香港終審法院

THE HONG KONG COURT OF FINAL APPEAL

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or

https://legalref.judiciary.hk/lrs/common/ju/judgment.jsp

PRESS SUMMARY

PERUSAHAAN PERSEROAN (PERSERO)

PT PERTAMINA

v

TREVASKIS LIMITED; and all other persons claiming or being entitled to claim damages arising from a collision between "STAR CENTURION" and "ANTEA", which occurred on or about 13 January 2019 off Horsburgh Light House, South China Sea

FACV No. 3 of 2023 on appeal from CACV No. 102 of 2021

[2023] HKCFA 20

APPELLANT: Perusahaan Perseroan (Persero) PT Pertamina

RESPONDENT: Trevaskis Limited; and all other persons claiming or being entitled to claim damages arising from a collision between "Star Centurion" and "Antea", which occurred on or about 13 January 2019 off Horsburgh Light House, South China Sea

JUDGES: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice Keane NPJ

COURTS BELOW: Court of First Instance: Anthony Chan J; Court of Appeal: Kwan VP, Barma JA, G Lam JA)

DECISION: Appeal unanimously dismissed

JUDGMENT: Mr Justice Keane NPJ delivering the Judgment with which the other members of the Court agreed

DATE OF HEARING: 20 June 2023

DATE OF JUDGMENT: 26 July 2023

REPRESENTATION:

Mr. Clifford Smith SC and Mr. Edward Alder, instructed by Reed Smith Richards Butler LLP, for the Appellant

Mr. Charles Sussex SC, Mr. Jason Yu and Mr. Cyrus Chua, instructed by Howse Williams, for the Respondents

SUMMARY:

Factual background and procedural history

1. This appeal arises from an action brought by the Appellant seeking to limit its liability against the Respondents' claims that stem from a collision between the Appellant's ship "Antea" and the vessel "Star Centurion", which sank in the collision.

2. It was accepted that Antea was entirely responsible for the collision, however, the Appellant claimed that it was entitled to limit its liability under the Convention on Limitation of Liability for Maritime Claims 1976 ("**the Convention**"), which had been incorporated into the laws of Hong Kong by the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434) ("**the Ordinance**"). The Appellant therefore constituted a limitation fund, which is a fund available for payment of claims in respect of which the Appellant is entitled to limit its liability, and which is to be distributed among claimants in proportion to their established claims against the fund. The Appellant

did so in Hong Kong by paying HK$175,062,000 into court. Meanwhile, the owner of Star Centurion ("**the Owners**") was issued a wreck removal order requiring it to remove the wreck, and as at 6 August 2020 had incurred approximately HK$139 million in expenses in doing so. As the costs for complying with the removal order are expected to increase, the Respondents' private recourse claim in respect of the wreck removal ("**the Wreck Removal Claim**") against the Appellant is likely to exceed the amount of the limitation fund so that there would be little left to cover the actual loss of Star Centurion. The Respondents therefore sought a declaration that the Appellant was not entitled to limit its liability for the Wreck Removal Claim.

3. At the Court of First Instance, the Judge agreed with the Respondents. He held that, under the maxim of "*generalia specialibus non derogant*" (general provisions do not overrule specific provisions, "**the Maxim**"), as Article 2(1)(d) of the Convention allowing shipowners to limit their liability with respect to wreck removal had been disapplied in Hong Kong by s.15 of the Ordinance in accordance with article 18(1) of the Convention which allowed for such a disapplication, the Appellant was not able to rely on the more generally phrased Article 2(1)(a) governing losses consequential upon loss of property to limit its liability for the Wreck Removal Claim. The Court of Appeal upheld the decision of the Judge for essentially the same reasons.

4. The Appeal Committee of this Court granted the Appellant leave to appeal on whether it was entitled to limit its liability for the Wreck Removal Claim under 2(1)(a) of the Convention.

Decision of this court

5. This Court held that the Appellant could not do so. Reading the Convention as a coherent whole and in accordance with common sense and ordinary usage, Article 2(1)(d) was unqualified in its scope

of limiting liability regardless of the legal basis of the claim or identity of the claimant as a private claimant or harbour authority. What mattered was the relationship between the Respondents' claim and the factual basis of occurrence of the loss or expense in respect of which the claim was being made.

6. In the present case, the Respondents' claim was a claim in respect of wreck removal that came within in the scope of Article 2(1)(d). For the Ordinance to disapply Article 2(1)(d) and thus exclude from limitation of liability a claim for recovery of the expense to remove the wreck of a ship on one hand, whilst allowing the Appellant to limit its liability on the basis that the Wreck Removal Claim could be understood as being consequential to the sinking of the ship and thus within the scope of Article 2(1)(a) would be to reduce Article 2(1) to incoherence. The Maxim applied and the exclusion of Article 2(1)(d) by the Ordinance meant that the Appellant could not limit its liability.

7. The Court also rejected the Appellant's argument that Article 2(1)(d) of the Convention was concerned with claims by harbor authorities only, holding that such a qualification to the scope of Article 2(1)(d) had no basis in either the wording of the Convention or the travaux preparatoires of the Convention, which in any event could not be used as a supplementary means of interpretation in this case due to the lack of any truly feasible alternative interpretations of the convention.

Disposition

8. Accordingly, this Court unanimously dismissed the appeal.

FACV No. 3 of 2023
[2023] HKCFA 20

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 3 OF 2023 (CIVIL)
(ON APPEAL FROM CACV NO. 102 OF 2021)

BETWEEN

PERUSAHAAN PERSEROAN (PERSERO) PT PERTAMINA	Plaintiff (Appellant)
and	
TREVASKIS LIMITED; and all other persons claiming or being entitled to claim damages arising from a collision between "STAR CENTURION" and "ANTEA", which occurred on or about 13 January 2019 off Horsburgh Light House, South China Sea	Defendants (Respondents)

Before: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice Keane NPJ

Date of Hearing: 20 June 2023

Date of Judgment: 26 July 2023

JUDGMENT

Chief Justice Cheung:

1. I agree with the judgment of Mr Justice Keane NPJ.

Mr Justice Ribeiro PJ:

2. I agree with the judgment of Mr Justice Keane NPJ.

Mr Justice Fok PJ:

3. I agree with the judgment of Mr Justice Keane NPJ.

Mr Justice Lam PJ:

4. I agree with the judgment of Mr Justice Keane NPJ.

Mr Justice Keane NPJ:

5. In January 2019, the Appellant's ship "ANTEA" collided with the "Star Centurion" while the latter was anchored in Indonesian waters. As a result of the collision, "Star Centurion" was a total loss. The Indonesian Ministry of Transportation issued a wreck removal order requiring the owner of "Star Centurion" to raise the wreck, remove it and render it harmless.[1] The Appellant has accepted that "ANTEA" was entirely responsible for the collision[2].

6. The owner of "Star Centurion" commenced proceedings in Hong Kong against the Appellant claiming damages for loss of the vessel and a right to be indemnified by the Appellant in respect of the wreck removal expenses

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1 [2021] 2 HKLRD 4 at [6].
2 [2021] 2 HKLRD 4 at [9].

incurred by it in complying with the wreck removal order. The Appellant commenced proceedings in Hong Kong against the owner of "Star Centurion" and all other persons claiming or entitled to claim damages arising from the collision with "ANTEA" (the Respondents") to limit its liability to their claims[3]. The Appellant's proceedings were brought pursuant to the Convention on Limitation of Liability for Maritime Claims 1976 ("the Convention"), the material provisions of which were incorporated into the law of Hong Kong by the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434) ("the Ordinance").

7. In accordance with the Ordinance, on 26 May 2020, the Appellant constituted a limitation fund in Hong Kong by paying HK$175,062,000 into court in its limitation proceedings. That fund is available for payment of claims in respect of which the Appellant is entitled to limit its liability[4], and is to be distributed among claimants in proportion to their established claims against the fund[5]. A claim which is not subject to limitation is not subject to the cap on liability set by the limitation fund.

8. The expenses incurred by the Respondents in complying with the wreck removal order of the Indonesian authorities as at 6 August 2020 was approximately HK$139 million. That amount will increase when pollution control costs are brought into account. As a result, the Respondents' claims against the Appellant are likely to exceed the amount of the limitation fund established by the Appellant so that there will certainly be little left to cover the actual loss of "Star Centurion". The Respondents sought a declaration in the Appellant's limitation proceedings that the Appellant is not entitled to limit its liability to the Respondents for the wreck removal expenses incurred by them.

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3 [2021] 2 HKLRD 4 at [9].
4 Article 11(1) of the Convention.
5 Article 12(1) of the Convention.

The Respondents relied upon the disapplication by the Ordinance of Article 2(1)(d) of the Convention. Article 2(1)(d) provided that claims in respect of wreck removal are subject to limitation; but its disapplication was expressly permitted by Article 18(1) of the Convention. Article 2(1)(d) was disapplied by s 15 of the Ordinance. The Respondents argued Article 2(1)(d) having been disapplied, their claims in respect of wreck removal were not subject to limitation.

9. The Appellant countered that it was entitled to limit its liability to the Respondents in respect of wreck removal expenses pursuant to Article 2(1)(a) of the Convention. Article 2(1)(a) expressly limits liability of shipowners for claims in respect of loss consequential upon loss of property occurring in direct connection with the operation of the limiting ship. The Appellant's argument was that the Respondents' claim for wreck removal is a claim in respect of "consequential loss" resulting from loss of property, namely "Star Centurion".

The Court of First Instance

10. In the Court of First Instance, Anthony Chan J granted the declaration sought by the Respondents, holding that the Respondents' wreck removal claim was not subject to limitation under Article 2. His Lordship, invoking the maxim "*generalia specialibus non derogant*" (general provisions do not overrule specific provisions), ("the Generalia Maxim"), reasoned that the general provisions of Article 2(1)(a) should give way to the specific provision for wreck removal claims in Article 2(1)(d) and its disapplication by the Ordinance.

11. His Lordship observed that Article 18(1) was intended to ensure that claims under Article 2(1)(d), being "separately categorised," may be excluded by a Contracting State. That being so, to construe a wreck removal claim so excluded

as nevertheless within Article 2(1)(a) would be to render Article 18(1) of the Convention and the Ordinance meaningless in this respect.[6]

The Court of Appeal

12. The Court of Appeal, in a judgment by Kwan VP with whom Barma and G Lam JJA agreed, dismissed the Appellant's appeal against the decision of the Court of First Instance[7]. Kwan VP said[8]:

> "47. In article 2(1)(d), words special to wreck removal are used, and cover all forms and guises of wreck removal. Claims under this head encompass direct claims by statutory authorities, whether under statute or at common law, and private recourse claims by shipowners for consequential loss or damage to property or resulting from the infringement of rights. It is common ground that there can be no 'partial reservation' under article 18(1) in excluding the application of article 2(1)(d).
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> 48. As a matter of language, articles 2(1)(a), (c) and (d) are each capable of encompassing claims of costs for wreck removal, irrespective of whether they are claims by statutory bodies or private recourse claims. If article 2(1)(a) or (c) applies, such claims will be subject to limitation. If article 2(1)(d) applies and a reservation is made under article 18(1) to exclude the application of article 2(1)(d), such claims will not be subject to limitation. There is an apparent conflict. I do not agree with [Counsel for the Appellant] that no conflict arises in that these provisions only partially overlap and point the same way. I agree with the judge the maxim of *generalia specialibus non derogant* applies, 'when the claims for wreck removal were specifically provided for' under article 2(1)(d) and 'the more general terms of [article 2(1)(a)] (or (1)(c)) should give way to the specific terms of 1(d) when the claim is for wreck removal'"[9].

13. Kwan VP went on to observe more broadly in relation to the Generalia Maxim that:

> "49. The maxim is not a mechanical rule, it represents common sense and ordinary usage and its application depends on the context (*The Giannis NK* at 622C to D, 627F). A helpful exposition of the principle was stated in *Goodwin v Phillips* (1908) 7 CLR 1 at 14: 'Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision

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6 [2021] 2 HKLRD 4 at [36].
7 [2022] 4 HKLRD 37.
8 [2022] 4 HKLRD 37 at [47]-[48].
9 [2021] 2 HKLRD 4 at [33].

> must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.' The application of the maxim is 'particularly appropriate' where the conflict arises from different sections in the same statute and applies with 'even greater force' where the conflict arises within the same section (*AAI Ltd v Moon* (2020) 92 MVR 271 at §134)."
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The appeal to this Court

14. The Appeal Committee of this Court (Fok Ag CJ, Lam PJ and Tang NPJ)[11] granted leave to appeal to this Court on the following question:

> "Where a Contracting State has enacted [the Convention] Article 2(1) in full into local law but has, by a provision of local law (pursuant to Article 18), disapplied (permanently or temporarily) head (d), is a shipowner nonetheless entitled to limit its liability for a Private Recourse Claim under head (a), or does the existence and/or suspension of head (d) exclude the shipowner's reliance upon head (a) for such claims?"

15. For the reasons that follow, this question should be determined against the Appellant, and the appeal should be dismissed. A full appreciation of the arguments agitated by the Appellant in this Court, and of the reasons for rejecting them, must begin with reference to the legislative framework within which the question before this Court arises.

The Convention and the Ordinance

16. Articles 1 to 15 of the Convention were incorporated into the law of Hong Kong by s 12 of the Ordinance. Section 12 provides:

> "Subject to this Part, the provisions of the Convention on Limitation of Liability for Maritime Claims, 1976 set out in Schedule 2 ... have the force of law in Hong Kong."

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[10] [2022] 4 HKLRD 37 at [49].
[11] [2023] HKCFA 5.

17. Schedule 2 of the Ordinance sets out the provisions of the Convention incorporated into the law of Hong Kong. Article 1(1) provides that shipowners (and salvors) may limit their liability in accordance with the rules of this Convention for claims set out in Article 2. Article 2(1) describes the kinds of claims that are subject to limitation under the Convention. While this appeal is concerned with Articles 2(1)(a) and (d), it is desirable to set out Article 2(1) in full:

> "ARTICLE 2
>
> Claims subject to limitation
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> 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 loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
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> (b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
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> (c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
>
> (d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
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> (e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
>
> (f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures."

Article 3 concerns claims for salvage and Article 4 refers to conduct barring limitation.

18. Reference to the full terms of Article 2(1) shows that the kinds of claims set out in Article 2(1) concern kinds of loss, that is to say factual categories of loss or expense, rather than to causes of action or legal right contraventions of which is the basis of the liability limited by Article 2(1). That this is so is confirmed by the chapeau to Article 2(1); it is also confirmed by Article 2(2), which is in the following terms:

> "Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1*(d)*, *(e)* and *(f)* shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable."

Given that there are 56 Contracting States that are bound by the Convention, it is readily understandable that the availability of limitation should not depend on the legal basis of the liability subject to limitation. The legal basis of that liability may vary across the diverse parties to the Convention.

19. Article 18(1) of the Convention states that any signatory may "reserve the right to exclude the application of Article 2 paragraph 1(d) and (e). No other reservations shall be admissible to the substantive provisions of this Convention". Hong Kong has reserved that right in relation to Article 2(1)(d).[12] The application of Article 2(1)(d) is currently suspended by s 15 of the Ordinance, which provides relevantly:

> "Claims subject to limitation

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[12] The UK ratified the Convention and made the reservation on behalf of Hong Kong. Upon the resumption of sovereignty by the PRC, the PRC stated that the Convention would continue to apply in Hong Kong and made the same reservation.

(1) The Chief Executive may by order provide for—

(a) the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in consequence of paragraph 1(d) of Article 2 of the Convention, of amounts recoverable by them in claims of the kind there mentioned; and

...

(3) Paragraph 1(d) of Article 2 of the Convention shall not apply unless an order has been made under subsection (1)."

20. As an order contemplated by s 15(1) has yet to be made by the Chief Executive, Article 2(1)(d) of the Convention does not apply under the law of Hong Kong.

21. It is to be noted here that it has not been suggested by either party that any law other than that of Hong Kong is applicable to the Respondents' claims against the Appellant or to the limitation of the Appellant's liability. There is no suggestion that the resolution of the question presented to this Court might be affected by the circumstances that s 15 is concerned with claims arising from the removal of wrecks from Hong Kong's waterways, and that the removal in question occurred in Indonesian waters and under Indonesian law.

The parties' argument

22. It is common ground between the parties that, as a matter of language, the Respondents' recourse claim against the Appellant for recovery of wreck removal expenses is capable of being captured by both Articles 2(1)(a) and (d)[13]. The Appellant's argument is that the Respondents' claim for wreck removal is "consequential loss" resulting from loss of or damage to property; and

[13] Appellant's Case, [19(1)]; Respondents' Case, [20]

as such, it falls within Article 2(1)(a) of the Convention.[14] The Appellant's primary positon is that Articles 2(1)(a) and (d) are co-extensive and the Appellant is entitled to rely on Article 2(1)(a).[15] The Appellant contends that the Generalia Maxim has no application in this case. The Appellant submits that the exclusion of the possibility of limiting a claim set out in Article 2(1)(d) is no more than the removal of an alternative basis on which the Appellant might have limited its liability to the Respondents' claim.

23. The Appellant argues as well for a fall-back positon; which is that the Respondents' claim against the Appellant is a recourse claim which falls exclusively within Article 2(1)(a) on the basis that Article 2(1)(d) refers only to claims by harbour authorities[16].

24. The Respondents' position is that the courts below were correct in holding that their claim for indemnity in relation to wreck removal expenses against the Appellant is comprehended by Article 2(1)(d),[17] which is disapplied by s 15(3) of the Ordinance.

Interpreting the Convention

25. The Convection must be interpreted, in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, so as to give full effect to the ordinary meaning of the words used in their context and in light of its evident object and purpose. In that regard, Longmore LJ explained in *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)*[18]:

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[14] Appellant's Case, [33].
[15] Appellant's Case, [19(2)].
[16] Appellant's Case, [19(4)]-[19(5)].
[17] Respondents' Case, [3], [7(1)].
[18] [2004] 1 All ER (Comm) 865 at [10].

> "... the duty of a court is to ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the convention. The court may then, in order to confirm that ordinary meaning, have recourse to... the travaux préparatoires and the circumstances of the conclusion of the convention."

In the *Gard Marine and Energy v China National Chartering (The Ocean Victory)* [19] Lord Clarke of Stone-cum-Ebony approved this approach, emphasising that, since the Convention had been incorporated, in terms, into English law (as it has been incorporated into the law of Hong Kong), the task of the court in construing the Convention is to construe the words of the Convention "without any English law preconceptions".

26. The principal English law preconception which must be disregarded in interpreting the Convention is the distinction drawn in relation to the right of limitation conferred by s 503(1) of the Merchant Shipping Act 1894 (UK) between claims to damages, that is to say claims in tort, which were held to be limitable under the statute, and claims arising in debt which were not[20]. In particular, one must disregard the answer given by Lord Merriman in *A.R. Appelqvist A/B v The Cyprian Coast (Owners) (The Arabert)*[21] to the question of whether the claim of an innocent ship against a negligent ship for wreck removal expenses which the innocent ship is liable to pay to a harbour authority is subject to limitation under s 503(1) of the Merchant Shipping Act. Lord Merriman held, contrary to the view taken in the earlier decision in *The Urka*[22], that the claim by the innocent ship was a claim for damages and was therefore subject to limitation. It is to be noted that this view of s 503(1) of the Merchant Shipping Act was focused upon the difference, as a matter of legal liability, between claims based in debt and claims based in negligence. It has already been noted that the chapeau

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19 [2017] 1 WLR 1793 at [72]-[75].

20 *The Millie* [1940] P 1 at p 9, 14; *Stonedale No 1 (Owners) v Manchester Ship Canal Co* [1956] AC 1 at p 9; *The Berwyn* [1977] 2 Lloyd's Rep 99 at p 102.

21 [1963] P 102 at p 116.

22 [1953] 1 Lloyd's Rep 478.

to Article 2(1) of the Convention and the terms of Article 2(2) emphasise that the basis of legal liability to a claim in respect of a loss or expense is immaterial to the application of the various paragraphs of Article 2(1).

27. It is an important aspect of both the Appellant's principal argument and its fall-back position that Article 2(1)(d) is concerned solely with claims by harbour authorities. It will be convenient to consider this aspect of the Appellant's argument more closely after a consideration of the ordinary meaning of Article 2(1)(d) of the Convention in its context and in light of its evident purpose.

The ordinary meaning of the Convention

28. The Appellant argued that the Generalia Maxim is applicable only if the putative specific provision is an exception to a general provision. It was said that Article 2(1)(d) is not an exception to Article 2(1)(a). The Appellant sought to contrast Article 2(1) with Article 3 which expressly overrides Article 2. It was said that there is no room for the operation of the Generalia Maxim as between the various claims set out in Article 2(1) because the various sub-paragraphs did not purport to express a general rule and then make exceptions from it. To the extent that the Appellant's approach seeks to direct attention away from the task of seeking the ordinary meaning of the words of the Convention and onto the task of construing the maxim itself, that approach is to be deprecated.

29. The Generalia Maxim is a particular expression of a more general principle of statutory interpretation. That principle is that, as a matter of "simple common sense and ordinary usage", an instrument should be given effect as a coherent whole.[23] As this Court said in *Kwok Cheuk Kin v Director of Lands (No*

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[23] *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605 at p 627.

2)[24], the rule that the specific prevails over the general is "simply one aspect of the more general principle that legislative instruments must be read as a coherent whole". As a matter of principle, common sense and ordinary usage must apply to give effect to the instrument as a whole whether or not the provisions in question can be said to bear a strict relationship of general rule and specific exception.

30. In seeking to give Article 2(1)(d) a coherent operation within the Convention as a whole, it is a compelling consideration that Article 2(1)(d) occurs in an immediate context of factual categories of loss or expense, and is expressly and specifically concerned with claims for wreck removal expenses. In contrast, Article 2(1)(a) makes no reference to wreck removal at all. Article 2(1)(d) is not only specific; it is also unqualified in its scope in that it makes no difference between claims by harbour authorities and other shipowners. It is comprehensive of any claim in respect of wreck removal and all such claims; the exclusion from limitability expressly contemplated by Article 18 is no less comprehensive in its scope.

31. Article 18(1) of the Convention is an important aspect of the context in which Article 2(1) is to be understood. Article 18(1) assumes that a claim of the kind set out in Article 2(1)(d) is identifiable as such so that it is able to be disapplied by the legislature of a Contracting State. Article 18(1) contemplates that any claim in respect of wreck removal expenses may be excluded from the Convention's scheme for the limitation of liability of shipowners. Any claim, and all claims, in respect of wreck removal are included in Article 2(1)(d). Each and every such claim may be disapplied pursuant to Article 18(1) because it is a claim in respect of wreck removal even if it is also possible to describe it as a

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[24] (2021) 24 HKCFAR 349 at [44(2)]. See also *Day v Governor of the Cayman Islands* (2022) UKPC 6 at [38].

claim for loss consequential upon damage to property. The breadth of what may be excluded under Article 18(1) is no less than the breadth of what is included by the application of Article 2(1)(d). It cannot be supposed that Article 18(1) contemplates that the legislature of a Contracting State would act in vain in disapplying Article 2(1)(d). The evident purpose of Article 18(1) can be achieved only if reservation by a Contracting State is effective in disapplying Article 2(1)(d) even though the expenses of wreck removal might also fall within the language in which other kinds of claims are described in Article 2(1).

32. In legislative instruments, expressions indicating connection between things, such as "in respect of" or "relating to" may be extremely wide in their scope, but they are indeterminate as to the nature and extent of the connection to be sought and identified for the purposes of the instrument. That being so, as Taylor J said in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*[25] a court must "endeavour to seek some precision in the context in which the expression in used" in order to identify "the plane" on which the relationship is to be sought and identified. This approach was approved by this Court in *Moody's Investors Service Hong Kong Ltd v Securities and Futures Commission*[26].

33. In the context in which Article 2(1)(d) appears, the expression "in respect of" is used to indicate connection between a kind of loss or expense and a claim to recover that loss or expense suffered against a shipowner. Each relevant loss or expense is described as a matter of fact and without reference to any particular class of claimant or the legal rights of that claimant. Article 2(1) is explicit that the right to limit is conferred "whatever the basis of liability may be". Article 2(2) is explicit that the right to limit liability for a claim is conferred

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25 (1961) 105 CLR 602 at p 620.
26 (2018) 21 HKCFAR 456 at p 469 [35]-[36].

in respect of a specified kind of lesser expense "even if brought by way of recourse or for indemnity under a contract or otherwise." The context also includes Article 18(1) which contemplates that a signatory may reserve the right to exclude the application of Article 2(1)(d). In this context, the plane on which the relationship between the claim and the liability in Article 2(1)(d) is, is that of the relationship between the claim and the factual basis of occurrence of the loss or expense in respect of which the claim is made. That is no less so because the claim might be based on a legal liability arising from the wrongful sinking of the ship which was required to be removed. On that plane, the Respondents' claim to recover the expenses of wreck removal is a claim in respect of wreck removal.

34. One may conclude then that it would reduce Article 2(1) to incoherence to read the Convention as providing that a Contracting State may disapply Article 2(1)(d) and thus exclude from limitation of liability a claim for recovery of the expense of removing the wreck of a ship that has sunk, while at the same time providing that limitation of liability remains available to limit the same claim for recovery of the same expense for no reason other than that the expense is a consequence of the sinking of the same ship. That conclusion is subject to the possibility, noted earlier, that Article 2(1)(d) is to be understood as being confined to claims for wreck removal expenses by harbour authorities. To a consideration of that possibility one may now turn.

Claims by harbour authorities only?

35. The distinction said by the Appellant to be made by Article 2(1)(d) between a recourse claim, that is a claim by an innocent shipowner against a wrongdoing ship on the one hand, and an authority claim, that is a claim by a harbour authority against the owner of a sunken vessel on the other, is important to both of the Appellant's arguments. The existence of the supposed distinction

allows the Appellant to argue that Article 2(1)(d) is concerned only with claims by harbour authorities so that its disapplication leaves recourse claims described in Article 2(1)(a) subject to limitation. For a number of reasons, the supposed distinction is without substance.

36. First, the Appellant's argument under this rubric necessarily means that Article 2(1)(d) should be read as if it provides "claims by harbour authorities in respect of" wreck removal. The Appellant's argument requires that Article 2(1)(d) be confined as if these extra words were added to it. The Appellant did not identify any reason for reading these extra words into the Convention so as to confine the otherwise comprehensive language in which it is expressed.

37. Secondly, the proposed qualification of the otherwise comprehensive language of Article 2(1)(d) is inconsistent with the evident indifference of Article 2(1) to the identity of the claimant as well as to the legal basis on which any claimant may assert a liability against a shipowner. The express provisions of the chapeau of Article 2(1) and of Article 2(2) are also inconsistent with this qualification.

38. Thirdly, to the extent that the Appellant argued that reference may properly be made to the travaux preparatoires of the Convention, no suggestion can be found there that claims in respect of wreck removal expenses should be confined in the way the Appellant argues.

39. Fourthly, the Supreme Court of the Netherlands in *MS Amasus BV v ELG Haniel Trading GmbH*[27] is persuasive authority against the Appellant. In that case, the Court noted the absence of support in the Convention and the travaux preparatoires for the contention that the Netherlands' reservation of

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[27] ECLI: NL: HR: 2018:140, Supreme Court, 16/04439 at 3.7.2.

Article 2(1)(d) was confined to claims by harbour authorities. The Court emphasised, both the importance of "the safety of shipping traffic, which ... can be promoted by parties other than waterway authorities, through [the activities] described in [Article 2(1)(d) and (e)]", and the absence of any justification for the outcome that an innocent "shipowner would not be able to seek recourse against the person who caused the collision to the same extent as for a waterway authority to take recourse against the ship owner." [*sic*] In arguing the contrary, the Appellant relied upon the Norwegian case of *Twitt Navigation Ltd v The State/Ministry of Defence*[28] in which the Hordaland District Court came to a different conclusion. That decision is of little persuasive force, given that the judge seems to have concluded that on the "objective interpretation" of the Convention both authority and recourse claims are subsumed under Article 2(1)(d), but nevertheless departed from that interpretation. That departure was in deference to an understanding which the judge derived from the travaux preparatoires and a consideration of the International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships, 1957 ("the 1957 Convention"). These considerations afford no acceptable ground to disregard the judge's evident conclusion as to ordinary meaning of the words of the Convention.

40. One may agree with the reasoning of the Netherlands Court in *Amasus* as to the purpose of the reservation contemplated by Article 18, and given effect by s 15(3) of the Ordinance. Unlimited liability of a shipowner liable for wreck removal expenses may help to ensure that, so far as possible, the burden of those expenses is not borne by harbour authorities. That possibility is minimised by ensuring that an innocent shipowner with a recourse claim against a negligent ship will not be left unable to bear the burden of wreck removal expenses (and

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[28] Case ID: CM|1726, THOD-2021-58354

meet its liability to the harbour authority) by reason of the absence of full recourse against the wrongdoer for those expenses. As Kwan VP said in the Court of Appeal[29]:

> "It would appear from the above there are legitimate concerns arising out of the impact of limitation on public safety, as shipowners who are unable to fully recover wreck removal costs by way of recourse claims against owners of another vessel may be inclined to neglect removing the wreck promptly even in cases of necessity. I am inclined to agree with Mr Sussex there is no good reason why the legislature would want to undermine the incentives for private shipowners to remove wrecks and place the burden solely on the public authorities."

The Tiruna

41. The reasoning of the majority in the Full Court of the Supreme Court of Queensland in *Barameda Enterprises Pty Ltd v Ronald Patrick O'Connor and KFV Fisheries (QLD) Pty Ltd (The "Tiruna" and "Pelorus")*[30], is also persuasive in relation to the effect of the disapplication of Article 2(1)(d) of the Convention. This was a decision on the 1957 Convention. Article 1(1) of the 1957 Convention provided relevantly that:

> "Article 1
>
> (1) The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:
>
> (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 or default the owner is responsible: Provided however that ... the act, neglect or default is one which occurs in the navigation or the management of the ship ...;
>
> (c) any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such ship)

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29 [2022] 4 HKLRD 37 at [72].
30 [1987] 2 Lloyd's Rep 666.

> and any obligation or liability arising out of damage caused to harbour works, basins and navigable waterways."

42. The Protocol of Signature provided that any state at the time of signing, ratifying or acceding to the 1957 Convention may make a reservation of the right to exclude Article 1(1)(c). The 1957 Convention was directly incorporated into Australian law by s 330 of the Navigation Act 1912 (Commonwealth), with an exclusion of Article 1(1)(c) by s 333.

43. In the Full Court of the Supreme Court of Queensland, Kelly J acknowledged that it was arguable that Article 1(1)(b) when "viewed in isolation" would cover a claim for recourse by a shipowner against the limiting ship for the recovery of wreck removal expenses; but his Honour noted the breadth of Article 1(1)(c) and concluded[31]:

> "Its operation is therefore not limited to a claim in relation to the ship of the owner seeking to limit his liability but extends also to the ship of an innocent shipowner claiming against the owner who is at fault and seeking to avail himself of the provision for limitation. In my view it would then be proper to regard sub-par. (l)(c) as being intended to cover a category of cases which does not come within sub-par. (l)(b). That being so it would not be correct to so interpret sub-par. (l)(b) as to include matters which are the subject of sub-par. (l)(c). The two sub-paragraphs should be regarded as being mutually exclusive and not as overlapping.
>
> This then leads to the conclusion that when the Commonwealth Parliament enacted s. 333 in the form in which it did by exercising its right to exclude the application of sub-par. (l)(c) it intended that claims which arise by reason of matters which were the subject of that sub-paragraph should not be the subject of limitation of liability."

44. The other member of the majority, McPherson J, reasoned that if the claim fell within Article 1(1)(b), then Parliament's deliberate omission of Article 1(1)(c) would have "achieved nothing"[32]. His Honour accepted that "[t]he mere omission of the right of limitation conferred by art. l(l)(c) of the [1957] Convention [in s.333 of the Navigation Act] is admittedly not the verbal

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31 [1987] 2 Lloyd's Rep 666 at pp 672 col 2-673 col 1.
32 [1987] 2 Lloyd's Rep 666 at p 687 col 2.

equivalent of the express exclusion of its subject-matter from art. 1, particularly if ... the like benefit remains capable of being claimed under art. 1(1)(b)", but said that "to give to s. 333 its literal or ordinary meaning" would "defeat the obvious intention of Parliament" and "lead ... to a result that is manifestly absurd or unreasonable"[33]. His Honour noted that the only "rational explanation" for the course taken by Parliament was "to exclude the wreck removal and other expenses specified in art. 1(1)(c) from the ambit of claims for which a shipowner is entitled to limit his liability whether under art. 1(1)(c) or otherwise"[34]. Hence, his Honour concluded that "s. 333 of the Navigation Act operates not simply to omit art. 1(1)(c) but affirmatively to prevent claims for wreck removal expenses from being the subject of limitation of liability", be it an authority claim under common law or statute or a private recourse claim[35]. Thus, "liability imposed by any law" was apt to include liability for wreck removal expenses imposed by a statutory provision and arising at common law[36].

45. It is noteworthy that the reasoning of the judges forming the majority in *The Tiruna* did not expressly invoke the Generalia Maxim at all. Rather, their Honours applied the principle which the maxim exemplifies, namely that legislative instruments should be read as a coherent whole.

46. In this Court, the Appellant argued that the suggestion by McPherson J that the exclusion of Article 1(1)(c) "achieved nothing" if recourse claims were limitable under Article 1(1)(b) was factually wrong. This criticism is not persuasive: the point is not about whether the exclusion of Article 1(1)(c) of the 1957 Convention would be rendered redundant, but whether the Appellant's proposed construction would result in incoherence in the operation

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33 [1987] 2 Lloyd's Rep 666 at p 688 col 1.
34 *Ibid.*
35 *Ibid.*
36 [1987] 2 Lloyd's Rep 666 at p 687 col 1.

of the scheme of the Convention and the Ordinance. The Appellant's construction would have that effect, as explained earlier in these reasons.

47. The Appellant placed heavy emphasis on the reasoning of the third member of the Full Court, Macrossan J. His Honour said that the subject matter of a claim for wreck removal expenses between shipowners had "not been placed in a different category from other claims for compensation that might be made against the wrongdoer by an innocent shipowner or other claimant."[37] Macrossan J went on to say[38]:

> "When the innocent shipowner seeks to recover from the wrongdoer the expenses of wreck removal which he has been forced to pay at the behest of the Harbour Authority, he is making a claim arising from the loss of his ship and so the limitation applies. He is seeking to recover what is, in effect, just one more item of special damage flowing from the loss of his ship. On the other hand, at the earlier stage, when the Harbour Authority demands, as against the innocent shipowner, removal of the wreck or seeks to recover the expense of removal, it is not making a claim arising from the loss of a ship (which would pre-eminently be a claim [in] tort) but is making a claim (a statutory demand in debt) simply arising out of an owner's failure to remove an obstruction which de facto exists. For this reason, while the innocent shipowner is not given protection against the Harbour Authority's demand, the wrongdoing owner is permitted to limit his liability against the innocent owner's consequential claim for compensation against him."

48. It is apparent that the analysis of Macrossan J was informed and guided by differences in the legal basis of liability to the claim by the harbour authority and the shipowner. It might well be said that such an analysis was inapposite having regard to the relevant provisions of the 1957 Convention. But whether or not that criticism of the reasoning of Macrossan J is justified, it is clearly the case that his Honour's approach is out of place in interpreting the terms of Article 2(1) of the Convention having regard both to the chapeau of Article 2(1) and the terms of Article 2(2).

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[37] [1987] 2 Llyod's Rep 666, at p 677, col 2.
[38] [1987] 2 Llyod's Rep 666, at pp 677, col 2-678 col 1.

49. It should also be said that whatever strength there may have been in the view of Macrossan J that Article 1(1)(c) of the 1957 Convention observed the distinction between claims by innocent shipowners and harbour authorities, for the reasons given earlier that distinction is not sustainable in relation to Article 2(1)(d) of the Convention.

50. Finally, it may be noted that in the reasoning of Macrossan J there is little in the way of consideration of the purpose underlying the reservation of the right to exclude Article 1(1)(c) of the 1957 Convention and the legislature's exercise of that right. Whether or not the failure by his Honour to turn his mind to a consideration of the purpose of these provisions was in accordance with then contemporary notions on the correct approach to the construction of a legislative instrument need not be decided. It is sufficient to say that this aspect of his Honour's approach would now be regarded as distinctly unorthodox.[39]

English authorities before the Convention

51. The Appellant relied upon the *The Putbus*[40] and *The Seaway*[41], decisions dealing with overlapping heads of claim under the provisions of the 1957 Convention. The Appellant argued that the Convention does not sufficiently indicate an intention to alter the position as to the limitability of recourse claims relating to wreck removal expenses established by these decisions. There is a threshold objection to the Appellant's approach. As noted above, this aspect of the Appellant's argument proceeds on an erroneous footing. The task of the Court is to interpret the Convention in its own terms, not with a

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39 *Chan Ka Lam v Country and Marine Parks Authority* (2020) 23 HKCFAR 414 at [26]-[27].
40 [1969] P 136.
41 [2005] 1 SLR 435.

predisposition in favour of maintaining the preconceptions of English law reflected in earlier cases.

52. In any event, *The Putbus* was not a decision upon the effect of the disapplication of the head of claim analogous to Article 2(1)(d) of the Convention upon the right to limitation, but upon the relevant provisions of the Merchant Shipping Act 1894 (UK)[42]. The question posed by the relationship between overlapping provisions of the 1957 Convention did not arise.

53. Similarly, *The Seaway* was concerned with the operation of the Singaporean equivalent of the Merchant Shipping Act, once again, no issue as to overlapping provisions of the 1957 Convention arose. The court expressly adverted to the reasoning of the majority in *The Tiruna*, and acknowledged that the statutory provision which Singapore had enacted was "substantially and materially different from the 1957 Convention".[43]

The Salvage Claim Cases

54. The Appellant argued that where a component of a claim for the recourse of loss consequential upon the sinking of a ship by the wrongful act of another ship includes wreck removal expenses incurred by the innocent shipowner, the claim does not bear the character of a claim to enforce a liability for wreck removal expenses because it is more truly characterised as a claim to recover loss consequential upon the loss of the innocent ship. There is some support for that approach in the academic literature.[44] The Appellant also seeks

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42 [1969] P 136 at pp. 149, 150, 154.

43 [2005] 1 SLR 435 at [42].

44 Marsden and Gault on Collisions at Sea, (15th ed, 2021) at [13-030]. Gutiérrez, Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes (2011), pp 99-101. Gaskell and Forrest, The Law of Wreck (2019), pp 104-105 esp fn 640-642 and Griggs, Williams and Farr, Limitation of Liability for Maritime Claims, (4th ed, 2004) ch 3, commentary to Article 2(1)(d), Fogarty, Merchant Shipping Legislation, (3rd ed, 2017) at [15.171].

support for its argument in *The Breydon Merchant*[45] and *Aegean Sea Traders Corporation v Repsol Petroleo S.A. (The Aegean Sea)*[46].

55. In both *The Breydon Merchant* and *The Aegean Sea,* it was held that claims for damages against shipowners could not be characterised as salvage claims within the meaning of Article 3 of the Convention. That was plainly correct because they were in no sense claims for salvage rewards by the claimant. The claims in question were exclusively within Article 2(1)(a).

56. In *The Aegean Sea*[47] Thomas J observed that this conclusion cannot "...be circumvented by looking at the original basis of the claim and not the indemnity or recourse claim being made. The Court is concerned with the claim being made against the party seeking limitation, not the original claim or its original factual or legal basis". But these observations do not aid the Appellant. Thomas J was making the point that the claim being made was for the recovery of the loss incurred by the claimant against the limiting party, not for the recovery by a salvor of a reward for salvage services. The former fell within Article 2(1)(a), the latter kind of claim falls within Article 3; there is no overlap.

57. More broadly, the argument that the Appellant seeks to make here depends on the legal characterisation of the claim by reference to the rights of the claimant, rather than its character as a claim in respect of loss or expense of a particular kind. The Appellant's argument invites a departure from the concrete language of Article 2(1), which refers to kinds of loss or expense incurred in fact in favour of a more abstract enquiry as to the legal basis of the liability asserted by the particular claimant. As noted above, Article 2(1) provides no

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45 [1992] 1 Lloyd's Rep 373.
46 [1998] 2 Lloyd's Rep 39.
47 [1998] 2 Lloyd's Rep 39 at p 55 col 1-col 2.

encouragement to that enquiry. Even where the legal basis for the claim is a recourse claim including consequential loss, it remains perfectly sensible to say that the loss or expense that is the factual basis of the claim is the expense of wreck removal.

58. The academic discussion of this aspect of the case reflects the reasoning of Macrossan J in *The Tiruna*[48]; which, as explained above, is not apposite to the interpretation of the Convention.

The Travaux Preparatoires

59. So far as use of the travaux preparatoires are concerned, the Appellant noted that in *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)*[49], Lord Steyn accepted that the travaux might be used as a "supplementary means of interpretation" in "an appropriate case involving truly feasible alternative interpretations of a convention". So, while it is settled that reference to the travaux is permissible to confirm the ordinary meaning of the words of convention understood in context and in light of its evident object and purpose, on this broader view, it may also be permissible to use them as a supplementary means of interpretation but only where there are truly feasible alternative interpretations arising from the text, context and purpose.

60. For the reasons already given, and in particular, having regard to the text of Article 2, the context in which it appears, especially Article 18(1), and its evident purpose and object, the interpretation of Article 2(1)(d) for which the Appellant contends is not a truly feasible interpretation.

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[48] See, for example, Gutiérrez, Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes (2011), at pp 101.

[49] [1998] AC 605 at pp 623-624.

Disposal

61. The appeal should be dismissed.

Chief Justice Cheung:

62. Accordingly, the court unanimously dismisses the appeal. The Court further makes an order *nisi* that the Appellant pay the costs of the appeal to the Respondents and directs that, if any party wishes to vary this order, written submissions should be filed within 14 days of the handing down of this judgment and the Court will make a final order as to costs on the papers.

(Andrew Cheung) Chief Justice	(R A V Ribeiro) Permanent Judge	(Joseph Fok) Permanent Judge

(M H Lam) Permanent Judge	(Patrick Keane) Non-Permanent Judge

Mr Clifford Smith SC and Mr Edward Alder, instructed by Reed Smith Richards Butler LLP, for the Plaintiff (Appellant)

Mr Charles Sussex SC, Mr Jason Yu and Mr Cyrus Chua, instructed by Howse Williams, for the Defendants (Respondents)