Neutral Citation Number: [2022] EWHC 835 (Admlty)

Case No: AD-2020-000089

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 12/04/2022

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

MSC MEDITERRANEAN SHIPPING COMPANY S.A.	**Claimant**
- and -	
(1) STOLT TANK CONTAINERS B.V. **(2) STOLT NIELSEN USA INC.** **(3) CLAIMANTS IN ACTION CL-2017-000540 (except the first and second defendants above)** **(4) CONTI 11. CONTAINER SCHIFFAHRTS-GmbH & CO. KG MS "MSC FLAMINIA"**	**Defendants**

- -
- -

Julian Kenny QC and Michal Hain (instructed by **Mills & Co LLP**) for the **Claimant**
Christopher Smith QC and David Walsh (instructed by **HFW LLP**) for the **Fourth Defendant**
The **First to Third Defendants** did not appear and were not represented

Hearing dates: 30, 31 March 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. On 14 July 2012, the containership *MSC Flaminia* was in the middle of the Atlantic Ocean *en route* from Charleston, Louisiana, to Antwerp when an explosion occurred in her no.4 cargo hold leading to a large fire on board. Three of her crew lost their lives: one was never found, the other two were grievously injured and died of their injuries shortly afterwards. Hundreds of containers were destroyed and extensive damage was caused to the ship. As the arbitrators to whom I refer below have observed, this was on any view an horrific tragedy.

2. The explosion was caused by auto-polymerisation of the contents of one or more of three tank containers laden with 80% divinylbenzene ('DVB'). Those tank containers had been shipped at New Orleans on 1 July 2012.

3. In July 2012, *MSC Flaminia* was operating under a period time charter dated 3 November 2000 between the claimant ('MSC') as time charterer and her registered owner, the fourth defendant ('Conti').

4. The time charter provided for London arbitration. An arbitration was started by Conti in 2012 but it was actively prosecuted only much later, after the US proceedings to which I refer below had been commenced. There have been three awards so far, issued by an arbitral tribunal comprising Stephen Hofmeyr QC, Sir David Steel and Julia Dias QC, namely:

   (i) A first award dated 8 February 2021 ('Award 1') dealing with clause 62 of the time charter. The arbitrators dismissed finally a claim by MSC that clause 62 was an indemnity in its favour covering the casualty. One of Conti's lines of defence to that claim was that if clause 62 was by nature an indemnity in favour of MSC capable of covering the casualty, nonetheless it did not apply if the casualty resulted from negligence on the part of MSC. The indemnity claim failed on the prior point that clause 62 did not provide for an indemnity in favour of MSC at all.

   (ii) A second award dated 30 March 2021 ('Award 2') dealing finally with all other liability issues. MSC was held liable to Conti in respect of the casualty. I consider more closely in the next two sections of this judgment what was determined by Award 2.

   (iii) A third award dated 30 July 2021 and corrected on 1 September 2021 ('Award 3'), by which Conti was awarded damages of c.US$200 million on a quantification by the arbitrators of its recoverable losses.

5. MSC sought to appeal against Award 1 pursuant to s.69 of the Arbitration Act 1996, but leave to appeal was refused, and so that Arbitration Claim was dismissed, by Order of Butcher J dated 19 April 2021. The Claim Form was issued on 8 March 2021 and was served promptly. The application for leave to appeal against Award 1 was pending, therefore, when Award 2 was issued at the end of March.

6. By this Admiralty limitation claim, commenced by MSC by Claim Form dated 21 July 2020, MSC claims to limit its liability, if any, for claims arising out of the casualty pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims as amended by the Amending Protocol of 1996 and enacted under English law by the Merchant Shipping Act 1995 ('the Amended 1976 Convention'). The scope of the Amended 1976 Convention is stated in these terms by Article 15.1, namely:

"*This Convention shall apply whenever any person referred to in Article 1 [i.e. a shipowner or salvor, but where 'shipowner' includes charterer: see Article 1.2] seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State.*"

This case does not concern the release or discharge of property or security in this jurisdiction. So the pertinent scope of the Convention is MSC's claim to limit its liability before this court.

7. In that regard, MSC claims a general limitation decree and such directions as may be necessary and proper for a limitation fund and the distribution thereof. A limitation fund has been established pursuant to an Order dated 5 October 2021 by way of a Letter of Undertaking from the Standard Club UK Ltd. The tonnage limitation amount is 25,318,000 SDRs (c.£26.5 million).

8. MSC has not named as defendants all parties that might have or might have had a claim against it arising out of the casualty, but only:

   (i) two Stolt companies (the first and second defendants), Stolt having been the road carrier of the DVB tank containers to New Orleans, and *vis-à-vis* MSC the shippers of those containers onto *MSC Flaminia*;

   (ii) the claimants in Claim No. CL-2017-000540 (who are, collectively, named as third defendant), a Commercial Court claim brought by cargo claimants whose bill of lading claims against MSC were subject to English law and jurisdiction; and

   (iii) Conti.

9. Other cargo claimants sued MSC, Conti, the New Orleans Terminal, Stolt and the DVB manufacturer, Deltech, in the US District Court for the Southern District of New York. Those proceedings were tried by US Federal District Judge Katherine B Forrest. In a Phase 1 Judgment dated 17 November 2017, Judge Forrest found that the auto-polymerisation that resulted in the explosion on board was caused by:

   (i) the decision to ship the DVB from New Orleans, which necessitated a longer voyage than a shipment from a port in the Northeastern US and exposed the DVB to undesirable conditions (essentially, warm ambient temperatures for a prolonged period);

(ii) the fact that the DVB was left on the dock in New Orleans for 10 hot days in the sun, next to a number of tank containers of heated diphenylamine ('DPA');

(iii) the stowage of the DVB tank containers in no.4 hold next to tank containers of heated DPA and near the ship's heated bunker tanks; and

(iv) a lack of ventilation in no.4 hold leading to hotter than normal ambient hold temperatures.

10. Judge Forrest found in addition that the DVB was adequately oxygenated and chilled when it left Deltech and did not auto-ignite. Ignition, she found, came by a spark caused by the opening of an access hatch to no.4 hold during the laden voyage.

11. While it is not said that Judge Forrest's conclusions create any issue estoppel here between MSC and Conti, I did not understand there to be any dispute over the accuracy of her findings summarised above (at all events for present purposes).

12. By her Phase II Judgment dated 10 September 2018, Judge Forrest concluded that all claims against *inter alia* Conti, MSC and the New Orleans Terminal failed. None of those, in Judge Forrest's opinion, was shown to have been at fault. By contrast, she held Deltech and Stolt to be at fault in various respects and liable as a result on various bases. She held further *inter alia* that MSC, and Conti as its sub-contractor, was entitled to a full indemnity from Stolt and Deltech in respect of the shipment of the dangerous DVB cargo; and that responsibility was to be apportioned *inter se* 55% to Deltech and 45% to Stolt.

13. Conti defends MSC's limitation claim on the merits, disputing that MSC has any limitation right under the Amended 1976 Convention in respect of Conti's recoverable losses, now quantified by Award 3, on the basis that either:

(i) Conti's loss "*resulted from [MSC's] personal act or omission, committed … recklessly and with knowledge that such loss would probably result*" within the meaning of Article 4 of the Amended 1976 Convention ('the Article 4 defence'), or

(ii) Conti's claims do not fall within the scope of Article 2 of the Amended 1976 Convention ('the Article 2 defence').

14. The Article 2 defence is listed for trial in October 2022. It is presently listed for 8 days, plus 2 days of pre-reading, but Mr Kenny QC indicated that his estimate was that only 2-3 days of hearing time should be necessary. I asked the parties to liaise and notify the Commercial Court Listing Office as soon as possible of any agreed revised time estimate.

15. The Article 4 defence is due for trial, if required, in 2023, although no trial date has yet been fixed. However, MSC says that no such trial is required. By Application Notice dated 16 July 2021, MSC applies for summary judgment dismissing the Article 4 defence, alternatively an order striking it out.

16. MSC further applies, by Application Notice dated 30 November 2021, for an anti-suit injunction restraining Conti from taking any step to enforce Award 3 anywhere in the world prior to the conclusion of the limitation claim in this court.

17. Finally by way of introduction, by Application Notice dated 10 December 2021 Conti cross-applies for declarations that:

    (i) Award 3 is binding on MSC and Conti;

    (ii) this pending limitation claim does not act to set aside or suspend Award 3;

    (iii) any limitation decree in due course granted will not operate to set aside or suspend Award 3.

Award 2

18. The first main ground on which MSC says it should have a summary dismissal of the Article 4 defence is that it is bound to fail by reason of an issue estoppel between MSC and Conti created by Award 2. It is convenient therefore to turn now to summarise the content of Award 2.

19. Award 2 contained, under a cover page, an award set out over 3 pages ("the Award"), including a signature page, and reasons for and forming part of the award set out over a further 140 pages ("the Reasons"). A copy of the Award (save for the signature page), as reproduced in the hearing bundle for the court, is appended to this judgment.

20. In the opening paragraphs, the Award sets out a brief history of the reference and states that Award 2 therefore addresses all outstanding issues of liability, i.e. all liability issues not dealt with by Award 1. Then under a heading, "**DISPOSITIVE AWARD**", and introduced by familiar arbitral language ("**NOW WE** … **DO HEREBY MAKE, ISSUE AND PUBLISH** this our **SECOND PARTIAL FINAL AWARD** as follows"), by the Award the arbitrators:

    (i) expressed in paragraphs (a) to (h) a series of conclusions in the form, "**WE FIND HOLD AND DECLARE THAT** …", or in the case of paragraph (c), "**WE FIND HOLD AND DECLARE** (by a majority) **THAT** …";

    (ii) awarded and directed in paragraph (i) that all matters relating to costs were reserved; and

    (iii) confirmed by paragraph (j), in declaratory form ("**WE FURTHER DECLARE** …"), that Award 2 was "**FINAL** as to the matters herein determined".

21. Paragraph (c), the conclusion expressed to be by majority (which the Reasons show to have been Ms Dias QC and Sir David Steel, with Mr Hofmeyr QC taking a contrary view) was that "*MSC was not negligent in so shipping the*

Cargo". From paragraph 2 of the Reasons, "the Cargo", as a defined term in Award 2, means the tanks of 80% DVB loaded into no.4 hold at New Orleans on 1 July 2012 the contents of one or more of which underwent auto-polymerisation resulting in the casualty. In context, the reference to MSC "so shipping" that DVB referred to the immediately preceding paragraphs (a) and (b) of the Award, by which the arbitrators expressed their conclusions that MSC had shipped it:

(i) otherwise than in accordance with the IMDG Code, so as to be in breach of clause 78 of the time charter, and

(ii) without giving Conti full information as to its hazardous characteristics such that Conti did not consent to the shipment with full knowledge of the danger, so as to be in breach of Article IV rule 6 of the Hague Rules.

22. Paragraph (d) of the Award expressed a conclusion that MSC's breaches of the time charter were an effective cause of the explosion; paragraph (e) that in one respect Conti had failed in breach of Article III rule 1 of the Hague Rules to exercise due diligence to provide a seaworthy ship; paragraph (f) that Conti did not in any other respect fail to provide a seaworthy ship; paragraph (g) that Conti's failure to provide a seaworthy ship had no causative impact in relation to the explosion or the crew's response thereto; and paragraph (h) that Conti did not fail properly and carefully to carry, keep or care for the DVB in breach of Article III rule 2 of the Hague Rules.

23. The submission for MSC was that it had thus been determined by arbitration that it was not even negligent in shipping the dangerous DVB cargo, and so it could not now be open to Conti to allege that the casualty resulted from a reckless act or omission on the part of MSC knowing that loss would probably result. The Article 4 defence, therefore, was bound to fail. MSC's submission treats paragraph (c) of the Award as a final and binding declaration (as to the absence of negligence) giving rise to issue estoppel.

24. The submission for Conti was that paragraph (c) of the Award does not give rise to an issue estoppel, the argument being that it amounted to no more than *obiter dictum*, unnecessary to the disposal of the claims submitted to the arbitrators given the finding against MSC of causative breaches of contract not requiring negligence. Conti accepted that if, contrary to that argument, it is bound *per rem judicatam* by the majority's conclusion that MSC was not negligent, then the Award, at all events when read with the Reasons so as to identify the basis for that conclusion, is fatal to the Article 4 defence.

25. Given that concession, it is not necessary to set out or summarise at length the majority's reasoning, as set out in the Reasons, for concluding that MSC had not been negligent. The argument over the nature of paragraph (c) does make it appropriate, however, to explain how the Reasons were structured, and to record what the arbitrators said when introducing their consideration of the question of negligence. References in square brackets in what follows are to the paragraph numbering in the Reasons.

26. The arbitrators recorded at [197] that Conti alleged "*that MSC were in breach of charterparty and/or of Article IV rule 6 of the Hague Rules and/or negligent in having failed properly to notify [Conti] of the dangerous nature and characteristics of the DVB cargo*". They said at [198] that Conti put its case on liability in five separate ways, *viz* that MSC was liable to it:

    (i) for negligence, in loading the DVB without giving any or any adequate notice to Conti of its dangerous qualities or of certain warnings said by Conti to have been provided by Stolt, all of which Conti said were or ought to have been known to MSC;

    (ii) for breach of clause 78 of the time charter;

    (iii) for breach of Article IV rule 6 of the Hague Rules (strictly, that must have been, as incorporated into the time charter);

    (iv) for breach of an implied warranty that dangerous goods would not be loaded without adequate notice to Conti of their dangerous characteristics;

    (v) under an implied indemnity in respect of the consequences of complying with MSC's employment orders pursuant to the time charter.

27. At [199] the arbitrators summarised MSC's response, which included a concession of breach of clause 78 "*on the basis that the DVB was, for reasons unknown to [MSC], in fact a prohibited cargo under the IMDG Code.*" As regards negligence, the arbitrators recorded that MSC accepted in principle that it owed Conti a duty of care in tort, but denied any breach of that duty.

28. At [201]-[203], the arbitrators noted again that breach of clause 78 had been conceded, concluded that MSC was "*necessarily therefore also in breach of [Article IV rule 6 of the Hague Rules] even if it adds little, if anything, to clause 78*", but rejected the existence of any implied warranty concerning the shipment of dangerous cargo in circumstances where the parties had regulated that matter by clause 78. They did not address the implied indemnity claim.

29. At [204]-[286], the arbitrators dealt with negligence, concluding by a majority that MSC had not been negligent. The way they introduce their discussion, at [204], is important to the argument of issue estoppel, so I set that out in full below.

30. From [287] to [381], the arbitrators considered MSC's complaints that Conti had acted in breach of Article III, rule 1 and/or rule 2 of the Hague Rules, finding that there had been a failure to exercise due diligence to ensure that there was a properly functional CO_2 fire extinguishing system on board that had no causative impact, but otherwise rejecting MSC's claims.

31. The arbitrators dealt from [382] with the question whether a discharge of CO_2, the failure to deploy which was alleged but not proved by MSC to have been a negligent failure on the part of the crew, would have prevented the explosion, eventually concluding at [492], that "*Had it been relevant to do so, … we would*

have concluded that MSC had not established that [Conti's] alleged breaches of charter had any causative effect."

32. The Reasons conclude at [493] with a series of "*conclusions on the issues as they were in fact presented to us*", some but not all of which are reflected in paragraphs (a) to (h) of the Award, summarised in paragraphs 21-22 above. Thus, for example:

    (i) [493(4)] states the conclusion by majority that MSC was not negligent that is reflected in paragraph (c) of the Award;

    (ii) [493(3)] states the conclusion that there was no implied warranty as to the loading of dangerous goods, and [493(8)] the conclusion that MSC had not established that the explosion would have been avoided, or its consequences minimised, if the crew had discharged CO_2 as MSC had alleged they should have, neither of which conclusions has any counterpart in paragraphs (a) to (h) of the Award.

33. Returning to [204], the arbitrators introduced their discussion of the question of negligence in these terms:

    "*MSC's admission of liability under clause 78 … and the Tribunal's conclusion on the effect of clause 62 strictly speaking renders it unnecessary to resolve the issue as to whether MSC was negligent regarding the shipping and loading of the DVB cargo, the more so given the confidentiality of these proceedings. Nevertheless, the parties have expended a very considerable amount of legal costs on the issue and it is right that the liability for those costs be determined. Furthermore, it is also right that an allegation of negligence in relation to such a significant casualty in terms of personal injury and death as well as physical damage having been fully argued should, if possible, not be left unresolved. Accordingly, we now turn to this issue against the background of an admitted duty of care.*"

Discussion – Issue Estoppel

34. The summary of legal principle set out in paragraphs 35-39 below, based upon Mr Smith QC's skeleton argument for Conti, was not controversial.

35. The issue estoppel principle was defined by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac* [2013] UKSC 46, [2014] AC 160, at [17], as "*the principle that even where the cause of action is not the same in the later action as it was in the earlier action, [if] some issue which is necessarily common to both was decided on the earlier occasion [the earlier decision on that issue] is binding on the parties.*"

36. The criteria established by the authorities for the creation of an issue estoppel were summarised and restated by the Court of Appeal in *The Good Challenger* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67, at [50], requiring that there be (a) a decision by a court or tribunal of competent jurisdiction that (b) is final and conclusive on the merits, (c) is between the same parties or their privies and

(d) has identity of subject matter (in other words the issue later sought to be contested must be the same as the issue previously decided).

37. The requirement of a final and conclusive decision on the merits requires "*a full contestation and a clear decision*", *per* Clarke LJ (as he was then) in *The Good Challenger*, at [54], harking back to Lord Wilberforce's speech in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 AC 853 and Lord Brandon's speech in *The Sennar (No.2)* [1985] 1 WLR 490. Putting in my own words what Clarke LJ went on to say there, it is necessary to take care to identify with precision the issues previously determined, as only issues the determination of which was necessary to the prior decision can give rise to issue estoppels, and there is an overriding consideration that the claim to an issue estoppel must work justice, not injustice.

38. The requirement of necessity means, as it is put in *Spencer, Bower & Handley: Res Judicata* (5th Ed.), at para.8.23, that: "*The determination must be fundamental not collateral. An express decision will not necessarily create an issue estoppel. Only determinations which are necessary for the decision, and fundamental to it, will do so. Other determinations, however positive, do not.*"

39. A matter which is *obiter* cannot form the basis of an issue estoppel, and that is true where the prior decision is an arbitration award as where it is a prior decision of the court: see *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2005] 2 CLC 664. I return to that case below, as it was central to Mr Smith QC's argument for Conti.

40. There is some danger in this area of imprecision or confusion of terminology. Thus, for example, *Spencer Bower*, *supra*, refer to an "*express decision*" not necessarily creating an issue estoppel, when what must be meant, more strictly, is that a finding or conclusion, even if expressed in seemingly final (rather than provisional) terms, may not be a decision at all. Or again, the requirement for a "*determination [that is] fundamental not collateral*" seeks to relate a prior determination of a particular issue to some ultimate decision made on that occasion, so as to assess whether that issue must be taken as having been decided then, as a necessary incident of the ultimate decision. Likewise, in *The Good Challenger*, *supra*, at [54(iii)], Clarke LJ stated one part of the principle I have put in my own words in paragraph 37 above in these rather circular terms, namely: "*The decision of the Court must be necessary for its decision*".

41. The question of issue estoppel in the present case arises in the context of a liability award (Award 2). An award as to liability, likewise an order of the court after a trial of liability only (with or without a more precise formulation of the issues to be tried), is by nature a determination of preliminary issues only, that is to say a final award as to some but not all of the matters referred to the arbitrators for decision. Such an award is often styled, as the arbitrators here styled Award 2, a 'partial final award', connoting that what it decides is decided finally in the reference but is only part of the subject matter referred.

42. Arbitrators are entitled to make such awards, unless the parties agree otherwise. That is s.47 of the Arbitration Act 1996, which provides as follows:

"*(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.*

(2) The tribunal may, in particular make an award relating–

(a) to an issue affecting the whole claim, or

(b) to a part only of the claims or cross-claims submitted to it for decision.

(3) If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award."

43. Whenever preliminary issues are determined, whether because a case has been divided into more or less generally defined phases, or because a list of specific questions has been directed to be decided first, and separately, it is important for at least three reasons to be clear as to what has been determined so as to bind the parties. Firstly, the parties need to know what is or is not open to them to argue in the balance of the proceedings in question. Secondly, the parties need to identify upon what aspects they should consider their rights (if any) to appeal or otherwise challenge the preliminary issues decision. Thirdly, the parties need to know what will or will not be open to them to revisit in other proceedings between them, especially if some such proceedings are already on foot or in contemplation when the preliminary issues decision is made. Whichever of those might motivate the enquiry, the same answer ought to be given to the question of what stands decided between the parties, and what does not, by the preliminary issues decision in question.

44. The importance of clarity in that regard was noted in *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd et al* [2002] EWCA Civ 1142, [2003] 1 WLR 307, an appeal from a judgment of Rix LJ sitting in the Commercial Court, *Compagnie Noga d'Importation et d'Exportation SA v Abacha et al (No.3)* [2002] CLC 207, which considered more generally the discretion to fix the form and content of relief to be granted following a preliminary issues trial. In that case, a trial of preliminary issues was held as to whether certain claims had been settled and if so on what terms. Upon that trial, Rix LJ concluded, favourably to Noga, that a figure of US$100 million had been agreed in principle for a compromise. However, he went on to conclude, unfavourably to Noga, that no binding settlement agreement at US$100 million resulted.

45. Provoked by the suggestion that the issue of fact whether US$100 million had been agreed in principle could be reopened on appeal, without permission to appeal, by a respondent's notice in an appeal by Noga against the decision that there had been no settlement at US$100 million, the question arose whether a final declaration should be granted to the effect of Rix LJ's finding of fact. Rix LJ concluded that it was open to him to grant such a declaration, and he did so.

46. On appeal, it was held that a trial judge indeed had a discretion in such circumstances to grant by way of relief upon a preliminary issues trial a final

declaration, binding the parties, such as Rix LJ had granted. The Court of Appeal was unanimously of the view that it would not be a proper exercise of that discretion to grant a declaration for the sole purpose of engineering a requirement for permission to appeal to be sought in order to raise on appeal a point that, but for the posited declaration, could have been raised by way of respondent's notice without requiring permission. The Court of Appeal went on to hold, by a majority, that that was not what Rix LJ had done, and so the appeal against the declaration he had granted was dismissed.

47. Waller LJ, who dissented as to the result, gave the main judgment, and the majority (Tuckey and Hale LJJ) expressly adopted what he said as to the applicable principles. Thus the difference of view in the Court of Appeal was only as to whether, read fairly, Rix LJ had granted his declaration solely for the impact that doing so would have upon the application of the procedural rules concerning permission to appeal. At [28], Waller LJ explained that:

"*The decision on a preliminary issue will be a judgment or order even if it is limited to a finding of fact. There is no difficulty where the only issue to be decided at a preliminary stage is one of fact. It is that issue on which the court has been asked to pronounce a judgment and, even if the court exercises its power to give judgment against a party on the whole of the case, since that was the issue the court was asked to determine, and since it is that issue on which the whole case ultimately turns, it will be the determination of that issue which will be the relevant judgment or determination so far as jurisdiction [i.e. the jurisdiction of the Court of Appeal] is concerned. In re B (A Minor) (Split Hearings: Jurisdiction) [2000] 1 WLR 790 is a good example … [where] the case having been adjourned, and the facts making a difference as to what might flow from the adjournment, the facts … were "pregnant with legal consequences". If however … the court had gone on to make a decision in relation to the legal consequences which one party would not seek to challenge, in my view that party would not be entitled simply to appeal the findings because it did not like the reasons for the decision in his or her favour. It is in that context that it might be appropriate for the court at first instance to consider whether some declaration should be granted to provide a "judgment" or "order" or "determination" which could be the subject of an appeal. If for example the findings of fact might be relevant to some other proceedings …, it might be appropriate to make a declaration so as to enable a party to challenge those findings and not find him or herself prejudiced by them. The findings would still be pregnant with legal consequences. It is to go beyond the scope of this judgment to consider precisely what circumstances might allow for the granting of a declaration where findings of fact might affect other proceedings. If an issue estoppel might arise that I suppose might provide a basis. … The fact that there may be circumstances shows the breadth of the discretion that the court has in relation to granting declarations …*" (my emphasis).

48. In the first of the sentences I have emphasised, Waller LJ focused on the interest of the losing party, as they would be, under a declaration, if made, to the effect of some particular finding (in that case, the finding that US$100 million had been agreed in principle), in having something to appeal against rather than an adverse finding incapable of independent challenge. This was to explain that the

fact that such a declaration (if made) would have to be appealed, if not accepted, by the party to whom it was adverse *might* be a proper consideration to take into account when deciding whether to make it. That emphasises the narrowness of the point upon the application of which to the facts the Court of Appeal was split, namely whether Rix LJ had been motivated exclusively by a purpose of causing that party to have to apply for permission to pursue what otherwise would have been, on the facts of that case, a purely 'defensive' respondent's notice in an appeal by Noga.

49. Far more straightforwardly – so much so, I suggest, that it went without saying in *Cie Noga* – the interest of the successful party, as they would be, under the posited declaration, in knowing where they stood on the point in question, if it was likely to be relevant in other proceedings between the same parties, and the wider interests of justice in certainty of outcome and the avoidance of the re-litigation of disputes, are apt to render it appropriate, in the exercise of a discretion, to grant it. All the more so, I would add, where (as here) that will serve another important interest, namely that of honouring and upholding the primacy *inter se* of the given parties' agreement to refer disputes to arbitration, preventing the litigation in court between those parties of a dispute between them already fully contested and, if the declaration is granted, determined in their agreed primary forum.

50. Applied to the present case, the principle endorsed unanimously by the Court of Appeal in *Cie Noga*:

(i) provided ample justification for the grant of relief in the form of a final declaration to the effect that MSC had not been negligent, in the relevant sense that it might be a proper exercise of the arbitrators' discretion to grant such relief, if only because of the very relevance to this limitation claim that is shown to exist by Conti's conditional concession of MSC's issue estoppel argument (paragraph 24 above);

(ii) confirms that such a declaration, if granted, indeed binds the parties to the proposition thus declared to be true.

51. That brings me to the *Sun Life* case, *supra*, relied on heavily by Mr Smith QC. In that case, there had been an arbitration between the claimant reassured ('Sun/Phoenix') and Cigna as reinsurer in relation to certain occupational accident ('Occ/Acc') risks. Mance LJ (as he was then) at [22] records that the Cigna Award recited that in the arbitration Cigna had sought declarations:

"*(1) [that Cigna] never became bound to the Occ/Acc Covers;*

(2) In the alternative to (1), that [Cigna] was entitled to, and did properly, avoid the four reinsurance contracts by which it participated in the Occ/Acc programme, on grounds of misrepresentation and non-disclosure;

(3) In the alternative to (1) and (2), that [Cigna] was not liable to indemnify the claimants against losses in respect of their reinsurances of the Unicover Personal Accident Pool Whole Account Protections;

(4) In the alternative, that, at the least, [Cigna] was not liable to indemnify the claimants in respect of their reinsurance of the said Unicover Pool's "burning cost policies"";

and that Cigna had also submitted at the arbitration hearing that certain other risks had not been validly ceded to the Occ/Acc covers so that no claims lay in respect of them against Cigna.

52. The final award in that arbitration, like Award 2, comprised a dispositive part and accompanying reasons, and the dispositive part included the following (*per* Mance LJ at [23]):

"*2. WE HOLD that in August/September 1998 [Cigna] became bound to the Occ/Acc Covers by becoming a party to four contracts of reinsurance, two with the Phoenix Claimants and two with the Sun Claimant.*

3. WE HOLD and DECLARE that [Cigna] has validly and properly avoided the contracts of reinsurance by which it participated in the Occ/Acc programme on the grounds of misrepresentation and non-disclosure in the placement …

4. WE HOLD that, subject to our decision in (3) above, all the numbered risks in respect of which the claimants sought an indemnity under the Occ/Acc covers were reinsured by [Cigna] with the exceptions of risks numbered 132 and 191-192."

53. In a second arbitration, brought against Sun/Phoenix by Lincoln, Sun/Phoenix contended that the Cigna reinsurance had not covered the Unicover risks and that therefore Sun/Phoenix's exposure to those risks was reinsured by Lincoln. There was a Net Retained Lines clause in the Lincoln reinsurance the effect of which was that if and to the extent that the Unicover risks would have been reinsured by Cigna, absent the avoidance, those risks were not reinsured by Lincoln (*per* Mance LJ at [3]).

54. Lincoln contended that it had been determined against Sun/Phoenix in the Cigna arbitration that the Unicover risks would have been reinsured by Cigna but for the avoidance, and that that determination bound Sun/Phoenix as against Lincoln. The Court of Appeal disagreed with both parts of Lincoln's contention. As to the first part, which is what matters for my purposes, the Court of Appeal construed the Cigna award as having determined finally only that the Cigna reinsurance had been validly avoided. The arbitrators' holding that but for any avoidance the Cigna reinsurance would have covered the Unicover risks was *obiter*, being unnecessary to that determination. The fact that it was recorded in paragraph 4 of the dispositive award did not change its character (the Court of Appeal rejected an argument by Sun/Phoenix that that paragraph was not to be read as extending to the Unicover risks anyway). The Cigna arbitrators said in their reasons that having upheld Cigna's avoidance, other issues did not arise and they were recording decisions on them only in deference to the detailed submissions that had been presented (*per* Mance LJ at [27]).

55. Mance LJ put it in this way, at [45]-[46]:

> "*45. … paragraph (4) of the dispositive part of the award was not necessary for the Cigna tribunal's decision. It was directed to an issue which the Cigna tribunal correctly stated in … its reasons did not arise in view of its decision on avoidance. Although expressed as part of the dispositive award, it was in fact obiter. Cigna, which won on avoidance, had no basis for appealing against it. If Sun/Phoenix had been able to appeal on the issue of avoidance, then the scope of the Cigna reinsurances might have become a necessary issue for determination, but there was no such appeal.*
>
> *46. … while I consider that the Cigna tribunal did hold and express the view that the Unicover book would have been covered by the Cigna reinsurances, I cannot regard its expression of that view as having been fundamental to its decision on avoidance, or as anything other than collateral. It is, I consider, clear that the Cigna tribunal would have arrived at precisely the same conclusion as it did regarding avoidance … even if it had formed an opposite view to the effect that the Unicover book fell outside or was excluded from the scope of the Cigna reinsurances.*"

56. Thus, Mance LJ's essential reasoning was that: (i) the Cigna award, properly considered, had decided only the question whether Cigna had validly avoided the reinsurance, determining that it had; (ii) the arbitrators' conclusion that but for avoidance the Unicover risks would have been covered was not essential to that decision. That reasoning reflects the fact that the conclusion on coverage could in principle have given rise to an estoppel *per rem judicatam* either because the award, properly considered, finally determined that very question or because, though the award did not do that, the coverage conclusion was necessary to such final determination as was made by the award.

57. Longmore LJ agreed with Mance LJ without adding anything on this aspect of the case (*ibid*, at [71]). Jacobs LJ also agreed with Mance LJ (*ibid*, at [86]), adding that "*It is worth standing back from the detail. What Lincoln seek to do is to rely upon a non-operative (in the sense that not actual consequences flow from it) opinion expressed by the Cigna arbitrators. The opinion is private in nature. Moreover it was unappealable. …*"

58. *Sun Life* is thus authority for the proposition that an arbitration award gives rise to estoppels *per rem judicatam* by reference only to the matters finally decided by the award, creating such estoppels both as regards the question or questions in terms decided by the award, upon a proper consideration of its terms, and particular issues, if any, the determination of which by the arbitrators was necessary to one or more of those ultimate decisions. *Sun Life* did not consider what the position would have been if, as Rix LJ had done in *Cie Noga*, the Cigna arbitrators had granted by way of final relief a declaration as to the facts or as to the parties' rights on a matter not necessary to the determination, also (still) made by the award, that Cigna had validly avoided.

59. In the present case, by Award 2 the arbitrators *did* grant by way of final relief within the reference a declaration that MSC was not negligent in shipping the DVB cargo on the casualty voyage otherwise than in accordance with the IMDG Code, so as to be in breach of clause 78 of the time charter, and without giving Conti full information as to its hazardous characteristics such that Conti did not

consent to the shipment with full knowledge of the danger, so as to be in breach of Article IV rule 6 of the Hague Rules. That is the purport of paragraph (c) of the Award, just as much as it is the purport of paragraph (a) of the Award to determine finally, and declare accordingly, that MSC was in breach of clause 78 of the charter. In each case, likewise as regards paragraphs (b) and (d) to (h) of the Award, the arbitrators by their language did more than just recite findings or opinions from the Reasons. They decided, in each case, to "***FIND HOLD AND DECLARE***" the position to be as they stated it to be. I do not think there is any reason not to treat the arbitrators' choice of language as deliberate and meaningful (just as in *Sun Life*, there was on the face of things a plain and presumably deliberate difference of language between the different paragraphs of the dispositive part of the Cigna award: see paragraph 52 above).

60. It is true that in the Reasons at [204], the arbitrators' first comment is that MSC's concession of breach of contract rendered it "*strictly speaking … unnecessary*" to resolve whether MSC had been negligent; but reading [204] as a whole, I consider that the arbitrators (i) meant by that only that it was unnecessary to resolve the issue of negligence to decide whether MSC had a liability to Conti for the casualty, and (ii) made clear that nonetheless they *were* finally resolving, and intending finally to resolve, the issue of negligence as between MSC and Conti. In that way, there is no tension between the finally dispositive character of paragraph (c) of the Award seemingly indicated by its own terms and the first sentence of Reasons at [204].

61. The conclusion that paragraph (c) of the Award is what it appears to be, namely a determinative declaration granted as one element of final relief in the reference, is reinforced, as Mr Kenny QC submitted, by the fact that Conti had referred a claim for damages for negligence, further to its claims for breach of contract and not merely in the alternative. Just as Award 2 does not articulate the relief granted in favour of Conti in the form of an award of damages to be assessed, but treats that as self-evidently the consequence of the declarations made, so also it does not articulate the relief granted in favour of MSC on the negligence claim in the form of a dismissal of that separate cause of action. That is equally self-evidently the consequence of the declarations made. In that way, though taking the form of a concise, final declaration that MSC was not negligent rather than a dismissal of the claim, paragraph (c) of the Award is *the* final relief in the reference disposing of the negligence claim referred by Conti for determination by the arbitrators.

62. That conclusion is further reinforced by the selection by the arbitrators of some but not all of their findings set out in the Reasons at [493] for inclusion as matters finally declared (see paragraph 32 above). That suggests, exactly as the language of paragraphs (a) to (h) of the Award indicates, a considered decision as to the scope and terms of a grant of declaratory relief.

63. The final rejection of the negligence claim, alongside and having no lesser effect than the final upholding of the claims for breach of clause 78 and of Article IV rule 6, served to define the parameters for the final phase of the reference in which the arbitrators were charged with determining, to the extent not agreed, what monetary award should be granted to Conti. In that phase (in the event, that is, by Award 3), the arbitrators' task was to measure and assess damages

for breach of contract (more particularly damages for the particular breaches of contract determined by Award 2 to exist) and/or an indemnity under Article IV rule 6 of the Hague Rules, and not damages in tort for negligence.

64. For completeness, I do not accept a further argument advanced by Mr Kenny QC that the arbitrators' conclusion on the issue of negligence was necessary in the context of Award 2 because MSC's application for leave to appeal against Award 1 was still pending. MSC's negligence, as alleged by Conti, was raised by Conti as a defence to MSC's claim for an indemnity under clause 62 of the time charter, as well as being raised as a necessary ingredient of Conti's claim in tort. But the arbitrators had finally disposed of the clause 62 claim by Award 1. That claim was no longer pending for determination by them. The contingent possibility that a successful appeal against Award 1 might result in a remission of the clause 62 claim for reconsideration by them does not mean that the clause 62 claim was before them when they issued Award 2.

65. Mr Smith QC complained that MSC did not seek in the reference, in a prayer for relief or the like, a declaration that it had not been negligent. He submitted also that, in contrast to *Cie Noga*, for example, the Reasons do not suggest that the arbitrators consciously gave separate consideration to the question whether in the exercise of a discretion as to the form of relief to grant at that stage in the reference a final declaration should be granted in MSC's favour. Those considerations do not affect my conclusion as to the import of Award 2 as in fact issued. I would have said that in any event, but all the more so bearing in mind, as Mr Kenny QC emphasised, that Award 2 was a partial final award only, dealing with liability issues by reference to a detailed and helpful list of issues drawn up during case management within the reference.

66. That the arbitrators chose in those circumstances to grant partial final relief in the form of a series of declarations is hardly surprising and almost certainly at least as useful to the parties as, if not more useful to them than, an award granting Conti damages or an indemnity to be assessed if not agreed and a dismissal of MSC's claim under Article III rule 2 of the Hague Rules, and granting MSC a dismissal of Conti's negligence claim and an award of nominal damages for breach of Article III rule 1 of the Hague Rules. If there were a valid complaint that the arbitrators did not consider adequately, or provide adequate reasons upon, a separate question of discretion whether to grant the declaration they granted in favour of MSC, that might have been material to a challenge to Award 2, had there been any. It would be sterile to debate now whether there was any such valid complaint, since it is far too late now for any challenge to Award 2.

67. Whether or not the other statutory requirements for an appeal under s.69 of the Arbitration Act 1996 would have been met (or the requirements for a challenge under s.68 of the Act), what matters for present purposes is that an application by Conti for leave to appeal under s.69 (or a s.68 claim) could not sensibly have been met with an argument that paragraph (c) did not constitute a final and binding award adverse to Conti that was capable in concept of being appealed (or challenged as a final award on an issue). Indeed, and this is a satisfactory coherence of approach, the impact of the arbitrators' decision that MSC had not been negligent upon the Article 4 defence in this limitation claim, just as it might

properly inform a decision by the arbitrators whether in their discretion to grant the declaration, would also inform any consideration of whether the declaration as granted would substantially affect the rights of the parties for the purpose of s.69(3) of the Act (or would work a substantial injustice for the purpose of s.68(2)).

68. In conclusion, and for the reasons set out above, Award 2, by paragraph (c) of the Award, finally determined between MSC and Conti that MSC was not negligent in shipping the DVB as it did, in contravention of the IMDG Code and without giving Conti full information as to the danger it presented. Conti is estopped thereby from contending otherwise before this court, and conceded that in those circumstances it could not maintain that the Article 4 defence might be viable. I shall grant by way of summary judgment a dismissal of the Article 4 defence in such precise form and terms as I shall settle if not agreed after this judgment has been handed down.

Other Grounds

69. In the circumstances, I shall take more shortly the other grounds upon which Mr Kenny QC developed the argument that the Article 4 defence should be struck out or summarily dismissed.

70. Those grounds all concern Mr Dirk Vande Velde, the head of MSC's Dangerous Cargo Department in Antwerp. Conti says that for the purpose of the Article 4 defence, his acts, omissions and knowledge were the personal acts, omissions and knowledge of MSC. It was not suggested that Conti does not have at least a real prospect of securing such a finding at a trial.

71. The Article 4 defence, then, taking Mr Vande Velde to personify MSC, as Conti claims, is that Conti's loss, in respect of which MSC claims entitlement to limit under the Amended 1976 Convention, resulted from a reckless act or omission on the part of Mr Vande Velde done or omitted to be done in the knowledge that "*such loss*" would probably result.

72. There may be an issue between the parties as to what precisely must have been appreciated as likely to result for there to have been knowledge that "*such loss*" was probable. But that need not detain me in this judgment. I say that because MSC's present Application Notice assumes in Conti's favour that it would be sufficient for Mr Vande Velde to have appreciated that his reckless act or omission (as alleged) "*would probably cause an explosion on board the MSC FLAMINIA or … some similar casualty*", and I did not understand Mr Smith QC to contend that anything less might be sufficient than contemplation as probable of a similar casualty.

73. Firstly, then, Mr Kenny QC submitted that Conti has not pleaded any such case of knowledge on the part of Mr Vende Velde. The Article 4 defence is therefore, he contended, bad in law on the face of the pleadings – demurrable, as once it would have been said. In that regard, Conti's relevant pleadings are as follows:

    (i) paragraph 3 of its Defence: "*[Conti] will say that [MSC] is not entitled to limit its liability under the Convention because "the loss resulted from*

> *[MSC's] personal act or omission, committed … recklessly and with knowledge that such loss would probably result" within the meaning of Article 4. Further particulars of the plea (pending full disclosure) are given overleaf*";

(ii) the current version of the further particulars referred to there.

74. I regard paragraph 3 of the Defence as doing no more than identifying the case that Conti wishes to assert. Whether it has alleged that which it must allege in order to assert that case falls to be considered by reference to the particulars in which, it is said, Conti's relevant case is to be found.

75. Those further particulars, then, now in an amended form, plead as follows:

(i) by paragraph 1, that Mr Vande Velde was MSC's *alter ego* for present purposes, with particulars of the factual basis for that plea;

(ii) by paragraph 2, that Mr Vande Velde knew that DVB cargoes were dangerous, with particulars of various specific properties of DVB cargoes said to have been known to him and particulars of the basis upon which it is alleged that Mr Vande Velde had that knowledge concerning DVB. As originally pleaded, paragraph 2 included an allegation that it is to be inferred that Mr Vande Velde knew that if those organising the loading of DVB cargoes were not warned that they should not be stowed near to heat sources or exposed to excessive temperatures, then they were liable to be so stowed and if then exposed to heat or excessive temperatures for excessive periods of time thereafter would auto-polymerise and/or explode and likely cause catastrophic loss and damage on a container ship such as in fact occurred in this case. I mention that because Mr Smith QC explained that it had been struck through when the further particulars were amended because it was seen as superseded by new paragraph 2A, not because it was accepted to be a bad plea or a plea for which Conti did not have any proper basis. He invited me to have regard to that original plea, therefore, on the ground that if I concluded that without it a viable Article 4 defence had been rendered demurrable, then that was an accidental consequence of the amendment of the further particulars that Conti should be allowed to reverse by reinstating the struck-through wording either where it had been or by adding it to paragraph 2A;

(iii) by paragraph 2A, that it is to be inferred that Mr Vande Velde knew that if those planning the loading of DVB cargoes were not given information or requests from the shippers concerning stowage, handling and segregation, they would not be able to take the same into account and would plan the stowage without regard thereto;

(iv) by paragraph 3, that Mr Vande Velde recklessly failed "*to ensure that DVB cargoes were handled, stowed and carried in accordance with requests or information provided by the shippers of such cargo and were not exposed to excessive temperatures and/or stowed near heat sources*", with particulars given of certain specific matters (as alleged) for which

it is said that Mr Vande Velde had responsibility, namely that (a) MSC staff were trained to ignore safety instructions and warnings unless included on Dangerous Goods Declarations ('DGDs') and not to follow special handling instructions, if any, supplied by shippers, (b) MSC operated a cargo booking system under which any safety or special handling instructions supplied by shippers that did not appear in DGDs were omitted from sea waybills drawn up for the ocean carriage and were not brought to the attention of MSC's Cargo Planning Department, US Hazardous Goods Department, or main Dangerous Goods Department (Mr Vande Velde's Department) in Antwerp, (c) MSC populated its cargo booking system database with only minimal dangerous goods information and/or incorrectly treated all dangerous goods as being alike in terms of heat sensitivity, and (d) MSC did not inform shippers of those various policies and practices meaning that shippers would be unaware that any stowage, handling or separation requests they might have made otherwise than in a DGD would be ignored by MSC;

(v) by paragraph 4, that Mr Vande Velde's recklessness (as alleged) caused the instant casualty, with particulars given focusing upon a failure to act upon safe stowage, handling and separation warnings given in respect of the subject DVB but which, it is said, were ignored because of the policies and practices said in paragraph 3 to have been Mr Vande Velde's responsibility and to have been reckless.

76. Conti's amended particulars, just summarised, were the subject of a Request for Further Information served by MSC. The Requests that matter for present purposes, and the Responses they received, are as follows:

(i) Request 10 asked whether Conti alleges that Mr Vande Velde "*actually considered (or thought about) the risk of causing an accident or casualty involving DVB on some future MSC voyage when he was acting (or omitting to act) as alleged in paragraphs 3(a)-(d)*". The Response was "*Yes, or at least he would have considered the risk as regards all dangerous cargoes, including DVB.*"

(ii) Request 11 asked a series of questions "*If so*", which questions did therefore arise for response. Request 11(2) asked: "*What degree of risk did Mr Vande Velde perceive with respect to the possibility of an accident on a future MSC voyage? In particular, did he consider that an accident involving DVB on a future MSC voyage was (i) more likely than not, (ii) a substantial possibility but less than a 50% likelihood, or (iii) only a remote chance?*". The Response was "*Owners do not know pending disclosure and witness evidence.*"

77. I agree with Mr Kenny QC that the amended particulars do *not* include any allegation that Mr Vande Velde knew when acting recklessly (as Conti alleges) that a DVB casualty was likely to result. The Further Information was a fair and proper opportunity to Conti to confirm or correct that appearance. Response 11(2) in terms concedes that Conti presently cannot advance that allegation. As regards the plea struck through on amendment but which Mr Smith QC said could readily be reintroduced (paragraph 75(ii) above), it pleads an appreciation

that catastrophic consequences were likely ***if*** a certain concatenation of circumstances occurred and an appreciation that that was possible. That is not a plea of action (or inaction) appreciating that a casualty would probably result.

78. Furthermore, in view of the extensive litigation of MSC's possible culpability in respect of this casualty, through the US litigation and the arbitration, I also agree with Mr Kenny QC that Conti has presented no more than a speculative hope that though it does not now have a proper basis to advance the necessary allegation, something might turn up. Had I not been dismissing the Article 4 defence summarily on the ground of issue estoppel, I would not have allowed such an exercise in Micawberism. Rather, I would have struck out paragraph 3 of Conti's Defence (and the opening words of paragraph 4, "*Further or alternatively*"), the amended particulars, and the Further Information.

79. Secondly, Mr Kenny QC submitted that as regards certain of the necessary elements of the Article 4 defence, as pleaded, I could say on the facts that Conti does not have any realistic prospect of success at trial. There was in that regard both a general reliance on the fact that whether MSC was guilty even of negligence had now been tried out fully, twice, in the US litigation and in the arbitration, the suggestion being that it should be regarded as most unlikely that Conti might find it was third time lucky on an allegation of far more serious culpability, and also a detailed criticism of the proposition that Conti might have any serious basis for any of four particular ingredients of its case that MSC sought to put under the microscope.

80. I shall not lengthen this judgment by engaging in a similar level of detailed scrutiny, since I am dismissing summarily a defence that is demurrable in any event. Having considered carefully Mr Kenny QC's attractively presented critique, and though it is possible to see why MSC says that Conti's case might face some difficulties, I am satisfied that Conti has a realistic (non-fanciful) prospect of establishing that which it has pleaded against Mr Vande Velde. If that which it has pleaded constituted a viable Article 4 defence that survived the issue estoppel argument, I would not have acceded to MSC's application to strike the defence out or dismiss it summarily.

Anti-Suit Injunction

81. As I said in the introduction to this judgment, MSC applies for an injunction restraining Conti from seeking to enforce Award 3 anywhere in the world prior to the conclusion of this limitation claim.

82. MSC commenced this claim only in July 2020, eight years after the casualty. Mr Mills of Mills & Co, MSC's solicitors, explained in his witness evidence for the present applications why a limitation was commenced then rather than earlier. I do not say that the thinking was unreasonable. Nonetheless:

    (i) it was evident as Mr Kenny QC developed the argument for an anti-suit injunction that MSC's only difficulty (if there is one) is that Conti now has a final monetary award, *prima facie* enforceable anywhere in the world where MSC may be amenable to enforcement, and a general

limitation decree from this court, if MSC is able to obtain one, is still some months away, and

(ii) that is a difficulty (if it is a real difficulty) of MSC's own making by leaving it until July 2020 before pursuing in this court its asserted right under the Amended 1976 Convention.

83. Though upon this judgment I shall be dismissing the Article 4 defence, that does not mean MSC can apply immediately or summarily for a general limitation decree. To establish its right to limit before this court under the Amended 1976 Convention its liability against allcomers in respect of the *MSC Flaminia* casualty will require MSC to prove that its liability to Conti, now fixed by Award 3, is a liability in respect of which the right to limit arises under Article 2. That cannot and will not be determined except by the trial now listed for October 2022 to which I referred in paragraph 14 above.

84. I am not aware and was not shown by counsel that the procedural issue just mentioned has been considered before. Mr Mills gave evidence from his recollection of the limitation proceedings that followed the *MSC Napoli* casualty in January 2007, in which the ship broke her back in the English Channel and was grounded at Branscombe Bay. The shipowner (represented as are Conti by HFW) constituted a limitation fund in this jurisdiction. MSC (represented then as now by Mills & Co) argued as time charterer that its bunkers on board the *MSC Napoli* were to be treated as part of the ship such that MSC's claim against the shipowner for the loss of those bunkers was not limitable under Article 2.

85. Mr Mills says that MSC did not take the point that a general limitation decree ought not to be granted without that argument being resolved. Rather, he says, MSC allowed a general limitation decree to be issued and filed a claim against the limitation fund without prejudice to its primary position (based on the above argument) that it had no right to make that claim. Mr Mills does not relate how that story ended, although I expect that if the shipowner had raised any objection to the course adopted by MSC Mr Mills would have said so. But however the *MSC Napoli* story played out, I cannot see that a single past instance in which MSC did not take a point is of any assistance to me now.

86. I see the convenience of the course adopted by MSC in the *MSC Napoli* case; but to my mind the logic of paragraph 83 above is compelling. If it is clear that the limitation claimant would obtain a general limitation decree, subject to an Article 2 point such as MSC's argument in that case or Conti's arguments in this case that will be available (if at all) to a particular limitation defendant or defendants only, the limitation claimant and that defendant or those defendants might choose to agree to deal with matters in that way, in effect creating by side-agreement a qualification *inter se* on the apparently unqualified language of the decree. But absent agreement, I would think it inadvisable for a limitation defendant with an Article 2 point to consent to a general limitation decree rather than defend the limitation action, as Conti has done here, by reference to that point.

87. If MSC obtains the general limitation decree it seeks and Conti claims on the fund, then under Article 13(1) of the Amended 1976 Convention, as enacted in this jurisdiction, MSC will have a statutory right that Conti be "*barred from exercising any right in respect of [its] claim against any other assets of [MSC]*". There is no evidence that Conti has any intention to claim against the fund, however.

88. Instead, there is evidence indicating that unless restrained by injunction from doing so, Conti has in mind to seek to enforce Award 3 elsewhere, i.e. not in this jurisdiction, possibly in the US (although where, more precisely, Conti has not vouchsafed). Conti is open about that. For example, in his skeleton argument, Mr Smith QC said in terms that "*[Conti intends] to enforce [Award 3] in whatever convenient jurisdiction they can locate assets belonging to MSC*", and objected on behalf of Conti to MSC's apparent attempt to force Conti to seek to enforce Award 3 only in this jurisdiction, against the limitation fund.

89. Article 13(2) of the Amended 1976 Convention will apply in all of the jurisdictions that are party to it, under which there will be a discretion, but not an obligation (since none of sub-paragraphs (a) to (d) of Article 13(2) applies on the present facts), to release any arrest or attachment there of MSC property at the suit of Conti, if Conti's claim could be made against the limitation fund (i.e. if its Article 2 point is not well founded). MSC's application did not provide any reason, let alone any good reason, why this court should, in effect, pre-judge the exercise of that discretion in another jurisdiction.

90. If enforcement by Conti is attempted in a jurisdiction not party to the Amended 1976 Convention, then the question may arise there whether a general limitation decree obtained here, in a limitation action in which Conti has participated, would have any impact. If there were at least a serious argument that it would, then the prior question would arise, if no decree had yet been obtained, whether the fact that this claim was pending in which MSC hoped to obtain a decree meant that no irreversible enforcement step should be allowed in the meantime.

91. There is no evidence that there is any jurisdiction in which MSC (i) might be amenable to material enforcement action in respect of Award 3 but (ii) might be prejudiced by not yet having a limitation decree here. That would mean a jurisdiction where it *would* (or at least might) benefit MSC, in defending the enforcement action, to have an English limitation decree, but despite that the courts there would (or at least might) allow irreversible steps by way of enforcement while the limitation action was pending here.

92. Mr Kenny QC submitted, with some force, that unless and until Conti in fact seeks to enforce, MSC cannot know which jurisdictions to address as regards considerations of that kind. That said, MSC will surely know where it has substantial assets, so the submission I have just acknowledged is a function of MSC's desire to remain coy about that as much as it is a function of Conti's desire to remain coy about where exactly it has in mind to seek to enforce.

93. That all seemed to me to show that this application is at best premature. If enforcement action is taken, MSC will be in a position to make concrete any

grounds, if there are any, for complaining to this court that Conti ought not to be allowed to pursue that action pending the conclusion of the limitation claim here. In *The Anti-Suit Injunction* (Raphael, 2nd Ed.), at para.5.70, the learned author notes that "*anti-enforcement injunctions have only been granted in two cases: Ellerman v Read, which has recently been interpreted as turning on the proposition that the foreign judgment was obtained by fraud; and Bank St Petersburg v Archangelsky, where the injunction was justified by a specific agreement not to bring enforcement proceedings, and there was no objection on the grounds of delay.*" There has now been a third example, on very particular facts, in *SAS v WPL* [2020] EWCA Civ 599, [2020] 1 CLC 816. This application, at this stage, did not constitute a proper occasion for considering whether to grant a fourth such injunction.

94. In those circumstances, I indicated that I would not be granting any anti-suit injunction on this application and did not call on Mr Smith QC to respond. He had demonstrated persuasively in writing, by his skeleton argument, why there was no imperative, wider public interest the serving of which required that a party in Conti's position should be restrained by anti-suit injunction, as Mr Kenny QC sought to suggest.

95. Firstly, it was said by Mr Kenny QC that to allow enforcement of Award 3 otherwise than against the limitation fund established here (if, contrary to Conti's case, its claims could be made against that fund) would be akin to the violation of a statutory scheme of distribution following insolvency that influenced the Privy Council in *Stichting Shell Pensioenfonds v Krys et al* [2014] UKPC 41, [2015] AC 616, at [18]. However, there is no good analogy:

(i) Though there is a public policy behind tonnage limitation, it is not one on which there is international consensus.

(ii) The Amended 1976 Convention provides an orderly means for a *pari passu* distribution of a particular fund between claimants who opt to claim against that fund (if entitled to do so), accepting thereby that they may not make any fuller recovery (by operation of Article 13(1)). It provides, ultimately, for no more than that.

(iii) A limitation action involves neither all the limiting party's assets nor all its creditors. Nor does it even involve necessarily all creditors entitled to claim against the fund (see (ii) above).

96. Secondly, Mr Kenny QC argued that it would be oppressive conduct on Conti's part to seek to enforce Award 3 having submitted to and participated in the limitation claim, referring to *Morris v Davies* [2011] EWHC 1272 (Ch) at [36]-[37], *Ardila v ENRC* [2015] EWHC 1667 (Comm) at [57], and *Star Reefers v JFC* [2012] 1 Lloyd's Rep 376 at [37]. The suggestion was that Conti would be improperly seeking to nullify, frustrate, pre-empt or hijack the limitation proceedings here or their orderly conclusion.

97. I disagree. Conti, served by MSC as a defendant to its limitation claim, has a legitimate interest in defending that claim, on its contention that its claims against MSC do not fall within Article 2 of the Amended 1976 Convention, and

would have had a legitimate interest in defending that claim by reference to Article 4 had it been able properly to plead a case under Article 4 that was not defeated by issue estoppel, *irrespective of whether it has any intention of enforcing against the fund*. The same would have been true if Conti had an argument that MSC was not a person entitled to limit at all (i.e. was not a shipowner or salvor within the purview of Article 1 of the Convention). The very interest, itself legitimate, that MSC has in relying in response to any enforcement action elsewhere upon any limitation decree it obtains here (if and to the extent that such a decree would assist it before the courts seized of the enforcement action), renders it legitimate, not vexatious or oppressive, for Conti to resist the grant of any such decree on properly arguable grounds.

98. By submitting to the jurisdiction and participating, Conti has eschewed any argument as to the appropriateness of this forum *for determining as between itself and MSC those Convention questions*. I can see that in those circumstances it might be possible to characterise Conti's conduct as vexatious and oppressive were it threatening to re-litigate those questions, in defiance of a determination of them in favour of MSC by this court (if that is the outcome of these proceedings), so as to prevent MSC from taking advantage of the Convention in a jurisdiction in which the right to limit thereunder would in principle operate to MSC's benefit. Even that may not be a straightforward argument, because it still may come down to an attempt to police by anti-suit injunction the principles applicable abroad to the recognition or enforcement of judgments of the English court. But in any event, MSC is not in a position, at all events at this stage, to propose that Conti is threatening or intending any such thing.

99. Conti is not seeking to frustrate MSC's limitation right under the Amended 1976 Convention by defending this claim whereby to dispute on properly arguable grounds the proposition that MSC has any such right. Subject to the timing point on which MSC presently has no relevant case to support an injunction application (paragraph 91 above), Conti's conduct in defending MSC's limitation claim in that way does not affect adversely to MSC the impact of the Convention (if it would otherwise have any) on Conti's ability to enforce Award 3.

100. In *The ICL Vikraman* [2003] EWHC 2320 (Comm), [2004] 1 WLR 2254, Colman J discharged an *ex parte* injunction granted to restrain cargo interests from enforcing an arbitration award against security issued in Singapore to obtain the release of a sister ship from arrest there, in support of a limitation claim here. The limitation amount under the 1976 Convention was US$1.7 million, but the cargo interests had an arbitration award for US$2.7 million. True it is that the application was made under Article 13(2) of the 1976 Convention, and failed on the ground that the discretion provided for there was not a discretion in the English court seized of the limitation claim to interfere in the cargo interests' attempt to enforce against an asset in Singapore, which was not party to the 1976 Convention. However, it does not appear to have occurred to anyone involved that quite apart from Article 13(2) it might be said to be unconscionable conduct apt for restraint by injunction for cargo interests to seek full satisfaction for a claim by pursuing enforcement in a jurisdiction where their recovery might not be limited by operation of the 1976 Convention.

101. In *The Western Regent* [2005] EWCA Civ 985, [2005] 2 Lloyd's Rep 359, a limitation decree had been issued by way of summary judgment, but the Court of Appeal upheld the refusal of an anti-suit injunction to restrain a limitation decree defendant from pursuing proceedings on its substantive claim in Texas. Clarke LJ (as he was then) observed at [52] that "*it is not unconscionable for Total to proceed in Texas … and the English Court should leave it to the court in Texas to decide what effect to give to the decree*". It is plain that in that case the reason why proceedings were being pursued in Texas was with a view to obtaining full satisfaction there because limitation would be based on the post-collision value of the vessel, not on the 1976 Convention limit, and that value was likely to exceed the value of the claim. Apart again from the timing point on which there is no evidential case (paragraph 91 above), there is no basis for distinguishing *The Western Regent* from the present case.

102. In *Bouygues Offshore S.A. v Caspian Shipping Co. et al (Nos. 1, 3, 4 and 5)* [1998] 2 Lloyd's Rep 461, there were liability proceedings in England and South Africa in respect of claims arising out of the total loss of a barge when her towline parted in stormy weather, and a limitation decree was granted in England. Evans LJ observed at [14] that "*while the decree will be effective as regards all proceedings in this country … it must be for the South African Courts to decide whether the same limits of liability will be recognised there*" and Sir John Knox at 474 lhc considered it doubtful whether the decree which Caspian had obtained would be of any practical value.

103. Thus, in my judgment it is the established understanding of English law that the statutory enactment here of the Amended 1976 Convention is not intended to dictate to other systems of law, or their courts, whether they give effect to that Convention and/or to decisions of the English courts. A different approach was adopted in Singapore, in relation to the 1957 Convention to which Singapore was then a party, in *The Ever Glory, Evergreen International SA v Volkswagen Group Singapore Pte Ltd et al* [2003] SGHC 142, on which Mr Kenny QC relied. It suffices to say, with respect, that the analysis adopted in that case by Belinda Ang Saw Ean J does not represent or reflect English law.

104. For all those reasons, I refuse MSC's application for an anti-suit injunction in the present case.

Award 3 Declarations

105. Finally, Conti seeks, by its Application Notice, an Order making declarations that Award 3 is binding on MSC and Conti, and that this limitation claim, or in due course a limitation decree if granted in it, does not, respectively will not, act to set aside or suspend Award 3.

106. Having considered the parties' written arguments and heard Mr Smith QC on this application, I was concerned that either:

    (i) there is no real dispute between the parties, or at any rate no dispute that the grant of the declarations sought would serve to resolve, or

(ii) there is or may be a real dispute between the parties, but it is difficult and premature to articulate what it is or why it matters and therefore impossible sensibly to consider what, if any, declaratory relief ought to be granted.

107. I indicated therefore that I would not grant any of the declarations sought, and did not call on Mr Kenny QC to respond to the application.

108. As explained by Mr Smith QC, and against the backdrop of some solicitors' correspondence in which HFW for Conti set out a series of propositions and demanded confirmation that they were all agreed and Mills & Co for MSC declined to agree any of them, the suggested concern is that MSC may attempt to resist enforcement of Award 3 by invoking Article V.1(e) of the New York Convention, under which recognition or enforcement of an arbitration award may be refused upon proof that the award "*has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*".

109. I considered that, as things stand, that suggested concern was somewhat manufactured. Certainly, I did not think it could be said that there is any real basis for supposing that MSC will take the suggested point under Article V.1(e), or that it contends that the existence of this limitation claim without more brings Article V.1(e) into operation or that a limitation decree, if granted in due course, would without more have that effect.

110. It is not just or convenient to consider the grant of declaratory relief such as is proposed by Conti's application at this stage, upon the basis of its Application Notice tacked by way of cross-application onto MSC's application for an anti-suit injunction. If Conti desires to pursue any such claim, it can and should apply for permission to do so by way of counterclaim and the matter can be pleaded out properly and dealt with hereafter in whatever way may be most appropriate.

Appendix – Award 2

Award 2 Extract.pdf

INTRODUCTION

1. The Tribunal issued a Partial Final Award in this Reference on 8 February 2021 ("**the First Partial Final Award**"). This is our Second Partial Final Award in this Reference.

THE ARBITRATION PROCEEDINGS

2. The procedural history of this Reference is dealt with compendiously in the First Partial Final Award and is not repeated.

3. At the conclusion of the Phase I(b) hearing, on 5 February 2021, the parties indicated that, having reflected further, it would be possible to have all aspects of liability dealt with in advance of the Phase II hearing. Accordingly, the Tribunal ordered that closing submissions in Phase I(b) would be in writing, to be exchanged on 26 February 2021 and to be followed by supplementary submissions in writing (if so advised), exchanged on 5 March 2021 and limited to 20 pages if possible.

4. The parties duly exchanged written submissions in respect of Phase I(b) in accordance with the Tribunal's direction.

THE ISSUES

5. This Second Partial Final Award accordingly addresses all outstanding issues of liability.

THE CONTENTIONS, RELEVANT LEGAL PRINCIPLES AND CONCLUSIONS

6. Set out in the attached reasons which form part of this Second Partial Final Award are (i) our findings of fact, (ii) a summary of the rival contentions of the parties on the outstanding issues of liability, (iii) the legal principles to which we have had regard in reaching our conclusions on these issues and (iv) our conclusions on these issues.

DISPOSITIVE AWARD

NOW WE, Julia Dias QC, Stephen Hofmeyr QC and Sir David Steel, having taken upon ourselves the burden of this reference and having carefully and conscientiously read and considered the submissions and documents put before us and given due weight thereto, **DO HEREBY MAKE, ISSUE AND PUBLISH** this our **SECOND PARTIAL FINAL AWARD** as follows:

(a) **WE FIND HOLD AND DECLARE THAT** MSC was in breach of clause 78 the Charterparty in shipping the Cargo otherwise than in accordance with the IMDG Code.

(b) **WE FIND HOLD AND DECLARE THAT** MSC was in breach of Article IV rule 6 of the Hague Rules in shipping the Cargo without giving Owners full information as to its hazardous characteristics such that Owners did not consent to such shipment with knowledge of the dangerous nature and character of the Cargo.

(c) **WE FIND HOLD AND DECLARE** (by a majority) **THAT** MSC was not negligent in so shipping the Cargo.

(d) **WE FIND HOLD AND DECLARE THAT** MSC's breaches of Charterparty were an effective cause of the explosion.

(e) **WE FIND HOLD AND DECLARE THAT** Owners failed in breach of Article III rule 1 of the Hague Rules to exercise due diligence to provide a seaworthy vessel in that the pipework of the Vessel's CO_2 system had been incorrectly installed and this should have been detected by a reasonably diligent technician during the periodic scheduled inspections of the system.

(f) **WE FIND HOLD AND DECLARE THAT** Owners did not fail to provide a seaworthy vessel in any other respects.

(g) **WE FIND HOLD AND DECLARE THAT** Owners' failure to provide a seaworthy vessel had no causative impact in relation to the explosion or the crew's response thereto.

(h) **WE FIND HOLD AND DECLARE THAT** Owners did not fail properly and carefully to carry, keep or care for the Cargo in breach of Article III rule 2 of the Hague Rules.

(i) **WE FURTHER AWARD AND DIRECT** that all matters relating to party costs and the incidence as between the parties of the Tribunal's costs and expenses of this Second Partial Final Award are reserved.

(j) **WE FURTHER DECLARE** that this **SECOND PARTIAL FINAL AWARD** is **FINAL** as to the matters herein determined.

We **RESERVE JURISDICTION** to ourselves to make a further Award or Awards as may be appropriate in respect of any outstanding issues between the parties.