



# International Trade, Bills of Lading, Charterparties and Arbitration

Day 3

## Cargo Claims

*Arun Kasi*

Advocate & Solicitor, Malaya

Arbitrator, AIAC and THAC panels

Fellow, Chartered Institute of Arbitrators London (CI Arb)

Member, London Maritime Arbitrators Association (LMAA)

# Cargo Claims

## *Legal Bases*

### LEGAL BASES OF CARGO CLAIMS

- Contract (bill of lading contract subject to Hague Rules / Hague-Visby Rules)
- Bailment
- Negligence [Tort]
- Conversion (misdelivery) [Tort]
  
- Utility of Bailment / Negligence actions
  - Subject to contractual rights if there is a contractual nexus between the parties
  - Utility when there is no contractual nexus
  - Utility when action the shipowner is not the contractual carrier,  
as an action against the shipowner in bailment / negligence will enable the ship to be arrested,  
which will in turn usually attract undertaking from the P&I Club to pay any award sum

# Cargo Claims *Contract*

## DETERMINING CONTRACT

- Direct Contract
  - eg. between shipper and contractual carrier, between shipowner and charterer
- Statutory Contract – UK Bills of Lading Act 1855, s. 1 / UK Carriage of Goods by Sea Act 1992, s. 2
  - eg. between shipowner / carrier and transferee of the bill (i.e. the lawful holder of the bill)
- Contract by Agency
  - eg. between consignor and shipowner on loading - *Pyrene v Scindia*  
(fire-tanker fell down during loading but before crossing the ship's rail)
- Implied Contract, eg. between shipper and carrier, between consignor and shipowner on loading, between consignee and shipowner on discharge - *Pyrene v Scindia*.
  - *Brandt v Liverpool*  
(implied contract between receiving bank and the shipowner on terms of the B/L so that the shipowner's liability to the owner limited as per BL although the rights under the bill would not be transferred to the transferee under the 1855 Act)

# Cargo Claims *Contract*

## IDENTIFYING CONTRACTUAL CARRIER (CONTRACT-CLAIM)

- Confusing identity/authentication in bills of lading
  - *Colgate Palmolive v Swedish East Asia*  
(Bill of lading displayed Malaya Indonesia Line, the call name shared by 3 shipping lines including the defendant Swedish East Asia Co Ltd)
  - *Punjab National Bank v Malayan Banking Berhad*  
(Bill of lading signed as “For UNICORN ...” and “AS AGENTS”)
- Bills silent as to whether the issuer of the bill is the owner of the ship
- Demise clause
  - If the ship is not owned by (or chartered by demise) to the company or line by whom the bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner (or demise charterer) as the case may be as principal made through the agency of the said company or line who acts as agents only, and who shall be under no personal liability whatsoever in respect thereof.
- Identity of carrier clause
  - The contract evidenced by this bill of lading is between the Merchant and the Owner of the vessel named herein and it is, therefore, agreed that the said shipowner alone shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage.

# Cargo Claims *Contract*

## PAROL TERMS (CONTRACT-CLAIM)

- *The Ardennes*
  - Oranges shipment – oral promise that the ship would sail from Cartagene directly to London, but she sailed with stop at Antwerp. The shipper's action against the shipowner for breach of the parol term succeeded.

# Cargo Claims

## *Bailment*

### BAILMENT

- *A sui generis*
- Contracts Act 1950, ss. 101 -124
  - Bailment, bailor, bailee
  - Bailment is between bailor and bailee
  - Bailment in place during contractual carriage
  - Bailment in place even after the contractual period of responsibility if the shipowner has possession of the goods, eg. where the consignee did not take delivery
  - Bailment-action may only be taken by the person who bailed the goods to the bailee
  - Bailment-action is subject to contractual terms between the bailor and bailee
- Head bailment and sub-bailments

# Cargo Claims

## *Bailment*

### BAILMENT

- Contracts Act 1950, ss. 101 -124
- 101. “Bailment”, “bailor” and “bailee”

A “bailment” is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the “bailor”. The person to whom they are delivered is called the “bailee”.

- 104. Care to be taken by bailee

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

- 105. Bailee when not liable for loss, etc., of thing bailed

The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104.

# Cargo Claims

## *Bailment*

### BAILMENT

- Evidence Act 1950, ss. 106
- 106. Burden of proving fact especially within knowledge

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

- Res ipsa loquitur – Evidentiary burden – Legal burden



# Cargo Claims

## *Bailment*

### BAILMENT

- Bailee's duty to deliver the goods
  - Bailee is liable if the goods are damaged in his possession, unless the bailee proves that the bailee has taken reasonable care and the damage happened despite that.
  - All that the cargo interest has to prove is the quantity / condition that the goods were delivered to the bailee and that they were returned by the bailee in a different quantity / condition.
  - Then, it is up to the bailee to prove that he has taken reasonable care to escape liability.
  - Bailee bears the legal burden.
  - This is different from negligence-action, where the burden of proving that the shipowner / carrier failed to take reasonable care of the goods is on the cargo interest.
    - The claimant bears the legal burden.

# Cargo Claims

## *Negligence*

### NEGLIGENCE (TORT-ACTION)

- Cargo owner, even if not the holder of the bill, may take negligence-action against the shipowner, if shipowner breached its duty of care.
  - *Donoghue v Stevenson* neighbourhood principle
- The claimant must have the proprietary / possessory rights at the time of first significant damage – *The Starsin*
- The claimant bears the legal burden

# Cargo Claims

## *Conversion*

### MISDELIVERY (TORT-ACTION)

- Misdelivery is different from mere non-delivery
- Misdelivery attracts conversion-action (tort), while mere non-delivery attracts a contract-action
- See Arun Kasi, 'A Critical Analysis of the Court of Appeal Decision on Misdelivery in Minmetals South-East Asia Corp Pte Ltd v Nakhoda Logistics Sdn Bhd', *The Law Review*, 2020, vol. 2, p. 105

# Cargo Claims

## *Conversion*

### MISDELIVERY (TORT-ACTION)

- Misdelivery happens where the possessory right of a person is interfered,
  - eg. the shipowner delivers the goods to a wrong person (who does not hold the bill of lading)
- Delivery without presentation of the bill of lading is strictly misdelivery, even if the charterparty authorises / requires such delivery or the goods are delivered against an indemnity
- To take misdelivery action, the claimant must have had the possessory right
- See Arun Kasi, 'Mewah-Oils Sdn Bhd v. Lushing Traders Pte Ltd – Court of Appeal Decision on Conversion: A Critical Analysis'; *The Law Review*, 2020, vol. 3, p. 209; *Legal Network Series (A)*, 2020, vol. 1, p. liv
- See Arun Kasi, 'Excluding Liability for Misdelivery and Non-Delivery under Bills of Lading: An Analysis under Laws of Malaysia, Singapore and England & Wales', *The Law Review*, 2020, vol. 2, p. 143; *Legal Network Series (A)*, (2020), Vol. 1, p. lvi

# Cargo Claims

## *Action for Benefit of Third Party*

- Common law
  - *Dunlop v Lambert* 1839  
(A shipper holding rights of suit, but not suffering the loss, may sue for substantial losses suffered by a third party.  
The claimant will then hold the proceeds in trust for the third party)
- Carriage of Goods by Sea Act 1992, s. 2(4)
- Both Common Law and s. (4) gives an *option*, but *not a duty*, to sue for benefit of the third party.
- Representative actions?
  - ROC 2012, O. 15(3), does not apply

# Cargo Claims

## *Action for Benefit of Third Party*

- Himalaya clauses
  - *Alder v Dickson* 1955 (passenger shipping case)
    - A carrier may limit liability by contract not only for his own benefit but also for benefit of third party, with a suitably drafted clause
    - In this case, the court found that as a matter of fact the clause was not for the benefit of third-party.
    - Hence, the master and the crew were not protected by the liability exclusion clause in the ticket which protected only the carrier
  - *Midland Silicones Ltd v Scruttons Ltd* 1962
    - HL set conditions to extend protection to third parties
      - i. The parties must intend to protect the third party
      - ii. The carrier must contract also as an **agent** of the third party
      - iii. The third-party must have authorised the carrier to contract **on its behalf**
      - iv. The third-party must have given consideration
    - The court found that the above conditions were not satisfied, as the protection was for the carrier, hence the stevedore was not entitled to rely on the liability limitation.
  - *The Eurymedon* 1974 (PC)
    - All conditions satisfied, so stevedore protected by the liability limitation regime applicable to the B/L.

# Cargo Claims

## *Action for Benefit of Third Party*

- Circular Indemnity clauses
  - Stay or anti-suit injunction
  - Pure indemnity claim
    - Conditions:
      - Contract between carrier and sub-contractor – carrier to protect sub0contractor
      - Sub-contractor found liable to cargo claimant
      - Sub-contractor holds the carrier liable
        - Sub-contractor may take a third-party action against carrier

# Cargo Claims

## *Presumptions and Estoppels*

- Statements in bill
  - Front
    - Description of goods
    - Quantity / weight / packages
    - Leading marks
    - Apparent condition and order
      - Received in apparent good order and condition
      - Qualifications (clausing)
      - 'Apparent' (external state only)
      - 'good order and condition' v quality
  - Back
    - Contract terms



# Cargo Claims

## *Presumptions and Estoppels*

- Claused bill v Clean bill
  - Quantity or Weight Not Known
  - Contents Not Known
  - Said to Contain
- Relta clause
  - *Tokio Marine v Relta Steamship* 1970
    - ('apparent good order and condition ... does not mean that the goods were free of visible rust or moisture)
    - American court held the clause excluded liability for 'rust of whatever degree on surface' of the goods metal pipes)
  - *The Explorer* 2012
    - English court recognised the Relta clause exception, but limited it to 'minor or superficial rust that would be present on any steel cargo'

# Cargo Claims

## *Presumptions and Estoppels*

- Shipped bill v Received for Shipment bill
- Clean shipped on board bill
- Shipper's indemnity

# Cargo Claims

## *Presumptions and Estoppels*

- Evidentiary value of statements on the bill
  - Presumption from Hague/Hague-Visby Rules
    - *Prima facie* evidence – Hague Rules (applicable in Peninsular Malaysia, Sabah and Sarawak)
    - Conclusive evidence – Hague-Visby Rules – leading marks / quantity / apparent condition (not applicable yet to any territory in Malaysia, but will likely apply to Peninsular Malaysia after the Carriage of Goods by Sea (Amendment) Bill 2019 is passed)
  - Estoppel at common law
    - *The Dona Mari* 1973
  - UK Carriage of Goods by Sea Act 1924, s. 4 (applicable in Penang, Malacca, Sabah and Sarawak)
    - Conclusive evidence - Shipment / Received for Shipment
- Why presumptions / estoppels are important in cargo claims?

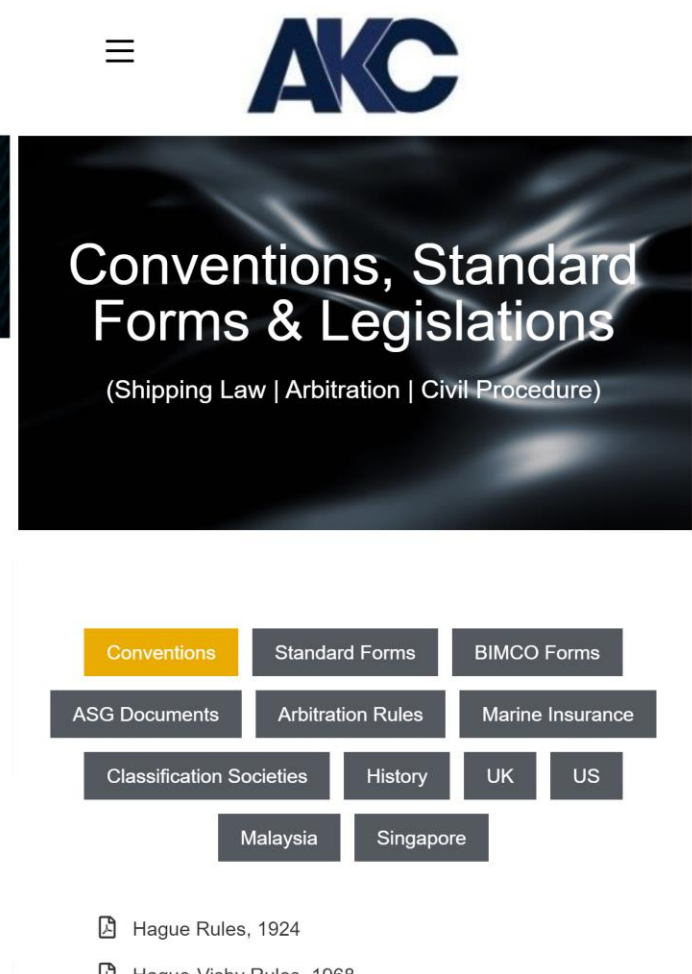
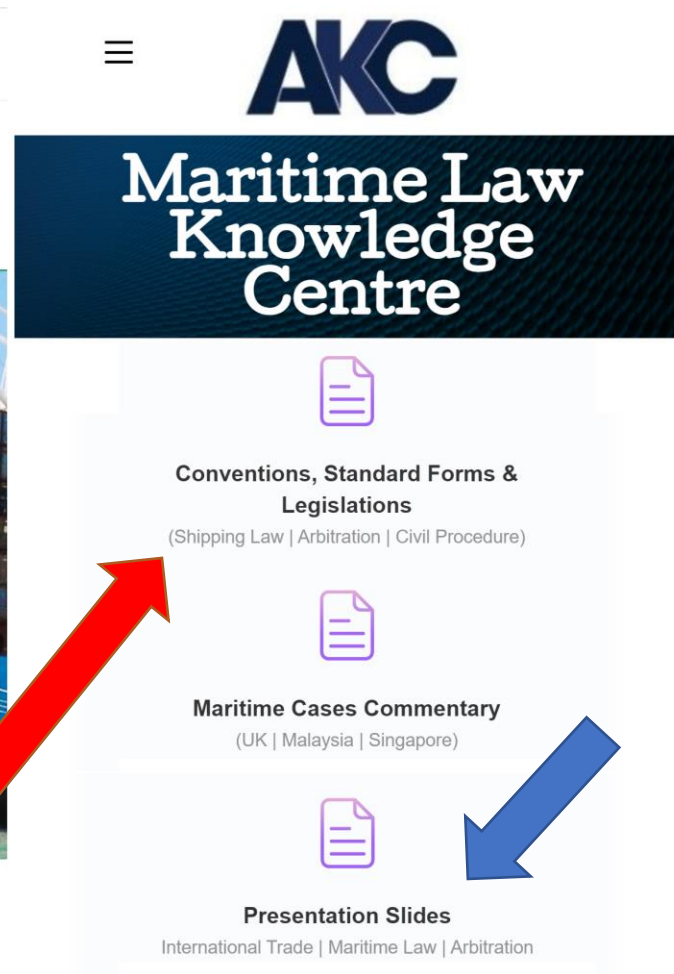
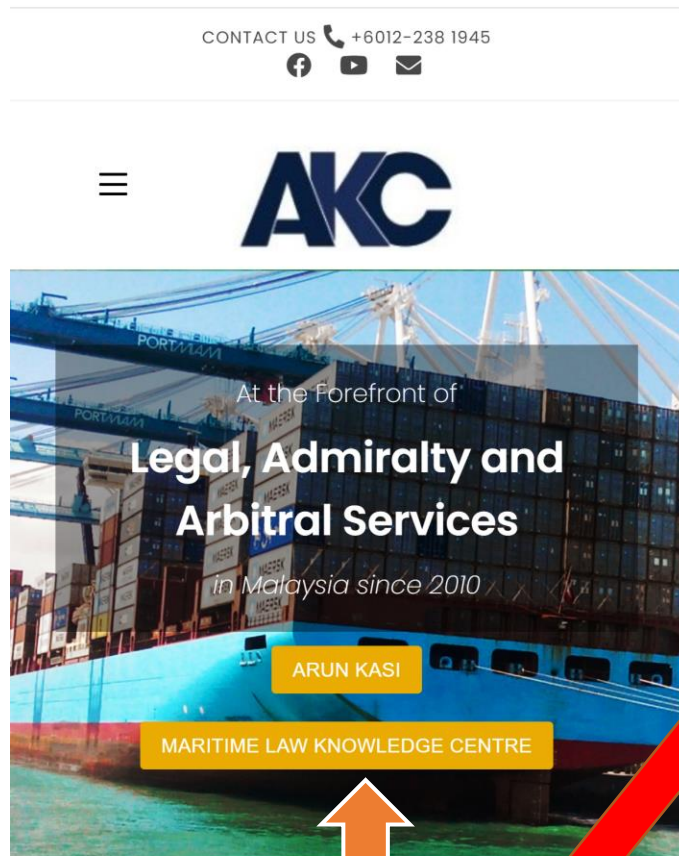
# Cargo Claims

## *Presumptions and Estoppels*

- Presumptions / estoppels – no place in disputes between seller and buyer
  - *China Steel v Pan Asia Shipyard 1988*
    - Singapore court rightly disallowed seller from relying on ‘apparent good order and condition’ statement against buyer, but reasons not satisfactory
  - *Borneo Co (M) Sdn Bhd v Penang Port Commission 1975*
    - Malaysian FC entertained statements in bill as prima facie evidence between consignee and port authority.
    - Criticised in Arun Kasi, *The Law of Carriage of Goods by Sea*, Singapore, Springer, 2021

# International Trade and Letter of Credit: Web Reference

[arunkasico.com](http://arunkasico.com) -> [Maritime Law Knowledge Centre](#) -> [Conventions ...](#)



# Legal Framework & Shipping Documents: Further Reading

[Arun Kasi, \*The Law of Carriage of Goods by Sea\*, Singapore, Springer, 2021](#)

## **PART I: INTRODUCTION AND INTERNATIONAL TRADE**

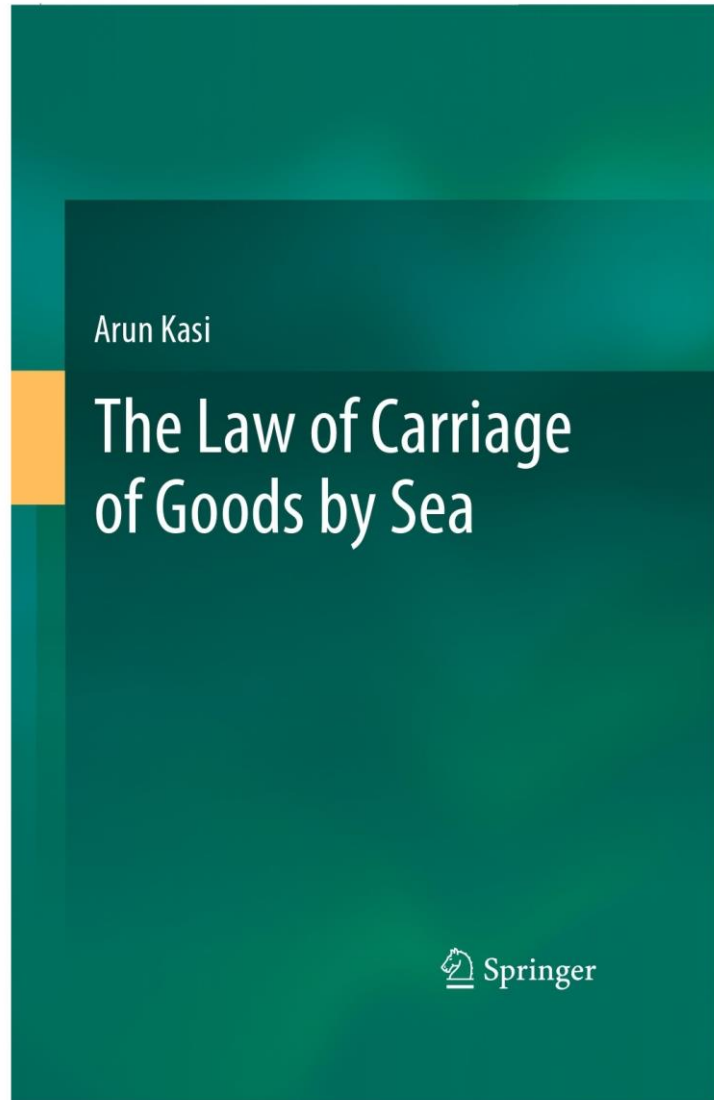
1. Introduction and Legal Framework
2. Shipping Documents
3. International Trade

## **PART II: BILLS OF LADING**

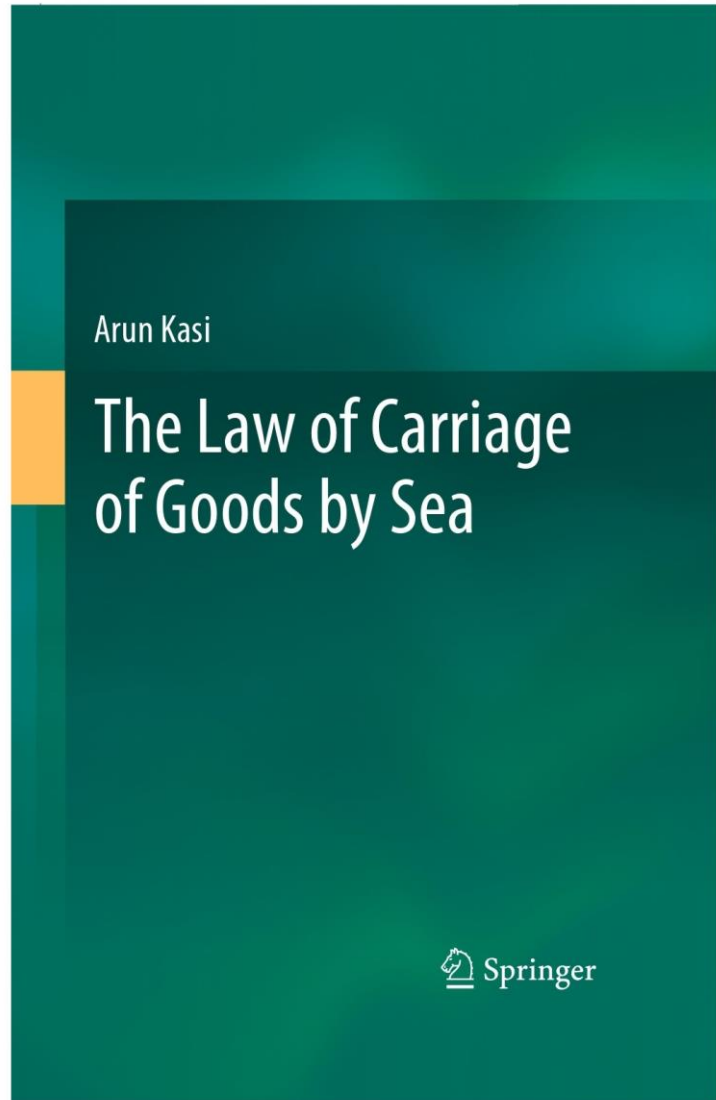
4. Cargo Claims: Legal Bases
5. Third Parties: Protection and Action for
6. Proof of Damages: Presumptions and Estoppels
7. Implied Terms and Exclusion Clauses.
8. Hague & Hague-Visby Rules: Application
9. Hague & Hague-Visby Rules: Carriers' Obligations and Defences
10. Hague & Hague-Visby Rules: Carriers' Liability and Time Limitations
11. Shippers' Obligation for Dangerous Cargo

## **PART III: CHARTERPARTIES**

12. Charterparty: Introduction
13. Voyage Charter: Freight and Lien
14. Voyage Charter: Laytime and Demurrage
15. Time Charter: Orders and Indemnity
16. Time Charter: Withdrawal, Off-Hire and Redelivery
17. Time Charter: Apportionment of Cargo-Claims Liability



# Legal Framework & Shipping Documents: Further Reading



## Availability

### Malaysia

- Kinokuniya

### UK

- Wildy
- Foyles
- Waterstone
- Blackwells
- John Smith's
- Browns Books

### USA

- Barnes & Noble
- Books A Million
- Walmart
- The Last Bookstore
- Schuler Books
- Bookscouter
- Joseph Beth
- Bluemanatee
- Bookshop.org
- Kinokuniya

### Germany

- Hugendubel
- Weltbild
- Thalia
- Langer Blomqvist
- Buchkatalog
- Umbreit
- Stephanus Buchhandlung

### France

- Galignani

### Brussels

- Standard Boekhandel
- Club

### Sweden

- Adlibris
- AkademiBokHandeln
- Bokus

### Switzerland

- Buchhaus
- OrellFuessli

### Australia

- Dymocks
- Kinokuniya

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- Books Wagon

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- Krisostomus

### Elovakia

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- Saxo