

# Cargo Claims: New technologies and future risks

John Russell QC  
Chris Smith QC  
Ruth Hosking  
Jai Sharma, Clyde & Co LLP

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With back to back wins, Quadrant Chambers demonstrates 'exceptional strength-in-depth for complex shipping disputes'

Legal 500 UK Awards 2020





**“One of the best of his generation, he is fantastic and logical in how he leads the judge.”**

(Chambers UK, 2021)

## John Russell QC

Called: 1993 Silk: 2014

[john.russell@quadrantchambers.com](mailto:john.russell@quadrantchambers.com)

### Areas of Expertise

Shipping	Energy	Commercial Dispute Resolution
Commodities & International Trade	International Arbitration	Aviation & Travel
Shipbuilding & Offshore Construction	Insurance	

John Russell QC is an experienced and determined commercial advocate and has acted as lead Counsel in numerous Commercial Court trials, international and marine arbitrations and appellate cases.

His work includes two successful appearances in the Supreme Court, including the landmark shipping decision in *Volcafe v CSAV*. He has also appeared as counsel in inquests and public enquiries.

John has been named Shipping Silk of the Year for both the Legal 500 UK Awards 2020 and the Chambers & Partners Bar Awards 2020, having also been nominated in 2019. He is ranked in the Legal 500 and Chambers & Partners in Shipping and Commodities.

He relishes both detailed legal argument and cross-examination of lay and expert witnesses. He will always ensure that a client's case is presented in the most persuasive manner possible, both in writing and orally.

John provides advice to a wide range of clients. He combines first rate technical legal analysis with a pragmatic, commercial, problem solving approach to cases.

John accepts instructions in many fields of commercial dispute resolution with a particular focus on shipping, commodities, international trade, marine insurance, aviation and travel.

John also takes appointments as an arbitrator in the fields in which he practices.

### What the Directories Say

*“He is a good, instinctive lawyer with clear views at the outset of a case and is very approachable.”* (Legal 500 Asia Pacific, 2021)

*“One of the best of his generation, he is fantastic and logical in how he leads the judge.”* (Chambers UK, 2021)

*“John Russell is an excellent and effective advocate.”* (Chambers UK, 2021)

*“His ability to read the tribunal and to analyse questions and situations as they arise during oral hearings is outstanding.”* (Chambers UK, 2021)

*“He is emerging as one of the leading shipping silks.”* (Legal 500, 2021)

*“A very good, practical silk who thinks very well on his feet.”* (Legal 500, 2021)

*“He makes matters seem so easy and simple by being clear, precise and straight to the point. On his feet he is cool under pressure and well organised.”* (Chambers UK, 2020)

*“He’s fantastic on all dry shipping matters, very calm and effective with judges.”* (Chambers UK, 2020)



“He is lucidly clear, forensically detailed and very well prepared, and he has the ability to give sagacious advice.”

(Legal 500, 2021)

## Chris Smith QC

Called: 1999 Silk: 2019

chris.smith@quadrantchambers.com

### Areas of Expertise

Energy	Commercial Dispute Resolution	International Arbitration
Shipping	Shipbuilding	Aviation & Travel
Commodities & International Trade	Insurance	

Chris has a broad commercial practice, with a particular focus on energy, shipping, commodities and insurance disputes.

He has appeared extensively in the Commercial Court, representing clients at all stages of proceedings, from urgent pre-action interlocutory applications all the way through to trial. Chris also appears regularly in both domestic and international arbitrations, and has undertaken cases before tribunals in London, Zurich and Hong Kong.

Chris is recommended as a leading barrister in the field of Shipping law in both Chambers and Partners and The Legal 500, as well as for Energy in The Legal 500. Comments have included: “He is outstanding in his legal analysis and presentation of cases before tribunals.”; “a star of the future and is a fierce advocate”; “he is thoroughly commercial and has sound judgment as to what points to fight”; “...a particularly tenacious and effective advocate; exactly the man you want in tight situations...”. He was nominated for Junior Shipping Barrister of the Year in the Chambers UK Bar Awards in 2015.

### What the Directories Say

*“His advice is extremely informative, and tailored to provide all possible arguments that could be run by the parties, including any potential counter arguments to address the legal issues. Further, his knowledge and expertise in understanding pure marine technical issues are also very helpful.”* (Legal 500 EMEA, 2021)

*“Responsive, clever, and prepared to get stuck in.”* (Legal 500 Asia Pacific, 2021)

*“A recommended option for both wet and dry shipping disputes.”* (Legal 500 Asia Pacific, 2021)

*“Chris is very approachable and commercially minded.”* (Chambers UK, 2021)

*“He is a punchy, skilful advocate who is not afraid to take difficult points.”* (Chambers UK, 2021)

*“His willingness to roll up his sleeves and work closely and persistently together to forge a way through some of the difficulties we faced was much appreciated.”* (Legal 500, 2021)

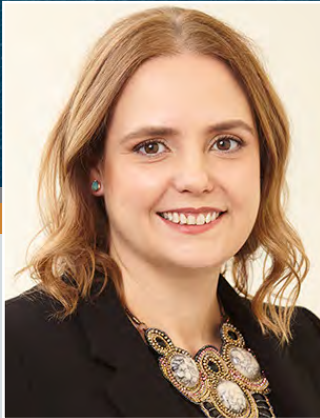
*“He is lucidly clear, forensically detailed and very well prepared, and he has the ability to give sagacious advice.”* (Legal 500, 2021)

*“Perceptive, strategic and good with clients.”* (Legal 500 Asia Pacific, 2020)

*“An excellent new silk.”* (Legal 500 Asia Pacific, 2020)

*“He has an extremely sharp mind and conveys it well as an advocate. His turnaround time and client care is excellent and he works very closely with his instructing solicitors.”* (Chambers UK, 2020)

*“He’s frighteningly quick and very precise.”* (Chambers UK, 2020)



“She is the all-round package, a brilliant barrister.”  
(Chambers UK, 2021)

## Ruth Hosking

Called: 2002

ruth.hosking@quadrantchambers.com

### Areas of Expertise

Commercial Dispute Resolution	Shipping	Public International Law
Fraud	International Arbitration	Shipbuilding
Commodities & International Trade	Insurance	

Ruth’s practice encompasses the broad range of general commercial litigation and arbitration. Her particular areas of specialism include shipping, civil fraud, private international law and commodities.

She undertakes drafting and advisory work in all areas of her practice and regularly appears in court and in arbitration, both as sole counsel and as a junior. Ruth also accepts appointments as an arbitrator (both as sole and as part of a panel).

Ruth has appeared in the House of Lords, Court of Appeal, High Court and has represented clients in a variety of international and trade arbitrations (including ICC, LCIA, LMAA, GAFTA and FOSFA). She has been involved in a number of high profile cases, including **“The Achilleas”**, a leading case on the contractual principles of remoteness of damage and **“The Atlantik Confidence”**, the first case in which an English Court has determined that a person was barred from relying on the limits provided by the Limitation Convention.

Ruth has a client-friendly approach to litigation and is happy to advise on urgent matters out of hours and at short notice. She adopts a collaborative approach to litigation, involving clients, experts and her instructing solicitors in progressing cases to trial or arbitration. She is ranked as a ‘Leading Junior’ in the latest editions of Chambers UK and The Legal 500. Praise given in previous editions include “quick to respond, pragmatic and honest” and “excellent”. In 2018 Ruth was shortlisted for the Legal 500 Shipping Junior of the Year. She is a meticulous advocate who combines rigorous analysis of detail with a common sense commercial approach.

Prior to coming to the bar Ruth studied for an LLM in commercial & corporate law specialising in restitution, corporate insolvency, conflict of laws and marine insurance at UCL; and was a visiting law tutor at King’s College London teaching tort (including economic torts) from 2001-2002.

### What the directories say

“Ruth is a very solid, competent and user-friendly junior.” (Chambers UK, 2021)

“She is the all-round package, a brilliant barrister.” (Chambers UK, 2021)

“She is very down to earth, easy to work with, and clients like her.” (Chambers UK, 2021)

“Has a quick grasp of complex issues.” (Legal 500, 2021)

“Ruth is both commercial and practical” ... “She has an impressive ability to construct arguments.” (Chambers UK, 2020)

“Her legal advice is practical, accurate and straight to the point.” (Legal 500, 2020)

“She provides swift and accurate advice.” (Legal 500, 2019)



## Jai Sharma

Partner

E: [jai.sharma@clydeco.com](mailto:jai.sharma@clydeco.com)

Jai is the head of Clyde & Co's marine cargo casualty practice.

He focuses on marine casualty cases and recoveries, and is one of very few solicitors with extensive experience of salvage and GA claims from a cargo perspective. He has been involved in more than 300 marine casualties for cargo underwriters during his career.

Cases he has handled include a number of very significant reported English maritime cases, for example "OLYMPIC GALAXY", "NEW FLAME", "AQASIA", "EURASIAN DREAM" and "CMA CGM LIBRA" as well as reported cases in other jurisdictions, such as Singapore, India and the Marshall Islands.

Other notable casualties Jai has been involved in are the "MOL COMFORT", "MSC FLAMINIA", "HYUNDAI FORTUNE", "APL PANAMA", "YM GREEN", "HANJIN ITALY", "HEUNG-A DRAGON", "MAERSK SEOUL", "PANAMAX TRADER" and "MAERSK HONAM".

Jai is recognised by Legal 500 as a recommended lawyer for shipping in London and South East England and has recently been recognised in Lloyd's List of the Top 10 maritime lawyers in 2020.

### Experience

- "AQASIA" – Led the UK High Court and Court of Appeal litigation for the successful insurers of the cargo. This is a key decision on the inapplicability of Hague Rules limitation to bulk cargo.
- "HANJIN ITALY" – Advising insurers of 700+ containers of cargo on claims for General Average and recovery of losses against the colliding ship "AL GHARRAFA"
- "MSC FLAMINIA" – Advising insurers on substantial claims for cargo loss and damage following a major fire on board a containership, during which several crew died, the ship was heavily damaged and at least 60% of the cargo on board was destroyed
- "HEUNG-A DRAGON" – Defending claims for the salvage and general average of the surviving containers, and pursuing recovery for the loss of cargo following a collision between a container ship and a bulk carrier, following which only the on-deck cargo was salvaged and nearly all 600 containers were lost
- "MOL COMFORT" – Advising multiple cargo insurers on the total loss of USD 300 million of cargo after "MOL COMFORT" broke in two, caught fire and sank in two sections, losing all 4,382 containers on board. This is the largest container vessel ever to be lost
- "FLASH" – Advising insurers of a cargo of 125,000MT of coal in the defence of LOF salvage claims



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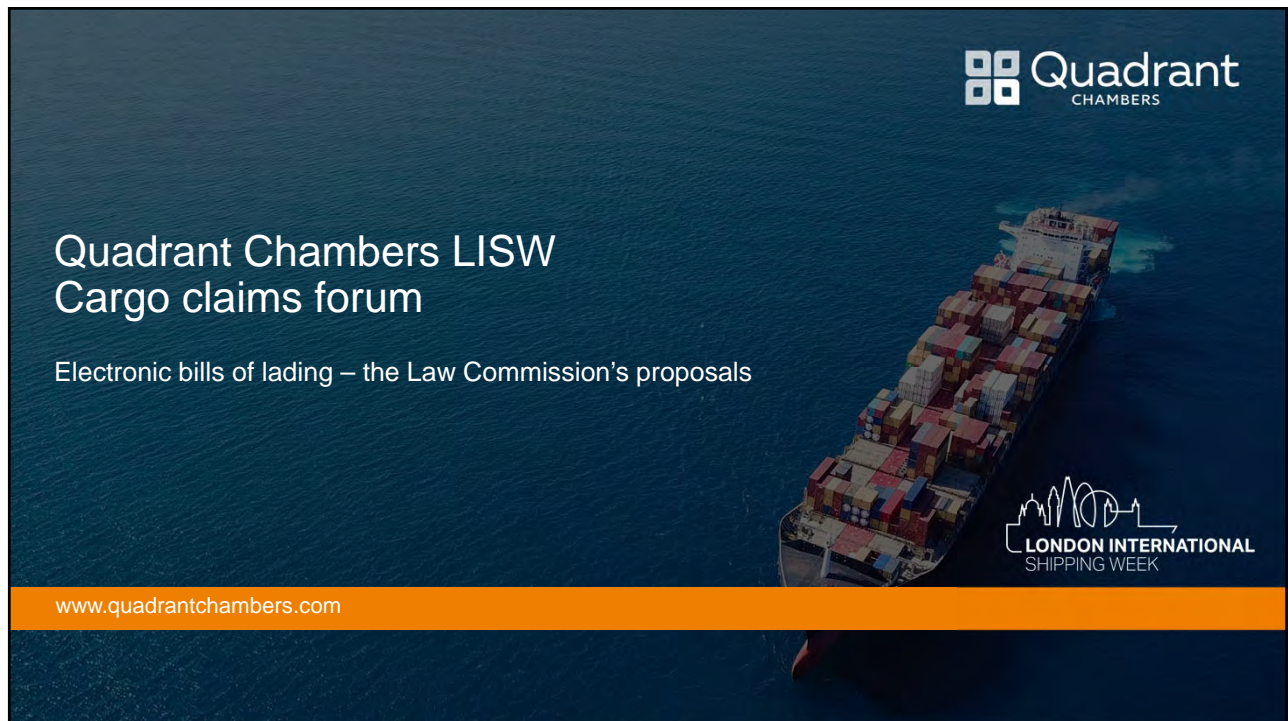
# Quadrant Chambers LISW Legal Breakfast Forum

Cargo Claims: New technologies and future risks

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# Quadrant Chambers LISW Cargo claims forum


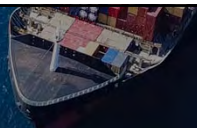
Electronic bills of lading – the Law Commission's proposals

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## The adoption of electronic bills of lading



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The screenshot shows a document from the International Chamber of Commerce (ICC) dated April 2021. It is addressed to the Hon. Robert Sutherland QC MP, Secretary of State for International Trade. The document discusses the adoption of electronic bills of lading and the need for legal reforms. It mentions the ICC's work on the e-BL and the need for a legal framework to support the use of electronic bills of lading. The document is signed by Chris Doughty, Secretary General of ICC.

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## The Law Commission's Consultation Paper



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- Consultation paper published on 30<sup>th</sup> April 2021
- Consultation process ended 30<sup>th</sup> July 2021
- Final report due to be published in January 2022
- Government response and the new Bill?

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## The function of a bill of lading and the problem

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A bill of lading has essentially three functions:

1. As a receipt, confirming that goods have been loaded on board a vessel.
2. As evidence of the contract of carriage.
3. As a document of title.

It is the last of these functions that possesses difficulties because as a matter of English law an intangible asset cannot be possessed, see OBG v Allan [2007] UKHL 21. Consistent with this COGSA 1992 does not apply to electronic bills of lading.

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## Current solutions


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## The Law Commission's proposals



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The Law Commission approached their task by asking what is it that makes a document possessable, and how can those properties be extrapolated to electronic trade documents?

The relativity of possession, see The Tubantia (1924) 18 L.L.Rep. 158.


The importance of the ability to use or control the asset in question.

The need for an intent to possess, see Parker v British Airways Board [1982] 1 W.B. 1004.

Do these elements only apply to tangible objects or are they equally capable of applying to electronic documents?

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## The Law Commission's draft Bill – the central scheme



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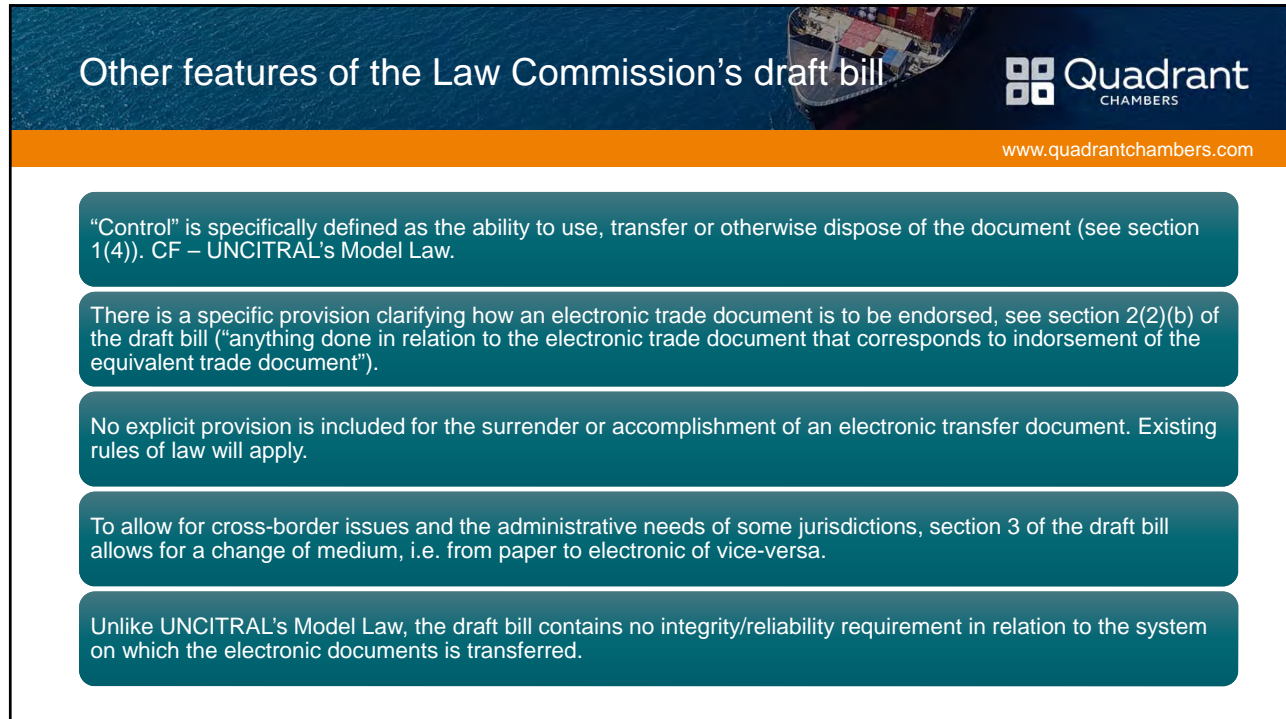
An exhaustive list of the documents that the bill applies to (section 1(2))

Only documents which are capable of exclusive control qualify. This means that the documents must be on a system that ensure that no more than one person (or group of people acting together) has control of the document at any one time (section 1(3)(c)(i))

The system must ensure that once the document is transferred from one person to another, the transferor no longer has control of it (section 1(3)(c)(ii))

Documents satisfying the above criteria are electronic transfer documents. Pursuant to section 2 of the draft bill, any person who has possession of such a document is to be regarded as being in possession of it for the purposes of any statutory provision or rule of law.

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## Other features of the Law Commission's draft bill

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"Control" is specifically defined as the ability to use, transfer or otherwise dispose of the document (see section 1(4)). CF – UNCITRAL's Model Law.

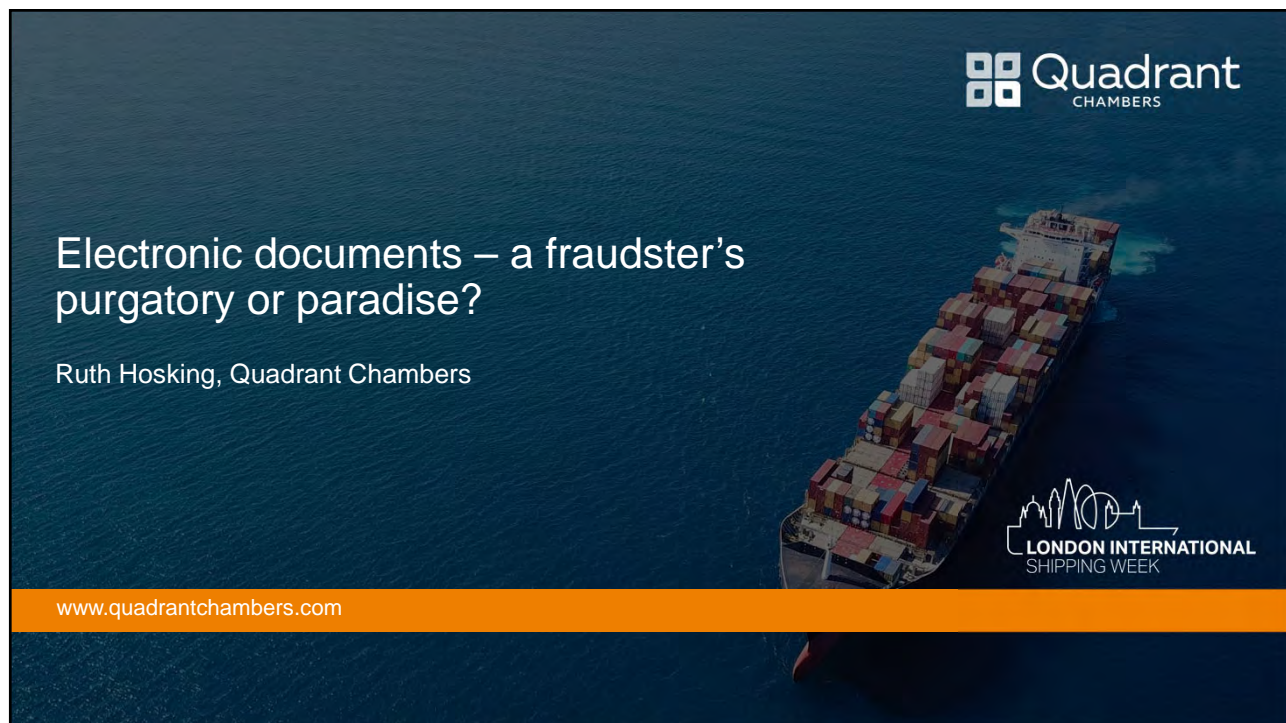
There is a specific provision clarifying how an electronic trade document is to be endorsed, see section 2(2)(b) of the draft bill ("anything done in relation to the electronic trade document that corresponds to indorsement of the equivalent trade document").

No explicit provision is included for the surrender or accomplishment of an electronic transfer document. Existing rules of law will apply.

To allow for cross-border issues and the administrative needs of some jurisdictions, section 3 of the draft bill allows for a change of medium, i.e. from paper to electronic of vice-versa.

Unlike UNCITRAL's Model Law, the draft bill contains no integrity/reliability requirement in relation to the system on which the electronic documents is transferred.

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## Electronic documents – a fraudster's purgatory or paradise?

Ruth Hosking, Quadrant Chambers

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## Current problems



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- ❖ International trade involves large number of different parties including transportation, insurance, finance and logistics service providers.
- ❖ Multiple documents with very few (if any) security features
- ❖ Bills of Lading –
  - ✦ Paper (which can be photocopied and signatures can be forged)
  - ✦ Issuing 3 originals
  - ✦ Need for physical possession (transporting hard copy documents internationally can leave them open to be stolen etc)

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- ❖ Fraudsters taking delivery using a forged bill of lading.
- ❖ Fraudsters presenting forged bills of lading to banks and being paid under letters of credit.
- ❖ Problems are international – they are not unique to UK.
- ❖ Singapore:
  - ✦ Companies issuing bills of lading for shipments that did not exist;
  - ✦ Companies using cargo to finance multiple transactions; and
  - ✦ Forged trade documents.

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## Examples of security features which did not work



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- ❖ ***Glencore International v MSC Mediterranean Shipping Co*** [2017] 2 Lloyd's Rep. 186
- ❖ Bill of Lading provided for bill to be surrendered in exchange for the goods or a delivery order.
- ❖ When the cargo arrived at the port of destination it was handled under an electronic release system ("ERS") used for containerised cargo.
- ❖ Under the ERS carriers did not issue paper delivery orders or release notes but provided computer generated electronic numbers (PIN codes) which holders of bills presented to the terminal to take delivery.

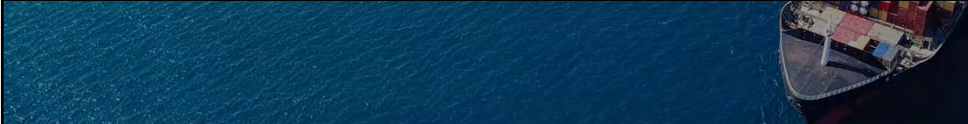
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- ❖ MSC's local agents emailed the notify party a Release Note for 3 containers giving for each of them an ERS PIN code.
- ❖ When notify party's hauliers went to collect the containers two of them had already been collected.
- ❖ Fraudsters had been able to acquire or access the PIN codes to authorise collection of the cargo.
- ❖ Courts held that the carrier was in breach for delivery to fraudsters rather than genuine B/L holders.
- ❖ Analogous No different to a fraudster simply presenting a forged bill to take possession.

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- ❖ ***Natixis v Marex Financial*** [2019] 2 Lloyd's Rep. 431
- ❖ High value nickel fraud involving forged warehouse receipts
- ❖ Contract for the sale of nickel to be stored in a warehouse.
- ❖ Contract provided that Marex was to deliver or procure delivery of the required documentation to Natixis which was defined as including warehouse receipts.
- ❖ Those receipts were to be authenticated by Access World. Unsurprisingly the purpose of authentication was to see if the receipts were genuine.
- ❖ 16 receipts delivered. Two were not authenticated but photocopies were subject of verification. 14 receipts were authenticated.

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- ❖ Later transpired the warehouse receipts were forged.
- ❖ Some of the differences related to different colours of certain parts of the receipt between the forged documents and the genuine receipts.
- ❖ Other differences and security features are referred to in the judgment as items 1 to 4 in accordance with a confidentiality order so cannot know precisely what those security features involved.
- ❖ Clear that some security features were not checked at all.
- ❖ Bryan J described some of the forgeries as *“unsophisticated and a dead give-away ... should have been spotted by an individual exercising the ordinary skill or an ordinary person exercising the particular art”*.

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## Current Electronic Bills of Lading



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- ❖ “Buzz” about electronic bills of lading for decades but never really taken off.
- ❖ Currently 7 private technical solutions providing electronic alternatives to paper bills of lading which have been approved by the International Group of P&I Clubs:
  - Bolero, essDOCS, e-Title, edoxONline, WavebL, CargoX and Tradelens.
- ❖ Total take up of these private frameworks relatively low.
- ❖ 2018 report from the European Commission estimated that the regional rate of uptake of electronic transport documents for maritime trade rounded to 0%.

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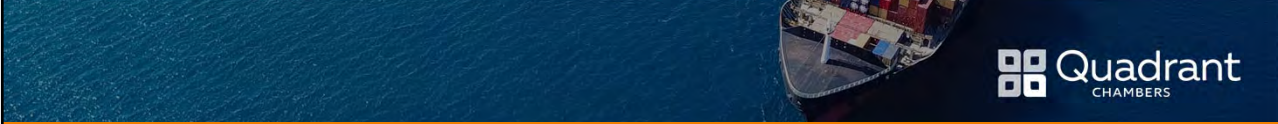
## Will Law Commission recommendations reduce fraud?



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- ❖ Law Commission’s consultation question No. 49 was *“We provisionally propose that electronic trade documents will reduce the risk of fraud compared to paper trade documents. Do consultees agree?”*
- ❖ Proposed system uses Distributed Ledger Technology – Law Commission says any attempt to manipulate the contents of the ledger to facilitate a fraud is *“practically speaking, impossible.”* (§2.52)
- ❖ They also say *“The digital architecture of the systems on which they are hosted will ensure that no more than one person is able to use, and transfer or otherwise dispose of them. Additionally, their movements and encumbrances may be recorded in a manner with which it is practically impossible to tamper.”* (§7.51)

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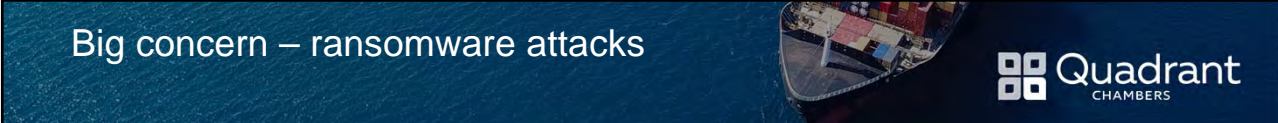


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- ❖ PWC carries out a Global Economic Crime and Fraud Survey every 2 years. Last one published is 2020.
- ❖ More than 5,000 companies responded:
  - ✦ 47% said they had experienced fraud in the past 24 months. That was the second highest reported level of incidents in 20 years.
  - ✦ Accounted for US\$42 billion of losses.
- ❖ 4 most common types of fraud are (1) customer fraud; (2) cybercrime; (3) asset misappropriation and (4) bribery and corruption.

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### Big concern – ransomware attacks



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- ❖ **Ransomware attacks** – form of malware that encrypts a victim's files. The attacker then demands a ransom from the victim to restore access to the data upon payment.
- ❖ 2021 examples: Taiwan-based PC manufacturer Acer (ransom of US\$ 50 million); one of the biggest insurance carriers in the US CNA Financial, Colonial Pipeline Company, Axa SA.
- ❖ Shipping examples: CMA CGM, APM- Maersk, Mediterranean Shipping Company, COSCO.
- ❖ Ransomware attacks on shipping firms tripled between 2019 and 2020 (report by BlueVoyant).

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**Cargo claims  
Containers overboard!**

Jai Sharma, Partner/Head of Cargo Casualty

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## Container Volumes

- Container vessels are about 10% of the world fleet
- World fleet has approximately 20m TEU capacity
- Port of Shanghai handles 40m containers annually
- 20,000 TEU vessels in service



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## Losses on an upward trend?

- Numbers of significant container overboard losses, and values involved, subjectively on an upward trend



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## “MSC ZOE” – 270+ containers lost



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## “BREMEN EXPRESS” 300+ containers lost



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## “SVENDBORG MAERSK”

- 517 containers lost overboard with a further 250 containers damaged
- 8,150 TEU vessel



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## “ONE APUS”

**1800+ containers lost and many more damaged**



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## Why?

**Recently, arguably Covid has triggered changes in demand**

**Supply chain imbalance**

**Capacity constraints and port congestion**

**Possibility the management of complex forces is not properly understood**



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## Pressures

**Time = money**

**Very high freight rates (spot rate China to US \$20,000+ per 40ft box)**

**Theoretically if 10,000 boxes were carried at that rate, total \$200m for one voyage**

**Record profits**

**Pressure on the schedules/speed**



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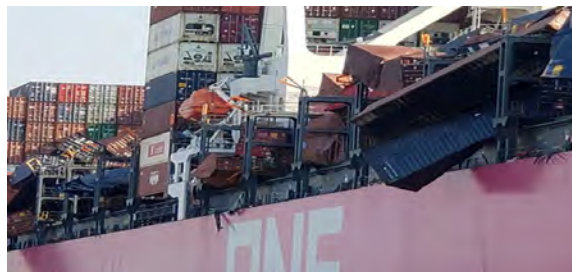
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## Causes of Container Losses

**Divided into categories:**

- **Stowage errors by carrier**
- **Stowage errors by shipper**
- **Defective equipment**
- **Interaction between ship and sea conditions**
- **Extreme weather**



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## Interaction Between Ship and Sea Conditions

- Increasing stack heights with each new generation of containership
- Rolling, slamming and whipping forces
- Speed and routing considerations for heavy weather
- High GM of vessels
- Crew training/fatigue issues may affect management of forces

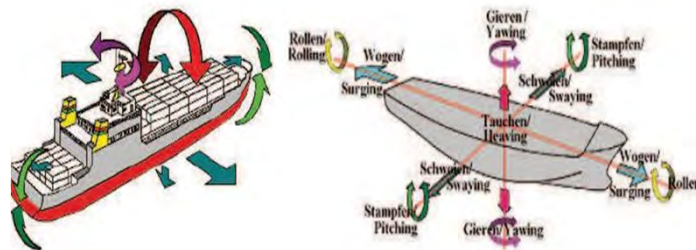


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## Complex Dynamic Forces



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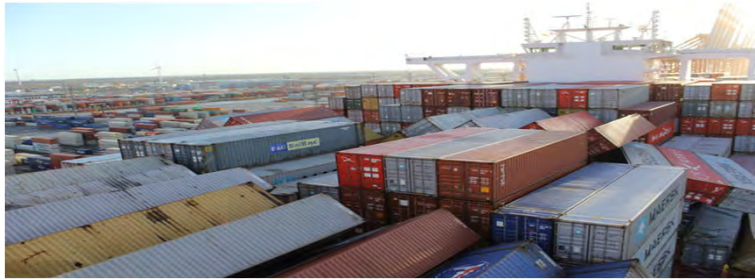
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## Synchronous Rolling

**Synchronous rolling – natural frequency of regular rolling in synch with waves**

**If rolls and waves resonate, this magnifies the extent of the roll unless the resonance is broken, by changing direction, changing ballast to alter the centre of gravity or losing deck cargo (which also changes the centre of gravity)**



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## Parametric Rolling

Rolling due to a time variation in a parameter. As the ship rolls, there is a righting lever. In head or following seas, that varies in force depending on the wave elevation and the pitch (among other variables). These forces can also resonate.

Large container ships tend to have a large flare at the bow and wide beams, which means that variation in stability (GM) is larger as the vessel ploughs through the sea.

Rolling can reach 30 degrees. The impact can be reduced by changing speed or course (or both), or the GM.

This can be a quick process – “YM EFFICIENCY” rolled for 60-90 seconds and circa 150 containers were lost/damaged.



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## Other Factors

- Failure to apply lashings properly – difficult to prove because evidence lost
- Possible poor quality or faulty lashing equipment or twistlocks
- Introduction of fully automatic twistlocks blamed for some recent losses
- Carrier has the burden of proof



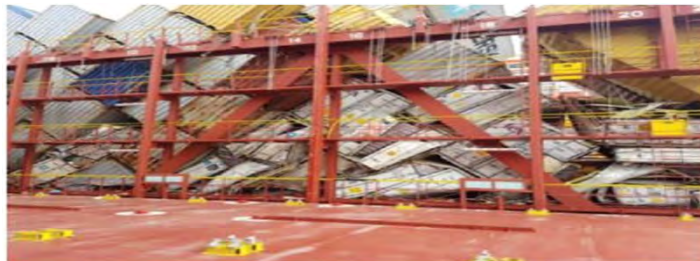
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## Defective Equipment

- Age of containers and the deterioration in condition of attachment point
- Previous IMO study (albeit a long time ago) found 9% of containers inspected had structural deficiencies
- Supply of new containers not necessarily keeping pace with growth of containerised carriage



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## Other Factors

**Failure to correctly tighten lashing gear after sailing**

**Damage to a lower tier container (either pre-existing damage or failure of the internal cargo stowage) affects integrity of stack**



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## Stowage Error by Carrier

- **Heavy container on top of lighter container**
- **Affects stack dynamics or results in crushing of lower container**
- **Late arrival of containers at load port**
- **Speed and profit ahead of safety**



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## Stowage Errors by Shippers

- Mis-declared weights
- “MSC NAPOLI” – 20% of recovered dry containers overweight, some by as much as 20 mt
- Opportunity to weigh container
- Poor stowage of container contents
- Effect on “innocent” cargo



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## Other Consequences

- Hazard to navigation
- Cost of container recovery/clean up cost
- Possible pollution



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## Conclusion

A number of these events have occurred recently

High values can be involved

Complex dynamic forces acting on ship and cargo perhaps not properly understood by carriers

Commercial pressures likely to result in more incidents

Carrier has high burden of proof to overcome under English law if they wish to defend the claim



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Offices Worldwide

440

Partners

4,000

Total staff

2,500

Legal professionals



Jai Sharma

Partner

E: [jai.sharma@clydeco.com](mailto:jai.sharma@clydeco.com)

[www.clydeco.com](http://www.clydeco.com)

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**Gary Ventura**

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**Senior Clerk**

Mobile: +44 (0)7761 004 100  
Direct: +44 (0)20 7822 1487  
gary.ventura@quadrantchambers.com



**Simon Slattery**

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**Senior Clerk**

Mobile: +44 (0)7956 335 684  
Direct: +44 (0)20 7822 1437  
simon.slattery@quadrantchambers.com



**Daniel Westerman**

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**Senior Practice Manager**

Mobile: +44 (0)7741 249 763  
Direct: +44 (0)20 7822 1490  
daniel.westerman@quadrantchambers.com



**John Walker**

---

**Practice Manager**

Mobile: +44 (0)7584 482 164  
Direct: +44 (0)20 7822 1489  
john.walker@quadrantchambers.com



**Daryl Hughes**

---

**Practice Manager**

Direct: +44 (0)20 7822 1430  
daryl.hughes@quadrantchambers.com



**Rob Frankish**

---

**Practice Manager**

Direct: +44 (0)20 7822 1439  
rob.frankish@quadrantchambers.com



**Tara Shah**

---

**Practice Manager**

Direct: +44 (0)20 7822 1493  
tara.shah@quadrantchambers.com



**Billy Beckett**

---

**Assistant Practice Manager**

Direct: +44 (0)20 7822 1491  
billy.beckett@quadrantchambers.com



**Lucie Rowsell**

---

**Assistant Practice Manager**

Direct: +44 (0)20 7842 0259  
lucie.rowsell@quadrantchambers.com



**Sarah Longden**

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**Business Development Director**

Mobile: +44 (0)7932 469 394  
Direct: +44 (0)20 7822 1454  
sarah.longden@quadrantchambers.com