

for their liability for the damage if it was caused as they suggest by bad handling.”

Applicant asserts that as this is essentially a cargo claim, clause 36 of the charter party has relevance. This clause provides: -

“Liability for cargo claims, as between owners and charterers shall be apportioned as specified by the Inter Club New York Produce Exchange Agreement 1996 and its subsequent amendments.”

Clause 4 (c) of the Inter Club New York Produce Exchange Agreement 1996 provides as follows:

“Appointment under this agreement shall only be applied to Cargo Claims where . . .  
(c) the claim has been properly settled or compromised.”

I was referred in argument to the case of *Primegates Maritime v Bunkers on Board mv “Cargo Explorer”* 1995 CLD 617 (D), in which the respondent sought to set aside an arrest and to cancel the security on the basis that the applicant had no existing claim or cause of action. The learned Judge analysed the provisions of clause 4 (1) of the 1984 Inter Club Agreement, giving careful consideration to the relevance of such agreement to that dispute. He came to the following conclusion:

“I am in agreement with Kerr, I.J. that it is only after there has been payment or settlement of a cargo claim that the Inter-Club Agreement comes into operation. That “settlement” refers to actual payment or compromise of the claim is supported by the fact that *ex gratia* settlements are excluded from the provisions of the Agreement. The very purpose of the Agreement is for the

parties to indemnify each other on a knock-for-knock basis irrespective of actual liability. See in this regard the remarks of Hobhouse, J. in the *Holstencruiser* referred to hereinbefore. That liability is postponed until the claim has been properly disposed of accords with the general principles of indemnity namely that the obligation to indemnify only arises once the underlying claims have been met.”

The Inter Club New York Produce Exchange Agreement 1996 replaces the Inter Club Agreement 1984. Should this court find that the claim herein is indeed a “cargo claim”, then it is apparent that the principle enunciated in the above case remains applicable in the present circumstances as a matter of law.

It is apposite to reconsider briefly the background giving rise to the present application. The respondent provided security to the cargo interests in consequence of a lien that arose under Panamanian and Italian law for damage to cargo. The applicant, according to respondent, failed or refused to substitute such security at the instance of the respondent. The applicant then chartered another vessel, “The Gallant II” on a time charter in which the applicant owned the bunkers. The respondent effected an attachment of such bunkers in Durban to indemnify itself for the security it put up, pending arbitration in London of a dispute.

The dispute between the present parties including that of the cargo interests all arise

in consequence of the purported damage to the cargo that arose at Ravenna. Although such claims depend on different causes of action, such cargo damage is their common source.

Mr. Reddy in his opposing affidavit referred to clause 18 of the charter party which provides inter alia that “charterers will not suffer, nor permit to be continued any lien or encumbrance by them or their agents, which might have priority over the title and interests of the owner of the vessel.” He submits that the claim under clause 18 is entirely untouched by the Inter Club agreement, the purpose of which is to establish a code for determining liability as between owner and charterer. He contends further that the present claim of the applicant is not a cargo claim as envisaged by the Inter Clause Agreement.

I do not concede this argument. Apart from the Inter Club Agreement having as its purpose to cut across claims of the present nature, the present application is embedded in a claim for damage to cargo. It cannot be separated artificially from the true nature of the dispute.

Until that claim is “compromised or settled”, respondent cannot make a claim for an

indemnity (or for security in respect thereof). (See *Primegates Maritime Co Ltd v Bunkers on Board the mv "Cargo Explorer"* 1995 CLD 617 (d)).

Although the respondents' claim was brought under section 5 (3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, which is worded as follows:

"A court may in the exercise of its admiralty jurisdictions order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceedings contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action in personam against the owner of the property concerned or an action in rem against such property or which would be so enforceable but for any such arbitration proceedings."

my view is that this section is not in conflict with the requirement that the claim forming the subject of the present dispute is to be settled or compromised before security can be validly claimed.

*Seguros Banavenez SA v The Oliver Drescher*, 761 F.2d 855, 1985 AMC 2168 (2d Cir. 1985), involved, inter alia, the arrest of a vessel as security for a cargo claim. At the request of the owner, Drescher, the district court ordered the charterer, Venline, to furnish Drescher with sufficient security so that Drescher, in turn, could post the bond necessary for the release of the vessel. The Second Circuit reversed the district

court on this issue, reasoning:

“Venline did not ask to be brought into court, and it did not concede liability over to Drescher. Indeed, that issue remains to be decided in arbitration. A Shipowner is not compelled to furnish a bond to the person who has arrested his ship. Its *quid pro quo* for voluntarily furnishing security is the release of its ship. Depriving Venline of its property by compelling it to furnish a bond to Drescher without any similar *quid pro quo*, without any valid prior finding as to the parties’ respective rights, and without any provision for protection of Venline’s interests and expenses, smacks of a violation of due process. (761 F.2d at 863-864, 1985 AMC at 2179-2180)”

Consequently even if this Court were incorrect in its findings that the claim in respect of the second claim is a “cargo claim”, then it nevertheless holds the view that without any prior establishment as to the parties’ respective liabilities for the cargo damage, a claim for security is premature.

I would then make the following order:

1. The security arrest granted in this matter on 21<sup>st</sup> February 2002 remain in force subject to its amendments under this order.
2. The amount of security to be provided by Wajilam Exports (Singapore) Pte Ltd be and is hereby reduced to USD 35 745.
3. The Registrar of the Durban and Coast Local Division be and is hereby ordered to return the guarantee dated 27 February 2002 in the sum of USD 109 912 to Garlicke & Bousfield Inc for cancellation against delivery to him or her of a

replacement guarantee on identical wording but in the sum of USD 35 745.

4. The said Registrar shall hold the said guarantee pending the outcome of the London arbitration proceedings between the parties arising out of the charter of the MV "ANTARES III" under a charter party dated 17 December 2001.
5. The costs of this application are to be paid by Transpacific Eternity SA.

*Bucay*