JUDGMENT : Mr Justice David Steel : Commercial Court. 27th March 2003

Introduction

1. By a charterparty on an amended NYPE form, dated Puteaux 9th April 1999, the respondent owners chartered their container vessel *CMA Djakarta* to the appellant charterers. The vessel was to be traded in the charterers' liner network.

2. During the currency of the charterparty, on the 10th July 1999, there was an explosion and fire on the vessel, leading to her abandonment. Salvage services were rendered to ship and cargo, following which, after discharge of the containers, both damaged and undamaged, the vessel underwent substantial repairs.

3. The owners claimed against the charterers damages in the sum of $26,638,032, together with an indemnity in respect of their exposure to cargo claims and general average contributions. The basis for this claim was the contention that the explosion and the fire was attributable to the shipment of two containers containing bleaching powder, that shipment being in breach, it was alleged, of the express terms of the charterparty relating to dangerous cargo.

4. This dispute was referred to arbitration under the relevant provisions of the charterparty. The arbitrators, Messrs Michael Baker-Harber, Mark Hamsher and Christopher Moss, published their first interim final award on the 15th January 2002. They found in favour of the owners on their claim.

The appeal

5. In the arbitration, the charterers had pleaded an entitlement to limit their liability in the following terms: -

"25. Further or in the further alternative the respondents are entitled to limit their liability pursuant to the provisions of the 1976 Convention on the Limitation of Liability for Maritime Claims. In this regard, the respondents will rely: -

(i) on the fund established in proceedings in the Tribunal de Commerce of Marseilles France and /or

(ii) on the right to limit by way of defence herein."

6. The arbitrators' reasons record a concession by the charterers that the arbitrators were bound by the decision of Mr Justice Thomas in ***The Aegean Sea*** [1998] 2 Lloyds Rep.39 to the effect that, on the facts of that case, voyage charterers were not entitled to limit their liability for claims brought by owners in respect of the nomination of an unsafe port. It was, in effect, accepted that the decision was not distinguishable.

7. Having "*reserved their right"* to argue that the decision was not correct, the charterers sought leave to appeal pursuant to Section 69 of the **Arbitration Act 1996.** Leave was granted by Moore-Bick J on the 28th May 2002.

8. The question of law on which leave was granted was as follows:- *"Whether the charterers are entitled to limit their liability arising out of the first, second and third interim awards as against the owners pursuant to the Merchant Shipping Act 1995 and the Convention on Limitation of Liability for Maritime Claims 1976."*

9. The charterers, of course, recognise that, in urging an affirmative answer to that question, it is implicitly contended that the decision in **The Aegean Sea**, supra, was wrong.

10. As appears from the form of the question, the arbitrators made two further interim awards, the first on the 9th May and the second on the 23rd August 2002. These dealt with issues of costs. Leave to appeal against those awards was granted by Morrison J and Colman J respectively. All three appeals have been consolidated. However, no separate issue arises as regards the additional awards and I make no further reference to them.

The 1976 Convention

11. Section 185 of the **Merchant Shipping Act 1995** (the "1995 Act") provides that the **Convention on Limitation of Liability for Maritime Claims 1976** (the "1976 Convention") as set out in a schedule to the Act should have the force of law in the United Kingdom (subject to an exception which is not relevant to the present claim).

12. As a treaty, the 1976 Convention falls to be interpreted in accordance with the principles codified in the **1969 Vienna Convention on the Law of Treaties** ("the Vienna Convention"): see ***Fothergill v Monarch Airlines*** [1981] AC.251 at p.282. Article 31 of the Vienna convention reads:- *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."*

13. With a view to identifying the context, together with the object and purpose of the 1976 Convention, it seems to me appropriate (and in this respect I share the approach contemplated by paragraph 12 of the charterers' arbitration application) to have regard to the historical development of limitation of liability and, in particular, the provisions of the immediate precursor to the 1976 Convention namely the **1957 Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Ships** (the "1957 Convention").

History of limitation

14. The first statutory grant of rights of limitation is to be found in the **Responsibility of Shipowners Act 1733** which allowed a shipowner to limit his liability in respect of theft by a master or crew up to the value of the ship and freight. The preamble to that Act recorded that it was "of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels, to prevent any discouragement to merchants which will necessarily tend to the prejudice of this kingdom".

15. In 1786, this was extended to cover the consequences of any act on the part of the master and crew occurring without the privity of the owners. The next development of substance was the **Merchant Shipping Act 1854**

whereby a minimum value was calculated by reference to the tonnage of the ship. This was taken a stage further in the **Merchant Shipping Acts, &c, Amendment Act 1862** whereby arbitrary figures for a rate per ton were prescribed for all circumstances regardless of the actual value of the vessel.

16. The principal shipping statute of the nineteenth century was the **Merchant Shipping Act 1894** ("the 1894 Act") which consolidated the earlier legislation. Section 503 furnished a limit to an owner's liability in respect of certain categories of occurrence:

"503(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,)

(b)… Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;…

(d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;…

be liable to damages beyond the following amounts… "

17. **The Merchant Shipping Act 1906** provided that the expression "owner" should be "deemed to include any charterer to whom the ship is demised": see section 71. In fact, "owner" was construed, even prior to the Act, as being inclusive of a demise charterer: see ***The Hopper No.66***. [1908] AC 127.

18. The first attempts at international harmonization of the principles of limitation of liability led to the **1924 Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels** (the "1924 Convention"). Under Article 1, the 1924 Convention afforded a limit in respect of :-

"(1) Compensation due to third parties by reason of damage caused, whether on land or water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

(2) Compensation due by reason of damage caused either to cargo delivered to the master to be transported, or to any goods or property on board;…"

19. As regards the extent of liability, the 1924 Convention adopted a further variation on the theme in the form of a limit equalling the value of the vessel but with a cap based on a rate per ton. Article 10 is also worthy of note: *"Article 10. Where a person who operates the vessel without owning it or the principal charterer is liable under one of the heads enumerated in article 1, the provisions of this convention are applicable to him."*

Although the 1924 Convention was signed by the British government, no amendment to the United Kingdom legislation was made to give effect to it.

20. The 1957 Convention attracted greater support, not least from the UK. Furthermore it replaced the 1924 Convention as between states which ratified the later one. The right of limitation was still afforded to owners for certain occurrences but the categories of occurrence were enlarged:

"Article 1(1).

(a) …loss of, or damage to, any property on board the ship;

(b) …loss of, or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect of default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: provided however that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo…"

21. The range of those entitled to limitation was also enlarged by Article 6: -

"6(2)…The provisions of this convention shall apply to the charterer, manager and operator of the ship, and to the master, members of the crew and others servants of the owner, charterer, manager or operating acting in the course of their employment, in the same way as they apply to the owner himself: provided that the total limits of liability of the owner and all such persons in respect of personal claims and property claims arising on a distinct occasion, shall not exceed the amounts determined in accordance with Article 3 of this convention."

22. Consistent with the then practice of the parliamentary draftsman to incorporate the effect of a Convention into the body of a English statute, the impact of the 1957 Convention was enacted in the form of the **Merchant Shipping (Liability of Shipowners and Others) Acts 1958** ("the 1958 Act") by way of amendment to the 1894 Act. In purported compliance with Article 1 (1) (b), Section 2 prescribed that a new sub-section (d) should be substituted in sub-section 1 of section 503 of the 1894 Act as follows: -

"(d) Where any loss or damage is caused to any property (other than any property mentioned in paragraph (b) of this sub-section) or any rights are infringed through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship, or in the loading, carriage, or discharge of its cargo …or through any other act or omission of any person on board the ship."

23. Further, in purported compliance with Article 6 (2), Section 3 of the 1958 Act provided: - *"The person whose liability in connection with a ship is excluded or limited by Part VIII of the **Merchant Shipping Act 1894** shall include any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship."*

24. Sections 5 and 6 of the 1958 Act sought to give effect to Articles 2(4) and 5 of the 1957 Convention as regards the release of security once a fund was constituted and the restriction thereafter of enforcement by any other means. These provisions provided a famous example of the difficulties that can arise when the draftsman attempted to transpose the words of a convention into more conventional parliamentary language. *"It is not a piece of English. It is only a collection of word-symbols"*: ***The Putbus*** [1969] P 136 per Lord Denning at p.149.

25. Twenty years later, the 1976 Convention introduced radical changes as regards to both the size of the fund and the circumstances in which the entitlement to limit might be lost. In short, the convention made available a significantly enhanced fund, at what was perceived to be the maximum insurable level, but the entitlement to which could only be challenged in quite exceptional circumstances: see ***The Leerort*** [2001] 2 Lloyds Reps 291.

26. However, it is notable that the 1976 Convention left largely untouched the range of persons entitled to limit, although it expressed the category in somewhat different words: -

"Article 1.

1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this convention for claims set out in article 2.

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

27. As is apparent, the principal change in this context was the introduction of a new category, namely *"salvors"*. It is notorious that this addition was prompted by the reaction in the shipping community to the decision of the House of Lords in ***The Tojo Maru*** [1972] AC 242 where salvors were held not to be entitled to limit in respect of the negligent action of their diver since, by definition, neither the diver nor the damaged vessel were on board the salvor's tug and, further, the diver was not acting in the management of the tug.

The rival contentions

28. Put briefly, it is the appellants' case that, first, as time charterers of the vessel, they fall squarely within the category of persons enabled to limit their liability as prescribed by Article 1 and that, second, the entire claim for damages arising out of the casualty falls equally squarely within the category of qualifying claims under Article 2.

29. Put equally succinctly, it is the respondents' case that it is clear from the overall context, having regard to the object and purpose of the convention, that the entitlement to limit is restricted to those persons identified in Article 1 (2) whose liability for the qualifying claim arises *qua* owner and not otherwise. On the facts of the present case, limitation is not available since it is common ground that no part of the claim arises from the role of the appellant charterers *qua* owner.

"Shipowners"

30. The appellants contend that there is no reason to limit the scope of the word *"charterers"* included within the category of shipowners: it is apt, it is submitted, to encompass a demise charterer, a time charterer, a voyage charterer, a time trip charterer, a consecutive voyage charterer, a sub-charterer and even a slot charterer. But, taking the terms of the 1976 Convention in isolation, it is striking, in my judgment, that it seeks to harmonise the rules for limitation of liability for maritime claims by reference to only two categories of persons: "shipowners" on the one hand and *"salvors"* on the other. The use of an all embracing category of "shipowners" suggests to me that individual members of that class, such as *"charterers"* may, as with "*managers"* or "*operators"*, be exposed to claims by reason of activities usually associated with ownership.

31. In contrast, the appellants' analysis introduces a quite distinct category, such that it would be expected that the convention would refer to three categories: first, "*shipowner*" meaning owners or manager, second, "*charterer"* meaning time or voyage charterer and third, "salvor". The inference I am minded to draw is that the term *"shipowner"* only includes those who, if they have no beneficial or possessory interest in a vessel, are nonetheless in a real sense directly concerned in the operation of the vessel and have incurred liability as such.

32. The position of a demise charterer would be axiomatic: he is the temporary or "*pro hac vice*" owner. By contrast a voyage charterer, who merely pays freight to the shipowner for the carriage of his own or others' goods on a defined voyage, in no sense operates or manages the vessel. In short, he has no more role or responsibility as the "shipowner" than a shipper.

33. The time charterer pays hire to a shipowner to the end that the owner's vessel should render services for a defined period by way of carriage of the time charterers' or others' goods. Albeit the vessel is under the legitimate orders of the time charterers as regards the vessel's employment (and accordingly commonly described as within their "disponent" ownership), again almost all aspects of management and operation remain the responsibility of the shipowners.

34. I have not forgotten that, from time to time, time charterers may engage in a role akin to that of an owner – for instance by the issuance of time charterers' bills of lading which attract liability in respect of cargo claims. In these circumstances it was conceded by the respondents that the charterers could, if necessary, invoke limitation under the convention against a claim brought by cargo-owners.

35. This may well be right but the point does not arise directly for consideration in the present case. Notably, I am not aware of any reported example of a time charterer praying in aid limitation (let alone successfully) in such circumstances although the potential for such entitlement has been in existence since at least 1924. If the appellants are unsuccessful in making good their wider case that any charterer can limit liability under the

convention in respect of any qualifying claim, including a claim brought against them in their capacity as charterers, I would not want to be regarded as necessarily having accepted the validity of this concession.

36. As already indicated, the appellants did not fight shy of the logical conclusion of their submission that any charterer could invoke limitation, whether acting *qua* owner or otherwise. It was accepted, for instance, that a slot charterer would be entitled to limit. Indeed the reasoning for including within the term "charterer" all forms of charterer whether time or voyage, whether of the whole or part of a vessel, can be said to be analogous with that successfully advanced in ***The Tychy*** [1999] 2 Lloyds Reps 11.

37. The context in which the phrase "the owner or charterer of, or in possession or in control of, the ship" had been raised in that case was Section 21 of the **Supreme Court Act 1981** which purported to enact, at least in part, the **1952 Arrest of Seagoing Ships Convention**. The broad interpretation was strongly supported both by reference to Article 3 of the Convention and by the express identification of "demise charterers" as a distinct class elsewhere in the very same section of the Act.

38. Even then the narrow construction received some support: see e.g. ***The Eschersheim*** [1976] 2 Lloyds Rep 1, ***The Evpo Agnic*** [1988] 2 Lloyds Rep 4ll. The broad view has, however, prevailed: see ***The Span Terza*** [1982] 1 Lloyds Rep 225, ***The Tychy***, supra. Thus, as stated by Clarke LJ at p.21: -

"… It makes no sense to hold that where "A" charters the whole of the parcel tanker, one of his ships can be arrested to secure a maritime claim arising in connection with that tanker, but where he charters, say half the tanker, his ships are immune from arrest in respect of an identical claim…

It thus can be seen that there is no distinction in principle between a slot charter and a voyage charter of a part of a ship. They are both in a sense charterers of space in a ship; a slot charter is simply an example of a voyage charter of part of a ship."

39. Clarke LJ went on to refer to ***The Aegean Sea***. Since the slot charterers had conceded in argument that they were a "charterer" for the purposes of the 1976 Convention, that was, he observed, by the same token a pointer to their being a "charterer" within the meaning of Sec.21 (4) of the 1981 Act. Absent that concession, I rather doubt whether the reverse is true. There seems to me to be two difficulties: -

a) By definition, the slot charterer is only charterer of part of the vessel. Why is he exposed to a higher limit than a time charterer i.e. a fund based on the entire tonnage and not the tonnage he has chartered?

b) Per contra the slot charterer is at least on this basis given a right to limit (albeit disproportionately high) but the shipper of the balance of the cargo is not. Does this make commercial sense?

40. It was these considerations which led the authors of Griggs and Williams **Limitation of Liability for Maritime Claims** 3rd. Ed to observe at page 9: - *"In the interests of achieving international uniformity on this issue, the authors suggest that the definition of "shipowners" in the convention should be reviewed. If part charterers (and may be shippers) are to be allowed to limit under the convention, it will also be necessary to prescribe whether the fund should be restricted by reference to the proportion of the ship's space which the part charterer or shipper is using at the material time."*

The previous conventions

41. In my view, the significance of the specific category of those entitled to limit being entitled "shipowners" is reinforced by the history of Article 1. As ready noted, the 1894 Act afforded rights of limitation to "owners". Article 6 of the 1957 Convention applied its provisions to charterers "in the same way as they apply to an owner himself". This phraseology strongly suggests, in my judgment, that the relevant charterer has to be exposed to one or more of the prescribed claims in a setting analogous to that which would usually implead an owner.

42. The 1958 Act, in purporting to enact the terms of the 1957 convention by way of a graft onto the 1894 Act, did not take up the phrase "in the same way as they apply to an owner himself", but, nonetheless, in my judgment, gave some emphasis to the need for a direct rather than merely contractual interest in the operation of the vessel in referring to "any charterer or any person interested in or in possession of the ship and, in particular, any manager or operator of the ship."

43. In the context of the 1976 Convention, Thomas J in ***The Aegean Sea*** put the matter this way at p.47 rhc and I respectfully agree with him:-

"I do not consider it significant that the phrase used in art. 6(2) of the 1957 Convention – "in the same way as they apply to an owner himself"- is not used in the 1976 Convention; the same result has been achieved by different drafting and retaining the charterer within the categorization "shipowner". This points to the view that the charterer is to be treated as a shipowner and entitled to limit for the claims brought against him when he acts as a shipowner."

The single fund

44. This requirement of a community of interest between those falling within the category "shipowner" is underlined by the machinery of a single fund, viz: -

"Article 9

1. The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinctive occasion:

(a) against a person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible…

Article 11

1. Any person alleged to be liable may constitute a fund with the Court…

3. A fund constituted by one of the persons mentioned in paragraph 1 (a)… of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1 (a)… "

45. These provisions are only consistent with all those identified as within the class of shipowner having a common potential exposure to the relevant claims and a common interest in funding the limit of liability, all the more so when no provision is made for allocation of the cost of putting up the fund amongst the members of the class.

46. Again I respectfully agree with the way this aspect was addressed by Thomas J in ***The Aegean Sea*** at p.49 lhc:- *"In my view the combined effect of these articles is important. As there is provision for a fund for those categorised as shipowners and that fund is to cover both charterers and owners, it is difficult to see how charterers can claim the benefit of limitation through that fund when a claim is brought against them by owners. Owners are entitled to the benefit of limitation for a claim brought by charterers as that claim is being brought by charterers not when performing a role in the operations of the ship or when undertaking the responsibility of a shipowners, but in a different capacity, usually through their interest in the cargo being carried."*

47. This lack of community of interest as between the owner and the charterer perhaps requires a little amplification. On the facts of such as the present case, the owners are entitled to damages from time charterers in respect of both damage to the ship and to the cargo as a consequence of the shipment of dangerous goods. To put it no higher, it would be surprising if, say, the owners having constituted a fund by reason of the perceived need to limit exposure to cargo owners, the charterers could invoke the very same fund as deemed to be constituted by them as well and furnishing a limit to all the claims for which the members of the class were liable, including the cross claim between the owners and the charterers.

48. The point becomes even more startling in the event of a series of sub-charters. Thomas J put this point with characteristic clarity in ***The Aegean Sea*** at p. 50 lhc: *"It cannot have been intended that either the limitation amount or the fund be reduced by direct claims by the owners against charterers for the loss of the ship or the freight or the bunkers; it was intended for claims by cargo interests and other third parties external to the operation of the ship against those responsible for the operation of the ship. To permit claims of the type advanced by the owners against charterers for the direct losses they suffer to come within the scope of the limitation amount or the fund would diminish what was available to others."*

The claim for loss of the ship

49. The curiosity of the situation is highlighted by that part of the cross-claim which reflects the damage to the vessel. As I have just observed, if an owner posts a fund to protect his exposure to cargo claims, there would be something unreal about a charterer then praying in aid the owner's own fund by way of restriction of a cross-claim for loss of the ship (together with the very same cargo claims). Of course, if per contra, claims in respect of damage to or loss of the vessel are not within the category of claims against which limitation can be invoked, this should be seen as another pointer to the fact that a charterer, as such, is not within the scope of the convention in the first place.

50. This leads to Article 2 1. (a): -

"1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) claims in respect of… damage to property… occurring onboard or in direct connection with the operation of the ship… and consequential loss resulting therefrom…"

51. The appellants say that where, as here, the claim includes damage to the chartered vessel, this is nonetheless damage to property occurring "in direct connection with the operation of the ship". The respondents submit that the vessel cannot be both the victim and the perpetrator for the purposes of the article. The property concerned, so the argument runs, must be the property of a third party either on board (e.g. cargo) or external (e.g. an SBM).

52. I agree with the respondents. The property damaged cannot be the very same thing as the operation of which caused the damage. This view receives, if necessary, further support from the terms of article 1 of the 1957 Convention which expressly draws a distinction between "the ship" and "other property". The ship cannot at the same time be the other property. The exclusion of this head of damage from the scope of claims subject to limitation is, in my judgment, inconsistent with limitation being available to a charterer *qua* charterer.

53. It is no answer, as the appellants contend, that Article 2 includes claims "whatever the basis of liability may be". This does not give rise to the inference that a claim against charterers is limitable in whatever capacity they are sued. In my judgment, it only confirms that the claim is limitable whatever may be the nature of the cause of action on which it is based e.g. tort, delict, contract, strict liability etc.

54. Indeed, as set out above, the whole history of limitation, both in its domestic and in its international form, is premised on the relevant claims having arisen either from damage to property on board or, alternatively, from damage to third party property caused by the operation of the ship. This continuing theme is entirely inconsistent with the appellants' case.

Cargo claims

55. I have not forgotten that another typical cross-claim brought by an owner against charterers would be by way of recourse in respect of cargo claims. These are clearly not excluded as such by Article 2. But the suggestion that the charterers could, if necessary, limit their liability in respect of that claim sits very uncomfortably with the fact that the owners themselves could (at least in a convention country) limit by reference to the very same fund in the first place.

56. It is true that the owners may have been caught in a jurisdiction in which limitation rights were not available. But there is nothing "absurd" or "unreasonable" in a result which leaves the charterers equally exposed on a recourse claim, all the more so where there is an opportunity to make appropriate provision for such cross-claims in the terms of the charterparty.

57. Furthermore, since the owners could not claim credit as against the fund more than the amount that would have been receivable by the cargo-owners if they had brought their claim direct against the fund (see ***The Giancinto Motta*** [1977] 2 Lloyd's Rep 221), it is difficult to see how the fund could ever be distributed either in fact or notionally if the fund must also respond to the recourse claim against the charterers for the entire cargo loss. As Thomas J put it in ***The Aegean Sea*** (albeit in a slightly different context):- *"The terms of the 1957 Convention and in particular the single limits of liability and the constitution of one fund make it difficult to see how the provisions of that convention were meant to provide to charterers (or the other interests listed in Art. 6) a right to limit their liability in the event of claims by shipowners against them. If this had been contemplated, there would have had to have been provision for more than one limit of liability and more than one fund."*

The effect of charterers' ability to limit

58. As is perhaps already apparent, the availability of a right of limitation to charterers can give rise to some startling results. Let it be supposed that a voyage charterer ships a low value part cargo of his own goods. In breach of the charter, they are dangerous. There is consequential damage to the ship, its bunkers and other cargo. What good reason is there for allowing the voyage charterers to limit their liability by reference to a ship which they neither own nor operate, let alone by reference to the size of the entire ship? If there is any logic, why does it not apply with equal force to a mere shipper of the same goods on the same ship?

59. Another example postulated by the respondents in argument was this. X is charterer of ship A and owner of ship B. Ship B negligently damages ship A. In a claim by the owners of ship A for recourse under the charter party, the appellants' approach would lead to the conclusion that X was entitled to limit by reference to ship A in respect of a claim deriving from the operation of their own ship B. The position would be even more remarkable if the incident was attributable to the fault of both vessels and X, in his capacity as owner of B, had claimed against the owners of A (for which A posted a fund) and X concurrently also sought to limit his liability to the owners of A by reference to ship A.

60. No resolution of the circular nature of the situation can be provided by identifying the source of the monies used to create the fund. Not only are questions of responsibility for supplying funds outside the convention but in any event Article 10 makes it clear that limitation can be invoked without constituting a fund and its distribution can be entirely notional.

61. The appellants argued that any limitation on the scope of the word "charterers" equally gave rise to "absurd" or "unreasonable" results. In particular, it is contended that respondents' interpretation gives rise to a want of reciprocity in that an owner can limit in circumstances where a charterer cannot. To my mind, this complaint merely reposes the question. The respondents concede that charterers can limit in circumstances where his liability arises *qua* owner. To that extent there is reciprocity.

62. The major complaint was directed to the potential exposure on the part of charterers to unlimited liability for pollution claims, a topic addressed by Professor Gaskell in a recent paper **Pollution Limitation and Carriage in the Aegean Sea**: **Lex Mercatoria: Essays on International Commercial Law in honour of Francis Reynolds** 2000 LLP. But it seems to me that this risk arises, not from any commercially unrealistic construction of the 1976 Convention but from the commonplace difficulty created by the impact of two parallel but inconsistent limitation regimes.

63. The problem arises in this way. The 1976 Convention excluded claims for oil pollution damage within the meaning of the **1969 International Convention on Civil Liability for Oil Pollution Damage** (the "1969 Convention"): Article 3 (b). The 1969 convention, as amended by the 1992 Protocol, provides:

    a) An owner is liable for pollution damage in a contracting state under the convention and not otherwise.

    b) No claim for pollution damage under the convention or otherwise can be made against any charterer ("howsoever described, including a bareboat charterer"), manager or operator.

    c) The owner can limit his liability by constituting a fund and may claim against the fund for his own expenses.

    d) These provisions are without prejudice to any rights of recourse of the owner against a third party.

64. The arrangements under the two conventions are accordingly very different. For instance, the 1976 convention provides for rights of limitation for charterers; the 1969 convention provides for exclusion of liability of charterers, even demise charterers.

65. Of course the situation is expressly contemplated where the owners seek recourse against the charterer. In that event:-

i) If the owners' liability was incurred under the Convention, it will by definition be limited and thus the charterers' exposure cannot be any greater.

ii) If the owners' liability was not incurred under the convention, it would be unlimited: by the same token the recourse claim against the charterers would (on the respondents' case) be equally unlimitable.

iii) Since the charterers themselves could only incur liability outside the terms of the 1969 Convention, such might also be unlimitable, unless (on the respondents' case) the liability was incurred *qua* owner. (I leave aside the wrinkle introduced by the cross-reference in Part II to Schedule 7 of the 1995 Act to section 153 of the Act).

66. I see no absurdity or want of reason in this outcome. As Professor Gaskell puts it:-

"As the particular claim in the *Aegean Sea* was a recourse action, the charterer would not have to pay more than the shipowner itself paid (which would probably be limited under the CLC of 1969); but, if the shipowner were deprived of the right to limit, then the charterer would have to indemnify the shipowner without limit and would therefore need high insurance cover. It may be that some charterers already need such cover in some parts of the world, but the *Aegean Sea* demonstrates that it may be more necessary than had been thought.": see also the discussion to the same effect in **Shipping and the Environment: De la Rue and Anderson** page 641 to 643.

Travaux Preparatoires

67. Article 32 of the Vienna Convention provides as follows: - *"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."*

68. It would appear, accordingly, that recourse to the travaux preparatoires is always permissible with a view to confirming any provisional view as to the meaning of the word "charterer" derived by application of Article 31. In any event, whereas here, the meaning of charterer is potentially ambiguous or obscure, the preparatory work of the treaty and the circumstances of its conclusion may be legitimately relied upon.

69. In fact, it is common ground that little can be derived from the travaux preparatoires. The most that can be discerned in my judgment is:

a) The express purpose of the 1976 Convention was to improve upon the 1957 Convention but there was no suggestion let alone proposal that the protection afforded to a charterer needed or benefited from any change or improvement.

b) The focus of the conference was the limit of insurance capacity available (excluding pollution) but nothing was said about, let alone turned on, the availability of cover to charterers. To the contrary the position of charterers does not appear to be referred to throughout the proceedings.

70. The only pertinent reference to charterers that I was shown did not even arise in the preparations for the 1976 Convention. It was contained in a report of the BMLA dated July 1954 by way of commentary on Article 10 of the 1924 Convention, or some unidentified proposal for variation of it, as part of the lead up to the 1957 convention.

71. The commentary observed: - *"This Article confers the same rights of limitation on time charterers as on registered owners and demise charterers. In the present circumstances the exclusion of time charterers from the benefits already afforded to demise charterers would seem to be unjustified."*

72. If this is of any assistance at all, it is inconsistent with any suggestion that the word "charterers" is to be accorded the wide meaning as contended by the appellants. Indeed, it tends to support the respondents' case that it is only a time charterer acting *qua* owner that is justified in being afforded rights of limitation.

Conclusion

73. For all these reasons, I can conclude by gratefully adopting another passage from the judgment of Thomas J in ***The Aegean Sea*** at p. 49 rhc:- *"It follows from the development of limitation prior to the 1976 Convention and the way in which the 1976 Convention is structured and its language that, in my view, it does not provide (and is not intended to provide) any entitlement to charterers to limit where the shipowner brings the type of claim I am concerned with against the charterers. Such claims cannot in principle, in my view, be reasonably brought within its language."*

I agree and, accordingly, the appeal must be dismissed.