[2007–09 Gib LR 154]

MERLIN UNTERNEHMENSVERWALTUNG GMBH and OTHERS v. ZELIKOV

COURT OF APPEAL (Stuart-Smith, Ag. P., Aldous and Kennedy, JJ.A.): September 17th, 2007

Shipping—limitation of ship-owner's liability—limitation claim—jurisdiction—ship-owner may limit liability in jurisdiction of choice under Convention on Limitation of Liability for Maritime Claims 1976, art. 10.1, without necessarily constituting limitation fund—may make limitation claim before liability proceedings commenced against him since claim need not be made in same jurisdiction as liability proceedings

The respondent brought an action in the Supreme Court against the appellant, seeking to limit his liability in respect of damage allegedly caused to the appellant's property.

A fire at a port in Ibiza destroyed both the appellant's and the respondent's yachts. The appellant alleged that the damage was caused by a fire on the respondent's boat. The respondent, whilst denying liability, sought a declaration that he could limit his liability to a fixed sum. He made a payment into court pursuant to the CPR, r.61.11(18) to limit his liability through the constitution of a limitation fund and was granted permission to serve the limitation claim form on the appellant in Germany. The appellant acknowledged service and, in an attempt to contest the jurisdiction of the Gibraltar court, applied to set aside service of the claim form under r.11 of the CPR and commenced liability proceedings against the respondent in Spain.

The Supreme Court (Schofield, C.J.) dismissed the appellant's application. It held that (a) it could assume jurisdiction over the respondent's application since he had shown a good arguable case that he was domiciled in Gibraltar (and the courts of a defendant's domicile (within the European Union) were given jurisdiction by Council Regulation (EC) No. 44/2001, art. 2(1)). He had met the domicile threshold created by para. 8(2) of Schedule 10 to the Civil Jurisdiction and Judgments Act, which provided that he was domiciled in Gibraltar if he was resident here and "the nature and circumstances of his residence indicate that he has a substantial connection with Gibraltar." He had adduced evidence of his regular use of his housing, his five-year permanent residence status, his banking activities as well as his Category 2 tax residency status which had, as part of its eligibility criteria, a requirement of appropriate accommodation in Gibraltar; and (b) it could

hear the limitation action even though the appellant was domiciled in Germany.

On appeal, the appellant submitted that the Supreme Court decision was wrong because (a) the respondent had adduced insufficient proof that he was domiciled in Gibraltar, since although his evidence showed he had a property here that had been used recently, he had not shown that it was he who had used it; and (b) the Convention on Limitation of Liability for Maritime Claims 1976 did not allow the respondent to limit his liability in a different jurisdiction to that in which the liability proceedings had been brought, or before the liability proceedings had been commenced against him since (i) art. 10 did not require a limitation fund to be constituted at all for a ship-owner to limit his liability and the interpretation of this provision should be consistent with art. 11 (also dealing with the constitution of a limitation fund) and the Convention as a whole; (ii) neither arts. 10 nor 11 expressly required the respondent to limit his liability before the commencement of liability proceedings in the same jurisdiction, and the right to limit liability could therefore only be invoked in response to a claim attempting to enforce his liability; (iii) although art. 10.1 did not require a limitation fund to be constituted in order for a ship-owner to limit his liability, a State could amend its national law to require a limitation fund when "an action is brought in its Courts to enforce a claim subject to limitation." Although this had not been done in the United Kingdom or Gibraltar, art. 10.1 should be interpreted in conformity with art. 11.1. The reference in art. 10.1 to an action being brought before national courts referred only to actions which were "legal proceedings . . . in respect of claims subject to limitation" (as in art. 11.1) which were actions enforcing the liability of ship-owners rather than actions for limitation of liability. The respondent therefore had to limit his liability in the same jurisdiction in which the liability proceedings had been commenced; and (iv) the interpretation of art. 10.1 also depended on art. 10.3 which stated that the resolution of procedural issues should be under "the national law of the State Party in which action is brought." The phrase "action is brought" should be interpreted in the same way in both articles and it therefore did not refer to the jurisdiction in which the respondent sought to limit his liability but the jurisdiction in which the claim to enforce the ship-owner's liability was made.

Held, dismissing the appeal:

(1) The Supreme Court had been correct to assume jurisdiction over the respondent on the basis that he was domiciled in Gibraltar. Although the court might not have come to the same conclusion as the Supreme Court on the facts, its decision should be respected as it had been made by a reasonable judge who had properly directed his mind to the issue and it would be inappropriate to reverse it: there was just sufficient evidence to support the respondent's submission that he was a Gibraltar domiciliary (paras. 19–21).

(2) On the proper interpretation of the Convention, the respondent was able to limit his liability before the commencement of liability proceedings in the same jurisdiction, *i.e.* in Gibraltar rather than Spain. The court's primary consideration when interpreting art. 10 should be the natural meaning of the words in their context and in the light of the purpose of the Convention as a whole. The option granted to Member States in art. 10.1 (allowing them to require parties limiting their liability to constitute a limitation fund) implied that when the option was not taken (as in Gibraltar), limitation proceedings could be commenced without the constitution of a fund and the respondent could therefore limit his liability in any jurisdiction of his choosing, since the making of a limitation claim was not restricted to constituting a limitation fund in the jurisdiction of the liability proceedings. Moreover, since art. 10.1 was clearly worded, it could not be cut down by implication from art. 11.1, as they dealt with separate issues regarding the constitution of a limitation fund. Although arts. 10.1 and 10.3 used the same phrase ("action is brought") it did not have the same significance in each article and should be interpreted differently. It was common ground that before the Convention was made a ship-owner could commence limitation proceedings in the court of his choice. Although the Convention had modified the law regarding limitation and liability claims, it was unlikely that major changes to liability and limitation, as suggested by the appellant, would have been introduced without discussion during the drafting of art. 10 (para. 25; para. 28).

Cases cited:

(1) *Bank of Dubai Ltd.* v. *Abbas,* [1998] Lloyd's Rep. Bank. 230; [1997] I.L.Pr. 308, referred to.

(2) *Canada Trust Co.* v. *Stolzenberg (No. 2)*, [2002] 1 A.C. 1; [2000] 3 W.L.R. 1376; [2000] 4 All E.R. 481; [2001] C.L.C. 118, referred to.

(3) *Deep Vein Thrombosis & Air Travel Group Litigation, In re*, [2006] 1 A.C. 495; [2005] 3 W.L.R. 1320; [2006] 1 Lloyd's Rep. 231; [2005] 2 C.L.C. 1083; [2006] P.I.Q.R. P14; [2005] UKHL 72, referred to.

(4) *Fothergill* v. *Monarch Airlines Ltd.*, [1981] A.C. 251; [1980] 2 All E.R. 696; [1980] 3 W.L.R. 209; [1980] 2 Lloyd's Rep. 295, referred to.

(5) *Harding* v. *Wealands*, [2007] 2 A.C. 1; [2006] 3 W.L.R. 83; [2006] 4 All E.R. 1; [2006] 2 C.L.C. 193; [2006] RTR 35; [2006] UKHL 32, referred to.

(6) *I.C.L Shipping Ltd.* v. *Chin Tai Steel Enterprise Co. Ltd., The ICL Vikraman*, [2004] 1 W.L.R. 2254; [2004] 1 Lloyd's Rep. 21; [2004] 1 C.L.C. 373; [2003] EWHC 2320 (Comm), referred to.

(7) *Seismic Shipping Inc*. v. *Total E&P UK Plc.*, *The Western Regent*, [2005] All E.R. (Comm) 515; [2005] 2 Lloyd's Rep. 359; [2005] 2 C.L.C. 182; [2005] EWCA Civ 985, followed.

(8) *Sherbro, The* (1996), Supreme Ct. (The Netherlands), unreported, referred to.

Legislation construed:

Civil Jurisdiction and Judgments Act 1993, Schedule 10, para. 8(2): The relevant terms of this paragraph are set out at para. 13.

Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. 2001, L.12), art. 2(1): The relevant terms of this paragraph are set out at para. 12.

Convention on Limitation of Liability for Maritime Claims 1976 (I-24635), art. 10: The relevant terms of this article are set out at para. 23.

art. 11: The relevant terms of this article are set out at para. 23.

J.M. Turner for the appellant;
Miss G. Andrews, Q.C. for the respondent.

1 **STUART-SMITH, Ag. P.,** delivering the judgment of the court: This is an appeal by the first defendant, brought with the leave of the Chief Justice against his order of May 15th, 2007, by which he dismissed the appellant's challenge to the jurisdiction of the Supreme Court of Gibraltar. The Chief Justice's reasons are contained in two judgments. The first was given on January 12th, 2007 on what may be called "the domicile point" in which he held that the respondent was domiciled in Gibraltar. The second was given in a reserved judgment on May 15th, 2007 on what may be termed "the *Western Regent* point" in which he held that the Gibraltar court had jurisdiction to hear a limitation action, notwithstanding that the appellant is domiciled in Germany. In so doing, the Chief Justice followed the decision of the English Court of Appeal in *Seismic Shipping Inc.* v. *Total E&P UK Plc.*, *The Western Regent* (7).

Factual background

2 During the night of December 18th–19th, 2005 the yachts *Olympia* and *Timbali II* were destroyed by fire in Ibiza. The respondent was the owner of the *Olympia*, the appellant was the owner of *Timbali II*. The appellant says that the destruction of its yacht was caused by the fire on the *Olympia* and that the respondent is responsible for it. Other yachts were destroyed or damaged in the same incident. Their owners are comprehended in the second and subsequent appellants.

Procedural history

3 The respondent, whilst denying liability, commenced these proceedings on April 26th, 2006 when he issued a claim form in which he sought a general decree that he was entitled to limit his liability (if any) arising out of the fire to the sum of £136,294.94. On the same day he also sought permission to serve the claim form on the appellant in Germany.

4 On the May 31st, 2006, the respondent constituted a limitation fund under the provisions of r.61.11(18) of the CPR by making a payment into court. The following day, the Chief Justice granted permission to serve the appellant. Having being served, the appellant filed an acknowledgement of service indicating an intention to contest the jurisdiction and on November 3rd, 2006 issued its application under r.11 of the CPR to set aside service of the claim form.

5 On December 15th, 2006 the appellant commenced liability proceedings against the respondent in Spain.

Issues before the Chief Justice

6 The appellant advanced two arguments in support of his application, both of which the Chief Justice decided against him. Assuming the correctness of the English Court of Appeal's decision in *The Western Regent* (7), the court could only take jurisdiction over the first defendant in the circumstances of this case if the respondent could show a good arguable case that he was domiciled within the jurisdiction of Gibraltar, which he could not ("the domicile point"). In the alternative, if the court found that the respondent had demonstrated that he was domiciled in Gibraltar, it could not entertain limitation proceedings under the Convention on Limitation of Liability for Maritime Claims 1976 in the absence of liability proceedings within the jurisdiction. To the extent that the decision in *The Western Regent* was to the contrary effect, it was wrong ("the *Western Region* point").

7 In this appeal, Mr. Turner, on behalf of the appellant, submits that the Chief Justice was wrong on both points.

Legal background to limitation of liability

8 It is common ground that the 1976 Convention applies to Gibraltar. The statutory basis for this is the Gibraltar Merchant Shipping (Safety, etc.) Act 1993, s.119(1) and para. (k) of the Schedule.

9 The right of a ship-owner to limit his liability in relation to certain classes of claims to a certain sum, calculated in accordance with the tonnage of his ship, does not qualify the substantive right of the claimant against the ship-owner, but is a procedural right to limit the ship-owner's overall liability to the claimants to a fixed sum (see Clarke, L.J. in *The Western Regent* (7) ([2005] 2 Lloyd's Rep. 359, at para. 52), approved by Lord Hoffmann in *Harding* v. *Wealands* (5) ([2006] 4 All E.R. 1, at para. 47)). The nature of the right to limit is that it does not attach to a particular claim but applies to the aggregate of claims which arise on a distinct occasion (see art. 9 of the 1976 Convention).

10 The 1976 Convention came into force on December 1st, 1986. It is

unnecessary at this stage to refer to the previous law in any detail since significant changes were introduced by the 1976 Convention. It is sufficient to note that prior to the 1976 Convention, a ship-owner could commence limitation proceedings in the jurisdiction of his choice, and now the ship-owner is entitled to limit his liability as of right unless the claimant can show that the person liable is guilty of deliberate or reckless conduct. This provision is considerably more advantageous to the ship-owner than that which previously obtained.

11 The right to limit may be invoked in two different ways (i) by way of partial defence to liability proceedings; or (ii) by way of an action for a general decree of limitation, with or without constituting a limitation fund. We are concerned with the second method.

12 Council Regulation (EC) No. 44/2001 of December 22nd, 2000 ("the Judgments Regulation") applies to Gibraltar (see Civil Jurisdiction and Judgments Act 1993, s.38 and Schedule 10). Article 2(1) of the Judgments Regulation provides that "subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." The appellant is domiciled in Germany and must therefore be sued in the German courts unless the respondent can bring himself within one of the exceptions to art. 2(1) (see art. 3(1)). The respondent relies on art. 7 which provides:

> "Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability."

13 Paragraph 8(2) of Schedule 10 to the Civil Jurisdiction and Judgments Act provides that—

> "an individual is domiciled in Gibraltar if and only if—
>
> (a) he is resident in Gibraltar; and
>
> (b) the nature and circumstances of his residence indicate that he has a substantial connection with Gibraltar."

The domicile point

14 There is no doubt that the onus is upon Mr. Zelikov to satisfy the court that he was domiciled in Gibraltar at the date of the commencement of the proceedings and that the standard of proof required is a good arguable case (see *Canada Trust Co.* v. *Stolzenberg (No. 2)* (2)). Further, it was not in dispute that to establish residence in Gibraltar, Mr. Zelikov needed to prove that Gibraltar was, for him, a settled or usual place of abode (see *Bank of Dubai Ltd.* v. *Abbas* (1)).

15 Mr. Turner did not spend time on the law as no issue of law arose. He submitted that the evidence did not support the judge's conclusion that Mr. Zelikov had demonstrated domicile to the required standard. He submitted that the conclusion reached by the Chief Justice was not one which a reasonable judge could have reached. As the decision depended on documentary evidence and the Chief Justice had no advantage over this court, it was open to us to come, and right that we should come, to a different conclusion.

16 Miss Andrews, Q.C., counsel for the respondent, submitted that the Chief Justice had come to the right conclusion having regard to the evidence. In any case, we should not interfere with his decision as the conclusion reached fell into the realm where reasonable judges might differ. The evidence which formed the basis of the claim was:

(a) The yacht *Olympia* was, according to the Gibraltar certificate of registration, dated 2003, and owned by Mr. Zelikov who, at the date of registration, gave his address as 51 Ragged Staff Wharf, Queensway Quay, Gibraltar.

(b) Mr. Zelikov became the lessee of 51 Ragged Staff Wharf in July 2002, and in November 2005, he assigned the lease to the Belize Offshore Corporations Co. It continued to be at his disposal.

(c) Mr. Zelikov paid the outgoings of the property. He produced by way of example a water rate demand addressed to him.

(d) Between May 2005 and the mid-November 2006, there was regular use of electricity at the property.

(e) Mr. Zelikov has a bank account in Gibraltar which he said he used to settle his personal bills.

(f) Mr. Zelikov has a permit of residence in Gibraltar issued on July 28th, 2003 which is valid for five years.

(g) Mr. Zelikov has properties at his disposal in many parts of the world. He said: "But, as I have already made clear, Gibraltar is my residence of choice."

(h) Mr. Zelikov pays tax in Gibraltar as a Category 2 individual.

17 Mr. Turner drew to our attention a letter written by his instructing solicitors dated November 24th, 2006 which stated:

> "You will appreciate that the defendant intends to dispute Mr. Zelikov's assertion of residence in Gibraltar. Whilst we are aware that he enjoys Category 2 status, this is not probative of actual residence in Gibraltar. We will accordingly be grateful if he would

provide evidence of his physical residence here, in the form of utility bills *etc.*, whilst we pursue our own enquiries."

18 Mr. Turner submitted that in the light of that letter, Mr. Zelikov could have been in no doubt about the challenge to his claim to residence. Despite that, the evidence of actual residence was non-existent. There was no evidence that Mr. Zelikov had slept a single night in the property. The Category 2 tax status did not depend on residence, but upon having appropriate accommodation available. The registration of the yacht did not provide evidence of any residence or continuity of residence in Gibraltar. The payment for electricity and water could have been due to others staying in the property. The true inference from the evidence was that Gibraltar was not his residence of choice, but was a jurisdiction of fiscal convenience.

19 Miss Andrews, Q.C. supported the conclusion of the judge. She submitted that the evidence had to be considered as a whole. Mr. Zelikov had at his disposal a property and he paid the bills relating to it. The electricity bill indicated that the property was in regular use. When all the evidence was taken into account, there was no reason to doubt or denigrate Mr. Zelikov's statement that Gibraltar was his residence of choice.

20 We are not sure that we would have come to the same conclusion as the Chief Justice, but we conclude that it would be inappropriate for us to reverse the decision that he came to. With the assistance of counsel, he properly directed himself as to the law. He then had to decide whether there was a good arguable case of domicile. His decision should be respected by this court if it was one to which a reasonable judge, properly directing his mind to the issue, could have come.

21 We believe that the Chief Justice did properly direct his mind to the issue, which was essentially one of fact. There was just sufficient evidence to support the assertion of Mr. Zelikov that Gibraltar was his residence of choice and as such was his settled place of abode. It was open to the judge to conclude that a good arguable case had been established.

The *Western Regent* point

22 Mr. Turner does not suggest that the law of Gibraltar is, or should be, different from English law in the construction of arts. 10 and 11 of the 1976 Convention. He is therefore faced with the daunting task of persuading this court that *The Western Regent* (7) was wrongly decided. It is technically open to him to do so, because this court is not bound by the decisions of the English Court of Appeal. But those decisions are nevertheless of the strongest persuasive authority. We do not propose to lengthen this judgment by the citation of the full reasoning of the Court of Appeal in that case. That reasoning is contained in *The Western Regent* in the judgment of Clarke, L.J. ([2005] 2 Lloyd's Rep. 359, at paras. 15–33)

and the judgment of Rix, L.J. (*ibid.*, at paras. 61–64) and these should be taken to be incorporated in this judgment. Rather, we will to try to deal with Mr. Turner's criticism of those judgments, with both of which Nourse, J., the third member of the court, agreed.

23 Since Mr. Turner's argument depends to a large extent on his submission that the construction of art. 10 must be consistent with the construction of art. 11, and because Mr. Turner submits that the Court of Appeal's decision leads to inconsistency between the two articles, it is helpful to set out the provisions of both articles so far as they are relevant. The full text of art. 10 is as follows:

> "1. Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. *However, a State Party may provide in its national law that, where an action is brought in its Courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or is constituted when the right to limit liability is invoked.*
>
> 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." [Emphasis supplied.]

The second sentence, the italicized part, does not appear in the text of the English or Gibraltar Convention and in neither jurisdiction has the option contained in the second sentence been adopted. Article 11.1 states that "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."

24 Mr. Turner's broad submission is that on a proper analysis of arts. 10 and 11, the construction which fits most naturally with the language used and which construes the two articles together, rather than in isolation, is that neither article countenances the invocation of the right to limit in the absence of liability proceedings in the same jurisdiction. The right can only be invoked responsively. This is so, he submits, notwithstanding the express words of art. 10.1.

25 It is common ground that the primary consideration is the natural meaning of the words; that the provision should be considered in context and in the light of the purpose of the 1976 Convention as a whole; and that the provision should not be construed with the same rigour as if it were a

piece of English parliamentary drafting (see *In re Deep Vein Thrombosis & Air Travel Group Litigation* (3) ([2006] 1 A.C. 495, at paras. 11–12, 31 and 51–52) and *Fothergill* v. *Monarch Airlines Ltd.* (4) ([1981] A.C. at 280–282).

26 Mr. Turner makes the following criticisms of the judgments in *The Western Regent* (7) which he submits reveal flawed reasoning:

(a) Rix, L.J. categorized the ship-owners' argument on art. 10 as depending, on an analogy to be drawn with art. 11 (see [2005] 2 Lloyd's Rep. 359, at para. 61). This, he submits, is to miss the point. The relevance of art. 11 is not that it is to be applied by analogy, but that since the 1976 Convention should be interpreted as a whole, it is appropriate to have regard to art. 11 when construing art. 10 and wrong in principle not to do so. But it is quite clear in our judgment that the court did consider art. 11 and drew attention to important distinctions between the two articles.

(b) That Rix, L.J. adopted an approach to construction redolent of that applied in the construction of domestic statutes (see his discussion in [2005] 2 Lloyd's Rep. 359, at para. 61 of the omission of the word "only" in art. 11) and *ibid.*, at para. 62, he pointed out the absence of the word "such" before "action"). We do not accept this criticism. As Rix, L.J. pointed out, the word "only" is used in the second sentence of art. 10.1. The word "such" will make no sense in art. 10.3 where, as in England and Gibraltar, the option in art. 10.1 is not adopted. The real question is whether the word "action" in art. 10.3 embraces the limitation action referred to in art. 10.1 or can only be taken to refer to "legal proceedings . . . in respect of claims subject to limitation" in art. 11.1, which Mr. Turner submits means claims to establish or enforce the liability of the ship-owner.

(c) That though the Court of Appeal recognized the difficulties posed by art. 11 and the authorities relied upon by the ship-owners (see *I.C.L. Shipping Ltd.* v. *Chin Tai Steel Enterprise Co. Ltd., The ICL Vikraman* (6) and *The Sherbro* (8)), it took the view that it did not need to grapple with them (see Clarke, L.J. in *The Western Regent* (7) [2005] 2 Lloyd's Rep. 359, at paras. 28–29 and 32, and Rix, L.J., *ibid.*, at paras. 61 and 64). But the point in issue did not arise in *The ICL Vikraman* and does not appear to have been argued before Colman, J. The observations of the Dutch Supreme Court seem to have been strongly influenced by the views of the Advocate-General based, in turn, on what the Minister told the Dutch Parliament art. 11 was intended to achieve. Where the Minister got this information is a mystery: it does not emerge from the *travaux préparatoires*. The actual decision of the Dutch court was that the appointment of an expert by the French court fell within the phrase "legal proceedings in respect of claims subject to limitation" in art. 11.1, a phrase which should be liberally interpreted.

27 Mr. Turner submits that the key to the construction of art. 10.1 lies in the meaning of the words "action is brought" in art. 10.3. We agree that this is obviously an important consideration. Mr. Turner then submits that it is markedly different from the words used in the first sentence of art. 10.1, but very similar to the expression used in the second sentence, namely "an action is brought in its Courts to enforce a claim subject to liability" and should therefore be given the same meaning. But it is not the same, and it seems to us that different expressions are used in art. 10.1 in the first and second sentence, and in arts. 10.3 and 11.1.

28 Despite Mr. Turner's elaborate and attractive arguments, we are unconvinced that the Court of Appeal was wrong in *The Western Regent* (7) and we respectfully adopt the reasoning of the court in that case. In our judgment there are three powerful arguments which militate against Mr. Turner's submissions:

(i) The words of the first sentence of art. 10.1 are quite clear. It would be very surprising if those clear words were to be cut down by implication derived from art. 11, which is dealing with a different question. This smacks of the very restrictive approach which Mr. Turner counselled us to avoid.

(ii) The fact that Member States are given the option in the second sentence of art. 10.1 can only imply that where the option is not adopted, limitation proceedings can be commenced in any court which will accept jurisdiction at the ship-owner's choice.

(iii) It is common ground that prior to the 1976 Convention a ship-owner could commence limitation proceedings in the court of his choice. Frequently, this was the court of his domicile. The 1976 Convention introduced changes, as was recognized by Clarke, L.J. but it would nevertheless be surprising if the change now alleged to have been made was introduced without any deliberations in the discussions that took place during the drafting of art. 10 (see the *travaux préparatoires*).

29 For these reasons we conclude that the appeal should be dismissed on both grounds.

Appeal dismissed.