

## A Certificate Is Final Again - The "Mercini Lady" Court Of Appeal Decision

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In May this year we published an Alert entitled "Certificate not so final: The Mercini Lady...". As the title suggested, a first instance case known as The Mercini Lady had introduced an apparent new basis for challenging the standard clause providing that the certificate of quality on loading is final save for fraud. We promised to report on the outcome of the appeal of that decision. That appeal decision has just been reported<sup>1</sup> and has categorically restored the previous status quo - a decision that will be popular with most traders and promotes certainty in trade.

The Commercial Court decision was the source of controversy, in that it potentially exposed FOB sellers to the risk of goods deteriorating after loading, even in a "certificates final on loading" contract. In addition it was decided that a standard exclusion clause of a kind that is widely relied upon did not exclude the application of terms implied by the Sale of Goods Act.

In the Court of Appeal this week, Lord Justice Rix put the first instance decision firmly in context. He found that, to the extent that the first instance decision may have created a novel implied term which could avoid the effect of the standard certificate final on loading clause, the decision was wrong, otherwise: "**All certainty in international sale of goods, which such inspection clauses are designed to provide ...would be utterly broken**". He added that the underlying principle of the Sale of Goods Act was "**still caveat emptor**"<sup>2</sup> (let the buyer beware) and concluded by saying the legal argument that had produced the first instance controversy had become "unsatisfactorily speculative and theoretical".

In respect of the exclusion of the terms implied by the Sale of Goods Act, Lord Justice Rix determined that the first instance decision was correct. However, he suggested that this finding would have little relevance to the express nature of the certificate final on loading clause:

"If...the alleged vice [off-spec quality criteria] is in truth something for which the specification and conclusive determination clauses provide... there may be no room for a separate allegation of breach by reference to the statutory implied term of what is now satisfactory quality or any similar term to be implied at common law."

Therefore, it remains the case that to exclude the effect of any implied statutory terms, the contract must be expressly specific in excluding "statutory implied terms and/or conditions".

## Conclusion

Before *The Mercini Lady*, most traders would have been confident in saying that:

- risk passes to the buyer on shipment, both in CIF and FOB contracts, for all purposes; and
- a "certificate final on loading" provision, coupled with a clean certificate, would provide incontrovertible protection if the goods deteriorate after loading.

For a while, that confidence was lost and the Commercial Court seemed to provide for certain on-going obligations for goods to remain "on spec" during the voyage and that the "final" loading certificate did not prevent those on-going obligations. Now **certainty in international sale of goods, which such inspection clauses are designed to provide**, has been fully restored. A clause for conclusive inspection and determination on loading "replaces or redefines the implied terms as to quality" and prevents further terms being implied relating to the cargo after delivery. The Court of Appeal mentioned (without deciding) that latent (i.e. hidden) inherent vice which could not have been picked up by contractual testing may still give rise to breach of an implied term of satisfactory quality.

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1. *The Mercini Lady* (KG Blominflot Bunkergesellschaft für Mieralole mbh & Co KG v Petroplus Marketing AG [2010] EWCA Civ 1145).

2. The doctrine of "caveat emptor" means the buyer must take care that goods suit his needs before he agrees to purchase them. Provided the seller does not conceal or misrepresent the



nature and condition of the goods, the buyer purchases them at his own risk and in the condition they are in. In this case, the buyer agreed to purchase the goods in the condition they were in at loading. It was for the buyer to protect itself by insisting on a provision that would have guarded against deterioration after loading.

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