

# BACK ON COURSE – EXCLUDING THE RIGHT TO LIMIT LIABILITY UNDER THE 1976 CONVENTION: *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankschiffahrts GMBH & Co KG ('The Cape Bari')* [2016] UKPC 20<sup>^</sup>

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## Introduction

The decision of the Privy Council earlier this year in *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankschiffahrts GMBH & Co KG ('The Cape Bari')*,<sup>1</sup> allowing an appeal from the Court of Appeal of the Commonwealth of the Bahamas, provides clarification on whether a shipowner can waive its right to limit liability under the *Convention on Limitation of Liability for Maritime Claims 1976*<sup>2</sup> (“Convention”) and on how a contract purporting to exclude the right to limit should be construed. The case represents the first consideration of this question under the Convention and since the 19<sup>th</sup> century by a final appellate court.<sup>3</sup> Ultimately, the Privy Council confirmed that the Convention can be contracted out of, and that whether a contract excludes the Convention is to be determined through construction of the relevant contract.

For centuries, a distinguishing feature of maritime law has been the capacity for shipowners to limit the quantum of liability for maritime claims against them.<sup>4</sup> Such regimes are justified on public policy grounds,<sup>5</sup> including the need to ensure the availability of affordable marine insurance.<sup>6</sup> Attempts to harmonise the law of maritime limitation culminated in the Convention, which has been incorporated into the domestic law of many nations.

The scheme of the Convention represented a “profound change” in the law of maritime limitation.<sup>7</sup> It set the limit on the quantum of maritime claims at a much higher level but “[i]n exchange for the much higher limitation fund claimants [had] to accept the extremely limited opportunities to break the right to limit”.<sup>8</sup> As Griggs, Williams and Farr note, it was intended to implement “a virtually unbreakable right to limit liability”.<sup>9</sup>

This compromise was recognised by the Privy Council in *The Cape Bari*, which noted that under the Convention:<sup>10</sup>

“...shipowners agreed to a higher limit of liability in exchange for an almost indisputable right to limit their liability. The effect of articles 2 and 4 is that the claims mentioned in article 2 are subject to limitation of liability unless the person making the claim proves...that the loss resulted from the personal act or omission of the shipowner committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result. This imposes upon the claimant a very heavy burden.”

It was a misunderstanding of the broader application of this high threshold for establishing “conduct barring limitation” under Article 4 of the Convention that led the Court of Appeal into error. Prior to the Court of Appeal’s decision, both case law<sup>11</sup> and leading texts<sup>12</sup> indicated that it was possible to exclude limitation of liability by contract.

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<sup>1</sup> [2016] UKPC 20 (19 July 2016) (Lords Neuberger, Mance, Clarke, Sumption and Toulson).

<sup>2</sup> 1946 UNTS 221.

<sup>3</sup> See *The Satanita* [1897] AC 59.

<sup>4</sup> For a summary of the historical developments, see Nigel Meeson and John R Kimbell, *Admiralty Jurisdiction and Practice* (Informa, 4th ed, 2011) 283-287; see also Patrick Griggs, Richard Williams and Jeremy Farr, *Limitation of Liability for Maritime Claims* (Informa, 4th ed, 2004) Ch 2.

<sup>5</sup> *The Bramley Moore* [1963] 2 Lloyd’s Rep 429, 429 (Lord Denning MR).

<sup>6</sup> For a contemporary justification, see *The European Enterprise* [1989] 2 Lloyd’s Rep 185, 191 (Steyn J).

<sup>7</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [14], citing *The Leerort* [2001] 2 Lloyd’s Rep 291, 293-294 [9] (Lord Phillips MR).

<sup>8</sup> Griggs, Williams and Farr, above n 4, Ch 1.

<sup>9</sup> *Ibid* Ch 1.

<sup>10</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016), citing *The Leerort* [2001] 2 Lloyd’s Rep 291, 293-294 [9] (Lord Phillips MR).

<sup>11</sup> *The Satanita* [1897] AC 59; *Virginia Carolina Chemical Co v Norfolk and North American Steam Shipping Co* [1912] 1 KB 229 (*‘Virginia’*).

<sup>12</sup> Meeson, above n 4, 292.

This note discusses the differing approaches of the Court of Appeal and Privy Council, the latter's focus on contractual construction in the resolution of these issues and the implications for parties seeking to exclude a shipowner's right to limit liability.

## The Incident Giving Rise to the Litigation

The litigation arose from damage caused by an allision between the *Cape Bari* and a berth at a terminal facility in the Bahamas. On 25 May 2012, the *Cape Bari*, an 81 076 GT oil tanker owned by the respondent, arrived at Freeport, Grand Bahama to discharge a cargo of crude oil at a terminal owned by the appellant.<sup>13</sup> In order to berth at the terminal, the *Cape Bari* was required to come to berth under pilotage and be escorted to the berth by tugs. Both the pilots and tugs were provided by the appellant.<sup>14</sup> Pilots boarded the *Cape Bari* and the two tugs commenced taking the vessel towards its assigned berth. The *Cape Bari* subsequently made impact with the berth, causing substantial damage.<sup>15</sup>

Prior to the escort to berth, the pilots required that the Master execute two agreements.<sup>16</sup> The first was a standard "Pilotage/Towage Agreement". It provided that the pilots and tug master "shall be deemed the servants of the Owner... [of the *Cape Bari*]"<sup>17</sup> The second document comprised "Conditions of Use" for the appellant's terminal. It relevantly provided that the Master remained solely responsible for his vessel's navigation whilst coming to berth and required the shipowner, in broad terms, to indemnify the terminal owner against any damage caused to the terminal by the vessel.<sup>18</sup>

Following the allision, the appellant commenced proceedings in the Supreme Court of the Bahamas seeking a "full indemnity" to the value of US\$ 26 800 000 for damage to the berth.<sup>19</sup> The respondent admitted liability, but sought to constitute a limitation fund pursuant to the Convention as incorporated into Bahamian law<sup>20</sup> that capped the quantum of its liability at US\$ 16 900 000.

## The Proceedings in the Bahamas

### Trial Decision

At first instance, Longley SJ relied upon the decision of the House of Lords in *The Satanita*,<sup>21</sup> and considered that the Convention granted a "bare right of limitation"<sup>22</sup> that was capable of being waived expressly or impliedly by agreement. In a conventional approach, His Honour stated that:<sup>23</sup>

"...prior to the parties entering into the indemnity agreement they must be taken to have done so knowing that the ship owner has a right to avail himself of the limitation provision of the Convention. Having entered into the indemnity agreement, it then became a matter of construction as to whether he retained the right or not or had by his contract of indemnity waived it or contracted out of it".

Justice Longley held that, in this case, the shipowner could not limit its liability as the Conditions of Use excluded the right to limit by requiring the shipowner to provide a full indemnity. His Honour rejected a submission by the shipowner that, as cl 6 of the Conditions of Use provided that the contract was to be interpreted in accordance with the law of the Bahamas, the Convention should be read into the Conditions of Use so as to qualify the obligation to provide a full indemnity.<sup>24</sup> In the absence of more specific reference to the Convention, a generic choice of law clause could not import the terms of the Convention as incorporated into Bahamian law into the

<sup>13</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [1], [5].

<sup>14</sup> *Ibid* [4].

<sup>15</sup> *Ibid* [5].

<sup>16</sup> *Ibid* [5].

<sup>17</sup> *Ibid* [6].

<sup>18</sup> *Ibid* [6].

<sup>19</sup> *Ibid* [1].

<sup>20</sup> *Merchant Shipping (Maritime Claims Limitation of Liability) Act 1989* (Bahamas).

<sup>21</sup> [1897] AC 59.

<sup>22</sup> *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankerschiffahrts GMBH & Co KG* (Unreported, Supreme Court of the Commonwealth of Bahamas, Longley SJ, 9 August 2013) (*Trial Decision*) [36].

<sup>23</sup> *Ibid* [34].

<sup>24</sup> *Ibid* [26]-[27].

contract.<sup>25</sup> However, the Convention would be excluded where the terms of the agreement “make it clear that the agreement forbids access to the limitation or [has terms that] are inconsistent with it”.<sup>26</sup>

### **Court of Appeal Decision**

The respondent appealed to the Court of Appeal of the Bahamas. President Allen, with whom Blackman and Adderley JJA agreed, delivered the leading judgment. The President resolved the appeal by interpreting the provisions of the Convention afresh, although this had not been the subject of submissions by the parties.<sup>27</sup>

Her Honour held that the Convention established a limitation regime that could not be contracted out of. President Allen quoted Article 2(2) of the Convention, which provides:<sup>28</sup>

“Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise”.

Regard was also had to Article 4 of the Convention, which, as stated above, provides for conduct barring limitation.<sup>29</sup> Her Honour took the view that the high bar for conduct barring limitation imposed a similar restriction upon the capacity of parties to exclude the right to limit by contract:<sup>30</sup>

“When one considers the text of the above limitation provisions they appear to provide that *only* the personal act or omission of a shipowner defeats the right to limit liability; that one could not lose that right either by way of recourse or indemnity under any contract or otherwise.”<sup>31</sup> (emphasis added)

Her Honour considered that the Convention represented a change in the law that forbade the contracting out of limitation, rather than merely barring limitation due to fault by the shipowner. *The Satanita*,<sup>32</sup> relied upon at first instance, was distinguished on two bases. First, that the case was concerned with private yachts rather than merchant ships.<sup>33</sup> Second, that the limitation regime existing at the time that case was decided was materially different as there was no provision equivalent to Article 2(2) of the Convention in the earlier legislation.<sup>34</sup> It was held that upon the Convention attaining the force of law, the effect was that Article 2(2) “specifically and clearly excludes the contracting out of the right to limit liability even by means of contracts of indemnity”.<sup>35</sup>

Therefore, the Court of Appeal concluded that the only way to remove the right to limit is contained within Article 4, repudiating a common assumption between the parties that it was possible to contract out of the Convention. President Allen relied upon the judgment of Lord Phillips MR in *The Leerort*<sup>36</sup> as affirming this interpretation,<sup>37</sup> despite the fact the judgment in that case, and Article 4 itself, is directed toward conduct that bars the right to limit, not the question of whether the Convention applies a compulsory limitation regime that excludes any consensual waiver.

### **Appeal to the Privy Council**

The terminal owners appealed to the Privy Council on the questions of whether it was possible to exclude the right to limit under the Convention by contract and, if that was possible, whether the Conditions of Use in this case effectively excluded the right to limit.

Although the central – and controversial – aspect of the Court of Appeal’s decision was whether the Convention absolutely precluded exclusion by contract, this issue was dealt with expediently by the Privy Council. The Board

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<sup>25</sup> Ibid [27].

<sup>26</sup> Ibid [36].

<sup>27</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [4].

<sup>28</sup> *Owner of the Cape Bari Tankschifahrt GMBH & Co KG et al v Bahamas Oil Refining Company International Ltd et al* [2014] BSCA 96 (‘CA Decision’) [20].

<sup>29</sup> Ibid [21].

<sup>30</sup> Ibid [22] (emphasis added).

<sup>31</sup> Ibid [22].

<sup>32</sup> [1897] AC 59.

<sup>33</sup> *CA Decision* [2014] BSCA 96 [29].

<sup>34</sup> Ibid [33].

<sup>35</sup> Ibid [35].

<sup>36</sup> [2001] 2 Lloyd’s Rep 291, 295 [16]-[17].

<sup>37</sup> *CA Decision* [2014] BSCA 96 [36], [39].

instead framed the key issue in the appeal as relating to the principles for the construction of a contract that purports to exclude a shipowner's right to limit liability.

### **Contracting out of the Convention**

Lord Clarke, in delivering the advice of the Board, noted that whether parties could contract out of the Convention was to be resolved by interpreting the Convention using the principles outlined in *CMA CGM SA v Classica Shipping Co Ltd*.<sup>38</sup> Under this approach, the correct procedure for interpreting the Convention is through application of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*,<sup>39</sup> given that the Bahamas had enacted the Convention into statute.<sup>40</sup>

In examining the text of the Convention, the Board noted that Article 1.1 of the Convention states that a shipowner “**may** limit their liability”<sup>41</sup> and that Chapter 1 of the Convention is entitled “**Right** of Limitation”<sup>42</sup> Indeed, the Convention was characterised as an instrument which “confers rights on shipowners and not duties.”<sup>43</sup> Its text indicated that shipowners “have a right to limit, which they can choose to exercise, or not, as they please”.<sup>44</sup> Accordingly, shipowners could contractually waive their right to limit; there being “no linguistic support” for the Court of Appeal’s contrary view within the Convention itself.

Like the Court of Appeal, their Lordships acknowledged that “[t]he Convention radically altered the position” on limitation of liability for maritime claims from that previously in force.<sup>45</sup> However, their Lordships emphasised that these changes were related to conduct barring limitation, not contractual exclusion of the right to limit. The fact that the right to limit extended to contracts of indemnity<sup>46</sup> did not mean that the right could not be excluded by contract.<sup>47</sup> The reasoning in *The Leerort* was distinguishable, as it concerned whether there was conduct by the shipowner that barred the right to limit, rather than whether the right had been waived by contract. The fact the right to limit was “virtually axiomatic” in terms of conduct barring limitation was the answer to a question distinct from whether the right to limit itself could be waived by contract.<sup>48</sup> Articles 2.1 and 2.2 of the Convention do not operate to prevent exclusion of the right to limit by contract, and Article 4 becomes relevant only where it is alleged there has been conduct barring limitation.<sup>49</sup>

Consequently, the position under the Convention on this point is no different to that under previous limitation statutes.<sup>50</sup> This interpretation also coheres with the general common law principle that a party may waive or exclude a protection conferred by statute. This link to the general law is important in understanding the Board’s approach to construing the Conditions of Use.<sup>51</sup>

### **Construction of the Conditions of Use**

Given the Board’s clear conclusion that it was in principle possible to contract out of the Convention, the primary issue in the Privy Council’s advice related to the construction of the particular Conditions of Use that the Master of the *Cape Bari* had signed.<sup>52</sup>

Clause 4 of the Conditions of Use provided that:<sup>53</sup>

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<sup>38</sup> [2004] 1 Lloyd’s Rep 460, 463-464 [9]-[11] (Longmore LJ), cited in *The Cape Bari* [2016] UKPC 20 (19 July 2016) [16].

<sup>39</sup> 1969, 1155 UNTS 331, arts 31-32, quoted in *The Cape Bari* [2016] UKPC 20 (19 July 2016) [17]-[18].

<sup>40</sup> This is consistent with the approach that would be taken in Australia, given that Australia has also incorporated the 1976 Convention into statute: *Limitation of Liability for Maritime Claims Act 1989* (Cth). See *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 239-240 (Dawson J); *Minister for Home Affairs v Zentai* (2012) 246 CLR 213, 223 [19] (French CJ).

<sup>41</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [20] (emphasis added).

<sup>42</sup> *Ibid* [20] (emphasis added).

<sup>43</sup> *Ibid* [20].

<sup>44</sup> *Ibid* [20].

<sup>45</sup> *Ibid* [10].

<sup>46</sup> See Convention art 2.2.

<sup>47</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [24] citing *CA Decision* [2014] BSCA 96 [35].

<sup>48</sup> *The Leerort* [2001] 2 Lloyd’s Rep 291, 295 [19] cited in *CA Decision* [2014] BSCA 96 [39].

<sup>49</sup> See *The Cape Bari* [2016] UKPC 20 (19 July 2016) [24]-[27].

<sup>50</sup> See *Ibid* [22], citing *The Satanita* [1897] AC 59.

<sup>51</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [23].

<sup>52</sup> *Ibid* [30].

<sup>53</sup> *Ibid* [6].

“4. If in connection with, or by reason of, the use or intended use by any vessel of the terminal facilities or any part thereof, any damage is caused to the terminal facilities or any part thereof from whatsoever cause such damage may arise, and irrespective of weather [sic] or not such damage has been caused or contributed to by the negligence of BORCO or its servants, and irrespective of whether there has been any neglect or default on the part of the vessel or the Owner, in any such event the vessel and the Owner shall hold BORCO harmless from and indemnified against all and any loss, damages, costs and expenses incurred by BORCO in connection therewith. Further, the vessel and her Owner shall hold BORCO harmless and indemnified against all and any claims, damages, cost and expenses arising out of any loss, damage or delay caused to any third party arising directly or indirectly from the use of the terminal facilities or of any part thereof by the vessel ...”

The appellant submitted that Clause 4 excluded the appellant shipowner’s right to limit its liability under the Convention. Given the Convention had statutory force in the Bahamas,<sup>54</sup> whether Clause 4 had this effect was to be determined by applying the general principles of contractual construction<sup>55</sup> for a clause purporting to exclude a legal right.<sup>56</sup> Various formulations of this principle exist in the cases,<sup>57</sup> however, the common element is that the clause must clearly evidence the parties’ intention to exclude the right.<sup>58</sup> An analogy with *Ingram & Royle Ltd v Services Maritimes du Treport Ltd*<sup>59</sup> was relied upon by the Privy Council. In that case, a bill of lading purportedly excluded limitation. Vaughan Williams LJ stated that there must be something “in the words” which excludes the protection.<sup>60</sup> The Privy Council also endorsed the statement of Wilmer J in *The Kirknes*,<sup>61</sup> where his Honour concluded that a statutory protection “applies unless quite clearly it is expressly or impliedly excluded by the terms of the contract”, and synthesised the relevant principles as follows:<sup>62</sup>

“The Board accepts that it might be possible to exclude the right to limit without express reference to the statute, but concludes that the right must be clearly excluded, whether expressly or by necessary implication”.

Their Lordships further opined that:<sup>63</sup>

“it would have to be clear from the language of the clause construed in its context that the parties intended to exclude the right to limit.”

The presumption that parties enter into contracts “in accordance with the known state of the law”,<sup>64</sup> operated to include the Convention as part of the factual matrix within which Clause 4 was to be interpreted.<sup>65</sup>

Applying these principles, the Board held the parties had not agreed to waive the right to limit liability under the Convention.<sup>66</sup> In their Lordships’ opinion, Clause 4 merely made the shipowner strictly liable for damage to the terminal and imposed an obligation for shipowners to indemnify the terminal owners for terminal damage or related losses. The Board was emphatic in its conclusion that “[t]here is nothing in clause 4 which contains even a hint that the owners were agreeing to waive their right to limit their liability under the Convention.”<sup>67</sup>

## Relevance of The Satanita

<sup>54</sup> *Merchant Shipping (Maritime Claims Limitation of Liability) Act 1989* (Bahamas).

<sup>55</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [30].

<sup>56</sup> *Ibid* [31].

<sup>57</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [32]-[37], citing *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (*‘Gilbert-Ash’*); *Trafalgar House Construction (Regions) Ltd v General Survey & Guarantee Co Ltd* [1996] 1 AC 199, 208; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574, 585; *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd’s Rep 61, 67 [11]; *Stocznia Gdynia v Gearbulk Holdings Ltd* [2009] 1 Lloyd’s Rep 461, 468 [23] (*‘Stocznia Gdynia’*); *Seadrill Management Services Ltd v OAO Gazprom* [2010] 1 CLC 934, [29]; *Ingram & Royle Ltd v Services Maritimes du Treport Ltd* [1914] 1 KB 541, 553 (*‘Ingram & Royle’*); *Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726; *The Kirknes* [1957] P 51; *Sun Wai Wah Transportation Ltd v Cheung Kee Marine Services Co Ltd* [2010] 1 HKLRD 833, [11] (*‘Sun Wai Wah’*).

<sup>58</sup> *Gilbert-Ash* [1974] AC 689, 717-718 (Lord Diplock) and *Stocznia Gdynia* [2009] 1 Lloyd’s Rep 461, [23] (Moore-Bick LJ), quoted in *The Cape Bari* [2016] UKPC 20 (19 July 2016) [32]-[33].

<sup>59</sup> [1914] 1 KB 541.

<sup>60</sup> *Ibid* 553, quoted in *The Cape Bari* [2016] UKPC 20 (19 July 2016) [34].

<sup>61</sup> [1957] P 51.

<sup>62</sup> *Ibid* 62 (Wilmer J), quoted in *The Cape Bari* [2016] UKPC 20 (19 July 2016) [37].

<sup>63</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016)[40].

<sup>64</sup> See *The Kirknes* [1957] P 1, 62 (Wilmer J); see also *Sun Wai Wah* [2010] 1 HKLRD 833, [11].

<sup>65</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [37].

<sup>66</sup> *Ibid*[37].

<sup>67</sup> *Ibid* [38].

Despite preferring to resolve the appeal by construing the Conditions of Use from first principles, the Privy Council noted that the appellant had contended that the decision in *The Satanita* had the effect that Clause 4 should be held to exclude the shipowner's right to limit.<sup>68</sup>

*The Satanita* concerned a collision between yachts sailing in a regatta. Rules of the Yacht Club stated that a yacht breaching the rules "shall pay all damages". The House of Lords held that the words "all damages" in the context of the Rules excluded the limitation regime provided under the *Merchant Shipping Act Amendment Act 1862* in force at the time. The appellants submitted that "all damages" was equivalent to the obligation in Clause 4 to hold the terminal owners "harmless from and indemnified against all and any loss, damages, costs and expenses".<sup>69</sup>

The Privy Council responded by confining *The Satanita* to its own facts,<sup>70</sup> distinguishing the context of racing yachts from that of merchant ships.<sup>71</sup> The judges in *The Satanita* emphasised that racing yachts during competition have less exposure to risk than merchant vessels which "must be on the seas at all times and in all weathers, both by day and by night".<sup>72</sup> In those circumstances, the judges in *The Satanita* considered that "all damages" manifested an intention of the parties to exclude the right to limit.<sup>73</sup> Furthermore, in *The Satanita* Lord Herschell noted that the limitation provision was tied to a "correlative right" in the contract that also entitled a yacht owner to be able to claim "all damage" caused to his vessel by other competitors.<sup>74</sup> The Privy Council adopted this and distinguished *The Satanita* on the basis that it did not address the "more usual type of exclusion or limitation clause inserted into a contract predominantly for the benefit of one party".<sup>75</sup> Clause 4 in *The Cape Bari* was such a clause. In the present appeal, which involved an allision between a commercial vessel and a berth, Lord Clarke reiterated that the correct approach was to presume that the parties intended for the right to limit under the Convention to be preserved by the contract, such that any purported exclusion must "clearly and unequivocally exclude the right".<sup>76</sup> Drawing an analogy with the words used in the *The Satanita* was not open.

The route taken by the Privy Council was consistent with that taken by the Hong Kong Court of First Instance in *Sun Wai Wah Transportation Ltd v Cheung Kee Marine Services Co Ltd*,<sup>77</sup> which was quoted with approval by their Lordships.<sup>78</sup> In that case, Reyes J rejected a submission that *The Satanita* was to apply. His Honour considered the Convention to be part of the factual matrix,<sup>79</sup> and held that an indemnity agreement was to be interpreted, in the absence of a clear exclusion, as providing an indemnity capped at the quantum of limitation set by the Convention.<sup>80</sup>

Accordingly, the words "all and any loss" in Clause 4 were not an exclusion of the right to limit. Instead, they imposed an obligation of indemnity up to the limit under the Convention. The Privy Council considered it:<sup>81</sup>

"inconceivable that the owners intended to waive their right to limit. Moreover, if BORCO had intended that they should do so, it could reasonably have been expected for BORCO to include such a clause in the Conditions of Use."

## Implications of the Privy Council's Decision

*The Cape Bari* is an important restatement of the law on the ability of parties to exclude the shipowner's right to limit liability under the Convention. It confirms, as it was traditionally thought under previous limitation statutes,<sup>82</sup> that the right can be excluded by contract. The decision also elucidates the principles for determining whether the right has been excluded. What is less evident, based on the reasoning in the case, is what contractual wording will be sufficiently clear to impliedly exclude the right to limit. Determining this is of great importance, as otherwise

<sup>68</sup> Ibid [37], [41].

<sup>69</sup> Ibid [43].

<sup>70</sup> Of course, a decision of the Privy Council is not binding upon the courts of England and Wales. A decision of the Privy Council on a common law doctrine such as this is likely to be highly persuasive, however: *Willers v Joyce & Anor* [2016] UKPC 44 (20 July 2016) [12] (Lord Neuberger).

<sup>71</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [49].

<sup>72</sup> Ibid [44], citing *The Satanita* [1897] AC 59, 62 (Lord Halsbury).

<sup>73</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [44]-[47].

<sup>74</sup> Ibid [46], quoting *The Satanita* [1897] AC 59, 65 (Lord Herschell).

<sup>75</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [47].

<sup>76</sup> Ibid, citing *The Kirknes* [1957] P 1 and *Ingram & Royle* [1914] 1 KB 541.

<sup>77</sup> [2010] 1 HKLRD 833.

<sup>78</sup> [2016] UKPC 20 (19 July 2016) [37], [51].

<sup>79</sup> [2010] 1 HKLRD 833 at [11].

<sup>80</sup> Ibid [12].

<sup>81</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [50].

<sup>82</sup> See *The Satanita* [1897] AC 59.

the ability of contracting parties to avail themselves of their established capacity to exclude the right to limit will be rendered inutile.

### **Construction, not precedent**

The case reinforces the primacy of the modern principles of construction over consideration of past judicial decisions regarding similar words.<sup>83</sup> This is evident from the rejection of a solution based on *The Satanita*. Maritime contracts that purportedly address limitation of liability, certainly in the traditional merchant vessel context, are to be interpreted in the same way as other commercial contracts seeking to exclude legal rights. Therefore, the correct question to ask is whether the relevant clause expressly or impliedly excludes the right to limit liability.

Despite differences between the English<sup>84</sup> and Australian<sup>85</sup> approaches, if a contract seeking to exclude the right to limit under the Convention is governed by Australian law, the same result is likely to be reached as the Convention is likely so “notorious” in a shipping transaction that it would be declared to be part of the “surrounding circumstances known to the parties”.<sup>86</sup> English statements of what constitutes the factual matrix have also been approved in the Australian cases.<sup>87</sup> Furthermore, given that the same test for contractual exclusion of a legal right is applied in Australia,<sup>88</sup> an outcome consonant with that in *The Cape Bari* is likely under Australian law.

### **Effectively Excluding the Right to Limit**

The Privy Council acknowledged that the right to limit could be excluded either by express reference to the Convention, or by “necessary implication”, if it was “clear from the language of the clause construed in its context that the parties intended to exclude the right to limit”.<sup>89</sup>

This reasoning suggests that, although an implied exclusion is technically possible, a prudent party seeking to restrict the right to limit should do so expressly. The bar for achieving an implied exclusion is likely to be a very high one given that clarity and commercial certainty are paramount considerations. Further, when considering the abandonment of valuable rights that arise by operation of law the guiding principle is “[t]he more valuable the right, the clearer the language will need to be”.<sup>90</sup> Given that the day-to-day maritime context exposes the shipowner to risks of incurring large liabilities, the statutory right is immensely valuable, and the language that purports to exclude it will have to be patently clear.

What the Privy Council referred to as “generic indemnity clause wording” will not be sufficient. Earlier case law provides little guidance, other than suggesting that the wording may need to be fundamentally “inconsistent” with limitation under the Convention in order to exclude the right to limit without express reference.<sup>91</sup> Where there is no express reference, the *Cape Bari* suggests the clause must go beyond providing for parties’ respective liabilities and must deal with the quantum of liability itself. A potential means of doing so that was canvassed in argument before the Privy Council is where a contract sets up its own independent limitation regime, so that it is a self-contained scheme which sets out the quantum of liability. This may be so fundamentally inconsistent with the rights provided under the Convention that a Court would find that the Convention had been impliedly excluded.

### **Effect of a Mutually Beneficial Clause**

<sup>83</sup> See, eg. *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, 2906 [14] (Lord Clarke) (*‘Rainy Sky’*).

<sup>84</sup> See *West Bromwich* [1998] 1 WLR 896, 912-913 (Lord Hoffman); *Rainy Sky SA* [2011] 1 WLR 2900, 2906-2911 [14]-[30] (Lord Clarke).

<sup>85</sup> See *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [48]-[50] (French CJ, Nettle and Gordon JJ); *Electricity General Corporation v Woodside Energy Ltd & Ors* (2014) 251 CLR 640, 656-657 [35] (French CJ, Hayne, Crennan and Kiefel JJ) (*‘Woodside’*); *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 332 (*‘Codelfa Construction’*). It is to be noted, in addition, that recent Australian authorities have also, overall, considered the *West Bromwich* principles positively: *Woodside* (2014) 251 CLR 640, 656-657 [35].

<sup>86</sup> *Codelfa Construction* (1982) 149 CLR 332, 352 (Mason J).

<sup>87</sup> *Ibid* 352 (Mason J).

<sup>88</sup> *Reardon Smith Line Ltd v Yngvar Hansen Tangen* [1976] 1 WLR 989, 995-996, approved in *Codelfa Constructions* (1982) 149 CLR 332, 350 (Mason J); *Woodside* (2014) 251 CLR 640, 656-657 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

<sup>89</sup> See, eg. *Downer EDI Ltd v Gillies* (2012) 92 ACSR 373, 412 [148] (Allsop P); *United Petroleum v 7-Eleven Stores Pty Ltd* [2013] 1 Qd R 272, [20] (Fraser JA); *J-Corp Pty Ltd v Mladenis* [2009] WASCA 157 (28 August 2009) [44]-[45] (Newnes JA).

<sup>90</sup> *Ibid* [36], [40]

<sup>91</sup> *The Cape Bari* [2016] UKPC 20 (19 July 2016) [33].

<sup>92</sup> *Virginia* [1912] 1 KB 229, 238, 239.

One of the bases upon which the House of Lords distinguished *The Satanita* was Lord Herschell’s reasoning that the limitation clause in that case was not predominantly for the benefit of one party, but rather created a reciprocal arrangement where each owner was granted a ‘correlative right’ to claim against another owner for all loss suffered during the race, in return for indemnifying all other owners for all loss caused by his yacht.<sup>92</sup> It is unclear whether this analysis has application to a limitation clause in a commercial contract, and exactly how the “mutually beneficial” nature of the limitation would affect the construction of the clause. Such considerations were irrelevant in *The Cape Bari*, given that the other entity was a terminal owner and not another vessel. Consequently, their Lordships provided no further elaboration on this point. Drafters of contracts conferring correlative rights to limit liability, such as bespoke agreements between tug and tow,<sup>93</sup> or contracts between two vessels in port should be on notice for any future judicial consideration of this point.

## Conclusion

Following *The Cape Bari*, the main lesson for shipowners and other contracting parties is to take care in the drafting of contracts. Excluding limitation of liability under the Convention is a question of contractual construction.

*The Satanita* is not a general authority that can simply be applied to commercial vessels. Rather, a first principles-based process of contractual construction must be adopted. In any event, the Privy Council held that it is possible to exclude the right to limit; the real inquiry is whether the parties evinced such an intention in their contract.<sup>94</sup>

Contracting parties that wish to exclude or modify the limitation of liability under the Convention with certainty should therefore refer expressly to the Convention in their agreements to ensure the desired outcome. Limitation is an example of risk allocation. Expressly and explicitly addressing the issue of excluding limitation is likely parties’ best mechanism for effectively allocating this risk of maritime (mis)adventure.

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<sup>92</sup> *The Satanita* [1897] AC 59, 65.

<sup>93</sup> Though of course acknowledging such arrangements are normally governed by the UK Standard Terms.

<sup>94</sup> See *The Cape Bari* [2016] UKPC 20 (19 July 2016) [44]-[45]; [47].