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April 1, 2011					
FEDERAL MARITIME COMMISSION					

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**DOCKET NO. 10-10**

**DRAFT CARGOWAYS (INDIA) PVT. LTD.**

**v.**

**DAMCO USA, INC., DAMCO A/S, A.P. MOLLER-MAERSK A/S,  
GLENCORE LTD., AND ALLEGHENY ALLOYS TRADING, L.P.**

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**ORDER GRANTING MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT AND  
DISMISSAL WITH PREJUDICE OF RESPONDENT GLENCORE LTD.**

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**I.**

On March 14, 2011, complainant Draft Cargoways (India) Pvt. Ltd. ("Draft Cargoways") and respondent Glencore Ltd. ("Glencore") filed a joint motion and memorandum ("Motion") seeking approval of a settlement agreement. Separate settlement agreements have been reached with the other parties in the proceeding, leaving Glencore as the only remaining respondent.

**II.**

The amended complaint served on December 8, 2010, named Glencore as a party. Draft Cargoways alleged that Glencore violated section 10(a)(1) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. § 41102(a), by failing to pay demurrage/detention charges. On January 27, 2011, Glencore filed a motion to dismiss for failure to state a claim. Glencore has not filed its answer to the amended complaint.

The parties request approval of a settlement agreement. The settlement agreement states:

**WHEREAS**, Cargoways filed a complaint with the Federal Maritime Commission (the "Commission") on October 29, 2010, against Damco USA, Inc., Damco A/S and A.P. Moller-Maersk A/S (collectively, "Maersk/Damco") seeking to have the Commission declare that certain of Maersk/Damco's practices in assessing

demurrage and detention against Cargoways were in violation of the Shipping Act of 1984;

**WHEREAS**, Cargoways filed an amended complaint with the Commission on November 22, 2010 (the "Claim"), alleging that if Cargoways were liable to Maersk/Damco for demurrage or detention (including certain detention or demurrage charges paid by Cargoways to Maersk/Damco), then Glencore would be liable for any such demurrage and detention, including demurrage or detention for the shipment under Cargoways bill of lading No. DCIPL/A/IND/5195 and Maersk bill of lading No. MAEU855934680;

**WHEREAS**, the Claim is disputed by Glencore (the "Dispute"); and

**WHEREAS**, the Parties have determined that it is in their mutual best interests to resolve the Dispute and settle the Claim by entering into this Agreement on the terms stated herein.

**NOW, THEREFORE**, for and in consideration of the mutual promises and covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

1. Consideration and Release.

(a) Glencore hereby delivers to Cargoways and Cargoways hereby acknowledges receipt of a check payable to its counsel Rodriguez O'Donnell Gonzalez & Williams, P.C. at the address of 1250 Connecticut Ave NW, Suite 200, Washington DC 20036 in the amount of \$4,000.00;

(b) Cargoways, for itself and its successors, assigns and affiliates, hereby fully, finally and forever release, quitclaim and discharge Glencore and each of its successors, assigns, affiliates, agents, attorneys, employees, officers and directors from any and all claims, liabilities, demands, debts, accounts, obligations, actions and causes of action, known or unknown, fixed, liquidated, or contingent, at law or in equity, including claims for attorneys' fees, consequential or punitive damages or claims for lost profits, which Cargoways had, now has, or may have, against Glencore arising out of or relating to the Dispute; and

(c) Cargoways shall promptly cause to be filed with the Commission a Motion for Approval of Settlement Agreement, in substantially the form of Exhibit A hereto.

2. No Admission of Liability.

This Agreement shall not in any way be construed as an admission by any Party of any liability or any act of wrongdoing whatsoever.

3. Advice of Counsel.

The Parties to this Agreement represent and warrant to each other that such Party has read and fully understands the terms and provisions of this Agreement, is voluntarily entering into this Agreement, has had an opportunity to review this Agreement with legal counsel and has executed this Agreement based upon such Party's own judgment and advice of independent legal counsel, if sought.

4. No Reliance.

Each of the Parties hereby represents and acknowledges that in executing this Agreement they are not relying and have not relied upon any representation or statement made by the other Party or the other Party's attorneys with regard to the subject matter, basis or effect of this Agreement, other than the promises and representations made in this Agreement.

5. Modification of Agreement.

This Agreement may be amended, revoked, changed, or modified only upon a written agreement duly executed on behalf of both Parties. No waiver of any provision of this Agreement will be valid unless it is in writing and signed on behalf of the Party against whom such waiver is charged.

6. Entire Agreement.

This Agreement sets forth the entire agreement between the Parties and fully supersedes any and all prior agreements or understandings between them. This Agreement shall be governed by the laws of the State of New York.

7. Counterparts.

This Agreement may be executed in counterparts and the execution by the Parties of separate counterparts shall be deemed an original and all of which shall constitute but one and the same instrument.

8. Effectiveness.

This Agreement shall become effective upon the date on which a decision granting the Motion referred to in Section 1(c) shall have become final.

Motion, Ex. A.

The parties argue that the proposed settlement meets all of the criteria for Commission approval. Motion at 6. The parties contend that the proceeding raises complex factual and legal issues and would require time consuming and costly discovery. Motion at 6. The parties state that the amounts at issue between them total only \$14,000 and that the cost of litigation could be substantial and would significantly exceed the disputed amount. Motion at 6. The parties indicate that "the settlement is fair, adequate and reasonable, particularly given the costs and risks of litigation and the amount of damages claimed." Motion at 6. Moreover, the parties indicate that as they "have entered into this settlement willingly, the settlement is not the product of collusion or coercion, and is not inconsistent with public policy issues that the Commission is obligated to consider." Motion at 6. The parties seek to discontinue the proceedings with prejudice and without costs to either party. Motion at 7.

### III.

Using language borrowed in part from the Administrative Procedure Act,<sup>1</sup> Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (*quoting Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

*Old Ben Coal*, 18 S.R.R. at 1092 (*quoting* 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976)).

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"The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

“While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation.” *Id.* However, if “a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval.” *Old Ben Coal*, 18 S.R.R. at 1093. “[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.” *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

“Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation.” *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the representations in the joint motion, the settlement agreement, and other documents filed in this matter, the parties have established that the agreement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. The parties have determined that the costs of proceeding would exceed the disputed amount. This litigation regarding failure to pay demurrage/detention charges does not significantly implicate the public interest. The parties are each represented by their own counsel and there is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the proposed settlement agreement is approved.

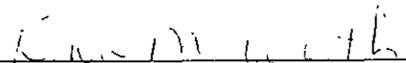
#### IV.

Upon consideration of the joint motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

**ORDERED** that the settlement agreement between complainant Draft Cargoways (India) Pvt. Ltd. and respondent Glencore Ltd. be **APPROVED**. It is

**FURTHER ORDERED** that any pending motions be **DISMISSED AS MOOT**. It is

**FURTHER ORDERED** that this proceeding against Glencore, Ltd. be **DISMISSED** with prejudice.

  
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Erin M. Wirth  
Administrative Law Judge