only be brought in a country where liability claims have already been brought".

30. In this regard I would like to point out that, despite the interpretation of the English Court of Appeal, which should not be regarded as precedent in the Republic of the Marshall Islands, the views of the distinguished commentators cited should not be disregarded. On this point Defendants cite Francesco Berlingieri, and it must be conceded that Professor Berlingieri dedicated many years specifically to the study of the 1976 LLMC Convention and the 1996 LLMC Protocol and has edited the *travaux preparatoires* of both international conventions published by the Comité Maritime International.[17] As such, commentators like Berlingieri speak with authority, having understood well what the delegations to the Conference which adopted these treaties had intended when drafting their provisions.

[17] Francesco Berlingieri, *The Travaux Preparatoires of the LLMC Convention, 1976 and of the Protocol of 1996*, Comité Maritime International, Antwerpen, Belgium, 2000 (*Travaux Preparatoires*).

31. Moreover, the English decisions allowing for preemptive filing of limitation (in a jurisdiction where no claims against it are pending) are objectively inconsistent with the positive law of the Marshall Islands - specifically, LLMCA §520, which ties invocation of limitation to "the defense of an action," which necessarily means there must *already be an action filed* prior to a claim for limitation.

32. Additionally, separate and apart from the inconsistency of the English decisions with the Marshall Islands positive law, a study of the *travaux preparatoires* on the issue of forum sheds light on the fact that "[t]he provisions of this Article are substantially the same as the equivalent rules in Article V of the 1969 Oil Pollution Liability Convention [CLC], although the systematic order is somewhat different".[18] It must be pointed out here that Article V of the CLC required the owner to "constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX or, if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX...". This has a direct impact in limiting the choice of Court as Article IX provides that:

> "Where an incident has caused pollution damage in the territory, including the territorial sea or an area referred to in Article II, of one or more Contracting States or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea or area, *actions for compensation may only be brought in the Courts of any such Contracting State or States.*"[19]

[18] *Travaux Preparatoires*, p. 290.

[19] Emphasis added.

33. It was thus clear that delegates to the Diplomatic Conference that adopted the 1976 LLMC Convention did not wish to confer on the shipowner an unfettered choice of jurisdiction. If the above is not deemed enough to substantiate this opinion, the following statements of delegates to the Conference may be referred to:

> "**Mr. Bursley (United States)** ... Article 11 appeared to offer unlimited freedom for a person seeking limitation to select the forum in which to initiate a limitation action or to constitute a fund. The United States delegation considered that *the* locus *of the fund should take into account the interests not only of the person seeking limitation but also of the claimants.*"[20]
>
> "**Mr Muller (Switzerland)** pointed out that *limitation proceedings were normally initiated after a claimant had sued the shipowner.*"[21]
>
> "**Mr. Jeannel (France)** interpreted the text of Article 11 as indicating that *the choice of court was left to the claimant.* It seemed to him very unlikely that a shipowner would deliberately set up a fund in a court other than the one in which proceedings were brought."[22]
>
> "**Mr. Bursley (United States)** ... recalled that it was not unknown for sham suits to be brought so as to establish jurisdiction in a particular forum to the detriment of large numbers of claimants."[23]

34. Moreover, it is particularly interesting to note that the above quoted comments were based on an earlier text that provided that "[a]ny person liable may constitute a fund with the Court or

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[20] *Travaux Preparatoires*, p. 295. Emphasis added..

[21] Ibid. Emphasis added.

[22] Ibid. Emphasis added.

[23] Ibid.

other competent authority in any Contracting State *in which legal proceedings are instituted.*"[24] In fact, it was Lord Diplock (United Kingdom), after consultation with other delegations, who proposed the addition of the words "in which legal proceedings *in respect of claims subject to limitation* are instituted".[25] This amendment, which eventually found its way (subject to a minor linguistic amendment) into the final text of the Convention, evidences the fact that it was the intention of the Conference that limitation of liability should be raised only as a defense. This is also in line with § 520 of the Marshall Islands Maritime Act (as amended) which stipulates that "[l]imitation of liability *may be invoked in the defense of an action...*".[26]

35. Having clarified that it was the intention of the Diplomatic Conference to restrict the *locus* of the fund, it may also be pertinent to quote two interventions which dealt in particular with the possible recognition of a limitation fund set up in a State which was not a Party to the Convention:

> "**Mr. Unkles (Australia)** ... [i]t should be open to persons claiming limitation to constitute a fund only in States which were parties to the Convention."[27]
>
> **Mr. Bendjenna (Algeria)** ... [t]o permit States which were not parties to the Convention to participate in a limitation fund would be treading on dangerous ground."[28]

36. These interventions highlight the fact that the rationale behind Article 11(1) was that all States that can recognize or have access to the fund will be parties to the same regime. The 1996 LLMC Protocol introduced a new international legal regime in the area of limitation of

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[24] *Travaux Preparatoires*, p. 291. Emphasis added.

[25] Ibid, p. 299.

[26] Emphasis added.

[27] *Travaux Preparatoires*, p. 294.

[28] Ibid.

liability which is different from, and separate from, the regime of the 1976 LLMC Convention. Therefore, in relation to States Parties to the 1996 LLMC Protocol, any allegedly constituted fund should only be recognized insofar as said fund matches the limits of the 1996 LLMC Protocol.

37. It is also worth recalling the case of *Hanwa General Insurance Co. Ltd. v m.v. "ELENI" (IMO No.9460277)* where the High Court of Bombay noted that the owners of the *Eleni* had, through a special arrangement and with no reasonable explanation, given security (in relation to claims arising out of the same incident as the claims before this Court), in the amount of US$ 40 million, which is certainly higher than the limits of liability prescribed by the 1976 LLMC Convention on which they are relying in this case.[29] The Indian Court reasonably was not convinced that the Hong Kong was a more appropriate forum and dismissed the shipowner's motion accordingly. In this respect, the Judge explained that:

> "[t]he shipowners often have to face litigation in different parts of the World and for a variety of reasons these shipowners have got to face litigation arising out of this in a number of jurisdictions. I do not think that the interest of justice demand that the present plaintiff who have brought an action in this Country as a matter of right, should be required to litigate in Hong Kong merely because the defendant has chosen to bring an action in Hong Kong which is also not a natural forum...
>
> 49. ... Therefore the balance of convenience should tilt in favour of the plaintiff."[30]

38. For the purpose of the present case, after determining that the only applicable regime in the Republic of the Marshall Islands is the 1996 LLMC Protocol, it bears particular emphasis that Hong Kong was not at the relevant time a State Party to said Protocol and as such any

[29] See paragraph 43 of the Judgment.

[30] See paragraphs 48 and 49 of the Judgment.

fund constituted there under the 1976 LLMC Convention, should not be deemed properly constituted for the purposes of Chapter 5 of the Marshall Islands Maritime Act 1990, as amended. Accepting such fund as valid would be, as stated by Mr. Bendjenna, treading on dangerous ground.

***Marshall Islands as a Competent Forum to Address Issues of Liability in this Case***

39. Defendants rightly mention that "[t]he only claim before this Court was negligence and the relief sought was damages caused by the alleged negligence". Claimants are indeed entitled to bring their claim before this Court and Defendants contentions that "[t]his lawsuit is just a second liability action..." and that "there were two advanced proceedings in Hong Kong underway already addressing all issues of liability, limits of liability and distribution of the limitation fund", for reasons highlighted above do not have any legal significance, particularly given the Court's prior denial of their FNC Motion. It is suggested that the mentioned proceedings are inapplicable to the claim before this Court, and it is very important to highlight that the argument that said foreign Court must address all issues of liability is not legally sound, as the 1976 LLMC Convention and the 1996 LLMC Protocol are not *liability conventions*; they are purely *limitation of liability* conventions. Unlike other conventions such as the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, as amended; the 1969 International Convention on Civil Liability for Oil Pollution Damage, as amended; the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, as amended; to mention a few, which provide the basis and limits of liability; neither the 1976 LLMC Convention nor the 1996 LLMC Protocol deal at all with

the basis of liability. Liability must thus be determined by the Court that has jurisdiction on the merits. The mere fact that a Court is entitled to constitute a limitation fund does not in itself give such Court jurisdiction to determine the merits of the case. The Court is entitled under the Convention to establish the rules on the constitution and distribution of the fund, but this does not disentitle claimants from seeking to establish liability before a Court that has a sufficiently close link with the incident to establish jurisdiction on the merits.

40. Defendants also contend that "[l]iability has been decided and there is nothing left for this Court to do other than dispose of it on summary judgment". It is true that liability has been decided in the separate Hong Kong liability proceedings initiated by Defendants against a sistership of the HEUNG A DRAGON, with an order of the Hong Kong Court apportioning 70% fault to Defendants as owners/operators of the non-carrying vessel ELENI. It is suggested that this argument is incorrect, however, with respect to dismissal of these proceedings because (for all the reasons explained above) there is no basis in Marshall Islands law for this Court to dismiss Plaintiffs' claims in favor of the Hong Kong limitation proceedings.

***The Right to Invoke Limitation of Liability***

41. Defendants also emphasize that the issue of limitation of liability has not been raised and, as such, the claim should be dismissed. Defendants, on this point are right in stating that it is up to the person liable to invoke the right to limit liability. This right cannot be imposed on them if they choose not to invoke it. However, this does not negate this Court's right to exercise its jurisdiction and determine issues of liability in this case, which should be compensated in full unless the shipowner (or other person listed in Article 1 of the Convention, as the case may

be) invokes said right. If Defendants truly adopt the position that they have not invoked limitation in this Court, then the Court should proceed to adjudicate Plaintiffs' full damages against Defendants without limitation. However, Defendants have effectively invoked limitation of liability before this Court ever since their FNC Motion and most recently in their Motion for Summary Judgment; and to the extent limitation of liability is the basis for Defendants dismissal arguments, it is thus suggested that this Court should apply the provisions of the 1996 LLMC Protocol under positive Marshall Islands law, and not those of the 1976 LLMC Convention.

*Conclusions*

**42.** The possibility of being a Party to the 1996 LLMC Protocol without denouncing the 1976 LLMC Convention is indeed unfortunate.[31] The situation becomes more acute in monist countries where both Statutes giving force of law to each treaty remain in force and where the Constitution usually declares a primacy of international law over national law. However, in dualist States, given the primacy of national law over unincorporated international law, the situation should not be as complicated. In fact, Lord Hoffman clearly explained that "[t]he argument that the courts are an organ of the state and therefore obliged to give effect to the state's international obligations is in my opinion a fallacy. If the proposition were true it would completely undermine the principle that the courts apply domestic law and not

[31] See Norman A. Martinez Gutierrez, *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes*, Routledge, London/New York, 2011, pp. 218-219.

international treaties ... *In domestic law, the courts are obliged to give effect to the law as enacted by Parliament. This obligation is unaffected by international law.*"[32]

43. This has also been the view taken by Trinidad and Tobago where this situation has actually been judicially tested. In *The Owners of the Vessel "Alam Selaras" v The Owners of the Vessel "Diamon Cay"*[33] the Court had to determine what, under the law of Trinidad and Tobago, was the limit on the quantum of liability that should accrue to a shipowner for damage to property resulting from a collision. The parties to the action accepted that the quantum was either one of the two figures:

    (a) If it was to be calculated under the formula set at section 359 of the Shipping Act, approximately USD 36,557.00; or

    (b) If effect was to be given to section 410 of the Shipping Act, then by virtue of the provisions of the 1976 LLMC Convention, there would be a substantial increase to approximately USD 260,000.00.

Section 359 of the Shipping Act provides a formula by which a shipowner could calculate his limitation of liability. However, section 410 of the Shipping Act provides:

> "Where an international convention or other international instrument applies to Trinidad and Tobago and a provision of that convention or instrument and a provision of this act conflict in any manner, the provision of the convention or instrument shall prevail unless the Minister otherwise provides."

Although Trinidad and Tobago acceded to the 1976 LLMC Convention on 28 February 2000, its terms were not incorporated into its national law through the legislative process. The purported effect of Section 410 then, in the circumstances of the government's accession to

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[32] *R v Lyons* [2003] 1 AC 976, 995.

[33] <http://www.ttlawcourts.org/index.php/component/attachments/download/333>.

the treaty, was to amend Section 359 of the Act (which provides the present limit) through an act of the Executive (i.e. the Minister). The Honourable Madam Justice Gobin in her judgement thus declared Section 410 of the Shipping Act to be unconstitutional, null, void and of no effect. At para.19 of her judgment she held that,

> I am mindful that a declaration to this effect may have negative implications for persons engaged in an important sphere of international commercial activity and it may place us, that is, the Government of Trinidad and Tobago in an unfavourable position in so far as our international obligations are concerned. But the situation can very easily be rectified by simply resorting to the procedure set out under the Constitution. This is hardly likely to be a contentious matter. It is not every day that the government accedes to international conventions. If they are to be meaningfully adhered to, steps must be taken to properly legislate them into effect.

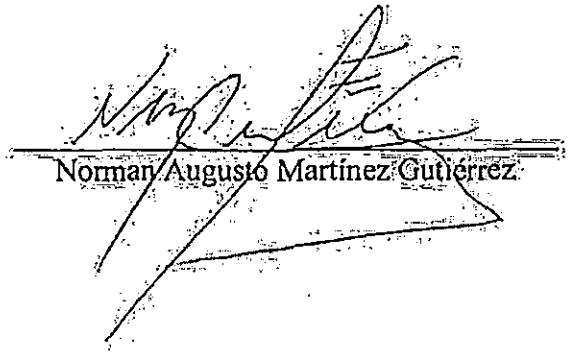
44. It is thus clear that in a dualist State, Courts should not be asked to enforce international treaties when there is specific national legislation on the relevant subject, particularly when that legislation is *contrary to* the international treaties. In fact, in *A v Secretary of State for the Home Department* Lord Scott held that: "It is not, normally, the function of the courts to entertain proceedings the purpose of which is to obtain a ruling as to whether an Act of Parliament is compatible with an international treaty obligation entered into by the executive. ... The executive has extensive and varied prerogative powers that it can exercise function to which I have referred, the courts are ... being asked to perform a function the consequences of which will be essentially political in character rather than legal".[34]

[34] [2005] 2 AC 68, 146.

45. In concluding I wish to recall that one of the principles relating to interpretation and application of treaties in national law is that if the language of legislation implementing a treaty is unambiguous, the courts will not look behind the legislation at the treaty.[35] In *R (on the application of Pepushi) v Crown Prosecution Service* the Court held that "[i]f Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the [State] in breach of an international treaty or not."[36]

I declare under penalty of law that the following is true and correct to the best of my knowledge and belief.

DATED: 30 May 2016 (London)



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[35] Anthony Aust, p. 193.

[36] [2004] EWHC 798 (Admin).

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  2011 to date

* Peer Reviewer for the Commonwealth Law Bulletin

  2008 to date

* Member of the International Maritime Organization's (IMO) Roster of Experts

  2003 to date

* International Maritime Law Consultant

  2000 to date

* Senior Visiting Researcher, Programa de Pós-graduação em Ciência Jurídica, Universidade do Vale do Itajaí (UNIVALI), Itajaí, Santa Catarina

  2011 – 2012

* Senior Lecturer at the IMO International Maritime Law Institute, Malta

  2010 – 2015

* Advisor in maritime cases before English courts (London High Court and Court of Appeal) and French Courts (Tribunal de Marseilles)

  2003 – 2005

* Lecturer at the IMO International Maritime Law Institute, Malta

  2001 – 2010

* Maritime Law Consultant to Sea Malta Company Limited

  2000 – 2005

* Junior Assistant Lecturer at the IMO International Maritime Law Institute, Malta

  1999 – 2001

* Interim Head of the Department of Training, Certification and Watchkeeping of Seafarers, General Directorate of the Merchant Marine of Honduras

  1999

* Interim Head of the Port Captaincies Department and Assistant to the Department of Training, Certification and Watchkeeping of Seafarers, General Directorate of the Merchant Marine of Honduras.

  1998 – 1999

* Legal Assistant, General Directorate of the Merchant Marine (Ship Registry Department)

  1997 – 1998

## SPEAKER AT CONFERENCES, COURSES AND INTERNATIONAL MEETINGS

* Guest lecturer in the annual "Training Programme on Regional Ocean Governance for Mediterranean and Eastern European Countries" organized by the International Ocean Institute (Kappara, Malta, 2005 to date).
* Guest lecturer at the "*IFLOS Summer Academy*" organized by the International Foundation for the Law of the Sea (Hamburg, Germany, 2014 to date).
* Lecturer in the "Master of Arts (M.A.) in Ocean Governance Programme" offered by the University of Malta in collaboration with the International Ocean Institute (Msida, Malta, 2014 to date).
* Guest lecturer in the annual "Training Programme on Regional Ocean Governance Framework, Implementation of the United Nations Convention on the Law of the Sea (UNCLOS) and its Related Instruments in the Southeast Asian Seas and the Indian Ocean" organized by the International Ocean Institute (Phuket, Thailand, 28 February – 19 March 2016).
* Guest lecturer in the "Malta Third Country Training Programme – Ocean Governance and Blue Growth Course" organized by The Commonwealth and the International Ocean Institute (Sliema, Malta, 17 – 23 September 2015).
* Guest lecturer in the "*Third Training Programme on the Sustainable Development and Governance of the Caspian Sea*" organized by the State Enterprise on Caspian Sea Issues at the President of Turkmenistan and the International Ocean Institute (Turkmenbashi, Turkmenistan, 2 – 13 March 2015).

* "*XLX Congresso Internacional de Direito Marítimo*" organized by the Instituto Ibero Americano de Direito Marítimo - IIDM (Lisbon, Portugal, 18 – 21 November 2014).
* "*Joint EMLO and MMLA Seminar*" organized by the European Maritime Law Organization and the Malta Maritime Law Association (Valletta, Malta, 8 May 2014).
* "*Civil Liability in Maritime Transport*" organized by Business Leaders Malta – Insights (St. Julians, Malta, 11 December 2013).
* "*Aspects of Registration of Vessels under the Malta Flag*" organized by the Institute of Legal Studies, Malta (Valletta, Malta, 21 November 2013).
* "*Kenya 2013 2nd Maritime Law Conference*" organized by the Kenya Maritime Authority and the Kenya School of Law (Mombasa, Kenya, 23 – 27 September 2013).
* "*III Jornadas de Lisboa de Direito Marítimo: Das Regras da Haia às Regras de Roterdão*" organized by the Centro de Direito Marítimo e dos Transportes da Facultade de Direito da Universidade de Lisboa (Lisbon, Portugal, 23 – 24 May 2013.
* "Convengno – Sicurezza e Libertà Nell'esercizio Della Navigazione" organized by the Unità di Ricerca dell'Università Di Messina (Messina, Italy, 22 – 23 March 2013).
* Guest lecturer at the "Maestría en Derecho Marítimo y Gestión Portuaria" of the Universidad Nacional Autónoma de Honduras (UNAH) (Tegucigalpa, Honduras, February 2013).
* "II Workshop de Direito Marítimo 'Contribuindo para a Disseminação de uma Maior Mentalidade Marítima'" Organized by the Brazilian Maritime Tribunal (Rio de Janeiro, Brazil, 1 October 2012).

* "I Congresso Brasileiro das Comissões de Direito Marítimo, Portuário e Aduaneiro da OAB / V Seminário Catarinense de Direito e Atividade Portuária" Organized by the Universidade do Vale do Itajaí (UNIVALI) (Itajaí, Brazil, 28 – 29 September 2012).
* "Colloquium on Recent Trends in European Port, Maritime & Transport Law" Organized by the University of Bologna (Faculty of Law), the Erasmus University of Rotterdam and the Scandinavian Institute of Maritime Law of Oslo (Ravenna, Italy, 22 June 2012).
* "La Importancia del Derecho Internacional para el Desarrollo Marítimo y Portuario de los Estados" presentation to the Dirección General Marítima – Autoridad Marítima Colombiana (Bogotá, Colombia, 28 May 2012).
* "Seminário de Cooperação Internacional para o Desenvolvimento, Direito Marítimo e Logística de Comércio Exterior" organized by the Centro de Cooperação Internacional para o Desenvolvimento Estratégico, Grupo de Pesquisa em Cooperação Internacional para o Desenvolvimento, Programa de Pós-Graduação em Direito, da Universidade Federal de Santa Catarina (Florianópolis, Brazil, 22 May 2012).
* International Round-table "EU Maritime Law and Policy: Safety at Sea, Protection of the Marine Environment, Maritime Transport and the Adriatic Sea" organized by the Maritime Law Association of Slovenia (MLAS) (Portorož, Slovenia, 18 May 2012).
* "National Judges and Magistrates Colloquium" organized by the Kenya Maritime Authority and the Kenya Judiciary Training Institute (Mombasa, Kenya, 19 – 23 December 2011).
* Guest lecturer in the "Training Programme on Ocean Governance for the Western Pacific Region" organized by the International Ocean Institute (Tianjin, People's Republic of China, 31 October – 18 November 2011).

* Guest lecturer at the LL.M. and Ph.D. programmes of the Universidade do Vale do Itajaí (UNIVALI) (Itajaí, Brazil, August 2011 – September 2012).

* "Congreso Internacional sobre Derecho Marítimo: Entre la tradición y los nuevos horizontes", organized within the framework of the research project of the Ministry of Science and Innovation: "Bases jurídicas del derecho marítimo Español: análisis, transversal y multidisciplinar para la reforma de la navegación marítima" (A Coruña, Spain, 30-31 May 2011).

* International Round-table "EU Maritime Policy and the Protection of the (Northern) Adriatic" organized by the Maritime Law Association of Slovenia (MLAS) (Portorož, Slovenia, 20 May 2011).

* Guest lecturer at the "Summer Programme" of the Faculty of Maritime Studies and Transportation, University of Ljubljana (Portorož, Slovenia, 21 – 23 June 2010).

* Guest lecturer at the "Operational Maritime Law Course" organized by the Armed Forces of Malta (AFM) – Maritime Safety and Security Training Centre (MSSTC), IMO International Maritime Law Institute (Msida, Malta, 18 May 2010).

* Main lecturer at the "Intensive Course on the Law of the Sea", organized by the IMO International Maritime Law Institute for the Italian Navy (Msida, Malta, 23 – 27 June 2008).

* Main speaker at the "Course on the Law of Marine Pilotage in the Mediterranean" organized by LITAV, Formazione Marittima Superiore (La Spezia, Italy, 22 June 2006).

* "7th International Conference on Traffic Science" (Nova Gorica, Slovenia, November, 2003).

* Stage "The Law of Maritime Safety, Navigation and Preservation of the Marine Environment under English Law and Maltese Law" for the Centro Richerche Giuridiche Per la Pesca e la Navigazione based in Pescara, Italy (Msida, Malta, June 2002).
* Stage "The Exploration, Exploitation, Conservation and Management of Living Resources under International Law" for the Centro Richerche Giuridiche Per la Pesca e la Navigazione based in Pescara, Italy (Msida, Malta, June 2002).

## AWARDS & ACKNOWLEDGEMENTS

* Diploma of Recognition by the General Directorate of the National Merchant Marine of Honduras for steadfast contributions to the international maritime community and in particular to the promotion of the good name of the Republic of Honduras (2011).
* Degree of Doctor of Philosophy in International Maritime Law (Ph.D.) at the IMO International Maritime Law Institute, Malta, awarded *Cum Laude* (2007-2010).
* Degree of Master of Laws in International Maritime Law (LL.M.) at the IMO International Maritime Law Institute, Malta, awarded *with Distinction* (1997-1998).
* IMO's Secretary-General Prize for Best Dissertation at the IMO International Maritime Law Institute during the year 1997 – 1998.
* Parchment for Excellent Collaboration during the XXVI Ibero-American Congress on Aeronautical and Space Law and Commercial Aviation (1996).
* Academic Excellence Diploma, Faculty of Law, Universidad Nacional Autónoma de Honduras (1995).

## MEMBERSHIP TO PROFESSIONAL ASSOCIATIONS

* Member of the Honduran Lawyers' Bar Association
* Member of the Malta Maritime Law Association
* Temporary Member of the Comité Maritime International

## PUBLICATIONS

### Books

* Attard, David Joseph, Fitzmaurice, Malgosia and Martínez Gutiérrez, Norman A. (Eds.), *The IMLI Manual on International Maritime Law, Volume I: Law of the Sea*, Oxford University Press, Oxford, 2014, pp. 800.
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* Martínez Gutiérrez, Norman A. y de Castro Junior, Osvaldo Agripino, "Limitação da Responsabilidade Civil do Prático", *Revista de Direito Aduaneiro, Marítimo e Portuário*, Vol. 5, Nov./Dec. 2011, pp. 27 – 46.

* Martínez Gutiérrez, Norman A. and Grbec, Mitja, "The 1999 Arrest Convention Enters into Force", *Shipping and Transport International*, Vol. 8, No. 4, pp. 22 – 26.

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* Martínez Gutiérrez, Norman A. y Vella, Ivan, "El Derecho Marítimo Maltés en 2010 y 2011", *Anuario de Derecho Marítimo*, No. 29, 2012, pp. 387 - 395.

* Martínez Gutiérrez, Norman A. y Vella, Ivan, "El Derecho Marítimo Maltés en 2012", *Anuario de Derecho Marítimo*, No. 30, 2013, pp. 447 - 464.

* Pavliha, Marko and Martínez Gutiérrez, Norman A., "Marine Scientific Research and the 1982 United Nations Convention on the Law of the Sea", *Ocean and Coastal Law Journal*, Vol. 16, No. 1, pp. 115 – 133.

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Attorneys for Plaintiffs

**IN THE HIGH COURT**

**OF THE**

**REPUBLIC OF THE MARSHALL ISLANDS**

| | |
|---|---|
| Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, et al.,<br><br>**Plaintiffs,**<br><br>v.<br><br>ELENI Maritime Limited in personam and Empire Bulkers Limited,<br><br>**Defendants.** | **H.Ct. Civil No. 2014-110**<br>**H.Ct. Civil No. 2014-050**<br><br>**DECLARATION OF EDWARD T. SWAINE;**<br>**EXPERT OPINION** |

**Declaration of Edward T. Swaine—Expert Opinion**

I, Edward T. Swaine, make this expert opinion in the form of a Declaration based on my personal knowledge and expertise.

1. I have been asked by Baker Donelson Bearman Caldwell & Berkowitz, PC, counsel to plaintiffs in this matter, to provide my opinion on the relationship between international treaty obligations and the domestic law applicable in a constitutional system like that of the Republic of the Marshall Islands ["Marshall Islands"].

2. I am Professor of Law at George Washington University, where I have taught since 2006. Previously, I served as the Counselor on International Law at the U.S. Department of State, and immediately prior to that, as an Associate Professor (with tenure) at the Wharton School, with a secondary appointment at the University of Pennsylvania Law School. I have practiced as an attorney in the Brussels office of Cleary, Gottlieb, Steen and Hamilton and in Washington at the U.S. Department of Justice. I am presently a reporter for the American Law Institute's Restatement of the Law (Fourth), Foreign Relations Law of the United States—focusing on the relationship between treaties and U.S. domestic law—and serve as an elected member of the American Law Institute. I am also a member of the Advisory Committee on Public International Law for the U.S. State Department. Previously, I have served as a member of the Executive Council of the



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American Society of International Law and as co-chair of the International Law in Domestic Courts interest group. This declaration is, of course, in my individual capacity only.

3. Among my academic work, I am co-author of Foreign Relations and National Security Law: Cases, Materials and Simulations (4th ed. 2011) (with Franck, Glennon, and Murphy), and I have published work in the American Journal of International Law, Columbia Law Review, Duke Law Journal, Harvard International Law Journal, Stanford Law Review, University of Pennsylvania Law Review, Virginia Journal of International Law, William and Mary Law Review, and Yale Journal of International Law, among others, principally on the subject of public international law—including the law of treaties—and foreign relations law.

4. I have been asked for my opinion concerning the legal effect, in the Marshall Islands, of certain provisions of the Convention on Limitation of Liability for Maritime Claims, 1976, Nov. 19, 1976, 1456 U.N.T.S. 221 ["1976 Convention"] and the Protocol of 1996 to Amend the Convention Limitation of the Liability for Maritime Claims and the Convention on Limitation, May 2, 1996, 1456 U.N.T.S. 24635 ["1996 Protocol"]. In this connection, I have reviewed, among other things, the Motion for Declaratory Judgment as to the Primacy in the Marshall Islands of the Protocol of 1996, the Declaration of Martin Davies, the Declaration of A.T. Chenault, and relevant legal authority, including the Constitution of the Republic of the Marshall Islands and Title 47, chapter 5 of the Marshall Islands Revised Code ["MIRC"]. I do not claim prior expertise particular to the 1976 Convention, the 1996 Protocol, or the law of the Marshall Islands. However, I am able to speak with expertise concerning the operation of international treaties in domestic law, which for the reasons discussed below is a threshold question at issue here.

5. The Marshall Islands is a party to two international agreements relevant to the case at hand. The first, the 1976 Convention, entered into force for the Marshall Islands on 1 March, 1995. The second, the 1996 Protocol, entered into force for the Marshall Islands on 30 April 2006. Although Article 19 of the 1976 Convention provides that states parties may denounce that Convention, it appears that the Marshall Islands has not taken that step.[1]

6. China is also a party to the 1976 Convention (on behalf of the Hong Kong Special Administrative Region only, subject to reservations and notifications not bearing directly on this opinion), with entry into force on 1 July 1997. The 1996 Protocol entered into force for China (again, on behalf of the Hong Kong Special Administrative Region only, and subject to a declaration not bearing directly on this opinion) on 3 May 2015.[2] It is my understanding that the collision at the heart of this matter occurred in 2013. Accordingly, because Article 9(3) of the 1996 Protocol provides that it "shall apply only to occurrences which shall take place after the entry into force for each State of this Protocol," the 1996 Protocol does not itself bind China (through application to Hong Kong) in this instance.

[1] See International Maritime Organization, Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions 358-61, 371-73(As at 19 April 2016).

[2] *Id.* at 358-61, 363, 366-67, 371-73, 374.



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7. The question of immediate import to a domestic court confronting the invocation of international law is whether that law is applicable within the State concerned. This will usually, as in this matter, be governed by the State's own law; it is not, in any event, a question resolved by international law. As one noted commentator observed, "[i]t should not be assumed that once a treaty has entered into force for a state it is then in force *in* that state; in other words, that it has become part of its law."[3]

8. Whether an international agreement like the 1976 Convention or the 1996 Protocol is part of the law of a State party is usually resolved by one of two approaches. The State's domestic law may establish a "monist" approach, providing that a treaty concluded in accordance with its law, and which has entered into force and remains in force for the State, is in principle applicable as part of the State's domestic law. (Whether a particular treaty provision is in fact applicable will in many constitutional schemes turn on whether it is deemed "self-executing," a principle that is subject to many different permutations.) Other, "dualist" constitutions adopt a different approach. Under a dualist approach, "the rights and obligations created by [treaties] have no effect in domestic law *unless legislation is in force to give effect to them.*" A second implication is more subtle. Because dualist constitutions deny a privileged or special status to treaties, "the provisions of a treaty that have been incorporated into domestic law have the status only of domestic law, and can be amended or repealed by later legislation. If such action were to result in a breach of the treaty, there would be *no* remedy in domestic law since there would have been no violation of it."[4]

9. The Constitution of the Marshall Islands is unambiguously dualist in character. Article V, section 4, provides that "No treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this Constitution shall, of itself, have the force of law in the Republic." Because the legislative power is assigned to the Nitijela (see Article IV, section 1), this means that implementation of an international agreement is the responsibility of the Marshall Islands legislature. As one commentary indicates, "Article V of the Constitution makes the Cabinet responsible for conducting the foreign affairs of the Marshalls, whether by treaty or otherwise, but treaties must be approved by the Nitijela, and no treaty has the force of law in the Marshalls until so approved."[5] This dualist approach is typical of parliamentary schemes, of which the Marshall Islands is (for the most part) representative,[6] and of the Pacific Islands in general.[7]

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[3] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (3rd ed. 2013) (emphasis in original).

[4] *Id.* at 167 (emphases in original).

[5] Jean G. Zorn, *The Republic of the Marshall Islands*, *in* SOUTH PACIFIC ISLANDS LEGAL SYSTEMS 100, 104 (Michael A. Ntumy, ed., 1993).

[6] *See, e.g.*, C.J. Lynch, *The 1979 Constitution of the Marshall Islands—A Hybrid?*, 61 PARLIAMENTARIAN 230 (1980); *cf.* ALICE DE JONG, THE CONSTITUTION OF THE MARSHALL ISLANDS: ITS DRAFTING AND CURRENT OPERATIONS 56-58 (1993) (describing judicial function in preserving the authority of constitutional lawmaking by the legislature).

[7] *See* Rhona K.M. Smith, *The Pacific Island States: Themes Emerging from the United Nations Human Rights Council's Inaugural Universal Review?*, 13 MELBOURNE J. INT'L L. 569, 580 (2012) (noting, with respect to human



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10. The 1976 Convention and the 1996 Protocol depend on implementation in national law and, consequently, the possibility of varying national approaches to obligations under those agreements appears to have been fully anticipated. Article 8, paragraphs 2 and 4, of the 1976 Convention indicate the possibility of certain declarations and communications with the effect of varying State commitments, and Article 18 licenses certain reservations. Moreover, Article 6, paragraph 3, provides that that national law may establish a different priority of claims; Article 10, paragraph 1, stipulates that "a State Party may provide in its national law" that invocation of the right to limit liability is subject to constitution of a limitation fund meeting certain criteria; and Article 15, paragraphs 2 and 4, specifically contemplates the regulation "by specific provisions of national law" of certain systems of liability. Perhaps most significant, under Article 14, the laws of a State party are deemed to regulate the rules governing the constitution and distribution of a limitation fund and all procedural matters relating thereto. These terms are retained under the 1996 Protocol. In light of the anticipated potential for lack of uniformity under the 1976 Convention and 1996 Protocol themselves, observers expressed little surprise at the additional possibility that the international obligations would also vary in their domestic implementation—including because of the nature of dualist jurisdictions.[8]

11. The Marshall Islands implemented provisions of the 1976 Convention and, subsequently, the 1996 Protocol, in its Limitation of Liability for Maritime Claims Act, codified as part of Title 47 of the MIRC, chapter 5. For example, 47 MIRC § 510, as amended in 2006, reflects the limits of liability as they are indicated in Article 3 of the 1996 Protocol, which replaced those in the 1976 Convention; it is subject to limits indicated in 47 MIRC § 511, which in turn reflects the limits indicated in Article 7 of the 1976 Convention as they were amended in Article 4 of the 1996 Protocol. Title 47, §§ 520-523, which address the constitution, distribution, and preclusive force of a limitation fund (as well as the limitation of liability without constitution of a limitation fund), directly reflect the text of Articles 10-13 of the 1976 Convention, which were not altered in the 1996 Protocol. In some instances the Marshall Islands appears not to have amended its domestic law to reflect changes in the 1996 Protocol. For example, although Article 8 of the 1976 Convention was partly incorporated in 47 MIRC § 512, the Marshall Islands appears not to have incorporated either Article 8(2) or its amendment in Article 5 of the 1996 Protocol, presumably because those provisions were not directly relevant to States (like the Marshall Islands) that are members of the International Monetary Fund.

12. In implementing the 1996 Protocol, the Marshall Islands appears to have excluded Article 9, which provides as follows:

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rights treaties, that "[a]ll Pacific Island states, being dualist in their approach to international law, require [national] implementing measures").

[8] *See, e.g.*, XIA CHEN, LIMITATION OF LIABILITY FOR MARITIME CLAIMS 129 (2001) (noting that uniformity of approach was dependent not only on the uniformity required by a convention, and the relationship between that convention and other international obligations, but also "upon the national implementation of the convention and its relationship with other national laws").



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Article 9

1. The Convention and this Protocol shall, as between the Parties to this Protocol, be read and interpreted together as one single instrument.

2. A State which is Party to this Protocol but not a Party to the Convention shall be bound by the provisions of the Convention as amended by this Protocol in relation to other States Parties hereto, but shall not be bound by the provisions of the Convention in relation to States Parties only to the Convention.

3. The Convention as amended by this Protocol shall apply only to claims arising out of occurrences which take place after the entry into force for each State of this Protocol.

4. Nothing in this Protocol shall affect the obligations of a State which is a Party both to the Convention and to this Protocol with respect to a State which is a Party to the Convention but not a Party to this Protocol. Nothing in this Protocol shall affect the obligations of a State which is a Party both to the Convention and to this Protocol with respect to a State which is a Party to the Convention but not a Party to this Protocol.

13. While the Marshall Islands could have incorporated Article 9 of the 1996 Protocol into its domestic law, a decision to refrain from doing so is explicable. The provisions of Article 9 address the relationship between the 1976 Convention and the 1996 Protocol as a matter of international law and may be obviated by a State party's domestic scheme. Article 9(1) suggests that the 1976 Convention and the 1996 Protocol are to be construed as one instrument; for courts of the Marshall Islands, as for other dualist States, interpretation is instead a matter of the interaction of its statutory provisions and their construction according to domestic canons. Article 9(2) is irrelevant to a State like the Marshall Islands, insofar as it was (and remains) party to the 1976 Convention and the 1996 Protocol. Article 9(3) concerns entry into force of the Convention as amended by the Protocol, but the effective date of Marshall Islands law is of course a question resolved instead by the statute itself.

14. As directly relevant here, Article 9(4) addresses the narrow question of "the obligations of a State" in the present position of the Marshall Islands—that is, as a party both the 1976 Convention and the 1996 Protocol—and "a State which is a party to the Convention but not a Party to this Protocol." As with the other paragraphs of Article 9, a decision by the Marshall Islands to refrain from incorporating Article 9(4) would make sense in context. Nothing in Title 47, chapter 5 appears to be contingent on whether the Marshall Islands owes international obligations under the 1976 Convention or the 1996 Protocol, either by virtue of its own status as a State party or another State's status. (Doing so would have made Marshall Islands law depend, for example, on whether it had denounced the 1976 Convention or, for that matter, the 1996 Protocol, but no such contingencies are indicated in its code.) Rather, relevant provisions in Title 47, chapter 5 appear to have been adopted to establish the sovereign choice of the Marshall Islands concerning the nature of the limitation funds (and associated rights and procedures) that can be constituted under its laws, irrespective of contingencies imposed by the international law of treaties. Consistent with that approach, it does not appear from Title 47, chapter 5 that the Marshall Islands ever

implemented the final clauses of the 1976 Convention, which regulated, *inter alia*, the efficacy of that Convention in relation to other States and other international agreements.

15. Whether the Marshall Islands has implemented relevant provisions of the 1976 Convention and the 1996 Protocol in its domestic law is decisive, in dualist system, of the question whether those provisions provide a domestic court with a source of law it may apply to a suit properly before it. An example of this distinction is provided by the recent order of the Bombay High Court in *Hanwha Gen'l Ins. Co. Ltd. v. M.V. ELENI*. In refusing to dismiss the action at issue there, Judge K.R. Shriram explained that while India is a State party to the 1976 Convention and the 1996 Protocol, "the entire Convention has not been enacted as a part of domestic law" in India.[9] Because Indian statutory law was "a clear departure" from Article 13(2) of the 1976 Convention, that domestic law, rather than the terms of the 1976 Convention, applied.[10] Although the treaty provisions in question, and the domestic law at issue, obviously differ, the positions of India and the Marshall Islands are comparable. As both are dualist jurisdictions, the law at issue depends on domestic enactments rather than the terms of any international obligations the State may have undertaken; in this case, accordingly, Article 9(4) of the 1996 Protocol is effective as a source of law only if it has itself been incorporated into Marshall Islands law.

16. The question of the law applicable within the Marshall Islands is distinct, it should be stressed, from whether the Marshall Islands owes obligations to another State as a matter of international law. It may be that failure to abide by Article 9(4) of the 1996 Protocol, through the application of Marshall Islands law notwithstanding that provision, is inconsistent with obligations that the Marshall Islands owes to China under international law—because, as noted earlier, China is a State that had not (at the relevant time) ratified the 1996 Protocol. Any such inconsistency, however, is a matter resolved between sovereign States on the international plane, subject to their rights and interests. In this regard, it is notable that China ratified the 1996 Protocol (with respect to Hong Kong Special Administrative Region), with entry into force as of 2015. This followed the initial adoption by Hong Kong of the necessary legislation, the Merchant Shipping (Limitation of Shipowners Liability) (Amendment) Bill 2005—albeit with what proved to be delayed effect, caused by the timing of accession.[11] These actions suggest that Hong Kong and ultimately China agreed with the terms established by the 1996 Protocol and, derivatively, with the policy adopted by the Marshall Islands in its statute. In such context, Hong Kong and China as a whole may not have any interest in disputing whether the Marshall Islands has acted inconsistent with Article 9(4) of the 1996 Protocol. In any event, that is a matter to be assessed on the international plane, as a

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[9] Hanwha Gen'l Ins. Co. Ltd. v. M.V. ELENI (IMO No. 9460277), Notice of Motion No. 769 of 2014 in Admiralty Suit (Lodg.) No. 329 of 2014 (Bombay High Court Jan. 5, 2015), ¶ 28 (attached as Exhibit 1 to Supplemental Reply (Per Court Order of April 21, 2015), Chubb Ins. (Thailand) Co. Ltd., et al. v. ELENI Maritime Ltd., H. Ct. Civil Nos. 2014-100 & 2014-050).

[10] *Id.* ¶ 33.

[11] For the bill itself, see http://www.legco.gov.hk/yr04-05/english/bills/b0501071.pdf; for explanatory background, see Hong Kong Legislative Council (LC) Paper No. LS63/14-15, Paper for the House Committee Meeting on 8 May 2015: Legal Service Division Report on Subsidiary Legislation Gazetted on 30 April 2015, available at http://www.legco.gov.hk/yr14-15/english/hc/papers/hc20150508ls-63-e.pdf.



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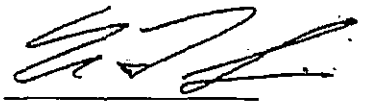
matter of international law and diplomacy, rather than in the application of Marshall Islands law by a court of that jurisdiction.

17. I declare under penalty of law that the following is true and correct to the best of my knowledge and belief.



Edward T. Swaine

May 2016

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## EMPLOYMENT

**GEORGE WASHINGTON UNIVERSITY LAW SCHOOL**

*Professor of Law* — 2010-present
*Associate Professor* — 2006-2010

- Classes: International Law; U.S. Foreign Relations Law; Contracts I & II
- Law School service: Admissions, Law School Supervisory committees, Inns of Court; previously Senior Associate Dean for Academic Affairs; Director, Competition Law Center; Co-Director, GW-Oxford Summer Human Rights Program; Appointments, Curriculum, and Technology committees
- University service: Faculty Senate; previously Board of Trustees Working Group on Appointment, Tenure, and Promotion and Faculty Governance Task Force
- Visits: Goerg-August-Universität Göttingen (2010)

**U.S. DEPARTMENT OF STATE**

*Counselor on International Law* — 2005-2006

- On leave from University of Pennsylvania
- Assisted Legal Adviser in advising Secretary of State

**WHARTON SCHOOL, UNIVERSITY OF PENNSYLVANIA**

*Associate Professor (with tenure)* — 2004-2006
*Assistant Professor* — 1997-2004

- Classes: Law of Marketing and Antitrust; Government and the Legal Environment of Business; Introduction to Law and Legal Process
- Visits: University of Chicago Law School (Fall 2002)

**UNIVERSITY OF PENNSYLVANIA LAW SCHOOL**

*Associate Professor of Law (secondary appointment)* — 2004-2006
*Associate Professor of Law (visiting)* — Fall 2003

- Classes: Public International Law; Comparative and International Federalism

**CLEARY, GOTTLIEB, STEEN & HAMILTON**, Brussels, Belgium

*Associate* — 1995-1997

CENTRE FOR ADVANCED LEGAL STUDIES, KATHOLIEKE UNIVERSITEIT LEUVEN, Leuven, Belgium
*Research Fellow* 1995-1997

U.S. DEPARTMENT OF JUSTICE, Washington, DC
*Attorney, Appellate Staff, Civil Division* 1990-1994

JUDGE ALVIN B. RUBIN, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, Baton Rouge, LA
*Law clerk* 1989-1990

TEMPLE, BARKER & SLOANE (Mercer Management Consulting), Lexington, MA.
*Research Associate, Informational Technology Industries* 1985-1986

**EDUCATION**

YALE LAW SCHOOL
J.D., 1989
- Editor-in-Chief, Yale Law Journal
- Co-Director, Jerome N. Frank Legal Services

HARVARD COLLEGE
A.B. (Social Studies), *magna cum laude*, 1985
- Winner, National Debate Tournament (1985)
- Literary Editor, Harvard Lampoon

MARQUETTE SENIOR HIGH SCHOOL, Marquette, MI

**WORKS IN PROGRESS**

Co-Reporter, American Law Institute, Restatement of the Law (Fourth), The Foreign Relations Law of the United States: Treaties (with Curtis Bradley and Sarah Cleveland)

Co-Author, U.S. Foreign Relations Law (with Sean Murphy) (tentative title; under contract with Oxford University Press)

Foreign Relations Law: Cases, Materials, and Simulations (with Sean D. Murphy and Ingrid Wuerth) (5th ed., West Publishing)

Infrequently Asked Questions (forthcoming, Journal of Appellate Practice and Process, 2017)

*Kiobel* and Extraterritoriality: Here, Not There, Probably Not Everywhere (forthcoming, University of Oklahoma Law Review, 2017 (symposium))

**BOOKS**

Foreign Relations and National Security Law: Cases, Materials, and Simulations (with Thomas M. Franck (dec'd), Michael J. Glennon, and Sean D. Murphy) (4th ed., West Publishing, 2011)

- U.S. Foreign Relations Law: Cases, Materials, and Simulations (with Thomas M. Franck (dec'd), Michael J. Glennon, and Sean D. Murphy) (4th ed., West Publishing, 2012) (derivative work)
- U.S. National Security Law: Cases, Materials, and Simulations (with Thomas M. Franck (dec'd), Michael J. Glennon, and Sean D. Murphy) (4th ed., West Publishing, 2012) (derivative work)

More Common Ground for International Competition Law? (symposium with Josef Drexl, Warren S. Grimes, Clifford A. Jones, and Rudolf J.R. Peritz, eds.) (Edward Elgar Publishing, 2011)

**ARTICLES AND BOOK CHAPTERS**

"Bond's Breaches," 90 Notre Dame L. Rev. 1517 (2015)

"Identifying Customary International Law: First Thoughts on the ILC's First Thoughts," AJIL Unbound (December 23, 2014) (http://www.asil.org/blogs/identifying-customary-international-law-first-thoughts-ilc%E2%80%99s-first-steps)

"Reservations," in The Oxford Guide to Treaties (Duncan Hollis, ed.) (Oxford University Press, 2012)

"Ersatz Treaties," 44 NYU J. Int'l L. & Pol. 833 (2012)

"Cooperation, Comity, and Competition Policy: United States," in Cooperation, Comity and Competition Policy (Andrew Guzman, ed.) (Oxford University Press, 2010)

"Bespoke Custom," 21 Duke J. Comp. & Int'l L. 201 (2010)

"The Political Economy of *Youngstown*," 83 S. Cal. L. Rev. 263 (2010)

"Putting *Missouri v. Holland* on the Map," 73 Mo. L. Rev. 1007 (2008)

"Taking Care of Treaties," 108 Colum. L. Rev. 331 (2008)

"*Medellín v. Texas*: Presidential Power and International Tribunals," 6 Georgetown J. L. & Pub. Pol. 129 (2008)

"Reserving," 31 Yale J. Int'l L. 307 (2006)

"Hail, No: Changing the Chief Justice," 154 U. Pa. L. Rev. 1709 (2006)

"The Constitutionality of International Delegations," 104 Colum. L. Rev. 1492 (2004) (cited in NRDC v. EPA, 464 F.3d 1 (D.C. Cir. 2006))

"Restoring (and Risking) Interest in International Law" (reviewing Jack L. Goldsmith & Eric A. Posner, The Limits of International Law), 100 Am. J. Int'l L. 259 (2006)

"Resisting Delegations," 97 Am. Soc'y Int'l L. Proc. 343 (2004)

"Perspectives on Empagran," The Antitrust Source, September 2004

"Against Principled Antitrust," 43 Va. J. Int'l L. 959 (2003)

"Unsigning," 55 Stan. L. Rev. 2061 (2003)

"Does Federalism Constrain the Treaty Power?," 103 Colum. L. Rev. 403 (2003) (cited in United States v. Bond, 581 F.3d 128, 135 (3d Cir. 2009), and subsequent decisions)

"Rational Custom," 52 Duke L.J. 559 (2002)

"'Competition, Not Competitors,' Nor Canards: Ways of Criticizing the Commission," 23 U. Pa. J. Int'l Econ. L. 597 (2002)

"The Local Law of Global Antitrust," 43 Wm. & Mary L. Rev. 627 (2001)

"The Undersea World of Foreign Relations Federalism," 2 Chicago J. Int'l L. 337 (2001)

"Crosby as Foreign Relations Law," 41 Va. J. Int'l L. 481 (2001)

"Negotiating Federalism: State Bargaining and the Dormant Treaty Power," 49 Duke L.J. 1127 (2000)

"Subsidiarity and Self-Interest: Federalism at the European Court of Justice," 41 Harvard Int'l L.J. 1 (2000)

Book Review (reviewing Earl H. Fry, The Expanding Role of State and Local Governments in U.S. Foreign Affairs), 30 Publius 249 (2000)

"The Triumph of Local Politics?," 93 Am. Soc'y Int'l L. Proc. 247 (2000)

"Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility" (student note), 98 Yale L.J. 187 (1988)

**SELECTED PROFESSIONAL ACTIVITIES**

Co-presenter, Restatement of the Law Fourth: The Foreign Relations Law of the United States – Treaties, American Law Institute Annual Meeting (Washington, DC) (May 2016, May 2015); Council (January 2016, January 2015); Advisors and Members Consultative Group (October 2015, November 2014, February 2014, October 2013); International Advisory Panel (April 2016, April 2015)

Panelist, Current Issues in Treaty Approvals, Advisory Committee on International Law (May 2016)

Co-Host, Potomac Foreign Relations Law Roundtable (May 2016-May 2006)

Keynote Lecture: Nature and Sources of International Law, National Foreign Affairs Training Center (Foreign Service Institute) (May 2016, 2015, 2014, 2013)

Moderator, Human Rights and Treaty Systems: Symposium on the Identity and Future of Human Rights Honoring Dinah Shelton (April 2016)

Paper presenter, *Kiobel* and Extraterritoriality: Here, Not There, Probably Not Everywhere, Accountability for Human Rights Abuses by Private Security Contractors -- University of Oklahoma (November 2015)

Commentator, Duke University-Geneva Conference on Comparative Foreign Relations Law (July 2015)

Paper presenter, Treaty Conditions and Constitutions: Wall, Window, or Valve? (International Legal Theory Workshop, American Society of International Law) (May 2015)

Panelist, Program on Alleged Abuses of Presidential Power (George Washington University Law School) (April 2015)

Moderator, State Oppression, Violence Against Minorities, and the Possibilities for Remedial Secession and Independence (George Washington University Law School) (April 2015)

Speaker, The Stagnation of International Law (American Society of International Law Annual Meeting) (April 2015)

Keynote speaker, *The Restatement (Fourth): Status, Challenges & Future* (Brigham Young University Law Review, Treaty Law and the Restatement (Fourth) of the Foreign Relations Law of the United States) (January 2015)

Paper presenter, *Bond's Breaches* (Notre Dame Law Review Symposium, Law Review Symposium, The Treaty Power After Bond v. United States: Interpretive and Constitutional Contraints) (November 2014)

Commentator, Expert Seminar on International Law and Drug Policy Reform (The Global Drug Policy Observatory, International Centre on Human Rights and Drug Policy, Transnational Institute and the Washington Office on Latin America) (October 2014)

Discussant/reaction paper, Temple Law School, International Law Roundtable, on Guzman and Meyer, *Goldilocks Globalism: The Rise of*

*Soft Law in International Governance* (September 2014)

Paper presenter, *Customary International Law*, Eighth Annual Potomac Foreign Relations Law Roundtable, George Washington University Law School (April 2014)

Panelist, Supreme Court Preview: United States v. Bond, American Constitution Society, Student Chapter, George Washington University Law School (November 2013)

Panelist, Sharia and Foreign Law Bans in a State Near You? Legal Difficulties, Practical Problems, Center for American Progress (May 2013)

Paper presenter, Panel on Ratifying the Hague Choice of Court Convention, Sokol Colloquium on Foreign Court Judgments and the U.S. Legal System, University of Virginia Law School (April 2013)

Speaker, International Law in Obama's Second Term: Problems and Priorities, George Washington University Law School/American Society of International Law (January 2013)

Moderator, Is the Treaty of the Law of the Seas in the United States' Interests?, World Affairs Council/American Academy of Diplomacy (December 2012)

Discussant, Theories of Ratification, Compliance, and Reservation, ASIL Research Forum, University of Georgia Law School (October 2012)

Senior commentator, Wharton-Colorado International Law Workshop, University of Colorado (Boulder) (September 2012)

Testimony before the Senate Committee on the Judiciary, Hearings on Holocaust-Era Claims in the 21st Century (June 2012) (http://www.judiciary.senate.gov/hearings/hearing.cfm?id=5e7c78a35dfade0822c4ebc5992b5080)

Faculty member, Annual Academy of American and International Law (Center for American and International Law, Plano, Texas: June 2012, June 2011, June 2010, May 2009)

Commentator, International Delegations: Book Symposium for Bradley, *International Law in the U.S. Legal System*, Duke University Law School (March 2012)

Moderator, A Recap and Analysis of the Supreme Court Oral Arguments Addressing the Alien Tort Statute in Kiobel v. Royal Dutch Petroleum, (co-sponsored by American Society of International Law; the Washington Foreign Law Society; the DC Bar International Law

Section; and the International Law and Environment, Energy, and Resources sections of the American Bar Association (March 2012)

Paper presenter, *States of Incorporation*, Human Rights Litigation In State Courts and Under State Law, University of California-Irvine (March 2012)

Commentator, Foreign Affairs and the States: Recent Developments in Federalism and International Law, Advisory Committee on International Law (Washington, DC, December 2011)

Speaker, Current Issues in International Dispute Resolution, American Society of International Law (Los Angeles, November 2011)

Paper presenter and panelist, *Ersatz Treaties*, Human Rights Law in Practice (NYU Journal of International Law and Policy, October 2011)

Participant/reaction paper, Temple Law School, International Law Roundtable on Dudziak, *War*Time* (September 2011)

Speaker, U.S. Federalism and Private International Law, Advisory Committee on Private International Law/Georgetown University Law Center (Washington, DC, September 2011)

Instructor, Appreciation Course on Competition Law for Officers of the Indian Administrative Service (New Delhi, India, September 2011)

Amicus, Brief for Professors of International Litigation and Foreign Relations Law in Support of Respondents, Samantar v. Yousuf (No. 08-1555) (filed January 2010) (http://www.cja.org/downloads/Samantar_Professors_Brief.pdf)

Paper presenter and discussant, *Bespoke Custom*, Duke Law Scholarship Roundtable: Opting Out of Customary International Law, Duke University Law School (January 2010)

Co-organizer and discussant, Annual Meeting of ASIL International Law in Domestic Courts Interest Group (University of California-Hastings College of Law, December 2009)

Panelist and presenter, The Role of Ethics in Public International Law (ASIL International Legal Theory Interest Group, Washington, DC, November 2009)

Participant/reaction paper, Temple Law School, International Law Roundtable on Raustiala, *Does the Constitution Follow the Flag?* (October 2009)

Instructor, Foundations of International Law (National Foreign Affairs Training Center, Washington, DC, May 2009)

Co-Panelist and Commentator, Russia and the European Court of Human

Rights (Program on Rule of Law in the Russian Federation, INDEM/Federal Judicial Center, Washington, DC, May 2009)

Paper Presenter, *Youngstown's Seizure* (Washington & Lee Law School, September 2008; International Law in Domestic Courts Section, American Society of International Law, Philadelphia, PA, December 2008; Potomac Foreign Relations Law Roundtable, George Washington University Law School, May 2009)

Co-panelist, Medellín v. Texas and the Self-Execution of Treaties (Annual Meeting of the American Society of International Law, Washington, DC, March 2009)

Co-presenter, Current Developments in Immunities Law, International Law in Domestic Courts Section Meeting, American Society of International Law, Washington, DC, March 2009)

Co-presenter, Official Immunities in International Litigation (Judicial Advisory Board Meeting, American Society of International Law, Washington, DC, March 2009)

Participant/reaction paper, Temple Law School, International Law Roundtable on Goodman and Jinks, *Socializing States* (October 2008)

Paper presenter, *Non-Self-Execution and the Non-Separation of Powers*, Duke-Harvard Foreign Relations Law Workshop, September 2008)

Moderator, Legal Expert, and Member of U.S. Delegation, 2008 Human Dimension Seminar: Constitutional Justice (Organization for Security and Co-operation in Europe, Warsaw, Poland, May 2008)

Commentator on Duncan Hollis, *Unpacking the Compact Clause* (Potomac Foreign Relations Law Roundtable, George Washington University Law School, May 2008)

Co-Presenter (with Curtis Bradley), Current Issues in Treaty Practice: Signing, Unsigning, and Attaching Reservations to Treaties (Advisory Committee on International Law, U.S. Department of State, March 2008)

Paper presenter and panelist, *Putting Missouri v. Holland on the Map*, Return to Missouri v. Holland: A Symposium on Federalism and International Law, University of Missouri School of Law, February 2008)

Commentator on Carlos M. Vázquez, *Treaties As Law of the Land: The Supremacy Clause and the Presumption of Self-Execution* (Temple Law School, January 2008)

Participant, American Society of International Law Interest Group on International Law in Domestic Courts Annual Workshop (Austin,

Texas, December 2007)

Co-Panelist, Supreme Court and International Law (American Society of International Law, Executive Council Luncheon, October 2008)

Commentator, C-Span, Washington Journal (October 2007)

Panelist, Medellín v. Texas: Presidential Power and International Tribunals (American Enterprise Institute, Washington, DC, September 2007)

Participant, Private-Sector Roundtable on Arbitration Provisions in U.S. Tax Treaties (U.S. Senate Committee on Foreign Relations, June 2007)

Paper presenter, *Taking Care of Treaties* (Potomac Foreign Relations Law Roundtable, May 2007; Duke-Harvard Foreign Relations Law Workshop, November 2006)

Discussion Leader, International Delegations, Political Safeguards, and Constitutional Restraints (International Delegations and the U.S. Constitution, Duke-Harvard Foreign Relations Law Workshop, November 2006)

Faculty Member and Panelist, International Law in the U.S. Courts: Current Issues, Future Trends (Program on International Law and Litigation for U.S. Judges, Federal Judicial Center/American Society of International Law, November 2006)

Paper presenter, *Alien Authority*? (International works-in-progress colloquium at the University of Georgia Law School, April 2006)

Paper presenter, *Taking Turns* (Conference on Delegating Sovereignty, Duke University, February 2006)

Paper presenter, *Hail, No: Changing the Chief Justice* (Conference on the Chief Justice and the Institutional Judiciary, University of Pennsylvania Law Review, November 2005)

Paper presenter, *Judicial States* (Roundtable on the Future of the State in International Law, University of Virginia Law School, October 2005)

Commentator on Carlos Vazquez, *Whither Missouri v. Holland?* (Foreign Relations Law Conference, Harvard Law School, September 2005)

Moderator and panelist, The Constitution at Home and Abroad (U.S. Department of State, September 2005)

Paper presenter, *The Ratification of International Instruments by Federal States: The American Doctrine* (International Conference on Federalism, Brussels, Belgium, March 2005)

Paper presenter, *Reserving* (Wharton School, March 2005; Georgetown Law Center, February 2005; Boalt Hall School of Law, January 2005;

Vanderbilt University School of Law, November 2004; Temple Law School, October 2004)

Panelist, International Ethics, *Contractarian Approaches to Business Ethics: The Evolution of Integrative Social Contracts Theory* (Carol and Lawrence Zicklin Center for Business Ethics Research, November 2004)

Panelist, International Law, *What's At Stake in the November Election* (American Constitution Society, October 2004)

Moderator, *The Supreme Court's Empagran Decision: How Does It Affect the Extra-Territorial Reach of the Sherman Act?* (American Bar Association, Antitrust Section, July 2004)

Speaker, *Treaties within the U.S. Legal System* (Training Seminar, Office of the Legal Advisor, U.S. Department of State, May 2004)

Co-organizer and commentator, *International Law and Institutions* (Wharton Legal Studies Department Research Colloquium, May 2004)

Panelist, *Treaties in U.S. Law: New Debates on Old Ideas?* (Annual Meeting, American Society of International Law, April 2004)

Paper presenter, *How Can International Agreements Facilitate Federalism?* (Symposium on International Law and Practice in American Constitutionalism, J.B. Moore Society of International Law, University of Virginia Law School, March 2004)

Commentator on Juan Rovira, *The World Bank's Policy Regarding Pricing of Medicines* (Symposium on Corporate and Legal Implications of Re-Pricing Medicines in Developing Nations, University of Pennsylvania Journal of International Economic Law/Institute for Law and Economics, February 2004)

Paper presenter, *From Delegation to Diffusion* (Academy of Legal Studies in Business, August 2003; University of Pennsylvania Law School, August 2003; Wharton School, October 2003; American Society of International Law, Interest Group on International Law in Domestic Courts, University of Maryland, December 2003)

Discussant, *How Should Cooperation Proceed: WTO, ICN or Bilateralism?* (University of California (Berkeley) Workshop on International Antitrust: Institute for European Studies and the Program in Law, Economics, and Institutions, June 2003)

Paper presenter, *Unsigning* (Program on International Politics, Economics, and Security, Harris School of Public Policy, University of Chicago, May 2003; Symposium on Treaties, Enforcement, and U.S. Sovereignty, Stanford Law School, March 2003)

Commentator on Avishalom Tor, *Developing a Behavioral Approach to Antitrust Law and Economics* (Loyola University of Chicago Third Annual Antitrust Colloquium, Institute for Consumer Antitrust Studies, April 2003)

Paper presenter, *Against Principled Antitrust* (Wharton Legal Studies Research Program, February 2003; Sokol Colloquium, University of Virginia Law School, October 2002)

Commentator on Paul B. Stephan, *A Becoming Modesty: U.S. Litigation in the Mirror of International Law* (American Society of International Law, Interest Group on International Law in Domestic Courts, Fordham University, December 2002)

Commentator on Welber Barral, *Antidumping Policy and Developing Countries*; Frank Garcia, *Beyond Special and Differential Treatment*; and Gregory Shaffer, *Reducing the Biases for International Trade Dispute Resolution: Imperfect Alternatives for a More Equitable International System* (American Society of International Law, International Economic Law Group, and the Program on International Business and Economic Law, Georgetown University Law Center, October 2002)

Paper presenter, *Does Federalism Constrain the Treaty Power?* (University of Chicago Law School, October 2002; Academy of Legal Studies in Business Annual Meeting, August 2002, Las Vegas, NV; University of Pennsylvania Law School, August 2002; Temple Law School, August 2002)

Presenter and panelist, *International Law and the Legal Curriculum* (American Society of International Law, March 2002, Washington, DC)

Paper presenter, *Rational Custom* (Hurst Seminar, University of Florida/California State University (Long Beach), February 2002; University of Chicago International Law Workshop, November 2001)

Panel chair and commentator, *Markets and Antitrust Policy in the European Union* (European Community Studies Association Seventh Biennial Conference, May 2001, Madison, WI)

Paper presenter, *Subsidiarity and Sovereignty: European Regionalism and Globalized Legal Relations* (European Community Studies Association Seventh Biennial Conference, May 2001, Madison, WI)

Paper presenter, *The Undersea World of Foreign Relations Federalism* (American Enterprise Institute, American Sovereignty: Issues for the New Administration and the New Decade, April 2001, Washington, DC)

Paper presenter and panelist, *E-Commerce and the Robinson-Patman Act*,

Annual Meeting of the American Bar Association, Antitrust Section (March 2001, Washington, DC)

Paper presenter, *Comities in Conflict: Reconciling International and Federal Antitrust* (Academy of Legal Studies in Business Annual Meeting, August 2000, Baltimore, MD)

Paper presenter, *European Regionalism and the Legal Trappings of Globalization* (Workshop on Regionalism and the EU: Interdisciplinary and Comparative Challenges, Institute of European Studies, The Queen's University of Belfast, June 2000, Belfast, UK)

**PROFESSIONAL AFFILIATIONS**

Co-Reporter (Treaties), American Law Institute, Restatement (Fourth), The Foreign Relations Law of the United States

Member, American Law Institute (2013-present)

Member, Advisory Committee on International Law, U.S. Department of State (2006-present)

Member, Executive Council, American Society of International Law (2011-2014)

Chair, American Society of International Law Working Group on Implementation of the Convention on Choice of Courts Agreements (2010-2013)

Co-Chair, Interest Group on International Law in Domestic Courts, American Society of International Law (2009-2013)

Member, ABA-American Society of International Law Task Force on Treaties in U.S. Law (2008-2009)

Member, Research Advisory Committee, American Society of International Law (inactive)

Member, Editorial Advisory Committee, Benchbook of International Law (inactive)

Member, New York (1991), District of Columbia (1992), and U.S. Supreme Court (2010) bars

Reviewer, Oxford University Press; Journal of International Economic Law; Journal of Legal Studies; Journal of Business Ethics; Business Ethics Quarterly; Publius; Marketing Science; American Business Law Journal

# FINAL ACT OF THE INTERNATIONAL CONFERENCE ON LIABILITY AND COMPENSATION FOR BUNKER OIL POLLUTION DAMAGE, 2001

1 In accordance with Article 2(b) of the Convention on the International Maritime Organization, the Council of the Organization decided, at its eighty-second session in June 1999, to convene a diplomatic conference to consider the adoption of a draft international convention on liability and compensation for bunker oil pollution damage. This decision was endorsed by the Assembly of the Organization at its twenty-first regular session by resolution A.877(21) of 25 November 1999 on the Work Programme and Budget for the Twenty-First Financial Period 2000-2001.

2 The Conference was held at the Headquarters of the International Maritime Organization in London from 19 to 23 March 2001.

3 Representatives of 70 States participated in the Conference, namely the representatives of:

ALGERIA
ANGOLA
ARGENTINA
AUSTRALIA
BAHAMAS
BANGLADESH
BOLIVIA
BRAZIL
CANADA
CHILE
CHINA
COLOMBIA
COTE D'IVOIRE
CROATIA
CUBA
CYPRUS
DENMARK
ECUADOR
EGYPT
ESTONIA
FIJI
FINLAND
FRANCE
GABON
GERMANY
PORTUGAL
REPUBLIC OF KOREA
RUSSIAN FEDERATION
SAUDI ARABIA
SINGAPORE
SOUTH AFRICA
SPAIN
SWEDEN
GHANA
GREECE
HONDURAS
INDONESIA
IRAN (ISLAMIC REPUBLIC OF)
ITALY
JAMAICA
JAPAN
KUWAIT
LATVIA
LEBANON
LIBERIA
MALAYSIA
MALTA
MARSHALL ISLANDS
MEXICO
MONACO
MOROCCO
NETHERLANDS
NIGERIA
NORWAY
PANAMA
PERU
PHILIPPINES
POLAND
TUNISIA
TURKEY
UKRAINE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
UNITED STATES OF AMERICA
URUGUAY

EXHIBIT D

| | |
|---|---|
| SWITZERLAND | VANUATU |
| SYRIAN ARAB REPUBLIC | VENEZUELA |
| TRINIDAD AND TOBAGO | VIET NAM |

4 A delegation from BENIN attended the Conference as an observer.

5 HONG KONG, CHINA, an Associate Member of the Organization, sent observers to the Conference.

6 A representative of the following body of the United Nations attended the Conference:

UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP)

7 The following intergovernmental organizations sent observers to the Conference:

EUROPEAN COMMISSION (EC)

ARAB FEDERATION OF SHIPPING (AFS)

LEAGUE OF ARAB STATES

INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS (IOPC FUNDS)

INTERNATIONAL MOBILE SATELLITE ORGANIZATION (IMSO)

8 The following non-governmental international organizations sent observers to the Conference:

INTERNATIONAL CHAMBER OF SHIPPING (ICS)

INTERNATIONAL UNION OF MARINE INSURANCE (IUMI)

INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS (ICFTU)

INTERNATIONAL MARITIME COMMITTEE (CMI)

INTERNATIONAL ASSOCIATION OF PORTS AND HARBORS (IAPH)

THE BALTIC AND INTERNATIONAL MARITIME COUNCIL (BIMCO)

EUROPEAN CHEMICAL INDUSTRY COUNCIL (CEFIC)

INTERNATIONAL MARITIME PILOTS ASSOCIATION (IMPA)

INTERNATIONAL SALVAGE UNION (ISU)

INTERNATIONAL GROUP OF P AND I ASSOCIATIONS (P AND I CLUBS)

THE INTERNATIONAL TANKER OWNERS POLLUTION FEDERATION LIMITED(ITOPF)

INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES (IUCN)

SOCIETY OF INTERNATIONAL GAS TANKER AND TERMINAL OPERATORS LIMITED (SIGTTO)

INTERNATIONAL ROAD TRANSPORT UNION (IRU)

INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS(INTERCARGO)

WORLD NUCLEAR TRANSPORT INSTITUTE (WNTI)

9 H.E. Mr. J.E.K. Aggrey-Orleans, Head of the delegation of Ghana was elected President of the Conference.

10 The Vice-Presidents elected by the Conference were:

Capt. C. Canales (Chile)

Mr. N. Charalambous (Cyprus)

Mr. D. Sharifi (Iran, Islamic Republic of)

Prof. H. Tanikawa (Japan)

Capt. D. Bruce (Marshall Islands)

11 The Secretariat of the Conference consisted of the following officers:

Secretary-General Mr. W.A. O'Neil

Secretary-General of the Organization

Executive Secretary Dr. R.P. Balkin

Director, Legal Affairs and External

Relations Division

Deputy Executive Secretary Mr. A. Blanco-Bazan

Senior Deputy Director/Head, Legal Office

Legal Affairs and External Relations Division

12 The Conference established a Committee of the Whole with the mandate to consider a draft international convention on liability and compensation for bunker oil pollution damage.

13 The Drafting Committee established by the Conference was composed of representatives of the following nine States:

ARGENTINA

AUSTRALIA

CHINA

EGYPT

FRANCE

GABON

RUSSIAN FEDERATION

SPAIN

UNITED KINGDOM

14 A Credentials Committee was appointed to examine the credentials of representatives attending the Conference. The Committee was composed of representatives of the following States:

JAMAICA

NIGERIA

PORTUGAL

SINGAPORE

TUNISIA

15 The officers elected for the Committees were as follows:

Committee of the Whole:

Chairman: Mr. A.H.E. Popp, Q.C. (Canada)

Vice-Chairmen: Mr. L.C. Vassallo (Malta)

Dr. J. Cowley (Vanuatu)

Drafting Committee:

Chairman: Mr. W. McF. Campbell (Australia)

First Vice-Chairman: Mr. R. Shaw (United Kingdom)

Second Vice-Chairman: Capt. J.R. Bergallo (Argentina)

Credentials Committee:

Chairman: H.E. The Hon. D. Muirhead (Jamaica)

16 The Conference used as the basis of its work the following document:

- draft international convention on liability and compensation for bunker oil pollution damage

17 Also before the Conference were a number of documents containing proposals and comments submitted by Governments and interested organizations on the above-mentioned draft text.

18 As a result of its deliberations the Conference adopted the following instrument:

INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE, 2001

19 The Conference also adopted the following resolutions which are contained in the Attachment to this Final Act:

1 RESOLUTION ON LIMITATION OF LIABILITY

2 RESOLUTION ON PROMOTION OF TECHNICAL CO-OPERATION

3 RESOLUTION ON PROTECTION FOR PERSONS TAKING MEASURES TO PREVENT OR MINIMIZE THE EFFECTS OF OIL POLLUTION

20 This Final Act is established in a single original text in the Arabic, Chinese, English, French, Russian and Spanish languages which is to be deposited with the Secretary-General of the Organization.

21 The Secretary-General shall send certified copies of this Final Act with its Attachment, and certified copies of the authentic text of the instrument referred to in paragraph 17 above to the Governments of the States invited to be represented at the Conference.

IN WITNESS WHEREOF the undersigned have affixed their signatures to this Final Act.

DONE IN LONDON this twenty-third day of March, two thousand and one.

# APPENDIX

## RESOLUTION ON LIMITATION OF LIABILITY

THE CONFERENCE,

HAVING ADOPTED the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (hereinafter "the Convention"),

NOTING THAT article 6 of the Convention preserves the right of the shipowner to limit its liability under any applicable national or international regime,

REAFFIRMING that clear rights to limitation of liability are desirable, to enable the shipowner to take out effective insurance cover at reasonable cost,

BELIEVING that limitation amounts must be sufficiently high to permit the payment of full compensation for eligible claims in normal circumstances,

1. URGES all States that have not yet done so, to ratify, or accede to the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976;

2. ENCOURAGES States Parties to the Convention on Limitation of Liability for Maritime Claims, 1976 to denounce that Convention with effect from the entry into force of the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 for those States Parties, or after a limited period of time;

3. ALSO ENCOURAGES States Parties to the International Convention for Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-Going Vessels, 1924 and the International Convention relating to Limitation of Liability of Owners of Sea-Going Ships, 1957 to denounce those Conventions with effect from the entry into force of the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 for those States Parties;

4. RECOMMENDS that States, when implementing the Convention in their national law, make clear which limitation of liability regime is applicable according to article 6 of the Convention.

## EXHIBIT E

## RESPONSIVE STATEMENT OF CONTESTED AND UNCONTESTED FACTS

1) UNDISPUTED

2) UNDISPUTED; but to clarify, no trial was even necessary. The Hong Kong court approved settlement between the ELENI Defendants and the HAD Parties apportioning fault for the Collision at 70% to the ELENI Defendants and 30% to the HAD Parties.[1]

3) UNDISPUTED; and as a result of the 70% apportionment of fault to the ELENI Defendants by the Hong Kong court, as well as this Court's indication that such a fault allocation would be binding in these proceedings as *res judicata*, it is indisputable that the ELENI Defendants are 100% liable in these negligence proceedings based on the "innocent cargo rule" of the United States GML[2] (insofar as the ELENI was the non-carrying vessel at 70% fault for the Collision that caused Cargo Plaintiffs' damages).

4) - 6) - UNDISPUTED

7) - 8) - **DENIED**. ELENI Defendants continue to argue, despite this Court's denial of their FNC Motion, that "Hong Kong [w]as the most appropriate forum to initiate limitation proceedings." It is undisputed, and the ELENI Defendants have already admitted, that Vietnam was "the jurisdiction most closely connected with" the Collision.[3] Moreover, the Indian Court in the Bombay Decision **squarely held Hong Kong "is not a natural forum" for litigation relating to the Collision.**[4] Further, the ELENI Defendants' contention that "Hong Kong had the same limits of liability as Vietnam," even though Vietnam is not a signatory to any multilateral limitation treaty, is misleading because it ignores that Vietnam often applies higher limits, and may not even allow limitation of liability for foreign vessels.[5] Thus, a proceeding in Vietnam may very well have allowed Cargo Plaintiffs to recover full damages, without any limitation at all. Finally, the ELENI Defendants' suggestion that Hong Kong was the most "appropriate forum to initiate limitation proceedings" ignores the fact that, as RMI incorporated entities

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[1] *See* Cargo Plaintiffs' February 10, 2016 Motion to Lift Stay, and ELENI Defendants' February 3, 2016 Status Report (attaching order of the Hong Kong court adopting the 70/30 liability split).

[2] *See* M.I. Rev. Code Title 47, §113. "Under [the "innocent cargo"] rule, [a plaintiff], whose cargo was loaded on [a vessel], is entitled to recover from the non-carrying vessel [for cargo damage caused by a collision] so long as the [non-carrying] is responsible for any degree of fault." *Tokio Marine & Fire Ins. Co. v. M/V FLORA*, 1998 WL 516110, at *3 (collecting cases and sources).

[3] *See* ELENI Defendants' FNC Reply Memorandum, p. 4.

[4] Exhibit I to Cargo Plaintiff's April 22, 2016 Supplemental Reply, Bombay Decision, ¶46.

[5] "Although Vietnam has not acceded to any of the limitation conventions, there is a tonnage limitation regime available, loosely based on the 1976 Convention. However, considerable doubt remains as to the level of the applicable limit. Moreover, the Vietnamese courts have on occasions tended not to apply the limits of liability set out in the Vietnamese Maritime Code, but have relied instead on a provision of the Civil Code which requires defendants to meet their liabilities in full. There is also still doubt in some quarters as to whether a foreign shipowner is entitled to limit liability at all." Richard Lovell and John Simpson, *Limitation and Arrest Regimes in Far East Jurisdictions* (2008). http://www.incelaw.com/en/documents/pdf_library/legal-updates/whos-who-legal-article.pdf.

owning/operating an RMI-flagged vessel, they were bound to "compl[y] with the terms of the conventions, *including all amendments that have entered into force*" listed by the RMI Maritime Administrator in Marine Notice no. 2-011-1 (Rev. 5/14), which their own expert A.T. Chenault relies on in his declaration, and which includes the 96 Protocol. The only way for the ELENI Defendants to invoke limitation in "compl[iance]" with the 96 Protocol was to constitute a 96 Protocol fund. Their resort to Hong Kong to avoid this obligation in their capacity as RMI entities operating an RMI-flagged vessel was anything but appropriate. Moreover, it bears noting that India was at least as appropriate a forum as Hong Kong given that the ELENI was arrested there, by both the HAD Parties and some cargo interests, and the Indian Court (viz. the Bombay Decision) has retained jurisdiction for the cargo claims. Further, the ELENI Defendants' contention that "[n]o party challenged the jurisdiction of Hong Kong . . . in the limitation action[n]" **is not accurate**. Specifically, as part of the India Agreement pursuant to which the ELENI Defendants agreed to a private side limitation fund with the HAD Parties of $60 million (10 times the amount of the fund in Hong Kong), the HAD Parties agreed *not to contest* the HK Limitation Suit and to dismiss their arrest proceedings in India.

9) UNDISPUTED - but with the caveat that, as far as Cargo Plaintiffs are aware, no one has asked the Hong Kong Court to rule on the scope of its own jurisdiction, and the Hong Kong court's *own* decision regarding whether it had proper jurisdiction *under Hong Kong law* **is completely irrelevant** to whether the HK Limitation Suit can be deemed to have been brought in a "court of competent maritime jurisdiction" *for purposes of RMI law*, which pursuant to LLMCA §524 governs "the rules relating to the constitution . . . of a limitation fund, and all rules of procedure in connection therewith." And the answer is that the HK Limitation Suit **was not** brought in a "court of competent maritime jurisdiction" under RMI law as required by LLMCA §§502 and 521, because RMI law *prohibits an owner from bringing a preemptive limitation action* prior to the owner being sued by a claimant. *See* Clash of Conventions Motion Memo, pp. 29-33; Section II.A of Opposition Memorandum.

10) -13) UNDISPUTED

14) UNDISPUTED, subject to the caveat (as explained in the Clash of Conventions Motion, pp. 5-6) that Cargo Plaintiffs were "between a rock and a hard place" with respect to the January 28, 2015 claim deadline in the HK Limitation Suit. Cargo Plaintiffs could not file a "protective" claim in the HK Limitation Suit (i.e. a "placeholder" claim merely to ensure compliance with the claims deadline), because by doing so they would arguably be submitting their claims to the jurisdiction of the Hong Kong court in the HK Limitation Suit, thus allowing the Hong Kong court to *enjoin* the Cargo Plaintiffs' prosecution of those claims in this Court, where they were and remain properly pending. It bears noting here that although a limited few of the Cargo Plaintiffs being served in the HK Limitation Suit, the ELENI Defendants *have never attempted to compel* their participation in those proceedings (and in fact agreed to *discontinue* those proceedings without seeking costs).

15- 16) UNDISPUTED

17) **DENIED** - Cargo Plaintiffs' are entitled to pursue their damage claims in this Court (as the Court has already agreed in denying the ELENI Defendants' FNC Motion), subject to the

Court's decision on the "Clash of Conventions."

18) UNDISPUTED

19) UNDISPUTED, except to the extent the ELENI Defendants suggest there was anything improper about Cargo Plaintiffs' bringing suit in this Court - in the jurisdiction of their incorporation - instead of submitting claims in the HK Limitation Suit. As noted in the Kimball Declaration, under principles of US GML (as well as the language of the 76 Convention itself) Cargo Plaintiffs' were not required to take their claims into the HK Limitation Suit, and were free to sue the ELENI Defendants in this Court. *See* Exhibit A, ¶¶3-6, 8-9, 17, 19(d) & (f).

20) -23) UNDISPUTED

24) **DISPUTED**. As previously noted, the ELENI Defendants' suggestion that they have not raised limitation as a defense is patently disingenuous: **they have raised limitation as a defense literally in every single pleading they have filed with this Court** (i.e. both in their initial FNC Motion briefing, as well as *in this very motion* by which they are currently seeking dismissal of Cargo Plaintiffs' claims in favor of the HK Limitation Suit). *See* Cargo Plaintiffs' Supplemental Reply Memorandum, pp. 1-2. If the ELENI Defendants are truly not asserting limitation as a defense, then they should pay 100% of the Cargo Plaintiffs' damages in this Court pursuant to the "innocent cargo" rule given their adjudicated 70% fault in the Collision. *See id.;* Exhibit B, ¶¶40-41.

25) -28) UNDISPUTED

29) **DISPUTED** for all the reasons stated in response to #24 above.

30) -31) UNDISPUTED

32) **DISPUTED.** The RMI **has in fact** made statements and taken actions inconsistent with any obligations it may have under the 76 Convention. Most definitively, it has **enacted positive domestic legislation** in the LLMCA **nullifying any effect** of the 76 Convention in the RMI. *See* Clash of Conventions Motion, p. 14-22. This action of the Nitijela reflects the express public policy of adopting the 96 Protocol limits as the law of the RMI, by which the ELENI Defendants should be bound based on their choice to incorporate and enjoy the benefits of their domicile in the RMI. And as further explained in the expert declarations of Professors Martinez and Swaine, a dualist jurisdiction like the RMI may deviate in its domestic law from the provisions of international instruments, such that the international instrument *has no domestic effect* where it conflicts with such legislation. *See* Exhibit B, ¶¶11-18, ¶25-27, ¶44 ("[T]he Nitijela chose the clear approach of 'repealing' the earlier limits of liability [under the 76 Convention] and giving exclusive force of law to the limits of liability in the 96 [Protocol]."); Exhibit C, ¶¶15-16. Consistent with these principles, the UK (another dualist jurisdiction like the RMI) has also taken the position "the [76 Convention] was denounced with effect from the entry into force of the [96 Protocol]" based on the enactment of the 96 Protocol into British domestic law.[6]

[6] *See* Nigel Meeeson, Q.C., *Jurisdictional Aspects of Limitation of Liability for Maritime Claims* in LIABILITY REGIMES IN CONTEMPORARY MARITIME LAW 301, 306 (Prof. D. Rhidian Thomas, ed., 2007).

Likewise, the same principles have been recognized in the Bombay Decision,[7] which **arose out of the same Collision at issue here,** and which the ELENI Defendants and their experts conveniently ignore. The Indian court properly recognized that even though India was a party to both the 76 Convention and the 96 Protocol, the domestic Indian statutes regarding limitation *had effectively nullified the 76 Convention* pursuant to India's public policy decision to adopt 96 Protocol limits, such that claimants against the ELENI were entitled to pursue their claims subject to the higher limits of the 96 Protocol. *See* Clash of Conventions Reply Memorandum, pp. 7-8; Exhibit C, ¶15. Also, as noted above, the RMI Maritime Administrator has stated that any RMI-flagged vessels must "compl[y] with the terms of the conventions, *including all amendments that have entered into force*" listed by the RMI Maritime Administrator in Marine Notice no. 2-011-1 (Rev. 5/14), which includes (if limitation is raised) the 96 Protocol. Further, the RMI delegation to the IMO's March 2001 drafting convention for a different maritime limitation convention (regarding bunker oil pollution) formally assented to the adoption of a resolution "ENCOURAG[ING] States Parties to the [76 Convention] to denounce that Convention" in favor of the 96 Protocol.[8]

33) UNDISPUTED - **However,** as noted in Cargo Plaintiffs' April 22, 2016 Supplemental Reply Memoranda, **Hong Kong actually passed its own internal legislation enacting the 96 Protocol in 2005** (and did so in specific terms of ensuring that "the liability limits [in] Hong Kong will be in line with the highest international standards").[9] It was only due to inexplicable administrative delays inherent in the unique political/bureaucratic situation between the Peoples' Republic of China ("PRC") and Hong Kong in its capacity as a Special Administrative Region ("SAR") of the PRC that the 96 Protocol did not come into effect in Hong Kong until 2015.[10] In fact, after the 2012 Lamma Island ferry disaster (Hong Kong's worst maritime casualty in decades), when family members of the deceased were faced with a 76 Convention limitation fund instead of the higher 96 Protocol limits, the president of Hong Kong's Legislative Counsel directed a formal letter to the Hong Kong Secretary for Transport and Housing demanding an explanation for the (at that point) *nearly eight year delay* in finalizing the effect of the 96 Protocol in Hong Kong.[11]

34) UNDISPUTED

35) **DISPUTED** - Article 9(4) of the 96 Protocol **does not apply before this Court,** as the provisions of that article have never been enacted into the domestic law of the RMI. *See* Exhibit B, ¶21 ("[T]o avoid confusion as to the applicable rules under domestic law, the Nitijela purposely omitted from the LLMCA Article 9(4) of the [96 Protocol] which could have created some confusion. This deliberate omission, not only leaves Article 9(4) outside the scope of

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[7] *See* Exhibit 1 to April 22, 2016 Supplemental Reply Memorandum.

[8] *See* Exhibit D to Opposition Memorandum.

[9] *See* Reply Memorandum, p. 12; http://www.legco.gov.hk/yr04-05/english/hc/papers/hc0204ls-22e.pdf (emphasis added); Exhibit C, ¶16.

[10] *See Hong Kong Introduces Higher Liability Limits* (June 25, 2015), http://www.gard.no/web/updates/content/20856439/hong-kong-introduces-higher-liability-limits; Exhibit C, ¶16.

[11] *See* http://www.info.gov.hk/gia/general/201310/16/P201310160296.htm ("

national law, but clearly establishes the intention that the Nitijela wished to implement the [96] Protocol to the exclusion of the [76 Convention]."); Exhibit A, ¶18(f); Exhibit C, ¶¶13-16).

36) **DISPUTED** for the reasons stated above at #35

37) **DISPUTED** for all the reasons stated at #24 above.

38) **DISPUTED** for all the reasons stated at #35 above. Additionally, the non-enactment of Article 9(4) of the 96 Protocol into RMI domestic law "is decisive, in [a]dualist system [like the RMI], of whether those provisions provide a domestic court with a source of law it may apply to a suit properly before it." Exhibit C, ¶15. Accordingly, Article 9(4) "is effective as a source of law only if it has itself been incorporated into" RMI, **which it has not been**. Exhibit C, ¶15; Exhibit A, ¶21. Moreover, the Nitijela's exclusion of Article 9(4) is eminently logical **given the otherwise wholesale enactment of the 96 Protocol *to the necessary exclusion of* the 76 Convention.** Exhibit A, ¶21 ("It must be asserted that the move away from the [76] Convention was a deliberate action by the Nitijela which, pursuant to the state's most recent international commitments, decided to repeal the [76] Convention and enact the [96] Protocol [with exclusion of Article 9(4)]."); *see also* Exhibit C, ¶13. In this regard, it bears noting that ELENI Defendants' expert A.T. Chenault, **who has no relevant expertise whatsoever regarding interpretation of international treaties and/or domestic enactment of same in dualist jurisdictions,**[12] is simply wrong (in addition to being unqualified to comment in the first place) in his suggestion at ¶6 of his Declaration that this Court is bound by the 76 Convention "no matter what [the RMI] does in its domestic law"; and at ¶11 in his suggestion that domestic legislation is irrelevant to the question of whether a state party must recognize limitation proceedings in another state party's courts. This also ignores (in the face of Prof. Davies' own acknowledgment) the express constitutionally dualist nature of the RMI, where "[n]o treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this Constitution shall, of itself, have the force of law in the Republic."[13] Likewise, Prof. Davies suggestion at ¶13 of his Declaration that the ELENI Defendants "have not . . . sought to limit their liability before" this Court is *demonstrably and objectively wrong* (see # 24 above). And his further suggestion - made without citation of any source or any analytical support - that the non-enactment of Article 9(4) by the RMI is irrelevant with respect to this Court's supposed "obligation" to defer to the HK Limitation Suit is likewise simply wrong given the strictly dualist nature of the RMI's legal system.

39) **DISPUTED** for all the reasons at #38 above. And, again, Prof. Davies' and Mr. Chenault's commentary at ¶¶11 and 13, and 10 and 14 of their respective Declarations ignore the fundamentally dualist nature of RMI law, which renders Article 9(4) of the 96 Protocol inapplicable in these proceedings.

40) **DISPUTED** - As discussed further below, the various cases relied on in the Davies and Chenault Declarations for the proposition that shipowners may preemptively file for limitation and choose a limitation jurisdiction, all of which apply or derive from the law of the United

[12] *See* C.V. of Mr. Chenault, attached to his Declaration in support of the ELENI MSJ.

[13] Constitution of the Republic of the Marshall Islands, Art. V, Sec. 1(4).

Kingdom, are distinguishable and at odds with the plain language of the RMI LLMCA, other international jurisprudence and leading scholarship regarding the 76 Convention/96 Protocol. *See, e.g.*, Exhibit B, ¶¶29-34.[14] Most notably, the Davies/Chenault position is at odds with **the very entity that drafted these conventions.**[15]

41) -43) UNDISPUTED

[14] *See also* Exhibits 6 & 9 to Clash of Conventions Motion.

[15] Exhibit 10 to Clash of Conventions Motion, CMI Yearbook 2000, p. 442.

FILED

MAY 16 2016

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE
HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

| | |
|---|---|
| Chubb Insurance (China) Company Ltd., et. al.<br><br>Plaintiffs,<br><br>vs.<br><br>Eleni Maritime Limited, in personam, and Empire Bulkers Limited<br><br>Defendants. | CIVIL ACTION NO. 2014-050<br>CIVIL ACTION NO. 2014-110<br>CIVIL ACTION NO. 2015-194<br><br>**ORDER TO EXTEND TIME** |

After reading and considering the stipulation of counsel the court hereby orders as follows:

1. Plaintiffs shall have until close of business June 3, 2016 (Majuro Date), to file their opposition to Defendants Motion for Summary Judgment.

2. Defendants shall have until close of business July 15, 2016 (Majuro date), to file any reply to Plaintiffs opposition to the Defendants Motion for Summary Judgment.

Dated this 16TH, day of MAY, 2016

Chief Justice Carl B. Ingram
High Court, Republic of the Marshall Islands

FILED

MAY 16 2016

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

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Dated this 16TH, day of MAY, 2016

Chief Justice Carl B. Ingram
High Court, Republic of the Marshall Islands

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FILED
MAY 13 2016
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE
HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

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The parties, each through counsel, respectfully move this court for an order extending the time for Plaintiffs to file their opposition to Defendants Motion for Summary Judgment and for Defendants response to Plaintiffs opposition as stipulated to by counsel.

5/14/16

DENNIS J. REEDER Date

FILED
MAY 16 2016
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**

**OF THE**

**REPUBLIC OF THE MARSHALL ISLANDS**

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|---|---|
| Chubb Insurance (China) Company Ltd., *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>Eleni Maritime Limited *in personam* and Empire Bulkers Limited<br><br>Defendants. | H.Ct. Civil No. 2014-050<br>H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2015-194<br><br>**STIPULATION TO EXTEND TIME** |

## STIPULATION

The parties, each by and through counsel, stipulate to the following:

1. Plaintiffs shall file and serve upon opposing counsel their opposition to Defendants Motion for Summary Judgment by close of business, June 3, 2016, Majuro date.
2. Defendants shall file and serve any response to Plaintiffs opposition to the Defendants Motion for Summary Judgment by close of business July 15, 2016, Majuro date.

DATED: May 14, 2016 (Honolulu)

Tatyana Cerullo

Tatyana Cerullo
David Lowe

Attorneys for Defendants
Eleni Maritime Limited
Empire Bulkers Limited

Dated: May 14, 2016

Dennis J. Reeder
Attorney for Plaintiffs
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FILED
MAY 16 2016
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

Attorney for Plaintiffs

IN THE HIGH COURT OF THE

REPUBLIC OF THE MARSHALL ISLANDS

| | |
|---|---|
| Chubb Insurance (China) Company Ltd., et. al., Plaintiffs, v. Eleni Maritime Limited , *in personam* and Empire Bulkers Limited, Defendants. | H. Ct. Civil Action No's. 2014-110, 2014- 050, 2015-194<br><br>CERTIFICATE OF SERVICE |

I hereby certify that on Monday, May 16, 2016 (Majuro Date), a true and correct copy of the Order to Extend Time was served on Tatyana Cerullo, Attorney for Defendants, by sending to her via email transmission in pdf. format to:

TC.LAW.llc@gmail.com

Dated: Monday, May 16, 2016 (Majuro Date)

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HIGH COURT
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| Chubb Insurance (China) Company Ltd., et. al.,<br><br>Plaintiffs,<br><br>vs.<br><br>Eleni Maritime Limited, in personam, and Empire Bulkers Limited<br><br>Defendants. | CIVIL ACTION NO. 2014-050<br>CIVIL ACTION NO. 2014-110<br>CIVIL ACTION NO. 2015-194<br><br>**Stipulation for Extension of time, Order, Certificate of Service** |

The parties, each through counsel, respectfully move this court for an order extending the time for Plaintiffs to file their opposition to Defendants Motion for Summary Judgment and for Defendants response to Plaintiffs opposition as stipulated to by counsel.

5/14/16

DENNIS J. REEDER Date

FILED

MAY 16 2016

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**

**OF THE**

**REPUBLIC OF THE MARSHALL ISLANDS**

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| Chubb Insurance (China) Company Ltd., *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>Eleni Maritime Limited *in personam* and Empire Bulkers Limited<br><br>Defendants. | H.Ct. Civil No. 2014-050<br>H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2015-194<br><br>**STIPULATION TO EXTEND TIME** |

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DATED: May 14, 2016 (Honolulu)

Tatyana Cerullo

Tatyana Cerullo
David Lowe

Attorneys for Defendants
Eleni Maritime Limited
Empire Bulkers Limited

Dated: May 14, 2016

Dennis J. Reeder
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FILED
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REPUBLIC OF THE MARSHALL ISLANDS

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Attorney for Plaintiffs

IN THE HIGH COURT OF THE

REPUBLIC OF THE MARSHALL ISLANDS

| | |
|---|---|
| Chubb Insurance (China) Company Ltd., et. al., Plaintiffs, v. Eleni Maritime Limited , *in personam* and Empire Bulkers Limited, Defendants. | H. Ct. Civil Action No's. 2014-110, 2014- 050, 2015-194<br><br>CERTIFICATE OF SERVICE |

I hereby certify that on Monday, May 16, 2016 (Majuro Date), a true and correct copy of the Order to Extend Time was served on Tatyana Cerullo, Attorney for Defendants, by sending to her via email transmission in pdf. format to:

TC.LAW.llc@gmail.com

Dated: Monday, May 16, 2016 (Majuro Date)

Dennis J. Reeder
Attorney for Plaintiffs

Tatyana Cerullo, M.I. Adm. # 150
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Attorneys for Defendants
ELENI MARITIME LIMITED and
EMPIRE BULKERS LIMITED

FILED

APR 28 2016

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**

**OF THE**

**REPUBLIC OF THE MARSHALL ISLANDS**

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|---|---|
| Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*<br><br>Plaintiffs,<br><br>v.<br><br>Eleni Maritime Limited *in personam* and Empire Bulkers Limited<br><br>Defendants. | H.Ct. Civil No. 2014-050<br>H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2015-194<br><br>**MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MARTIN DAVIES, ATTACHMENTS A-B; DECLARATION OF A. T. CHENAULT, EXHIBITS A-C; DECLARATION OF JAMES ROBERT JAMES; CERTIFICATE OF SERVICE** |

## MOTION FOR SUMMARY JUDGMENT

Defendants ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED ("Eleni Maritime") and ("Empire Bulkers") (collectively, "Defendants") hereby move this Court to grant Defendants summary judgment on Plaintiffs' claim for negligence pursuant to Rule 56 of the Marshall Islands Rules of Civil Procedure because there are no material disputes of fact remaining and Defendants are entitled to judgment as a matter of law. This motion is based on this motion, the accompanying Memorandum of Points and Authorities and supporting Declaration of James Robert

James, Declaration of Martin Davies with Attachments A-B, Declaration of A. T. Chenault with Exhibits A-C, MIRCP Rule 56, the 1976 Convention on Limitation of Liability for Maritime Claims, Article 9(4) of the 96 Protocol and the record herein.

DATED: 29 April 2016

Tatyana Cerullo

Tatyana Cerullo
David Lowe
Attorneys for Defendants
ELENI MARITIME LIMITED and
EMPIRE BULKERS LIMITED

## MEMORANDUM OF POINTS AND AUTHORITIES

Throughout this case, Plaintiffs' *pro hac vice* counsel has done nothing but try to turn this straightforward negligence action into a tome of empty rhetoric. To hide from the lack of merit, the briefs ramble about irrelevant facts, offer conjecture about international law, and misinterpret, and in one case, misquote Marshall Islands law. It is no secret that millions of dollars are at stake or that foreign cargo Plaintiffs have taken a gamble by pursuing their claims in the Marshall Islands. They purposefully opted to miss their opportunity to recover damages in Hong Kong, and the pressure to prevail here is palpable. Nonetheless, no amount of paper or zealous advocacy can detract from the simple indisputable facts and applicable law in this case and its proper disposition. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). No truffles are buried in Plaintiffs' briefs. Because the only issues to be decided now are questions of law, the posture of this case is ripe for summary judgment.

### I. STATEMENT OF UNDISPUTED FACTS AND APPLICABLE LAW

1) Negligence is the only cause of action set forth in the Complaints. *See* Complaints.

2) In its 6 January 2016 Order, the Hong Kong court approved a settlement by both shipowners on their apportionment of liability. *See* Declaration of James Robert James ¶26 (hereinafter "James Declaration").

3) In its 22 October 2014 Order, this Court under the principle of *res judicata*, stated it would most likely accept the Hong Kong High Court's decision on liability.

4) All material factual disputes with regard to liability have been resolved in Hong Kong. *See* James Declaration ¶27.

5) On 13 November 2013, Defendants initiated limitation proceedings in Hong Kong. *See* James Declaration ¶4.

6) The Defendants in the limitation action are (1) Heung-A Shipping Co., Ltd. (Republic of Korea), three cargo claimants located in Hong Kong, and all other persons claiming and/or being entitled to claim damages in respect of alleged loss and damage arising out of the collision between the vessels "ELENI" and "HEUNG-A DRAGON" on or around 7 November 2013. *See* James Declaration ¶5.

7) Defendants chose Hong Kong as the most appropriate forum to initiate limitation proceedings for all parties involved for the following reasons:

- Hong Kong was the last port of call;
- Some cargo claimants are located in Hong Kong and are the named defendants in the Hong Kong limitation action;
- Unlike Vietnam where the collision occurred, Hong Kong is an active and established maritime jurisdiction;
- Hong Kong is a close neighbor to Vietnam which borders China;
- Hong Kong is centrally located in Asia providing convenience to the many interested parties spread throughout Asia;
- At the time of the collision, Hong Kong had the same limits of liability as Vietnam (although not a Party, employing the 76 Convention limits via local law); and
- No party challenged the jurisdiction of Hong Kong in the *in rem* or the limitation actions.

*See* James Declaration ¶11.

8) Ample grounds existed for Hong Kong jurisdiction for the limitation action. *See* James Declaration ¶12.

9) The limitation proceedings are procedurally proper according to the way in which the 76 Convention is applied in England and Hong Kong. *See* Declaration of Martin Davies (hereinafter "Davies Declaration"), ¶25; *See* James Declaration ¶13.

10) Under applicable Hong Kong law, the Hong Kong court granted a Limitation Decree by order dated 14 May 2014. *See* James Declaration ¶14.

11) In accordance with Hong Kong law and in compliance with the order dated 14 May 2016, Defendants properly constituted a Limitation Fund in Hong Kong. *See* James Declaration ¶15; *see also* Davies Declaration, ¶14, Art. 14 of the 76 Convention.

12) All interested parties were given notice of the Limitation Fund. *See* James Declaration ¶16.

13) Plaintiffs knew about the Hong Kong Limitation Fund and the deadline to file their claims. *See* James Declaration ¶17; *see also* Plaintiffs' Motion for Declaratory Judgment, p. 4.

14) Plaintiffs had an opportunity to file their claims against the Hong Kong Limitation Fund. *See* James Declaration ¶18.

15) The deadline for Plaintiffs to file their claims passed on 28 January 2015. A number of claims were filed by that date by other claimants, totaling in value approximately US$16,795,082.69. *See* James Declaration ¶19.

16) Claims that were filed by the deadline will be adjudicated upon by the High Court of Hong Kong before being admitted to participate in the Limitation Fund which is expected to be distributed in accordance with the order of the court dated 6 January 2016 in the collision proceedings, recording the apportionment of liability agreed on settlement by the parties thereto, namely the owners of the Eleni and the Heung-A Dragon, and in accordance with the 76 Convention limits of liability. *See* James Declaration ¶20.

17) All material factual disputes with regard to damages will be resolved in Hong Kong. *See* James Declaration ¶28.

18) Had Plaintiffs filed their claims in Hong Kong as other claimants have done, they would have been able to participate in the distribution of the Limitation Fund in accordance with the Court-ordered apportionment of liability and 76 Convention limits of liability. *See* James Declaration ¶21.

19) Plaintiffs purposefully withheld their claims in Hong Kong. *See generally* Plaintiffs' Reply in support of Motion for Declaratory Judgment.

20) Plaintiffs are seeking to recover damages in the Marshall Islands pursuant to the higher limits of liability of the 96 Protocol. *See* Plaintiffs' Motion for Declaratory Judgment, p. 41.

21) Section 525(1) of the Marshall Islands Limitation of Liability for Maritime Claims Act, 47 MIRC Ch.5, (the "Act") provides:

> **§525. Scope of application.** (1) This Chapter shall apply whenever any person ***referred to in Section 502*** of this Chapter, seeks to limit his liability ***before a Court of the Republic*** or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of the Republic. (emphasis added).

22) Section 502 of the Act provides:

> **§502. Persons entitled to limit liability.**
>
> (1) Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Chapter for claims set out in Section 503 of this Chapter.

(2) The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship. ...

23) Persons entitled to limit liability are "shipowners" and "salvors" as defined in the Act. [47 MIRC 502].

24) In this case, Defendants as shipowners have not sought to limit their liability "***before a Court of the Republic.***" [47 MIRC 525].

25) In this case, Defendants as shipowners have not sought to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of the Marshall Islands. [47 MIRC 525].

26) Plaintiffs are not shipowners. *See* Complaints.

27) Cargo claimants and their insurers are not entitled to invoke the Marshall Islands Limitation of Liability for Maritime Claims Act, 47 MIRC Ch.5.

28) Plaintiffs are cargo claimants or their insurers. *See* Complaints.

29) The Act has not been invoked. [47 MIRC Ch.5]; *see* Davies Declaration, ¶13.

30) The Marshall Islands is a party to both the 76 Convention and the 96 Protocol. *See* IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions* (updated 19 April 2016) (hereinafter "IMO Official Status"); *see* IRI official RMI treaty list; *see* Chenault Declaration ¶5, Exhibits B and C.

31) The Marshall Islands has not denounced the 76 Convention. *See* IMO Official Status; *see also* Declaration of Martin Davies, ¶11; *see* Declaration of A.T. Chenault (hereinafter "Chenault Declaration") ¶5, Exhibits B and C.

32) The Marshall Islands has made no declaration, reservations, or statements with regard to its member status of the 76 Convention and 96 Protocol (as other member states have done). *See* IMO Official Status; *see also* Davies Declaration, ¶24; *see* Chenault Declaration ¶5, Exhibits B and C.

33) At the time the Hong Kong proceedings were initiated, Hong Kong was a member of the 76 Convention only. *See* James Declaration ¶ 6.

34) Article 9(4) of the 96 Protocol deals with obligations between Parties as follows:

> Nothing in this Protocol shall affect the obligations of a State which is a Party ***both to the Convention and to this Protocol*** with respect to a State which is a Party to the Convention but not a Party to this Protocol.

*See* Davies Declaration, ¶11.

35) Article 9(4) applies here because the Marshall Islands is a "Party to both the [76] Convention and to [the 96] Protocol" and Hong Kong is a "Party to the [76] Convention but not a Party to [the 96] Protocol." *See* Davies Declaration, ¶¶11 and 13.

36) Plaintiffs agree that if Article 9(4) applies, "this Court would be bound by the HK Limitation Suit, insofar as the Marshall Islands and Hong Kong have only the 76 Convention in common." *See* Plaintiffs' Motion for Declaratory Judgment, p. 11; *see* Davies Declaration, ¶11.

37) The absence of Art. 9(4) in the Act is immaterial in this case because the Act is inapplicable since Defendants as shipowners have not sought to limit their liability "before a Court of the Republic.": [47 MIRC 525]; *see* Davies Declaration, ¶13 and Chenault Declaration, ¶6.

38) The absence of Art. 9(4) in the Act is immaterial because this provision "deals with the obligations of countries to one another." *See* Davies Declaration, ¶13, and Chenault Declaration, ¶6.

39) The Marshall Islands has "obligations... with respect to" Hong Kong. *See* Davies Declaration, ¶ ¶ 11 and 13; *see* Chenault Declaration ¶¶10, 14.

40) International jurisprudence supports the conclusion that it is the right of the shipowner to choose the limitation forum. *See* Davies Declaration, ¶¶16, 19-22; *see* Chenault Declaration ¶17.

41) International jurisprudence interpreting the 76 Convention and 96 Protocol supports one forum for limitation proceedings. *See id.*

42) There is no directly applicable Marshall Islands case law.

43) The United States is not party to the 76 Convention or 96 Protocol, and so has not had occasion to interpret them other than in dicta. *See* Chenault Declaration ¶18.

44) In dicta, U.S. law recognizes that "the 1976 Convention requires its signatories to defer to certain limitation proceedings abroad." *Id.* (citing *Perforaciones Exploración Y Producción v. Maritimas Mexicanas de C.V.*, No. 08-41021 (5th. Cir. 12/9/2009).

## II. SUMMARY JUDGMENT STANDARD

Rule 56(a) and (b) of the MIRCP provide:

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to

judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless the court orders otherwise, a party may file a motion for summary judgment *at any time* until 30 days after the close of all discovery.

Summary judgment is appropriate where the only issues to be decided are questions of law. *See Central Oil & Supply Corp. v. United States*, 557 F.2d 511, 515 (5th Cir. 1977); Wright & Miller, Federal Practice & Procedure § 2725 at 79.

Under summary judgment practice, the moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). Although all facts and inferences therefrom are to be construed in favor of the party opposing the motion, *see Harlen Assocs. v. Village of Mineola*, 273 F.3d 494, 498 (2d Cir. 2001), the nonmoving party must raise more than just "metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987). "[M]ere speculation and conjecture is insufficient to preclude the granting of the motion." *Harlen*, 273 F.3d at 499. "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citation omitted).

Summary judgment avoids unnecessary trials in cases with no genuinely disputed material facts. *See N.W. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see

whether there is a genuine need for trial." *Matsushita*, 475 U.S. at 587 (internal citation omitted) (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

## III. LEGAL QUESTIONS

The remaining question of law is whether this Court must defer to Hong Kong for its resolution of damages and limitation where:

(i) the Hong Kong Limitation Fund was constituted properly in accordance with the way the 76 Convention is applied in Hong Kong and England,
(ii) the Marshall Islands is a party to both the 76 Convention and 96 Protocol,
(iii) the Marshall Islands has not denounced the 76 Convention nor made any declaration, reservations, or statements with regard to its member status of the 76 Convention and 96 Protocol,
(iv) at the time the Hong Kong proceedings were initiated, Hong Kong was a member of the 76 Convention only,
(v) the Marshall Islands and Hong Kong have the 76 Convention in common,
(vi) Art. 9(4) of the 96 Protocol mandates that a Party to both the 76 Convention and the 96 Protocol has obligations to a Party to the 76 Convention only,
(vii) the absence of Art. 9(4) in the Marshall Islands Limitation of Liability for Maritime Claims Act is immaterial because this provision deals with the obligations of Parties to one another and the Act does not apply in this case anyway as no person entitled to limit liability has sought to limit before this Court,
(viii) international jurisprudence supports the conclusion that it is the right of the shipowner to choose the limitation forum and there should be one forum for limitation proceedings.

## ARGUMENT

## IV. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIM

Plaintiffs commenced a negligence action against Defendants seeking damages for alleged losses arising from the collision that is the subject of Defendants' limitation proceeding in Hong Kong. *See* Chenault Declaration ¶13. There simply is not a separate Marshall Islands limitation proceeding. *Id.* Defendants have not sought to limit liability or constitute a limitation fund in the Marshall Islands. *Id.* Plaintiffs are cargo owners or insurers, and are not shipowners or salvors, and

are not proper parties to commence a limitation proceeding under the 76 Convention, the 96 Protocol, or the Marshall Islands Limitation of Liability for Maritime Claims Act. *Id.*

Defendants do not need to commence a limitation proceeding in the Marshall Islands because of the limitation proceeding pending in Hong Kong. *See* Chenault Declaration ¶14, Davies Declaration ¶¶ 11, 14, 15. Plaintiffs had notice of the Hong Kong proceeding and the deadline for filing claims, but made a deliberate decision not to file their claims in that proceeding. *See* James Declaration ¶¶16, 17. Even if Defendants sought to commence a limitation proceeding in the Marshall Islands, the Court should not allow it to proceed because of the parallel proceeding already begun in Hong Kong. *See* Chenault Declaration ¶14. Requiring the Defendants to constitute a second limitation fund in the Marshall Islands would directly conflict with Article 9(4) of the 1996 Protocol, which requires the Marshall Islands to recognize the limitation proceeding in Hong Kong. *Id.* There is no reason why a protocol intended to affect only the value of the limitation fund would allow this Court to disregard the Hong Kong proceeding. *Id.*

Defendants' defense is that claimants asserting claims in a party state to the 76 Convention are bound by the determination of a limitation proceeding in another party state constituted for claims arising from the occurrence that gave rise to the need for limitation. *See* Chenault Declaration ¶15. Claimants cannot simply opt out of a limitation proceeding properly constituted under the laws of one party state to seek to assert claims in a different party state. *Id.*; *see also* Davies Declaration ¶23. All material factual disputes with regard to liability have been resolved in Hong Kong. *See* James Declaration ¶27. There is nothing left for this Court to do other than to dispose of this case on summary judgment by application of international maritime law.[1] *See* Chenault Declaration ¶19.

[1] Even in the United States, which is neither a party to the 76 Convention nor 96 Protocol, courts have deferred to the appropriate foreign forum for liability and damages, including limitation. *See e.g., In re Compania Naviera Joanna SA v. Koninklijke Boskalis Westminser NV*, 569 F.3d 191 (4th Cir. 2009) (case for liability, limitation of liability and damages dismissed in favor of Chinese forum).

### A. This Court Must Defer to the Hong Kong Limitation Proceedings for its Resolution of Damages and Limitation

This Court must defer to the Hong Kong limitation proceeding for its resolution of damages and limitation for the following reasons.

#### *1. The Hong Kong Limitation Fund was constituted properly*

Ample grounds existed for Hong Kong jurisdiction of the limitation action. *See* James Declaration ¶12. The limitation proceedings are procedurally proper according to the way in which the 76 Convention is applied in Hong Kong and England. *See* Davies Declaration, ¶25; James Declaration ¶13. Under applicable Hong Kong law, the Hong Kong court granted a Limitation Decree by order dated 14 May 2014. *See* James Declaration ¶14. In accordance with Hong Kong law and in compliance with the Limitation Decree, Defendants properly constituted a Limitation Fund in Hong Kong. *See* James Declaration ¶15; see also Davies Declaration, ¶¶14, 15, 25; Art. 14 of the 76 Convention. All interested parties were given notice of the Limitation Fund pursuant to Hong Kong law. *See* James Declaration ¶16. Plaintiffs knew about the Hong Kong Limitation Fund and the deadline to file their claims, but they deliberately ignored it. *See* James Declaration ¶17.

#### *2. The Marshall Islands and Hong Kong are Both Parties to the 76 Convention*

The Marshall Islands is a party to both the 76 Convention and the 96 Protocol. *See* IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions* (updated 19 April 2016) (hereinafter "IMO Official Status"); *see* IRI official RMI treaty list; *see* Chenault Declaration ¶5, Exhibits B and C. The Marshall Islands' adoption of the 96 Protocol does not alter that fact, as the Protocol is merely an amendment to the provisions of the 76 Convention. *See* Davies Declaration, ¶11. The Marshall Islands has not denounced the 76 Convention. *See* IMO Official Status; *see also* Davies Declaration, ¶11. The Marshall Islands has made no declaration,

reservations, or statements with regard to its member status of the 76 Convention and 96 Protocol (as other member states have done). *See* IMO Official Status; *see also* Davies Declaration, ¶24.

There is no such thing as "de facto" denouncing a Convention. Chenault Declaration ¶6. There is a formal procedure that must be followed, involving an official diplomatic communication with the depositary of the Convention, which, in this case, is the Secretary General of the United Nations, pursuant to Article 22(1). *Id.* Article 19 deals specifically with the procedure for denunciation, which involves the deposit of "an instrument" with the depositary. *Id.* The Marshall Islands accepted international obligations when adopting the 76 Convention and it still has them, no matter what it does in its domestic law. *Id.* The court simply cannot (or should not) disregard those international obligations. *Id.* There are other state parties to the 96 Protocol that have formally denounced the 76 Convention. *Id.* The Marshall Islands is not one of them. *Id.*

At the time the Hong Kong proceedings were initiated, Hong Kong was a member of the 76 Convention only. *See* James Declaration ¶ 6. Thus, the Marshall Islands and Hong Kong have the 76 Convention in common. *Id.; see also* Davies Declaration ¶11.

### 3. *Art. 9(4) of the 96 Protocol mandates that the Marshall Islands has treaty obligations to Hong Kong*

Article 9(4) of the 96 Protocol deals with obligations between Parties as follows:

> Nothing in this Protocol shall affect the obligations of a State which is a Party ***both to the Convention and to this Protocol*** with respect to a State which is a Party to the Convention but not a Party to this Protocol.

*See* Davies Declaration, ¶11.

The Marshall Islands is a "Party to both the [76] Convention and to [the 96] Protocol" and Hong Kong is a "Party to the [76] Convention but not a Party to [the 96] Protocol" and therefore Article 9(4) applies in this case. *See* Davies Declaration, ¶¶11 and 13. If Article 9(4) applies, "this Court would be bound by the HK Limitation Suit, insofar as the Marshall Islands and Hong Kong have only the 76 Convention in common." *See* Plaintiffs' Motion for Declaratory Judgment, p. 11; *see*

Davies Declaration, ¶11. Thus, the Marshall Islands has "obligations... with respect to" Hong Kong. *See* Davies Declaration, ¶ ¶ 11, 13; *see* Chenault Declaration ¶¶10, 14.

#### *4. The Absence of Art. 9(4) in the Marshall Islands Limitation of Liability for Maritime Claims Act is Immaterial.*

The Act does not apply in this case as no person entitled to limit liability has sought to limit before this Court. Section 525(1) of the Marshall Islands Limitation of Liability for Maritime Claims Act, 47 MIRC Ch.5, (the "Act") provides:

> **§525. Scope of application.** (1) This Chapter shall apply whenever any person ***referred to in Section 502*** of this Chapter, seeks to limit his liability ***before a Court of the Republic*** or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of the Republic. (emphasis added).

Section 502 of the Act provides:

> **§502. Persons entitled to limit liability.**
>
> (1) Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Chapter for claims set out in Section 503 of this Chapter.
>
> (2) The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship. ...

Persons entitled to limit liability are "shipowners" and "salvors." 47 MIRC 502. In this case, Defendants as shipowners have not sought to limit their liability "***before a Court of the Republic.***" 47 MIRC 525. Plaintiffs are not shipowners; they are cargo claimants and insurers. *See* Complaints. Cargo claimants and their insurers are not entitled to invoke the Act, 47 MIRC Ch.5.

As a simple matter of statutory interpretation, the provisions of the Act are not directly relevant to this case. 47 MIRC Ch.5; *See* Davies Declaration, ¶13. For the same reason, it is irrelevant that the Act did not enact Art. 9(4) of the 96 Protocol, which "deals with the obligations of countries to one another." *Id.* What is relevant is the fact that the Marshall Islands, as a party to 76 Convention, owes international law obligations to Hong Kong. *See* Davies Declaration, ¶ ¶ 11, 13; *see* Chenault Declaration ¶¶10, 14. Thus, this Court should dispose of this case and defer to the

Hong Kong limitation proceeding by application of the 76 Convention and Art. 9(4) of the 96 Protocol. *Id.*; *see also* Chenault Declaration ¶ 19.

### 5. *International Jurisprudence Supports The Conclusion That It Is The Right Of The Shipowner To Choose The Limitation Forum And That There Should Be One Forum For Limitation Proceedings*

The current international jurisprudence supports the conclusion that this Court should defer to Hong Kong, the forum chosen by Defendants as shipowners to initiate limitation proceedings. In *The Herceg Novi and Ming Galaxy*, an English case which effectively overruled *Caltex Singapore Pte Ltd v. BP Shipping Ltd* [1996] 1 Lloyd's Rep. 286 and *The Vishva Abha* [1990] 2 Lloyd's Rep. 312, the Court of Appeal granted an unconditional stay of the 76 Convention limitation proceedings because of the existence of parallel limitation proceedings in relation to the same incident in Singapore under the 1957 Limitation Convention. *See* Davies Declaration ¶20. Even in a "clash of convention" case involving the 1957 Limitation Convention and the 76 Convention,[2] the unanimous Court of Appeal held ([1998] 2 Lloyd's Rep. 454 at 460):

> [I]n terms of abstract justice, neither Convention is objectively more just than the other. Our task is not to decide whether our law is better than the law of Singapore. It is to decide whether substantial justice will be done in Singapore. In our view it will be. This appeal should be allowed, and an unconditional stay of the English action granted.

In *Seismic Shipping Inc. v. Total E&P UK Pic* (*The Western Regent*) [2005] 2 Lloyd's Rep. 359 the English Court of Appeal held that the shipowner may constitute a limitation fund in a country of its own choosing by instituting limitation proceedings there. *See* Davies Declaration ¶15.

The Court of Appeal had previously held, in *Saipem S.p.A. v. Dredging V02 B.V.* (*The Volvox Hollandia*) [1988] 2 Lloyd's Rep. 361, that a proceeding in identical form to that made by the Plaintiffs in the present case, seeking a negative declaration that shipowner defendants were not

[2] The term "clash of the Conventions" was coined by Professor Hare in a book that Defendants' expert Martin Davies edited. Professor Hare was referring to a clash between two separate and independent Conventions, the International Convention Relating to Limitation of the Liability of Owners of Sea-Going Ships 1957 ("the 1957 Limitation Convention") and the Convention on Limitation of Liability for Maritime Claims 1976 ("76 Convention"). The supposed clash in the present case is between the unamended 76 Convention, to which Hong Kong is party, and 76 Convention as amended by the 96 Protocol, to which the Marshall Islands is party. There is no clash as both countries are party to the same Convention, the 76 Convention. *See* Davies Declaration ¶9.

entitled to limit their liability in the U.K. should not be allowed to proceed, because the shipowner had chosen, as it was entitled to do, to institute limitation proceedings in the Netherlands. *See* Davies Declaration ¶16. The Court of Appeal held that it is for the shipowner to choose the limitation forum, not the liability claimants. *Id.*

In *Evergreen International S.A. v. Volkswagen Group Singapore Pte Ltd* [2004] 2 S.L.R. 457, the High Court of Singapore granted an anti-suit injunction to restrain cargo claimants from proceeding in Belgium in relation to a collision that had already given rise to limitation proceedings in Singapore. *See* Davies Declaration ¶21. Just as in the present case, the cargo claimants' goal was to bring suit in a jurisdiction with a higher limit of liability (76 Convention, rather than the 1957 Limitation Convention). Belinda Ang, J. held that by doing so, the cargo plaintiffs were acting vexatiously and oppressively, because they were attacking the shipowner's right to choose the limitation forum, and its right to invoke limitation of liability in Singapore, a competent forum according to its own jurisdictional rules. *Id.*

More recently, a Full Court of the Full Court of Australia stayed limitation proceedings in Australia brought pursuant to LLMC 76 as amended by the 1996 Protocol, because of the existence of parallel proceedings in relation to the same incident in China, which is not party to any of the limitation Conventions. *See* Davies Declaration ¶22; *CMA CGM S.A. v. Ship Chou Shan* (2014) 224 F.C.R. 384. The *Chou Shan* Court granted a stay notwithstanding the fact that the Australian test for grant of a *forum non conveniens* stay is more demanding than the English test that was applied in *The Herceg Novi*. *Id.* The possibility of parallel limitation proceedings in Australia and China persuaded the Australian court to stay its own proceedings, despite the restrictiveness of the Australian test, which requires the moving party to show that the plaintiffs' chosen forum is "clearly inappropriate." *Id.* The Full Court held that it was "clearly inappropriate" for an Australian court to

continue to hear limitation proceedings, given the existence of parallel limitation proceedings in relation to the same incident in China. *Id.*

In summary, even where there is a true "clash of Conventions" (or as in *Chou Shan*, a clash between a Convention and a national maritime code), the more recent international trend is for national courts hearing limitation proceedings to defer to the existence of parallel limitation proceedings validly constituted in other jurisdictions or, as in the *Evergreen* case, to restrain the possibility of parallel proceedings in another jurisdiction when there are existing, validly constituted, limitation proceedings in the jurisdiction chosen by the shipowner. *See* Davies Declaration ¶23. The same preference for a single limitation forum should follow even more clearly where, as here, the two countries are party to the same Convention. *Id.*

## V. CONCLUSION

Based on the foregoing, Defendants respectfully request this Court to grant their Motion for Summary Judgment and defer to the Hong Kong limitation proceeding by application of the 76 Convention and Art. 9(4) of the 96 Protocol. Defendants have shown that there is no genuine dispute as to any *material* fact and they are entitled to judgment as a matter of law. Since summary judgment is appropriate where the only issues to be decided are questions of law, it is appropriate here. No inferences drawn out of the air, mere speculation or conjecture is sufficient to preclude this Motion for Summary Judgment.

Dated: 29 April 2016

Tatyana Cerullo

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EMPIRE BULKERS LIMITED

FILED

APR 29 2016

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**

**OF THE**

**REPUBLIC OF THE MARSHALL ISLANDS**

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|---|---|
| Chubb Insurance (China) Company Ltd., *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>Eleni Maritime Limited *in personam* and Empire Bulkers Limited<br><br>Defendants. | H.Ct. Civil No. 2014-050<br>H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2015-194<br><br>**DECLARATION OF JAMES ROBERT JAMES** |

## DECLARATION OF JAMES ROBERT JAMES

I, JAMES ROBERT JAMES, of 38th Floor, Jardine House, 1 Connaught Place, Central, Hong Kong declare as follows:

1. I am a Partner in the firm of Norton Rose Fulbright Hong Kong, solicitors for Eleni Maritime Limited in the limitation and *in rem* actions pending in Hong Kong, and am duly authorised to swear this affirmation on their behalf.
2. I make this declaration with the authority of my client Eleni Maritime Limited in support of this motion for summary judgment.
3. Save where otherwise indicated, the facts and matters deposed to herein are based on the documents, information and instructions I have received in my aforesaid capacity from Ms. Sandra Marie Kelly, a Partner of Norton Rose Fulbright Greece, and Mr. Ian Teare, a Partner in the Singapore office of Norton Rose Fulbright (Asia) LLP, the client's solicitors in Greece and Singapore, respectively, and are true to the best of my information, knowledge and belief.
4. On 13 November 2013, an *in personam* limitation action was filed in the High Court of the Hong Kong Special Administrative Region Court of First Instance Admiralty Jurisdiction ("HCAJ") (Action No. 189 of 2013).
5. The named Defendants in the limitation action are (1) Heung-A Shipping Co., Ltd. (Republic of Korea) (2) E-One Garment Limited (Hong Kong), (3) Peninsula Merchandising Limited (Hong Kong), (4) Faratronic (Hong Kong) Company Limited, and all other persons claiming and/or being entitled to claim damages in respect of alleged loss and damage arising out of the collision between the vessels "ELENI" and "HEUNG-A DRAGON" on or around 7 November 2013.
6. At the time the Hong Kong proceedings were initiated, Hong Kong was a party to the Convention on Limitation of Liability for Maritime Claims 1976 ("the 1976 Convention"). The 1976 Convention provides for the court in an implementing country to

issue a limitation decree. This is a judicial confirmation, enforceable against any subsequent claimant, that the applicant for the decree has only limited liability in respect of the particular casualty. The decree is recognised in all implementing countries.

7. The named Defendants in the limitation action are Heung-A Shipping Co., Ltd, the owner of the HEUNG-A DRAGON and three cargo claimants located in Hong Kong as stated in paragraph 5 above.

8. The Plaintiffs in the Marshall Islands proceedings were entitled to participate in the Limitation Action with respect of their claims for alleged loss and damage arising out of the collision of the two vessels.

9. Heung-A Shipping Co., Ltd and the three named cargo claimants were served with process in the Limitation Action.

10. The Endorsement of Claim set forth in the "Amended Writ of Summons in Limitation Action" and the "Concurrent Amended Writ of Summons" states as follows:

> The Plaintiff, as owners of the vessel "ELENI" belonging to the port of Majuro, claims and seeks a declaration that its liability in respect of damage resulting from the collision between their ship "ELENI" and the ship "HUENG-A DRAGON" which occurred in or near the channel off the Vietnamese port of Phu May at about 1638 UTC on 7 November 2013, be limited pursuant to Hong Kong law and in particular the provisions of the Merchant Shipping (Limitation of Shipping Liability) Ordinance, Cap. 434 and that all necessary and proper directions be given for the purposes of ascertaining the amount of the Plaintiff's liability and for distributing the same amongst those entitled thereto.

11. Hong Kong was the most appropriate forum to initiate limitation proceedings for all parties involved for the following reasons:

    - Hong Kong was the last port of call;
    - Some cargo claimants are located in Hong Kong and are the named defendants in the Hong Kong limitation action;

- Unlike Vietnam, Hong Kong is an active and established maritime jurisdiction;

- Hong Kong is a close neighbor to Vietnam which borders China;

- Hong Kong is centrally located in Asia providing convenience to all interested parties spread throughout Asia;

- At the time of the collision, Hong Kong had the same limits of liability as Vietnam (although not a Party, employing the 76 Convention limits via local law); and

- No party challenged the jurisdiction of Hong Kong in the *in rem* or the limitation actions.

12. Ample grounds existed for Hong Kong jurisdiction for the limitation action in HCAJ 189 of 2013.

13. The limitation proceedings are procedurally proper according to the way in which the 76 Convention, Art. 11(1) is applied in Hong Kong and England.

14. In accordance with Hong Kong law, the High Court of Hong Kong granted a Limitation Decree by order dated 14 May 2014.

15. In accordance with Hong Kong law and in compliance with the order dated 14 May 2016, Eleni Maritime Limited properly constituted a Limitation Fund in Hong Kong.

16. Also in accordance with the order, the Defendants duly advertised a notice in each of Lloyd's List, The South China Morning Post and The Hong Kong Standard, specifying particulars of the Limitation Decree, on 19 May 2014. All persons with claims against Eleni Maritime Limited with respect to the collision between the "ELENI" and the 'HEUNG-A DRAGON" were given until 28 December 2014 to file their claims. All interested parties were given notice of the Limitation Fund

17. Plaintiffs knew about the Hong Kong Limitation Fund and the deadline to file their claims.

18. Plaintiffs had an opportunity to lodge their claims against the Hong Kong Limitation Fund.

19. At the request of solicitors acting for the three named cargo claimants and with the consent of my firm and solicitors for Heung-A Shipping Co., Ltd, the deadline was extended until 28 January 2015 by order of the High Court of Hong Kong dated 1 December 2104. The deadline for persons with claims against Eleni Maritime Limited to file their claims passed on 28 January 2015. A number of claims were filed by that date, totalling in value approximately US$16,795,082.69.

20. Claims that were filed by the deadline will be adjudicated upon by the High Court of Hong Kong before being admitted to participate in the Limitation Fund which I expect will be distributed in accordance with the order of the court dated 6 January 2016 in the collision proceedings, recording the apportionment of liability agreed on settlement by the parties thereto, namely the owners of the Eleni and the Heung-A Dragon (see paragraph 26 below) and in accordance with the 76 Convention limits of liability.

21. Had Plaintiffs filed their claims in Hong Kong as other claimants have done, they would have been able to participate in the distribution of the Limitation Fund in accordance with the Court-ordered apportionment of liability mentioned above and 76 Convention limits of liability.

22. The owners of the vessel ELENI also issued an Admiralty action *in rem* Writ of Summons in Hong Kong in the HCAJ (Action No. 188 of 2013) on 13 November 2013, in relation to the vessel HEUNG-A BANGKOK for damages to the vessel ELENI of

approximately three million three hundred and fifty thousand dollars (USD $3,350,000) arising out of the collision between the HEUNG-A DRAGON and the ELENI. The HEUNG-A BANGKOK was arrested in Hong Kong on 14 November 2013 and released from arrest on 19 November 2013, on the provision of a letter of undertaking.

23. The *in rem* proceedings were issued and served on the sister ship of the HEUNG-A DRAGON, i.e., the HEUNG-A BANGKOK, because Heung-A Shipping Co., Ltd. is the common owner of these two vessels and a number of others.

24. As the owners of the HEUNG-A BANGKOK, Heung-A Shipping Co., Ltd. participate in the *in rem* proceedings. Following the filing of an acknowledgment of service in the action on 28 November 2013, the action proceeds in rem and in personam.

25. The parties in the *in rem* action entered into a settlement agreement to apportion liability.

26. In its 6 January 2016 Order, the Hong Kong court approved the settlement by both shipowners on their apportionment of liability. There will be a reference to the Registrar of the High Court on quantum in due course.

27. All material factual disputes with regard to liability for the collision have been resolved in Hong Kong.

28. All material factual disputes with regard to damages will be resolved in Hong Kong

29. I declare under penalty of law that the following is true and correct to the best of my knowledge and belief.

DATED: 25 April 2016

J.R. James

James Robert James

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EMPIRE BULKERS LIMITED

FILED

APR 29 2016

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**

**OF THE**

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| Chubb Insurance (China) Company Ltd., *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>Eleni Maritime Limited *in personam* and Empire Bulkers Limited<br><br>Defendants. | H.Ct. Civil No. 2014-050<br>H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2015-194<br><br>**DECLARATION OF MARTIN DAVIES – EXPERT OPINION** |

## DECLARATION OF MARTIN DAVIES – EXPERT OPINION

I, Martin Davies, make this expert opinion in the form of a Declaration based on my personal knowledge and experience.



MD

1. I have been retained by Defendants' counsel to provide further support for the Opposition to Plaintiffs' Motion for Declaratory Judgment. I am retained as a consultant by Norton Rose Fulbright, one of the law firms acting for Defendants, but I genuinely hold the opinions set out in this Declaration, which are correct to the best of my knowledge and belief.

2. I am competent to make this Declaration based on my understanding of international maritime law, derived from thirty years of experience in teaching, researching and writing in this field.

3. I am the Admiralty Law Institute Professor of Maritime Law at Tulane University Law School in New Orleans and Director of the Tulane Maritime Law Center.

4. I have taught at Tulane University Law School since 2000. While at Tulane, I have taught courses in all aspects of U.S. maritime law, including: Admiralty I; Admiralty II; Carriage of Goods by Sea; Comparative Admiralty Procedure; International Conventions and Maritime Law; The Law of Salvage; Maritime Arbitration; Maritime Liens; Limitation of Shipowners' Liability; and International Maritime Law (Jurisdiction and Conflicts of Law). I also regularly teach Torts, Contracts I, International Commercial Arbitration, Transnational Litigation, and International Sale of Goods. I have been the Director of the Maritime Law Center since 2004.

5. I am co-author with Professor Robert Force and Professor Athanassios Yiannopoulos of a two-volume case-book on U.S. maritime law, published by Beard Books, entitled *Admiralty and Maritime Law*. I have published journal articles on many aspects of U.S. maritime law in journals such as the *Tulane Law Review*, the *Tulane Maritime Law Journal*, the *Journal of Maritime Law and Commerce*, *Lloyd's Maritime and Commercial*

*Law Quarterly* and the *Pacific Rim Law and Policy Journal*. In 2004, I edited a book entitled *Jurisdiction and Forum Selection in International Maritime Law*, which was published by Kluwer Law International in 2005, and which focused on issues of competing jurisdiction in maritime cases.

6. Before joining the Tulane faculty, I taught for nearly sixteen years in Australian university law schools. I am co-author with Professor Anthony Dickey, Q.C., of a text-book on Australian maritime law, entitled *Shipping Law*, now in its third edition, with a fourth edition to be published by Thomson Reuters in 2016. Chapter 16 of that book, which I wrote, deals with limitation of liability, and it contains an extensive section headed "Choice of forum: shopping for the most favourable Convention," which deals with precisely the kind of issues raised by the Plaintiffs' Motion for Declaratory Judgment.

7. I received the degrees of Bachelor of Arts (in Jurisprudence) and Bachelor of Civil Law, both with First Class Honours, from the University of Oxford, England, and the degree of Master of Laws from the Harvard Law School. I also hold the degree of Master of Arts from the University of Oxford, but that is largely ceremonial: at Oxford, an earned Bachelor of Arts simply becomes a Master of Arts with the passing of time.

8. My complete resume is Attachment A to this report. In Attachment B, I list the cases in which I have appeared as an expert witness on maritime law issues.

9. I have been asked for my opinion about Plaintiffs' Motion for Declaratory Judgment as to the Primacy in the Marshall Islands of the Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims 1976 (hereafter "P.M.D.J."). In brief, I say that I disagree with Plaintiffs' argument that this case presents "a classic case of the clash



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of the Conventions," to use a phrase coined by Prof. John Hare in a book I edited. P.M.D.J. pp. 2-3. Professor Hare was referring to a clash between two separate and independent Conventions, the *International Convention Relating to Limitation of the Liability of Owners of Sea-Going Ships 1957* (hereafter "the 1957 Limitation Convention") and the *Convention on Limitation of Liability for Maritime Claims 1976* (hereafter "LLMC 76"). The supposed clash in the present case is between the unamended LLMC 76, to which Hong Kong is party, and LLMC 76 as amended by the Protocol of 1996, to which the Marshall Islands is party. In my opinion, there is no clash as both countries are party to the same Convention, LLMC 76.

10. I shall address Plaintiffs' arguments under separate sub-headings.

*Plaintiffs' argument that the 1976 Convention does not apply in the Marshall Islands*

11. The Marshall Islands has not denounced LLMC 76, and so is still party to the Convention as a matter of international law. The Marshall Islands' adoption of the 1996 Protocol does not alter that fact, as the Protocol is merely an amendment to the provisions of LLMC 76. Thus, the Republic of the Marshall Islands still owes international treaty obligations to the Hong Kong Special Administrative Region under LLMC 76. Article 9.4 of the 1996 Protocol makes that quite clear by providing that countries party to LLMC 76 and the 1996 Protocol (like the Marshall Islands) owe treaty obligations to countries party to LLMC 76 but not the 1996 Protocol (like the Hong Kong SAR). It is immaterial that Art. 9.4 does not appear in the domestic Marshall Islands legislation giving effect to the Protocol, because it deals with treaty obligations under international law.



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12. I understand that the Marshall Islands is a "dualist" jurisdiction, to use the usual international law terminology – i.e., that international Conventions do not automatically have the force of law domestically, even if self-executing, but require implementing legislation to give effect to them in domestic law. Plaintiffs cite a "Pacific Islands Treaty Series" webpage[1] as authority for that proposition (P.M.D.J., pp. 12-13), which I believe is enshrined in the *Constitution of the Republic of the Marshall Islands*, Art. V, §1(4): "No treaty or other international agreement which is finally accepted by, or on behalf of the Marshall Islands on or after the effective date of this Constitution shall of itself have the force of law in the Marshall Islands."

13. Although the Nitijela did not legislate to give effect to all of the provisions of LLMC 76, or the Protocol of 1996, in the *Limitation of Liability for Maritime Claims Act* (hereafter "LLMCA") that does not mean, as Plaintiffs assert, that LLMC 76 has no bearing on the impact that the Hong Kong limitation proceedings should have in the Marshall Islands. The P.M.D.J. refers extensively to several provisions of LLMCA, but it does not point out that LLMCA §525 provides (equivalent to LLMC 76, Art. 15(1)) that:

> This Chapter shall apply whenever any person referred to in Section 502 of this Chapter, seeks to limit his liability before a Court of the Republic or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of the Republic.

As I understand it, Defendants have not (or not yet) sought to limit their liability before "a Court of the Republic," nor to procure release of a ship or other property in the Republic, nor for the discharge of any security given in the Republic. Thus, as a simple

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1. Pacific Islands Treaty Series, http://www.paclii.org/pits/en/domestication.shtml.

matter of statutory interpretation, the provisions of LLMCA are not directly relevant to these proceedings. For the same reason, it is irrelevant that LLMCA did not enact Art. 9.4 of the Protocol, which deals with the obligations of countries to one another. What is relevant is the fact that the Marshall Islands, as a party to LLMC 76, owes international law obligations to the Hong Kong Special Administrative Region.

*Plaintiffs' arguments that the limitation fund in Hong Kong is not "constituted" for purposes of Marshall Islands law, and that the Hong Kong court is not a "court of competent maritime jurisdiction" under Marshall Islands law*

14. Plaintiffs' argument that the Hong Kong limitation fund is not properly constituted because the Hong Kong court does not have jurisdiction to hear the limitation action is both flatly inconsistent with the view adopted by the Hong Kong court itself and, frankly, disrespectful of the Hong Kong court's decision about its own jurisdiction. If the Hong Kong court has jurisdiction according to its own rules, its competence cannot and should not be questioned by any court anywhere, including by this Court. That is a fundamental principle of private international law. It is for the country where limitation is invoked, and that country alone, to decide whether or not its courts have jurisdiction. LLMC Art 14 makes that quite clear by providing:

> "[T]he rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connexion therewith, shall be governed by the law of the State Party in which the fund is constituted.

15. Plaintiffs assert that the Hong Kong court is not a court of competent maritime jurisdiction because the Hong Kong limitation suit was brought by Defendants before any

liability claims had been filed against them. P.M.D.J. p. 30. Admittedly, some distinguished commentators would agree that limitation proceedings should only be brought in a country where liability claims have already been brought, because of LLMC 76, Art. 11(1), which provides that a limitation fund may be constituted in a country "in which legal proceedings are instituted in respect of claims subject to limitation." See, e.g., F. Berlingieri, *International Limitation Conventions* (2015), Vol. 2, p. 381. The English Court of Appeal does not agree, however, and it is the English view that is followed in Hong Kong. In *Seismic Shipping Inc. v. Total E&P UK Plc (The Western Regent)* [2005] 2 Lloyd's Rep. 359 the English Court of Appeal held that the phrase "in which legal proceedings are instituted in respect of claims subject to limitation" is not confined to liability claims brought against the shipowner, but includes limitation proceedings brought by the shipowner itself, with the result that the shipowner may constitute a limitation fund in a country of its own choosing by instituting limitation proceedings there.

16. The Court of Appeal had previously held, in *Saipem S.p.A. v. Dredging VO2 B.V. (The Volvox Hollandia)* [1988] 2 Lloyd's Rep. 361, that a proceeding in identical form to that made by the Plaintiffs in the present case, seeking a negative declaration that shipowner defendants were not entitled to limit their liability in the U.K., should not be allowed to proceed, because the shipowner had chosen, as it was entitled to do, to institute limitation proceedings in the Netherlands. The Court of Appeal held that it is for the shipowner to choose the limitation forum, not the liability claimants.

17. Although *The Western Regent* interpretation of Art. 11(1) is not universally accepted, it is neither idiosyncratic nor obviously wrong, despite Plaintiffs' assertion that it is contrary

to the "plain language" of Art. 11. P.M.D.J. pp. 29-31. It is consistent with the "plain language" of the French text of Art. 11(1) which, by operation of LLMC Art. 23, is equally authentic to the English text. The French text does not require an actual allegation of liability, but provides in Art. 11(1) that a limitation fund may be constituted by: "Toute personne dont la responsibilité peut être mise en cause..." – i.e. by any person whose responsibility *may be* questioned.

18. For present purposes, however, it is irrelevant whether *The Western Regent* interpretation of Art. 11(1) is regarded as being right or wrong. All that matters is that it is accepted in Hong Kong, and formed the basis for the Hong Kong's decision about jurisdiction in this case. The phrase "competent authority" in LLMC 76, and its equivalent in LLMCA § 502(8) ("court of competent maritime jurisdiction") must be interpreted to mean "competent" according to the forum's own rules. To hold otherwise, as Plaintiffs invite the Court to do in the P.M.D.J., would be to question the Hong Kong Court's jurisdictional decision, applying Marshall Islands standards to a decision based on Hong Kong law.

*Plaintiffs' argument that concurrent/parallel limitation funds are acceptable and an inherent result of competing international limitation regimes*

19. In the "Reprise" section of P.M.D.J., Plaintiffs refer extensively to scholarship and cases that either deal with a different situation – a true "clash of Conventions" – and/or are out of date or overruled. As I have already pointed out, Prof. John Hare was writing of a clash between the 1957 Limitation Convention and LLMC 76 in his chapter of the book I edited, not a situation such as the present, where there is the possibility of parallel claims

in countries party to the same Convention. The English cases cited in P.M.D.J., *Caltex Singapore Pte Ltd v. BP Shipping Ltd* [1996] 1 Lloyd's Rep. 286 and *The Vishva Abha* [1990] 2 Lloyd's Rep. 312, were effectively overruled by the later decision of the English Court of Appeal in *The Herceg Novi and Ming Galaxy* [1998] 2 Lloyd's Rep. 454.

20. In the cases cited in P.M.D.J., *Caltex Singapore* and *The Vishva Abha*, English courts of first instance refused to stay English proceedings on *forum non conveniens* grounds on the ground that there were parallel limitation proceedings in relation to the same incident in another country under a different Convention. In *The Herceg Novi and Ming Galaxy*, the Court of Appeal did exactly the opposite, staying English LLMC 76 proceedings because of the existence of parallel limitation proceedings in relation to the same incident in Singapore under the 1957 Limitation Convention. In a passage of its judgment with direct relevance to Plaintiffs' argument in the P.M.D.J., the unanimous Court of Appeal said ([1998] 2 Lloyd's Rep. 454 at 460):

> [I]n terms of abstract justice, neither Convention is objectively more just than the other. Our task is not to decide whether our law is better than the law of Singapore. It is to decide whether substantial justice will be done in Singapore. In our view it will be. This appeal should be allowed, and an unconditional stay of the English action granted.

21. In *Evergreen International S.A. v. Volkswagen Group Singapore Pte Ltd* [2004] 2 S.L.R. 457, the High Court of Singapore granted an anti-suit injunction to restrain cargo claimants from proceeding in Belgium in relation to a collision that had already given rise to limitation proceedings in Singapore. Just as in the present case, the cargo claimants' goal was to bring suit in a jurisdiction with a higher limit of liability (LLMC 76, rather than the 1957 Limitation Convention). Belinda Ang, J. held that by doing so, the cargo

plaintiffs were acting vexatiously and oppressively, because they were attacking the shipowner's right to choose the limitation forum, and its right to invoke limitation of liability in Singapore, a competent forum according to its own jurisdictional rules.

22. More recently, a Full Court of the Full Court of Australia stayed limitation proceedings in Australia brought pursuant to LLMC 76 as amended by the 1996 Protocol, because of the existence of parallel proceedings in relation to the same incident in China, which is not party to any of the limitation Conventions. *CMA CGM S.A. v. Ship Chou Shan* (2014) 224 F.C.R. 384. The *Chou Shan* Court granted a stay notwithstanding the fact that the Australian test for grant of a *forum non conveniens* stay is more demanding than the English test that was applied in *The Herceg Novi*. The possibility of parallel limitation proceedings in Australia and China persuaded the Australian court to stay its own proceedings, despite the restrictiveness of the Australian test, which requires the moving party to show that the plaintiff's chosen forum is "clearly inappropriate." The Full Court held that it was "clearly inappropriate" for an Australian court to continue to hear limitation proceedings, given the existence of parallel limitation proceedings in relation to the same incident in China.

23. In summary, even where there is a true "clash of Conventions" (or as in *Chou Shan*, a clash between a Convention and a national maritime code), the more recent international trend is for national courts hearing limitation proceedings to defer to the existence of parallel limitation proceedings validly constituted in other jurisdictions or, as in the *Evergreen* case, to restrain the possibility of parallel proceedings in another jurisdiction when there are existing, validly constituted, limitation proceedings in the jurisdiction chosen by the shipowner. The same preference for a single limitation forum should

follow even more clearly where, as here, the two countries are party to the same Convention.

*Conclusions and summary*

24. Plaintiffs' repeated assertions that the Marshall Islands is not party to LLMC 76 because of the manner in which the LLMCA was enacted are incorrect. The Marshall Islands has not denounced LLMC 76, as several other countries have done. It owes treaty obligations to the Hong Kong Special Administrative Region, as Art. 9.4 of the Protocol of 1996 makes quite clear. The Court cannot simply ignore as irrelevant the existence of proceedings in another country party to the same Convention, as P.M.D.J. asks it to do.

25. Plaintiffs assert that Defendants' preemptive filing of the Hong Kong limitation proceedings was "procedurally improper in terms of jurisdiction." P.M.D.J. p. 37. It was not. It was procedurally proper according to the way in which LLMC 76, Art. 11(1) is understood in England and Hong Kong.

26. Defendants have not yet sought to limit their liability in a Court of the Marshall Islands, nor have they sought to procure the release of a ship or other property or the discharge of other security given in the Republic. Thus, LLMCA has no application to the disposition of the present case, by operation of § 525(1).

27. I declare under penalty of law that the following is true and correct to the best of my knowledge and belief.

DATED: 5 April 2016 (Louisiana)

Martin Davies

Martin Davies



AMANDA N. MOELLER
NOTARY PUBLIC
LSBA NO. 30103
MY COMMISSION IS FOR LIFE.

ATTACHMENT A

**MARTIN DAVIES**

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## ACADEMIC APPOINTMENTS

| | |
|---|---|
| **Tulane University Law School, New Orleans, LA** | since 2000 |
| Admiralty Law Institute Professor of Maritime Law | since 2002 |
| Professor of Law | 2000-2002 |
| Director, Tulane Maritime Law Center | since 2004 |
| Co-Director, Tulane Maritime Law Center | 2002-2004 |
| Deputy Director, Tulane Maritime Law Center | 2000-2002 |
| **Melbourne Law School, The University of Melbourne, Australia** | since 1995 |
| Professorial Fellow | since 2000 |
| Harrison Moore Professor of Law | 1995-2000 |
| Associate Dean (Academic), Faculty of Law | 1996-1998 |
| **Monash University Law School, Melbourne, Australia** | 1989-1995 |
| Associate Professor of Law | 1993-1995 |
| Senior Lecturer in Law | 1989-1992 |
| Associate Dean (Research), Faculty of Law | 1991-1993 |
| **The University of Western Australia Law School, Perth, Australia** | 1983-1989 |
| Lecturer in Law | 1983-1989 |
| Sub-Dean, Faculty of Law | 1986-1989 |
| **Department of Law, Nottingham University, Nottingham, U.K.** | 1980-1981 |
| Lecturer in Law | 1980-1981 |

## VISITING APPOINTMENTS

| | |
|---|---|
| **Law School, Dalian Maritime University, China** | 2016 |
| **Law Faculty, Baku State University, Azerbaijan** | 2014, 2015 |
| **Law Faculty, National University of Singapore** | |
| Distinguished Visitor | 2008, 2009 |
| Maritime and Port Authority Distinguished Visitor | 2004 |

**Università degli Studi Cagliari, Sardinia, Italy**

Visiting Professor 2007, 2008

## PROFESSIONAL EMPLOYMENT

**Consultant, Norton Rose Fulbright, Australia, Singapore and USA** since 2011

**Consultant, Blake Dawson Waldron, Melbourne, Sydney and Brisbane, Australia** 1999-2011

**Consultant, Mallesons Stephen Jaques, Melbourne and Sydney, Australia** 1989-1999

**Consultant, Gibson and Gibson, Perth, Australia** 1988-1989

## OTHER PROFESSIONAL APPOINTMENTS

**Panel Arbitrator, International Center for Dispute Resolution, American Arbitration Association** since 2014

## EDUCATION

B.A. (with First Class Honours) in Jurisprudence, University of Oxford 1978

B.C.L. (with First Class Honours), University of Oxford 1979

LL.M., Harvard Law School 1980

M.A., University of Oxford, England 1983

## SUBJECTS TAUGHT/AREAS OF RESEARCH EXPERTISE

Admiralty and Maritime Law (all aspects); International Sale of Goods; Conflict of Laws/Transnational Litigation; International Commercial Arbitration; Contracts; Torts.

## PUBLICATIONS

**Books (author or co-author)**

INTERNATIONAL TRANSACTIONS IN GOODS: GLOBAL SALES IN COMPARATIVE CONTEXT (Oxford University Press, 2014), with David V. Snyder.

NYGH'S CONFLICT OF LAWS IN AUSTRALIA (LexisNexis Butterworths, 9th ed., 2014), with Andrew Bell, S.C. and Justice Paul Brereton.

- Eighth edition (with Bell and Brereton) 2010; seventh edition (with Peter Nygh) 2002.

ADMIRALTY AND MARITIME LAW: PRACTITIONER'S EDITION (2 volumes)(Beard Books, 2005), with Robert Force and A.N. Yiannopoulos.

- Revised editions published 2008, 2012.

ADMIRALTY AND MARITIME LAW: ABRIDGED EDITION (Beard Books, 2006), with Robert Force and A.N. Yiannopoulos.

- Revised edition published 2008.

SHIPPING LAW (Thomson LawBook Co, 3rd ed., 2004), with Anthony Dickey, Q.C.

- Second edition 1995; first edition 1990.

INTERNATIONAL TRADE LAW: COMMENTARY AND MATERIALS (Thomson LawBook Co., 2nd ed., 2004), with Michael Pryles and Jeff Waincymer.

- First edition 1996.

TORTS (LexisNexis Butterworths, 7th ed., 2015), with Ian Malkin.

- First edition 1992; second edition 1995; third edition 1999; fourth edition 2003; fifth edition 2008; sixth edition 2012.

CONFLICT OF LAWS: COMMENTARY AND MATERIALS (Butterworths, 1997), with Sam Ricketson and Geoffrey Lindell.

**Books (editor)**

JURISDICTION AND FORUM SELECTION IN INTERNATIONAL MARITIME LAW: ESSAYS IN HONOR OF ROBERT FORCE (ed. Martin Davies, Kluwer Law International, 2005).

**Book chapters**

*Incorporation of charterparty terms into bills of lading held by third parties: choice of law issues*, in THIRD PARTIES' RIGHTS AND LIABILITIES UNDER BILLS OF LADING (ed. F. Lorenzon, Taylor & Francis, 2014).

*Admiralty and maritime jurisdiction in the United States: "Same same but different,"* in INTERNATIONAL COMMERCIAL LAW AND ARBITRATION: PERSPECTIVES 145-57 (ed. N. Perram, Ross Parsons, 2014).

*Excuse of impediment and its usefulness*, in INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 295-306 (ed. L. DiMatteo, Cambridge University Press, 2014).

*Maritime law: the epitome of transnational legal authority* in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 327-40 (eds. G. Handl, J. Zekoll & P. Zumbansen, Kluwer International, 2012).

*Product liability* in FLEMING'S THE LAW OF TORTS 555-85 (eds. Carolyn Sappideen and Prue Vines 10th ed., 2011).

*Australia* in TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE 1-30 (2nd ed., eds., A. von Ziegler, C. Debattista, A. Plégat and J. Windahl, 2011).

*Warranties and utmost good faith in U.S. marine insurance contracts*, in THE MODERN LAW OF MARINE INSURANCE, VOLUME THREE 81-100 (ed. D. Rhidian Thomas, 2009).

*Classification society liability in the United States*, in LIABILITY REGIMES IN CONTEMPORARY MARITIME LAW 129-147 (ed. D. Rhidian Thomas, 2007).

*Forum selection clauses in international maritime contracts,* (with Robert Force) in JURISDICTION AND FORUM SELECTION IN INTERNATIONAL MARITIME LAW: ESSAYS IN HONOR OF ROBERT FORCE 1-58 (ed. Martin Davies, 2005).

*Taking evidence by video-link in international litigation* in INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH 69-88 (eds. T. Einhorn and K. Siehr, 2004).

*Product liability in international markets* in TORTS TOMORROW: ESSAYS IN HONOUR OF JOHN FLEMING 130-151(eds N. Mullany and A. Linden, 1998).

*The end of the affair: duty of care and liability insurance* in THREE ESSAYS IN INSURANCE LAW 29-47 (1989).

**Journal articles**

"Parallel proceedings for insolvency and limitation of liability," [2015] Lloyd's Maritime and Commercial Law Quarterly 24.

"Insurers' pre-contractual disclosure obligations: the position in the United States of America," 23 Insurance Law Journal 70 (2012).

"Forum Selection, Choice of Law and Mandatory Rules," [2011] Lloyd's Maritime and Commercial Law Quarterly 237.

"Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases," 85 Tulane Law Review 889-982 (2011) (with Robert Force and Joshua Force).

"Liability issues raised by the Deepwater Horizon blowout," 25 Australia & New Zealand Maritime Law Journal 35-48 (2011).

"Documents That Satisfy the Requirements of CISG Art. 58," 49(3) Belgrade Law Review (Annals of the Faculty of Law of Belgrade) 39-66 (2011).

"More Lawyers but Less Law: Maritime Arbitration in the 21st Century," 24 Australia & New Zealand Maritime Law Journal 13-20 (2010).

- Published version of the 2009 Australian Maritime and Transport Arbitration Commission (AMTAC) Address, Federal Court of Australia, Brisbane, Australia (video-linked to Federal Courts in Sydney, Melbourne and Perth), 2 July 2009.

"Choice of Law and U.S. Maritime Liens," 83 Tulane Law Review 1435-61 (2009).

"Legal and Practical Aspects of Salvage in the United States" [2009] Lloyd's Maritime and Commercial Law Quarterly 28-41.

"Whatever Happened to the Salvage Convention 1989?" 39 Journal of Maritime Law & Commerce 463-504 (2008).

"Choice of Law After the Civil Liability Legislation," 17 Torts Law Journal 104-119 (2008).

"Court-ordered Interim Measures in Aid of International Commercial Arbitration," 17 American Review of International Arbitration 299-334 (2008).

"*McDermott v. AmClyde*: The Quiet Achiever," 39 Journal of Maritime Law & Commerce 11-25 (2008).

"Bypassing the Hague Evidence Convention: private international law implications of the use of video and audio conferencing technology in transnational litigation," 55 American Journal of Comparative Law 205-237 (2007).

"Litigation fights back: avoiding the effects of arbitration clauses in charterparty bills of lading," 35 Journal of Maritime Law and Commerce 617-43 (2004).

"Forum selection clauses in maritime cases," 27 Tulane Maritime Law Journal 367-87 (2003).

"Obligations and implications for ships encountering persons in need of assistance at sea," 12 Pacific Rim Law & Policy Journal 109-41 (2003).

"Time to change the federal *forum non conveniens* analysis," 77 Tulane Law Review 309-86 (2002).

"Foreign maritime liens: should they be recognised in Australian courts?," 76 Australian Law Journal 775-82 (2002) (with Kate Lewins).

"In defense of unpopular virtues: personification and ratification," 75 Tulane Law Review 337-411 (2000).

"Subrogation, contribution and insurance law: an Australian view," [2000] Restitution Law Review 70-81.

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"Conflict of laws issues in fatal accidents actions," 1 Torts Law Journal 45-62 (1993).

"The liability of auditors to third parties in negligence," 14 UNSWLJ 171-197 (1991).

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"'Special skill' in negligent misstatement," 17 Melbourne University Law Review 484-496 (1990).

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**Essays, case notes and other short pieces**

"A tribute to Professor William Tetley," 39 Tulane Maritime Law Journal i-iii (2014).

"Conversion of intangible goods," 88 Australian Law Journal 235-37 (2014).

"Wrongful arrest of ships – a reply to Sir Bernard Eder," 38 Tulane Maritime Law Journal 137-42 (2013).

- A response to Hon Mr Justice Bernard Eder, "Wrongful arrest of ships: a time for change," 38 Tulane Maritime Law Journal 115 (2013).
- See also "Wrongful arrest of ships: rejoinder by the Honourable Mr Justice Bernard Eder," 38 Tulane Maritime Law Journal 143 (2013).

"Houseboat or floating home or what? Certiorari process in the U.S. Supreme Court," 87 Australian Law Journal 234-6 (2013).

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"Renvoi and presumptions about foreign law: *Neilson v Overseas Projects Corporation of Victoria Ltd*," 30 Melbourne University Law Review 244-268 (2006).

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"*Kuwait Airways Corp v Iraqi Airways Co*: The effect in private international law of a breach of public international law by a state actor," 2 Melbourne Journal of International Law 523-534 (2001).

"Insured's post-contract duty uberrimae fidei: *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)*," 32 Journal of Maritime Law and Commerce 501-510 (2001).

"Common law liability of statutory authorities: *Crimmins v Stevedoring Industry Finance Committee*," 8 Torts Law Journal 133-151 (2000).

"Application of the Hague Rules" "perils of the sea" defense in Australia: *The Bunga Seroja*," 23 Tulane Maritime Law Journal 449-64 (1999).

"A chink (or two) in the bill of lading plaintiff's jurisdictional armour? Good news for Australian maritime arbitration?," 26 Australian Business Law Review 70-74 (1998).

"A curate's egg: good in parts - *Akai Pty Ltd v People's Insurance Co Ltd*," 25 Australian Business Law Review 215-21 (1997).

"What is "ownership" for the purposes of ship arrest under the Admiralty Act 1988 (Cth)?," 24 Australian Business Law Review 76-80 (1996).

"The Hamburg Rules: what happens in 1997?," 23 Australian Business Law Review 235-36 (1995).

"The Constitutional Validity of Residence Requirements in No-Fault Transport Accident Compensation Schemes," 2 Torts Law Journal 275-84 (1994).

"Section 37 of the Admiralty Act 1988: Safety net or not?," 22 Australian Business Law Review 447-50 (1994).

"Strict Liability and Reasonable Foreseeability: *Cambridge Water Co v Eastern Counties Leather plc,"* 2 Torts Law Journal 12-21 (1994).

"The Exocet finds a new target, or fear and loathing for freight forwarders and other carriers by sea," 21 Australian Business Law Review 377-84 (1993).

"Auditors' liability to third parties: *R Lowe Lippman Figdor & Franck (a firm) v AGC (Advances) Ltd*," 1 Torts Law Journal 114-21 (1993).

"What obligations does a shipowner take over from a defaulting time charterer under charterers' bills of lading?," 21 Australian Business Law Review 227-30 (1993).

"The new Act, old bills of lading and the United States District Court for the Southern District of New York: an interesting mix," 20 Australian Business Law Review 432-36 (1992).

"Case note: *New South Wales Leather Co Pty Ltd v Vanguard Insurance Co Ltd*," 5 Insurance Law Journal 159-64 (1992).

"Deviation is alive and well and living in New South Wales," 19 Australian Business Law Review 379-83 (1991).

"Fruits of the Blooming Orchard," 19 Australian Business Law Review 217-22 (1991).

"Default of one in a chain of charterparties," 19 Australian Business Law Review 51-57 (1991).

"Carriage of Goods by Sea Bill," 19 Australian Business Law Review 57-60 (1991).

Case note: *Qantas Airways Ltd v SS Pharmaceutical Pty Ltd*, 18 Australian Business Law Review 435-40 (1990).

Case note: *Verna Trading (Aust) Pty Ltd v New India Assurance Co Ltd*, 18 Australian Business Law Review 430-35 (1990).

"*San Sebastian* revisited," 17 UWA L Rev 150-159 (1987).

## EDITORIAL POSITIONS

Member, Editorial Board, LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY

Member, Editorial Advisory Board, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY

Member, Editorial Advisory Board, AEGEAN REVIEW OF THE LAW OF THE SEA AND MARITIME LAW

Member, Editorial Board, AUSTRALIA & NEW ZEALAND MARITIME LAW JOURNAL

Member, Editorial Board, NEW ZEALAND BUSINESS LAW QUARTERLY

Member, Advisory Board, MELBOURNE JOURNAL OF INTERNATIONAL LAW

Member, Advisory Board, THE UNIVERSITY OF WESTERN AUSTRALIA LAW REVIEW

## PROFESSIONAL BODIES

| | |
|---|---|
| Member, Maritime Law Association of the United States | since 2000 |
| Associate Member, American Bar Association | since 2000 |
| Member, Maritime Law Association of Australia and New Zealand | 1990–2000 |
| Member, Documentary Committee, Intertanko | since 2003 |

**Attachment B**

**Cases in which Martin Davies has acted as an expert witness on U.S. law**

**Oral testimony in court or in arbitration to support written report (in reverse chronological order)**

*Sunglory Maritime Ltd v. PHI Inc. and A Certain Helicopter No. N764P*, U.S. District Court for the Eastern District of Louisiana (2016).

*In re United Kaiun Kaisha Ltd and Cogent Fibre, Inc.*, Arbitration by a Panel of the Society of Maritime Arbitrators, New York City (2014).

*Continental Insurance Co. v. Lopez-Castro*, U.S. District Court for the Southern District of Florida (2008).

*Farmers Rice Milling Co. Inc., Louisiana Rice Mill, L.L.C., Supreme Rice Mill, Inc. v. Novel Commodities, S.A.*, Arbitration by a Panel of the U.S.A. Rice Millers' Association, Houston (2008).

*Overseas Dispatcher Co. v. C.C.N.I.*, First Maritime Court of the Republic of Panama (2007).

*Dixie Machine Welding & Metal Works Inc. v. Societe Nationale de Transportes Maritimes & Compagnie Nationale Algerienne de Navigation Maritime*, First Maritime Court of the Republic of Panama (2003).

**Testimony by deposition, affidavit or written report (in reverse chronological order)**

*Houston Casualty Co. v. Supreme Towing Co., Inc.*, U.S. District Court for the Eastern District of Louisiana (2012)(written report).

*Amaran v. Royal Caribbean Cruise Lines, Inc.*, Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida (2011)(deposition).

*Equatorial Marine Fuel Management Services Pte Ltd v. Owners of the Ship Bunga Melati 5*, High Court of the Republic of Singapore (2010)(affidavit).

*In re Petition of Frescati Shipping Co. Ltd*, U.S. District Court for the Eastern District of Pennsylvania (2010)(affidavit).

*Bominflot Ltd v MV Neptune Naiad*, Second Maritime Court of the Republic of Panama (2009)(affidavit).

*Assa Cia de Seguros, S.A. v. Seaboard Marine Ltd*, Second Maritime Court of the Republic of Panama (2007)(affidavit).

*Interoceanica de Seguros, S.A. v. Seaboard Marine Ltd*, Second Maritime Court of the Republic of Panama (2006)(affidavit).

*Sportex Zona Libre, S.A. v. v. Seaboard Marine Ltd*, Second Maritime Court of the Republic of Panama (2006)(affidavit).

*Cia Internacional de Seguros, S.A. v. Seaboard Marine Ltd*, First Maritime Court of the Republic of Panama (2006)(affidavit).

*In re MFV Lochan Ora*, High Court of South Africa (Cape of Good Hope Provincial Division) (2004)(affidavit).

*Pennant Shipping Services, Inc. v. M/V Pytheas*, Second Maritime Court of the Republic of Panama (2003) (court-appointed expert, written report to Judge Gisela Agurto).

Tatyana Cerullo, M.I. Adm. # 150
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Attorneys for Defendants
ELENI MARITIME LIMITED and
EMPIRE BULKERS LIMITED

FILED

APR 29 2016

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**

**OF THE**

**PUBLIC OF THE MARSHALL ISLANDS**

| | |
|---|---|
| Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*<br><br>Plaintiffs,<br><br>v.<br><br>Eleni Maritime Limited *in personam* and Empire Bulkers Limited<br><br>Defendants. | H.Ct. Civil No. 2014-050<br>H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2015-194<br><br>**DECLARATION OF ALANSON T. CHENAULT**<br>**EXPERT OPINION** |

## DECLARATION OF A.T. CHENAULT – EXPERT OPINION

I, Alanson T. Chenault, make this expert opinion in the form of a Declaration based on facts provided to me and my personal knowledge, experience, and expertise.

1. I have been retained by Defendants' counsel to provide my opinions on various legal issues related to limitation of liability.

2. I am qualified to provide this opinion. I graduated with honors from Tulane Law School in New Orleans, Louisiana, in 1991. I was admitted to the Louisiana state and federal bars that year and have practiced law since then. I am also admitted to practice in the U.S. Supreme Court and the Fourth, Fifth, and Eleventh Circuit Courts of Appeals. Most of my legal practice deals with maritime law issues, sometimes on an international scope, and I have been involved frequently with limitation of liability cases, representing both

vessel interests and claimants. I am also an adjunct faculty member at Tulane Law School, where I co-teach a course on the law of collision and limitation of liability. One of the limitation of liability course subjects specifically addresses the international limitation of liability systems, including the 1957 and 1976 conventions. I have frequently made presentations at seminars on a variety of maritime law subjects or issues. My resume is attached as Exhibit A.

3. I understand the following to be the basic facts. The collision happened in Vietnam territorial waters. Defendants initiated a limitation proceeding in Hong Kong. Plaintiffs deliberately chose not to file a claim in the Hong Kong proceeding, but have commenced a negligence action against the defendants in the Marshall Islands. Defendants have not commenced a limitation proceeding in any location other than Hong Kong.

4. I have been asked to consider whether Hong Kong was an appropriate forum for the limitation proceeding. After considering the factors related to the choice of Hong Kong, I believe that it was an appropriate forum. Although the collision occurred in Vietnamese waters, that country does not have an active and established maritime legal system like Hong Kong does. Commencing a limitation proceeding in Vietnam likely would not benefit vessel interest or claimants. This is supported by the fact that none of the claimants have commenced legal proceedings in Vietnam. Because of its legal system, Hong Kong should be an attractive forum for both Defendants and claimants. It is also a convenient forum because it was the last port before the collision occurred; some of the cargo claimants are located in Hong Kong; it is relatively close to Vietnam, which shares a border with China; and it is centrally located in Asia, allowing convenient access. Under the 1976 Convention, Hong Kong also has the same liability limits as Vietnam, so none of the claimants' recoveries will be reduced compared to proceeding in Vietnam. Hong Kong's suitability is supported by the fact that none of the parties to the Hong Kong proceeding have challenged its jurisdiction. Nor has the Hong Kong court.

5. At the time that Defendants commenced their limitation proceeding in Hong Kong, both Hong Kong and the Marshall Islands had adopted the 1976 Limitation Convention. The Marshall Islands had also adopted the 1996 Protocol to the 1976 Limitation Convention. The Marshall Islands has not formally denounced the 1976 Convention. Attached as Exhibit B is a true and correct copy of the list from International Registries Inc., of the International Maritime Conventions, Protocols and other instruments adopted by the Republic of the Marshall Islands, which on page 3, item 18, shows that both the 1976 Limitation Convention and the 1996 Protocol have been adopted. This is corroborated by the IMO Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions (updated 19 April 2016). See Exhibit C is a true and correct copy of the relevant excerpt of this document.

6. Furthermore, there is no such thing as "de facto" denouncing a Convention. There is a formal procedure that must be followed, involving an official diplomatic communication with the depositary of the Convention, which, in this case, is the Secretary General of the United Nations, as Art. 22(1) states. Article 19 deals specifically with the procedure for denunciation, which involves the deposit of "an instrument" with the depositary, in this case the Secretary General. The Marshall Islands accepted international obligations when adopting the 1976 Convention and it still has them, no matter what it does in its domestic law. The court simply cannot (or should not) disregard those international obligations. There are other state parties to the 96 Protocol that have formally denounced the 1976 Convention. The Marshall Islands is not one of them.

7. The Hong Kong limitation fund was properly constituted under the law applicable to the Hong Kong proceeding. It is my understanding that none of the parties objected to the manner in which the fund was constituted, and that the Hong Kong court has issued a limitation decree and will distribute the limitation fund to the claimants in due course.

8. Plaintiffs in this proceeding have admitted that they had notice of the Hong Kong limitation proceeding and the deadline for filing claims in that proceeding. However, the defendants appear to have made a deliberate reasoned decision not to file a claim in the Hong Kong proceeding. Based on my experience as a maritime lawyer, decisions like that are made to eliminate an otherwise available forum in an effort to obtain an advantage in an alternate forum. U.S. courts do not look favorably upon the situation where a party deliberately forfeits an available alternative forum in order to seek a larger recovery in a limitation proceeding.[1] Had the plaintiffs lodged their claim in the Hong Kong proceeding, they could recover damages in Hong Kong in accordance with the court-ordered liability apportionment of the limitation fund, which fund would be the same size fund available under Vietnamese law.

9. At the time that the ELENI limitation fund was constituted, Hong Kong had not yet adopted the 1996 protocol, but the Marshall Islands had. The 1996 protocol anticipated that not all party countries would have adopted the 1996 protocol, and resolved that issue through Article 9. Paragraph 4 makes is clear that the 1996 protocol does not affect the obligations of a country which is a party to both the convention and the protocol with respect to a state which is a party only to the convention and not the protocol:

> 4. Nothing in this Protocol shall affect the obligations of a State which is a Party both to the Convention and to this Protocol with respect to a State which is a Party to the Convention but not a Party to this Protocol.

10. Article 9(4) gives the conventions extraterritorial effect in party countries, which is different from U.S. limitation of liability law, which is not part of an international treaty

[1] *See, e.g. Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F. 3d 191 (4th Cir. 2009).

and does not provide any extraterritorial effect. Any U.S. court decisions containing the general statement that limitation of liability proceedings have no extraterritorial effect must be carefully scrutinized when considering the state parties to the 1976 Convention. U.S. limitation of liability law dates from 1851 when there were no international limitation of liability conventions, and maritime countries relied upon their own domestic limitation law, and no country's limitation law had effect in other countries. In contrast, the 1976 Convention was drafted so that a limitation proceeding commenced in one state party would be given effect in all state parties. Thus, the Marshall Islands must give effect to the Hong Kong limitation proceeding.

11. The requirement that the party state give effect to *limitation proceedings initiated* in other party states arises from adoption of the convention itself, not from separate legislation enacted in the party state. Article 14 of the convention states "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." The Hong Kong fund was constituted in accordance with Hong Kong law and will be distributed in accordance with Hong Kong law.

12. This case does not present a "clash of conventions." The "class of conventions" situation exists when there are parallel limitation proceedings with one being under the 1957 Convention and the other being under the 1976 Convention. The limitation amounts are different, but so are the fundamental standards for determining whether the vessel owner will be allowed to limit liability. Because of these differences, the 1957 and 1976 Conventions "clash." In contrast, there is no fundamental clash between the 1976 Convention and the 1996 Protocol.

13. While Plaintiffs want to create a controversy over whether a Marshall Islands limitation proceeding may proceed independently from the Hong Kong limitation proceeding arising from the same incident, there simply is not a separate Marshall Islands limitation proceeding as of the date of this declaration. Plaintiffs have commenced a negligence action against Defendants, seeking damages for alleged losses arising from the incident that is the subject of Defendants' limitation proceeding in Hong Kong. However, Defendants have not commenced a limitation proceeding or constituted a limitation fund in the Marshall Islands. Plaintiffs are cargo owners or insurers, and are not shipowners or salvors, and are not proper parties to commence a limitation proceeding under the 1976 Convention or the 1996 Protocol. Defendants as shipowners are proper parties to commence a limitation proceeding, but they have not done so in the Marshall Islands.

14. Defendants do not need to commence a limitation proceeding in the Marshall Islands because of the limitation proceeding pending in Hong Kong. Plaintiffs had notice of the Hong Kong proceeding and the deadline for filing claims, but made a deliberate decision not to file their claims in that proceeding. Even if Defendants sought to commence a

limitation proceeding in the Marshall Islands, the Court should not allow it to proceed because of the parallel proceeding already begun in Hong Kong. Requiring the Defendants to constitute a second limitation fund in the Marshall Islands would directly conflict with Article 9(4) of the 1996 Protocol which requires the Marshall Islands to recognize the limitation proceeding in Hong Kong. There is no reason why a protocol intended to affect the value of the limitation fund would allow the Marshall Islands Court to disregard the Hong Kong proceeding.

15. Plaintiffs argue that defendants have asserted limitation of liability as a defense in the Marshall Islands proceeding, but that is not actually correct. Defendants do not need to constitute a limitation fund in this Court or ask the Court to determine whether Defendants are entitled to limit their liability under the 1976 Convention and 1996 Protocol. Instead, their defense is that claimants asserting claims in a party state are bound by the determination of a limitation proceeding in another party state constituted for claims arising from the occurrence that gave rise to the need for limitation. Claimants cannot simply opt out of a limitation proceeding properly constituted under the laws of one party state to seek to assert claims in a different party state.

16. It was appropriate for Defendants to commence a limitation proceeding before any claimants had filed a lawsuit. The broad venue rules under U.S. law for commencing a limitation proceeding contemplate that the shipowner may choose to commence a limitation proceeding before being sued by a claimant. While not all commentators or courts may agree, the English view that a shipowner may choose where to commence a limitation proceeding is the more practical approach, and is followed in Hong Kong, where the limitation proceedings were initiated.

17. International law supports the conclusion that the shipowner may choose the limitation forum. I agree with Professor Martin Davies' assessment and opinion filed with this motion for summary judgment on the relevant international case law. For U.S. law, that principle is expressly stated in the venue provision of Rule F(9) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure, which allows the owner a broad choice of venue options if the ship has not been arrested or attached, or if no suit has been filed in connection with the incident.

18. The United States is not a party to the 76 Convention or the 96 Protocol, and has not had occasion to interpret them other than in dicta. In dicta, U.S. law recognizes that the 76 Convention requires state parties to defer to certain limitation proceedings abroad.[2]

[2] *See Perforaciones Exploración Y Producción v. Marítimas Mexicanas de C.V.*, No. 08-41021 (5th. Cir. 12/9/2009).

19. Based on the above, it is my opinion that by application of the 76 Convention and 96 Protocol, Art. 9(4), the Marshall Islands should defer to the Hong Kong limitation proceedings and dispose of this case.

I declare under penalty of law that the following is true and correct to the best of my knowledge and belief.

DATED: 28 April 2016 (Louisiana)

Alanson T. Chenault

# ALANSON T. CHENAULT

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e-mail: atc@frfirm.com

**Employment History**

Partner, Fowler Rodriguez, 2004-present
Partner, The O'Neil Group, July 2001- 2004
Associate and Partner, Fowler Rodriguez, 1992-2001
Associate, Phelps Dunbar, 1991-1992
U.S. Navy – 1976-1987, Nuclear Submarine Officer

**Education**

Tulane Law School, New Orleans, Louisiana, J.D. (with honors) 1991

**Awards and Activities**

Managing Editor, Tulane Maritime Law Journal
Faculty Award, Corpus Juris Secundum (highest grade) Criminal Procedure

U.S. Navy Nuclear Propulsion Training (12 months) 1977
U.S. Naval Academy, Annapolis, Maryland, B.S. (Naval Architecture) 1976

**Teaching Experience**

Adjunct Faculty, Tulane Law School, Collision Law & Limitation of Liability, 2006, 2008-present

Firefighting Instructor, U.S. Naval Reserve, 1987-1988

Naval Engineering Instructor, U.S. Naval Academy, 1982-84

Courses taught in naval architecture/marine engineering curriculum include Introduction to Naval Engineering, Thermodynamics, and Introduction to Marine Engineering

**Practice Areas and Litigation Experience**

Mr. Chenault's practice centers on cases involving marine casualties, collision, cargo claims, pollution, personal injury and death claims, toxic torts, longshore workers, insurance, products liability, commercial and business matters. He has arrested or attached vessels and other property to assert maritime liens and other types of claims. In addition to representing clients at the trial level, and in mediation, he has successfully represented clients at the appellate level. He has represented clients during U.S. Coast Guard and National Transportation Safety Board (NTSB) investigations.

**Significant marine casualty and pollution experience follow:**

M/V CGM MACARENA (fire); M/V DG HARMONY (explosion and fire); M/V CONTSHIP FRANCE (explosion and fire); M/V CARNIVAL SPLENDOR (engine failure and fire); M/V CARNIVAL TROPICALE (engine room fire); M/V CARNIVAL ECSTASY (fire); M/V CARNIVAL CELEBRATION (engine failure and fire); M/V CARNIVAL MIRACLE (allision); M/V CARNIVAL SPIRIT (allision during tsunami); M/V CARNIVAL ECSTASY (heeling incident); M/V CARNIVAL FANTASY (barge breakaway incident); M/V CARNIVAL LEGEND (allision during squall); M/V CARNIVAL TRIUMPH (engine room fire and breakaway from repair berth); M/V CARNIVAL LIBERTY (engine fire); M/V CARNIVAL PRIDE (engine fire); M/T NEW WORLD (collision and fire); M/V FAR EASTERN PROGRESS (collision); BARGE MORRIS J. BERMAN (oil spill); M/V SONDRA B (collision and oil spill); M/V GRAIN UNION (two collisions); M/V ELBE (allision); M/V OCEAN NAVIGATOR (collision); M/V NEW ARGOSY (collision); M/V CHINA PRIDE (grounding); M/T AMERSHAM (grounding); M/T EAGLE SUBARU (collision); M/V GRAND UNION (navigation embarrassment); M/V ANTWERPEN (navigation embarrassment); M/V ELENA TOPIC (navigation embarrassment and grounding); DEEPWATER HORIZON (rig blowout and pollution incident); THUNDER HORSE PDQ (rig listing incident); M/V ROBERT BOUCHARD (engine explosion and fire); M/V BELO HORIZONTE (high river mooring incident); M/V ARABELLA (high river incidents); M/V GLOBAL SPIRIT 1 (collision with drifting barges); M/V AKOVA (dock damage incident); M/V BETTY (tug sinking); M/V W.D. FAIRWAY (collision, vessel attachment, limitation of liability, forum non conveniens)

**Significant environmental claims experience follows:**

CITGO Refinery Oil Spill, June 2006: Counsel for Marine Services Response
Corporation (response contractor) in defense of over 500 claims for property damage, economic losses and personal injury arising from major waste oil spill on the Calcasieu River in Lake Charles, Louisiana.

Former Pan American Refinery litigation: Counsel for BP Products North America, Inc., defending claims from a neighboring landowner's lawsuit for property damages caused by alleged migration of hazardous substances and other contaminants

MORRIS J. BERMAN: Barge grounding and catastrophic oil spill at San Juan,
Puerto Rico, on January 7, 1994. (Damages - In excess of $100 million)

**Significant cargo claims experience follows:**
M/T IVER CHAMPION (cargo contamination); M/T SOLAR (cargo contamination) M/V HOEGH DUKE (fire damage and general average)

**Court Admissions**
United States Supreme Court
United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits
United States District Courts for the Eastern, Middle, and Western Districts of Louisiana;
Southern District of Texas
All Louisiana State Courts

**Recent Presentations**
"Off-Hire Clauses," International Time & Voyage Charter Parties, Lloyds Maritime Academy, Miami, 2013
"An Overview of the Rotterdam Rules," Association of Transportation Law Professionals, Annual Meeting, 2011
"The Effects of AmClyde" Tulane Admiralty Law Institute, 2011
"Limitation of Liability in the United States," Tulane CLE, 2009
"Anatomy of a Maritime Casualty, Preliminary Investigation and Evidence Gathering," Tulane CLE, 2006

**Publications**
Co-Editor of copyrighted coursebooks entitled, Admiralty: Limitation of Liability - Cases and Materials and Admiralty: The Law of Collision - Cases and Materials
Co-Author: "United States of America," Enforcement of Judgments, Awards & Deeds in Commercial Matters (European Lawyer Series, First Edition 2013; Second Edition 2015)

**Awards and Recognition**
Best Lawyers in America, 2014, 2015
Louisiana Super Lawyers, 2015

**Memberships**
Maritime Law Association of the United States, Proctor Member
Society of Naval Architects and Marine Engineers, Associate Member
Propeller Club Port of New Orleans, President, 2003 – 2005
Navigation Safety Advisory Counsel, 2015 – present
Lake Pontchartrain Basin Maritime Museum, President, 2015 – present

REPUBLIC OF
THE MARSHALL ISLANDS

OFFICE OF THE
MARITIME ADMINISTRATOR

Marine Notice

No. 2-011-1

Rev. 5/14

**TO:** **ALL SHIPOWNERS, OPERATORS, MASTERS AND OFFICERS OF MERCHANT SHIPS, AGENTS AND RECOGNIZED ORGANIZATIONS**

**SUBJECT:** **International Maritime Conventions and Other Instruments Adopted by the Republic of the Marshall Islands.**

**Reference:** **Maritime Regulation 2.11.2**

**PURPOSE:**

In accordance with the publication requirements of the Republic of the Marshall Islands (RMI) Maritime Regulation 2.11.2, this Marine Notice provides a list of the International Maritime Conventions, Protocols and other instruments adopted by the RMI. This Notice supersedes Rev. 8/11 and reflects the addition of new items 5, 15 and 16 in section I with all renumbered, the addition of new section IV with rest renumbered and the addition of new items 1, 6, 7, 11, 14, 18, 20 and 21 with all renumbered under item 2 in section VII.

**APPLICABILITY:**

It is the responsibility of Owners and Masters to ensure that their vessels are in compliance with the applicable requirements of these International Conventions and Agreements. It shall also be the responsibility of the RMI Recognized Organizations (ROs) to *effectively* oversee Owner, Master and vessel compliance with the applicable instruments for which they have been given authority under written agreement.

## I IMO Instruments for which the Marshall Islands is a Contracting State

Compliance with the terms of the conventions, including all of the amendments that have entered into force, is required for vessels registered in the Marshall Islands. The scope of compliance includes any IMO Resolutions and Codes that are specified as mandatory in the convention.

1. Convention on the International Maritime Organization (IMO CONVENTION)

2. International Convention for the Safety of Life at Sea, 1974 (SOLAS 74), including the Protocols of 1978 and 1988 (SOLAS PROT 78/88), and amendments

3. International Convention on Load Lines, 1966, (LL 1966) including the 1988 Protocol (LL PROT 1988)



Inquiries concerning the subject of this Notice should be directed to the Office of the Maritime Administrator, Republic of the Marshall Islands, c/o Marshall Islands Maritime and Corporate Administrators, Inc., 11495 Commerce Park Drive, Reston, VA 20191-1506 USA. The most current version of all Republic of the Marshall Islands Marine Notices may be found at www.register-iri.com.

4. International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78) and amended*

5. 1996 Protocol to the Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (LC PROT 1996)

6. International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 1969)**

7. Convention on the International Regulations for Preventing Collisions at Sea, 1972 as amended, (COLREG 1972)

8. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW 1978), including the 2010 Manila amendments

9. Convention on the International Mobile Satellite Organization, as amended, (IMSO C 76)

10. International Convention for Safe Containers 1972, as amended (CSC 1972)

11. International Convention on Oil Pollution Preparedness, Response and Co-Operation. 1990, as amended (OPRC 1990)

12. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (INTERVENTION 1969)

13. Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil, 1973, as amended (INTERVENTION PROT 1973)

14. Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND PROT 92)

15. Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1976)

16. Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1992)

17. Convention on Facilitation of International Maritime Traffic, 1965, as amended (FAL 1965)

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* The RMI is signatory to Annexes I, II, III, IV, V and VI, wherein the provisions of Regulation 13 are retroactive to 1 January 2000.

** The RMI has adopted the IMO Resolutions that permit a previous national gross tonnage to also be placed on the International Tonnage Certificate for SOLAS compliance purposes. However, only the ITC69 tonnage shall be used for ISPS Code compliance after 1 July 2008.

18. Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976) and 1996 Protocol (LLMC PROT 1996).

19. Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (PAL1974), including the Protocol (PAL PROT 76)

20. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), and the Protocol of 2005 (SUA 2005)

21. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (SUA PROT), and the Protocol of 2005 (SUA PROT 2005)

22. International Convention on Salvage, 1989 (SALVAGE 1989)

23. International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (BUNKERS 2001)

24. International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 (AFS 2001)

25. International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (BWM 2004)

## II IMO Codes and Instruments Implemented by the Marshall Islands

1. International Code on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Code), Part A***

2. International Safety Management Code (ISM Code)***

3. International Ship and Port Facility Security Code (ISPS Code), Part A***

4. International Life-Saving Appliance Code (LSA Code)***

5. International Code for Fire Safety Systems (FSS Code)***

6. International Code for the Application of Fire Test Procedures (FTP Code)***

7. $NO_X$ Technical Code***

8. Code of Safe Practice for Solid Bulk Cargoes (BC/IMSBC Code)***

9. International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code)***

*** Code is mandatory under SOLAS 74/78/88, MARPOL 73/78 and/or STW Convention.

10. International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code)***

11. Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships (INF Code)***

12. International Code for the Safe Carriage of Grain in Bulk (International Grain Code)***

13. International Code of Safety for High-Speed Craft (1994 and 2000 HSC Codes)***

14. International Maritime Dangerous Goods Code (IMDG Code)***

15. Code of Safety for Special Purpose Ships (SPS Code)***

16. Code for the Construction and Equipment of Mobile Offshore Drilling Units (1979, 1989 and 2009 MODU Codes)***

17. Code of Safe Practice for the Carriage of Cargoes and Persons by Offshore Supply Vessels (OSV)

18. Cargo Stowage and Securing (CSS) Code

19. Code of Safe Practice for Ships Carrying Timber Deck Cargoes

20. 1997 SOLAS Conference, Resolution 4, reg. XII/1.5 (reg. XII/1.7 as of 1 July 2006), Standards for the Evaluation of Scantlings of the Transverse watertight Vertically Corrugated Bulkhead Between the Two Foremost Cargo Holds and for the Evaluation of Allowable Hold Loading of the Foremost Cargo Hold

21. Resolution MSC.133(76), as amended, SOLAS reg. II-1/3 – 6.2.1, Adoption of Technical Provisions for Means of Access for Inspections

22. Resolution MSC.168(79), SOLAS reg. XII/7.2, Standards and Criteria for Side Structures of Bulk Carriers of Single-Side Skin Construction

23. Resolution MSC.169(79), SOLAS reg. XII/14, Standards for Owners Inspection and Maintenance of Bulk Carrier Hatch Covers

24. Resolution A.739(18), SOLAS reg. XI – 1/1, Guidelines for the Authorization of Organizations Acting on Behalf of the Administration

25. Resolution A.789(19), SOLAS reg. XI – 1/1, Specifications on the Survey and Certification Functions of Recognized Organizations Acting on Behalf of the Administration

*** Code is mandatory under SOLAS 74/78/88, MARPOL 73/78 and/or STW Convention.

26. Resolution A.744(18), as amended, SOLAS reg. XI – 1/2, Guidelines on the Sampling Method of Thickness Measurements for Longitudinal Strength Evaluation and Repair Methods in Accordance with Annex 12 to Annex B to Resolution A.744(18), as amended

27. Resolution MEPC.94(46), as amended through Resolution MEPC. 99(48), Resolution MEPC. 111(50) and Resolution MEPC.112 (50), Condition Assessment Scheme

28. Resolution MSC.210(81), Performance Standards and Functional Requirements for the Long-Range Identification and Tracking of Ships

## III Additional Conventions, Standards and Agreements for which the Marshall Islands is a Contracting State

1. United Nations Convention on the Law of the Seas (UNCLOS) excluding the Agreement Relating to the Implementation of Part XI of the Convention

2. Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC)

3. Vienna Convention for the Protection of the Ozone Layer 1985, as amended, including the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, (Montreal Protocol)

4. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)

5. Stockholm Convention on Persistent Organic Pollutants

6. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention)

7. WHO International Health Regulations, 2005

8. Constitution and Convention of the International Telecommunication Union (ITU), 1992, and Radio Regulations, as amended

9. Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations

10. Vienna Convention on Consular Relations, 1963

11. Vienna Convention on Diplomatic Relations, 1961

12. Convention and Statute on the International Regime of Maritime Ports, 1923

13. Hague Convention on Abolishing the Requirement of Legalization for Foreign Public Documents, 1961 (Apostille Convention)

14. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)

15. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC)

16. Comprehensive Nuclear-Test-Ban Treaty (CTBT)

17. Treaty on the Non-Proliferation of Nuclear Weapons (NPT)

18. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

19. United Nations Convention against Transitional Organized Crime (UNCTOC)

## IV U.S. Bilateral Agreements

1. Compact of Free Association, as amended

2. Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea

3. Cooperative Shiprider and Shipboarding Agreement

## V Regional Agreements

1. Convention for the Protection of Natural Resources and Environment in the South Pacific Region (Noumea Convention), 1986

2. Protocol for the Prevention of Pollution in the South Pacific Region by Dumping (Protocol on Dumping), 1986

3. Protocol Concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region (Protocol on Pollution Emergencies), 1986

4. Agreement Establishing the South Pacific Regional Environmental Programme (SPREP)

5. Agreement establishing the Pacific Islands Forum (PIF)

## VI Conventions applied, in whole or in part, under Marshall Islands National Law and Regulations

1. 1972 London Convention

2. International Convention on Maritime Liens and Mortgages of 1993

## VII ILO Instruments

1. ILO Constitution

2. Maritime Labour Convention, 2006, (MLC, 2006) which consolidates and updates more than 65 ILO instruments, including, i.e., the following:

    1. No. 8 Unemployment Indemnity (Shipwreck) Convention, 1920

    2. No. 22 Seamens' Articles of Agreement Convention, 1926

    3. No. 53 'Officers' Competency Certificates Convention, 1936

    4. No. 55 Shipowners' Liability (Sick and Injured Seamen) Convention, 1936

    5. No. 58 Minimum Age (Sea) Convention (Revised), 1936

    6. No. 68 Food and Catering (Ships' Crews) Convention, 1946

    7. No. 69 Certification of Ships' Cook Convention, 1046

    8. No. 73 Medical Examination (Seafarers) Convention, 1946

    9. No. 74 Certification of Able Seamen Convention, 1946

    10. No. 92 Accommodation of Crews Convention (Revised), 1949

    11. No. 109 Wages, Hours of Work and Manning (Sea) Convention (Revising ILO No. 57, 76 and 93), 1958

    12. No. 133 Accommodation of Crews (Supplementary Provisions) Convention, 1970

    13. No. 134 Prevention of Accidents (Seafarers) Convention, 1970

    14. No. 146 Seafarers' Annual Leave with Pay Convention, 1976

    15. No. 147 Merchant Shipping (Minimum Standards) Convention, 1976 and Protocol of 1996

    16. No. 163 Seafarers' Welfare Convention, 1987

    17. No. 164 Health Protection and Medical Care (Seafarers) Convention, 1987

    18. No. 165 Social Security (Seafarers) Convention (Revised), 1987

19. No. 166 Repatriation of Seafarers Convention (Revised), 1987

20. No. 178 Labour Inspection (Seafarers) Convention, 1996

21. No. 179 Recruitment and Placement of Seafarers Convention, 1996

22. No. 180 Seafarers' Hours of Work and Manning of Ships Convention, 1996

3. C185 – Seafarers' Identity Documents Convention, 2003 (No.185)

4. ILO Conventions applied, in whole or in part, under Marshall Islands National Law and Regulations:

1. No. 87 Freedom of Association and Protection of the Right to Organize Convention, 1948

2. No. 98 Right to Organize and Collective Bargaining Convention, 1949

3. No. 111 Discrimination (Employment and Occupation) Convention, 1958

4. No. 112 Minimum Age (Fishermen) Convention, 1959

5. No. 113 Medical Examination (Fishermen) Convention, 1959

6. No. 114 Fishermen's Articles of Agreement Convention, 1959

7. No. 152 Occupational Safety and Health (Dock Work) Convention, 1979

INTERNATIONAL MARITIME ORGANIZATION

*E*

# Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions

*As at 19 April 2016*

SHIPPING
INDISPENSABLE TO THE WORLD

## INTRODUCTION

The International Maritime Organization (IMO) or its Secretary-General acts as depositary for a number of multilateral international instruments. In discharging these depositary responsibilities, the Secretary-General notifies the Governments concerned of signatures or the deposit of formal instruments in respect of the various international acts, of the entry into force of these acts, and of the receipt of other notifications and declarations in relation to them.

This document contains a compilation of the above data on the instruments in relation to which IMO discharges the above-mentioned responsibilities. Information is given of the status of each instrument and the relation of various Governments to it. In the case of each treaty instrument the document reproduces those final clauses which have a direct bearing on the information furnished.

In respect of a number of instruments, actions taken in the name of China prior to 23 May 1972 have not been recorded in this document, in view of the decision taken by the Council in its resolution C.53(XXVIII) of 23 May 1972.

This document is for information only and is not intended to replace in any way the official communications which the Secretary-General is required to make under the provisions of the conventions or their related international acts.

Information relating to the London Convention (LC 1972) is also herewith included. IMO performs secretariat duties in relation to the Convention and depositary functions in respect of amendments to the Convention. The depositary functions of the parent Convention are assigned to the Governments of Mexico, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Accordingly, information reproduced here is based on information received from the depositary Governments to which requests for authoritative information of depositary character should be addressed.

This document also contains information relating to the International COSPAS-SARSAT Programme Agreement, for which IMO is joint depositary with ICAO. Accordingly, information reproduced here is based on information received from the second depositary.

## CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976 (LLMC 1976)

Done at London, 19 November 1976

**Entry into force:** 1 December 1986

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**Signature, ratification, acceptance, approval, accession**

**Article 16**

1. This Convention shall be open for signature by all States at the Headquarters of the [International Maritime Organization] (hereinafter referred to as "the Organization") from 1 February 1977 until 31 December 1977 and shall thereafter remain open for accession.

2. All States may become parties to this Convention by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General.

**Entry into force**

**Article 17**

1. This Convention shall enter into force on the first day of the month following one year after the date on which twelve States have either signed it without reservation as to ratification, acceptance or approval or have deposited the requisite instruments of ratification, acceptance, approval or accession.

2. For a State which deposits an instrument of ratification, acceptance, approval or accession, or signs without reservation as to ratification, acceptance or approval, in respect of this Convention after the requirements for entry into force have been met but prior to the date of entry into force, the ratification, acceptance, approval or accession or the signature without reservation as to ratification, acceptance or approval, shall take effect on the date of entry into force of the Convention or on the first day of the month following the ninetieth day after the date of the signature or the deposit of the instrument, whichever is the later date.

3. For any State which subsequently becomes a Party to this convention, the Convention shall enter into force on the first day of the month following the expiration of ninety days after the date when such State deposited its instrument.

**Denunciation**

**Article 19**

1. This Convention may be denounced by a State Party at any time after one year from the date on which the Convention entered into force for that Party.

2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General.

3. Denunciation shall take effect on the first day of the month following the expiration of one year after the date of deposit of the instrument, or after such longer period as may be specified in the instrument.

I. Signatories

II. Contracting States

III. Denunciations

IV. Declarations, Reservations and Statements

V. Notifications

VI. Amendments

## I. Signatories

| | |
|---|---|
| Denmark | Subject to ratification |
| Finland | Subject to ratification |
| France | Sous réserve d'approbation |
| Germany, Federal Republic of | Subject to ratification |
| Norway | Subject to ratification |
| Spain | Subject to ratification |
| Sweden | Subject to ratification |
| United Kingdom | Subject to ratification |

## II. Contracting States

| | Date of deposit of instrument | Date of entry into force | Effective date of denunciation |
|---|---|---|---|
| Albania (accession) | 7 June 2004 | 1 October 2004 | |
| Algeria (accession) | 4 August 2004 | 1 December 2004 | |
| Antigua and Barbuda (accession) | 12 October 2009 | 1 February 2010 | |
| Australia (accession) | 20 February 1991 | 1 June 1991 | 1 June 2014 |
| Azerbaijan (accession) | 16 July 2004 | 1 November 2004 | |
| Bahamas (accession) | 7 June 1983 | 1 December 1986 | |
| Barbados (accession) | 6 May 1994 | 1 September 1994 | |
| Belgium (accession)[1, 2] | 15 June 1989 | 1 October 1989 | |
| Benin (accession) | 1 November 1985 | 1 December 1986 | |
| Bulgaria (accession) | 4 July 2005 | 1 November 2005 | |
| China[1, 2, 4] | - | 1 July 1997 | |
| Congo (accession) | 7 September 2004 | 1 January 2005 | |
| Cook Islands (accession) | 12 March 2007 | 1 July 2007 | |
| Croatia (accession) | 2 March 1993 | 1 June 1993 | |
| Cyprus (accession)[1] | 23 December 2005 | 1 April 2006 | |
| Denmark (ratification) | 30 May 1984 | 1 December 1986 | 1 April 2005 |
| Dominica (accession) | 31 August 2001 | 1 December 2001 | |
| Egypt (accession) | 30 March 1988 | 1 July 1988 | |
| Equatorial Guinea (accession) | 24 April 1996 | 1 August 1996 | |
| Estonia (accession)[1] | 23 October 2002 | 1 February 2003 | |
| Finland (ratification) | 8 May 1984 | 1 December 1986 | 13 May 2004 |
| France (approval)[1, 2] | 1 July 1981 | 1 December 1986 | |
| Georgia (accession) | 20 February 1996 | 1 June 1996 | |
| Germany (ratification)[1, 2, 5] | 12 May 1987 | 1 September 1987 | 13 May 2004 |
| Greece (accession) | 3 July 1991 | 1 November 1991 | |
| Guyana (accession) | 10 December 1997 | 1 April 1998 | |
| Hungary (accession) | 4 July 2008 | 1 November 2008 | |
| India (accession) | 20 August 2002 | 1 December 2002 | |
| Iran (Islamic Republic of) (accession) | 1 September 2015 | 1 December 2015 | |
| Ireland (accession)[1] | 24 February 1998 | 1 June 1998 | |
| Jamaica (accession) | 17 August 2005 | 1 December 2005 | |
| Japan (accession)[1] | 4 June 1982 | 1 December 1986 | 1 August 2006 |
| Kiribati (accession) | 5 February 2007 | 1 June 2007 | |

| | Date of deposit of instrument | Date of entry into force | Effective date of denunciation |
|---|---|---|---|
| Latvia (accession) | 13 July 1999 | 1 November 1999 | |
| Liberia (accession) | 17 February 1981 | 1 December 1986 | |
| Lithuania (accession) | 3 March 2004 | 1 July 2004 | |
| Luxembourg (accession) | 21 November 2005 | 1 March 2006 | |
| Marshall Islands (accession) | 29 November 1994 | 1 March 1995 | |
| Mauritius (accession) | 17 December 2002 | 1 April 2003 | |
| Mexico (accession) | 13 May 1994 | 1 September 1994 | |
| Mongolia (accession) | 28 September 2011 | 1 January 2012 | |
| Netherlands (accession)[1, 2, 3] | 15 May 1990 | 1 September 1990 | 1 January 2012 |
| New Zealand (accession)[6] | 14 February 1994 | 1 June 1994 | |
| Nigeria (accession) | 24 February 2004 | 1 June 2004 | |
| Niue (accession) | 27 June 2012 | 1 October 2012 | |
| Norway (ratification)[2] | 30 March 1984 | 1 December 1986 | 1 November 2006 |
| Poland (accession)[2] | 28 April 1986 | 1 December 1986 | |
| Romania (accession) | 12 March 2007 | 1 July 2007 | |
| Saint Lucia (accession) | 20 May 2004 | 1 September 2004 | |
| Samoa (accession) | 18 May 2004 | 1 September 2004 | |
| Serbia (accession) | 19 March 2013 | 1 July 2013 | |
| Sierra Leone (accession) | 26 July 2001 | 1 November 2001 | |
| Singapore (accession)[1] | 24 January 2005 | 1 May 2005 | |
| Spain (ratification) | 13 November 1981 | 1 December 1986 | 1 November 2007 |
| Sweden (ratification)[2] | 30 March 1984 | 1 December 1986 | 1 August 2005 |
| Switzerland (accession)[2] | 15 December 1987 | 1 April 1988 | |
| Syrian Arab Republic (accession) | 2 September 2005 | 1 January 2006 | |
| Tonga (accession) | 18 September 2003 | 1 January 2004 | |
| Trinidad and Tobago | 6 March 2000 | 1 July 2000 | |
| Turkey (accession) | 6 March 1998 | 1 July 1998 | |
| Tuvalu (accession) | 12 January 2009 | 1 May 2009 | |
| United Arab Emirates (accession) | 19 November 1997 | 1 March 1998 | |
| United Kingdom (ratification)[1, 2, 3bis] | 31 January 1980 | 1 December 1986 | 13 May 2004* |
| Vanuatu (accession) | 14 September 1992 | 1 January 1993 | |
| Yemen (accession) | 6 March 1979 | 1 December 1986 | |

Number of Contracting States: 54
(the combined merchant fleets of which constitute approximately 54.80 % of the gross tonnage of the world's merchant fleet

* Denunciation of the Convention extended to the following UK territories:

| Name of territory | with effect from |
|---|---|
| - Island of Jersey | 14 December 2009 |
| - Cayman Islands | 31 January 2011 |
| - Isle of Man | 1 May 2012 |
| - Bailiwick of Guernsey | 11 June 2013 |
| - Gibraltar | 25 February 2014 |

The Convention applies provisionally in respect of Belize

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[1] For the text of a declaration, reservation or statement, see section IV.

[2] With a notification, see section V.

[3] Extended to Bonaire, Sint Eustatius and Saba (the Caribbean part of the Netherlands) with effect from 10 October 2010.

*[Footnotes continued]*

*[Footnotes continued]*

[3bis] The United Kingdom declared its ratification to be effective also in respect of:

Bailiwick of Jersey
Bailiwick of Guernsey
Belize*
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands**
Gibraltar
Hong Kong***
Isle of Man
Montserrat
Pitcairn
St. Helena, Ascension and Tristan da Cunha ****
Turks and Caicos Islands
United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus

| | | |
|---|---|---|
| Anguilla | ) | extended |
| British Antarctic Territory | ) | from |
| British Indian Ocean Territory | ) | 4 February 1999 |
| South Georgia and the South Sandwich Islands | ) | |

* Has since become the independent State of Belize to which the Convention applies provisionally.

** For the text of communications received from the Governments of Argentina and the United Kingdom, see footnote *** of section II of COLREG 1972.

*** Ceased to apply to Hong Kong with effect from 1 July 1997.

**** The depositary received a communication, dated 2 March 2010, from the Foreign and Commonwealth Office in London, informing that the name of the British overseas territory formerly called "St. Helena and Dependencies" has been changed to "St. Helena, Ascension and Tristan da Cunha". The status of the territory as a British overseas territory remains unchanged.

[4] Applies only to the Hong Kong Special Administrative Region.

[5] On 3 October 1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded[1, 8] to the Convention on 17 February 1989.

[6] The instrument of accession contained the following statement:

"AND WHEREAS it is not intended that the accession by the Government of New Zealand to the Convention should extend to Tokelau;".

## III. States which have denounced the Convention

| | Date of receipt of denunciation | Effective date of denunciation |
|---|---|---|
| Australia | 31 May 2013 | 1 June 2014 |
| Belgium | 9 October 2009 | 1 November 2010 |
| Denmark | 25 March 2004 | 1 April 2005 |
| Finland | 15 September 2000 | 13 May 2004 |
| Germany | 18 October 2000 | 13 May 2004 |
| Japan | 29 July 2005 | 1 August 2006 |
| Netherlands | 23 December 2011 | 1 January 2012 |
| Norway | 31 October 2005 | 1 November 2006 |
| Spain | 27 November 2006 | 1 November 2007 |
| Sweden | 22 July 2004 | 1 August 2005 |
| United Kingdom | 17 July 1998 | 13 May 2004 |

## IV. Declarations, Reservations and Statements

### AUSTRALIA

The instrument of accession of Australia was accompanied by the following reservation:

"... pursuant to article 18, paragraph 1, of the said Convention, Australia will not be bound by article 2, paragraph 1(d) and (e)."

### BELGIUM

The instrument of accession of the Kingdom of Belgium was accompanied by the following reservation (in the French language):

*[Translation]*

"In accordance with the provisions of article 18, paragraph 1, Belgium expresses a reservation on article 2, paragraph 1(d) and (e).

### CHINA

By notification dated 5 June 1997 from the People's Republic of China:

*[Translation]*

"1. with respect to the Hong Kong Special Administrative Region, it reserves the right in accordance with Article 18(1), to exclude the application of the Article 2(1)(d);"

### CYPRUS

The instrument of accession of the Republic of Cyprus contained the following reservation:

"Pursuant to paragraph 1 of Article 18 of the Convention on Limitation of Liability for Maritime Claims, 1976 as amended by the Protocol of 1996, the Republic of Cyprus hereby excludes:

(a) the application of Article 2, paragraphs 1(d) and (e);

(b) claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or any amendment or protocol related thereto."

### ESTONIA

The instrument of accession by Estonia contained the following declaration and reservation:

"Pursuant to Article 15(2)(b) of the Convention, the Republic of Estonia, declares that the limit of liability set to ships weighting up to 250 tons forms half of the limit of liability set to ships weighting up to 500 tons."

"The Republic of Estonia reserves the right, in accordance with article 18, paragraph 1, of the Convention, to exclude the application of article 2, paragraph 1(d) and (e) of the Convention."

### FRANCE

The instrument of approval of the French Republic contained the following reservation (in the French language):

*[Translation]*

"In accordance with article 18, paragraph 1, the Government of the French Republic reserves the right to exclude the application of article 2, paragraphs 1(d) and (e)."

## GERMAN DEMOCRATIC REPUBLIC

The instrument of accession of the German Democratic Republic was accompanied by the following reservation and declaration (in the German language):

*[Translation]*

**Article 2, paragraph 1(d) and (e)**

"The German Democratic Republic notes that for the purpose of this Convention there is no limitation of liability within its territorial sea and internal waters in respect of the removal of a wrecked ship, the raising, removal or destruction of a ship which is sunk, stranded or abandoned (including anything that is or has been on board such ship). Claims, including liability, derive from the laws and regulations of the German Democratic Republic".

**Article 8, paragraph 1**

"The German Democratic Republic accepts the use of the Special Drawing Rights merely as a technical unit of account. This does not imply any change in its position toward the International Monetary Fund".

## FEDERAL REPUBLIC OF GERMANY

The instrument of ratification of the Federal Republic of Germany was accompanied by the following declaration and reservation (in the German language):

*[Translation]*

... that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany."

"In accordance with art. 18, par. 1 of the Convention, the Federal Republic of Germany reserves the right to exclude the application of art. 2, par. 1 (d) and (e) of the Convention."

## IRAN (ISLAMIC REPUBLIC OF)

The instrument of accession by the Islamic Republic of Iran was accompanied by the following reservation:

"The Government of the Islamic Republic of Iran reserves its right to exclude the application of the provisions of Article 2, paragraphs (d) and (e), according to Article 18(1) of the Convention."

## IRELAND

The instrument of accession of Ireland was accompanied by the following reservation:

"In accordance with Article 18 of the Convention on Limitation of Liability for Marine Claims, done at London on the 19th of November, 1976, Ireland's accession to the said Convention is subject to the exclusion of the application of Article 2, paragraph 1(d) and (e) thereof to Ireland."

## JAPAN

The instrument of accession of Japan was accompanied by the following statement (in the English language):

"... the Government of Japan, in accordance with the provision of paragraph 1 of article 18 of the Convention, reserves the right to exclude the application of paragraph 1(d) and (e) of article 2 of the Convention."

## NETHERLANDS

The instrument of accession of the Kingdom of the Netherlands contained the following reservation:

"In accordance with Article 18, paragraph 1, of the Convention on Limitation of Liability for Maritime Claims, 1976, done at London on 19 November 1976, the Kingdom of the Netherlands reserves the right to exclude the application of Article 2, paragraph 1(d) and (e) of the Convention."

## NORWAY

The following declaration was received from the Government of Norway:

"In accordance with Article 18.1(a) of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, Norway hereby declares that it reserves the right to exclude the application of Article 2, paragraph 1(d) and (e)."

## SINGAPORE

The instrument of accession of the Republic of Singapore contained the following reservation:

"The Republic of Singapore reserves the right, in accordance with article 18, paragraph 1, of the Convention, to exclude the application of article 2, paragraph 1(d) and (e) of the Convention."

## UNITED KINGDOM

The instrument of ratification of the United Kingdom of Great Britain and Northern Ireland contained a reservation which states that the United Kingdom was "reserving the right, in accordance with article 18, paragraph 1, of the Convention, on its own behalf and on behalf of the above-mentioned territories, to exclude the application of article 2, paragraph 1(d); and to exclude the application of article 2, paragraph 1(e) with regard to Gibraltar only".

## V. Notifications

**Article 8(4)**

**China:**

*[Translation]*

"The manner of calculation employed with respect to article 8(1) of the Convention concerning the unit of account shall be the method of valuation applied by the International Monetary Fund;"

**German Democratic Republic:**

*[Translation]*

"The amounts expressed in Special Drawing Rights will be converted into marks of the German Democratic Republic at the exchange rate fixed by the Staatsbank of the German Democratic Republic on the basis of the current rate of the US dollar or of any other freely convertible currency".

**Poland:**

"Poland will now calculate financial liabilities mentioned in the Convention in the terms of the Special Drawing Right, according to the following method.

"The Polish National Bank will fix a rate of exchange of the SDR to the United States dollar according to the current rates of exchange quoted by Reuter. Next, the US dollar will be converted into Polish zloties at the rate of exchange quoted by the Polish National Bank from their current table of rates of foreign currencies."

**Switzerland:**

*[Translation]*

"The Federal Council declares, with reference to article 8, paragraphs 1 and 4 of the Convention that Switzerland calculates the value of its national currency in special drawing rights (SDR) in the following way:

"The Swiss National Bank (SNB) notifies the International Monetary Fund (IMF) daily of the mean rate of the dollar of the United States of America on the Zurich currency market. The exchange value of one SDR in Swiss francs is determined from that dollar rate and the rate of the SDR in dollars calculated by IMF. On the basis of these values, SNB calculates a mean SDR rate which it will publish in its Monthly Gazette."

**United Kingdom:**

"... the manner of calculation employed by the United Kingdom pursuant to article 8(1) of the Convention shall be the method of valuation applied by the International Monetary Fund."

**Article 15(2)**

**Belgium:**

*[Translation]*

"In accordance with the provisions of article 15, paragraph 2, Belgium will apply the provisions of the Convention to inland navigation."

**China:**

*[Translation]*

"with regard to Article 15(2)(b) of the Convention, the limits of liability which will be applied to ships under 300 tons are 166,667 units of account in respect of claims for loss of life or personal injury and 83,333 units of account in respect to any other claims."

**France:**

*[Translation]*

" - that no limit of liability is provided for vessels navigating on French internal waterways;

" - that, as far as ships with a tonnage of less than 300 tons are concerned, the general limits of liability are equal to half those established in article 6 of the Convention .... for ships with a tonnage not exceeding 500 tons."

**Federal Republic of Germany:**

*[Translation]*

"In accordance with art. 15, par. 2, first sentence, sub-par. (a) of the Convention, the system of limitation of liability to be applied to vessels which are, according to the law of the Federal Republic of Germany, ships intended for navigation on inland waterways, is regulated by the provisions relating to the private law aspects of inland navigation.

"In accordance with art. 15, par. 2, first sentence, sub-par. (b) of the Convention, the system of limitation of liability to be applied to ships up to a tonnage of 250 tons is regulated by specific provisions of the law of the Federal Republic of Germany to the effect that, with respect to such a ship, the limit of liability to be calculated in accordance with art. 6, par. 1 (b) of the Convention is half of the limitation amount to be applied with respect to a ship with a tonnage of 500 tons."

**Netherlands:**

**Paragraph 2(a)**

"The Act of June 14th 1989 (Staatsblad 239) relating to the limitation of liability of owners of inland navigation vessels provides that the limits of liability shall be calculated in accordance with an Order in Council.

"The Order in Council of February 19th 1990 (Staatsblad 96) adopts the following limits of liability in respect of ships intended for navigation on inland waterways.

I Limits of liability for claims in respect of loss of life or personal injury other than those in respect of passengers of a ship, arising on any distinct occasion:

1. for a ship not intended for the carriage of cargo, in particular a passenger ship, 200 Units of Account per cubic metre of displacement at maximum permitted draught, plus, for ships equipped with mechanical means of propulsion, 700 Units of Account for each kW of the motorpower of the means of propulsion;

2. for a ship intended for the carriage of cargo, 200 Units of Account per ton of the ship's maximum deadweight, plus, for ships equipped with mechanical means of propulsion, 700 Units of Account for each kW of the motorpower of the means of propulsion;

3. for a tug or a pusher, 700 Units of Account for each kW of the motorpower of the means of propulsion;

4. for a pusher which at the time the damage was caused was coupled to barges in a pushed convoy, the amount calculated in accordance with 3 shall be increased by 100 Units of Account per ton of the maximum deadweight of the pushed barges; such increase shall not apply if it is proved that the pusher has rendered salvage services to one or more of such barges;

5. for a ship equipped with mechanical means of propulsion which at the time the damage was caused was moving other ships coupled to this ship, the amount calculated in accordance with 1, 2, or 3 shall be increased by 100 Units of Account per ton of the maximum deadweight or per cubic metre of displacement of the other ships; such increase shall not apply if it is proved that this ship has rendered salvage services to one or more of the coupled ships;

6. for hydrofoils, dredgers, floating cranes, elevators and all other floating appliances, pontoons or plant of a similar nature, treated as inland navigation ships in accordance with Article 951a, paragraph 4 of the Commercial Code, their value at the time of the incident;

7. where in cases mentioned under 4 and 5 the limitation fund of the pusher or the mechanically propelled ship is increased by 100 Units of Account per ton of the maximum deadweight of the pushed barges or by 100 Units of Account per ton of the maximum deadweight or per cubic metre of displacement of the other coupled ships, the limitation fund of each barge or of each of the other coupled ships shall be reduced by 100 Units of Account per ton of the maximum deadweight of the barge or by 100 Units of Account per ton of the maximum deadweight or per cubic metre of displacement of the other vessel with respect to claims arising out of the same incident;

however, in no case shall the limitation amount be less than 200,000 Units of Account.

II The limits of liability for claims in respect of any damage caused by water pollution, other than claims for loss of life or personal injury, are equal to the limits mentioned under I.

III The limits of liability for all other claims are equal to half the amount of the limits mentioned under I.

IV In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of an inland navigation ship, the limit of liability of the owner thereof shall be an amount equal to 60,000 Units of Account multiplied by the number of passengers the ship is authorized to carry according to its legally established capacity or, in the event that the maximum number of passengers the ship is authorized to carry has not been established by law, an amount equal to 60,000 Units of Account multiplied by the number of passengers actually carried on board at the time of the incident. However, the limitation of liability shall in no case be less than 720,000 Units of Account and shall not exceed the following amounts:

(i) 3 million Units of Account for a vessel with an authorized maximum capacity of 100 passengers;

(ii) 6 million Units of Account for a vessel with an authorized maximum capacity of 180 passengers;

(iii) 12 million Units of Account for a vessel with an authorized maximum capacity of more than 180 passengers;

"Claims for loss of life or personal injury to passengers" have been defined in the same way as in Article 7, paragraph 2 of the Convention on Limitation of Liability for Maritime Claims, 1976.

"The Unit of Account mentioned under I-IV is the Special Drawing Right as defined in Article 8 of the Convention on Limitation of Liability for Maritime Claims, 1976".

**Paragraph 2(b)**

"The Act of 14 June 1989 (Staatsblad 241) relating to the limitation of liability for maritime claims provides that with respect to ships which are according to their construction intended exclusively or mainly for the carriage of persons and have a tonnage of less than 300, the limit of liability for claims other than for loss of life or personal injury may be established by Order in Council at a lower level than under the Convention.

"The Order in Council of February 19th 1990 (Staatsblad 97) provides that the limit shall be 100,000 Units of Account.

"The Unit of Account is the Special Drawing Right as defined in Article 8 of the Convention on Limitation of Liability for Maritime Claims, 1976".

**Singapore:**

"The Republic of Singapore, pursuant to article 6, paragraph 3, of the Convention, notifies that it has provided in its national law that claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have priority over other claims under article 6, paragraph 1(b), of the Convention.

The Republic of Singapore further notifies that, with respect to article 15, paragraph 2(b) of the Convention, the limits of liability which Singapore intends to apply are as follows:

(a) to a ship licensed as a harbour craft under the Maritime and Port Authority of Singapore Act (Cap. 170A), Article 6 of the Convention has effect as if the aggregate of the amounts in paragraph 1(a)(i) and (b)(i) referred to the sum insured under the policy of insurance for the time being required by the Port Master under that Act to be in force in relation to that harbour craft in respect of third party risks; and

(b) to any other ship with a tonnage less than 300 tons, article 6 of the Convention has effect as if:

(i) paragraph 1(a)(i) referred to 166,667 Units of Account; and

(ii) paragraph 1(b)(i) referred to 83,333 Units of Account."

**Switzerland:**

*[Translation]*

"In accordance with article 15, paragraph 2, of the Convention on Limitation of Liability for Maritime Claims, 1976, we have the honour to inform you that Switzerland has availed itself of the option provided in paragraph 2(a) of the above-mentioned article.

Since the entry into force of article 44a of the Maritime Navigation Order of 20 November 1956, the limitation of the liability of the owner of an inland waterways ship has been determined in Switzerland in accordance with the provisions of that article, a copy of which is [reproduced below]:

II. Limitation of liability of the owner of an inland waterways vessel

**Article 44a**

1 In compliance with article 5, subparagraph 3c, of the law on maritime navigation, the liability of the owner of an inland waterways vessel, provided in article 126, subparagraph 2c, of the law, shall be limited as follows:

a. in respect of claims for loss of life or personal injury, to an amount of 200 units of account per deadweight tonne of a vessel used for the carriage of goods and per cubic metre of water displaced for any other vessel, increased by 700 units of account per kilowatt of power in the case of mechanical means of propulsion, and to an amount of 700 units of account per kilowatt of power for uncoupled tugs and pusher craft; for all such vessels, however, the limit of liability is fixed at a minimum of 200,000 units of account;

b. in respect of claims for passengers, to the amounts provided by the Convention on Limitation of Liability for Maritime Claims, 1976, to which article 49, subparagraph 1, of the federal law on maritime navigation refers;

c. in respect of any other claims, half of the amounts provided under subparagraph a.

2. The unit of account shall be the special drawing right defined by the International Monetary Fund.

3. Where, at the time when damage was caused, a pusher craft was securely coupled to a pushed barge train, or where a vessel with mechanical means of propulsion was providing propulsion for other vessels coupled to it, the maximum amount of liability, for the entire coupled train, shall be determined on the basis of the amount of the liability of the pusher craft or of the vessel with mechanical means of propulsion and also on the basis of the amount calculated for the deadweight tonnage or the water displacement of the vessels to which such pusher craft or vessel is coupled, in so far as it is not proved that such pusher craft or such vessel has rendered salvage services to the coupled vessels."

**United Kingdom:**

"... with regard to article 15, paragraph 2(b), the limits of liability which the United Kingdom intend to apply to ships of under 300 tons are 166,677 units of account in respect of claims for loss of life or personal injury, and 83,333 units of account in respect of any other claims."

**Article 15(4)**

**Norway:**

"Because a higher liability is established for Norwegian drilling vessels according to the Act of 27 May 1983 (No. 30) on changes in the Maritime Act of 20 July 1893, paragraph 324, such drilling vessels are exempted from the regulations of this Convention as specified in article 15 No. 4."

**Sweden:**

"... in accordance with paragraph 4 of article 15 of the Convention, Sweden has established under its national legislation a higher limit of liability for ships constructed for or adapted to and engaged in drilling than that otherwise provided for in article 6 of the Convention."

# PROTOCOL OF 1996 TO AMEND THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976 (LLMC PROT 1996)

Done at London, 2 May 1996

**Entry into force:** 13 May 2004

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**Signature, ratification, acceptance, approval and accession**

**Article 10**

1. This Protocol shall be open for signature at the Headquarters of the Organization from 1 October 1996 to 30 September 1997 by all States.

2. Any State may express its consent to be bound by this Protocol by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

4. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to the Convention as amended by this Protocol shall be deemed to apply to the Convention so amended, as modified by such amendment.

**Entry into force**

**Article 11**

1. This Protocol shall enter into force ninety days following the date on which ten States have expressed their consent to be bound by it.

2. For any State which expresses its consent to be bound by this Protocol after the conditions in paragraph 1 for entry into force have been met, this Protocol shall enter into force ninety days following the date of expression of such consent.

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I. Signatories

II. Contracting States

III. Declarations, Reservations and Statements

IV Amendments

## I. Signatories

| | |
|---|---|
| Canada | subject to ratification |
| Denmark | subject to ratification and with reservation for application to the Faroe and Greenland |
| Finland | subject to acceptance |
| France | sous réserve de ratification |
| Germany, Federal Republic of | subject to ratification |
| Netherlands | subject to acceptance |
| Norway | subject to ratification |
| Sweden | subject to ratification |
| United Kingdom | subject to ratification |

## II. Contracting States

| | Date of signature or deposit of instrument | Date of entry into force |
|---|---|---|
| Albania (accession) | 7 June 2004 | 5 September 2004 |
| Antigua and Barbuda (accession) | 12 October 2009 | 10 January 2010 |
| Australia (accession) | 8 October 2002 | 13 May 2004 |
| Belgium (accession) | 9 October 2009 | 7 January 2010 |
| Bulgaria (accession) | 4 July 2005 | 2 October 2005 |
| Canada (ratification)[1] | 9 May 2008 | 7 August 2008 |
| China[4] (accession) | 2 February 2015 | 3 May 2015 |
| Congo (accession) | 19 May 2014 | 17 August 2014 |
| Cook Islands (accession) | 12 March 2007 | 10 June 2007 |
| Croatia (accession)[1] | 15 May 2006 | 13 August 2006 |
| Cyprus (accession) | 23 December 2005 | 23 March 2006 |
| Denmark[1, 3] (ratification) | 12 April 2002 | 13 May 2004 |
| Estonia (accession) | 16 March 2011 | 14 June 2011 |
| Finland (acceptance) | 15 September 2000 | 13 May 2004 |
| France (ratification)[1] | 24 April 2007 | 14 July 2007 |
| Germany (ratification)[1] | 3 September 2001 | 13 May 2004 |
| Greece (accession) | 6 July 2009 | 4 October 2009 |
| Hungary (accession) | 4 July 2008 | 2 October 2008 |
| Iceland (accession)[1] | 17 November 2008 | 15 February 2009 |
| India (accession) | 23 March 2011 | 21 June 2011 |
| Ireland (accession) | 25 January 2012 | 24 April 2012 |
| Jamaica (accession) | 19 August 2005 | 17 November 2005 |
| Japan (accession) | 3 May 2006 | 1 August 2006 |
| Latvia (accession) | 18 April 2007 | 17 July 2007 |
| Liberia (accession) | 18 September 2008 | 17 December 2008 |
| Lithuania (accession)[1] | 14 September 2007 | 13December 2007 |
| Luxembourg (accession) | 21 November 2005 | 19 February 2006 |
| Malaysia (accession) | 12 November 2008 | 10 February 2009 |
| Malta (accession)[1] | 13 February 2004 | 13 May 2004 |
| Marshall Islands (accession) | 30 January 2006 | 30 April 2006 |
| Mongolia (accession) | 28 September 2011 | 27 December 2011 |
| Netherlands (acceptance) | 23 December 2010 | 23 March 2011 |
| New Zealand (accession)[1] | 4 April 2014 | 3 July 2014 |
| Niue (accession) | 27 June 2012 | 25 September 2012 |
| Norway (ratification)[1] | 17 October 2000 | 13 May 2004 |
| Palau (accession) | 29 September 2011 | 28 December 2011 |
| Poland (accession)[1] | 17 November 2011 | 15 February 2012 |
| Kenya (accession)[1] | 7 July 2015 | 5 October 2015 |
| Romania (accession) | 12 March 2007 | 10 June 2007 |
| Russian Federation (accession)[1] | 25 May 1999 | 13 May 2004 |
| Saint Lucia (accession) | 20 May 2004 | 18 August 2004 |
| Samoa (accession) | 18 May 2004 | 16 August 2004 |
| Serbia (accession) | 19 March 2013 | 17 June 2013 |
| Sierra Leone (accession) | 1 November 2001 | 13 May 2004 |
| Slovenia (accession) | 6 July 2015 | 4 October 2015 |

| | | |
|---|---|---|
| Spain (accession)[1] | 10 January 2005 | 10 April 2005 |
| Sweden (accession)[1] | 22 July 2004 | 20 October 2004 |
| Syrian Arab Republic (accession) | 2 September 2005 | 1 December 2005 |
| Tonga (accession) | 18 September 2003 | 13 May 2004 |
| Turkey (accession)[1] | 19 July 2010 | 17 October 2010 |
| Tuvalu (accession) | 12 January 2009 | 12 April 2009 |
| United Kingdom (ratification)[1, 2] | 11 June 1999 | 13 May 2004 |

Number of Contracting States: 52
(the combined merchant fleets of which constitute approximately 57.41% of the gross tonnage of the world's merchant fleet[5]

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[1] For the text of a declaration, reservation or statement, see section III.

[2] The Protocol was extended by the United Kingdom to the Isle of Man with effect from 13 May 2004.
On 25 May 2012, the Secretary-General received a notification from the Foreign and Commonwealth Office, informing him that the reservation and declaration made by the United Kingdom (see section III) are now applicable to the Isle of Man.

The Protocol was further extended by the United Kingdom to the following UK territories:
- the Island of Jersey from 14 December 2009;
- the Cayman Islands from 31 January 2011;
- Isle of Man from 25 May 2012;
- the Bailiwick of Guernsey from 11 June 2013; and
- Gibraltar from 25 February 2014,

declaring that the reservations made by the Government of the United Kingdom of Great Britain and Northern Ireland upon ratification with respect to articles 18(1)(a) and (b), 2(1)(d) and (e), 15(2)(b), 6(1)(a)(i) and (1)(b)(i), and 15(3bis) of the 1976 Convention as amended by the Protocol of 1996 will apply in respect of the above-listed UK territories.

[3] Denmark extended the Protocol to Greenland with effect from 13 May 2004.

[4] Applies only to the Hong Kong Special Administrative Region.

[5] This figure may differ from the one in GISIS, which automatically includes China tonnage (3.83%). China acceded to LLMC PROT 1996 only for the Hong Kong territory.

## III. Declarations, Reservations and Statements

The Secretary-General received, on 31 May 2013, a communication from the Minister for Foreign Affairs of Australia, containing the texts of two reservations as follows:

"Pursuant to Article 7 of the Protocol, the Government of Australia:
"(a) Reiterates its reservation, made on depositing its instrument of accession to the Convention on Limitation of Liability for Maritime Claims, 1976, to exclude the application of Article 2, paragraphs 1(d) and (e); and
(b) reserves the right to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or any amendment or protocol related thereto.

### BELGIUM

The instrument of accession of Belgium contained the following reservation:

*Translation*

"In accordance with article 18, paragraph 1(a) of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, the Kingdom of Belgium reserves the right to exclude application of article 2, paragraph 1(d) and (e) of the 1976 Convention, as amended by the 1996 Protocol."

### CANADA

The instrument of ratification of Canada contained the following reservation:

"Canada reserves the right to exclude the application of article 2, paragraph 1(d):

(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such a ship."

### CHINA

The instrument of accession by the People's Republic of China was accompanied by the following declaration:

"The Protocol at present only applies to the Hong Kong Special Administrative Region of the PRC and the Hong Kong Special Administrative Region shall not be bound by article 2, paragraph 1(d) of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol."

### CROATIA

The instrument of accession of the Republic of Croatia was accompanied by the following reservation:

"Pursuant to Article 18 paragraph 1 of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, the Republic of Croatia reserves the right:

(a) to exclude the application of article 2 paragraphs 1(d) and (e);

(b) to exclude claims for damage within the meaning of the International Convention o Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or of any amendment or protocol thereto."

### CYPRUS

The instrument of accession of the Republic of Cyprus contained the following reservation:

"Pursuant to paragraph 1 of Article 18 of the Convention on Limitation of Liability for Maritime Claims, 1976 as amended by the Protocol of 1996, the Republic of Cyprus hereby excludes:

(a) the application of Article 2, paragraphs 1(d) and (e);

(b) claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or any amendment or protocol related thereto."

## DENMARK

The instrument of ratification of Denmark was accompanied by the following declaration:

"1. "In Act No. 228 of 21 April 1999, implementing the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, Denmark has made use of the provision in Article 15, paragraph 1, of the said Convention, on the application of the Convention. Consequently, if a person, who has his habitual residence or principal place of business in a State Party to the Convention of 1976, but not to the Protocol of 1996, seeks to limit his liability before a Court in Denmark during the period where Denmark is both a State Party to the Convention of 1976 and the Protocol of 1996, Denmark will accept limitation of liability according to the Convention of 1976. For other persons seeking to limit liability, Denmark will apply the limitation of the Protocol of 1996."

2. "Denmark intends to make use of the provision in the Convention on Limitation of Liability for Maritime Claims, 1976, Article 15, paragraph 2(b). According to this provision a State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons. Denmark will inform the Secretary-General of the International Maritime Organization of the limits of liability upon adoption of the specific provisions in the Danish Legislation."

As stated in the Instrument, the Protocol shall, however, not apply to the Faroe and Greenland."

On 25 March 2004, Denmark declared that the Protocol shall extend to Greenland with effect from 13 May 2004, i.e. the date of entry into force of the Protocol.

Denmark also declared that:

"the declaration made by Denmark upon deposit of its instrument of ratification of the Protocol of 1996, in which it was stated under point 2 that Denmark intended to make use of the provision in Article 15, paragraph 2(b), of the Convention according to which a State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons. In this connection, I have the honour to inform you that with effect from the date of entry into force of the Protocol of 1996, the Danish limits of liability for ships of less than 300 tons will be 500.000 Units of Account as compared with the 1 million Units of Account stipulated in Article 6, paragraph 1(b)(i), of the Convention as amended by the Protocol."

On 23 May 2012 the Secretary-General received the following declaration by the Government of Denmark:

"The Government of Denmark would like to make use of the option in article 15(3bis) of the 1976 Convention as amended by the 1996 Protocol to regulate, by specific provisions of national law, the system of limitation of liability to be applied to passengers. National law in Denmark will thus provide for a higher limit of liability in respect of claims arising from the loss of life or personal injury to passengers of a ship."

## ESTONIA

The instrument of accession of the Republic of Estonia contained the following reservation:

"Pursuant to paragraph 1(b) of article 18 of the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, the Republic of Estonia reserves the right to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or any amendments or protocol related thereto."

## FRANCE

The instrument of ratification of France contained the following declaration:

*[Translation]*

"Pursuant to the provisions of article 7 of this Protocol amending paragraph 1(a), article 18 of the Convention on Limitation of Liability for Maritime Claims, 1976, the Government of the Republic of France reiterates its decision, declared on depositing its instrument of approval of the above-mentioned Convention, to exclude all entitlement to limitation of liability for claims relating to paragraphs 1(d) and 1(e), article 2 of the Convention".

## GERMANY

The instrument of ratification of the Federal Republic of Germany contained the following declaration:

"In accordance with Article 15 paragraph 2 first sentence (a) of the Convention as amended by the Protocol, the limitation of liability to be applied to vessels which are, according to the law of the Federal Republic of Germany, ships intended for navigation on inland waterways, is regulated by the provisions of the Act Relating to the Private Law Aspects of Inland Navigation. Sections 5e to 5l of this Act provide as follows:

"Section 5e

(1) The limit of liability for the total of all claims in respect of personal injury arising on any distinct occasion shall be calculated as follows, so far as these are not claims within the meaning of sections 5h and 5k:

1. For a passenger ship or other ship not intended for the carriage of cargo, to the extent that a different amount does not arise under nos. 3 and 4, 200 Units of Account per cubic metre of displacement at maximum permitted draught shall be fixed, and, for ships equipped with mechanical means of propulsion, increased by 700 Units of Account for each kW of the motorpower of the means of propulsion.

2. For a ship intended for the carriage of cargo, 200 Units of Account per ton of the ship's maximum dead weight shall be fixed, and, for ships equipped with mechanical means of propulsion, increased by 700 Units of Account for each kW of the motorpower of the means of propulsion.

3. For a tug or pusher, 700 Units of Account for each kW of the motorpower of the means of propulsion shall be fixed.

4. For a dredger, crane, elevator and any other floating moveable plant or appliance of a similar nature, the value which the plant or appliance had at the time of the occasion giving rise to liability shall be fixed.

(2) Where, at the time of the occasion giving rise to liability, a pusher was rigidly coupled with one or more pushed barges to form a pushed convoy, the amount to be fixed for the pusher in accordance with subsection 1 no. 3 shall be increased by 100 Units of Account per ton of the maximum dead weight of the push boat, to the extent that the pusher had not rendered salvage services or assistance services to one or more of these pushed barges. If the limit of liability is increased for the pusher pursuant to the first sentence, claims arising from the same occasion shall be reduced by the same amount for each pushed barge which was rigidly coupled with the pusher. However, the second sentence shall not apply to a claim of the party liable for the pusher against the party liable for one of the pushed barges rigidly coupled with the pusher for internal indemnification.

(3) Subsection 2 shall apply analogously to a mechanically propelled ship which, at the time of the occasion giving rise to liability, was securely coupled with one or more vessels, which do not constitute plants or appliances within the meaning of sub-section 1 no. 4, as well as to coupled ships; subject, however, to the proviso that the amount to be fixed for the moving ship in accordance with subsection 1 be increased by 1000 Units of Account per cubic metre of displacement or per ton of the maximum deadweight of the other ships.

(4) In any case, the limit of liability shall be not less that 200,000 Units of Account, to the extent that the vessel in question is not a barge which is only used for the purpose of transferring cargo in harbours.

Section 5f

(1) The limit of liability for claims in respect of material damage arising on any distinct occasion shall be one half of the relevant limits of liability mentioned in section 5e to the extent that

these are not claims within the meaning of section 5h.

(2) On payment in respect of the maximum amount of liability referred to in sub-section 1, claims in respect of damage to harbour works, basins, waterways, locks, bridges and aids to navigation shall have priority over other claims.

Section 5g

Where the limit of liability for claims in respect of personal injury mentioned in section 5e is insufficient to pay these claims in full, the amount calculated in accordance with subsection 1 shall be available for payment of the unpaid balance of claims under section 5e. The balance of claims in respect of personal injury shall rank rateably with claims in respect of material damage in this context; section 5f sub-section 2 is, in this respect, not to be applied.

Section 5h

(1) For the total of all claims in respect of damage caused by third parties arising on any distinct occasion as a result of dangerous substances transported on the ship of the party liable, a separate limit of liability shall apply where the claims are not claims under section 22 of the Water Resources Management Act. The limit of liability shall be available solely for payment of the claims referred to in the first sentence. Dangerous substances within the meaning of the first sentence are listed in Annex A to the Regulations for the Carriage of Dangerous Substances on the Rhine (ADNR) (Annex 1 to the Ordinance on the Entry into Force of the Regulations for the Carriage of Dangerous Substances on the Rhine and the Regulations for the Carriage of Dangerous Substances on the Mosel of 21 December 1994, Federal Law Gazette II pp. 3830, 3831) in the respective version enacted in the Federal Republic of Germany.

(2) The limit of liability applicable pursuant to subsection 1 shall be,

1. for the total of all claims in respect of personal injury arising on any distinct occasion, three times the limits of liability applicable pursuant to section 5e; subject, however, to minimum of 5 million Units of Account;

2. for the total of all claims in respect of material damage arising on any distinct occasion, three times the limits of liability applicable pursuant to section 5f; subject, however, to a minimum of 5 million Units of Account.

(3) On payment in respect of the maximum amount of liability referred to in sub-section 2 no. 2, claims in respect of damage to harbour works, basins, waterways, locks, bridges and aids to navigation shall have priority over other claims.

(4) Where the limit of liability for claims in respect of personal injury applicable pursuant to subsection 2 no. 1 is insufficient to pay these claims in full, the amount calculated in accordance with subsection 2 no. 2 shall be available for payment of the unpaid balance of claims under subsection 2 no. 1. The balance of claims in respect of personal injury shall rank rateably with claims in respect of material damage in this context; subsection 3 is, in this respect, not to be applied.

Section 5i

Notwithstanding sections 5e, 5f subsection 1 and section 5h, a salvor within the meaning of section 5c subsection 1 no. 2 or a pilot working on board can limit his liability for the total of all claims in respect of personal injury arising on any distinct occasion to an amount of 200,000 Units of Account, and, for claims in respect of material damage, to an amount of 100,000 Units of Account. Section 5f subsection 2 and section 5g shall apply analogously.

Section 5j

For the total of all claims arising from wreck removal, a separate limit of liability shall apply. This limit shall be one half of the limits of liability mentioned in section 5e. The limit of liability shall be available solely for payment of the claims arising from wreck removal.

Section 5k

(1) In respect of the total of all claims arising on any distinct occasion for loss of life or personal injury to persons carried by that ship (passengers):

1. under a contract of passenger carriage, or

2. who, with the consent of the carrier, are accompanying a vehicle or live animals which are covered by a contract for the carriage of goods,

a separate limit of liability shall apply. This limit of liability shall be available solely for payment

of claims made by those passengers.

(2) The limit of liability for claims in respect of personal injury to passengers pursuant to subsection 1 shall be 60,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate. If the number of passengers who may be carried is not specified, the limit of liability shall be determined on the basis of the number of passengers actually carried by the ship at the time of the occasion giving rise to liability. However, the limit of liability shall be no less than 720,000 Units of Account and shall not exceed 12 million Units of Account.

(3) Notwithstanding subsection 2, the limit of liability for a salvor with the meaning of section 5c subsection 1 no. 2 or a pilot working on board shall be 720,000 Units of Account.

Section 5l

The Unit of Account referred to in this chapter shall be the Special Drawing Right as defined by the International Monetary Fund. The limits of liability mentioned in sections 5e to 5k shall be converted into German Marks according to the value of the German Mark at the date the limitation fund shall have been constituted or at the date of the provision of security permitted by a court. If the limit of liability is asserted by way of defence pursuant to section 5d subsection 3, the date of the court decision shall be decisive for the date of conversion. The value of the German Mark in terms of the Special Drawing Right shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions."

In accordance with Article 15 paragraph 2 first sentence (b) of the Convention as amended by the Protocol, the limit of liability for ships with a tonnage of up to 250 tons is regulated by specific provisions of the domestic law of the Federal Republic of Germany to the effect that, with respect to such a ship, the limit of liability to be calculated in accordance with Article 6 paragraph 1 (b) of the Convention is one half of the limit of liability applicable to a ship with a tonnage of 2,000 tons.

Moreover, the Federal Republic of Germany reserves the right, in accordance with Article 18 paragraph 1 of the Convention as amended by the Protocol, to exclude the application of Article 2 paragraph 1 (d) and (e) of the Convention as amended by the Protocol of 1996."

## ICELAND

The instrument of accession of Iceland contained the following reservation:

"In accordance with Article 18, paragraph 1, of the Convention on Limitation of Liability for Maritime Claims of 19 November 1976, as amended by Article 7 of the Protocol, Iceland excludes the application of Article 2, paragraphs 1(d) and (e).

In accordance with Article 18, paragraph 1, of the Convention on Limitation of Liability for Maritime Claims of 19 November 1976, as amended by Article 7 of the Protocol, Iceland excludes claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 or of any amendment of protocol thereto.

The other provisions of the Convention shall be inviolably observed."

## KENYA

The instrument of accession of Kenya contained the following reservation:

"The Government of the Republic of Kenya pursuant to article 7(1)(b) of the Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims, 1976, reserves the right to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

## LITHUANIA

The instrument of accession of Lithuania contained the following reservation:

"... pursuant to paragraph 1 of Article 18 of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, the Republic of Lithuania hereby excludes:

(1) the application of subparagraphs d) and e) of paragraph 1 of Article 2 of the Convention on Limitation of Liability for Maritime Claims, 1976;

(2) claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or any amendment or protocol related thereto."

## MALTA

The instrument of accession by Malta contained the following reservations and declarations:

"(a) Pursuant to Article 18(1)(a) and (b) of the 1976 Convention as amended by the 1996 Protocol, Malta reserves the right to exclude the application of Article 2, paragraphs 1(d) and (e), and to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, which arise from occurrences which take place after the coming into force of that Convention as part of the Law of Malta.

(b) Malta intends to make use of the option provided for in Article 15(2)(b) of the 1976 Convention as amended by the 1996 Protocol to regulate by specific provisions of national law the system of limitation of liability to be applied to ships less than 300 tons. National law in Malta will apply the provisions of the 1976 Convention as amended by the 1996 Protocol to such ships. However, for such ships, Article 6 will have effect as if Article 6(1)(a)(i) refers to 1,000,000 Units of Account and Article 6(1)(b)(i) refers to 500,000 Units of Account.

(c) Malta intends to make use of the option provided for in article 15*(3bis)* of the 1976 Convention as amended by the 1996 Protocol to regulate by specific provisions of national law the system of limitation of liability to be applied to passengers. To this effect, national law in Malta implementing the 1976 Convention as amended by the 1996 Protocol will not apply to claims covered by the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, which arise from occurrences which take place after the coming into force of that Convention as part of the Law of Malta."

## NETHERLANDS

The instrument of acceptance by the Netherlands was accompanied by the following reservation:

"The Kingdom of the netherlands reserves the right, pursuant to paragraph 1 of article 18 of the Convention on Limitation of Liability for Maritime Claims, 1976, amended by article 7 of the Protocol of 1996, to exclude:

(a) the application of article 2, paragraphs 1(d) and (e);
(b) claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or of any amendment or protocol related thereto."

## NEW ZEALAND

The instrument of accession of New Zealand was accompanied by the following declaration:

"..consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the charter of the United Nations, this accession shall not extend to Tokelau unless and until a declaration to this effect is lodged by the Government of New Zealand with the depositary on the basis of appropriate consultation with that territory."

## NORWAY

The instrument of ratification of the Kingdom of Norway contained the following reservation:

"In accordance with article 18 paragraph 1 of the Convention on Limitation of Liability for Maritime Claims, 1976 as amended by article 7 of the Protocol of 1996, Norway reserves its right to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection

with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or of any amendment or protocol thereto."

## POLAND

The instrument of accession by Poland contained the following reservation and declaration:

"(a) Pursuant to Article 18(1)(a) and (b) of the 1976 Convention as amended by the 1996 Protocol, the Republic of Poland hereby excludes the application of Article 2, paragraphs 1(d) and (e), and claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or of any amendment or protocol related thereto, which arise from occurrences which take place after the entry into force of that Convention with regard to the Republic of Poland.

(b) The Republic of Poland intends to make use of the option provided for in article 15(2)(b) of the 1976 Convention as amended by the 1996 Protocol to regulate by specific provisions of national law the system of limitation of liability to be applied to ships less than 300 tons. The Republic of Poland will inform the Secretary-General of IMO of the limits of liability upon adoption of the specific provisions in the Polish legislation."

Further to the above declaration, the Depositary received, on 5 November 2012, the following notification from Poland:

"In accordance with article 15, paragraph 2(b) of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, the Republic of Poland hereby informs that the following limits of liability to ships of less than 300 tons are applied in Poland as from 27 October 2012:

1) 200 000 Units of Account – in respect of claims for loss of life or personal injury,
and
2) 100 000 Units of Account – in respect of any other claims."

## RUSSIAN FEDERATION

The instrument of accession of the Russian Federation contained the following reservation and statement (in the Russian language):

*[Translation]* "The Russian Federation reserves the right, pursuant to paragraph 1 of article 18 of the Convention on Limitation of Liability for Maritime Claims, 1976, amended by the Protocol of 1996, to exclude:

(a) the provisions of subparagraphs (d) and (e) of paragraph 1 of article 2;
(b) claims related to damage in the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or any amendment or protocol related thereto."

### Statement

"The Russian Federation pursuant to subparagraph (e) of article 3 of the Convention on Limitation of Liability for Maritime Claims, 1976, amended by the Protocol of 1996, will apply the legislation of the Russian Federation on compensation for injury to persons or property, in full, to claims for personal injury or property caused to employees of shipowners or rescuers, arising from liabilities related to the vessel or rescue operations, as well as to claims by their heirs, dependants or persons entitled to be maintained by them, if the contract of employment between the shipowner or rescuer and those employees is subject to the law of the Russian Federation.

The Russian Federation makes use of the possibility, provided in paragraph 3 of article 15 of the Convention on Limitation of Liability for Maritime Claims, 1976, amended by the Protocol of 1996, and will apply the law of the Russian Federation on compensation for damage to persons or personal property, in full, to claims for compensation for damage to persons or personal property, directly connected with the operation of the ship or with rescue operations, if the shipowner and the person concerned or rescuer and the person concerned are organizations or citizens of the Russian Federation.

The Russian Federation makes use of the possibility, provided in paragraph 3 of article 15 of the Convention on Limitation of Liability for Maritime Claims, 1976, amended by the Protocol of 1996, and will apply the law of the Russian Federation on compensation for damage to the life or health of citizens, in full, to claims for compensation for damage caused to the life or health of passengers on a ship if the shipowner and passenger are organizations or citizens of the Russian Federation."

## SPAIN

The instrument of accession by Spain contained the following reservation:

"1. In accordance with paragraph 2(b), article 15 of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, the limit of liability for ships not exceeding 300 gross tonnage shall be regulated by specific provisions of the national law of the Kingdom of Spain, such that, in respect of those ships, the limit of liability, calculated in accordance with paragraph 1(a) and (b), article 6 of the Convention, shall be half of the liability limit applicable to a ship not exceeding 2,000 gross tonnage.

2. The Kingdom of Spain, in accordance with paragraph 1, article 18 of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, reserves the right not to apply paragraph 1(d) and (e), article 2 of the Convention.

Claims relating to paragraph 1(d) and (e), article 2 of the Convention shall not have entitlement to limitation of liability and shall be subject to the provisions of national law, specifically article 107 of the State Ports and Merchant Marine Act No.27/1992 of 24 November 1992."

## SWEDEN

The Secretary-General received, on 3 July 2015, the following notification by the Government of Sweden:

"The Government of Sweden is making use of the option in article 15(3bis) of the 1976 Convention on Limitation of Liability for Maritime Claims as amended by the 1996 Protocol to regulate, by specific provisions of national law, the system of limitation of liability to be applied to passengers.

National law in Sweden will as of 2 September 2015 provide a higher limit of liability in respect of claims arising from the loss of life or personal injury to passengers of a ship, namely 250 000 Units of Account."

## TURKEY

The instrument of ratification of Turkey was accompanied by the following reservation:

"The republic of Turkey reserves the right, pursuant to paragraph 1 of article 18 of the Convention on Limitation of Liability for Maritime Claims, 1976, amended by article 7 of the Protocol of 1996, to exclude:

(a) the application of article 2, paragraphs 1(d) and (e);
(b) claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, or of any amendment or protocol related thereto."

## UNITED KINGDOM

The instrument of ratification of the United Kingdom was accompanied by the following reservations and declarations:

"(a) Pursuant to article 18(1)(a) and (b) of the 1976 Convention as amended by the 1996 Protocol, the United Kingdom reserves the right to exclude the application of article 2, paragraphs 1(d) and (e), and to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

(b) The United Kingdom intends to make use of the option provided for in article 15(2)(b) of the 1976 Convention as amended by the 1996 Protocol to regulate by specific provisions of national law the system of limitation of liability to be applied to ships less than 300 tons. National law in the United Kingdom will apply the provisions of the 1976 Convention as amended by the 1996 Protocol to such ships. However, for such ships, article 6 will have effect as if article 6(1)(a)(i) referred to 1,000,000 Units of Account and article 6(1)(b)(i) referred to 500,000 Units of Account.

(c) The United Kingdom intends to make use of the option provided for in article 15*(3bis)* of the 1976 Convention as amended by the 1996 Protocol to regulate by specific provisions of national law the system of limitation of liability to be applied to passengers. National law in the United Kingdom implementing the 1976 Convention as amended by the 1996 Protocol will provide for no limit of liability in respect of claims arising from the loss of life or personal injury to passengers of a ship. However, separate limits may continue to apply to a liability for such claims under national law based on the provisions of the Convention relating to the Carriage of Passengers and their Luggage by Sea.

The United Kingdom's ratification of the Protocol of 1996 will not be extended to the Overseas Territories of the United Kingdom until such time as the United Kingdom's denunciation of the 1976 Convention is extended to them."

## VI. Amendments

### (1) 2012 (limitation amounts set out in article 3 of the 1996 LLMC Protocol) Amendments (LEG.5(99))

#### A. Adoption

The Legal Committee at its ninety-ninth session (April 2012) adopted by resolution LEG.5(99), in accordance with article 8(4) of 1996 LLMC Protocol, amendments to the limitation amounts set out in article 3 of the 1996 LLMC Protocol.

#### B. Entry into force

(a) In accordance with article 8(7) of the 1996 LLMC Protocol, and as determined by the Legal Committee, the amendments shall be deemed to have been accepted at the end of a period of 18 months after the date of notification, i.e. 8 December 2013, unless, prior to that date, not less than one-fourth of the States that were Contracting States on the date of the adoption of these amendments have communicated to the Secretary-General that they do not accept these amendments.
(b) In accordance with article 8(8) of the 1996 LLMC Protocol, these amendments deemed to have been accepted in accordance with paragraph (a) above shall enter into force 18 months after their acceptance, i.e. 8 June 2015. No communication of non-acceptance was received and, accordingly, the amendments will, accordingly, enter into force on 8 June 2015 (NV1 B1/F/3.03 dated 8 June 2012 refers).

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REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

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|---|---|
| Chubb Insurance (Thailand) Company Ltd, Tok Marine & Nichido Fire Insurance Co Ltd, *et al.*<br><br>**Plaintiffs,**<br>**v.**<br><br>ELENI Maritime Limited *in personam* and Empire Bulkers Limited<br><br>**Defendants** | **H.Ct. Civil No. 2014-110**<br>**H.Ct. Civil No. 2014-050**<br><br>**REPLY MEMORANDUM; CERTIFICATE OF SERVICE** |

## SUPPLEMENTAL REPLY (PER COURT ORDER OF APRIL 21, 2015)[1]

Cargo Plaintiffs submit this Reply Memorandum to the ELENI Defendants' Opposition and Declaration of Martin Davies ("Davies Declaration") regarding the Clash of Conventions.[2]

## INTRODUCTION - ELENI DEFENDANTS HAVE RAISED A LIMITATION DEFENSE

Cargo Plaintiffs must first set straight the objectively untrue and disingenuous fallacy that "limitation has not been raised as an issue...or as a defense" (Opposition, pp. 8, 9).

Limitation - and *specifically* the Clash of Conventions - **was *first* raised by the ELENI Defendants in their own responsive briefing:**

[1] This Reply Memorandum will use all shorthand terms as previously defined in the Clash of Conventions Motion.

[2] Cargo Plaintiffs reserve their right, in advance of any hearing, to submit a responsive expert declaration to the Davies Declaration (in light of the brief seven-day delay for filing the instant Reply pursuant to Marshall Islands Rule of Civil Procedure 7(b)(3)). Cargo Plaintiffs further note generally that the Davies Declaration does not address at all any United States general maritime law jurisprudence (which governs in these proceedings pursuant to M.I. Rev. Code Title 47, §113), but rather focuses on treaty issues and/or decisions under British law. Likewise, Prof. Davies is listed on the website of the ELENI Defendants' counsel as a retained consultant (with a Norton Fulbright Rose telephone, facsimile number and email address), and thus his opinions in this matter are not entirely those of a disinterested scholar.

- "[ELENI Defendants are] **entitled to limit [their] liability under the...[76 Convention]** which is applied in Hong Kong." FNC Memo, p. 3.
- "[T]he [RMI] courts...would be compelled by international maritime law to recognize [the 76 Convention] limitation decree in...Hong Kong ..." FNC Memo, p. 15
- **"Considering the Marshall Islands is bound by the 76 Convention** ... [this action should be dismissed] in favor of the [HK Limitation Suit]." FNC Memo, p. 16.
- **"[T]his Court would be compelled by international maritime law to recognize the limitation decree in the [HK Limitation Suit] as it applies to [Cargo] Plaintiffs. . .** Status as a party to the [96 Protocol] does not mean that a party can ignore its obligations with respect to a party just to the [76 Convention]." FNC Reply, p. 9.
- "[The 76 Convention] applies and the [RMI] must recognize [the HK Limitation Suit]... [under] the [76 Convention], 96 Protocol, and international law..." FNC Reply, p. 10.[3]

The ELENI Defendants are definitively "seek[ing] to limit [their] liability before a Court [of the RMI]" as provided at §525 of the LLMCA. The ELENI Defendants cannot logically say that limitation is not an issue, and then claim this Court must apply the Hong Kong limitation law.

The ELENI Defendants apparently rely on the fact that they have not asserted limitation as an affirmative defense in an actual pleading. The irony here, however, is **the ELENI Defendants have refused to file any responsive pleading** (other than the denied FNC Motion), despite this Court' order to do so within 14 days of the lifting of the prior stay (*see* Order of May 5, 2015); and in violation of MIRCP Rule 12(a)(4). *They are the ones who have failed to timely file* the very pleading they claim is lacking (Cargo Plaintiffs reserve their right to take a default).

## REPLY TO ELENI DEFENDANTS' PROCEDURAL ARGUMENTS

The ELENI Defendants contend (Opposition pp. 5-7) that the Clash of Conventions Motion is procedurally deficient[4] because it seeks a declaration via "motion" rather than through a separate "action." This suggestion depends on a misguided elevation of form over substance.

Numerous federal courts, including the Supreme Court, have considered similar motions,

[3] The ELENI Defendants again raised the issue (post-FNC motion) in a Motion for Clarification (later withdrawn).

[4] Cargo Plaintiffs, in full disclosure, note that they erroneously and inadvertently cited to a prior version of Rule 56(a). This error, as explained below, does not affect the procedural validity of the Clash of Conventions Motion.

recognizing the practical, efficient principle, as the ultimate arbiters of law, that "where declaratory relief is not requested the courts may grant such relief where the pleading and proof show such to be appropriate."[5] This principle is also expressly provided for at Rule 54(c) of the MIRCP.[6] Under the rule, jurisprudence, and the leading commentary of Wright & Miller[7] (in the *same section* selectively cited by the ELENI Defendants themselves), "a party may seek declaratory relief subsequent to the pleading stage of a civil action if such relief is merited."[8]

Courts **routinely** grant summary judgment motions declaring various ***pure issues of law*** like the Clash of Conventions,[9] and routinely consider choice-of-law summary judgment motions in *non-declaratory judgment action* cases.[10] Additionally, the ELENI Defendants have themselves effectively raised limitation/Clash of Conventions issues as an affirmative defense, and this Court has authority to rule on the invalidity of that defense.[11]

The *International Brotherhood* decision (concerning competing claims to escrow funds), primarily relied on by ELENI Defendants, simply noted that there is no "motion for declaratory judgment" provided for in the federal rules **but then treated the motion "as a motion for**

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[5] *Turner v. Liverpool Cent. Sch.*, 186 F. Supp. 2d 187, 190 (N.D.N.Y. 2002) (citing *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964)); *Serv. Trades Council v. Walt Disney World Co.*, 2008 WL 686916, at *3 (M.D. Fla. Mar. 11, 2008) (same). *See also Broussard v. State Farm Fire & Cas. Co.*, 2007 WL 2264535 (E.D. La. Aug. 7, 2007); *Mishcon de Reya New York LLP v. Grail Semiconductor, Inc.*, 2014 WL 656062, at *6 (S.D.N.Y. Feb. 20, 2014).

[6] MIRCP Rule 54(c) ("Every . . . final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.").

[7] 10B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2768 (3d ed.) ("Rule 54(c) applies, however, and the court is to give whatever relief is justified by the evidence, regardless of the demand in the complaint"). The ELENI Defendants cite this same section, but omit this language.

[8] *Turner*, 186 F. Supp. 2d at 190.

[9] *See, e.g., Total Safety US, Inc. v. Con-Dive, LLC*, 2009 WL 3673051, at *1 (S.D. Tex. Nov. 4, 2009); *Jose v. M/V Fir Grove*, 765 F. Supp. 1024, 1034 (D. Or. 1991).

[10] *See, e.g., Magnolia Healthcare, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2006 WL 3347952 (N.D. Miss. Nov. 17, 2006); *Neill Corp. v. John Paul Mitchell Sys.*, 92-2157, 1995 WL 381684 (E.D. La. June 26, 1995).

[11] *U.S. ex rel. King v. Solvay S.A.*, 304 F.R.D. 507, 510 (S.D. Tex. 2015); *Sahota v. Cobb*, 2015 WL 6835480, at *5 (W.D. La. Nov. 6, 2015).

**summary judgment on an action for a declaratory judgment,"** ultimately denying it for lack of evidence/facts.[12] Moreover, unlike *International Brotherhood*, the ELENI Defendants' own responsive filings have squarely raised Clash of Conventions issues. The other decisions are also inapposite, or *actually considered* the motions at issue as summary judgment motions.

**BACKGROUND - ELENI Defendants Forum Shopped and "Forum Shoplifted"**

The Opposition's Background section accuses the Cargo Plaintiffs of "blatant forum shopping" (p. 3) for bringing their claims before this Court, in the ELENI Defendants domiciliary jurisdiction. This is the height of irony: the ELENI Defendants have not only blatantly forum shopped themselves, but have effectively "forum shoplifted" by filing for limitation in a **completely unnatural jurisdiction**, and by engaging in other inequitable efforts to manipulate their way to lower 76 Convention limits than those of the RMI, their domicile.

United States courts have historically dispensed "that which equity and good conscience impels" under general maritime law, and have squarely relied on equity **to allow parallel proceedings viz. limitation** in transnational disputes.[13]

The Cargo Plaintiffs have consistently and forthrightly represented to this Court that they filed this suit both because the ELENI Defendants are domiciled in the RMI, and to gain access to the higher 96 Protocol limits, as "countenanced by courts [around] the world."[14]

However, the ELENI Defendants have, in less transparent and more egregious form, gone outside of their home forum, to a forum with no objective link whatsoever to the Collision, to obtain a lower limit of liability under the 76 Convention. Indeed, the ELENI Defendants previously attempted to argue (in their FNC motion) that their choice of the Hong Kong forum

[12] *Int'l Bhd. of Teamsters v. E. Conf. of Teamsters*, 160 F.R.D. 452, 456-57 (S.D.N.Y. 1995)..

[13] *See In Re Otal Investments Ltd.*, 2005 WL 1588986, *3-5 (S.D.N.Y. July 8, 2005) *aff'd sub nom. Otal Investments Ltd. v. M.V. CLARY*, 494 F.3d 40, 63 (2d Cir. 2007).

[14] John Hare, Best Admiralty Bargain, pp. 166-167 (Martin Davies, ed., 2005).

had to do with convenience of witnesses, availability of evidence, etc. *despite* the inescapable fact that **none of the witnesses or evidence is in Hong Kong** (other than the documents the ELENI Defendants *sent to their Hong Kong lawyers* after the Hong Kong suits were filed).

The ELENI Defendants have **admitted** "that the jurisdiction most closely connected with [the Collision] is Vietnam" (FNC Motion Reply Memo, p. 4). Critically, however, Vietnam *is not a signatory* to the 76 Convention; thus, even though the monetary limits in a Vietnam limitation might be the same as the 76 Convention, a Vietnamese fund would not be recognized by convention signatories, and thus would not have allowed the ELENI Defendants to argue extraterritorial limitation (as they have done **numerous times** here).[15]

Thus, the HK Limitation Suit **was admittedly not filed** in the so-called "natural" jurisdiction for determination of liability and damages for the Collision; Vietnam would have been the "natural jurisdiction." Notably, **every single decision** relied on by the ELENI Defendants for the suggestion that a first-filed limitation action should bar later-filed liability actions (*see* Opposition pp. 18-25; Davies Declaration, ¶¶19-23) reached this conclusion in part because the original limitation action **was filed in the "natural jurisdiction" of the underlying casualty.**[16] Indeed, one of these decisions (*Ship Chou San*) recognized that parallel proceedings,

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[15] The ELENI Defendants have also **incorrectly** stated that "[n]o other Asian jurisdiction, except Japan, has adopted" the 96 Protocol (FNC Motion Reply Memo, p. 5); **this is not correct** - India and Malaysia (both Asian countries) have signed the 96 Protocol. *See* http://www.imo.org/About/Conventions/StatusOf Conventions/Documents/status-x.xls (summarizing country-by-country ratification information). And as explained below, Hong Kong's legislature **adopted the 96 Protocol in 2005**, although the Chinese government did not deposit the instrument of accession to give it effect until 2015.

[16] *See, e.g., The Herceg Novi and Ming Galaxy* [1998] 2 Lloyd's Rep. 454 (Queen's Bench Division(Admiralty Court) (collision in Singapore (57 Convention signatory), limitation and liability actions first filed in Singapore, later-file arrest/liability action in United Kingdom (76 Convention signatory) with no substantive link to the casualty; British action stayed); *Evergreen International S.A. v. Volkswagen Group Singapore Pte Ltd* [2004] 2 S.L.R. 457 (Singapore High Court) (collision in Singapore, first-filed limitation and liability actions in Singapore, later-filed liability/arrest action in Belgium (76 Convention signatory) with no substantive link to casualty; Belgian action enjoined); *CMA CGM S.A. v. Ship Chou Shan* (2014) 224 F.C.R. 384 (Federal Court of Australia) (collision in China, first-filed limitation action under Chinese law (no convention) and liability/arrest in China, later-filed arrest in Australia (96 Protocol signatory); Australian action stayed).

one of which provides a juridical advantage to claimants by way of higher limitation limits, may be appropriate if safeguards are in place to prevent inconsistent liability findings: "[W]here a plaintiff had a legitimate advantage in an Australian limitation of liability regime [i.e. 96 Protocol] in enforcement of a maritime lien claim, in circumstances where the risk of inconsistent findings in parallel proceedings could be eliminated, or at least significantly ameliorated," allowing the parallel proceedings should be allowed "to vindicate rights under Australian law."[17] **This is exactly what has happened in this case**; the Court stayed proceedings until a liability determination in the HK Sistership Suit, and now Cargo Plaintiffs should have the opportunity to vindicate their rights under RMI law.

Moreover, the ELENI Defendants/Davies Declaration **completely ignore other international decisions** - including one from the Hong Kong Court of Appeal in *KAPITAN SHVETSOV*[18]- approving parallel limitation proceedings in jurisdictions with different limitation regimes when no proceeding is commenced in the "natural jurisdiction" and when the parallel proceeding allows a party to obtain the "juridical advantage" of higher limitation fund limits.[19]

Perhaps most glaringly, the ELENI Defendants have failed to bring this Court's attention to the recent ruling by the Bombay High Court in India ("Bombay Decision," which has been

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[17] 224 F.C.R. 384, ¶83.

[18] *See The KAPITAN SHVETSOV*, [1998] 1 Lloyd's Rep. 199 (Hong Kong Court of Appeal) (collision in Phraya River in Thailand between KAPITAN SHVETSOV and NANTA BHUM; owners of the latter arrested sister ship in Singapore and filed for limitation under the 57 Convention; owners of the former arrested sister ship in Hong Kong; the court allowed the Hong Kong action to proceed parallel to the Singapore actions).

[19] *Atlasnavios Navegacao, LDA v. the Ship XIN TAI HAI*, [2012] FCA 1497 (Federal Court of Australia) (collision in Straits of Malacca between B OCEANIA and XIN TAI HAI; first-filed limitation action by the XIN TAI HAI interests in China (non-convention state), as well as liability claims; B OCEANIA interests later arrested the XIN TAI HAI in Australia, a 96 Protocol state; the court allowed the Australian action to proceed given the B OCEANIA's "seek[ing] the benefit of the legitimate advantages of . . . a larger limitation fund," particularly when the XIN TAI HAI interests had faced the B OCEANIA interests with "a sword of Damocles" decision on whether to continue in the Chinese limitation or seek greater relief abroad).

favorably cited in a recent appellate decision[20]) involving the ELENI Defendants themselves and the same Collision and HK Limitation Suit at issue in this Court, in which the Indian court **allowed a parallel action in India** - a 96 Protocol state that, like the RMI, *has not* denounced the 76 Convention[21] - **to proceed on the basis that the HK Limitation was not binding in India.**[22] The Bombay Court rejected the ELENI Defendants' identical efforts to bind the Indian court and "parties world over" by the HK Limitation Suit, recognizing that the same English decisions and authorities relied on by the ELENI Defendants (i.e. *Herceg Novi*, *Western Regent*) **were not relevant** due to India's domestic enactment of the treaties.[23] Likewise, the Bombay Court adopted the reasoning *of the Hong Kong Court* in the *KAPITAN SHVETSOV* decision, as the most directly applicable authority viz. comity between India and Hong Kong.[24]

Notably, the Bombay Decision relied on several of the same factors supporting Cargo Plaintiff's Clash of Conventions Motion before this Court:

- India's domestic enactment of the 76 Convention/96 Protocol, like the RMI's enactment of those treaties in the LLMCA, varies in important respects from the actual text of those treaties. In this situation, principles of comity of nations must give way to the **stated intent of the domestic legislature.**[25]
- The Bombay Decision applied India's domestic statutes *notwithstanding* 96 Protocol Article 9.4 (requiring application of the 76 Convention as between two states who share only that convention, even if the other has acceded to the 96 Protocol without denouncing the 76 Convention) ("Overlap Clause").[26] Notably, India's enactment of the 96 Protocol, like the RMI's, **omits Article 9.4 entirely.**

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[20] *See Murmansk Shipping Co. v. Adani Power Rajasthan Ltd. (The "Yuriy Arshenevskiy")*, High Court (Admlty) (S C Gupte J) – 8 January 2016.

[21] *See* https://imo.amsa.gov.au/public/parties/ll-mc76.html. *See also* Bombay Decision, ¶19.

[22] *Hanwha Gen'l Ins. Co. Ltd. v. M.V. ELENI (IMO No. 9460277)*, Notice of Motion No. 769 of 2014 in Admiralty Suit (Lodg.) No. 329 of 2014 (Bombay High Court, Jan. 5, 2015). The Bombay Decision is attached here for the Court's ease of reference as Exhibit 1.

[23] Bombay Decision, ¶29.

[24] *Id.* at ¶¶39-46.

[25] *Id.* at ¶39.

[26] *See id.* at ¶19-20

The Bombay Court refused to dismiss the Indian liability action **based on the plain terms of India's domestic enactment of the 76 Convention/96 Protocol.**

- Specifically, India's enactment of Article 13 of the 76 Convention ("Bar to Other Actions") **omitted** the discretionary bases for barring claims filed after a limitation fund is constituted, and enacted solely the mandatory bases for barring claims **if the limitation is constituted in a specified "relevant"** (i.e. "natural") **jurisdiction.**[27] Because the HK Limitation Fund was not constituted in a "relevant" jurisdiction under India's statutes, the ELENI Defendants were not entitled to a bar against the insurers' claims under Indian law.[28]
- **The same effective result obtains in this case**, albeit on a slightly different statutory basis. The RMI Nitijela, like the Indian Parliament, has **selectively enacted** Article 13 of the 76 Convention/96 Protocol as a result of its domestic statutes implementing the 96 Protocol. Specifically, LLMCA §523 ("Bar to Other Actions," the analog to India's §352D) only allows for a bar to other actions **if "a limitation fund has been constituted in accordance with Section 521"** of the LLMCA.[29] In turn, §521 of the LLMA **mandates that "constitution" of a fund must be for 96 Protocol limits.**[30] Thus, while the India domestic enactment limits the effect of the bar to other actions depending on whether the limitation is filed in a "relevant"/natural jurisdiction, the RMI's enactment only allows for a bar to other actions **if there is a 96 Protocol fund "constituted"** (whether in the RMI or elsewhere). Because the HK Limitation Fund is *not* constituted with 96 Protocol limits, the Bombay Decision's analysis applies equally here, and the HK Limitation Suit **cannot** affect Cargo Plaintiff's claims in this Court.

- Finally, the Bombay Court expressly recognized that India's adoption of the 96 Protocol's higher limits reflects strong public policy favoring the interests of claimants in maritime casualties, particularly in situations where a shipowner resorts to an "unnatural" lower limit jurisdiction.[31]

Identically, Cargo Plaintiffs are not subject to dismissal/bar vis-à-vis the HK Limitation Suit, and are entitled to the benefit of the RMI Nitijela's public policy decision to adopt higher limits under the 96 Protocol,[32] particularly given that the ELENI Defendants have chosen to incorporate and enjoy the benefits of their domicile in the RMI.

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[27] *See id.* at ¶¶28, 30-33 (citing Merchant Shipping Act, 1958 §352).

[28] *Id.*

[29] M.I. Rev. Code Title 47, §523 (emphasis and underling added).

[30] *Id.* at §521.

[31] Bombay Decision, at ¶42.

[32] Ironically, the ELENI Defendants have previously argued to this Court in the FNC Motion that the "public policy [of the RMI] would be served" by dismissing this case in favor of the 76 Convention HK Limitation Suit.

And the ELENI Defendants' "forum shoplifting" extends beyond just improper forum shopping viz. the "unnatural" jurisdiction HK Limitation Suit to other conduct around the world.

First, the ELENI Defendants previously entered a private "side limitation agreement" ("India Agreement," existence of which they sought to withhold) with the owner of the HEUNG-A BANGKOK and HEUNG-A-DRAGON ("HAD Parties"), after the HAD Parties arrested the ELENI in India for claims arising out of the Collision. The ELENI was released pursuant to the India Agreement, which provided that the claims against the ELENI would be asserted in the HK Limitation Suit, subject to the ELENI Defendants' agreement (i) to post security totaling in excess of $60 million (ten times the value of the fund in the HK Limitation Suit); (ii) that a large portion of this security would not have to be returned even after constitution of a fund in the HK Limitation Suit; and (iii) an agreement to a "private limitation figure" well in excess of the fund in the HK Limitation Suit. Thus, the ELENI Defendants themselves clearly do not intend to be bound by the HK Limitation Suit/76 Convention in their dealings with other parties affected by the Collision. Their argument that Cargo Plaintiffs have engaged in forum shopping, and that the present action should likewise be governed by the 76 Convention, rings hollow.

Indeed, the Bombay Decision **recognized the patent inequity** of the India Agreement, which is at odds with the ELENI Defendants' apparent intent to limit in the HK Limitation Suit, and which would result in a much lower recovery for claimants like the Cargo Plaintiffs.[33]

Second, some of the Cargo Plaintiffs arrested the ELENI in South Africa, and obtained security for the balance of their claims ("South Africa Security"), with said security responsive to a judgment in the RMI "or other competent court." However, after the ELENI Defendants affirmatively consented to the terms of the South Africa Security, they (1) filed the FNC Motion

[33] Bombay Decision, ¶43.

to dismiss the RMI action and (2) at the same time attempted to remove the "or other competent court" language, such that the South African Security would be *solely* responsive to an RMI judgment, which (if they won the FNC motion) *could never be issued.* The result, had they been successful, would have been the invalidation of the security they affirmatively agreed to.

The ELENI Defendants' conduct in forum shopping/"forum shoplifting" is objectively inequitable given that (a) they have not admitted to its obvious forum shopping; (b) they filed the HK Limitation Action in a **completely unnatural forum** with no link whatsoever to the underlying casualty; (c) they themselves have surreptitiously undermined the 76 Convention and the HK Limitation Suit (which they are advocating for this Court to uphold) by entering the India Agreement; and (d) they have attempted to limit the South Africa Security to a judgment from this Court *while at the same time* urging this Court to reject jurisdiction. Moreover, as a further matter of equity, the ELENI Defendants' forum shopping (if countenanced by granting dismissal of this case) would effectively render the adoption by the RMI Nitijela of the higher limitation limits of the 96 Protocol meaningless, insofar as RMI-based shipowners could simply resort at will to commencing limitation proceedings in a lower limit jurisdiction (regardless of whether any claim had been made against them and regardless of whether there is any connection at all between the casualty and that jurisdiction), as and if it suits them. The ELENI Defendants' flouting of the RMI's public policy should not be countenanced.

## III. ELENI DEFENDANTS FIRST RAISED LIMITATION UNDER RMI LAW

The ELENI Defendants make the curious and unsupported assertion that they "do not need to raise limitation as a defense" - ignoring that they have already effectively done so - "because there is no case anymore" (Opposition, p. 9). This statement makes no sense, but presumably refers to the statement on the same page (contradicting their assertions that limitation

is not an issue at all) that Cargo Plaintiff's are bound by the HK Limitation Suit, and that all this Court need do is dismiss this case and send Cargo Plaintiffs into the Hong Kong proceedings. This, however, **is precisely what this Court refused to do** in denying the FNC Motion.[34]

## IV. THE CLASH OF CONVENTIONS IS REAL; THE 96 PROTOCOL IS RMI LAW

### A. The Clash of Conventions is Undeniable

The ELENI Defendants/Davies Declaration (¶9) assert that there is no Clash of Conventions because the 76 Convention and the 96 Protocol are *the same convention*, just with different limits. With due respect to Prof. Davies, the broader scholarship does treat this situation as a true Clash of Conventions, if not by the name coined in Prof. Hare's article.[35]

### B. RMI Owes no Treaty Obligations to Hong Kong Under 76 Convention

The ELENI Defendants and Prof. Davies *acknowledge* that the RMI is a dualist jurisdiction, but then essentially ignore the fact that the Nitijela **did not enact Article 9.4 of the 96 Protocol** into its domestic laws. Rather, they fall back on the unrelated (and incorrect) suggestion that the ELENI Defendants have never sought limitation in the RMI to suggest that the LLMCA, as the Nitijela's domestic enactment of the 96 Protocol, **does not apply**, and so (presumably) only the 96 Protocol itself (and Article 9.4) - and not any provisions of the LLMCA - are at issue before the Court. Opposition, p. 13-14; Davies Declaration ¶¶11-13.

This is wrong for two reasons. First, the premise that the ELENI Defendants have not

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[34] Notably, the only case cited for these arguments (*Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F. 3d 191 (4th Cir. 2009) is irrelevant because it was a forum non conveniens case, not a Clash of Conventions case.

[35] *See*, Nigel Meeeson, Q.C., *Jurisdictional Aspects of Limitation of Liability for Maritime Claims* in LIABILITY REGIMES IN CONTEMPORARY MARITIME LAW 301, 305 (Prof. D. Rhidian Thomas, ed., 2007) (hereinafter "Meeson") ("Not all contracting states to the [76 Convention] have accepted the [96 Protocol]. This gives rise to the possibility that a shipowner can engage in forum shopping essentially within the [76 Convention] regime by seeking to establish a fund in a [76 Convention] state which has not implemented the [96 Protocol]"); Patrick Griggs, *Limitation of Liability for Maritime Claims*: the Search for International Uniformity [1997] [LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY 369, 376 (noting *inter alia* 96 Protocol, and stating that failure of some countries to denounce earlier treaties after acceding to new ones results in lack of uniformity).

Nitijela chose to omit Article 9.4, and also positively nullified any effect of the 76 Convention.

Moreover, the ELENI Defendants (and Prof. Davies) omit a practically critical fact: Hong Kong, as a Special Administrative Region (SAR) of the Peoples' Republic of China (PRC), **actually passed its own domestic legislation *in February 2005* adopting the 96 Protocol as the law in Hong Kong**[43] (although it did not take effect until 2015, due to the administrative intricacies viz. Hong Kong's status as an SAR of the PRC). Thus, while it was not so at the outset of these proceedings, Hong Kong *is now a party* to the 96 Convention as well. Likewise, the domestic legislature of Hong Kong in 2005 adopted the 96 Protocol **"so that the liability limits [in] Hong Kong will be in line with the highest international standards"**[44] and "consistent with [the] policy objective to maintain Hong Kong's status as an international maritime centre."[45] In rough practical terms, the RMI and Hong Kong have in fact been *de facto* parties to the 96 Protocol since 2005, rendering any Article 9.4 issues moot.

### C. HK Limitation Fund is NOT Constituted under RMI Law; nor is the HK Limitation Suit Jurisdictionally Proper under RMI Law

The ELENI Defendants rely on several English law cases (Davies Declaration, ¶¶14-18) suggest the HK Limitation Suit should be deemed brought in a "court of competent maritime jurisdiction" as required by LLMCA §§502 and 521, insofar as the Hong Kong court deemed its jurisdiction over that suit proper. This, however, ignores the text of the LLMCA.

Section 524 of the LLMCA provides terms that "the rules relating to the constitution . . . of a limitation fund, and all rules of procedure in connection therewith, **shall be governed by the**

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[43] *See, e.g., Hong Kong Introduces Higher Liability Limits* (June 25, 2015), http://www.gard.no/web/updates/content/20856439/hong-kong-introduces-higher-liability-limits.

[44] http://www.legco.gov.hk/yr04-05/english/hc/papers/hc0204ls-22e.pdf (emphasis added).

[45] http://library.legco.gov.hk:1080/articles/1022971.3030/1.PDF (emphasis added).

**civil procedure law of the [RMI].**"[46] Thus, the law of the RMI will determine, in the scenario of a foreign fund (as allowed for under LLMCA §502 and 521), whether that fund is "constituted" *for purposes of RMI law and proceedings*. Cargo Plaintiffs do not challenge the Hong Kong court's own determination of jurisdiction under Hong Kong law; that is not the issue before the Court. Rather, the question is whether the HK Limitation Suit is *jurisdictionally proper* under RMI law for purposes of "constitute[ing] a fund" under the LLMCA.

And the simple answer is that it is not; the plain language of the LLMCA **precludes a preemptive limitation action** like the one the ELENI Defendants filed in Hong Kong, as Cargo Plaintiffs have already argued (*see* Clash of Conventions Motion Memo, pp. 29-33).

Likewise, the ELENI Defendants/Prof. Davies' resort to English law decisions is improper for three reasons: (1) the English law cases are at direct odds with other decisions (i.e. Bombay Decision *KAPITAN SHVETSOV*) as well as other jurisdictions and the Comite Maritime International, which *originally drafted* the 76 Convention (a point Prof. Davies does not address);[47] (2) the English law cases involve the UK's wholesale domestic enactment of the treaties, unlike the RMI's selective enactment; and (3) **all those cases** involved limitations filed in "natural" jurisdictions, not forum-shopped actions like the HK Limitation Suit.

**D. *Perforaciones* and other U.S. Jurisprudence support Cargo Plaintiffs' Position**

The ELENI Defendants suggest that *Perforaciones* supports them based on the United States' non-party status to the 76 Convention. As explained again above, however, the Nitijela's domestic enactment of the 96 Protocol is a *de facto* denunciation of the 76 Convention that renders the 76 Convention inapplicable in the RMI. *Perforaciones* is **precisely** analogous.

[46] M.I. Rev. Code Title 47, §524

[47] *See* Clash of Conventions Motion Memo, pp. 31-33.

Moreover, the U.S. general maritime law has long recognized (as far back as the TITANIC)[48] that foreign limitation **cannot** have extra-territorial effect (absent shared treaty obligations, of which there are none here).[49] And *Perforaciones* is not the only decision under United States general maritime law to hold in this regard. The federal district court for the Southern District of New York in *In Re Otal Investments, Ltd*, as later affirmed by the Second Circuit Court of Appeals, allowed concurrent, parallel limitation proceedings - with a foreign fund as well as separate and parallel domestic security - based on the non-extraterritorial effect of a foreign limitation fund.[50] The same result should apply here.

**E. All ELENI Defendants' English Cases are Irrelevant and Inapposite**

As previously discussed, all of the ELENI Defendants' cases at pp. 18-25 of the Opposition (Davies' Declaration ¶¶19-23) are irrelevant/distinguishable English law decisions. Further, the jurisprudence/authorities cited by Cargo Plaintiffs' contradict these cases. There is no "recent international trend" (Opposition, p. 25) to defer wholesale to first-filed limitations.

Finally, ELENI Defendants' incorrectly suggest that a parallel limitation fund in the RMI would somehow result in Cargo Plaintiffs not "sharing rateably with others" in the HK Limitation Suit. ELENI Defendants would retain their right to subrogate against an RMI 96 Protocol fund, on a ratable basis,[51] to the extent of claims paid in the HK Limitation Suit. Again, given that the ELENI Defendants have already unilaterally undermined the 76 Convention via the India Agreement, this result would be eminently equitable.

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[48] *THE TITANIC*, 233 U.S. 718, 34 S.Ct. 754, 58 L.Ed. 1171 (1914).

[49] *Perforaciones*, 356 F. App'x at 681(emphasis added).

[50] 2005 WL 1588986 (S.D.N.Y. July 8, 2005) *aff'd* 494 F.3d 40 (2007).

[51] *See* LLMCA §522 ("the fund shall be distributed among the claimants in proportion to their established claims against the fund"). Thus, any subrogation claims the ELENI Defendants take into a 96 Protocol fund in the RMI will not result in a 1:1 recovery, but rather a ratable recovery viz. the higher 96 Protocol limits.

April 22, 2016 (Majuro Date)

Dennis Reeder Date
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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ADMIRALTY AND VICE ADMIRALTY JURISDICTION**

**NOTICE OF MOTION NO. 769 OF 2014**
**IN**
**ADMIRALTY SUIT (LODG.) NO. 329 OF 2014**

m.v. "ELENI" (IMO No.9460277) .. Applicant
(Orig. Defendant)

**IN THE MATTER BETWEEN :**

Hanwha General Insurance Co. Ltd. .. Plaintiff
Vs.
m.v. "ELENI" (IMO No.9460277) .. Defendant

Mr.Prashant Pratap, senior advocate a/w. Mr.A.Sinha i/b Harsh Pratap, advocate for applicant.

Mr.Ravi Kadam, senior advocate a/w. Mr.Rahul Narichania, senior advocate i/b DSK Legal for defendant.

**CORAM : K.R.SHRIRAM, J.**

**DATED : 5th JANUARY, 2015**

**P.C.**

1 This notice of motion is taken out on behalf of the defendant for dismissal of the suit in view of the order and decree passed by the High Court of Hong Kong and, in the alternative, return the suit to the plaintiff to be presented in the Hong Kong High Court and, in the further alternative, stay the suit *sine die* and return the security furnished by the defendant.



EXHIBIT 1



Bombay High Court

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2 This action arises out of a collision on 7th November 2013 between two ships, m.v. Heung-A Dragon and m.v. Eleni, the first defendant vessel, in or near the channel off the Vietnamese port of Phu My.

The plaintiff is claiming against the defendant vessel a sum of US$ 787,343.94 together with interest at 12% per annum from the date of the suit until payment/realization. The plaintiff is a Korea based Insurance Company who stands as subrogated insurers of five parties whose cargo was onboard the vessel m.v. Heung- A Dragon. The plaintiff claim to have settled the claim of the insured. It is the case of the plaintiff that the collision happened due to the negligence on the part of the first defendant vessel and in the collision the containers carrying the cargo that was insured by the plaintiff, which were onboard m.v. Heung-A Dragon fell overboard and were lost or got flooded and therefore the cargo was a total loss.

3 On 13th November 2013, the owners of the defendant vessel filed an admiralty action No.HCAJ 188/2013 in the High Court of Hong Kong and obtained an order of arrest of m.v. Heung-A Bangkok the sister ship of m.v. Heung-A Dragon. Pursuant to the order of arrest m.v. Heung-A Bangkok was arrested on 13th November 2013. On the same date, the owners of the defendant vessel initiated another admiralty action namely HCAJ No.189/ 2013 in Hong Kong High Court to limit liability arising out of the incident



Bombay High Court

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of collision. Limitation of liability is very peculiar to maritime industry. A shipowner in a situation like in the present case, where due to collision he can expect various claims, can limit his liability based on the tonnage of the ship and set up a fund called limitation fund. All claimants have to go against the fund. Many countries including India has recognised this and are signatories to or have ratified or have accepted the instruments concluded in the conventions on limitation of liability for maritime claims. India has, infact included it in its domestic law Merchant Shipping Act, 1958, as amended, not the entire provisions of one such convention as explained later, but most of it.

4 On 19th November 2013, the owners of m.v. Heung-A Dragon provided security to secure release of m.v. Heung-A Bangkok. On 25th November 2013, the limitation action namely HCAJ No.189/2013 was amended to include three cargo interests, who are also based in Hong Kong.

5 On 2nd December 2013, the Hong Kong Solicitors of the owners of the defendant vessel addressed an e-mail to the plaintiff's Hong Kong Solicitors informing them that the defendant has commenced limitation action in Hong Kong namely HCAJ No.189/2013 and that some of the cargo interests have



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been served and very soon the owners of the defendant vessel would be setting up a limitation fund. The plaintiff's Hong Kong advocates replied querying what did Hong Kong have to do with the case. In reply, the plaintiff's Hong Kong lawyers were informed that m.v. Heung-A Bangkok was arrested by the defendant at Hong Kong and that security has been furnished for her release and that m.v. Heung-A Dragon had called in Hong Kong before proceeding to Vietnam. I am not delving much into the motive of the owners of defendant vessel filing the limitation action in Hong Kong. Suffice to say there was no bar against doing so, they had the liberty to do so and the Hong Kong Court has exercised jurisdiction. No further details are available as to what transpired after December, 2013, but on 9th April 2014, the present admiralty suit was filed by the plaintiff.

6 A caveat against arrest of the defendant vessel under Rule 929 of the High Court (O.S.), Rules had been filed by owners of defendant vessel undertaking to put up security upto US$ 12 million. Therefore, upon notice, the owners of the defendant vessel furnished security by way of bank guarantee in the sum of US$ 787,343.94 together with interest at the rate of 12% per annum on the said sum (claim in this suit) for release of the defendant vessel.



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On 14th May 2014, the Hong Kong High Court by consent of all parties decreed the limitation action and directed all claimants to file their claims on or before 28th November 2014. This deadline, the counsel for the defendant said has been extended. On 19th May 2014, public notices were issued in three papers including Loyd's list in London and on 21st May 2014 the owners of the defendant vessel deposited HK$ 48,929,241.96 to create the limitation fund. Having established the limitation fund, the owners of the defendant vessel have taken out the present notice of motion. Henceforth, for brevity, the owners of the defendant vessel is referred to as defendant. It is the case of the defendant that the limitation fund having been created, all parties world over, who have claim against the defendant vessel should go and claim against the limitation fund and therefore, the reliefs as sought in this notice of motion ought to be granted.

7 It is the case of the defendant that the limitation action was commenced in Hong Kong because (a) the defendant arrested m.v. Heung-A Bangkok, the sister vessel of m.v. Heung-A Dragon, for claims in direct connection to the collision; (b) m.v. Heung-A Dragon had called in Hong Kong before she collided with the defendant vessel; (c) three of the cargo interest onboard m.v. Heung-A Dragon (who stand on the same footing as the plaintiff herein) are based in Hong Kong and there were prospects of



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claims being brought in that jurisdiction. Hence, the defendant was justified in invoking the jurisdiction of Hong Kong High Court and constituting the funds therein.

8 It is the defendant's case that the funds having already been set up in Hong Kong, in accordance with Article 11 of the Convention on Limitation of Liability for Maritime Claims, 1976 (for brevity 1976 Convention), this Court should direct return of security and further direct the plaintiff to go and stake its claim against the fund. The defendant also submits that the Hong Kong Court has jurisdiction and that is why it exercised its jurisdiction and permitted the defendant to constitute the limitation fund and as provided in the case of the ***Seismic Shipping INC and Anr. Vs. Total E & P UK PLC (The "Western Regent")***[1] there is nothing in the 1976 Convention which restricts an action for limitation to an action in which there already exits a claim against the shipowners in the same jurisdiction. The defendant is emphasizing on this because when the defendant filed the limitation action invoking limitation of liability, there was no claim or legal proceedings instituted in Hong Kong High Court against the defendant for claims which will be subject to limitation.

1 (2005) Vol.2 Lloyd's Law Reports 359



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9 The defendant also relied on extracts from the Book on Limitation of Liability for Maritime Claims by Patrick Griggs and Others (2005-4th Edition) and Modern Maritime Law and Risk Management by Aleka Mandaraka Sheppard (2009-2nd Edition) to buttress the point that there was nothing in the language of the 1976 Convention which required the person seeking to limit to wait until a claimant brought proceeding in England. Relying on these extracts it was submitted that it is quite common that the person seeking to limit to start limitation proceedings in a jurisdiction of his choice before the liability action is brought and English Courts do not have any difficulty in permitting limitation actions to be brought in a different forum from that of the liability action.

10 In this regard, the defendant also relied on another English Court judgment in the matter of ***Caspian Basin Specialised Emergency Salvage Administration & Anr. Vs. Bouygues Offshore S.A. & Ors. (No.4.)***[2], in which the Court held that the choice of the forum for a limitation action belongs in principle to the party seeking to limit, not to the claimant.

> ".....There can be nothing surprising or inappropriate about a limitation action being commenced in the same forum as a claimant action to establish liability; but equally thee is nothing unusual about a limitation action taking place in a different forum from that in which liability is being litigated. Moreover, the choice of forum for a

2 (1997) Vol.2, Lloyd's Law Reports 507



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> limitation action belongs in principle to the party seeking to limit, not to the claimant. It has been established that it would be wrong in principle for a claimant seek to usurp a shipowner's choice of forum for this limitation action by seeking a negative declaration in the liability action to the effect that the shipowner was not entitled to limit."
>
> (emphasis supplied)

Therefore, I agree that it is rather clear, under 1976 Convention, it is possible and there is nothing wrong to file a free standing limitation action in a forum where no claim has been filed. Moreover, the Hong Kong High Court has permitted that and exercised jurisdiction by permitting the defendant to set up the limitation fund. In India the position would be different. As explained later, such a free standing action cannot be filed and limitation of liability can be invoked only in the event legal proceedings are instituted in respect of claims subject to limitation.

11 Having come to this conclusion, as to why there was nothing wrong in setting up a limitation fund in Hong Kong High Court and the defendant having set up the limitation fund, the next point which requires to be considered is should this Court stay the proceedings, return the security and direct the plaintiff to go to Hong Kong.



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12 Let us now consider the provisions of 1976 Convention. Convention on Limitation of Liability for Maritime Claims, 1976 (for the sake of brevity hereinafter referred as '1976 Convention') came into force on 1st December 1986 and United Kingdom of Great Britain and Northern Island was a signatory to the same with a declaration of applications to Hong Kong. Therefore, the 1976 Convention is applicable to Hong Kong.

Article 1 (1) of the 1976 Convention provides that *ship owners and salvors may limit their liability in accordance with the Rules of Convention for claims set out in Article 2.* Article 1(2) provides the term *'ship owner' means the owner, charterer, manager and operator of a seagoing ship*. Article 1(4) provides if any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner is responsible, such person shall be entitled to avail himself of the limitation of liability provided in this Convention and Article 1(5) provides the liability of a shipowner shall include liability in an action brought against the vessel herself. Article 1(7) provides the act invoking limitation of liability shall not constitute an admission of liability.

Under Article 2 it is provided that subject to Articles 3 and 4, the claims mentioned therein whatever the basis of liability may be, shall be subject to limitation of liability. Article 2(1)(a) provides for claims in respect of loss of life or personal injury or loss of or damage to



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property.....occurring onboard or in direct connection with the operation of the ship..... and consequential loss resulting therefrom.

Article 3 provides which are the claims excepted from limitation and Article 4 provides a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Article 6 provides for the limits of liability or in other words quantum of limitation fund to be constituted.

Article 9 provides that the limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion against the persons mentioned in the said article.

Articles 10, 11, 12, 13 and 14 which are directly relevant for this motion are reproduced herein below :

> **Article 10 : Limitation of liability without constitution of a limitation fund --**
>
> 1 Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. However, a State Party may provide in its national law that, where an action is brought in its Courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or



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is constituted when the right to limit liability is invoked.

2 If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.

3 Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

CHAPTER III: THE LIMITATION FUND

**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.

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**Article 12 - Distribution of the fund :**

1 Subject to the provisions of paragraphs 1, 2 and 3 of Article 6 and of Article 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

2 If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

3 The right of subrogation provided for in paragraph 2 may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

4 Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs 2 and 3 had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

**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 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,



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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 connexion therewith, shall be governed by the law of the State Party in which the fund is constituted."

13 Article 13 of the 1976 Convention is relevant to the issue raised in paragraph 11 above, whether this Court should stay the proceedings and direct the plaintiff to go to Hong Kong.

Article 13 is in two parts. In the book on Limitation of liability for Maritime Claims by Patrick Griggs and others referred above at page 77, the



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author has written as under :

"Article 13(2) is effectively in two parts :

(1) the factors which must be satisfied before the court can act to release a vessel or property which has been arrested in its jurisdiction. These factors are :

(a) A limitation fund must have been established, by or on behalf of the person to whom the ship or property arrested belongs, in a State Party in which legal proceedings have been instituted in respect of the claims in question. (This State Party does not have to be the same State Party as that in whose territory the ship or property has been arrested.)

(b) The vessel or property must have been arrested or attached for a claim which may be made against the limitation fund which has been established. Therefore, the governing factor is the nature of the claim and it is not a requirement that the claim *has actually been made* against the limitation fund.

(2) Once it is established that the court can act to release a vessel or property which has been arrested, the court has to determine whether circumstances exist in which it is *obliged* to release or whether the circumstances are such that it has a *discretion* whether to release :

(a) The court *must* release the vessel or property if the limitation fund has been constituted :
(i) at the place where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
(ii) at the port of disembarkation in respect of claims for loss of life or personal injury ; or
(iii) at the port of discharge in respect of damage to cargo; or
(iv) in the State where the arrest is made.
(b) The court has a *discretion* whether to release



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> the vessel or property in circumstances other than these set out in (a).

14 In what circumstances should the Court exercise its discretion in favour of the shipowners, is discussed by the English Court of Appeal in the matter of ***Herceg Novi (owners) Vs. Ming Galaxy (owners)***[3] relied upon by the defendant. In the said judgment, the Court reached the following conclusion :

> "We have to say that we agree with Waung J and with Liu JA, rather than with the majority of the Court of Appeal inHong Kong and the English judges at first instance. We reach that decision for three reasons :
>
> (1) The 1976 convention has not received universal acceptance, or anything like it. It is not 'an internationally sanctioned and objective view of where substantial justice is now viewed as lying'. It is simply the view of some 30 states.
>
> (2) The International Maritime Organisation is not a legislature. It may commend the 1976 convention to the international community. But if by doing so it were found to have enacted an international consensus, that would be to deprive sovereign states to a large extent of their right to stay with some other regime. We say that because jurisdiction could often be obtained by arresting a ship in a 1976 country, and if that action were allowed to proceed despite there being a more appropriate forum where 1957 prevailed, the 1957 country would be left with no effective use for its own law.
>
> (3) In our view, it is quite impossible to say that substantial justice is not available in Singapore, seeing

3 (1998) 2 Lloyd's Rep.454 Court of Appeal (Civil Division)



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> that there is a significant body of agreement among civilised nations with the law as it is there administered. The preference for the 1976 convention has no greater justification than for the 1957 regime. Loss in the cases we are considering will often be borne by the insurers of one side or the other. The 1976 convention provides a greater degree of certainty, which they, will perhaps welcome. But in terms of abstract justice, neither convention is objectively more just than the other. Our task is not to decide whether out law is better than the law of Singapore. It is to decide whether substantial justice will be done in Singapore. In our view it will be. This appeal should be allowed, and an unconditional stay of the English action granted."

Therefore, the Court stayed the proceedings of the claimants in England and directed them to seek against the limitation fund set up by the owners in Singapore where the Convention Relating to the Limitation of Owners of Seagoing Ships of 1957 (1957 Convention) prevailed, even though under 1957 Convention, the limitation amount to be constituted is less than the amount to be constituted under the 1976 Convention. Relying on this, the defendant stated that even though under the 1996 Protocol, which is applicable in India, the amount of limitation fund is higher than the limitation amount set up in Hong Kong under 1976 Convention, this Court should follow what the English Court of Appeal has said and direct the plaintiff to go to Hong Kong and seek its claim against the limitation fund by staying these proceedings.



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15 With due respect to the English Court, everybody knows substantial justice will be done in Singapore. For that matter in all Courts. But I cannot accept one of the reasons which has prevailed strongly for the English Court to arrive at their conclusion is "Loss in the cases we are considering will often be borne by the insurers of one side or the other...". In my view even if the insurance companies are going to bear the loss, even they are entitled to be protected and in this case, the plaintiff was the Insurer of five of the cargo that was carried on board m.v. Heung-A Dragon. Are they not entitled to compensation to the best possible extent? Though the limitation action was filed in Hong Kong prior in point of time to the suit filed in this Court that we are deciding, the limitation fund itself was set up after the present suit was filed and security was furnished in this Court.

16 The basic reason why various States recognised the desirability of determining certain uniform rules relating to the limitation of liability for maritime claim is because almost in all situation, the cargo interest may commence action in different forums in different States and the shipowner will have to go on furnishing security and defend the actions in each forum. That is how the 1957 convention came into being under which the shipowners could limit liability to the extent mentioned therein provided the owner was able to prove that the action for which the claim arose, did not



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arise due to any actual fact or privity on the part of the owner. There were various matters later which raised further complications and therefore 1976 convention was concluded whereby the person entitled to limit liability was extended to include salvors rendering services in direct connection with salvage operations and the term 'shipowner' included the owner, charter, manager and operator of a seagoing ship. The limits were enhanced under the 1976 convention but the onus was shifted from the person entitled to limit his liability to the party opposing constitution of limitation fund.

17 Article 4 of the 1976 convention provides a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Therefore, the person entitled to limit liability would always limit liability unless it is proved against him that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This is a very difficult fact to prove and therefore, under the 1976 Convention generally a shipowner should be able to always limit his liability. That is why the amount of fund was enhanced as against 1957 Convention.



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The 1976 Convention was amended by the Protocol of 1996 to which India is also a signatory. There is not much difference between the 1976 Convention and 1996 Protocol. One notable difference is the limits of liability under Article 6 has been enhanced substantially. It is for that reason, the plaintiff is saying that the defendant went to Hong Kong even though Hong Kong had nothing to do with the collision or had no connection with the collision and set up limitation fund so that they could pay lesser amount than in India.

18 The counsel for the defendant stated that the defendant had already filed HCAJ No.188/2013 against Heung-A Dragon in Hong Kong by arresting the sister ship of Heung-A Dragon in which evidence will be recorded and same evidence will be available even for the benefit of HCAJ No.189/2013. Therefore, Hong Kong is a convenient forum and as concluded by the English Court of Appeal in the ***Herceg Novi*** case (supra), this Court also should stay this suit and direct the plaintiff to go to Hong Kong even if the limitation amount is less because in the Hong Kong High Court substantial justice will be done to the parties. They also submitted that some of the cargo claimants who are defendants in the Hong Kong proceedings HCAJ No.189/2013 have consented to setting up the limitation fund.



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19 Counsel for the defendant further submitted that the stand of the plaintiff that the defendant has set up limitation fund under the 1976 Convention deliberately is also not correct. Counsel submitted that the 1996 Protocol which the plaintiff stated is applicable in India is not much at variance with the 1976 Convention except the quantum of limitation fund to be established. According to counsel, 1976 Convention is still applicable to India read with 1996 Protocol because as recently as October 2014, India has not denounced the 1976 Convention.

20 As regards the contention of the plaintiff that the defendant cannot seek the reliefs as sought as there is a mismatch between the funds to be constituted under the 1976 Convention and the 1996 Protocol, the counsel for the defendant relied upon a passage from the book on Liability Regimes in Contemporary Maritime Law edited by Prof. D. Rhidian Thomas (2007 edition), where, the author has, at page 306, para 16.22, commented as under :

> "....
> Any limitation fund established in a 1976 State will not be in the amount required by the 1996 Protocol and therefore on an ordinary reading of the amended version of Schedule 7 to the 1995 Act will not be a fund constituted in accordance with Article 11. Accordingly, because such a fund is not a fund constituted in accordance with Article 11, then the English Court is not obliged to stay under the mandatory provisions of



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Article 13.2 nor is the discretionary power under Article 13.2 applicable."

The counsel for defendant also submitted that India not having denounced the 1976 Convention and India was a signatory to the 1976 Convention and is also a signatory to the 1996 Protocol, reading Article 9(4) of the 1996 Protocol, read with the passage mentioned above, the Court should exercise the discretion in favour of the defendant.

21 As regards, the plaintiff's contention that there are suits filed by various claimants in Marshall Islands where the defendant vessel is registered which are pending and therefore, this suit also should be proceeded with, the counsel for the defendant submitted that pursuant to an order dated 22nd October 2014, the proceedings in the Marshall Islands have been stayed until 22nd April, 2015 or until the Hong Kong Court decides on the liability in HCAJ No.188/2013 whichever occurs first. Counsel, however, was also not able to state with certainty as to whether the defendant has furnished any security in Marshall Islands or not because the order dated 22nd October 2014 is silent in that regard.



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22 Submissions were also made on the applicability of Part XA of the Merchant Shipping Act, 1958 (MS Act) to this suit. The plaintiff's counsel contended that it was applicable, whereas the defendant's counsel submitted that it is not applicable because it contemplates only a fund constituted in India. I have dealt with this later.

23 According to the counsel for the defendant, the only thing which needs to be looked into is 1976 Convention. Counsel concluded by saying that this Court should exercise its discretion in favour of the defendant and must grant reliefs as sought. He also relied on the judgment of the Apex Court in ***O. Konavalov Vs. Commander, Coast Guard Region & Ors.***[4] to say that the comity of nations is a reciprocal courtesy which one member of the family of nations owes to the others and requires that one Court should respect the other.

24 Mr.Kadam, counsel for the defendant relied upon a judgment of House of Lords in the matter of ***Spiliada Maritime Corporation Vs. Cansulex Ltd. (The "Spiliada")***[5] to submit that if the Court is satisfied that there is another forum which is *prima-facie* the appropriate forum for trial of the action then it will ordinarily not refuse stay unless there are

4 (2006) 4 SCC 620
5 (1987) Vol.1 Lloyd's Law Reports 11



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circumstances by reason of which justice requires that a stay should not nevertheless be granted. One such factor can be established cogent evidence that the plaintiff will obtain justice in the foreign jurisdiction.

25 Mr. Kadam also submitted that the key to the issue that has to be considered is what is in the best interest of all the parties and meets the ends of justice. He also submitted that an advantage to the plaintiff will ordinarily give rise to a disadvantage to the defendant. The advantage could be that damages awarded may be on a higher scale or a more complete procedure of discovery or a power to award interest or a more generous limitation period. He submitted that as general view, relying upon the ***Spiliada*** (supra), the Court should not be deterred from granting a stay of proceedings simply because the plaintiff will be deprived of such an advantage, provided that the Court is satisfied that substantial justice will be done in the appropriate forum overseas.

26 It is the plaintiff's case that the collision happened due to the fault of the defendant vessel. Mr. Pratap, counsel for the plaintiff also submitted that under the MS Act or the 1996 Protocol, the limitation fund will be about US$ 6.2 million. At the same time, in the action that was filed in Gujarat High Court against the defendant vessel by the owners of Heung-A Dragon,



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the defendant has given security to the owners of Heung-A Dragon in a sum in excess of US$ 40 million as against the limitation fund. He states that if the defendant has limited liability, then where was the need to furnish security in excess of US$ 40 million. Therefore, they had a special arrangement and because of this special arrangement, the owners of Heung-A Dragon who are the first defendant in HCAJ/189/2013 consented for the decree passed by the Hong Kong Court to set up limitation fund. He submitted that therefore the Court should not pay much importance to a consent decree obtained in this fashion. In response, the counsel for the defendant submitted that the plaintiff in that case was a shipowner whereas the plaintiff herein is the cargo interest and hence the plaintiff herein cannot expect to be treated on the same footing as a shipowner. The whole thing according to him is a matter of negotiation. I cannot accept this submission of the plaintiff's counsel. I see no reason why the plaintiff should be discriminated against, just because they are cargo interests and not shipowners.

27 Mr. Pratap, counsel for the plaintiff also submitted that even though the defendant had filed the limitation action HCAJ/189/2013 in Hong Kong in November, 2013, still the defendant was expecting many claims in India and therefore, on 7th April 2014, the defendant filed a caveat against arrest in



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Bombay agreeing to furnish security upto sum of Rs.74 crores equivalent about US$ 12 million. The defendant vessel arrived on 9th April 2014 and later after one or two extensions, the defendant furnished security in the sum of US$ 787,343.94 with 12% p.a. interest which is the claim amount in the suit. On that day, the fund had not been set up in Hong Kong. The fund was set up only on 14th May 2014. The counsel for the plaintiff further submitted that as defendant had filed caveat to secure upto about US$ 12 million and the plaintiff's claim is only about US$ 787,343.94, they were expecting many more applications for arrest and that is why the caveat was to secure upto US$ 12 million.

He submitted that after setting up the funds on 14th May 2014, the defendant took out the present notice of motion and requested the Court to pass an order deferring the need to file the written statement and therefore, the stand of the defendant that the present suit has not progressed much is not correct because otherwise, the defendant would have had to file the written statement and issues would have been framed within a month and by now affidavits in evidence could have been filed. He submitted that the submission of the defendant that the Hong Kong proceedings have moved far and this suit has not progressed at all is not correct.



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28 On the point as to MS Act is applicable or not, it has to be noted that India although has signed the 1976 Convention and the 1996 Protocol, the entire Convention has not been enacted as a part of domestic law. Part XA of the MS Act sets out provisions pertaining to limitation of liability. Only some of the provisions of the Convention as amended have been incorporated into the MS Act. This shows the Parliament did not want to include those provisions of the Convention which are not incorporated in Part XA of the MS Act. Notable among the exceptions are the following:

> a) The Article 4 of the Convention which refers to conduct barring limitation, or breaking limitation as is more commonly understood.
>
> b) The free-standing right to limit liability set out in Article X of the Convention. Thus limitation of liability can only be invoked in the event legal proceedings are instituted in respect of claims subject to limitation as provided in Section 352C (1).
>
> c) Article 13 of the Convention has not been incorporated into the domestic legislation in its entirety. Only the second part of Article 13(2) [the mandatory provisions] and Article 13(3) is incorporated with some changes.

29 The English Merchant Shipping Act 1995 sets out the 1976 Convention in Schedule 7 and the Convention has been adopted in its entirety as a part of the English Merchant Shipping Act. This is not the position under Indian law. Consequently the English decisions and commentaries on Article 10 and Article 13 are not really relevant.



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30 Section 352 E of the Merchant Shipping Act, 1958 provides for the scope of application of Part X-A. It provides, *interalia*, that

> *"The provisions of Part X-A shall apply whenever any person referred to in sub section (1) of Section 352A seeks to limit his liability before the Court or seeks to procure the release of a ship or other property or the discharge of any guarantee given within the Indian jurisdiction".*

The defendant is the ship-owner as referred to in sub section (1) of Section 352A and is seeking discharge of a bank guarantee provided by it in this Court. Consequently the defendant is covered by Section 352E. Part X-A of MS Act, therefore, would apply in this case. For the purpose of seeking discharge of the bank guarantee, the defendant is required to make an application under Part XA and is entitled to the discharge of the guarantee only in the event the defendant is able to satisfy the requirements of Part XA and not otherwise.

31 It is the defendant's case that they have set up a Limitation Fund in Hong Kong and deposited the fund amount in the Hong Kong High Court. Where a Limitation Fund has been set up, under the MS Act, a party can seek release of security only if the party satisfies the provision of Section 352D(6). The provisions of Section 352D(1), (2) and (3) do not apply.



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32 In my view, the defendant does not satisfy the requirements of Section 352D(6) because the Limitation Fund has been constituted in Hong Kong which is not the port as identified in Section 352D(6). Consequently the other requirements of Section 352D(7) are not required to be considered because the threshold compliance with Section 352D(6) is not met. It is, however, the case of the plaintiff that they have not brought any claim against the fund before the Court administering the Fund and neither is the fund actually available and freely transferable.

33 Section 352D (6) and (7) are a clear departure from Article 13(2) of the 1976 Convention. The discretion given to the Court for release of security under the first part of Article 13(2) is not incorporated in Part XA of the MS Act. Only the latter half of Article 13(2) which provides for a mandatory release of security has been incorporated with a slight modification. The intention of the legislature is clear. There will be a release of security only if the mandatory provisions of Section 352D(6) are complied with and not otherwise.

34 The High Court referred to in Section 352D(7) is the "High Court administering the Fund". In the present case, the High Court which is administering the Fund is the Hong Kong High Court. The definition of



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High Court in Section 3(15) of the Merchant Shipping Act is not applicable because Section 3(15) refers to the High Court in relation to a vessel. The High Court in relation to a vessel may not be the High Court administering the Fund because a Fund can be set up in any relevant port. Likewise, the definition of "High Court" in the General Clauses Act as submitted by the counsel for the defendant is also not relevant because the High Court is expressly identified in Section 352 D(7) of the MS Act as the High Court administering the Fund. Which is the High Court administering the fund is a question of fact in each case and is not confined to the High Court in relation to a vessel.

35 The submission of the defendant that Section 352D(6) and (7) apply only in the event a Limitation Fund is set up in a High Court in India is not correct. In the event a Limitation Fund is set up in India then the provisions of Section 352C apply such that after the Fund is constituted no person entitled to claim against the Fund shall be entitled to exercise any right against any other assets of the ship-owner. Thus, if the defendant had set up a Limitation Fund in a High Court in India, the defendant would then be able to seek an order setting aside the arrest and for return of security under the provisions of Section 352C(3). However, if a Limitation Fund is set up in a Court other than a Court in India, then the provisions of Section



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352D(6) apply.

36 Furthermore, if the defendant's submission that the MS Act applies only if the Fund is constituted in India, is to be accepted, then the effect will be that there is no provision under Part XA which provides for return of the bank guarantee if the Fund has been constituted outside India. That can never be the intention because Part XA in Section 352D(3) also permits release of security if prior security is given in India or elsewhere. Likewise it permits release of security if a Limitation Fund is set up in a port as identified in Section 352D(6), provided the requirements of Section 352D(7) are met. Therefore the intention is to permit release of security in certain circumstances if prior security is given outside India, in a relevant port, in a convention country or a Fund is constituted in the relevant port wherever it is situated and is freely available.

37 Once it is clear that MS Act permits release of security only in a certain situation and not otherwise, it is equally clear that if the requirements of MS Act are not complied with, then the defendant is not entitled to return of security. This is the public policy of India and a public policy, as held by the Apex Court in ***VO Tractoroexport v/s. Tarapore and***



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***Company***[6] must prevail over any provisions of the Convention which are not a part of domestic law and any principle of comity of nations or international law.

38 The problem of Renvoi in conflict of laws suggests the predicament of the domestic courts in deciding matters relating to the comity of nation. A question arises as to whether international law would apply with the aid of the domestic law and if yes, then what is the extent with which it would apply.

39 The comity of nations requires the rules of international law may be accommodated in the municipal law to the extent they do not run in conflict with the internal laws. While applying international law, the sovereignty and supremacy of the powers of the legislature to also be kept in mind. Thus comity of nations or no, when there is a conflict, the internal law of the land will prevail.

40 Article 51 of the Constitution of India directs that the state shall endeavor to foster respect for international law and treaty obligations. Indian Courts have also given positive response to developments in

6 1969 (3) SCC 562



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international law as manifested through their judgments in several areas.

41 The Apex Court in ***Gramaphone Company Limited vs. Birendra Bahadur Pandey***[7] has held that "nations must match with the international community and the municipal laws must respect the rules of international law even as nations respect international opinion. The Court suggested a harmony be brought between the two. However in case of conflict, the municipal law would prevail.

42 On the submissions of the defendant that Hong Kong is a convenient forum as stated in paragraph 19 above, Mr. Pratap submitted that even if the test of forum non convenience is to be applied, then if all witnesses could go to Hong Kong which is not a natural forum, they could also come to India. Natural forum is a place where the collision took place or if the collision happened in mid-sea, the next port of call of the vessel. He further submitted that in any event, the judgment of the Hong Kong Court of Appeal in the matter of ***m.v. Kapitan Shvetsov***[8] is a complete answer on this point. Application of the Hong Kong judgment and the principles set out therein would be consistent with the principle of comity of courts and this Hon'ble Court should be applying the same test as applied by the Hong

7 (1984) 2 SCC 534
8 (1998) 1 LLR 199



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Kong Court of Appeal. English decisions are not relevant because it is comity between India and Hong Kong that is required to be considered and not India and England.

Mr. Pratap further submitted that apart from the fact that Hong Kong is not the natural forum and not a more appropriate forum than India, the plaintiff will suffer a tremendous juridical disadvantage if they are required to litigate in Hong Kong where the Limit of Liability is substantially lower than in India. In fact Indian Public policy is reflected in Part XA of the MS Act which applies the higher 1999 Protocol limits and a plaintiff who has invoked the jurisdiction of this Hon'ble Court as of right ought not to be denied the benefit of the higher limit that Indian Public Policy provides. Consequently irreparable loss, harm and prejudice will be caused to the plaintiff which far outweighs any advantage to the defendant in terms of convenience, if any.

43 What is to be really looked into is whether the plaintiff will be at a great disadvantage and a great injustice will be caused to them or not. Defendant has given security for US$ 40 million in the Gujarat proceedings to secure the claim of the owners of m.v. Heung-A Dragon when the limitation of liability in India would have been only US$ 6.2 million and a limitation fund has already been set up in Hong Kong. No acceptable



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explanation for this also came forth from the defendant. Therefore, it does appear that there was a special arrangement between the defendant and owners of Heung-A Dragon. Should they decide to settle the liability action in Hong Kong, viz., HCAJ 188/2013 and apportion the liability and settle the matter at 50% - 50% or 30% fault against defendant vessel and 70% against Heung-A Dragon the amount that the plaintiff herein will recover, would be limited to so much less than the sum they may recover in this country. The difference in limitation fund between India and Hong Kong is 1:2.4. This means if in Hong Kong the fund to be set up is US$ 1 in India it will be US$ 2.4 under the MS Act, 1958.

44 The Hong Kong Court of Appeal in the matter of ***Kapitan Shvetsov*** (supra) relied upon by plaintiff, did not stay the action even though the proceedings in Singapore arising out of the same collision had progressed substantially. In this case, there was collision between Russian Ship, Kapitan Shvetsov owned by the plaintiff and the defendant Singaporean Ship Nanta Bhum in the channel of Chao Phraya river in Thailand. Neither of the shipowners wanted proceedings in Bangkok. The defendant brought an action *in rem* in the Singapore Court claiming damages against the owners of Russian Ship, who commenced action in Hong Kong against the owners of Singapore ship claiming damages. The Russian owners applied



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for a stay of the Singaporean action but their application was not granted. The Singaporean owners reciprocated by applying to stay the Hong Kong action in favour of Singapore. The 1957 Convention applied in Singapore which provided for setting up a lesser fund compared to 1976 Convention which was applicable in Hong Kong.

45 The Hong Kong Court of Appeal proceeded on the basis that both the parties have not filed action in the natural forum which in that case would have been Bangkok. Each party preferred its own chosen forum and was exercising its principal right of access to that forum a right which Court should not disturb even though the balance of factors is strongly in favour of the defendant. The Court did not stay the proceedings even though there will be multiplicity of proceedings or parallel proceedings in Singapore and Hong Kong, and there was a possibility that there may be an overlap and the Court may come to different conclusion. The Court also went on the basis that if witnesses can go to Singapore from Thailand certainly they could also come to Hong Kong. What really tilted the case in favour of the plaintiff is that the limit of liability under the 1957 Convention in the Singapore proceedings would be US$ 9,55,000/- whereas in Hong Kong where the 1976 Convention apply, it would exceed US$ 1.5. million. The Court while



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concluding held as under :

> The position boils down to this. The Russian owners have properly invoked the jurisdiction of the Hong Kong Court for the adjudication of their claim. They have a right to have their claim determined by the Hong Kong Court. In principle, this right cannot be lightly disturbed. The Singapore owners have not brought proceedings in a forum which is natural to the action; that is, the forum with which the action has the most real and substantial connection. Additionally, there is a considerable juridical disadvantage to the Russian owners if they were forced to prosecute their claim in Singapore; the interest of both parties and the ends of justice do not demand that they be driven from their chosen forum.
>
> Once this point is reached, the conclusion is inevitable that the Singapore owners' motion to stay is ill-founded and should have been dismissed.
>
> I would allow this appeal, discharge the Judge's order and dismiss the Singapore owners' application to stay the Hong Kong proceedings.
>
> I would also make an order nisi that the Singapore owners should pay the costs here and below.

46 In the present case also the facts are similar to that in ***Kapitan Shvetsov*** (supra). In the present case, Hong Kong where the defendant has invoked limitation of liability and constituted a fund is not a natural forum. The plaintiff herein, has chosen this forum which has jurisdiction over the



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defendant vessel. Therefore, both the parties have chosen forums which are not the natural forums and one should not have the inherent juridical advantage over the other. Moreover, the plaintiff herein if dragged to go to Hong Kong, will recover a lot less amount than what they would otherwise recover if a fund had been set up in India. The admitted position is that the defendant herein though having set a limitation fund in Hong Kong has given an additional security of US$ 40 million to the owners of Heung-A Dragon which was carrying the plaintiff's cargo. The defendant is also willing to secure the claim of those cargo interest who has sued the defendant in South Africa and in Marshall Islands, as stated by the counsel for the defendant on instructions.

47 Mr.Pratap also relied upon a judgment of the English Court in the matter of ***The Vishva Abha***[9] where again the English Court did not grant a stay. The court in page 314 and 315 has held as under :

> ".....The action has been brought by the plaintiff cargo-owners in this court as of right. Accordingly, I must direct myself initially by the principle, enunciated by Lord Goff on p.11, col.1: p.477 where he says :
>
> In my opinion, the burden resting on the defendant is not just to show that England is

9 (1990) Vol.2 Lloyd's Law Reports 312



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not the natural or appropriate forum for the available forum which is clearly or distinctly more appropriate than the England forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right.

The defendants are parties to litigation in South Africa, ..... It is because that was the country in which they found the ship *Dias* under another name. They had attempted to find the ship and to serve a writ on her at other ports in the world --- .....Whether or not there was a Court or emporium in which they could ship.....in those ports, I know not; but it was entirely a matter of chance that the defendants in this action were able to find *Dias* in Durban and commence litigation there by arresting her. By doing so, they may have obtained an advantage because the limit of liability in South Africa is still the limit set by the 1957 Convention which is substantially lower than the limit set by the 1976 Convention which was been adopted in this country.

.....if *Vishva Apurva* were to invoke limitation in South Africa, the fund would be in the region of £367,500 at today's rate of exchange for the rand. If *Vishva Apurva* were to invoke limitation in England , the fund would be more than £1.5 million. So there may well be a powerful and important juridical advantage to the plaintiffs in litigating in England, and a powerful juridical advantage to the defendants if they can force the plaintiffs to bring their action in South Africa.

.....that the action which has been commenced in England is an action commenced by the owners of cargo. The action which is currently running in South Africa is an action between the two ship owners.



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.....which is whether the defendants have shown that the South African forum is clearly or distinctly more appropriate than the English forum, I have to look to see what are the factors which affect the convenience or expense of both parties ..... firstly, that the defendants will be faced with the prospect of litigating the same same issue twice; once in England and once in South Africa, unless I stay this action. He says, secondly, that there is a danger that the view which this Court takes as to liability may be different from the view which is taken by the South African Court, and that is something which should, if possible, be avoided.

Dealing with the latter point first, it seems to me that it is relevant that the litigation in this country, this action, is not between the same parties as the litigation currently being pursued in South Africa, and that the plaintiffs prima-facie should not be deprived of litigating in the forum of their choice merely because others have chosen to litigate in South Africa. However, the point goes further in this case because, as I have already pointed out, it was mere chance which dictated that the defendants have found themselves litigating in South Africa./..... It seems to me that there are occasions when it is not possible to avoid two different jurisdictions, even with the possibility of two different decisions. So that is only a theoretical possibility. Indeed, so far as the defendants are concerned, they may possibly have the advantage in this country that the plaintiffs will be unable to call any witnesses to give oral evidence ---- and that is a severe disadvantage in a collision action.

.....

There is one other matter which has been ventilated, and that is the question of potential delay.....a possibility that a collision action



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> in South Africa would be heard rather later than in this country, but not materially so. It is a point that has not impressed me greatly.
>
> .....if the action proceeds to trial in this country and if the plaintiffs recover damages in excess of £1.5 million. On the other hand, an assuming that the South African Court took precisely the same view on liability, the plaintiffs would recover only their share of £367,000. It does seem to me that it would be a grave injustice to deprive them of their right to litigate in this country and send them to South Africa where their chances of recovering damages would be limited to so much less than the sum they may recover in this country.
>
> I have balanced that against the expense to which the defendants will be put in litigating in both the countries, but the expense of bringing a few witnesses to England is as nothing compared with the very substantial sum involved in the difference between the limits of liability in this country and South Africa. For these reasons, the motion is dismissed.

48 I am also not convinced that Hong Kong is a distinctly more appropriate forum than this Court. The shipowners often have to face litigation in different parts of World and for a variety of reasons these shipowners have got to face litigation arising out of this in a number of jurisdictions. I do not think that the interest of justice demand that the present plaintiff who have brought an action in this Country as a matter of right, should be required to litigate in Hong Kong merely because the defendant has chosen to bring an action in Hong Kong which is also not a



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natural forum. Even in the ***Herceg Novi*** (supra) relied upon by the counsel for the defendant, one of the factors that tilted in favour of English Court staying the English proceedings is that the other proceedings were in England which was not a natural forum where the first action was filed.

49 Fifty-Eight (58) countries, I am told, have signed the 1976 Convention out of which Forty-Nine (49) countries are signatories to the 1996 Protocol including India. Therefore, the balance of convenience should tilt in favour of the plaintiff.

50 Therefore, the inevitable conclusion that I would arrive at is that the defendant's motion to dismiss the suit or return the plaint to the plaintiff to be presented in the Hong Kong High Court or stay the suit and return the security cannot be granted.

Notice of Motion is accordingly disposed as rejected. Costs to be costs in the suit.

51 At the same time the defendants have stated that in HCAJ/188/2013, in Hong Kong (a) inspection and discovery of documents is complete, (b) pleadings have been closed, (c) witness statements have already been exchanged, (d) experts have been retained by both parties, (e) trial is due to



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progress and (f) the Court first will determine the liability before the quantum issue. The suit in this court has not progressed so much.

52 In my view, judicial time can be saved, if this Court does not simultaneously commences trial arising out of the same collision in which trial is going to begin in Hong Kong High Court. It would, therefore, be better to wait and see the outcome of the Hong Kong proceedings. It is also possible that this Court may accept the Hong Kong High Court's decision on liability. The plaintiff herein may also accept. Therefore, the parties are directed to advise this Court as soon as the Hong Kong High Court issues its decision in HCAJ/188/2013 or by 30th April, 2015 report to the Court on the status of HCAJ/188/2013, whichever first occurs. In the meanwhile, the defendant is directed to file the written statement within four weeks from today.

**(K.R. SHRIRAM, J.)**

Bombay High Court



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Attorney for Plaintiffs

IN THE HIGH COURT OF THE

REPUBLIC OF THE MARSHALL ISLANDS

| | | |
|---|---|---|
| Chubb Insurance (China) Company Ltd., et. al., | ) | Civil Case No. 2014-050 |
| Plaintiffs, | ) | Civil Case No. 2014-110 |
| | ) | Civil Case No. 2015-194 |
| v. | ) | |
| Eleni Maritime Limited , *inpersonam* and | ) | CERTIFICATE OF SERVICE |
| Empire Bulkers Limited, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

I hereby certify that on Friday, April 22, 2016 (Majuro date), a true and correct copy of the Plaintiffs Supplemental Reply to Defendants Motion for Declaratory Judgement consisting of 16 pages, the 16th page being the signature page, with attached Exhibit 1, consisting of 42 pages, were served on Tatayana Cerullo, Attorney for Defendants:

Email attachments in PDF format to TC.Law.lllc@gmail.com.

Dated: Friday, April 22, 2016 (Majuro date).

Dennis J. Reeder
For Plaintiffs

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

Chubb Insurance Comp., Jizhou City Huayang Ch... ) Civil Case No. 2015-194
Plaintiff )
vs )
)
) **CERTIFICATE OF SERVICE**
)
Eleni Maritime Limited & Empire Bulkers Limite... )
Defendant )
)

I, Shenae Reimers, Asst. Clerk of the Courts, hereby certify that on 4/21/16

I served the Order

filed 04/21/2016 in the above captioned matter on:

1. Dennis Reeder by ☑ Email ☐ Fax ☐ Personal Hand Delivery
2. Tatyana Cerullo by ☑ Email ☐ Fax ☐ Personal Hand Delivery
3. _____ by ☐ Email ☐ Fax ☐ Personal Hand Delivery
4. _____ by ☐ Email ☐ Fax ☐ Personal Hand Delivery

Attached is a copy of my ☒ Sent Email / ☐ Fax Confirmation.

FILED:

Shenae Reimers
Asst. Clerk of the Courts
Marshall Islands Judiciary

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APR 21 2016
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**

**OF THE**

**REPUBLIC OF THE MARSHALL ISLANDS**

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| Chubb Insurance (China) Company Ltd, Jizhou City Huayang Chemical Co Ltd, Infinite Chem Co Ltd, and Urekote-Thai Co Ltd<br><br>Plaintiffs,<br><br>v.<br><br>Eleni Maritime Limited *in personam* and Empire Bulkers Limited<br><br>Defendants. | H.Ct. Civil No. 2014-050<br>H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2015-194<br><br>**ORDER** |

**ORDER**

Pursuant to Plaintiffs' Rule 60 Motion to Reconsider, the Court hereby orders that Plaintiffs may exceed the 7 page limit as set out in the Marshall Islands Rules of Civil Procedure, Rule 7(b)(3), for their Reply in support of their Motion for Declaratory Judgment; provided, however that the Reply shall not exceed 15 pages.

Carl B. Ingram
Chief Justice

April 21, 2016

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Attorney for Defendants
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EMPIRE BULKERS LIMITED

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REPUBLIC OF THE MARSHALL ISLANDS

**IN THE HIGH COURT**

**OF THE**

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## MOTION TO RECONSIDER

Defendants ELENI MARITIME LIMITED and EMPIRE BULKERS LIMITED ("Eleni Maritime") and ("Empire Bulkers") (collectively, "Defendants") respectfully move this Court pursuant to Rule 60 of the Marshall Islands Rule of Civil Procedure (2015) ("MIRCP") Defendants ELENI MARITIME LIMITED

and EMPIRE BULKERSLIMITED ("Eleni Maritime") and ("Empire Bulkers") (collectively, "Defendants") respectfully move this Court to Reconsider the Order filed herein today April 21, 2016 for the following reasons:

1) Plaintiffs' motion was to exceed the page limit for "its reply in response to defendants' Motion for Summary Judgment." However, no motion for summary judgment has been filed yet. To clarify, Plaintiffs are asking for an increase in the page limit for their Reply in support of their Motion for Declaratory Judgment – not Summary Judgment.

2) Plaintiffs' Motion for Declaratory Judgment was over 40 pages and Defendant's recently-filed Opposition was only 27 pages. The Court ordered a page limit for the Opposition to be no more than 40 pages. Thus, there should also be a page limit on Plaintiffs' Reply and it should be less than the page limit for the motion and the opposition. Defendants submit that 15 pages is a reasonable increase. Although Plaintiffs claim that "new" issues were raised, this claim is misplaced. Defendants were only responding to Plaintiffs' motion and no new issues were raised justifying a lengthy Reply brief.

3) Plaintiffs due date for filing is today. They should not be allowed to increase to over 15 pages at the very last minute.

DATED: 21 April 2016

Tatyana Cerullo

Tatyana Cerullo
David Lowe
Attorneys for Defendants
ELENI MARITIME LIMITED and
EMPIRE BULKERS LIMITED

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**IN THE HIGH COURT**

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| Chubb Insurance (China) Company Ltd, Jizhou City Huayang Chemical Co Ltd, Infinite Chem Co Ltd, and Urekote-Thai Co Ltd<br><br>Plaintiffs,<br><br>v.<br><br>Eleni Maritime Limited *in personam* and Empire Bulkers Limited<br><br>Defendants. | H.Ct. Civil No. 2014-050<br>H.Ct. Civil No. 2014-110<br>H.Ct. Civil No. 2015-194<br><br>**DECLARATION OF TATYANA CERULLO** |

DECLARATION OF TATYANA CERULLO

1. I represent Defendants and make this Declaration based on my personal knowledge and belief.

2. Plaintiffs' states in their motion that they want to exceed the page limit for "its reply in response to defendants' Motion for Summary Judgment."

3. However, no motion for summary judgment has been filed yet.

4. To clarify, Plaintiffs are asking for an increase in the page limit for their Reply in support of their Motion for Declaratory Judgment – not Summary Judgment.

5. Plaintiffs' Motion for Declaratory Judgment was over 40 pages and Defendant's recently-filed Opposition was only 27 pages. The Court ordered a page limit for the Opposition to be no more than 40 pages. Thus, there should also be a page limit on Plaintiffs' Reply and it should be less than the page limit for the motion and the opposition. Defendants submit that 15 pages is a reasonable increase. Although Plaintiffs claim that "new" issues were raised, this claim is misplaced. Defendants were only responding to Plaintiffs' motion and no new issues were raised justifying a lengthy Reply brief.

6. Plaintiffs due date for filing is today. They should not be allowed to increase to over 15 pages at the very last minute.

7. I declare under penalty of law that the following is true and correct to the best of my knowledge and belief.

Tatyana Cerullo

April 21, 2016

Tatyana Cerullo
Attorney for Defendants

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**IN THE HIGH COURT**

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I hereby certify that on 21 April 2016 (RMI date), a true and correct copy of the foregoing will be served upon the following by email attachment in PDF format to:

Dennis J. Reeder
Attorney for Plaintiffs
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DATED: 21 April 2016

Tatyana Cerullo
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IN THE HIGH COURT OF THE

REPUBLIC OF THE MARSHALL ISLANDS

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| Chubb Insurance (China) Company Ltd., et. al., Plaintiffs, v. Eleni Maritime Limited , *in personam* and Empire Bulkers Limited, Defendants. | Civil Case No. 2014-050<br>Civil Case No. 2014-110<br>Civil Case No. 2015-194<br><br>CERTIFICATE OF SERVICE |

I hereby certify that on Thursday, April 21, 2016 (Majuro date), a true and correct copy of the Plaintiffs Response to Defendants Motion for Declaratory Judgement consisting of 26 pages, with attached Exhibit 1, consisting of 42 pages, were served on Tatayana Cerullo, Attorney for Defendants:

Email attachments in PDF format to TC.Law.lllc@gmail.com.

Dated: Thursday, April 21, 2016 (Majuro date).

4/21/16 (MAJURO DATE)

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**IN THE HIGH COURT**

**OF THE**

**REPUBLIC OF THE MARSHALL ISLANDS**

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| Chubb Insurance (Thailand) Company Ltd, Tokio Marine & Nichido Fire Insurance Co Ltd, *et al.*<br><br>**Plaintiffs,**<br><br>**v.**<br><br>ELENI Maritime Limited *in personam* and Empire Bulkers Limited<br><br>**Defendants** | **H.Ct. Civil No. 2014-110**<br>**H.Ct. Civil No. 2014-050**<br>**H.Ct. Civil No. 2015-194**<br><br>**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT REGARDING CLASH OF CONVENTIONS; CERTIFICATE OF SERVICE** |

## REPLY MEMORANDUM IN SUPPORT OF CARGO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT REGARDING CLASH OF CONVENTIONS

Cargo Plaintiffs submit this Reply Memorandum to respond to Eleni Maritime Limited and Empire Bulkers Limited's (collectively "the ELENI Defendants") Opposition and supporting Declaration of Martin Davies ("Davies Declaration")[1] filed in response to Cargo Plaintiff's

[1] Cargo Plaintiffs reserve their right, in advance of any hearing on the Clash of Conventions Motion (and/or any subsequent motions filed by the ELENI Defendants), to submit a responsive expert declaration to the Davies Declaration (given the brief seven-day delay for filing the instant Reply pursuant to Marshall Islands Rule of Civil Procedure 7(b)(3) ). Cargo Plaintiffs further note generally that the Davies Declaration does not address at all any United States general maritime law jurisprudence (which governs in these proceedings pursuant to M.I. Rev. Code Title 47, §113), but rather focuses on treaty issues and/or decisions under British law. Further, it bears noting that Prof. Davies is listed on the website of the ELENI Defendants' counsel as a retained consultant for Norton Fulbright Rose (with a Norton Fulbright Rose telephone, facsimile number and email address), and thus his opinions in this matter are not entirely those of a disinterested scholar.

Moreover, Cargo Plaintiff's note that to the extent the Davies Declaration purports to instruct this Court on how to apply the law regarding the domestic application *vel non* and/or interpretation of the law of the RMI, treaty

Motion for Declaratory Judgment ("Clash of Conventions Motion") as to the primacy of the 96 Protocol[2] under the law of the Republic of the Marshall Islands ("RMI").

## INTRODUCTORY STATEMENT - THE ELENI DEFENDANTS HAVE RAISED LIMITATION AS A DEFENSE

As an initial point, Cargo Plaintiffs must set straight the demonstrable fallacy posited several times by the ELENI Defendants' Opposition that "limitation has not been raiscd as an issue . . . or as a defense" (Opposition, p. 8) or that they "have not raised limitation as a defense (*id.*, p. 9) or (perhaps most starkly at odds with their own submissions to this Court) that "[l]imitation is not an issue now and never should be" (*id.*). This is simply, objectively, untrue and attempts to misdirect the Court from the ELENI Defendants' repeated arguments for barring Cargo Plaintiffs' claims via a 76 Convention limitation defense.

In fact the issue of limitation - and *specifically* the Clash of Conventions - **was raised *for the first time* by the ELENI Defendants in their own briefing in support of their initial responsive filing** in these proceedings (namely the FNC Motion and Reply in support), as shown in the following exemplary quotations:

- "[ELENI Defendants are] **entitled to limit [their] liability under the...[76 Convention]** which is applied in Hong Kong." FNC Motion & Memo, p. 3.
- "[T]he Marshall Islands courts...would be compelled by international maritime law to recognize the limitation decree in...Hong Kong [under the 76 Convention]...In 2006, the Marshall Islands adopted the [96 Protocol], which updates the [76 Convention]...**The decree must be recognized in all implementing countries, including the Marshall**

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provisions and/or foreign law decisions, it is improper under Rules 702 and 704 of the RMI Rules of Evidence (which is derived from the United States Federal Rules of Evidence). "Courts have consistently been reluctant to permit legal experts to testify as to matters of domestic law." *Woodard v. Andrus*, 2009 WL 140527 (W.D. La. Jan. 20, 2009). And "[t]he principle that legal opinion evidence concerning the law is inadmissible is so well-established that it is often deemed a basis [sic] premise or assumption of evidence law - a kind of axiomatic principle." *The Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037 , 1042 (D. Ariz. 2005). Thus, courts typically prohibit lawyers, professors, and other experts from interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case." *Id.* at 1042.

[2] Cargo Plaintiff's will use all shorthand terms as previously defined in the Clash of Conventions Motion.

**Islands.**" FNC Motion & Memo, p. 15

- **"Considering the Marshall Islands is bound by the 76 Convention,** certainly judicial economy and public policy would be served by dismissing this action in favor of the [HK Limitation Suit]." FNC Motion & Memo, p. 16.
- **"[T]his Court would be compelled by international maritime law to recognize the limitation decree in the [HK Limitation Suit] as it applies to [Cargo] Plaintiffs. . .** Status as a party to the [96 Protocol] does not mean that a party can ignore its obligations with respect to a party just to the [76 Convention]." FNC Motion Reply Memo, p. 9.
- "[The 76 Convention] applies and the Marshall Islands must recognize [the HK Limitation Suit] and Limitation Fund . . . [pursuant to] the [76 Convention], 96 Protocol, and international law . . ." FNC Motion Reply Memo, p. 10.[3]

The ELENI Defendants' suggestion that limitation "has not been raised as a defense" is wrong, and patently disingenuous. The ELENI Defendants are definitively "seek[ing] to limit [their] liability before a Court [of the RMI]" as provided at §525 of the LLMCA.

Moreover, in the same breath as the statements in the Opposition about limitation *not being an issue* in this case, the ELENI Defendants nonetheless go on to suggest that Hong Kong limitation law (i.e. the 76 Convention) will govern Cargo Plaintiff's damages and that this "Court [has an] obligation[n] [to] uphol[d] the 76 Convention [in deference] to the [HK] [L]imitation [A]ction" (*id.* at pp. 9-10). Thus, the ELENI Defendants are saying on the one hand that the issue of limitation of liability is not before this Court (which is incorrect in any event given their prior pleading of limitation throughout the FNC motion practice), but then at the same time telling this Court it **must** dismiss Plaintiff's claims in deference to Hong Kong under the 76 Convention. The ELENI Defendants cannot logically state that limitation is not an issue, and then claim this Court must apply the Hong Kong limitation law. This makes no sense.

The ELENI Defendants appear to be relying on the fact that they have not technically

[3] Likewise, after their FNC motion was denied, the ELENI Defendants <u>again</u> raised the issue of limitation in a Motion for Clarification (later withdrawn) as to whether the Court would "accept the Hong Kong Court's decision on limitation of liability" under the 76 Convention.

pled limitation as a discrete, specifically identified affirmative defense in this case. The irony here, however, is that the only reason limitation has not yet been technically raised in an actual pleading is **because the ELENI Defendants have refused to file any responsive pleading** (other than the denied FNC Motion, which is not a pleading) to Cargo Plaintiffs' Complaints, despite this Court' order that they do so within 14 days of the lifting of the prior stay (*see* Order of May 5, 2015); and in violation of Rule 12(a)(4) of the Marshall Islands Rules of Civil Procedure ("MIRCP"), which requires filing of responsive pleadings within 14 days of denial of an initial motion to dismiss. Thus, the ELENI Defendants are attempting to rely on the hypertechnical absence of a formally pled limitation defense (which has been *raised by them* in any event since the outset of this matter) as a basis for denying the Clash of Conventions Motion when *they are the ones who have failed to timely file* the very pleading they say is lacking.

If the ELENI Defendants truly contend that limitation is not an issue - despite their express and implicit attempts at every step of the way to invoke limitation as a bar to Cargo Plaintiff's claims - they should file a responsive pleading waiving limitation of liability as an affirmative defense, and the Cargo Plaintiffs will pursue their full damages against the ELENI Defendants, who, given the binding *res judicata* 70% fault allocation in the HK Sistership Suit, will be 100% liable for all those damages under the innocent cargo rule (save certain previously settled claims). However, if the ELENI Defendants intend to rely on the HK Limitation Suit as a bar to this suit (as they have done all along and continue to do), **they are asserting limitation as a defense**, regardless of whether they ever actually spell it out as an affirmative defense if and when they actually respond to the Complaints.[4]

## RESPONSE TO ELENI DEFENDANTS' PROCEDURAL ARGUMENTS

[4] Cargo Plaintiffs reserve the right to seek a default absent ELENI Defendants' filing of responsive pleadings.

As an additional preliminary point, the ELENI Defendants contend (Opposition pp. 5-7) that the Clash of Conventions Motion is somehow procedurally deficient[5] because it seeks entry of a declaratory judgment via "motion" rather than through a separate "action" for declaratory judgment. This suggestion depends on a misguided elevation of form over substance.

Numerous United States federal courts (applying the United States Federal Rules of Civil Procedure "FRCP", the model for the MIRCP), have considered motions seeking a declaration as a matter of law on a contested issue *even when* styled as motions for declaratory judgment (otherwise normally requiring a separate pleading/complaint for declaratory judgment):

> Because this is not a declaratory judgment proceeding ... pursuant to Rule 57 of the [FRCP] [the model for MIRCP Rule 57] and the Declaratory Judgment Act, [the model for M.I. Rev.Code Title 30, §212], the Court will treat defendant's motion as a Rule 12(c) motion [the verbatim model for MIRCP Rule 12(c)] for judgment on the pleadings to the extent that it challenges plaintiffs' claims based on the pleadings and a Rule 56 [the model for MIRCP Rule 56] motion for summary judgment to the extent that it relies on matters outside the pleadings.[6]

In other words, courts recognize the practical, efficient principle, in their role as the ultimate arbiters of law in a case, that "where declaratory relief is not requested the courts may grant such relief where the pleading and proof show such to be appropriate."[7] Even the Supreme Court of the United States has espoused this eminently practical rule.[8]

This principle is also expressly provided for at Rule 54(c) of the MIRCP (analog to U.S.

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[5] Cargo Plaintiffs, in full disclosure to the Court, note that they erroneously and inadvertently cited to a prior version of Rule 56(a) of the MIRCP (but did not "misquote" or "make up") in the Clash of Conventions Motion. This error, however, as explained below, does not affect the procedural validity of the Clash of Conventions Motion.

[6] *Broussard v. State Farm Fire & Cas. Co.*, 2007 WL 2264535 (E.D. La. Aug. 7, 2007); *Mishcon de Reya New York LLP v. Grail Semiconductor, Inc.*, 2014 WL 656062, at *6 (S.D.N.Y. Feb. 20, 2014) (granting motion for declaratory judgment, without formal pleading, and construing motion as a summary judgment motion).

[7] *Turner v. Liverpool Cent. Sch.*, 186 F. Supp. 2d 187, 190 (N.D.N.Y. 2002) (citing *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964)); *Serv. Trades Council v. Walt Disney World Co.*, 2008 WL 686916, at *3 (M.D. Fla. Mar. 11, 2008) (same).

[8] *See Katzenbach*, 379 U.S. at 296 (court may grant declaratory relief not requested if the court finds it necessary).

Federal Rule 54(c), which **mandates** that "[e]very . . . final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Accordingly, under the rule, jurisprudence, and the leading commentary of Wright & Miller[9] (in the *same section* selectively cited by the ELENI Defendants themselves), "a party may seek declaratory relief subsequent to the pleading stage of a civil action if such relief is merited."[10]

And as discussed above, the purely legal issues inherent in the Clash of Conventions Motion were first raised **by the ELENI Defendants themselves** in the FNC Motion, as reiterated in their Opposition. This Court's summary judgment decision is procedurally appropriate, regardless of the ELENI Defendants' form-over-substance arguments.

Moreover, the Clash of Conventions Motion involves purely legal choice-of-law questions. Courts **routinely** grant summary judgment motions declaring various ***pure issues of law*** when an issue has been squarely implicated in the proceedings.[11] And in particular, courts routinely consider choice-of-law summary judgment motions seeking declarations as to the applicable law in *non-declaratory judgment action* cases.[12]

Additionally, insofar as the ELENI Defendants have themselves effectively raised limitation/Clash of Conventions issues as an affirmative defense to Cargo Plaintiffs' claims (both in their FNC filings and in the Opposition itself), the Clash of Convention Motion properly seeks

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[9] 10B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2768 (3d ed.) ("Rule 54(c) applies, however, and the court is to give whatever relief is justified by the evidence, regardless of the demand in the complaint"). The ELENI Defendants cite this same section, but omit this language.

[10] *Turner*, 186 F. Supp. 2d at 190.

[11] *See, e.g., Total Safety US, Inc. v. Con-Dive, LLC*, 2009 WL 3673051, at *1 (S.D. Tex. Nov. 4, 2009) (granting a second motion for a declaratory judgment" regarding parties contract dispute, notwithstanding that no "action" for declaratory judgment was included in any pleading); *Jose v. M/V Fir Grove*, 765 F. Supp. 1024, 1034 (D. Or. 1991) (considering summary judgment for declaration regarding choice of law in maritime dispute).

[12] *See, e.g., Magnolia Healthcare, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2006 WL 3347952 (N.D. Miss. Nov. 17, 2006) (considering cross-motions for (a) declaratory judgment and (b) partial summary judgment as to choice of law dispute); *Neill Corp. v. John Paul Mitchell Sys.*, 92-2157, 1995 WL 381684 (E.D. La. June 26, 1995).

a ruling from this Court on the invalidity of that defense.[13]

Finally, all the cases cited in the ELENI Defendants' procedural argument are distinguishable, and some *actually support* this Court's consideration of this motion.

The ELENI Defendants' primary case, the *International Brotherhood* decision (which involved competing claims to escrowed funds), simply noted that there is no "motion for declaratory judgment" provided for in the federal rules **but then went on to treat the motion at issue "as a motion for summary judgment on an action for a declaratory judgment,"** ultimately denying the motion as such for lack of evidence or factual pleadings.[14] Thus, the *International Brotherhood* court did not simply ignore the motion, but rather treated it as a summary judgment motion. Moreover, unlike the situation in *International Brotherhood*, the ELENI Defendants' own responsive filings have squarely raised the facts and legal issues inherent in the Clash of Conventions Motion. The rest of the decisions are likewise inapposite and/or *actually considered* the motions at issue as summary judgment motions.[15]

In the end, the ELENI Defendants' procedural arguments non-sensically suggest that in order to seek the Court's ruling on the Clash of Conventions, the Cargo Plaintiffs somehow should have raised limitation in their Complaints, despite the fact that it is not their right to as

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[13] *U.S. ex rel. King v. Solvay S.A.*, 304 F.R.D. 507, 510 (S.D. Tex. 2015) ("[C]ourts allow partial summary judgment [as to affirmative defenses], as it enable[s] the district court to enter an order indicating that the defense in no longer in controversy . . ." citing 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1381 (3d ed.2004)); *Sahota v. Cobb*, 2015 WL 6835480, at *5 (W.D. La. Nov. 6, 2015).

[14] *Int'l Bhd. of Teamsters v. E. Conf. of Teamsters*, 160 F.R.D. 452, 456-57 (S.D.N.Y. 1995)..

[15] *Barmat, Inc. v. United States*, 159 F.R.D. 578, 582 (N.D. Ga. 1994) (dispute between the IRS and a *non-party* to the litigation regarding a problematic tax settlement;, the court declined to consider the motion because the movant's "status as a 'party' remain[ed] questionable"); *Brown v. Voorhies*, 2009 WL 700692, *7 (S.D. Ohio Mar. 10, 2009) (pro se prisoner asserted claims of improper medical treatment; the court ultimately *did consisder* (and denied) a motion for declaratory judgment as a motion for summary judgment); *I.E.C. v. Minneapolis Public Schools*, 970 F. Supp. 2d 917 (D. Minn. 2013) (improper attempt by a plaintiff to seek relief in one federal case *that had already been denied* in another; even then the court *ultimately considered* (but denied) the motion for declaratory judgment as a motion for summary judgment).

plaintiffs to do so and is (obviously) contrary to their interests. In any case, the ELENI Defendants have raised the issue repeatedly, and this motion is procedurally proper.

## *SERIATIM* REPLY TO REMAINING OPPOSITION SECTION HEADINGS

### BACKGROUND - ELENI Defendants Forum Shopped and "Forum Shoplifted"

The Opposition's Background section accuses the Cargo Plaintiffs of "blatant forum shopping" (p. 3) for bringing their claims before this Court, in the ELENI Defendants domiciliary jurisdiction. This is the height of irony because the ELENI Defendants have not only blatantly forum shopped themselves, but have effectively "forum shoplifted" by filing for limitation in a **completely unnatural jurisdiction that has nothing to do with the Collision,** and by engaging in other inequitable efforts to manipulate their way to a lower limit under the 76 Convention than they would otherwise be subject to in their domiciliary jurisdiction of the RMI.

The venerable pronouncement of renowned United States admiralty Judge John R. Brown regarding resort to equity in admiralty is particularly pertinent given the applicability of U.S. maritime law: "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense . . . that which equity and good conscience impels."[16] Indeed, U.S. courts have squarely relied on principles of equity **to allow parallel proceedings viz. limitation** in transnational disputes.[17]

The Cargo Plaintiffs have consistently and forthrightly represented to this Court that they filed this suit both because the ELENI Defendants are domiciled in the RMI, and to gain access to the higher 96 Protocol limits. In this regard, a maritime litigant's resort to a limitation jurisdiction that is most beneficial and relevant to its claim is proper; in fact "forum shopping for

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[16] *Compania Anonima Venezolana De Navegacion v. A. J. Perez Exp. Co.*, 303 F.2d 692, 699 (5th Cir. 1962).

[17] *See In Re Otal Investments Ltd.*, 2005 WL 1588986, *3-5 (S.D.N.Y. July 8, 2005) *aff'd sub nom. Otal Investments Ltd. v. M.V. CLARY*, 494 F.3d 40, 63 (2d Cir. 2007).

the better limitation regime has been countenanced by courts [around] the world."[18]

However, the ELENI Defendants have, in less transparent and more egregious form, gone outside of their home forum, to a forum with no objective link whatsoever to the Collision, and filed the HK Limitation Suit in an attempt to obtain a lower limit of liability under the 76 Convention. Indeed, despite this elephant-in-the-room fact, the ELENI Defendants previously attempted to argue (in their FNC motion) that their choice of the Hong Kong forum had to do with convenience of witnesses, availability of evidence, etc. *despite* the inescapable fact that **none of the witnesses or evidence is in Hong Kong** (other than the documents the ELENI Defendants *sent to their Hong Kong lawyers* after the Hong Kong suits were filed).

In fact, the ELENI Defendants have **admitted** "that the jurisdiction most closely connected with [the Collision] is Vietnam" (FNC Motion Reply Memo, p. 4), and then suggested that Vietnam has the same monetary limits as Hong Kong under the 76 Convention. **Critically, however, Vietnam *is not a signatory* to the 76 Convention**; thus, even though the monetary limits in a Vietnam limitation might be the same as the 76 Convention, a Vietnamese fund would not be recognized by convention signatories, and thus would not have allowed the ELENI Defendants to argue extraterritorial limitation (as they have done **numerous times** here).[19]

Thus, the ELENI Defendants have effectively admitted that the HK Limitation Suit **was not filed** in the so-called "natural" jurisdiction for determination of liability and damages for the Collision; Vietnam would have been the "natural jurisdiction." Notably (as explained below),

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[18] John Hare, Best Admiralty Bargain, pp. 166-167 (Martin Davies, ed., 2005).

[19] The ELENI Defendants have also **incorrectly** stated that "[n]o other Asian jurisdiction, except Japan, has adopted" the 96 Protocol (FNC Motion Reply Memo, p. 5); again, however, as with their erroneous suggestion that the Marshall Islands is a party to the VCLT, the ELENI Defendants statement **is not correct** - India and Malaysia (both Asian countries) have signed the 96 Protocol. *See* http://www.imo.org/About/Conventions/StatusOfConventions/Documents/status-x.xls (summarizing country-by-country ratification information).

**every single decision** relied on by the ELENI Defendants for the suggestion that a first-filed limitation action should bar later-filed liability actions (*see* Opposition pp. 18-25; Davies Declaration, ¶¶19-23) reached this conclusion because the original limitation action **was filed in the "natural jurisdiction" of the underlying casualty.**[20] Indeed, one of these decisions (*Ship Chou San*) recognized that parallel proceedings, one of which provides a juridical advantage to claimants by way of higher limitation limits, may be appropriate if safeguards are in place to prevent inconsistent liability findings: "[W]here a plaintiff had a legitimate advantage in an Australian limitation of liability regime [i.e. 96 Protocol] in enforcement of a maritime lien claim, in circumstances where the risk of inconsistent findings in parallel proceedings could be eliminated, or at least significantly ameliorated," allowing the parallel proceedings should be allowed "to vindicate rights under Australian law."[21] **This is exactly what has happened in this case**; the Court stayed proceedings until a liability determination in the HK Sistership Suit, and now Cargo Plaintiffs should have the opportunity to vindicate their rights under RMI law.

Moreover, the ELENI Defendants and the Davies Declaration **completely ignore other international decisions** - including one from the Hong Kong Court of Appeal in *KAPITAN SHVETSOV*[22]- approving parallel limitation proceedings in jurisdictions with different limitation

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[20] *See, e.g., The Herceg Novi and Ming Galaxy* [1998] 2 Lloyd's Rep. 454 (Queen's Bench Division(Admiralty Court) (collision in Singapore (57 Convention signatory), limitation and liability actions first filed in Singapore, later-file arrest/liability action in United Kingdom (76 Convention signatory) with no substantive link to the casualty; British action stayed); *Evergreen International S.A. v. Volkswagen Group Singapore Pte Ltd* [2004] 2 S.L.R. 457 (Singapore High Court) (collision in Singapore, first-filed limitation and liability actions in Singapore, later-filed liability/arrest action in Belgium (76 Convention signatory) with no substantive link to casualty; Belgian action enjoined); *CMA CGM S.A. v. Ship Chou Shan* (2014) 224 F.C.R. 384 (Federal Court of Australia) (collision in China, first-filed limitation action under Chinese law (no convention) and liability/arrest in China, later-filed arrest in Australia (96 Protocol signatory); Australian action stayed).

[21] 224 F.C.R. 384, ¶83.

[22] *See The KAPITAN SHVETSOV*, [1998] 1 Lloyd's Rep. 199 (Hong Kong Court of Appeal) (collision in Phraya River in Thailand between KAPITAN SHVETSOV and NANTA BHUM; owners of the latter arrested sister ship in Singapore and filed for limitation under the 57 Convention; owners of the former arrested sister ship in Hong Kong; the court allowed the Hong Kong action to proceed parallel to the Singapore actions).

regimes when no proceeding is commenced in the "natural jurisdiction" and when the parallel proceeding allows a party to obtain the "juridical advantage" of higher limitation fund limits.[23]

**1) The Bombay High Court's Ruling Involving the Same Collision, the ELENI Defendants, and the same Issues Reached the Same Result Sought Here**

Perhaps most glaringly, the ELENI Defendants have failed to bring this Court's attention to the recent ruling by the Bombay High Court in India ("Bombay Decision," which has been favorably cited in a recent appellate decision[24]) involving the ELENI Defendants themselves and the same Collision and HK Limitation Suit at issue in this Court, in which the Indian court **allowed a parallel limitation proceeding *under the 96 Protocol* to proceed on the basis that the HK Limitation was not binding in India, a 96 Protocol state *that had not officially denounced* the 76 Convention.**[25] In the Bombay Decision, a Korea-based Insurance Company (as a subrogee to cargo claims) arrested the ELENI in India (a 96 Protocol state *that has not* denounced the 76 Convention[26]) for cargo damage liability claims arising out of the Collision, **after** the HK Limitation Suit had been filed. The ELENI Defendants then sought dismissal of the insurer's action on the basis that the HK Limitation Suit and Fund mandated that parties world over, including the insurers, could only claim against the fund.

The Bombay Court rejected the ELENI Defendants' motion essentially on the basis that

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[23] *Atlasnavios Navegacao, LDA v. the Ship XIN TAI HAI*, [2012] FCA 1497 (Federal Court of Australia) (collision in Straits of Malacca between B OCEANIA and XIN TAI HAI; first-filed limitation action by the XIN TAI HAI interests in China (non-convention state), as well as liability claims; B OCEANIA interests later arrested the XIN TAI HAI in Australia, a 96 Protocol state; the court allowed the Australian action to proceed given the B OCEANIA's "seek[ing] the benefit of the legitimate advantages of . . . a larger limitation fund," particularly when the XIN TAI HAI interests had faced the B OCEANIA interests with "a sword of Damocles" decision on whether to continue in the Chinese limitation or seek greater relief abroad).

[24] *See Murmansk Shipping Co. v. Adani Power Rajasthan Ltd. (The "Yuriy Arshenevskiy")*, High Court (Admlty) (S C Gupte J) – 8 January 2016.

[25] *Hanwha Gen'l Ins. Co. Ltd. v. M.V. ELENI (IMO No. 9460277)*, Notice of Motion No. 769 of 2014 in Admiralty Suit (Lodg.) No. 329 of 2014 (Bombay High Court, Jan. 5, 2015). The Bombay Decision is attached here for the Court's ease of reference as Exhibit 1.

[26] *See* https://imo.amsa.gov.au/public/parties/ll-mc76.html. *See also* Bombay Decision, ¶19.

the Port of Hong Kong, where the limitation fund had been constituted *with 76 Convention limits*, was not a proper locus for limitation to be binding under India's domestic enactment of the 96 Protocol. Thus, the ELENI Defendants could not restrict the insurers' right to claim damages in India or require the plaintiff to only proceed against the HK Limitation fund. Importantly, the Bombay Court recognized that the same English decisions and authorities relied on by the ELENI Defendants in this case (i.e. *Herceg Novi*, *Western Regent*) **were not relevant** because while the United Kingdom has domestically enacted *the entirety* of the 76 Convention/96 Protocol, India's domestic enactment *has excluded certain provisions and otherwise varied from* the 76 Convention/96 Protocol.[27] Likewise, the Bombay Court recognized that to the extent issues of international comity were implicated, the proper focus of the comity was as between India and Hong Kong. Accordingly, the Bombay Court adopted the reasoning *of the Hong Kong Court* in the *KAPITAN SHVETSOV* decision (which, as mentioned above, ELENI Defendants and the Davies Declaration have omitted), as the most directly applicable authority.[28]

Notably, the Bombay Decision relied on several of the same factors supporting Cargo Plaintiff's Clash of Conventions Motion before this Court:

- India's domestic enactment of the 76 Convention/96 Protocol, like the RMI's enactment of those treaties in the LLMCA, varies in important respects from the actual text of those treaties. In this situation, principles of comity of nations must give way to the **stated intent of the domestic legislature**:

> "The comity of nations requires the rules of international law may be accommodated in the municipal law to the extent they do not run in conflict with the internal laws. While applying international law, the sovereignty and supremacy of the powers of the legislature to also be kept in mind. **Thus comity of nations or no, when there is a conflict, the internal law of the land will prevail.**"[29]

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[27] Bombay Decision, ¶29.

[28] *Id.* at ¶¶39-46.

[29] *Id.* at ¶39.

- The Bombay Decision reached this conclusion *notwithstanding* 96 Protocol Article 9.4 (purporting to require application of the 76 Convention as between two states who share only that convention, even if the other has acceded to the 96 Protocol without denouncing the 76 Convention) ("Overlap Clause").[30] Notably, India's enactment of the 96 Protocol, like the RMI's, **omits Article 9.4 entirely**
- As a result, the Bombay Court refused to dismiss the liability action filed in India in favor of the HK Limitation Suit **based on the plain terms of India's domestic enactment of the 76 Convention/96 Protocol.**
    - Specifically, India's enactment of Article 13 of the 76 Convention ("Bar to Other Actions") **omitted** the discretionary bases for barring claims filed after a limitation fund is constituted, and enacted solely the mandatory bases for barring claims **if the limitation is constituted in a specified "relevant"** (i.e. "natural") **jurisdiction.**[31] Because the HK Limitation Fund was not constituted in a "relevant" jurisdiction under India's enactment of the treaties, the ELENI Defendants were not entitled to a bar against the insurers' claims under Indian law.[32]
    - **The same effective result obtains in this case,** albeit on a slightly different statutory basis. The RMI Nitijela, like the Indian Parliament, has **selectively enacted** Article 13 of the 76 Convention/96 Protocol as a result of its domestic statutes implementing the 96 Protocol. Specifically, LLMCA §523 ("Bar to Other Actions," the analog to India's §352D) only allows for a bar to other actions **if "a limitation fund has been constituted in accordance with Section 521"** of the LLMCA.[33] In turn, §521 of the LLMA **mandates that "constitution" of a fund must be for 96 Protocol limits.**[34] Thus, while the India domestic enactment limits the effect of the bar to other actions depending on whether the limitation is filed in a "relevant"/natural jurisdiction, the RMI's enactment only allows for a bar to other actions **if there is a 96 Protocol fund "constituted"** (whether in the RMI or elsewhere). Because the HK Limitation Fund is *not* constituted with 96 Protocol limits, the Bombay Decision's analysis applies equally here, and the HK Limitation Suit **cannot** affect Cargo Plaintiff's claims in this Court.

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[30] *See id.* at ¶19-20

[31] *See id.* at ¶¶28, 30-33 (citing Merchant Shipping Act, 1958 §352). This section requires release of security (i.e. a "bar" to other actions) if a limitation fund has been constituted, but only if it has been constituted in "a relevant port," which is defined (in terms similar to the "natural jurisdiction" discussed in the jurisprudence) as "[1]a port where the event giving rise to the claim occurred, or if that event did not occur in that port, [2] the first port of call after the event occured and [3] includes in relation to a claim for loss of life or personal injury or for damage to cargo, the port of disembarkation or discharge."

[32] *Id.*

[33] M.I. Rev. Code Title 47, §523 (emphasis and underling added).

[34] *Id.* at §521.

- Finally, the Bombay Court expressly recognized that India's adoption of the 96 Protocol's higher limits reflects strong public policy favoring the interests of claimants in maritime casualties, particularly in situations where a shipowner resorts to a lower limit jurisdiction *with no natural relationship* to the casualty:

> [A]part from the fact that Hong Kong is not the natural forum and not a more appropriate forum than India, the plaintiff will suffer a tremendous juridical disadvantage if they are required to litigate in Hong Kong where the Limit of Liability is substantially lower than in India. **In fact Indian Public policy is reflected in [the domestic enactment of the 96 Protocol] which applies the higher 199[6] Protocol limits and a plaintiff who has invoked the jurisdiction of this Hon'ble Court as of right ought not to be denied the benefit of the higher limit that Indian Public Policy provides.** Consequently irreparable loss, harm and prejudice will be caused to the plaintiff [if forced into the HK Limitation Suit].[35]

The Bombay Decision, for these reasons (and others bearing on the equities of this case, *see* Section 2 immediately below), mandates the same result in this case. Cargo Plaintiff's claims are proper before this Court, and are not subject to dismissal/bar vis-à-vis the HK Limitation Suit. Moreover, the Cargo Plaintiffs are entitled to the benefit of the RMI Nitijela's public policy decision to adopt higher limits under the 96 Protocol,[36] particularly given that the ELENI Defendants have chosen to incorporate and enjoy the benefits of their domicile in the RMI, in return for which they must also respect the entirety of RMI law.

**2) ELENI Defendants' Other Conduct of "Forum Shoplifting"**

And the ELENI Defendants' "forum shoplifting" extends beyond just improper forum shopping viz. the "unnatural" jurisdiction HK Limitation Suit to other conduct around the world.

First, the ELENI Defendants previously entered a private "side limitation agreement"

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[35] Bombay Decision, at ¶42.

[36] Ironically, the ELENI Defendants have previously argued to this Court in the FNC Motion that the "public policy [of the RMI] would be served" by dismissing this case in favor of the 76 Convention HK Limitation Suit.

("India Agreement")[37] with the owner of the HEUNG-A BANGKOK and HEUNG-A-DRAGON ("HAD Parties"), after the HAD Parties arrested the ELENI in India on March 14, 2014 based on damage claims to the HEUNG-A-DRAGON (including indemnity claims vis-à-vis cargo owner's losses) arising out of the Collision. The ELENI was released pursuant to the India Agreement, which provided that the claims against the ELENI would be asserted in the HK Limitation Suit, subject to the ELENI Defendants' agreement (i) to post security totaling in excess of $60 million (ten times the value of the fund in the HK Limitation Suit); (ii) that a large portion of this security would not have to be returned even after constitution of a fund in the HK Limitation Suit; and (iii) an agreement to a "private limitation figure" well in excess of the fund in the HK Limitation Suit. Thus, the ELENI Defendants themselves clearly do not intend to be bound by the HK Limitation Suit/76 Convention in their dealings with other parties affected by the Collision. Their argument that Cargo Plaintiffs have engaged in forum shopping, and that the present action should likewise be governed by the 76 Convention, rings hollow.

Indeed, the Bombay Decision **recognized the patent inequity** of the India Agreement, which is at odds with the ELENI Defendants' apparent intent to limit in the HK Limitation Suit, and which would result in a much lower recovery for claimants like the Cargo Plaintiffs:

> At the same time, in [a different] action that was filed in [another Indian court] against the [ELENI] by the [HAD Parties], the [ELENI Defendants] [gave] security to the [HAD Parties] in a sum in excess of US$ 40 million as against the limitation fund . . .[I]f the defendant has limited liability, then where was the need to furnish security in excess of US$ 40 million. Therefore, they had a special arrangement and because of this special arrangement, the [HAD Parties] who are . . . consented [for Hong Kong limitation]. It is submitted that therefore the Court should not pay much importance to a consent decree obtained in this fashion. In response, the counsel for the [ELENI Defendants] submitted that the plaintiff in

[37] Notably, the ELENI Defendants previously attempted to withhold/conceal the existence of the India Agreement from the Cargo Plaintiffs, notwithstanding that it relates (albeit indirectly, via the indemnity provisions) to the Cargo Plaintiffs' claims in this case.

> that case was a shipowner whereas the plaintiff herein is the cargo interest and hence the plaintiff herein cannot expect to be treated on the same footing as a shipowner. The whole thing according to him is a matter of negotiation. I cannot accept this submission . . . [and] see no reason why the plaintiff should be discriminated against, just because they are cargo interests and not shipowners.
>
> * * *
>
> [ELENI] Defendant[s] ha[ve] given security for [over] US$ 40 million in the [HAD Parties Indian suit] to secure the claim of the [HAD Parties] when the limitation of liability in India [under the 96 Protocol] would have been only US$ 6.2 million and a limitation fund has already been set up in Hong Kong. No acceptable explanation for this also came forth from the defendant. Therefore, it does appear that there was a special arrangement between the [ELENI Defendants] and [HAD Parties]. Should they decide to settle the [HK Sistership Suit, which occurred as reported to the Court in the motion to lift stay in these proceedings] and apportion the liability and settle the matter at 50% - 50% or 30% fault against [the ELENI] and 70% against [the HEUNG-A-DRAGON] the amount that the plaintiff herein will recover, would be limited to so much less than the sum they may recover in this country. The difference in limitation fund between India and Hong Kong is 1:2.4. This means if in Hong Kong the fund to be set up is US$ 1 in India it will be US$ 2.4 under.[38]

Second, some of the Cargo Plaintiffs arrested the ELENI in South Africa, and obtained security for the balance of their claims ("South Africa Security"), with said security responsive to a judgment in the RMI "or other competent court." However, after the ELENI Defendants affirmatively consented to the terms of the South Africa Security, they (1) filed the FNC Motion to dismiss the RMI action and (2) at the same time attempted to remove the "or other competent court" language, such that the South African Security would be *solely* responsive to an RMI judgment. The result, had they been successful on both fronts, would have been the complete invalidation of the security they had affirmatively agreed to for Cargo Plaintiffs' claims. The ELENI Defendants' gamesmanship in attempting to have the South Africa Security limited *exclusively* to a judgment from this Court - while at the same time arguing that this Court should divest itself of jurisdiction on an FNC basis - is inequitable.

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[38] Bombay Decision, ¶¶26, 43.

The ELENI Defendants' conduct in forum shopping/"forum shoplifting" is objectively inequitable given that (a) they have not admitted to its obvious forum shopping; (b) they filed the HK Limitation Action in a **completely unnatural forum** with no link whatsoever to the underlying casualty; (c) they themselves have surreptitiously undermined the 76 Convention and the HK Limitation Suit (which they are advocating for this Court to uphold) by entering the India Agreement; and (d) they have attempted to limit the South Africa Security to a judgment from this Court *while at the same time* urging this Court to reject jurisdiction. Moreover, as a further matter of equity, the ELENI Defendants' forum shopping (if countenanced by granting dismissal of this case) would effectively render the adoption by the RMI Nitijela of the higher limitation limits of the 96 Protocol meaningless, insofar as RMI-based shipowners could simply resort at will to commencing limitation proceedings in a lower limit jurisdiction (regardless of whether any claim had been made against them and regardless of whether there is any connection at all between the casualty and that jurisdiction), as and if it suits them. The ELENI Defendants' flouting of the RMI's public policy should not be countenanced.

## III. ELENI DEFENDANTS, NOT CARGO PLAINTIFFS, FIRST RAISED LIMITATION UNDER RMI LAW

Cargo Plaintiffs have previously addressed the ELENI Defendants' incorrect assertion that limitation is not before this Court (*see* Introductory Statement), but briefly revisit the issue here in response to the ELENI Defendant's contention at Opposition p. 11 that "no person referred to in Section 502 [of the RMI LLMCA] has sought to limit liability" in this Court.

To reiterate, the ELENI Defendants have from the outset of this case, including in their present Opposition, told this Court that the Cargo Plaintiffs' claims are necessarily barred as a result of the HK Limitation Suit. This is an uninhibited attempt "by [ELENI Defendants] to limit

[their] liability before a Court [of the RMI]" as contemplated by LLMCA §525. ELENI Defendants themselves have raised the issue in this Court, not Cargo Plaintiffs.

Likewise, the ELENI Defendants make the curious and unsupported assertion that they "do not need to raise limitation as a defense" - ignoring the fact that they have already effectively done so - "because there is no case anymore" (Opposition, p. 9). This statement makes no sense on its own, but presumably refers to the ELENI Defendants' statement on the same page (contradicting their assertions that limitation is not an issue at all) that Cargo Plaintiff's claims are bound by the HK Limitation Suit, and that all this Court need do is dismiss this case and send Cargo Plaintiffs into the Hong Kong proceedings. This, however, **is precisely what this Court refused to do** in denying the FNC Motion.[39]

## IV. THE CLASH OF CONVENTIONS IS REAL; THE 96 PROTOCOL IS RMI LAW

### A. The Clash of Conventions is Undeniable

The ELENI Defendants, in reliance on the Davies Declaration (¶9), assert that there is no Clash of Conventions because the 76 Convention and the 96 Protocol are *the same convention*, just with different limits. With due respect to Prof. Davies, the broader scholarship does treat this situation as a true Clash of Conventions, if not by the name coined in Prof. Hare's article.[40]

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[39] Notably, the only case cited for these arguments (*Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F. 3d 191 (4th Cir. 2009) is irrelevant because it was a forum non conveniens case, not a Clash of Conventions case. Notably, however, the *Compania Naviera* court only agreed to dismiss the United States limitation action in favor of the more convenient/natural jurisdiction China limitation if the owner in the Chinese proceedings consented to "not raising or asserting a defense based on a statute of limitations or court-imposed deadline in response to any claim" by the United States claimants (whose claims were otherwise time-barred).

[40] *See*, Nigel Meeeson, Q.C., *Jurisdictional Aspects of Limitation of Liability for Maritime Claims* in LIABILITY REGIMES IN CONTEMPORARY MARITIME LAW 301, 305 (Prof. D. Rhidian Thomas, ed., 2007) (hereinafter "Meeson") ("Not all contracting states to the [76 Convention] have accepted the [96 Protocol]. This gives rise to the possibility that a shipowner can engage in forum shopping essentially within the [76 Convention] regime by seeking to establish a fund in a [76 Convention] state which has not implemented the [96 Protocol]"); Patrick Griggs, *Limitation of Liability for Maritime Claims*: the Search for International Uniformity [1997] [LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY 369, 376 (noting *inter alia* 96 Protocol, and stating that failure of some countries to denounce earlier treaties after acceding to new ones results in lack of uniformity).

**B. RMI Owes no Treaty Obligations to Hong Kong Under 76 Convention**

The ELENI Defendants go on to suggest, based on the Davies Declaration (¶¶11-13), that the RMI owes treaty obligations to Hong Kong pursuant to 96 Protocol Article 9.4's Overlap Clause. However, their argument in this regard does not make internal sense.

First, the ELENI Defendants and Prof. Davies *acknowledge* that the RMI is a dualist jurisdiction. However, they then go on to essentially ignore the fact that the Nitijela **did not enact Article 9.4 of the 96 Protocol** into its domestic laws. Rather, they resort to the unrelated (and incorrect) suggestion that the ELENI Defendants have never sought limitation in the RMI to suggest that the LLMCA, as the Nitijela's domestic enactment of the 96 Protocol, **does not apply**, and so (presumably) only the 96 Protocol itself (and Article 9.4) - and not any provisions of the LLMCA - are at issue before the Court. Opposition, p. 13-14; Davies Declaration ¶¶11-13.

This is wrong for two reasons, one factual and one purely legal. First, the premise that the ELENI Defendants have not sought to limit in this Court pursuant to LLMCA §525 is wrong as previously discussed (*see* Introductory Comments and Background).[41] Second, as Cargo Plaintiffs have previously argued, the Nitijela not only *excluded* Article 9.4 from the LLMCA entirely, it also **directly prohibited the application of Article 9.4** by its domestic enactment of other provisions of the 96 Protocol providing that **only** a fund established pursuant to 96 Protocol limits can have any effect on claims in the Marshall Islands:

- "constitution . . . of a limitation fund" is expressly governed by Marshall Islands law (per M.I. Rev. Code Title 47, §524);
- "constitution" of a fund requires limits consistent with the 96 Protocol (per M.I. Rev. Code Title 47, §510 and §521);
- under the "[a]ggregation of claims" provision "[t]he limits of liability determined

[41] Notably, the Davies Declaration does not mention any of the ELENI Defendants' prior filings or assertions.

in accordance with Section 510 [i.e. 96 Protocol limits] shall apply to the aggregate of all claims which arise on any distinct occasion" (per M.I. Rev. Code Title 47, §513) - i.e. *only if there is a 96 Protocol fund constituted* by a defendant will that defendant be entitled to aggregate claims against the fund.

- LLMCA §523 only allows for a bar to other actions if "a limitation fund has been constituted in accordance with Section 521" (M.I. Rev. Code Title 47, §523); which in turn requires 96 Protocol limits (*id.* at §521).

Thus, not only has the Nitijela *excluded* Article 9.4 entirely from the RMI's domestic law, it has also *affirmatively precluded* the effect contemplated by Article 9.4 based on the positive provisions of the LLMCA enacting other provisions of the 96 Protocol. This same basic legislative action has been recognized by commentators (with regard to the United Kingdom's enactment of the 96 Protocol) **as a de facto denunciation** of the 76 Convention.[42] Likewise, the Bombay Decision, which recognized the validity of India's domestic enactment of the 96 Protocol limitation regime, notwithstanding its lack of formal denunciation of the 76 Convention, in the face of a parallel limitation in Hong Kong under the 76 Convention. Further, the RMI's delegation to the International Maritime Organization's ("IMO") March 2001 drafting convention for a different maritime limitation convention (regarding bunker oil pollution) formally assented to the adoption of a resolution "ENCOURAG[ING] States Parties to the [76 Convention] to denounce that Convention" in favor of the 96 Protocol.[43] Thus, the RMI has indicated its intent to denounce the 76 Convention in both the domestic legislative will of the Nitijela and the international assent in IMO proceedings.

It bears noting here that a draft version of the 96 Protocol actually included (in addition to Article 9.4) an article that would have **required denunciation of the 76 Convention** as a

[42] *See* Meeson at 306 ("The position of the United Kingdom is that the [76 Convention] was denounced with effect from the entry into force of the [96 Protocol]" based on the enactment of the 96 Protocol into British domestic law).

[43] Final Act of the International Conference on Liability and Compensation for Bunker Oil Pollution Damage, 2001, *available at* http://www.crclass.org/chinese/ccr-3/ccr-3doc/ccr-3b/38/10_bunker%202001.pdf (PDF p. 18).

prerequisite to accession to the 96 Protocol.[44] However, this provision was removed (in favor of keeping Article 9.4 alone), amidst suggestions from some delegations that the 76 Convention/96 Protocol overlap issue should "[be left] up to the States to decide whether it is really appropriate [or possible] to have both" at the same time.[45] Clearly, the RMI Nitijela chose only the 96 Protocol by omitting Article 9.4 from, and by positively nullifying any effect of the 76 Convention in, its domestic enactment of the 96 Protocol.

Moreover, even assuming there is some residual treaty obligation between the RMI and Hong Kong, the ELENI Defendants (and Prof. Davies) omit a practically critical fact: Hong Kong, as a Special Administrative Region (SAR) of the Peoples' Republic of China (PRC), **actually passed its own domestic legislation *in February 2005* adopting the 96 Protocol as the law in Hong Kong.**[46] However, due to the administrative intricacies of the political framework between Hong Kong as an SAR of the PRC, the ministerial processes to formally enact the 96 Protocol in Hong Kong were not completed until February of 2015, with the 96 Protocol taking effect in Hong Kong in May of 2015. Thus, while it was not so at the outset of these proceedings, Hong Kong *is now a party* to the 96 Convention as well.

Notably, however, even though Hong Kong was not *technically* a party to the 96 Protocol when this case began due to the purely ministerial delay of the PRC in completing the necessary process (*ten years* later) of formally depositing the instrument of accession on Hong Kong's behalf for accession to the 96 Protocol, **the legislature of Hong Kong itself unequivocally**

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[44] *See* The Traveaux Preparatoires of the LLMC Convention, 1976 and of the Protocol of 1996, pp. 591-92 *available at* http://comitemaritime.org/Uploads/Publications/Travaux%20Preparatoirse%20of%20the%20LLMC%20Convention%201976%20and%20of%20the%20Protocol%20of%201996.pdf.

[45] *Id.* at p. 517.

[46] *See, e.g., Hong Kong Introduces Higher Liability Limits* (June 25, 2015), http://www.gard.no/web/updates/content/20856439/hong-kong-introduces-higher-liability-limits.

**adopted the 96 Protocol** and expressly stated that the 96 Protocol **was the world standard:**

> Although ratification of the [96] Protocol is voluntary, the Administration considers it **necessary to implement it in Hong Kong so that the liability limits [in] Hong Kong will be in line with the highest international standards...**[47]
>
> ***
>
> **This will be consistent with our policy objective to maintain Hong Kong's status as an international maritime centre...**We have registered our plan to apply the [96] Protocol in HKSAR with the [PRC] and secured its agreement to notify IMO on our behalf when we have enacted the present Bill...[48]

As underlined portion indicates, *the only reason* Hong Kong's expressly stated, and legislatively enacted, intent to adopt the 96 Protocol did not come into effect sooner was the delay of the PRC in the final ministerial step of depositing an instrument with the IMO.

In short, in rough practical terms, the RMI and Hong Kong have in fact been *de facto* parties to the 96 Protocol since 2005, rendering any Article 9.4 issues moot.

### C. HK Limitation Fund is NOT Constituted under RMI Law; nor is the HK Limitation Suit Jurisdictionally Proper under RMI Law

The ELENI Defendants, in reliance on several English law cases (Davies Declaration, ¶¶14-18) suggest the HK Limitation Suit should be deemed brought in a "court of competent maritime jurisdiction" as required by LLMCA §§502 and 521, insofar as the Hong Kong court deemed its jurisdiction over that suit proper. This, however, ignores the text of the LLMCA.

First, as stated above, **the HK Limitation Suit cannot be a "constituted fund" in the RMI** because only a 96 Protocol limits fund can be deemed "constituted" under RMI law.

Second, Section 524 of the LLMCA provides in no uncertain terms that "the rules relating to the constitution . . . of a limitation fund, and all rules of procedure in connection

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[47] http://www.legco.gov.hk/yr04-05/english/hc/papers/hc0204ls-22e.pdf (emphasis added).

[48] http://library.legco.gov.hk:1080/articles/1022971.3030/1.PDF (emphasis added).

therewith, **shall be governed by the civil procedure law of the [RMI].**"[49] Thus, it is the law of the RMI which will determine, in the scenario of a foreign fund (as allowed for under LLMCA §502 and 521), whether that fund is "constituted" *for purposes of RMI law and proceedings.* Cargo Plaintiffs do not challenge the Hong Kong court's own determination of jurisdiction under Hong Kong law; that is not the issue before the Court. Rather, the question is whether the Hong Kong Limitation Suit is *jurisdictionally proper* for purposes of this Court, applying RMI law, to determine if the fund in that suit is properly "constituted" under the LLMCA.

And the simple answer is that it is not; the plain language of the LLMCA **precludes a preemptive limitation action** like the one the ELENI Defendants filed in Hong Kong, as Cargo Plaintiffs have already argued (*see* Clash of Conventions Motion Memo, pp. 29-33).

Likewise, the ELENI Defendants/Prof. Davies' resort to English law decisions is improper for two reasons (as explained in part in the Introductory Statement): (1) the English law cases are at direct odds with other decisions, including the Bombay Decision and the *KAPITAN SHVETSOV* decision in Hong Kong, as well as numerous other jurisdictions and the Comite Maritime International - the organization *that originally drafted* the 76 Convention (a point Prof. Davies does not address);[50] and (2) **all those cases** involved limitations filed in "natural" jurisdictions, not forum-shopped limitations like the HK Limitation Suit.

**D. *Perforaciones* and other U.S. Jurisprudence support Cargo Plaintiffs' Position**

The ELENI Defendants suggest that the *Perforaciones* decision supports their view because the ruling was based on the United States' non-party status to the 76 Convention. As explained again above, however, the Nitijela's domestic enactment of the 96 Protocol constitutes

[49] M.I. Rev. Code Title 47, §524

[50] *See* Clash of Conventions Motion Memo, pp. 31-33.

a *de facto* denunciation of the 76 Convention, and in any event, renders the 76 Convention entirely inapplicable in the RMI. Thus, the situation in *Perforaciones* is **precisely** analogous.

Moreover, the United States general maritime law has long recognized (as far back as the sinking of the TITANIC)[51] that foreign limitation of liability **cannot** have extra-territorial effect (absent shared treaty obligations): "[b]ecause a decree in limitation normally receives only domestic recognition, the courts of each country will apply local law on the question of limitation; **no country will give effect to a foreign limitation decree as barring further suit.**"[52] Again, because Hong Kong and the RMI effectively *do not* share limitation treaty obligations, the HK Limitation Suit cannot have extraterritorial effect in these proceedings (either under the LLMCA or under United States general maritime law).

And finally, *Perforaciones* is not the only decision under United States general maritime law to hold in this regard. The federal district court for the Southern District of New York, as later affirmed by the Second Circuit Court of Appeals, in *In Re Otal Investments, Ltd.* allowed concurrent, parallel limitation proceedings - with a foreign fund as well as separate and parallel domestic security - based on the non-extraterritorial effect of a foreign limitation fund.[53] *Otal* involved a three-ship collision in the Dover Straits off England; the owners of the M/V KARIBA (Otal) arrested the M/V CLARY (owned by the Clary Interests) in the Netherlands. The Clary Interests filed for limitation in the Netherlands (a 76 Convention state), and Otal filed a claim in the limitation proceeding. Otal then filed its own limitation proceeding in the United States, and also again arrested the M/V Clary in the Southern District of Georgia. The Clary interests sought

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[51] *THE TITANIC*, 233 U.S. 718, 34 S.Ct. 754, 58 L.Ed. 1171 (1914).

[52] *Perforaciones*, 356 F. App'x at 681(emphasis added).

[53] 2005 WL 1588986 (S.D.N.Y. July 8, 2005) *aff'd sub nom. Otal Investments Ltd. v. M.V. CLARY*, 494 F.3d 40 (2007).

dismissal of Otal's U.S. *in rem* claims based on the Dutch limitation proceeding. The *Otal* refused to dismiss Otal's claims in the United States based on principles of comity because the 76 Convention *had no extraterritorial effect* and was not binding on the United States:

> Clary Interests argue that the Court should employ equity and comity to recognize and give effect to the 1976 Convention and dismiss the in rem claim in this jurisdiction. But equity as well as case law allow for a different result when the issue is the extraterritorial effect of a convention to which the United States is not a signatory. . . Here, comity will not be invoked since the United States has chosen not to adopt the [76 Convention] but rather to enact its own statute.[54]

The same result under United States general maritime law should apply here. The RMI Nitijela has rejected/*de facto* denounced the 76 Convention by enacting the 96 Protocol pursuant to the LLMCA as its domestic law. This Court is not bound to recognize the HK Limitation Suit.

### E. All ELENI Defendants' English Law Cases for the Proposition that Shipowners Have the Right to Choose Limitation Jurisdiction are Irrelevant and Inapposite

As previously discussed, all of the ELENI Defendants' cases at pp. 18-25 of the Opposition (and Davies' Declaration ¶¶19-23) are English law decisions that have no bearing on this case. Further, the jurisprudence and authorities cited by Cargo Plaintiffs' motion and in the Introductory Statement in this reply contradict these cases (contrary to ELENI Defendants' unsubstantiated suggestion of "selective misrepresentation" of authorities, Opposition p. 19).

Likewise, those cases (*Evergreen, Herceg Novi, Ship Chou San*) **all involved "natural" jurisdiction limitation proceedings,** unlike the HK Limitation Suit, which was admittedly not filed in a natural jurisdiction for the Collision. The cases cited in the Introductory Statement of this Reply (*KAPITAN SHVETSOV,* Bombay Decision, *Ship XIN TAI HAI*) all involved forum-shopped limitation proceedings filed in "unnatural" jurisdictions, and all those courts allowed parallel funds/proceedings to go forward. There is no "recent international trend" (Opposition, p.

[54] 2005 WL 1588986 at *4 (citations omitted).

25) to defer wholesale to first-filed limitation proceedings as ELENI Defendants contend.

Finally, ELENI Defendants' contention that a parallel limitation fund in the RMI would somehow result in Cargo Plaintiffs not "sharing rateably with others" in the limitation amount from the HK Limitation Suit. This is incorrect under the LLMCA. ELENI Defendants would retain their right to subrogate against an RMI 96 Protocol fund, on a ratable basis,[55] to the extent of claims paid in the HK Limitation Suit. Again, given that the ELENI Defendants have already unilaterally undermined the 76 Convention limits by establishing an extra-76 Convention private limitation fund in the India Agreement, this result would be eminently equitable.

4/21/16 (MAJURO DATE)

Dennis Reeder Date
Attorney for Plaintiffs

**-OF COUNSEL-**

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[55] LLMCA §522 provides that "the fund shall be distributed among the claimants in proportion to their established claims against the fund," (M.I. Rev. Code Title 47, §522(1)), such that any subrogation claims the ELENI Defendants take into a 96 Protocol fund in the RMI will not result in a 1:1 recovery, but rather a ratable recovery viz. the higher 96 Protocol limits.

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REPUBLIC OF THE MARSHALL ISLANDS



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ADMIRALTY AND VICE ADMIRALTY JURISDICTION**

**NOTICE OF MOTION NO. 769 OF 2014**
**IN**
**ADMIRALTY SUIT (LODG.) NO. 329 OF 2014**

m.v. "ELENI" (IMO No.9460277) .. Applicant
(Orig. Defendant)

**IN THE MATTER BETWEEN :**

Hanwha General Insurance Co. Ltd. .. Plaintiff
Vs.
m.v. "ELENI" (IMO No.9460277) .. Defendant

Mr.Prashant Pratap, senior advocate a/w. Mr.A.Sinha i/b Harsh Pratap, advocate for applicant.

Mr.Ravi Kadam, senior advocate a/w. Mr.Rahul Narichania, senior advocate i/b DSK Legal for defendant.

**CORAM : K.R.SHRIRAM, J.**

**DATED : 5th JANUARY, 2015**

**P.C.**

1 This notice of motion is taken out on behalf of the defendant for dismissal of the suit in view of the order and decree passed by the High Court of Hong Kong and, in the alternative, return the suit to the plaintiff to be presented in the Hong Kong High Court and, in the further alternative, stay the suit *sine die* and return the security furnished by the defendant.

Bombay High Court

of collision. Limitation of liability is very peculiar to maritime industry. A shipowner in a situation like in the present case, where due to collision he can expect various claims, can limit his liability based on the tonnage of the ship and set up a fund called limitation fund. All claimants have to go against the fund. Many countries including India has recognised this and are signatories to or have ratified or have accepted the instruments concluded in the conventions on limitation of liability for maritime claims. India has, infact included it in its domestic law Merchant Shipping Act, 1958, as amended, not the entire provisions of one such convention as explained later, but most of it.

4 On 19th November 2013, the owners of m.v. Heung-A Dragon provided security to secure release of m.v. Heung-A Bangkok. On 25th November 2013, the limitation action namely HCAJ No.189/2013 was amended to include three cargo interests, who are also based in Hong Kong.

5 On 2nd December 2013, the Hong Kong Solicitors of the owners of the defendant vessel addressed an e-mail to the plaintiff's Hong Kong Solicitors informing them that the defendant has commenced limitation action in Hong Kong namely HCAJ No.189/2013 and that some of the cargo interests have



Bombay High Court

been served and very soon the owners of the defendant vessel would be setting up a limitation fund. The plaintiff's Hong Kong advocates replied querying what did Hong Kong have to do with the case. In reply, the plaintiff's Hong Kong lawyers were informed that m.v. Heung-A Bangkok was arrested by the defendant at Hong Kong and that security has been furnished for her release and that m.v. Heung-A Dragon had called in Hong Kong before proceeding to Vietnam. I am not delving much into the motive of the owners of defendant vessel filing the limitation action in Hong Kong. Suffice to say there was no bar against doing so, they had the liberty to do so and the Hong Kong Court has exercised jurisdiction. No further details are available as to what transpired after December, 2013, but on 9th April 2014, the present admiralty suit was filed by the plaintiff.

6 A caveat against arrest of the defendant vessel under Rule 929 of the High Court (O.S.), Rules had been filed by owners of defendant vessel undertaking to put up security upto US$ 12 million. Therefore, upon notice, the owners of the defendant vessel furnished security by way of bank guarantee in the sum of US$ 787,343.94 together with interest at the rate of 12% per annum on the said sum (claim in this suit) for release of the defendant vessel.

Bombay High Court

On 14th May 2014, the Hong Kong High Court by consent of all parties decreed the limitation action and directed all claimants to file their claims on or before 28th November 2014. This deadline, the counsel for the defendant said has been extended. On 19th May 2014, public notices were issued in three papers including Loyd's list in London and on 21st May 2014 the owners of the defendant vessel deposited HK$ 48,929,241.96 to create the limitation fund. Having established the limitation fund, the owners of the defendant vessel have taken out the present notice of motion. Henceforth, for brevity, the owners of the defendant vessel is referred to as defendant. It is the case of the defendant that the limitation fund having been created, all parties world over, who have claim against the defendant vessel should go and claim against the limitation fund and therefore, the reliefs as sought in this notice of motion ought to be granted.

7 It is the case of the defendant that the limitation action was commenced in Hong Kong because (a) the defendant arrested m.v. Heung-A Bangkok, the sister vessel of m.v. Heung-A Dragon, for claims in direct connection to the collision; (b) m.v. Heung-A Dragon had called in Hong Kong before she collided with the defendant vessel; (c) three of the cargo interest onboard m.v. Heung-A Dragon (who stand on the same footing as the plaintiff herein) are based in Hong Kong and there were prospects of

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claims being brought in that jurisdiction. Hence, the defendant was justified in invoking the jurisdiction of Hong Kong High Court and constituting the funds therein.

8 It is the defendant's case that the funds having already been set up in Hong Kong, in accordance with Article 11 of the Convention on Limitation of Liability for Maritime Claims, 1976 (for brevity 1976 Convention), this Court should direct return of security and further direct the plaintiff to go and stake its claim against the fund. The defendant also submits that the Hong Kong Court has jurisdiction and that is why it exercised its jurisdiction and permitted the defendant to constitute the limitation fund and as provided in the case of the ***Seismic Shipping INC and Anr. Vs. Total E & P UK PLC (The "Western Regent")***[1] there is nothing in the 1976 Convention which restricts an action for limitation to an action in which there already exits a claim against the shipowners in the same jurisdiction. The defendant is emphasizing on this because when the defendant filed the limitation action invoking limitation of liability, there was no claim or legal proceedings instituted in Hong Kong High Court against the defendant for claims which will be subject to limitation.

1 (2005) Vol.2 Lloyd's Law Reports 359



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9 The defendant also relied on extracts from the Book on Limitation of Liability for Maritime Claims by Patrick Griggs and Others (2005-4th Edition) and Modern Maritime Law and Risk Management by Aleka Mandaraka Sheppard (2009-2nd Edition) to buttress the point that there was nothing in the language of the 1976 Convention which required the person seeking to limit to wait until a claimant brought proceeding in England. Relying on these extracts it was submitted that it is quite common that the person seeking to limit to start limitation proceedings in a jurisdiction of his choice before the liability action is brought and English Courts do not have any difficulty in permitting limitation actions to be brought in a different forum from that of the liability action.

10 In this regard, the defendant also relied on another English Court judgment in the matter of ***Caspian Basin Specialised Emergency Salvage Administration & Anr. Vs. Bouygues Offshore S.A. & Ors. (No.4.)***[2], in which the Court held that the choice of the forum for a limitation action belongs in principle to the party seeking to limit, not to the claimant.

> ".....There can be nothing surprising or inappropriate about a limitation action being commenced in the same forum as a claimant action to establish liability; but equally thee is nothing unusual about a limitation action taking place in a different forum from that in which liability is being litigated. Moreover, the choice of forum for a

2 (1997) Vol.2, Lloyd's Law Reports 507



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> limitation action belongs in principle to the party seeking to limit, not to the claimant. It has been established that it would be wrong in principle for a claimant seek to usurp a shipowner's choice of forum for this limitation action by seeking a negative declaration in the liability action to the effect that the shipowner was not entitled to limit."
>
> (emphasis supplied)

Therefore, I agree that it is rather clear, under 1976 Convention, it is possible and there is nothing wrong to file a free standing limitation action in a forum where no claim has been filed. Moreover, the Hong Kong High Court has permitted that and exercised jurisdiction by permitting the defendant to set up the limitation fund. In India the position would be different. As explained later, such a free standing action cannot be filed and limitation of liability can be invoked only in the event legal proceedings are instituted in respect of claims subject to limitation.

11 Having come to this conclusion, as to why there was nothing wrong in setting up a limitation fund in Hong Kong High Court and the defendant having set up the limitation fund, the next point which requires to be considered is should this Court stay the proceedings, return the security and direct the plaintiff to go to Hong Kong.

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12 Let us now consider the provisions of 1976 Convention. Convention on Limitation of Liability for Maritime Claims, 1976 (for the sake of brevity hereinafter referred as '1976 Convention') came into force on 1st December 1986 and United Kingdom of Great Britain and Northern Island was a signatory to the same with a declaration of applications to Hong Kong. Therefore, the 1976 Convention is applicable to Hong Kong.

Article 1 (1) of the 1976 Convention provides that *ship owners and salvors may limit their liability in accordance with the Rules of Convention for claims set out in Article 2.* Article 1(2) provides the term *'ship owner' means the owner, charterer, manager and operator of a seagoing ship.* Article 1(4) provides if any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner is responsible, such person shall be entitled to avail himself of the limitation of liability provided in this Convention and Article 1(5) provides the liability of a shipowner shall include liability in an action brought against the vessel herself. Article 1(7) provides the act invoking limitation of liability shall not constitute an admission of liability.

Under Article 2 it is provided that subject to Articles 3 and 4, the claims mentioned therein whatever the basis of liability may be, shall be subject to limitation of liability. Article 2(1)(a) provides for claims in respect of loss of life or personal injury or loss of or damage to

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property.....occurring onboard or in direct connection with the operation of the ship..... and consequential loss resulting therefrom.

Article 3 provides which are the claims excepted from limitation and Article 4 provides a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Article 6 provides for the limits of liability or in other words quantum of limitation fund to be constituted.

Article 9 provides that the limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion against the persons mentioned in the said article.

Articles 10, 11, 12, 13 and 14 which are directly relevant for this motion are reproduced herein below :

> **Article 10 : Limitation of liability without constitution of a limitation fund --**
>
> 1 Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. However, a State Party may provide in its national law that, where an action is brought in its Courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or

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is constituted when the right to limit liability is invoked.

2 If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.

3 Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

## CHAPTER III: THE LIMITATION FUND

**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.

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**Article 12 - Distribution of the fund :**

1 Subject to the provisions of paragraphs 1, 2 and 3 of Article 6 and of Article 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

2 If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

3 The right of subrogation provided for in paragraph 2 may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

4 Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs 2 and 3 had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

**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 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,

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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 connexion therewith, shall be governed by the law of the State Party in which the fund is constituted."

13 Article 13 of the 1976 Convention is relevant to the issue raised in paragraph 11 above, whether this Court should stay the proceedings and direct the plaintiff to go to Hong Kong.

Article 13 is in two parts. In the book on Limitation of liability for Maritime Claims by Patrick Griggs and others referred above at page 77, the

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author has written as under :

"Article 13(2) is effectively in two parts :

(1) the factors which must be satisfied before the court can act to release a vessel or property which has been arrested in its jurisdiction. These factors are :

(a) A limitation fund must have been established, by or on behalf of the person to whom the ship or property arrested belongs, in a State Party in which legal proceedings have been instituted in respect of the claims in question. (This State Party does not have to be the same State Party as that in whose territory the ship or property has been arrested.)

(b) The vessel or property must have been arrested or attached for a claim which may be made against the limitation fund which has been established. Therefore, the governing factor is the nature of the claim and it is not a requirement that the claim *has actually been made* against the limitation fund.

(2) Once it is established that the court can act to release a vessel or property which has been arrested, the court has to determine whether circumstances exist in which it is *obliged* to release or whether the circumstances are such that it has a *discretion* whether to release :

(a) The court *must* release the vessel or property if the limitation fund has been constituted :
(i) at the place where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
(ii) at the port of disembarkation in respect of claims for loss of life or personal injury ; or
(iii) at the port of discharge in respect of damage to cargo; or
(iv) in the State where the arrest is made.
(b) The court has a *discretion* whether to release

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the vessel or property in circumstances other than these set out in (a).

14 In what circumstances should the Court exercise its discretion in favour of the shipowners, is discussed by the English Court of Appeal in the matter of ***Herceg Novi (owners) Vs. Ming Galaxy (owners)***[3] relied upon by the defendant. In the said judgment, the Court reached the following conclusion :

> "We have to say that we agree with Waung J and with Liu JA, rather than with the majority of the Court of Appeal inHong Kong and the English judges at first instance. We reach that decision for three reasons :
>
> (1) The 1976 convention has not received universal acceptance, or anything like it. It is not 'an internationally sanctioned and objective view of where substantial justice is now viewed as lying'. It is simply the view of some 30 states.
>
> (2) The International Maritime Organisation is not a legislature. It may commend the 1976 convention to the international community. But if by doing so it were found to have enacted an international consensus, that would be to deprive sovereign states to a large extent of their right to stay with some other regime. We say that because jurisdiction could often be obtained by arresting a ship in a 1976 country, and if that action were allowed to proceed despite there being a more appropriate forum where 1957 prevailed, the 1957 country would be left with no effective use for its own law.
>
> (3) In our view, it is quite impossible to say that substantial justice is not available in Singapore, seeing

3 (1998) 2 Lloyd's Rep.454 Court of Appeal (Civil Division)



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> that there is a significant body of agreement among civilised nations with the law as it is there administered. The preference for the 1976 convention has no greater justification than for the 1957 regime. Loss in the cases we are considering will often be borne by the insurers of one side or the other. The 1976 convention provides a greater degree of certainty, which they, will perhaps welcome. But in terms of abstract justice, neither convention is objectively more just than the other. Our task is not to decide whether out law is better than the law of Singapore. It is to decide whether substantial justice will be done in Singapore. In our view it will be. This appeal should be allowed, and an unconditional stay of the English action granted."

Therefore, the Court stayed the proceedings of the claimants in England and directed them to seek against the limitation fund set up by the owners in Singapore where the Convention Relating to the Limitation of Owners of Seagoing Ships of 1957 (1957 Convention) prevailed, even though under 1957 Convention, the limitation amount to be constituted is less than the amount to be constituted under the 1976 Convention. Relying on this, the defendant stated that even though under the 1996 Protocol, which is applicable in India, the amount of limitation fund is higher than the limitation amount set up in Hong Kong under 1976 Convention, this Court should follow what the English Court of Appeal has said and direct the plaintiff to go to Hong Kong and seek its claim against the limitation fund by staying these proceedings.

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15 With due respect to the English Court, everybody knows substantial justice will be done in Singapore. For that matter in all Courts. But I cannot accept one of the reasons which has prevailed strongly for the English Court to arrive at their conclusion is "Loss in the cases we are considering will often be borne by the insurers of one side or the other...". In my view even if the insurance companies are going to bear the loss, even they are entitled to be protected and in this case, the plaintiff was the Insurer of five of the cargo that was carried on board m.v. Heung-A Dragon. Are they not entitled to compensation to the best possible extent? Though the limitation action was filed in Hong Kong prior in point of time to the suit filed in this Court that we are deciding, the limitation fund itself was set up after the present suit was filed and security was furnished in this Court.

16 The basic reason why various States recognised the desirability of determining certain uniform rules relating to the limitation of liability for maritime claim is because almost in all situation, the cargo interest may commence action in different forums in different States and the shipowner will have to go on furnishing security and defend the actions in each forum. That is how the 1957 convention came into being under which the shipowners could limit liability to the extent mentioned therein provided the owner was able to prove that the action for which the claim arose, did not



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arise due to any actual fact or privity on the part of the owner. There were various matters later which raised further complications and therefore 1976 convention was concluded whereby the person entitled to limit liability was extended to include salvors rendering services in direct connection with salvage operations and the term 'shipowner' included the owner, charter, manager and operator of a seagoing ship. The limits were enhanced under the 1976 convention but the onus was shifted from the person entitled to limit his liability to the party opposing constitution of limitation fund.

17 Article 4 of the 1976 convention provides a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. Therefore, the person entitled to limit liability would always limit liability unless it is proved against him that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This is a very difficult fact to prove and therefore, under the 1976 Convention generally a shipowner should be able to always limit his liability. That is why the amount of fund was enhanced as against 1957 Convention.

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The 1976 Convention was amended by the Protocol of 1996 to which India is also a signatory. There is not much difference between the 1976 Convention and 1996 Protocol. One notable difference is the limits of liability under Article 6 has been enhanced substantially. It is for that reason, the plaintiff is saying that the defendant went to Hong Kong even though Hong Kong had nothing to do with the collision or had no connection with the collision and set up limitation fund so that they could pay lesser amount than in India.

18 The counsel for the defendant stated that the defendant had already filed HCAJ No.188/2013 against Heung-A Dragon in Hong Kong by arresting the sister ship of Heung-A Dragon in which evidence will be recorded and same evidence will be available even for the benefit of HCAJ No.189/2013. Therefore, Hong Kong is a convenient forum and as concluded by the English Court of Appeal in the ***Herceg Novi*** case (supra), this Court also should stay this suit and direct the plaintiff to go to Hong Kong even if the limitation amount is less because in the Hong Kong High Court substantial justice will be done to the parties. They also submitted that some of the cargo claimants who are defendants in the Hong Kong proceedings HCAJ No.189/2013 have consented to setting up the limitation fund.

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19 Counsel for the defendant further submitted that the stand of the plaintiff that the defendant has set up limitation fund under the 1976 Convention deliberately is also not correct. Counsel submitted that the 1996 Protocol which the plaintiff stated is applicable in India is not much at variance with the 1976 Convention except the quantum of limitation fund to be established. According to counsel, 1976 Convention is still applicable to India read with 1996 Protocol because as recently as October 2014, India has not denounced the 1976 Convention.

20 As regards the contention of the plaintiff that the defendant cannot seek the reliefs as sought as there is a mismatch between the funds to be constituted under the 1976 Convention and the 1996 Protocol, the counsel for the defendant relied upon a passage from the book on Liability Regimes in Contemporary Maritime Law edited by Prof. D. Rhidian Thomas (2007 edition), where, the author has, at page 306, para 16.22, commented as under :

> "……
> Any limitation fund established in a 1976 State will not be in the amount required by the 1996 Protocol and therefore on an ordinary reading of the amended version of Schedule 7 to the 1995 Act will not be a fund constituted in accordance with Article 11. Accordingly, because such a fund is not a fund constituted in accordance with Article 11, then the English Court is not obliged to stay under the mandatory provisions of

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Article 13.2 nor is the discretionary power under Article 13.2 applicable."

The counsel for defendant also submitted that India not having denounced the 1976 Convention and India was a signatory to the 1976 Convention and is also a signatory to the 1996 Protocol, reading Article 9(4) of the 1996 Protocol, read with the passage mentioned above, the Court should exercise the discretion in favour of the defendant.

21 As regards, the plaintiff's contention that there are suits filed by various claimants in Marshall Islands where the defendant vessel is registered which are pending and therefore, this suit also should be proceeded with, the counsel for the defendant submitted that pursuant to an order dated 22nd October 2014, the proceedings in the Marshall Islands have been stayed until 22nd April, 2015 or until the Hong Kong Court decides on the liability in HCAJ No.188/2013 whichever occurs first. Counsel, however, was also not able to state with certainty as to whether the defendant has furnished any security in Marshall Islands or not because the order dated 22nd October 2014 is silent in that regard.

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22 Submissions were also made on the applicability of Part XA of the Merchant Shipping Act, 1958 (MS Act) to this suit. The plaintiff's counsel contended that it was applicable, whereas the defendant's counsel submitted that it is not applicable because it contemplates only a fund constituted in India. I have dealt with this later.

23 According to the counsel for the defendant, the only thing which needs to be looked into is 1976 Convention. Counsel concluded by saying that this Court should exercise its discretion in favour of the defendant and must grant reliefs as sought. He also relied on the judgment of the Apex Court in ***O. Konavalov Vs. Commander, Coast Guard Region & Ors.***[4] to say that the comity of nations is a reciprocal courtesy which one member of the family of nations owes to the others and requires that one Court should respect the other.

24 Mr.Kadam, counsel for the defendant relied upon a judgment of House of Lords in the matter of ***Spiliada Maritime Corporation Vs. Cansulex Ltd. (The "Spiliada")***[5] to submit that if the Court is satisfied that there is another forum which is *prima-facie* the appropriate forum for trial of the action then it will ordinarily not refuse stay unless there are

4 (2006) 4 SCC 620
5 (1987) Vol.1 Lloyd's Law Reports 11



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circumstances by reason of which justice requires that a stay should not nevertheless be granted. One such factor can be established cogent evidence that the plaintiff will obtain justice in the foreign jurisdiction.

25 Mr. Kadam also submitted that the key to the issue that has to be considered is what is in the best interest of all the parties and meets the ends of justice. He also submitted that an advantage to the plaintiff will ordinarily give rise to a disadvantage to the defendant. The advantage could be that damages awarded may be on a higher scale or a more complete procedure of discovery or a power to award interest or a more generous limitation period. He submitted that as general view, relying upon the ***Spiliada*** (supra), the Court should not be deterred from granting a stay of proceedings simply because the plaintiff will be deprived of such an advantage, provided that the Court is satisfied that substantial justice will be done in the appropriate forum overseas.

26 It is the plaintiff's case that the collision happened due to the fault of the defendant vessel. Mr. Pratap, counsel for the plaintiff also submitted that under the MS Act or the 1996 Protocol, the limitation fund will be about US$ 6.2 million. At the same time, in the action that was filed in Gujarat High Court against the defendant vessel by the owners of Heung-A Dragon,

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the defendant has given security to the owners of Heung-A Dragon in a sum in excess of US$ 40 million as against the limitation fund. He states that if the defendant has limited liability, then where was the need to furnish security in excess of US$ 40 million. Therefore, they had a special arrangement and because of this special arrangement, the owners of Heung-A Dragon who are the first defendant in HCAJ/189/2013 consented for the decree passed by the Hong Kong Court to set up limitation fund. He submitted that therefore the Court should not pay much importance to a consent decree obtained in this fashion. In response, the counsel for the defendant submitted that the plaintiff in that case was a shipowner whereas the plaintiff herein is the cargo interest and hence the plaintiff herein cannot expect to be treated on the same footing as a shipowner. The whole thing according to him is a matter of negotiation. I cannot accept this submission of the plaintiff's counsel. I see no reason why the plaintiff should be discriminated against, just because they are cargo interests and not shipowners.

27 Mr. Pratap, counsel for the plaintiff also submitted that even though the defendant had filed the limitation action HCAJ/189/2013 in Hong Kong in November, 2013, still the defendant was expecting many claims in India and therefore, on 7th April 2014, the defendant filed a caveat against arrest in



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Bombay agreeing to furnish security upto sum of Rs.74 crores equivalent about US$ 12 million. The defendant vessel arrived on 9th April 2014 and later after one or two extensions, the defendant furnished security in the sum of US$ 787,343.94 with 12% p.a. interest which is the claim amount in the suit. On that day, the fund had not been set up in Hong Kong. The fund was set up only on 14th May 2014. The counsel for the plaintiff further submitted that as defendant had filed caveat to secure upto about US$ 12 million and the plaintiff's claim is only about US$ 787,343.94, they were expecting many more applications for arrest and that is why the caveat was to secure upto US$ 12 million.

He submitted that after setting up the funds on 14th May 2014, the defendant took out the present notice of motion and requested the Court to pass an order deferring the need to file the written statement and therefore, the stand of the defendant that the present suit has not progressed much is not correct because otherwise, the defendant would have had to file the written statement and issues would have been framed within a month and by now affidavits in evidence could have been filed. He submitted that the submission of the defendant that the Hong Kong proceedings have moved far and this suit has not progressed at all is not correct.

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28 On the point as to MS Act is applicable or not, it has to be noted that India although has signed the 1976 Convention and the 1996 Protocol, the entire Convention has not been enacted as a part of domestic law. Part XA of the MS Act sets out provisions pertaining to limitation of liability. Only some of the provisions of the Convention as amended have been incorporated into the MS Act. This shows the Parliament did not want to include those provisions of the Convention which are not incorporated in Part XA of the MS Act. Notable among the exceptions are the following:

> a) The Article 4 of the Convention which refers to conduct barring limitation, or breaking limitation as is more commonly understood.
>
> b) The free-standing right to limit liability set out in Article X of the Convention. Thus limitation of liability can only be invoked in the event legal proceedings are instituted in respect of claims subject to limitation as provided in Section 352C (1).
>
> c) Article 13 of the Convention has not been incorporated into the domestic legislation in its entirety. Only the second part of Article 13(2) [the mandatory provisions] and Article 13(3) is incorporated with some changes.

29 The English Merchant Shipping Act 1995 sets out the 1976 Convention in Schedule 7 and the Convention has been adopted in its entirety as a part of the English Merchant Shipping Act. This is not the position under Indian law. Consequently the English decisions and commentaries on Article 10 and Article 13 are not really relevant.

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30 Section 352 E of the Merchant Shipping Act, 1958 provides for the scope of application of Part X-A. It provides, *interalia*, that

> *"The provisions of Part X-A shall apply whenever any person referred to in sub section (1) of Section 352A seeks to limit his liability before the Court or seeks to procure the release of a ship or other property or the discharge of any guarantee given within the Indian jurisdiction".*

The defendant is the ship-owner as referred to in sub section (1) of Section 352A and is seeking discharge of a bank guarantee provided by it in this Court. Consequently the defendant is covered by Section 352E. Part X-A of MS Act, therefore, would apply in this case. For the purpose of seeking discharge of the bank guarantee, the defendant is required to make an application under Part XA and is entitled to the discharge of the guarantee only in the event the defendant is able to satisfy the requirements of Part XA and not otherwise.

31 It is the defendant's case that they have set up a Limitation Fund in Hong Kong and deposited the fund amount in the Hong Kong High Court. Where a Limitation Fund has been set up, under the MS Act, a party can seek release of security only if the party satisfies the provision of Section 352D(6). The provisions of Section 352D(1), (2) and (3) do not apply.

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32 In my view, the defendant does not satisfy the requirements of Section 352D(6) because the Limitation Fund has been constituted in Hong Kong which is not the port as identified in Section 352D(6). Consequently the other requirements of Section 352D(7) are not required to be considered because the threshold compliance with Section 352D(6) is not met. It is, however, the case of the plaintiff that they have not brought any claim against the fund before the Court administering the Fund and neither is the fund actually available and freely transferable.

33 Section 352D (6) and (7) are a clear departure from Article 13(2) of the 1976 Convention. The discretion given to the Court for release of security under the first part of Article 13(2) is not incorporated in Part XA of the MS Act. Only the latter half of Article 13(2) which provides for a mandatory release of security has been incorporated with a slight modification. The intention of the legislature is clear. There will be a release of security only if the mandatory provisions of Section 352D(6) are complied with and not otherwise.

34 The High Court referred to in Section 352D(7) is the "High Court administering the Fund". In the present case, the High Court which is administering the Fund is the Hong Kong High Court. The definition of

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High Court in Section 3(15) of the Merchant Shipping Act is not applicable because Section 3(15) refers to the High Court in relation to a vessel. The High Court in relation to a vessel may not be the High Court administering the Fund because a Fund can be set up in any relevant port. Likewise, the definition of "High Court" in the General Clauses Act as submitted by the counsel for the defendant is also not relevant because the High Court is expressly identified in Section 352 D(7) of the MS Act as the High Court administering the Fund. Which is the High Court administering the fund is a question of fact in each case and is not confined to the High Court in relation to a vessel.

35 The submission of the defendant that Section 352D(6) and (7) apply only in the event a Limitation Fund is set up in a High Court in India is not correct. In the event a Limitation Fund is set up in India then the provisions of Section 352C apply such that after the Fund is constituted no person entitled to claim against the Fund shall be entitled to exercise any right against any other assets of the ship-owner. Thus, if the defendant had set up a Limitation Fund in a High Court in India, the defendant would then be able to seek an order setting aside the arrest and for return of security under the provisions of Section 352C(3). However, if a Limitation Fund is set up in a Court other than a Court in India, then the provisions of Section

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352D(6) apply.

36 Furthermore, if the defendant's submission that the MS Act applies only if the Fund is constituted in India, is to be accepted, then the effect will be that there is no provision under Part XA which provides for return of the bank guarantee if the Fund has been constituted outside India. That can never be the intention because Part XA in Section 352D(3) also permits release of security if prior security is given in India or elsewhere. Likewise it permits release of security if a Limitation Fund is set up in a port as identified in Section 352D(6), provided the requirements of Section 352D(7) are met. Therefore the intention is to permit release of security in certain circumstances if prior security is given outside India, in a relevant port, in a convention country or a Fund is constituted in the relevant port wherever it is situated and is freely available.

37 Once it is clear that MS Act permits release of security only in a certain situation and not otherwise, it is equally clear that if the requirements of MS Act are not complied with, then the defendant is not entitled to return of security. This is the public policy of India and a public policy, as held by the Apex Court in ***VO Tractoroexport v/s. Tarapore and***

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***Company***[6] must prevail over any provisions of the Convention which are not a part of domestic law and any principle of comity of nations or international law.

38 The problem of Renvoi in conflict of laws suggests the predicament of the domestic courts in deciding matters relating to the comity of nation. A question arises as to whether international law would apply with the aid of the domestic law and if yes, then what is the extent with which it would apply.

39 The comity of nations requires the rules of international law may be accommodated in the municipal law to the extent they do not run in conflict with the internal laws. While applying international law, the sovereignty and supremacy of the powers of the legislature to also be kept in mind. Thus comity of nations or no, when there is a conflict, the internal law of the land will prevail.

40 Article 51 of the Constitution of India directs that the state shall endeavor to foster respect for international law and treaty obligations. Indian Courts have also given positive response to developments in

6 1969 (3) SCC 562



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international law as manifested through their judgments in several areas.

41 The Apex Court in ***Gramaphone Company Limited vs. Birendra Bahadur Pandey***[7] has held that "nations must match with the international community and the municipal laws must respect the rules of international law even as nations respect international opinion. The Court suggested a harmony be brought between the two. However in case of conflict, the municipal law would prevail.

42 On the submissions of the defendant that Hong Kong is a convenient forum as stated in paragraph 19 above, Mr. Pratap submitted that even if the test of forum non convenience is to be applied, then if all witnesses could go to Hong Kong which is not a natural forum, they could also come to India. Natural forum is a place where the collision took place or if the collision happened in mid-sea, the next port of call of the vessel. He further submitted that in any event, the judgment of the Hong Kong Court of Appeal in the matter of ***m.v. Kapitan Shvetsov***[8] is a complete answer on this point. Application of the Hong Kong judgment and the principles set out therein would be consistent with the principle of comity of courts and this Hon'ble Court should be applying the same test as applied by the Hong

7 (1984) 2 SCC 534
8 (1998) 1 LLR 199



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Kong Court of Appeal. English decisions are not relevant because it is comity between India and Hong Kong that is required to be considered and not India and England.

Mr. Pratap further submitted that apart from the fact that Hong Kong is not the natural forum and not a more appropriate forum than India, the plaintiff will suffer a tremendous juridical disadvantage if they are required to litigate in Hong Kong where the Limit of Liability is substantially lower than in India. In fact Indian Public policy is reflected in Part XA of the MS Act which applies the higher 1999 Protocol limits and a plaintiff who has invoked the jurisdiction of this Hon'ble Court as of right ought not to be denied the benefit of the higher limit that Indian Public Policy provides. Consequently irreparable loss, harm and prejudice will be caused to the plaintiff which far outweighs any advantage to the defendant in terms of convenience, if any.

43 What is to be really looked into is whether the plaintiff will be at a great disadvantage and a great injustice will be caused to them or not. Defendant has given security for US$ 40 million in the Gujarat proceedings to secure the claim of the owners of m.v. Heung-A Dragon when the limitation of liability in India would have been only US$ 6.2 million and a limitation fund has already been set up in Hong Kong. No acceptable

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explanation for this also came forth from the defendant. Therefore, it does appear that there was a special arrangement between the defendant and owners of Heung-A Dragon. Should they decide to settle the liability action in Hong Kong, viz., HCAJ 188/2013 and apportion the liability and settle the matter at 50% - 50% or 30% fault against defendant vessel and 70% against Heung-A Dragon the amount that the plaintiff herein will recover, would be limited to so much less than the sum they may recover in this country. The difference in limitation fund between India and Hong Kong is 1:2.4. This means if in Hong Kong the fund to be set up is US$ 1 in India it will be US$ 2.4 under the MS Act, 1958.

44 The Hong Kong Court of Appeal in the matter of ***Kapitan Shvetsov*** (supra) relied upon by plaintiff, did not stay the action even though the proceedings in Singapore arising out of the same collision had progressed substantially. In this case, there was collision between Russian Ship, Kapitan Shvetsov owned by the plaintiff and the defendant Singaporean Ship Nanta Bhum in the channel of Chao Phraya river in Thailand. Neither of the shipowners wanted proceedings in Bangkok. The defendant brought an action *in rem* in the Singapore Court claiming damages against the owners of Russian Ship, who commenced action in Hong Kong against the owners of Singapore ship claiming damages. The Russian owners applied

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for a stay of the Singaporean action but their application was not granted. The Singaporean owners reciprocated by applying to stay the Hong Kong action in favour of Singapore. The 1957 Convention applied in Singapore which provided for setting up a lesser fund compared to 1976 Convention which was applicable in Hong Kong.

45 The Hong Kong Court of Appeal proceeded on the basis that both the parties have not filed action in the natural forum which in that case would have been Bangkok. Each party preferred its own chosen forum and was exercising its principal right of access to that forum a right which Court should not disturb even though the balance of factors is strongly in favour of the defendant. The Court did not stay the proceedings even though there will be multiplicity of proceedings or parallel proceedings in Singapore and Hong Kong, and there was a possibility that there may be an overlap and the Court may come to different conclusion. The Court also went on the basis that if witnesses can go to Singapore from Thailand certainly they could also come to Hong Kong. What really tilted the case in favour of the plaintiff is that the limit of liability under the 1957 Convention in the Singapore proceedings would be US$ 9,55,000/- whereas in Hong Kong where the 1976 Convention apply, it would exceed US$ 1.5. million. The Court while

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concluding held as under :

> The position boils down to this. The Russian owners have properly invoked the jurisdiction of the Hong Kong Court for the adjudication of their claim. They have a right to have their claim determined by the Hong Kong Court. In principle, this right cannot be lightly disturbed. The Singapore owners have not brought proceedings in a forum which is natural to the action; that is, the forum with which the action has the most real and substantial connection. Additionally, there is a considerable juridical disadvantage to the Russian owners if they were forced to prosecute their claim in Singapore; the interest of both parties and the ends of justice do not demand that they be driven from their chosen forum.
>
> Once this point is reached, the conclusion is inevitable that the Singapore owners' motion to stay is ill-founded and should have been dismissed.
>
> I would allow this appeal, discharge the Judge's order and dismiss the Singapore owners' application to stay the Hong Kong proceedings.
>
> I would also make an order nisi that the Singapore owners should pay the costs here and below.

46 In the present case also the facts are similar to that in ***Kapitan Shvetsov*** (supra). In the present case, Hong Kong where the defendant has invoked limitation of liability and constituted a fund is not a natural forum. The plaintiff herein, has chosen this forum which has jurisdiction over the



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defendant vessel. Therefore, both the parties have chosen forums which are not the natural forums and one should not have the inherent juridical advantage over the other. Moreover, the plaintiff herein if dragged to go to Hong Kong, will recover a lot less amount than what they would otherwise recover if a fund had been set up in India. The admitted position is that the defendant herein though having set a limitation fund in Hong Kong has given an additional security of US$ 40 million to the owners of Heung-A Dragon which was carrying the plaintiff's cargo. The defendant is also willing to secure the claim of those cargo interest who has sued the defendant in South Africa and in Marshall Islands, as stated by the counsel for the defendant on instructions.

47 Mr.Pratap also relied upon a judgment of the English Court in the matter of ***The Vishva Abha***[9] where again the English Court did not grant a stay. The court in page 314 and 315 has held as under :

> ".....The action has been brought by the plaintiff cargo-owners in this court as of right. Accordingly, I must direct myself initially by the principle, enunciated by Lord Goff on p.11, col.1: p.477 where he says :
>
> In my opinion, the burden resting on the defendant is not just to show that England is

9 (1990) Vol.2 Lloyd's Law Reports 312



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> not the natural or appropriate forum for the available forum which is clearly or distinctly more appropriate than the England forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right.

The defendants are parties to litigation in South Africa, ..... It is because that was the country in which they found the ship *Dias* under another name. They had attempted to find the ship and to serve a writ on her at other ports in the world --- .....Whether or not there was a Court or emporium in which they could ship.....in those ports, I know not; but it was entirely a matter of chance that the defendants in this action were able to find *Dias* in Durban and commence litigation there by arresting her. By doing so, they may have obtained an advantage because the limit of liability in South Africa is still the limit set by the 1957 Convention which is substantially lower than the limit set by the 1976 Convention which was been adopted in this country.

.....if *Vishva Apurva* were to invoke limitation in South Africa, the fund would be in the region of £367,500 at today's rate of exchange for the rand. If *Vishva Apurva* were to invoke limitation in England , the fund would be more than £1.5 million. So there may well be a powerful and important juridical advantage to the plaintiffs in litigating in England, and a powerful juridical advantage to the defendants if they can force the plaintiffs to bring their action in South Africa.

.....that the action which has been commenced in England is an action commenced by the owners of cargo. The action which is currently running in South Africa is an action between the two ship owners.

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.....which is whether the defendants have shown that the South African forum is clearly or distinctly more appropriate than the English forum, I have to look to see what are the factors which affect the convenience or expense of both parties ..... firstly, that the defendants will be faced with the prospect of litigating the same same issue twice; once in England and once in South Africa, unless I stay this action. He says, secondly, that there is a danger that the view which this Court takes as to liability may be different from the view which is taken by the South African Court, and that is something which should, if possible, be avoided.

Dealing with the latter point first, it seems to me that it is relevant that the litigation in this country, this action, is not between the same parties as the litigation currently being pursued in South Africa, and that the plaintiffs prima-facie should not be deprived of litigating in the forum of their choice merely because others have chosen to litigate in South Africa. However, the point goes further in this case because, as I have already pointed out, it was mere chance which dictated that the defendants have found themselves litigating in South Africa..... It seems to me that there are occasions when it is not possible to avoid two different jurisdictions, even with the possibility of two different decisions. So that is only a theoretical possibility. Indeed, so far as the defendants are concerned, they may possibly have the advantage in this country that the plaintiffs will be unable to call any witnesses to give oral evidence ---- and that is a severe disadvantage in a collision action.

.....

There is one other matter which has been ventilated, and that is the question of potential delay.....a possibility that a collision action

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> in South Africa would be heard rather later than in this country, but not materially so. It is a point that has not impressed me greatly.
>
> .....if the action proceeds to trial in this country and if the plaintiffs recover damages in excess of £1.5 million. On the other hand, an assuming that the South African Court took precisely the same view on liability, the plaintiffs would recover only their share of £367,000. It does seem to me that it would be a grave injustice to deprive them of their right to litigate in this country and send them to South Africa where their chances of recovering damages would be limited to so much less than the sum they may recover in this country.
>
> I have balanced that against the expense to which the defendants will be put in litigating in both the countries, but the expense of bringing a few witnesses to England is as nothing compared with the very substantial sum involved in the difference between the limits of liability in this country and South Africa. For these reasons, the motion is dismissed.

48 I am also not convinced that Hong Kong is a distinctly more appropriate forum than this Court. The shipowners often have to face litigation in different parts of World and for a variety of reasons these shipowners have got to face litigation arising out of this in a number of jurisdictions. I do not think that the interest of justice demand that the present plaintiff who have brought an action in this Country as a matter of right, should be required to litigate in Hong Kong merely because the defendant has chosen to bring an action in Hong Kong which is also not a

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natural forum. Even in the ***Herceg Novi*** (supra) relied upon by the counsel for the defendant, one of the factors that tilted in favour of English Court staying the English proceedings is that the other proceedings were in England which was not a natural forum where the first action was filed.

49 Fifty-Eight (58) countries, I am told, have signed the 1976 Convention out of which Forty-Nine (49) countries are signatories to the 1996 Protocol including India. Therefore, the balance of convenience should tilt in favour of the plaintiff.

50 Therefore, the inevitable conclusion that I would arrive at is that the defendant's motion to dismiss the suit or return the plaint to the plaintiff to be presented in the Hong Kong High Court or stay the suit and return the security cannot be granted.

Notice of Motion is accordingly disposed as rejected. Costs to be costs in the suit.

51 At the same time the defendants have stated that in HCAJ/188/2013, in Hong Kong (a) inspection and discovery of documents is complete, (b) pleadings have been closed, (c) witness statements have already been exchanged, (d) experts have been retained by both parties, (e) trial is due to



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progress and (f) the Court first will determine the liability before the quantum issue. The suit in this court has not progressed so much.

52 In my view, judicial time can be saved, if this Court does not simultaneously commences trial arising out of the same collision in which trial is going to begin in Hong Kong High Court. It would, therefore, be better to wait and see the outcome of the Hong Kong proceedings. It is also possible that this Court may accept the Hong Kong High Court's decision on liability. The plaintiff herein may also accept. Therefore, the parties are directed to advise this Court as soon as the Hong Kong High Court issues its decision in HCAJ/188/2013 or by 30th April, 2015 report to the Court on the status of HCAJ/188/2013, whichever first occurs. In the meanwhile, the defendant is directed to file the written statement within four weeks from today.

**(K.R. SHRIRAM, J.)**

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