[2024 Gib LR 26]

OLDSTONE CARGO LIMITED v. ATTORNEY-GENERAL, GIBRALTAR PORT AUTHORITY, CAPTAIN OF THE PORT OF GIBRALTAR, OWNERS OF M.V. "ADAM LNG," and ALL OTHER PERSONS CLAIMING TO HAVE SUFFERED LOSS AND DAMAGE BY REASON OF THE COLLISION BETWEEN M.V. "OS35" and M.V. "ADAM LNG" OFF THE COAST OF GIBRALTAR ON AUGUST 29TH, 2022

SUPREME COURT (Restano, J.): March 11th, 2024

2024/GSC/007

Shipping—limitation of insurer's liability—limitation fund—letter of undertaking by foreign insurer acceptable and adequate guarantee to constitute limitation fund—letter of undertaking not unlawful in Gibraltar—court satisfied as to financial standing of well-established, regulated insurer with A+ credit rating—no real or material concerns about enforceability

A limitation fund was to be constituted.

In August 2022, a collision occurred at the western anchorage in Gibraltar between the M.V. "OS35" and the M.V. "Adam LNG," which led to the "OS35" sinking and becoming a wreck. Claims were made by the defendants against the claimant's insurers, QBE Europe SA/NV ("QBE Europe"), as well as against the claimant. The liability of an insurer in cases of this sort was capped under the International Convention on Limitation of Liability in Maritime Claims 1976, as amended.

The present claim was commenced for the purposes of constituting a limitation fund. Article 11.2 of the 1976 Convention provided:

> "A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority."

Before the hearing, the claimant conceded that the limit that should apply to the claim was £14,187,984.90, as contended by the defendants. The hearing was concerned with whether a letter of undertaking ("LOU") offered by QBE Europe constituted adequate and acceptable security. QBE Europe had made a payment into court but now wished to substitute an LOU for the cash security.

QBE Europe carried out the salvage and wreck removal operation at a cost of around £26.12m.

The claimant submitted that (a) an LOU was "acceptable" and "adequate" under the 1976 Convention; (b) QBE Europe was a first-class insurer which was voluntarily offering an LOU in the sum of £14,187,984.90 plus interest; (c) there was no principle that claims from a public authority such as those made by the first, second and third defendants should be preferred over other claims, such as the claim from the owners of the "Adam LNG." As to the "acceptability" of a guarantee (a) there was no prohibition under Gibraltar law for the provision of an LOU; (b) QBE Europe was authorized by the National Bank of Belgium and deemed authorized in the United Kingdom by the Prudential Regulation Authority and regulated by the Financial Conduct Authority and the Prudential Regulation Authority; (c) as an alternative, an LOU had been offered by QBE Management Services (UK) Ltd., which was a representative of QBE UK Ltd.; (d) there was no requirement for QBE Europe or QBE Management Services (UK) Ltd. to be regulated in Gibraltar for the LOU to be acceptable. As to "adequacy" (a) QBE Europe and QBE Management Services (UK) Ltd. were both rated A+ by Standard & Poor; (b) QBE Europe wrote €1,248,794,000 worth of gross written premium for 2019; (c) QBE Europe would pay following any final court judgment entered against it; (d) the court was referred to examples where the securitization of limitation funds by way of LOU had been deemed acceptable; (e) there was no merit in the first to third defendants' complaint that QBE Europe was not a P&I Club; (f) the distinction between P&I Clubs and other types of insurers was irrelevant for the purposes of the 1976 Convention; (g) the mere fact that a party might have to enforce a guarantee in a foreign jurisdiction was not sufficient to render it inadequate; (h) the expert evidence showed that Belgian law provided a streamlined approach for the enforcement of foreign judgments that was in accordance with international norms; (i) there were no material concerns about enforceability and any hypothetical concerns about delay could be ameliorated with an award of interest; (j) the real reason for the rejection of the LOUs was clear from the Gibraltar Port Authority's policy imposing a blanket prohibition on all LOUs, contrary to the 1976 Convention; and (k) the LOU offered was in standard form and should not be altered unnecessarily.

The first, second and third defendants submitted that (a) there was no precedent for a guarantor being permitted to substitute cash security for an LOU where a limitation fund had already been set up by way of a cash deposit, and there was no reason why that should be allowed to happen in the present case; (b) the LOU offered was neither acceptable nor adequate; (c) the court should be slow to read too much into *The Atlantik Confidence* (a decision of the English Court of Appeal that a limitation fund could be constituted by the production of a guarantee) and was distinguishable because it did not concern a public authority claim, and that the LOU in that case came from a P&I Club authorized to carry on insurance in the UK; (d) the effect of *The Atlantik Confidence* was that an insurer offering

an LOU in this case had to be authorized by the Gibraltar Financial Services Commission, which QBE Europe was not; (e) weight should be attached to the risk and liability pooling nature of mutual assurance P&I Clubs; (f) a public authority in Gibraltar seeking payment of expenses incurred in the public interest of Gibraltar should not have to chase a private insurer internationally for the enforcement of an order of the Gibraltar court where there was a more adequate alternative, namely the current cash deposit; (g) in relation to "adequacy," there was no evidence of QBE Europe's financial standing and assets; (h) the evidence that QBE Europe held assets in the UK suggested that if enforcement became necessary, QBE Europe would have to be pursued in multiple jurisdictions and if enforcement in the UK were necessary, the position regarding the registration and enforcement of a Gibraltar judgment there was not clear; (i) QBE Europe could be expected to take whatever steps it considered necessary to hinder or delay enforcement; (j) the conduct relied on in this regard included QBE Europe's failure to agree a guarantee and indemnity, or to provide other cash security, and that QBE Europe had not been clear with the Captain of the Port about the fact that the cargo on board the "OS35" had been abandoned by its owners and that QBE Europe's contractor for the removal of the wreck claimed ownership of the cargo; and (k) complaints were made about QBE Europe's conduct in these proceedings, including the late minute concession as to the amount of the limitation fund; QBE Europe's failure to serve the fourth defendant with the documents in the claim in good time before a previous hearing, which led to an adjournment; and an offer of an LOU from QBE Management Services (UK) Ltd., which showed another shift in position.

The owners of the "Adam LNG" originally opposed an LOU but were willing to agree to an LOU from QBE Europe if the court considered it acceptable and adequate. They submitted that (a) the effect of *The Atlantik Confidence* was not that a guarantor had to be regulated in Gibraltar but that the court should be satisfied that an insurer not regulated in Gibraltar was acting lawfully in providing an LOU; and (b) some textual amendments to the LOU were proposed and it was submitted that the officers signing the LOU should have authority to sign on behalf of QBE Europe.

Held, judgment as follows:

(1) An LOU from QBE Europe was "acceptable." The first element of "acceptability" was that any guarantee offered should not contravene Gibraltar law, being the place where the fund was constituted. This was clearly so, as providing an LOU was not unlawful in Gibraltar. The second element was that a guarantee also had to satisfy positive requirements of Gibraltar law, such as regulatory requirements. Thus, if a guarantee were offered by a Gibraltar insurer in the course of its business in Gibraltar, it would need to be regulated by the Gibraltar Financial Services Commission. However, that did not mean that only a Gibraltar registered insurer could provide an acceptable LOU to set up a limitation fund in Gibraltar. It meant

that any insurer offering a guarantee must be appropriately regulated. QBE Europe was authorized by the National Bank of Belgium to carry on insurance business, and it was clearly in good standing. By offering an LOU and possibly paying out claims in Gibraltar, it would not be carrying on insurance business in Gibraltar requiring it to be regulated by the Gibraltar Financial Services Commission (paras. 51–58).

(2) An LOU from QBE Europe was "adequate." There were three conditions to be satisfied for security to be "adequate": (i) the financial standing of the guarantor; (ii) the practicality of enforcement; and (iii) the terms of the guarantee itself. (i) There was sufficient material for the court to be satisfied as to QBE Europe's financial standing as a guarantor. Although the materials before the court showed that LOUs tended to be provided by mutual assurance P&I Clubs in similar cases, it did not follow that other guarantors, whether fixed premium P&I Clubs, as QBE Europe described itself, or commercial entities, should not be considered to have financial standing to do so. QBE was a regulated insurance company and the fact that it wrote €1,248,794,000 of gross written premiums in 2019, whilst a little out of date, clearly indicated that it would be able to honour an LOU of less than £15m. QBE Europe's financial position remained robust, as confirmed by the current rating by Standard & Poor of A+, which provided a solid indicator of creditworthiness. (ii) In respect of the practicality of enforcement, the mere fact that a party might have to enforce in a foreign jurisdiction did not render security inadequate. Relevant factors included whether the enforcement regime accorded with private international law and the strength of the rule of law in the relevant foreign jurisdiction. The evidence showed that Belgian law provided a streamlined approach for the enforcement of foreign judgments consistent with the principles of private international law. Neither party's expert suggested that any of the grounds under which enforcement could be opposed might be applicable in this case. Furthermore, Belgium had a strong rule of law. Nothing suggested that there were any real or material concerns about enforceability. The first, second and third defendants complained that they had experienced behaviour from QBE Europe which was non-responsive, evasive and obstructive. However, there had been a misplaced emphasis by the first, second and third defendants on the underlying dispute and tensions between the parties, when the focus should be on whether there were real and material concerns about enforcement against QBE Europe. None of the matters raised by the first, second and third defendants compelled the conclusion that QBE Europe, a well-established, regulated, global insurer with a credit rating of A+, would fail to pay under an LOU following a final judgment being entered against it. Further, it had satisfactorily carried out the salvage and wreck removal of the "OS35," which it was said cost £26.12m. This provided a coherent and powerful rebuttal to the suggestion that it would not honour the undertakings contained in the LOU. QBE Europe had offered to provide an undertaking to the defendants and to the court not to take enforcement points. (iii) In respect of the adequacy of the

guarantee, the LOU was based on the standard form ASG 12 devised by the Admiralty Solicitors Group. Certain amendments needed to be made in this case. The LOU should be addressed to the Registrar, and it should be subject to Gibraltar law and to the jurisdiction of the Gibraltar courts. Although the original interest rate applied was calculated applying a rate of 1% above the base rate, interest should be calculated on the basis that, if a deposit of over £14m. were made in cash, the court would provide appropriate directions for the deposit to be made in a first-class bank in Gibraltar where a commercial rate of interest could be earned. QBE Europe's agreement to submit to the jurisdiction of the Gibraltar courts should be reflected in the LOU. Further, the LOU should include the additional undertaking offered by QBE Europe not to take any enforcement points. Should the defendants wish to accept QBE Europe's offer to accept service on nominated lawyers, confirmation of the lawyers irrevocably instructed to accept service for the purpose of any enforcement action should also be included (paras. 59–119).

(3) The claimant's application to establish a limitation fund by way of an LOU in the sum of £14,187,984.90 plus interest was therefore granted. The terms of the LOU should be based on ASG 12 and incorporate the court's amendments and observations (paras. 120–121).

Cases cited:

(1) *Afina Navigation Ltd*., *Owners of M.V. "Afina 1"* v. *Monford Management Ltd*., *Owners of M.V. "Kiveli,"* Case AD-2023-000012, Admiralty Ct., January 30th, 2023, considered.

(2) *Kairos Shipping Ltd.* v. *Enka & Co. LLC (M.V. "Atlantik Confidence")*, [2014] EWCA Civ 217; [2014] 1 W.L.R. 3883; [2014] 1 Lloyd's Rep. 586; [2014] 1 CLC 293; [2014] C.P. Rep. 28, followed.

(3) *Smit Salvage B.V.* v. *Luster Maritime SAE (M.V. "Ever Given")*, [2023] EWHC 697 (Admlty), considered.

Legislation construed:

Gibraltar Merchant Shipping (Safety, etc.) Act 1993, s.119: The relevant terms of this section are set out at para. 9.

Schedule: The relevant terms of this schedule are set out at para. 10.

Supreme Court Funds Rules 1979, r.12: The relevant terms of this rule are set out at para. 117.

Civil Procedure Rules (S.I. 1988/3132), r.61.11(18): The relevant terms of this provision are set out at para. 15.

International Convention on Limitation of Liability in Maritime Claims 1976 (as amended by the 2012 amendments to the 1996 protocol), art. 11: The relevant terms of this article are set out at para. 8.

F. Hornyold-Strickland and *R. Triay* (instructed by Triay Lawyers) for the claimants;
G. Licudi, *K.C.* and *C. Bonfante* (instructed by Hassans) for the first, second and third defendants;
C. Allan and *A. Rose* (instructed by Peter Caruana & Co.) for the fourth defendant.

THE "OS35"—LIMITATION CLAIM

1 **RESTANO, J.:**

Introduction

On August 29th, 2022, a collision took place at the western anchorage in Gibraltar between the M.V. "OS35" and the M.V. "Adam LNG," which led to the "OS35" sinking and becoming a wreck.

2 As the now defunct "OS35" was the only asset that the claimants owned, and as provided for under the Nairobi International Convention on the Removal of Wrecks 2007 ("the Nairobi Convention"), claims are being made by the defendants against the claimants' insurers, QBE Europe SA/NV ("QBE Europe") whose trading name is British Marine, as well as against the claimants.

3 The liability of an insurer in cases of this sort is capped under the International Convention on Limitation of Liability in Maritime Claims 1976 ("the 1976 Convention"), as amended by the 2012 amendments to the 1996 protocol.

4 This claim has been commenced for the purposes of constituting a limitation fund, and this hearing was scheduled to determine two issues in that claim.

5 The first issue, which has since fallen away, was a determination of the correct limitation amount for the limitation fund. This fell away because shortly before this hearing the claimants conceded that the limit that should apply to the claim is £14,187,984.90 as contended by the defendants, rather than the lower limit that they had previously said should apply. This hearing was therefore exclusively concerned with the other issue, namely, whether a letter of undertaking or LOU offered by QBE Europe constitutes "adequate" and "acceptable" security. This is my judgment on that issue, following a final hearing that took place on February 5th–7th, 2024.

The evidence

6 The factual evidence in support of the claimants' application consists of three witness statements filed by Raymond Triay, a member of the claimants' legal team, and a witness statement filed by Anja Evans who is a senior claims adjuster for QBE Europe. On the first day of the hearing, I

also granted the claimants permission to rely on the witness statement of Jim Cashman, another member of the claimants' legal team. As the question of enforceability of a Gibraltar judgment in Belgium is an issue in the proceedings, the claimants also rely on the expert report of Professor Ralph De Wit, who is an expert in Belgian law.

7 The first, second and third defendants' factual evidence in response to the application, insofar as is material, consists of two witness statements of John Ghio, the Captain of the Port and three witness statements of Charles Bonfante, a member of the first, second and third defendants' legal team. Further, the first, second and third defendants relied on an expert report on Belgian law provided by Ingrid Van Clemen.

The law

8 Article 11 of the 1976 Convention deals with the constitution of a limitation fund, and it provides as follows:

> "**CHAPTER III: THE LIMITATION FUND**
>
> **Article 11**
>
> **Constitution of the fund**
>
> 1. Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.
>
> 2. A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.
>
> 3. A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively."

9 The 1976 Convention was ratified for the UK and for various overseas territories including Gibraltar. Further, the Convention has the force of law in Gibraltar further to s.119 of the Gibraltar Merchant Shipping (Safety, etc.) Act 1993 which states as follows:

"119. (1) International Conventions and Agreements, relating to matters falling under this Act, which have been ratified by the United Kingdom and the application of which has been extended to Gibraltar shall be specified in the Schedule to this Act.

(2) The Government may from time to time vary, amend, add to and delete from the Schedule for the purpose of obtaining compliance with the provisions of subsection (1)."

10 One of the international conventions specified in the schedule to this Act at para. (k) is: "The International Convention on Limitation of Liability for Maritime Claims 1976 as amended from time to time."

11 A limitation fund can therefore be constituted under art. 11.2 of the 1976 Convention either by a cash deposit, or by a guarantee that is "acceptable" under Gibraltar law and considered "adequate" by this court.

12 The leading English authority on the constitution of a limitation fund is *Kairos Shipping Ltd.* v. *Enka & Co. LLC* (2) ("*The Atlantik Confidence*"). In that case, the limitation claimants applied for an interim declaration that the limitation fund could be constituted by the provision of a P&I Club guarantee. The judge at first instance (Simon, J.) refused to make the declaration sought and held that a limitation fund could only be constituted by means of a payment into court. The Court of Appeal allowed an appeal by the limitation claimants and held that a limitation fund could be constituted by the production of a guarantee. Gloster, L.J. who gave the leading judgment, with which Beatson, L.J. and Rimer, L.J. agreed, discussed the meaning of the conditions contained in art. 11.2 of the 1976 Convention that a guarantee should be "acceptable" and "adequate." She stated as follows ([2014] EWCA Civ 217, at paras. 28–29):

"28. The ordinary meaning of the words could not be clearer. The 'either . . . or' structure of this provision indicates that the party constituting the fund has a choice, i.e. whether to deposit the sum or to produce a guarantee. The choice of which method to employ is that of the party constituting the fund. As Mr Thomas submitted, a State Party would not be entitled to impose a blanket exclusion on all guarantees, since the 1976 Convention expressly provides for the party constituting the fund to have a choice. Moreover, whilst Article 14 provides that:

'the rules relating to the Constitution and distribution of the limitation fund, and all the rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted'

that provision is 'Subject to the provisions of this Chapter', which of course includes Article 11.2, which expressly confers a right to constitute a fund by production of a guarantee.

29. The provision imposes two conditions on the right to constitute a fund by producing a guarantee: the guarantee must be: (i) 'acceptable under the legislation of the State Party'; and (ii) 'considered to be adequate by the Court or other competent authority.'"

13 Dealing with the meaning of "acceptable," Gloster, L.J. stated as follows (*ibid.*, at paras. 30–36):

"30. In relation to the first requirement, the judge appears to have taken the view (see paragraph 15 of his judgment) that there had to be primary legislation, or a provision in the CPR derived from primary legislation, specifically, or expressly, providing that a guarantee was 'acceptable' *for the purposes of the 1995 Act.* He also concluded that the fact that the guarantee offered by the Appellants complied with the requirements of the Statute of Frauds, did not mean that it was 'acceptable' under the legislation of the United Kingdom for the purposes of Article 11.2 of the 1976 Convention; that was because, in his view, the Statute of Frauds was concerned with whether a guarantee was 'enforceable' which, he concluded, was different.

31. I disagree with both these conclusions. I do not consider that there is any ambiguity about the effect of the wording used in Article 11.2 in this respect. There is no additional requirement that there should be specific legislation expressly defining what is 'acceptable' for the purposes of the 1995 Act.

32. The ordinary meaning of the phrase 'acceptable under the legislation of the State Party' does not predicate, or require, specific additional enabling legislation, expressly defining what is 'acceptable' for the purposes of the 1995 Act. It simply means that the guarantee must be regarded as 'acceptable' under any relevant United Kingdom legislation. 'Acceptable' in this context does not need to be construed as having any technical meaning. It could equally mean a guarantee which was not regarded as 'unacceptable' under any United Kingdom legislation; in other words, simply a guarantee that did not contravene any relevant statutory provision. A guarantee which satisfied the requirements of the Statute of Frauds—because the guarantee itself, or some note or memorandum of it, was in writing and signed by the guarantor or his authorised agent - would be likely to be regarded as 'acceptable' as a guarantee for the purposes of the 1995 Act (at least, under English and Welsh legislation), because it was enforceable. Conversely, an oral guarantee, which did not satisfy the requirements of the Statute, and was therefore not enforceable, clearly would not be 'acceptable' for the purposes of the 1995 Act.

33. In particular circumstances, in order to qualify as 'acceptable', a guarantee might also have to satisfy other requirements of United Kingdom legislation. For example, if the guarantee were one given

by an institution in the course of carrying on insurance business, then, in order to be 'acceptable', the guarantee would also have to be provided by a person who was duly authorised by The Prudential Regulation Authority under the relevant provisions of the Financial Services and Markets Act 2000 to carry on insurance business of that type in the United Kingdom (as indeed Owners' P&I Club is in the present case). But the fact that the Statute of Frauds is directed at the circumstances in which a court action can be brought to enforce a guarantee, does not in my judgment preclude the statutory provision from being used as a reference point for 'acceptability'.

34. Indeed, in my judgment, even on the hypothesis that there were no statutory provisions in English and Welsh legislation expressly governing the form of guarantees, restricting their enforceability or imposing restrictions as to who was able to issue them, a guarantee would nonetheless be 'acceptable' for the purpose of the 1995 Act, provided it did not contravene the provisions of any statute.

35. In drawing a distinction between 'acceptable' and 'enforceable', the judge, in my view, adopted too narrow and technical and approach to the construction of a word of wide and general application, which, as the authorities referred to above demonstrate, has to be construed purposively in the context of the aim and intention of the 1976 Convention. Conversely, the construction which I conclude is the correct one gives effect to the general purpose and intention of the 1976 Convention; namely that the provision of international trade by way of sea-carriage should be encouraged by facilitating the ability of owners, charterers, managers and operators to limit their liability by the provision of either a deposit of a particular sum or by producing a guarantee.

36. In this context it is also relevant to note that, under the 1957 Convention (the immediate precursor to the 1976 Convention), whilst provision was made that, when the aggregate of claims exceeded the limits of liability, the total sum representing such limits might be constituted as one distinct limitation fund, the 1957 Convention gave no guidance as to how and where the fund was to be constituted. This was all left to the domestic law of each country. In contrast, the 1976 Convention, as already stated, expressly provides in Article 11.2 that a fund may be constituted by producing a guarantee, and indeed that Article, and Article 12, set out detailed guidelines in relation to the constitution and distribution of the fund. Again, in my judgment, that deliberate change supports what I regard as the correct construction of Article 11.2." [Emphasis in original.]

14 As for "adequacy," Gloster, L.J. said as follows (*ibid.*, at para. 37):

"37. So far as the second condition of adequacy is concerned, the wording of the provision presents no problem in this context. It simply contemplates that a guarantee constituting a limitation fund will need to be 'considered to be adequate' by the court or other competent authority. In the absence of any defined criteria in the CPR, this merely means that a court approving the constitution of the limitation fund will need to be satisfied that the guarantee provides 'adequate' security for the fund. Thus the court will need to be satisfied as to the financial standing of the guarantor, the practicality of enforcement and as to the terms of the guarantee instrument itself. That is the type of question which judges of the Admiralty Court or the Commercial Court consider every day when deciding issues such as the adequacy of a cross-undertaking in damages."

15 CPR, r.61.11(18) provides as follows:

"(18) The claimant may constitute a limitation fund by—

(a) making a payment into court;

(b) providing security in such form and on such terms as considered adequate by the court; or

(c) a combination of (a) and (b) . . ."

16 Further, CPR, para. 2D–76, at 898 provides the following commentary:

"Following *Daina Shipping Co v MSA Mediterranean Shipping Co SA* [2012] Fo. 255 and *Kairos Shipping v Enka & Co (The 'Atlantik Confidence')* [2014] EWCA Civ 217, CPR r.61.11(18) now makes provision for constituting a fund both by making a payment into court and by providing other security (typically by letter of undertaking from a P&I Club), or a combination of the two . . ."

The parties' submissions in outline

17 Mr. Hornyold-Strickland, who appeared for the claimants, submitted that an LOU in this case was "acceptable" and "adequate" under the 1976 Convention. Before turning to those conditions, he said that contrary to the criticisms levelled by the first, second and third defendants against QBE Europe in opposition to this application, QBE Europe had been a model of good behaviour. Whilst QBE Europe could have left the wreck where it was, paid £14,187,984.90 which was the limit of their legal liability, and told the Gibraltar Port Authority to organize the wreck removal as it thought fit, they did not do that. Instead, they carried out the salvage and wreck removal operation at a cost of around £26.12m., much more than its legal liability. Thus, he said that QBE Europe had shouldered an enormous financial burden for the benefit of the residents of Gibraltar and for the benefit of the natural environment around Catalan Bay. Further, QBE Europe

as a first-class insurer was now voluntarily offering an LOU in the sum of £14,187,984.90 plus interest.

18 Also in response to the case presented by the first, second and third defendants, Mr. Hornyold-Strickland submitted that there was no principle that claims from a public authority such as those made by the first, second and third defendants should be preferred over other claims, such as the claim from the owners of the "Adam LNG."

19 Dealing first with the "acceptability" of a guarantee, Mr. Hornyold-Strickland said that there was no prohibition under Gibraltar law for the provision of an LOU. Further, he said that QBE Europe is authorized by the National Bank of Belgium, and that it is deemed authorized in the UK by the Prudential Regulation Authority and regulated by the Financial Conduct Authority and the Prudential Regulation Authority. Further, he said that as an alternative, an LOU had been offered by QBE Management Services (UK) Ltd. which was a representative of QBE UK Ltd., which is authorized by the Prudential Regulatory Authority and regulated by the Financial Conduct Authority and Prudential Regulation Authority.

20 Mr. Hornyold-Strickland submitted that there was no requirement for QBE Europe or QBE Management Services (UK) Ltd. to be regulated in Gibraltar for it to be acceptable. Further, he pointed out that there are only 57 insurers registered in Gibraltar, and that those insurers do not include any P&I Clubs or large global insurance companies. If it was necessary for cover to be provided by Gibraltar regulated insurers, this would inevitably require a Gibraltar regulated insurer to obtain an undertaking from P&I Club or similar. In his submission, such a course would impede, rather than promote the aims of the 1976 Convention.

21 Turning to the "adequacy" requirement, Mr. Hornyold-Strickland said that QBE Europe and QBE Management Services (UK) Ltd. were both rated A+ by Standard & Poor, one of the highest possible credit ratings for a financial institution, and that they were therefore creditworthy. He also referred to a Solvency and Financial Condition Report for QBE European Operations plc, QBE UK Ltd. and QBE Europe SA/NV, which states that QBE Europe wrote €1,248,794,000 worth of gross written premium for the year ending December 31st, 2019. He repeatedly confirmed to the court that QBE Europe would pay following any final court judgment entered against them. He also referred to two examples where the Admiralty Court in London had ordered the provision of limitation funds by way of an LOU. In *Smit Salvage B.V.* v. *Luster Maritime SAE (M.V. "Ever Given")* (3), one of the largest limitation funds constituted in history, an LOU was provided by UK Mutual Steam Ship Assurance Ltd. In *Afina Navigation Ltd*., *Owners of M.V. "Afina 1"* v. *Monford Management Ltd*., *Owners of M.V. "Kiveli"* (1) an LOU was provided by the West of England Ship Owners Mutual Insurance Association (Luxembourg). Mr. Hornyold-Strickland

pointed out that both these P&I Clubs' ratings were lower than QBE Europe's. Further, he referred to other examples in leading shipping jurisdictions where the securitization of limitation funds by way of LOU had been deemed acceptable.

22 Mr. Hornyold-Strickland submitted that there was no merit in the complaint made by the first to third defendants that QBE Europe was not a P&I Club. He said that whilst QBE Europe are a fixed premium P&I Club, rather than a mutual assurance P&I Club, the distinction between P&I Clubs and other types of insurers was irrelevant for the purposes of the 1976 Convention.

23 Similarly, he said that there was no merit to the suggestion that Ms. Evans was being misleading in her witness statement when she said that "we have a market capitalization of $15.86 billion." He said that the reference to "we" in this context showed that she is referring to QBE's group market capitalization, and not that of QBE Europe.

24 Turning to the practicality of enforcement, Mr. Hornyold-Strickland submitted that the mere fact that a party might have to enforce a guarantee in a foreign jurisdiction is not sufficient to render it inadequate. He said that was demonstrated by the fact that the LOU provided in *The Afina* was provided by a Luxembourg-incorporated entity. Whilst he accepted that this might be an issue when dealing with countries such as Venezuela, Afghanistan, and the Congo where he said enforcement might be resisted through bribery, corruption, or sclerotic court practices, he said that none of this applied when considering enforcement of a Gibraltar judgment in Belgium or the UK.

25 Mr. Hornyold-Strickland said that the expert evidence showed that Belgian law provided a streamlined approach for the enforcement of foreign judgments that was in accordance with international norms. He said that there were no material concerns about enforceability, and that Belgium is ranked 23rd in the world out of 195 states for the rule of law by TheGlobalEconomy.com. Further, he said that any hypothetical concerns over delay could be ameliorated with an award of interest of judgment debt.

26 Dealing with enforcement in the UK, Mr. Hornyold-Strickland said that the 1968 Brussels Convention continues to apply between Gibraltar and the UK. He said that to the extent that enforcement had to take place in the UK where QBE Europe had assets, this only made things easier.

27 Mr. Hornyold-Strickland rejected the concerns raised about enforcement, which he said did not show any real or material concerns in this regard. Further, he said that the real reason for the rejection of the LOUs was clear from the Gibraltar Port Authority's policy that clearly imposes a blanket prohibition on all LOUs, contrary to the 1976

Convention. Further, he submitted that this unlawful policy was putting Gibraltar, through the UK, in breach of public international law.

28 Finally, dealing with the text of the LOU offered, Mr. Hornyold-Strickland said that this was in the standard form, and that it should not be altered unnecessarily.

29 Mr. Licudi, K.C. who appeared for the first, second and third defendants said that there was no precedent for a guarantor being permitted to substitute cash security for an LOU where a limitation fund had already been set out by way of a cash deposit, and that there was no reason why this should be allowed to happen here. Further, he said that the LOU offered here was neither "acceptable" nor "adequate."

30 Mr. Licudi submitted that the court should be slow to read too much into *The Atlantik Confidence* (2), which he stressed was a decision of the English Court of Appeal. Further, he said that it was distinguishable because it did not concern a public authority claim, and that the LOU offered in that case came from a P&I Club authorized to carry on insurance in the UK. Further, he said that the effect of *The Atlantik Confidence* ([2014] EWCA Civ 217, at para. 33) was that an insurer offering an LOU in this case had to be authorized by the Gibraltar Financial Services Commission, which QBE Europe were not.

31 Mr. Licudi submitted that weight should be attached to the risk and liability pooling nature of mutual assurance P&I Clubs. In this connection, he referred to the fact that P&I Clubs had provided LOUs in the precedents before the court, and that the commentary in the CPR and *P&I Clubs Law and Practice*, 4th ed. (2010) also stated that LOUs were typically given by P&I Clubs. In Mr. Licudi's submission, whilst LOUs from guarantors other than mutual assurance P&I Clubs were not forbidden, LOUs coming from such guarantors should be viewed with scepticism.

32 Mr. Licudi said that a public authority in Gibraltar seeking payment of expenses incurred in the public interest of Gibraltar should not have to chase a private insurer internationally for the enforcement of an order of the Gibraltar court where there is a more adequate alternative, namely the current cash deposit. Mr. Licudi highlighted para. 41 of Mr. Ghio's first witness statement where he explains why the LOU from QBE Europe was not considered acceptable in the following terms:

> "The LOU was both insufficient and unacceptable to me. It has been GPA policy since 2012 not to accept LOUs as security and insist on cash security. In our experience we have found that the problems of accep[ting] LOUs are 2-fold. Firstly, there is no real incentive for timely consideration and payment of invoices or for insurers to deal with outstanding claims expeditiously, which puts the GPA at a significant disadvantage. It is the GPA and other contractors that

> remained out of pocket for a considerable period of time whilst the matters got resolved. We also found that given the time it took to settle the issues we were usually presented with considerably discounted settlement offers which we had to accept given our limited commercial and bargaining power. Secondly, any enforcement of an LOU would necessarily require proceedings and enforcement action outside Gibraltar. The GPA did not see why it had to put itself in a position where it would have to chase insurers outside Gibraltar when the incidents concerned occurred inside Gibraltar."

33 Turning to "adequacy," Mr. Licudi said that there was no evidence of QBE Europe's financial standing and assets. He said that QBE Europe's annual accounts had not been provided, and he said that little or no weight should be attached to credit rating agencies, observing that they had favourably rated Lehman Brothers shortly before its demise. Further, he said that the evidence that QBE Europe held assets in the UK suggested that, if enforcement became necessary, QBE Europe would have to be pursued in multiple jurisdictions. He added that if enforcement in the UK was necessary, the position regarding the registration and enforcement of a Gibraltar judgment there was not clear, as observed by Adrian Briggs in *Civil Jurisdiction and Judgments*, 7th ed., at para. 36.02 (2021).

34 Turning to enforcement in Belgium, he referred to para. 5.32 of Ms. Van Clemen's expert report where she states that: "it is important to know that any form of contestation will lead to serious delay." Further, he referred to para. 5.49 of that report where Ms. Van Clemens states that the grounds for refusing enforcement can be abused with the sole purpose of causing delay. In this context, he drew attention to the reference in Professor De Wit's report to a case before the Court of First Instance of Antwerp where enforcement had taken years and where every conceivable ground for refusal was raised unsuccessfully. He linked this to QBE Europe's conduct in this case, and he said that one could expect them to take whatever steps they considered necessary to hinder or delay enforcement.

35 The conduct relied on by Mr. Licudi in this regard included QBE Europe's failure to agree a guarantee and indemnity agreement provided to them, or provide other cash security. He also said that out of the expenses claimed, around £7m. of invoices, which had been substantially paid, less than £1m. had been reimbursed, and that around half of the total amount claimed appeared to be challenged. He said that the first, second and third defendants felt that they had to detain the ship's cargo to obtain security. Further, they then felt that they had been misled when, following an assurance that cash security would be provided in a joint escrow account in exchange for the release of the cargo, the offer which then followed was for the funds to be held by QBE Europe's Gibraltar lawyers.

36 Mr. Licudi also submitted that QBE Europe had not been clear with the Captain of the Port about the fact that the cargo on board the "OS35" had been abandoned by its owners, and that QBE Europe's contractor for the removal of the wreck claimed ownership of the cargo. He also criticized QBE Europe for refusing to say whether a claim had been made on the ship's hull and machinery insurance.

37 Further, Mr. Licudi complained about QBE Europe's conduct in these proceedings. This included a late minute concession on the amount of the limitation fund, and QBE Europe's failure to serve the fourth defendant with the documents in the claim in good time before a previous hearing, which led to an adjournment.

38 Mr. Licudi said that an offer of an LOU from QBE Management Services (UK) Ltd. showed another shift in position. Further, he said that this was an unregulated management services company, and that it was neither a P&I Club nor an insurer.

39 Mr. Allan appeared for the owners of the "Adam LNG." Although they originally opposed an LOU, at the hearing Mr. Allan confirmed that his client was willing to agree to an LOU from QBE Europe if the court considered it "acceptable" and "adequate." Mr. Allan limited his submissions to two main points.

40 First, he dealt with the suggestion that an insurer providing a guarantee in Gibraltar would need to be regulated in Gibraltar. In Mr. Allan's submission, the effect of para. 33 (*ibid.*) of *The Atlantik Confidence* (2) was not that a guarantor in this case had to be regulated in Gibraltar. He added, however, that the court should be satisfied that an insurer not regulated in Gibraltar was acting lawfully in providing an LOU in this case. In this connection, he referred to guidance on the analogous provisions of the Financial Services Act 2019, in an FCA handbook entitled *The Perimeter Guidance Manual*, which he said confirmed that this was the case.

41 Secondly, Mr. Allan proposed some textual amendments to the LOU, and added that the officers signing the LOU should have authority to sign on behalf of QBE Europe.

42 In reply, Mr. Hornyold-Strickland said that the FCA guidance referred to by Mr. Allan was helpful as it showed that paying out under an LOU did not require regulation in Gibraltar. He also confirmed to the court that the signatories named in the LOU were authorized to sign on behalf of QBE Europe.

43 In response to the allegation that QBE Europe had acted improperly, Mr. Hornyold-Strickland accepted that whilst the Captain of the Port might have been unhappy about the speed of communications, he said that, if anyone, it was the first, second and third defendants that had acted

improperly. He said that the draft guarantee and indemnity agreement sought was a side-instrument ignoring other claims, and that it was tantamount to a "blank cheque." He further observed that the first, second and third defendants did not object to QBE Europe acting as a guarantor in that context.

44 Mr. Hornyold-Strickland also submitted that the Captain of the Port had improperly detained the cargo as commercial leverage to force QBE Europe to securitize the limitation fund in cash at a time when they were engaged in and paying for the wreck removal. Further, he submitted that the first, second and third defendants' claims largely fell within the limitation fund.

Discussion and determination

45 The issue in this case is whether the claimants should be permitted to constitute a limitation fund with an LOU. The first, second and third defendants raised a preliminary objection to this because a payment into court has already been made by QBE Europe, and they said that the LOU would be substituting this cash security, something for which there is no precedent.

46 The payment into court of £14.2m. as security is governed by an order dated March 15th, 2023, which was entered into by consent, and which states as follows:

> "The payment is made without prejudice to the Claimant's rights to contest: (a) its option to provide an acceptable letter of undertaking ('LOU') by way of security instead of cash into Court for the purposes of limitation under the [1976] Convention; and (b) its right to contest which limits apply under the Convention (whether the 1976 limits, 1996 protocol limits, or 2012 protocol limits)."

47 It is clear from para. 2(a) of this order that the parties agreed that the claimant could pursue this application for an LOU to substitute the cash deposit. This was an entirely sensible course, and one which is not prohibited under art. 11.2 of the 1976 Convention. Given the clear terms of the consent order entered, I do not consider that this objection bears a moment's examination.

48 Before coming to the detail of the two conditions which need to be satisfied for a limitation fund to be constituted by way of guarantee, I must say a word about *The Atlantik Confidence* (2) which the first, second and third defendants said is largely a case-specific authority of no binding effect.

49 The Court of Appeal's judgment in *The Atlantik Confidence* was a landmark decision that marked a shift in the long-held practice of the Admiralty Court in England & Wales that a limitation fund could only be

constituted by means of a cash payment into court. Whilst the guarantee in that case came from a P&I Club LOU, the guidance provided by the Court of Appeal on art. 11.2 of the 1976 Convention is clearly not limited to claims brought by private claimants or to LOUs given by P&I Clubs. It is an authoritative articulation of the meaning of "acceptability" and "adequacy" of guarantees given for the purposes of a limitation fund, and it applies equally to other insurers and reinsurers who provide insurance in respect of maritime claims. This is clear from Gloster, L.J.'s judgment where she states ([2014] EWCA Civ 217, at para. 3):

> "The issue is one of considerable importance to the shipping industry, including P&I Clubs and others who provide insurance and reinsurance in respect of maritime claims."

50 As a decision of the English Court of Appeal, this authority only has persuasive authority in Gibraltar. I consider, however, that the guidance provided by Lady Justice Gloster should be accorded considerable weight, and I will respectfully adopt it.

51 Having cleared away those preliminary objections, I turn first to the condition that the guarantee should be "acceptable" under the legislation of the State Party where the fund is constituted. What this means is explained in *The Atlantik Confidence* (*ibid.*, at para. 32), and the first element of "acceptability" is that any guarantee offered should not contravene relevant United Kingdom (that case being an English case) legislation.

52 Although the State Party responsible for extending the 1976 Convention to Gibraltar is the United Kingdom, the fund is being constituted in Gibraltar. The parties proceeded on the basis that, for the purposes of this case, this feature of the condition of "acceptability" means that there should be no contravention of Gibraltar law. This is clearly the case as providing an LOU is not unlawful in Gibraltar.

53 Gloster, L.J. also referred to a second element of this condition (*ibid.*, at para. 33), namely that a guarantee might also have to satisfy other requirements of United Kingdom legislation. Applying that statement to the circumstances of Gibraltar, the first, second and third defendants argued that this meant that an insurer offering an LOU in Gibraltar would have to be regulated by the Gibraltar Financial Services Commission for that guarantee to be acceptable.

54 When one examines this passage in Gloster, L.J.'s judgment, she is clearly referring to the positive side of the "acceptability" condition. The judge is explaining that as well as guarantees not contravening domestic law, they must also comply with any positive requirements of domestic law such as regulatory requirements. Thus, if a guarantee were being offered by a Gibraltar insurer in the course of its business in Gibraltar, it would need to be regulated by the Gibraltar Financial Services Commission. This

passage does not bear the weight of establishing, however, that only a Gibraltar regulated insurer can provide an acceptable LOU to set up a limitation fund in Gibraltar. What this means in practice, is that for a guarantee to be "acceptable," any insurer offering it must be appropriately regulated. In that sense, it seems to me that there is an overlap between "acceptability" and "adequacy." This construction is also consistent with the aim and intention of the 1976 Convention, namely encouraging international trade by way of sea-carriage by facilitating the limitation of liability by the provision of a deposit or a guarantee.

55 QBE Europe is authorized by the National Bank of Belgium to carry on insurance business, and it is clearly in good standing. Further, by offering an LOU and possibly paying out claims in Gibraltar, they would not be carrying on insurance business in Gibraltar requiring them to be regulated by the Gibraltar Financial Services Commission. Apart from the fact that an LOU is not a contract of indemnity, this is also borne out by s.5 of the Financial Services Act 2019. Insofar as is material, this provides that an activity is a regulated activity if it is a specified activity (which carrying out a contract of insurance is), if it is carried on by way of business, and if it is related to listed items that include contracts of insurance.

56 In determining whether business is being carried out, *The Perimeter Guidance Manual*, issued by the FCA, whilst not applicable in Gibraltar, is helpful as it sets out the sorts of issues to be considered in deciding this issue. Paragraph 2.3.3 of that handbook states that this is ultimately a question of judgment, but that relevant factors to be considered include the degree of continuity, the existence of a commercial element, the scale of the activity and the proportion which the activity bears to other activities carried on by the same persons but which are not regulated.

57 QBE Europe would only be offering an LOU in Gibraltar on a one-off basis following a collision that happened to take place here. It has no other business in Gibraltar, and its only involvement would be to pay out on a claim if called to do so. This all points to them not carrying out business in Gibraltar, and not therefore being required to be regulated in Gibraltar. This construction is also consistent with the commercial reality that insurers all around the world routinely pay out claims in jurisdictions where they are not regulated.

58 In my view, therefore, an LOU from QBE Europe is "acceptable."

59 Moving onto "adequacy." *The Atlantik Confidence* (2) (*ibid.*, at para. 37) states that there are three conditions that need to be satisfied for this limb to be satisfied, namely (1) the financial standing of the guarantor; (2) the practicality of enforcement; and (3) the terms of the guarantee itself. I will deal with each of these conditions in turn.

60 When addressing the financial standing of QBE Europe, the first, second and third defendants' first complaint was that QBE Europe is not a mutual assurance P&I Club. Accordingly, they said that QBE Europe's creditworthiness should be viewed with scepticism.

61 QBE Europe describes itself as a fixed premium P&I Club. Broadly speaking, this means that there is no collective sharing of risks as is the case with mutual assurance P&I Clubs, and that it operates as a commercial entity. Whilst the materials before the court showed that LOUs tend to be provided by mutual assurance P&I Clubs in similar cases, this only shows that those mutual assurance P&I Clubs have been considered to have financial standing for the purposes of giving LOUs. It does not follow, however, that the financial standing of other guarantors whether they are fixed premium P&I Clubs or commercial entities should be viewed with scepticism. Such an approach is not only based on tainted logic but it is not in accordance with principle either. The 1976 Convention does not prescribe what guarantees might be regarded as acceptable by the court. *The Atlantik Confidence* (2) ([2014] EWCA Civ 217, at para. 3) refers to P&I Clubs "and others who provide insurance and reinsurance in respect of maritime claims." What matters is financial standing.

62 QBE Europe provided a witness statement from Anja Evans who states that they provide LOUs for several reasons, including for the provision of security for limitation funds. Further, Ms. Evans confirms that such LOUs have been accepted in various jurisdictions including the UK, France, Germany, Italy, the USA, and Canada. She also points out that the jurisdictions that do not accept QBE Europe's LOUs and insist on the provision of bank guarantees are generally lower economically developed countries such as Yemen, Tunisia, and Sudan. She points out that whilst QBE Europe can provide bank guarantees, these are more expensive, take longer to arrange, and are a drain on resources.

63 Ms. Evans also points out that QBE Europe have been rated as an A+ insurer by the major credit rating agencies, including Standard & Poor, and that this rating is higher than Standard Club Ltd. which was the P&I Club that offered the LOU in *The Atlantik Confidence*. Further, she confirms that if QBE Europe is ordered to pay a sum of money, it will be paid promptly. She explains that QBE Europe's financial reputation depends on prompt payment, and that if payment is not made, their credit rating would decrease which ordinarily would have a far more deleterious effect on the business than simply not paying what is ordered.

64 Ms. Evans states, "we have a market capitalization of $15.86 billion." Although this could have been better phrased to ensure that it referred specifically to QBE's (and not QBE Europe's) group market capitalization, I reject the criticism levied by the first, second and third defendants that this statement was designed to be misleading. Even if it does not relate

directly to QBE Europe's financial position, it is helpful evidence because it shows the financial stability of the QBE group, although of course what ultimately matters is the financial standing of the entity providing the guarantee.

65 Although QBE Europe's annual accounts were not before the court, a solvency and financial condition report for QBE European Operations plc, QBE UK Ltd. and QBE Europe SA/NV for the year ending December 31st, 2019 was provided. This refers to QBE Europe having written €1,248,794,000 worth of gross written premium in that year. QBE is a regulated insurance company, and the fact that it wrote that level of gross written premiums in 2019, whilst a little out of date, clearly indicates that it will be able to honour an LOU of less than £15m.

66 QBE Europe's financial position remains robust as confirmed by the current rating by Standard & Poor of A+, one of the highest possible ratings for a financial institution. I do not consider that it is correct to dismiss out of hand credit rating agencies from companies such as Standard & Poor as the first, second and third defendants sought to do because they have not always been correct. Standard & Poor is one of the largest, well-established, and independent credit rating agencies around the world. The rating of A+ by Standard & Poor provides a solid indicator of creditworthiness.

67 Ultimately, the court needs to undertake an assessment based on the totality of the evidence before the court on the financial standing of QBE Europe. In my judgment, the evidence of Ms. Evans, the Solvency and Financial Condition Report for 2019, and the A+ rating by Standard and Poor (and other similar credit ratings from AM Best (A (Excellent)) and Fitch (A+)) all provide sufficient material for the court to be satisfied as to QBE Europe's financial standing as a guarantor.

68 As I turn to the "practicality of enforcement" of a Gibraltar judgment against QBE Europe, I make one preliminary observation. The mere fact that a party may have to enforce in a foreign jurisdiction is not in my view sufficient to render it inadequate. The LOU in *The Afina* (1), for example, was provided by a Luxembourg-incorporated entity.

69 The practicality of enforcement is an issue for the court to consider based on all the materials before it, and any concerns about enforcement must be real and material. Pertinent factors in determining this question include whether the enforcement regime accords with private international law, and the strength of the rule of law in the relevant foreign jurisdiction. There will be some cases where the court can readily conclude that enforcement is not practical, especially when there is evidence that enforcement in the country in question might be resisted through bribery and corruption, or sclerotic court practices. Each case will, however, turn on its own facts and a realistic and common-sense view must be taken on this question. As Gloster, L.J. said, this is something that judges of the

Admiralty Court or the Commercial Court consider every day when deciding issues such as the adequacy of a cross-undertaking in damages: see *The Atlantik Confidence* (2) ([2014] EWCA Civ 217, at para. 37).

70 In this case, the court has the benefit of two expert reports dealing with the reciprocal regime for enforcement in Belgium.

71 The claimants' expert, Professor De Wit is a professor of law at the University of Brussels. He states that the applicable law is the 1934 Convention between the UK and Belgium dated May 2nd, 1934, as supplemented by the Belgian Code of Private International Law ("the Belgian Code"). He states that recognition of a UK judgment is automatic and should not require any proceedings, and that enforcement can be refused on seven "classic" grounds set out in art. 3 of the 1934 Convention. I will not set out these grounds in full but they are the sorts of familiar grounds that can be relied on to oppose the enforcement of a judgment. They include cases where enforcement is based on a default judgment where the debtor was unaware of the proceedings, a judgment that is contrary to public policy, or a case where there is an appeal pending.

72 Professor De Wit further states that a judgment in this matter would fall entirely within the Belgian Code, which largely follows the 1934 Convention, and which also sets out nine "classic" grounds on which enforcement can be resisted, and which are set out in art. 25 of that Code.

73 Professor De Wit concludes that a judgment in this matter would be recognized and enforced in Belgium "as a matter of routine" unless it falls within one of the grounds under which enforcement can be opposed. In this regard, he states that:

> "These grounds have in common that they go back to fundamentals such as the judgment being contrary to public policy, or the rights of the defence having been violated."

74 The first to third defendants' expert on Belgian law, Ingrid Van Clemen, is a partner at Ambos Law in Antwerp. Her view is that the 1934 Convention no longer applies following the UK's accession to and later withdrawal from the EU, and that the Belgian Code applies. She states, however, that the procedure for enforcement under the Belgian Code is largely the same as under the 1934 Convention. She sets out art. 25 of the Belgian Code, which set out the grounds on which enforcement can be opposed, and which include cases where a judgment is incompatible with public order, where the defence's rights are being violated or decisions which are not final because there is a pending appeal. She states that if enforcement is not opposed, the court must decide the matter within a short time, which is normally a period of one month although this can take longer. If enforcement is opposed, however, she states that this could lead to serious delays. She states that at first instance this could take one to two

years but if there is an appeal this could take a further two to five years, with a delay of another year if there is an appeal to the Court of Cassation.

75 Whilst the experts disagreed on which regime applied, they agreed that a similar system applied, and the bases on which enforcement can be opposed were largely the same, although these were slightly more expansive under the Belgian Code. Whether it is one or another regime, the evidence shows that Belgian law provides a streamlined approach for the enforcement of foreign judgments consistent with the principles of private international law. Neither expert suggested that any of the grounds under which enforcement can be opposed might be applicable in this case. Further, Belgium has a strong rule of law. It is a member of the EU and it is ranked 23rd in the world out of 195 states for the rule of law by TheGlobalEconomy.com, around the same as the UK and France.

76 None of this suggests that there are any real or material concerns about enforceability. In the event, the first, second and third defendants' concern about the practicality of enforcement boiled down to them saying that QBE Europe would take advantage of delays in the Belgian justice system by raising frivolous arguments to delay and obstruct enforcement.

77 One answer to the concern raised by the first to third defendants is that court delays can ultimately be compensated for in interest. Whilst this goes some way to mitigate any concerns about delay, it does not provide a complete answer. It seems to me that a real and material concern about enforcement might exist in a case where there is evidence that a judgment creditor will be kept out of pocket for years by a judgment debtor intent on staving off payment as long as possible by means fair or foul. The question, therefore, is whether there is evidence to suggest that is the case here.

78 Before I do so, I am anxious to point out that this is not an inquiry into the salvage and wreck removal of the "OS35." Nor is the question whether QBE Europe's communications with the Captain of the Port were as good as they should have been. We are not dealing with the adjudication of the underlying claims either. Rather, we are concerned with whether there is evidence to support real and material concerns about the enforcement of a final court judgment against QBE Europe along the lines expressed by the first, second and third defendants.

79 The first, second and third defendants' first concern in this regard was based on the fact that QBE Europe had argued that lower limitation limits applied under the 1976 Convention on the grounds that the 1996 and 2012 Protocols did not apply in Gibraltar, only to concede this point shortly before the hearing. The issue that this raised, and which has now fallen away, was whether legislative action was required to incorporate these protocols under s.119(2) of the Gibraltar Merchant Shipping (Safety, etc.) Act 1993, or whether the reference in the schedule to that Act applying the 1976 Convention "as amended from time to time" was sufficient. Detailed

technical arguments were deployed as to whether the schedule to the Gibraltar Merchant Shipping (Safety, etc.) Act 1993 effectively incorporated these protocols into Gibraltar law. Just to put this issue into context, had the 1976 limits applied, the limit of liability would have been around £4m., as opposed to the updated sum of around £14m.

80 In my view, the first, second and third defendants have conflated two very different things in advancing this complaint. It is also one thing for QBE Europe to have taken a technical point, even a weak one, in the course of litigation on the incorporation of international conventions and statutory construction, when around £10m. was at stake. It is quite another to suggest that this indicates that there are real and material concerns about enforcement. Taking points like this in litigation, especially when large sums of money are at stake, is unexceptional. One cannot properly infer from this that a well-established global insurer will try to avoid payment under an LOU following a final court judgment by raising frivolous arguments about enforcement. One thing simply does not follow from the other. Further, the fact that the point was ultimately conceded, albeit late in the day, only assisted, rather than obstructed, the orderly progress of this hearing.

81 Further, the first, second and third defendants referred to the fact that QBE Europe had failed to serve the fourth defendant in good time prior to a previous hearing that took place on April 12th, 2023, and which resulted in an adjournment. This arose as follows. On March 30th, 2023, QBE Europe's lawyers notified the fourth defendant's lawyers of that court hearing but failed to provide the relevant court documents. A request for those documents by the fourth defendant's lawyers the following day was not complied with. At that hearing, Mr. Hornyold-Strickland for QBE Europe explained to the judge that this was the result of an oversight, for which he apologized, although he added that the fourth defendant had been on notice of the application and that they had said nothing about it until the day before the hearing. In response, Mr. Licudi said that this was an attempt by QBE Europe to exclude an interested party from the proceedings. Whilst it was clearly unsatisfactory that an adjournment was necessary, and the judge hearing that application was clearly not impressed, there is no correlation between an adjournment being ordered in those circumstances and an inference being drawn that there are real and material concerns about enforcement. Just to complete the picture, at that point, cash security had already been paid into court by QBE Europe under protest. Also, the fourth defendant's participation in the proceedings was very limited in the end as they have no objection to the LOU offered by QBE Europe.

82 The first, second and third defendants also said that QBE Europe had changed its position by proposing that an LOU be given by QBE Management Services (UK) Ltd. This was an inaccurate characterization of the position. As an alternative, and considering the objections raised by

the first, second and third defendants to an LOU being offered by a Belgian company, an LOU was also offered by a UK company in the QBE group. That is all that was.

83 Apart from these matters, the first, second and third defendants' overarching complaint was that they had experienced behaviour from QBE Europe which was non-responsive, evasive, and obstructive, and that regard should be had to this when considering the adequacy of an LOU from them. Further, they said that they had been misled by QBE Europe when they described themselves as a P&I Club.

84 I will first quickly clear away the point about QBE Europe describing themselves as a P&I Club, as I have already dealt with P&I Clubs above in the context of financial standing. As I have said, QBE Europe is a fixed premium P&I Club and not a mutual assurance P&I Club. At no time did QBE Europe say that they were a mutual assurance P&I Club. In any event, I consider that the significant weight that the first, second and third defendants attached to this distinction was misguided.

85 Returning to the concerns raised by the first, second and third defendants, they referred in particular to QBE Europe's refusal to provide a guarantee or security as requested. This must be looked at in its proper context.

86 This process commenced the day after the collision when the first, second and third defendants' lawyers, Hassans, provided QBE Europe's agents a draft guarantee and indemnity agreement. This draft guarantee and indemnity agreement provided for payment "on demand," *i.e.* within 24 hours, by QBE Europe to the Captain of the Port and the Government so that they could cover the "Guaranteed Obligations." "Guaranteed Obligations" are defined in that draft agreement as all moneys, debts and liabilities of any nature from time to time incurred by the Captain of the Port and/or the Government of Gibraltar in connection with the collision and/or wreck pursuant to the laws of Gibraltar. Further, it provided for payments made by QBE Europe to be released to the Captain of the Port for him to use for the purposes of meeting expenses lawfully recoverable from "the obligors" who were defined as the ship owners and QBE Europe.

87 QBE Europe's lawyers, Triay Lawyers, said that they would consider this but that they had to consider their own procedures and processes as well. Around a fortnight later, on September 15th, 2022, the Captain of the Port served a wreck removal notice requiring the owners of the "OS35" to remove the wreck and its contents. This resulted in QBE Europe taking on the salvage and then wreck removal operation.

88 Coming back to the draft agreement provided, my first passing observation is that the first, second and third defendants were clearly happy to accept a guarantee from QBE Europe at that stage provided it was in the

terms drafted by them. The position has clearly changed, although in my view the fact that a party may have accepted a guarantee at one point and not another is not conclusive in any event.

89 The draft agreement makes no reference to the insurers' rights to limit liability. Whilst at that stage no application had been made to limit liability as the collision had just taken place, this was very likely to be an issue. Further, it refers to the debts incurred by the Captain of the Port and the Government of Gibraltar, and for payment to be released for expenses recoverable against "the Obligors," *i.e.* ship owners and QBE Europe. Whilst a claim for wreck removal can be brought directly against insurers under art. 12(10) of the Nairobi Convention, an insurer is entitled to limit its liability in accordance with the limits set out in the 1976 Convention. A ship owner on the other hand is not able to limit liability: see exclusion of the application of art. 2(1)(d) of the 1976 Convention under ss. 14 and 15 of the Gibraltar Maritime Administrative Instruction (General) 2014. This agreement also requires payment on demand.

90 Potentially, therefore, this draft agreement seeks to impress upon QBE Europe the liability to pay, on demand, all expenses claimed beyond the scope and limits provided for in the Nairobi Convention and 1976 Convention, read together.

91 There is also the complaint that QBE Europe then failed to engage and was non-responsive more generally. QBE Europe have accepted that communication could have been better at a time when the Captain of the Port was understandably anxious about the costs he was incurring, and clearly frustrated about the delays in sorting matters out with QBE Europe. QBE Europe have, however, also pointed out that by September 15th, 2022 they had taken on the salvage and then wreck removal operation at their own expense, which they said was a considerable task that took up much of their time. They say that they have spent £26.12m. on that successful operation, which they say well exceeds their legal liability.

92 As for the amounts claimed by the first, second and third defendants, this totals around £7m., most of which they say has already been paid out by them. Further, only £981,124.45 of this has been reimbursed by QBE Europe, and around half of the total amount claimed appears to be disputed. QBE Europe has engaged ITOPF Ltd., a company specializing in chemical and oil spills worldwide, to review these invoices. A report was provided in relation to the first tranche of invoices submitted. This confirmed that some claims had been accepted, some had been queried and others rejected as unreasonable.

93 As a result of QBE Europe's failure to pay these expenses or provide the guarantee sought, the Captain of the Port threatened to detain the ship's cargo. In response, QBE Europe confirmed that they were not the cargo owners, that such a step would interfere with the wreck removal operation,

and that there were several claims in respect of which QBE Europe could limit liability. I pause here to mention briefly some other related complaints.

94 The first, second and third defendants also complained that QBE Europe was not clear about the fact that the cargo had been abandoned, and how their contractor for the removal of the wreck came to claim ownership of the cargo. They have also said that full disclosure has not been provided in relation to any claim made by the owners of the "OS35" on its hull and machinery policy.

95 On February 6th, 2023 the cargo was detained by the Captain of the Port, and on February 8th, 2023, Triay Lawyers stated that "our client is amenable to entering into the joint escrow arrangements to be agreed," and they confirmed that they held £3,198,350.20 in their escrow account pending the finalization of this joint escrow account. The cargo was then released on February 9th, 2023 on the strength of that representation, and a draft agreement was provided on February 14th, 2023. This provided for Triay Lawyers to be the sole escrow agent and that they would only pay out upon written instructions from all parties or as directed by a court. This was not acceptable to the first, second and third defendants and the cargo was detained a second time which resulted in a cash deposit of around £14m. being made by QBE Europe under protest, and an LOU being rejected.

96 Let me now draw the threads of these events together.

97 Whatever the ultimate intention behind the draft guarantee and indemnity agreement, it is hardly surprising that QBE Europe recoiled at the prospect of signing it, and that they would have wanted to consider their position carefully given its terms. This is especially the case when there is a substantive dispute between the parties over the expenses claimed which if not resolved, will end up being adjudicated upon in some form or another. No conclusions can be drawn about the likely outcome of that dispute at this stage, and one cannot infer from the position taken by QBE Europe, or by delays experienced in this process, that there are real and material concerns about enforcement against them.

98 Turning to the complaints about QBE Europe's failure to provide information about claims made on the hull and machinery policy and the cargo. There is no legal obligation which the first, second and third defendants could point to which requires this information to be provided to them at this stage, and the highest they put their case in this regard is that this might yield information which needs to be factored into the claim in some way. Whilst it may be that disclosure or further information about these matters may become necessary in due course in the context of the substantive dispute, it does not follow that the failure to provide this

information at this stage amounts to conduct suggesting real and material concerns about enforcement.

99 I come now to QBE Europe's failure to agree to a joint escrow account contrary to an earlier indication that they would do so. Even though there appears to have been no binding agreement on this issue, it is unfortunate that the Captain of the Port was led to believe one thing, and then another turned out to be the case when the atmosphere between the parties was already so tense. It is difficult to see, however, why this development gained the significance that it did when the funds, whether they were held in the client account of QBE Europe's lawyers or jointly by both firms of lawyers, would ultimately be held in Gibraltar pending the outcome of court proceedings. In my view, this does not support the concerns expressed about enforcement either.

100 Pausing here, it is worth noting that an LOU was considered to be "particularly unacceptable" in this case as the Gibraltar Port Authority's policy since 2012 has been not to accept LOUs at all.

101 As the decision of Simon, J. in *The Atlantik Confidence* (2) (which was then overturned by the Court of Appeal) shows, when this policy was promulgated in 2012, the position at least in England & Wales was that a limitation fund could only be constituted by making a payment into court. That changed in 2014 with the Court of Appeal's judgment, but the Gibraltar Port Authority's policy has not been revised accordingly as it still imposes a blanket prohibition on all LOUs.

102 The position is now clearly stated by Gloster, L.J. in *The Atlantik Confidence* ([2014] EWCA Civ 217, at para. 28):

> "[A] State Party would not be entitled to impose a blanket exclusion on all guarantees, since the 1976 Convention expressly provides for the party constituting the fund to have a choice."

103 This is therefore relevant background as it shows that the lens through which the first, second and third defendants approached the offer of an LOU was wrong. They were acting further to a policy that, insofar as it relates to limitation funds, is *ultra vires* as it is contrary to s.119 of the Gibraltar Merchant Shipping (Safety, etc.) Act 1993, which gives force of law to the 1976 Convention.

104 Thus, when matters are looked at objectively and in context, one can see that there are real disputes between the parties as to whether all the expenses claimed are recoverable from QBE Europe, and what constitutes appropriate security for those claims. There is a world of difference, however, between disputants locking horns in commercial disputes, and real or material concerns about enforcement following a final court

judgment when sums have been adjudged to be due, and where the grounds to resist enforcement are very limited.

105 In my view, therefore, there has been a misplaced emphasis by the first, second and third defendants on the underlying dispute and tensions between the parties, when the real focus should be on whether there are real and material concerns about enforcement against QBE Europe.

106 None of the matters raised by the first, second and third defendants compel the conclusion that QBE Europe, a well-established, regulated, global insurer with a credit rating of A+, would fail to pay under an LOU following a final judgment being entered against them. Further, they have satisfactorily carried out the salvage and then wreck removal of the "OS35" as required of them, and which they say in their evidence has cost them £26.12m. In my view, this provides a coherent and powerful rebuttal to the suggestion that QBE Europe would not honour the undertakings contained in the LOU.

107 Further, QBE Europe have offered to provide an undertaking to the defendants and to the court not to take enforcement points. No evidence on Belgian law was provided as to the effect that these undertakings would have in the enforcement process. Under principles of private international law, however, one can infer that the honouring of such obligations is likely to be taken extremely seriously by a Belgian court. Thus, I regard this additional undertaking as helpful and further evidence of QBE Europe's commitment to comply with the undertakings to pay contained in the LOU following a final judgment, and as to the adequacy of the LOU in this case.

108 As an alternative, and considering the objections raised by the first, second and third defendants to an LOU from a Belgian company, an LOU was offered by QBE Management Services (UK) Ltd., a UK company in the QBE group. This was also rejected by the first, second and third defendants, and the fourth defendant preferred the LOU to come from QBE Europe. In the light of what I have concluded, I do not consider that it is necessary to determine whether an LOU from this company is acceptable and adequate. This does not render the question of enforcement in the UK irrelevant though, as QBE Europe's lawyers have stated, QBE Europe holds assets in the UK, and this was a further reason which the first, second and third defendants said made enforcement impractical.

109 The first, second and third defendants said that the registration and enforcement of a Gibraltar judgment in England was unclear, relying on a passage in Briggs, *Civil Jurisdiction and Judgments*, 7th ed., para. 36.02, at 854, which states as follows:

> "Judgments from Gibraltar given in civil or commercial matters take effect in England as though Gibraltar were a Contracting State to the Brussels Convention: Section 39 of the 1982 Act authorised the

> United Kingdom so to provide, and it did so. However, the order made under Section 39 did not provide for the registration of Gibraltar judgments. It was widely assumed that they were to be registered under Section 4 of the 1982 Act, though it is not known whether any actually were. Section 4, however, will be deleted from the 1982 Act when the United Kingdom leaves the European Union; and it remains unclear how a Gibraltar judgment will be enforced in England if there is no mechanism for its registration (or, indeed, for challenges to be made to its registration) for enforcement."

110 The relevant instrument that extends the Brussels Convention to the enforcement of judgments between Gibraltar and the UK on a reciprocal basis is the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997, made under s.39 of the Civil Jurisdiction and Judgments Act 1982. This provides for the extension of the Brussels Convention to certain territories, and continues to apply after the UK's departure from the EU further to the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019.

111 The point made by Professor Briggs, K.C. (Hon.) is that whilst the Brussels Convention has been extended between Gibraltar and the UK, there appears to have been an oversight in that s.4 of the Civil Jurisdiction and Judgments Act, which provided the mechanism for registration, has gone following the UK's departure from the EU. The intricacies of the mechanics of registration and enforcement of judgments from Gibraltar in the UK may well be somewhat unclear but the fact that the Brussels Convention applies between Gibraltar and the UK can only make enforcement in the UK easier than in other EU states. Thus, if QBE Europe's assets in the UK can be identified, enforcement would turn out to be even easier as enforcement action could be taken directly against those assets.

112 In any event, QBE Europe has offered to undertake both to the court and to the defendants that it will not take any enforcement points. This includes not challenging the mechanics of any enforcement action in the UK, which is likely to resolve the matter from a practical point of view.

113 The final condition that needs to be considered on the question of "adequacy" is the terms of the guarantee itself.

114 The LOU offered by QBE Europe is a form known as ASG 12 devised by the Admiralty Solicitors Group, a group of solicitors practising admiralty law in England. These precedents have been developed and agreed over the years by this group of leading maritime lawyers, and they have been accepted internationally in the shipping and insurance industries. The LOU offered by QBE Europe is based on that standard form of wording and it is therefore, in principle, "adequate."

115 The ASG 12, like other standard forms of wording, is a flexible document that can be adapted as necessary, and I consider that certain amendments need to be made to it in this case. Before turning to those amendments, I should make it clear that only such amendments as are necessary and appropriate should be made to a standard document of this type, and that the temptation by lawyers to gild the lily should be resisted.

116 First, the LOU should be addressed to the Registrar, and it should be subject to Gibraltar law and to the jurisdiction of the Gibraltar courts.

117 Further, although the original interest rate applied was calculated applying a rate of 1% above the base rate, this was based on the Merchant Shipping (Liability of Shipowners and Others (New Rate of Interest Order) 2004 (S.I. 2004 No. 931); that is a UK statutory instrument and does not apply in Gibraltar. The applicable rate of interest in Gibraltar is that stipulated in r.12 of the Supreme Court Funds Rules 1979, which states:

> "Where any sum is paid to the Accountant General as a deposit by way of security or to be credited to a miscellaneous ledger account, he shall, unless the court otherwise directs, forthwith deposit such sum in the Government Savings Bank in the name of the Accountant General as trustee for the person making the payment."

118 The interest rate for deposits at the Gibraltar Savings Bank is variable and at present stands at 0.75% per annum. If a deposit of over £14m. were to be made in cash in this case, I would envisage that the court would provide appropriate directions for the deposit to be made in a first-class bank in Gibraltar where a commercial rate of interest could be earned. It therefore seems appropriate to me that interest should be calculated on that basis.

119 As QBE Europe has agreed to submit to the jurisdiction of the Gibraltar courts, this too should be reflected in the LOU. Further, the LOU should include the additional undertaking offered by QBE Europe not to take any enforcement points. Should the defendants wish to accept QBE Europe's offer to accept service on nominated lawyers, confirmation of the lawyers irrevocably instructed to accept services for the purposes of any enforcement action should also be included.

Conclusion

120 QBE Europe's offer to provide an LOU constitutes "adequate" and "acceptable" security under the 1976 Convention. The claimants' application to establish a limitation fund by way of an LOU in the sum of £14,187,984.90 plus interest is, therefore, granted.

121 The terms of the LOU should be based on ASG 12 and incorporate my amendments and observations as set out above. If the parties cannot

agree the final text of the LOU within 7 days of the handing down of this judgment, the matter is to come back before me.

122 Any further consequential matters that cannot be agreed between the parties are to be dealt with at the handing down of this judgment, or later if necessary.

Judgment accordingly.
