ARREST, RELEASE, AND THE EQUIVALENCE OF SUBSTITUTE SECURITY: THE DECISION OF *MITSUI OSK LINES LTD V THE SHIP: YANGZE 22* [2025] FCA 563

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1. Introduction

The arrest of a vessel is among the most powerful remedies available to a maritime claimant. It provides security for a claim by detaining the *res* — the ship itself — within the jurisdiction of the court. However, this drastic remedy is subject to the principle that, upon the provision of sufficient alternative security, the arrested vessel should be released. The question of what constitutes "sufficient and reasonable security" has long occupied admiralty courts, and the Federal Court of Australia's decision in *Mitsui OSK Lines Ltd v The Ship: Yangze 22* ('*The Yangze 22*')[1] provides an instructive and timely contribution to this body of jurisprudence.

2. Facts

On 30 December 2024, the *Vega Dream* and the *Yangze 22* collided in the Beicao Fairway on the approaches to the port of Shanghai. The owner and time charterer of the *Vega Dream* — Mitsui O.S.K. Lines Ltd and Protea Navigation respectively — are the plaintiffs in the Australian proceedings. The registered owner of the *Yangze 22* is Nebula Shipping Pte Ltd ('Nebula'), a Singaporean entity. Nebula appeared conditionally without submitting to the jurisdiction of the Federal Court.[2]

The collision gave rise to parallel proceedings in the Shanghai Maritime Court ('the Maritime Court'). The sequence of events in those proceedings is essential context for understanding the Australian proceedings:[3]

1 In January 2025, Nebula applied to the Maritime Court to constitute a limitation fund in the sum of USD 9 million for maritime claims arising from the collision. Nebula simultaneously applied for the pre-litigation seizure of the *Vega Dream* and an order requiring Protea Navigation to provide security in the sum of RMB 200 million. The limitation fund was constituted, and the *Vega Dream* was seized, on 13 February 2025.

2 On 21 February 2025, the plaintiffs lodged an objection in the Maritime Court asserting that the *Yangze 22* was at fault for the collision. The *Vega Dream* was subsequently released from seizure on 5 March 2025, following the provision of a letter of undertaking by a Chinese insurer in the sum of RMB 200 million on the plaintiffs' behalf.

3 On 18 March 2025, the plaintiffs' claim in negligence was accepted for filing in the Maritime Court. On 6 May 2025, the plaintiffs arrested the *Yangze 22* at the Port of Newcastle pursuant to r 52 of the *Admiralty Rules 1988* (Cth) ('the Admiralty Rules'), as security for their claim in negligence arising from the collision.

4 On 25 May 2025, Nebula provided the plaintiffs with a letter of undertaking in the sum of USD 23,375,672 ('The LOU'). The LOU provided that:[4]

> *For the avoidance of doubt, the Claimants' rights to call for payment under this letter of undertaking shall automatically expire in the event that:*
> *1. the Shipowners establish a limitation fund in any jurisdiction and it is either:*
> *i. ordered by a Court of competent jurisdiction; or*
> *ii. agreed in writing between the Shipowners and the Claimants that the Claimants' claims in the Proceeding are limitable and (if so) to the extent those claims are limitable and may be brought against the limitation fund established by the Shipowners…*

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[1] [2025] FCA 563 ('*The Yangze 22*').
[2] Ibid [1].
[3] Ibid [4].
[4] Ibid [7].

3. Issues

The essence of the dispute is whether the LOU constituted sufficient and reasonable security for the plaintiffs' claim, such that the vessel should be released. The plaintiffs did not dispute the quantum of the LOU.[5] Rather, they contended that it was rendered inadequate by the above condition, which provided that the plaintiffs' right to call for payment under the LOU would automatically expire in the event that: (a) Nebula established a limitation fund in any jurisdiction; and (b) it was either ordered by a court or agreed between the parties that the plaintiffs' claims were limitable and could be brought against that fund ('the Condition').[6] Automatic expiration could be avoided if the LOU were drafted according to the standards provided for in the *Convention on Limitation of Liability for Maritime Claims 1976* ('the *LLMC*'). The plaintiffs therefore sought the following drafting of the LOU:[7]

> *For the avoidance of doubt, the Claimants' rights to call for payment under this letter of undertaking shall automatically expire in the event that:*
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> *1. the Shipowners establish a limitation fund in Australia under the LLMC Act, and the claims are found or agreed to fall within Art 2 of the 1976 Convention made to have the force of law in Australia by the LLMC Act, s 6.*

Two principal issues therefore arose for determination. *First*, whether the Condition merely prevented the plaintiffs from recovering twice for the same loss, or whether it extinguished the plaintiffs' right to payment altogether upon the establishment of a limitation fund in any jurisdiction. *Second*, if the LOU was inadequate, whether it should be amended such that the plaintiffs' right to compensation would only expire upon the establishment of a limitation fund in Australia pursuant to the LLMC Act.

4. The Court's Reasoning

4.1. Relevant Principles

Justice Derrington's analysis was guided by well-established law governing the release of arrested vessels upon the provision of security. The applicable principles may be summarised as follows:

1 An arrested vessel will only be released upon the provision of security sufficient to cover the plaintiff's "reasonably arguable best case", including interest and costs.[8]

2 An order to release a vessel without security being given against the wishes of a claimant who has properly exercised the right to arrest is a drastic order that should only be made where proposed security is clearly sufficient.[9]

3 The power to insist that a vessel remain under arrest is not to be exercised oppressively.[10]

4 Where the parties are unable to agree on the terms of security, the Court cannot impose an agreement upon them.[11]

4.2. Construction of the LOU

Nebula's Counsel sought to characterise the Condition as a mechanism to prevent double recovery: if the plaintiffs recovered from a limitation fund established elsewhere, the LOU would merely be reduced by the amount so recovered. Nebula illustrated this by hypothetical example — if a limitation fund in China were valued at USD 12 million, and the plaintiffs were the only claimants and recovered the full USD 12 million, the LOU would reduce by that amount.[12]However, her Honour found that this construction was not borne out by the plain wording of the LOU. On its proper construction, the plaintiffs' right to call for payment "automatically expires" upon the establishment of a limitation fund in any jurisdiction and a finding or agreement that the claims are limitable. The LOU made no provision for reduction or adjustment; rather, the right to payment was extinguished in its entirety.

[5] Ibid [6].
[6] Ibid [11].
[7] Ibid [8].
[8] *The Moschanthy* [1971] 1 Lloyd's Rep 37, 44*; Freshpac Machinery Pty Limited v Ship "Joanna Bonita"*" (1994) 125 ALR 683, 686–7.
[9] *The Myrto* [1977] 2 Lloyd's Rep 243; *The APJ Shalin* [1991] 2 Lloyd's Rep 62, 67.
[10] *The Polo II* [1977] 2 Lloyd's Rep 115, 119; *The Gulf Venture* [1984] 2 Lloyd's Rep 445, 449; *Owners of the Ship "Carina' v Owners or Demise Charterers of The Ship 'MSC Samia"* (1997) 148 ALR 623, 628.
[11] *The Alletta* [1974] 1 Lloyd's Rep 40, 50.
[12] *The Yangze 22* (n 1) [13].

As her Honour observed, the consequence was that the plaintiffs would "be left with nothing should this condition be met, contrary to their current position where they have the ship".[13]

This aspect of the reasoning engages a critical dimension of the case: the significance of China's non-accession to the LLMC. Were China a State Party to the LLMC, the limitations and safeguards of that Convention would necessarily apply. However, as China is not a party to the LLMC, and as the LLMC Act confines the operation of the Convention to State Parties, there was no assurance that a limitation fund constituted in China would afford the plaintiffs equivalent protection.[14] The plaintiffs' right to payment under the LOU could thus be extinguished upon the establishment of a fund with a value far below their actual loss. Accordingly, Justice Derrington dismissed the application to release the ship on the basis that the LOU did not provide the plaintiffs with "sufficient and reasonable security" within the meaning of r 52 of the Admiralty Rules.[15]

4.3. Amendment of the condition

Having found the LOU inadequate, her Honour turned to the question of whether the Condition should be redrafted to provide that the right to payment would expire only upon the establishment of a limitation fund in Australia under the LLMC. The answer is no: according to the fifth principle outlined above, the Court cannot impose terms upon unwilling parties like Nebula. However, in reaching this conclusion, Her Honour contrasted the LOU with that deployed in *Atlasnavios Navegacao, LDA v The Ship "Xin Tai Hai"* ('*The Xin Tai Hai*').[16] In that case — which also involved a collision between a foreign vessel and a Chinese vessel, with parallel limitation proceedings in the Qingdao Maritime Court — the LOU preserved the arresting party's security by providing for reduction (rather than expiry) of the LOU by any amounts recovered from the Chinese limitation fund, and only upon the order of a competent Australian court.[17] The *Xin Tai Hai* LOU thus provided a model for what would constitute acceptable drafting: an LOU must protect the arresting party against the risk that a foreign limitation fund might not afford equivalent protection to that provided under the LLMC, whilst still permitting adjustments to avoid double recovery.

5. Comment

5.1. The LLMC Framework in Geopolitical Context

The central difficulty exposed by *The Yangze 22* is one which the LLMC regime was designed to resolve: the asymmetry between limitation regimes in contracting States and those in non-party jurisdictions. The LLMC, given force of law in Australia by s 6 of the *Limitation of Liability for Maritime Claims Act 1989* (Cth), establishes a framework governing the constitution and distribution of limitation funds. Key protections include Art 12 (requiring that the fund be constituted in a court of a State Party in which proceedings are brought) and Art 13 (ensuring proportionate satisfaction of established claims). These protections are substantive guarantees that a claimant's right of recovery will not be defeated by the unilateral act of the party seeking limitation.

The Yangze 22 illustrates the consequences of China's non-accession to the LLMC. As her Honour correctly observed, the Condition meant the plaintiffs' right to compensation could be extinguished upon the establishment of a fund of any value in a jurisdiction whose limitation regime is not subject to the safeguards of the LLMC. Expressed differently, the sufficiency of the fund – once established – is governed solely by Chinese law. The result is unsatisfactory. *The Maritime Code of the People's Republic of China 1992* does provide its own limitation regime in Chapter XI, under which the maximum funds a claimant can recover have progressively increased. However, those amounts remain generally lower than those prescribed by the LLMC, and the procedural protections available to claimants differ in material respects.[18]

These differences gain significance in the current geopolitical context of maritime trade between Australia and China. Shifts in international trade patterns have materially increased the volume of cargo carried on routes to Chinese ports, with correspondingly increased risk of collision.[19] Once collisions become more frequent, so do

[13] Ibid [14].
[14] Ibid [12]; *ICL Shipping Limited v Chin Tai Steel Enterprise Co Ltd* [2003] EWHC 2320 (Comm); [2004] 1 Lloyd's Rep 21 [44].
[15] Ibid [16].
[16] [2012] FCA 715; 291 ALR 795 ('*The Xin Tai Hai*').
[17] Ibid [11] per Rares J.
[18] *Symphony Shipholding SA v Sea Justice MOL* (Supreme Court of the Republic of the Marshall Islands, 2 August 2023) 6–7. See also Jaime W Betbeze, 'International Forum Shopping for Limitation of Liability' (2018) 92 *Tulane Law Review* 1093, 1098.
[19] United Nations Conference on Trade and Development, *Review of Maritime Transport 2025* (United Nations, 2025) 5–6.

disputes about the adequacy limitation funds in non-LLMC jurisdictions. Thus, her Honour's reasoning in *The Yangze 22* is significant because it indicates the Federal Court's position on the validity of agreements which subject a claimant to the regimes of non-LLMC States: once arrested, a ship cannot simply vanish upon the unilateral act of the defendant in another forum, so neither should the substitute security be permitted to do so.

5.2. The Appropriateness of Employing *The Xin Tai Hai as a* 'Trojan Horse'

The fifth principle — that the Court cannot impose security terms upon unwilling parties — presents an obvious difficulty for a claimant who considers the proffered LOU inadequate. Her Honour's use of the *Xin Tai Hai* precedent offers an intriguing solution. The *Xin Tai Hai* LOU provided for security to be "discharged or reduced by a competent court of Australia, including by reason of the receipt by the plaintiff of monies from the limitation fund". Critically, it required an Australian court order before the security could be varied.[20] By referencing those conditions as an example of drafting which *may* have achieved the effect Nebula contended for, her Honour effectively communicated the contractual drafting which the Court would consider acceptable — without formally imposing terms. With respect, the legitimacy of this approach is disputable.

On the one hand, the Court's role in assessing provisions of security is binary: the security is either sufficient or insufficient. Accordingly, her Honour's approach could be perceived as creating an impermissible third option: using comparative precedents as a 'Trojan Horse' mechanism to impose contractual terms on parties to a dispute. Once the Court has indicated that the Condition is inadequate and the *Xin Tai Hai* structure is appropriate, the defendant faces a stark choice: either amend the LOU in conformity with the Court's indication, or leave the vessel under arrest with all the attendant costs of detention, crew, and commercial disruption. In most commercial contexts, this is no choice at all. If the fifth principle is to retain meaning, it must protect a defendant who genuinely and not unreasonably disagrees with the claimant's proposed terms. A court which routinely signals preferred drafting, then holds the vessel under arrest until the defendant capitulates, risks collapsing the distinction between indication and imposition. Taken to its logical extreme, this approach could be criticised as judicial overreach, particularly where the defendant has offered security of adequate quantum such that the dispute concerns technical drafting questions.

On the other hand, there is a meaningful distinction between imposing terms and indicating, by reference to precedent, what the Court would consider adequate. As Meeson and Kimbell observe, the court's function in assessing the adequacy of security necessarily involves a qualitative evaluation of the instrument offered, meaning a court which identifies deficiencies is not thereby dictating terms but rather performing its proper adjudicative role.[21] The analogy may be drawn with the Singapore Court of Appeal's emphasis in *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd*[22] on parties adopting the correct procedural route to preserve their rights in admiralty proceedings. Just as the Singapore court emphasised that procedural missteps could defeat otherwise meritorious claims, so does the Federal Court signal that the adequacy of security is not merely a question of quantum, but of structure.[23]

This warning was especially warranted in the circumstances of *The Yangze 22.* The Condition was not a function of mere ignorance; it was a provision capable of extinguishing the plaintiffs' entire right to recovery upon an event occurring in a foreign jurisdiction beyond the Australian court's supervisory control. The fifth principle cannot shield a defendant offering security which is, in substance, no security at all. In that context, the reference to *Xin Tai Hai* can be rationalised as the identification of precedent demonstrating it is possible to accommodate a defendant's interest in avoiding double recovery whilst preserving the claimant's fundamental right to security equivalent to the arrested res. The weight of principle and practical justice supports the adopted approach.

6. Conclusion

The Yangze 22 is a significant contribution to the law governing the adequacy of substitute security in Australian admiralty practice. Justice Derrington's decision correctly applies the principle that substitute security must be genuinely equivalent to the arrested *res*, and extends that principle to encompass qualitative assessment of conditions capable of defeating the claimant's rights. The deployment of *The Xin Tai Hai* as a model demonstrates

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[20] *The Xin Tai Hai* (n 16) [11] per Rares J.
[21] Nigel Meeson and John Kimbell, *Admiralty Jurisdiction and Practice* (Informa Law from Routledge, 5th ed, 2018) [8.48]–[8.50].
[22] [2025] SGCA 30.
[23] Ibid [64]. See also Thea Gendner and Kanaga Dharmananda SC, 'The Relationship of Securities Over Subrogation, and Admiralty Proceedings: Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd [2025] SGCA 30' (2025) 39(2) *Australian and New Zealand Maritime Law Journal* 11.

a pragmatic exercise of judicial authority which, whilst pressing against the boundaries of the fifth principle, ultimately respects it. As collisions involving Chinese vessels increase in frequency, and limitation disputes in non-LLMC jurisdictions proliferate, the decision provides authoritative guidance that the Federal Court will not countenance substitute security whose efficacy depends upon the operation of a foreign limitation regime beyond its supervisory control.