THE NAIROBI WRECK REMOVAL CONVENTION will come into force on 14 April. Since most states already have various means (with or without legislation) to force the removal of wrecks that are inconveniently located at the cost of P&I insurance, the Convention will probably not make any major difference. However, it will be interesting to see to what extent the Convention’s provisions about proportionality and limitation of liability for the shipowner will have on unreasonable and disproportionate demands by states.

The raising of the Costa Concordia in one piece was an exceptionally risky operation that, if it had failed, could have resulted in massive environmental damages and financial losses. The Costa Concordia illustrates an inherent problem for wreck removal operations, namely that the combination of unlimited liability for the shipowner, an inexhaustible insurance policy and a decision maker - the state – that stands no financial risk, is an unfortunate combination that leads to cost-inefficient decisions in the best case, and plainly dangerous decisions in the worst case. It remains to be seen if the Convention can change this.

One pressing issue with the Convention is that very few flag states have ratified it. As a result, P&I clubs and shipowners have an onerous task to ascertain to which state blue cards (proof of financial security) should be issued. Indeed, the administration of blue cards under international conventions has become an increasingly important – and complex – task for P&I clubs.

Two co-assured dilemmas
The English Court of Appeal has recently resolved several interesting issues following the grounding of the Ocean Victory in Kishma port (Gard Marine & Energy Ltd v China National Chartering Co Ltd [2015] EWCA Civ 16). One finding was that even if severe swell in a port is not abnormal, and strong wind in the same port is not abnormal, a combination of the two can qualify as an “abnormal occurrence” with the result that the port was legally safe. (A port is generally safe if the cause of damage had nothing to do with the features of the port but instead was an “abnormal occurrence.”)

One further, and perhaps more controversial finding, was that even if the port had been legally unsafe there could have been no claim against the time charterer for breach of the safe port warranty in the charterparty because the owner and the bareboat charterer had the same hull insurer. As a result, the so-called right of subrogation did not arise, and a claim could not have been passed on to the time charterer. Even though the finding may be technically correct, it is noted with some concern that a standard co-assured entry can prevent a major recovery (the claim in Ocean Victory was USD 70 million). The ruling prompts the question why a particular insurance solution should prevent a recovery action against a wrongdoer.

The second co-assured dilemma concerned losses suffered by BP following the Deepwater Horizon casualty (In Re Deepwater Horizon, No. 13-0670, Supreme Court of Texas, 13 February 2006). BP sought insurance cover from Transocean’s liability insurer for sub-surface well pollution on the basis that BP was named as co-assured in the contract with Transocean.

The ruling in the owners’ favour, are harsh reminders that co-insurance is not an entirely straightforward issue, and the terms of the contract between the co-assured and main assured can have unexpected and unwanted consequences.

Look beyond the letter
The owners of the B Atlantic (Comm Ct [2014] EWHC 4133) were relieved to receive the judgement on their claim against the war risk insurers for a total loss. The vessel was detained on 13 August 2007 in a Venezuelan port for having 132 kg of cocaine strapped to the hull. The drugs were assumed to have been affixed by persons unknown, but Venezuelan courts nevertheless convicted two officers and confiscated the vessel after three years of detention.

The insurers argued the total loss was due to “infringement of any customs regulations”, which was an exception in the policy. The court, ruling in the owners’ favour, adopted a holistic approach and held that it was not a case of “infringement” but instead a manifestation of a malicious act by third parties. Hence the exception did not apply. A reminder that the exact wording does not always count, not even in the legal world.