

SINGAPORE PERSPECTIVE ON USING A LETTER OF UNDERTAKING TO ESTABLISH A LIMITATION FUND

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Recent amendments to the Rules of Court which permit a party wishing to constitute a limitation fund to do so by way of a P&I Club's letter of undertaking bring us in line with the position in the UK and other jurisdictions that permit limitation funds to be constituted by way of letters of undertaking, as opposed to the traditional payment-into-court method. This article seeks to examine and discuss some of the practical consequences that have arisen as a result of this new mechanism for constitution of limitation funds.

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I. Constituting a limitation fund by way of a letter of undertaking

1 With effect from 1 February this year,¹ a shipowner seeking to set up a limitation fund, by reference to the tonnage of his vessel pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims (the "Limitation Convention"), has the option of doing so by way of a letter of undertaking from a Protection & Indemnity Club ("P&I Club"). This means that cash does not have to be paid into court; instead, a letter of undertaking from the P&I Club stating the amount of the limitation fund that it shall undertake to pay will be sufficient for the purposes of setting up a limitation fund.

2 The amendment to the Rules of Court brings us in line with Art 11(2) of the Limitation Convention which permits constitution of a limitation fund either by depositing the sum or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the court or other competent authority.²

1 Rules of Court (Amendment) Rules 2018 (S 51/2018).

2 Article 11(2) of the 1976 Convention on Limitation of Liability for Maritime Claims (the "Limitation Convention") states: "A fund may be constituted, (cont'd on the next page)

3 Therefore, in the summons application for a limitation decree, it would be prudent to annex a draft letter of undertaking (“LOU”) wording to the summons for review and confirmation by all parties for the purposes of setting up the limitation fund. Additionally, an affidavit needs to be filed by the P&I Club demonstrating its financial capability to meet its obligations under the LOU. No doubt this deviates from the usual practice where the P&I Club’s financial status is not challenged when LOUs are provided as, say, security for a claim or to secure the release of a vessel under arrest, but the rationale for requiring the P&I Club to make an express affirmation on affidavit appears to stem from the court’s oversight of the arrangement.

4 Following Art 8 of the Limitation Convention,³ the limits of liability as per Arts 6 and 7 “shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment”.

5 Therefore, upon confirmation of the LOU wording by the court, the party issuing the LOU, having checked the conversion rate of the Special Drawing Right (“SDR”) equivalent for Singapore dollars (the currency in which the limitation fund will be set up and which the LOU has to guarantee), shall procure the LOU to be issued by the P&I Club undertaking payment of the limitation sum in Singapore dollars and the LOU shall be filed via e-litigation and the original document delivered to the Registry. The date of filing by e-litigation is the date of constitution of the limitation fund.

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

3 Article 8 of the Limitation Convention states:

The Unit of Account referred to in Articles 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Articles 6 and 7 shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment.

II. Replacement letter of undertaking

6 However, there will invariably be a variance in the SDR conversion rate, as demonstrated in the following scenario. When issuing the LOU, the SDR as defined by the International Monetary Fund (“IMF”) shall be converted into the value of the national currency for the purposes of stating this in the LOU. Since the IMF publishes the conversion rate as at yesterday, the P&I Club, when issuing an LOU, will only be able to convert the SDR into national currency using yesterday’s conversion rate. The LOU may or may not be e-filed on the same day it is issued, but even if e-filed on the same day it is issued, the limitation fund is not constituted on the same day as the day at which the conversion rate was obtained.

7 In other words, one cannot ascertain today’s conversion rate on the IMF website and the latest conversion rate will be yesterday’s rate or the last working day before today. Depending on how large the variance is in the conversion rate, this may have a discernible impact on the quantum of the LOU and hence a replacement LOU may have to be issued, particularly if the variance produces a higher quantum on the date of filing or deposit of the LOU in court.

8 Therefore, in the majority, if not all, of the cases, it may be necessary to replace the LOU initially filed with a replacement LOU. This creates an administrative hassle of having to repeat the process of obtaining an LOU from the P&I Club, filing the replacement LOU and expunging the earlier LOU filed.

III. Replacement letter of undertaking – Any way out?

9 Arguably, a way around this would be to fix the date of conversion so as to avoid having to replace the LOU and expunging the earlier LOU filed in court. A possible date may be the date on which the limitation decree order is made or the date of occurrence of the event.

10 However, the committee discussions on the drafting of the Articles in the Limitation Convention show that such a possibility is unfortunately not feasible.

11 At the outset, the question of whether the conversion date of the SDR to national currency should be a date other than the date on which the limitation fund was created was debated by the Inter-Governmental Maritime Consultative Organisation (“IMCO”) Legal Committee. The debate centred on whether the conversion date should be “the date of occurrence”⁴ or “the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State, is equivalent to such payment”.⁵ The parties arguing for the former date suggested that using the date of occurrence would prevent speculation. However, as the settlement of a debt in foreign currency invariably entails delay, it was pointed out that the date of occurrence was not a good choice because of inflation.⁶ The majority of delegates in the IMCO Legal Committee voted in favour of the latter date as the basis for conversion by 15 votes, 11 votes for the former and nine votes in abstention.⁷ Whether the Committee was alive to the consequence flowing from the decision remains unclear, but certainly, the question of when the date of conversion of SDR to national currency should be was debated and considered.

12 Notwithstanding the above, is there still room for the national courts and legislative bodies in a State Party where the fund is being set up to intervene or decide on this question of when the currency conversion should take place or what amounts to the constitution of a limitation fund?

13 On a closer reading of the Limitation Convention, the answer, unfortunately again, seems to be “no”. Except for Art 10(3) of the Limitation Convention which gives an express right to the State Party where the limitation fund is being set up to decide in accordance with its national laws on the

4 Comité Maritime International, *The travaux préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* at p 260.

5 Comité Maritime International, *The travaux préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* at p 260.

6 Inter-Governmental Maritime Consultative Organisation Legal Committee’s debate at the Twenty-third and Twenty-eight sessions and the Committee of the Whole at the Tenth Meeting on 8 November 1976, available in Comité Maritime International, *The travaux préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* at pp 260–267.

7 Committee of the Whole at the Tenth Meeting on 8 November 1976, available in Comité Maritime International, *The travaux préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* at pp 262–267.

question of procedure arising under Art 10,⁸ no express provision or permission has been given to State Parties to deviate from the application of the Limitation Convention in relation to the other Articles.

14 In this respect, Art 8 (Unit of Account)⁹ read with Art 11(2) (Constitution of the fund)¹⁰ makes it clear that whilst the fund may be constituted by depositing cash or a guarantee, the conversion of the SDR rate into national currency shall be at the date the limitation fund shall have been constituted or payment made or security given.

15 Thus, it appears that no further deviation may be possible from the intended operation as expressed in these Articles.

IV. Continuing interest post-constitution of limitation fund

16 The Limitation Convention makes it clear that the limitation fund shall be constituted together with interest running from the date of occurrence giving rise to the liability

8 Article 10 of the Limitation Convention provides as follows:

Article 10 – Limitation of liability without constitution of a limitation fund

1. Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been consolidated.
2. If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.
3. Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.

9 Article 8 of the Limitation Convention states:

The Unit of Account referred to in Articles 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Articles 6 and 7 shall be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date the limitation fund shall have been constituted, payment is made, or security is given which under the law of that State is equivalent to such payment.

10 Article 11(2) of the Limitation Convention states: “A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.”

until the date of the constitution of the fund.¹¹ However, it is silent as to the accrual of interest, post-constitution of the fund.

17 Prior to the use of depositing security or LOU to constitute the limitation fund, cash which is paid into court to constitute the fund will ordinarily be deposited by the Accountant-General into an interest-bearing account and the interest accrued on the sum so deposited will form part of the limitation fund and be apportioned *pro rata* at the point of distribution. Presently, with the use of security or LOU to constitute the limitation fund, the court has directed that post-constitution interest shall be provided in the LOU, so that the claimants are not made worse off, so to speak, by being deprived of post-constitution interest which would have otherwise accrued on a cash payment into court. In other words, the LOU which secures the amount payable as the limitation fund shall also expressly state and include interest running at the specified rate from the date of the constitution of the fund or deposit of LOU in court until the date of payment under the LOU.

18 Thus far, the quantum or rate of post-constitution fund interest has been the subject of legal submissions by counsel arguing at the limitation application hearing, with the result of different rates of post-constitution interest being ordered in different actions. A more certain means of fixing the post-constitution interest may be to peg this to the average prevailing rate for fixed deposits of a prescribed number of local banks in relation to a prescribed period, *eg*, a period the Accountant-General would have applied if cash had been deposited in court.

11 Article 11(1) of the Limitation Convention states:

Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

V. Conclusion

19 The practice of constituting a limitation fund has evolved from the relatively primitive method of locking up large sums of cash in court to the provision of a letter of undertaking from a P&I Club to secure the sum. Considering that substantial liquidity is thereby freed up as a result, the added exposure to post-constitution of fund interest and the administrative trouble of having to organise a replacement LOU may be a small price to pay for this convenience.