Neutral Citation Number: **[2022] EWCA Civ 798**

Case No: CA-2021-003203

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Sir Nigel Teare (sitting as a Judge of the High Court)
[2021] EWHC 2808 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2022

Before:

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LORD JUSTICE SNOWDEN

- -

Between:

M/V PACIFIC PEARL CO LIMITED	**Appellant/ Claimant**
- and -	
OSIOS DAVID SHIPPING INC	**Respondent /Defendant**

- -
- -

Robert Thomas QC (instructed by **Ince Gordon Dadds LLP**) for the **Appellant**
James M. Turner QC (instructed by **Reed Smith LLP**) for the **Respondent**

Hearing date: 26 May 2022

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Approved Judgment

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday 14th June 2022.

Lord Justice Males:

1. This appeal is concerned with clause C of the Collision Jurisdiction Agreement devised by the London Admiralty Solicitors Group and known as "ASG 2". The purpose of this agreement is to provide for claims arising from a collision to be determined in the English court in accordance with English law and for security for those claims to be given in order to avoid the costs and delays caused by an arrest. Clause C of the standard form provides:

> "Each party will provide security in respect of the other's claim in a form reasonably satisfactory to the other. [Each party agrees to waive its rights to apply to arrest or re-arrest to obtain further security under the Civil Procedure Rules 1998 Part 61.6.]"

2. The second sentence of this clause is optional and, in the present case, the parties chose to delete it.

3. ASG 2 is intended to be used in conjunction with ASG 1, which is a draft Letter of Undertaking (or "LOU") to be given by the parties' respective P&I Clubs. It provides, in short, that in consideration of the beneficiary of the LOU giving up the right to arrest in order to obtain security, the P&I Club agrees to pay whatever is agreed or determined to be due.

4. Following a collision in the Suez Canal the appellant (the owner of a ship called PANAMAX ALEXANDER) offered to provide security to the respondent (the owner of a ship called OSIOS DAVID) in the form of an LOU from its P&I Club, the Britannia. However, the respondent refused to accept the security offered, insisting that the inclusion of a sanctions clause meant that it was unsatisfactory. Instead it preferred to maintain the arrest of a ship in associated ownership which it had obtained in South Africa. The judge, Sir Nigel Teare, found that the security offered by the PANAMAX ALEXANDER was in a reasonably satisfactory form for the purpose of clause C. But he went on to hold that although the appellant was obliged to provide security in a reasonably satisfactory form, the respondent was free to reject that security and to take whatever steps it saw fit to obtain or maintain alternative security elsewhere.

5. The appellant challenges that conclusion. The respondent supports the judge's reasoning, and in addition takes issue by a Respondent's Notice with the judge's conclusion that the security offered was in a reasonably satisfactory form.

The facts

6. The circumstances in which these issues arise are set out in detail in the judgment below. For the purpose of this appeal, the following summary is sufficient.

7. On 15th July 2018, three vessels, PANAMAX ALEXANDER, SAKIZAYA KALON and OSIOS DAVID collided in the Suez Canal. The parties' respective P&I Clubs, all members of the International Group of P&I Clubs, were in contact almost immediately to discuss jurisdiction and security. The International Group consists of the 13 largest P&I Clubs which between them cover more than 90% by tonnage of the world's oceangoing fleet.

8. On 8th August 2018, the appellant and the respondent agreed in principle to a bipartite Collision Jurisdiction Agreement on the standard terms of ASG 2. They did so in consultation with their respective P&I Clubs, the Britannia for the appellant and the Standard for the respondent. The agreement was signed on 16th August 2018. It provided, among other things, that each party's claim would be determined exclusively by the English court in accordance with English law and practice, and that each party would provide security in respect of the other's claim in a form reasonably satisfactory to the other.

9. Discussions followed as to the amount and terms of the respective security to be provided by each party. While those discussions were continuing, on 5th September 2018, the respondent arrested in South Africa a ship called PANAMAX CHRISTINA, owned by a company associated with the appellant.

10. On 7th September 2018, the appellant's P&I Club proposed a draft LOU which it was willing to provide to the respondent. This was based on the standard wording of ASG 1, but with the addition of a "sanctions clause" relieving the Club from its obligation to pay in certain circumstances. The clause was in the following terms:

> "We shall not be obliged to make payment under, nor be deemed to be in default of, this Letter of Undertaking if (i) doing so would be unlawful, prohibited or sanctionable under the United Nations resolution or the sanctions, laws, or regulations of the European Union, United Kingdom, United States of America or [the place of incorporation or domicile of your member] or the ship's flag state ('the Sanctions'), or (ii) if any bank in the payment chain is unable or unwilling to make, receive or process any payment for any reason whatsoever connected with the Sanctions (including but not limited to a bank's internal policies). If any such circumstance arises as described in (i) or (ii) herein, then we shall use reasonable endeavours to obtain whatever Governmental or other regulatory permissions, licences or permits as are reasonably available in order to enable the payment to be made."

11. Thus the proposed clause relieved the Club from its obligation to pay not only if it would in fact be contrary to sanctions regulations imposed by the United Nations or the laws of any of the specified countries to do so, but also (in very wide terms) if any bank in the payment chain was (rightly or wrongly) unwilling to process a payment for any reason whatsoever connected with such regulations. The proposed currency of payment was the Euro, no doubt because of the difficulties of making US dollar payments through New York banks in the event of United States sanctions applying (cf. *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm) at [3] and [4]).

12. This clause was included because the PANAMAX ALEXANDER had been on a voyage to Iran and the United States had recently announced the re-introduction of sanctions against Iran (see *Mamancochet Mining Ltd v Aegis Managing Agency Ltd* [2018] EWHC 2643 (Comm), [2019] 1 All ER (Comm) 335 at [10] to [29]). The Club was concerned that it might be unable to pay under its LOU if called upon to do so without being in breach of sanctions regulations or, at any rate, that banks in the

payment chain who were known to be sensitive to sanctions issues might be unable or unwilling to handle any payment.

13. The respondent and its P&I Club were not prepared to accept an LOU with this (or any) sanctions clause, expressing concern that security in this form might prove worthless. They maintained that position, notwithstanding that the wording proposed was approved by the International Group's Sanctions Committee on 10th September 2018.

14. Accordingly the respondent refused to agree to the release of the PANAMAX CHRISTINA from arrest in South Africa unless security was provided which did not include a sanctions clause. Such security was provided on 10th September 2018, in the form of an LOU from the United Kingdom Club with which that ship was entered. The UK Club LOU did not contain a sanctions clause. It provided for South African law and jurisdiction to govern the LOU.

15. Despite the release of PANAMAX CHRISTINA on provision of this LOU, the proceedings in South Africa have continued because the lawfulness of the arrest is being challenged. We were told that an appeal before the Full Bench of the KwaZulu Natal Local Division is due to be heard this month.

16. On 6th May 2019 the appellant's P&I Club repeated its offer to provide an LOU in the same terms as before but this time backed by a guarantee from HSBC. The terms of the guarantee were that HSBC would irrevocably and unconditionally guarantee payment of any liability on the part of the appellant to the respondent. It did not include any form of sanctions clause. This offer was said to be made in order to mitigate the appellant's damages claim and was open for seven days. It was not accepted.

17. On 15th July 2019 these proceedings were initiated seeking damages for breach of the Collision Jurisdiction Agreement, together with declaratory relief. The damages claimed consist of fees payable by the appellant to the owners of PANAMAX CHRISTINA for providing security in the form of the UK Club LOU, together with out-of-pocket expenses incurred by the owners of PANAMAX CHRISTINA in connection with the arrest in South Africa.

18. In the event the judge was to find that PANAMAX ALEXANDER was wholly responsible for the collision (see *The Panamax Alexander* [2020] EWHC 2604 (Admlty)), although we were told that the quantum of the claim has not yet been determined.

19. During the hearing before us Mr Robert Thomas QC for the appellant (but also on this point with instructions from the Britannia Club) confirmed that the offer by the appellant and the Club to provide an LOU on the terms proposed on 7th September 2018 remains open, subject to the return of the LOU provided by the UK Club. We were informed after the hearing that the HSBC guarantee is also still available, if required.

The Collision Jurisdiction Agreement

20. The agreement concluded in this case was signed by the parties' solicitors and provided as follows:

> "A. The claim of each party, including the question of limitation of liability, shall be determined exclusively by the English Courts in accordance with English law and practice.
>
> B. The undersigned will accept service of the other party's proceedings (including any limitation proceedings) on behalf of their respective clients/principals.
>
> C. Each party will provide security in respect of the other's claim in a form reasonably satisfactory to the other.
>
> D. The owners of the 'PANAMAX ALEXANDER' hereby warrant that the registered owners of the 'PANAMAX ALEXANDER' at the time of the alleged collision were Pacific Pearl Co. Limited of Office 740B, 7th Floor, Iris Tower, John Kennedy Street, Limassol, Cyprus and that the 'PANAMAX ALEXANDER' was not demise chartered out at such time.
>
> E. The owners of the 'OSIOS DAVID' hereby warrant that the registered owners of the 'OSIOS DAVID' at the time of the alleged collision were Osios David Shipping Inc. of Trust Company Complex, Ajeltake Island, Majuro, MH96960, Republic of the Marshall Islands and that the 'OSIOS DAVID' was not demise chartered out at such time.
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> F. This agreement shall be governed by English law and any dispute arising hereunder shall be submitted to the exclusive jurisdiction of the English Courts."

The background to ASG 2

21. The background to and purpose of ASG 2 was described by the judge in terms which are not controversial as follows:

> "1. An arrest of a ship in English law (and in the law of many other maritime nations, though the details may differ) is a means not only of establishing jurisdiction but also of obtaining security for a maritime claim. Where ships collide causing damage the owners of each ship will be concerned to recover that damage from the other ship. Of immediate concern will be the decision as to where to arrest in order to commence proceedings and to obtain security for the claim. However, an arrest may not be the ideal way of founding jurisdiction or of obtaining security. The ship to be arrested may be in a jurisdiction which, for one reason or another, is not regarded as suitable for determining the merits of the claim. The arrest will only provide adequate security if the market value of the ship, when sold, is sufficient to cover not only the claim for collision damage but also the claims of others such as a mortgagee whose claims may have priority to that of the damage claimant. Furthermore, an arrest is costly, not only for the arresting party but also for the owner of the arrested ship.

> 2. For these reasons the owners of ships involved in a collision will often agree upon a jurisdiction where the claims of each owner against the other will be heard and will also agree to an exchange of letters of undertaking from each owner's P&I Club (or Hull Underwriters) securing the claim of each owner against the other. A letter of undertaking ('LOU') from an owner's P&I Club is preferable to an arrest. It avoids the costs and uncertainty of an arrest and provides a reliable and trustworthy form of security. A LOU is therefore often provided before an arrest takes place; see *The Alkyon* [2018] EWHC 2033 (Admlty) at paragraph 15.
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> 3. Solicitors practising admiralty law in England, the Admiralty Solicitors Group (the 'ASG'), have devised two concise forms of agreement to assist the owners of ships involved in a collision when dealing with the choice of jurisdiction and the provision of LOUs. The first, known as ASG 1, is a draft form of LOU. The second, known as ASG 2, is a draft Collision Jurisdiction Agreement, in which the parties agree to litigate or arbitrate their claims in England. Clause C of ASG 2 provides that 'Each party will provide security in respect of the other's claim in a form reasonably satisfactory to the other'.
>
> 4. The advantage of these standard forms of agreement is their simplicity which enables parties to agree them without delay so that the costs and delays caused by an arrest can be avoided. The published notes to ASG 1 state that ASG 1 will generally be given by the P&I Club or hull underwriters of the vessels concerned and that ASG 1 has been designed to be used in conjunction with ASG 2. ASG 2 is stated to be a flexible document capable of easy adaptation whereas ASG 1 should not need adaptation."

22. In summary, therefore, it is recognised that an arrest involves disadvantages for both parties, and causes unnecessary costs and delays. One purpose of ASG 2 is to avoid those disadvantages and the costs and delays associated with them.

23. Mr James Turner QC for the respondent emphasised a number of features of Admiralty law and practice, again in terms which are not controversial. He submitted that in practice, in the absence of a Collision Jurisdiction Agreement such as ASG 2, because almost all merchant shipping is owned by one ship companies with no other asset than the ship itself, the only means of bringing a claim for collision damage or obtaining security is by arresting (or threatening to arrest) the ship (or in limited jurisdictions, such as South Africa, a ship in associated ownership). In England and Wales, as in a number of other jurisdictions, an arrest can be made as of right, with no undertaking in damages required (*The Alkyon* [2018] EWCA Civ 2760, [2019] QB 969), and damages for wrongful arrest can only be obtained if malice or gross negligence can be proved (*The Alkyon* at [44]), although the position is different in some jurisdictions (*The Alkyon* at [70] to [73]). In practice, however, the number of arrests is relatively low because a sophisticated system exists whereby, when an arrest is threatened, the P&I Club in which the ship is entered will provide an LOU.

24. Some other features of Admiralty jurisdiction are also worth mentioning. Thus Article 3(3) of the 1952 Arrest Convention (given effect in this jurisdiction by the Administration of Justice Act 1956 and subsequently by the Senior Courts Act 1981) provides that a ship shall not be arrested more than once in respect of the same maritime claim by the same claimant and that "if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest". Thus, if appropriate security has been given, a ship may not be arrested and, if it has been arrested, it must be released, with only limited exceptions.

25. In English law the assumption that a ship may not be arrested, or will be released, where security has been given is apparent from CPR 61.6, although that rule will have no application unless the ship comes, or is likely to come, within the jurisdiction. The rule applies "if, in a claim in rem, security has been given to (a) obtain the release of property under arrest; or (b) prevent the arrest of property". The rule goes on to empower the court to order that the amount of security be reduced or increased, unless the terms on which the security has been given provide otherwise. It is this provision which is referred to in the second sentence of clause C of ASG 2, which the parties deleted in the present case. Even when it applies, however, the claimant does not have a right to make a further arrest to obtain increased security, but must apply to the court for permission to do so.

26. It is possible for a shipowner to avoid an arrest by filing a request for a caution against arrest. In doing so, the shipowner must undertake to file an acknowledgement of service and to give sufficient security to satisfy the claim with interest and costs (CPR 61.7). The entry of a caution, however, will only prevent an arrest in the jurisdiction in which the caution has been entered.

27. Disputes which may arise as to the security to be given in order to avoid an arrest or to obtain the release of an arrested ship may in theory concern three main topics. One is as to the way in which security should be given. In many jurisdictions, including the United Kingdom, an LOU from an International Group P&I Club will be accepted as reasonable security, with older forms of security (such as a bail bonds) having become obsolete or virtually so. In other jurisdictions, however, that may not be so. A second potential dispute concerns the amount of security to be provided, but it is now well established that a claimant is entitled to security for its reasonably arguable best case (*The Moschanthy* [1971] 1 Lloyd's Rep 37). A third potential dispute, as in the present case, concerns the terms on which security is to be provided.

28. If there is a dispute whether the security offered is sufficient, or if the terms are reasonable, it will be for the court in whose jurisdiction the ship has been arrested to determine that issue (see the judgment of Mrs Justice Gloster in *The Kallang* [2006] EWHC 2825 (Comm), [2007] 1 Lloyd's Rep 160 at [33]). However, once reasonable security has been provided, there will be no justification for an arrest and, if a vessel has already been arrested, it will be released.

The judgment

29. As the judge pointed out, this case raised two important issues concerning ASG 2, a widely used form of contract between shipowners involved in collision cases:

> "10. … The first is whether the LOU offered by the Owners of PANAMAX ALEXANDER was 'in a form reasonably satisfactory' to the Owners of OSIOS DAVID notwithstanding that it contained a sanctions clause. The second is whether, if the LOU was in a reasonably satisfactory form to the Owners of OSIOS DAVID, the Owners of OSIOS DAVID were contractually obliged by the [Collision Jurisdiction Agreement] to accept it."

30. The main focus of the proceedings in the court below was on the first issue, which was treated as an issue of principle. The respondent contended that a sanctions clause was unacceptable in principle because it rendered worthless, or at any rate seriously diluted, the security which an LOU was intended to provide. The judge heard expert evidence as to the practice of P&I Clubs and the practical impact of sanctions on them. He held that the requirement in clause C that the security should be "in a form reasonably satisfactory to the other" imported an objective test, with reasonableness to be assessed by reference to the position of a reasonable person in the position of the proposed recipient of the LOU; that it was necessary to take account of the legal and practical difficulties which had given rise to the need for a sanctions clause; that the same or similar difficulties would also arise if security was sought by way of an arrest instead of an LOU; that, in cases with an Iranian nexus, a Club LOU would typically include a sanctions clause because of the low risk tolerance of banks which was a fact of commercial life; and that an LOU which contained a sanctions clause recognised an inevitable commercial reality and was not unreasonable for doing so. Accordingly, on the basis that the effect of the sanctions clause offered by the appellant's Club in this case was to suspend its liability to pay and not to terminate it, the clause was reasonable.

31. There is now no challenge to the judge's decision that, in principle, it is reasonable to include a sanctions clause in a Club LOU to be provided pursuant to clause C of ASG 2, although the respondent by its Respondent's Notice takes some specific points on the wording of the sanctions clause proposed by the appellant's Club in this case. Accordingly we have had no submissions on this question of principle and I express no view about it.

32. The judge described the second issue of principle as being whether a party to whom security in a reasonably satisfactory form is offered is obliged to accept it – in effect, whether such a party must refrain from seeking alternative security by way of an arrest. The judge answered this question in the negative, both as a matter of the true construction of clause C and as a matter of implication.

33. He dealt in one sentence with construction, saying only that "there are no words in clause C capable of bearing the suggested construction".

34. He held also that no term could be implied: the suggested implied term was not necessary for the business efficacy of the Collision Jurisdiction Agreement or for its commercial or practical coherence; nor was it so obvious that it went without saying.

35. The judge was particularly influenced in reaching this conclusion by the principle stated by Sir Thomas Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, cited by Lord Neuberger in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [19], that "it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred". He acknowledged that "the implication of the suggested obligation would ensure that the delay, uncertainty and cost of an arrest would be avoided and in that sense the implied term might well be said to be necessary"; but said that while this would be one solution which the parties might have adopted, another solution would be "to rely on the commercial reality that a party will generally accept security that is reasonably satisfactory to it".

Submissions on appeal

36. Mr Thomas for the appellant submitted as his primary case that the provision of reasonable security was a unilateral act, the performance of the clause C obligation, and that it was irrelevant whether that security was accepted by the other party. If reasonable security was provided, that was the end of the matter. Here, the only reason why the security was not in fact provided was that the respondent had made clear that it would not accept the security and would maintain the arrest of the PANAMAX CHRISTINA in South Africa. Mr Thomas therefore relied on the futility principle. Alternatively, he submitted that, on the true construction of clause C of ASG 2, a party to whom reasonably satisfactory security is offered is obliged to accept it. He submitted that the interpretation of contracts is not exclusively concerned with the words expressly used by the parties and that sometimes "the context in which the words are used, and the conduct of the parties at the time when the contract is made, tell you as much, or even more, about the essential terms of the bargain as do the words themselves" (per Lord Briggs in *Devani v Wells* [2019] UKSC 4, [2020] AC 129 at [59]). He submitted that the natural meaning of clause C of ASG 2, and in particular the word "provided", is that the security provided will be accepted by the other party. If that were not so, there would be no need for the objective requirement that the security should be in a form reasonably satisfactory to the other party. This gave effect to the purpose of clause C, which is to avoid the disadvantages to both parties associated with an arrest. Moreover, it is well established law that a party who seeks to use a foreign arrest for a purpose beyond obtaining reasonable security for its claim is in breach of an exclusive English jurisdiction or arbitration clause (*The Kallang (No. 2)* [2008] EWHC 2761, [2009] 1 Lloyd's Rep 124 at [79]; *SRS Middle East FZE v Chemie Tech DMCC* [2020] EWHC 2904 (Comm), [2021] 1 Lloyd's Rep 371 at [35]). He submitted that it follows from this that where reasonable security has been provided to a party, it is a breach of contract to seek alternative security by arresting the other party's ship. In contrast, the consequences of the judge's decision were striking. It meant that, even after agreeing a Collision Jurisdiction Agreement in the terms of ASG 2, either party is at liberty to act unreasonably by refusing reasonably satisfactory security and causing the very things (delays and costs) which ASG 2 is designed to avoid by arresting or threatening to arrest the other party's ship.

37. Alternatively, Mr Thomas submitted that if necessary a term should be implied into ASG 2 that a party offered reasonably satisfactory security would accept that security.

This was necessary as a matter of business efficacy and because such a term was so obvious that it went without saying. Without such a term, the objective of the parties to avoid the costs and delays caused by an arrest would not be achieved. It was not sufficient to rely on what the judge described as "the commercial reality" because that left the party to whom reasonable security had been offered free to act in an unreasonable and unprincipled way; therefore the implied term was the only contractual solution that achieved the parties' intentions.

38. Mr Turner for the respondent supported the judge's analysis. He relied on the matters of Admiralty law and practice which I have already described, which formed the background to ASG 2, but submitted that clause C made little difference to what would happen anyway. In principle clause C might impose an obligation on the parties to provide reasonable security, but in practice (as he submitted was the position in this case) the only way of enforcing that agreement would be if an arrest could be threatened or achieved. Accordingly, the purpose of ASG 2 was to provide a framework for dialogue and negotiation, with the expectation that if reasonable security was offered, it would be accepted, but with no obligation on the recipient party to accept what was offered or to refrain from seeking better security elsewhere by arresting the ship. The right to arrest was such a fundamental feature of Admiralty claims that any agreement to abandon that right would need to be clearly spelled out. There were no words in clause C capable of having that effect as a matter of construction and there was no justification for implying any term.

Discussion

39. In principle, as explained in *Marks & Spencer*, construction and implication are different, the former being concerned with what the parties have said while the latter is concerned with what they have not said. In some cases, however, including the present case, there may be little practical difference between them. The considerations which tell in favour of one construction may equally lead to the conclusion that it is necessary to imply a term if that construction is not adopted. In my judgment it is clear in the present case, whether as a matter of construction or implication, that shipowners who enter into an agreement on the terms of ASG 2 agree that, if reasonable security is provided pursuant to clause C, it is not open to the receiving party to seek alternative or better security by means of an arrest; and that if a ship has been arrested, it must be released once reasonable security is provided.

40. I begin by approaching this question as a matter of construction of the clause against the background which I have described. It can be seen that the way in which the agreement is intended to work is as follows:

(1) Clause A of ASG 2 deals with the question of jurisdiction for the parties' claims and the law to be applied; instead of arresting the ship in whatever jurisdiction it can be found, and applying whatever law would be applied in that jurisdiction, the parties agree on English jurisdiction and applicable law.

(2) Clauses D and E deal with the identity of the parties to be sued; they ensure that the registered owners of each vessel are the correct defendants to the claims.

(3) Instead of having to arrest a ship and serve proceedings *in rem* on the ship itself, the parties agree in clause B that proceedings may be commenced by service on their respective solicitors.

(4) Clause C deals with the provision of security; to my mind it is a straightforward reading of the clause that the security to be provided by each party will be *the* "security in respect of the other's claim"; there is no room for the seeking of alternative security; if a party were free to seek alternative or better security, there would be no need to stipulate that the security to be provided under clause C should be "in a form reasonably satisfactory to the other".

(5) Clause C also avoids the need to enter cautions in multiple jurisdictions in order to avoid an arrest. While clause B contains an undertaking to accept service, clause C contains the undertaking to provide security which must be given in order to obtain the entry of a caution.

(6) Finally, the combination of clauses C and F means that if there is a dispute about whether the security provided is "in a form reasonably satisfactory to the other", that dispute is to be determined not in the foreign court where a ship has been arrested (as would be the position absent this agreement: see *The Kallang*), but exclusively in the English court.

(7) This ensures that, contrary to what may be the position in some jurisdictions, security in the form of an LOU from a member of the International Group of P&I Clubs will be acceptable; and that any issue about the terms of the security are to be determined here in accordance with English law and practice.

41. Thus the effect of clauses C and F is to transfer any dispute about the sufficiency of security from a foreign court where the ship has been arrested to the English court. But the consequences when reasonable security has been provided are unchanged. That is to say, once reasonable security has been provided, there is no justification for an arrest and, if the ship has been arrested, it must be released. This provides an answer to Mr Turner's submission that the right to arrest is so fundamental that it should not be held to have been abandoned without clear words. The true position is that there is no right to arrest where security has been provided. The judge's approach, however, leaves a party which has been provided with reasonable security free to seek alternative or better security by arresting the ship (or a ship in associated ownership) in any jurisdiction in which it can be found, however unreasonable that may be and whatever the disruption to the ship's trading or the cost, delay and inconvenience of getting the ship released. This turns well established Admiralty practice on its head and is contrary to the clear purpose and, in my judgment, the language of ASG 2.

42. The judge said that there was nothing in ASG 2 about giving up the right to arrest. However, as I have sought to show in my summary above, the whole scheme of the agreement is that its provisions operate *instead* of an arrest in order to found jurisdiction, to enable a claim to be served and to provide for security to be given.

43. In reaching this conclusion I do not need to rely on the decision of Mr Jonathan Hirst QC in *The Kallang (No. 2)* that a party who seeks to use a foreign arrest for a purpose beyond obtaining reasonable security for its claim is in breach of an exclusive English jurisdiction or arbitration clause. That case was concerned with an attempt to litigate

the merits of the claim in the foreign court and is not directly relevant here. However, its general tenor is in accordance with the conclusion which I have reached.

44. Alternatively, I would if necessary conclude that the same result should be reached by way of an implied term that a party offered security in a reasonably satisfactory form would accept that security within a reasonable time (which in practice is likely to be a short time). In my judgment such a term is necessary as a matter of business efficacy and because such a term is so obvious that it goes without saying, for much the same reasons as already indicated in relation to construction. As Mr Thomas submitted, without such a term, the objective of the parties to avoid the costs and delays caused by an arrest would not be achieved.

45. As I have indicated, the judge came close to accepting this, but was persuaded to the contrary because of what Sir Thomas Bingham MR had said in *Philips Electronique*. The judge said:

> "91. The implication of the suggested obligation would ensure that the delay, uncertainty and cost of an arrest would be avoided and in that sense the implied term might well be said to be necessary. That is an attractive argument. However, I have noted the observation of Bingham MR in paragraph 19 of the above quotation from Lord Neuberger's judgment that 'it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ...'
>
> 92. I have been guided by that observation and have concluded that I am unable to say there is only one contractual solution. One solution is to imply the suggested term. The other solution is not to imply the suggested term but to rely on the commercial reality that a party will generally accept security that is reasonably satisfactory to it. I am also unable to say that without doubt the solution of implying the suggested term would have been preferred by the parties…"

46. There are, however, at least two difficulties with the judge's reasoning. One is that if it is enough to rely on "the commercial reality that a party will generally accept security that is reasonably satisfactory to it", clause C becomes effectively redundant. Another is that it misunderstands the point being made by Sir Thomas Bingham MR in *Philips Electronique* where he speaks of more than one "contractual solution".

47. The passage in question is as follows:

> "In the familiar cases already mentioned [i.e. the implication of a term into a contract between surgeon and patient that the surgeon will exercise reasonable care and skill; and the implication into a contract for the sale of unseen goods that they should be of merchantable quality, answer to their description and conform with sample] there could be little room for doubt

> what the parties' joint answer would have been had the question been raised at the outset. There would, almost literally, have been only one possible answer. But this may not be so where a contract is novel, known to involve more than ordinary risk and known to be more than ordinarily uncertain in its outcome. And it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred: *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609-10, 613-4."

48. Two points are key to an understanding of this passage. The first is that it is dealing with novel as distinct from standard contracts, with unusual risks and uncertainties. Second, the citation of *Trollope & Colls* is important. In *Trollope & Colls* the argument was that because the parties had overlooked the possible effect of an overrun of an initial phase of a building contract on the time for completing a later phase, a term needed to be implied to address this event. But as Lord Pearson said in the first of the passages cited:

> "Suppose, however, that the parties did overlook the possible effect of an overrun of phase I on the time for completing phase III. What is the extension of time which they must have intended? There are at least four possibilities: …"

49. Lord Cross, in the second passage, thought that there were five. Each of these four or five possibilities was, therefore, a possible "contractual solution" to the difficulty which the parties overlooked. But the fact that there were so many possibilities, each with something to be said in its favour, made it impossible to say which (if any) of these solutions would have been preferred. The result was that none of them was to be implied. That is the situation addressed in *Philips Electronique*.

50. The position in the present case is different. There is only one "contractual solution" advanced, namely the implied term for which the appellant contends. The alternative, which the judge favoured, was not a contractual solution as that term was used in *Philips Electronique* at all. It amounted to refusing to imply a term which was necessary to ensure that the purpose of the agreement was achieved and which left the party offered reasonable security free to act in an unreasonable and damaging way. When the matter is viewed in this light, I have no doubt that the suggested implied term would have been preferred by the parties.

51. It is true, as Mr Turner submitted, that the appellant did not actually provide security in accordance with clause C. In theory, it could have done so unilaterally, for example by paying the amount of security into court. However, it is clear that ASG 2 is intended to be used in conjunction with a Club LOU, typically in the form of ASG 1. The submission that the appellant did not actually provide security therefore leads nowhere. The appellant did tender performance of the clause C obligation by making an unconditional offer to provide security in the form of a Club LOU which the judge found to be in reasonably satisfactory form, but the respondent refused to accept that performance (see *Chitty on Contracts*, 34th Ed, Vol 1, para 24-082). Further, a Club

LOU is a contract between the Club and the beneficiary with consideration provided by both parties. The Club agrees to secure the claim, but the beneficiary (here the respondent) must agree to release and/or refrain from arresting any ship in the same or associated ownership as the name ship. Such a contract cannot be imposed unilaterally if the beneficiary is unwilling to agree this, as the respondent was.

52. In my judgment, therefore, and subject to the Respondent's Notice, the correct analysis is that the respondent was under an obligation to accept the security offered and that it was in breach of the Collision Jurisdiction Agreement for refusing to do so.

The Respondent's Notice

53. By the Respondent's Notice the respondent challenges the judge's conclusion that the LOU offered by the appellant's Club was in a reasonably satisfactory form. As I have indicated, there is no challenge to the judge's decision that in principle it was appropriate to include a sanctions clause. Rather, the respondent takes issue with the wording of the proposed LOU, submitting that:

(1) the sanctions clause should have provided for the Club to use "best endeavours" rather than "reasonable endeavours" to obtain permission to make payment; and

(2) the judge gave too much weight to the fact that the LOU was to be provided by a reputable P&I Club which was a member of the International Group.

54. In my judgment there is nothing in these points. Whether the proposed LOU was in reasonably satisfactory form required an evaluation by the judge of its terms and of the identity of the Club which was to provide it. The judge considered in detail the respondent's specific objections but concluded that, whether considered individually or collectively, they did not enable the respondent to say that the LOU was not reasonably satisfactory to them. That was a conclusion which he was entitled to reach and with which I would not be prepared to interfere.

The HSBC guarantee

55. As I have concluded that the Britannia Club LOU was in a reasonably satisfactory form and that the respondent was obliged to accept it, it is unnecessary to extend this judgment by addressing the later offer of a Club LOU backed by a guarantee from HSBC.

Disposal

56. I would allow the appeal. It is common ground that, in that event, judgment should be entered for the appellant in the sum of €297,000 and US $201,275, and that the appellant will be entitled to recover in respect of such further losses as may accrue between the date of judgment and the conclusion of the proceedings in South Africa.

Lord Justice Snowden:

57. I agree.

Lord Justice Lewison:

58. I also agree.