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P & I Club Letters of Undertaking and Admiralty Arrests

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Alternative forms of security to prevent the arrest (or the continued arrest) of ships in admiralty proceedings in rem are vital in ensuring uninterrupted international trade. This paper examines one of the more popular and successful modern forms of alternative security, P & I club letters of undertaking. Club letters provide a fascinating example of highly effective private ordering by commercial parties within the broader framework of public judicial administration. Although undoubtedly contractual in nature, they have been required to respond and adapt to the particular requirements and policy concerns of the admiralty jurisdiction. It may be argued, therefore, that club letters have developed over time into a distinctive, if not sui generis, species of commercial surety.

Keywords: P & I clubs, letters of undertaking, alternative security, ship arrest, admiralty proceedings in rem

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1 Introduction

Shipowners have always been keen to avoid actual or threatened arrests of their ships in admiralty proceedings, or to secure the release of their ships as promptly as possible by posting alternative security. The economic reasons for this are obvious. Admiralty courts have likewise always been acutely aware that keeping ships under arrest, especially for extended periods of time, is completely contrary to the broader interests of international trade – commercial vessels are ‘made to plough the ocean, and not to rot by the wall’.¹ However, the seemingly draconian powers of ship arrest serve a significant commercial purpose by providing claimants with access to efficient and effective security for their maritime claims.

Admiralty courts initially sought to balance these competing commercial interests and legal rights by allowing defendant shipowners to secure the release of their vessels by paying a substitute fund into court. The disadvantage of this security mechanism was that shipowners had to have immediate access to significant funds, which would then be tied up for the duration of the proceedings.²

Admiralty courts also permitted a more attractive variation of alternative security, the bail bond. Rather than physically paying funds into court, third party sureties give a direct undertaking to the court to satisfy any judgment it might deliver in the relevant admiralty proceedings. From a claimant’s perspective, the bail bond is attractive because it is an undertaking provided directly to the court, rather than being a third party private contract of surety — the bond itself serves as a substitute res, and any judgment in rem issued against the defendant shipowner therefore automatically binds the sureties, and can be directly enforced against them as a judgment debt without the need for further litigation.³

¹ *The Apollo* (1824) 1 Hagg 306, 312; 166 ER 109, 111.

² For a brief historical discussion of the different forms of security, see David Chong Gek Sian, ‘Security in Actions in Rem’ (1989) 1 Singapore Academy of Law Journal 81.

³ *The Nied Elwin* (1811) 1 Dods 50, 53; 165 ER 1229, 1330 (Sir William Scott): ‘This Court is not in the habit of considering the effect of bonds precisely in the same limited way as they are viewed by the courts of common law. In those courts they are very properly considered as mere personal securities for the benefit of those parties to whom they are given. In this place they are subject to more enlarged considerations: they are here regarded as pledges or substitutes for the thing itself, in all points fairly in adjudication before the Court.’

However, there are also obvious drawbacks to the bail bond. Because it is directly executable against the surety, a bail bond is only practically effective if the surety has adequate assets within the jurisdiction against which the bond can easily be executed — a bail bond provided by a foreign guarantor without local assets has been said to be ‘an empty, worthless piece of paper’.⁴ Bail bonds, like payments of funds into court, are also reactive instruments that can only be used to effect the release of a vessel after arrest and appearance by the defendant shipowner, rather than a means of proactively avoiding arrest in the first instance.⁵ They therefore cannot successfully mitigate all of the disruptive effects of arrest. Finally, because bail bonds are court instruments rather than private contracts of surety, they are often encumbered with bureaucratic formalities and inflexible rules.⁶

It therefore became increasingly commonplace in the 20th century for claimants and defendant shipowners in admiralty proceedings to enter into their own private security arrangements using a third party surety, either by negotiating mutually acceptable bank guarantees⁷ or P & I Club letters of undertaking (club letters).⁸ Club letters are nowadays the most routinely and ubiquitously used form of security in international shipping litigation, to the extent that bail bonds and payments into court in admiralty proceedings have become

⁴ *The Piya Bhum* [1993] SGHC 311, [1993] 3 SLR(R) 905 [10]-[11]. This would seem to be something of an hyperbole, based on the court’s pessimistic view that its judgment in rem would have ‘no extra-territorial force in that it cannot be enforced in a foreign country by direct execution’. This ignores the possibility of common law and statutory recognition and enforcement of foreign judgments. With respect, it therefore does not necessarily follow that a foreign bail bond is ‘worthless from the plaintiffs’ point of view’. For a more relaxed and arguably more pragmatic approach to bail bonds issued by foreign banks, see *Navios International Inc v The Ship Huang Shan Hai* [2011] FCA 895 and *The Hua Tian Long* [2008] HKCFI 465, [2008] 4 HKC 131.

⁵ See DC Jackson, *Enforcement of Maritime Claims* (4th edn, LLP 2005) [15.134]-[15.135] for a critique of this position.

⁶ For example, in the UK the form of bail bond only allowed cover for costs in the Admiralty Court, but not on appeal; it had to be extended by the cumbersome process of an Order in Council: see *The Helene* 3 Moo NS 240, 16 ER 90. In the US, the Federal Rules of Civil Procedure require the bail bond to avoid arrest to be ‘at least double the aggregate amount claimed by claimants in all actions begun and pending in which such vessel has been attached or arrested’: see FRCP Rule E(5)(b), discussed in Michael Marks Cohen, ‘Restoring the Luster to the P & I Letter of Undertaking’ (2011) 42 JMLC 255, 259.

⁷ Except in the US, where federal regulatory rules make it difficult for banks to issue guarantees on credit, necessitating the use of ‘evergreen’ standby letters of credit instead: see Cohen (n 6) 256-257.

⁸ On which, see generally Steven J Hazelwood and David Semark, *P&I Clubs: Law and Practice* (4th edn, LLP, 2010) Chapter 14; K X Li, ‘Acceptability of P&I Club Letters as security’ [2000] IJOSL 76.

practically obsolete in most Anglo-Common Law jurisdictions.⁹ The advantages of club letters are neatly summarised by Timothy Walker J in *The Oakwell*:¹⁰

[S]peedy security in a negotiated amount, no need for actual payment of money or provision of a bank guarantee, a negotiated choice of jurisdiction, avoidance of the delay, cost and inconvenience which an arrest inevitably causes, and continuing security for the claimant without risk. One of the primary purposes is to avoid the machinery of the Court being invoked until the time comes (which in a number of cases it never does) that it is necessary for the [claimants] to issue proceedings because the claim has not been settled.

2 Form of club letters

Most P & I clubs have standard draft letters for different situations. They all essentially include an undertaking by the P & I club, acting as the agent of the defendant shipowner,¹¹ to pay to the claimant's solicitors on demand such sums as may be awarded to the claimant in proceedings before a court or in arbitration up to a specified maximum. This undertaking is given in consideration for the claimant refraining from arresting the relevant vessel, or releasing the vessel already under arrest, as the case may be.

The club letter is therefore a binding contractual agreement between the claimant and defendant shipowner.¹² Although the letter is negotiated and drafted by the P & I club, the

⁹ See *The Alacrity* [1994] HKCFI 134, [1994] 2 HKC 659 [6] (Barnett J): 'Historically, the practice of the court was that a defendant could only obtain release of a vessel by way of bail bond. ... Additionally, a defendant could pay the amount of security claimed by a claimant into court. Since the 19th century, however, the practice has developed of the parties coming to a private arrangement between themselves, whereby a defendant gives security for a plaintiff's claim direct to a plaintiff by way of undertaking, indemnity or guarantee given by a P & I Club or a bank. This practice has grown to the extent that bail is almost unheard of while payment into court is unusual.' The ghost does linger on, however — the history of recovery of fees or commissions for bail bonds in Admiralty was discussed exhaustively by Sir Mark Waller in *ENE 1 KOS Ltd v Petroleo Brasileiro SA (The Kos)* [2010] EWCA Civ 772, [2010] 2 Lloyd's Rep 409.

¹⁰ *Galaxy Energy International Ltd v Assuranceforeningen Skuld (Ejenside) (The Oakwell)* [1999] 1 Lloyd's Rep 249, 253.

¹¹ See *The Berny* [1977] 2 Lloyd's Rep 533; *The Zuhai K and Selin* [1987] 1 Lloyd's Rep 151, 154. For a more detailed discussion of the contractual relationship between P & I clubs and their members, see Hazelwood and Semark (n 8) [14.35]-[14.54].

¹² See *The ASL Power* [2002] SGHC 164, [2003] 1 SLR(R) 545 [35] (Lai Siu Chiu J): 'The defendants had provided consideration to the plaintiffs for not arresting the tug and or any other vessels they owned; the plaintiffs

defendant shipowner 'remains the party with real monetary interest in the quantum that the plaintiff may be awarded on its claim'¹³ and it is the shipowner, rather than the P & I Club, that has locus standi to intervene and dispute variations of the security in admiralty proceedings.¹⁴

In some instances, however, identifying the parties to a club letter can be more complicated, particularly where the letter is not drafted or addressed with sufficient precision¹⁵ — club letters are often drafted under considerable time pressure — or where intermediaries are involved. The latter situation is illustrated by the facts of *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening*.¹⁶ In this case, initial negotiations regarding security were conducted between Dolphin, acting as a recovery agent for the cargo underwriters, who had become subrogated to the cargo interests' rights, and the Swedish Club on behalf of the defendant shipowner. The ensuing club letter was addressed to 'The Owners and/or Underwriters of the cargo detailed below ('the Cargo Interests') c/o Dolphin Maritime & Aviation Services Ltd'. Subsequently, the cargo underwriters and the club directly negotiated a settlement agreement bypassing Dolphin and agreeing not to call on the club letter. Dolphin sought unsuccessfully to claim its fees from the Swedish Club under the club letter. Christopher Clarke J held that the terms of the club letter did not purport to confer a benefit on Dolphin, and that the parties to the club letter did not intend it to be directly enforceable by Dolphin under section 1 of the Contracts (Rights of Third Parties) Act 1999 (UK).¹⁷

cannot be allowed to resile from their position or renege on the terms and conditions spelt out in that document for the provision of the P&I Club's undertaking.'

¹³ *Shell Refining Company (Federation of Malaya) Bhd v Neptune Associated Shipping Pte Ltd* [2007] 5 MLJ 84 [11].

¹⁴ See eg *FSL-9 Pte Ltd v Norwegian Hull Club (The FSL New York)* [2016] EWHC 1091 (Comm), [2017] 1 Lloyd's Rep Plus 18.

¹⁵ See eg *Almatrans SA v The Steamship Mutual Underwriting Association (Bermuda) Ltd (The Tutova)* [2006] EWHC 2223 (Comm), [2007] 1 Lloyd's Rep 104 (club letter addressed to Almatrans-Interferries Lines SA, a non-existent company, instead of Almatrans SA, the intended beneficiary, was held to be a mere misnomer); *The Elpis* [1999] 1 Lloyd's Rep 606 (club letter addressed to 'the owners of and other persons interested in the cargo referred to above (hereinafter together referred to as the 'Cargo Owners') held to include a claimant cargo owner added to the proceedings after the letter was issued); *Galaxy Energy International Ltd v Assuranceforeningen Skuld (Ejenside) (The Oakwell)* [1999] 1 Lloyd's Rep 249 (name of the defendant shipowner was inadvertently admitted but rectification was allowed); and *Fetim BV v Oceanspeed Shipping Ltd (The Flecha)* [1999] 1 Lloyd's Rep 612 (club letter only addressed to some of the cargo claimants).

¹⁶ [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep 123.

¹⁷ *Ibid* [65]-[84].

The typical wording of the club's undertaking to pay 'on demand' raises the fundamental conceptual issue of whether club letters impose an autonomous primary payment obligation on the P & I club issuing the letter, or whether the club only incurs secondary liability if — and only if — the claimant can prove that the sum covered by the letter is in fact due — typically on final judgment on the matter. In *The Rays*¹⁸ Gloster J analogised club letters to performance bonds and demand guarantees issued by banks in the following terms:¹⁹

So far as characterisation of the [Club's] obligation is concerned, I see no reason why the principles applicable to performance bonds (ie the imposition of a primary liability) should not apply to letters of undertaking issued by P&I Clubs, in circumstances such as these if, and only if, the language of the particular letter in question justifies such a construction. Obviously Clubs are not banks, but a claimant, which is agreeing to release a vessel from arrest, might well wish to obtain the certainty that a covenant of a Club, as insurer, will respond to a demand without having to prove any underlying liability on the part of the owner. The fact that Canmer has not identified any authority in which such undertakings have been so characterised, does not persuade me that the characterisation of a covenant as giving rise to primary liability is necessarily inconsistent with the function of a Club in these circumstances. But in this case, in my judgment, the wording makes clear that no such liability is imposed. The LOU does not describe itself in terms appropriate to a demand bond or similar instrument imposing primary liability. There is nothing in the language to rebut the presumption ... that, outside the banking context, and in the absence of clear words applicable to a performance bond, such an undertaking is not regarded as imposing primary liability.

In my view, the analogical application of performance bond principles to club letters in these obiter dicta is both artificial and unhelpful. It does not take into account the very different and specific contexts within which, and the purposes for which, these two commercial instruments

¹⁸ *Canmer International Inc v UK Mutual Steamship Assurance Association (Bermuda) Ltd (The Rays)* [2005] EWHC 1694 (Comm), [2005] 2 Lloyd's Rep 479.

¹⁹ *Ibid* [50]. See too *The Rio Assu (No 2)* [1999] 1 Lloyd's Rep 115, 121 where Clarke J noted in passing that the club letter 'is not strictly a contract of guarantee because, as is common ground, the club promises to pay as primary obligor upon the happening of a particular event'; and *FSL-9 Pte Ltd v Norwegian Hull Club (The FSL New York)* [2016] EWHC 1091 (Comm), [2017] 1 Lloyd's Rep Plus 18 [11], where Blair J agreed that club letters are 'analogous to a bank guarantee' and that 'the special principles of construction applicable to contracts of suretyship will not apply, since these are premised on the surety's secondary liability'.

are issued. While there may be some superficial formal similarities between them, in the sense that they are both third party payment undertakings triggered by specific conditions, there is the fundamental difference that club letters are designed to serve solely as security for a judgment within the context of admiralty proceedings.²⁰ Given this specific context, it seems inconceivable that a P & I club would ever intend to incur an abstract primary payment obligation triggered solely by a claimant's demand, as opposed to the court's determination of the underlying claim (and therefore the defendant shipowner's liability) on the merits. It seems equally inconceivable that an admiralty court would not regard such a demand by a claimant as being oppressive and amounting to an abuse of the admiralty process.

Club letters usually contain an undertaking to accept service of in rem and/or in personam admiralty proceedings²¹ on behalf of the defendant shipowners, within a specified period from the receipt of a request to do so, and to acknowledge service without prejudice to any application which may be made to the court for a stay of proceedings or for the release of the security.²² This is obviously particularly important to facilitate service of the writ to commence proceedings in rem where the club letter is provided in order to avoid threatened arrest. The position in the UK is that acknowledgment of service does not, in itself, amount to an unconditional appearance on the part of the defendant shipowner.²³ In other jurisdictions, however, particular care may need to be taken in the drafting of such clauses to ensure that they are interpreted as a conditional appearance on behalf of the defendant shipowner,

²⁰ The commercial purpose of club letters is 'to place the claiming party in no less a favourable position than if it had begun an action in rem and arrested the vessel': *FSL-9 Pte Ltd v Norwegian Hull Club (The FSL New York)* [2016] EWHC 1091 (Comm), [2017] 1 Lloyd's Rep Plus 18 [11], citing *Galaxy Energy International Ltd v Assuranceforeningen Skuld (Ejenside) (The Oakwell)* [1999] 1 Lloyd's Rep 249, 253. The obvious point is that the security in the vessel would only be available to the claimant on judgment in rem and judicial sale.

²¹ See *Galaxy Energy International Ltd v Assuranceforeningen Skuld (Ejenside) (The Oakwell)* [1999] 1 Lloyd's Rep 249 where the relevant vessel was sold for scrap, thus rendering in rem proceedings impossible. The club was nonetheless required to appoint English solicitors to acknowledge service of in personam admiralty proceedings. See also *The Juntha Rajprueck* [2003] EWCA Civ 378; [2003] 2 Lloyd's Rep 107. The specific requirements for service in in personam collision claims should be borne in mind, however: Hazelwood and Semark (n 8) [10.44].

²² See for example, the wording of the club letter in *The Vasso (formerly Andria)* [1984] 1 Lloyd's Rep 235. For the US position, see Cohen (n 6) 264-265.

²³ Nigel Meeson and John A Kimbell, *Admiralty Jurisdiction and Practice* (5th edn, Informa Law 2018) [4.31]; PD 61.3.11.

thereby preserving the defendant shipowner's right to protest the court's jurisdiction if this is considered necessary.²⁴

Where the club letter contains an undertaking to acknowledge service, this must be honoured even if the vessel is subsequently sold before a writ in rem is issued. Although the sale of the vessel may put paid to the possibility of an action in rem, acknowledging service will still be sufficient to establish in personam admiralty jurisdiction. A failure to comply with the acknowledgment of service clause in such circumstances will therefore amount to a breach of the club letter.²⁵

Club letters will almost always contain some form of choice of law and forum clauses. These will often, unsurprisingly, specify English law and English litigation or arbitration.²⁶ This is particularly important where the club letter is provided to avoid arrest in the context of the European Union regime, which would otherwise require arrest or full submission to establish jurisdiction.²⁷

The use of choice of law and forum clauses in club letters, however, may sometimes raise difficult questions as to whether these clauses were intended to govern disputes regarding the club letter and its enforcement only, or whether they were meant to operate as a variation on, or a complete substitution of, existing choice of law and forum clauses in charterparties, bills of lading or other commercial contracts relevant to the underlying claims in respect of which the club letter is issued as security. Such issues fall to be resolved on a case by case basis, on an application of ordinary contract interpretation principles.

²⁴ See, eg, *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (ex 'Frey')* [2005] FCAFC 68, (2005) 143 FCR 43 [2] (Allsop J): 'The club's provision of security was made conditional on the resolution of the "jurisdictional" point, which is the subject of the orders sought in the notice of motion seeking the setting aside of the writ, and the subject of these reasons. Put shortly, the club acknowledged that it would provide security if it were held that the arrest was authorised under the Admiralty Act 1988 (Cth) On the other hand, if there were no such authority, the letter did not respond.'

²⁵ *Galaxy Energy International Ltd v Assuranceforeningen Skuld (Ejenside) (The Oakwell)* [1999] 1 Lloyd's Rep 249.

²⁶ Such clauses are potentially problematic in the US context: see Cohen (n 6) 265.

²⁷ See Jackson (n 5) [15.139]; Meeson and Kimbell (n 22) [4.31]; *The Deichland* [1990] QB 361 (CA).

So, for example, in *The Quest*²⁸ Males J had little hesitation in holding that the context and comprehensive terms of the arbitration clause in the parties' club letter meant that they had clearly envisaged that this later clause would supersede various earlier charterparty arbitration clauses incorporated into the relevant bills of lading in order to streamline and consolidate the dispute resolution process. However, in *The Aeolian*²⁹ the English Court of Appeal held that an exclusive English jurisdiction and choice of law clause in the club letter was intended to govern the claimant's claim based on one agreement entered into between the parties, but was not convinced that the choice of law clause effectively rendered English law the proper law of another agreement out of which the defendant's counter-claim arose, even though the parties had anticipated the possibility of that counter-claim. This meant that the merits of the counter-claim had to be decided by the English courts on an application of the applicable proper law — in this case, Japanese law. The divergent outcomes in this area highlight the need for particular clarity and sophistication in the drafting of choice of forum and law clauses in club letters.

It seems clear, at least, that the inclusion of a choice of law clause in a club letter should not preclude an admiralty court from applying the relevant private international law rules of the governing law of the club letter to determine the merits of underlying disputes. So, for example, in *The ASL Power*³⁰ where the club letter contained a submission to Singapore jurisdiction and the application of Singapore law, the court considered and applied foreign law, as part of an application of Singapore conflict rules, to determine tortious, contractual and proprietary issues raised by the underlying claims.

Because club letters are negotiated between individual P & I clubs and claimants' solicitors, they are not expressed in uniformly standard terms, and may be subject to sometimes protracted and fraught negotiations over the exact wording of terms and the ambit of the undertaking. Examples of such disputes include the coverage of the relevant ship and sister

²⁸ *Viscous Global Investment Ltd v Palladium Navigation Corp (The Quest)* [2014] EWHC 2654 (Comm), [2014] Lloyd's Rep 600; see also *The Pia Vesta* [1984] 1 Lloyd's Rep 169 (agreement in an LOU to submit to English jurisdiction overrode an existing bill of lading clause providing for Danish jurisdiction).

²⁹ *ISS Machinery Services Ltd v Aeolian Shipping SA (The Aeolian)* [2001] EWCA Civ 1162; [2001] 2 Lloyd's Rep 641. The US cases also do not speak with one voice on this issue: Cohen (n 6) 258.

³⁰ [2002] SGHC 164, [2003] 1 SLR(R) 545. It must be said, however, that the conflicts approach adopted by the Court in this case was anything but clear.

ships,³¹ how narrowly defined the reference to the covered forum should be,³² what a ‘competent court’ means,³³ and whether cover should extend to successors of the parties to the letter.³⁴

In the absence of agreement by the parties, it seems that admiralty courts may be willing to step in and settle the wording and/or quantum of the club letter or bank guarantee as a last resort.³⁵ Stone J observed in *The Hua Tian Long*³⁶ that the court must do this in a broad-brush fashion, as best it can, on the basis of the material before it, and with reference to the accepted admiralty yardstick for the appropriate level of security:

In deciding the quantum issue the court must of course get a ‘feel’ of the case in terms of the specific heads of recoverability as put forward, but to dilute the quantum of security simply because of the existence of liability issues, which may or may not be decided in

³¹ See eg *Westshore Terminals Limited Partnership v Leo Ocean SA*, 2014 FCA 231 (Ontario); *The Evmar* [1989] SGHC 40, [1989] 1 SLR(R) 433. The court in *The Evmar* also held that the issuing of a club letter ‘under protest’ simply meant that the defendant shipowner was reserving its legal rights, as it was entitled to do, and that this did not justify the vessel being kept under arrest.

³² Where there is no existing exclusive arbitration agreement or jurisdiction clause, the claimant is entitled to have a security document that is appropriately generically drafted to cover both arbitration awards and judgments of any competent tribunal: *The Benja Bhum* [1993] SGHC 240, [1993] 3 SLR(R) 242. However, where the dispute is governed by an existing exclusive arbitration agreement or jurisdiction clause, the club LOU ought to be drafted with reference to such clauses. It is unreasonable for the claimant to demand security in broader terms: *The ICL Raja Mahendra* [1998] SGHC 419, [1998] 2 SLR(R) 922.

³³ In *The Juntha Rajprueck* [2003] EWCA Civ 378, [2003] 2 Lloyd’s Rep 107 the English Court of Appeal held that, in the context of a club letter, the adjective ‘competent’ should not be read narrowly to require physical presence of the vessel within the court’s territorial waters; the natural meaning of a ‘competent Court’ in relation to an in rem proceeding could be a Court competent to exercise subject matter jurisdiction over the claim. This conclusion was consistent with the wording of the club’s undertaking, which envisaged that jurisdiction would be established by the acceptance of service and not before. See also *Galaxy Energy International Ltd v Assuranceforeningen Skuld (Ejenside) (The Oakwell)* [1999] 1 Lloyd’s Rep 249.

³⁴ This is important because P & I club memberships and rights are not transferable or assignable without the club’s consent: Hazelwood and Semark (n 8) [14.23]. In *The Rio Assu (No 2)* [1999] 1 Lloyd’s Rep 115, 121 Clarke J, construing the club letter in its commercial context, held that it made no commercial sense for the letter to cover the shipowner but not its successor, and therefore ruled that the club was liable to the successor as well. The club’s appeal was dismissed by the Court of Appeal: *The Rio Assu (No 2)* [1999] 1 Lloyd’s Rep 115, 122. See also *The Arktis Fighter* [2001] 2 SLR(R) 157, [2001] SGHC 124 [10]: ‘[T]he plaintiffs must be entitled to an undertaking that will be nearly as secure as the vessel they had arrested; and if that can be achieved by inserting the words “and their successors” to the relevant portion of the letter of undertaking then it must, of course, be so inserted — a small matter of prophylaxis.’

³⁵ See eg *General Motors New Zealand Ltd v The Ship ‘Pacific Charger’* Unreported, HC Wellington, AD 135, 24 July 1981. But see *The Alacrity* [1994] HKCFI 134, [1994] 2 HKC 659, where Barnett J warns that the admiralty court must not ‘enter the arena and adjudicate upon the competing proposals for security put forward by the respective parties. [T]he court would in such circumstances be formulating the agreement for the parties.’

³⁶ [2008] HKCFI 397, [2008] 4 HKC 111 [87]. Security negotiations in this case were complicated by the fact that the vessel under arrest was a large floating derrick/crane that was not registered with any P & I Club.

favour of the arresting party, in my view is not the correct course to take; as the authorities make plain, the court is expected to proceed on the basis of the plaintiff's 'reasonably arguable best case'.

3 Claimant's role

Given that a club letter is only one of the forms of alternative security that a defendant shipowner can put up, the question arises as to whether, and in what circumstances, a claimant can justifiably reject a club letter and demand another form of security. The reasons given for so doing are usually the risk of the P & I club's insolvency or default, or a lack of assets within the jurisdiction against which the club letter can be enforced. In the earlier cases, challenges were also levelled at the admiralty courts' jurisdiction to accept club letters in any event, especially where relevant admiralty rules still referred expressly to traditional forms of security such as payment into court and bail bonds.

In most cases, these challenges proved unsuccessful. Courts in the UK,³⁷ New Zealand,³⁸ Canada,³⁹ Singapore,⁴⁰ Australia,⁴¹ Hong Kong⁴² and South Africa⁴³ have all held that club

³⁷ Jackson (n 5) [15.139]. CPR 61.5(10) now simply refers generically to 'security'.

³⁸ *General Motors New Zealand Ltd v The Ship 'Pacific Charger'* Unreported, HC Wellington, AD 135, 24 July 1981 (Savage J); affirmed by the New Zealand Court of Appeal, judgment reported as an appendix in [1988] 3 MLJ 263.

³⁹ See eg *Calogeras & Master Supplies Inc v Ceres Hellenic Shipping Enterprises Ltd* 2011 FC 1276 [12] n 6 (Gauthier J): 'Although the Rules do not provide for the use of a protection and indemnity ("P&I") letter of undertaking, it is well understood in the maritime community that, unless one is not dealing with well known and established P&I clubs, such letters are customarily accepted and used.'

⁴⁰ *The Arcadia Spirit* [1988] SGHC 8, [1988] 1 SLR(R) 73. See also Steven Chong, 'Charting Our Own Courses: The Australia, New Zealand, and Singapore Journeys in Maritime Law' (2016) 30 *Australia and New Zealand Maritime LJ* 1, 7 et seq; and Steven Chong, 'Maritime Law in Singapore and Beyond — Its Origins, Influence and Importance' NUS Centre for Maritime Law Working Paper 17/01, 16 <<https://law.nus.edu.sg/cml/pdfs/wps/CML-WPS-1701.pdf>>.

⁴¹ *Navios International Inc v The Ship Huang Shan Hai* [2011] FCA 895 (Rares J): 'International maritime trade and commerce could not be carried on if Admiralty Courts, with no better reason than the fact that a P&I Club or insurer was based in a foreign jurisdiction, rejected letters of undertaking that were proffered by them.'

⁴² *The Alacrity* [1994] HKCFI 134, [1994] 2 HKC 659.

⁴³ See eg *Transnet Ltd v The Owner of the Alina II (The Alina II)* [2011] ZASCA 129, 2011 (6) SA 206 (SCA), [2011] 4 All SA 350 (SCA); *Sea Melody Enterprises SA v Bulktrans (Europe) Corp (The Merak S)* [2002] ZASCA 18, [2002] 2 Lloyd's Rep 287.

letters are a sufficient and appropriate form of security in the context of admiralty proceedings, and therefore cannot be rejected by claimants out of hand.

In *The Arcadia Spirit*,⁴⁴ the Singapore High Court expressly addressed the claimant's concerns that the P & I club (in this case the Japan Club) providing the letter of undertaking had no presence or assets in Singapore, and was incorporated in a non-Commonwealth and non-Common Law jurisdiction, which could give rise to problems of enforcement in the event of a default. Joseph Grimberg JC was persuaded that the loss of the club's international reputation, were it to default on its letter, was sufficient to ensure that it would 'fulfil its obligations with honour',⁴⁵ and released the vessel on the strength of the club letter.

It now seems almost universally accepted, within the Anglo-Common Law world at least,⁴⁶ that the club letter is a routine and sufficient form of alternative security in admiralty proceedings.⁴⁷ The only exception would seem to be where the relevant P & I club's liquidity is successfully placed in doubt by the claimant on the basis of credible information, in which case the admiralty court may insist on a more reliably solvent surety. Courts are unlikely to entertain spurious suggestions of lack of financial viability on the part of established clubs, however, especially in relation to relatively modest cargo claims.⁴⁸

There does not, however, seem to be a particularly uniform judicial approach to the issue of P & I Club credit ratings. So, for example, in the Singapore case of *The Arktis Fighter*,⁴⁹ the

⁴⁴ [1988] SGHC 8, [1988] 1 SLR(R) 73.

⁴⁵ *Ibid* [2].

⁴⁶ It seems to still be standard practice in the US for club letters to contain a provision that the club has a duty, upon receiving a demand by the claimant, to file a bail bond issued by an authorised surety in substitution of the club letter. This appears to be necessary to allow for the possibility of constructive arrest of the bail bond (substitute res) in accordance with the US personification doctrine. Claimants may object to a club letter that does not contain such a substitution clause: Cohen (n 6) 259, 263-264, 266. For a survey of acceptability of club letters in other jurisdictions, see Li (n 8).

⁴⁷ Claimants refusing to accept an offer of appropriate security in the form of a club letter within a reasonable period therefore do so at their own peril, as this intransigence may have knock-on effects: see *DGM Commodities Corp v Sea Metropolitan SA (The Andra)* [2012] EWHC 1984 (Comm), [2012] 2 Lloyd's Rep 587.

⁴⁸ *Kallang Shipping SA v AXA Assurances Senegal (The Kallang)* [2006] EWHC 2825 (Comm), [2007] 1 Lloyd's Rep 160 [11].

⁴⁹ [2001] 2 SLR(R) 157, [2001] SGHC 124. See also the later unreported decision in *The Genmar Revenge*, discussed in <[http://eoasis.rajahtann.com/eoasis/lu/pdf/09-Apr-Letter-of-undertaking\(3\).pdf](http://eoasis.rajahtann.com/eoasis/lu/pdf/09-Apr-Letter-of-undertaking(3).pdf)>, where the Singapore High Court distinguished *The Arktis Fighter*, accepting a Skuld club letter as appropriate security (Skuld's S&P credit had by then improved to an A- or stable rating).

claimant objected to a club letter being provided by Skuld on the basis that the Club had recently been downgraded to category 'BB' by Standard & Poors in its credit ratings, which indicated 'vulnerable characteristics' and 'could lead to insufficient ability to meet financial commitments'. The Court held that this was enough to warrant caution, and ordered that the Skuld club letter could stand in the interim, provided that the defendants substituted a local banker's guarantee within a month. By contrast, in the Hong Kong case of *The Hua Tian Long*⁵⁰ Reyes J had no difficulty accepting a bond from a Hong Kong subsidiary of China Merchants Bank Co Ltd, which had a Standard and Poors rating of BBB- rating for long term obligations, noting that other P & I clubs 'from which this Court routinely accepts bail bonds' had roughly similar credit ratings.⁵¹

4 Court's role

Unless the claimant agrees to the release of the arrested vessel, release is at the discretion of the admiralty court.⁵² Although release of a vessel will exceptionally be granted without security, the normal position is that the court will endeavour to provide the claimant with alternative security that is equivalent to the security afforded by the arrested vessel. As we have seen, the provision of alternative security was formerly supervised directly by the court, in terms of ordering funds to be paid into court, or a bail bond to be executed in court. Because club letters are private contractual arrangements between the parties and a third party commercial surety, however, the traditional view was that admiralty courts had no jurisdiction to directly regulate or dictate their terms:⁵³

⁵⁰ [2008] HKCFI 465, [2008] 4 HKC 131, sidestepping *The Piya Bhum* [1993] SGHC 311, [1993] 3 SLR(R) 905.

⁵¹ Ibid [20]: 'Thus, for example, London Steamship Owners Mutual Insurance Association has a BBB_{pi} rating (the "pi" subscript signifying that the rating given does "not reflect in depth meetings with an issuer's management and are therefore based on less comprehensive information than ratings without a 'pi' subscript"); Steamship Mutual Underwriting Association a BBB+ rating; West of England Ship Owners' Mutual Insurance Association a BBB_{pi} rating; Swedish Club a BBB rating; and American Steamship Owners Mutual P & I Association a BB- rating.'

⁵² Meeson and Kimbell (n 22) [4.78].

⁵³ Kenneth C McGuffie, PA Fugeman and PV Gray, *Admiralty Practice* (Stevens, 1964) 139. The argument persists in more recent cases — see, eg *Shell Refining Company (Federation of Malaya) Bhd v Neptune Associated Shipping Pte Ltd* [2007] 5 MLJ 84 [20]: 'As this is a contract between the plaintiffs and a third party, the defendant maintains that the court has no jurisdiction albeit statutory or inherent to rewrite or substitute a separate contract for that achieved by consensus between the parties.'

There are certain alternatives to the bail bond. It may, for example, be agreed between the solicitors for the parties that the plaintiff will be satisfied with an undertaking on behalf of the defendants to enter an appearance and to provide security if called upon to do so. A guarantee by a bank or insurance company or other suitable company or corporation may be agreed upon, guaranteeing payment of any sum which may be held to be due to the plaintiff or may be agreed between the parties following a settlement. Such a guarantee is purely private and has nothing to do with the court.

However, the matrix of judicial administration within which club letters are issued and operate necessarily means that this view is no longer accurate.⁵⁴ Club letters are no longer regarded as 'purely private' arrangements and are routinely subjected to the admiralty courts' supervisory jurisdiction and intervention.

As already discussed, admiralty courts will actively investigate the liquidity of P & I clubs where there are genuinely founded concerns about the quality of the security being put forward. In addition, courts have actively intervened in respect of the quantum of cover in club letters, as well as the quality of security provided. Courts should not, however, become involved in the negotiation of the minutiae of the club letter itself. As Tamberlin J explained in *Owners of the Ship Carina v The Owners or Demise Charterers of the Ship MSC Samia*:⁵⁵

Where ... conditions proffered in the undertaking are in contest ... it is generally inappropriate for the court to interfere with the negotiations of the parties or to impose terms on them. It will often be more appropriate for the court to leave that question to commercial negotiation between the parties. If they cannot agree, the procedures relating to the provision of a bail bond or payment into court can be pursued. The court should not be placed in a position of arbitrating or mediating in respect of ongoing negotiations between the parties as to what are the terms of an acceptable security. If there is to be any involvement of the court it should occur where it is established that

⁵⁴ So too Jackson (n 5) [15.140]: 'The view taken in 1973 that the security is not in the court's control would seem now to be overtaken by the control to be exercised over the form, duration and amount of security.'

⁵⁵ (1997) 148 ALR 623, 630.

there has been an abuse of the negotiating process in a way which amounts to clearly oppressive conduct or an abuse of the court's process.

As is apparent from the above quotation, the basis for the admiralty court's supervisory jurisdiction of club letters is said to derive from its inherent jurisdiction to prevent oppressive conduct or abuse of process. This means that admiralty courts will not hesitate to intervene where the claimant demands excessive security, either in terms of quantum⁵⁶ or breadth of cover,⁵⁷ or where the arrest of the vessel is wrongful or amounts to an abuse of process. Admiralty courts will also exercise their equitable jurisdiction to intervene to assist where security turns out to be inadequate as a result of the defendant's or third party fraud, justifiable mistake, or where the full extent of the underlying claim could not reasonably be ascertained at the time of negotiating the security.

However, the courts' discretion to vary club letters to provide an adequate level of security is not entirely open-ended. Where a claimant has simply underestimated the amount of security needed, despite possessing 'the requisite knowledge and ability to assess the quantum of damages likely to arise', the court is less likely to be sympathetic, or exercise its discretionary jurisdiction to intervene. In *The Borcos Takdir*⁵⁸ Nallini Pathmanathan J pithily stated the principle as follows:

The Plaintiff has now found that sum to be less than adequate. That in itself does not warrant interference by this Court in the purported exercise of its inherent admiralty jurisdiction. This is because no abuse or oppression has been shown, which I accept to be the basis on which the Court can, in a suitable case, intervene This Court cannot re-write or substitute the private third party security arrangement reached between the Plaintiff and the P & I Club on behalf of the Defendant.

⁵⁶ See eg *The Moschanthy* [1971] 1 Lloyd's Rep 37; *The Suhaili 5201* [1987] SLR(R) 541; [1987] SGCA 17; *Det Norske Veritas AS v The Ship Clarabelle* [2002] 3 NZLR 52; [2002] 2 Lloyd's Rep 479 (CA); *Freshpac Machinery Pty Ltd v Ship Joana Bonita* (1994) 125 ALR 683; *Shell Refining Company (Federation of Malaya) Bhd v Neptune Associated Shipping Pte Ltd* [2007] 5 MLJ 84.

⁵⁷ See eg *The ICL Raja Mahendra* [1998] SGHC 419, [1998] 2 SLR(R) 922.

⁵⁸ [2011] 6 MLJ 562.

In addition, admiralty courts will police club letters to some extent to ensure that they provide an appropriate quality of security. In terms of quantum, this normally means that the claimant is entitled to security in an amount sufficient to cover its best reasonably arguable case, including interest and costs, up to the total value of the res.⁵⁹ In terms of the form of security, this normally means security that will comprehensively cover in rem and/or in personam actions brought in the relevant competent tribunal, for the full duration of the proceedings. However, there are limits to this policing mechanism. The court cannot directly order P & I clubs to increase the level of security available under a club letter if the club does not wish to do so, even if there is a 'liberty to apply' clause in the letter.⁶⁰

... English Admiralty procedure applies as between the parties to the particular dispute, here owners and charterers. The P & I Club will not be a party to the court proceedings, any more than a bank would be a party if security had been given by way of a bank guarantee instead of an LOU. In other words, adjustment [to the security] takes place between the parties which are in dispute.

In such circumstances, a 'liberty to apply' clause in a club letter will rather be interpreted as enabling the claimant to apply to the court to allow arrest (or rearrest) the defendant's vessel if the security under the club letter proves inadequate, notwithstanding the usual prohibition against arrest or rearrest.⁶¹

Finally, just as admiralty courts exercise their discretionary powers to release vessels, they also possess a discretionary inherent jurisdiction, said to be based on their equitable powers to order the surrender or cancellation of false or ineffective contracts, to decide when and in what circumstances the alternative security provided by club letters will be cancelled or released.⁶² Where there has been an abuse of process of the admiralty court that taints the club letter, for example a failure to disclose material facts in the claimant's ex parte

⁵⁹ Meeson and Kimbell (n 22) [4.83]; *Det Norske Veritas AS v The Ship Clarabelle* [2002] 3 NZLR 52; [2002] 2 Lloyd's Rep 479 (CA); *FSL-9 Pte Ltd v Norwegian Hull Club (The FSL New York)* [2016] EWHC 1091 (Comm), [2017] 1 Lloyd's Rep Plus 18 [8].

⁶⁰ *FSL-9 Pte Ltd v Norwegian Hull Club (The FSL New York)* [2016] EWHC 1091 (Comm), [2017] 1 Lloyd's Rep Plus 18 [25].

⁶¹ *Ibid* [37]; and see Part 5 below.

⁶² *The Wladyslaw Lokietek* [1978] 2 Lloyd's Rep 520, 533, 539; *The Alacrity* [1994] HKCFI 134, [1994] 2 HKC 659.

application for arrest, the court will make an unconditional order for the discharge of the security obtained by reason of the arrest.⁶³

In cases where admiralty proceedings are stayed in favour of a foreign exclusive jurisdiction or arbitration cases, it does not follow that the alternative security in the form of a club letter will necessarily be released. The court may rule that the club letter has to remain in place, particularly where there are justifiable doubts that the defendant shipowner will satisfy any foreign arbitration award. As Brandon J famously said in *The Rena K*:⁶⁴

The choice of forum for the determination of the merits of a dispute is one thing. The right to security in respect of maritime claims under the Admiralty law of this country is another. This distinction has been recognised and given effect to by the way in which the Court has exercised its discretion in foreign jurisdiction clause cases and vexation cases, in which it has either treated the plaintiff's right to security as a material factor in refusing a stay, or else has only granted a stay subject to a term for the provision of alternative security.

If this distinction between choice of forum on the one hand and right to security on the other is recognised and given effect to in foreign jurisdiction clause cases and vexation cases, I cannot see any good reason why it should not equally be recognised and given effect to in arbitration cases.

5 Failure or default

The international success of club letters as commercial instruments is largely underpinned by their reliability and the trust of the international maritime industry in the P & I club sector. Insolvencies of P & I clubs and failures to honour their undertakings are relatively rare. However, when such failures or defaults do occur in the admiralty context, the question

⁶³ *The Vasso (formerly Andria)* [1984] 1 Lloyd's Rep 235, 243.

⁶⁴ *The Rena K* [1978] 1 Lloyd's Rep 545, 559. This discretion is now codified in several Anglo-Common Law jurisdictions: see eg s 11 of the Arbitration Act 1996 (UK); s 7(1)(b) of the International Arbitration Act, Cap 143A (Singapore).

immediately arises whether the claimant has a right to arrest or rearrest the defendant's vessel to seek effective security.

The traditional view, which was much less problematic in the context of bail bonds and funds paid into court, was that the alternative security thereby provided was a complete substitute for the res, and that all existing maritime claims against the res transferred to the alternative security instead.⁶⁵ This would still seem to be the position in maritime jurisdictions that follow the personification theory more faithfully.⁶⁶ Indeed, the whole point of club letters is to avoid the arrest or rearrest of the vessel in respect of claims covered by the club letter,⁶⁷ and most club letters expressly provide that a prohibition against arrest or rearrest is part of the bargain.⁶⁸

Where third-party bank guarantees or club letters fall over, however, this traditional theory raises the possibility that claimants will be estopped from arresting or rearresting vessels or seeking another alternative form of security, as their claims will have merged with the initial failed security or in rem judgment.⁶⁹ Admiralty courts in Anglo-Common Law jurisdictions⁷⁰ have predictably responded to this unpalatable possibility in a flexible and pragmatic fashion, by permitting a second bite of the security cherry where this is considered necessary to 'do full justice to the plaintiff'.⁷¹

⁶⁵ *The Wild Ranger* (1863) Br & Lush 84, 87; 167 ER 310, 312 (Dr Lushington): 'Now bail given for a ship in any action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action.' See also *NM Paterson & Sons Ltd v The Birchglen* [1990] 3 FC 301, 36 FTR 92, 1991 AMC 978 [11]-[18].

⁶⁶ *Petroleos Mexicanos Refinacion v M/T King A*, 554 F 3d 99, 2009 AMC 67, (3d Cir NJ 2009): 'Generally, once a LOU is issued, the letter becomes a complete substitute for the res and the maritime lien transfers from the vessel to the LOU.' Also see Grant Gilmore & Charles L Black, *The Law of Admiralty*, (2nd ed, Foundation Press 1975) 799 § 9-89: 'With respect to a lien in suit the effect of release is to transfer the lien from the ship to the fund represented by the bond or stipulation. The lien against the ship is discharged for all purposes and the ship cannot again be libeled in rem for the same claim.'

⁶⁷ *The Christiansborg* (1885) LR 10 PD 141 (CA); Meeson and Kimbell (n 22) [4.80].

⁶⁸ But see *FSL-9 Pte Ltd v Norwegian Hull Club (The FSL New York)* [2016] EWHC 1091 (Comm), [2017] 1 Lloyd's Rep Plus 18 on the effect of a 'liberty to apply' clause in a club letter.

⁶⁹ See eg *The Kalamazoo* (1851) 15 Jur 885; *The Point Breeze* [1928] P 135 and *The Alletta* [1974] 1 Lloyd's Rep 40. But see *The Daien Maru No 18* [1984] SGHC 43, [1983-1984] SLR(R) 787, [1986] 1 Lloyd's Rep 387.

⁷⁰ The position appears to be somewhat stricter in the US, where courts only allow rearrest on the basis of fraud or mistake, where such mistake is 'tinged with fraud or misrepresentation or [is] the mistake of the court and not that of the claimant': *Industria Nacional Del Papel CA v M/V Albert F*, 730 F 2d 622, 1985 AMC 1437 (11th Cir Fla 1984); *Petroleos Mexicanos Refinacion v M/T King A*, 554 F 3d 99, 2009 AMC 67 (3d Cir NJ 2009); Cohen (n 6) 262.

⁷¹ *The Hero* Br & L 447, 448; (1865) 167 ER 436 (Dr Lushington).

A classic example of this pragmatic flexibility is provided by *The Ruta*,⁷² where the owners of the *Lutra II*, a vessel involved in a collision with the *Ruta*, had obtained a club letter from the *Ruta's* owners' P & I club, Ocean Marine Mutual Insurance Association Ltd, which subsequently went into liquidation and failed to honour its letter.⁷³ David Steel J nonetheless allowed the owners of the *Lutra II* to join in subsequent related admiralty proceedings against the *Ruta*, even in a situation where judgment in those proceedings had already been given, on the basis that it would be unjust to deprive the owners of the *Lutra II* from accessing the available security, or to treat them differently from the other plaintiffs in the related proceedings.

In deciding how to approach the thorny issues arising from failed alternative security, admiralty courts arrogate to themselves a broad discretion based on the facts of each particular case and 'the requirements that full justice and equity be applied'.⁷⁴ This may seem problematic in terms of potentially generating commercial uncertainty, but is arguably justifiable in terms of the admiralty court's overriding policy concerns to avoid oppression and unfairness and treat all maritime creditors even-handedly.

Club letters are directly enforceable against the club by their named beneficiaries⁷⁵ as normal contracts of surety once a final judgment has been delivered in the proceedings or the parties have reached a settlement. The usual contractual remedies are available for breaches of club letters, namely a declaration that the club is in breach, an award for damages, or a mandatory injunction requiring performance of the club's obligations under the letter (typically to appoint solicitors to accept and acknowledge service of in rem proceedings).⁷⁶ In addition to directly enforcing club letters, courts will issue anti-suit injunctions, where these are an available remedy, in support of club letters where the claimant arrests the defendant's vessel or a sister ship in circumstances that amount to an abuse of process, or have the effect of

⁷² [2000] 1 Lloyd's Rep 359.

⁷³ For further fall-out from the Ocean Marine liquidation, see *MV Ivory Tirupati v Badan Urusan Logistik (The Ivory Tirupati)* [2002] ZASCA 155, [2003] 1 All SA 55 (SCA).

⁷⁴ *NM Paterson & Sons Ltd v The Birchglen* [1990] 3 FC 301, 36 FTR 92, 1991 AMC 978 [26] (Joyal J).

⁷⁵ Typically, the claimant or its underwriters: see *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep 123.

⁷⁶ See also *The Juntha Rajprueck* [2003] EWCA Civ 378, [2003] 2 Lloyd's Rep 107.

undermining the integrity and efficacy of the club letter that is already in place, and the admiralty proceedings that are already underway.⁷⁷

6 Conclusion

Club letters are highly successful commercial instruments that have evolved over the past half a century or so into the paradigmatic form of alternative security in admiralty proceedings. Their usefulness has been further enhanced now that the English Court of Appeal has officially (and some would say, belatedly) also accepted them as an acceptable security mechanism for constituting a limitation fund.⁷⁸ The ongoing success of club letters stems from their flexibility, their convenience and their overall reliability.

Club letters provide a fascinating example of highly effective private ordering by commercial parties within the broader framework of public judicial administration. Although club letters are undoubtedly contractual in nature and are construed by the courts in accordance with general contract interpretation principles,⁷⁹ they have been required to respond and adapt to the particular requirements and policy concerns of the admiralty jurisdiction. The case law on club letters evidences a relatively consistent trend away from the traditional view that they are separate, private and collateral arrangements outside the court's jurisdiction, to the current position where admiralty courts actively exercise their powers of supervision, revision and cancellation over club letters, in the interests of providing appropriate security for admiralty proceedings and achieving overall justice for the parties.

⁷⁷ *Atlasnavios Navegação Lda v Ship Xin Hai Tai* (2012) 291 ALR 795. See also *Kallang Shipping SA v AXA Assurances Senegal (The Kallang)* [2006] EWHC 2825 (Comm), [2007] 1 Lloyd's Rep 160; *Kallang Shipping SA Panama v AXA Assurances Senegal (The Kallang No 2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124; *Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou LO (The Duden)* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep 145; *Shipowner's Mutual Protection & Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386, [2016] 1 Lloyd's Rep 641; but see *Aline Tramp SA v Jordan International Insurance Co (The Flag Evi)* [2016] EWHC 1317 (Comm), [2017] 1 Lloyd's Rep 467.

⁷⁸ *Kairos Shipping Ltd v Enka & Co LLC (The Atlantik Confidence)* [2014] EWCA Civ 217, [2014] 1 Lloyd's Rep 586.

⁷⁹ See *The Rio Assu (No 2)* [1999] 1 Lloyd's Rep 115, 120-12 (Clarke J); 123-136 (Waller LJ).

It may be argued, therefore, that club letters provided as alternative security in the context of admiralty arrest have developed over time into a distinctive, if not sui generis, species of commercial surety. Although they display the basic conceptual characteristics of all contracts of commercial surety, they are so heavily imprinted by the peculiar mercantile, procedural and jurisdictional matrix in which they operate that their form and function can only be fully appreciated within this specific context. Club letters are, and will continue to be, fundamentally moulded by the dictates of international shipping and admiralty jurisdiction and procedure.