In The Court Of Appeal
On Appeal From The High Court Of Justice
Business & Property Courts Of England & Wales
Commercial Court (KBD)
[2025] EWHC 1878
The Honourable Mr Justice Knowles CBE
Between:

Pedregal Maritime S.A.

Appellant

- and -

Batavia Eximp & Contracting (S) Pte. Ltd.

Respondent

The *'Taikoo Brilliance'*

Respondent's Skeleton Argument For Appeal In CL-2023-000144

"In these Rules... "goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried": Hague-Visby Rules, Article I(c).

Introduction

1. In his single Judgment below, Robin Knowles J disposed of two appeals under S.69(1) Arbitration Act 1996 [1/1],[1] one by each party to the reference, on questions of law arising out of an Award of the late Ian Kinnell KC [4/14]. The arbitration arose out of the misdelivery of a cargo which had been carried under a contract governed by the Hague-Visby Rules. Pedregal was the contracting carrier. Batavia was the holder of the bills of lading.

2. About 33% of the cargo was carried on deck, the balance under deck. Mr Kinnell held that Batavia's claim was timebarred in relation to the under-deck cargo because Batavia had not brought suit within a year as required by Art.III r.6 HVR. But he held that Art.III r.6 did not apply to the deck cargo, because the bills of lading contained a sufficient *"on-deck statement"* to engage Art.I(c), which excepts deck cargo from the scope of the HVR. Batavia's claim therefore succeeded in part, in relation to c.33% of the total cargo.

3. Bright J gave Batavia leave to appeal (CL-2023-000147) on questions of law as to whether it had brought suit within a year, and Pedregal leave to appeal (CL-2023-000144)

[1] References are in the form [Tab/Page].

on a question of law as to whether the on-deck statement was sufficient to engage Art.I(c).

4. Knowles J agreed with Mr Kinnell's view of the law. He dismissed both appeals, but gave both parties leave to appeal to this Court under S.69(8) Arbitration Act 1996 [3/12].

5. This Skeleton addresses Pedregal's appeal. Batavia anticipates that both appeals will be heard together. (The Court will notice that, if Batavia's appeal succeeds, Pedregal's appeal becomes redundant: if Batavia is right that it complied with Art.III r.6 in any event, its claim is not timebarred in relation to any of the cargo, and it does not matter whether Art.I(c) excepts that part of the cargo which was carried on deck from the HVR.)

6. The question of law on Pedregal's appeal is: *"Where cargo covered by a bill of lading is carried partly on and partly under deck, what statement must there be on the face of the bill of lading to engage the exception in Article I(c) of the Hague-Visby Rules?"*.

7. Before Mr Kinnell, then on its application for leave to appeal under S.69 Arbitration Act, and again before Knowles J, Pedregal contended that an on-deck statement only engages Art.I(c) if it states the *"precise parcels of cargo that were carried on deck"*, and that it is never sufficient for a bill of lading to *"identify just the quantity"* of deck cargo.

8. On that basis, Pedregal argued that Art.I(c) was not engaged here because the bills did not state the precise parcels, notwithstanding Mr Kinnell's unappealable findings of fact that the bills did contain sufficient information for an informed estimate of the risks and to determine the value of the deck cargo reasonably accurately at the time of contracting.

9. *"Precise parcels"* remains Pedregal's primary case on this appeal. But it also advances a modified version as an alternative, which proposes that the bill must at least contain sufficient information to enable the precise parcels, and their value, to be ascertained.

10. In dismissing the precise parcels argument, Knowles J rejected the idea, which was and remains inherent in Pedregal's case, that Art.I(c) compels *"one single approach"* to the drafting of an on-deck statement which applies in every single scenario, regardless of the nature of the cargo or of the surrounding circumstances in any individual case. He concluded that the application of Art.I(c)'s *"simple and practical"* wording requires a

"pragmatic and commercial approach", and that, while Art.I(c)'s text, and therefore its construction, will not vary from case to case, what is sufficient to satisfy it may vary.

11. Batavia submits that Knowles J was right. Pedregal proposes an inflexible approach which is not justified by Art.I(c)'s wording or required for any reasons of principle. It is not supported by any English authority, or by any textbook analysis. On a correct reading, it is not supported even by the overseas material on which Pedregal heavily relies, viz the British Columbian decisions in *Timberwest v Gearbulk* and *Gearbulk v Seaboard*.

Factual Background

12. Since this is an Arbitration Act appeal, the question of law falls to be decided on the basis of the findings of fact in the Award: S.69(3)(c). Mr Kinnell made the relevant findings below (references to Paras are to his Award) [4/14]). He also made various other findings which are relevant to Batavia's appeal, but which do not bear on Pedregal's appeal.

13. The Cargo was of pine logs. It was loaded on board *'Taikoo Brilliance'* in New Zealand (an HVR contracting state) in August 2019, for carriage to Kandla, in India: Para 1.

14. It was common ground that the HVR applied to the contract of carriage by force of law by reason of S.1(2) Carriage of Goods by Sea Act 1971 and HVR Art.X: Paras 14, 23.

15. There were 4 Bills of Lading, Nos. 501 to 504: Paras 1, 73 [4/14, 51].

16. Batavia was at all material times the lawful holder of the Bills, with title to sue. Pedregal was the Vessel's registered owner and the contracting carrier: Paras 1, 14, 21-22, 73 [4/14, 20, 25, 51].

17. The Bills incorporated the terms of a charterparty. The incorporated terms included an arbitration clause under which Mr Kinnell was appointed: Paras 2, 14, 73 [4/14, 20, 25, 51]. They also included express provision for the Cargo to be carried both under and on deck: Para 85 [4/57].

18. The Bills stated that the Cargo consisted of New Zealand pine logs and stated the size of the Cargo by reference to numbered lots, stating, for each lot, both its quantity, in numbers of pieces, and its volume, in m^3. The Bills did not contain any information about the value

of the Cargo: Para 97; and see also the Bills themselves.

19. The overall Cargo size was c.37,000m^3/ 45 lots/101,952 pieces: Paras 1, 85 [4/14/57], the Bills [5/76].

20. The faces of the Bills contained spaces for stating what (if anything) was carried on deck. The space in Bill 502 was completed to state that 22,994 pieces out of 28,217 were carried on deck. The space in Bill 504 stated that 11,092 pieces out of 16,662 were carried on deck. The spaces in Bills 501 and 503 stated that *"nil"* was carried on deck. Overall, 34,086 pieces out of 101,952, or c.33%, were carried on deck: Paras 1, 85 [4/14/57], the Bills [5/76].

21. The Cargo was discharged at Kandla in September 2019, without production of the original Bills. It was then delivered to various third parties against unsigned, specious bills of lading, again without production of the original Bills: Paras 1, 14, 22, 63 [4/14, 25, 45].

<u>The Arbitration & Mr Kinnell's Decision</u>

22. Pedregal did not dispute that it had delivered the Cargo without production of the original Bills, or that this was a breach of contract, of bailment, and a conversion. But it contended that Batavia's claim was time barred on the facts by Art.III r.6: Paras 14, 23, 75 [4/20, 26].

23. Batavia submitted that no part of the claim was time barred, for various reasons specific to Art.III r.6 which are not relevant to Pedregal's appeal. Batavia submitted in the alternative that the HVR did not apply to the deck Cargo, by reason of Art.I(c): Para 55 [4/41].

24. Pedregal argued that Art.I(c) did not apply because it is only ever engaged if the bill of lading identifies the precise packages which are carried on deck. It submitted that *Timberwest* supported that proposition as a rule of universal application: Paras 89ff [4/60].

25. Mr Kinnell did not accept that there was such a rule. He concluded that *Timberwest* was factually distinguishable, and held that Bills 502 and 504 contained sufficient information for them to comply with Art.I(c) at the date when they were issued: Paras 96-97 [4/63].

Specifically, he found that the Bills contained sufficient information to *"make an informed estimate of the risks of the adventure"* when they were issued, and that it was possible to determine the deck Cargo's value reasonably accurately and without excessive manipulation or assumption, both at the date when the Bills were issued (September 2019) and for the purposes of assessing damages in his Award (February 2023): Paras 97-98 [6/63].

26. Making good his point that it was possible to value the deck Cargo for damages purposes, Mr Kinnell calculated Batavia's recoverable loss to two decimal places. He held that the proper measure was the deck Cargo's sound arrived value at the time of its loss by misdelivery, and relied upon CIF values in the specious bills of lading as evidence of sound arrived value in September 2019. Based upon information in the specious bills, he calculated the damages at US$1,159,972.40: Paras 99-100 [4/64], Appendix To Award [4/72].

The Appeal & Knowles J's Decision

27. Pedregal repeated its precise parcels case before Knowles J: Judgment @ Para 25 [1/6].

28. Knowles J accepted Pedregal's submission that the purpose of Art.I(c)'s requirement for an on-deck statement is to enable a holder of the bill to know whether or not goods fall within the HVR liability regime, which may be an important point for insurance: Para 27 [1/6].

29. However, he considered that Pedregal's case added a gloss that the holder must be able to ascertain the position *"quickly and easily"* (a phrase from Pedregal's Skeleton before him) from the on-deck statement itself. Knowles J concluded that, not only was the gloss not justified by the text, but it was also inherent in the *"is so carried"* requirement that applying Art.I(c) may involve factual evidential inquiries outside the bill: Paras 28, 35 [1/6, 8].

30. Knowles J further concluded that the precise parcels case was misconceived because it proposed that Art.I(c) mandated *"one single approach"*. He held that the correct analysis, was that the on-deck statement requirement was *"simply and practically expressed"*, and that it required a *"pragmatic and practical commercial approach"*: Paras 36-37 [1/8].

31. Approaching it that way, Knowles J held that what is required to satisfy Art.I(c) may vary from case to case, depending on the nature of the cargo and the circumstances. He noted in this respect that listing the packages by number had been described in *Seaboard* as *"the simplest"* way of satisfying Art.I(c), but not the only way. In short, while it might be *"best practice"* to state more information than Bills 502 and 504 contained, Mr Kinnell had not been wrong in law to conclude that Art.I(c) applied: Paras 33, 36, 38, 41 [1/7-8].

Background To Art.I(c)

32. As a background point, it may be relevant to note that the HVR are not original in treating deck cargo as a special case. So, for example, it is a breach of contract at common law to carry goods on deck, unless deck carriage is authorised by a binding custom or by express agreement: *Foxton et al, 'Scrutton On Charterparties'*, 25th edn @ 9.136-138. (The incorporated charterparty terms did authorise deck carriage here: see above).

33. Moreover, general exceptions are not readily interpreted as applicable to this type of breach: *Royal Exchange v Dixon* (1886) 12 App Cas 11. (Though this is a matter of construction, not a rule of law: *The 'Antares'* [1987] 1 Lloyd's 424. The position is perhaps akin to the familiar principle that very clear words are required to extend exceptions to misdelivery: eg, *The 'MSC Amsterdam'* [2007] 2 Lloyd's Rep 622 @ Para 30.)

34. Again, jettison of cargo carried on deck does not generate rights in general average, absent a binding custom or the consent of the other parties to the venture: *'Scrutton'* @ 12.55.

35. The reason for this special treatment is that deck cargo involves special risks. Cargo on deck is exposed directly to wind, sun, rain, and, in rough seas, waves. It is at risk of being lost overboard in a way that cargo under deck is not. It is inevitably the first cargo to be jettisoned in a genuine emergency, and, being easy to access, is at risk of being jettisoned unnecessarily in a merely apprehended one: *Wright v Marwood* (1881) 7 QBD 62 @ 67.

36. Historically, carriers offered to carry cargo on deck at reduced rates to maximise freight, but on terms intended to exclude liability: *Aikens et al, 'Bills Of Lading'*, 3rd edn @ 11.85. By creating an exception which takes deck cargo outside the HVR duties of care, Art.I(c) preserves carriers' *"liberty to make special conditions"* for deck cargo: *Berlingieri, 'The*

Travaux Preparatoire Of The Hague & Hague-Visby Rules' @ 131 (where it was suggested that the liberty be extended to other *"special goods"*, viz perishables: that was rejected). This reflects a perception that *"it would be unreasonable to impose mandatory obligations on the carrier"* in relation to a particularly risky type of cargo *Aikens* @ 11.82.

37. But disapplying the HVR altogether is a blunt instrument. There is no obvious reason of principle why, eg, the documentary obligation in Art.III r.3 should not apply to deck cargo. It was recognised during the drafting that it would be *"perfectly logical"* to confine the exception to specific Rules, eg Art.III r.2. But it proved *"impossible"* to modify Art.I(c), because *"it was only by means of this stipulation that the agreement of the interested parties could be obtained"*, and they would accept *"absolutely no change to the terms of this compromise, which had been obtained after long debate": Berlingieri* @ 134.

38. Art.I(c)'s initial draft simply excluded *"cargo carried on deck"*. That made the mere fact that cargo was carried on deck both necessary and sufficient. The addition of the requirement for an on-deck statement was a second thought: *Berlingieri* @ 131-132. The *Travaux* do not show exactly what the thought process behind the drafting change was, and textbooks do not focus on the point. But there are perhaps two possible explanations.

39. 1st, if the mere fact that cargo was carried on deck was sufficient for Art.I(c) to apply, the HVR would be excluded by unauthorised deck carriage: *Rose, 'Carver On Bills Of Lading'*, 5th edn @ 9.116. If the bill contained effective exemptions, the carrier's breach would then put it in a better position than if it had complied with its duty to carry under deck, in which case the HVR regime would have applied. That would be odd. Although *"the phrasing of the Rules is not elegant"*, the aim seems to be to confine the exception to contractual deck carriage (albeit that *"is stated as being carried"* is not satisfied by a mere liberty to carry on deck: *Svenska v Maritime Agencies* [1953] 2 QB 295): *Aikens* @ 11.86.

40. 2nd, the point made in *Gearbulk*, emphasised by Pedregal, and accepted in principle by Knowles J, about the bill of lading holder's interest in knowing what is being carried on deck for the purpose of assessing risk. Risk assessment is particularly material to deck cargo, both because of the basic point that it involves enhanced risk (see above), and because, if the HVR are excluded, there may be limited recourse against the carrier in case of loss or damage (ie, if the bill contains effective exemptions). Cargo interests may want to take these factors into account in making insurance arrangements. This indicates

that one purpose of the requirement for an on-deck statement is to provide cargo interests with sufficient information to assess the risk and tailor their insurance arrangements.

The Nature Of The Issue On Appeal

41. The nub of the issue on this appeal is, what degree of information must the on-deck statement provide? It seems a short point, but the parties suggest very different answers.

42. Batavia submits that Knowles J was right that a pragmatic, practical, and commercial approach is appropriate, and submits that the question to be answered in that spirit in any case is whether the bill contains sufficient information to enable a holder to evaluate what is at risk on deck. The answer may depend upon the nature of the cargo and other circumstances, so that what required may vary from case to case, as Knowles J said.

43. By contrast, Pedregal contends for a *"minimum information"* requirement for the bill to state either the precise parcels, or sufficient information to ascertain them and their value, in every case. Such an inflexible approach is the antithesis of Knowles J's analysis, and Batavia submits that there is no good reason to insist on writing specific information into every single bill in every single case, regardless of individual circumstances.

***"Value"* In On-Deck Statements**

44. Parts of Pedregal's Skeleton appear to suggest that the bill must state the value of the deck cargo. Thus, the point of departure for Pedregal's primary and alternative cases is that *"the parties must be able to tell, from the face of the bill of lading [emphasis added], what the value of the cargo being carried on deck is and which parcels are not subject to the HVR"*: Pedregal's Skeleton @ Para 6. On a literal reading, that appears to suggest that the bill must not only identify the precise parcels, but must also state their (precise?) values.

45. It is not entirely clear from the rest of the Skeleton how far Pedregal really does suggest this. It is certainly not part of Pedregal's primary case, which is simply that the bill must identify the precise parcels themselves: Skeleton @ Paras 7, 34, 48. Pedregal must therefore accept that, in a case where the bill does identify the parcels, eg by listing their numbers, the holder may have to look beyond the bill for their value in order to assess the risk. The Bills here said nothing about the Cargo's value. If they had identified the precise parcels loaded on deck, a holder would have had to look to, eg, sales/invoice values, published pricing data, or its own market knowledge to evaluate what was at risk.

46. The position seems rather less certain for Pedregal's secondary case, that the bill must contain sufficient information *"on its face"* to enable the parties to ascertain the precise parcels <u>and</u> their value: Skeleton @ Paras 7, 33, 34, 49. Perhaps *"ascertaining"* value extends to information outside the bill itself. But Paras 23, 33(b) and 50 may imply that Mr Kinnell contravened Art.I(c) by referring to *"extraneous material"* to value the Cargo.

47. To the extent that Pedregal <u>does</u> contend that the bill itself must state the value of the on-deck cargo, Batavia submits that that is not sustainable as a matter of Art.I(c)'s language, as Knowles J commented: Judgment @ Para 33 [1/7]. The relevant word is *"cargo"*. Art.I(c) excepts specified cargo (ie, that which is stated as being carried on deck and is so carried) from *"goods"*, which are defined as *"goods, wares, merchandise and articles of every kind"*. The focus is on chattels, not on their economic worth. What is required, and is sufficient, is an appropriate reference to chattels, not a statement of their value. Granted that one of Art.I(c)'s purposes is to provide cargo interests with information to assess the risk, Art.I(c) does not import that the holder will be able to evaluate the risk, in money terms, solely from the bill itself, without also having to look at invoices or other materials.

48. Knowles J noted that a remark in *Seaboard* @ Para 19 may seem to require the bill to state the value: Judgment @ Paras 33-34 [1/7]. Mr Kinnell's reference to *"the requirement of value seemingly added by Gearbulk"* may imply that he read it that way, though he held that a statement of value was not necessary to estimate the risk on the facts here.

49. However, as Knowles J pointed out, the remark in *Seaboard* @ Para 19 was clarified @ Para 20, which said that the *"simplest"* (not *"only"*) way of complying with Art.I(c) on the facts would have been to list the package numbers. There was no reference @ Para 20 to stating the values in the bill itself. Rather, the point being made was that, if the package numbers <u>had</u> been listed, the package <u>values</u> could have then been *"readily determined"*. *"Determined"* indicates that the values could not simply have been read from the face of the bill itself, and that the holder would have had to look at other materials. There is no indication that any of the bills in *Gearbulk* itself stated the values of the packages.

50. Batavia therefore submits that Mr Kinnell did not contravene Art.I(c) in referring to the specious bills. In any event, he only referred to them in calculating damages to two

decimal places: Award @ Para 99 [4/64]. It cannot sensibly be suggested that Art.I(c) is directed to risk evaluation with that degree of precision. Separate from the damages calculation, Mr Kinnell found that the Bills contained sufficient information for an informed assessment of the risks, and to determine reasonably accurately the value of the deck Cargo, at the time when the Bills were issued: Award @ Paras 97-98 [4/63]. Batavia submits that that is sufficient to satisfy Art.I(c). (Since the proper measure of damages was the sound arrived value at time of misdelivery, it is not surprising that Mr Kinnell referred to material generated after the Vessel's arrival: cf Pedregal's Skeleton @ 23.)

Pedregal's Primary Case

Introduction

51. Pedregal's primary case is that *"the bill of lading must identify the precise parcels being carried on deck"*: Skeleton @ 7, 34, 48. This is the case which Pedregal advanced before Mr Kinnell and Knowles J. Batavia submits that they were right to reject it. There may be cases in which the holder of a bill needs to know the precise parcels are carried on deck in order to evaluate the risk. But there are other cases in which it simply does not.

Homogenous Cargoes

52. Put the case of a cargo of 1,000 x 1kg gold ingots, numbered 1 to 1,000, worth £100,000 each, carried under a bill containing exclusions which are null and void under Art.III r.8 if the HVR apply, but effective to exempt the carrier altogether if the HVR do not apply.

53. A statement that *"100 ingots"* are carried on deck tells the holder of the bill all that it sensibly needs to know in order to evaluate what is at risk on deck. If Art.I(c) is engaged, there is no recourse against the carrier in respect of £10 million of the £100 million total value of the shipment. The holder can make insurance arrangements accordingly. It does not need to know the package numbers of the 100 on-deck ingots. That information does not affect the evaluation of the risk: given the facts, it is redundant. No practical purpose is served, and no principled consideration is advanced, by reading Art.I(c) as requiring the bill to list the package numbers of the precise ingots in such a case.

54. The position is the same for any homogenous cargo, as Knowles J implicitly recognised: Judgment @ Para 36 [1/8]. Even Pedregal appears to accept that, from a prospective viewpoint, when the parties are evaluating risk at the time of shipment or when taking up

the bill, a precise packages requirement is redundant if the cargo is homogenous: Skeleton @ 45.

55. But Pedregal does not concede the logical conclusion, which is that there is no such requirement for homogenous cargoes. Forensically, that is understandable. Accepting that a precise package requirement is not necessary in some cases would imply that it may not be necessary in others, and perhaps not in this one. To serve Pedregal's purpose, the precise packages requirement has to be a universal rule which applies in every case.

Pedregal's Argument From Retrospectivity

56. Pedregal suggests that it is indeed universal, even for homogenous cargoes, because there is also a retrospective dimension. The argument is this: Because Art.I(c) disapplies the HVR, it may result in on-deck cargo and under-deck cargo being governed by different liability regimes: the HVR versus the terms of the particular bill, or the HVR versus common law. If it does, and if loss or damage is discovered at the end of the voyage, the parties need to know retrospectively which precise packages were carried where in order to establish which liability regime applies to which packages: Skeleton @ 46-47.

57. This is creative, but Batavia submits that it does not make good Pedregal's argument for a universal precise packages requirement. There are two points.

58. The 1st point is that the parties do not need to know which precise packages were carried on deck in every case. If the ship sinks and the 1,000 ingots are lost, the position is clear: the holder of the bill must look to its own insurers, not to the carrier or its insurers, for £10 million in respect of 100 ingots carried on deck. It does not matter which precise ingots were carried on deck. There is no principled reason why Art.I(c) should be engaged in this scenario if the bill lists the deck ingots by number, but the HVR should apply to the whole cargo of 1,000 ingots if the bill states only that *"100 ingots"* are carried on deck.

59. It is true that the position is less straightforward in a case of partial loss or damage. If the crew surrender to temptation and one ingot is not delivered on arrival, then whether or not the carrier is liable may indeed depend upon where that specific ingot was carried.

60. But this leads into the 2nd point, which is that the relevant question which then arises is

whether or not the missing ingot was carried on deck. And Batavia submits that that question goes to the *"is so carried"* limb of Art.I(c), and not to the separate *"is stated as being carried"* limb. Further, it is a question of pure primary fact, which falls to be determined on the evidence and the balance of probabilities, in the usual way.

61. On the general *Constantine v Imperial* [1942] AC 154 principle that a party which asserts an affirmative must prove it, the burden of proof may depend on how the question arises. If the bill's terms exclude liability for deck cargo and the carrier, looking to evade the HVR and claim the benefit of the exemption, contends that the ingot was carried on deck, it will bear the burden. If the holder of the bill delays in bringing suit and asserts that Art.III r.6 does not apply because the ingot was carried on deck, it will bear the burden.

62. Either way, Knowles J was right to emphasise the importance of the point that the *"is so carried"* limb necessarily makes evidential inquiries into what cargo was carried where unavoidable, and Art.I(c) does not purport to exclude such inquiries: Judgment @ Para 35 [1/8]. This makes it misguided to try to interpret Art.I(c) with a view to eliminating factual inquiry. But that, in effect, is what Pedregal's retrospective dimension argument proposes.

63. Suppose that the bill states that Ingots No.1 to 100 are carried on deck. Ingot No.1 is lost. In a subsequent arbitration, one party contends that Ingot No.1 was in fact carried under deck, and that the HVR therefore apply, with a more favourable outcome for that party than under the bill's terms or at common law. In this scenario, the bill does identify the precise parcels. Pedregal accepts that Art.I(c) applies: the factual question must therefore be answered in order to determine which liability regime applies to Ingot 1.

64. Suppose that the bill states only that *"100 ingots"* are carried on deck. Ingot No.1 is lost. One of the parties claims that it was carried on deck, looking to avoid an unfavourable outcome under the HVR. In this scenario, the bill does not identify the precise parcels. Pedregal's case is that Art.I(c) is not engaged: the HVR apply to the entire cargo, and the factual question need not be answered. Yet the factual question is the same in both cases: where was Ingot No.1 carried? Batavia submits that there is no principled justification for concluding that the answer is critical in one scenario, but irrelevant in the other.

65. Batavia submits that the missing ingot scenario also illustrates Knowles J's point that it will sometimes be best to start with the *"is so carried limb"*, and then, having answered the evidential question, go back to the bill to see whether the on-deck statement was sufficient in the circumstances: Judgment @ Para 40 [1/8]. If Ingot No.1 is lost, and it is established on the balance of probabilities that it was carried on deck, there is no reason in principle why a statement that *"100 ingots"* were carried on deck should not engage Art.I(c). That statement told the bill of lading holder what it needed to know to evaluate what was at risk on deck, and therefore enabled the holder to make insurance arrangements which would have responded to the loss which has in fact occurred.

66. Other unavoidable factual inquiries may arise if bills refer to parts of a cargo in generic terms. Pedregal's Skeleton @ Fn 5 puts the case of a cargo divided between two bills with different consignees. If some cargo is lost, which consignee suffers? Pedregal emphasises that this could arise even if the cargo is homogenous. But it could also arise even if the entire cargo is stated to be carried under deck and is in fact so carried: Judgment @ Para 39 [1/8]. Again, the HVR do not purport to eliminate the need for factual inquiry.

67. Even with a homogenous cargo, some statements will be too vague to satisfy Art.I(c). So, if the cargo is 1000 x 1kg gold ingots numbered 1 to 1000 and worth £100,000 each, a statement that *"a few"*, *"some",* or *"lots"* of them are carried on deck does not enable the holder of the bill to evaluate what it as risk. Any attempt to tailor insurance to cater for the fact that an unknown portion is being exposed to enhanced risks will be an uninformed guess which, in the case of a total loss, is likely to leave the bill of lading holder exposed. Even if only one ingot is lost, and it is proved, retrospectively, that it was among the *"some"* which were carried on deck, that does not alter the fact that, prospectively, the on-deck statement was insufficient. Art.I(c) will not be engaged in such circumstances.

Non-Homogenous Cargoes

68. The more the facts move away from a homogenous cargo, the more the information that is likely to be required to satisfy Art.I(c). If the cargo is a mixed consignment of 1000 x 1kg gold ingots worth £100,000 each and 1000 x 1kg lead ingots worth £1 each, the holder of the bill cannot evaluate what is at risk from a statement that *"100 ingots"* carried on deck. The value on deck could be anything from £100 to £10 million. Any attempt to tailor insurance to the non-specific on-deck statement would again be guesswork.

69. However, while the holder of the bill needs more information to evaluate the risk in this scenario, it again does not need to know which precise packages are being carried on deck. If the gold ingots are numbered 1 to 1,000 and the lead ingots are numbered 1,001 to 2,000, then listing the numbers of the ingots on deck may be a convenient way of equipping the holder to evaluate the risk. But it is not the only way. It is sufficient for the holder to know that the deck cargo consists of, say, 50 gold ingots and 50 lead ingots.

70. The position may be different if there is no real homogeneity at all. If the cargo is an assortment of gold ingots of significantly different sizes and values, any attempt at a valuation based solely on the number carried on deck may be guesswork. In this scenario the bill of lading holder may need information which relates to the individual ingots. Even here, however, the holder does not necessarily need to know which precise packages are carried on deck: eg, it will be able to evaluate the risk if the bill states the aggregate weight of the on-deck ingots, without identifying them individually by number.

71. So, as Knowles J noted, referring to the reference in *Seaboard* to the *"simplest"* manner, there may be alternative ways of conveying the relevant information on the facts of individual cases: Judgment @ 33 [1/7]. If there are, Art.I(c) does not expressly mandate that one specific method, such as a list of package numbers, must be adopted over others, such as an aggregate weight. It does not even expressly mandate, more abstractly, that the *"simplest"* method, or the most *"quick and easy"*, must always be adopted. But Pedregal's case proposes that it should be read as implicitly requiring the bill to identify the precise packages carried on deck in every case, regardless of the cargo or the circumstances.

72. There may be scenarios where the holder cannot evaluate what is at risk on deck unless the bill identifies the precise packages. Pedregal's Skeleton @ 45 claims that that is true for any scenario where the cargo is not homogenous, and suggests that this case illustrates the point. But, on any view, that can only hold if evaluating the risk is taken to mean calculating it to two decimal places. Again, Batavia submits that that is not sensible: the holder does not need such precision. Mr Kinnell found that the Bills contained sufficient information for an informed assessment of the risk and a reasonably accurate evaluation at the time when they were issued without identifying the precise packages. The same is likely to be true in many other cases. Batavia submits that that is sufficient.

73. And even if there may be hypothetical cases in which it impossible to make a commercially satisfactory evaluation without knowing the precise packages, Batavia submits that it is a *non sequitur* to turn what may be a necessary requirement in some specific cases into a universal rule which is mandatory in every case, regardless of whether it is helpful, let alone necessary, in any given circumstances. That is not what Art.I(c) says: and there is no principled justification for reading it as though it did say it.

Knowles J's Analysis

74. On the contrary, Art.I(c) is *"simply and practically expressed"*, as Knowles J said: Judgment @ Para 37 [1/8]. The rationale behind the requirement for an on-deck statement, viz enabling the bill of lading holder to evaluate what is at risk on deck, is also simple and practical. Art.I(c) therefore serves a practical commercial purpose. And, as the *Travaux* show, the decision to exclude deck cargo from the HVR altogether where Art.I(c)'s requirements are satisfied was itself a pragmatic compromise: see above. Batavia submits that, in the circumstances, Knowles J's view that *"a pragmatic and practical commercial approach is required"* is fully justified and correct: Judgment @ 38 [1/8].

75. Batavia also submits that such an approach should recognise, as Knowles J recognised, that the information which the holder of the bill of lading needs to evaluate what is at risk on deck may vary depending on the nature of the cargo and the circumstances of the individual case, as illustrated above: Judgment @ 36 [1/8]. The approach should be flexible, and adaptable to the enormous variety of commercial and practical reality.

76. Pedregal's case is the antithesis of that. As Knowles J recognised, it necessarily supposes that Art.I(c) imports *"one single approach to drafting a bill of lading"*, regardless of the nature of the cargo or the circumstances in any given case, or of any considerations of necessity, utility, or practicality: Judgment @ Para 36 [1/8]. There is no reason to imagine that that was the philosophy with which the CMI's drafting committee approached the pragmatic compromise embodied in Art.I(c). Batavia submits that Knowles J was correct to reject the one-size-fits-all thinking which is inherent in Pedregal's case.

Pedregal's Criticisms Of Knowles J

77. Pedregal complains that Knowles J's approach does not make clear *"the minimum information that must be conveyed"* by the on-deck statement in order to engage Art.I(c): Skeleton @ Paras 31-32. The complaint parallels a criticism which Pedregal made below, that Mr Kinnell had not considered what Art.I(c) required as a *"general question"*.

78. With respect, this rests on essentially the same misconception as Pedregal's primary case. It supposes that Art.I(c) mandates some universal *"minimum content"*, whether it be listing the precise packages carried on deck, or stating the weight, volume, or anything else. But it is misguided to focus on the <u>form</u> of the notation in the bill. Art.I(c) has a practical commercial purpose. Whether or not it is engaged in any given case must be governed by whether, as a matter of <u>substance</u>, the relevant bill contains sufficient information to achieve that purpose: in Pedregal's terms, sufficient information *"to enable the parties to identify their respective risks and responsibilities"*: Skeleton @ Para 6.

79. Mr Kinnell held that Bills 502 and 504 <u>did</u> contain sufficient information. Knowles J held that he had made no error of law in reaching that overall conclusion. Batavia submits that this was all that it was necessary for the arbitrator and the Judge respectively to decide. It was not incumbent upon either of them to try to define exhaustively what notation would or would not suffice to engage Art.I(c) for any given combination of cargo and facts. Given the huge range of possible combinations, any such attempt would be futile.

<u>Other Considerations</u>

80. Batavia submits that the following considerations further support the conclusion that Art.I(c) does not mandate any universal precise packages requirement.

81. 1st, the point, obvious but no less valid for it, that, if that was the intention, Art.I(c) could easily have made it explicit. It simply does not do so. Pedregal suggests that *"which is stated"* imports *"an identification requirement <u>in relation to each item</u> [emphasis added]"* which is said to comprise the deck cargo: Skeleton @ 39. But that is not sustainable on the wording. If a bill for 1,000 ingots says *"of which, 100 on deck"* then, as a matter of ordinary language, it states what cargo is carried on deck. Just as Knowles J thought in relation to Pedregal's *"quickly and easily"* gloss, Pedregal's *"identification requirement"* argument loads the words with more than they will bear: Judgment @ 28 [1/6].

82. (Batavia submits that there is no relevant *"ambiguity"* here, either in Art.I(c) or in the Bills, so that Pedregal's reliance on *The 'BBC Greenland'* [2012] 1 Lloyd's Rep 230 is not in point. But the Court will note Andrew Smith J's observation that *contra proferentem* is seldom if ever of any assistance in the context of commercial contracts in any event.)

83. 2nd, a universal requirement for the bill to state the precise packages would circumscribe the scope of Art.I(c)'s application, with no clear and principled justification. That would undercut Art.I(c)'s purpose, which is to preserve carriers' liberty to make special conditions for special cargo without compulsory application of the HVR: see above.

84. 3rd, and relatedly, a practical reason why a universal requirement would circumscribe the scope of Art.I(c)'s application is that a carrier who wishes to take (legitimate) advantage of Art.I(c) may simply not know what precise parcels have been loaded on deck.

85. Pedregal suggests that the carrier *"must (or should) know"*, and that it would be a *"bizarre"* concealment not to record its knowledge in the bill: Skeleton @ Para 52. This is not obvious. It is true that the charterparty here contemplated that Pedregal might separate the Cargo. But it also contemplated that charterers might do it: Award @ Para 85 [4/57]. Charterparty forms in common use allocate all cargo operations to charterers: eg, NYPE Cl.8, Gencon Cl.5. If port rules require cargo to be handled by compulsory stevedores, it may be that neither cargo interests nor carrier know what precise parcels have been loaded where. But why should that debar them from agreeing to carry on non-HVR terms?

86. (If - see above - it is part of Pedregal's case that the bill must state the deck cargo's value, the carrier is unlikely to know that, even if it knows what has been loaded on deck.)

Conclusion

87. Batavia submits that Pedregal's primary case is wrong: Art.I(c) does not impose any universal requirement for the bill to state the precise packages carried on deck. Mr Kinnell was right to conclude on the facts that Bills 502 and 504 contained sufficient information to engage Art.I(c), and Knowles J was right that Mr Kinnell made no error of law.

Pedregal's Alternative Case

88. Pedregal's alternative case is that the bill *"as a minimum, must contain sufficient*

information to enable both the original parties to the bill, and any subsequent parties thereto, to ascertain the foregoing matters": Skeleton @ Para 7: also Paras 34, 49.

89. *"The foregoing matters"* appears to refer to (i) the precise parcels which are carried on deck, and (ii) the value of those parcels: Skeleton @ Paras 7, 34.

90. Since this case is an alternative to the primary case that the bill itself must state what precise parcels are on deck, it must refer to a scenario where the bill does not do that, but does state something from which the precise parcels can be *"ascertained"*. Perhaps one scenario might be where the bill cross-refers to, say, a packing list, manifest, or invoice, and states that all of the packages mentioned in that document are carried on deck.

91. Whatever Pedregal has in mind, Batavia submits that the alternative case is wrong for essentially the same reasons as the primary one. There are numerous scenarios in which the holder of the bill does not need to know what precise parcels are on deck, whether directly from the bill itself, indirectly from a document referred to in the bill, or at all.

92. There is therefore no more need or principled justification for a universal rule that the bill must contain sufficient information to enable the holder to <u>ascertain</u> the precise parcels, than there is for one that the bill must <u>state</u> the precise parcels. Knowles J's conclusion that a pragmatic and practical commercial approach is required is again correct, and, again, whether a bill contains sufficient information to enable the holder to evaluate what is at risk on deck is a matter of substance, not form.

93. As for value, since the alternative case does not require the precise packages to be identified in the bill itself, it may be that it does not require their value to be stated in the bill itself either. But, if it does, Batavia repeats what it has said about that above.

94. If Pedregal's case is that the bill must contain sufficient information to enable the holder to <u>ascertain</u> the value at risk on deck, but need not itself <u>state</u> the value, neither Mr Kinnell nor Knowles J would disagree in principle: Award @ Para 97 [4/63]; Judgment @ Para 27 [1/6]. But, again, Mr Kinnell found that the Bills <u>did</u> contain sufficient information for an informed estimate of the risks and to determine the value of the deck cargo reasonably accurately at the time when the bills were issued. Batavia submits that that was enough.

The ascertainment requirement under Pedregal's alternative case was therefore satisfied.

English Legal Materials

Authorities

95. No English authority supports the idea that Art.I(c) is only engaged if the precise parcels carried on deck are either stated in or ascertainable from the bill of lading, or mandates any other particular form of notation as a universal minimum requirement. In fact, there is scant English authority on *"stated as being carried"*, aside from the decision in *Svenska v Maritime Agencies* that a mere liberty to carry under deck does not engage Art.I(c).

96. Batavia submits that this is itself rather suggestive. The dearth of appeals to the Courts on Art.I(c) issues indicates that arbitrators have managed to apply the on-deck statement requirement pragmatically on the particular facts of individual cases, without finding it necessary to resort abstract principles or supposed rules of universal application. That coheres with Knowles J's pragmatic and practical commercial approach.

Textbooks

97. Pedregal's suggestion that textbooks support a universal precise packages requirement is over-optimistic: Skeleton @ Para 65. Batavia submits that Knowles J's assessment that the books *"do not deal with the question in depth"* is more accurate: Judgment @ 24 [1/6]..

98. That too is suggestive. True, the scarcity of cases offers authors scant material to work with. But the absence of speculative discussion indicates that authors share Knowles J's view that the question does not lend itself to treatment in depth: Judgment @ 24 [1/6].. Again, that coheres with the conclusion that the application of *"stated as being carried"* is a pragmatic exercise tied to the circumstances of individual cases, based on commercial practicalities rather than on the articulation of abstract principles of universal application.

99. None of the books articulates a rule that Art.I(c) requires the precise parcels to be stated in or ascertainable from the bill of lading. Indeed, *'Scrutton'* @ 9.138 says that Art.I(c) applies if the bill states *"what <u>and or</u> how much deck cargo is being carried [emphasis added]"*. That is a broad and flexible formulation, which would cover this case.

100. *Young et al, 'Voyage Charters'*, 5th edn @ 66.73 states that, if the bill does not *"sufficiently identify which parts of the cargo"* are on deck, so that *"it is impossible for the parties to*

evaluate" the risk, then Art.I(c) is not engaged. Batavia submits that *"sufficiently"* is important in that formulation. And the authors clearly consider that *"sufficiency"* is judged by reference to Art.I(c)'s purpose of enabling the holder to evaluate the risk, and to the facts of the individual case. Mr Kinnell found that it was not *"impossible"* to evaluate what was at risk on deck in this case. *'Carver'* @ 9.119 also clearly treats the facts of each case as key: eg, it quotes the precise notation from the bills in *Gearbulk*.

The *Gearbulk* Cases

Introduction

101. The most that Pedregal can sensibly claim of the textbooks is that some refer to the *Gearbulk* cases (as Mr Kinnell said, *"in passing"*, without analysis in depth: Award @ Para 89 [4/60]) in terms which may imply that they are right, or at least do not say that they are wrong, according to their own lights. But that does not advance matters, because it merely begs the question of what those cases actually decided, according to their own lights.

102. Pedregal suggested before Mr Kinnell and Knowles J that the British Columbian Courts had decided in terms that Art.I(c) is only engaged if the bill of lading identifies the precise parcels carried on deck. Pedregal's Skeleton @ 53ff does not explicitly put it so high. But Batavia submits that that is what Pedregal must show, in order to gain any support from *Gearbulk*. And Batavia submits that Pedregal cannot show it, because the correct reading is that the *Gearbulk* cases were decided by reference to the particular facts, and very much in line with Knowles J's *"pragmatic and practical commercial approach"*.

Timberwest v Gearbulk

103. The facts appear from Cullen J's Judgment at 1st instance (2001 BCSC 882).

104. Timberwest sold different parcels of lumber to two Dutch receivers: Paras 1, 8:
   (1) Hoorebeke: 920 packages/49,892 pieces/1,243,669 FBM;
   (2) Altripan: 805 packages/46,740 pieces/1,0151,219 FBM:

   FBM *("foot board measure")* is a measure of volume: 1 FBM = 144 inches^3.

105. The *"unit prices"* (inferentially, the prices per FBM) differed by as much as c.100%, from US$550 up to US$1,060. It was not simply the case that bigger pieces were worth more

because they contained more wood: a portion representing 10% of the total cargo volume might have represented either more or less of the total value: Para 18. (Inferentially, this may be the factual aspect which Mr Kinnell found *"unusual"* : Award @ Para 90.)

106. Timberwest instructed Seaboard to arrange the carriage to Holland. Seaboard engaged Gearbulk, with whom it had a long term contract of affreightment, as actual carrier. Gearbulk loaded both parcels onto *The 'Rhone'* as a single cargo: Para 13.

107. 261 packages out of a total of 1,725 were loaded on deck. The packages were intermixed during loading. No attempt was made to distinguish between the two parcels, and no record was kept of which specific packages were loaded on deck: Paras 16, 67.

108. Gearbulk issued one bill of lading to Seaboard. It stated that the total cargo was 2,304,888 FBM, and that 1,982,204 FBM was loaded on deck. On those figures, 322,684 FBM was loaded under deck, and the on-deck and under-deck proportions of the total were 86% and 14% respectively. This bill did not refer to individual packages by marks or numbers, and did not indicate which parts of the two different parcels were loaded on deck: Para 5.

109. Seaboard issued two bills to Timberwest. These bills <u>did</u> refer to individual packages by marks and numbers: 920 packages/49,892 pieces/1,243,669 FBM in one; 805 packages/ 46,740 pieces/1,0151,219 FBM in the other. This split corresponded to the Hoorebeke and Altripan parcels, and Hoorebeke and Altripan were the notify parties: Para 8.

110. Each Seaboard bill stated that 86% of the cargo which it covered was loaded on deck and 14% under. Seaboard took these percentages from the mate's receipt. Like Gearbulk's bill, the mate's receipt covered the entire cargo. It did not indicate what proportions of the different parcels (let alone which individual packages) were loaded on deck. For all that anyone could tell at the time, anything from 74% to 100% of Hoorebeke's parcel, and from 70% to 100% of Altripan's, might have been deck cargo. Even in hindsight after an evidential trial, anything from 70% up (Hoorebeke) or 78% up (Altripan) may have been loaded on deck. The true percentages were simply unknowable: Paras 15, 17, 61-64.

111. *The 'Rhone'* also loaded soda ash. The crew negligently contaminated 727 of Hoorebeke's packages and 269 of Altripan's with soda ash during discharge. A hindsight analysis

showed that all of the damaged cargo had been carried on deck: Paras 2-4, 59, 67.

112. The cargo interests sued Gearbulk. Gearbulk argued that Art.I(c) was engaged, that the HVR were thus excluded, and that exemptions in the bills applied: Paras 5, 11, 19-20.

113. Cullen J held that Seaboard's bills, not Gearbulk's bill, had contractual effect: Para 48.

114. Cullen J concluded that the 86%-14% statements in Seaboard's bills did *"not represent the facts"*. They purported to state the percentages for each parcel, but actually reflected only the total cargo. As statements about each parcel, they were *"simply not reliable"*. There was an *"asymmetry"* between the statements and what had in fact been carried on deck. That asymmetry was compounded by the variations in unit value: Paras 61-66.

115. Even in retrospect, it was *"not possible to identify the specific packages"* which had been carried on deck, other than the damaged packages. Prospectively, when the bills were issued, it would have been impossible to value the deck cargo even if its quantity had been known, because the unit prices varied between the packages, and the documents did not identify the *"specific packages"* which had been carried on deck: Paras 61-62, 66-67

116. Cullen J regarded this latter point as decisive to the case. For Art.I(c) to apply, there must be certainty *"so as clearly to identify each party's potential risk"*. That certainty must exist when the bill of lading was issued. On the facts in *Gearbulk*, there was no prospective certainty *"as to the quantity or value"* of the cargo at risk on deck: Paras 88-89, 95.

117. In dismissing Gearbulk's appeal, the British Columbia Court of Appeal (2003 BCCA 39) highlighted Cullen J's findings that the percentages in Seaboard's bills were *"unreliable with respect to each shipment"* and that *"<u>because</u> the specific packages carried on deck... were not identified it was impossible to determine the value of the cargo on deck even if the quantities could be determined [emphasis added]*: Para 42.

118. The CoA also endorsed Cullen J's analysis that Art.I(c) required prospective certainty, to enable the parties to *"assess their respective risks and determine the appropriate price"*. But, *"<u>on the facts of this case</u>... the parties could not, when the bills of lading were issued, determine the value of the cargo that was stored on deck, and <u>thus</u> could not determine*

their respective risks [emphasis added]. Art.I(c) was therefore not engaged: Paras 45-47.

<u>Gearbulk v Seaboard</u>

119. Gearbulk subsequently sued Seaboard for an indemnity/damages in respect of its liability to cargo interests. It contended that Seaboard should have worded its bills in a way which would have enabled Gearbulk to rely on the exemptions and avoid liability.

120. Cohen J (2005 BCSC 1620) dismissed the claim, essentially on the grounds that Seaboard had simply adopted the notation of Gearbulk's own mate's receipt and could not have done anything else. In effect, Gearbulk had caused its own loss: Paras 92-93.

121. An additional detail which emerged at the *Seaboard* trial was that even the FBM figures in the mate's receipt, adopted in Seaboard's bills, were *"only a very rough estimate"*, based on a notional average volume per foot. Correcting for that, the percentage of the total cargo actually loaded on deck was *"significantly"* higher than 86%: Paras 67-68. That meant that Seaboard's bills were inaccurate as to the on-deck volume, and simply unverifiable as to the percentages of each parcel which had been carried on deck.

122. In the CoA (2006 BCCA 552), Gearbulk submitted that the statements in *Timberwest* that Art.I(c) did not apply if the parties could not prospectively determine the value of the cargo on deck were *obiter*. The CoA rejected that, and dismissed the appeal: Paras 19-20.

<u>Analysis</u>

123. The British Columbian Courts clearly thought that the fact that Seaboard's bills did not identify the precise packages carried on deck was significant in the *Gearbulk* cases.

124. But Batavia submits that it is also clear that the Courts did <u>not</u> regard the fact as significant because they thought that Art.I(c) imports a universal rule that the precise packages must be stated in, or ascertainable from, the bill of lading. None of the judgments propose any such rule. Indeed, as Knowles J pointed out, the BC Courts did not state that listing the packages was the <u>only</u> way of satisfying Art.I(c)'s *"stated as being carried"* limb, even on the facts of the *Gearbulk* cases themselves: Judgment @ Para 33 [1/7].

125. The true significance of the fact that the precise packages were not identified was that,

because the unit values differed very substantially between packages, it was impossible to prospectively value the deck cargo without relatively detailed information. But there is no hint that the BC Courts thought that it would matter that the precise packages were not stated in or ascertainable from the bill if the cargo was homogenous, or in any other scenario where what was at risk on deck could be evaluated without that information.

126. Mr Kinnell considered *Gearbulk* carefully: Award @ Paras 90ff [4/60]. In particular, he identified and highlighted the point that the variation in unit values made it impossible to determine the value of the on-deck cargo on the facts in *Gearbulk*: Award @ Paras 92, 96 [4/61, 63]. But, as Mr Kinnell commented, the facts of this case are *"very different"*: Award @ Para 96 [4/63]. There is no finding here of any substantial variation in unit values, or that it was impossible to prospectively value 34,086 pieces stated in Bills 502 and 504 as being carried on deck without knowing precisely which pieces were referred to.

127. On the contrary, Mr Kinnell's unchallengeable findings were that the information in the Bills (which stated, in number of pieces, the quantity carried on deck) was sufficient to make an informed estimate of the risks, and that it was possible to determine the relative value of the deck cargo reasonably accurately at the time when the bills were issued: Award @ Paras 97-98 [4/63-64]. It is clear from the context that, in these respects, Mr Kinnell was comparing and contrasting the facts of this case with those in *Gearbulk*.

128. Mr Kinnell held that, in the circumstances, the Bills contained sufficient information to comply with Art.I(c) *"at the time when it is required (namely when the relevant bill is issued)"*: Award @ Para 97 [4/63]. The quote indicates that he agreed with the BC Courts that Art.I(c) requires the bill to contain sufficient information for a prospective assessment of the risk. But he concluded that, on the facts of this case, Bills 502 and 504 did so.

129. There is another point of distinction from *Gearbulk*. The statement in Seaboard's bills that 86% of each parcel was carried on deck was so unreliable that the truth could never be known, even after trial. It was based on an FBM figure which was itself inaccurate, and in any event it related to the total cargo: Seaboard had no basis for thinking that it applied to the individual parcels. As Mr Kinnell said, it might be thought that this by itself prevented compliance with Art.I(c): Award @ Para 96 [4/63]. In substance, the 86% was

no more use than a statement that *"lots"* of cargo was carried on deck, as to which, see above. There is no comparable finding in this case that the statement in Bills 502 and 504 that 34,086 pieces were carried on deck was inaccurate or unreliable.

130. Batavia submits that, for these reasons, there is no material analogy on the facts between this case and *Gearbulk*, and the *Gearbulk* Judgments do not assist Pedregal.

Conclusion

131. Batavia respectfully invites the Court to dismiss Pedregal's appeal.

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15th December 2025