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## "IT IS WHAT IT IS" -THE MSC FLAMINIA

On 9 April 2025 the Supreme Court handed down its judgment on the MSC Mediterranean Shipping Company SA -v- Conti 11 Container Schiffahrts-GmbH& Co KG MS (The "MSC Flaminia") [2025] UKSC 14 providing further clarifications on the charterer's right to limit its liability under the Convention for the Limitation of Liability for Maritime Claims 1976.

### A. BACKGROUND

1 The case arises out of the explosion and ensuing fire which occurred on board the MSC Flaminia (the "**Vessel**") in July 2012, while she was in mid-Atlantic on her way from Charleston, US to Antwerp, Belgium (the "**Incident**"). At the time of the Incident the Vessel's registered owner was Conti 11 Container Schiffahrts-GmbH& Co KG MS (the "**Owner**") and she was employed by MSC Mediterranean Shipping Company SA (the "**Charterer**") under a time charterparty on the NYPE 1946 form (the "**Charterparty**").

2 After the fire was brought under control, the Vessel was towed by salvors to Wilhelmshaven, Germany for the removal of the fire-fighting water and the cargo which remained on board. These removal operations were completed in January 2013, after which the Vessel proceeded to Romania and then Denmark for the removal of waste which remained on board the Vessel (together, the "**Removal Operations**").

3 The Owner brought a claim in arbitration against the Charterer under the Charterparty and was awarded US$200million as losses resulting from the Incident.

4 In December 2023, the Charterer commenced limitation proceedings in the High Court of England and Wales (the "**Proceedings**") and established a limitation fund of £26.5million (the "**Fund**"), seeking to limit its liability arising from the Incident under the Convention on Limitation of Liability for Maritime Claims 1976 (as amended by the amending Protocol of 1996) (the "**Convention**").

5 In the first instance, the High Court held that the Charterer did not have the right to limit its liability, because the Owner's losses were for damage to the Vessel, which were not limitable. The Charterer filed an appeal before the Court of Appeal, which held that the Charterer did not have the right to limit its liability for the Owner's claim, because the Owners' losses were losses directly suffered by the Owner. The Court of Appeal's judgment

was further appealed (and cross-appealed) before the Supreme Court.

6 The only heads of loss for which the Charterer was seeking to limit its liability pending the Supreme Court's determination were:

6.1 The Owner's claim for payments made to national authorities for measures taken by those authorities to guard against the risk of pollution from the Vessel's bunkers while the Vessel was being towed to Wilhelmshaven; and

6.2 The costs of the Removal Operations, i.e. of discharging and decontaminated the cargo and removing the fire-fighting water at Wilhelmshaven, and of removing waste in Romania and Denmark.

## B. THE ISSUES

7 There were two questions before the Supreme Court:

7.1 Did the Convention give to the Charterer the right to limit its liability against the Owner for losses suffered directly by the Owner?

7.2 Was the claim brought by the Charterer a claim for damage to the Vessel, for which the Charterer could not limit its liability? If not, was the Charterer entitled to limit its liability for the individual heads of loss comprising the Owner's claim, under Article 2.1 of the Convention?

## C. ANALYSIS

### Underlying principles

8 Article 1.1 of the Convention gives to "*Shipowners*" the right to "*limit their liability in accordance with the rules of this Convention for claims set out in Article 2*". Article 1.2 of the Convention defines the term "*shipowner*" as "*the owner, charterer, manager and operator of a seagoing ship.*". The combination of Paragraphs 1 and 2 of Article 1 is that a charterer has the right to limit its liability under the Convention.

9 It is typical (although not necessary) in the aftermath of a casualty, that the owner of the relevant ship will set up a limitation fund (under Article 11 of the Convention) where parties that suffered losses due to the casualty will submit their claims. Such fund could be established by any party who is a "Shipowner" under Article 1 and is deemed established by all parties falling within that definition. The fund will then be distributed to the claimants that have established the owner's (or any "Shipowners'") liability for their losses.

10 The claimants who receive a contribution from the distribution of the fund are those whose claims fall within the scope of Article 2.1 of the Convention. Article 2.1 provides *inter alia that* "*... the following claims, whatever the basis of liability may be, shall be subject to limitation of liability*" and lists six types of claims for which liability can be limited under the Convention.

11 In the past, a charterer's right to limit its liability against the owner of the ship had been disputed (in the cases The Aegean and The CMA Djakarta, in the first instance). The Court of Appeal in The CMA Djakarta had resolved that dispute, confirming that a charterer can limit its liability against an owner. It held that, in determining any party's right to limit, the focus should be on the type of loss and whether it falls within the categories of limitable claims in Article 2. On this basis the Court in The CMA Djakarta held that an owner's claim for damage to a ship and consequential losses arising therefrom does not fall within Article 2 and therefore a charterer cannot limit its liability for such loss suffered by the owner.

### Losses directly suffered by an owner

12 In the MSC Flaminia, the Owner attempted to impose a narrower qualification on a charterer's right to limit its liability for an owner's claim. The Owner argued that a distinction should be drawn between (a) a charterer's right to limit its liability for recourse claims brought by the owner for losses originally incurred by third parties, i.e. parties not within the definition of a "shipowner" of Article 1.2 ("outsiders"); and (b) a charterer's right to limit its liability for losses

directly incurred by the owner. In particular, the Owner *inter alia* argued that the purpose of the Convention was not to afford to a charterer the right to limit its liability for losses suffered directly by the owner of the vessel. A charterer, according to the Owner, was entitled to limit its liability to the owner only for losses which were originally suffered by an outsider. In other words, in the case of an owner claiming against a charterer (or any other "insider"), the word "claims" in Article 2, for which a charterer could limit its liability, had to be read as 'claims for losses originally suffered by an outsider'.

13 On this basis, the Owner argued that the Charterer was not entitled to limit its liability against the Owner for losses incurred directly by the Owner. The payments to the authorities and the costs of the Removal Operations were such losses suffered directly by the Owner.

14 The Supreme Court rejected the Owner's argument. The Court was reluctant to add any qualification to the meaning of the word "claims" as that proposed by the Owner. It held that the Owner's argument would add a "gloss" on the word "claims" which would only operate on claims of a particular type which are brought by an owner (as opposed to claims by any other "insider") against another insider. Such qualification did not clearly arise from the wording of the Convention and was not necessary to achieve the purpose of the Convention.

15 In reaching this conclusion the Supreme Court addressed the Owner's argument that, if a charterer were allowed to limit its liability for losses directly incurred by the owner, an owner would have to bring that claim against the fund. This would have the absurd result that, if the owner had set up that fund, it would have to pay its own claim.

16 The Supreme Court accepted the possibility of an owner bringing a claim and receiving a contribution from its own fund. It considered that the only claims for which the owner would be entitled to bring a claim against its own fund (or a fund deemed constituted by itself) would be claims which fall within the provisions of Article 2. The Court found that this result was not "absurd". It held (as the Court in the CMA Djakarta had done) that the focus of the Convention is on the types and nature of the claims. Article 2.1 did not contain any general qualification of claims that are limitable in relation to the party incurring the relevant loss. There was nothing in the wording of the Convention preventing an owner from bringing a limitable claim against its own fund.

17 On this basis, the Court upheld the Charterer's right in principle to limit its liability for the Owner's claims, if it could bring those claims within the scope of Article 2.1.In the absence of an express agency agreement, the Court adopted an approach by attaching particular importance to "inherent probabilities" to decide whether an agency agreement existed at all. In the end it did so decide and did determine the extent of the authority of CTW Ltd based on various factors including:

**Type of loss**

18 In this regard, the Charterer argued that the Owner's claims for the payments to the authorities and the costs of the Removal Operations were consequential losses arising from the loss of the cargo. Therefore, they were limitable under Article 2.1(a): "(*a*) *Claims in respect of … damage to property … occurring on board or in direct connexion with the operation of the ship … and consequential loss resulting therefrom*".

19 The Owner argued that the Charterer's claims did not fall within the scope of any of the provisions of Article 2.1. It relied on a finding of fact from the first instance Court, according to which the payments to the authorities and the costs of the Removal Operations were costs that "(*a*) *needed to be incurred if the ship was to repaired*; (*b*) *were in fact incurred to enable Conti to have the ship repaired or as part of the repairs themselves*". On this basis, the Owner argued that its losses arose out of damage to the Vessel and therefore that the Charterer's liability for the Owner's claim could not be limited under the Convention (in accordance with the Court of Appeal's judgment on The CMA Djakarta).

20 The Supreme Court rejected this argument. The Court was once again reluctant to import any qualification into the words of the Convention. It reiterated that the right to limit under Article 2 of the Convention depends on the nature of the claims. There was nothing in the Convention which precluded the "*dual characterisation*" of a claim under more than one of the sub-paragraphs of Article 2.1. Namely, a claim that could be excluded from limitation under one of those sub-paragraphs (for example a claim for damage to the Vessel which cannot be limited under sub-paragraph (a)) could still be limited under another sub-paragraph of Article 2, if it could be brought within its scope.

21 On this basis, the Supreme Court considered whether the Owner's losses fell within the scope of Article 2.1(a). It accepted that it was bound by the first instance Court's finding of fact that all of the claims remaining before the Supreme Court were for losses incurred in order to repair the Vessel and hence were losses arising out of the damage to the Vessel. They could therefore not be characterised as consequential losses arising from damage to the cargo for the purposes of Article 2.1(a) and were not limitable thereunder.

22 The Charterer further claimed that it was entitled to limit its liability for payments made to authorities and for the costs of removing the firefighting water under Article 2.1(f) of the Convention, as costs incurred "*in order to avert or minimize*" a limitable loss, i.e. loss of or damage to the cargo. The Supreme Court rejected this argument. It held that, in accordance with the first instance Court's finding of fact, these were costs incurred in order to repair the Vessel and not in mitigation of any loss of or damage to the cargo. They were therefore not limitable under Article 2.1(f).

23 Finally, the Charterer claimed a right to limit its liability for costs incurred in discharging and decontaminating the cargo in Wilhelmshaven under Article 2.1(e) of the Convention, as costs "*in respect of the removal, destruction or the rendering harmless of the cargo*". The Supreme Court accepted this argument. It held that those costs fell within the scope of the ordinary meaning of the wording of Article 2.1(e). Given that the claims clearly fell within the scope of the provision, the Court could uphold the Charterer's right to limit it liability for those costs, despite the fact that the Owner's intention in incurring those costs was to effect repairs to the Vessel.

24 On this basis, the Court upheld the Charterer's right to limit its liability for the Owner's claim only in relation to the costs incurred in discharging and decontaminating the cargo in Wilhelmshaven.

## D. THE EFFECT OF THE JUDGMENT

25 In The CMA Djakarta, the Court of Appeal refused to add a qualification to the charterer's right to limit its liability. Consistent with this approach, the Supreme Court's judgment on the MSC Flaminia confirmed, on every chance it had, that the Convention "*is what it is*"[1] : No qualifications to a charterer's right to limit should be imported into the provisions of the Convention.

26 The ultimate effect of both of these judgments (the MSC Flaminia and the CMA Djakarta) seems to be the reinforcement of a charterer's (and any other "insider's") right to limit its liability. A party's ability to limit its liability seems to be the same whether that party is the owner or the charterer of the ship. The owner's claims do not enjoy 'preferential' treatment under the Convention. Insofar as a claim could be limited under Article 2, it makes no difference that it is an owner or an "outsider" that brings the claim.

27 Even more, the Court's acceptance of the "*dual characterisation*" of a claim under Article 2.1 further reinforces a charterer's position. Although an owner's losses may be losses for the damage to the vessel, a charterer can still limit its liability for those losses, if it can bring them within the scope of one of the categories of claims in Article 2.

[1] Per Paragraph 130 of the judgment.

28 It remains to be seen whether this general reinforcement of a charterer's right to limit is a general approach which the Court will follow in dealing with the interpretation of gaps and pitfalls of the Convention, which will undoubtedly arise in the future, or whether this was a mere coincidence arising from the particular factual matrix and findings which the Court had to consider on this occasion.

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