

**ABC CONTAINERLINE DEMISE 1996
CO-ORDINATION OF CARGO INTERESTS
RECOVERING CARGO FROM VESSELS
UNDER ARREST IN SYDNEY, AUCKLAND,
HALIFAX, HAIFA AND SINGAPORE**

BY

**JOHN LEVINGSTON
LEVINGSTONS**

ABC CONTAINERLINE DEMISE 1996 - COORDINATION OF CARGO INTERESTS - RECOVERING CARGO FROM VESSELS UNDER ARREST IN SYDNEY, AUCKLAND, HALIFAX, HAIFA AND SINGAPORE

Presented by John Levingston, Principal of Levingstons Solicitors in Sydney for the 24th Annual Conference of the Maritime Law Association of Australia and New Zealand, Hobart, 14 October 1997.

(jl\3367s)

Introduction

In March 1996 a vessel owned and operated by Combo Carriers was arrested in Melbourne by a mortgagee bank, and this arrest probably precipitated the failure of ABC Containerline which operated a round-the-world service, leading to the subsequent arrest of vessels, and creating the problem of discharging cargo in Sydney, Auckland, Halifax, Haifa and Singapore. There were two further vessels under arrest in North America, but they did not involve Australian cargo and I did not get involved.

This paper is about the practical challenges faced and the solutions found in each of those jurisdictions in organising the discharge of the cargo in a timely and cost effective manner. The legal issues are being addressed by other authors during this session.

The exercise was coordinated in Sydney and involved lawyers and other professionals in each of those ports, where a myriad of different issues arose.

To put everything in context, some statistics:

1. There were five vessels under arrest in various ports:

<u>Port</u>	<u>Vessel</u>
Sydney	Martha II
Auckland	Cornelis Verolme
Halifax	Brussel
Haifa	Ellen Hudig
Singapore	Antwerpen

2. Each vessel was carrying between 1,000 and 1,200 containers;
3. There were about 500 to 600 interests to keep informed about each vessel;
4. The vessels were in different time zones, and the start of business hours in each port posed another communication and coordination problem in Sydney in discussions with local lawyers and others involved in decision making. The operational times were:

<u>Port</u>	<u>Opening</u> *	<u>Closing</u> *
Auckland	0700	1500
Singapore	1200	2100
Haifa	1800	0300
Halifax	2400	0700 (the day before)

* Relative to Sydney opening at 0900 and closing at 1800 hours.

This was effectively a 24 hour a day operation.

5. An estimated US\$600,000 had to be found to fund the discharge of each ship.

DISCHARGE OF CARGO

1 Managing the Problem

The size of the operation involving a large number of ships, containers and individual interests required allocation of considerable resources, and an early decision was made to stagger the timing of discharge operations dealing first with northbound export cargo in Sydney, Auckland and Halifax as this involved a considerable amount of foodstuff cargo and humanitarian (as well as commercial) issues at destination ports, and then with a second group of southbound import cargo stranded in Singapore and Haifa.

2 Logistics

"Logistics" is a military term which refers (amongst other things) to the mathematics of transport and supply. The planning of the discharge operations had all the elements of a logistics problem as it involved, co-ordinating large numbers of cargo interests from Australia, New Zealand and other countries with many different kinds of cargo.

The operation had all the hallmarks of a military operation and presented a massive undertaking for cargo interests, lawyers and other professionals. I might add that at times the operations had to be conducted under 'hostile fire', and on a few occasions we suffered from 'friendly fire', but fortunately we suffered no fatalities, and the only collateral damage suffered was delay.

The problems arising from the sheer size of the operation and its conduct in several different ports, was tackled by breaking the exercise up into smaller tasks which were delegated to different groups, such as lawyers in different ports, stevedoring and logistical experts, and other planners who provided assistance in identifying following vessels which could carry cargo, advising carrying capacity and so on.

3 The form of Court Orders obtained by Cargo

The Court orders enabling discharge of cargo from the vessels under arrest followed the same broad scheme in each jurisdiction, and contained the following elements, although there were variations in some jurisdictions:

3.1 Discharge of all cargo from the vessel;

3.2 All cargo interests to bear a pro rata share of the discharge costs;

3.3 Cargo unclaimed after a specified period to be sold at auction, and the sale proceeds to be paid first to auction fees, second to port and storage charges, third to pro-rata discharge costs, balance to owners/consolidated revenue;

No orders were needed in Haifa as the ABC Trustees appointed an agent to discharge the vessel by agreement with cargo representatives.

Get manifests for cargoes consigned/consignees - type cargo -
4 Limiting the scope of the work

There were many issues associated with the discharge operations, and even more issues which arose once the containers were discharged. Whilst the objective of discharging cargo presented a common purpose for cargo interests on each vessel, there were many different and diverse issues for individual cargo owners once the cargo was discharged. I believed that as individual choices were involved from that stage, it was impossible to manage, and the best policy was to limit the scope of the work to 'get the containers to the quay'.

During the course of the second cargo discharge in Auckland, it became clear that an exception had to be made to this policy in an effort to protect cargo interests, and the scope was broadened to include negotiations on behalf of cargo interests with container owners to help

keep forwarding costs down. This problem also arose in Singapore, where container owners obtained orders restraining removal of containers from Singapore without consent and payment of security. However, as in most cases, the issues were resolved by negotiation.

The diversity of different issues for individual cargo interests after arrival of the containers into terminal stack at discharge port was simply too great for involvement and I took the position that these arrangements should be made by cargo interests appointing a forwarder or other agent, than than involving lawyers.

5 Funding

Each ship had been moved to a buoy away from the port, and had to be brought back to a container berth for discharge operations. Some of the issues included negotiation of stevedore rates and port fees, obtaining bunkers, tugs, pilots and so on.

The first and most important question was 'what is this going to cost?'. A simple enough question, but the answer was almost impossible to get as in the early stages no-one was prepared to commit themselves to quotes.

I suspect that many of those potentially involved could foresee any number of currently unquantifiable issues, particularly those in the industry, and it was only the lawyers who remained blissfully unaware (for a short time only) of the problems.

And then, there were different matters which arose in each port. For example, in Singapore and despite the form of the court orders, the discharge agent wanted a cash contingency fund to protected it against claims by the Port of Singapore Authority for unclaimed containers.

The obvious solution was how to cost each potential exercise, and this was done by identifying all likely costs and creating a budget. Each port had different components to cost, and different rates for everything, and separate budgets had to be calculated. Halifax involved the first budget, and was used as an outline for the other ports.

However, as became apparent in Auckland, 'expect the unexpected', and it was impossible to discharge containers in one operation due to the presence of bulk mineral sands in a forward hold. The concern was potential stress damage to the hull (and possible vessel capsizing), and this resulted in three container discharge operations. This significantly increased discharge costs, particularly for the last group of containers.

Accurate budget forecasting was almost impossible.

In Sydney, ABC Containerline paid for the movement, discharge and reloading of the Martha II cargo onto the Cornelis Verolme, and no funds were collected from cargo interests. Perhaps fortunately, as this vessel was arrested in Auckland some weeks later.

For Halifax, I arranged for a major cargo owner to fund the whole discharge, with a teu rate recovery from other cargo interests. The risk of a financial loss on this exercise was assumed to be low on the assumption that most cargo owners would claim their cargo, and there would be some value in those that might be abandoned.

This was the easiest solution as it turned out, as the discharge proceeded based on best guess estimates, and once the exercise was complete, the discharge costs were known, as were the cargo interests who wished to receive their cargo. Calculating the pro rata share was perhaps the simplest part of that discharge operation.

In Auckland, Singapore and Haifa funds were collected in advance from cargo interests on a per teu rate, being a pro rata share of the estimated discharge costs. This sounds fine, but in Singapore, after obtaining a quote and agreeing on a price with the discharge agent and advising cargo of the cost, the discharge agent introduced an additional fee of S\$91,100 which they described as 'Anticipated Storage Charge to be incurred due to non-nomination of 2nd Carrier'.

There were a small number of cargo interests who attempted to obtain discharge of their cargo without contributing to the discharge costs. These were dealt with by Court Order to ensure their contribution.

6 Additional expense

Delay was a problem, as it created uncertainty, and meant rearranging everything, usually at great cost to cargo interests who at the very least had to reschedule onward bookings.

Frustration also increased discharge costs. In Singapore, the discharge took about one week to organise. A Court Order was obtained, the preconditions satisfied, the discharge booked with approval of the Sheriff, and at the last moment cancelled as lawyers for the ABC Trustees insisted that they wished to inspect all original bills of lading which had been produced to the Court, before cargo could be discharged. They estimated that they could inspect the bills of lading at a rate of about 80 per day, which would take several weeks to complete. Although the Court ruled against this request, the discharge was delayed for 2 weeks.

7 Co-ordinating cargo interests

The legal issues were relatively straightforward as the cargo was not under arrest, but as the vessels were under arrest, Court Orders were required to allow movement of the vessels, and the discharge operations.

These legal issues are being covered by other papers at this conference and are not covered here.

However, co-ordinating large numbers of separate cargo interests to discharge between 1,000 and 1,200 containers from each ship under arrest in five ports in different legal jurisdictions required coordination and organisation, skills of a diplomat, and where necessary resort to Court processes to clear away obstacles.

Communication with cargo interests was a major problem. The issue was how to handle the sheer number of incoming fax and telephone communications. On average there were about 500 to 600 different addressees to contact for each vessel, so that we had to keep about 2,000 cargo interests informed about what was going on. This was solved by allocating additional personnel and equipment resources and adopting a policy of 'do not call us, we will call you'.

We kept cargo interests informed by issuing regular (pro forma) bulletins to cargo interests using fax stream facilities, and by issuing press releases which were published in the Daily Commercial News.

8 Collective Action

In my opinion, both then and now, the only logical and cost-effective way of handling the legal and practical aspects of the discharge of large numbers of containers and hundreds of cargo interests on each vessel was to promote the advantages of collective action using 'strength in numbers' to avoid the high costs for individual cargo attempting to discharge cargo on their own, and without group negotiating and purchasing power, and without a clear understanding of what was needed to complete the whole exercise.

An example of this problem arose for a New Zealand cargo interest with a container on the Antwerpen in Singapore. He had appointed a Singapore lawyer who charged him about S\$4,000 to obtain an Order entitling him to take his container off the ship. He had a practical problem, it was not economic to pay the costs of moving the ship, removing containers from the ship which were in his way, taking his container off the ship, having all the other containers lifted back onto the ship, and the ship taken back to the buoy.

Promoting a united front was an efficient way of obtaining appropriate and all-encompassing court orders in foreign courts and immediately created a position of strength from which cargo interests could conduct commercial negotiations.

9 Negotiation with Port Authorities

It was imperative to open lines of communication with the Port Authorities as a matter of policy. Cargo owners and Port Authorities had a common purpose, as it was not in the interests of the ports to have large numbers of containers discharged and remaining at the terminal. For example, in Auckland this was a major concern due to limited terminal storage capacity. Overall, a great deal of assistance and support was received from port authorities, especially the Port of Singapore Authority which provided a number of valuable commercial concessions to encourage cargo owners to on-forward containers without delay.

10 Freight forwarders

Some cargo was carried under house bills of lading by which freight forwarders were providing door to door service, and had the principal obligation in relation to obtaining discharge for their clients. In this capacity freight forwarders provided a useful coordination point for communicating with cargo interests, and they assisted by reducing the number of individual cargo inquiries.

Some freight forwarders had insurance cover for carrier insolvency risk, whereas almost no cargo was covered for this risk under the usual terms of marine policies.

11 Litigating in foreign courts

As ABC ships were arrested in foreign ports, it was necessary to instruct foreign lawyers to act for cargo interests to obtain orders for discharge. The assistance received was of the highest level, consistent with the fine service maritime lawyers provide to each other.

The practice and procedure of the courts in Australia, New Zealand, Canada and Singapore were very similar, and the applications came before specialist Admiralty judges.

The Israeli Court, however, did not appear to have a dedicated Admiralty judge, and the matter proceeded by agreement of the parties after protracted negotiations, but supported by consent orders approved by the Court.

Despite each jurisdiction having its own peculiar set of local rules, the orders for discharge of cargo reflected a common approach of protecting innocent cargo interests.

12 Negotiations with container owners

In each jurisdiction, it was necessary to negotiate with container owners who were concerned about the problems associated with ensuring the return of their containers in the face of ABC's failure.

Many owner's proposed two charges, continuing hire at a daily rate as they were not going to be paid by ABC, and a security bond to ensure container return.

The charges were on scales depending on the container type, but they were in the first instance, extremely extravagant, ranging up to US\$45,000 for a tank. In at least one negotiation, we were concerned that container owners were approaching the matter with an apparent upper-hand, on the basis of 'if you do not like it, take your cargo out of our containers, and make your own arrangements', and if the threat was real, substantial costs would be incurred by cargo interests, and delay and disruption was likely to be caused at the discharge port. However, I felt they were bluffing for a number of reasons, including the possibility of having to retrieve and onforward empty containers.

In Auckland, cargo interests obtained court orders against container owners reducing the security bonds to more reasonable levels.

The experience in Auckland was used to negotiate with container owners in other ports.

A similar situation arose in Singapore, and an internal memo of one of the container owners was given to me which set out a high level of proposed charges. However, the proposal was withdrawn during negotiations and a lower hire and security rate agreed which was more in line with what had been either ordered or agreed in other ports.

13 Notifying marine cargo insurers

Many cargo interests notified their cargo insurers as soon as they became aware of the arrests.

Most cargo was carried under ICC(A) clauses, which did not cover additional expenses arising from carrier insolvency.

However, many freight forwarders providing door to door carriage had cover against this eventuality.

We attempted to cover this consideration for all cargo owners, regardless of their insurer, by advising the Australian underwriters 'Large Loss Committee' of the arrests, and providing a copy of the manifest for each vessel, showing consignors, consignees and cargo details.

In addition, we recommended a risk management approach to Australian underwriters suggesting that they coordinate action through the Large Loss Committee to appoint joint surveyors and take appropriate action to ensure reefer containers were operational and spare parts were available in the event of breakdown.

14 Payment of additional expenses.

There were a number of additional expenses associated with container movement and on-carriage after discharge at the Quay. These included handling charges for dangerous cargoes, storage fees, handling charges for inland transport and warehouseman, charges for arranging onward freight. Many of these charges were billed to cargo owners by local agents who were appointed by individual cargo owners.

15 Payment of freight

There were two broad claims for freight made by the Trustees of ABC Containerline as a condition for the release of cargo after discharge from the vessel.

16 Prepaid freight

This arose where consignors (such as freight forwarders) held a current account with ABC Containerline and had not paid the freight prior to the collapse, although the bills of lading had been issued by or on behalf of ABC with the words 'freight pre-paid'. On one view, this may have been a fraud against consignees and their banks who negotiated payment

in good faith based on that statement, when in fact the bills of lading were tainted, and the cargo subject to a carrier's lien.

However, where freight was yet to be paid, claims for it were made, and a range of different solutions negotiated or ordered by the court in different ports.

17 Freight Collect

Consignees receiving cargo on this basis were troubled by the idea they were to pay freight to ABC Containerline, and a further payment to a second carrier to complete the voyage. The legal issue was based on the contractual term that freight was deemed to have been earned on delivery of the cargo to ABC Containerline. In some ports, cargo argued that there was a legal basis for refusing payment. This argument was most successfully contested by cargo interests in Auckland, whilst in Halifax and Haifa monies were paid into a disputed monies account for later argument. The matter was settled in Halifax, whilst it remains unresolved in Haifa at the time of writing this paper. The matter was not raised in Singapore.

18 Production of Original Bills of lading

The production of original bills of lading became a logistics nightmare for cargo interests with cargo on board vessels in Singapore and Haifa, where original Bills of Lading had to be produced before containers could be on-forwarded. In Singapore, production had to be made to the Sheriff before the vessel movement and discharge booking could even be made, and only those containers for which the original bill of lading was produced could be discharged.

Unhappily, loading clerks make errors, and in Singapore we discovered discrepancies between container numbers in the bills of lading, in the

vessel's manifest, and on the containers. Some errors were obvious, with transposition of numbers, and those containers were discharged.

19 House bills of lading

The requirement for production of original bills of lading in Singapore and Haifa raised a problem in relation to NVOCC or house bills of lading, and there was considerable debate in Singapore and Haifa about whether a non-ABC Containerline bill of lading was acceptable.

We also discovered that a lot of small package LCL cargo originating in Haifa had been consolidated into containers under a house bill of lading, and we were told that individual package owners did not have any form of bill of lading at all. In the end, the only practical solution was to accept the house bills, and this was done.

In Sydney, Auckland and Halifax original bills were not required, and the cargo was treated as being in transshipment, although fresh bills of lading were issued by on-forwarding carriers.

The Singapore and Haifa requirements were of great concern as I believed there was a potential liability for me if a bill of lading was misplaced or lost, or stolen by a rogue, who then obtained delivery of the goods. Some of the cargo was of high value, such as tanks of whisky and other alcohol, and about 30 veteran Rolls Royce on the Singapore vessel.

For the Singapore discharge, I had already delivered photocopies of bills of lading to my Singapore agents (at the time not being aware that the Court would require production of the originals), and I subsequently advised cargo interests (who were located all round the world) to air courier the originals to Singapore so they could be produced to the Sherrif. This exercise took place over about two days, and I estimated

the additional cost to cargo interests of air courier expenses at about A\$20,000 to A\$30,000 for the Australian cargo interest alone.

For the Haifa discharge, I had more planning time, and arranged for the original bills of lading held in Australia to be consolidated in Sydney and sent to Israel. This at least reduced the overall cost of the exercise. However, a different problem arose for Haifa, as it was not on a direct air courier route, and packages had to back-track from Europe, adding about two days to the delivery time.

20 Time

Timing was of the utmost importance in these discharge operations.

There were almost as many issues as types of cargo. There were some very valuable cargoes, such a whisky and the veteran Rolls Royces, and so on which were susceptible to theft whilst discharged and awaiting on carriage, cargo subject to deterioration (Baileys Irish Cream, chocolates, seafood and so on sitting in reefers in tropical heat) through being off power, mechanical breakdown and so on, foodstuff cargo which had a 'use by date' marked on packaging which was going to arrive too late for it to have a reasonable shelf life for distribution into the consumer market, raw materials required for manufacturing processes with delay likely to lead to temporary closure and loss of employment during down time, a threat to agricultural production as a chemical was required for crop treatment and was not likely to arrive in time.

It became imperative to arrange the discharge of cargo at the earliest possible time. There were competing interests in this regard as some cargo interest believed their cargo should get preferential treatment. However, I pursued a policy of treating all cargo equally to avoid a potential conflict of interest, but more importantly in my opinion, to do otherwise had the potential to break-up the cargo interests which were being presented to

third parties as unified, and I was concerned about the potential to lose any negotiating power which been obtained due to the strength in numbers approach.

21 Further problems

There were a number of other problems, which arose in different ports.

In Sydney at one stage it was seriously suggested that the vessel remain on its buoy in the harbour and containers discharged onto barges, then it was suggested that as the vessel was in Port Jackson it should discharge at Glebe Island, and some 1,200 containers be moved by truck down to Port Botany. This would have involved great expense, disruption to local communities in the inner west suburbs of Sydney, and significant delay in getting all the containers moved due to the sheer number involved. In the end, the Federal Court made orders for the vessel to be moved to Port Botany for discharge at the terminal to enable loading onto a following vessel, which ironically, proved to be the vessel subsequently arrested in Auckland.

In Halifax, a stevedore company was in control of the discharge operations, and there was some dispute about which of two terminals would be used for discharge of the vessel. One terminal was used for North American traffic, whilst the other was used for european bound cargo. At an early stage, it appeared as though the vessel would discharge at the American terminal, which would incur additional costs and a logistics nightmare, involving road transport of some 1,200 containers, involving considerable delay arising from the time to shift so many containers, and at a significant cost to cargo interests.

In addition, it was very difficult to get firm quotes for discharge operations in any port, and in relation to Halifax we discovered that the quote for discharge was significantly more as the stevedores quoted on the

basis of a 'one-off ' discharge operation, without giving us the benefit of the ABC Containerline negotiated rate. In circumstances, an expert was retained in Sydney and flew to Halifax to negotiate the discharge costs directly with the stevedores. He stepped off the plane and went straight into the negotiations, and on the first day saved cargo an average of C\$100 per teu.

22 Traps for Inexperienced Players

There were a number of issues which emerged during the various discharge operations, some of them traps for both experienced and inexperienced players. The lessons drawn are set out in the following paragraphs.

23 Melbourne loading after arrest

It has never been clear who authorised the continued loading of the Martha II (Combo Carriers) after its arrest in Melbourne at 1600 hours. Loading was discontinued temporarily, and resumed about 1800 hours until completed. Although it may have been well intentioned, that conduct led to substantial losses exceeding \$150,000 to cargo interests whose cargo was loaded, clean bills of lading presented and freight paid without any knowledge that their cargo was now on a vessel under arrest.

24 Sydney Discharge and Loading

This was a case of out of the frying pan and into the fire. The cargo was discharged from the Martha II (Combo Carriers) and loaded onto the Cornelius Verholme following an offer by ABC Containerline that it would carry as much of cargo as possible. At that stage we did not know that it was really ABC Containerline which was in financial difficulty (rather than just Combo Carriers) and about to fail. We obtained written assurances that all was well before allowing the loading of the Cornelius Verholme, but these proved to be inadequate as that vessel continued its voyage to Auckland. I first became aware of trouble when the vessel failed to arrive

within the expected time, and was subsequently reported off the New Zealand coast 'with rudder trouble', where she remained for some 17 days. In the end, I approached the Federal Court in Sydney seeking orders that the owners deliver up the cargo in Auckland. The matter was never argued, as the vessel then arrived in Auckland where she was arrested.

25 Liability for loss arising from mishandling of original bills of lading
The potential liability for discharging lawyers having to manage receipt and onforwarding of some 2,000 bills of lading can not be overstated, and worried me greatly. Whilst I believe that as lawyers we were acting in good faith using best endeavours, and a documented procedure, the potential existed for theft by an opportunist which would lead to an allegation of negligence. Fortunately, this did not arise, but on reflection an indemnity from cargo owner would be of great comfort.

26 Conclusion

Everyone who was involved learned a great deal, mostly as we went along, and are all much wiser. One of the participants informed me he was now sufficiently wise to decline involvement in a similar exercise again. It was an interesting exercise, and on a scale like this probably features only once in a professional career.

27 Acknowledgement

This paper would not be complete without an acknowledgment of the fine work done by all my staff, and particularly Mr Simon Benson and Catriona Carver who fielded many thousands of phone calls and faxes, and my correspondents in the ports where the cargo had to be discharged. I record my special thanks to William Moreira QC of Messrs Daley Black & Moreira in Halifax and Ms Pauline Barratt of Messrs Jones Fee in Auckland who both pioneered many of the solutions which were used as a basis of negotiations in other ports, together with Messrs Gurbani & Co in Singapore, and Mr Singer in Haifa.