INTERNATIONAL CIVIL LITIGATION AND THE POLLUTION OF THE MARINE ENVIRONMENT

Prof. Dr. Frank Smeele

1. Introduction

1. Whenever a major accident occurs to a ship – whether a fire or an explosion on board of the ship, or a collision with another ship, or the ship running aground or sinking and becoming a wreck – it is likely that this casualty will result in considerable physical damage to the ship and its cargo, and in some cases also in loss of life or personal injury to crew members and passengers aboard the ship. Obviously this may have huge financial implications for parties interested in ship and cargo and for crew members, passengers and their relatives. However a maritime casualty not only affects parties involved in the ship's operation but also third parties. Depending on the circumstances of the incident and the nature of the resulting damage, (many) third parties from various countries are likely to suffer losses as well. A few examples may help to draw the picture. States may be affected e.g. if wreck removal and clean-up operations become necessary, but also the financial interests and livelihoods of private individuals and businesses, such as local hotels and restaurants who lose earnings from tourists when the coast line becomes covered by a thick layer of crude oil or fisheries who temporarily or permanently lose access to their fishing grounds. Indirectly, the financial interests of many more parties will be affected by the disaster as its consequences ripple on through the local and national economy. This group includes the sub-buyers and final users of the goods, as well as underwriters, whether Hull and Machinery (H&M) underwriters or Protection & Indemnity (P&I) insurers of the ship or marine cargo underwriters.

2. Besides the multitude of interests likely to be affected by a maritime casualty involving a ship, there is also a potential for exceptional financial losses resulting from it. It was reported in 2008 that the costs of clean-up operations in Alaska following the Exxon Valdez oil spill in 1989 had reached the figure of US$ 3,5 Billion and still counting. But not only oil tankers and ships carrying other hazardous cargoes are capable of generating such enormous losses. Modern container vessels with over 12,000 TEU capacity may easily have cargoes on board worth hundreds of millions of Euros, as is illustrated by the fires involving the m.v. "Hanjin Pennsylvania" in 2002 and the m.v. "Hyundai Fortune" in 2006, and the voluntary grounding of the "MSC Napoli" in 2007.

2. Limitation conventions

3. Obviously, this extreme potential for damage entails the risk that the ship-owner will be held liable to compensate all of these losses in full. It was in order to protect the shipping industry against this extreme liability exposure that the notion of limitation of liability of the ship-owner was first developed.[1] The basic idea is that in case of a maritime disaster involving his ship, a ship-owner is to be released from all his liabilities to anyone, if he puts a limited amount of money, the fund, at the disposal of his joint creditors.

4. Originally, this privilege was granted to ship-owners under national law, but as from 1924 a variety of international conventions dealing with limitation of liability of the ship-owner has come into being.[2] These conventions can be divided in two groups, i.e. on the one hand the limitation conventions of more or less general application, which are:

- 1924 Brussels Convention[3],
- 1957 Brussels Convention[4],
- 1979 Protocol to the 1957 Convention[5],
- 1976 London Convention (LLMC)[6],
- 1996 LLMC as amended by the 1996 Protocol[7],
- 1988 Strasbourg Convention (CLNI)[8].

---

1 For a comparative history of the ship-owner's right to limitation of liability under German, French, English and American law, see: P.K. Sotiropoulos, *Die Beschränkung der Reederhaftung*, diss. Hamburg, 1962. See also: J.J. Donovan, 'The origins and developments of limitation of shipowner's liability', *Tulane Law Review* 54 (1979) No. 4, p. 1000

2 For an up-to-date overview of the dates of entry into force and the status as to ratifications of various limitation conventions, see: http://www.imo.org under the heading Conventions, "Status of Conventions Summary" and "Status of Conventions by Country".

3 International convention for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels, Brussels 25.8.1924, *International Transport Treaties*, ed. by J.E. de Boer, Kluwer, Deventer (Looseleaf) I-23 seq. (cited: ITT). The 1924 Convention entered into force on 2 June 1931.

4 International convention relating to the limitation of the liability of owners of sea-going ships, Brussels, 10.10.1957, *ITT*, I-76 ff. The 1957 Convention entered into force on 31.5.1968.

5 Protocol amending the International convention relating to the limitation of the liability of owners of sea-going ships dated 10 October 1957, Brussels 21.12.1979, *ITT*, I-309 ff.

6 Convention on limitation of liability for maritime claims, London, 19.11.1976, *ITT*, I-247 ff. LLMC 1976 entered into force on 1 December 1986 and as per 28.2.2009 had 52 contracting states, representing 49.08 % of the world's shipping tonnage. Based on information provided by the U.N. International Maritime Organization (IMO) on its website: www.imo.org/Conventions Summary of status of Conventions.

7 Protocol of 1996 to amend the convention on limitation of liability for maritime claims, 1976, London, 2.5.1996, *ITT*, I-561 ff. The LLMC 1996 entered into force on 13.5.2004 and already has 34 contracting states representing 35.48% of world tonnage.

8 Strasbourg convention on the limitation of liability of owners of inland navigation vessels (CLNI), 4.11. 1988, *ITT*, II-87 ff. CLNI 1988 entered into force on 1.9.1997 and has 4 contracting states.

and on the other hand the conventions in relation to the civil liability and/or limitation of liability and/or compensation of specific types of damage (hereafter to be called: special conventions), which are:

- 1969 Civil liability convention for oil pollution damage (CLC)[9],
- 1976 CLC as amended by the 1976 Protocol (CLC 1976)[10],
- 1992 CLC as amended by the 1992 Protocol (CLC 1992)[11],
- 1971 International Fund Convention (IFC)[12],
- 1976 IFC as amended by the 1976 Protocol (IFC 1976)[13],
- 1992 IFC as amended by the 1992 Protocol (IFC 1992)[14],
- 2003 Supplementary Fund Protocol to IFC[15],
- 1989 Civil liability convention carriage of dangerous goods by road, rail and inland navigation vessels (CRTD)[16],
- 1996 Liability convention for hazardous and noxious substances (HNS)[17],
- 2001 Civil liability convention for bunker oil pollution damage (Bunker)[18],
- 2007 Wreck Removal Convention (WRC).[19]

5. A remarkable common feature of this second group of conventions is that whilst recognizing[20] the principle of limitation of liability by the ship-owner, these conventions also

---

9 Brussels, 29.11.1969, *ITT*, I-167 ff. CLC 1969 entered into force on 19.6.1975 and as per 31.3.2009 still has 38 contracting states representing 2.89% of world tonnage.

10 London, 19.11.1976, *ITT*, I-265 ff. CLC 1976 entered into force on 8.4.1981 and as per 31.3.2009 has 53 contracting states representing 56.41% of world tonnage.

11 London, 27.11.1992, *ITT*, I-459 ff. It is worth observing that the Protocol to amend CLC of 25.5.1984, *ITT*, I-355 ff. did never enter into force. CLC 1992 entered into force on 30.5.1996 and as per 31.3.2009 has no less than 121 contracting states representing 96.39% of world tonnage.

12 International convention on the establishment of an international fund for compensation for oil pollution damage, London, 18.12.1971, *ITT*, I-185 ff. IFC 1971 entered into force on 16.10.1978. After many denunciations as per 31.3.2009 it has 20 contracting states left. *CMI Yearbook 2007-2008*, p. 440 ff.

13 London, 19.11.1976, *ITT*, I-268 ff. IFC 1976 entered into force on 22.11.1994 and as per 31.3.2009 has 31 contracting states representing 47.33% of world tonnage.

14 London, 27.11.1992, *ITT*, I-476 ff. IFC 1992 entered into force on 30.5.1996 and as per 31.3.2009 has 103 contracting states representing 94.12% of world tonnage.

15 Protocol of 2003 to the international convention on the establishment of an international fund for compensation for oil pollution damage 1992, London, 16.5.2003, *ITT*, I-711 ff. The Supplementary Fund Protocol 2003 entered into force on 3.3.2005 and as per 31.3.2009 has 23 contracting states representing 19.84% of world tonnage.

16 Convention on civil liability for damage caused during carriage of dangerous goods by road, rail, and inland navigation vessels (CRTD), Geneva 10.10.1989, *ITT* IV-81 ff. CRTD 1989 has not entered into force.

17 International convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, London, 3.5.1996, *ITT*, I-573 ff. HNS 1996 has not yet entered into force despite 13 ratifications of states representing 13.64% of world tonnage as per 31.3.2009.

18 International convention on civil liability for bunker oil pollution damage, London, 23.3.2001, *ITT*, I-655 ff. Bunkers 2001 recently entered into force on 21.11.2008 and as per 31.3.2009 already has 38 contracting states representing 75.50% of world tonnage.

19 International convention on the removal of wrecks, Nairobi 18.5.2007, *ITT*, I-759 ff. As per 31.3.2009 WRC 2007 has not been ratified by any state or entered into force.

aim to ensure a proper level of compensation for damage resulting from oil pollution and hazardous or noxious substances. To this end all these special conventions impose a strict liability[21] and a compulsory insurance obligation[22] on the ship-owner[23] and provide for a direct right of action of injured parties against the liability underwriters of the ship-owners.[24]

3. Beneficiaries of limitation or immunity

6. The various limitation conventions have in common that besides the ship-owner, also (diverging) groups of other persons involved in the operation of the ship, benefit from the statutory limitation of liability. In this respect there are two systems in use. Under the general limitation conventions, the right to limitation of liability is extended to a wider group of persons, whose legal position is equated to that of the ship-owner. In contrast, under the specific limitation conventions all liability and the right to limit is channelled towards the ship-owner[25] and roughly the same group of persons around the ship-owner is granted immunity from liability.[26] Below, for easy reference these groups of persons either entitled to limitation of liability or immune from liability altogether, will be referred to jointly as beneficiaries of limitation or immunity.

7. Depending on the particular convention the group of beneficiaries of limitation or immunity may include one or more of the following parties: – the ship-owner[27], – the salvor[28], – the carrier[29], – the operator[30], – the charterer[31], – the hirer[32] or – the manager[33] of the

---

20 Whereas CLC 1992, IFC 1992, Supplementary Fund 2003, CRTD 1989 and HNS 1996 provide for limitation funds of their own, Bunker 2001 and WRC 2007 clarify that they do not affect any right to limitation of the ship-owner under any applicable national or international regime such as LLMC. See: art. 6 Bunker 2001, art. 10-2 WRC 2007.

21 See art. III-1 CLC 1992, art. 7-1 HNS, art. 3-1 Bunker and art. 10-1 WRC. For the rather limited grounds of exemption available to the ship-owner, see art. III-2 and III-3 CLC 1992, art. 7-2 and 7-3 HNS, art. 3-2 and 3-3 Bunker and art. 10-1 (a), (b) and (c) WRC. See also art. 5-4 CRTD.

22 See art. VII-1 CLC 1992, art. 12 HNS, art. 7-1 Bunker and art. 12-1 WRC.

23 The only exception is CRTD 1989 which imposes the strict liability and compulsory insurance obligation on the *carrier*, see art. 5-1 and 13-1 CRTD 1989.

24 See art. VII-8 CLC, art. 12-8 HNS, art. 7-10 Bunker, art. 12-10 WRC and art. 15 CRTD.

25 An exception is provided by art. 5-1 CRTD in which all liability is channelled, not to owner of the vehicle, but to the (contractual) carrier of dangerous goods.

26 See art. III-4 (a) to (f) CLC 1992, art. 7-5 (a) to (f) HNS, art. 5-7 (a) to (g) CRTD.

27 See art. 1 1924 Convention, art. 1 1957 Convention, art. 1-1 LLMC, art. 1-1 CLNI, art. 5-7 (c) CRTD, art. V-1 CLC 1992, art. 9-1 HNS, art. 6 Bunker.

28 See art. 1-1 LLMC, art. 1-1 CLNI, art. 5-7 (d), (e) and (f) CRTD, art. III-4 (d) and (e) CLC, art. 7-5 (d) and (e) HNS, art. 6 Bunker.

29 See art. 9-1 CRTD.

30 See art. 10 1924 Convention, art. 6-2 1957 Convention, art. 1-2 LLMC, art. 1-2 CLNI, art. 5-7 (c) CRTD, art. III-4 CLC 1992, art. 7-5 (c) HNS, art. 1-3 Bunker.

31 See art. 10 1924 Convention, art. 6-2 1957 Convention, art. 1-2 LLMC, art. 1-2 CLNI, art. 5-7 (c) CRTD, art. III-4 (c) CLC 1992, art. 7-5 (c) HNS, art. 6 Bunker.

32 See art. 5-7 (c) CRTD.

ship, – their respective agents and servants[34], – the crew members[35] and – the pilot or any other person, who without being a crew member, performs services for the ship.[36] Furthermore, if the applicable law allows an action *in rem* against the ship or a direct action against the liability underwriters of the ship-owner, then the ship[37], respectively the liability underwriters[38] are entitled to invoke limitation of liability as well.

8. It is a general principle common to the general and special limitation conventions that the beneficiaries of limitation or immunity lose this protection if it is proven that the damage "resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."[39] Under the older limitation conventions the right to limit of the ship-owner was understood to be a limit to his vicarious liability as employer for the acts and faults of his servants, not a right to limit for his own faults. Consequently there was no right to limit if "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner".[40] This resulted in many cases in which the right to limit was successfully contested under the 1957 Convention.[41] The modern approach, which was introduced with CLC 1969 and LLMC 1976, aimed to make the limits of liability virtually "unbreakable".[42] It seems that this objective has been achieved, because internationally there are hardly any cases where the right to limit is lost[43],

---

33 See art. 6-2 1957 Convention, art. 1-2 LLMC, art. 1-2 CLNI, art. 5-7 (c) CRTD, art. III-4 (c) CLC 1992, art. 7-5 (c) HNS, art. 1-3 Bunker.

34 See: art. 6-2 1957 Convention, art. 1-4 and 9-2 LLMC, art. 1-3 and 9-3 CLNI, art. 5-7 (a) and (g) CRTD, art. III-4 (a) and (f) CLC 1992, art. 7-5 (a) and (f) HNS, art. 6 Bunker.

35 See art. 6-2 1957 Convention, art. 1-4 LLMC, art. 1-3 CLNI, art. 5-7 (a) CRTD, art. III-4 (a) CLC 1992, art. 7-5 (a) HNS, art. 6 Bunker.

36 See art. 1-4 LLMC, art. 1-3 CLNI, art. 5-7 (b) CRTD, art. III-4 (b) CLC 1992, art. 7-5 (b) HNS, art. 6 Bunker.

37 See art. 1-5 LLMC, art. 1-4 CLNI, art. 6 Bunker.

38 See art. 1-6 LLMC, art. 1-5 CLNI, art. 15-2 CRTD, art. V-11 and art. VII-8 CLC 1992, art. 9-11 and art. 12-8 HNS, art. 6 and art. 7-10 Bunker.

39 See art. 4 LLMC, art. 4 CLNI, art. 10-1 CRTD, art. V-2 CLC and art. 9-2 HNS.

40 See art. 1-1 and art. 6-3 1957 Convention, and art. 2 1924 Convention.

41 See e.g. The Lady Gwendolen [1965] 1 *Lloyd's Rep.* 335, 335 (CA); The Marion [1984] 2 *Lloyd's Rep*. 1; Cour d'appel (CA) Aix-en-Provence 9.6.1988, *Droit Maritime Français (DMF)*, 1989, 708, CA Aix-en-Provence 14.12.1988, *DMF* 1990, 248.

42 See: F. Berlingieri (ed.), *The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996*, Antwerp, CMI, 2000, p. 123, No. [8].

43 See e.g. the decision of the Court of Appeal (CA) The Hague 26.2.2002 *S&S* 2002, 60 [*The Pioner Onegi*] setting aside the earlier decision of 23.4.1998 of the Court of Rotterdam in which – subject to further evidence – the loss of the right to limit by the ship-owner was considered possible on the alleged facts of the case. The *Pioner Onegi* had left the port of Antwerp in a very unstable condition because of too many containers stowed above deck and capsized at the first bend in the river Scheldt on its way to sea. It was alleged that an employee at the head-office had pressured the master to take on board too much cargo. The CA The Hague decided that even if that was true, it did not constitute a "personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result" on the part of the ship-owner, as required under art. 4 LLMC to break the right to limit.

however with the notable exception of France, where despite the new criterion of art. 4 LLMC it is still fairly easy to "break" the right to limit.[44]

4. An intermezzo: *Commune de Mesquer v. Total*

9. In the recent case of *Commune de Mesquer v. Total France*[45], the European Court of Justice (ECJ) was confronted with preliminary questions of which the third essentially raised the issue whether the concepts of limitation of liability for the ship-owner in art. V-1 CLC 1992 and of immunity from liability for the charterer in art. III-4 (c) CLC 1992, are compatible with the liability of the "holder" in art. 15 of the Waste Directive 75/442.[46]

10. The case arose out of the sinking of the oil tanker "Erika" and the resulting oil spill on the Atlantic Coast of France in 1999. Several factors added to the complexity of this case. Firstly, Waste Directive 75/442 (as all Directives under European law) is to be implemented through the national legislation of the EU member states, in this case France, yet the authentic interpretation of these Directives is reserved for the European Court of Justice. Secondly, although CLC 1992 and IFC 1992 are not part of EU law, at the time of the incident CLC 1992 and IFC 1992 had been ratified by France and 23 other EU member states and are very important international conventions providing worldwide uniformity on liability for and compensation of oil pollution damage.

11. Before a conflict could arise between Waste Directive 75/442 and CLC 1992, the ECJ had to establish first whether the Erika's cargo of heavy fuel oil constituted a "waste" under Waste Directive 75/442. The ECJ's approach in answer to the first question is that "heavy fuel oil sold as a combustible fuel does not constitute "waste" within the meaning of … (Waste Directive 75/442), where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing."[47] This implies that a cargo of heavy fuel oil carried as cargo on board of an oil tanker as such is not a waste under Waste Directive 75/442.

---

44 See e.g. Trib. Bordeaux 23.9.1993, *DMF* 1993, 731 and CA Bordeaux 31.5.2005, *DMF* 2005, 839 [*The Heidberg*] with comment A. Vialard ; P. Bonassies and C. Scapel, *Droit Maritime*, Paris, LGDJ, 2006, No. 428 ff., I. Corbier, 'La faute inexcusable de l'armateur or du droit de l'armateur de limiter sa responsabilité', *DMF* 2002, 403 ff., Ph. Delebecque, 'La faute inexcusable en droit maritime français (Brèves remarques sur deux aspects controverses) », Jurisprudence du Port d'Anvers (JPA), 2005, p. 328. See also the overview of French case law in : F. Stevens, *Beperking van aansprakelijkheid, Zee- en Binnenvaart*, Brussels, Larcier, 2008, p. 105 ff.

45 ECJ 24.6.2008 (C-188/07), [2008] 2 *Lloyd's Rep.* 672 [Commune de Mesquer v. Total France S.A., Total International Ltd.]

46 European Council Directive 75/442 on Waste, as amended by European Commission Decision 96/350.

47 ECJ 24.6.2008 (C-188/07), [2008] 2 *Lloyd's Rep*. 672 [Commune de Mesquer v. Total], No. 90, sub 1.

12. However, the position is different where (part of) a cargo of heavy fuel oil (= hydrocarbons) escapes from the ship and spills into the sea water. In that case, "hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of … (Waste Directive 75/442), where they are no longer capable of being exploited or marketed without prior processing."[48] The implication is that a spill of heavy fuel oil from a tanker vessel constitutes both "oil"[49] "pollution damage"[50] under CLC 1992 and a "disposal of waste"[51] to which Waste Directive 75/442 applies.

13. The third question before the ECJ was whether "in the event of the sinking of an oil tanker, the producer of the heavy fuel oil spilled at sea and/or the seller of the fuel and charterer of the ship carrying the fuel may be required to bear the cost of disposing of the waste thus generated, even though the substance spilled at sea was transported by a third party, in this case a carrier by sea."[52]

14. This raised the issue whether charterer Total International and/or seller Total France were to be considered "producer"[53] and/or (previous) "holder"[54] of the waste under Waste Directive 75/442. In the affirmative this would mean that these companies were liable to bear the cost of disposing of waste/clean up of the oil spill under the "polluter pays"-principle of art. 15 Waste Directive 75/442.[55] In its decision, the ECJ held that the reason for imposing the financial obligation of bearing the cost of disposing of waste upon previous hol-

---

48 ECJ 24.6.2008 (C-188/07), [2008] 2 *Lloyd's Rep.* 672 [Commune de Mesquer v. Total], No. 90, sub 2.

49 In art. I-5 CLC "oil" is defined as "any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil,, whether carried on board a ship as cargo or in the bunkers of such a ship."

50 In art. 1-6 CLC "pollution damage" is defined as: "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; (b) the costs of preventive measures and further loss or damage caused by preventive measures."

51 See for definitions of "waste" and "disposal", art. 1 (a) j° Annex I, resp. art. 1 (e) j° Annex II, A of Waste Directive 75/442.

52 As reformulated by the ECJ in its judgment in No. 64.

53 "Producer" is defined in art. 1 (b) Waste Directive 75/442 as "anyone whose activities produce waste ("original producer") and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste".

54 "Holder" is defined in art. I (c) Waste Directive 75/442 as "the producer of the waste or the natural or legal person who is in possession of it".

55 Art. 15 Waste Directive reads as follows: "In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by: – the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9, and/or – the previous holders or the producer of the product from which the waste came.

ders or the producer of waste is "their contribution to the creation of the waste and, in certain cases, to the consequent risk of pollution."[56] The ECJ then continues as follows:

> "78. In the case of hydrocarbons accidentally spilled at sea following the sinking of an oil tanker, the national court may therefore consider that the seller of the hydrocarbons and charterer of the ship carrying them has 'produced' waste, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship. In such circumstances, it will be possible to regard the seller-charterer as a previous holder of the waste for the purposes of applying the first part of the second indent of Article 15 of Directive 75/442.

15. It follows from the ECJ's reasoning that it is quite possible that a court in a member state may conclude that the charterer and by extension also the owner of a ship are to be considered "producers" and "(previous) holders" of waste and therefore liable under art. 15 Waste Directive 75/442 if on the facts of the case it is established that the charterer and/or the ship-owner through his/their conduct contributed to the risk of pollution.

16. This however raises the question in earnest whether the ship-owner's limitation of liability under art. III-1 CLC and the charterer's immunity of liability under art. III-4 CLC are compatible with art. 15 Waste Directive 75/442. The ECJ begins by pointing out[57] that art. 15 Waste Directive does not preclude EU member states from laying down pursuant to their obligations under CLC 1992 and IFC 1992 that the liability of the ship-owner and the charterer is limited or that the IOPC Fund assumes liability to a maximum amount "in place of the 'holders' …, for the cost of disposal of the waste resulting from hydrocarbons accidentally spilled at sea." The ECJ then continues as follows:

> "82 However, if it happens that the cost of disposal of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by that fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the ship-owner and/or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1(c) of Directive 75/442, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.

17. Although the European Union is not bound by CLC 1992 and IFC 1992[58], the above citations nevertheless suggest that the ECJ is lenient towards member states who in their national implementation of the Waste Directive, prevent that the costs of waste disposal

---

56 ECJ 24.6.2008 (C-188/07), [2008] 2 *Lloyd's Rep.* 672 [Commune de Mesquer v. Total], Nos. 77, 89.

57 ECJ 24.6.2008 (C-188/07), [2008] 2 *Lloyd's Rep.* 672 [Commune de Mesquer v. Total], No. 81.

58 As expressly observed by the European Court of Justice in No. 85 of decision of 24.6.2008 (C-188/07), [2008] 2 Lloyd's Rep. 672 [*Commune de Mesquer v. Total*].

above the applicable CLC and IFC limits are borne by the ship-owner or charterer, who under art. 15 Waste Directive may qualify as "holders" of the waste. It suffices for the proper transposition of the Waste Directive for the member state to provide that in that case "the producer of the product from which the waste thus spread came" (i.e. the manufacturer of the heavy fuel oil) bears the costs of disposal.

5. Patchwork of limitation regimes

18. As a result of the multitude of general and specific limitation conventions currently in force, a rather complex patchwork of limitation regimes has developed for the various claims arising out of a maritime casualty. In order to create an overview over this inaccessible area of the law, it is necessary to begin by distinguishing the claims subject to limitation from all other claims which are in principle recoverable in full. After the claims subject to limitation have been identified, these claims can be divided over the various claim categories for which separate liability limits have been set under the general and special limitation conventions.

6. Claims subject to limitation

19. As a general rule, limitation of liability is possible only[59] in relation to liability claims in respect of loss or damage occurring on board or in direct connection with the operation of the ship or with salvage operations.[60] The legal basis for the claim whether in contract, tort or otherwise, is generally of no consequence[61] as long as it is a *civil* liability. Claims based on public law, e.g. a fine based on criminal or administrative law or a tax liability are not subject to limitation of liability under the general or special limitation conventions.

20. Furthermore a claim subject to limitation must either fall within the catalogue of claims to which the general conventions apply[62] or under the material scope of application of one of the special conventions.[63] Whether the claim is brought directly by the injured party itself or indirectly by another party who has compensated this loss and has become subro-

---

59 An exception is CRTD 1989, which in art. 1-6 CRTD uses the notion of "vehicle" to refer to "a road vehicle, a railway wagon or a ship", but the basic idea is the same.

60 See art. 1-1 1924 Convention, art. 1-1 1957 Convention, art. 2-1 LLMC, art. 2-1 CLNI, art. 1-10 CRTD, art. 1-6 CLC 1992, art. 1-6 HNS and art. 1-9 Bunker.

61 See art. 2-1 LLMC "whatever the basis of liability may be".

62 Pursuant to art. 2-1 LLMC and art. 2-1 CLNI the following claims are subject to limitation: claims in respect of (a) loss of life or personal injury or loss of or damage to property and consequential loss resulting therefrom, (b) loss resulting from delay in the carriage of cargo, passengers or their luggage, (c) other loss resulting from infringements of rights other than contractual rights, (d) and (e) wreck and cargo removal, (f) preventive and loss mitigation measures. See also: art. 1-1 1924 Convention and art. 1-1 1957 Convention.

63 See art. 1-10 CRTD, art. 1-6 CLC 1992, art. 1-6 HNS and art. 1-9 Bunker.

gated in the claim or who seeks recourse or indemnification is irrelevant.[64] Finally, it needs to be verified whether the particular claim has not been excluded from limitation, whether directly by the relevant limitation convention itself[65] or indirectly by a reservation made by the contracting state upon ratification of the convention.[66]

7. Claim categories and limitation funds

21. Once the claims subject to limitation have been identified the next step is to determine the applicable limits of liability. This is necessary because modern limitation conventions differentiate the compensation level of claims based on the nature of the damage. This is effected by the creation of different limitation funds for different categories of claims. This differentiation prevents that e.g. personal injury claims must compete with claims for compensation of property damage in the division of the fund. It also allows higher limits to be set for personal injury claims or oil pollution damage as a matter of public policy.

22. The LLMC PERSONS FUND relates to claims for loss of life and personal injury other than claims from passengers.[67] Based on a vessel with a gross tonnage[68] of e.g. 40,000 m.t., the amount of the persons fund is set at SDR[69] 11,491,000 under LLMC 1976 and SDR 30,400,000 under LLMC 1996.[70] If the persons fund is insufficient to meet the total quantum of verified claims made against it, the fund will be divided proportionally over each of the claims. The unpaid balance of each of the personal injury claims will then share rateably with the claims made against the General Liability Fund discussed below.[71]

---

64 See art. 2-2 LLMC, art. 2-2 CLNI.

65 See art. 2 and 13 1924 Convention, art. 1-4 1957 Convention, art. 3 LLMC, art. XI CLC, art. 4-3 to 4-5, art. 5-1 to 5-5 HNS, art. 4 Bunker. The excluded claims under art. 3 LLMC relate to (a) salvage rewards, special compensation (art. 14 London Salvage Convention) and GA contributions, (b) claims for oil pollution damage covered by CLC 1969 and amendments, (c) and (d) nuclear damage, (e) claims against the shipowner or salvor from their servants if precluded by the law applicable to the employment contract. See also art. 15-5 LLMC excluding air-cushion vehicles and floating oil rigs from the application of LLMC.

66 Pursuant to art. 15-2 and 15-3 LLMC contracting states may depart from LLMC in relation to ships intended for inland navigation, ships of less than 300 tons and purely national cases. Furthermore under art. 18 LLMC, a contracting state may upon ratification reserve the right to exclude claims for wreck and cargo removal costs (see art. 2-1 (d) and (e) LLMC). Art. 18 LLMC 1996 allows such reservation also for damage claims covered by HNS 1996 and amendments. See also art. 8 1957 Convention, art. 18 CLNI.

67 See art. 2-1 (a) and art. 6-1 (a) LLMC.

68 See art. 6-5 LLMC which refers for the calculation of the gross tonnage to the International Convention on Tonnage Measurement of Ships, 1969.

69 The abbreviation "SDR" stands for "Special Drawing Right", the unit of account of the International Monetary Fund, see also art. 8 LLMC.

70 See also art. 6-1 CLNI.

71 See art. 6-2 LLMC.

23. The LLMC PASSENGER FUND applies to claims for loss of life and personal injury from passengers[72] and is based on the passenger carrying capacity of the ship. The amount of the fund for a ship authorised to carry 1,000 passengers is SDR 25 million under LLMC 1976 and even SDR 175 million under LLMC 1996.[73]

24. The LLMC GENERAL LIABILITY FUND applies to all claims subject to limitation other than personal injury claims.[74] Based on a vessel with a gross tonnage of e.g. 40,000 m.t., the amount of the general liability fund is set at SDR 6,343,500 under LLMC 1976 and SDR 15.2 million under LLMC 1996. In principle all claims rank equally under the general liability fund, however LLMC allows contracting states to give priority in their national law to claims in relation to harbour works, basins and waterways and navigational aids.[75]

25. WRECK AND CARGO REMOVAL CLAIMS. In principle the application of the LLMC General Liability Fund extends also to claims for wreck and cargo removal.[76] This fact recognized by the 2007 Wreck Removal Convention, which in art. 10-2 WRC expressly states that the WRC shall not affect any right of the ship-owner to limit liability under any applicable national or international regime such as the LLMC. However, art. 18 LLMC allows contracting states to reserve the right to exclude claims for wreck and cargo removal from limitation under LLMC. Several European states such as Belgium, France, Germany, Japan, The Netherlands and the United Kingdom have made this reservation of art. 18 LLMC. In that case it is up to the contracting state to decide for itself whether to allow limitation of liability for such claims under a separate wreck and cargo removal fund[77] or not at all[78]

---

72 See art. 7-1 LLMC and art. 7-1 CLNI. Passenger is defined in art. 7-2 LLMC as a person carried in that ship (a) under a contract of passenger carriage or (b) who, with the carrier's consent, accompanies a vehicle or live animals covered by a contract for the carriage of goods.

73 The LLMC passenger limits may conflict with the limit of SDR 400,000 per passengers as contained in art. 7 the proposed EU Regulation on the liability of carriers of passengers by sea and inland waterways in the event of accidents, COM (2005) 592 final and 2005/0241 (COD) if it enters into force.

74 See art. 6-1 (b) LLMC.

75 See art. 6-3 LLMC.

76 See art. 6-1 (b) and art. 2-1 (d) and (e) LLMC.

77 This option was used by Germany, Belgium and The Netherlands which states allow under § 487 HGB (German Commercial Code), art. 18-1 Wrakkenwet (Belgian Wreckages Act), resp. art. 8:755-1 (c) BW (Dutch Civil Code) limitation for wreck and cargo removal claims under a separate fund. Based upon a vessel with a gross tonnage of 40,000 m.t. the amount of the wreck and cargo removal fund is SDR 15.2 million (Germany), € 8,767,500 (Belgium), SDR 6,414,500 (Netherlands).

78 This option has been used by the United Kingdom and France which states do not allow limitation of liability for wreck and cargo removal claims.

26. OIL POLLUTION DAMAGE NOT COVERED BY CLC. In principle the application of the LLMC General Liability Fund extends also to claims for oil pollution damage not covered by CLC such as bunker oil spills from non-tanker vessels[79]

27. The LLMC SALVOR'S FUNDS. The abovementioned LLMC-limits apply in principle also to liability claims against a salvor operating from his own ship. However if the salvor operates from no ship at all or solely from the ship to be salved, then the applicable limits are based on a fictional ship with a gross tonnage of just 1,500 m.t.[80] Art. 6-1 Bunkers 2001 clarifies that that convention does not affect any right of the ship-owner to limit liability under any applicable national or international regime such as LLMC.

28. The OIL POLLUTION FUNDS. For oil pollution damage caused within the jurisdiction[81] of contracting States a three tier limitation and compensation system has developed. CLC 1992 applies to the first tier, IFC 1992 to the second tier and the Supplementary Fund Protocol 2003 to the third tier of compensation. Whereas the CLC Fund is paid for by the ship-owner, the IFC Fund and the Supplementary Fund are paid for by the oil industry on the basis of contributions levied by the IOPC Fund.[82]

– The CLC FUND. The first tier of compensation is to be provided by the ship-owner who can limit his liability by creating a limitation fund based on the gross tonnage of the ship, which cannot exceed SDR 89.7 million.[83]
– THE IFC FUND. In cases where a claimant has been unable to obtain compensation of oil pollution damage because the ship-owner is not liable under CLC for the oil pollution damage, or because the ship-owner is financially incapable to meet his obligations or because the total damage amount of all claimants exceeds the level of compensation

---

79 Claims for oil pollution damage resulting from a bunker oil spill from a non-tanker sea-going vessel are subject to limitation under art. 2-1 (a) or (c) LLMC and are not excluded in art. 3 (b) LLMC which excludes only claims for oil pollution damage covered by CLC are excluded from the scope of application of the LLMC. As follows from art. I-5 CLC 1992 only oil pollution damage as a result of bunker fuel escaping from tanker vessels is covered by CLC and not bunker fuel escaping from other vessels.

80 See art. 6-4 LLMC. As a result the persons fund is then set at SDR 833,000 (LLMC 1976) and SDR 2 million (LLMC 1996) whereas the salvor's general liability fund amounts to SDR 595,000 (LLMC 1976) and SDR 1 million (LLMC 1996).

81 Under art. II CLC 1992, this convention applies to pollution damage caused (a) in the territory, including the territorial sea or (b) in the exclusive economic zone of a contracting state, and further to preventive measures wherever taken to prevent such damage.

82 See art. 10-1 IFC 1992and art. 10-1 Supplementary Fund Protocol 2003 which impose a duty to contribute to the IFC and Supplementary funds on any person who within a calendar year has received over 150,000 m.t. of oil in ports or terminal installations on the territory of a contracting state.

83 See art. V-1 CLC 1992 as amended by the Legal Committee of the United Nations International Maritime Organization (IMO) in its first resolution dated 18 October 2000. Based on a ship with a gross tonnage of 40,000 m.t., the applicable limit is SDR 26,595,000.

provided by the first tier[84], the International Oil Pollution Convention (IOPC) Fund will[85] pay compensation up to an overall level of SDR 203 million.[86]

– The SUPPLEMENTARY FUND. In cases where a claimant has been unable to obtain full and adequate compensation of oil pollution damage because the total amount of this damage exceeds the applicable limits under the CLC and IFC Funds, then the Supplementary Fund will provide additional compensation. However this additional compensation is limited so that the total sum payable in respect of any one incident under CLC, IFC and Supplementary Fund may not exceed SDR 750 million.[87]

29. The HNS FUNDS. Although HNS 1996 may well be superseded by a Protocol to amend it before ever entering into force[88], a brief look at the HNS-regime is included in this overview of the various limitation regimes in relation to different kinds of claims. HNS provides a two tier compensation and limitation system for damage[89] caused by hazardous and noxious substances (hereafter HND damage)[90] within the jurisdiction[91] of contracting States. The first tier of compensation for HNS damage is to be provided by the ship-owner who can limit his liability by creating a limitation fund based on the gross tonnage of the ship, which cannot exceed SDR 100 million.[92] In cases where a claimant has been unable to obtain compensation of HNS damage because of the fact that the ship-owner is not liable, or because the ship-owner is financially incapable to meet his obligations or because the total damage amount of all claimants exceeds the level of compensation provided by the first tier[93], the

84 See art. 4-1 IFC 1992

85 The only exceptions to the obligation of the IOPC Fund to compensate oil pollution damage covered by the CLC 1992 and IFC 1992 are given in art. 4-2 and 4-3 IFC 1992.

86 See art. 4-4 (a) and (b) IFC 1992 as amended by the Legal Committee of IMO in its second resolution of 18 October 2000.

87 See art. 4-2 Supplementary Fund Protocol to IFC 1992.

88 At the 95th session of the IMO Legal Committee early April 2009 a draft proposal to amend HNS 1996 was adopted. If in June 2009 the IMO Council approves, a diplomatic conference could be convened to consider the protocol in 2010.

89 In art. 1-6 HNS "damage" is defined as (a) loss of life and personal injury, (b) loss of or damage to property, (c) loss or damage by contamination of the environment (but limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken) and (d) costs of preventive measures or further loss or damage caused by preventive measures. Pursuant to art. 11 HNS claims for death and personal injury have priority over other claims.

90 See art. 1-6 and 1-5 HNS.

91 Under art. 3 HNS, this convention applies to damage caused by hazardous and noxious substances (a) in the territory, including the territorial sea of a contracting state or (b) in the exclusive economic zone of a contracting state, (c) carried on board of a ship registered in or flying the flag of a contracting state and (d) to preventive measures wherever taken, to prevent or minimize such damage.

92 See art. 9-1 HNS. Based on a ship of 40,000 m.t., the applicable limit would be SDR 67 million.

93 See art. 14-1 and 14-2 HNS.

Hazardous and Noxious Substances (HNS) Fund in London will pay[94] compensation of oil pollution damage up to an overall level of SDR 250 million (second tier).[95]

30. The CRTD Fund. Although CRTD 1989 has not been ratified by any state and may never enter into force, a brief look at the CRTD-regime will complete this overview of the various limitation regimes in relation to different kinds of claims. CRTD applies to claims for damage[96] caused within the jurisdiction[97] of contracting States during carriage of dangerous goods by road, rail or inland navigation vessel, other than claims arising out of any contract for the carriage of goods and persons.[98] A carrier may limit his liability for CRTD damage by constituting the relevant limitation fund(s) for the relevant claim(s). CRTD differentiates the applicable limits of liability in two ways. Firstly, the CRTD limits for a carrier by road or rail are substantially higher than those for a carrier by inland navigation vessel.[99] Secondly, the limits for loss of life and personal injury claims are substantially higher than those applicable to any other claim.[100]

8. Procedural complications

31. Whenever the ship-owner or any other beneficiary of limitation seeks to invoke his right to limitation of liability against claims from his creditors, this is likely to give rise to many complications of a procedural nature. To the extent that procedural matters are not regulated in the uniform limitation conventions, it is a general principle that procedural matters are to be decided by the law of the courts seized of the case (the *lex fori*).[101]

32. One reason for the abovementioned procedural complications is that limitation of liability may be a key issue in at least three kinds of proceedings taking place simultaneously or in succession of each other. Firstly, court or arbitral proceedings to the merits of the claim

---

94 The only exceptions to the obligation of the HNS Fund to compensate HNS damage are given in art. 14-3 and 14-4 HNS 1996.

95 See art. 14-5 HNS 1996.

96 In art. 1-10 CRTD "damage" is defined as (a) loss of life and personal injury on board or outside the vehicle carrying the dangerous goods, (b) loss of or damage to property outside the vehicle carrying the dangerous goods, (c) loss or damage by contamination of the environment (but limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken) and (d) costs of preventive measures or further loss or damage caused by preventive measures.

97 Under art. 2 CRTD, this convention applies (a) to damage sustained in the territory of a contracting state or (b) to preventive measures wherever taken, to prevent or minimize such damage.

98 See art. 3 and 4 CRTD.

99 SDR 18 million and SDR 12 million for the carrier by road or rail (see art. 9-1 CRTD) compared to SDR 8 million and SDR 7 million for the carrier by inland navigation vessel (see art. 9-2 CRTD).

100 SDR 18 million and SDR 8 million in respect of claims for loss of life and personal injury (see art. 9-1 (a) and art. 9-2 (a) CRTD) as compared to SDR 12 million and SDR 7 million in respect of any other claim (see art. 9-1 (b) and art. 9-2 (b) CRTD.

101 See art. 8-5 1924 Convention, art. 4 1957 Convention, art. 14 LLMC, art. 14 CLNI.

(main proceedings) are often inevitable if liability is not admitted or the claim amount in dispute. Secondly, court proceedings with regard to the constitution and division of the limitation fund (limitation proceedings) are often needed and thirdly, summary relief proceedings before a court where conservatory and enforcement measures against the ship or other assets were taken, in order to obtain security for a claim subject to limitation (provisional proceedings). Normally, ship's arrests are lifted voluntarily after alternative security was provided by the P&I Club of the ship, but even then an issue may still arise about the return of the guarantees after the constitution of the limitation fund.

33. Although in principle these three kinds of proceedings take place independently from each-other, as will be shown below there is a need for co-ordination between them if the objectives of limitation of liability are not to be defeated. Furthermore issues may arise with regard to jurisdiction in relation to the main proceedings and the limitation proceedings and generally with regard to the enforcement and recognition of judgments.

9. Jurisdiction

34. There is no unity of approach between the general and special limitation conventions in relation to jurisdiction with regard to the main proceedings or the limitation proceedings. The general limitation conventions such as LLMC leave the issue of jurisdiction unregulated and leave it therefore to the domestic jurisdiction rules of the court seized[102] to determine whether it will accept or decline jurisdiction with regard to the proceedings to the merits of a claim or to limitation proceedings.[103] Although art. 11-1 LLMC provides that "any person alleged to be liable may constitute a fund with a Court or other authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation", this provision does not provide a ground for jurisdiction but rather presumes such jurisdiction to be there.[104] Therefore, as observed by the English Court of Appeal in *The Western Regent*[105] (as per LJ Clarke):

---

102 Under the Brussels- I Regulation 44/2001 art. 7 provides a jurisdiction ground for limitation proceedings: "Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability." See also art. 6-bis Lugano Convention 1988.

103 Cf. N. Meeson, *Admiralty Jurisdiction and Practice*, 2nd ed. London, LLP, 2000, No. 8-074, D.C. Jackson, *Enforcement of Maritime Claims*, 3rd Ed., London, LLP, 2000, No. 24.39, P. Wetterstein, 'Article 7 of the Brussels I – regulation and limitation of liability', (2005) 11 *Journal of International Maritime Law (JIML)* 417 e.v., W. van der Velde, *De positie van het zeeschip in het internationaal privaatrecht (The position of the ship in private international law)*, diss. Groningen, Deventer, Kluwer, 2006, p. 403 e.v.

104 This is even more clear under art. 11-1 CLNI which reads as follows: "any person alleged to be liable may constitute a fund with a Court or other authority in any State Party in which legal proceedings are insti-

> "15. There is no general jurisdiction provision in the Convention stating where the right of limitation must be invoked. It therefore appears to me that in principle the Convention permits a party to seek to limit its liability in any Contracting State which has personal jurisdiction over the defendant. (...)"

35. On the other hand, the special limitation conventions do provide jurisdiction grounds, both for the main proceedings to the merits of the claim and for the limitation proceedings. Under the exclusive jurisdiction grounds of CLC 1992, HNS and Bunker actions for compensation of the relevant kind of damage, may only be brought before the courts of the contracting state on whose territory this damage has occurred.[106] See e.g. art. IX-1 CLC 1992[107], which reads as follows:

> "-1. 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. Reasonable notice of any such action shall be given to the defendant."

36. In addition, art. 38-2 HNS provides several alternative jurisdiction grounds for HNS damage which occurs on the High Seas, outside the territory of any state:

> "-2. Where an incident has caused damage exclusively outside the territory, including the territorial sea, of any State and either the conditions for application of this Convention set out in Article 3(c) have been fulfilled or preventive measures to prevent or minimize such damage have been taken, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of:
> (a) the State Party where the ship is registered or, in the case of an unregistered ship, the State Party whose flag the ship is entitled to fly; or
> (b) the State Party where the owner has habitual residence or where the principal place of business of the owner is established; or
> (c) the State Party where a fund has been constituted in accordance with Article 9, paragraph 3.
> 3. Reasonable notice of any action taken under paragraph 1 or 2 shall be given to the defendant.
> (...)"

37. CLC 1992 and HNS further provide that the ship-owner may constitute a limitation fund with the court or other competent authority of any one of the contracting states in which an action for compensation of damages was brought.[108] If no action is brought, art. 9-

---

tuted in respect of claims subject to limitation, *or if no legal proceedings are instituted, with the Competent or other competent authority in any State party in which proceedings may be instituted for a claim subject to limitation*." (with added stress).

105 Seismic Shipping Inc./Total E & P UK Ltd., The Western Regent, [2005] 2 *Lloyd's Rep.* 359 (CA). Cf. *The Denise*, [2005] 2 All E R 47 (Admiralty Court).

106 See art. 9-1 CLC, art. 38-1 and -2 HNS and art. 9-1 Bunker. See also art. 19 CRTD.

107 Which is identical in wording to art. 9-1 and 9-2 Bunker combined. Art. 34-1 HNS reads as follows: "Jurisdiction in respect of an action against the Owner -1. Where an incident has caused damage in the territory, including the territorial sea or in an area referred to in Article 3(b), of one or more States Parties, or preventive measures have been taken to prevent or minimize damage in such territory including the territorial sea or in such area, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of any such States Parties.

108 See art. V-3 CLC 1992 and art. 9-3 HNS.

3 HNS even allows the limitation fund to be constituted in anyone country where an action under art. 38 HNS can be brought.

10. Optional nature of right to invoke limitation of liability

38. Limitation of liability is an optional right of the ship-owner, not an obligation. In principle this option can be invoked until payment of the claim has been effected whether voluntarily or through the enforcement of a judgment condemning the debtor to pay the claim. This latter point was illustrated by the recent *Uno*-case[109], in which the Danish ship-owner chose to wait until the moment that enforcement in Denmark was asked pursuant to the Brussels I Regulation 44/2001[110] of a German court judgment, to constitute a limitation fund in Denmark.

> The case concerned a collision in the Kiel Channel, Germany between the Danish m.s. "Uno" and the German barge "Dettmer Tank 46/116". As a result of the collision, the "Uno" sinks and its wreck is removed by the Wasser- und Schiffahrtsdirektion Nord (WSN) a branch of the German government. WSN sues owners of "Uno" before the local court in Itzehoe and obtains a judgment condemning owners of the "Uno" to pay full compensation of the wreck removal costs. Owners of the "Uno" chose not to invoke limitation of liability for the wreck removal costs before the German Court, because under German law[111] a separate wreck removal fund equal to the general liability fund under LLMC would have been necessary, whereas under Danish law the LLMC general liability fund would also extend to wreck removal claims. Instead they waited until the WSN asked for the enforcement of the court judgment in Denmark to invoke limitation, because Denmark had not made the reservation of art. 18 LLMC in order to exclude wreck and cargo removal claims from the application of LLMC.

39. Not only is limitation of liability an optional right, under art. 10-1 LLMC it may even be invoked without the constitution of a limitation fund. Unfortunately there is no unity of approach between the general and special limitation conventions with regard to the question whether the constitution of a limitation fund is a condition precedent to the right to invoke limitation of liability. Art. 10-1 LLMC[112] states quite categorically that "limitation may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted", whereas art. V-3 CLC 1992 and art. 9-1 HNS provide that the ship-owner who wishes to avail himself of the benefit of limitation must constitute a fund. In the same vein, the second sentence of art. 10-1 LLMC permits a contracting state to provide in its national

---

109 An unofficial English translation of the decision dated 11.5.2005 of the Maritime and Commercial Court of Copenhagen in the Uno-case is attached to this contribution. With special thanks to Mr. Axel Laudrup of the Copenhagen law firm Gorissen, Federspiel, Kierkegaard.

110 European Council regulation 44/2001 of 22 .12.2000 on jurisdiction and enforcement of judgments in civil and commercial matters.

111 § 487 HGB, see above footnote 76.

112 Cf. art. 10-1 CLNI.

law that a beneficiary of limitation may only invoke the right to limit liability if a limitation fund has been constituted.[113]

40. From LLMC's *Travaux Préparatoires*[114] it may be deduced that the LLMC-drafters were unable to reach consensus on this issue. Some delegations did not wish to allow the person liable the option of establishing a fund or not. Other delegations contested the utility or desirability of making the constitution of the fund a prerequisite of limitation. A limitation fund was considered to be costly, often unnecessary and of no advantage to the claimant if he had alternative security already. Also it was said that a mandatory provision would require provisions on enforcement of judgments and possibly compulsory insurance as well.

41. Admittedly, there may be some situations in maritime practice where the constitution of a fund is not really necessary to allow limitation of liability to work well, e.g. where there is only one creditor, where the right to limitation is accepted or where an amicable settlement of the claims based on the limits of liability is possible. However, that is still insufficient reason to adopt as the main rule under art. 10-1 LLMC that limitation of liability may be invoked even without the prior constitution of a fund.

42. Not only does the system in which the constitution of the fund is optional favour the debtor too much over his creditors, it also leaves room for uncertainty, which is likely to result in more court action being taken in order to be the first to seize the court. In addition it is in my view undesirable that one or more other courts or arbitral tribunals than the court where the limitation fund is situated should decide about fundamental issues such as who can limit and whether there is a right to limit at all. What if in the *Uno*-case, the WSN had asked and obtained a declaratory decision from the local court of Itzehoe, Germany that – failing the constitution of a limitation fund – the Danish ship-owner was not entitled to limitation of his liability.

43. Furthermore, limitation proceedings to set up and divide the limitation fund offer a useful procedural structure which may be used as well for the exchange of information between all the parties involved and for the co-ordination of various main proceedings to the

---

113 As follows from the answers received to the CMI-Questionnaire, this option has been used by Germany, Mexico, The Netherlands, Slovenia and Venezuela, whereas Australia, Belgium, Chile, Denmark, France, Greece, Ireland, New Zealand, Norway and Sweden a fund allow limitation of liability to be invoked even if no limitation fund has been constituted yet, see: F. Berlingieri and G. Timagenis, 'Analysis of the Responses to the Questionnaire', *CMI Yearbook* 2005-2006, p. 304-305.

114 See F. Berlingieri (ed.), *Travaux Préparatoires of the LLMC Convention, 1976, and of the Protocol of 1996*, Antwerp, CMI, 2000, p. 280, Nos. [12] 46 and 47.

merits sometimes in several jurisdictions, although apart from recginition and enforcement rules in the special limitation conventions, no rules governing the relation between the limitation proceedings and the various main proceedings exist.

44. In my view the rule under CLC 1992 and HNS that the constitution of a fund is a prerequisite before the right to limit may be invoked deserves to be a general rule applicable to all limitation conventions. If that were to imply that rules about the recognition and enforcement of judgments and compulsory insurance needed to be included into LLMC and CLNI, so much the better for it.

11. Limitation proceedings

45. Although it is possible in limitation cases that there is only one creditor and one debtor, it is more common that there are claims from several parties or even from a multitude of parties arising out of the maritime casualty. Under the special conventions, these claims must all be directed against the ship-owner[115], whereas under the general limitation conventions, it may well be that the claim is directed (also) against e.g. the ship's managers[116], a charterer[117] or even a crew member.[118]

46. Either way it is a general principle of limitation law that the limitation amount applies to the "aggregate of all claims which arise on any distinct occasion"[119], that once a limitation fund is constituted creditors must direct their claims against the fund and are barred from

115 See above § 3, no. 6.

116 Who as managers to owners may have made fatal decisions in relation to the technical maintenance and safety management or crewing of the ship.

117 If a ship operating under a bareboat or demise charter is involved in a collision, it will be the bareboat charterer rather than the ship-owner against whom liability claims in collision must be directed under English law. This follows from the fact that under the bareboat charter the possession of the ship passes to the charterer, as the master of the ship and crew are the servants of the charterer not the owner. Furthermore, it may be that the ship-owner seeks recourse against the charterer e.g. for a cargo claim brought against him by third parties. Pursuant to art. 2-2 LLMC such recourse or indemnity claims are subject to limitation, see: *The CMA Djakarta* [2004] 1 Lloyd's Rep. 460 (CA).

118 In some countries such as France and Belgium it is customary in cargo claims to include the master of the ship in the list of defendants in court proceedings to the merits. In that case the master whose right to limit follows from art. 1-4 LLMC, has an interest in the limitation proceedings as well.

119 Art. 9-1 LLMC. See also: art. 6 1924 Convention, art. 2 1957 Convention, art. 9-1 CLNI, art. V-1 CLC 1992, art. 9-1 HNS, art. 9-1 CRTD. Under the modern general limitation conventions, a limitation fund constituted by one of the beneficiaries of limitation is to be deemed constituted by all beneficiaries. See art. 11-3 LLMC and 11-3 CLNI.

exercising any rights against other assets of beneficiaries of limitation[120] and that the fund is to be divided proportionally over the established claims against it.[121]

47. It follows that a situation may easily arise where claims from various creditors compete with each other for their or a higher share in the limitation fund. The situation is similar to other court proceedings where a fund whether in money[122] or in assets[123], is to be divided over various interested parties or creditors and it seems that many legal systems have modelled their limitation proceedings more or less on their insolvency proceedings or their fund division proceedings.[124]

48. This implies that apart from court proceedings for the constitution and division of a limitation fund also a mechanism for the verification and assessment of claims made against the fund is required not only between creditor and debtor but also between a creditor and his fellow creditors. Normally liability claims will be evaluated in court or arbitral proceedings to the merits between the creditor(s) and debtor(s) of the claim, however once a limitation fund has been constituted the verification and assessment of a claim will affect the interests of fellow creditors against the fund as well.

49. Actually, in cases where liability is not disputed by the debtor and where the total quantum of the claims far exceeds the amount of the limitation fund, it will generally be of little interest to the ship-owner and his P&I Club or to other beneficiaries of limitation how the fund is divided over the claims made against it. However for a creditor against the fund it can make quite a difference for the proportion of his claims that is recoverable from the fund, how the claims of fellow creditors against the fund are verified and assessed.

---

120 See: art. 5 1957 Convention, art. 13-1 LLMC, art. 13-1 CLNI, art. VI-1 CLC 1992, art. 10-1 HNS, art. 11-8 CRTD. See also: art. 8 and 9 1924 Convention.

121 See art. 12-1 LLMC. See also art. 12-1 CLNI, art. V-4 CLC, art. 9-4 HNS, art. 3-2 1957 Convention and art. 11-4 CRTD. A few exceptions are made to the general principle of proportional division of the limitation fund over the established claims, see art 11 HNS and art. 9-3 CRTD which allow claims for death and personal injury to take priority over other claims. See also art. 6-3 LLMC which allows states to give priority in their national law to claims in respect of damage to harbour works, basins and waterways and aids to navigation.

122 E.g. the sale proceeds of the forced sale.

123 E.g. an insolvent's estate.

124 For an overview of how various maritime countries have structured their procedural law, see F. Berlingieri and G. Timagenis, 'Analysis of the Responses to the Questionnaire", *CMI Yearbook 2005-2006*, p. 304 ff. and F. Berlingieri and G. Timagenis, 'Digest of the Responses received from Argentina, Australia, Belgium, Chile, China, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Mexico, Netherlands, New Zealand, Norway, Slovenia, Sweden, Venezuela', *CMI Yearbook 2005-2006*, p. 313 ff.

50. It may even be doubted whether limitation of liability proceedings without such a mechanism for fellow creditors to challenge competing claims against the fund constitute a "fair trial" in the meaning of article 6 EHRC.[125] After all, if they were to allow a creditor's right of claim against the fund[126] to be compromised by competing claims from fellow creditors, without allowing the creditor the fundamental right to challenge these other claims, this effectively comes down to the creditor being denied his fundamental right of access to justice.

51. If the above reasoning is correct, it may pose a problem under the special rules on international recognition and enforcement of judgments under CLC[127], HNS[128], CRTD[129] and Bunkers.[130] See e.g. art X CLC 1992 which reads as follows:

> "1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except: (a) where the judgment was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present his case.
> 2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened."

52. These special rules aim to facilitate the free movement of judgments between Contracting States to CLC, HNS and Bunker and complement the exclusive grounds of jurisdiction contained therein.[131], Only the courts of the state on whose territory the relevant damage has occurred, have jurisdiction in relation to claims for compensation of that damage. It is therefore not surprising that the special rules on recognition and enforcement under CLC, HNS and Bunker have only few refusal grounds and do not permit the merits of the case to be reopened. Although between the parties to the proceedings which resulted in the decision, this rule may be justifiable based upon the principles of *res judicata* and *ne bis in idem*,

---

125 European Convention for the protection of Human Rights and Fundamental Freedoms, Rome 4.11.1950. As far as relevant here art. 6-1 ECRH reads as follows: "Art. 6 Right to a fair trial 1 In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …

126 Which is covered by the rather wide notion of "property" as protected by article 1 of the First Protocol to the European Convention for the protection of Human Rights and Fundamental Freedoms, Rome 20. 3.1952. Art. 1 First Protocol reads as follows: "Protection of property Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (…)".

127 See art. X CLC 1992.

128 See art. 40 HNS.

129 See art. 20 CRTD.

130 See art. 10 Bunker, of which the wording is virtually identical to that of art. X CLC 1992.

131 See art. IX CLC 1992, art. 9-3 HNS and art. 9 Bunker. See also above in chapter 9.

there is no reason why a fellow creditor against the limitation fund who was nor party to those proceedings should be bound to that decision and be unable to challenge it.

12. Recognition of limitation fund

53. Finally, it is yet another general principle of limitation law that once a limitation fund has been constituted, all creditors with claims subject to limitation, must refrain from securing or enforcing these claims through attachment of any other assets of the beneficiaries of limitation (arrest immunity). Instead these claims must be enforced against the limitation fund.[132]

54. Nevertheless, the effectiveness of this principle of arrest immunity under the limitation conventions has always remained somewhat limited because only courts in contracting states to the relevant convention were bound by it. Furthermore, particularly in art. 13-2 LLMC, the way that the rules on arrest immunity, lifting of arrests and return of security already given were formulated, was insufficiently imperative and left far too much discretionary powers to the courts asked to give effect to them. In contrast, the rule in art. VI CLC 1992 and art. 10 HNS is of a much better drafting quality because of its imperative nature. Art. 13 LLMC and art. VI CLC 1992 read as follows:

> **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, 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 VI CLC 1992**
>
> 1. Where the owner, after an incident, has constituted a fund in accordance with Article V, and is entitled to limit his liability,

[132] See art. 8 1924 Convention, art. 5 1957 Convention, art. 13-1 LLMC, art. 13-1 CLNI, art. VI CLC 1992, art. 10 HNS, art. 11-8 CRTD.

(a) no person having a claim for pollution damage arising out of that incident shall be entitled to exercise any right against any other assets of the owner in respect of such claim;
(b) the Court or other competent authority of any Contracting State shall order the release of any ship or other property belonging to the owner which has been arrested in respect of a claim for pollution damage arising out of that incident, and shall similarly release any bail or other security furnished to avoid such arrest.
2. The foregoing shall, however, only apply if the claimant has access to the Court administering the fund and the fund is actually available in respect of his claim.

55. In recent years however, important developments have taken place in European case law, which make clear that the Brussels I Regulation 44/2001 and the Lugano Convention 1988[133] can be made useful to give greater effect and wider recognition to limitation funds constituted with courts in Europe. It started with the *Maersk Olie & Gas*-decision of the European Court of Justice[134], in which it was decided that an ex parte decision of the Groningen Court to order the constitution of a limitation fund under the 1957 Convention, was a judgment in the sense of article 25 European Judgments and Jurisdiction Convention (EJJC), which had to be recognized pursuant to art. 26 EJJC by the Danish Courts even though at the time of the accident, Denmark had already denounced the 1957 Convention in favour of LLMC.[135]

56. Then came the *Seawheel Rhine/Assi Eurolink*-decision[136] of the Dutch Supreme Court. In this case a general liability fund of SDR 1.8 Million had already been set up with the Court of Stockholm in Sweden when the Seawheel Rhine was arrested twice in Rotterdam in relation to the collision claim from the owner of the "Assi Eurolink" and a claim for wreck removal costs from the Dutch State. At the time of the incident both Sweden and The Netherlands were party to LLMC 1976. However, under Dutch law an additional wreck removal fund of about SDR 4.4 Million would have been required in order to limit liability[137], whereas under

---

133 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Lugano 16.9.1988.

134 ECJ 14.10.2004 (C-39/02), [2005] 1 *Lloyd's Rep*. 210 [Maersk Olie & Gas v. Firma M. de Haan and W. de Boer; The Cornelis Simon]. See also my commentary to this decision, 'Recognition of foreign limitation proceedings under the European Judgments and jurisdiction Convention', *IPRax*, 2006, p. 229-233.

135 Very recently a decision of the Norwegian Supreme Court in the matter of *The General Grot-Rowecki* was reported at www.internationallawoffice.com by G.K. Gjelsten, 'Landmark Limitation Fund Ruling by Supreme Court', which concerned the recognition under the Lugano Convention 1988 by the Norwegian Courts of a French limitation fund under LLMC 1976, although at the time of the incident Norway had already ratified LLMC 1996. The Norwegian Supreme Court followed the ECJ's reasoning in the Maersk Olie & Gas-case and gave effect to the French limitation fund.

136 Hoge Raad 29.9.2006, *Schip & Schade* 2007, 1 [Seawheel Rhine/Assi Eurolink]. An unofficial translation in English of this decision, courtesy of the Rotterdam law firm Van Traa Advocaten is attached as an appendix to this contribution.

137 As was mentioned earlier already in footnotes 67 and 76, The Netherlands has used the option in art. 18 LLMC to exclude claims for wreck and cargo removal (art. 2-1 (d) and (e) LLMC) from the application of LLMC.

Swedish law the general liability fund applied to both the collision claim and the wreck removal claim.

57. The two ship's arrests were lifted in return for guarantees and then owners and bareboat charterers of the "Seawheel Rhine" commenced summary relief proceedings to obtain the return of the guarantees either under art. 13 LLMC or alternatively pursuant to the Brussels I Regulation 44/2001. Both the Court of Rotterdam and The Hague Court of Appeal rejected the claim on the ground that in their view LLMC prevailed over the Brussels I Regulation 44/2001 and that the Swedish court need not be recognised under art. 13 LLMC because it had not been constituted in accordance with art. 11 LLMC because of alleged forum shopping by the Swedish owners/bareboat charterers. The matter is then brought before the Hoge Raad, the Dutch Supreme Court.

58. In translation[138], the Hoge Raad reasons as follows:

> 3.4.2 Where the LLMC does not itself include any arrangement in this respect, the recognition and enforcement in this country of the decision of the Swedish fund court regarding the limitation petition is governed by the provisions of the Brussels I Regulation.
> 3.4.3 The aforementioned decision of the Swedish court to constitute the limitation fund is a decision as referred to in Art. 32 of the Brussels I Regulation. The fact that the decision was made ex parte does not detract from this (cf. – subject to the Brussels Convention – ECJ 14 October 2004, case C-39/02 (Maersk/De Haan) (...).
> As ensues from the aforementioned judgment of the European Court of Justice, recognition of a decision to constitute a fund to limit liability without prior notice to the relevant creditor, even if this creditor has filed an appeal contesting the competence of the court which makes the decision, cannot be refused in this country on the basis of Art. 34, point 2 of the Brussels I Regulation, provided this decision was served on or notified to the defendant in a regular and timely manner. The latter is the case in these proceedings, now that ... it has been established that Westereems filed an appeal against this decision before the SVEA Court in Stockholm, which assumes such service or notification. Pursuant to Art. 33 Paragraph 1 of the Brussels I Regulation, the decision of the Swedish fund court must therefore be recognised without any form of proceedings, whereby in a case such as this one, pursuant to Art. 35 Paragraph 3 of the Brussels I Regulation the competence of the Swedish court may not be reviewed and, pursuant to Art. 36 of the Brussels I Regulation, in no event may there be a review of the accuracy of the decision made in Sweden.
> 3.4.4 The legal consequence in this country of the decision of the Swedish fund court is thus determined by Swedish law. This includes Art. 13 LLMC, in which provision "immunity" of arrests is laid down. The recognition of that decision in the Netherlands entails that this "immunity" also applies in this country. As the recognition takes place without an investigation into the accuracy of the decision of the Swedish fund court, it must also be assumed that, in accordance with the (implicit) decision, the arbitration procedure referred to ... above satisfies the condition for constituting a fund that legal proceedings have been brought with regard to claims subject to limitation as laid down in Art. 11 LLMC.
> 3.4.5 Art. 13 Paragraph 1 LLMC entails that a person who has brought a claim against the fund is not permitted to exercise any right relating to such claim with regard to any other assets of a person who constituted the fund or on whose behalf the fund was constituted. This means that arrests, prior to or after the constitution of the limitation fund, made by a person who brought a claim against the fund, lack legal effect. It ensues from this that in such case the arrests must be released, without the court to whom the application is made having any discretion of evaluation

138 The full translation is attached as an appendix to this contribution.

in this respect. The circumstance that in this case the arrest lacks legal effect and must be released immediately, also means that it is not permitted to demand security in return for which the arrest will (might) be released.
The facts ... show that on 13 March 2003, after the limitation fund was constituted, Westereems arrested the "Seawheel Rhine" and that it presented its claim to the fund in October 2003. That Westereems filed this fund conditionally and under denial of, inter alia, the competence of the Swedish court does not detract from the fact of this presentation. The arrest therefore lacks legal effect and release thereof and return of the security given to release the arrest is therefore imperatively prescribed.
3.4.6 The above entails that the opinion of the court of appeal rests on an incorrect view regarding the recognition in this country of the decision of the Swedish fund court and regarding the legal consequences which are attached to Art. 13 LLMC in respect of the "immunity" of arrests. Contrary to what the court of appeal held, in the evaluation of the claim for the return of the guarantees given, there is no scope for an investigation into whether or not the claim on the basis of which the arrest was made was well-founded or not. The legal complaints of the sections are therefore effective.

59. In conclusion, some implications may be drawn from the above. It is clear from both *Maersk Olie & Gas* and *Seawheel Rhine/Assi Eurolink* that the Brussels I Regulation 44/2001 and the Lugano Convention 1988 may assist in extending the scope of application of limitation conventions such as LLMC beyond the range of their contracting states to include all EU member states and the states party to the Lugano Convention. In this way also the protection that a ship-owner or other beneficiary of limitation may derive from the constitution of a limitation fund is further enhanced. Important is also that “recognition” of the Swedish limitation fund is interpreted to mean that the legal consequences of the Swedish fund in the Dutch jurisdiction are to be decided by Swedish law. In that way, despite the weak drafting of article 13 LLMC, the release from arrest of the ship and the return of security is speeded up remarkably.[139]

[139] In the decision of *The General Grot-Rowecki* by the Norwegian Supreme Court (see above footnote 134) the Norwegian ship’s arrest was lifted in view of the implications of the limitation fund set up in France, which set a bar to other actions under art. 13 LLMC, and which was given the same effect in Norway as in France.

Annex I: Decision of the Maritime and Commercial Court of Copenhagen of 11 May 2005 (The "Uno" Case)

Translated by Hens Feilberg[140]

Statement of Claim

On the 11th July 2002 the M/S Uno, registered in Fredericia, collided with the barge, the Dettmer Tank 46/116, in the Kieler Channel. The collision caused the M/S Uno to sink within few minutes. The chief engineer died in connection with the accident. Apart from the personal injury the Dettmer Tank 46/116 was damaged and the cargo was damaged or lost. Furthermore, costs were incurred in relation to salvaging of the cargo onboard, to pollution of bunkers and for removal of the wreck of the M/S Uno. The owner of the M/S Uno was the partnership, Uno, the partners of which were Erik Petersen Schmidt and Rasmus Peter Schmidt. A hull insurance had been taken out for the vessel with Codan A/S and an P&I Insurance with Assuranceforeningen Skuld, Den Danske Afdeling. The cargo was insured with Tryg A/S.
The wreck of the M/S Uno was removed according to a decision taken by Wasser- und Schiffahrtsdirektion Nord in Kiel (hereinafter WSN) which paid EUR 770,000 for the removal. Having received income from the sale of the wreck etc. WSN's claim relating to removal of the wreck amounted to EUR 746,528. On the 29th April 2003 WSN obtained a judgment from Landgericht Itzehoe for the part of the costs relating to removal of the wreck to which the WSN was entitled pursuant to German law, SDR 406,979. The amount appeared after WSN had reduced its claim following objections from Uno. In the judgment it says that in the Writ WSN claimed payment of EUR 746,528. After Uno had submitted an allegation on limitation of liability pursuant to S 487(2) of the Handelsgesetzbuch, cf. Article 6 of the 1976 Convention, WSN in principle acknowledged the limitation of liability during the final hearing on the 8th April 2003 and withdraw the case in that respect. Uno filed a defence for non-liability for WSN's claim giving various reasons. In the judgment it further says that Uno relied on its right to submit further limitation of liability under Danish law which was the governing law in the event of enforcement of the judgment.
The court found for WSN and in that connection said that the court was not to take a decision on Uno's allegation about limitation of liability pursuant to S 487(2) of the Handelsgesetzbuch, cf. the provisions of the 1976 Convention. In that connection the court noted:

> "For the sake of completeness reference is made to the contents of discussions during the final hearing on the 8th April 2003. The Defendants' additional allegations relating to possible limitation of liability under Danish law which applies in the event of enforcement is not relevant in relation to this matter…"

On the 3rd July 2003 Landgericht Itzehoe endorsed the judgment of the 29th April 2003 to the effect that it was final and conclusive. On the 6th February 2004 the Bailiff's Court in Fredericia endorsed the judgment to the effect that it could be enforced, cf. S 4(2), cf. S 6(1) of the Act on the EU Judgments Convention.

---

[140] Reprinted here with gracious permission of Mr. Axel Laudrup of the law firm of Gorrisen Federspiel Kierkegaard, of Copenhagen, Denmark

Then WSN asked the Bailiff's Court to enforce the judgment. In its decision of the 13th September 2004 the Bailiff's Court took into account that the 1976 Convention prevailed over the EU Judgments Convention, cf. Article 57 thereof. Uno had failed to appeal the judgment and reservations had not been made in the judgment as mentioned in S 180(1) of the Merchant Shipping Act, and neither had a limitation fund been set up before the judgment became final and conclusive on the 3rd July 2003. Therefore, Uno cannot rely on the provision of S 178(2) of the Merchant Shipping Act and therefore, the application for execution should be furthered.
The decision rendered by the Bailiff's Court in Fredericia was appealed to the Danish High Court, Western Division, which rendered its decision on the 23rd February 2005. During the appeal case Uno submitted a primary claim for referral of the case to the Maritime and Commercial Court, alternatively for the execution to be stayed. The High Court rejected the claim for referral to the Maritime and Commercial Court and explained that after the proceedings had been instituted before Landgericht Itzehoe, Uno had had the possibility of setting up a limitation fund before the competent German authority in accordance with Article 1 of the Limitation of Liability Convention. In such situation the German rules implementing the provisions of Article 13 of the Convention on exclusion of other legal steps would have applied. However, Uno never set up such fund and then Landgericht Itzehoe found that the judgment was subject to Article 25 of the EU Judgments Convention and therefore, it could be enforced here in this country, cf. Article 31(1) of the Convention. Article 57 of the Judgments Convention would not have changed the result as the 1976 Convention does not set out rules for the competence of the courts or recognition or enforcement of decisions.
The limitation fund which Uno had now set up here in this country, see below, had been set up after the judgment from Landgericht Itzehoe was final and therefore, S 178(2) first sentence of the Merchant Shipping Act did not prevent execution on the basis of the judgment. Then the decision of the Bailiff's Court was upheld. On the 29th March 2004 based on a notice from the Bailiff's Court in Fredericia attorney Alex Laudrup on behalf of the owner of the M/S Uno filed a request for the setting up of a limitation fund pursuant to S 177 of the Merchant Shipping Act, cf. S 234(1), to cover claims under S 175(3) of the Merchant Shipping Act. On the 2nd April 2004 the Maritime and Commercial Court rendered the following decision:

> "Based on the information made available to the court the owner of the M/S Uno may limit its liability pursuant to the provisions of Part 9 of the Merchant Shipping Act. Pursuant to S 175(3) of the Merchant Shipping Act the limitation amount has been calculated at SDR 406,979 based on the vessel's gross register tonnage of 1,937 to which should be added interest from the 11th July 2002 until the date for the setting up of the fund, cf. S 232 of the Merchant Shipping Act, preliminarily calculated at SDR 27,932.52 covering the period from the 11th July 2002 – 29th March 2004, in total SDR 434,911.52 translated into DKK 3,919,727.06. In the event that a fund is set up an amount to cover costs of administration of the fund should be added and further legal costs and costs for any further claims for interest, cf. S 234(2) of the Merchant Shipping Act. The amount is on a preliminary basis set at DKK 100,000. The court approves the security offered by the owner's P&I insurers in the form explained in the draft. then it is held that The amount of the limitation fund which the owner of the M/S Uno has requested with reference to the sinking on the 11th July 2002 is set at DKK 3,919,727.06 plus an amount pursuant to S 234(2) of the Merchant Shipping Act of DKK 100,000. The Court accepts the security offered by the owner of the M/S Uno in the form described in the draft of the 29th March 2004".

On the 5th April 2004 the court rendered the following decision:

> "As the security offered has now been completed the limitation fund requested by the partnership of Uno by corresponding owner Rasmus Peter Schmidt and Assuranceforeningen Skuld is now considered having been set up, cf. the decision rendered by the Maritime and Commercial Court on the 2nd April 2004. It is held that: With reference to the limitation fund of SDR 406,979 plus interest from the 11th July 2002 – 5th April 2004 plus an additional amount of DKK 100,000 pursuant to S 234(2) of the Merchant Shipping Act requested by the owner of the M/S Uno in relation to the collision on the 11th July 2002 with the barge, the Dettmer Tank 46/116, in the north-eastern part of the Kieler Channel is considered set up".

On the 14th April 2004 the Maritime and Commercial Court inserted an announcement about the setting up of the fund in the Danish Official Gazette. The deadline for filing of claims was the 1st July 2004. The announcement further said that separate proceedings on claims subject to limitation of liability or whether the persons for the benefit of whom the fund had been set up were entitled to limit their liability could not be instituted here in this country after the limitation fund had been set up, cf. S 177(3) of the Merchant Shipping Act. On the 11th June 2004 WSN filed its claim with the fund. The claim was for SDR 406,979 plus 5 per cent interest annually from the 4th September 2002 (claim no. 1). Other claims from Tryg and Umweltschutzamt, Itzehoe, were filed on the 29th June 2004.

As a result of a dispute between WSN and Uno among others as to whether WSN's claim should be further limited than in the decision rendered by Landgericht Itzehoe a hearing was set on the 6th October 2004 for discussion of the following questions;

1. whether the fund had been validly set up;
2. whether the claim made by WSN could be limited;
3. which claims could be filed with the limitation fund (the full amount, the judgment amount or the difference between the first two amounts).

After exchange of pleadings the final hearing took place on the 8th and 16th March 2005 for discussion of the said questions. At that time the following claims had been made:

1. WSN's claim relating to removal of wreck, SDR 406,979. In the registration it says that it is not an expression of acceptance of Uno's right to further limit the amount which WSN was awarded by Landgericht Itzehoe. WSN explicitly objected against Uno being entitled to further limitation of liability than expressed in the judgment. Furthermore, WSN held that Uno could not prevent execution by setting up a limitation fund in Denmark in connection with the execution. In that connection it was stated that pursuant to the Convention national law could only allow limitation where the limitation fund had already been set up prior to the judgment being final and conclusive.

In a letter of the 28th June 2004 received on the 29th June 2004 WSN's attorney explained that he had noted that he should actually have filed WSN's full claim which was EUR 929,869.65. The claim was maintained in WSN's Written Pleadings of the 26th November 2004. In the Written Pleadings WSN claimed further EUR 49,443.29 which was the remainder of the claim from Wasser- und Schiffahrtamt Brunsbüttel and a claim of EUR 73,459.30 by the same for costs relating to the collision. Then WSN's total claim amounted to EUR 1,052,772.20. The claim was later reduced by EUR 49,443.29 after Staatliches Umweltamt Itzehoe had waived the claim against WSN. Furthermore, the claim was reduced by EUR 23,472.00 being the net value of the wreck. Then the claim totalled EUR 979,856.71.

2. Staatliche Umweltamt Itzehoe's claim of EUR 109,443.29 for cleaning up costs. The claim was assigned to Interessentskabet Uno and Skuld. The claim has not been contested by WSN.

3. Claim relating to damage to cargo etc. of EUR 34,707.22. The claim has been assigned to Interessentskabet Uno and Skuld. The claim has not been contested by WSN.

The Decision of the Court

1. If the fund is established properly, and 2. if the claim proved by WSN can be reduced. Pursuant to Section 177 of the Danish Merchant Shipping Act, a limitation fund can be established before the Maritime and Commercial Court of Copenhagen, if an arrest is requested in this country, legal proceedings are instituted; or other legal steps are requested to be taken in consequence of claims which according to their kind can be limited. According to the wording of this provision, the background for it, and the purpose of it, cf. Report No. 924/1981 on limitation of the liability of the owner, it must be assumed that a request for execution of a judgment as the present judgment of 29 April 2003 delivered by Landgericht Itzehoe, which concerns a claim that, according to its kind, can be limited, could form the basis of the establishment of a limitation fund in Denmark. An opposite interpretation would lead to the unacceptable result that the scope of the applicability of the rules on limitation of liability through the establishment of a fund could be eliminated to a non-immaterial extent, which would contradict the purpose of the 1976-Convention and the 1996-Protocol.

The fact that a legally binding judgment is available from another EU-country does not prevent limitation of liability in the establishment of a limitation fund in Denmark. Pursuant to Article 57 of the Judgments Convention, this provision does not involve conventions adopted or to be adopted by contracting states, and which in specific respects provide for jurisdiction and also for recognition and execution of judicial decisions. The 1976-Convention contains in Articles 11-13 further provisions as to the establishment of a limitation fund, the distribution of the fund, and the exclusion of other legal steps after the establishment of a limitation fund, including the prevention of arrest. In accordance with the indication of the Danish Ministry of Economic and Business Affairs in connection with tabling of a motion for the amendment of the Danish Merchant Shipping Act (the passing of the 1996-Protocol to the Convention on Global Limitation of 1976 etc., Bill No. 165, parliamentary session 1998-99), these provisions may, however, imply that the 1976-Convention and the 1999-Protocol take precedence over the Judgments Convention, cf. Article 57 (1) of the Judgments Convention.

The same result is also supported by reference to the judgment of the Judgments Convention of 14 October 2004 in the matter of Maersk Olie & Gas A/S vs. Firma de Haan and W. de Boer (C-39/02), which, inter alia, establishes that a request from the owner to the competent court in a state as to the establishment of a limitation fund indicating a specific claimant and an action in another state from the claimant against the owner did not imply pendent elite, cf. Article 21 of the Judgments Convention. The court furthermore provided that an action for damages and a request for the establishment of a limitation fund do not have the same subject matter. This must lead to the fact that the limitation fund established on 5 April 2004 is also established properly compared to WSN's claim.

The court can adopt that it is of no importance to the question of justification of the establishment of the fund of 5 April 2004 that Uno did not make certain reservations before

Landgericht Itzehoe pursuant to Section 180 (1) (2) of the Danish Merchant Shipping Act as to other claims, merely because according to the information received, there would not be raised any other claims against Uno in Germany on account of the wreck removal for which a separate fund is established in Germany. A reservation in the judgment delivered by Landgericht Itzehoe would consequently be unfounded according to German law.

The Question of Prolongation

WSN is not prevented from pleading that the provisions of the 1996-Protocol, cf. Part 9 of the Danish Merchant Shipping Act, shall apply to the Limitation Fund of 5 April 2004. The 1996-Protocol establishes in Article 9 (3) that the 1976-Convention as amended in the Protocol only applies to claims that arise in connection with events which happen after the Protocol takes effect for each state participating in the Protocol. Pursuant to Act No. 228 of 21 April 1999 which carried the 1996- Protocol into effect in Denmark, the amendment to the Act came into effect according to the decisions of the Minister of Economic and Business Affairs as it is furthermore stated in Section 2 of the amendment to the Act. It is evident from the explanatory notes to this provision that the provision *"contains an authority of the Minister of Economic and Business Affairs to determine the date for the commencement of the Act and an authority to put the Act into force successively. The provision makes it possible for the Act to be put into force, when the Protocol comes into force"*. Furthermore, it is evident from the explanatory notes that the provision makes it possible for provisions of higher limitation for damages to passengers based on the 1996-Protocol to be put into force sooner than the other provisions, and also before the 1996-Protocol came into force. This is possible due to the fact that the 1976-Convention made it possible to fix a higher limitation ceiling over damages to passengers. In Section 2 of the motion for the Act on amendment of the Danish Merchant Shipping Act or in the explanatory notes to it, there is no basis for intending also to put the provisions on limitation for other things than damages to passengers into force, i.e. obtain legal effects of events which took place before the time mentioned in the Protocol, which proved to be on 13 May 2004.

The amended rules came into force on 1 January 2004 as prescribed by the Minister of Economic and Business Affairs in Regulation No. 782 of 5 September 2003. Accordingly, it is presumed that by doing so, it is intended to have the amended provisions relating to other things than damages to passengers be put into force, i.e. obtain application of events occurring after the time stated in the Protocol. So, it is properly established that the limitation fund of 5 April 2004 was established with an amount pursuant to the 1976-Convention. The rules in Part 9 of the Danish Merchant Shipping Act containing the provisions of the 1996-Protocol shall apply to all events, where limitation of liability is claimed before a Danish court. However, the rules in Part 9 a, which contain the provisions of the 1976-Con vention, shall apply to 1. if it is requested, and 2. if the claimant is domiciled or has headquarters in a state bound by the 1976- Convention, but not by the 1996-Protocol. These provisions are intended, as it is evident from the explanatory notes to the provision, to solve some of the legal disputes, which could occur as a consequence of some states having affiliated with the 1996-Protocol, while others stick to the 1976-Convention. The provisions are of no importance to the question of the application of the 1996- Protocol in respect of time, which question must be decided according to Article 9 (3) of the Protocol and the nation-wide commencement provisions. As to the reasons stated by Uno, it is moreover endorsed that Denmark was not bound by the 1996-Protocol at the time of the establishment of the limi-

tation fund in accordance with Uno's petition. According to Article 11 of the 1996- Protocol, it comes into force 90 days after the date, when 10 states have consented to be bound by the Protocol. The requirement for the approval of the 10 states was fulfilled on 13 February 2004, for which reason the Protocol came into force on 13 May 2004, from which date Denmark, which had ratified the Protocol on 12 April 2002, was bound by it. Denmark was not as such bound by the 1996-Protocol from 1 January 2004 irrespective of the fact that the amendment of the Act was put into force by virtue of Regulation No. 782 of 5 September 2003, which indicated to come into force on 1 January 2004. The two mentioned conditions of the application of the 1976-Convention were as such fulfilled at the time of the establishment of the limitation fund. Therefore, the court has to agree with Uno that WSN must recognise that the claim proved in the fund has to be limited pursuant to the rules on limitation of liability valid at the time of damage.

3. Which claims can be proved in the limitation fund (the whole claim, the judgment amount or the difference between the two first amounts). According to the indications of the parties during the closing speech, the Court finds it appropriate to make a decision on the questions of partial renunciation of the requested amount and on the question of foreclosure of the proved claim of 26 November 2004 of Landgericht Itzehoe. WSN's claim can, see above, be tabulated as follows (except for entry a, which is in EUR):

Date of Notification:
Amount: Comments:
A 11 June 2004 406,979 SDR
B 29 June 2004 929,869.65 Replaces a
c 26 November 2004 49,443.29 Waived
e 26 November 2004 73,459.30 Brunsbüttel, costs
f - 23,472.00 Sale of wreck
Claim in total **979,856.95**

As to entry b, the question is whether WSN as a consequence of the notification of its claim in the limitation fund has waived to prove a part of its original total claim. WSN has withdrawn the case instituted at Landgericht Itzehoe in respect of part of the claim amounting to EUR 746,528, which exceeded the limitation amount pursuant to Section 487 (2) of Handelsgesetzbuch combined with Article 6 of the 1976-Convention, which amounts to SDR 406,979, a difference according to the rate of exchange on 6 May 2005 of DKK 2,010,339. The court finds that WSN's waiver of this differential claim against Uno during the legal proceedings at Landgericht Itzehoe ought to imply that WSN is prevented from advancing the whole claim in the limitation fund. It serviced no purpose in maintainning the whole claim, as there were and are probably no grounds for assuming that the whole claim was unfeasible before a German court. At this point, Uno had not quite yet taken steps to establish a limitation fund. A failure to make reservations as to the possibility of advancing the claim in another manner should under the prevailing circumstances not prevent WSN from advancing the whole amount in the limitation fund. It is advanced that recognition of Uno's whole claim would imply that a part of the settlements entered into by Uno has affected the wrong prerequisites that solely the amount awarded WSN by Landgericht Itzehoe would be included as a claim in the fund. In connection with this, it may be remarked that the contents and prerequisites of these settlements have not been further stated. Consequently that is why the

consideration can only be attributed to a limited extent. In addition to this, WSN has not participated in the settlements and does seem to have received indications if these are made on the assumption of claims of a certain magnitude on WSN's part. Consequently, WSN ought not to bear the risk of prerequisites of the settlement.

Inasmuch as Uno has maintained that WSN's part of its claim in the amount of EUR 73,459.30, proved on 26 November 2004, has been proved too late, it must be mentioned that the claim has been proved, before the distribution of the fund has been tried before a court in the first instance, cf. Section 238 of the Danish Merchant Shipping Act combined with Sections 235, 238, and 245. Thereby, the claim was proved prior to barring of claims.

A considerable amount of exhibits have been produced to the court as to the further statement of WSN's claim. Uno has contended the statement as insufficiently substantiated. A further review of the entries recorded was not performed. The question as to the further statement of the proved claims is not included in the subjects of the fixed part legal proceedings. The court does, however, not find it necessary in connection with this present part judgment to make a decision on the documentation for and on the statement of the proved claims. The question as to legal costs is postponed till the final distribution of the fund.

IT IS HELD THAT

Wasser- und Schiffahrtsdirektion Nord must recognise that the claims proved in the fund have to be limited pursuant to the rules on limitation of liability of the Danish Merchant Shipping Act valid at the time of damage. In making up the proved claims, it ought not be taken into consideration the fact that Wasser- under Schiffahrtsdirektion Nord withdrew the case instituted at Landgericht Itzehoe as regards the part of the claim amounting to EUR 746,528, which exceeded the limitation amount pursuant to Section 487 (2) of Handelsgesetzbuch combined with Article 6 of the 1976-Convention. The claim proved by Wasser- und Schiffahrtsdirektion Nord on 26 November 2004 amounting to EUR 73,459.30 is not excluded from coverage in the fund on account of the time of notification.

Annex II: Decision of the First Chamber of the Hoge Raad of 29 September 2006, No. C05/147 HRJ MH/MK

Translated by Frank Smeele

Judgment
in the matter of:
the legal person under Swedish law
1. B&N NORDSJÖFRAKT AB,
having its registered office in Skärham, Sweden,
2. NORTHSEA SHIPPING AB,
having its registered office in Kyrkesund, Sweden,
PLAINTIFFS in the cassation appeal,
attorneys: R.S. Meijer and F.E. Vermeulen,

versus

WESTEREEMS B.V.,
having its registered office in Delfzijl,
DEFENDANT in the cassation appeal,
attorney: M.V. Polak.

1. The proceedings in the fact-finding courts

By two writs of 26 March 2003, the plaintiffs in the cassation appeal – hereafter called: B&N and Northsea – summoned the State of the Netherlands, the Ministry of Transport, Public Works and Water Management (North Sea Directorate, having its registered office in Rijswijk), having its registered office in The Hague and the defendant in the cassation appeal – hereafter individually called: the State and Westereems – to appear in preliminary relief proceedings before the preliminary relief judge of the district court of Rotterdam and requested by judgment which was immediately enforceable at any time upon presentation of the original:

primarily:

1. an order that Westereems return the two guarantees of Alandia and The Swedish Club given on the part of Northsea, whereby failure to comply was to be subject to a fine to be fairly determined;
2. an order that the State return the guarantee given to it in respect of Northsea, whereby fai-lure to comply was to be subject to a fine to be fairly determined;

alternatively:

1. an order that Westereems return the two guarantees of Alandia and The Swedish Club given to it on the part of Northsea in return for B&N and Northsea furnishing a proper guarantee in the amount of the value of the "Seawheel Rhine" of US$ 1,900,000, whereby failure to comply was to be subject to a fine to be fairly determined;
2. an order that the State return the guarantee given to it in return for B&N and Northsea furnishing a proper guarantee in the amount of the value of the "Seawheel Rhine" of US$ 1,900,000, whereby failure to comply was to be subject to a fine to be fairly determined.

The State and Westereems contested both the primary and the alternative claims. By judgment of 24 April 2003 the preliminary relief judge dismissed the claims of B&N and Northsea and ordered B&N and Northsea to pay the costs of these proceedings. B&N and Northsea filed an appeal against the judgment before the court of appeal of The Hague. By judgment of 15 March 2005 the court of appeal affirmed the judgment against which the appeal was filed and ordered B&N and Northsea to pay the costs of the appeal, which judgment was immediately enforceable. The judgment of the court of appeal is attached to this judgment.

2. The proceedings in the cassation appeal

B&N and Northsea filed a cassation appeal against the judgment of the court of appeal in the case against Westereems. The cassation summons is attached to this judgment and forms part hereof. Westereems requested that the appeal be dismissed. The case was argued on behalf of the parties by their attorneys and on behalf of Westereems by E.D. van Geuns, attorney with the Supreme Court.
The conclusion of the Advocate-General L. Strikwerda is to quash the contested judgment and for adjudication of the case by the Supreme Court as set out under 25 of the conclusion. Westereems' attorney responded to said conclusion by letters of 1 June 2006 and 8 June 2006.

3. Evaluation of the appeal

3.1 The following can be assumed in the cassation appeal.

(i) On or around 25 January 2003 there was a collision on the North Sea to the north of Terschelling, outside of the territorial waters on a deep-water route on the Netherlands continental shelf – the Friesland Junction – between the sea-going vessel "Seawheel Rhine" and the sea-going vessel "Assi Eurolink". The "Assi Eurolink" sunk virtually immediately as a result of the collision.

(ii) The "Seawheel Rhine" belongs to Northsea, based in Sweden, which chartered the ship to B&N, also based in Sweden. The "Assi Eurolink" belongs to Westereems, based in the Netherlands.

(iii) On 10 and 11 February 2003 Westereems summoned both Northsea and B&N to appear before the district court of Groningen to compensate hull and other damage connected with the loss of the "Assi Eurolink", and any wreck salvage costs which it may have to pay the Netherlands State.

(iv) In response, on 19 February 2003 Northsea instituted arbitration proceedings against B&N before the Arbitration Institute of the Stockholm Chamber of Commerce in Sweden. In said appeal Northsea claims a declaratory judgment from the arbitrators that B&N is bound to indemnify it against all claims brought against Northsea in connection with the collision.
(v) On 24 February 2003 B&N then filed a limitation petition with the court in Stockholm, Sweden, which was granted by decision one day or a few days later and which fixed B&N's liability in advance at € 2,255,218.62 (SEK 20,791,629 / SDR 1,800,093), for which amount B&N had already constituted a fund before the relevant court by means of the giving guarantees by The Swedish Club and Försäkingsaktiebolaget Alandia / the P&I Club and the hull insurer of the "Seawheel Rhine".

(vi) Northsea and Westereems are referred to as possible creditors in the limitation petition. Westereems was not given the opportunity to be heard prior to the decision. Sweden has no regulation that possible creditors must be informed as to a petition to constitute a fund.

(vii) On 13 March 2003 Westereems arrested the "Seawheel Rhine" in Rotterdam. The arrest was lifted upon the giving of two guarantees – one of SDR 2,628,375, on 20 March 2003, by the Swedish Club (for wreck salvaging) and one of SDR 1,800,093, on 21 March 2003, by Försäkingsaktiebolaget Alandia (for the property fund), both in the name of Northsea.

(viii) Westereems appealed against the decision of the Swedish court set out under (v). The SVEA Court in Stockholm dismissed this appeal on 26 June 2003.

(ix) In October 2003 Westereems presented its claim to the limitation fund constituted in Sweden, albeit conditionally and under denial of – inter alia – the competence of the Swedish court.

(x) Following the petitions presented by Westereems in this respect, the court of Stockholm considered by decision of 29 April 2004 that the previous decision on constitution of the fund was not of a provisional nature and that, if Westereems wished to argue that its claims are not eligible for limitation in Sweden, or that the fund does not apply to costs of wreck

salvaging, or must be dealt with under Dutch law, it must institute a "limitation action", proceedings on the merits, before the Swedish limitation court.

(xi) B&N and Northsea have in the meantime instituted such a "limitation action" against Westereems in Sweden.

(xii) The Netherlands and Sweden are both parties to the Convention on Limitation of Liability for Maritime Claims of 19 November 1976, Trb. 1980, 23, hereafter: the Convention. Contrary to the Netherlands, Sweden did not make use of the option to exclude applicability of the Convention with regard to the costs of wreck salvaging. Sweden has no separate wreck fund. If B&N and Northsea had filed a limitation petition in the Netherlands, in addition to the property fund they would also have had to constitute a wreck fund in the amount of € 3,329,585.79 (SDR 2,628,375.00).

3.2 Arts. 11 and 13 of the Convention read, insofar as relevant here:

> Article 11
> 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. (...)
>
> Article 13
> 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, 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. How-ever, such release shall always be ordered if the limitation fund has been constituted: (...)
> 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.

3.3.1 As set out in 1, B&N and Northsea's primary claim before the preliminary relief judge of the district court was for Westereems to be ordered to return the guarantees which were given on behalf of Northsea to release Westereems' arrest of the "Seawheel Rhine", whereby failure to comply was to be subject to a fairly determined fine. Insofar as relevant in the cassation appeal, B&N and Northsea based this claim – in short – on the ground that the decision of the Swedish court, whereby B&N was given leave to constitute a limitation fund in Sweden, must, pursuant to the Brussels I Regulation, be recognised and that the guarantees must be returned pursuant to Arts. 11 and 13 of the Convention.

3.3.2 Westereems has contested the claim and presented the following arguments, inter alia, in this respect. The Swedish fund was not constituted in accordance with Art. 11 of the Convention, as Westereems, by filing the proceedings against B&N and Northsea before the district court of Groningen, had instituted legal proceedings as referred to in Art. 11 well before the constituting of the limitation fund in Sweden, so that the Swedish arbitration proceedings cannot be seen as legal proceedings as refer-red to in Art. 11 of the Convention and Art. 13 does not apply. The Brussels I Regulation does not apply as the Convention, which contains a special jurisdiction clause in Art. 11, derogates from the Brussels I Regulation. Moreover, even if applicability of the Brussels I Regulation were to be assumed, the Swedish limitation decision should not be recognised under the Regulation as it was made ex parte.

3.3.3 The preliminary relief judge dismissed the claims of B&N and Northsea. The preliminary relief judge was of the opinion that – in short – the arbitration proceedings which Northsea brought against B&N in Sweden cannot be deemed a "legal proceeding" as referred to in Art. 11 of the Convention, so that the Swedish court did not have jurisdiction to decide on the limitation petition of B&N and Westereems does not have to return the guarantees on the basis of Art. 13 of the Convention.

3.3.4 In the disputed judgment in the appeal filed by B&N and Northsea, the court of appeal affirmed the judgment of the preliminary relief judge. Toward this end the court of appeal, in short, considered the following. Appeal grounds I-III relate to the question whether the decision of the Swedish fund court is eligible for recognition (and enforcement) (point 5). Northsea wants recognition of the Swedish decision because of what it believes is the related legal consequence pursuant to Swedish law and pursuant to Art. 13 of the Convention, that the guarantees given on its behalf must be returned (points 6 and 7). The legal opinions presented by the parties do not indicate that under Swedish law this legal consequence is attached to the decision of the Swedish court (points 7.2 and 7.3). Nor does the legal consequence mandatorily ensue from Art. 13 of the Convention, as this article lays down as a prerequisite that the limitation fund must be constituted in accordance with Art. 11, which condition has not been satisfied here, as Northsea had already been summoned before the district court of Groningen when it instituted arbitration proceedings in Sweden and it cannot rely on proceedings in which it is itself the plaintiff (points 7.4 and 7.5). Should, contrary to the above, the legal consequence claimed by Northsea be attached to the Swedish decision under Swedish law, then such decision with regard to said legal consequence cannot be recognised in this country, as the decision with regard to said legal consequence has not been or has not been able to be the subject of a defended action in which Westereems was able to contest the competence of the Swedish court, B&N's right to constitute a fund in Sweden and Northsea's right to rely thereon. The contrary does not ensue from the decision of the SVEA Court in Stockholm; said decision does not encompass a

substantive evaluation of the objections and only refers to the proceedings on the merits (point 8). In the opinion of the court of appeal, as it had not been summarily demonstrated that the claims for which the arrest was made and for the release of which the guarantees were given were unfounded, the claim for return of the guarantees was therefore rightly dismissed (point 9).

3.4.1 Sections I.1, I.4, II and IV are suitable for being dealt with jointly. They support the argument that the opinion of the court of appeal fails to note that the decision of the Swedish fund court – mentioned above in 3.1 under (v) – must be recognised in this country and that this entails that the "immunity" of the arrests referred to in Art. 13 of the Convention also extends to the Netherlands, so that the arrest which was made, after the limitation fund had been constituted, by a person who had presented a claim on the fund, lacks legal consequence on the basis of the first paragraph of Art. 13 of the Convention. According to said sections, the court of appeal therefore wrongly did not order the release of the security imperatively prescribed in Art. 13 of the Convention for this case.

3.4.2 Where the Convention does not itself include any arrangement in this respect, the recognition and enforcement in this country of the decision of the Swedish fund court regarding the limitation petition is governed by the provisions of the Brussels I Regulation.

3.4.3 The aforementioned decision of the Swedish court to constitute the limitation fund is a decision as referred to in Art. 32 of the Brussels I Regulation. The fact that the decision was made ex parte does not detract from this (cf. – subject to the Brussels Convention – ECJ 14 October 2004, case C-39/02 (Maersk/De Haan), sources in the conclusion of the Advocate-General under 12).

As ensues from the aforementioned judgment of the European Court of Justice, recognition of a decision to constitute a fund to limit liability without prior notice to the relevant creditor, even if this creditor has filed an appeal contesting the competence of the court which makes the decision, cannot be refused in this country on the basis of Art. 34, point 2 of the Brussels I Regulation, provided this decision was served on or notified to the defendant in a regular and timely manner. The latter is the case in these proceedings, now that – as has been set out above in 3.1 under (viii) – it has been established that Westereems filed an appeal against this decision before the SVEA Court in Stockholm, which assumes such service or notification. Pursuant to Art. 33 Paragraph 1 of the Brussels I Regulation, the decision of the Swedish fund court must therefore be recognised without any form of proceedings, whereby in a case such as this one, pursuant to Art. 35 Paragraph 3 of the Brussels I Regulation the competence of the Swedish court may not be reviewed and, pursuant to Art. 36 of the Brussels I Regulation, in no event may there be a review of the accuracy of the decision made in Sweden.

3.4.4 The legal consequence in this country of the decision of the Swedish fund court is thus determined by Swedish law. This includes Art. 13 of the Convention, in which provision "immunity" of arrests is laid down. The recognition of that decision in the Netherlands entails that this "immunity" also applies in this country. As the recognition takes place without an investigation into the accuracy of the decision of the Swedish fund court, it must also be assumed that, in accordance with the (implicit) decision, the arbitration procedure referred to in 3.1 under (iv) above satisfies the condition for constituting a fund that legal proceedings have been brought with regard to claims subject to limitation as laid down in Art. 11 of the Convention.

3.4.5 Art. 13 Paragraph 1 of the Convention entails that a person who has brought a claim against the fund is not permitted to exercise any right relating to such claim with regard to any other assets of a person who constituted the fund or on whose behalf the fund was constituted. This means that arrests, prior to or after the constitution of the limitation fund, made by a person who brought a claim against the fund, lack legal effect. It ensues from this that in such case the arrests must be released, without the court to whom the application is made having any discretion of evaluation in this respect. The circumstance that in this case the arrest lacks legal effect and must be released immediately, also means that it is not permitted to demand security in return for which the arrest will (might) be released.

The facts set out in 3.1 under (vii) and (ix) above show that on 13 March 2003, after the limitation fund was constituted, Westereems arrested the "Seawheel Rhine" and that it presented its claim to the fund in October 2003. That Westereems filed this fund conditionally and under denial of, inter alia, the competence of the Swedish court does not detract from the fact of this presentation. The arrest therefore lacks legal effect and release thereof and return of the security given to release the arrest is therefore imperatively prescribed.

3.4.6 The above entails that the opinion of the court of appeal rests on an incorrect view regarding the recognition in this country of the decision of the Swedish fund court and regarding the legal consequences which are attached to Art. 13 of the Convention in respect of the "immunity" of arrests. Contrary to what the court of appeal held, in the evaluation of the claim for the return of the guarantees given, there is no scope for an investigation into whether or not the claim on the basis of which the arrest was made was well-founded or not. The legal complaints of the sections are therefore effective.

3.5 With this state of affairs, the other (alternative) complaints of section I and section III need not be discussed.

3.6 The Supreme Court can decide this matter itself. It ensues from the above that the disputed judgment cannot be maintained. Appeal grounds I-III directed against the judgment of the preliminary relief judge are well-founded. The judgment of the preliminary relief judge

must be quashed. In the fact-finding instance Westereems presented the defence that the claim for return of the guarantees fails on the basis of the specific conditions agreed by the parties in the guarantee agreements on which the guarantees must be returned. As considered in 3.4.5 above, the arrest lacks all legal effect and it is not permitted to demand security for the release of such arrest. The defence, which is also based on the view that the guarantees were intended to release the arrest, thus fails. The primary claim against Westereems will therefore be awarded in the manner referred to hereafter.

4. Decision

The Supreme Court:
quashes the judgment of the court of appeal of The Hague of 15 March 2005;
quashes the judgment of the preliminary relief judge of the district court of Rotterdam of 24 April 2003;
orders Westereems to return the two guarantees given to it on behalf of Northsea of Försäkingsaktiebolaget Alandia and the Swedish Club, within two working days after service of this judgment, whereby failure to comply is subject to a fine of € 50,000 for every day or part of a day that Westereems fails to comply;
orders Westereems to pay the costs of the proceedings, fixed up to the date of this judgment on the part of B&N and Northsea:
- in first instance at € 991.16;
- in appeal at € 2,995.20;
- in cassation appeal at € 457.78 in disbursements and at € 2,600 in salary.

This judgment was passed by the vice-president D.H. Beukenhorst as president and the judges O. de Savornin Lohman, A.M.J. van Buchem-Spapens, W.A.M. van Schendel and W.D.H. Asser, and pronounced in public by judge E.J. Numann on 29 September 2006.

Issued as an original copy by me, Court Clerk of the Supreme Court of the Netherlands on 29 September 2006 on behalf of the plaintiffs in the cassation appeal.