MARITIME LSLC BUSINESS FORUM

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Queen Mary University of London
Centre for Commercial Law Studies

# Cargo Claims and Cargo Disputes: Current Issues

Chairperson**: Belinda Bucknall QC,** Arbitrator - Quadrant Chambers

Speakers:
**Erin Walton** – West of England Insurance Services
**Dr Michaela Domijan-Arneri** – West of England Insurance Services
**Charlotte Tan** – 20 Essex Street
**Poonam Melwani QC** – Quadrant Chambers
**Dr Miriam Goldby** – CCLS, Queen Mary University of London

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**Centre for Commercial Law Studies**
**QMUL, 67-69 Lincoln's Inn Fields, WC2A 3JB**

*LSLC - MARITIME BUSINESS FORUM*
*Quadrant House, 10 Fleet Street, London, EC4Y 1AU*
*Tel: 020 7936 3417 ~ E-mail: shipping@shippinglbc.com*
*Chairman's Tel: 020 7936 3418 ~ Chairman's E-mail: asheppard@shippinglbc.com*
*Web-site: www.shippinglbc.com*

Introduction:

This seminar will focus on some legal issues that have recently arisen in relation to the performance of shipping contracts involving the carriage of cargo. While these contracts tend to be subject to standard terms which are widely used in the industry, the interpretation of these terms continues to give rise to disputes and some recent cases have shed new light on the way in which they might be construed and understood, making this a subject that is ripe for re-examination.

In summary, the issues for discussion are:

- Current practical issues in the interpretation of the Inter-Club Agreement
- *The Yangtze Xing Hua*: the ICA in the Court of Appeal
- Delivery without the Bill of Lading: Letters of Indemnity and their Enforcement
- Container Cargoes in the Courts: *Glencore v MSC* and *Kyokuyo v Maersk*

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ICA: Current and Practical Issues

*LSLC - MARITIME BUSINESS FORUM*
*Quadrant House, 10 Fleet Street, London, EC4Y 1AU*
*Tel: 020 7936 3417 ~ E-mail: shipping@shippinglbc.com*
*Chairman's Tel: 020 7936 3418 ~ Chairman's E-mail: asheppard@shippinglbc.com*
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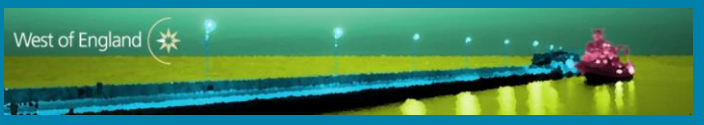
# ICA: Current and Practical Issues

Erin Walton & Dr Michaela Domijan-Arneri

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## Overview

- **The History and Purpose of the Inter-Club Agreement**
- **How does it work?**
  - Application
  - Notification
  - Time Bars
  - Security
- **Current Issues**
  - Obtaining Security
  - Scope – customs fines
  - Security wording: IG vs Non-IG
  - Avoiding Litigation

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## History and Purpose

- **The International Group Claims Cooperation Committee**
- **A constantly reviewed and developing broad brush liability allocation mechanism to avoid disputes and litigation surrounding liability for third party cargo claims**
- **Several revisions since 1970:**
  - 1984
  - 1996: Included definition of 'Cargo Claim', response to The Holstencruiser [1992] 2 Lloyd's Rep. 378.
  - 2011: Security exchange mechanism (Clause 9)

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## How does it work?

- **Application**
  - Clause 3: *"Cargo Claim(s) mean claims for loss, damage, shortage (including slackage, ullage or pilferage), overcarriage of or delay to cargo including customs dues or fines in respect of such loss, damage, shortage, overcarriage or delay and include:*

    *(a) any legal costs claimed by the original person making any such claim;*

    *(b) Any interest claimed by the original person making such claim;*

    *(c) All legal, Club correspondents' and experts' costs reasonably incurred in the defence or in the settlement of the claim made by the original person, but shall not include any costs of whatsoever nature incurred in making a claim under this Agreement or in seeking an indemnity under the charterparty.*

  - Clause 4: *"Apportionment under this Agreement shall only be applied to Cargo Claims where:*

    *(a) the claim was made under a contract of carriage, whatever its form, (i) which was authorised under the charterparty…"*

    *(b) the cargo responsibility clauses in the charterparty have not been materially amended…"*

    *(c) the claim has been properly settled or compromised and paid"*

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## How does it work?

- **Notification**
  - Notification requirement time bar exists separately to commencement time bar

*"(6) Recovery under this Agreement by an Owner or Charterer shall be deemed to be waived and absolutely barred unless written notification of the Cargo Claim has been given to the other party to the charterparty within 24 months of the date of delivery of the cargo or date the cargo should have been delivered, save that, where the Hamburg Rules or any national legislation giving effect thereto are compulsorily applicable by operation of law to the contract of carriage or to that part of the transit that comprised carriage on the chartered vessel, the period shall be 36 months. Such notification shall if possible include details of the contract of carriage, the nature of the claim and the amount claimed."*

  - When giving notice, give as much information as available and make it clear that notice is given under the ICA. Identify the vessel, voyage, contract of carriage, amount and nature of the claim. Review before two year expiry period.

  - See Ipsos S.A. v Dentsu Aegis Network Limited [2015] EWCH 1171 (Comm)

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## How does it work?

**Time Bar**

- Clause 2:
  - *The terms of this Agreement shall apply notwithstanding anything to the contrary in any other provision of the charterparty; in particular the provisions of clause (6) (time bar) shall apply notwithstanding any provision of the charterparty or rule of law to the contrary.*

- For commencement of proceedings for breach of contract under English law, the Limitation Act 1980 provides 6 years from the date on which the cause of action accrued.

- Liability for the indemnity is established from the time the claim is settled and paid, **not** from the date of delivery or when the cargo should have been delivered (differs from trigger for notice requirement). See London Arb 32/04

- For claims falling under the ICA , the ICA Time Bar prevails over any apparently conflicting time bars in the charterparty. See Genius Star 1.

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## How does it work?

- **Security**
  - Clause 9 incorporated in 2011 in response to desire for security once a party to the charterparty provides security for the original claim to a third party:

*"If a party to the charterparty provides security to a person making a Cargo Claim, that party shall be entitled upon demand to acceptable security for an equivalent amount in respect of that Cargo Claim from the other party to the charterparty, regardless of whether a right to apportionment between the parties to the charterparty has arisen…"*

  - Owners often gave security to a claimant but were not entitled to the same from their Charterer as liability had not crystallised under the ICA until payment of the original claim.
  - Reciprocal exchange expressly provided for in 2011 wording.
  - Claims Cooperation Committee have recommended a standard wording for quick exchange of security.
  - Provision of security is still subject to each IG Club's rules and procedures on provision of security.

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## When does the right to demand security arise?

- Right to demand security between Owners and Time Charterers in respect of a cargo claim that is subject to the ICA – for example, timing is crucial in cases where arrest proceedings are commenced as a means of obtaining security for a claim arising pursuant to the ICA and where the court needs to form a view as to the validity of the arrest.

- Three possible trigger periods:

1. Date of the incident giving rise to a cargo claim and potential liability.
2. Date when security is provided to the cargo claimants.
3. Date when the cargo claim is paid.

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## Scope – customs fines

- For apportionment under the ICA to apply there must be:

1. A cargo claim – Clause (3) ICA1996/2011; AND
2. A claim made under a contract of carriage -Clause (4) ICA1996/2011

**Clause (3)**

*…Cargo Claim(s) mean claims for loss, damage, shortage (including slackage, ullage or pilferage), overcarriage of or delay to cargo including customs dues or fines in respect of such loss, damage, shortage, overcarriage or delay and include:*

*(a) any legal costs claimed by the original person making any such claim;*

*(b) any interest claimed by the original person making any such claim;*

*(c) all legal, Club correspondents' and experts' costs reasonably incurred in the defence of or in the settlement of the claim made by the original person, but shall not include any costs of whatsoever nature incurred in making a claim under this Agreement or in seeking an indemnity under the charterparty.*

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- Shortage claims presented by the authorities rather than receivers and for a "customs fine" for alleged short-landings calculated by the difference between the shore-scale figure and the B/L figure:
  - inconsistency between Clubs in dealing with such claims but as they are not strictly cargo claims they do not fall within the ICA.
  - while Owners have the right to claim an indemnity under the C/P from Charterers, the cargo settling provisions of the ICA would not apply and if Owners were to provide security no automatic right to demand provision of counter-security from Charterers which could leave Owners exposed.
  - IG Claims Cooperation Committee

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## Non IG Security

- IG has developed a recommended wording for ICA counter-security.
- Non IG Clubs do not always accept the IG wording and have developed their own standard wording, for e.g in Charterers' P&I Club wording no requirement for the Club to appoint solicitors on behalf of their Members to accept service.
- In C/P chain where there are Owners, Disponent Owners and Sub-Charterers, Disponent Owners may find that they have obtained security from Sub-Charterers on less favourable terms than that they provided to Owners.
- Like for like security

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## Avoiding litigation

- Intention behind the ICA is to provide a relatively simple mechanism to apportion liability for cargo claims as a means of avoiding litigation.
- Criticism that it has given rise to litigation.
- Cases arising from the application of the ICA regime as clarification on a point of construction required leading to revisions of the ICA following decisions in some cases including the following:

- **D/S A/S Idaho v P. & O. [1982] 2 Lloyd's Rep. 296 (HC);[1983] 1 Lloyd's Rep. 219 (CA) - THE STRATHNEWTON**

Court considered whether all cargo claims under the C/P should be advanced pursuant to the terms of the C/P, including its Clause Paramount, and only then "settled" by way of the ICA 70 - CA held that the 12 month time bar of the NYPE Clause Paramount did not apply to indemnity claims under the ICA holding that the statutory 6 year time limit under English law applied.

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Following the decision the ICA was amended to ICA 84 to provide that a party must notify the other party of a claim, providing details of the bill of lading and the nature and amount of the claim within 2 years from the date of discharge, failing which the right of recovery would be time barred. Subsequently the 1996 revision to the ICA included the admission of Hamburg Rules, where compulsorily applicable, and in such cases the prescribed time period of 3 years.

- **A/S Ivarans Rederei v KG MS Holstencruiser Seeschiffahrt GmbH [1992] 2 Lloyd's Rep. 378 - THE HOLSTENCRUISER**

The Court decided that under the terms of the ICA 84 the apportionment of short delivery claims did not apply to customs fines imposed in respect of short delivered cargo. Consequently, it became necessary to introduce a clear definition of "cargo claims" – now defined as claims relating to the following – loss of cargo; damage to cargo; shortage of cargo; overcarriage of cargo; delay to cargo; customs dues or fines in respect of any of the above.

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- Although the 1984 version did not contain a definition of cargo claims it made clear that the apportionment should also apply to "legal costs incurred" on cargo claims. In The Holstencruiser, in interpreting the 1984 version the Court decided that where the 50/50 apportionment applied, charterers were not entitled to recover 50% of the legal costs in defending and settling the claim nor 50% of the judicial survey fees.
- The position under ICA 1984 following that decision was that only legal costs paid to the original cargo claimant would be included in the apportionment - hence the change in the ICA 1996 which continues to include costs in the apportionment and sets out that "costs" comprise:
  (1) Any legal costs claimed by the original cargo claimant;
  (2) All legal, Club correspondents and experts costs reasonably incurred in the defence of or in the settlement of the original cargo claim.

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- ICA 1996 expressly excludes from the apportionment costs incurred in making a claim under the Agreement or in seeking an indemnity under the C/P – not to say that parties would not be able to recover them outside the ICA
- ICA 1996 expressly allows the apportionment of interest claimed by the original cargo claimant (not clear in earlier versions).

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- **MH Progress Lines SA v Orient Shipping Rotterdam BV/Nordana Project & Chartering [2011] EWHC3083 (Comm) – THE GENIUS STAR 1**

The High Court found on the basis of considering the contract as a whole rather than giving the rider clauses more weight that the ICA time bar should apply on the basis of clause (2).

The issue of incorporation of the Centrocon 12 month time bar was resolved in favour of the charterers by reference to the parties' intentions finding that it could not possibly have been the intention of the parties to nullify clause (6) of the ICA by retroceding 12 month time bar into the ICA through clause (9) which would have the effect of nullifying clause (2).

ICA supersedes conflicting time bars in C/P. Applies to ICA 2011 in the same way where the material clauses remain unchanged.

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**-Transgrain Shipping (Singapore) Ptd. Limited v Yangtze Navigation (Hong Kong) Co Ltd ("MV YANGTZE XING HUA") [2017] EWCA Civ 2107**

The dispute revolved around the interpretation of the word "act" in Clause 8 (d) and the CA determined that contrary to the charterers' arguments on construction an act does not need to connote culpability to be causative of a cargo claim.

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## Conclusion

- Any criticism is a reflection of a small number of cases which have arisen in the 40 years of ICA's existence. It provides a simple mechanism to apportion cargo liabilities and at Club level a large number of cargo claims are resolved by way of its application without having to incur legal costs.
- It will continue to be reviewed and scrutinised so that it remains relevant but also continues to evolve within its original spirit and intent which is ultimately to take a pragmatic approach to apportioning cargo liabilities.
- If parties choose to incorporate it into their C/Ps the practical considerations that will remain imperative to its operation are:
  1. who is the party that they are contracting with;
  2. which Club are they entered with.

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# THANK YOU

**Erin Walton & Dr Michaela Domijan-Arneri**
**West of England Insurance Services (Luxembourg) S.A**

Part B

Charlotte Tan

The Yangtze Xing Hua: the ICA in the Court of Appeal


## The Yangtze Xing Hua: the facts

- Trip time charter on NYPE form; carriage of soybeans from South America to Iran.
- Charterers ordered the vessel to wait off disport, ultimately for four months.
- Cargo overheated; claim against the Vessel; settled by Owners who then sought indemnity from Charterers under ICA.
- No fault on part of Owners or Charterers.
- Cause of the damage:

  "*a combination of the inherent nature of the cargo (and its oil and moisture content) together with the prolonged period at anchorage*".

  "*[Charterers were not] in breach or at fault or "neglect" in loading the cargo, albeit that what in fact they loaded, together with the instructions to wait outside the discharge port, was in all probability the cause of the damage…. "*

## The Yangtze Xing Hua: the ICA apportionment regime

"(8) Cargo claims shall be apportioned as follows:
(a) Claims in fact arising out of unseaworthiness and/or error or fault in navigation or management of the vessel:
100% Owners
save where the Owner proves that the unseaworthiness was caused by the loading, stowage, lashing, discharge or other handling of the cargo, in which case the claim shall be appointed under sub-Clause (b).

(b) Claims in fact arising out of the loading, stowage, lashing, discharge, storage or other handling of cargo:
100 Charterers
unless the words "and responsibility" are added in Clause 8 or there is a similar amendment making the Master responsible for cargo handling in which case:
50% Charterers
50% Owners
save where the Charterer proves that the failure properly to load, stow, lash, discharge or handle the cargo was caused by the unseaworthiness of the vessel in which case:
100% Owners

(c) Subject to (a) and (b) above, claims for shortage or overcarriage:
50% Charterers
50% Owners
unless there is clear and irrefutable evidence that the claim arose out of pilferage or act or neglect by one or the other (including their servants or sub-contractors) in which case that party shall bear 100% of the claim.

(d) All other cargo claims whatsoever (including claims for delay to cargo):
50% Charterers
50% Owners
unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim."

## The Yangtze Xing Hua: the issue

- Does the word “act” in the phrase “act or neglect” in clause 8(d) mean culpable act in the sense of fault or does it mean any act, whether culpable or not?

## The Yangtze Xing Hua: the decision

- "Act" means any act and there was no need to prove fault.
- Charterers' orders to load the cargo and wait off disport were "acts" within the meaning of clause 8(d) so the cargo claim was 100% for Charterers' account.
- The Strathnewton [1982] 2 Lloyd's Reports 296:

  The ICA "*cuts right across any allocation of functions and responsibilities based upon the Hague Rules [which in that case governed the owner/charterer relationship]; indeed the avoidance of such allocation is the very objective of the ICA*" (p225rhc)

  "*the ICA provides for a more or less mechanical apportionment of liability by reference to the nature of the claims put forward by the BL holders…a more or less mechanical apportionment of financial liability which is wholly independent of [the Hague Rules standards of obligation].*"
- The Benlawers [1989] 2 Lloyd's Reports 51

  "*[The ICA] is an agreement which is primarily for the benefit of the respective parties' insurers that is of the character of a knock-for knock agreement. It has advantages and disadvantages for shipowners, but it is intended to work in that way: it solves insurance problems and is not concerned with such considerations as hardship or lack of moral culpability*."

## The Yangtze Xing Hua: the decision

- Apportionment provisions encompass fault but do not require it.
- The "*critical question*" under the apportionment regime is that of causation. "*Does the claim 'in fact' arise out of the act, operation or state of affairs described? It does not depend upon legal or moral culpability*": per Hamblen LJ at [27(5)]

## The Yangtze Xing Hua: problem area 1

- Opportunity for the ICA to become an unacceptably wide indemnity against following Charterers' voyage orders.
- Answer 1: insufficiently clear and irrefutable evidence?
- Answer 2: causation? But see the approach to causation in The Kamilla [2006] 2 Lloyd's Rep 238:

> *"provided the unseaworthiness of the vessel could be said in a practical sense to be a [and I stress the use of the indefinite article] cause of the loss, it was not appropriate to embark upon a further inquiry as to whether it was the [and I stress the definite article] effective cause of the loss. . ."* (original square brackets)

## The Yangtze Xing Hua: problem area 2

- Causation => knotty legal problems
- Causation => not easy to predict outcomes. See e.g. from the implied indemnity context, The Kos [2012] 2 Lloyd's Rep 292.

# The Yangtze Xing Hua: problem area 3

- Unjust outcomes and fine distinctions?
- Example 1: Master interrupts journey to help vessel in distress causing delay; does the cargo claim "arise out of" the Master's decision?
- Example 2: fire on board; Master decides to flood the holds rather than use $CO_2$ system; does the cargo claim "arise out of" the Master's decision?
- Example 3: cargo under-ventilated; should it matter whether the cause was an "act" in positively closing off the vents or "neglect" in failing to open them?

**London**
20 Essex Street
London
WC2R 3AL
Tel: +44 (0)20 7842 1200

**Singapore**
Maxwell Chambers #02-09
32 Maxwell Road
Singapore 069115
Tel: +65 62257230

Email: clerks@20essexst.com

# Part C

## Poonam Melwani QC

Delivery without the bill of lading – Letters of Indemnity and their enforcement

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# Delivery without the Bill of Lading - Letters of Indemnity and their enforcement.

Poonam Melwani QC

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## USUAL FEATURES OF AN LOI

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- It's a Letter (not a bilateral contract)
- Containing a request from LOI issuer to LOI recipient to deliver cargo to X without production of original bill of lading
- LOI issuer agrees to indemnify/hold LOI recipient harmless in respect of any liability, loss, damage or expense of whatsoever nature sustained by LOI recipient, or his servants or agents by reason of delivering in accordance with LOI issuer's request
- And to provide him with sufficient funds to defend any proceedings in connection with such delivery
- And to provide on demand such bail or other security as may be required to prevent arrest/detention or secure release of vessel, if in connection with delivery as aforesaid.
- English Law and Jurisdiction – not arbitration.
- And often a chain of LOIs – under time and/or voyage charters and/or sale contracts

## USUAL FEATURES OF AN LOI

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- Many LOIs simply require delivery to X;
- However, following Bremen Max [2009] 1 Lloyds Rep 81, International P&I Clubs' standard wording amended so that delivery request is often now for delivery

> "*to X or such party as you believe to be or to represent X or to be acting on behalf of X*"

Considered in The Zagora [2017] 1 Lloyd Rep 194 and Songa Winds [2018] EWHC 397

## THE COURT'S APPROACH TO CONSTRUING LOIs

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- LOIs – "*commonplace in international trade*" and a legitimate answer to the problem of modern short voyage trades with the bill of lading still in the banking chain.
  - The Jag Ravi [2012] 1 Lloyds rep 637 – Court of Appeal
- "*LOIs, particularly those in standard form, are important commercial instruments which need to be interpreted robustly and in a straightforward way. They are often issued and relied upon by those for which English is not their first language and whose opportunities for close textual analysis before committing to a wording are in the real world very limited.*"
  - The Jag Ravi [2011] 2 Lloyds Rep 309 – HHJ Mackie QC at para 43
- The Laemthong Glory [2005] 1 Lloyds Rep 688, CA rejected the "*you*" argument which had "obvious force" because of "commercial common sense" (para 40)
- Courts keen to ensure LOI gives Owners/LOI recipient the intended protection.
- But NB the indemnity may be unenforceable if carrier knows that delivery is wrongful. However, knowledge of the existence of a genuine bona fide dispute not sufficient to debar Owners. (obiter The Jag Ravi CA para 51)

## THE ADDRESSEE OF THE LOI

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- Head Owner/Carrier is the party who prima facie needs the indemnity;
- But in chain, can have a LOI
  - addressed to Owners
  - addressed to Charterers
  - addressed to "*Owners/Disponent Owners/Charterers*" (As in The Jag Ravi)
- Argued in The Jag Ravi that such an LOI wasaddressed to Owners/bareboat Charterers only i.e. the party who were effecting delivery in reality and not also to additional Charterers. CA rejected argument that there was a single composite offeree or a compendious way of describing a single offer, namely the contracting carrier with possession of the cargo. Phrase comprises a descending hierarchy progressing from Owners to time charterers to voyage charterers. (para 41)

## WHEN CAN OWNERS ENFORCE AN LOI ?

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- Owners can enforce LOI if addressed to them and Owners know about the LOI
- What about if addressed to Owners but Owners do not know about the LOI?
  - Can arise and be important. E.g. where Charterer and Shipper/Buyer issue LOI addressed to Owner but Charterer insolvent. Owners may not know about second LOI addressed to them down the chain until after they have effected delivery.
  - But LOI is a unilateral contract – like in the reward cases.

## WHEN CAN OWNERS ENFORCE AN LOI? (2) – UNILATERAL CONTRACT

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- Various English cases support the notion that there cannot be acceptance/a binding contract where the offer is unknown. Basic principle that "*contract is rooted in mutual agreement, through offer and acceptance.*"
- But per Chitty on Contracts "*it is hard to see what legitimate interest of the promisor is prejudiced by holding him liable to a party who has in fact complied with the terms of the offer, though without being aware of it.*"
- In The Jag Ravi HHJ Mackie did not decide the point but noted at para 47 –

*"[The LOI issuer] have the better of the argument .... The issue is an open one under English Law and an important one*."

- Argument not run in the Court of Appeal
- Situation here different from usual unilateral contract because here offeree/Owners know about the offer and the promise – what they did not know was the identity of the offeror – i.e. that there was more than one.

## WHEN CAN OWNERS ENFORCE AN LOI ? (3) Contracts (Rights of Third Parties ) 1999

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- But Owners can enforce an LOI even if they do not know about it, if the LOI is addressed to Charterers
  - Contracts (Rights of Third Parties Act) 1999;
  - Contract between Charterers and LOI issuer because Charterers had accepted LOI issuer's offer by delivering as requested, via Owners as their agents.

    "..*if charterers were to deliver the cargo to the receivers, the only way they could do so was, in ordinary language, through the agency of the owners.*"
    *The Laemthong Glory (CA para 15 and 27)*
  - LOI expressly confers benefit on "servants or agents" of addressee
  - Owners are Charterers' agents for purposes of delivery of cargo;
  - So Owners entitled to claim under LOI issued to Charterers

## WHEN CAN OWNERS ENFORCE AN LOI ? (4) Contracts (Rights of Third Parties ) 1999

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- "*it is natural to read the receivers' LOI as conferring a direct benefit on the owners. That is so, even though it of course also operated as between the receivers and the charterers and is by no means lacking in meaning as a contract between them".*
- The "You" argument – whereby it was argued that the indemnities in the LOI apply only to losses suffered by the charterers is "*commercially insensible*";
- Argument that the fact that there was a chain of LOIs showed that no intention to benefit Owners under an LOI to Charterers rejected. CA found "*no tradition of chain LOIs"* such as in construction industry which required preservation of straight contractual recourse.

- Note - Same result where LOI is addressed to Owners and Charterers. Owners who are ignorant of the LOI can still enforce under the 1999 Act, relying on the contract between Charterers and LOI Issuer, even if their ignorance means that they cannot enforce the LOI addressed to them in their own direct right.

The Jag Ravi

## WHEN CAN CHARTERERS ENFORCE AN LOI

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- Charterers can enforce when LOI addressed to them and they know about it. Situation unlikely to arise where there is an LOI in favour of Charterers which they do not know about.
- But unilateral contract point might still arise and be important. E.g. if all LOIs are in favour of Owners, Owners claim against Charterers and are willing to assign to Charterers the benefit of an LOI from shipper/buyers addressed to Owners. Works if Owners knew of the second LOI or if Owners did not know of the second LOI but can still enforce it per Chitty. Or if Charterers' knowledge of the second LOI is imputed to Owners on basis that Charterers are Owners' agents in negotiating/receiving such an LOI.
- Alternatively, Charterers may have a claim against a fellow LOI Issuer under the Civil Liability (Contribution) Act 1978?

## What is delivery?

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- "*Discharge and delivery are different concepts. Discharge is the movement of the cargo from the ship "over the ship's rail". Delivery is the transfer of possession of the cargo to a person ashore. Discharge and delivery may occur simultaneously but they need not do so.*" The Bremen Max [2009] 1 Lloyds Rep 81
- Delivery is where an Owner has "*surrendered possession (that is, has divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them.*" Barclays v Customs & Excise [1963] 1 Lloyds Rep 81 per Diplock
- Delivery is where an owner has divested himself of "*the power to compel any dealing in or with the cargo which can prevent the consignee from obtaining possession.*" The Jag Ravi – CA
- Usually LOI is for delivery not merely discharge. If discharge, Owners remain responsible for the goods and are taking on an added responsibility which they are unlikely to wish to do.
- For example of LOI for discharge not delivery see –The Bao Ye [2016] 1 Lloyd's Rep. 320

## What is delivery ? (2)

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- Jag Ravi – cargo given to port authority with a delivery order. First instance held that that was sufficient for delivery even though Owners made later attempts to revoke delivery order.
- CA disagreed. Must be effective divesting of power - so if can revoke and do revoke a delivery order, not delivery. But there attempted revocation did not work, and delivery was effected when receivers obtained cargo.
- Irrelevant that cargo received piecemeal or that Owners tried to stop delivery.
- And obiter – "*the LOI offers an indemnity in respect of such delivery as has been effected. If it were to be construed as requiring delivery of the entire cargo before any entitlement to an indemnity arises, it would be productive of disputes as to shortages, unpumpable residues and the like. I can see no reason why the indemnity offered should not be regarded as co-extensive with the delivery effected...*"
- But note - may be an implied obligation to deliver promptly

## Delivery – to whom?

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- "X" or "X or their agents"
- No difference between the two? Delivery to Y who is a representative of X or who is the agent of X is delivery to X and satisfies even the narrow *pre- Bremen Max wording.* Not conceded but regarded by Judge as unarguably correct in The Songa Winds
- In Bremen Max, argued that even where LOI is issued, shipowner has an option and is not obliged to deliver without original bill of lading. Teare J noted that taking on obligation to deliver without an OBL is a new risk, but was not persuaded that there would be difficulties in the real world since :-

*"the shipowner has to satisfy himself that the person to whom the cargo is delivered is indeed, on the facts of this case, Kermikovtizi. How it was asked rhetorically does the shipowner do that? What documents must he insist upon? What inquiries must he make? He has given up a position of safety for one fraught with danger." ..."If the shipowner is in doubt as to that he may ask the charterer to identify the intended receiver. If the shipowner then complies with such representations as the charterer makes as to the identity of the person to whom delivery is to be made the charterer will be estopped from denying that the shipowner delivered the cargo to the person to whom the charterer requested the shipowner to make delivery. For this reason the commercial difficulties which it was suggested would face the owner ..... are unlikely to arise in practice."*

## Delivery to whom? (2)

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- Led to new wording of delivery proviso, referring to Owners' belief. Neater than relying on estoppel. Remains important for Owners/all LOI recipients to seek identification of exactly who coming on board to collect – so that can "believe" that person who collects does represent the named intended recipient.
- Collector will often be a port agent of some sort rather than a commercial party. E.g. Jag Ravi and Zagora
- Zagora – named recipient was X. Cargo was delivered to port agent Sea-Road in circumstances where known that usual practice was for agent not to deliver to anyone until OBL to hand.
- And Sea-Road was agent of time charterers at discharge port and agent of buyers under the various sale contracts. Also performed minor agency duties on behalf of Owners. Thus, "*When the vessel arrived at Lanshan it is probable that Sea-Road performed one or more functions for all of the named entities in this case. The crucial question, however, is whether, when taking delivery of the cargo, Sea Road was acting on behalf of the Owners (or Charterers) or on behalf of Xiamen." ....The fact that Sea-Road may for some purposes be the agent of disponent owners does not mean when taking delivery of the cargo from the vessel it was acting as their agent."*

## Delivery to whom? (3)

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- Argument that delivery to Sea Road was not delivery to X and was merely discharge by Owners to their own agent to hold cargo - rejected.
- If LOI given naming X and it is known that delivery will be to agent, the expectation must be that in taking delivery, agent is agent of X. Evidence from X that agent was not appointed as agent to take delivery rejected because why then, would an LOI be given naming X.
- "*Conversely, it is most unlikely that Sea-Road was acting on behalf of the Owners at that time. The Owners' interest at the discharge port, if the receivers were not in possession of an original bill of lading, was to discharge and deliver the cargo in accordance with the terms of an LOI. If they did so, they would have the protection of the LOI. The Owners had no interest in discharging the cargo into the possession of Sea-Road as their own agent. Such discharge would not provide the protection of the LOI..*"

## Delivery to whom? (4)

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- And fact that it was known that there would be discharge to an agent and then delivery by that agent against the OBL and that these were two separate acts irrelevant. "*The LOI was intended to protect and it could only have done so if discharge and delivery to Sea-Road was regarded by the parties as delivery to Xiamen.*"
- **Belief**
- Must be an honest belief. Must not be arbitrary, capricious or irrational.
- If LOI issuer say that a port agent will come on board, legitimate to believe that the port agent is the person identified as acting on behalf of the receiver named in the LOI.

## Delivery to whom? (5)

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- Whose belief matters? If LOI is issued to charterer, then they are the "you" in the LOI. Linguistically it is therefore their belief that matters – not the belief of the Owners.
- Not so. Since the obligation to deliver can only be performed by Head Owners, Head Owners vicariously performs delivery on behalf of the other LOI recipients. That being so, those down the chain are entitled to rely upon the beliefs of Owners and their servants when vicariously performing the delivery obligation. Zagora para 39 and Songa Wind para 54.
- What if the Owners and the LOI recipient have different beliefs? Undecided but arguably should make a difference?

## If Legal Proceedings Against Owners

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- Where Vessel arrested, LOI recipient can obtain a mandatory injunction requiring LOI issuer to do whatever necessary to secure the release of the Vessel.
- If Owners have already secured release of vessel, LOI issuers can be ordered to put up security in place of that provided by Owners.
- Argument that obligation under LOI is to secure release of vessel and, if already achieved, promise does not bite/impossible to perform rejected in Bremen Max. "*The intention and commercial purpose of clause 3 of the LOI is that the shipowner should not have to suffer the arrest of the vessel and that any bail or other security.... should not be put up by the shipowner but by the charterer. Action taken by Owners to mitigate loss where Charterers act in breach and refuse to put up security does not discharge that obligation or provide charterers with a defence.*"
- Answer might be different if no previous request for security/release from LOI recipient to LOI issuer.

Quadrant
CHAMBERS

Quadrant House
10 Fleet Street, London EC4Y 1AU

Tel +44 (0)20 7583 4444
Fax +44 (0)207583 4455
DX 292 London Chancery Lane

www.quadrantchambers.com

Part D

Dr Miriam Goldby

Container Cargoes in the Courts: Kyokuyo v Maersk
and
Glencore v MSC

Queen Mary University of London

# *Container Cargoes in the Courts: Kyokuyo v Maersk* and *Glencore v MSC*

M A Goldby, 27th March 2018
Centre for Commercial Law Studies

## Contracts of Carriage in the Liner Trade

- Contracts of adhesion: terms are imposed by the carrier and are offered to the shipper on a take-it-or-leave-it basis.
  - https://terms.maerskline.com/carriage
  - https://www.msc.com/lbr/contract-of-carriage?lang=en-gb
- The courts appear to take into account this feature of liner bills, as is illustrated by their decisions in the two recent cases of *Kyokuyo v Maersk* and *Glencore v MSC*.

## *Kyokuyo v Maersk* [2017] EWHC 654 (Comm),

[20] No bill of lading for containers A, B and C, or the replacement container, or any of them, was ever issued. In order to avoid further delay in delivery, the claimant and Maersk Line agreed to the issue of sea waybills rather than bills of lading. In an e-mail to the claimant on 28 January 2013, Maersk Line proposed: If you need not issue in Japan, we will revise to sea waybills. Please confirm. The claimant agreed to this proposal, over the telephone.

## *Kyokuyo v Maersk*: basis for HVR application

[46] the basis of decision in the prior authorities has been that whether a contract of carriage is covered by a bill of lading for present purposes is defined by whether, when concluded, the contract provided for a bill of lading to be issued. … [T]hat is sufficient to satisfy article I(b) and therefore sufficient (assuming other requirements to be satisfied) for the Hague-Visby Rules to have the force of law here under section 1(2) of COGSA 1971, as well as being necessary for the rules to have the force of law here because of section 1(4).

[48] … there is no reason to distinguish between the shipper who, by never demanding a bill of lading, does not insist upon his right to a bill of lading, from the shipper who, by agreeing to accept something less than a bill of lading, does not insist upon that right. Assuming in both cases a contract of carriage providing, originally, for a bill of lading to be issued, in my judgment there is no reason for the failure to insist upon a bill to be immaterial in the first case, yet critical in the second, to the question whether under article I(b) the contract of carriage was a contract covered by a bill of lading.

## *The European Enterprise* [1989] 2 Lloyd's Rep 185, 188 per Steyn J

'… in the present case the contract expressly provided that no bill of lading would be issued. The consignment note is described as a non-negotiable receipt note, which is not a document of title. The only gateway to the statutory application of the rules is therefore s. 1(6)(b) of the 1971 Act.'

'… shipowners, if they are in a strong enough bargaining position, can escape the application of the rules by issuing a notice to shippers that no bills of lading will be issued by them in a particular trade.'

## Was the *European Enterprise* correctly decided?

HVR art. VI permits any terms to be agreed in a contract of carriage covered by "a receipt which shall be a non-negotiable document and shall be marked as such" (therefore, freedom of contract in these cases), but the proviso reads:

> 'Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.'

HVR art. VI was not considered in *The European Enterprise*. Read with art. III(3), it suggests that for ordinary commercial shipments, the shipper has the right to demand a bill of lading from the carrier.

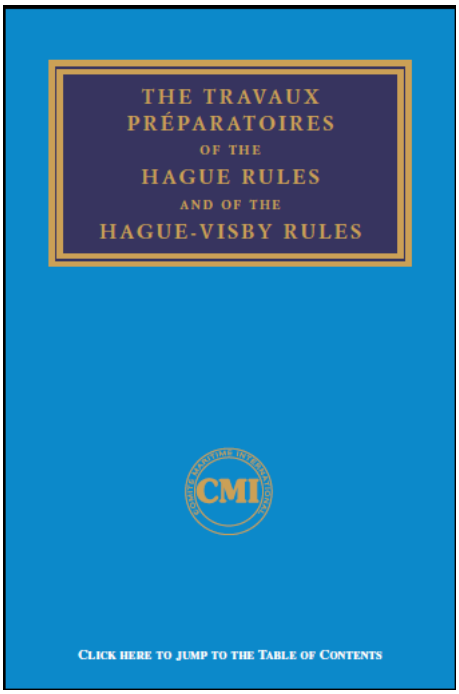
# Could *Kyokuyo* have gone further?

Should it matter, in the case of ordinary commercial shipments, whether the contract of carriage contemplates the issue of a bill of lading or some other transport document?

- HVR 'should be given a purposive rather than a narrow literalistic construction…': *The Morviken* [1983] 1 AC 565, 572.
- The Hague Rules 'were intended . . . to govern the great majority of ordinary commercial shipments. It seems plain that the concern of those negotiating the Hague Rules was not to restrict the scope of the Rules but to prevent their circumvention.' *The Rafaela S* [2005] 2 AC 423, [18].
- *Anticosti Shipping Co v Viateur St Amand* [1959 ] 1 Lloyds Rep 352, 357 (Canada) and *The Beltana* [1967 ] 1 Lloyds Rep 531 (Australia), both discussed in *Kyokuyo* at [47].

# *Travaux Preparatoires*, 89

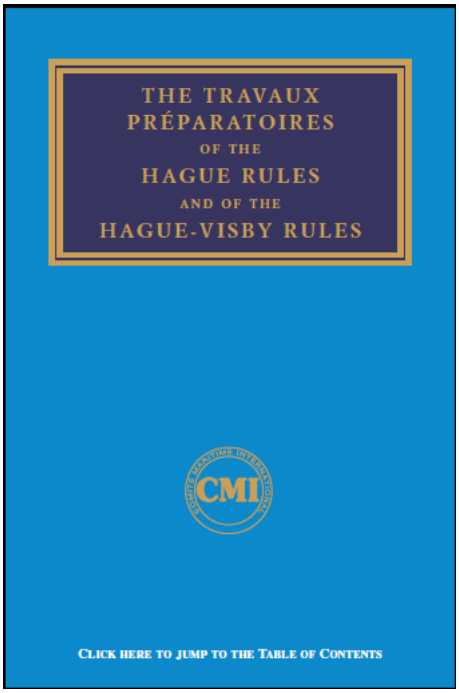
'… when you have to deal with the conference liners, they, of course, quite in a business way, all combine to have certain bills of lading worded in a certain way, so that they may work in conference, and they cannot get out of it, and, with such clauses in the bills of lading as there are now, no cargo owner can make any bargain with the shipowner. He has simply to ship his goods in accordance with the bills of lading which exist in the conference lines, or otherwise to have his cargo shut out or refused.'



# *Travaux Preparatoires*, 90, 91

'Originally, the authors of the Code had the intention to provide rules for all carriages by sea, but they intentionally altered that, and left the carriage of goods under charter-parties free, and only wanted to regulate the carriage of goods under a bill of lading.'

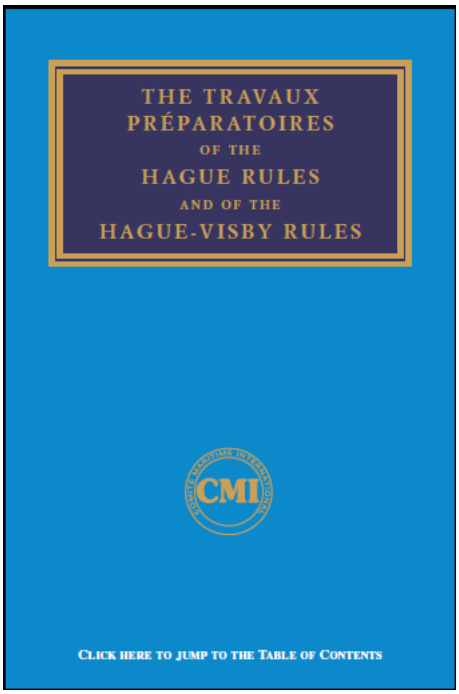
'The whole agitation for restrictive legislation of this kind arises quite naturally out of the modern conditions of liner carriage, where you have the lines established regularly running from one port to another, carrying all kinds and conditions of cargo, where there is no preliminary agreement between the particular shipowner and the particular shipper as to the conditions applicable to the particular cargo.'




# *Travaux Preparatoires*, 657

'I should like to know whether, as in article 3(3), when goods have been received, the shipowner must issue a bill of lading? Should the carrier, as a general rule, have the duty to issue a bill of lading? As a consequence of article 6, he would be freed from this obligation. Is it then the aim of this article to give the shipowner more rights than he had up until now?'

'In my opinion the scope of article 6 is exactly that which we had in mind. It deals with certain special contracts in which there is no bill of lading but simply a non-negotiable receipt, and in this case the parties have the right to make whatever terms they please. It is not very clearly indicated how far this goes. To a large extent it is the judge who will decide.'



# *Travaux Preparatoires*, 662

**Sir Leslie Scott** pointed out that the rules always applied to ordinary commercial cargoes.

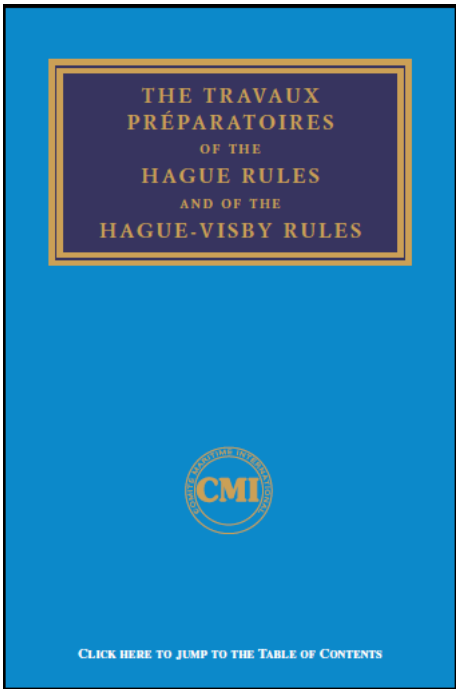
**Mr. Ripert** asked what should be understood by exceptional cargoes.

**Sir Leslie Scott** cited some examples. Aboard was a cargo of cotton damaged by seawater and there was a desire to reship what remained of this damaged cargo. Another example might be the shipment of a product containing some new material when it was not known whether this cargo would suit the ship, for which it might be dangerous. That was an experimental shipment. It was the beginning of what would perhaps later become an ordinary trade, but for the time being it was still an exceptional cargo.

**Mr. Ripert** noted that these examples demonstrated that there were two different hypotheses. In the first, the cargo was exceptional. In the second, it was the shipment that was exceptional.

**Sir Leslie Scott** indicated that the two cases were covered by the word "shipment".

**Mr. Franck** felt that in the case cited by Mr. Ripert the Convention marked the distinction very well. If the Remington Company, for example, wishes to ship to itself it could do so.

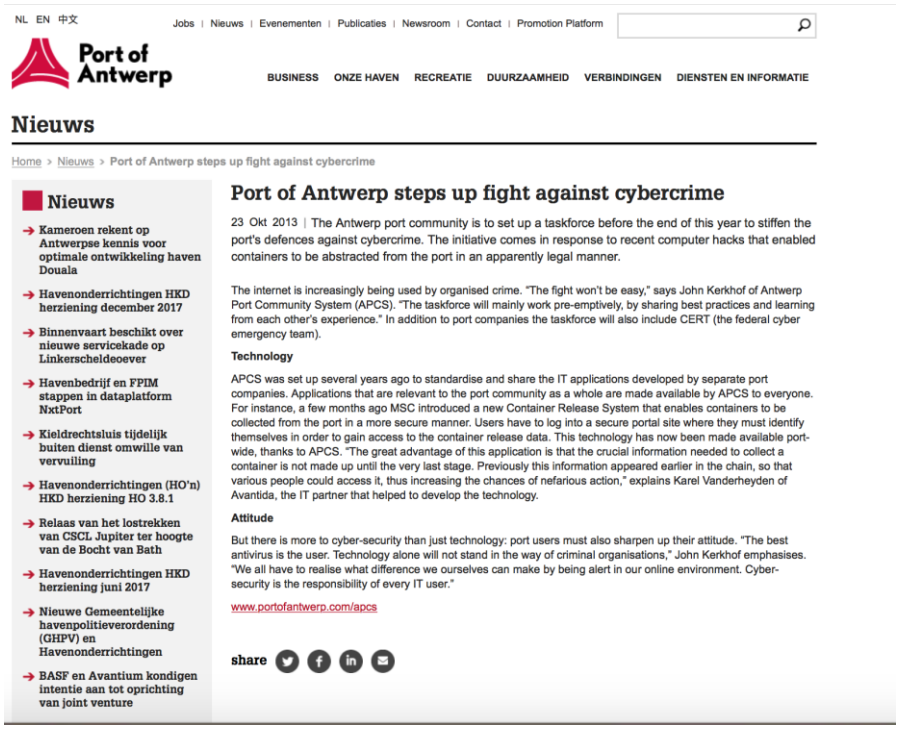



# *Glencore v MSC*: the context

- Port Authority of Antwerp has implemented an electronic platform to facilitate the flow of goods through the port: http://www.portofantwerp.com/nl/node/4665
- Cooperates with Alfaport Antwerp, an organisation composed of five industry associations representing shipowners, ships' agents, stevedores, freight forwarders and trafficflow controllers: http://www.portofantwerp.com/en/alfaport-antwerpen
- One of the facilities in place at the port of Antwerp is an (optional) Electronic Release System for cargo.

# *Glencore v MSC*

- Use of Electronic Release System (ERS) at Antwerp in place of delivery orders (bills of lading exchanged for pin codes).
- Goods misappropriated through unauthorised use of pin codes by unknown persons on 26/27th June 2012.
- Legal framework governing the effect of use of the ERS as between private users
  - Express bill of lading terms
  - Model contract (adoption optional) (recommended by Alfaport)
  - Release note sent by carrier to receiver containing pin codes and disclaimer
- The pin codes (together with container number) were used as the only method of identifying the person entitled to claim delivery of the cargo.



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Port of Antwerp

BUSINESS ONZE HAVEN RECREATIE DUURZAAMHEID VERBINDINGEN DIENSTEN EN INFORMATIE

Nieuws

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Nieuws

- Kameroen rekent op Antwerpse kennis voor optimale ontwikkeling haven Douala
- Havenonderrichtingen HKD herziening december 2017
- Binnenvaart beschikt over nieuwe servicekade op Linkerscheldeoever
- Havenbedrijf en FPIM stappen in dataplatform NxtPort
- Kieldrechtsluis tijdelijk buiten dienst omwille van vervuiling
- Havenonderrichtingen (HO'n) HKD herziening HO 3.8.1
- Relaas van het lostrekken van CSCL Jupiter ter hoogte van de Bocht van Bath
- Havenonderrichtingen HKD herziening juni 2017
- Nieuwe Gemeentelijke havenpolitieverordening (GHPV) en Havenonderrichtingen
- BASF en Avantium kondigen intentie aan tot oprichting van joint venture

## Port of Antwerp steps up fight against cybercrime

23 Okt 2013 | The Antwerp port community is to set up a taskforce before the end of this year to stiffen the port's defences against cybercrime. The initiative comes in response to recent computer hacks that enabled containers to be abstracted from the port in an apparently legal manner.

The internet is increasingly being used by organised crime. "The fight won't be easy," says John Kerkhof of Antwerp Port Community System (APCS). "The taskforce will mainly work pre-emptively, by sharing best practices and learning from each other's experience." In addition to port companies the taskforce will also include CERT (the federal cyber emergency team).

**Technology**

APCS was set up several years ago to standardise and share the IT applications developed by separate port companies. Applications that are relevant to the port community as a whole are made available by APCS to everyone. For instance, a few months ago MSC introduced a new Container Release System that enables containers to be collected from the port in a more secure manner. Users have to log into a secure portal site where they must identify themselves in order to gain access to the container release data. This technology has now been made available port-wide, thanks to APCS. "The great advantage of this application is that the crucial information needed to collect a container is not made up until the very last stage. Previously this information appeared earlier in the chain, so that various people could access it, thus increasing the chances of nefarious action," explains Karel Vanderheyden of Avantida, the IT partner that helped to develop the technology.

**Attitude**

But there is more to cyber-security than just technology: port users must also sharpen up their attitude. "The best antivirus is the user. Technology alone will not stand in the way of criminal organisations," John Kerkhof emphasises. "We all have to realise what difference we ourselves can make by being alert in our online environment. Cyber-security is the responsibility of every IT user."

www.portofantwerp.com/apcs

share

# *Glencore v MSC*

**Forwarder's Covenant:**

Article. 1: Obligatory use of the electronic release procedure For the purpose of delivering full import containers, the parties hereby agree only to use an electronic release procedure in which:

1) the container is released by the shipping company or its ship's agent, to the consignee or the latter's representative, by communicating an electronic release code generated individually for each container, which is also communicated to the terminal operator;
2) delivery of the container by the freight handler to the consignee or the latter's representative can only be made once the latter has entered the container number together with the corresponding release code mentioned under (1) above in the terminal operator's ICT system.

# *Glencore v MSC*

**Bill of Lading:**

If this is a negotiable (To order/of) Bill of Lading, one original Bill of Lading, duly endorsed must be surrendered by the Merchant to the Carrier … in exchange for the Goods or a Delivery Order….

**Release Note:**

- Incorporated bill of lading terms
- Incorporated forwarder's covenant
- Provided:

Discharge of the cargo will constitute due delivery of the cargo. After discharge the cargo will remain on the quay at risk and at the expense of the cargo, without any responsibility of the shipping agent or the shipping company/carrier.

# *Glencore v MSC* [2015] EWHC 1989 (Comm)

Decision for Glencore. MSC unsuccessful mainly because Glencore had no knowledge of the arrangements made in Antwerp. There was no mention of them in the bill of lading.

- The bill of lading was the only contractual document that bound Glencore. Neither should it be interpreted in the light of the arrangements adopted at Antwerp ([22] and [23]) or have a term implied into it reflecting those arrangements ([26] and [27]).
- Steinweg did not have authority to vary the bill of lading contract ([31]) and its use of the ERS could not estop Glencore from asserting that the delivery of the cargo upon presentation of a pin code was a breach of contract and/or duty by MSC [33].
- The release note did not contain the undertaking found in a ship's delivery order, so could not constitute a delivery order [19].

# *Glencore v MSC* [2017] EWCA Civ 365

Argument 1: by generating the pin code and sending it to Glencore MSC had delivered the goods exactly as required by the bill of lading (symbolic delivery). Rejected: for delivery of a symbol to do duty for delivery of goods, there had to be not only delivery but the requisite intention as to its effect, and found that here there was no evidence of any such intention.

Argument 2: Release note + pin code= Delivery order. Rejected: no undertaking.

Argument 3: Having operated the ERS procedure happily and without complaint for over a year, Glencore was estopped from denying that MSC satisfied its obligations by providing a pin code. Rejected: in all previous instances, goods had actually been delivered.

# Evaluation

- The result of the case is correct in terms of economic efficiency:
  - MSC in control of contractual terms.
  - MSC chose to adopt the optional ERS.
- The decision may raise some doubts with respect to whether it fulfilled the parties' reasonable expectations:
  - How is the person entitled to delivery identified when a paper delivery order is used?
  - How are risks normally allocated as between issuer and user where electronic keys are used to transact?
  - What if there had been evidence that the pin codes fell into the wrong hands as a result of a security breach at Steinweg?

# MSC Standard T&C Belgium

**9.7 Electronic Release**

**Release at Belgium ports are, since 01.01.2011, made based on an Electronic Release System (ERS). Upon fulfillment of the conditions defined in clauses 9.1** [presentation of original MSC bill of lading] **and 9.2** [where a sea waybill is used, the signing and stamping by the Consignee of a Letter of Indemnity / Undertaking acknowledging its acceptation of the MSC Bills of lading Terms and Conditions] **here above, a Release pincode will be automatically generated by MSC Belgium and transmitted to the consignee and/or to any party duly authorised by this consignee to organise and perform delivery. By requesting delivery of the cargo under the above procedure, the consignee and/or the party duly authorised undertake to keep the release code strictly confidential to the sole persons and companies entitled to organise and perform material delivery of the cargo on their behalf. Any breach of this confidentiality obligation will be at the sole responsibility of the Consignee and/or of the party duly authorised by this consignee, being expressly agreed that the issuance and transmission of the Release pincode by MSC Belgium will constitute the delivery of the cargo as defined within the front page clause at the bottom of the MSC Bill of lading and/or Sea Waybill.**

# Part E

# CURRICULA VITAE

# THE CHAIRMAN

## Belinda Bucknall QC

Qualified: Barrister (Queen's Counsel)
Mediator
Member of Independent Evaluation

Practice: Currently as an arbitrator and mediator from Quadrant Chambers, 10 Fleet Street, London EC4Y IAU

Judicial: Formerly:
Crown Court Recorder (crime)
Deputy High Court Judge (Admiralty law)
Deputy High Court judge (Administrative law)

Currently:
Judge of the Court of Appeal of the Falkland Islands

Accredited as a mediator by CEDR
Member of ADR Chambers
Panellist for ACI
Panellist for the Royal Aeronautical Society Arbitration and Mediation Scheme
Former Member of the Steering Committee of the London Shipping Law Centre and now supporting member via Quadrant Chambers
Member of the Western Circuit
Supporting member of the London Maritime Arbitrators' Association

Specialist Areas:

Shipping generally (involving offshore structures, large commercial vessels, super yachts, smaller private pleasure yachts)
Carriage of goods (bills of lading)
Charterparties (including construction of clauses in standard forms such as NYPE, Supplytime, Towhire and MYBA charterparties, fraudulent dealings with documents, goods and bunkers, unsafe port cases, negligent navigation, ice navigation, etc.)
Collision and the faults leading to collision
Salvage of objects of all descriptions (including commercial and pleasure craft and off shore structures of all sizes)
Wreck removal
Ship and yacht construction and repair
Ship and yacht sale and purchase
Personal injury arising out of accidents on or adjacent to commercial vessels, offshore structures and yachts
Marine insurance including yacht insurance
Aviation (fixed wing and helicopter) accidents

Education: St. Anne's College, Oxford. MA Law (Oxon)

Additional: She is a very experienced arbitrator and frequently sits both as sole arbitrator and as a member of an arbitra1 panel. She specialises in substantial disputes which involve areas of expertise such as negligent navigation, chemistry, explosion and fire, engineering, hypothermia, metallurgy, meteorology, naval architecture and personal injury.

# THE CHAIRMAN

She is used to dealing with paper-heavy cases involving oral evidence of fact and expertise but is equally happy to act as arbitrator in small cases which are heard on documents alone pursuant to fixed cost or limited cost procedures.

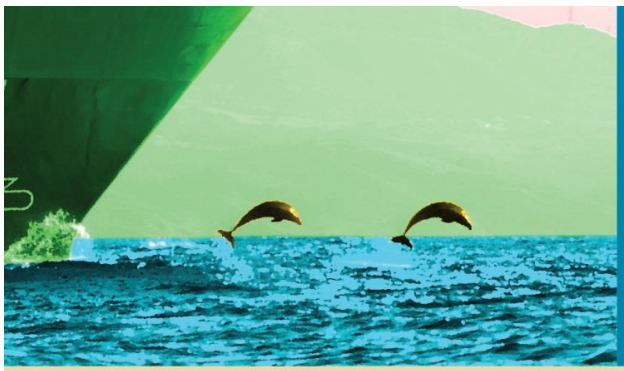
She successfully acted as a mediator in a number of disputes both before and after taking the CEDR residential course. She specialises in mediating shipping and commercial disputes, including disputes where sensitivity is paramount such as disputes involving or arising out of personal injury and death. Her success rate is high.

As a Recorder she has presided over numerous criminal trials. As a Deputy Admiralty Judge she has determined the factual and legal issues arising out of disputes relating to such diverse matters as the cause of damage to a ship's structure at an unsafe berth, personal injury arising from an accident on a ferry and damage to a food cargo caused by rats. As a Deputy Administrative High Court judge she has heard the full range of claims brought against public bodies.

Personal:

Belinda practiced as a barrister for some 30 years, building up a reputation for thoroughness and attention to detail which resulted in her appointment in many factually and legally complicated cases. During the course of her career at the Bar she participated in a number of Merchant Shipping Inquiries, including the Inquiry into the loss of the Penlee life boat, the loss of the sailing vessel MARQUES, the Inquiry into the loss of THE HERALD OF FREE ENTERPRISE at Zeebrugge and the first Inquiry into the Loss of the DERBYSHIRE. She has appeared on television to speak on shipping matters.

She has a working knowledge of French and Italian.



West of England

# Your Contacts

## Claims Team 3

### **Erin Walton –** Associate


Phone; **+44 20 7716 6033**
Mobile: **+44 7432 593711**
Email: **Erin.Walton@westpandi.com**


Erin joined the Club in 2014 from London shipping law firm Thomas Cooper where she trained and practised for four years. She studied law and politics at the University of California before obtaining her LLB at the College of Law in London. She also holds a Master of Laws in International Law from The University of Notre Dame and has also worked for the port agency department of Gulf Agency Company. Erin works with a wide range of Members with a particular focus on India and handles both FD&D and P&I claims.

### **Dr Michaela Domijan-Arneri –** Associate


Phone; **+44 20 7716 6036**
Mobile: **+44 7985 632275**
Email: **Michaela.Domijan-Arneri@westpandi.com**


Michaela Domijan-Arneri studied law at University College London (UCL). She also obtained the Master of Laws Degree and completed her doctorate having been awarded a PhD degree in maritime law. She is an English qualified lawyer and practiced as a solicitor with a major London shipping law firm before joining the Club in 2010. She is also a CEDR qualified mediator. Michaela is multilingual and counts French, Italian, Dutch, Croatian and German among languages in which she is highly proficient. Michaela handles both P&I and FD&D disputes, working with various Members with a focus on Europe.

# Charlotte Tan

Called 2008

20 ESSEX STREET

## Areas of Expertise

- Banking & Finance
- Commercial Law
- Civil Fraud
- Insurance & Reinsurance
- Shipping
- Arbitration & Mediation

Charlotte has a broad commercial practice, with particular focus on civil fraud, international trade and finance, insurance and private international law. She is regularly instructed in matters in the High Court and the Court of Appeal as well as international arbitrations under different rules (LCIA, ICC, LMAA, GAFTA and FOSFA). She has substantial experience of applications for interim relief (freezing orders, in particular).

She is recommended by the directories for Commercial Dispute Resolution and Shipping and Commodities. In 2014, Charlotte was selected in Legal Week's "*Stars at the Bar*" as one of 10 "*up-and-coming commercial and Chancery barristers recognised for their exceptional abilities*", where she was described as a junior who is "*unflappable and always manages to maintain a calm, clear head and a sense of perspective*", "*highly sought after*" and a "*real star*".

Her commercial litigation experience includes acting in several major fraud cases (***Vincent Tchenguiz v Grant Thornton & Ors***, ***Deutsche Bank AG v Sebastian Holdings Inc and Alexander Vik*** and the ***BTA Bank v Ablyazov*** litigation) and her recent shipping and commodity matters include ***Ronelp & Ors v STX Offshore and Shipbuilding***, a c. USD100m shipbuilding dispute relating to Commercial Court claims brought against the Defendant for failing to construct five hulls following the yard's collapse, raising issues of illegality and the exclusion of remedies under the standard SAJ Shipbuilding form and issues under the the Cross-Border Insolvency Regulations ([2016] EWHC 2228 (Ch)) and ***Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd & Ors***, a substantial action in the High Court, concerning claims arising out of the misappropriation of significant quantities of coal from storage facilities in Turkey, held as a finance fund's collateral for sums advanced under a Sharia compliant Murabaha Financing Agreement (committal proceedings reported in part at [2015] EWHC 3748 (Comm)).

Her international arbitration experience includes acting for Charterers in ***The Yangtze Xing Hua*** [2017] 1 Lloyd's Rep. 212 (Teare J); [2017] EWCA Civ 2107 (CA) on the operation of the apportionment regime in the NYPE Inter-Club Agreement; acting for the Club in ***The Prestige*** against the Kingdom of Spain and the French State in relation to oil pollution claims arising from one of the worst spills in recent years (total quantum up to €4.5bn) (reported decisions at [2014] 1 All E.R. (Comm) 300; [2014] 1 Lloyd's Rep. 137; [2013] 2 C.L.C. 562 (High Court) and [2015] 2 Lloyd's Rep. 33 (Court of Appeal)); and ***Griffon Shipping LLC v Firodi Limited*** [2013] 2 All E.R. (Comm) 246; [2013] 2 Lloyd's Rep. 50 (Teare J; instructed as sole counsel); [2014] 1 Lloyd's Rep. 471 (CA; led by Michael Coburn QC) on the true construction of the NSF 1993 form, concerning whether buyers of a second hand ship who have failed to pay a deposit are liable to pay the same as debt or damages following termination of the MOA. Charlotte has experience in a wide range of shipping and commodities disputes including those concerning JV disputes, dangerous goods, safe ports, fire damage, ship sale disputes, zinc smelting disputes and ethanol sale disputes.

## Quotes

"*A hard-working commercial junior.*" (Chambers & Partners 2018, Commercial Dispute Resolution)

"*She's very thorough and hard-working, and she understands the business issues, not just the legal aspects of the case.*" (Chambers & Partners 2018, Commercial Dispute Resolution)

"*She is outstanding. She's user-friendly and she works as part of a team.*" (Chambers & Partners 2018, Shipping)

"*Excellent.*" (Legal 500 2017, Shipping)

"*A highly regarded junior who is trusted by top silks to handle big-ticket matters. She has experience of acting in huge fraud, insurance and shipping cases, and is viewed as someone who punches well above her level of call.*" (Chambers & Partners 2017, Commercial Dispute Resolution)

"*She produces high-quality paperwork that is seriously well reasoned and beautifully put together.*""*She is the best junior that I have worked with due to the quality of her advice, her commercial approach and her responsiveness.*" (Chambers & Partners 2017, Commercial Dispute Resolution)

"*An 'extremely bright and charming' junior.*""*She is a really effective and hard-working junior. 'Getting involved' is an understatement, I felt she had become part of our team.*" (Chambers & Partners 2017, Shipping and Commodities)

"*I have seen her at a hearing outmatch an opposing QC with ease and elegance. She is proactive and often comes up with smart ideas for arguing a case which are not immediately obvious but which stand up on analysis.*" (Chambers & Partners 2017, Shipping and Commodities)

An "*up-and-coming commercial junior with a growing reputation among instructing solicitors.*" (Chambers & Partners 2016, Commercial Dispute Resolution).

A "*rising star of the commercial Bar*"."*She is very user-friendly, hard-working and has a nice touch.*" (Chambers & Partners 2016, Insurance)

Recommended "*given the strength of her flourishing commercial practice*";"*she is phenomenally intelligent and hard-working and has a maturity and knowledge beyond her call*" (Chambers & Partners 2015, Insurance)

# Poonam Melwani QC

**Called: 1989 Silk: 2011**

poonam.melwani@quadrantchambers.com

*"...Very impressive." "User-friendly, practical, quick and bright. She is responsive and very good on her feet...." (Chambers UK Bar, 2018)*

*"...A fantastic advocate..." (Legal 500, 2017)*

## Practice Overview

Poonam Melwani QC is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Praised as "...always in demand, she is as good on her feet as she is adept at mastering complex legal, factual and expert material...." (Chambers UK) Poonam has been ranked as a 'Leading Silk' over many years by the Legal Directories. She represents clients in a wide variety of jurisdictions and arbitral regimes including ICC, LCIA, LMAA and ad hoc, as well as English High Court Litigation, mainly in the Commercial Court and the Appellate Courts.

Poonam's clients want her for their "difficult cases" where innovative thinking and oversight of a large team, complex issues and mult-strands are necessary. In Commerzbank v Pauline Shipping [2017] 1 WLR 3497 Poonam successfully argued that asymmetrical jurisdiction clauses, prevalent in banking agreements, are exclusive jurisdiction clauses for the purposes of Brussels 1 Recast, an issue and judgment which has attracted widespread attention. She concluded the CSAV v Hin Pro Litigation [2015] 2 Lloyds Rep 1 (Court of Appeal) and [2015] 1 Lloyds Rep 301 where a new approach to damages for breach of exclusive jurisdiction clause was adopted. Poonam recently concluded Latin American Investments v Maroil Trading involving joint venture shareholders of a fleet of vessels and complex allegations of breach of fiduciary duty, secret profits and fraud and where Poonam successfully obtained a WWFO of over US$60 million. She currently leads an entirely new team in the action of Zumax v FCMB where Poonam is seeking to appeal a summary judgment finding of breach of trust and fraud and resisting a claim for an account of profits of over US$200 million.

Poonam has also acted on an enormous amount of marine insurance work and significant re-insurance work. Cases include: The US$20 million reinsurance dispute of Beazley Underwriting Ltd v Al Ahleia Insurance Co [2013] Lloyds Rep I.R. 561 where Poonam successfully represented insurers and made new law and two recent confidential scuttling cases.

## What the directories say

*"...Very impressive." "User-friendly, practical, quick and bright. She is responsive and very good on her feet...."* (Chambers UK, 2018)

- *"...A fantastic advocate..."* (Legal 500, 2017)
- *"...Incredibly hard-working, she will leave no stone unturned to fight your case..."* (Chambers UK, 2017)
- *"...Excellent...."* (Legal 500, 2016)
- *"...she has a good ability to think outside the box." "She is very tenacious and hard-working..."* (Chambers UK, 2015)
- *"...stands out from the crowd, because of her confident approach and particularly strong advocacy..."* (Legal 500, 2014)

Queen Mary University of London

Centre for Commercial Law Studies

# DR MIRIAM GOLDBY

Dr Miriam Goldby is Reader in Shipping, Insurance and Commercial Law at the Centre for Commercial Law Studies (CCLS), Queen Mary University of London (QMUL), and director of Centre's LLM in International Shipping Law in London.

She is also Deputy Director of the Centre's Insurance Law Institute and Deputy Editor of the British Insurance Law Association Journal. She has received research funding from the British Academy, the ESRC and Lloyd's of London and has contributed to research undertaken by the Bank of England and the Law Commission.

Between 2012 and 2017 she participated in the work of UNCITRAL's Working Group IV (Electronic Commerce) as delegate and as a member of the Experts Group and contributed to the drafting of an instrument on Electronic Transferable Records.

She is the author of *Electronic Documents in Maritime Trade: Law and Practice* (OUP, 2013) and the editor of *The Role of Arbitration in Shipping Law* (OUP, 2016).